MODELS OF IMPLEMENTATION OF ARTICLE 12 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

PRIVATE AND CRIMINAL LAW ASPECTS

Edited by
Maciej Domański and Bogusław Lackoroński

ROUTLEDGE

Models of Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD)

This book examines the implications of Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD), its resulting standard of protection for persons with disabilities and the way it is understood and implemented in its diverse signatory states. Its overarching theme is to assess the impact of CRPD Article 12 on the private law concept of legal capacity and its limitations, the significance of which carries over into the realm of penal law regulations. Its impact is analysed primarily from the legal point of view, but with due regard for its psychological and psychiatric ramifications. Recognising the importance of these disciplines is important when implementing CRPD Article 12 into domestic law, as they contribute to the determinants in creating a qualificatory legal framework for all, persons with disabilities in particular, to exercise their rights to legal capacity without let or hindrance. As active legal capacity is a notion rooted in and coming from private law, this forms the main research perspective. The first section discusses the foundational concepts constituting the CRPD Article 12 standard from domestic private law and international law perspectives. The work shows that the concepts adopted in private law interact with the protection of persons with disabilities as victims provided for in criminal law. In addition, where relevant, authors also look at public law institutions that are connected with the private law solutions. The volume will be an essential reference for academics, researchers and policy-makers working in the areas of private law, criminal law, mental health law, human rights, discrimination law as well as psychology and psychiatry.

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Private and Criminal Law Aspects

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Introduction

Maciej Domański and Bogusław Lackoroński

This book is the fruit of four years of interdisciplinary research into the implications of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD), its resulting standard of protection for vulnerable persons, the way it is understood and implemented in its diverse signatory state, and those elements of Polish law that interact with it. Its overarching theme is the impact of CRPD Article 12 on the private law concept of legal capacity and its limitations and the significance of which carries over into the realm of penal law regulations. CRPD Article 12's knock-on effects are analysed primarily from the legal point of view, but with all due regard for its psychological, psychiatric and diagnostic ramifications. Scholarly reflection on the benefits of legal capacity, notably in contracting, requires the engagement of awareness, will and communications skills, attributes belonging to the fields of psychology and psychiatry. For this reason, the *acquis* of these disciplines should not be overlooked when implementing CRPD Article 12 into domestic law and should be accounted for among the determinants in creating a qualificatory legal framework for all, persons with disabilities in particular, to exercise their rights to legal capacity without let or hindrance. Taking into consideration the achievements of these non-legal disciplines in the course of preparing new regulations may help to avoid using the notions which are unequal to the task of diagnosing and describing states of the persons with disabilities, which may affect their capacity to perform legal acts (active legal capacity).

Active legal capacity is a private law mechanism by which one may independently define one's legal status in accordance with one's will. This is effected through submission of various types of declarations of will, which are constitutive components of contracts underpinning civil law transactions, as well as family law-related activities, or *mortis causa* legal activities, particularly those concerning last wills and testaments.

The CRPD affects traditional paradigms of legislations concerning the capacity of persons with disabilities to perform legal acts. When the CRPD was adopted, the protection of persons with disabilities in the field of capacity to perform legal acts was mainly based in many countries on a substitute decision-making model. The importance and scope of application of the assisted (supported) decision-making model applied was limited and narrow. The CRPD, in particular its Article 12, requires that this state of things should be changed and improved in order to reduce the scope of application of the substitute decision-making model to the maximum possible extent. It corresponds to the fact that

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the CRPD underlines the importance of reinfoircing respect for their autonomy to the maximum possible extent. Thus, the considerations included in this book are generally in line with the views of many scholars in[1] and outside[2] Poland.

The book consists of four basic sections and a summary.

1 M. Zima, *Ubezwłasnowolnienie osób z niepełnosprawnością intelektualną jako ograniczenie wolności i praw konstytucyjnych w świetle artykułu 31 ust. 3 Konstytucji Rzeczypospolitej Polskiej z 3 kwietnia 1997 r.*, Warsaw, 2009, *passim*; T. Pajor, Ochrona osób niepełnosprawnych a ubezwłasnowolnienie, in: *Studium nad potrzebą ratyfikacji przez Rzeczpospolitą Polską Konwencji o prawach osób niepełnosprawnych*, ed. K. Kurowski, Wydawnictwo Kurza Stopka J. Tyluś Malak, Łódź, 2010, p. 80; M. Zima, Ubezwłasnowolnienie osób z niepełnosprawnością intelektualną w świetle Konstytucji RP oraz Konwencji o Prawach Osób Niepełnosprawnych, in: *Studium nad potrzebą ratyfikacji przez Rzeczpospolitą Polską Konwencji o prawach osób niepełnosprawnych*, ed. K. Kurowski, Wydawnictwo Kurza Stopka J. Tyluś Malak, Łódź, 2010, p. 150; M. Tomaszewska, Ubezwłasnowolnienie zagrożeniem prawa do wolności? in: *Idea wolności w ujęciu historycznym i prawnym. Wybrane zagadnienia*, ed. E. Kozerska, P. Sadowski, A. Szymański, Wydawnictwo Adam Marszałek, Toruń, 2010, p. 521; R. Pudło, Ubezwłasnowolnienie – doktryna, wątpliwości, alternatywy, *Psychiatria po Dyplomie*, 2012, no. 3, p. 41; M. Zima-Parjaszewska, Artykuł 12 Konwencji ONZ o prawach osób niepełnosprawnych a ubezwłasnowolnienie w Polsce, *Studia Prawnicze*, 2013, no. 2, pp. 79–99; M. Wilejczyk, *Zagadnienia etyczne części ogólnej prawa cywilnego*, Wydawnictwo C.H. Beck, Warszawa, 2014, p. 154 *et seq*; K. Zaradkiewicz, Ubezwłasnowolnienie – perspektywa konstytucyjna a instytucja prawa cywilnego, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka. Pamięci prof. dr. hab. Zbigniewa Radwańskiego*, ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, p. 190; M. Zima-Parjaszewska, Artykuł 12 Konwencji ONZ o prawach osób z niepełnosprawnościami a ubezwłasnowolnienie w Polsce, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka. Pamięci prof. dr. hab. Zbigniewa Radwańskiego*, ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, p. 127; M. Domański, Ubezwłasnowolnienie w prawie polskim a wybrane standardy międzynarodowej ochrony praw człowieka, *Prawo w Działaniu*, 2014, no. 17, p. 7; A. Śledzińska-Simon, Ograniczenia osób ubezwłasnowolnionych w zakresie konstytucyjnych praw i wolności o charakterze politycznym, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka. Pamięci prof. dr. hab. Zbigniewa Radwańskiego*, ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, p. 284; D. Pudzianowska, Zagadnienie ubezwłasnowolnienia w orzecznictwie Europejskiego Trybunału Praw Człowieka, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka. Pamięci prof. dr. hab. Zbigniewa Radwańskiego*, ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, p. 45; I. Markiewicz, J. Heitzman, A. Pilszyk, Ubezwłasnowolnienie – instytucja wciąż potrzebna? *Psychiatria*, 2014, no. 4, p. 203; T. Srogosz, Ubezwłasnowolnienie w polskim prawie w świetle Konwencji o prawach osób niepełnosprawnych, in: *Globalne problemy ochrony praw człowieka*, ed. E. Karska, Uniwersytet Kardynała Stefana Wyszyńskiego, Warsaw, 2015, p. 407; I. Radlińska, Ochrona podmiotowości prawnej osób niepełnosprawnych intelektualnie w stopniu umiarkowanym w prawie polskim, *Pomeranian Journal of Life Sciences*, 2017, no. 1, p. 76; M. Balwicka-Szczyrba, A. Sylwestrzak, Instytucja ubezwłasnowolnienia w perspektywie unormowań Konstytucji RP oraz Konwencji ONZ o prawach osób niepełnosprawnych, *Gdańskie Studia Prawnicze*, 2018, no. 2, p. 151; M. Pyziak-Szafnicka, Ubezwłasnowolnienie jako środek ochrony osób dotkniętych chorobami otępiennymi i chorobą Alzheimera – aktualna regulacja i projektowane zmiany, *Studia Prawno-Ekonomiczne*, 2019, no. 111, p. 63; A. Pudło, Problematyka ubezwłasnowolnienia w orzecznictwie Europejskiego Trybunału Praw Człowieka, *Roczniki Administracji i Prawa*, 2019, no. 2, p. 49; J. Drobot, Ubezwłasnowolnienie całkowite na tle rozwiązań europejskich, *Radca Prawny. Zeszyty Naukowe*, 2020, no. 1, p. 115; M. Pasieka-Kuzara, Bliski koniec ubezwłasnowolnienia, *Transformacje Prawa Prywatnego*, 2021, no. 2, pp. 85–104; J. Gudowski, Ubezwłasnowolnienie – relikt normatywny czy przejaw prawnego obskurantyzmu? in: *Ius et ratio. Księga jubileuszowa dedykowana Profesor Elżbiecie Skowrońskiej-Bocian,* ed. W. Borysiak, J. Wierciński, A. Gołaszewska, M. Olechowski, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2022, pp. 126–141 – this text was publish also in *Przegląd Sądowy*, 2022, no. 11, pp. 22–40; and many others.

2 A. Arstein-Kerslake, E. Flynn, The right to legal agency: Domination, disability and the protections of article 12 of the convention on the rights of persons with disabilities, *International Journal of Law in Context*, 2017, vol. 13, no. 1; M. Bach, L. Kerzner, *A new paradigm for protecting autonomy and the right to legal capacity (advancing substantive equality for persons with disabilities through law, policy and practice)*, Commissioned by the Law Commission of Ontario, Toronto, October 2010; P. Bartlett, At the interface between

The first section discusses the basic concepts constituting the CRPD Article 12 standard from the domestic private law and international law perspectives. Active legal capacity is a notion rooted in and coming from private law, and that is why we have adopted the private law perspective as the main research perspective. However, we do take note of the importance of active legal capacity and its scope in many contexts outside private law which are essential from the point of view of the autonomy and self-determination of persons with disabilities. Thus, the concepts of active legal capacity influence the legal situations of persons with disabilities extensively and profoundly. This book aims to show that the concepts adopted in private law interact with the protection measures for persons with disabilities as victims in criminal law. Particular authors elaborate to some extent on the public law institutions which are connected with private law solutions.

Because contemporary law, particularly private law, is deeply rooted in the traditions of Roman law, the point of departure is acknowledgement of the approach to incapacitation and limitations of active legal capacity in ancient Rome. Roman law is the genesis of that centuries-old evolutionary process of which the CRPD is but a descendant stage as its legitimate progeny.

The second section contains a legal-comparative analysis of 25 legal regimes existing in 24 CRPD signatory states taking the standard enshrined in CRPD Article 12 as its point of departure. The research comprised various implementational approaches and mechanisms in incorporating CRPD Article 12 into domestic laws. *Eight* of the analysed regimes submitted reservations or interpretative declarations as to CRPD Article 12. The focus of these reflections is on private law regulations on the ability to execute acts in law and their limitation, and in particular on those penal law regulations that contain a basis to protect persons with disabilities.

The third section of this book is dedicated to Polish regulations on legal capacity and its limitation, and the penal law basis of protection for persons with disabilities. It presents not only the actual legal status but also a historical-legal analysis aimed at identifying the roots of the Polish current regulations. The aim of this section's reflections is to present those elements of Polish law which are relevant from the point of view of the CRPD Article 12 protection standard and which should be taken into account in the course of its implementation into Polish law.

The fourth section of the book contains extra-legal analyses within the ambit of psychology, psychiatry and psychological diagnostics, which are essential to comprehensive reflection on the efficacious exercise of legal capacity and its limitation due to disability. This section gives insight into the psychological and psychiatric aspects of legal acts, the possible methods of diagnosing the influence of mental and intellectual disability on an individual's legal capacity and on determining the degree of help persons with disabilities need in exercising their rights to perform acts in law.

The summary contains final resolutions on the optimal ways of implementing CRPD Article 12 into domestic law.

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paradigms: English mental capacity law and the CRPD, *Frontiers in Psychiatry*, September 2020, vol. 11; A. Dhanda, Conversations between the proponents of the new paradigm of legal capacity, *International Journal of Law in Context*, 2017, vol. 13, no.(1; T. Minkowitz, The reception of Article 12 of the convention on the rights of persons with disabilities in the United States (New York), Mexico, and Peru, *SSRN Electronic Journal*, January 2017, https://ssrn.com/abstract=2902629; L. Series, A. Nilsson, *The UN convention on the rights of persons with disabilities: A commentary*, ed. I. Bantekas, M. A. Stein, D. Anastasiou, Oxford University Press, Oxford, 2018.

The book's structure, its comprehensiveness and multi-aspected reflections, decidedly drive its conclusions beyond the confines of Polish law. It may be useful in every state squaring up to the problem of implementing CRPD Article 12 standard into its domestic law. The method of presenting the analysed material aspires to offer its foreign readership comprehensive guidelines essential to assessing the extent to which the solutions applied here lend themselves to emulation in their own domestic legal regimes.

These research results might also constitute a significant source of information for the UN Committee on the Rights of Persons with Disabilities in that they provide a review of the interpretative problems and nuances in understanding the conventional categories in various legal cultures.

The CRPD is in that group of United Nations conventions that are most common and universal due to their very large number of signatory states of diverse cultural and legal traditions. CRPD Article 12's impacts unevenly on its signatories, depending on the depth of legal tradition and broad cultural context of the given state. In some signatory states, its implementation dictates fundamental changes to various private law institutions. Sometimes they are accompanied by public law solutions to guarantee the necessary help for persons with disabilities offered by social institutions not only in executing legal acts but also in dealing with everyday life matters. Adjusting the legal system to the benchmark set by CRPD Article 12 frequently triggers drastic need of revision of the domestic regulations on active legal capacity and its limitations. In other signatory states, changes implementing the CRPD come in the practice of applying the law and in a simple change of interpretation of the regulations on active legal capacity and its limitations. A review of various approaches to the implementation of CRPD Article 12 and the problems domestic legislators must grapple with has been dealt with in the comparative section. It contains a review of the way of implementation or the causes of non-implementation of CRPD Article 12 in 25 jurisdictions in force in 24 states, as well as a comparative analysis of the solutions applied in various countries.

The authors constitute a group of established jurists, psychologists, psychiatrists and health scientists from more countries than can be readily enumerated. Their everyday scholarly focus is fixed on the issues discussed in the chapters they have contributed to this book.

The book is the collective work of many authors, who deserve our deepest gratitude for the effort they put into producing their particular chapters. Our role as editors was supportive. The credit for everything good that can be said about each particular chapter is due to their authors alone. In a book that is the product of expertise in the legal systems of so many different countries, it is natural that each author's exposition is based on the terminology used in his/her particular jurisdiction. In each of the chapters, its author's selection of literature and jurisprudence is also brought to bear. *Prima facie,* this natural and unavoidable particularities may make it difficult to compare legal solutions offered by the laws in the particular countries involved here. However, a deeper reflection makes it possible to establish a common frame of reference for various solutions used in the legal systems of particular countries and to show the multifaceted nature of the issues touched upon. General remarks and observations that are valid across jurisdictions are annotated with references to publications and judgments available to individual authors and editors. We recognise that, due to the general nature of these observations, the footnotes that accompany them could contain cross-references to many other pieces of literature from different jurisdictions. However, we recognised that they also have value when they include references to selected pieces of legal literature and case law from particular jurisdictions.

We trust that this book will prove both interesting and useful to all who seek optimal solutions in implementing CRPD Article 12.

Part I
General

1 Active legal capacity of natural persons and its intersectional relevance to the legal system

Maciej Domański and Bogusław Lackoroński

1. The concept of legal capacity

Legal capacity comes in two forms in private law: ***passive***, which means the ability to be the subject of private law rights and obligations, and ***active***, which includes the capacity to perform legal acts (active legal capacity), the capacity for tort[1] and other legal actions,[2] which can be called all together active capacities. The individual elements that make up active capacities are not always formally linked to each other.[3] It should also be noted that the individual elements of active capacities are not even-handedly regulated.[4] Active legal capacity, understood as the capacity to perform legal acts, is one of the most widely regulated aspects of active capacities. This applies in particular to the relationship between active legal capacity and tort capacity, which are not formally interdependent.[5] Active legal capacity is secondary to and derived from the passive. The maximum scope of active legal

1 Z. Klein, Zdolność prawna, zdolność do czynności prawnych i inne zdolności a klasyfikacja zdarzeń prawnych, *Studia Cywilistyczne*, 1969, vol. XIII–XIV, p. 163; P. Machnikowski, O zdolności deliktowej, *Acta Universitatis Wratislaviensis* No. 3048, Prawo CCCIV, Wrocław, 2008, p. 111; R. Majda, *Kodeks cywilny. Część ogólna. Komentarz*, ed. M. Pyziak-Szafnicka, P. Księżak, Wolters Kluwer SA, Warsaw, 2014, commentary to Article 8, p. 160, Nb 7.

2 M. Domański, Konwencja ONZ o prawach osób niepełnosprawnych w interpretacji Komitetu do spraw praw osób niepełnosprawnych a podstawowe instytucje prawa cywilnego, *Prawo w Działaniu*, 2019, no. 40, p. 135; S. Grzybowski, *System prawa cywilnego. Tom I. Część ogólna*, editor-in-chief W. Czachórski, Ossolineum, Wrocław Warszawa Kraków Gdańsk, 1974, p. 337; S. Grzybowski, ed., *System prawa cywilnego. Tom I. Część ogólna*, editor-in-chief W. Czachórski, Ossolineum, Wrocław Warszawa Krakow Gdańsk Łódź, 1985, p. 338; A. Herbet, *Zobowiązania. Tom I. Przepisy ogólne i powiązane przepisy Księgi I KC. Komentarz*, ed. P. Machnikowski, Wydawnictwo C.H. Beck, Warsaw, 2022, commentary to Article 14, p. 29, Nb 17; M. Pilich, *Kodeks cywilny. Komentarz. Tom I. Część ogólna. Cz. 1 (art. 1–554)*, ed. J. Gudowski, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2021, commentary to Article 11, p. 264, Nb 2; M. Serwach, *Kodeks cywilny. Część ogólna. Komentarz*, ed. M. Pyziak-Szafnicka, P. Księżak, Wolters Kluwer SA, Warsaw, 2014, commentary to Article 11, p. 187, Nb 2–3.

3 Cf. H. Dąbrowski, *Kodeks cywilny. Komentarz. Tom 1*, ed. J. Pietrzykowski, Wydawnictwo Prawnicze, Warsaw, 1972, commentary to Article 11, p. 76.

4 Cf. M. Serwach, *Kodeks cywilny. Część ogólna. Komentarz*, ed. M. Pyziak-Szafnicka, P. Księżak, Wolters Kluwer SA, Warsaw, 2014, commentary to Article 11, pp. 186–187, Nb 1–2.

5 Cf. M. Gutowski, *Kodeks cywilny. Tom I. Komentarz. Art. 1–352*, ed. M. Gutowski, Wydawnictwo C.H. Beck, Warsaw, 2021, commentary to Article 11, p. 147, Nb 9; P. Księżak, *Komentarze Prawa Prywatnego. Tom I. Kodeks cywilny. Komentarz. Część ogólna. Przepisy wprowadzające KC. Prawo o notariacie (art. 79–95 i 96–99)*, ed. K. Osajda, Wydawnictwo C.H. Beck, Warsaw, 2017, commentary to Article 11, p. 123, Nb 10.

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capacity is determined by the scope of passive legal capacity.[6] This means that the scope of active legal capacity (the scope of the possibility to acquire any civil law rights and obligations by one's own acts) may be the same as, or narrower than, the scope of passive legal capacity. *Ipso facto*, the scope of active legal capacity may not be broader than the scope of passive legal capacity. As the subject of this study is the legal capacity of natural persons and its limitations, further considerations will refer to active legal capacity as one of its elements.

Given the fundamental importance in all private law of the principle of autonomy allowing entities to shape their legal situations as they see fit, the scope of active legal capacity is derivative and active legal capacity itself is essential for the realisation of the autonomy of private law entities. Indeed, without active legal capacity, the principle of autonomy of private law entities could not be realised. Active legal capacity is the instrument necessary for private law entities to shape their legal situations by establishing, modifying or terminating (abolishing) legal relations according to their will.[7]

Depending on the legal tradition and even on the legal terminology, there is either a clear distinction between passive capacity referred to as legal capacity and active capacity called capacity for legal action (by way of example: *Geschäftsfähigkeit* in Austrian law, *capacité d'exercise* in French law, *capacité civile active* [*Handlungsfähigkeit*] in Swiss law), or there is a general concept of legal capacity within which passive and active aspects are distinguished. In this chapter, the term 'legal capacity' will generally be used to refer to its passive aspect, unless it is clear from the context that it is used in a different sense. The context in which the concept of 'legal capacity' is used to refer to both passive and active capacity is a consideration directly related to CRPD Article 12. Indeed, CRPD Article 12.2 uses the concept of 'legal capacity', which, taking into account the other paragraphs of CRPD Article 12 in some legal systems, can be understood as referring only to passive legal capacity.[8] However, given the totality of the issues addressed by CRPD Article 12,

6 Cf. M. Gutowski, *Kodeks cywilny. Tom I. Komentarz. Art. 1–352*, ed. M. Gutowski, Wydawnictwo C.H. Beck, Warsaw, 2021, commentary to Article 11, p. 146, Nb 2.

7 Cf. P. Księżak, *Komentarze Prawa Prywatnego. Tom I. Kodeks cywilny. Komentarz. Część ogólna. Przepisy wprowadzające KC. Prawo o notariacie (art. 79–95 i 96–99)*, ed. K. Osajda, Wydawnictwo C.H. Beck, Warsaw, 2017, commentary to Article 11, p. 122, Nb 5.

8 Cf. the Peruvian Supreme Court's understanding of CRPD Article 12 as reported by Renata Bregaglio Lazarte and Renato Constantino Caycho, Un modelo para armar: La regulación de la capacidad jurídica de las personas con discapacidad en el Perú a partir del Decreto Legislativo 1384, *Revista Latinoamericana en Discapacidad, Sociedad y Derechos Humanos*, 2020, vol. 4, p. 45. Doubts as to how the concept of 'legal capacity' used in CRPD Article 12 should be understood seem to have given rise to such interpretive declarations as that made by Egypt, which states, '*The Arab Republic of Egypt declares that its interpretation of article 12 of the International Convention on the Protection and Promotion of the Rights of Persons with Disabilities, which deals with the recognition of persons with disabilities on an equal basis with others before the law, with regard to the concept of legal capacity dealt with in paragraph 2 of the said article, is that persons with disabilities enjoy the capacity to acquire rights and assume legal responsibility ('ahliyyat al-wujub),* **but not the capacity to perform** *('ahliyyat al-'ada'), under Egyptian law*.' In the same direction, Kuwait's more laconic interpretative declaration to CRPD Article 12(2) appears to be along the lines of '*The enjoyment of legal capacity shall be subject to the conditions applicable under Kuwaiti law*.' https://treaties.un.org/pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-15&src=IND, accessed January 7, 2023, 20:30. Poland's legal system is among those that distinguish between **passive** and **active** legal capacity. It appears, however, that the content of Poland's interpretative statement to CRPD Article 12 indicates that Poland understood this provision as referring specifically to active legal capacity. Cf. M. Domański, Konwencja ONZ o prawach osób

its interpretation should lead to the conclusion that the concept used therein refers to both passive and active legal capacity.[9] This means that, in principle, the concept of *legal capacity* will be used interchangeably with the concept of *passive legal capacity*. In contrast, the concept of *capacity for legal activity* will be used interchangeably with the concept of *active legal capacity*.

2. The importance of active legal capacity from the perspective of the national legal system

Active legal capacity is relevant in all areas of private law. This ranges from the general part of civil law, where legal action, and therefore the capacity to exercise its attendant rights, is one of the basic conceptual categories running through contract law, property law, down to succession law (in particular the capacity to testify, bear witness when drawing up a will or be the executor of a will) and family law (in particular the capacity to marry, adopt children or exercise parental authority). Active legal capacity is a necessary attribute for subjects to exercise their autonomy. However, its significance goes far beyond the boundaries of private law.[10] Indeed, active legal capacity is the basic reference category on which the legislator makes the possibility of taking various legally significant actions that do not trigger private law effects dependent. It turns out, however, that the fulfilment of the premises for acquiring legal capacity in the sphere of private law is considered by the legislators to be both necessary and sufficient to undertake legally significant actions in the sphere of public law, including, in particular, in exercising active and passive electoral rights. This makes it possible to conclude that active legal capacity has intersectional significance as a prerequisite for active participation in the functioning of the state and society in various regulated parts of the legal system.

In the Polish legal system, the intersectional nature of active legal capacity is expressed, in particular, in the fact that

1. active legal capacity translates directly into procedural capacity, i.e. the ability to independently perform procedural acts in civil proceedings[11];

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niepełnosprawnych w interpretacji Komitetu do spraw praw osób niepełnosprawnych a podstawowe instytucje prawa cywilnego, *Prawo w Działaniu*, 2019, no. 40, p. 125; P. Machnikowski, Instytucja opieki nad pełnoletnim w pracach Komisji Kodyfikacyjnej Prawa Cywilnego w latach 2012–2015, *Państwo i Prawo*, Warsaw, 2019, no. 4, pp. 134–135; T. Pajor, Ochrona osób niepełnosprawnych a ubezwłasnowolnienie, in: *Studium nad potrzebą ratyfikacji przez Rzeczpospolitą Polską Konwencji o prawach osób niepełnosprawnych*, ed. K. Kurowski, Wydawnictwo Kurza Stopka J. Tyluś Malak, Łódź, 2010, p. 83.

9 M. Balwicka-Szczyrba, A. Sylwestrzak, Instytucja ubezwłasnowolnienia w perspektywie unormowań Konstytucji RP oraz Konwencji ONZ o prawach osób niepełnosprawnych, *Gdańskie Studia Prawnicze*, 2018, vol. XL, p. 152; M. Zima-Parjaszewska, Artykuł 12 Konwencji ONZ o prawach osób z niepełnosprawnościami a ubezwłasnowolnienie w Polsce, *Studia Prawnicze*, 2013, no. 2, pp. 95–97.

10 Cf. L. Kociucki, Niektóre problemy nowelizacji polskiego prawa o ubezwłasnowolnieniu, *Studia Prawnicze*, 2013, no. 2, pp. 116–119; M. Tomaszewska, Ubezwłasnowolnienie zagrożeniem prawa do wolności? in: *Idea wolności w ujęciu historycznym i prawnym. Wybrane zagadnienia*, ed. E. Kozierska, P. Sadowski, A. Szymański, Wydawnictwo Adam Marszałek, Toruń, 2010, pp. 522–523.

11 Cf. Article 65 of the Polish Act of November 17, 1964 Civil Procedure Code, Journal of Laws 2023, item 1550 as amended.

2. active legal capacity translates directly into procedural capacity, i.e. the ability to independently perform procedural acts in administrative[12] and administrative court proceedings[13];
3. full active legal capacity is sometimes a premise for active and passive electoral rights[14] (due to this, active legal capacity is extremely important for participation in democratic processes);
4. a notary[15] should have full legal capacity (it should be emphasised that in the case of judges[16] and prosecutors,[17] the legislator does not explicitly impose the requirement to have full active legal capacity but makes the possibility of exercising these professions dependent on the premise that one's state of health presents no obstacles to performing the attendant duties);
5. a lawyer[18] should have full legal capacity;
6. legal counsel[19] should have full legal capacity;
7. a judicial officer (bailiff) should have full legal capacity[20];
8. a Supreme Audit Office auditor should have full legal capacity[21];
9. a local government employee[22] should have full legal capacity;
10. an academic teacher[23] should have full legal capacity;
11. a patent attorney should have full legal capacity[24];
12. the right to practise as a pharmacist[25] or as a doctor or dentist[26] is contingent on the practitioner's full legal capacity.

12 Cf. Article 30 § 1 of the Polish Act of June 14, 1960 Administrative Procedure Code, Journal of Laws 2023, item 775 as amended.

13 Cf. Article 26 of the Polish Act of August 30, 2002 Law on Proceedings before Administrative Courts, Journal of Laws 2023, item 1634 as amended.

14 Cf. Articles 10 § 2(3) and 11 § 1 of the Polish Electoral Code Act of January 5, 2011, Journal of Laws 2022, item 1277, as amended, and Chapter 24 of this book: María José Bravo Bosch, Inés Celia Iglesias Canle, Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in the Spanish Legal System, in which the authors refer to the case Caamaño Valle v. Spain, no. 43564/17 decided by the ECtHR judgment of May 11, 2021.

15 Cf. 11(1a) of the Polish Act of February 14, 1991 Law on Notaries, Journal of Laws 2022, item 1799 as amended.

16 Cf. Article 61 § 1(4) of the Polish Act of July 27, 2001 Law on the System of Common Courts, Journal of Laws of 2023, item 217, as amended.

17 Cf. Article 75 § 1(4) of the Polish Act of January 28, 2016 Law on the Public Prosecutor's Office, Journal of Laws 2023, item 1360 as amended.

18 Cf. Article 65(2) of the Polish Act of May 26, 1982 Law on Advocacy, Journal of Laws 2022, item 1184 as amended.

19 Cf. Article 24(1)(4) of the Polish Act of July 6, 1982 on legal advisers, Journal of Laws 2022, item 1166, as amended.

20 Cf. Article 11(1)(2) of the Polish Act of March 22, 2018 on judicial officers (bailiffs), Journal of Laws 2023, item 1691, as amended.

21 Cf. Article 67(2) of the Polish Act of December 23, 1994 on the Supreme Chamber of Control, Journal of Laws 2022, item 623, as amended.

22 Cf. Article 6(1)(2) of the Polish Act of November 21, 2008 on local government employees, Journal of Laws of 2022, item 530, as amended.

23 Cf. Article 20(1)(1) in conjunction with Article 113(3) of the Polish Act of 20 July 2018 Law on Higher Education and Science, Journal of Laws 2023, item 742 as amended.

24 Cf. Article 19(1)(2) of the Polish Act of April 11, 2001 on patent attorneys, Journal of Laws 2023, item 303, as amended.

25 Cf. Article 13(1)(2) of the Polish Act of December 10, 2020 on the profession of pharmacist, Journal of Laws 2022, item 1873 as amended.

26 Cf. Article 5(1)(3), Article 7(1)(2) and Article 7(2a)(3) of the Polish Act of December 5, 1996 on the professions of physician and dentist, Journal of Laws of 2023, item 1516 as amended.

These examples of Polish regulations demonstrate the importance of active legal capacity in various contexts. It should be emphasised that these examples represent only a small part of the regulations in light of which active legal capacity is a precondition for taking independent action in proceedings before public authorities or for practising various professions or fulfilling certain functions.

The cross-sectoral significance of active legal capacity – evident from these examples – justifies the statement that it determines not only the possibility of exercising autonomy in the sphere of private law, allowing one to shape one's own situation, but also the possibility of active participation in the life of one's state and society and the possibility of exercising various professions, those of public trust included. Hence, the reflection on active legal capacity and its limitations must take into account a broad spectrum of consequences associated with its possession.[27] At the same time, it should be pointed out that these consequences are important not only from the point of view of persons whose active legal capacities are considered *in concreto* but also from the perspective of other persons who enter into personal, property or professional relations with them. This raises the fundamental question to what extent, in the implementation of CRPD Article 12, it is possible to take these two opposing perspectives into account.

3. The importance of active legal capacity from the CRPD perspective

There is no doubt that the basic idea driving the authors of CRPD Article 12 was to impose an obligation on signatory states to take into account the standpoint of persons with disabilities when shaping the regulation of active legal capacity. This follows directly from the wording of CRPD Article 1.1 and is also directly and strongly confirmed in the wording of CRPD Article 12.1–3, 12.4 (sentences 2 and 3) and 12.5. This issue is presented in Chapter 2 on the interpretation of CRPD Article 12. Its purpose was to replicate the standard of protection of the legal capacity of persons with disabilities in accordance with the principles of interpretation of international treaty provisions. CRPD Article 12.4 emphasises that the exercise of active legal capacity may involve abuses that signatory states have undertaken to prevent. It follows from CRPD Article 12.4 that the prevention of abuses that may occur in connection with the exercise of legal capacity by persons with disabilities requires the introduction of appropriate and effective safeguards in accordance with international human rights law. These safeguards must, on the one hand, be adequate, effective and in accordance with international human rights law (CRPD Article. 12.4, sentence 1) and, on the other hand, meet the requirements provided for in CRPD Article 12.4, sentences 2 and 3.[28] Adequate and effective safeguards against abuses that

27 Cf. K. Zaradkiewicz, Ubezwłasnowolnienie – perspektywa konstytucyjna a instytucja prawa cywilnego, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka*, ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, pp. 194–204.

28 CRPD Article 12.4 has been treated by the Republic of Poland in its interpretative declaration as a provision '*allowing the application of the incapacitation, in the circumstances and in the manner set forth in the domestic law, as a measure indicated in Article 12.4, when a person suffering from a mental illness, mental disability or other mental disorder is unable to control his or her conduct*', https://treaties.un.org/pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-15&src=IND, accessed January 7, 2023, 20:40. This interpretative statement is treated in Polish private law doctrine as inadmissible in light of the purpose of the CRPD (cf. in particular A. Herbet, *Zobowiązania. Tom I. Przepisy ogólne i powiązane przepisy Księgi I KC. Komentarz*, ed. P. Machnikowski, Wydawnictwo C.H. Beck, Warsaw, 2022, commentary to Article 14, p. 19, Nb 2; P. Księżak, *Komentarze Prawa Prywatnego. Tom I. Kodeks cywilny. Komentarz. Część ogólna. Przepisy wprowadzające KC. Prawo o notariacie (art. 79–95 i 96–99)*, ed. K. Osajda, Wydawnictwo C.H. Beck,

may be associated with the exercise of active legal capacity by persons with disabilities may be introduced in the interests not only of persons with disabilities but also of other participants in civil law transactions and even to protect the general certainty and security of civil law transactions.[29] This is supported by the phrasing of CRPD Article 12.4, sentence 1, which uses the broad concept of 'abuse' without referring to any group or interest to be safeguarded by measures introduced in the performance of an obligation under this provision. In the absence of strong arguments against the application of the *lege non distinguente nec nostrum distinguere est* principle of interpretation, it must be assumed that the first sentence in CRPD Article 12.4, is concerned with combating any abuse to the detriment of any interest. For this reason, when adapting national legislation to the standard of protection under CRPD Article 12, it is necessary to take into account the broad context in which active legal capacity affects the ability of persons with disabilities to function independently. The implementation of CRPD Article 12 should take into account both the interests of persons with disabilities and any other interests that may be affected by their exercise of active legal capacity in the absence of adequate and effective safeguards. These safeguards inevitably involve interference with the sphere of autonomy of persons with disabilities. This interference should be as limited as possible but adequate to the needs of these persons.[30]

4. Sources of active legal capacity

A fundamental issue is the question of the source of the active legal capacity of legal entities. From a private law perspective, it is important to consider several issues in this regard. Firstly, whether active legal capacity must be granted by the legislator expressly, or whether it can be derived from the provisions that provide the basis for the acquisition of passive legal capacity. Thus, is active legal capacity an immanent attribute of every private law entity, the possession of which the legislature can only confirm, but not make its existence or exercise contingent on formal legislation? Secondly, do the rules specifying different scopes of active legal capacity create legal frameworks within which private law entities can shape their legal situations, thereby limiting their original active legal capacity, which by definition fully corresponds to passive legal capacity, or do the rules on active legal capacity

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Warsaw, 2017, commentary to Article 13, p. 132, Nb 7. For this reason, the Polish doctrine of private law formulates *de lege ferenda* postulates indicating the necessity to adapt the Polish regulation of legal capacity and its limitation to the standard resulting from Article 12 of the Civil Code. The Polish Supreme Court indicated that '*the advanced legislative work carried out in the Commission for the Codification of Civil Law under the Minister of Justice, aimed at adapting Polish law to the requirements of the said Convention, inter alia by eliminating the institution of incapacitation and introducing the 'guardianship of an adult', has been interrupted, the burden of adapting the provisions of the Convention must – where possible – rest on the judicature, and in particular the judicature of the Supreme Court*' (justification of the Polish Supreme Court's resolution of September 28, 2016, III CZP 38/16, Legalis).

29 Cf. K. Zaradkiewicz, Ubezwłasnowolnienie – perspektywa konstytucyjna a instytucja prawa cywilnego, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka*, ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, pp. 204–207.

30 Cf. J. Dawson, A realistic approach to assessing mental health laws' compliance with the UNCRPD, *International Journal of Law and Psychiatry*, 2015, vol. 40, p. 74; M. Domanski, Konwencja ONZ o prawach osób niepełnosprawnych w interpretacji Komitetu do spraw praw osób niepełnosprawnych a podstawowe instytucje prawa cywilnego, *Prawo w Działaniu*, 2019, no. 40, p. 152; M. Scholten, J. Gather, Adverse consequences of article 12 of the UN convention on the rights of persons with disabilities for persons with mental disabilities and an alternative way forward, *Journal of Medical Ethics*, 2018, vol. 44, no. 4, p. 231 et seq.

confer constitutively the possibility for entities to shape their own legal situations? And consequently, thirdly, if there were no provisions relating to active legal capacity, would entities with passive legal capacity be able to shape their own legal situations to the full extent themselves?

Dealing with the first issue posed requires initially noting that the position on the source and nature of active legal capacity should be uniform for all civil law entities. This does not mean that the reasoning behind prejudging the sources and bases of the active legal capacity of different types of entities must be the same. Since this study refers to the active legal capacity of natural persons, the question of the indicated attribute of other civil law entities will remain outside the scope of the considerations contained herein.

When attempting to address the problem of the foundations and sources of the active legal capacity of natural persons, the study should not be limited to a purely formal-dogmatic analysis of legal provisions. Indeed, it should be emphasised that the regulation of legal capacity, and the attributes associated with it, is derived from the profound philosophical assumptions that were at the root of the modern codifications of private law, such as the Napoleonic Code. These assumptions have become the foundation of modern legal systems in general. The idea of the modern codifications of private law originated from the law of nature school which postulated that the sovereign authority should legislate in order to perpetuate just norms, sanctioned by nature and reason and formulated by the doctrine of law.[31] The regulation of legal capacity in general, and of active legal capacity in particular, represents the search for the optimal way to realise this postulate of the school of the law of nature, with regard to individual freedom, its limits and the possibility of realisation by individual subjects. Two main currents can be distinguished in this search. The first – called the system of autonomy of the will – was based on the assumption that individual freedom is inherent and not bestowed by anyone. Although the state does not confer freedom on individuals, it is obliged to provide them with adequate legal protection. In this view, freedom means the ability to shape one's legal situation in accordance with one's own free will, within the limits set by generally applicable rules, including those introduced by the legislature. This current of thinking is discernible in the Napoleonic Code. The second – called the system of heteronomy of will – was based on the assumption that freedom is derivative, dependent on the will of the legislature, which determines its scope and limits. The second approach is more evident in the solutions adopted in the original text of the BGB (the German civil code).[32] It corresponds to the normative concept of legal acts, according to which, it is 'not the naturalistic concept of the autonomy of the will of the individual, but the concrete legal system that provides the basis for the legally binding force of legal acts'.[33] The German legal system has, however, undergone significant changes in this respect since January 1, 1992.[34]

Nowadays, it is usually assumed that the will is the necessary but insufficient starting point in the process of civil law entities independently shaping their own situations. This is because it is emphasised that in order for an individual's will to produce legal effects, it is

31 L. Górnicki, *System prawa prywatnego. Tom 1. Prawo cywilne – część ogólna*, vol. ed. M. Safjan, editor-in-chief Z. Radwański, Wydawnictwo C.H. Beck, Warsaw, 2007, p. 79, Nb 5.

32 Cf. L. Górnicki, *System prawa prywatnego. Tom 1. Prawo cywilne – część ogólna,* vol. ed. M. Safjan, editor-in-chief Z. Radwański, Wydawnictwo C.H. Beck, Warsaw, 2007, p. 101, Nb 24.

33 L. Bosek, *Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne,* Wydawnictwo Sejmowe, Warsaw, 2012, p. 317.

34 Cf. the considerations in Chapter 14 of this book.

necessary for the legal system to determine the underlying premises.[35] At the same time, it is pointed out that, despite the rejection of the pure legal-natural concept of the autonomy of the will, its philosophical presuppositions are still considered relevant today.[36] In doing so, it should be emphasised that the autonomy of the will that permeates the whole of private law is not only a way of realising individual freedom but also a generally accepted justification for attributing to a certain entity the effects of his or her behaviour. It is not only about the consequences of legal acts but also about consequences that can give rise to liability. This view of will and will autonomy makes it possible to see its broader meaning, which goes far beyond the issue of the performance of legal acts and the close connection of these concepts with consciousness and, in particular, with the discernment of the meaning of individual behaviour and its consequences.[37]

In our view, one of the enduring legacies of the legal-natural concept of autonomy of the will is the possibility of assuming that entities with the capacity to be possessors of rights and obligations, granted by the legislator, have an active legal capacity regardless of whether it has been granted explicitly in any legal provision. Consequently, in our view, the provisions explicitly referring to and exercising active legal capacity do not constitute a *sine qua non* condition for the permissibility of shaping one's legal situation according to one's will but only create a legal framework and limits in this respect. The legal system, insofar as it sets the boundaries of the autonomy of entities under civil law and determines the manner of its exercise, also determines the premises of legal significance to the acts of will of entities under civil law and determines the legal effects of the exercise of the autonomy of one's will. The emergence of these effects, however, is the direct result of the will of the entity concerned, and only secondarily of the application of certain legal provisions. This means that rules explicitly conferring active legal capacity are not necessary in order to be able to realise the essence of autonomy consisting in shaping one's own legal situation according to one's will, as long as this is within the limits set by generally applicable rules. However, to the extent that legal rules define the premises for and the manner of exercising active legal capacity, observance of these principles becomes a condition for the relevance of the acts of will of entities under civil law.[38]

These statements relate to the relationship between active legal capacity and its regulation. In our assessment, they do not just correspond to a greater extent to the private law provisions on declarations of will, the means of their submission and the determination of their legal effects than the concept of heteronomy of will. Acceptance of the concept posited here to an even greater extent makes it possible to treat legal provisions limiting the exercise of active legal capacity,[39] by definition, as exceptions subject to restrictive inter-

35 Z. Radwański, K. Mularski, *System prawa prywatnego. Tom 2. Prawo cywilne – część ogólna,* vol. ed. Z. Radwański, A. Olejniczak, ed. Z. Radwański, Wydawnictwo C.H. Beck, Warsaw, 2019, pp. 8–9, Nb 4, p. 13, Nb 11; A. Herbet, *Zobowiązania. Tom I. Przepisy ogólne i powiązane przepisy Księgi I KC. Komentarz*, ed. P. Machnikowski, Wydawnictwo C.H. Beck, Warsaw, 2022, commentary to Article 14, p. 29, Nb 16.

36 Z. Radwański, K. Mularski, *System prawa prywatnego. Tom 2. Prawo cywilne – część ogólna*, ed. Z. Radwański, A. Olejniczak, editor-in-chief Z. Radwański, Wydawnictwo C.H. Beck, Warsaw, 2019, p. 13, Nb 11.

37 Cf. M. Domański, Konwencja ONZ o prawach osób niepełnosprawnych w interpretacji Komitetu do spraw praw osób niepełnosprawnych a podstawowe instytucje prawa cywilnego, *Prawo w Działaniu*, 2019, no. 40, pp. 137–140.

38 Cf. R. Strugała, *Kodeks cywilny. Komentarz*, ed. E. Gniewek, P. Machnikowski, Wydawnictwo C.H. Beck, Warsaw, 2021, commentary to Article 11, p. 38, Nb 2.

39 It is as much about formal restrictions as material ones.

pretation on the *exceptiones non sunt extendandae* principle.[40] Taking a different assumption as a starting point that entities can only do what the legal system allows them to do, results in rules limiting the autonomy under civil law of entities not being, by definition, exceptions to the rule. As a result of such a concept, provisions limiting the autonomy of entities under civil law can only be of exceptional character by the will of the legislator, who determines the relationship between provisions 'granting' active legal capacity and provisions that can be understood as limiting it.

It is quite generally accepted that provisions relating to active legal capacity are not a source of a personal rights in the sense accepted in private law.[41] Active legal capacity appears as an entity's inalienable property (attribute) under civil law.[42] In the absence of an express legal basis, active legal capacity may not be subject to waivers or legal actions leading to its permanent limitation, which does not exclude the admissibility of a commitment not to use it to the extent permitted by the provisions regulating the scope of freedom of contract of a contract being a source of effective *inter partes* obligations.[43]

Nowadays, in the discussion concerning the sources and bases of the active legal capacity of natural persons, one should take into account not only private law provisions, but also provisions of a constitutional nature, such as Article 30 of the Polish Constitution.[44] Norms resulting from international treaties, including in particular CRPD Article 12 are

40 Cf. M. Tomaszewska, Ubezwłasnowolnienie zagrożeniem prawa do wolności? in: *Idea wolności w ujęciu historycznym i prawnym. Wybrane zagadnienia*, ed. E. Kozierska, P. Sadowski, A. Szymański, Wydawnictwo Adam Marszałek, Toruń, 2010, pp. 522–525.

41 M. Serwach, *Kodeks cywilny. Część ogólna. Komentarz*, ed. M. Pyziak-Szafnicka, P. Księżak, Wolters Kluwer SA, Warsaw, 2014, commentary to Article 11, p. 189, Nb 8; M. Wilejczyk, *Zagadnienia etyczne części ogólnej prawa cywilnego*, Wydawnictwo C.H. Beck, Warsaw, 2014, p. 153; cf. also P. Machnikowski, *Swoboda umów według Art. 353[1]* KC. Konstrukcja prawna, Wydawnictwo C.H. Beck, Warsaw, 2005, p. 141, footnote 234, who aptly disputes the view according to which the exercise of the capacity to perform legal acts depends on the possession of an appropriate subjective right. However, it should be emphasised that human rights doctrine points out that active legal capacity is a universal human right. Cf. A. Dhanda, Universal legal capacity as a universal human right, in: *Mental health and human rights; vison, praxis, and courage*, ed. M. Duley, D. Silove, F. Gale, Oxford University Press, Oxford, 2012, p. 177; A. S. Kanter, *The development of disability rights under international law: From charity to human rights*, Routledge, London and New York, 2015, p. 235 et seq.; A. Kanter, Y. Tolub, The fight for personhood, legal capacity, and equal recognition under law for people with disabilities in Israel and beyond, *Cardozo Law Review*, 2017, vol. 39, no. 2, p. 569 et seq.; K. B. Glen, Introducing a 'new' human right: Learning from others, bringing legal capacity home, *Columbia Human Rights Law Review*, 2018, vol. 49, no. 3, p. 4 et seq. It should be emphasised, however, that the recognition of active legal capacity as a universal human right does not mean that active legal capacity is a subjective right in the sense adopted in private law.

42 M. Gutowski, *Kodeks cywilny. Tom I. Komentarz. Art. 1–352*, ed. M. Gutowski, Wydawnictwo C.H. Beck, Warsaw, 2021, commentary to Article 11, p. 145, Nb 4; K. Piasecki, *Kodeks cywilny z komentarzem. Tom I*, ed. J. Winiarz, Wydawnictwo Prawnicze, Warsaw, 1989, commentary to Article 11, p. 27, Nb 7; T. Sokołowski, *Kodeks cywilny. Komentarz Lex. Tom I. Część ogólna*, ed. A. Kidyba, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2012, commentary to Article 11, p. 77, Nb 3.

43 M. Gutowski, *Kodeks cywilny. Tom I. Komentarz. Art. 1–352*, ed. M. Gutowski, Wydawnictwo C.H. Beck, Warsaw, 2021, commentary to Article 11, p. 145, Nb 4; K. Piasecki, *Kodeks cywilny z komentarzem. Tom I*, ed. J. Winiarz, Wydawnictwo Prawnicze, Warsaw, 1989, commentary to Article 11, p. 27, Nb 7.

44 Article 30 of the Polish Constitution: The inherent and inalienable dignity of the human being is the source of human and civil liberties and rights. It is inviolable and its respect and protection is the duty of public authorities.

closely related to constitutional regulations.[45] Such constitutional and international legal regulations justify the statement that the source of passive and active legal capacity is external to the legal system,[46] and the legal system only regulates the scope and manner of its exercise. This statement prompts the conclusion that provisions such as the cited Articles 30 and 31.3[47] of the Polish Constitution, as well as CRPD Article 12, can serve as a point of reference and a benchmark for the control of the compliance of the legal regulation relating to active legal capacity and the possibility to exercise it in particular by persons with disabilities.[48]

This does not mean that private-law regulations concerning the active legal capacity of individuals lose their significance. On the contrary, in these regulations, the legislator defines the legal framework and the limits within which the autonomy of individuals can materialise by shaping their own legal situation in accordance with their will. It seems that the implementation of the standard arising from CRPD Article 12 should consist not only in the appropriate shaping of the content of the legal regulation but also in the endeavour to place it in a single normative act. The natural place for the regulation in question, in systems of codified private law, should be in the general provisions of civil law.[49] The

45 Cf. M. Balwicka-Szczyrba, A. Sylwestrzak, *Kodeks cywilny. Komentarz*, ed. M. Balwicka-Szczyrba, A. Sylwestrzak, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2022, commentary to Article 13, pp. 43–44, Nb 1; A. Herbet, *Zobowiązania. Tom I. Przepisy ogólne i powiązane przepisy Księgi I KC. Komentarz*, ed. P. Machnikowski, Wydawnictwo C.H. Beck, Warsaw, 2022, commentary to Article 14, pp. 18–19, Nb 2; P. Księżak, *Komentarze Prawa Prywatnego. Tom I. Kodeks cywilny. Komentarz. Część ogólna. Przepisy wprowadzające KC. Prawo o notariacie (art. 79–95 i 96–99)*, ed. K. Osajda, Wydawnictwo C.H. Beck, Warsaw, 2017, commentary to Article 13, pp. 132–133, Nb 7–8; M. Pazdan, *Kodeks cywilny. Tom I. Komentarz. Art. 1–44910*, ed. K. Pietrzykowski, Wydawnictwo C.H. Beck, Warsaw, 2020, commentary to Article 13, p. 98, Nb 15; M. Pilich, *Kodeks cywilny. Komentarz. Tom I. Część ogólna. Cz. 1 (art. 1–554)*, ed. J. Gudowski, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2021, commentary to Article 13, pp. 279–280, Nb 25; R. Strugała, *Kodeks cywilny. Komentarz*, ed. E. Gniewek, P. Machnikowski, Wydawnictwo C.H. Beck, Warsaw, 2021, commentary to Article 13, p. 41, Nb 6.

46 Cf. P. Tuleja, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2019, commentary to Article 30, pp. 112–113.

47 Article 31 of the Constitution of the Republic of Poland:

(1) Human freedom is subject to legal protection.
(2) Everyone is obliged to respect the freedoms and rights of others. No one shall be compelled to do what the law does not require them to do.
(3) Restrictions on the exercise of constitutional freedoms and rights may be established only by law and only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or the freedoms and rights of others. Such limitations may not impair the essence of the freedoms and rights.

48 The Polish Constitutional Tribunal in its judgment of March 7, 2007, K 28/05, stated that 'Article 559 in conjunction with Article 545 § 1 and 2 of the Act of November 17, 1964.– Civil Procedure Code (Journal of Laws no. 43, item 296, as amended), to the extent that it does not grant an incapacitated person the right to request the initiation of proceedings to revoke or modify guardianship, is inconsistent with Articles 30 and 31 of the Constitution of the Republic of Poland'. Currently, the Article 559 § 3 of the Civil Procedure Code provides that an application to revoke or modify guardianship may be made by the guardian himself. There is also no doubt that an application for incapacitation may be filed by the person to be incapacitated (decision of the Supreme Court of October 20, 1965, II CR 273/65, Legalis; resolution of the Supreme Court of September 28, 2016, III CZP 38/16, Legalis).

49 Cf. L. Kociucki, Niektóre problemy nowelizacji polskiego prawa o ubezwłasnowolnieniu, *Studia Prawnicze*, 2013, no. 2, p. 116, who generally indicates that these provisions should be included in the Civil Code without specifying, in which part of it they should be included.

regulation concerning vital interests, in particular of persons with disabilities, should not be scattered in various laws. This is because it may raise doubts about the relationship between the different legal provisions. It should be emphasised that due to CRPD Article 12, national regulations referring directly to active legal capacity should no longer be a simple expression of the legislator's will regarding the scope and possibility of exercising active legal capacity by particular categories of entities but must be shaped by taking into account legal standards resulting from constitutional regulations and CRPD Article 12.[50] The postulate to take into account CRPD Article 12 refers not only to the shaping of the content of the law in the legislative process, but also to the interpretation of the provisions which, to the extent that the content of the regulation allows it, should take into account the conventional standard. Where the existing interpretation of national law does not comply with CRPD Article 12 and the content of the domestic regulations allows for a different interpretation, in our view, the entry into force of the CRPD justifies a reinterpretation of national legal provisions in order to ensure the compliance of the national legal system with CRPD Article 12.[51]

50 Cf. M. Balwicka-Szczyrba, A. Sylwestrzak, Instytucja ubezwłasnowolnienia w perspektywie unormowań Konstytucji RP oraz Konwencji ONZ o prawach osób niepełnosprawnych, *Gdańskie Studia Prawnicze*, 2018, vol. XL, pp. 152–154; J. Gudowski, Ubezwłasnowolnienie – relikt normatywny czy przejaw prawnego obskurantyzmu? in: *Księga jubileuszowa dedykowana Profesor Elżbiecie Skowrońskiej-Bocian*, ed. W. Borysiak, J. Wierciński, A. Gołaszewska, M. Olechowski, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2022, pp. 133–135; L. Kociucki, Niektóre problemy nowelizacji polskiego prawa o ubezwłasnowolnieniu, *Studia Prawnicze*, 2013, no. 2, pp. 103–122; I. Markiewicz, J. Heitzman, A. Pilszyk, Ubezwłasnowolnienie – instytucja wciąż potrzebna? *Psychiatria*, 2014, no. 4, pp. 203–209; I. Radlińska, Ochrona podmiotowości prawnej osób niepełnosprawnych intelektualnie w stopniu umiarkowanym w prawie polskim, *Pomeranian Journal of Life Sciences*, 2017, no. 1, pp. 69–77; M. Szeroczyńska, Mozolna droga ku likwidacji instytucji ubezwłasnowolnienia, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka*, ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, pp. 164–165, 180–188; K. Zaradkiewicz, Ubezwłasnowolnienie – perspektywa konstytucyjna a instytucja prawa cywilnego, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka*, ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, pp. 200–204. In the member states of the Council of Europe, in addition to CPRD Article 12, the jurisprudence of the European Court of Human Rights has been important in shaping the regulation of active legal capacity. Cf. A. Pudło, Problematyka ubezwłasnowolnienia w orzecznictwie Europejskiego Trybunału Praw Człowieka, *Rocznik Administracji i Prawa*, 2019, vol. XIX, no. 2, pp. 49–59. In doing so, it is emphasised that the European Court of Human Rights did not consider the institution of incapacitation per se to be contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms, Dz. U. of 1993, no. 61, item 284; so A. Pudło, Problematyka ubezwłasnowolnienia w orzecznictwie Europejskiego Trybunału Praw Człowieka, *Rocznik Administracji i Prawa*, 2019, vol. XIX, no. 2, pp. 50, 58.

51 Cf. P. Księżak, *Komentarze Prawa Prywatnego. Tom I. Kodeks cywilny. Komentarz. Część ogólna. Przepisy wprowadzające KC. Prawo o notariacie (art. 79–95 i 96–99)*, ed. K. Osajda, Wydawnictwo C.H. Beck, Warsaw, 2017, commentary to Article 13, p. 133, Nb 8, who postulates that the institution of curatorship for a person with a disability regulated in Article 183 of the Polish Family and Guardianship Code (FGC) should be the main means of legal protection and assistance available to persons with disabilities used in all those situations where guardianship is not actually necessary. P. Machnikowski, Instytucja opieki nad pełnoletnim w pracach Komisji Kodyfikacyjnej Prawa Cywilnego w latach 2012–2015, *Państwo i Prawo*, 2019, no. 4, p. 136. Please note that Article 183 of the Polish FGC will have been amended as a result of the Act of July 28, 2023 on amendment of the FGC and some other acts, Journal of Laws 2023, item 1606. This amendment comes into force on February 15, 2024. As a result of this amendment the nature of the curatorship for a person with disability and the scope thereof are flexible. The nature and the scope of the curatorship for a person with disability is to be adequate for the needs of the person for whom it is established. This is to be decided by the court taking into account all the relevant circumstances on a case by case basis. The court is obliged to hear the person with disability before any decision on curatorship is taken, unless communication with this person is impossible. The person with disability may determine a candidate who can be a curator.

The standard under CRPD Article 12, insofar as it relates to active legal capacity, requires national legislators to structure legal regulations in such a way as to ensure the fullest possible realisation of the autonomy of persons with disabilities, which must be accompanied by adequate and effective safeguards against abuse. To the extent that the realisation of the autonomy of persons with disabilities requires safeguards against abuse, signatory states may, in fact are even obliged to, put in place safeguards that meet the requirements of CRPD Article 12.4. This applies in particular to solutions that may have the effect of limiting the active legal capacity of persons with disabilities. They must be proportionate to the extent to which they affect the rights and interests of the person concerned. A legal system in which there is no basis for the use of safeguards allowing, in particularly justified cases, for the use of a substitutive model of performing legal acts, only ostensibly meets the standard of protection for persons with disabilities under CRPD Article 12.[52] In reality, such a legal system leaves persons in need of assistance without the possibility to provide it in a way that safeguards their interests effectively and in proportion to their needs. The complete elimination of the substitution model may deny persons with disabilities the benefits of civil law protection on truly equal terms,[53]

The standard arising from CRPD Article 12 and the associated paradigm shift in the approach to the active legal capacity of persons with disabilities requires compliance with the principle of proportionality, not only in shaping the scope of possible restrictions (*in abstracto*) and restrictions applied *in concreto* but also in shaping the grounds for the application of the substitution and assisted/supported model of performing legal acts by persons with disabilities. Thus, irrespective of whether there is a higher-order norm in the respective signatory state to the CRPD, analogous to Article 30 or Article 31.3 of the Polish Constitution, which could be a benchmark for the control of the constitutionality of national regulations on active legal capacity (in particular justifying the application of the substitutive mode of performing legal acts),[54] CRPD Article 12 constitutes such a benchmark of an independent nature.

52 Cf. M. Domański, ONZ o prawach osób niepełnosprawnych w interpretacji Komitetu do spraw praw osób niepełnosprawnych a podstawowe instytucje prawa cywilnego, *Prawo w Działaniu*, 2019, no. 40, p. 152. The view that the Polish current regulation of active legal capacity and its limitations by way of incapacitation based on the substitute model of performing legal acts does not fundamentally contradict the provisions of the CRPD is presented by T. Pajor, Ochrona osób niepełnosprawnych a ubezwłasnowolnienie, in: *Studium nad potrzebą ratyfikacji przez RP Konwencji o prawach osób niepełnosprawnych*, ed. K. Kurowski, Wydawnictwo Kurza Stopka J. Tyluś Malak, Łódź, 2010, p. 84; M. Pyziak-Szafnicka, Ubezwłasnowolnienie jako środek ochrony osób dotkniętych chorobami otępiennymi i chorobą Alzheimera – aktualna regulacja i projektowane zmiany, *Studia Prawno-Ekonomiczne*, 2019, vol. CXI, pp. 70–71, 76; dissenting opinion: M. Zima-Parjaszewska, Artykuł 12 Konwencji ONZ o prawach osób z niepełnosprawnościami a ubezwłasnowolnienie w Polsce, *Studia Prawnicze*, 2013, no. 2, pp. 100–101.

53 T. Pajor, Ochrona osób niepełnosprawnych a ubezwłasnowolnienie, in: *Studium nad potrzebą ratyfikacji przez Rzeczpospolitą Polską Konwencji o prawach osób niepełnosprawnych*, ed. K. Kurowski, Wydawnictwo Kurza Stopka J. Tyluś Malak, Łódź, 2010, pp. 83–84; cf. also P. Machnikowski, Instytucja opieki nad pełnoletnim w pracach Komisji Kodyfikacyjnej Prawa Cywilnego w latach 2012–2015, *Państwo i Prawo*, 2019, no. 4, p. 139; M. Wilejczyk, *Zagadnienia etyczne części ogólnej prawa cywilnego*, Wydawnictwo C.H. Beck, Warsaw, 2014, pp. 158–160.

54 The question whether Article 30 of the Polish Constitution may, in this respect, constitute a model for the control of the constitutionality of the regulation formulating the requirements for the independent and substitutive performance of legal acts is not free from controversy. This possibility is excluded by L. Bosek, *Konstytucja RP. Tom I. Komentarz. Art. 1–86*, ed. M. Safjan, L. Bosek, Wydawnictwo Sejmowe, Warsaw, 2016, commentary to Article 30, p. 749, Nb 89.

5. Conclusions

Recognising the multifaceted nature of active legal capacity and outlining the standards of protection against its undue restriction, particularly for persons with disabilities, leads to some more general observations. Firstly, reflection on active legal capacity in general, and with regard to persons with disabilities in particular, should not be limited to private law. Private law is important from the perspective of persons with disabilities, as it is mainly within this framework that the interests closest to each individual are realised. However, public law contexts should not be overlooked either; here, active legal capacity is important, as a precondition for performing various acts of legal and social or political significance or as a premise for being able to carry out various professions. In this respect, legislators should also be guided by the principle of proportionality under CRPD Article 12.4. Private law should be the starting point in reflection on active legal capacity, as the field from which this attribute of private law subjects originates and in which it is regulated. However, this reflection should go beyond the field of private law. Secondly, in the process of shaping the regulation of active legal capacity, national legislators should take into account the standards for the protection of persons with disabilities arising in particular from CRPD Article 12.4. These relate not only to the manner and scope of the restrictions introduced but also to the scope of application of the substitution model. Thirdly, restrictions on active legal capacity introduced to protect against abuse, and in particular to protect persons with disabilities, should be introduced as exceptions to the principle, which is the full active legal capacity of natural adults. Fourthly, it should be considered whether the other capacities that make up active legal capacity in the broad sense, and in particular the capacity to incur different types of liability, should be correlated with the scope of active legal capacity. Fifthly and finally, the relationship of the regulation of active legal capacity with the will and the principle of autonomy of the will, the importance of which goes far beyond the performance of legal acts, calls for an in-depth reflection on the justification for weakening and reducing the significance of the hitherto paradigm, according to which, the possibility to perform a legal act and to attribute its effects to a given entity depended on the corresponding ability to sufficiently discern, decide and express will.[55]

55 Cf. M. Domański, Konwencja ONZ o prawach osób niepełnosprawnych w interpretacji Komitetu do spraw praw osób niepełnosprawnych a podstawowe instytucje prawa cywilnego, *Prawo w Działaniu*, 2019, no. 40, pp. 147–148.

2 Legal-international analysis of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities

The impact of the Vienna Convention on the Law of Treaties and the International Bill of Human Rights

Jerzy Menkes

1. Introductory notes

a. Consensus on the adoption of the Resolution of December 13, 2006

The United Nations General Assembly (hereinafter UNGA) – in *the consensus*[1] procedure (that is, 'without vote'[2]) – passed Resolution 61/106[3] under which the Convention on the Rights of Persons with Disabilities (hereinafter CRPD),[4] with Additional Protocol was adopted.[5] The CRPD and the Protocol constitute an integral part of the Resolution and, from this perspective, can be recognised as secondary legislation passed by the UN, UN *acquis*. The UNGA did not stop with passing the Resolution and called on the states to become bound by 'the Convention and Protocol' by 'signature and ratification'. The UNGA, with this call, has given expression – legitimately – to its conviction that, in the absence of an explicit grant of lawmaking powers in the UN Charter to the UNGA to adopt norms for members of the organisation other than those directly related to membership in the organisation, the signing and ratification of the CRPD and the Additional Protocol will strengthen state obligations to implement these international texts in national legal orders.

1 Consisting of each UNGA member supporting passing the Resolution and its full contents.
2 https://research.un.org/en/docs/ga/quick/regular/61, accessed March 28, 2022.
3 A/RES/61/106.
4 The title of the Convention is compliant with its official title in Polish, under this title the Convention was published in the Journal of Laws (Journal of Laws of 2021, item 1169). The Polish title of the Convention corresponds with the title in Russian: 'о правах инвалидов'. In authentic linguistic versions equally binding as the Russian, the title is worded differently, namely, in: English, 'on the Rights of Persons with disabilities'; –French, 'relative aux droits des personnes handicapées'; –Spanish 'sobre los Derechos de las Personas con discapacidad' (I do not refer to the Chinese and Arabic versions). The difference in linguistic terms is significant, since it reflects and shapes perception of 'a person'. In Polish and Russian linguistic versions two separate categories of persons are distinguished: a person and a disabled person. In other linguistic versions 'a person' is one category, designations of which include persons with disabilities. English, French and Spanish reflect the evolution undergone by the societies using these languages from exclusion and stigmatisation of 'disabled persons' to developing an inclusive society open to differences and accepting of such differences.
5 The Convention and Protocol constitute appendices I and II to the Resolution.

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b. Modus operandi in works on the CRPD

The UN founding states imposed on the organisation a function of the following wording: 'shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification' (Article 13.1 of the UN Charter) and granted relevant competencies, indicating that the obligation of performance thereof lies with the UNGA. Within the performance of the power, by exercising the aforementioned function, the UNGA established the subsidiary organ in a form of the International Law Commission and provided it with a statute under Resolution 174 (II)[6] of November 21, 1947. 'An intermediary' between the general forum of the UNGA and the ILC is the Sixth Committee (Legal) of the General Assembly.

In the Statute of the ILC, the procedure related to both the 'development' and 'codification' of the law was precisely defined[7] and described. The elements of the procedure which, from the point of view of perceiving further solutions, are considered key – concerning the 'law development' – are the dispositions of Article 16.2. (c), 'It shall circulate a questionnaire to the Governments, and shall invite them to supply, within a fixed period of time, data and information relevant to items included in the plan of work'; and (d) 'It may consult with scientific institutions and individual experts', as well as (h), 'The Commission shall invite the Governments to submit their comments on this document', repeated – with regard to 'codification' – in Article 17, as well as Article 19 in conjunction with Article 20 describing the mode of works

> Article 19 . . . 2. The Commission shall . . . address to Governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary. Article 20. The Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary containing: *(a)* Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine; (*b*) Conclusions defining: (i) The extent of agreement on each point in the practice of States and in doctrine; (ii) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution.

The practice of the international lawmaking process in this mode (i.e. on UN fora) with the use of these procedures brought effects beneficial in terms of the law; a systematic analysis of the ILC's works allows formulating an assessment that both subsidiary organs of the UNGA and the manner of work stood the test of time. Bad international texts – both in the area of law development and codification – were solely the effect of the states' will, with regard to which the UN is only the forum of fulfilment – and they did not result from the wrong regime of legislation.

6 Text of the Resolution, as amended, https://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf.

7 'Article 15. In the following articles the expression "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression "codification of international law" is used for convenience as meaning the more precise formulation and systematisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.'

In the works on the CRPD and the Additional Protocol, these experiences were rejected. It was determined by a lot of various factors: the most important, the will of creating the law for the stakeholders and by the stakeholders was emphasised, thus implementing the social expectation 'nothing about us without us', and it worked. The second desirable result of work conducted by the Committee *ad hoc* is the speed; work on the agreement lasted incomparably shorter than in a regular procedure. In the case of a regular procedure, the length of work stems from both objective factors, i.e. the time necessary to perform work, and subjective factors, i.e. the possibilities of delaying work by states using various methods. In the case of this Convention, works on the Committee's forum and the participation of NGOs hindered or even prevented the states from 'stalling', that is to say, delaying works. Governments were under continuous pressure from NGOs, and it brought results. At the same time, a price was paid for this manner of conducting works – perhaps consciously – in the form of a controversial, from the perspective of the rules of good legislation, and legal quality of the international text. What was missing in the works on the CRPD at the beginning, and what influences the result, is the lack of an analysis of the *status quo* preceding the adoption of the CRPD and the Additional Protocol. Not discussing the preliminary approach, i.e. non-negotiable discrimination of persons with disabilities, resulted in the following:

- No data was collected and organised to regarding the sources, areas, and forms of discrimination of persons with disabilities, etc., which are a necessary precondition preceding starting works on treaties, and indicating 'this/such' discrimination, which can be banned by injunctions addressed at the states and executed vertically: refraining from discrimination (negative activities) and activities in a positive formula. There is no separation between what states should and can do immediately (i.e. both refrain and act) and what is realistically possible to implement only gradually and where the level of implementation depends on the economic capacity of states (and to a lesser extent on the will), as well as the need to eliminate discrimination in the level system (in which state institutions are one of the actors in the transition process).
- Is the source the lack of law – legal norms or bad law or bad practice of implementation, enforcing the law (and if yes, by what authorities)?
- A desirable result has not been instrumentalised since equal treatment – elimination of any discrimination – is too general.

In consequence, the CRPO (and in a certain scope the Additional Protocol) repeats known norms and includes legal postulates – expectations – which have been given the form of legal (binding) norms.[8]

Awareness of these doubts accompanied works on agreements since the beginning. Don Mac Kay – president of the Ad Hoc Committee on Disabilities Convention (Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities), through the prism of narrowly, legally understood sense of works on agreements, stated that 'theoretically there was no need for a new convention, because the existing human rights instruments

8 More: N. Watson, S. Vehmas, *Routledge handbook of disability studies*, Routledge, London and New York, 2020, pp. 72–88.

apply to persons with disabilities, in just the same way that they do to everyone else'.[9] This opinion was shared by the representative of Canada, who indicated that the rights of persons with disabilities, respecting them, would best be ensured by linking existing treaty bodies throught a system of experts.

These statements jointly indicate the commonness of a recognition that discrimination of persons with disabilities does not result from the lack of the law (norms) but from the lack of or wrong implementation thereof. The opinion indicating weakness of the implementation as a source of discrimination was mentioned in many speeches both assessing the hitherto *status quo* and formulating expectations; the representative of Israel indicated that after announcing the success – the adoption of the Resolution, entry into force of international acts (Convention and Protocol) and ending with the celebration of 'a year of persons with disabilities' – the CRPD will be assessed on the forum of the institution of the UN system, solely based on its implementation.

States supporting the CRPD explicitly underlined the need of implementation measures.[10] From the perspective for implementation, special significance has been attributed by the states to monitoring that is the Additional Protocol, which underlines the appearance of being bound with the CRPD by the states which became bound with the CRPD without binding themselves with the Additional Protocol.[11]

Furthermore, implementation tools in the area of international cooperation have been indicated by postulating directing development assistance to eliminate discrimination of persons with disabilities, as well as taking this objective into account in implemented development assistance programmes.

In the debate it has been stated that the formula of including NGOs in works on treaty should be maintained with regard to the implementation and monitoring thereof. A conviction was expressed that for the implementation to be effective, it cannot be limited to the activities of the states and the unexposed yet existing awareness that discrimination is not only the effect of states' activities/negligence (vertical relations: state–individual/group), but discrimination also occurs in horizontal relations and that the elimination of discrimination also requires a change in horizontal relations (individual/group–individual/group).

Simultaneously, even 'on stage', during works on Convention and Protocol, in the spotlight, not all states expressed support for the works. There were voices[12] – assessment of the legitimacy of which is impossible due to their general nature – that the CRPD should not include new rights, but only 'repeat' the common ones and confirm the existing national legal status.

9 However, MacKay contradicted this opinion himself by stating that the reality is different, and he expressed the expectation that agreements constitute 'a point of reference for future standards and measures'.

10 The need to amend the law, including the philosophy of law – the perception of persons with disabilities was emphasised by the representative of Chile by indicating that discrimination may result from 'the protective approach', and it requires a change aimed at stopping discrimination without resigning from positive discrimination.

11 As, e.g., Poland or Switzerland.

12 Primarily from African, Latin American and Caribbean countries.

c. Integrity of the Resolution (text and appendices)

In the entire text of the Resolution, the UNGA underlined the integrity and inseparability of the CRPD and the Additional Protocol, and this integrity and inseparability are indicated by the language of the call: '3. Calls upon States to consider signing and ratifying the Convention **and** (bold – J.M.) the Optional Protocol as a matter of priority, and expresses the hope that they will enter into force at an early date'. There is no doubt that if the GA intended to leave the addressees with a choice: signing and ratifying jointly the Convention and the Protocol, or only the Convention,[13] the referred point would include two conjunctions 'and/or' instead of one. The accepted *de facto* practice of some states is, from the point of view of a literal interpretation of the Resolution, *contra legem*. The significance of a silent adoption of such practice can, at most, justify recognising it as *praeter legem* practice. At the same time, both the silent acceptance and the practice of choice – treating the Resolution as if *à la carte* – is a manifestation of disregarding the Resolution of the UNGA and its own declarations in the event of each state which participated in the establishment of a *consensus* – it did not present an opinion differing from the one included in the Resolution and its two appendices. I, obviously, extend the indication of the occurrence of *contradictio in adiecto* with regard to the practice of states co-establishing *the consensus* and not signing (not ratifying) both appendices to the states that co-created *the consensus*, and then raised reservations against the subject matter and objectives of the CRPD.

The fact that this is a frequent practice on the UNGA's forum does not change the evaluation thereof. The states publicly support, or at least do not oppose, resolutions and statements (these are not always normative statements, and they do not always include norms), including contents assessed as 'good' and, after public declaration of support or a lack of objection, reject the possibility of binding themselves with them. Considering that, as has been proved in practice, the 'memory' of the media and public opinion (voters) is short, only a short-term '*CNN effect*'.[14] Governments know that after – a short time – neither the media nor ordinary people will 'notice' that the government has not implemented the declaration. They will not verify a practice that deviates from the downside of the public promise and public expectations.

d. Nominal consensus vs status quo

However, *the consensus* for states to be binding by the entire agreement was nominal. Its nominal nature became determined by subsequent practice. Some states took advantage of the division of the agreement into the CRPD and the Additional Protocol and bound themselves only to the CRPD. The states were not willing to oppose the treaty 'on the stage, in the spotlight'. I refer to the method of working out the final text of the Convention as a 'rotten compromise' because the conclusion of the negotiations and the adoption of the text came as the result of a compromise to remove from the text a provision that was the subject of controversy.

13 The possibility to sign and ratify the Additional Protocol without signing and ratifying the Convention is inadmissible *ipso facto*.

14 P. Robinson, The CNN effect: Can the news media drive foreign policy? *Review of International Studies*, 1999, vol. 25, no. 2, pp. 301–309.

I describe the method of establishing the final text of the Convention as 'a rotten compromise' even though ending negotiations and adopting the text was a compromise consisting in removing from the text a provision that was the subject of controversy. In the course of negotiations, there was a significant difference in opinions between the 'West', the position of which was most often presented by the EU and Canada concerning the legal capacity,[15] and the rest of the states.[16] In compliance with the Western position, legal capacity meant the legal capacity to act,[17] whereas opponents (a group of Arabian countries, African countries, Russia and China) stated that legal capacity is only a synonym for

15 That is the subject of the entire compilation, which this chapter is a part of.

16 Full documentation of works, see Background Documents. Article 12 – Equal recognition as a person before the law, https://www.un.org/esa/socdev/enable/rights/ahcstata12bkgrnd.htm.

17 In the EU discussion – and, as a matter of fact, the 'West' (represented by Ireland) – presented the following position: 'the EU shares many of the concerns about this Article being too detailed in certain areas and insufficient in others. The EU supported the Canadian proposal, except that there is a need at the outset of the Article for a strong statement of equality to set the framework for subsequent discussion of legal capacity. For that reason, like China and others, the EU supported rephrasing 9(a) and 9(b) to read along the lines of, "Recognize PWD as individuals with equal rights before the law, and guarantee equality before the law without discrimination against PWD". There is a difference between recognition of equal rights and guaranteed equality, and both should feature in this Article. It is necessary to return to an exploration of recognition of legal capacity by persons who need assistance, and therefore the EU supported 9(c)(i). The words after "tailored to their circumstances" should be deleted because they are unclear. The idea in 9(c)(ii) is central. Any decision in relation to legal capacity needs to be taken by independent and impartial authority, Canada's proposal in this regard deserves a close look. Paragraphs 9(d) and 9(e) are too detailed and lack clarity. As an odd mixture of ideas in these paragraphs, they should be deleted initially, and their concepts should be considered later. The issue of property is worthy of special mention, and can be resolved by keeping 9(f), but the EU remains open to further proposals in that regard'. The referred position of Canada was of the following wording: '1. States Parties shall recognize that, in civil matters, adults with disabilities have a legal capacity identical to that of other adults and shall accord them equal opportunities to exercise that capacity. In particular, they shall recognize that adults with disabilities have equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals. 2. States Parties shall ensure that where adults with disabilities need support to exercise their legal capacity, including assistance to understand information and to express their decisions, choices and wishes, the assistance is proportional to the degree of support required and tailored to the adult's individual circumstances. 3. Only a competent, independent and impartial authority, under a standard and procedure established by law, can find an adult not to have legal capacity. States Parties shall provide by law for a procedure with appropriate safeguards for the appointment of a personal representative to exercise legal capacity on the adult's behalf. Such an appointment should be guided by principles consistent with this Convention and international human rights law, including: "(a) ensuring that the appointment is proportional to the adult's degree of legal incapacity and tailored to the adult's individual circumstances; and, (b) ensuring that personal representatives take into account, to the maximum extent possible, the adult's decisions, choices and wishes." This new language would address the lack of clarity regarding the definition of "legal capacity" by referring to CEDAW, Article 15.2. There would be no need to include 9(a), 9(b), and 9(c) equality provisions since equality would be fully covered by Article 7. The proposed text for 9.2 comes from WG draft 9(c)(i),(ii) with important concepts of proportionality and the tailoring of support to the individual circumstances of PWD. 9.3 is included to clearly address India and other delegates' concerns regarding what would happen when a PWD is found to have diminished or no legal capacity. Language addressing these issues is necessary for inclusion in the Article, so that critical safeguards regarding appointment of a personal representative or substitute decision maker for that adult are in place. Canada's two Article revision imperatives are to incorporate proportionality, and adult choices and wishes"'. Daily summary of discussions related to Article 9. *Equal Recognition as a Person Before the Law*, May 26, 2004, vol. 4, no. 3, https://www.un.org/esa/socdev/enable/rights/ahc3sum9.htm.

legal capacity for act.[18] The 'rest' introduced their definition to the provision in translations of the draft into Chinese, Russian and Arabic.[19] The *Ad Hoc Committee*[20] decided to resign from explaining the source of the difference in positions[21] or to reach a compromise and removed the provision from the draft in its entirety.[22]

The final text differs from the draft, in which the wording of the provision was simple:

> Article 11 *Right to recognition as a person before the law*. 1. Everyone shall have the right to recognition everywhere as a person before the law, with full legal capacity. This right shall not be limited or restricted based on disability or impairment. 2. Persons with disabilities who experience difficulty in asserting their rights, understanding information presented to them or articulating or communicating their choices have a right to be provided with advocacy assistance and other reasonable accommodation with the aim of giving effect to the person's own decisions.[23]

e. 'Importance' – significance of the Resolution

The CRPD is the first universal treaty of international human rights adopted in the 21st century. In the narration of non-governmental organisations grouping both persons with disabilities and persons acting to the benefit of protection and promotion of rights of such persons, a treaty constitutes an important stage of activities to the benefit of rights of persons with disabilities in the international space. Approximately 650 million persons were directly authorised due to the Convention, in the course of passing it. However, the group of persons directly and indirectly influenced by the Convention is significantly larger, analogously to the impact of disability. Disability has a direct impact not only on the life of a person with a disability but also on their loved ones: it affects social relations.

18 The group of Arabic countries (represented by Iraq) stated 'that his delegation had joined the consensus on the Convention on the basis that, under Article 12, on "equal recognition before the law" – by which States parties would recognize that persons with disabilities enjoyed legal capacity on an equal basis with others in all aspects of life – "legal capacity" referred to "the capacity of rights not the capacity to act", in accordance with the national laws and legislations of those States.' However, the representative of Syria added that 'her delegation had joined the consensus on the understanding that none of the Convention's provisions would contradict her country's religion or culture and that its implementation would take culture and background into account. Syria also understood Article 12 to refer to the "capacity to enjoy" rights rather than "capacity to exercise", as determined by the laws of the State'.

19 Full documentation of the Committee's work with the complete discussion, proposals, etc., see https://www.un.org/esa/socdev/enable/rights/adhoccom.htm. All referred statements are included therein. It was included in Annex III to the draft of Article 9: '1. States parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law'. And footnote '*Footnotes – Annex III:* In Arabic, Chinese and Russian the term "legal capacity" refers to "legal capacity for rights", rather than "legal capacity to act" '. Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities. New York, January 24–February 4, 2005 Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its fifth session. A/AC.265/2005/2, https://www.un.org/esa/socdev/enable/rights/ahc5reporte.htm#texta3fna.

20 The head of the Committee was Don McKay, a politician with an extensive experience in multilateral international diplomacy (see https://www.un.org/press/en/2004/bio3597.doc.htm), New Zealand Permanent Representative to the UN.

21 On the topic of *modus operandi* in works on the Convention and Protocol and consequences thereof further.

22 It is relatively common for this practice to take place at the UN in work on universal regulations.

23 Draft of December 2003, https://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm#6.

Assessment of the significance of the Convention and the Additional Protocol can be conducted *ex ante* or *ex post*.[24] A key element of the *ex ante* assessment is the position of the agreement's addressees who are persons with disabilities and NGOs uniting these persons and conducting activities to their benefit. Their position is univocally positive. Another group whose voice has an impact on the assessment is politicians, and on their behalf, the president of the UNGA, Ms Sheikha Haya Rashed Al-Khalifa,[25] stated that the UN member states bound themselves on the UNGA's forum to promote and protect human rights, freedoms and dignity of all persons with disabilities.[26]

The *ex post* assessment of the CRPD and the Additional Protocol has been and will be conducted in a changed reality. Stakeholders of the CRPD and the Additional Protocol expect that the agreement is *sui generis* a self-implementing forecast, which means that its expected positive effects exceed assessable elements of the CRPD and the Additional Protocol in the formula of *ex ante* assessment, taking into consideration only the factual contents of the regulation without the aforementioned consequences and the spillover effect. This effect was indicated by Ambassador Rashed Al Khalifa, who regarded the Convention reaffirming the 'universal commitment to the rights and dignity of all people without discrimination' as a needed impetus for broader cultural change in the perception of 'disabled persons'.[27] A similar perception of the Convention was expressed by the UN Secretary-General Kofi Annan, who stated that 'nothing is going to change overnight, but changes take place faster when supported by the law'. The potential and expectation of a change were indicated in many speeches. Representatives of the states underlined that a change in the perception and treatment of persons with disabilities has evolved from discriminated, excluded persons to persons treated as 'objects of charity'.[28] As has been indicated, states do not treat the hitherto evolution as 'the end of history' and want to contribute to creating a new paradigm within which persons with disabilities will be recognised as holders of rights and active members of society.

2. Legal characteristics of the CRPD

a. General notes

The CRPD (with the Additional Protocol) is the Resolution of the UNGA and the international treaty. The analysed international text includes normative contents, which is not the rule in the case of resolutions of the UNGA. The fact of having normative contents is a precondition for attributing binding force to the text. Resolutions of the UNGA do not have *ex lege* binding force.[29] Norms of the international agreement are binding for the

24 See *General assembly adopts groundbreaking convention, optional protocol on rights of persons with disabilities.* Delegations, Civil Society Hail First Human Rights Treaty of Twenty-First Century, https://www.un.org/press/en/2006/ga10554.doc.htm, accessed March 29, 2022.

25 Bahrain Permanent Representative to the UN.

26 Full documentation of works with texts of speeches, see UN Human Rights Treaties, Travaux Préparatoires, https://hr-travaux.law.virginia.edu/document/catcidtp/ecn4l1544/lawarchives%40virginia.edu?field_doc_supplemental_value=All&page=26.

27 It is a sad paradox that she used this term against the text of the Resolution and appendices.

28 https://www.un.org/press/en/2006/ga10554.doc.htm.

29 More: J. Menkes, Prawny charakter rezolucji Zgromadzenia Ogólnego ONZ (Legal nature of the resolution of the UN general assembly), *Sprawy Międzynarodowe*, 1978, no. 9, pp. 139–146; J. Menkes, A. Wasilkowski,

parties thereto – subject of the international law only as an effect of becoming bound with the agreement in compliance with the principle of voluntariness.[30]

In the case of the CRPD, the legal status is different due to the following reasons:

- First of all, and most importantly, the rights and freedoms articulated in the CRPD are, with regard to persons with disabilities, guaranteed and not granted rights. Consequently, the CRPD does not create (new) rights and freedoms and – only or as much as – is a declaration on the part of states that they are in the know about their obligations.
- Secondly, rights and freedoms guaranteed in the CRPD are rights with regard to which states declared the awareness of the obligation and safeguarding them in many other international texts, both resolutions (primarily the Universal Declaration of Human Rights) and (universal and regional) international agreements – mainly in the two International Covenants (on Civil and Political Rights and on Economic, Social and Cultural Rights).[31]

In consequence, in the Resolution and two appendices thereto constituting the Agreement (or agreements, if the CRPD and the Additional Protocol are treated as separate and integral agreements), norms of the binding law and, at that, norms with a status of universal common law norms, were repeated. It decides on the binding force of this (concrete) Resolution. It means that each state (and any other organised subject of the international law) is obliged to fully respect each norm included in the CRPD and the entirety thereof, as well as to incorporate them in the legal system and implement, to concerning which it has relevant competencies. Therefore, in essence, binding oneself with the CRPD of a state or other subject of the international law by signing or ratifying thereof results in accountability in relations with other subjects to regarding the performance of the obligation. It results from the fact that the subject of international law voluntarily informed other subjects – declared to other subjects that it will perform the obligation to implement rights and freedoms safeguarded for an individual, in good faith.

A state's failure to bind itself to an agreement (the CRPD and the Additional Protocol) does not – because it cannot – deprive individuals of their rights and freedoms. However, the practice of the subject of international law about the execution of (their own) declaration provides the grounds for the assessment of the state (or other subjects of international law) in international relations and allows assessment of the obligation execution ('fulfil in good faith the obligations').

Organizacje międzynarodowe. Prawo instytucjonalne (International organisations: Institutional law), PWN, Warsaw, 2017, pp. 537–566; K. Skubiszewski, *The elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective*, Institut de Droit International Session of Cairo, Cairo, 1987; M. Virally, *International texts of legal import in the mutual relations of their authors and texts devoid of such import*, Institut de Droit International Session of Cambridge, Cambridge, 1983 (in the case of IDI works, a full source are the works on the reports).

30 It results from sovereignty – independence of a subject of international law.

31 They all contribute to the International Bill of Human Rights.

b. Framework character of the CRPD

The creators of the CRPD selected for this act a construction of 'a framework convention':[32] this choice is legitimate in all respects. It allowed stipulating relatively broader obligations concerning the parties thereto, obligations which can be specified with both consecutive international texts, as well as – or even above all – statutes and legal acts, which are of an implementing nature about the CRPD on the grounds of national legal orders.

States started using the construction of a framework convention to stipulate norms in the international relations[33] relatively recently. However, they have been using it more and more frequently. This positively verified practice reflects, among others, the process of extending and deepening the domain regulated by international law. It is a direct consequence of concluding agreements of a *traité-loi* nature, which (in contrast with *traités-contrats*) include general norms and, in consequence, analogically as in the event of 'statutes' in the national law order, implementation thereof often (or perhaps even more often) requires implementing acts. A framework convention does not differ in terms of legal force from other (regular) treaty. The framework nature of the CRPD allows the states parties to draw up and adopt national policies and strategies of implementation thereof. At the same time, the framework nature of the CRPD does not decrease and even increases, the possibility of accountability regarding the practice of states.

As a consequence of using this construction, neither persons with disabilities nor parties to the CRPD are 'hostages of the text'. The CRPD is not 'an agreement between suicides', which would have to follow the rule *dura lex sed lex*, but an obligation to achieve results-values specified in the Resolution.

Giving the CRPD a framework character was supported by many various factors, however, herein it is justified to indicate only the objective ones.[34] Doubtlessly, the factual status – the situation of persons with disabilities varies in different countries and national methods, operating instruments and (unfortunately) the actual possibilities of exercising the rights and freedoms of these persons – are different, which unequivocally supports individualisation of measures. In consequence, such a manner of stipulating the law was possible that the 'hard law' – being *ex definitione* the CRPD – a treaty regulated by international law including normative regulations of guaranteed rights and freedoms, includes *sui generis* 'soft law' norms, 'softness' of which does not result from the legal status, from a lack of binding, but from the 'softness (lack of legal clarity)' of the legal language of the regulation. The CRPD guarantees rights and freedoms and confirms required standards by gently indicating the path to achieve a specific result. The procedure of implementation and a manifestation of the framework nature of the CRPD is supplemented by the Additional Protocol allowing gradual modification of the CRPD's legal system.[35]

The framework character of the CRPD allows for its implementation in the 'open model of coordination', CPRD is a *sui generis* European directive. The agreement was structured

32 On 'framework agreement', see more in the international text: Economic Commission for Europe, *Framework Convention Concept*, 3 and 4, 2011, Informal notice 5.

33 The roots of the practice can be found in environmental agreements; see more: A. Kiss, Les traités – cadres: Une technique juridique caractéristique du droit international de l' environnement, *Annuaire Français de Droit International*, 1993, vol. 39, pp. 792–797.

34 Reproaching the states for unwillingness to adopt 'firm and tough obligations' does not have any factual basis and constitutes a projection of the author's distrust of the external world and others.

35 See more: K. De Feyter, *Towards a framework convention on the right to development*, Friedrich Ebert Stiftung, International Policy Analysis, Geneva, April 2013.

according to the pattern of 'experimental architecture[36]'. Thus, the positive experience of implementing the Ottawa Treaty (Mine Ban Treaty) was taken advantage of. CRPD is a living treaty, not a closed 'shopping list'. Thanks to this, issues not regulated by the convention were not automatically placed in the basket of issues excepted from regulations. States and NGOs were left to choose, in dialogue, the implementation modes.

3. A lack of self-execution of the CRPD

The starting point of the analysis of the legal nature of the CRPD is the separate division of treaties regulated by international law into self-executing and non-self-executing, with a simultaneous, not-always-articulated conviction that self-executing is 'better'. It is accompanied by not-fully-defined self-execution, which in the legal understanding is limited to the directedness of applying the law by the courts without the need to develop national instruments allowing treating norms of the agreement as legal grounds in adjudicating. Additionally, this division is treated as uniform and international – i.e. each self-executing treaty is self-executing in every legal system, in every national law order.[37]

The qualification of the CRPD into one of these (two) categories of agreements is preceded by a separation – as the basis for the qualification – of the substance of domestic law from the substance of international law. The dimension of national law includes states in which treaties, in principle, can be self-executing, such as Poland,[38] and states in which treaties, in principle, are not self-executing, such as the USA[39] and Great Britain. The source of the difference consists in monism *versus* dualism; in the case of dualistic states, a basis for the general lack of self-execution is the 'supremacy clause', in compliance with which:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally affect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> Simultaneously, the American Supreme Court further stated,
>
> In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates by itself without the aid of any legislative provision.

36 See C.F. Sabel, J. Zeitlin, Learning from difference: The new architecture of experimentalist governance in the European Union, *European Law Journal*, 2008, vol. 14, no. 3, pp. 271–327.

37 It occurs in spite of the fact that the division was developed, in the 19th century, on the grounds of the American law in the case 'Foster & ELAM *v* Neilson' (27 U.S. 2 Pet. 253 253 (1829)), and automatic transfer of the division to the national law of other states and the international law is incorrect.

38 See A. Wyrozumska, *Umowy międzynarodowe: Teoria i praktyka (International agreements: Theory and practice)*, Wyd. Prawo i Praktyka Gospodarcza, Warsaw, 2006, pp. 531–677.

39 It was underlined in *Fourth restatement of foreign relations law*; analysis, see W. S. Dodge, *International comity in the restatement (fourth) of foreign relations law*, January 6, 2019, SSRN, https://ssrn.com/abstract=3311889 or http://dx.doi.org/10.2139/ssrn.3311889.

In consequence, reviewing/stating self-execution or non-self-execution of an international agreement in a national legal order must be conducted separately for each state and, additionally, when the practice of states is not consistent, with regard to each agreement. In consequence, a general classification of the CRPD in the category of self-executing agreements or non-self-executing agreements is, in each national order, impossible.

The situation is different from the point of view of international law. An admissible yet not applied liaison comprises including in the agreement a provision on its self-execution. However, such a provision will not make it or the agreement self-executing against the national law. In the event of a division of agreements from the perspective of international law,[40] the opinion is prevailing that states the superiority of self-executing agreements over non-self-executing, which is decided by trust in (independent) courts as a reliable executive of legal obligations.

In the case of the CRPD, we deal with a hybrid agreement, namely, an agreement comprising both norms, including basic human rights and freedoms, in the event of which implementation is limited to refraining from violation thereof. These norms are self-executing, which is determined by the initial status, namely, the fact that in international relations/international law, they are 'only' – similarly as in internal relations/national law – guaranteed. National courts in the rule of law and democratic states always, as is confirmed in practice, apply the referred norms directly. Nevertheless, the CRPD's catalogue of norms also includes other norms. In the event thereof, the lack of self-execution is determined by the expected factual status related to the necessity of a state taking action since these norms have the character of positive human rights – demanding action from the obliged.

In some cases, non-self-execution is a derivative of the contents of the provision. This naturalness of self-execution or non-self-execution is visible as early on as in the case of provisions of articles referring to definitions included in Article 2 of the CRPD:

- With reference to Article 5, paragraphs 1 and 2, of the CRPD ('1. States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to equal protection and equal benefit of the law. 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds'), the court examining the claim indicating discrimination due to disability can directly adjudicate on the grounds of Article 5 of the CRPD by stating that 'discrimination' in the understanding adopted in Article 2 of the CRPD occurred (' "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'). Therefore, this is a self-executing norm.

However, in the case of expectation of implementing obligation under Article 5, paragraph 3, of the CRPD[41] in relation to the definition in Article 2 of the CRPD[42] and with

40 See C. M. Vazquez, The four doctrines of self-executing treaties, *American Journal of International Law*, 1995, vol. 89, pp. 695–723.

41 'In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided'.

42 ' "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.

regard to the last sentence of the definition of 'discrimination' in this article,[43] self-execution of the norm is not possible since the CRPD is in this part judicially non-self-executing.

In the case of a claim referring to the ban on discrimination, formulated against positive discrimination, Article 5, paragraph 4 ('Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention'), allows the court to dismiss a suit[44] as groundless in recognising the norm as self-executing.[45]

The aforementioned hybrid character of the CRPD is nothing special and does not prevent self-execution of self-executing norms. Of course, an additional element of the self-execution's assessment is the distinction of a situation when a treaty establishes or does not establish a claim-legal title from the possibility of referring treaties as a means of defence – against an action.

4. Interpretation of Article 12 of the CRPD in the light of the Vienna Convention on the Law of Treaties

In the Vienna Convention on the Law of Treaties (hereinafter the VCLT) the subject matter of the interpretation of treaties was regulated extensively and accurately by devoting to it three articles – the entirety of § 3. The VCLT codifies rules of interpretation that are norms of common customary international law. The general rule of interpretation is 'good faith'. Interpretation starts with a linguistic interpretation, in which 'terms' should be attributed with ordinary meaning in the context in which they are used as well as consistent with the object and purpose of the agreement.

In Article 31, paragraph 2, of the VCLT, a dispute (in the doctrine) was solved regarding the binding force of preambles which have been included together with annexes in the context of the treaty.

Additionally, it has been recognised in the VCLT that during interpretation, one can use 'any agreement . . . in connection with the conclusion of the treaty' and 'any instrument . . . accepted . . . as an instrument related to the treaty' – provided that they have been 'accepted' by the parties. It indicates the approval of the practice of supplementing treaties with international texts of various natures in respect of a form. This provision has important normative contents and causes significant results.

Supplementary means of interpretation include, among others, preparatory work and circumstances of concluding a treaty.

Nevertheless, I conclude again that due to the *modus operandi* of works on the CRPD, the only interpretation rules are 'the rule of good faith' and context determined by its object and purpose (Article 31, paragraph 1).

At the same time, the VCLT opens a path to non-textual interpretation by admitting inclusion in the interpretation – on the same footing with the context – 'a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; b) any subsequent practice in the application of the treaty which establishes an agreement of the parties regarding its interpretation', pursuant to Article

43 'It includes all forms of discrimination, including denial of reasonable accommodation'.

44 I am using Polish law terms, for which there are equivalents in the law of other states.

45 I am disregarding the complaint regarding the manner of stipulation and contents of norms determining in the national law the standard of 'reasonable accommodation'.

31, paragraph 3, points a and b. Neither these subsequent agreements nor the subsequent practice was recognised under norms of the VCLT, against reality, as a modification of the treaty (the term modification was defined in Article 32 of the Convention). The VCLT opened doors to interpret treaties in the formula of 'a living treaty' (I am paraphrasing the term 'living Constitution'[46]). With regard to the CRPD and many other framework treaties, treaties-acts (*traité-loi*), the opinion of Judge Posner is fully applicable:

> The framers of a constitution who want to make it a charter of liberties and not just a set of constitutive rules face a difficult choice. They can write specific provisions and thereby doom their work to rapid obsolescence, or they can write general provisions, thereby allowing substantial discretion to the authoritative interpreters. . . . If the Bill of Rights had consisted entirely of specific provisions, it would no longer be a significant constraint on the behaviour of government officials.[47]

Despite the different context of this statement, it captures the essence of rational expectations with regard to the possibilities and needs of interpretation of an agreement governed by international law, especially the International Bill of Human Rights. The doctrine of interpretation of agreements guaranteeing human rights and freedoms as 'living agreements' is especially popular with regard to the European Convention on Human Rights.[48]

5. Article 12 of the CRPD: guaranteed or granted right?

The general rule concerning the sources of fundamental human rights and freedoms is to recognise that they are a special kind of rights – subjective entitlements vested in every human being, which follows – from the very fact – that he is a human being. Human rights are binding because they are good – that is, they have, in an objective sense, moral principles as a basis for the binding force of the law. Duty in the scope of a legal obligation to respect human rights and freedoms results from existence. Human rights are of an absolute nature[49] since they do not depend on the will of the state, society or individual.[50] In some legal systems, it is 'explained' by referral to the external and unspecified source of these rights. It is illustrated in Article 30 of the Constitution of the Republic of Poland,[51]

46 The group of supporters of such a perception-interpretation of the Constitution includes both 'pragmatists' and 'activists', its exemplars being Justice Oliver Wendell Holmes Jr. and Louis D. Brandeis.

47 R. A. Posner, What am I? A potted plant, *New Republic*, September 1987, https://www.gvsd.org/site/handlers/filedownload.ashx?moduleinstanceid=3264&dataid=29267&FileName=Posner.pdf.

48 It was started by the judgment of the ECHR in the case of 'Tyrer *v* United Kingdom (https://hudoc.echr.coe.int/eng#{%22dmdocnumber%22:[%22695464%22],%22itemid%22:[%22001–57587%22]})'. See more: *Dialogue between judges: Proceedings of the seminar January 31, 2020* (The European Convention on Human Rights: Living instrument at 70 1. Living instrument: The evolutive doctrine), https://www.echr.coe.int/Documents/Dialogue_2020_ENG.pdf; K. Dzehtsiarou, European consensus and the evolutive interpretation of the European convention on human rights, *German Law Journal*, 2011, vol. 12, pp. 1730–1745.

49 Emphasised by Professor Waśkiewicz who stated that 'Human rights are special type of legal rights vested in a human being, and thus entitlements of a legal nature . . . they are legal rights vested in a human being by the natural law'; see H. Waśkiewicz, *Prawa człowieka: Problemy otwarte (Human rights: Open issues)*, Chrześcijanin w świecie, Kraków, 1985, no. 12.

50 They are inalienable.

51 The Constitution of the Republic of Poland of April 2, 1997, https://www.sejm.gov.pl/prawo/konst/polski/kon1.htm.

including the norm: 'The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities'. In compliance with the disposition of this norm, human rights and freedoms originate from dignity:[52] it is not necessary to deliberate on what 'dignity' is, among others, since it would transfer deliberations outside of the area of law; however, the disposition of Article 30 is obvious. Poland did not/does not grant human rights and freedoms. The American Declaration of Independence, which was drawn up earlier, includes the statement:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.[53]

Analogous norms are included in international texts, such as the following:

- in compliance with Article 1 of the Universal Declaration of Human Rights: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood';[54]
- in compliance with the Preamble of the International Covenant on Civil and Political Rights: 'these rights derive from the inherent dignity of the human person';[55]
- In compliance with Article 1 of the Convention (of the Council of Europe) for the Protection of Human Rights and Fundamental Freedoms: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in § I of this Convention'.[56]

Explicitness and uniformity of norms of the national and international law determine the pointlessness of deliberations on the alternative (regardless of its type), whether human rights are guaranteed or granted. It is a universally recognised rule that human rights and freedoms are only guaranteed by the state and such a guarantee is the obligation of the state. The general nature of this rule does not allow exceptions. This makes it clear that the norms of Article 12 of the CRPD are guaranteed by every state – whether or not it is a party to the CRPD and the Additional Protocol – and the obligation to guarantee them, that is, to protect and implement them, is a prerequisite for expressing the will to establish a state – acquiescence to its existence.[57] Execution thereof legitimises (any) state and legalises its actions/negligence.

52 This opinion obtained a legal scientific dimension in publications of Professor Michalska; see A. Michalska, Źródła praw człowieka (Sources of human rights), in: *Prawa człowieka a policja (Human rights vs the police)*, ed. A. Rzepliński, Centrum szkolenia Policji, Legionowo, 1994. See also: J. Zajadło, Godność jednostki w aktach międzynarodowej ochrony praw człowieka (Dignity of an individual in the international human rights files), *Ruch Prawniczy Ekonomiczny i Socjologiczny*, 1989, no. 2, pp. 103–117.

53 Declaration of Independence, IN Congress, July 4, 1776, https://www.archives.gov/founding-docs/declaration-transcript.

54 https://www.unesco.pl/fileadmin/user_upload/pdf/Powszechna_Deklaracja_Praw_Czlowieka.pdf.

55 Journal of Laws of 1977, No. 38, item 167.

56 Journal of Laws of 1993, No. 61, item 284.

57 'Is made by the representatives of the good people of Virginia, assembled in full and free convention which rights do pertain to them and their posterity, as the basis and foundation of government'. See the Virginia Declaration of Rights, June 12, 1776, https://www.archives.gov/founding-docs/virginia-declaration-of-rights.

Recognition of the fact – in the formula of a declaration of knowledge – that rights covered by the CRPD and the Additional Protocol are guaranteed (and not granted) rights, was confirmed by the UN member states in the text of the Resolution (and it is independent of signing and ratifying the agreement) since such requirement does not exist concerning the declaration of knowledge.

In the Preamble of the CRPD, the states included the following statement: '(c) Reaffirming the universality, indivisibility, interdependence, and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination'. This declaration of knowledge was confirmed in consecutive provisions of the Convention, namely, Articles 4. (i), 5.2, 6.2, 14.22, and 29.

The Preamble and the provisions contain identical dispositions. From this perspective, the statement of the representative of Rehabilitation International is incomprehensible. After the adoption of the Resolution, in the informal part of the meeting of the UNGA, she expressed satisfaction 'that legal capacity had been established'.[58] This statement was, doubtlessly contrary to intentions, directed against every person vested with rights due to human rights and the essence of human rights itself. These rights are guaranteed rights, not granted.

6. Article 12 of the CRPD vs human rights guaranteed by the international human rights

The normative contents of Article 12 of the CRPD are unequivocal:

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

58 'In an informal segment, a representative of Rehabilitation International said she was pleased the paradigm for those with disabilities had shifted to include women and children, and that legal capacity had been established. Disability was a global phenomenon and it was expected that Governments would swiftly sign and ratify the Convention and its optional protocol in order to encourage the continuation of the partnerships that had resulted in today's success'. Press Release, https://press.un.org/en/2006/ga10554.doc.htm, accessed August 20, 2022.

The contents of Article 12 determine the framework of interpretation in compliance with the general rule of the law *clara non sunt interpretanda – interpretatio cessat in claris*.[59] At the same time, whenever the law is applied, the body applying the law interprets it.[60]

In Article 12, the parties confirmed their obligation to guarantee a person with a disability – as any other human being – 'equal recognition before the law'. As an effect of this equal recognition covered by the guarantee, the legal personality and correlative legal capacity of a person with a disability have been unconditionally recognised in national law.

In Poland, the source of justified doubts is not the contents of the CRPD, but its translation into Polish. In paragraphs 2 and 3 of Article 12 of the CRPD, in the text announced in Polish, the following disposition was included:

> *2. Państwa Strony uznają, że osoby niepełnosprawne mają zdolność prawną, na zasadzie równości z innymi osobami, we wszystkich aspektach życia. 3. Państwa Strony podejmą odpowiednie środki w celu zapewnienia osobom niepełnosprawnym dostępu do wsparcia, którego mogą potrzebować przy korzystaniu ze zdolności prawnej.*

And further, the Polish legislator, since such competence and function is executed by the body binding Poland with the agreement, uses in the official translation of the CRPD into Polish announced in the Journal of Laws the term 'legal capacity' to describe 'capacity to legal transactions'. However, in the text of the CRPD in English, French and Spanish versions, the following norms are included:

> 2. States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Doubtlessly, while announcing the CRPD in Poland, the contents of the regulation included in the Act – Civil Code was omitted.[61] The Civil Code stipulates – in Title II, Chapter I – explicitly in Article 8, paragraph 1, 'Every man from birth has a legal capacity'. The legal basis of the code regulation is the guaranteed, fundamental human right to have legal capacity; Poland executed in this case the obligation not to violate the limitation of human legal capacity – the legal obligation to protect a human and their legal capacity. And the legislator differentiated legal capacity from the capacity to legal transactions. In the case of capacity to legal transactions, the legislator indicated that a human has, in principle, full capacity to legal transactions, unless due to age (Article 12 and Article 11 in conjunction with Article 10) or incapacitation (Article 12 and Article 16) has this capacity temporarily or indefinitely limited or is, temporarily or indefinitely, deprived of the capacity to legal transactions.

Similarly, of course, Polish version of paragraph 4 of this article of the CRPD is wrong, and at the same time, the obligation to respect and fully exercise the norm regulating the

59 See A. Redelbach, S. Wronkowska, Z. Ziembiński, *Zarys teorii państwa i prawa (Outline of the theory of state and law)*, PWN, Warsaw, 1992, p. 205.

60 See J. Wróblewski, *Rozumienie prawa i jego wykładnia (Understanding of the law and its interpretation)*, Ossolineum, Wrocław-Warsaw, 1990, p. 55; M. Zieliński, *Wykładnia prawa. Zasady – reguły – wskazówki*, Wolters Kluwer, Warsaw, 2017.

61 Journal of Laws 2020.0.1740.

practice of limiting or depriving of the capacity to legal transactions in forms indicated in these provisions of the CRPD requires diligent implementation ('*Zabezpieczenia zapewnią, że środki związane z korzystaniem ze zdolności prawnej będą respektowały prawa, wolę i preferencje osoby, będą wolne od konfliktu interesów i bezprawnych nacisków, będą proporcjonalne i dostosowane do sytuacji danej osoby, będą stosowane przez możliwie najkrótszy czas i będą podlegały regularnemu przeglądowi przez właściwe niezależne i bezstronne władze lub organ sądowy. Zabezpieczenia powinny być proporcjonalne do stopnia, w jakim takie środki wpływają na prawa i interesy danej osoby*'). This norm, disregarding the difference in the term, is identical in the referred in the analysis language versions of the Convention ('Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests'). The aim of the regulation is to protect persons with disabilities against abuse of law related to limiting the scope or indicating the scope of exercising by such a person the capacity to legal transactions. In this scope, in the case of a regulation of the Polish Civil Code, a statutory representative replaces, and not supports – despite the disposition of paragraph 3 – a person with disability in execution of their capacity to legal transactions, and at the same time, statutory regulations of implementation of paragraph 4 are missing. Implementation by provisions of a lower level than a statute or beyond statutory implementation does not fulfil the obligation of proper implementation.

Contents of paragraph 5 of Article 12 of the CRPD raises justified concern; this provision does, in fact, include a norm that is equivalent to the ban on violating the law. Disposition in the wording 'States Parties shall take all appropriate and effective measures' indicated that either states have not undertaken such measures or they are ineffective; each case requires undertaking immediate remedies. However, in general, the norm of paragraph 5 stipulates that each state is obliged to provide effective protection with relevant legal instruments (law and institutions) of the binding law.

7. Admissibility of raising reservations and interpretative declarations to Article 12 of the CRPD in the light of the VCLT

States parties to the VCLT codified in Articles 19–23 norms of the international law,[62] devoting thereto the entirety of § 2 of the VCLT, confirming, in principle, the right to raise reservations to tri-, pluri- and multilateral agreements and codified or adopted norms regulating legal frameworks and the manner or exercising this right.[63]

The presumption regarding the right to raise them was confirmed, as indicated by the requirement to either include in the contents of a specific agreement an explicit, written ban on raising reservations to the specific agreement or, in the same form, indicating a closed catalogue of admissible reservations. This limitation was supplemented with a

62 See S. E. Nahlik, *Kodeks prawa traktatów (Code of the law of treaties)*, PWN, Warsaw, 1976, pp. 148–177.

63 More: R. Szafarz, *Zastrzeżenia do traktatów wielostronnych (Reservations to multilateral treaties)*, PWN, Warsaw, 1974; A. Wyrozumska, *Umowy międzynarodowe: Teoria i praktyka (International agreements: Theory and practice)*, Wyd. Prawo i Praktyka Gospodarcza, Warsaw, 2006, pp. 230–256.

general exclusion of the admissibility of raising reservations 'incompatible with the object and purpose of the treaty', and thus, reservations, in case of the raising of which, becoming bound with the treaty by the entity raising such a reservation constitutes a *feigned legal action*.

The confirmation of the right to raise a reservation indicates the political preference of states to extend the group of parties to the agreement at the cost of uniformity of the standard. States accept the law and practice of creating agreements that reflect the lowest common denominator. Therefore, practice in some states differs from this general regulation and even though in many agreements, norms banning raising reservations have not been included, raising them is not politically admissible. Becoming bound with the agreement without reservations is the *sine qua non* condition of 'admission' to the agreement.[64]

No provision has been included in the CRPD prohibiting or limiting the right to raise reservations, which means that the right of the states to submit them is guaranteed – of course, with the exclusion of reservations contradictory to the object and purpose of the Convention. Unfortunately, some of the declarations and reservations exceeded the legal frameworks of declarations or reservations admissible under the Vienna Convention on the Law of Treaties. It resulted from, in the majority of cases, the general nature – a lack of legal unambiguity of the contents of declarations of will or knowledge – and it was contested by many parties to the CRPD in the form of an objection against the reservation/declaration. However, these objections did not object to the CRPD entering into force in relations between the parties.[65]

Concerning the CRPD 'declarations' and 'reservations' have been submitted by the following:[66]

- (interpretative) declarations by Australia, Azerbaijan, Cyprus, Egypt, Estonia, France, Georgia, the Netherlands, Iran, Ireland, Canada,[67] Kuwait, Libya, Latvia, Malesia, Malta, Monaco, Norway, Syria, the EU,[68] Uzbekistan[69] and Great Britain;
- reservations by Brunei Darussalam, Cyprus,[70] Greece, Ireland, Israel, Japan, Canada, Kuwait, Malesia, Malta, Monaco, Poland, Singapore, Slovakia, Surinam, the EU[71] and Great Britain.

Significant, from the point of view of the topic of the compilation, are declarations of Australia, Cyprus, Egypt, Estonia, Georgia, the Netherlands, Ireland, Canada, Kuwait,

64 This practice is illustrated by, among others, the following agreements: Washington Naval Treaty and Treaty on European Union. In both cases, we deal with agreements-practice excluding being a party to the agreement, treating the agreement as *à la carte agreement and removing from the agreement 'beneficial' provisions – not undertaking to adhere to the 'unfavourable' provisions (the cherry-pick practice is rejected)*.

65 In compliance with Article 21 of the Vienna Convention on the Law of Treaties.

66 See texts: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

67 The subject of the reservation – referring to the complex, federal structure of Canada, was Article 33 (2) of the CRPD.

68 The EU Declaration is related to its status, as well as functions and competences.

69 Uzbekistan titled the document 'Declaration and Reservation'. It is not transparent which statement is treated as declaration and which as reservation. The analysis of the contents indicates that Uzbekistan submitted an interpretative declaration and not a reservation.

70 Groundless from the perspective of the compilation.

71 Ibid.

Norway, Poland, Syria and Uzbekistan, and the reservations of Brunei Darussalam – and potentially also Singapore.

a. Declarations

Australia in the Declaration primarily referred to Article 12 of the CRPD directly:

> Australia recognises that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.

Indirectly,

> Australia recognises that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards.

Australia's declaration confirms that it recognises the object and purpose of the Convention as the general directive of the implementation.

Analogous conclusions result from the interpretation of Canada's declaration, in which it was stated that

> Canada recognises that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law. To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards. With respect to Article 12 (4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal.

Cyprus' declaration, indirectly referring to Article 12, does not affect the manner of the CRPD's implementation. Analogous reservations were raised by the EU, Greece and Ireland.

Article 12 is directly referred to in the Declaration of Estonia; the contents are not, *prima facie*, contradictory to the object and purpose of the CRPD. Submission of a declaration can result from the level of the government's diligence. However, a full assessment of the effects thereof requires revising the law and practice of its application in Estonia. Similar conclusions are drawn from the analysis of the contents of the Declarations of Ireland, Kuwait[72] and Singapore. The Declaration of Georgia reinforces its obligations confirmed in Article 12 of the CRPD.

72 'The enjoyment of legal capacity shall be subject to the conditions applicable under Kuwaiti law'.

The declarations of Egypt and Syria have an effect other than the aforementioned. In compliance with the literal wording of Egypt's declaration ('The Arab Republic of Egypt declares that its interpretation of Article 12 of the International Convention on the Protection and Promotion of the Rights of Persons with Disabilities, which deals with the recognition of persons with disabilities on an equal basis with others before the law, with regard to the concept of legal capacity dealt with in paragraph 2 of the said Article, is that persons with disabilities enjoy the capacity to acquire rights and assume legal responsibility ('ahliyyat al-wujub) but not the capacity to perform ('ahliyyat al-'ada'), under Egyptian law'), a person with a disability is deprived of the capacity to legal transactions. While Syria refers to the analysed position of the 'Arabic group' as a binding interpretation of Article 12 of the CRPD.

b. Reservations

International legal analysis of the reservation of Brunei Darussalam is impossible: 'The Government of Brunei Darussalam expresses its reservation regarding those provisions of the said Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the official religion of Brunei Darussalam'. Indication of the supremacy of the Constitution included in the reservation is obvious, and at the same time, it would require the entity raising a reservation to specify which provisions of the CRPD can be contradictory to the constitution of the state, while referring to the possibility of avoiding obligations under the CRPD due to their contradiction to 'the beliefs and principles of Islam' can mean everything or nothing (among others, due to the lack of uniform, common and permanent rules of interpreting Islam).

c. Final notes

All of these criticised elements of declarations and reservations were raised in the objections against the reservations. In some cases, it had a positive result in the form of withdrawing the reservations, as was done by El Salvador.

8. How to implement Article 12 of the CRPD – international law model

International law entities, in their relations regulated by international law, have not established a universal implementation model of agreements regulated by the international law. The general rule of international law, confirmed in the UN Charter, orders the performance of obligations in good faith (Article 2 of the UN Charter and Preamble of the VCLT and its Article). 'The principle of good faith (*bona fides*)' belongs to the catalogue of general principles of international law recognised by civilised nations (Article 38, paragraph 1.c, of the Statute of the ICJ).[73] This principle refers not only and not even primarily to the provisions of the agreement but to its purpose and manner of implementation. Objectives of the agreement understood as values, the execution of which is aimed at by

73 More: J. Menkes, Prawny charakter rezolucji Zgromadzenia Ogólnego ONZ (Legal nature of the resolution of the UN general assembly), *Sprawy Międzynarodowe*, 1978, no. 9; J. Menkes, Ł. Majewski, eds., *Wybór kazusów z prawa międzynarodowego. Źródła prawa międzynarodowego (A selection of international law cases: Sources of the international law)*, Wyd. SWPS, Warsaw 2010, pp. 11–12.

the agreement, are indirectly indicated in Article 19.c of the VCLT by excluding the possibility of raising reservations 'incompatible with the object and purpose of the treaty'. The referred dispositions of treaties indicate general frameworks within which the *modus operandi* of implementation should be compliant. International law – parties making this law – stopped at that, and it is unlikely that this *status quo* is going to change in the foreseeable future.

In summary, the recommendation in the scope of the manner of implementing the agreement is specified by the following scheme: the general framework is determined by the 'principle of good faith'; the rules-sequence of implementation is determined by the VCLT's norms; the *modus operandi*, a general directive, which must be followed by the entity implementing the agreement, consists in an unconditional pursuit of the achievement of the objective of the agreement. This pursuit includes both the order to undertake measures aimed at the achievement of this objective, as well as, and even primarily, refraining from any measures contradictory to the objective of the agreement, and the more so a measure that might nullify the possibility of achieving the objective of the agreement.

In international practice, many agreements are characterised by the generality of the regulation (relatively low precision of language); however, this is not always a disadvantage. Lack of precision opens the way to *intra legem* practice – because the parties to the agreement can and should cooperate during its implementation. Due to the character of international law (differences about the national law), agreeing does not have to be a final stage of making the law within which the legitimised and legal path of implementation is proceeding in compliance with the rule *secundum legem*. If, in the case of national law, the legislator should state *Roma locuta, causa finita*, then, in the case ofinternational law, the parties to the agreement are at the disposal of, first of all, agreement amendment instruments – agreement interpretation – agreement implementation in the *praeter legem* formula, measures known to the international practice and accepted thereby are measures, from the point of view of textualism (originalism),[74] assessed as *contra legem*. International law entities express, in practice, the belief that the agreed practice *praeter legem* or *contra legem* is *intra legem*.[75] No international law agreement constitutes a 'suicide pact'.[76]

a) The margin of discretion of the States Parties in selecting manners of implementing Article 12 of the CRPD – admissibility of applying substitute decision-making or the order to apply only supported decision-making.

Deliberations concerning the margin of discretion of the states concerning the manners of implementing Article 12 of the CRPD are hindered by the aforementioned 'original sin' in the sphere of the method of lawmaking the CRPD, namely, resignation from the initial

74 In the implementation of the international law, there is no space for the approach, the symbol and author of which was the United States Supreme Court Judge Antonio Scalia.

75 See J. Menkes, M. Menkes, Legitymizm versus efektywność. Nomokracja lub kritokracja, lub kritarchia – metody realizacji wartości (Legitimism versus effectiveness: Nomocracy or citocracy, or kritarchy – value recovery methods), in: *Aksjologia współczesnego prawa międzynarodowego (Axiology of the contemporary international law)*, ed. A. Wnukiewicz-Kozłowska. Wyd. UWr., Wrocław, 2011, pp. 147–176.

76 I am paraphrasing the statement ('*The Constitution is not a suicide pact*') made both by judges of the Supreme Court R. H. Jackson (in the case on '*Terminiello* v. *Chicago*') and A. Goldberg (in the case on '*Kennedy* v. *Mendoza-Martinez*'), as well as Judge R. Posner (on the basis of the entire adjudication included in the group of non-textualists – it was primarily determined by his position in the case on 'Bork *v* Beethoven').

stage of works on agreements negotiated on the UN forum with the participation of its assisting authorities. Firstly, the work on the 'new' law was not preceded by the collection of information data on practice. Secondly, the collection of 'positions' of states and other participants in the lawmaking process about expectations – (the future) practice of law application (after the conclusion of the CRPD) was abandoned. In the case of Article 12 of the CRPD, its content is vague, but – in principle – this vagueness should not be a barrier to the process of its implementation (make it difficult, let alone impossible, to achieve the purpose of the agreement). In the view of a dilemma of a potential choice regarding the implementation of the norm[77] in the formula of maintaining a (traditional[78]) model of substitute decision-making for a person with a disability or supplementing or, more so, replacing substitute decision-making with supported decision-making,[79] the international law is not at the disposal of norms facilitating the choice.

There is a lack of evidence that there was a *consensus* about the establishment of a uniform practice in the referred scope. In this case, *a contrario*, it is legitimate to presume that states did not want to do so.

At the same time, some of the analysed interpretative declarations indicate that in the opinion of states submitting the referred declarations, the CRPD not only supports the supported decision-making but also can be interpreted as downright ordering the elimination of the substitute model. It was indicated by Ireland ('Ireland declares its understanding that the Convention permits supported and substitute decision-making arrangements which provide for decisions to be made on behalf of a person, where such arrangements are necessary, by the law, and subject to appropriate and effective safeguards. To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Ireland reserves the right to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards'). Analogous conclusions are drawn up from the analysis of the Declaration of the Netherlands,[80] Norway[81] and primarily Venezuela, giving the CRPD the priority of application about the national law.[82]

77 On the topic of difference, see J. L. Pilcher, Substitute decision making versus supported decision making: What is the difference? *Journal of Aging* 2019, vol. 29, no. 1, pp. 12–19.

78 More on the topic of roots of the institution and the institution, see M. Domański, *Ubezwłasnowolnienie w prawie polskim a wybrane standardy międzynarodowej ochrony praw człowieka (Incapacitation in the Polish law vs selected standards of the international human rights)*, Prawo w działaniu. Sprawy cywilne, Wydawca, 2014, pp. 7–48; Ibid., further literature.

79 On the topic of this model, see, among others: https://supporteddecisions.org/about-supported-decision-making/.

80 'The Kingdom of the Netherlands recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Furthermore, the Kingdom of the Netherlands declares its understanding that the Convention allows for supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law. The Kingdom of the Netherlands interprets Article 12 as restricting substitute decision-making arrangements to cases where such measures are necessary, as a last resort and subject to safeguards'.

81 'Norway recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Norway also recognises its obligations to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. Furthermore, Norway declares its understanding that the Convention allows for the withdrawal of legal capacity or support in exercising legal capacity, and/or compulsory guardianship, in cases where such measures are necessary, as a last resort and subject to safeguards'.

82 'The Bolivarian Republic of Venezuela reaffirms its absolute determination to guarantee the rights and protect the dignity of persons with disabilities. Accordingly, it declares that it interprets paragraph 2 of Article 12

Paradoxically, the analysis of 'Declarations and Reservations' of Uzbekistan, which, however, wishes to maintain a practice with the prevalence of the substitute model, leads to a similar conclusion.

The desired model of implementation in the regional dimension was indicated by the Council of Europe in Recommendation No. R (99) 4 of the Committee of Ministers, and this model comprises supported decision-making. The Recommendation is deprived of a formal binding force; however, on the grounds of general norms of the institutional law of international organisations, members of the Council of Europe should not should not act in a manner contrary to the Recommendation,[83] unless they use the possibility of opting out and, as Ireland and France, *expressis verbis* excluded towards themselves the obligation to respect the indicated recommendation.

In the situation when expectations of member states of the Council of Europe and their experiences indicate the desired direction of shaping a universal implementation model, it was legitimate to expect that even if a desired, universal model was not established, the debate would disclose the positions of states, possibilities of compromise, etc. The Council of Europe and its members would not be isolated in postulating changes regarding to the practice.[84]

After adopting the CRPD, a change can result from the amendment of the law or the development of a habit as a result of the Additional Protocol's implementation. Such a desirable direction of evolution is signalled by the work of the UN's subsidiary body the Department of Economic and Social Affairs. The developed document 'Chapter Six: From Provisions to Practice: Implementing the Convention – Legal Capacity and Supported Decision-Making'[85] includes unequivocal support for changing the model of implementation in the direction of supported decision-making.

Summarising these deliberations, I state that the fact and status of the international debate indicate silence of the international law about to choosing between the substitute decision-making and the supported decision-making within the implementation of Article 12 of the CRPD. Of course, one can refer to the arguments indicating the fact that the supported decision-making is compliant with the 'spirit' of universal agreements confirming basic rights and freedoms that belong to the International Bill of Human Rights. However, such a statement ('interpretation' of the law), albeit morally justified, would exceed the framework of jurisprudence. The postulate for a model change is a non-legal postulate and each attempt of embedding it in international law is an attempt related to

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of the Convention to mean that in the case of conflict between that paragraph and any provisions in Venezuelan legislation, the provisions that guarantee the greatest legal protection to persons with disabilities, while ensuring their well-being and integral development, without discrimination, shall apply'.

83 J. Menkes, A. Wasilkowski, *Organizacje międzynarodowe. Prawo instytucjonalne (International organisations: Institutional law)*, PWN, Warsaw, 2017, pp. 544–546.

84 It is indicated by, among others, a debate in Canada (see https://www.planningnetwork.ca/resources/action-guide-to-understanding-legal-capacity-and-supported-decision-making, accessed April 6, 2022) or in Australia (https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/2-conceptual-landscape-the-context-for-reform-2/supported-and-substitute-decision-making/).

85 https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-six-from-provisions-to-practice-implementing-the-convention-5.html) in which the indicated model is treated as a conduct template (see governmental publication *Supported Decision Making. A handbook for facilitators.* https://www.ideas.org.au/uploads/resources/1392/Supported%20Decision%20Making%20A%20handbook%20for%20Facilitators.pdf).

an ontological error (argument).[86] In works on the CRPD, NGOs were unequivocally in favour of the supported model and criticised the substitute model that prevails in practice. They indicated negligence in this scope from each state.[87]

Recognition that the CRPD treats supported decision-making as a desirable model is supported by dispositions of many articles of the CRPD, including the referred paragraph 3 of Article 12 ('States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'). However, a lack of documentation of the negotiations, positions of the states, reviews of practice, etc. determines that, in this case, the linguistic interpretation does not allow for identifying the intentions of the states.

From the point of view of international law, implementation of paragraph 3 of Article 12 of the CRPD in Poland, in the formula of guardianship over a completely incapacitated person according to Article 13, paragraph 2, of the Civil Code or deputyship over a partially incapacitated person according to Article 16, paragraph 2, is not contradictory to the obligation to implement the Convention. Disposition of Article 16 includes explicit wording indicating that appointment of deputyship results from the need to assist or a lack of an analogous justification for guardianship; instead, the legislator indicated the fact that a person 'is not capable of guiding their conduct' – which does not change the assessment of the purpose of guardianship or deputyship. The guardianship matrix recalls the model of Article 175 of the Family and Guardianship Code confirms the inconsistency of the practice with the socially accepted model;[88] in this scope, the court is obliged to act in the best interests of a person for whom it appoints guardianship/a guardian. Additionally, to protect the interests of a person who has been appointed a guardian, the court's consent is required for decisions made by the guardian in each matter of importance. Guardianship is executed under the supervision of a court (Articles 165–168 of the Family and Guardianship Code). In Polish law and practice, incapacitation – and, in particular, complete incapacitation – is aimed solely at protecting the interests of a person about whom an interference in their rights and freedoms occurs; the law and practice in Poland have been amended as a result of criticisms indicating insufficient respect for human rights and freedoms.

86 By paraphrasing Anselm of Canterbury, I would have stated that the fact of equality recognition – a ban on discrimination comprises the necessity to recognise as the only one, the model of supported decision-making in the scope of practice based on incapacitation in the event of persons with disabilities.

87 'Ms. Minkowitz (Tina Minkowitz, World Network of Users and Survivors of Psychiatry – J.M.) added that, from a perspective of persons with disabilities, there must be equality in all aspects that related to matters of human rights, including legal capacities and the capacity to act. The footnote issue had given the coalition an opportunity to raise more awareness about the issue. The coalition had been promoting the concept of supported decision-making. There was not yet any country that had fully implemented legal changes to accommodate supported decision-making and a lot of work in that area had still to be done. Everyone should be able to make decisions in their own lives, using their legal capacity'. Press Conference on Convention Concerning Rights of Disabled Persons, December 13, 2006, https://press.un.org/en/2006/061213_Disabilities.doc.htm, accessed August 20, 2022).

88 Guardianship is established by the court on the basis of Article 145, paragraph 2, and Article 178, paragraph 2, of the Family and Guardianship Code.

The Interpretative Declaration is an obstacle to a positive assessment of Polish law and practice:

> The Republic of Poland declares that it will interpret Article 12 of the Convention in a way allowing the application of the incapacitation, in the circumstances and in the manner outined in the domestic law, as a measure indicated in Article 12.4, when a person suffering from a mental illness, mental disability or other mental disorder is unable to control his or her conduct.

The analysis of the Interpretative Declaration is closely related to the contents of Article 12.4[89] about which Article 12.2 of the CRPD is superior.[90] The interpretation of the provisions requires stating that every person (including a person with a disability) has a legal capacity equal to the legal capacity of other persons. The state is obliged to protect a person authorised due to this right and to protect exercising legal capacity. This obligation of a state is confirmed by Article 12.4 of the CRPD. The aforementioned norms are confirmed; they are guaranteed in the Polish Constitution. Article 12.4 of the CRPD determines the legal frameworks of protection. However, it does not constitute legal grounds for stipulating or enforcing limitations in 'exercising legal capacity'. Poland, as has been confirmed in the CRPD, is obliged to protect – with legal instruments – persons with disabilities from abuse related to the limitation of exercising legal capacity. The scope of the state's obligation includes both stipulations of legal norms protecting from abuse and institutions performing such functions and developing a mechanism of monitoring practice and for stating abuse. The contents of the Interpretative Declaration are, given the best will of the person conducting the analysis, to say the least, not related to the norm about which it has been drawn up. In compliance with the Declaration, incapacitation is to be applied to 'persons suffering from a mental illness, mental impairment or other mental disorder', according to Polish law. It disregards the obligation to protect from abuse as the basic obligation of a state about using incapacitation and monitoring the practice. The Declaration is an instrument developing an umbrella not primarily and not only over the Polish law but over the practice of applying the law. From this perspective, the contents of the Declaration are contradictory to statutory regulations, in Polish law; from this point of view, the government was not authorised to submit it since this is not the wording of the article about which the Declaration was submitted.

89 'States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests'.

90 'States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.

9. Final notes

Due to the normative contents, the CRPD does not constitute a breakthrough in the scope of the implementation of the ban on discrimination – the order to treat persons with disabilities, the discrimination of whom is a fact, equally. At the same time, works on the CRPD and the Convention itself facilitated the social coming-out of persons with disabilities, allowing them to not go unnoticed. In the scope of regulations of Article 12 of the CRPD, positions expressing the conviction regarding the obligation to respect the dignity of persons with disabilities and implementation of their inherent rights and freedoms, with full respect for their dignity, have been made public. Paradoxically, the visible hypocrisy of many states (demonstrated, among others, in interpretative declarations and reservations) is a tribute to virtue (respect for every human, recognition of equal rights for all people) made by the offence (discrimination).[91]

91 In the original version of the aphorism '*L'hypocrisie est un hommage que le vice rend à la vertu*', François de La Rochefoucauld.

3 Outline of the legal situation of persons with mental disabilities (furiosi) in Roman law

Zuzanna Benincasa and Maria Nowak

Introduction – legal capacity

The capacity to perform acts in law, understood as the ability to express effective declarations of will, was shaped in Roman law somewhat differently than in modern legal systems because the full capacity to act in legal transactions was also determined by elements different from those recognised today. Roman law also lacks a fixed definition of capacity to perform acts in law, so a discourse about the legal standing of *furiosi* requires a brief introduction.

Persons under legal age, i.e. children between the ages around 12 and 14 (the age limit has never been clearly defined), did not have (full) independence in legal transactions. They were generally under the power of their male ascendants (*patria potestas*), so they did not need a representative, but, if the father was dead, they had to have a tutor (G. 1.144). Another group which in a certain period in Roman history was deprived autonomy in legal transactions was women, who also needed a male tutor (*tutor mulierum*). However, the guardianship over women in the classical period was only symbolic; a woman needed a guardian to perform the formal archaic acts, such as *mancipatio*, which were already rarely used in that period (e.g. G. 1.190–193).[1] The little importance of the tutela over women is confirmed by the absence of actions against tutors compared to those taken against *tutor impuberum*.

In addition, young adults up to the age of 25 were offered certain benefits in transactions for their protection, which in fact led to a limitation of their capacity to perform acts in law: The *Lex Laetoria* of 191 BCE introduced *iudicium publicum* against persons who have profited by abusing the inexperience of *minores*; it also provided young adults with the right to private *actio legis Laetoriae*, which allowed them to reverse the effects of a deed unfavourable to a *minor*. They were also entitled to *exceptio legis Laetoriae* and *restitutio in integrum ob aetatem*.[2] As a result, it became a common practice for minors to appoint a curator. From the time of Marcus Aurelius onwards, it was possible to appoint a permanent curator, who, however, did not have the power to manage the property of a minor but only assisted in legal acts which effects might otherwise have been questioned (*Scriptores historiae Augustae* 10.12). This undoubtedly means a *de facto* limitation of the

1 Maria Nowak, Mancipatio and its life in late-Roman law, *The Journal of Juristic Papyrology*, 2011, vol. 41, pp. 103–122.

2 See Salvatore Di Salvo, *Lex Laetoria: Minore età e crisi sociale tra il III e il II a. C.*, Jovene, Naples, 1979.

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capacity to perform acts in law, but it should be borne in mind that acts performed by young adults were fully effective, although easily revocable.[3]

Finally, the situation of persons under someone else's power – namely, adult children under *patria potestas* and slaves – was specific. Although they could act freely in legal transactions, they did not own any property, and everything they acquired increased the property of their *pater familias*. Their obligations constituted only natural obligations, unless they acted under the authority of their *pater familias*. In such cases, they acted as representatives of the *pater familias*, against whom an action with modified *intentio* could be brought for the obligations concluded by a person under his power. The father of the family was also liable for their delict, but they were liable for their own crimes (*crimina*).[4]

1. Persons with disabilities in Roman society

As far as the *furiosi* are concerned, it is not possible to say how common mental disabilities were in the Roman world. Due to the low level of medical knowledge, a huge number of children with disabilities simply had no chance of survival. The parents could be obliged to expose a child with visible bodily deformities. Roman authors attributed a law of this content to Romulus (Plut., *Rom*. 4), who is said to have ordered the father to abandon the deformed child after presenting it to the five nearest neighbours. According to Cicero (Cic., *de leg*. 3.8.19), this norm was adopted in the Law of the Twelve Tables (Tab. IV.1). Paulus, a jurist of the classical period, expressed the opinion that deformed newborns should not be recognised as live births, unless their deformity consisted in having more than the normal number of limbs (D. 1.5.14).[5]

As regards the less visible disabilities, the sources do not mention a similar obligation. However, both in the Roman empire and in the ancient world in general, *expositio* was a common practice, i.e. the exposure of newborns regardless of their physical condition.[6] Both one's own children and children of slaves were exposed if they deemed unwanted in the household by their parents or owners. The reason for exposure could be the gender, the physical condition of the infant or simply too many previous children in relation to the family's economic means.

Undoubtedly, however, a certain group of persons with mental disabilities must have survived childhood. This is evidenced by the existence of the term *furor* in Roman law, which is semantically closest to current term 'insanity' or 'madness'.[7] Roman jurists also

3 Antonio Azara, Ernesto Eula, EDS., Novissimo digesto italiano, Utet, Milan, 1964 [NDI], *s.v.* cura.

4 See Barry Nicholas, Susan M. Treggiari, Patria potestas, *Oxford Classical Dictionary*, https://doi.org/10.1093/acrefore/9780199381135.013.4779.

5 On this topic see Lucia Monaco, Non sunt liberi qui contra formam humani generis converso more procreantur, in: *Individui e res publica dall'esperienza giuridica romana alle concezioni contemporanee. Il problema della 'persona'. Atti del VI Seminario Internazionale 'Diritto romano e Attualità', S. Maria Capua Vetere e Napoli, 26–29 ottobre 2010*, ed. L. Monaco, O. Sacchi, Santa Maria Capua Vetere, Naples, 2017, pp. 271–300.

6 For a general study of the *expositio* in the Roman Empire, see William V. Harris, Child-exposure in the Roman empire, *Journal of Roman Studies*, 1994, vol. 84, pp. 1–22.

7 The terminology used to describe a person with mental disability is not uniform. The oldest term used in legal sources is *furiosus*, derived from the Latin word *furor*, meaning primarily madness or insanity, which was known as early as in the time of the Law of the Twelve Tables, i.e., at least in the fifth century BCE (Tab. V.7a). Other terms used are *insania*, *dementia*, *mente amens*, *mente captus* and *mente carens*, as well as, less commonly, *fatuus* and *morus*. Occasionally the term *melancholicus* or descriptive forms such as *non sanae mentis* and *sanitatis non spes* are used. It cannot be excluded that the Severian jurist, Ulpian, was the first to use the

recognised temporary lack of recognition, *mente captus*.[8] It is worth noting that they distinguished between severe mental disability, *furor saevissimus* (D. 24.3.22.7: Ulp.), as a violent and severe condition, of a permanent nature and with no chance of recovery, and minor disabilities, which were of a temporary nature and ended in a complete recovery or were periodic (recurrent) – with periods of insanity alternating with periods of recovery (*lucida intervalla*).

Insanity, as a condition that excludes conscious decision-making and understanding of reality, was a circumstance that justified the actions of a person affected by insanity since the dawn of time. Such persons were believed to be cursed or blinded by gods or demons or, in naturalistic terms, to be afflicted with a brain defect.[9] However, it is only in Roman law that we can find attempts to systematically address the legal standing of mentally challenged persons and to uniformly regulate their liability in civil and criminal law. The approach developed by Roman jurists was later adopted by the medieval *ius commune* – it had an indirect but significant impact on the development of contemporary concepts of mental disability as a circumstance that prevents appearance in legal transactions and excludes liability for unlawful conduct.[10]

2. Restrictions on capacity to perform acts in law due to *furor*

In Roman law, *furiosi* were considered incapable of expressing their will on their own: *furiosi nulla voluntas est*, 'a lunatic has no will' (D. 50.17.40: Pomp.). They can therefore be compared to the absentees, as expressed in Pomponius' phrase: *furiosus absentis loco est* (D. 50.17.124.1). Thus, if we were to use today's term of capacity to perform legal acts, the *furiosi* were fully deprived of it. This is explicitly expressed in the text of Gaius' Institution, 3.106: *Furiosus nullum negotium gerere potest, quia non intellegit quid agat* – 'An insane person cannot perform legal acts because he does not understand what he is doing'

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term *dementia* as meaning any state of mental disability, whether a mental disorder or a state of total insanity. Greek equivalents of the terms *furor* and *furiosus* are *μανία* and *μαινόμενος* and the much rarer *ἀφρόνως* and *μωρός* (*fatuus* or *morus*). The term *παραφροσύνη* is used to describe *dementia*. For the terminology used to describe the mentally disabled person, cf. Enzo Nardi, Squilibrio e deficienza mentale in diritto romano, Giuffrè, Milan 1983, p. 38–45; Margaret Trenchard-Smith, Insanity, exculpation and disempowerment in Byzantine law, in: *Madness in medieval law and custom*, ed. W. J. Turner, Brill, Leiden and Boston, 2010, p. 40; Giunio Rizzelli, Modelli di 'follia' nella cultura dei giuristi romani, Edizioni Grifo, Lecce, 2014, pp. 156–159; Giunio Rizzelli, Inteletto, volontà e crimine nella cultura giuridica del principato, Rivista di diritto romano, 2020, vol. 20, pp. 81–82. Nevertheless, *furiosus* remains the most common term used by scholars. See Adolf Berger, *Encyclopedic dictionary of Roman law*, The American Philosophical Society, Philadelphia, 1953, *s.v. furiosus*. For the overview of the most recent literature, see Giovanbattista Greco, *Follia, processo e responsabilità nella Pro Sexto Roscio Amerino*, Giappichelli, Torino, 2021, pp. 3–7.

8 Carlo Lanza, Furiosus et prodigue, in *Dictionnaire de l'Antiquité*, Puf, Paris, 2005, p. 927.

9 Already in Homer's *Iliad*, Agamemnon justifies his actions by saying that Jove and Fate and the Erinyes walk in darkness drove him mad, so he took from Achilles the meed that had been awarded to him (Hom., *Iliad*. XIX). (*Translator's note: The Iliad by Homer, Book XIX*, trans. Samuel Butler, http://classics.mit.edu/Homer/iliad.19.xix.html.) A similar motif can be found in Plato (Plato, Laws IX, 864) and Aristotle (Arist., Nicomachean Ethics 1111a). On the treatment of insanity in Greek culture see Mario Augusto Maieron, The meaning of madness in ancient Greek culture from Homer to Hippocrates and Plato, *Medicina Historica*, 2017, vol. 1, pp. 65–76.

10 Carl-Friedrich Stuckenberg, Comparing legal approaches: Mental disorders as grounds for excluding criminal responsibility, Bergen Journal of Criminal Law and Criminal Justice, 2016, vol. 4, no. 1, pp. 48–64.

(tr. de Zuluetta). Similarly, acts performed by persons only temporarily deprived of discernment, *mente capti*, were considered void (P.S. 3.4a.11).

Legal acts performed by *furiosi*, both unilateral and bilateral, including those from the archaic period, such as *mancipatio* or formal verbal promises, were void. It must also be emphasised that the lack of capacity to perform legal acts was a consequence of the *furor* itself but not of the curatorship.

The *furiosi* could not acquire possession as they could not manifest *animus rem sibi habendi*. This principle was expressed by Celsus who discussed the transfer of possession to a *furiosus* (D.41.2.18.1: Cels.). However, the possession of things acquired earlier in time continued also after a possessor was affected by mental decease.

The same was true of ownership and paternal power: the mentally challenged person lost neither their property nor *patria potestas* over the members of their family (e.g. D.1.6.8: Ulp.). Especially the latter may seem a controversial solution, but it was an obvious one for the Romans. First, *patria potestas* could only be ceased in a formal way, either by freeing a child (*emancipatio*) or by giving it up for adoption.[11] Both acts required a ritual sale in the form of fictitious *mancipatio* and subsequent *manumissio* (G. 1.132). *Furiosus* could not perform these acts, so he could not liberate the children from his power or place them under the power of another *pater familias*.

As another argument in favour of maintaining the *patria potestas* of mentally challenged *patres*, the interest of the descendants can be invoked. In Roman law, persons under the power of a *pater familias* did not own property, while being his civil heirs in the first class, *sui heredes*.[12] Should mental illness extinguish *patria potestas*, the descendants (and the wife under *manus*) would lose their status of *sui heredes*. The inheritance from the *pater familias* would pass on to the next group, that is, first of all, to the agnate relatives who had once been under the power of the same *pater familias*. Such offspring could claim inheritance only on the basis of the praetorian edict and only in a distant class *unde cognati*, which would practically mean excluding them from inheriting.[13]

Furthermore, *furiosi* could not conclude legal marriage, because marriage in Roman law was based on the mutual will of the spouses to enter into a legal union (*affectio maritalis*), the existence or absence of which could not be ascertained in a person affected by *furor*.[14] It is worth noting that, if the *furor* occurred after the marriage had already been concluded, the marriage was not automatically dissolved, as might be expected. Mentally challenged spouses also could not dissolve their marriage, since they lacked judgement, or according to D. 24.3.22.7: (Ulp), *quia sensum non habet*, 'because they have no recognition'.[15]

11 Even in the case of the physical exposure of a child, *expositio*, the paternal power did not cease. This was changed only by Emperor Constantine, who forbade the father or owner of an exposed child to demand its return from whomever would take it and raise it (C.Th. 5.9.1: 331 CE). On the status of exposed children, see Agnieszka Kacprzak, Maria Nowak, Foundlings in the Greco-Roman world: Status and the (im)possibility of adoption, *Tijdschrift voor Rechtsgeschiedenis*, 2018, vol. 86, 13–54.

12 Pasquale Voci, *Diritto ereditario romano, vol. II. Parte speciale. Successione ab intestato, successione testamentaria*, Giuffrè, Milan, 1963, pp. 11–12.

13 Ibid., pp. 13–16.

14 Edoardo Volterra, Consensus facit nuptias, in: *Scritti giuridici*, vol. III, Jovene, Naples, 1991, p. 589.

15 Sandrine Vallar, Folie et droit romain – Quelques observations, *Criminocorpus*, http://journals.openedition.org/criminocorpus/3146.

The reasons for this solution are also unclear. Marriage, similarly to possession, should be treated as a factual state, so that an existing marriage would not be interrupted due to subsequent defects of the will, unless one of the spouses suffered from mental illness at the time the *affectio maritalis* had been expressed.

Another argument could be based on archaic law. The institution of *cura furiosi* originates from the archaic period, when marriage was followed by the *conventio in manum*. As a result, a husband acquired the power over his wife (*manus*), which made her a person *alieni iuris* deprived of her own property but also an heir of her husband in the first class on a part to his legal children (*sui heredes*).[16] Therefore, the dissolution of marriage required freeing the wife from the *manus*, which the *furiosus* could not do. Thus, the *furiosus* could not deprive his wife of the *suus heres* position by dissolving the marriage.

As a rule, the spouse of a *furiosus*, at least in classical times, could divorce them, but in post-classical law mental illness was not considered a valid reason for divorce. There were, however, situations where an exception could be made, namely, when the illness was of a violent and dangerous nature and did not promise recovery or when the couple was childless and the divorce was justified by the hope of having children with a person not suffering from mental illness (D. 24.3.22.7: Ulp.).[17]

The same applied to a partnership. *Furor* does not appear as one of the reasons for terminating a partnership (D. 17.2.63.10: Ulp.). Justinian's constitution, C. 4.37.7, states that the curator may dissolve a partnership acting on behalf of the *furiosus*.[18]

Acts depleting property performed by *furiosi* were void *iure civili*. Thus, their effects could be reversed, e.g. by means of *restitutio in integrum*, unless, as in the case of *cura minorum* or *tutela impuberum*, they have been approved by the guardian.[19] If a creditor who concluded a contract with a mentally challenged person raised an action, the judge in a formulary procedure (and even more so in the *cognito extra ordinem*) should recognise the non-existence of the liability and discharge: *non oportet*. During periods of recurring consciousness (*lucida intervalla*), the *furiosus* and *mente captus* could act autonomously, e.g. conclude a contract or make a will (D. 28.1.20.4: Ulp.). Of course, acts that only increased the property were valid, even if they were performed independently outside the periods of consciousness (*PSent.* 3.4a.7).

3. *Furiosus* as a wrongdoer

The analysis of texts concerning a mentally challenged person as a wrongdoer[20] leads unambiguously to the conclusion that a person affected by a mental disease was not held

16 Pasquale Voci, *Diritto ereditario romano, vol. II. Parte speciale. Successione ab intestato, successione testamentaria*, Giuffrè, Milan, 1963, p. 12.

17 Por. Giunio Rizzelli, Modelli di 'follia' nella cultura dei giuristi romani, Lecce, 2014, p. 18.

18 Sandrine Vallar, Perseverantia voluntatis e furor, *Quaderni lupiensi di storia e diritto*, 2013, vol. 3, pp. 147–159.

19 NDI, *s.v.* cura.

20 The distinction between delicts and crimes based on the fact that, while delicts affect the interests of individuals, crimes threaten the interests of the community as a whole, dates back to the archaic period. However, at that time, there was hardly any interference in the administration of justice by the state authorities and most acts were punished by private revenge. The process of eliminating retribution in favour of monetary compensation can be observed over time, which in turn led to the development of delicts that primarily gave rise to the perpetrator's liability for damages. The number of acts recognised as *crimen* and giving rise to public liability, by public prosecution and under formal procedures strictly controlled by state authority, was

liable under the law and was not subject to punishment. The liability of *furiosi* for delict and public offences was probably excluded only in the classical period, although it cannot be ruled out that the origins of such an approach to a person recognised as not *sane mentis* can be traced back to the republican period.

Already in Cicero's second speech against Verres (Cic., *in Verr*. II.4.1), the friends of the former governor tried to defend him presenting his unlawful conduct as *morbus* and *insania,* while for Cicero it should be defined as *latrocinium* (banditry). The absence of liability for the delict of *damnum iniuria datum* committed by *furiosus* is first mentioned in the opinion expressed by the first-century jurist Pegasus, to which the Severian jurist Ulpian refers. As for crimes, there is an opinion of the second century jurist Pomponius, who excluded the liability of a mentally challenged person for *fraus capitalis* by comparing him to a under puberty person (D. 21.1.23.2). Similarly, Marcus Aurelius and Commodus excluded the liability of a matricide who had committed a crime *per furorem* (D. 1.18.14: Macer).

As a justification for excluding the *furiosi* from liability for private law offences, it is most often given that, since they lack free will, they cannot be blamed for the committed act. Since it is not possible to determine the guilty party, the harmful event is treated as an event rather than unlawful conduct.

Ulpian gave a negative response to the question whether the *furiosus* is liable for property damage. He justified his view with the rhetorical question *Quae enim in eo culpa sit, cum suae mentis non sit?* – 'How there can be any accountable fault in him who is out of his mind?' (D. 9.2.5.2 tr. A. Watson), comparing the damage caused by a *furiosus* to that caused by a four-legged animal or a falling tile. In the same text, Ulpian compared a *furiosus* to a child under the age of seven (*infans*), who is neither liable for damage nor for theft. As for a person under puberty, Ulpian considered that such person might be held liable as long as they understood unlawfulness of the acts committed.

Based on the previous text, it can thus be concluded that, just as no guilt may be attributed to a mindless animal, and no person responsible for an event can be identified, no person can be identified as guilty of the damage caused by a *furiosus*. Since no fault can be attributed to anyone, no liability arises under *lex Aquilia*. And the reason that the *furiosus* could not be considered guilty was because he was unaware of the unlawfulness. The exclusion of liability of a mentally challenged person for damage caused to property is also confirmed in the commentary of Pomponius *ad Sabinum*, where the jurist advocates the exclusion of the liability of the *furiosus* for loss and damage caused to someone else's property (D. 6.1.60).[21]

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initially small (e.g. treason, murder), but towards the end of the Republic and in the beginning of the Principate, due to civil unrest and the increasing violence, a rapid development of Roman criminal law (with the criminal legislation of Cornelius Sulla at its core) occurred, followed by an increase in the number of crimes prosecuted by public indictment. During the Principate, the extension of the catalogue of acts prosecuted by public indictment was also affected by the new form of trial, the so-called *cognitio extra ordinem*, i.e. extraordinary proceedings before the imperial court. Many of the existing delicts thus began to be prosecuted also by public indictment, which resulted in a dual liability system giving the injured party the choice between suing the perpetrator in a private trial ended with a financial penalty or pursuing public proceedings before a criminal tribunal.

21 The same jurist excludes the liability of a mentally disabled person for damage caused by him to someone else's property, stating that what was done under the influence of *furor*, i.e. insanity, should go unpunished, just as what happened accidentally, without the involvement of any person (D. 26.7.61).

Further in the commentary of Ulpian (D. 9.2.7.6), examples are given where the perpetrator did not interact directly with the damaged or destroyed object, but indirectly caused the damage by his deliberate or careless behaviour: a person who had given a sword to a madman and a person who had administered poison instead of medicine. In both cases, the perpetrator of the damage will be indirectly liable on the basis of *actio ex lege Aquilia in factum*, as the person at guilty for the delict. Thus, the mentally challenged person is treated only as a tool in the hands of the perpetrator, who bears the entire responsibility for causing damage to someone else's property (e.g. killing a slave).

Just as a *furiosus* is not liable for causing damage to someone else's property, they are also not liable for the delict of insult. The perpetrator's intention to insult (*animus iniurandi*) was necessary for liability to arise on the basis of *actio iniurarum aestimatoria*. Such intention, referred to as *dolus*, consisted of a conscious and intentional act aimed at bodily injury or offence against the good reputation of a person. As Ulpian notes in his commentary on the edict (D. 47.10.3.1), both the insane and the person under puberty are incapable of consciously expressing such an intention.[22]

A contrario, according to Ulpian, a mentally challenged person can be insulted without even being aware of it. However, this jurist does not comment further on this case. If a son under paternal power was insulted in the presence of his *pater familias* who was affected by *furor vel aliud casus dementiae*, the action for insult was given not in the name of the son to the father but directly to the son.[23] According to Ulpian, such a father should be treated as if he had been absent when *iniuria* was committed (D. 47.10.17.11).

While the latter solution could be considered coherent with the understanding of *furiosus* as a dead or absent person, the assumption that a *furiosus* can be offended may seem logically incompatible with such a concept. As a justification for this decision, one can point to, on the one hand, the general conviction that committing a delict cannot remain without any legal consequences for the perpetrator. That would be a consequence of recognising that no insult is committed with respect to the *furiosus*, even if the perpetrator has acted intentionally *iniurandi causa*. On the other hand, the recognition that a mentally challenged person was insulted, even in the absence of a subjective feeling of insult, protected the interests and good name of the Roman *familia*. The *pater familias* was entitled to bring an action for insult suffered by a *furiosus* both on behalf of *alieni iuris* and on his own behalf as the head of the family. Finally, it should be noted that such a solution also protected mentally challenged persons, who may not have been aware of being verbally insulted but nevertheless suffered the consequences of the physical abuse.

With regard to theft (*furtum*), none of the texts confirms *expressis verbis* the exclusion of a mentally challenged person from liability for the committed act. Such a conclusion is logically drawn from an analysis of the texts concerning the construction of theft. First of all, the delict could only be committed intentionally, acting *dolo malo* (with malicious intent), which excludes subjective unlawfulness when the person taking someone else's property was not aware of the theft or had no intention to steal it (*animus furandi*).[24]

22 Similarly, the post-classical compilation *Pauli Sententiae* excludes the possibility of an action for insult against the *furiosus* and the child (*infans*) because of the lack of *adfectus doli*, i.e. the intention to inflict the insult, and the inability to understand the fact of committing the insult at the time of the insulting action (*carentia captu contumeliae*). Cf. *PSent.* 5.4.2.

23 In another case, insulting a person under authority also meant insulting a *pater familias* (G. 3.221).

24 In the light of the definition of Paulus preserved in the Digests (D. 47.2.1.3), theft is the unlawful contact with someone else's thing against the will of the owner and with the intention of gaining a pecuniary

In the case of a *furiosus*, on the other hand, who is unable to consciously express his will, *animus furandi* must be excluded *a priori*.

The exclusion of *furiosus*' liability for theft also results from the analysis of the mentioned text on liability for causing damage to someone else's property (D. 9.2.5.2). Having stated that the *furiosus* was not liable under the *lex Aquilia* as a person to whom no fault can be ascribed, Ulpian stated that the same should apply to a child under the age of seven (*infans*). He contrasted the position of *infans* and *furiosus* with the *impubes*, referring to Labeon, who, deemed them liable both for theft and damage. Ulpian shared Labeo's opinion on the liability of *impubes*, insofar, however, as the *impubes* was able to understand that they had committed an insult. It can be indirectly concluded that both *infans* and similarly treated *furiosus* were not liable either for causing damage to someone else's property or for committing theft.

4. *Furiosus* as an offender

The lack of liability for delicts corresponds to the lack of *furiosus*' liability under criminal law. The reasons seem surprising. Liability is not excluded because of lack of will but because the offender is considered to be affected by misfortune and therefore pitted.[25] The second motive is that mere insanity and its consequences (the need to remain under constant tight control and under adverse conditions, also in bonds or shackles) constituted sufficient punishment.[26]

On the other hand, *parricidium*, i.e. the murder of a parent, was deemed so transgressive that it could be a symptom of madness itself. Cicero regarded *parricidium* as an act manifestly contrary to nature, that can only be understood by a madman, a person affected by *summus furor atque amentia* (Cic. pro Rosc. Amer. 62).

In the 12th book of *pandectae,* Modestinus stated that it was clear that someone who killed a parent *per furorem* was not subjected to punishment and cited the rescript of the *divi fratres* concerning the matricide (D. 48.9.9.2). He indicated, however, that the perpetrator had to remain under constant control, even held in bonds.

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advantage. The requirement that the physical contact with the thing must be unlawful implied both objective unlawfulness, i.e. acting against the will of the owner (if the owner consented to the removing of the thing, no theft was committed), as well as subjective unlawfulness, i.e. awareness and intention to steal (*animus furandi*). Cf. Gai. 3.195. On the construction of the tort of *furtum*, see Reinhard Zimmermann, *Roman Law of Obligations*, Oxford University Press, Oxford, 1991, pp. 922–952.

25 Analogously as *furiosus*, Modestinus treats a child (*infans*) who is the perpetrator of a homicide, characterised by *innocentia consilium*, i.e. innocence of intention (D. 48.8.12). According to Giunio Rizzelli (Giunio Rizzelli, Inteletto, volontà e crimine nella cultura giuridica del principato, Rivista di diritto romano, 2020, vol. 20, p. 85), Modestino's reference to *fati infelicitas* reproduces the pervasive cultural image of the matricide as a person punished by fate.

26 The motif of madness as a punishment sent by the gods for criminal acts is often present in ancient literature, primarily in myths, which have been also analysed by ancient medical experts as examples in their considerations of the typology of mental illnesses (e.g. Heracles, who kills his children in a frenzy, or Orestes, the murderer of his mother, Clytaemnestra, who is driven mad by the pursuing Erinyes). More on this topic Giunio Rizzelli, Inteletto, volontà e crimine nella cultura giuridica del principato, Rivista di diritto romano, 2020, vol. 20, pp. 84–85.

Probably the same rescript is referred to by Macer in D. 1.18.14, who, however, attributes it to Marcus Aurelius and Commodus.[27] If it has been established with certainty that the matricide (Aelius Priscus) was so insane that he or she lacked the capacity to understand reality due to his or her permanent absence of mind, and there were no grounds for concluding that he or she had killed his or her mother by simulating mental illness, he or she was not liable to punishment. Insanity alone is considered as sufficient punishment, whereas the usual punishment for homicide, especially of one's own parent, was death, and this was inflicted in a qualified manner by being sewn up in a sack and drowned (*poena cullei*). However, it was recommended that a person who has committed a crime while mentally ill should be imprisoned, placed under supervision, bail bondsman or even left alone, and the decision was left to the official.[28]

The aforementioned rescript concerning the liability of the matricide had a great impact on the development of contemporary criminal law in the field of treatment of mentally challenged offenders, namely, placing them in a closed penal and therapeutic institution. It was also analysed in a journal of psychiatry and psychology in 2005.[29]

Therefore, in the case of crimes, jurists recommend verifying in each case whether the committed act was indeed committed *per furorem* and whether the perpetrator was evading criminal liability by simulating a mental disorder or whether the act was not committed during a temporary break in mental illness (*lucidum intervallum*). In the latter cases, the offender should be held accountable as a person conscious of the committed offence. That confirms the casuistic approach of Roman law to the criminal liability of a mentally challenged person and the lack of a juridical concept of the *furiosus.* Mental illness itself did not guarantee the offender's impunity, as in each individual case it was necessary to verify whether the offender was in a state that excluded the consciousness, i.e. the ability to direct the undertaken act and to understand reality. It can thus be presumed that the perpetrators of homicide sometimes attempted to evade liability by simulating mental illness. A similar practice is also confirmed in the sources in the field of liability under civil law. According to Ulpian, a magistrate appointing a *curator furiosi* should act with utmost caution since some persons simulated *vel furor vel dementia* in order to free themselves from *onera civilia*, i.e. liability under civil law (D. 27.10.6). There did not seem to be a need or custom to consult physicians or even to refer to existing medical knowledge in this

27 D. 1.18.13.1. It cannot be excluded that this is the same rescript referred to in D. 1.18.14, which Macer erroneously ascribes to Commodus and Marcus Aurelius, but it is also possible that these are two rescripts with analogous content issued on the occasion of two different cases. More extensively on this rescript, see Giunio Rizzelli, Il furor di Elio Prisco: Macer 2 iud. publ. D. 1.18.14, in: Studi per Giovanni Nicosia, vol. VI, Giuffrè, Milan, 2007, pp. 524–530; Giunio Rizzelli, Inteletto, volontà e crimine nella cultura giuridica del principato, Rivista di diritto romano, 2020, vol. 20, pp. 73–119.

28 The text comes from seventh book of Ulpianus' works *de officio proconsulis*, and refers to the duty of the provincial governor to ensure that the province under his government was a peaceful and safety place. He should not only prosecute criminals and impose penalties, but also, regarding the mentally challenged, whose relatives were unable to control them, take the preventive measure by imprisoning them, as decided in the rescript of Emperor Antoninus Pius. On the prison as a precautionary measure for *furiosus* and its function as a kind of insane asylum cf. Pilar Pavón, Furiosus in carcerem (Ulp. 7 de off. proc., D. 1.18.13.1), Habis. Filología clásica, historia antigua, arqueología clásica, 2000, vol. 31, pp. 261–266.

29 Giunio Rizzelli, Inteletto, volontà e crimine nella cultura giuridica del principato, Rivista di diritto romano, 2020, vol. 20, p. 75.

regard.[30] Therefore, it seems reasonable to assume that the magistrates acted on their own discretion, although of course they could also rely on the opinions of experts in this area.[31]

A mentally challenged person (*insanus*), as a *dignissima miseratione*, was also not liable for insulting majesty (*crimen laesae maiestatis*); thus, the judge had the duty to verify whether the perpetrator was conscious of the insult (D. 48.4.7.3: Mod.; CTh. 9.4.1; C. 9.7.1pr.).

The exclusion of *furiosus*' liability for *crimina* is implied in the text concerning the liability of a slave under the s.c. *Silanianum* (D. 29.5.3.11: Ulp.). Under these regulations enacted in AD 10, slaves who resided 'under the same roof' at the time of their owner's premature death were treated as potential murderers and subjected to torture under investigation. However, a slave who was *furiosus* was exempted from such an investigation.[32] In addition, the jurists excluded the recognition that in the past a slave had committed *fraus capitalis* as a defect of a slave sold (D. 21.1.23.2: Ulp.).

The only text in the Digests in which Roman jurists recognised the criminal liability of *furiosus* concerned the case of a soldier guilty of self-harm or attempted suicide, usually punishable by death. However, according to Hadrian's rescript, if a soldier acted driven by *impantientia doloris* (inability to endure pain), *taedium vitae* (aversion to life in general), *furor* (insanity) or *pudor* (shame), he was not subject to capital penalty but suffered *ignominia*, i.e. loss of dignity resulting in certain disabilities in legal rights (D. 49.16.6.7: Arrius Menander). His *furor* thus permitted him to escape the capital punishment. However, the term *furor* in this text should be perhaps interpreted as a temporary mental confusion, a loss of self-control, when the soldier decided to take his own life, and not a permanent mental disability.

5. *Cura furiosi*

Since Roman law regarded deeds performed by *furiosi* as void, such persons needed assistance. *Cura furiosi* served this purpose. However, this institution was significantly different from its modern equivalent. The main reason for the appointment of a curator was not the welfare of the *furiosus* but the safety of the family assets and economic interests of the heirs. If concern for a person occurs in the sources, it is always related to the protection of property.

Curatorship was only applied to persons *sui iuris* who did not have a *pater familias* over them. *Alieni iuris* persons did not need a representative, because they could not act independently anyway. This rule remained in force until the time of Emperor Justinian, as confirmed in his constitution (C. 5.70.7). The same applied to persons under puberty with a tutor. They also did not require the curator's assistance, as their affairs were handled by a tutor, whom every person under a certain age and not subject to the *potestas* of a father or grandfather had to have. The curatorship of adult women deemed *furiosae* was regulated

30 Fritz Schulz, *Classical Roman Law*, Clarendon Press, Oxford, 1951, pp. 198–199.

31 On the diagnosis of *furor* and the use of expert knowledge on the subject see I. Israelowich, Physicians as figures of authority in the Roman courts and the attitude towards mental diseases in the Roman courts during the high empire, *Historia: Zeitschrift Für Alte Geschichte*, 2014, vol. 63, pp. 445–462.

32 On *s.c. Silanianum* see Jill Harries, The Senatus Consultum Silanianum: Court decisions and judicial severity in the early Roman empire, in *New frontiers: Law and society in the Roman world*, ed. P. J. du Plessis, Edinburgh University Press, Edinburgh, 2013, pp. 51–70.

differently. Although they still had a tutor in the classical period, this tutela had no real legal effect, so a mentally challenged adult woman needed a curator.

The most archaic was the *cura legitima*, which probably predated the Law of the Twelve Tables. The *furiosus* was under the power of agnate relatives or members of the kin. The sources do not provide much information on the subject, but it must have been constituted when relatives recognised someone as a *furiosus*. It was probably superseded by the *cura dativa* quite early.

The *cura dativa* could be imposed by the praetor or the governor, who had *imperium* similar praetor in the provinces (D. 27.10.13). The magistrate imposed *interdictio bonorum*, i.e. the exclusion of a person from managing their property, and appointed a curator upon the request of the legal heirs. Undoubtedly, in some cases, especially if the *furiosus* had committed a crime, the magistrate himself could take some provisions on his own initiative.[33] As mentioned, such an official had to assess the mental state himself in each case.

Only a Roman citizen could become the curator and a tutor. As for the *cura legitima*, the choice was limited to agnate relatives, effectively brothers. (Neither the father nor the grandfather could perform this function, since if they were alive, they would have paternal power over such person.) In addition to agnate brothers, the emancipated could also become curators (C. 5.70.5).

By the second century CE, however, a son could not be the curator of his father, who, as mentioned, even if *furiorus*, remained the son's *pater familias*. Exercising *cura* over one's own *pater familias* might have seemed an extravagant solution to jurists. However, according to Ulpian, Emperor Marcus Aurelius changed it (D. 27.10.1.1). The emperor not only allowed the son to be the curator of his *pater familias* but even preferred such a solution. Such doubts never concerned mentally challenged mothers. The son seemed to be the most natural candidate to be her curator, as there was no legal bond similar to *patria potestas* in the mother-son relationship. Since not every *furiosus* had agnate relatives, both cognate relatives and third parties could be appointed as curators. Significantly, there was no institution of a public curator for mentally challenged persons or special establishments. Thus, the *cura* always remained a private law institution in Roman law.

Differently to *tutela impuberum*, a *pater familias* could not appoint a curator for a mentally ill son in his will. In other words, there was no *cura testamentaria* in Roman law. Jurists, however, advocated that the praetor or governor, when appointing a curator for a *furiosus*, should take into account his testamentary instructions in this regard (D. 26.3.1; 27.10.16 pr.). It should be remembered that despite such a recommendation, the curator was still appointed by the magistrate thus within the framework of *cura dativa*.

In the classical period, the *cura furiosi* ceased when a person regained his mental faculties, as ascertained by a magistrate authorised to appoint a curator. However, this situation changed in late antiquity. Although transactions undertaken during periods of lucidity (*lucida intervalla*) were considered valid, the *cura* itself did not cease automatically. Moreover, periods of 'lucidity' were not a prerequisite for the termination of the curatorship, as expressed in the constitution preserved in the Codex, C. 5.70.6.1, i.e. dating to Justinian's early reign.

33 NDI, s.v.

In the archaic times, the *furiosus* was under the custody of the family, which exercised the decretive power over such person and his property. This power was gradually limited. In the classical period its scope became similar to that of the *tutela impuberum*. In his *Institutiones* Gaius confirmed that a tutor could dispose of the property of a *furiosus* (G. 2.64 together with 63). However, his power was not unlimited. The curator had no authority to manumit slaves, except on the basis *fideicommissum* (D. 40.1.13: Pomp.). Nor could the curator pledge or mortgage the rural estate of his ward, unless authorised by the magistrate (C. 5.70.2).

The curator could authorise deeds contracted by his *furiosus* prior to the appointment of the curator, as confirmed by a passage in Emperor Aurelian's constitution (C. 5.70.30).

As far as legal protection of curatorship is concerned, it was realised through the *actio negotiorum gestorum*, i.e. conducting someone else's business without authorisation. (Some scholars believe that *cura furiosi* created the ground for this institution.[34]) The action against the curator could have been brought by the ward, provided that they regained consciousness, as well as their heirs. The curator, in turn, could claim the reimbursement of his own expenses incurred for the ward through *iudicium contrarium*.

In Novella 115.3, Justinian listed neglect of the mentally challenged among legitimate reasons for disinheritance. The *furiosus*, acting in the period of *lucida intervalla*, could disinherit negligent relatives. As this was not always possible, anyone could bring an action against such relatives (*actio popularis*). If a third party provided for the *furiosus*, they could claim the inheritance of the mentally challenged person.[35]

As mentioned, *cura* was a private law institution, and no public establishments existed. It is difficult to say to what extent public institutions, central or local, supported mentally challenged persons and their curators. A papyrus from the grain archive of third-century Oxyrhynchos in Egypt (P. Oxy. XL 2908, col. III) suggests that some support may have been offered. In principle, registered citizens of Oxyrhynchos, Alexandria and Rome were entitled to participate in the corn dole in the city of their registration. They obtained this privilege by lot, only after the death of another recipient of grain. This was the main group of entitled persons, but the liturgists performing obligatory service for the city also received grain. The latter group was much smaller.[36]

The text was drafted by Aurelius Sarapiades on behalf of his foster brother, Aurelius Aphynchis, requesting grain in Oxyrhynchos. Aurelius Aphynhis, described as μωρός, meaning 'weak in mind', was enrolled in the group of ῥεμβοί, liturgists. However, there is no mention of the liturgy performed by Aphynchis, so perhaps he was entitled because of his mental disorder. The ῥεμβοί did not have to wait for a vacancy and received grain without allotment, which put them in a better position than the ordinary urban citizens.[37]

34 Reinhard Zimmermann, *Roman Law of Obligations*, Oxford University Press, Oxford, 1991, p. 437.

35 Max Kaser, *Das römische Privatrecht, II*, C.H. Beck, Munich, 1971, p. 237.

36 On the distribution of grain in Oxyrhynchos, see Maria Nowak, Get your free corn: The fatherless in the corn-dole archive from Oxyrhynchos, *U schyłku starożytności. Studia źródłoznawcze*, 2017, vol. 16, pp. 215–228.

37 See J. Rea John Rea's commentary to P. Oxy. XL 2908, col. III, l. 12.

Conclusion

The answer to the question of whether and to what extent the Roman tradition influenced the modern concept of capacity to perform legal acts is not clear. The invalidity and ineffectiveness of legal acts because of certain characteristics of the persons performing them was also known in antiquity, also outside the Roman world. In classical Athenian law and in the broader Hellenistic legal *koine*, women could not act independently in legal transactions and certain legal acts could not be performed at all by them. That was a case of making a will.[38]

Similarly, the standing of person with mental illness in Greek legal culture was subject to regulation and discussion. For example, Plato state in his *Laws* that people with mental disorders should be kept at home in the care of relatives and that if the latter failed to supervise them, they suffered financial penalties (Plat. Nom. 11.934c–d).

Thus, the very recognition of the link between mental illness and inability to validly express one's will was not unique to the Romans. However, the Roman *iurisprudentes* were the first to approach the problem in a systematic way. Apparently, it was a long process, because in archaic law the care of *furiosi* must have been primitive and limited to placing their property under the supervision of relatives. However, it is not until the classical period that the developed concept of the *furor* itself and the curatorship over the *furiosi* can be traced.

Of course, certain solutions may seem inhuman from today's perspective. The institution itself was mainly aimed at protecting ancestral property and public order, although concern for *furiosi* occurs sporadically in legal texts, e.g. D. 27.10.7 pr. The sources do not indicate any standards of care for the mentally challenged. On the contrary, they mention being imprisoned and kept in chains, which undoubtedly had a literal dimension. At the same time, however, divorcing a mentally challenged person was considered contrary to *humanitas*, as long as the spouse did not threaten their *familia*. This view manifests the protection and humane treatment of the *furiosi* in Roman law.

Recognising mental diseases as a prerequisite for excluding the delictual and criminal liability should be considered a modern solution. However, the idea of madness serving as an element excluding liability was known already in Roman times and was successively adopted by the modern *ius commune*. In this way it has influenced many legal orders, not only continental legal systems.

Since Roman law did not define mental illness, we could trace a lively debate among the jurists on the criminal and private law liability for offences. According to the jurists, it was necessary to verify on a case-by-case basis whether the perpetrator was able to and control his actions. The approach to liability was therefore casuistic.

Roman law did not develop special tools to protect mentally challenged people from crime. It does not seem that the offender was punished more severely, since, at least in theory, the type and level of punishment were based on various criteria, such as the

38 Bernard Legras, Les testaments grecs dans le droit hellénistique: La question des héritières et des testatrices, in *Symposion 2005: Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Salerno, 14.–18. September 2005)*, ed. E. Cantarella, Vienna, pp. 293–306.

perpetrator's social standing or relationship with a victim. When discussing people particularly vulnerable to becoming victims of criminal acts, Aristotle did not mention mentally challenged people as particularly exposed to victimisation.[39] Similarly, Roman jurists do not separately address the issue of the *furiosus* as a victim of crime.[40]

39 Arist. Ret. 1.12.17–27. While it is true that in the catalogue of characteristics conducive to victimisation, it is possible to identify certain traits that mentally disabled people may have (e.g. frequent experience of crime, shyness also understood as a lack of reaction to the wrong done, helplessness in the face of having to go through the legal process and inability to assert one's rights in court), but mental disability in itself is not indicated as a circumstance that makes a person affected by it a typical victim of crime. For a more extensive discussion of the victim of crime in antiquity, see Anna Tarwacka, Ofiara przestępstwa w myśli starożytnej [Victim of crime in antiquity], in *Z problematyki wiktymologii. Księga dedykowana Profesor Ewie Bieńkowskiej*, eds. W. Klaus, L. Mazowiecka, A. Tarwacka, Wolters Kluwer, Warsaw, 2017, pp. 37–48.

40 Although Ulpian indicates in text D. 47.10.3.1 that a person who is not of full mental capacity may be insulted, it seems that the situation in which a mentally disabled person is the victim of an insult served the Severian jurist only as an example to show that the lack of will of the perpetrator, insofar as it excludes the possibility of committing an intentional crime, is not the same as recognising that the lack of awareness of the insult excludes the possibility of being the victim of a tort. Thus, Ulpian did not separately address the case where the insult was directed against a person suffering from a mental disability, which would have affected the scope of the perpetrator's liability. It should be noted, however, that the recognition that a mentally disabled person may suffer an insult may also have been dictated by the need to protect the insulted person, who, without being aware of the insult, may nevertheless have suffered if the insult consisted in a violation of his or her bodily integrity (e.g. beating or flogging). On the other hand, however, the recognition that the *furiosus* was insulted, even though he or she was not aware of the insult, may also have been dictated by the need to protect the reputation of the entire *familia*, including the *pater familias* or husband of the mentally disabled person. Finally, recognising that the *furiosus*, because of his lack of discernment and awareness of being insulted, could not be the victim of the insult would allow the perpetrators of the unlawful acts to avoid responsibility for their actions.

Part II

Implementation of Article 12 of the CRPD (Country Reports and Comparative Analysis)

4 Introductory remarks

Maciej Domański and Bogusław Lackoroński

The New York Convention on the Rights of Persons with Disabilities (CRPD), signed by 164 states and ratified by 185 as of May 6, 2022, is one of the UN's multilateral treaties with the highest number of party states.

This book is devoted to CRPD Article 12, which has already been transposed into the laws of many countries, but not universally. Moreover, the results of the transposition of CRPD Article 12 to domestic legal systems have not always proved satisfactory. Numerous critical assessments of the changes to national legal systems have arisen from different angles and with different justifications. On the one hand, it is pointed out that the assumption of granting legal capacity (in its active and passive aspects) to all persons with disabilities has not been guaranteed. This criticism stems from the view that it is unacceptable to leave the substitution model of performing legal acts to any, even to the most limited, extent. According to this view, the substitution model always violates the CRPD Article 12 standard (cf. Chapter 16 on Ireland).[1] On the other hand, it is emphasised that full transposition of the idea of a complete removal of the substitution model poses a serious risk of abuse and endangers the safety of persons with disabilities (cf. Chapter 26 on Switzerland).[2] The complete and absolute impossibility of substitution mechanisms also raises fundamental questions in regard of persons whose capacities prevent them from expressing their wills to any extent. In this context, granting consent for healthcare services or the performance of various medical procedures, including life- and health-saving ones proffered to persons with disabilities, is most controversial.

Permanent (e.g. congenital) health problems frequently prevent individuals from taking their own decisions and exercising their will. At the same time, there is a constant and systematic need to make decisions on the provision of health services. The question arises whether representatives, however much they may endeavour to take full account of their charges (presumed) position, but lacking the possibility to establish the truly autonomous wishes of that persons, are in a position to express the legally binding will of those persons. The alternative, it would seem, would be to subject the person to *ad hoc* judicial procedures leading to the authorisation of medical services. Such solutions would sooner seem

1 See Committee on the Rights of Persons with Disabilities, *General comment no. 1. Article 12: Equal recognition before the law*, CRPD/C/GC/1, 2014.

2 Cf. the analogous concerns formulated in the context of Polish private law with regard to the postulate of a complete abandonment of the substitution model of performing legal acts by K. Zaradkiewicz, Ubezwłasnowolnienie – perspektywa konstytucyjna a instytucja prawa cywilnego, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka,* ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, pp. 205–206.

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to threaten the vital interests of persons with disabilities (including their life and health) and become a source of serious encumbrance on the very persons they are ostensibly designed to help.

Similar doubts are raised by the absolute impossibility of applying open-ended-term remedies to persons with disabilities arising from irremediable causes that are not responsive to treatment based on current medical knowledge. The application of fixed period measures entails systematic legal proceedings linked to medical examinations, which in no way serve to improve the health of the person who is prescribed that treatment. This is all the more incomprehensible as it concerns cases in which the outcome of the investigations is a foregone conclusion – the condition does not change. This situation has been noted as a result of changes introduced in the Czech legal system (Chapter 9). The principialism of a sort evident in the application of some adopted legal remedies is all the more difficult to defend as they may be amended or revoked when the facts have changed to such an extent that their underlying premises no longer exist.

The problematic nature of CRPD Article 12 is also confirmed by the fact that, on more than one occasion, its transposition into national legal systems is subject to divergent assessments. Peru is a case in point. On the one hand, some experts rate the Peruvian solutions very highly and emphasise that they implement the Convention's standard to the full[3] as confirmed by the position of the Committee on the Rights of Persons with Disabilities[4] as well; on the other hand, serious reservations are voiced regarding the internal legal system's coherence and operability following these changes (see the considerations and references in Chapter 22).

Analyses of the implementation of CRPD Article 12 in 25 national legal systems in force in 24 countries from different regions of the world are presented further here. Those legal systems were selected according to several criteria. Firstly, we were eager to present as large a group of countries as possible that made reservations to, or interpretative declarations on, CRPD Article 12. Of the 24 states whose legal systems are scrutinised in this book, eight had made such reservations or declarations. Secondly, it was important to obtain reports from those legal systems that had already made efforts to implement CRPD Article 12. Thirdly, it was of moment to examine the status of that article's transposition into those legal systems that were of fundamental influence on the shaping of Polish solutions, i.e. those of Austria, France and Germany. This arose from one of the objectives of the project which gave rise to this book, which was to present the assumptions in the adaptation of the Polish national regulation of legal capacity to the standards arising from CRPD Article 12.

When Poland regained its independence in 1918 after 123 years of partition (between Austria/Austro-Hungary, Prussia/the Second German Empire and Russia/the Soviet Union), its territory was governed by alien private law systems, notably Austrian, French, German and Russian. The impact of French private law on the Polish private law is a kind of heritage of Napoleonic epoch. The Austrian, French and German systems had the greatest impact on the shape of contemporary Polish private law. For this reason, the presentation of the degree of implementation of CRPD Article 12 into these systems was

3 T. Minkovitz, The reception of article 12 of the convention on the rights of persons with disabilities in the United States (New York), Mexico, and Peru, *SSRN Electronic Journal*, January 2017, *passim*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2902629.

4 Concluding observations on the initial report of Peru: Committee on the Rights of Persons with Disabilities: Addendum, pp. 4–5, Concluding observations on the initial report of Peru: (un.org), accessed March 5, 2023.

of particular importance. At the same time, it should be emphasised that the current Polish regulation on incapacitation was to a large extent modelled on the Austrian Imperial Decree – Ordinance on Incapacitation of June 28, 1916 (Kaiserliche Verordnung vom 28 Juni 1916 über die Entmündingung, RGBl. Nr. 207).[5] Due to the perceived similarity of the Polish regulation of legal capacity to the Austrian and German solutions, it should be concluded that it was rooted in the Germanic legal tradition. However, it must not be overlooked that the division into total and partial incapacitation in the Polish legal tradition also existed in French and Swiss legislation. Thus, these systems should also be considered as a source of inspiration for the Polish legislator.[6]

The individual chapters of the legal comparative part were prepared according to a single scheme, containing eight issues related to the transposition of CRPD Article 12 primarily into private law.

The analyses of the national legal systems outline the concept of capacity and its limitations. However, the main subject of consideration is the transposition of CRPD Article 12 and its resultant amendments into the national legal system. Creating solutions that meet the Convention's standards requires analysing regulations in the fields of substantive, procedural and sometimes even systemic law. The extent of the changes turned out to be extremely varied and dependent on the conditions in the individual national legal systems. Modifications in private law have most often consisted of adapting the regulation of legal capacity and its limitations to the CRPD Article 12 standard. Modifications of procedural regulations require shaping the proceedings in such a way that a person with disabilities can, to the extent possible, perform procedural acts independently, without being exposed to acts or omissions that could produce undesirable effects. Systemic changes may create appropriate institutional backup for the transposition of the CRPD Article 12 standard in the form of, for example, an appropriately shaped social assistance system.

The standard of protection for persons with disabilities under CRPD Article 12 requires a holistic view of the importance of active legal capacity and institutions protecting against various types of abuse in the context of the principle of autonomy of all entities under private law and the principle of *pacta sunt servanda*. This holistic approach requires not just private law being taken into account but criminal law too.

It is worth pointing out that the regulation of active legal capacity and its limitations in private law should correspond with the relevant criminal law regulations. Indeed, it seems that the reduction of private law safeguards for persons with disabilities, which involve the limitation of their active legal capacity, should be combined with consideration of the introduction of broader and more intensive protection of persons with disabilities in domestic criminal law.

Reflection on the protection of persons with disabilities leads to the conclusion that its transposition into private law and criminal law differs.

In private law, it operates *ex ante* by definition. Its purpose is essentially to prevent abuse to the detriment of persons with disabilities. However, the effectiveness of protective measures derives from the interference with the sphere of autonomy of persons with

5 K. Zaradkiewicz, Ubezwłasnowolnienie – perspektywa konstytucyjna a instytucja prawa cywilnego, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka*, ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, pp. 192–193.

6 H. Konic, *Prawo osobowe. Wykład porównawczy na tle prawodawstw obowiązujących w Polsce w zestawieniu z kodeksem szwajcarskim. Część trzecia,* Księgarnia F. Hoesicka, Warsaw, 1929, p. 426 *et seq.*

disabilities: when such persons cannot effectively perform certain categories of acts, they cannot thereby act to their own detriment. Opponents of the paternalistic treatment of persons with disabilities emphasise the right of everyone to make mistakes and reject the permissibility, in the light of CRPD Article 12, of maintaining any substitutive measures. This type of approach is a response to the regulation of active legal capacity in force for many years, which allows for its very broad limitation (if only by the institution of incapacitation). It is the result of adopting the position that, when making a decision on incapacitation, transactional security is of primary importance, as is possibly the protection of family assets against the reckless actions of persons affected by mental or intellectual disability. However, this position is not always fully justified, as in some countries (for example, in Poland), it has been widely accepted and emphasised for several decades in case law, that the interests and needs of a person subject to an application for incapacitation, should be taken into account first and foremost, even though the legislator does not explicitly impose an obligation on the courts in this respect. However, it must be acknowledged that, regardless of how the emphasis is distributed when taking into account the interests and needs of the person subject to an application for incapacitation, active legal capacity has often been restricted beyond measure, in complete disregard of the prospective effects of the proposed measures on that person. Such practices are to be deplored.

However, adopting the view that completely rejects the permissibility of substitution mechanisms is too radical. A legitimate objection to the excessive restriction of the autonomy of persons with disabilities must not lead to their being completely deprived of protection against the exploitation of their vulnerability by dishonest participants in civil law transactions.

Unlike in private law, in criminal law the protection operates *post facto*. The measures provided for in criminal law only apply as a consequence of the commission of a criminal act to the detriment of a person with a disability, which has resulted in an adverse disposal of property. This type of protection does not interfere with the sphere of autonomy, but it should be noted that effective implementation is not always possible. Even if the public law mechanisms work, it is usually only after a longer period of time. This is due to the specific nature of criminal proceedings, the aim of which is not only to prosecute crime but also to ensure that an innocent person does not suffer injustice. The achievement of the latter objective necessarily requires a period of time during which a victim (with a disability) is deprived of his or her home or means of livelihood.

In light of these observations, abolishing or limiting the remedies available to persons with disabilities under private law should entail granting them more intensive protection in criminal law and in civil procedural law. More intensive protection for persons with disabilities in civil procedural law could consist of increasing the availability of interim protection measures used in security proceedings. At present, this is unfortunately rare.

The discussion on the transposition of CRPD Article 12 into the different legal systems is based on formal-dogmatic analyses that also refers to the statistical data or forecasts available in this regard. Unfortunately, such data is not available in all countries. Thus, in this aspect, detailed studies are not always comparable. Also, due to the differences between the legal systems, it was not always possible to stick consistently to the same chapter content sequences regarding the compared jurisdictions.

5 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Austria

Igor Adamczyk and Jakob Fortunat Stagl

Introduction

Legal capacity and capacity to act are regulated in Austrian law by the civil code Allgemeines bürgerliches Gesetzbuch from 1811 (hereinafter 'ABGB').[1] The ABGB itself, although more than 200 years old, has been continuously amended and adapted by the legislator to current social or economic needs. Among other things, the regulation of legal capacity, including in particular the position of adults who, for health – especially mental – reasons, are unable to fully manage their own affairs, has been subject to changes recently. The legislative changes were carried out to implement the Convention into the Austrian legal order.[2]

At the outset, reference should be made to the procedure itself for the signing and ratification of the Convention by the Republic of Austria. Austria signed the Convention on the first possible day according to Article 42, i.e. on March 30, 2007.[3] The Convention was approved by the National Council (Nationalrat), signed by the president and countersigned by the chancellor, then the instruments of ratification for the Convention and the Optional Protocol were deposited with the secretary-general of the United Nations on September 26, 2008. On September 26, 2008, it was ratified.[4]

The Convention and the Optional Protocol were published in the Austrian Federal Law Gazette on October 23, 2008, in the authentic English and French versions with a German translation.[5] At the same time, the National Council decided in accordance with Article 49 § 2 B-VG[6] that the other authentic languages would be available for public inspection at the Federal Ministry for European and International Affairs. Pursuant to

1 Kaiserliches Patent vom 1. Junius 1811: Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie, JGS Nr. 946/1811, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622, accessed October 22, 2022.

2 2 Erwachsenenschutz-Gesetz. Regierungsvorlage – Erläuterungen, 1461 der Beilagen XXV. GP pp. 1–4, https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01461/index.shtml, accessed October 22, 2022.

3 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en, accessed October 22, 2022.

4 Instruments of ratification, Bundesgesetzblatt (Federal Law Gazette; hereinafter BGBl) III Nr. 155/2008, https://www.ris.bka.gv.at/eli/bgbl/III/2008/155, accessed October 22, 2022.

5 BGBl. III Nr. 155/2008.

6 B-VG – Bundesverfassungsgesetz BGBl. Nr. 1/1930, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000138, accessed October 22, 2022; M. Schauer, Das UN Übereinkommen über die Behindertenrechte und österreichisches Sachwalterrecht. Auswirkung und punktueller Anpassungsbedarf, *Interdisziplinäre Zeitschrift für Familienrecht (iFamZ)*, May 2011, p. 258.

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Article 45 § 2 of the Convention and Article 13 § 2 of the Optional Protocol, the two treaties entered into force for Austria on October 26, 2008.[7]

In general, the Convention is not directly applicable. The Austrian National Council decided that it 'shall be fulfilled by enacting laws'.[8] This decision of the National Council means that citizens are excluded from being able to directly assert the rights under the Convention. This interpretation has been confirmed by Austrian courts.[9] The National Council usually proceeds in this form with regard to state treaties regulating human rights. However, the authorities and courts must interpret these laws and all state law in conformity with international law. The reservation therefore does not violate the *pacta sunt servanda* principle of Article 26 of the Vienna Convention on the Law of Treaties.[10] Austria made neither a reservation nor a declaration on the Convention.[11]

Austria passed or amended the bills *inter alia* on monitoring of people's rights arising from the UN Convention on the Rights of Persons with Disabilities and modernised the law regarding the capacity to undertake legal actions. The most significant acts passed or amended because of the Convention are Bundesbehindertengesetz (BBG – The Persons with Disabilities Act),[12] Volksanwaltschaftsgesetz (VolksanwG – The Ombudsman Act)[13] Zweites Erwachsenenschutzgesetz (2. ErwSchG – The second Adult Protection Act).[14]

With regard to legal capacity, the most relevant law in the implementation of the provisions of the Convention was the latter, the 2. ErwSchG, which was published in the BGBl on April 25, 2017, and which entered into force on July 1, 2018. Its main objective was to provide as much support as possible for persons with disabilities to participate in legal transactions while at the same time being as independent as possible in carrying out legal acts. To this end, the legislator, in creating the new norms, was guided by the so-called four-column model (German: Vier-Säulen-Modell) consisting of (1) precautionary power of attorney (German: Vorsorgevollmacht) or an adult representative (German: Erwachsenenvertreter), (2) elective representative (German: gewählter Vertreter),

7 BGBl. III Nr. 155/2008, https://www.ris.bka.gv.at/eli/bgbl/III/2008/155, accessed October 22, 2022.

8 Ibid.

9 Decision of the Austrian Supreme Court of May 15, 2013, case file No. 3Ob97/13f, https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20130515_OGH0002_0030OB00097_13F0000_000, accessed October 22, 2022.

10 B. Eccher, ed., *Gutachten über die aus dem UN-Übereinkommen über die Rechte von Menschen mit Behinderungen erwachsenden Verpflichtungen Österreichs*, Innsbruck, 2014, pp. 19–20.

11 BGBl. III Nr. 155/2008.

12 Bundesgesetz vom 17. Mai 1990 über die Beratung, Betreuung und besondere Hilfe für behinderte Menschen (Bundesbehindertengesetz – BBG), BGBl. I Nr. 100/2018, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008713, accessed October 22, 2022.

13 Bundesgesetz über die Volksanwaltschaft (Volksanwaltschaftsgesetz 1982 – VolksanwG), BGBl. I Nr. 56/2021, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000732, accessed October 22, 2022.

14 Bundesgesetz, mit dem das Erwachsenenvertretungsrecht und das Kuratorenrecht im Allgemeinen bürgerlichen Gesetzbuch geregelt werden und das Ehegesetz, das Eingetragene Partnerschaft-Gesetz, das Namensänderungsgesetz, das Bundesgesetz über Krankenanstalten und Kuranstalten, das Außerstreitgesetz, die Zivilprozessordnung, die Jurisdiktionsnorm, das Rechtspflegergesetz, das Vereinssachwalter-, Patientenanwalts- und Bewohnervertretergesetz, das Unterbringungsgesetz, das Heimaufenthaltsgesetz, die Notariatsordnung, die Rechtsanwaltsordnung, das Gerichtsgebührengesetz und das Gerichtliche Einbringungsgesetz geändert werden (2.Erwachsenenschutz-Gesetz – 2. ErwSchG), BGBl 59/2017, https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2017_I_59/BGBLA_2017_I_59.pdfsig, accessed October 22, 2022.

(3) statutory representative (German: gesetzlicher Vertreter), and (4) court-appointed representative (German: gerichtlicher Vertreter).[15]

Austrian law, like Polish law, assumes that all human beings, natural persons (German: natürliche Personen), have full legal personality from the moment of birth.[16] This is derived from § 16 ABGB,[17] which is imbued with a legal-naturalistic concept. According to this provision, every human being has inherent and reasonably justifiable rights and should therefore consequently be regarded as a person in the legal sense (subject of the law).[18]

Along with legal capacity, there is of course legal capacity to act. Austrian law uses a slightly different framework than Polish law in this matter. The starting point for the description of a person's capacity to independently transform his/her legal situation is the notion of *Handlungsfähigkeit*, regulated in § 24 (1) ABGB as the capacity of a natural or legal person to undertake actions under any legal circumstances in order to acquire rights or incur obligations.[19] The term *Handlungsfähigkeit* has no direct equivalent in Polish and is best translated as the capacity to take action. It is not a capacity to act within the meaning of Article 11 et seq. of the Polish Civil Code but a broader concept. Indeed, Austrian law distinguishes between the constituent capacities of legal capacity to act (*Geschäftsfähigkeit*) and tortious capacity (*Deliktsfähigkeit*). In this study we are interested in the first-mentioned capacity.[20]

A capable person according to the law is one who has the capacity to make a decision. The ABGB defines decision-making capacity as the ability to understand the meaning and consequences of one's behaviour in every legal situation, to base one's will and decisions on this. At the same time, the law presumes that an adult is capable of making decisions.[21] Thus, it can already be seen at this stage that the capacity for *Handlungsfähigkeit* does not derive from the mere fact of birth; it is necessary that a person is at an appropriate stage of psycho-physical development. On the other hand, this does not mean that the ABGB

15 R. Welser, A. Kletečka, *Bürgerliches Recht. Bd. I*, Wien, 2018, pp. 635–636; M. Schauer, Die vier Säulen des Erwachsenenschutzrechts. Vorsorgevollmacht, gewählte, gesetzliche und gerichtliche Erwachsenenvertretung, *iFamZ*, March 2017, pp. 148–157.

16 The ABGB also takes into account the legal situation of unborn children (*nasciturus*) cf. § 22 ABGB.

17 § 16 ABGB: *Every individual has inherent rights, already evident from common sense, and must thus be recognised as a person. Slavery or serfdom, and the exercise of any power in this regard, is prohibited in these countries.* – All translations into English of ABGB paragraphs being in force after July 1, 2018 are from: P. Eschig, E. Pircher-Eschig, *Das österreichische ABGB – The Austrian civil code*, Wien, 2021. All other translations are own.

18 The Code uses the phrase 'persona' to describe a person's legal status; this approximates the Roman separation of *persona* from *homo;* see in detail J. F. Stagl, Persona: A mask with a human face. On the legal archaeology of personal law, *Studia Iuridica*, 2020, vol. 86, pp. 254–285.

19 § 24 (1) ABGB: *The capacity to act is the capacity of a person to acquire rights and assume obligations by his own actions depending on the respective legal circumstances. The capacity to act is subject to a person's capacity to make decisions unless the law provides otherwise. The law may impose further conditions depending on the individual circumstances.*

20 It is regulated in § 176 ABGB: *If a fault cannot already be attributed to a minor child (§ 1310), such child will be deemed liable in tort pursuant to the rules relating to tort upon having reached the age of discretion.* For a detailed account of the capacity in tort of Deliktsfähigkeit, see P. Bydlinski, *Bürgerliches Recht. Allgemeiner Teil*, Wien, 2018, pp. 63–66.

21 § 24 (2) ABGB: *Anyone who has the capacity to understand the meaning and consequences of his actions in the respective circumstances and who his able to determine his will by taking into account these circumstances and to act accordingly, has the capacity to make decisions. If in doubt, an adult is deemed to have the capacity to make decisions.*

makes the capacity of each individual dependent on his own characteristics like a group of jurists in ancient Rome called the Sabinians.[22] Security of legal trade requires the adoption of uniform rules, which Austrian law also does by making the sub-types of capacity, i.e. legal capacity and capacity in tort, in principle dependent on the age of the natural person.[23] Only then can this capacity be subject to restrictions due to the possible limitations of a particular person, such as, for example, in the case of disabled adults, primarily mentally ill, who do not understand the meaning of their own decisions.

Legal capacity to act has been defined as the ability of a person (natural or legal) to acquire rights or obligations by his own action.[24] It depends primarily on the age of the individual. There are four age categories: (1) persons under 7 years of age, (2) persons between 7 and 14 years of age, (3) persons between 14 and 18 years of age, and (4) persons over 18 years of age (adults).

1. Capacity on grounds of age

a. Persons under 7 years of age

In general, legal transactions undertaken by children under the age of 7 are absolutely void.[25] Consequently, it is only the legal representative who can bind himself and acquire rights on behalf of such a child subject to specific statutory provisions, e.g. with regard to possible court's approval.

The ABGB, like the the Polish Civil Code, accepts one exception to this rule. Acts usually concluded by persons under 7 years of age and concerning daily living needs become retroactively effective since the conclusion at the time of the child's performance of the contract.[26]

It should also be noted that, pursuant to § 865 (2) ABGB, any person, including a child under the age of 7, may only perform acts for his benefit.[27]

Prior to the entry into force of the 2. ErwSchG on July 1, 2018, children under the age of 7 and any person who was unable to manage his own affairs could not even carry out acts that exclusively benefited them.[28]

22 Institutions of Gaius, G. 1, 196.

23 Vide infra.

24 § 865 (1) ABGB: *Legal capacity is the capacity of a person to acquire rights and assume obligations by his own conduct. It requires that the person is capable of making decisions and it is assumed that adults have such capacity. Paragraph 170 and 171 must be considered in connection with minors and § 242 (2) in connection with adults.*

25 § 865 (4) sentence 1 ABGB: *Any conduct relating to the entering into of legal transactions of a minor who is less than seven years old does not have any legal effect.*

26 § 170 (3) ABGB: *If a minor child concludes a legal transaction which is usually concluded by minors of the same age and which relates to a minor matter of daily life, such a legal transaction becomes legally binding retrospectively upon satisfaction of the child's obligations even if the requirements of (2) have not been satisfied.*

27 § 865 (2) ABGB: *Every person can accept a promise which has only been made to his benefit.*

28 F. Parapatits, S. Perner, Die Neuregelung der Geschäftsfähigkeit im 2. Erwachsenenschutzgesetz, *iFamZ*, March 2017, p. 163.

b. Persons between the ages of 7 and 14

Persons between the ages of 7 and 14 have limited legal capacity. Apart from minor acts of everyday life, in order to enter into an obligation, persons between the ages of 7 and 14 must either be represented by a legal representative or obtain the consent of such a representative to enter into the act, either expressly or tacitly (§ 170 (1) ABGB).[29] Of course, like children under the age of 7, they may perform acts that are intended to result in their exclusive profit. In addition, according to § 310 ABGB, from the age of 7 a person may acquire possession of things on his own.

Unlike actions by children under 7 years of age, those concluded by persons in the age currently discussed without the approval of the legal representative are ineffective until the subsequent approval of the action will be made by the representative.[30] Nevertheless, from the moment the act is concluded, the minor's counterparty is bound by the declaration he has made. However, he cannot require the performance of the minor's obligation until the action is confirmed by the legal representative. We are then dealing with a 'limping contract' (*negotium claudicans*).[31] In order to protect the legal turnover and the minor's counterparty, the ABGB in § 865 (5) grants the counterparty the possibility to set a time limit for the minor's legal representative to confirm the action, after the ineffective expiry of which the counterparty becomes free.[32] Such a time limit should be appropriate.[33] Of course, it cannot be disregarded that in certain situations the approval of the legal representative will not be sufficient and the approval of a court of protection will be required.[34] Moreover, the minor himself can confirm the effectiveness of the concluded act in writing once he has reached the age of majority.[35] Once the minor has reached the age of majority, his counterparty may call upon the minor to validate the act, and again a reasonable time must be allowed for this. If the incumbent minor fails to make any statement or objects, the transaction becomes absolutely void.[36]

The structuring of the legal action for this category of persons does not differ from the pre-2018 regulations.

29 § 170 (1) ABGB: *A minor child can neither contract nor oblige itself by way of entering into a legal transaction without the express or implied consent of its legal representative.*

30 § 865 (4) sentence 2 ABGB: . . . *In the case of other minors, such conduct is effective upon approval by his representative and, if applicable, upon the additionally required court approval.*

31 G. Wesener, Die Stellung des Kindes im Recht der Altösterreichischen Länder (Vom Mittelalter bis zum A.B.G.B.), *L'enfant. Recueils de la Société Jean Bodin*, 1976, vol. 36, pp. 453–492.

32 § 865 (5) ABGB.

33 P. Rummel, *ABGB – Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, ed. P. Rummel, M. Lukas, Wien, 2014, commentary § 865 ABGB, No. 10.

34 R. Welser, A. Kletečka, *Bürgerliches Recht*, Bd. I, Wien, 2018, p. 60.

35 § 168 ABGB: *If a legal transaction requires the consent of the legal representative, the consent of the other parent or the approval of the court of protection, the adult child will only be validly obliged without such consent or approval if it declares in writing to accept these obligations as legally effective. If the creditor requests the person having become an adult to make a declaration pursuant to the first sentence, the creditor must grant a reasonable period of time to provide such declaration.*

36 C. Fischer-Czermak, *ABGB-ON1.05*, ed. A. Kletečka, M. Schauer, 2018, commentary § 168, https://rdb.manz.at/document/1102_abgb_105_p0168, accessed October 22, 2022.

c. Persons between 14 and 18 years of age

The ABGB distinguishes a category of persons with a broader, partial legal capacity. Their legal situation does not generally differ from that of persons between the age of 7 and 14. However, these persons can freely enter into contracts of services, with the exception of contracts concluded for the purposes of education, including vocational training.[37] In addition, a person in the discussed age may dispose of remuneration for work performed and things given to him for his exclusive use to such an extent that the satisfaction of his living needs would not be in danger.[38]

Children between the age of 14 and 18 also have the capacity to make a will. However, this capacity is not absolute. Indeed, a minor can only draw up a will before a court or a notary, except in emergency situations.[39] The will of the minor testator is subject to review by the court or notary from the perspective of the freedom and consideration in making it.[40] The legal capacity of this category of persons does not differ before the 2. ErwSchG came into force.

2. Mental capacity – adults

The extent of legal capacity is generally determined by age. However, it happens that adults, due to their mental state, are not able to independently perform legal acts on their own. In such cases, the legal capacity is corrected due to the mental state. An important change in the regulations concerning this field of the Austrian law was brought about by the entry into force of the already mentioned 2. ErwSchG, which aimed to bring national law into line with the Convention. Subsequently, the most important pre-2018 regulations will be presented first, and then the changes introduced by the 2. ErwSchG.

a. Pre-2018 status

i. Guardianship (Sachwalterschaft)

Prior to 2018, ABGB in § 865 provided that all persons over the age of 7 who lacked the capacity to make an independent decision lacked legal capacity to act, as did children under the age of 7. An exception was made for minor actions undertaken in daily

37 § 171, sentence 1, ABGB: *Unless provided otherwise, a minor child having reached the age of discretion can oblige itself by contract to the performance of services, except services pursuant to an apprenticeship contract or other training contracts.*

38 § 170 (2) ABGB: *After reaching the age of majority, however, he may dispose of and commit himself to property that has been left to his free disposal and to income from his own earnings to the extent that this does not jeopardise the satisfaction of his necessities of life.*

39 § 569, sentence 1–4, ABGB: *Underage persons do not have the capacity to declare a last will. Minors having reached the age of discretion can only declare a last will orally at court or in front of a notary public except in case of emergency (§ 584). The court or the notary public must be convinced that the last will has been declared freely with consideration.*

40 C. Mondel, G. Knechtel, *ABGB-ON1.04*, ed. A. Kletečka, M. Schauer, 2020, commentary § 569, https://rdb.manz.at/document/1102_abgb_104_p0569, accessed October 22, 2022.

needs.[41] The ABGB did not provide for a gradation of legal capacity for such adults before 2018. The person could be either capable or not. However, it was recognised that such a distinction could often lead to overly arbitrary decisions. Therefore, it was accepted that, in relation to the legal actions of persons who are slightly limited in making conscious decisions, it should be examined in relation to the particular act whether they had the capacity at this time, especially the awareness of the decision during performing the legal act.[42]

Persons who were mentally disabled to such an extent that they could not make decisions independently and consciously, and thus could not perform legal acts, had to obtain a guardian (*Sachwalter*). This guardian was appointed for all or selected affairs of such a person, depending on the mental state.[43] By the term affairs we mean not only legal actions but also other actions causing legal effects for the person being represented, like conducting court proceedings.[44] The appointment of a guardian was made on the basis of a court order with constitutive effect, which was issued in non-contentious proceedings.[45] The appointment of a guardian resulted in the deprivation of full capacity to act of a disabled person in the matters entrusted to the guardian. A legal act undertaken within the scope of the guardian's authority by the incapacitated person required his explicit or tacit consent.[46] Such a person could, however, undertake acts on her own only for the benefit and in the ordinary activities of daily life. His capacity thus did not differ from that of children between the ages of 7 and 14.

In the legal doctrine, it was already pointed out long before 2018 and the entry into force of the 2. ErwSchG, as well as before the entry into force of the Convention itself, that the appointment of a guardian was of a flexible nature and should correspond to the needs of the person being under the guardianship.[47] Moreover, the institution of a guardian was seen as a subsidiary, an *ultima ratio*, to be used as a last resort. Such a need would not exist if the person was already being represented by another legal representative or could be assisted in other ways, such as being represented by a family member.[48]

Like the appointment, the termination of the guardianship was effected by a constitutive court order, of course, if the need for which the guardian had been appointed had ceased. It was also possible to change the guardian if the welfare of the person under guardianship

41 § 865, sentence 1, ABGB pre-2018: *Children under seven years of age and persons over seven years of age who do not have the use of reason are incapable of making or accepting a promise, except in cases under § 170 (3).*

42 H. Koziol, R. Welser, A. Kletečka, *Bürgerliches Recht*, Bd. I, Wien, 2014, p. 63; P. Steinbauer, *Die Handlungsfähigkeit geistig Behinderter nach dem neuen Sachwalterrecht*, Österreichische Juristenzeitung, 1985, pp. 385–427, https://rdb.manz.at/document/rdb.tso.LI0920000644; C. Fischer-Czermak, Einsichts-und Urteilsfähigkeit und Geschäftsfähigkeit, *Österreichische Notariatszeitung*, October 2004, pp. 302–309.

43 § 268 (1) ABGB pre-2018: *If a person of full age who suffers from a mental illness or is mentally disabled (disabled person) is unable to manage all or some of his or her affairs without risk of disadvantage to himself or herself, a guardian shall be appointed for this purpose at his or her request or ex officio.*

44 W. Tschugguel, F. Parapatits, *ABGB-ON1.03*, ed. A. Kletečka, M. Schauer, 2014, commentary § 268, No. 3, https://rdb.manz.at/document/1102_abgb_103_p0268, accessed October 22, 2022.

45 J. Stabentheiner, *ABGB – Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, ed. P. Rummel, M. Lukas, Wien, 2014, commentary § 268 ABGB, No. 16.

46 § 280 ABGB pre-2018.

47 P. Steinbauer, Die Handlungsfähigkeit geistig Behinderter nach dem neuen Sachwalterrecht, *Österreichische Juristenzeitung*, 1985, pp. 385–427.

48 § 268 (2) ABGB pre-2018; H. Koziol, R. Welser, A. Kletečka, *Bürgerliches Recht*, Bd. I, Wien, 2014, p. 65.

required it or if the guardian did not provide a guarantee for the proper performance of the function held or for some other reason could not perform the function, e.g. death.[49] A change in the health of the person under guardianship may also not have justified the revocation of the guardianship *per se* but may have a change in the scope of the guardian's mandate and thus in the scope of the affairs that the person under guardianship was able to conduct independently.[50] The court was also obliged to review the necessity of continuing the guardianship at appropriate intervals, but not longer than five years.[51]

ii. Power of attorney granted to close relatives

In 2006, i.e. even before the Convention came into force, the Austrian legislator decided to introduce into the ABGB, alongside the institution of guardianship, the possibility of empowering a close relative to manage certain affairs. The introduction of this institution was intended to reduce the excessive number of guardianships.[52]

A close relative was supposed to act on behalf of the disabled person in his daily affairs, as well as to provide for his care needs or medical services. An agent could be appointed not only for persons with disabilities but also for those who require support due to elderly age, poor health or poverty.[53] The appointment of an agent was made *ex lege*. Neither a declaration of intent by the person concerned nor a corresponding decision by, for example, a court of protection, was therefore necessary.[54] However, the party himself could, despite his lack of capacity, oppose the appointment of a representative, which did not require any form.[55] ABGB contained also a legal definition of a relative. These were parents, adult children, a spouse or registered partner living with the represented adult in a common household and a cohabiting partner, provided he or she had been living in a common household with the represented adult for three years.[56] A representative could not be appointed if a guardian had already been appointed or a precautionary power of attorney (German: Vorsorgevollmacht) had been granted.

49 § 278 (1) ABGB pre-2018: *The court shall transfer the guardianship (curatorship) to another person upon application or ex officio if the guardian (curator) dies, does not have the required qualification, he cannot reasonably be expected to exercise the function, one of the circumstances of § 273 (2) occurs or becomes known or the welfare of the person in care requires this for other reasons. § 178(3) shall apply accordingly.*

50 § 278 (2) ABGB pre-2018: *The guardian (curator) shall be removed upon application or ex officio if the prerequisites for his or her appointment under §§ 268 to 272 cease to apply; if these prerequisites cease to apply only to part of the matters entrusted to the guardian (curator), his or her scope of action shall be restricted. His or her scope of action shall be extended if this is necessary. If the ward dies, the guardianship (curatorship) expires. § 183 (2) shall apply accordingly.*

51 § 278 (3) ABGB pre-2018.

52 P. Barth, M. Ganner, eds., *Handbuch des Schwalterrechts*, Wien, 2010, p. 461.

53 § 284 b (1) ABGB pre-2018: *If a person of full age is unable to take care of legal transactions of daily life himself due to mental illness or mental disability and if he does not have a guardian or any other legal or appointed representative, he may be represented by a next of kin in these legal transactions, provided that they correspond to his living conditions. The same applies to legal transactions to cover the need for care as well as the assertion of claims due to elderly age, illness, disability or poverty, in particular claims under social insurance law, claims to care allowance and social assistance as well as fee exemptions and other benefits.*

54 J. Stabentheiner, *ABGB – Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, ed. P. Rummel, M. Lukas, Wien, 2014, commentary § 284b ABGB, No. 5.

55 § 284 d (2) ABGB pre-2018.

56 § 284 c (1) ABGB pre-2018.

A close relative of the person being represented was required to have the representation recorded in the Austrian Central Representative Register (*Österreichische Zentrale Vertretungsverzeichnis*, or ÖZVV),[57] but the entry in this register, for the reason of being *ex lege*, had only a declaratory and not a constitutive effect.[58] The inclusion of the power of attorney in the register should have protected the good faith of the contracting parties of the empowered person.[59]

The revocation of the power of attorney by close relatives followed by a subsequent objection of the represented adult,[60] the death of either party, the appointment of a guardian, divorce (in case if the spouse was empowered) or the cessation of the ground for which the power of attorney was established.[61]

iii. Precautionary power of attorney (Vorsorgevollmacht)

A precautionary power of attorney could only be granted by a person with full legal capacity anticipating the event that he or she lost his capacity to act. The precautionary power of attorney had to contain at least a generically defined scope of the affairs.[62] It should also have been handwritten and signed by the empowering party.[63] If the precautionary power of attorney was to authorise actions in especially important matters, such as medical treatment or transfer of residence, it had to be granted before an advocate, notary or court.[64] The precautionary power of attorney could be disclosed in the Austrian Central Representative Register (ÖZVV). Disclosure, as in the case of precautionary power of

57 The Austrian Central Representative Register is an online register, but with a restricted access. In general, only courts, the registering entities (notary's office, advocate's offices, adult protection associations) as well as social insurance and social welfare institutions, and the represented people with their representatives may check the register. All the other persons can obtain information from the register only if they submit the request in writing and prove the legal interest; see https://www.justiz.gv.at/home/service/erwachsenenschutz/a-z-des-erwachsenenschutzrechts/oesterreichisches-zentrales-vertretungsverzeichnis-(oezvv).3a.de.html, October 22, 2022.

58 J. Stabentheiner, *ABGB – Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, ed. P. Rummel, M. Lukas, Wien, 2014, commentary § 284b ABGB, No. 5.

59 M. Schauer, *ABGB-ON1.02*, ed. A. Kletečka, M. Schauer, 2017, commentary § 284b, No. 5–10, https://rdb.manz.at/document/1102_abgb_102_p0284b, accessed October 22, 2022; M. Schauer, *ABGB-ON1.02*, ed. A. Kletečka, M. Schauer, 2017, commentary § 284e No. 18–23, https://rdb.manz.at/document/1102_abgb_102_p0284e, October 22, 2022; P. Barth, M. Ganner, eds., *Handbuch des Schwalterrechts*, Wien, 2010, pp. 553–559.

60 § 284 d (2) ABGB pre-2018.

61 M. Schauer, *ABGB-ON1.02*, ed. A. Kletečka, M. Schauer, 2017, commentary § 284d, No. 6–12, https://rdb.manz.at/document/1102_abgb_102_p0284d, accessed October 22, 2022.

62 § 284 f (1) ABGB pre-2018: *A precautionary power of attorney is a power of attorney which, according to its content, is to become effective if the grantor of the power of attorney loses the legal capacity or the capacity of insight and judgement required to take care of the matters entrusted to him loses his ability to express himself. The matters for which the power of attorney is granted must be specified. The authorised representative may not be in a relationship of dependence or in any other close relationship with a hospital, a care home or any other institution in which the principal is staying or by which the principal is being cared for.*; M. Schauer, *ABGB-ON1.02*, ed. A. Kletečka, M. Schauer, 2017, commentary § 284f No. 8, https://rdb.manz.at/document/1102_abgb_102_p0284f, accessed October 22, 2022.

63 § 284 f (2) ABGB pre-2018; as a rule, these are form requirements as for wills; see also P. Barth, M. Ganner, eds., *Handbuch des Schwalterrechts*, Wien, 2010, pp. 357–361.

64 § 284 f (3) ABGB pre-2018.

attorney by close relatives, caused that a third party acting in good faith could claim the truthfulness of the information in the register.[65]

b. Status after 2018

Introductory remarks

As already mentioned, the 2. ErwSchG led to the amendment of the ABGB provisions on the legal capacity of persons with disabilities, especially those with mental limitations. The legislator was guided by the provisions of the Convention and tried to take into account the autonomy of the individual as much as possible, which is reflected in the introductory explanations to the 2. ErwSchG:

> *The judicial care for persons who are no longer able to take care of their own affairs is to be reorganised. The autonomy of these persons is to be expanded. They should – as far as this is possible, expedient and justifiable – determine their legal relationships themselves. The possibilities for autonomous provision and self-determined decision-making are to be expanded in this sense, and the persons concerned are to be accompanied and supported in the often not easy decision-making processes to a greater extent than before. Judicial legal care should be reduced to its core, namely the representation of persons in legal matters. The representative and the court should therefore no longer take over tasks of social welfare or disability assistance in place of the responsible institutions.*[66]

As already mentioned in the introduction, the so-called four-column model shaping the legal capacity of adults with disabilities has been adopted in Austria in the 2. ErwSchG, consisting of legal institutions, such as the precautionary power of attorney and three types of representation (elected, statutory, court-appointed).[67]

The general rules provided by the legislator in the provisions of §§ 239–259 ABGB apply to all types of adult representation and precautionary power of attorney. First of all, the subsidiary nature of all types of substitution must be pointed out.[68] The essence of this principle is indicated by its insertion at the very beginning of the § 239 (1) ABGB, according to which efforts should be made to ensure that an adult who is limited in his ability to make independent decisions in legal trade as a result of a mental illness or other disability but is able to manage his affairs as independently as possible, with the possible support[69] of, for example, family or special entities established to support the disabled.[70] The use of one of the forms of adult representation in legal trade can be used

65 § 284 h (2) ABGB pre-2018; C. Spruzina, *Rechtsnatur und Bedeutung notarieller Bestätigungen, Notariatszeitung*, vol. 31, Wien, April 2010, pp. 104–105.

66 2 Erwachsenenschutz-Gesetz. Regierungsvorlage – Erläuterungen, 1461 der Beilagen XXV. GP, pp. 1–4, https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01461/index.shtml, accessed October 22, 2022.

67 M. Schauer, Die vier Säulen des Erwachsenenschutzrechts. Vorsorgevollmacht, gewählte, gesetzliche und gerichtliche Erwachsenenvertretung, *iFamZ*, March 2017, pp. 148–150.

68 H. Koziol, R. Welser, A. Kletečka, *Bürgerliches Recht*, Bd. I, Wien, 2014, p. 636.

69 § 239 (1) ABGB: *In connection with legal transactions entered into by adults it must be ensured that adults with limited capacity to make decisions due to a mental illness or a comparable impairment are able to take care of their own affairs to the greatest extent possible and, if required, with corresponding support.*

70 § 239 (2) ABGB.

only if the adult person himself sees the need for it or if it is necessary due to the necessity of safeguarding his interests or rights.[71] At the same time, the legislator has decided, following the experience of the legal experience of guardianship, to limit the appointment of representatives if the adult receives the necessary support or has granted a precautionary power of attorney.[72] On the other hand, even if the adult receives a representative or has granted a precautionary power of attorney, the person acting on his behalf should, as far as possible, take into account the expectations of the represented adult and notify him of the intended actions affecting him.[73]

Following the wording of Article 12 of the Convention, the legislator assumed in the 2. ErwSchG that the establishment of any form of representation does not at the same time lead to an automatic incapacity of an adult.[74] Therefore, it can be seen, at first glance, a significant difference from the previous model, in which, for example, appointing a guardian in the constitutive court decision could lead also to the complete incapacity of an adult. In the current state of the law, a person who has an appointed representative or agent may still manage his affairs independently and effectively carry out legal actions, provided that he has the capacity to discern the meaning of the actions performed and the action falls within the scope of the representative's authority.[75] If, in a particular case, he does not have the capacity to make decisions on his own, the effectiveness of the action is suspended and subject to confirmation. If the adult does not have a representative or agent and did not have the capacity to make the legal act independently, it is invalid.[76] Exceptionally, when a court-appointed representative has been appointed for the adult and, at the same time, the court has foreseen the requirement for the ward to obtain the prior consent of the representative or the court (in matters exceeding the ordinary management of the ward's assets), the legal act always requires confirmation.[77]

In addition, 2. ErwSchG has broadened the scope of activities that an adult can undertake independently in everyday matters. This is because the legislator has deleted

71 § 240 (1) sentence 1 ABGB: *The persons specified in § 239 (1) only require a representative to participate in legal transactions if this has been intended by such person himself or if a representation is absolutely necessary to safeguard such person's rights and interests.*

72 § 240 (2) ABGB: *If an adult receives the required support in connection with the management of his affairs or has specifically provided for the required support in connection with such management, in particular by way of a precautionary power of attorney, it is not permitted to appoint a representative of adults for such person.*

73 § 241 (1) ABGB: *A representative authorised pursuant to a precautionary power of attorney or a representative of adults must seek to ensure that the represented person can arrange his living conditions in accordance with his wishes and ideas within his potential and possibilities, and the representative must enable this person to manage his affairs to the greatest extent possible.* § 241 (2) ABGB: *A representative authorised pursuant to a precautionary power of attorney or a representative of adults must notify the represented person of any decisions relating to such person or his property in a timely manner and must give him the opportunity to raise his opinion within a reasonable period of time. The declaration of the represented person must be considered unless this would severely prejudice his welfare.*

74 F. Parapatits, S. Perner, Die Neuregelung der Geschäftsfähigkeit im 2. Erwachsenenschutzgesetz, *iFamZ*, March 2017, pp. 163–164. The need for changes due to the Convention was already discussed in 2011; see M. Schauer, Das UN-Übereinkommen über die Behindertenrechte und österreichisches Sachwalterrecht. Auswirkung und punktueller Anpassungsbedarf, *iFamZ*, May 2011, pp. 258–266.

75 § 242 (1) ABGB: *The represented person's capacity to act is not limited by a precautionary power of attorney or the appointment of a representative of adults.*

76 § 865 (3) ABGB.

77 § 242 (2) ABGB.

the attribute of minor matters.[78] As before, a legal act concerning the everyday matters becomes effective at the time of its performance. The exception to this is that, also for such matters, the judicial reservation of obtaining the consent of the court-appointed representative or the court applies.[79]

I. PRECAUTIONARY POWER OF ATTORNEY

The precautionary power of attorney (German: Vorsorgevollmacht), as seen earlier, had its place in the Austrian legal system even before the entry into force of the 2. ErwSchG. The legislator remodeled this institution having regard to the previous experience.[80]

As was the case prior to the time of the 2. ErwSchG, a precautionary power of attorney may be established by an adult for the event that the empowering person becomes incapable of making decisions on the matters covered by the precautionary power of attorney. The principal may also convert a previously existing ordinary power of attorney into a precautionary power of attorney.[81] A precautionary power of attorney may relate to specific matters or some sorts of affairs.[82] It is intended by the legislator only to have possible effects in the future. However, it must be established at a time when the principal has full decision-making capacity. The conditional nature of this type of power of attorney is therefore evident.[83]

The precautionary power of attorney must be granted in person, in writing before a notary public, an advocate or an adult protection association (Erwachsenenschutzverein),[84] cited in § 1 Erwachsenenschutzverfahrensgesetz.[85] The equalization of the position of the adult protection associations with advocates or notaries public is a novelty compared to the legal standing before 2018. A precautionary power of attorney drawn up, as well as the occurrence of an event actualising the representation, should be registered by the entity before which it was drawn up in the ÖZVV. Also, the termination of the precautionary power of attorney shall be effected by an entry in the ÖZVV by one of the aforementioned entities. The entry in the ÖZVV register therefore has constitutive effect.[86] This constitutes a novelty in relation to the previous state of the law. At the same time, the law instructs the notary, the advocate or the adult protection association to

78 F. Parapatits, S. Perner, Die Neuregelung der Geschäftsfähigkeit im 2. Erwachsenenschutzgesetz, *iFamZ*, March 2017, pp. 166–168.

79 § 242 (3) ABGB.

80 M. Schauer, Die vier Säulen des Erwachsenenschutzrechts. Vorsorgevollmacht, gewählte, gesetzliche und gerichtliche Erwachsenenvertretung, *iFamZ*, March 2017, pp. 150–151.

81 § 260 ABGB: *A precautionary power of attorney is a power of attorney which shall become effective upon the principal's loss of capacity to make decisions required in connection with the entrusted matters. The principal can also provide that an existing power of attorney shall be converted into a precautionary power of attorney subject to the occurrence of an event covered by the precautionary power of attorney.*

82 § 261 ABGB.

83 H. Weitzenböck, *ABGB Praxiskommentar*, ed. M. Schwimann, G. E. Kodek, Wien, 2018, commentary § 260, No. 1–2, p. 1436; M. Schauer, *ABGB-ON1.03*, ed. A. Kletečka, M. Schauer, 2019, commentary § 260 No. 7, https://rdb.manz.at/document/1102_abgb_103_p0260, accessed October 22, 2022.

84 § 262 (1) ABGB.

85 Bundesgesetz über Erwachsenenschutzvereine (Erwachsenenschutzvereinsgesetz – ErwSchVG), BGBl. Nr. 156/1990, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002937, accessed October 22, 2022.

86 M. Ganner, *ABGB. Großkommentar zum ABGB – Klang-Kommentar – 239 bis 284. Erwachsenenschutz*, ed. A. Fenyves, F. Kerschner, A. Vonkilch, Wien, 2020, commentary § 263 ABGB, No. 3, p. 395.

control the act being performed. If any of these entities becomes reasonably doubtful about the principal's capacity to make decisions at the time of the granting of the precautionary power of attorney, the occurrence of the event justifying the granting of the precautionary power of attorney or the recovery of the principal's capacity or the consent of the authorised person to accept the power of attorney, they are then obliged to refuse to draw up the precautionary power of attorney or to register any of these events in the ÖVZZ and, in case that there are grounds for believing that the welfare of the adult is at risk, to inform the relevant court of protection without any delay.[87]

A precautionary power of attorney expires upon the death of either party, by court order, by an entry in the ÖVZZ register: an information that the reason for granting it has ceased to exist, as well as by revocation or termination by the mandator. For the latter actions, it is sufficient for the substituted person to make it known that he no longer wishes to be substituted. This can be done in any way that indicates that the precautionary power of attorney is no longer valid. A mere factual conduct is sufficient.[88] The possibility of revoking the precautionary power of attorney cannot be waived by the principal.[89]

II. ELECTIVE REPRESENTATION

Elective representation is intended to enable an adult to appoint a representative when he has lost the capacity to act due to his mental illness or other infirmity so that he cannot fully take care of himself and at the same time does not have a representative or has not previously appointed a precautionary agent. A prerequisite for the effectiveness of his choice is that the adult still understands the meaning and consequences of the appointment of a representative and that he is capable of determining his will and expressing it appropriately. The adult may appoint one or more representatives from among those close to him people[90] – not necessarily in the sense of blood ties. It could be, for example, a friend or neighbour. There must be a certain relationship of trust with the selected person.[91]

The representative is appointed by means of a contract concluded between him and the adult to be represented, which defines the scope of his empowerment.[92] In defining the scope of empowerment the legislator's particular emphasis on the autonomy of the adult can be seen. Indeed, the parties may stipulate that any action, with the exception of representation before a court, will be undertaken by the representative with the consent of the

87 § 263 ABGB.

88 H. Weitzenböck, *ABGB Praxiskommentar*, ed. M. Schwimann, G. E. Kodek, Wien, 2018, commentary § 246, No. 23, pp. 1382–1383.

89 § 246 (1) sentence 2 and 3 ABGB: *It is sufficient for the revocation or objection by the represented person if the represented person expresses his intention that he no longer wants to be represented. These rights cannot be waived.*

90 § 264 ABGB: *If an adult is not able to take care of his own affairs due to a mental illness or a comparable impairment of his capacity to make decisions and such adult does not have a representative and is no longer able to establish a precautionary power of attorney but is, irrespective thereof, able to have a basic understanding of the importance and consequences of the granting of a power of attorney and to form a corresponding will as well as to act accordingly, he can select one or several of his close contacts as his representative of adults in order to manage these affairs.*

91 M. Schauer, *ABGB-ON1.04*, ed. A. Kletečka, M. Schauer, 2019, commentary § 264, No. 12–15, https://rdb.manz.at/document/1102_abgb_104_p0264, accessed October 22, 2022.

92 § 265 (1) ABGB: *The adult and his elective representative of adults must enter into an agreement (§ 1002) which specifies the powers of representation of the representative of adults.*

adult or by the adult himself with the consent of the representative.[93] Such an arrangement should ensure the autonomy of the adult, which also comes to the fore in Article 12 of the Convention.[94] The scope of the representative's authority may indicate specific affairs or types of affairs of the represented adult.[95]

As in the case of the precautionary power of attorney, the ABGB sets that the appointment of an elective representative must be made in person and in writing before a notary public, an advocate or an adult protection association.[96] This document must also be registered in the register (ÖZVV), and the persons before whom it is drawn up must, if they have any doubts about the grounds for appointing a representative or the agreement of the parties, refuse to prepare it, and if there is any reason to believe that the welfare of the adult is at risk, immediately inform the proper court of protection.[97] Also in this case, registration of the establishment of an elective representative has a constitutive effect.[98] Termination occurs in situations analogically to the termination of the precautionary power of attorney.[99]

III. STATUTORY REPRESENTATION

The situation is slightly different with regard to statutory representation, which can be considered the equivalent of the pre-2018 institution of representation by close relatives.[100] Its appointment is possible if certain acts of an adult, as catalogued in the ABGB, cannot be performed independently due to mental illness or other comparable infirmity limiting the capacity to make a decision and, at the same time, the adult cannot take care of himself without danger of harm. At a first glance, it is apparent that the situation of the adult person justifying the appointment of a legal representative is more serious than this of the elective representation, which does not require the prerequisite of danger of harm.[101] In addition, the ABGB requires that the adult has no other representative, is unable or unwilling to choose a representative and has not objected in advance to the appointment of a statutory representative. Such an objection must be registered in ÖZVV.[102]

Also, the catalogue of people who can become legal representatives has been restricted in comparison to elective representation. These can only be immediate and close relatives, such as parents, grandparents, and adult children.[103] There is no order of appointment

93 § 265 (2) ABGB: *The agreement relating to the elective representation of adults can – with the exception of the representation at court – provide that the representative of adults shall only be entitled to perform acts of representation with a legal effect subject to the agreement with the represented person. The agreement can – with the exception of the representation at court – also provide that the represented person shall only be able to make declarations with legal effect subject to the approval of the representative of adults.*

94 P. Barth, Das 2. Erwachsenenschutz-Gesetz. Eine Annäherung, *iFamZ*, March 2017, p. 144.

95 § 265 (3) ABGB: *The powers of representation can relate to individual matters or certain types of matters.*

96 § 266 (1) ABGB.

97 § 267 (1) and (2) ABGB.

98 H. Weitzenböck, *ABGB Praxiskommentar*, ed. M. Schwimann, G. E. Kodek, Wien, 2018, commentary § 267, No. 1, p. 1451.

99 § 246 (1) point 1, 2, 4.

100 M. Schauer, Die vier Säulen des Erwachsenenschutzrechts. Vorsorgevollmacht, gewählte, gesetzliche und gerichtliche Erwachsenenvertretung, *iFamZ*, March 2017, p. 152.

101 M. Schauer, *ABGB-ON1.04*, ed. A. Kletečka, M. Schauer, 2019, commentary § 268, No. 2, https://rdb.manz.at/document/1102_abgb_104_p0268, accessed October 22, 2022.

102 § 268 (1) ABGB.

103 § 268 (2) ABGB.

between them. Anyone of them may request a notary, an advocate or an adult protection association to be entered in the register as a representative. If no one offers to serve as a representative, the court should appoint a representative (court-appointed representation).[104]

The catalogue of matters for which a representative may be appointed is enumerative and is set out in § 269 ABGB.[105] These include such matters as (1) representation in administrative and administrative-court proceedings, (2) representation in court proceedings, (3) management of the adult's income, assets and liabilities, (4) conclusion of legal transactions for the purpose of meeting care needs, (5) deciding on and concluding contracts relating to medical services, (6) change of residence and conclusion of contracts relating to residence in care homes, (7) representation in other legal-personal matters relating to the deponent, and (8) conclusion of other legal transactions.

The form and registration of statutory representation is of the same nature as for elective representation. First of all, the constitutive effect of the registration should be mentioned.[106] Also in this situation, it is possible to raise an objection by a notary, an advocate and an adult protection association against the appointment of the representative.[107]

In principle, statutory representation is terminated in the same way as the elective representation, i.e. by death or court order. It also expires as a result of an objection of the represented adult or the representative. Unlike the elective representation, the statutory representation is time-limited and expires three years after the date of registration in the ÖZVV register, unless it is re-established in advance.[108]

IV. COURT-APPOINTED REPRESENTATION

Court-appointed representation is the equivalent of the former guardianship. An adult's representative may be appointed by the court in particularly justified situations, i.e. when the adult cannot manage his own particular affairs. The ABGB specifies that this refers to situations where a mental illness or other similar impairment interferes with the adult's ability to make decisions and conduct legal acts, resulting in a risk of harm to the adult. In addition, the person may have no other representative or may be unable or unwilling to choose one, and it is not possible to appoint a representative. The intention of the legislator was therefore to use this institution as a last resort.[109]

A court-appointed representative, as the name suggests, is appointed by the court *ex officio* or on application.[110] The court, in its order, is required to specifically indicate the

104 M. Hinteregger, *Familienrecht*, Wien, 2019, p. 283.

105 § 269 (1) ABGB.

106 C. Voithofer, *ABGB. Großkommentar zum ABGB – Klang-Kommentar – 239 bis 284, Erwachsenenschutz*, ed. A. Fenyves, F. Kerschner, A. Vonkilch, Wien, 2020, commentary § 263 ABGB, No. 16–19, pp. 461–462.

107 § 270 (2) ABGB.

108 § 246 (1) point 5 ABGB.

109 P. Barth, Das 2. Erwachsenenschutz-Gesetz. Eine Annäherung, *iFamZ*, March 2017, p. 145; M. Schauer, Die vier Säulen des Erwachsenenschutzrechts. Vorsorgevollmacht, gewählte, gesetzliche und gerichtliche Erwachsenenvertretung, *iFamZ*, March 2017, p. 153.

110 § 271 ABGB: *The court must appoint a court-appointed representative of adults upon request of an adult or ex officio if: 1. the adult is not able to manage specific affairs himself due to a mental illness or a comparable impairment of his capacity to make decisions without the risk of any resulting disadvantage for the adult concerned, 2. the adult does not have a representative for these matters, 3. the adult is not able, or does not want, to select a representative, and 4. the statutory representation of adults is not an option.*

scope of the representative's mandate, which refers to a specific affairs or type of affairs.[111] However, the court cannot appoint a representative for all of the adult's affairs. It is also not possible to define the scope of the affairs or type of affairs on the off-chance.[112] Once an action has been performed or the handling of affairs has been completed, the court is obliged to either limit the scope of the representative's mandate accordingly or to revoke it.[113] There is also nothing to prevent a court-appointed representative and a statutory representative from coexisting at the same time – both of course with a different scope of authority.[114]

In choosing a representative, the court should be guided by the needs of the represented adult and take into account his wishes, obtain the potential representative's consent to the appointment and take into account the nature of the matters to be dealt with by the representative.[115] As to the person who should handle this function, the Code provides for specific categories of people. In the first instance, these should be e.g. person who has been designated by the adult as a precautionary agent or who were to act as an elective representative.[116] It seems to be clear that for the legislator, it was important that the representative possibly were the person who the adult himself would have chosen and therefore in whom he would most likely have confidence.

As mentioned earlier, the effectiveness of a legal act performed by an adult, as well as his actions in administrative and judicial-administrative proceedings, may be subject to the approval of the representative and sometimes even of the court. The court must include such a reservation in the order appointing the court representative, together with an indication of the matters in which the confirmation is needed.[117] This additional restriction is intended to resist any serious risk to the adult person being replaced. Pending confirmation, the effectiveness of the action is suspended.

A court-appointed representative, like a statutory representative, may be appointed by the court for a maximum period of three years. On the other hand, nothing prevents the representative from being reappointed, if the need of the person being replaced so requires, before the expiry of that period. The cessation of the representation takes place in the court order (the revocation, German: Widerruf) and by such obvious events as the death of either party.[118]

This type of representative should be also registered in the ÖZVV register; however, because the appointment is made by court order, such registration has only a declaratory nature. The situation is analogous in case of the recall of the representative by the court.

111 § 272 (1) ABGB: *The court-appointed representative of adults can only be appointed for specific current matters or specific types of current matters which must be described in detail by court.*

112 P. Barth, I. Koza, *ABGB. Großkommentar zum ABGB – Klang-Kommentar – 239 bis 284. Erwachsenenschutz*, ed. A. Fenyves, F. Kerschner, A. Vonkilch, Wien, 2020, commentary § 272 ABGB, No. 3, p. 517.

113 § 272 (2) ABGB: *The court-appointed representation of adults must be limited or terminated following the completion of the entrusted matter. The representative of adults must submit a corresponding request to court without undue delay.*

114 P. Barth, I. Koza, *ABGB. Großkommentar zum ABGB – Klang-Kommentar – 239 bis 284. Erwachsenenschutz*, ed. A. Fenyves, F. Kerschner, A. Vonkilch, Wien, 2020, commentary § 272 ABGB, No. 92, p. 531.

115 H. Weitzenböck, *ABGB Praxiskommentar*, ed. M. Schwimann, G. E. Kodek, Wien, 2018, commentary § 273, No. 2–3, pp. 1472–1473.

116 For specific categories see. § 274 ABGB.

117 § 242 (2) ABGB.

118 § 245 (3) and § 246 (1), p. 5 ABGB.

3. Active legal capacity of the persons with disabilities and its restrictions in the light of statistical data before the UN Convention on the Rights of Persons with Disabilities was ratified and afterwards

Before 2018 and, even earlier, before the ratification of the CPRD, the number of the guardianships was still increasing. Since the entry into force of the 2. ErwSchG and the remodeling of the legal capacity system for adults with disabilities, there has been a clear downward trend in court representation (formerly guardianship). Prior to the entry into force of the 2. ErwSchG, 52,746 guardianships were established. At the beginning of 2022, the number of court-appointed representation was approximately 36,500. This is therefore a decrease of as much as 30% in the period of only four years. At the same time, there is an upward trend in the number of existing elective and statutory representations. From 2018 to 2022, the number has increased from 1,812 and 9,114 to 5,599 and 21,091, respectively. The increase is therefore more than 300% and 200%, respectively. And the number of the precautionary powers of attorney granted as of January 1, 2020, was 150,607.[119] These changes send a clear signal that the changes that came into force in 2018 are effective and the four-column model based, among other principles, on the principle of subsidiarity and autonomy is working.[120]

The institution of power of attorney granted to close relatives being the predecessor of statutory representation was not mandatorily registered in the ÖZVV register, and therefore, we do not have reliable data on their number prior to the entry into force of the 2. ErwSchG.

The average duration of adult protection proceedings was four months in 2021.[121]

4. The relations between private law restrictions of active legal capacity and protection of persons with disabilities under criminal law

The persons with disabilities, among other vulnerable groups of people, are protected by the Austrian penal law. In this context two dispositions of the Austrian Penal Code (hereinafter StGB) should be mentioned, i.e. § 154 and § 155. The scope of this provisions is broader and not limited only to the protection of the persons with disabilities.

§ 154 StGB penalizes the so-called money usury (*Geldwucher*). It refers to the situation when someone exploits another person's predicament, recklessness, inexperience or lack of judgement by promising or allowing to be granted to himself or to a third person a pecuniary advantage for a service which serves to satisfy a pecuniary need, in particular for granting or arranging a loan or for deferring a pecuniary claim or arranging such a deferral, which pecuniary advantage is strikingly disproportionate to the value of his own service. The StGB provides for such a crime a prison sentence of up to three years. From the perspective of the topic under discussion, the prerequisite of lack of judgement is relevant. This prerequisite is understood broadly. It occurs not only when a person is completely lacking judgement but also when a person lacks it to a significant degree.

119 I. Koza, 2. Erwachsenenschutz-Gesetz in Zahlen. Eine erste Zwischenbilanz per 1.1.2020, *iFamZ*, January 2020, p. 24.

120 Detailed see the following charts. Currently, only partial statistics are available. The Ministry of Justice of the Republic of Austria plans to present a report on the five years of the 2. ErwSchG in 2023, including also broadly statistics.

121 https://www.justiz.gv.at/home/justiz/daten-und-fakten/verfahrensdauer.1e7.de.html, accessed October 22, 2022.

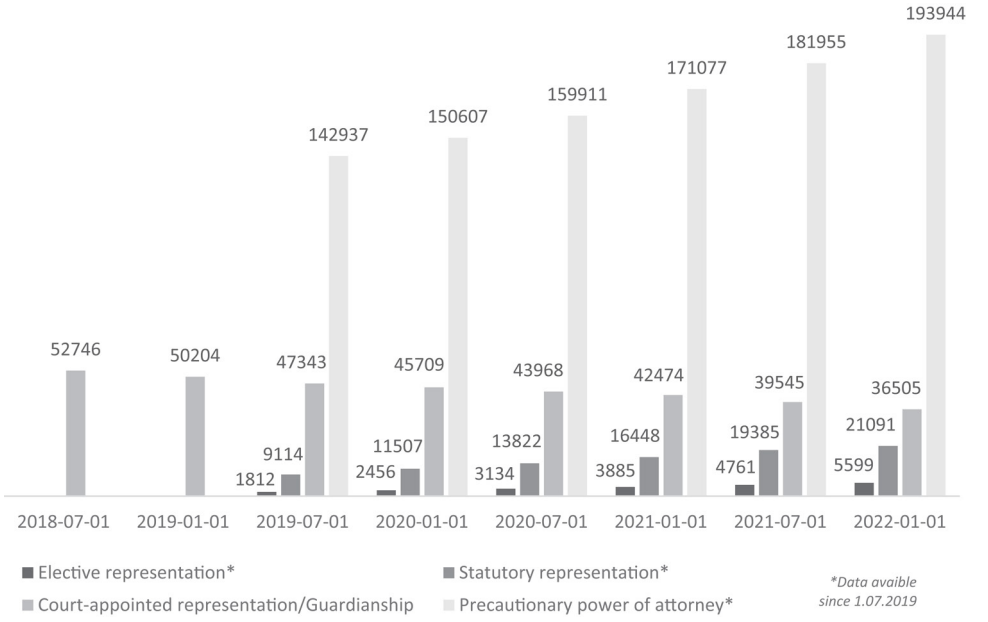

Chart 5.1 Representation of vulnerable persons in Austria since 2018.

Source: VertretungsNetz, Wien (Vienna)

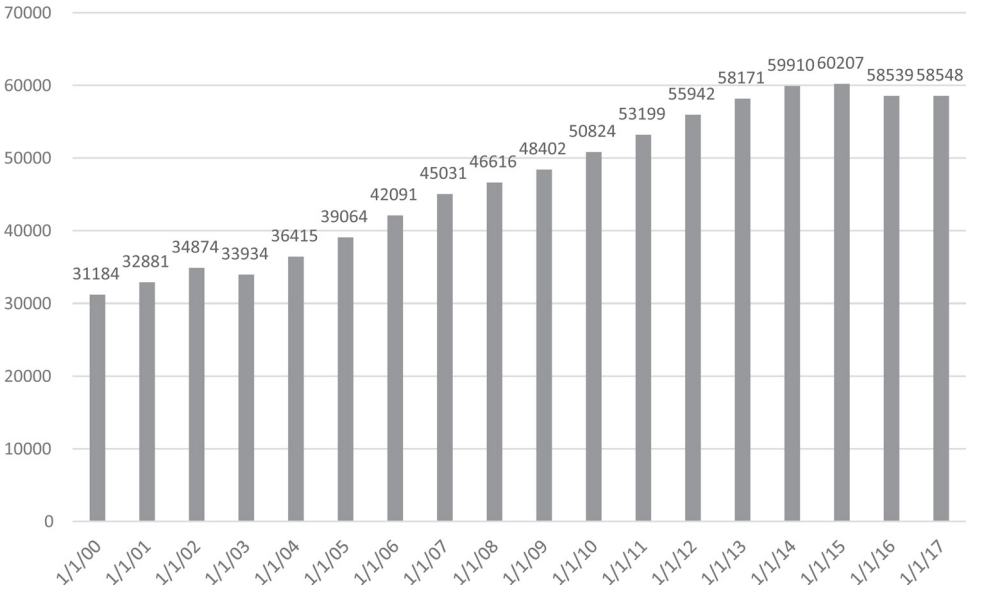

Chart 5.2 Guardianships in Austria, 2000–2017.

Source: A. Pilgram, G. Hanak, R. Kreissl, A. Neumann, Entwicklung von Kennzahlen für die gerichtliche Sachwalterrechtspraxis als Grundlage für die Abschätzung des Bedarfs an Vereinssachwalterschaft, Abschlussbericht Wien 2009; Bundesministeriums der Justiz; Bundesministerium für Arbeit, Soziales, Gesundheit und Konsumentenschutz (2019)

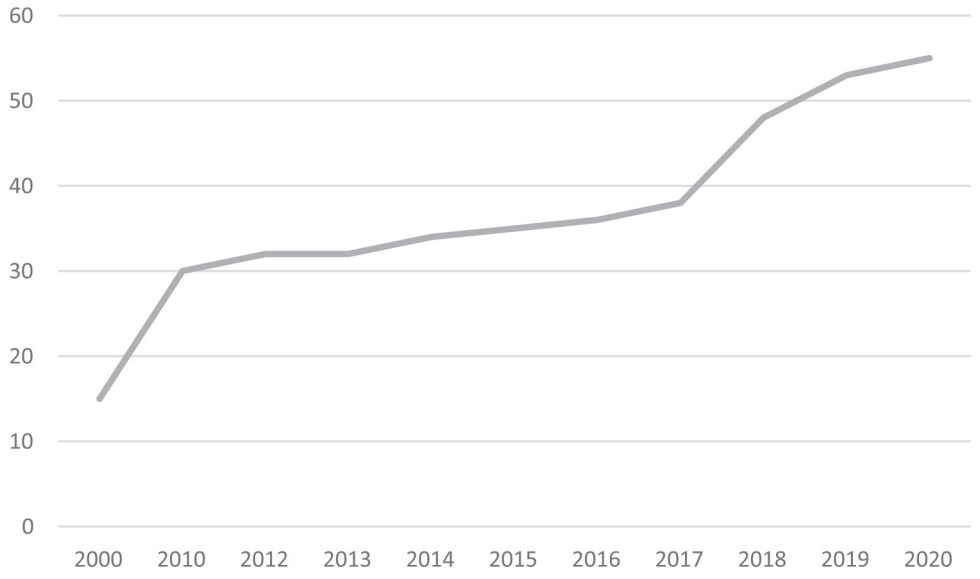

Chart 5.3 Expenditures in EUR Mio Adult's protection, patient advocacy and residents' representation in 2000–2020 (benefits in kind).

Source: Sozialschutz 1990–2020: Ergebnistabellen für Österreich, Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz, Die Anzahl Tabelle 71: Bewährungshilfe und Erwachsenenschutz

Lack of capacity for judgement is regarded as a significantly impaired ability to be led by rational motives and to correctly assess the mutual consideration and economic consequences of a legal transaction, which is often caused by a mental illness.[122]

§ 155 StGB, in comparison to its predecessor, deals with other examples of usury excluding monetary usury (*Sachwucher*). Also, this time, people who have a lack of judgement are protected by the Code. This prerequisite in the light of § 155 StGB is interpreted analogously. In addition, this type of usury must have the commercial aim to be penalized, which is not required in the case of money usury.[123]

Summary

So far, it can be concluded that the 2017–2018 amendment of the legal capacity provisions in the ABGB significantly takes into account the values and requirements guiding the Convention and primarily those expressed in its Article 12 of the CRPD. The Austrian legislator has essentially realised the requirement that people with disabilities are recognised as

122 M. Eder-Rieder, *Salzburger Kommentar zum Strafgesetzbuch*, ed. O. Triffterer, C. Rosbaud, H. Hinterhofer, Wien, 2022, commentary § 154 StGB, p. 11, No. 31; M. Nemec, A. Kern, *Wirtschaftsstrafrecht*, ed. M. Preuschl, N. Wess, Wien, 2018, commentary § 154 StGB, No. 3.

123 M. Eder-Rieder, *Salzburger Kommentar zum Strafgesetzbuch*, ed. O. Triffterer, C. Rosbaud, H. Hinterhofer, Wien, 2022, commentary § 155 StGB, p. 6, No. 20; E. Fabrizy, A. Michel-Kwapinski, B. Oshidari, *Strafgesetzbuch StGB und ausgewählte Nebengesetze. Kurzkommentar*, Wien, 2022, commentary § 155 StGB, No. 2.

subjects of the law and should enjoy the broadest possible legal capacity to act. Indeed, it should be noted that neither of the representation form or precautionary power of attorney automatically deprives an adult of legal capacity. The appointment of a representative or a precautionary agent does not prevent an adult, as long as he has the capacity to make a conscious decision, from acting independently. Furthermore, the scope of everyday matters that an adult can carry out on his own has been significantly widened by removing the prerequisite of their minority, as well as allowing incapacitated adults to effectively enter into legal transactions that only benefit them. This has ensured values such as party autonomy. It should be also noticed that all the forms of representation are subsidiary in nature. In particular, the most radical court-appointed representative should only be used in very exceptional situations.

Judging on the whole, it is doubtful whether any real progress is brought about by these reforms and whether they do not put additional burden and strain on the system and its representatives which do this kind of work out of an altruistic impulse. This doubt stems from the very fact that in the cases at hand it seems as if legislation tried to change the nature of things, to work wonders, which, to us at least, is impossible, as Celsus already knew 2,000 years ago (Digest 50, 17, 188, 1): *Quae rerum natura prohibentur, nulla lege confirmata sunt.*

6 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in the Catalan legal system

Núria Coch Roura

1. Why is it necessary for Catalonia to have its own chapter? Catalan legislative competence

The assumption of exclusive legislative competence in civil matters by the autonomous community of Catalonia may come as a surprise to outside observers, but it derives directly from the institutional framework established in the Spanish Constitution of 1978[1] (hereinafter, C78.), which allowed not only the preservation of the so-called historic rights but also their modification and development. This recognition affected not only Catalonia but also other Spanish territories, such as Aragon, the Balearic Islands, the Basque Country, Galicia and Navarre.

In the specific case we are dealing with, that of Catalonia, the legislative power stems from Article 149.1.8 and the 1st Additional Provision of the Constitution, as well as Article 9.2 of the 1979 Statute of Autonomy (EA79), which was subsequently replaced by Article 5 of the 2006 Statute of Autonomy (EA06). The publication in 2010 of Book II of the Catalan Civil Code on persons and the family[2] makes it necessary to consider the

1 Article 149.1.8 C78 The State has exclusive competence over the following matters: Civil legislation, without prejudice to the preservation, modification and development by the autonomous communities of civil, foral or special laws, wherever they exist. In any case, the rules relating to the application and effectiveness of legal rules, civil-legal relations relating to the forms of marriage, the organisation of registrers and public instruments or entities, the basis of contractual obligations, rules for the resolution of conflicts of laws and the determination of the sources of law, with respect, in the latter case, to the rules of foral or special law.

1st Additional Provision C78.

The Constitution protects and respects the historical rights of the foral territories.

The general updating of this foral regime shall be carried out, where appropriate, within the framework of the Constitution and the Statutes of Autonomy.

Article 9. EA79: The Generalitat of Catalonia shall have exclusive power over the following matters: (1) organisation of its institutions of self-government, within the framework of this Estatut, and (2) preservation, modification and development of Catalan civil law.

Article 5. EA06 Historical rights.

The self-government of Catalonia is also based on the historical rights of the Catalan people, on its secular institutions and on the Catalan legal tradition, which this Estatut incorporates and updates under Article 2, the second transitional provision and other precepts of the Constitution, from which derives the recognition of a singular position of the Generalitat in relation to civil law, language, culture, the projection of these in the field of education, and the institutional system in which the Generalitat is organised.

2 The Codi Civil de Catalunya has been created using the open code system through the publication of different laws: in 2003, Book I, on the structure and basic content, was approved; in 2006, Book V, on rights in rem; in 2008, Book III, on legal persons; and Book IV, on successions; in 2010, Book II on persons and the family, was published; and finally, in 2017, Book VI on obligations and contracts.

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application of Article 12 of the United Nations Convention on Persons with Disabilities to Catalan substantive law.

I will try concisely, and not exhaustively, to point out some of the historical circumstances that have been decisive in shaping the current constitutional framework.

The maintenance of its own legal institutions dates back to the Middle Ages, when the Iberian peninsula was divided into different kingdoms and territories.[3] Thus, in Catalonia – following the etymology of Roman law – the *Constitucions i altres drets de Catalunya* (Constitutions and other rights of Catalonia) were promulgated in 1422. In 1704, the Third Compilation of the Constitutions of Catalonia was published as an ordered summary of all the provisions considered applicable in legal matters, mainly those of civil law.

In the War of the Spanish Succession (1701–1714), Catalonia sided with Archduke Charles of Austria, who lost the battle against the Bourbon pretender.[4] The new King Philip V, by means of the Nueva Planta Decree, abolished[5] the historical rights of his adversaries. It is true that the derogation affected above all the jurisdictional sphere and left civil institutions in place:

> *In everything else that is not provided for in previous chapters of this decree, the constitutions that previously existed in Catalonia shall be observed; it being understood that they are newly established by this decree, and that they have the same force and effect as the individual provisions of the decree.*

In other words, the Nueva Planta Decree maintained the traditional Catalan civil law, but without the possibility of adapting and updating it, as it abolished the Catalan legislative bodies.

Surprisingly, some of them survived in the inheritance and family spheres. The permanence of these institutions, which are deeply rooted in the Catalan social structure, cannot be explained without their link to their own language,[6] which has remained alive in Catalonia throughout the centuries. The combination and preservation of these two elements, law and language, determine the idiosyncrasy of the Catalan people.

During the 19th century, when codification was undertaken in Spain, an attempt was made to enact appendices to the Spanish Civil Code that included the so-called historical and foral rights.[7] In the Catalan sphere, the work of the jurisconsult Manuel Duran

3 As I have already mentioned, Catalonia is not the only territory which maintained historical rights: in chronological order of the publication of the respective compilations, we find Vizcaya and Alaba (1959), the Balearic Islands (1961), Galicia (1963), Aragon (1967) and Navarre (1973).

4 The conflict ended with the capitulation of Barcelona (1714).

5 It is debated whether the derogation was legal since the Constitucions were not revoked according to the procedure they contemplated but according to the Decrees of the Nueva Planta. The following procedure is established in the Constitucions: *Statuim i ordenem que les Constitucions de Cathalunya, Capitols, i Actes de Corts no pugan esser revocades, alterades, ni suspeses, sinó en Corts Generals i si el contrari sia fet no tinga ningun força ni valor (lib. 1.tit.17.const.18.pag.52)*.

6 Catalan is a Western Romance language. It is the official language of Andorra and the official language of three autonomous communities in Spain: Catalonia, the Valencian Community and the Balearic Islands. It also has a semi-official status in the Italian territory of Alghero. It is spoken in the department of Oriental Pyrénées in France and in two other areas of Spain: the eastern fringe of Aragon and the Carche area in the Region of Murcia. The language evolved from Vulgar Latin in the Eastern Pyrenees area.

7 The *fueros* are laws or statutes granted in the Middle Ages to a territory.

i Bas[8] stands out. He wrote a report on the institutions of the Civil Law of Catalonia, a document that is still currently used as a plea for the Catalan legal system. Great admirer of Savigny, he successfully defended the continuity of the legal systems of the territories with their own law within the Spanish state at the Congress of Spanish Jurists in 1885.

Article 5 of the Foundation Act (Ley de Bases) of May 11, 1888, stipulated that the provinces and territories in which foral law subsisted would retain it for the time being in its entirety, without their legal system being altered by the publication of the Code, which would govern only as supplementary law in the absence of that which was applicable in each of those provinces and territories by their special laws. The government had to submit the corresponding appendices to the Cortes.

This did not take place until 1960, with Law 4/1960 of July 21 on the Compilation of the special law of Catalonia. A similar situation to the one of the Nueva Planta Decree was once again created, since the Compilation of Special Law provided for the systematisation of historical institutions, taking into account their validity and applicability in 1960. However, the same problems remained, the Compilation could not innovate because it had the same conservative purpose of traditional law as the Nueva Planta Decree, and Catalonia's legislative capacity was not restored. It should be noted, however, that the preamble to the Compilation of Special Law of Catalonia stated that

> this Act is a compilation of ancient laws that remain in force and are justified by their centuries-long permanence, by their undeniable observance and roots, and whose basis lies in being an expression of social and legal peculiarities with authentically national roots.

Two different working methodologies were followed in the codification of Catalan law: firstly, the system of an appendix to the Spanish Civil Code embodied in Law 40/1960[9] and the system of a compilation of its own – which would end up being imposed – as a consequence of the Decree of May 23, 1947 (the result of the National Civil Law Congress held in Zaragoza in 1946).

With the promulgation of the 1978 Constitution and the Statute of Catalonia (1979),[10] a decisive milestone was reached: the recovery by the Catalan Autonomous Community of exclusive legislative competence in civil matters – for their preservation, modification and development – is the culmination of a long-desired process.

It was necessary to adapt the Compilation of Special Law of Catalonia to constitutional principles and to resume the drafting of historical law in Catalan; the result was

8 Manuel Durán y Bas (1823–1907) is perhaps the most influential Catalan jurist of the contemporary era, father of the so-called Catalan legal school. Professor of Elements of Commercial and Criminal Law, Extension of Commercial and Criminal Law, and Philosophy of Law and International Law at the University of Barcelona. A great admirer of Savigny, he was the founder of the Spanish Commission of the Savigny Foundation and its president from 1869. He was a speaker at the Congress of Spanish jurists in 1885 and successfully defended the continuity of the legal regimes of the territories with their own law within the Spanish state; as a member of the General Codification Commission, he wrote the famous Report on the institutions of the civil law of Catalonia (1883), which has served as the basis for the various projects of appendices and compilations. He was Minister of Grace and Justice in 1889, and his great prestige and influence promoted the maintenance of the historical rights of Catalonia.

9 Law 40/1960 was drafted in Spanish, the only official language at the time.

10 In 2006, after a long and controversial process, a new Statute of Catalonia was approved, replacing the 1979 Statute as the basic institutional norm in Catalonia.

reflected in Llei 13/1984 of March 20, 1984, on the Compilation of Civil Law of Catalonia (Compilació de Dret Civil de Catalunya). The possibility of reforming and updating the law – within the competences established by the 1978 Constitution and the Statute of Autonomy – made possible the appearance of different legislative bodies – Llei de Successió intestada (1987), Codi de Successions (1991) and Codi de Família (1998) – which crystallised in the promulgation of the Codi Civil de Catalunya.

2. Presentation of the subject

The existence of functional and psychological diversity – that is, disability – is consubstantial to humanity.

There are three models of disability: a first model, which could be called dispensation, in which the causes of disability are assumed to be religiously motivated and in which people with disabilities are considered unnecessary for different reasons: because they do not contribute to the needs of the community or because they are the consequence of the anger of the gods, for example. As a consequence of these premises, society decides to do without people with disabilities, either through the application of eugenic policies or by placing them in the space destined for the abnormal and the poor classes, as objects of charity and subjects of assistance.

The second model is the so-called rehabilitative model. Its philosophy considers that the causes of disability are not religious but scientific (derived from the individual limitations of people). People with disabilities are no longer considered useless or unnecessary but only to the extent that they are rehabilitated. That is why the main aim of this model is to normalise people with disabilities.

Finally, a third model, known as the social model, considers that the causes of disability are neither religious nor scientific but are, to a large extent, social. This philosophy insists that people with disabilities can contribute to society in the same way as other people – without disabilities – but always based on valuing and respecting differences. This model is closely related to the assumption of certain values intrinsic to human rights and aims to promote respect for human dignity.

Both illness and other extrinsic and intrinsic factors or the normal deterioration of the body and mind lead to the coexistence in our society of people who do not conform to the predominant 'canon'. For centuries, these people have been marginalised or cornered, and the exercise of their legal capacity has been limited for most of them.[11]

The United Nations Convention on the Rights of Persons with Disabilities (hereinafter 'the Convention' or 'the CRPD') was adopted – after years of debate, especially around its Article 12 – on December 13, 2006, by the United Nations General Assembly. Article 12, on equal recognition as a person before the law, stated the following:

1. *States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*
2. *States Parties shall recognize that persons with disabilities have legal capacity on an equal basis with others in all aspects of life.*

11 A. Fernández de Buján, *Derecho Privado Romano*, 11th ed., Iustel, Madrid, 2022, p. 211 y ss; A. Fernández de Buján, *Derecho Romano*, 6th ed., Dykinson, Madrid, 2022, p. 156 ff.

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

Spain signed the Convention and ratified it, and it was incorporated into the Spanish legal system in 2008. However, most of the reforms promoted by the Convention were not completed until Law 8/2021[12] on the reform of civil and procedural legislation to support persons with disabilities in the exercise of their legal capacity (hereinafter Law 8/2021). From 2008 to 2021, this process of adaptation to the principles of the Convention has been developed in Spain.[13]

The cornerstone of the whole regulation of the Convention – as Professors Bravo Bosch and Iglesias Canle rightly point out in their work – is to be found in Article 12, which deals with the concept of 'legal capacity' and especially with 'the exercise of legal capacity' of persons with disabilities. In our legal tradition, the notion of legal capacity would be divided into two: legal capacity and capacity to act. However, the Convention does not admit the distinction between legal capacity and the exercise of legal capacity of persons with disabilities, advocating an indistinct treatment of legal capacity and the exercise of legal capacity[14] from the age of majority onwards.

12 I would like to thank Professors María Paz García Rubio, president of the Codification Commission of the section on persons of the Spanish Civil Code, and Mª del Carmen Gete-Alonso Calera, president of the Codification Commission of the section on persons of the Civil Code of Catalonia, for their help and indications.

13 See in this sense Implementation of art. 12 of the un convention on the rights of persons with disabilities into the legal system of Spain, from María José Bravo Bosch and Inés Celia Iglesias Iglesias Canle.

14 There are many works on this subject in Spanish civil law, without being exhaustive:

A. Fernández de Buján, Convención de 2006 sobre los derechos de las personas con discapacidad y proceso de incapacitación, *Revista de las Facultades de Derecho y Ciencias Económicas y empresariales*, no. 83–84, Especial 50 Aniversario ICADE, 2011, pp. 119–155; A. Fernández de Buján, Constitución y discapacidad: la protección de las personas con discapacidad como paradigma del estado social, *Revista Jurídica de la Universidad Autónoma de Madrid*, 2022, no. 46, 2022, p. II; A. Fernández de Buján, La Ley 8/2021, para el apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica: Un nuevo paradigma de la discapacidad, *La Ley*, November 26, 2021, pp. 1–13; A. Fernández de Buján, *Incapacitation and disability, Derecho de familia*, coord. G. Díez-Picazo Giménez, TR Civitas, España, 2011 [2012], pp. 1903–1954; García Rubio, M. Paz, Contenido y significado general de la reforma civil y procesal en materia de discapacidad, *Familia y sucesiones: Cuaderno jurídico*, 2021, no. 136, pp. 45–62, ISSN 1889–2299; García Rubio, M. Paz, Las medidas de apoyo de carácter voluntario, preventivo o anticipatorio, *Revista de Derecho Civil*, September 2018, vol. V, no. 3, p. 32; P. Cuenca Gómez, Sobre la inclusión de la discapacidad en la teoría de los derechos humanos, *Revista de Estudios Políticos (nueva época)*, October–December 2012, no. 158,

The Autonomous Community of Catalonia has legislative competence in the civil sphere and therefore has its own regulations, which is why this work is proposed separately from the one on the implementation of Article 12 of the Convention in the Spanish legal system. However, as Catalonia does not have competence in the procedural sphere, I refer in its entirety to the excellent work by Professors Bravo Bosch and Iglesias Canle, which logically includes the procedural aspects of the reform brought about by the reform of Law 8/2021.

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pp.103–137, Madrid, ISSN: 0048–7694; A. Castro-Girona Martínez, La Convención de los Derechos de las personas con discapacidad y la actuación notarial: El Notario "ombuds-man social", *Red Iberoamericana de expertos en Discapacidad y Derechos Humanos*, May 2011, www.derechoshumanos.aequitas.org/documentos.php; A. Castro-Girona Martínez, Nuevos retos para el Notariado tras la Convención de Nueva York, in: *Nuevas Orientaciones del Derecho Civil en Europa*, Aranzadi, 2015, pp. 165–182; S. De Salas Murillo, Repensar la curatela, *Derecho Privado y Constitución*, 2013, no. 27, pp. 11–48; Sofía de Salas Murillo, coord., *Los mecanismos de guarda legal de las personas con discapacidad tras la Convención de las Naciones Unidas*, Civil Law Monographs Collection, Dykinson, Madrid, 2013; C. Ganzenmüller Roig, Garantías y derechos de las personas con discapacidad especialmente vulnerables en la Convención de Nueva York. 2003–2012: 10 years of legislation on non-discrimination of persons with disabilities in Spain, in: *Studies in homage to Miguel Ángel Cabra Luna*, coord. Luis Cayo Pérez Bueno, Gloria Esperanza Álvarez Ramírez, 2012, p. 401 *et seq*., https://dialnet.unirioja.es/servlet/libro?codigo=520544; C. Guilarte Martín-Calero, El procedimiento para la adopción de las medidas de protección: Una propuesta de reforma, *Jornadas de Tossa*, 2012, vol. XVII; C. Guilarte Martín-Calero, *La curatela en el nuevo sistema de capacidad graduable*, McGraw-Hill, New York, 1997; C. Guilarte Martín-Calero, dir., *Comentarios a la Ley 8/2021 por la que se reforma la legislación civil y procesal en materia de discapacidad*, Thomson Reuters Aranzadi, España, 2021; A. Legeren-Molina, *Instrumentos de protección de la discapacidad a la luz de la Convención de las Naciones Unidas*, coord. María E. Rovira-Sueiro, Antonio Legerén-Molina, Sofía de Salas Murillo, María Victoria Mayor del Hoyo, España, 2015, pp. 63–224; C. Martínez de Aguirre, El tratamiento jurídico de la discapacidad mental o intelectual tras la Convención sobre los derechos de las personas con discapacidad, in: *Los mecanismos de guarda legal de las personas con discapacidad tras la Convención de Naciones Unidas*, coord. Sofía de Salas Murillo Civil Law Monographs, Dykinson, Madrid, 2013; A. Palacios Rizzo, La progresiva recepción del modelo social de la discapacidad en la legislación española, in: *Hacia un Derecho de la Discapacidad. Studies in Homage to Professor Rafael de Lorenzo*, Thomson-Reuters Aranzadi, Madrid, 2009, p. 143 et seq.; F. Santos Urbaneja, A propósito de los efectos en el Código Civil de la Convención de las Naciones Unidas sobre los derechos de las personas con discapacidad, *Conclusiones de las Jornadas de Fiscales Especializados en la protección de las personas con discapacidad y tutelas*, 2009, Estudios Jurídicos number, p. 21 et seq.; I. Vivas-Tesón, *Los 25 temas más frecuentes en la vida práctica del derecho de familia*, coord. Francisco Lledó Yagüe, Alicia Sánchez Sánchez, Oscar Monje Balsameda, vol. I, Dykinson, Madrid, 2011, pp. 363–374. In the field of Roman law: S. Castán Pérez-Gómez, *Discapacidad y Derecho Romano. Reus Ed*, November 2019, https://www.editorialreus.es/static/pdf/primeraspaginas_9788429021745_discapacidad-y-derecho-romano_reus.pdf; N. Coch Roura, Sistemas de protección para las personas con enfermedad mental, de las XII Tablas a la nueva reforma de la ley 8/2021, de 2 de junio, por la que se reforma la legislación civil y procesal para el apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica, referencia especial a la cura furiosi, *RGDR*, 2021, vol. 37; N. Coch Roura, Modification of the capacity to act: The cases of furiosus and prodigus from the xii tables to the United Nations convention on the rights of persons with disabilities, *RGDR*, 2018, no. 30; N. Coch Roura, La curatela a luz de la convención de las naciones unidas sobre los derechos de las personas con discapacidad y su antecedente en la cura furiosi, *La Notaria*, 2018, no. 1. This article was also published in *Revista General de Derecho Romano, RGDR*, 2018, no. 31; Martínez de Morentín, M. Lourdes, Tutela y Curatela en Derecho Romano, *RGDR*, 2020, vol. 35, p. 6; Martínez de Morentín, M. Lourdes, Anotaciones acerca de la discapacidad en Derecho Romano, *RGDR*, 2020, vol. 34; Martínez de Morentín, M. Lourdes, Régimen jurídico de la prodigalidad: de Roma a la Ley 8/2021 de reforma de la legislación civil y procesal en materia de discapacidad, *RGDR*, 2022, 38.

3. The application of the Convention in the Catalan Civil Code prior to Law 8/2021

Law 25/2010 of July 29, 2010, on Book II of the Catalan Civil Code (hereinafter CCCat) – which came into force on January 1, 2011 – included in its preamble the principles inspiring the Convention[15] and incorporated a wide variety of instruments[16] for protection[17] which aimed to cover a wide range of situations in which people with disabilities could find themselves:[18]

1. Under the rehabilitation and extension of parental authority (Article 236–33 CCCat), parents exercise the function of protection not as guardians but as holders of parental authority, although their powers will be determined by the content of the judgment. As holders of parental authority, they have no obligation to draw up an inventory or to render annual accounts, and they may grant a binding voluntary deed of delation/appointment to decide who will be the guardian of their child when they die or when their authority is extinguished – and therefore, this appointment must be respected by the judge with only few exceptions, such as not appointing the person appointed by the parents if this person currently suffers from dementia at the time when he/she is to exercise this protective function. Parental appointments shall be maintained in cases in which it is reasonable to assume that a measure of protection and support of a substitutive nature will be maintained throughout the life of the person with disabilities.

15 The incorporation of the principles of the CRPD could not be complete since the Spanish Civil Code maintained in its Article 199, the causes of modification of capacity, and also the Spanish procedural legislation retained the procedures for judicial modification of capacity, which were not eliminated until Law 8/2021, of June 2, which reformed civil and procedural legislation to support persons with disabilities in the exercise of their legal capacity.

16 These instruments have been affected by Decree-Law 19/2021 of August 31, adapting the Catalan Civil Code to the reform of the procedure for the judicial modification of capacity. Guardianship has been relegated to the age of minority, and curatorship has disappeared completely.

17 However, in Decree-Law 19/2021 and in the bill currently being processed in the Parliament of Catalonia, this terminology is left aside, as it is understood that, applying the principles of the Convention, persons of legal age – with or without disabilities – should not be protected but rather supported or helped. The idea of protection is reserved for minors. This paper will continue to use the notion of protection while examining legislation prior to Law 872021 and Decree-Law 19/2021.

18 Without being exhaustive, they deal with this matter in the Catalan sphere: Gete-Alonso y Calera, Ma C. Condición civil de la persona y género. Actualidad Civil. 2008. Gete-Alonso y Calera, Ma C. (Dir.) and Solé Resina, J. (Coord.) Tratado de derecho de la persona física Madrid, Civitas, 2013; Gete-Alonso y Calera, C. Ma, J. Solé Resina, *Actualización del derecho de filiación. Repensando la maternidad y la paternidad*, Tirant lo Blanch, Valencia, 2021; E. Arroyo, E. Bosch, J. Ferrer, E. Ginebra, A. Lamarca, S. Navas, A. Vaquer, *Dret Civil. Part General i dret de la persona*, Atelier Llibres Jurídics, Barcelona, 2013; E. Bosch Capdevila, P. Del Pozo Carrascosa, A. Vaquer Aloy, *Les institucions de protección de la persona en el Dret Civil de Catalunya*, Centre d'estudis jurídics i formació especialitzada, Departament de Justícia, Barcelona, 2012; J. Ribot Igualada, Las bases de la reforma del Código Civil de Cataluña en materia de apoyos al ejercicio de la capacidad jurídica, *Jornades sobre el nou model de discapacitat/coord. per Ma del Carmen Gete-Alonso Calera*, 2020, https://dialnet.unirioja.es/servlet/articulo?codigo=7652393; J. Ribot Igualada, The assistance regulated by the civil code of Catalonia, *Revista de derecho privado*, February 2014, no. 98, pp. 41–68; J. Ribot Igualada, The new "curatela" differences with the previous system and perspectives of operation, in: *Claves para la adaptación del ordenamiento jurídico privado a la convención de Naciones Unidas en materia de discapacidad*, dir. Sofía de Salas Murillo, María Victoria Mayor del Hoyo, 2019, pp. 215–252, https://www.revista-aji.com/wp-content/uploads/2022/04/AJI-16-1.pdf.

In the case of rehabilitation, the judgment may limit the rehabilitation to only one of the parents if justified by the child's interests.

As the judgment can determine the content and scope of the protective mechanism, it is perfectly feasible that the rehabilitated parental authority would operate as a curatorship or that the parents would only have to authorise certain acts that are specified in the judgment and would not represent their child in general. It is also possible for parental authority to be reinstated with the content of a curatorship, with one parent having the powers of personal care and the other parent having the powers of property.

What characterises the concept of parental authority in Book II of the CCCat is not the intensity of the power[19] but the nature of its holders, as it can only be exercised by the parents and for this reason it enjoys a differentiated treatment and only in the interest of the offspring.

2. Guardianship (Article 222–1 CCCat) as a substitute institution for the will – which could be either partial or total. A mechanism delimited in the image and likeness of parental authority whose typical characteristic is that it implies the representation of the ward or dependent, at least in the content determined by the sentence of modification of capacity. The regulation of guardianship includes the figure of the Guardianship Council, Article 222–54, a little known but decisive figure of control of the guardian.

   The voluntary disclosure or declaration of guardianship is also formulated (Article 222.4 CCCat), regulated in broad and flexible terms, which can also be applied to the case where a guardianship is necessary.
3. The patrimonial administrator as the legal representative of the person with a disability within the scope of his or her competences (Article 222–12 CCCat). Special administration is also regulated (donation, inheritance, Article 222–41 CCCat).
4. Curatorship (*curatela*) (Article 223–1 CCCat) is designed as a flexible and complementary figure of the will with a minimum content established by law, delegating to the courts the power to determine the maximum content in each specific case. The legislative technique used to regulate different institutions is interesting because it is a minimum or noninvasive regulation, with this flexibility the specific regulations in each case are left to the judicial system. It also incorporates a modality of curatorship in which the attribution of powers of administration to the curator is admitted, and in which the latter may even act as a representative (Article 223–6 CCCat), thus attenuating the differences between guardianship and curatorship.
5. As a great novelty, the voluntary figure of the assistant (Article 226–1 CCCat) was introduced as a support for people whose capacity has not been judicially modified. It was originally intended for elderly people without cognitive impairements but in whom the simple passage of time produces a decrease in their capacities. It also regulated the possibility that in certain cases the assistant could have powers of estate administration. This was a non-incapacitating and protective figure with a predominantly supportive and complementary content but which in its original wording could even have a certain representative content. Not only would the idea that the only institution that can be representative is guardianship be broken (we have already seen that the so-called

19 It is a departure from the concept of parental authority contemplated in the Spanish Civil Code, which had a markedly 19th-century character, configured as the broadest power that can be held over children. In the Civil Code of Catalonia, parental authority is not understood if it is not implemented in the interests of the children and not as a display of power and authority.

curatorship can be representative) but also, in this case, the substitution would not have its origin in a sentence of incapacitation. This is a sign of the flexibility of the institutions that were shaped with Law 25/2010 of July 29.

6. Preventive powers of attorney (Article 222–2 CCCat) is a voluntary instrument for the self-regulation of persons, without requiring judicial ratification.
7. *De facto* guardianship (*guarda de hecho*) (Article 225–1) refers to the care of a minor or a person in whom there were causes for modification of capacity, without originally having any legal title or designation. We can also see a sign of flexibility in this institution since the ruling that establishes it can provide it with the appropriate content to the specific needs.
8. The judicial defender of protector (*defensor judicial*) has two possible forms (Article 224–1):

   8.a. a 'transitory' figure as long as the guardianship or curatorship is not constituted, but also when for any reason the guardian or curator does not exercise his or her duties;

   8.b. where there is a conflict of interest between the holder of the protection measure and the protected person.

9. Autonomous community protected assets (*patrimonio protegido autonomico*). A figure different from the one regulated in the national Law 41/2003 of November 18, on the patrimonial protection of people with disabilities, in terms of its legal configuration but not in terms of its purpose, is the patrimonial protection of people with disabilities. In the autonomous Catalan legislation, it is configured as a fiduciary estate or *trust*.

In short, the entry into force of Book II maintained the traditional institutions of protection linked to incapacitation, but in a much more malleable form and, in addition, it regulated others that operated or could eventually operate outside it, in accordance with the observation that in many cases the person with a disability or their relatives prefer not to promote this disability. This flexibility in institutions and diversity of protection regimes was in line with the duty to respect the rights, will and preferences of the individual and with the CRPD principles of proportionality and tailoring of supports and safeguards to the circumstances. In particular, the references to the fact that any rule or ruling affecting a person with a disability should be interpreted in the least restrictive sense for personal autonomy, requiring to take into account his or her personality, wishes and expectations.

The irruption of the Catalan autonomous regulation meant an important advance for the legal equal treatment of people with disabilities; for the first time in Spain, there were people with disabilities that, thanks to the figure of the assistant, could enjoy a support, without the need to be judicially incapacitated, maintaining both their legal capacity and the exercise of the latter.

4. Development of jurisprudence in the Catalan sphere until 2021

Based on the diversity of protection measures – to which we have referred in the previous section – and the legislative technique of establishing in the autonomous text-only minimum contents, the Catalan courts carried out an important task of elaboration and adaptation of the protection measures to the specific cases, preferably choosing the institution of curatorship as a capacity modification measure which is more respectful with the rights

of persons with disabilities and anticipating the application of the principles of the CRPD. We will specifically analyse two judgments of the Provincial Court of Barcelona (18th section) which has been a pioneer in terms of the CRPD: the first examines the institution of curatorship and the second recognises, for the first time, the right to vote of persons with disabilities.

4.1. Judgement of the Provincial Court of Barcelona (SAP), 754/2019 of November 13

The magistrate-speaker (*magistrado-ponente*) was Francisco-Javier Pereda Gámez, who gave a detailed and in-depth analysis of the matter.

The appeal concerned a verdict in which the person concerned – who was suffering from a mental health pathology – was declared partially incapacitated and was subject to a guardianship that only affected the estate sphere in the concrete and specific terms set out in the judgment of the court of first instance.

The speaker (*ponente*) gives a sharp and thoughtful review of the different issues raised. He begins with a reference to the doctrine of the Supreme Court regarding the reception of the Convention. He continues distinguishing between guardianship and curatorship, a reflection which we reproduce in order to analyse the decision in its entirety. The speaker states, for the Supreme Court, 'guardianship is the most intense protective measure, the person under guardianship lacks capacity, it involves a legal representation of the affected person, and the High Court maintains that it is reserved for total incapacitation'. On the contrary, 'curatorship means that the person under curatorship is capable, but requires a complement of capacity, it is the least intense support that, without replacing the person with disability, helps him/her to make decisions that affect him/her, it is conceived in more flexible terms; it is designed for partial incapacitation'. In short, the case law of the Supreme Court characterises curatorship as 'a flexible institution characterised by its content of assistance and supervision, not by its personal or patrimonial scope or by the extent of the acts in which it is called upon to be provided'.

As the aforementioned judgment rightly stated, the scope and extent of incapacity was regulated in the Spanish Civil Code – before Law 8/2021 – and the regulation of the specific protective measures was contained in the Catalan Civil Code (CCCat). It is precisely for this reason that the statements of the Supreme Court relating total incapacitation to guardianship and partial incapacitation to curatorship, according to the Barcelona SAP, 'were not clearly transposed to the Catalan legal system'. The verdict stated,

> The Catalan High Court of Justice assumed the interpretative line of the High Court, but with some particular clarifications of the specific Catalan autonomous legislation – which came into force after the ratification of the CRPD. The Catalan High Court of Justice clearly establishes that curatorship can be extended to acts of personal assistance and health.

From the legislative precedents examined by the ruling, the Catalan autonomous legislation already configured the curatorship as a much more elastic and accommodating institution than the homonymous regulated in the Spanish Civil Code; it was structured as a complement to capacity in all acts that by law or because the court ruling stipulated it, the person with disabilities could not carry out on their own, being able – if the court decision so determined – to even exclude the concurrence of a guardian in certain acts. Furthermore, although the general principle prevailing in national legislation established that the guardian did not exercise the legal representation of the person subject to the

protection measure, exceptionally, in the judgment of the Barcelona Court of Appeal we are examining, it states that 'depending on the degree of discernment or judgement of the incapacitated person and for specific legal acts', the curator could be the legal representative on an *ad hoc* basis, as it was already established in the autonomous legislation prior to the Civil Code of Catalonia, specifically Article 75 of Law 39/91.

The ruling of the Provincial Court (hereinafter AP) subsequently referred to the judgment of the Catakab High Court of Justice of Catalonia[20] (hereinafter TSJC) of June 4, 2018, which refers to the principles already established in the previous legislation and which were also included in the preamble of Book II of the Catalan Civil Code. Among them, we find the possibility of admitting that representation functions can be conferred to the curator in the patrimonial administration sphere, the factual specification is produced in Article 223–6 of the CCCat. And in the opposite sense, it also includes the possibility of exempting the guardian and the curator from representation in some cases.

The ruling of the Barcelona Provincial Court 754/2019, of November 13, also argued the possibility that this exceptional function of representation could be extended to other areas outside property or patrimonial administration, for two reasons. Firstly, the aforementioned STSJC of June 4 invoked, where it was stated that 'capable' persons can request the courts to appoint an assistant ex Article 226 CCCat when their physical or mental faculties are diminished so that this person can receive the information or give consent. Secondly, (articles 212-1 and 212-2 CCCat), this consent can also be given by relatives. Based on the above assumptions, ruling 754/2019 concludes that the function of exceptional representation can be extended to other areas if it is entrusted to a curator who has been granted this possibility by a court decision.

The speaker expresses his full agreement with the Catalan High Court of Justice (TSJC) when it states,

> This means that the functions of the guardian or curator are not always as clear as they might seem, the fundamental factor in establishing one or the other – without denaturalising them – being the intensity of the modification of the personal capacity that has been declared and the type of protection that [the incapacitated person] needs according to his particular characteristics and the pathology he suffers.

In his conclusion, the speaker of the ruling – highlighting in a conciliatory mood – avoids the controversy with the Supreme Court as to whether a total incapacitation must always correspond to a guardianship and a partial incapacitation to a curatorship and does so because he chooses a solution that is more respectful of fundamental rights while highlighting his experience in the field of persons with disabilities.

Thus, he rightly states that

> it is utopian to think that always and, in all cases a protective measure of capacity configured as a complement to it will be sufficient in all cases in which decisions need to be taken. We find many cases in which the person to be protected is neither aware of his or her pathology nor able to form his or her own will, even with a supplementary aid.

20 The High Court of Justice completes the judicial organisation in the territorial scope of the Autonomous Community of Catalonia, without prejudice to the jurisdiction corresponding to the Supreme Court and to those matters requiring constitutional guarantees, which are the competence of the Constitutional Court.

Therefore, taking into account the legislative background, which has been maintained and reinforced in Book II, in the jurisprudence of the Catalan Provincial Courts and especially in the judgement of the Catalan High Court of Justice of June 4, 2018, the speaker solves the problem raised, extending the traditional curatorship as a complement to configure an exceptional representative curatorship. The speaker resorts to this possibility only in those cases in which it is understood that the dual scheme-curatorship as a complement, not only entails a support, but may even harm the affected person himself.

In the specific case dealt with in the judgment, there was an underlying problem of administration close to what the doctrine has been considering prodigality, which is why the magistrate expressly includes this case as a necessary case of intervention and representation by the guardian 'when there is a risk that the affected person may squander his assets' and rightly argues,

> A curatorship with representative and substitution powers must be possible in some area in which, due to the circumstances of the illness, it is not appropriate simply to complement the decision-making capacity or when this complement is expected to be difficult to implement, blocked by incapacity or unavoidable confrontation between the guardian and the affected person, due to the circumstances of the illness, it is not appropriate to simply supplement the decision-making capacity or when this supplement is expected to be difficult to implement, blocked by an incapacity or an unavoidable confrontation between the curator and the ill that could affect his health or endanger his assets.

At the end of the ruling, it was recognised that the protected person will be exempted from the curatorship in provisions of up to 80 euros per week.

We therefore understand that curatorship was preferred as a more respectful institution than guardianship, and surprisingly, in the same judgment, it was given a triple treatment. First, in terms of content, it was not limited to the traditional patrimonial sphere but could reach any sphere of the individual (health) with the limitations established in the court ruling. Second, the curatorship was projected beyond its main complementary function towards a representative modality, provided that it was expressly included in the court ruling and provided that a prejudice to the subject in need of protection could be inferred from the dual scheme. And third, the institution could disappear in cash provisions of up to 80 euros per week.

This ruling reflected the flexibility of the guardianship contemplated in the Civil Code of Catalonia, which adopts different virtualities with the main purpose of restricting the use of guardianship to those cases where it is strictly essential. It is also worth highlighting the detailed technical-legal wording of the court ruling, the famous 'tailor-made suit',[21] which is configured as a mechanism for the defence of the rights of people with disabilities.

4.2. Judgement of the Provincial Court of Barcelona, (SAP) 183/2014 of March 13

The appeal was about a verdict that considered that the total incapacitation of a person was appropriate and, taking into account the deterioration of the person's mental faculties,

21 This expression was used for the first time in Supreme Court Judgement 282/2009 of April 29, 2009, for which Dr. Encarna Roca Trías was the rapporteur, and its use has become widespread.

justified the deprivation of the right to vote because the judge considered that the person in question was unaware of the political parties and chose without any known criteria.

This ruling – which was the first to give this treatment to the right to vote in Catalonia – begins by analysing the relevant international legislation, in particular:

1. The CRPD, specifically Article 12 and particularly Article 29, which recognised the protection of the right of persons with disabilities to cast their vote in secret in public elections and referenda without intimidation (also to participate fully and effectively in political and public life and even the right to be elected).
2. The Recommendations of the Council of Europe n. R (92) 6, of April 9, 1992, and 1185 (1992), of May 7, preached that governments and competent authorities were invited to seek and encourage the effective and active participation of disabled people in community and social life, and Recommendation (2006) 5 of April 5, for the promotion of the rights and full participation of disabled people in society, defended that the participation of all citizens in the life in political and public life and in the democratic process was essential for the development of democratic societies and that society should reflect the diversity of its citizens and draw on their multiple experiences and knowledge. It was therefore argued that it was important for persons with disabilities to be able to exercise their right to vote and to participate in such activities.
3. The case law of the European Court of Human Rights was already sensitive to the protection of the right to vote and in the judgement of May 20, 2010, handed down in Case n. 38832/06, Alijos Miss v. Hungary stated (para. 42), that the Court could not admit that the imposition on any person under curatorship of an absolute ban on voting, irrespective of their actual faculties was unacceptable. And furthermore, where a restriction of fundamental rights applies to a particularly vulnerable group in society, which has suffered considerable discrimination in the past, such as mentally disabled persons, then the state has a rather narrow margin of appreciation, and there must be very strong reasons for imposing such restrictions (and quotes other cases on discrimination – on grounds of sex [Aduláis, Cabales and Barandal v. United Kingdom], race [D.H.R. v. United Kingdom, D.H.R.; D.H.R. United Kingdom; D.H. and Others v. Czech Republic] and sexual orientation [E.B. v. France] – insofar as certain classifications are justified by the fact that these social groups have in the past been subjected to unfavourable treatment leading to their exclusion from society). It therefore condemns uniform applications without the possibility of individually assessing their capacities and needs (Chtoukatourov v. Russia, March 27, 2008).

That is to say, at the time of the ruling in question, only the CRPD unequivocally defended the right to vote for persons with disabilities. What European law did was to condemn the systematic application of deprivation of persons with disabilities.

With regard to national legislation, Article 23.1 of the Spanish Constitution established and currently establishes as a fundamental right the right to participate in public affairs as a manifestation of the principle of political representation. However, Organic Law 5/1985 of June 19, 1985, on the General Electoral System, despite preaching in its Preamble that the right of vote should be exercised in full freedom and that the people should freely make the majority decision on government affairs, Article 3[22] regulated exceptions to the

22 Paragraphs b and c of the article were subsequently deleted by Organic Law 2/2018.

exercise of the right of vote. Among these exceptions were those declared incapable by virtue of a final court ruling, provided that the ruling expressly declared them incapable of exercising the right to vote, and those interned in a psychiatric hospital with judicial authorisation, provided that the judge expressly declared them incapable of exercising the right to vote.

The judgment also invoked the principles set out in the preamble to the Catalan Civil Code and, on the basis of these legal grounds, concluded that the right to political participation, through the exercise of the right to vote, could not be discriminated against on the grounds of mental illness nor could a judge establish a standard of requirement of cognitive or intellectual capacities superior to those predictable in any citizen to prevent the exercise of the right to vote so that only very specific, motivated, justified reasons, in the interests of the alleged disabled person or for reasons of public order, could legitimise a limitation of the right to vote. A limitation of this right could not be justified on the basis of the disabled person's lack of knowledge of political options or on the basis of criteria of irrationality in the choice of options.

Surprisingly, although the applicable legislation for the determination of the right to vote was basically the same (Article 23.1 of the Spanish Constitution and Article 3 of Organic Law 5/1985 of June 19, 1985, on the General Electoral System), the courts of other Spanish autonomous regions and the Spanish Supreme Court maintained very distinct positions from the one of the Barcelona Provincial Court[23] until the modification of the electoral legislation.

5. The application of the CRPD in Catalan legislation after Law 8/2021

Since 2018, the Persons and Family Section of the Codification Commission of Catalonia has undertaken the task of reviewing Catalan civil legislation with the aim of updating it fully with the principles and the new concept of a legal capacity. Although the most important part focuses on the adaptation of the Second Book of the Civil Code of Catalonia, the cross-cutting nature of disability meant that all regulations referring to it had to be reviewed.

Prior to this, the Codification Commission's Section on Persons and the Family discussed and drafted a first text of these bases in order to make it available to all persons, natural and legal persons and institutions directly affected, so that they could participate in the reform project. The basis for the reform of the Catalan Civil Code in matters of support for the exercise of legal capacity were the first instrument for starting a broad dialogue between all those involved. Subsequently, the drafting of a preliminary draft bill titled Preliminary Draft Bill for the modification of certain articles of the Catalan Civil Code regarding support in the exercise of legal capacity was undertaken, which is currently at an initial stage.

The enactment of national Law 8/2021, of June 2, reforming civil and procedural legislation to support persons with disabilities in the exercise of their legal capacity (Law 8/2021), made it necessary to rethink the process that was being carried out in parallel in Catalonia.

23 See in this sense the "*Caso Caamaño Valle contra España*" in Implementation of art. 12 of the un convention on the rights of persons with disabilities into the legal system of Spain, from María José Bravo Bosch and Inés Celia Iglesias Iglesias Canle.

Law 8/2021 entailed the disappearance of the causes of incapacity and the elimination of the distinction between legal capacity and capacity to act as regards application in the field of disability, as well as the abolition of the procedure for judicial modification of capacity. These circumstances made it necessary to urgently adapt Catalan legislation to the CRPD provisions in order to avoid legal loopholes.

As a matter of urgency, the Catalan government enacted Decree-Law 19/2021 of August 31, adapting the Catalan Civil Code to the reform of the procedure for the judicial modification of capacity by virtue of Law 8/2021. In its explanatory memorandum, it was already indicated that while the process of adaptation of the Catalan Civil Code was not concluded with the approval by the Parliament of Catalonia of the regulations implementing a new regime fully adapted to the CRPD, it was necessary and urgent to establish a transitional regime, derived from the suppression of the judicial modification of capacity operated by Law 8/2021.

5.1 Decree-Law 19/2021

The decree-law came into force on September 2 2021, in order to avoid the legal vacuum that would have occurred on September 3, with the entry into force of Law 8/2021. As we have outlined in the explanatory memorandum, it was already stated that the law that would adequately adapt the provisions of the Catalan Civil Code should be published within a reasonable period of time. The decree-law was therefore provisional in terms of its temporary application,[24] but this provisional nature did not affect the content, since the principles and core rules for the definitive reform were already set out in the decree-law.

In terms of its structure, the decree-law consists of an explanatory memorandum that introduces the content of the regulation, which boils down to two articles – specifically, Article 2 contains the modification of Chapter II of Title II of the Catalan Civil Code (CCCat) – three transitory provisions and two final provisions.

The most important innovations or regulatory cores can be highlighted as follows:

1. Recognition of the capacity of all persons

The explanatory memorandum states,

> The abolition of the judicial modification of capacity implies a new concept of the legal capacity of the person . . . it is necessary to recognise that all persons with disabilities have legal capacity on equal terms with all other citizens, in all aspects of life, and that all persons with disabilities must have access to the support measures they may need to exercise their legal capacity . . . it is urgent to establish a transitional regime to respond to the needs that arise once the judicial modification of capacity has been abolished.

These statements are reflected in Article 1[25] of the decree-law.

24 The government undertook to present, within 12 months of its entry into force, a draft law amending the Catalan Civil Code in support for the exercise of the legal capacity of persons with disabilities (Final Provision Four), but this deadline has not been met.

25 Article 1. Provision of support in accordance with Catalan civil legislation: 'A person of legal age who needs support to exercise his or her legal capacity under equal conditions may request the constitution of the assistance regulated by articles 226–1 to 226–7 of the Civil Code of Catalonia'.

2. Elimination of legal representation of persons of legal age

The entry into force of Decree-Law 19/2021 entails the abolition of guardianship, curatorship and extended and rehabilitated parental authority for persons of legal age. The reason for the disappearance of these institutions – formerly known as protective measures – is based on the fact that it is not possible for there to be a person – a legal representative – to replace the will of the person with a disability who needs support for the exercise of his or her legal capacity.

This eradication is set out in the Second Transitional Provision[26] and in the Third Final Provision.[27]

3. Disappearance of prodigality

The recognition of full legal capacity for all persons and the exercise of this legal capacity inevitably entails the elimination of prodigality as a limitation on the individual's property or patrimonial rights.

The decree-law indicates that those already constituted should be extinguished. The truth is that to find a ruling – both in Catalonia (since the entry into force of Book II of the Civil Code of Catalonia) and in Spain – that based the modification of capacity solely on prodigality, one has to go back to the 1960s. We can find limitations in the patrimonial sphere of individuals, but these disorders in patrimonial management had to be caused by some kind of pathology, normally of mental health, which gave rise to it. In short, although the decree-law provides for the extinction of curatorship constituted due to prodigality, *de facto* the curatorships that are extinguished for this reason will be practically none.

4. Review of the judicial measures in force

If, as mentioned, the disappearance of prodigality made it necessary to review the judgments that could be based on it, the same happened for the abolition of guardianships and curatorships, and the extended and rehabilitated parental authority made it necessary to re-examine the judgments in force that contemplated these institutions in the light of the new regulatory framework. In the interim of these revisions, the principles of the decree-law oblige persons exercising guardianship to act in accordance with the new paradigms. The most important consequence is that guardians should not act in substitution of the will of the person with a disability, even if the revision of the guardianship (or curatorship as the case may be) had not taken place at that time.

26 Second Transitional Provision: from the entry into force of this decree-law, guardianship, curatorship and extended or rehabilitated parental authority regulated by the provisions of Title II of Book Two of the Civil Code of Catalonia may not be constituted in relation to persons of full age.

27 Third Final Provision: all references in current legislation to guardianship, curatorship or extended or rehabilitated parental authority for persons of legal age shall be understood to refer to the new system of support measures for persons with disabilities established by this decree-law.

Fortunately, the deadlines[28] that the decree establishes to carry out this review are the same as those of national Law 8/2021, in order to avoid mismatches. In this sense, the need to adapt to the new paradigms on capacity in the face of possible institutional conflicts at national- and autonomous-community-level predominates.

5. Support measures in the new configuration

Catalan legislation definitively opted for the institution of assistance,[29] which already existed in the Catalan Civil Code. This institution was one of the great innovations of the Catalan Civil Code, however, we must be aware that assistance had a very residual character until the entry into force of this decree-law. The original wording of the assistance in Book II of the CCCat referred to very limited cases, whereas after the entry into force of the decree-law it was configured as a universal support mechanism. Thus, the regulation of assistance had to be redrafted in order to accommodate the diversity of situations in which a person with a disability could require support for the exercise of his or her legal capacity. This led to the new wording of Articles 226–1 to 226–8 CCCat:

Article 226–1. Concept and type of designation.

1. *A person of full age may request the designation of one or more persons to assist him or her in accordance with the provisions of this Chapter, if he or she needs it in order to exercise his or her legal capacity on an equal footing.*
2. *The constitution of the assistance can be carried out by the execution of a notarial deed or in accordance with the voluntary jurisdiction procedure for the provision of judicial support measures for persons with disabilities.*
3. *The judicial designation of the assistance may also be requested by the persons legitimised by the Voluntary Jurisdiction Act to promote the file for the provision of judicial measures of support for persons with disabilities, in the event that it has not been previously constituted voluntarily, and provided that there is no preventive power of attorney in force that is sufficient to provide the support that the person requires.*
4. *The exercise of care functions must correspond to the dignity of the person and must respect his or her rights, wishes and preferences.*

28 Second Transitional Provision: review of the judicial measures in force:

2. Guardianships, curatorships and extended or rehabilitated parental powers constituted prior to the entry into force of this decree-law shall be maintained until the review referred to in paragraphs 3 and 4.
3. Persons with judicially modified capacity, parents with extended or rehabilitated parental authority and persons exercising guardianship or curatorship may at any time request a review of the measures that have been established to adapt them to the suppression of the judicial modification of capacity and to apply, if applicable, the assistance regime regulated by Articles 226–1 to 226–8 of the Civil Code of Catalonia. The review of the measures must be carried out within a maximum period of one year from the application.
4. In the absence of the request mentioned in paragraph 3, the review must be carried out ex officio by the judicial authority or, at the request of the Public Prosecutor's Office, within a maximum period of three years from the entry into force of this decree-law.

29 Guardianship is limited to the area of minority.

Article 226–2. Judicial designation of the person who has to provide assistance.

1. *The will, wishes and preferences of the person concerned shall be taken into account with regard to the appointment of the person who is to provide the required assistance.*
2. *When the assisted person is unable to express his will and preferences, and has not granted the document referred to in article 226–3, the designation of the person providing the assistance must be based on the best interpretation of the will of the person concerned and of his preferences, in accordance with his life history, his previous manifestations of will in similar contexts, the information available to persons of trust and any other consideration relevant to the case. In such a case, it is obligatory to communicate to the judicial authority all the circumstances that are known in relation to the wishes expressed by the person assisted.*
3. *Exceptionally, by means of a reasoned decision, what has been stated by the person concerned may be disregarded when serious circumstances unknown to that person are established or when, in the event of appointing the person indicated by that person, he/she would be in a situation of risk of abuse, conflict of interest or undue influence.*
4. *The judicial authority may establish such control measures as it deems appropriate in order to ensure respect for the rights, will and preferences of the individual, and also to prevent abuse, conflicts of interest and undue influence.*
5. *The appointment of the person assisting and the assumption of office must be recorded in the civil registry by means of the communication of the corresponding court decision.*
6. *The assistance measure shall be reviewed ex officio every three years. Exceptionally, the judicial authority may set a longer review period, which may not exceed six years.*

§ 226–3. Notarial appointment by the person himself.

1. *Any person of full age, in a public deed, in anticipation or appreciation of a situation of need of support, may appoint one or more persons to exercise assistance and may establish provisions with respect to the functioning and content of the appropriate support regime, including with respect to the care of his person. It may also establish such control measures as it deems appropriate in order to ensure their rights, respect for their wishes and preferences and to prevent abuse, conflicts of interest and undue influence.*
2. *The granting of a subsequent act of designation of assistance revokes the previous act in all respects in which it modifies or is incompatible with the previous act.*
3. *In the case of voluntary designation of assistance, substitutions may be made. If several persons are appointed and the order of substitution is not specified, the one named in the subsequent document is preferred and, if there is more than one, the one appointed first.*
4. *The designations of assistance granted in a public deed must be communicated to the civil registry for registration in the individual register of the person concerned and also to the register of non-testamentary appointments of support for legal capacity or the one that replaces it.*
5. *The judicial authority, in the absence or due to insufficiency of the measures taken voluntarily, may establish other supplementary or complementary measures. Exceptionally, by means of a reasoned decision, it may dispense with what the person concerned has stated, when serious circumstances unknown to him/her are accredited or when, in the event of appointing the person he/she has indicated, he/she would be in a situation of risk of abuse, conflict of interest or undue influence.*

Article 226–4. Content of the assistance constituted judicially.

1. *The person's wishes, desires and preferences must be taken into account with regard to the type and extent of assistance.*
2. *In the decision appointing the assistance, the judicial authority must specify the functions to be performed by the person providing the assistance, both in the personal and property spheres, as appropriate.*
3. *The judicial authority, in a reasoned decision and only in exceptional cases in which it is indispensable due to the circumstances of the person assisted, may determine the specific acts in which the person providing assistance may assume the representation of the person assisted.*

Article 226–5. Ineffectiveness of acts of the person assisted.

Legal acts that the person assisted makes without the intervention of the person assisting him, if such intervention is necessary in accordance with the voluntary or judicial measure of assistance, are annullable at the request of the person assisting, of the person assisted and of the persons who succeed him by inheritance within four years of the conclusion of the legal act.

Article 226–6. Legal regime.

The rules of guardianship apply to care insofar as they do not conflict with the care regime, interpreted in accordance with the International Convention on the Rights of Persons with Disabilities.

Article 226–7. Modification of assistance.

1. *The persons entitled to request the establishment of assistance may request its modification or revision if there is a change in the circumstances that gave rise to it.*
2. *If the person assisting becomes aware of circumstances that allow for the termination of the assistance or the modification of its scope or functions, he/she shall inform the judicial authority.*

Article 226–8. Termination of assistance.

1. *Assistance shall cease for the following reasons:*

   (a) on the death or declaration of death or absence of the person assisted.
   (b) the circumstances that led to it have ceased to exist.

2. *In the case of paragraph 1.b), the judicial authority, at the request of a party, shall declare the event giving rise to the termination of the assistance and shall terminate the appointment of the assistant.*

A major novelty introduced in the new regulation of assistance consists of the possibility of constituting it by means of a notarial deed. This represents an important step forward in terms of the de-judicialisation of support measures for people with disabilities in the exercise of their legal capacity.

6. Maintenance of the other institutions that are compatible with the new conception of capacity

We refer specifically to the preventive powers of attorney and the declarations made by the same person[30] which were already contained in the CCCat, the decree-law maintains their effectiveness and those powers of attorney and/or declarations will be taken into account in the event that the person requests an assistant.

5.2 Structure of the preliminary draft bill to amend the Catalan Civil Code in the area of supports in the exercise of legal capacity according to the basis for the reform of the Catalan Civil Code in the area of supports[31]

The change brought about by the extension of the exercise of legal capacity to persons with disabilities at national and autonomous community levels is going to change the systematic structure of Title II of Book Two of the Catalan Civil Code, which until now had been named '*Institutions for the protection of the person*', but it is planned to be renamed '*Institutions for the protection and support of the person*'. The term 'protection' is only predicated on minors because legal representation and its legal regime are still maintained. This situation opposes the one of adults, who are not considered to be protected, but rather to be supported or assisted, and who as a general rule cannot be legally represented, and only very exceptionally can their will be substituted.

A distinction will therefore be made between two blocks: on the one hand, the institutions for the protection of minors, to which Chapter I will be dedicated, and, on the other hand, the measures to support the exercise of legal capacity in Chapter II.

5.2.1. Chapter I: Institutions for the protection of minors

In addition to the parental power that acts in the relationship of filiation, the institutions proper to the minority of age will be: guardianship, de facto guardianship (*guarda de hecho*) and those applicable in the situation of abandonment.

It is foreseeable that the curatorship of minors will disappear – the one for adults has already been extinguished by Decree-Law 19/21. The reasons that have led to the elimination of the curatorship of minors are clear. In the regulation (still in force in the CCCat), the curatorship of minors fulfils a residual and minimal function. In contrast to the curatorship agreed for persons whose capacity was judicially modified, the curatorship of minors only acted when emancipation existed, in order to grant consent to certain acts in which the autonomy of the emancipated person was limited.

It seems that the Codification Commission understands that it makes no sense to maintain an institution such as this when it is possible to cover the cases to which it could be

30 Third transitional provision: self-determination.

1. The declarations made by the person himself in the case of judicial modification of capacity remain effective and apply, if applicable, in the event that the appointment of a person to assist the grantor in the exercise of his legal capacity is requested.
2. The provisions of Article 226–3 of the Catalan Civil Code shall apply to these declarations.

31 This information is not public at the time of writing, we took as a reference the bases for the reform of the Catalan Civil Code regarding the provision of support, following the advice of the president of the section, Professor Ma del Carmen Gete-Alonso Calera, so we must warn that the information we provide may be modified, both in the draft law and in its parliamentary processing.

applied by resorting to another institution: judicial defence (*defensa judicial*). When the emancipated person needs the consent, in the new regulation, he or she should request the specific judicial appointment of a person to do so.

Judicial defence would be the only institution common to minors and adults. It would be regulated in Chapter III, under the heading of transitional measures of protection and support, the function of which is to facilitate the decision-making required by a person in specific and non-permanent matters, both for adults and minors.

The most important characteristic of these institutions is their exclusivity, i.e. they would be the monopoly of minors. The Codification Commission wants to remove the references to the regulations of the rules specific to persons of legal age, in order to avoid certain misunderstandings that are already occurring in the application of Law 8/2021, which did include these references.

5.2.2. Chapter II: Measures to support the exercise of legal capacity

We will only[32] deal with the general principles – which are included in the basis for the reform of the CCCat regarding support in the exercise of legal capacity, non-formalised support, formalised support and safeguards.

5.2.2.1. GENERAL PRINCIPLES

The provisions of this section are general principles applicable to all types of support and will naturally not be innovative as they take up the notions of the Convention, in particular Article 12 and the interpretation that has been made of it. Therefore, they do not deviate from the principles that have informed the state reform contained in Law 8/2021. However, they do contain special features specific to the Catalan regime. The reform will take into account the following principles:

a. Recognition of the legal capacity of all persons All persons have legal capacity and are entitled to exercise their rights and to have the means to do so on an equal basis.

No one, not even the persons closest to the person affected by a disability, can assume the representation of another person, only exceptionally, when it is not possible to rely on the will of the person and he/she has not granted a preventive power of attorney or appointed a person to assist him/her, it is admissible that others can act for him/her. In the case of acts of mere formality and those of little economic significance that cannot be delayed, this would be dealt with in accordance with the general rules on the handling of the business of others without a mandate.

As a consequence, prodigality, as a limitation of a person's financial or patrimonial capacity, must disappear completely from the system. The person who has problems in managing and controlling his or her assets (as in the case of compulsive gambling, among others) can use the ordinary means but can also provide himself or herself with the appropriate support to help him or her. The elimination of prodigality does not mean that the person concerned can apply for other support.

32 It is planned that this chapter will be divided into five sections: (1) general principles, (2) non-formalised support, (3) power of attorney, (4) notarial and judicial assistance and (5) safeguards.

The recognition of the capacity of all persons implies, from a civil legal point of view, that in order to adopt a support it is not necessary to justify anything, to grant a preventive power of attorney, or to agree on an assistance, their will is sufficient. It is not even necessary to have a disability.

Disability shall be understood as a situation that gives rise to the adoption of those measures, in particular civil measures, necessary to guarantee the full exercise of rights by the persons themselves. From the civil perspective, disability is that situation of the person due to the concurrence of one or multiple permanent physical, mental, intellectual or sensorial conditions that interfere with the development of life and inclusion in the social environment, which can and must be supported and assisted in order to guarantee the exercise of rights.

b. Pre-eminence of the will Right to support: All persons in need have the right to request and receive support to exercise their rights without having to justify their situation or meet certain requirements. As explained, the only requirement is the will of the person, whether or not they are entitled to administrative support.

The will of the person is the guidance that determines all the questions concerning the support measures to be applied to him/her, their configuration, characters, people who provide it, exclusions, types of support, moments in which they must act, and so on.

In situations in which the person is unable to express his/her will, despite this circumstance, it must be investigated whether he/she has previously expressed it. If this is not the case, an attempt must be made to find out what it would have been if he/she had been able to express it (the hypothetical will). All possibilities must be exhausted since imposition is considered exceptional.

This will, which must indeed be taken into account, is what governs the adoption of the measure and its type and scope, both positively and negatively. The person concerned has the right to reject specific issues, such as the exclusion of certain people, as well as the support itself, and even to terminate it when he/she deems it appropriate.

The supremacy of the will of the person shall be absolute; this does not mean that, exceptionally it can be disregarded. Exceptions to this principle may be made in specific situations, in particular in the case of certain illnesses.

Derived from the paradigm shift established by the Convention, which moves from the traditional 'interest of the person with disabilities' to 'respect for the will of the person with disabilities', support measures have been articulated, giving preference to those that are agreed and implemented without the need to go to court, which are considered more appropriate and less harmful to the person affected.

c. Principle of proportionality The point of reference of the support measure is the needs of the person, as the objective is to enable him/her to resolve his/her affairs and make decisions adapted to his/her situation. Hence, together with his/her will, it is the personal circumstances and situations which determine the type of help, how and with what scope and intensity the support measure for each person should operate. As opposed to the previous model of guardianship and curatorship, which responded to a fairly consolidated and rigid standard – although we have seen that the jurisprudential elaboration had a great deal of autonomy in the determination of the support needs – the model that will be applied will essentially be born as a specific model for each person.

5.2.2.2.2 NON-FORMALISED SUPPORT

The regulation will distinguish between non-formalised support, which advocates that help for people who need it comes from their family and social environment, and formalised support, which in turn can be extrajudicial and judicial.

The reform will contemplate non-formalised support, which advocates that help for people who need it comes from their family and social environment, and formalised support, which in turn can be extrajudicial and judicial. These non-formalised supports seem to correspond to what before Decree-Law 19/2021 was called de facto guardians (*guardadores de hecho*). It is foreseen that the de facto guardianship of adults will disappear from the regulation, but the recognition of non-formal care and support will survive in any case.

It is considered that the Codification Commission decided to abolish *de facto* guardianship because it does not fully respect the Convention, on the understanding that it has a protection component that is not specific to adults, whether or not they have a disability.

Non-formalised support will try to accompany, help and advise so that the person concerned can make his or her own decisions.

5.2.2.3. FORMAL SUPPORTS

Formal support will be the one originating from the designation made by the affected party: this would include, on the one hand, the preventive power of attorney – which is formalised in a notarial deed – as an instrument of prevention for the future and, on the other hand, assistance.

Assistance consists of the voluntary designation of the person or persons who will provide support for a person. Assistance is the formal support institution around which – as from Decree-Law 19/2021 – the provision of support in Catalonia is materialised.

There are two modalities: judicial and notarial. It would be possible for the parliamentary procedure to introduce the possibility of assigning the function of appointing an assistant to an entity, although this is not currently envisaged in the draft.

The will of the person, as has been repeatedly explained, is, in formal support, what governs its delimitation, i.e. content and scope, in the identification of the persons who have to provide it, and of course, it is what determines its permanence. That is to say, the existence, modification and subsistence of the support depends on the will of the person, except in exceptional cases.

The relevance of the person's will implies that as long as he or she is able to express his or her will, it is the person who determines its scope, modifies it and revokes the designation of support. Revocation and modification may be subject to certain requirements or formalities, including a period of reflection.

For their part, the persons designated to assist may relinquish the assignment, as long as it ensures that the person in need of support can continue to receive the support they require.

The acts carried out by the assisted persons – whether with the participation of the assistant or not – may be declared ineffective, but not for lack of consent but due to the defects of the consent, which must be subject to a careful study and reelaboration.

In general, one would start from the consideration that the different types of support, formal and non-formal, are not necessarily mutually exclusive; that is to say, given the characteristics of each of them, a person can enjoy several at the same time, of different types, provided, of course, that they are not incompatible. Besides, this is the most usual

and common situation in the reality of people's lives – the one that best suits the principles and their needs.

5.2.2.4. SAFEGUARDS

Finally, safeguards will be addressed, the aim of which is to ensure that the person providing the support acts with respect for the rights, will and preferences of the person concerned and that there is no abuse, undue influence or conflict of interest between them.

These guarantees are mandatory in the notarial and judicial sphere in the determination of support measures, taking into account the pre-eminence of the will of the person concerned.

In this section we would find the aptitude requirements to be met by the persons providing support. Continuing with the preference for avoiding remissions, these requirements will be delimited in a specific and separate manner from those that will be demanded of the guardianship positions of minors.

It will also include the monitoring of the activities carried out by the assistant, the periodic review of the support measure itself and the accountability regime, all with the aim of ensuring the proper functioning of the support measures and safeguards.

It is likely that reference will be made to mediation as a mechanism for resolving conflicts that may arise in the designation of the persons who are to exercise the support, or in the content of the support measure, or in the determination of the willingness of the person in need of support.

6. Active legal capacity of persons with disabilities and its restrictions in the light of statistical data before and after the ratification of the UN Convention on the Rights of Persons with Disabilities

There are no public judicial statistics available on the situation in Catalonia before the entry into force of Law 8/2021 and Decree-Law 19/2021, let alone after the legislative modifications.

In Catalonia there are around 635,000 people with some kind of disability according to the absolute figures for 2021 provided by the Directorate General for Social Protection of Catalonia.[33] The statistics offer different classifications: according to the degree of disability, the type of disability, age and gender. In this regard, if we look at age, we can see that 5% is concentrated in the first years of people's lives but then decreases and concentrates from the age of 55 onwards to a percentage of 69.8% of people with disabilities, which reveals that age-related degeneration and the dementias associated with it constitute the most important group of people whose exercise of their legal capacity may be affected.

33 Year 2021, https://dretssocials.gencat.cat/web/.content/03ambits_tematics/15serveissocials/estadistiques/persones_discapacitat/any2021/5-Pers.discap.-tipologia-grau-sexe-i-grups-dedat-2021.pdf; Year 2020, https://dretssocials.gencat.cat/web/.content/03ambits_tematics/15serveissocials/estadistiques/persones_discapacitat/any2020/5-pers-discap-tipologia-grau-sexe-edat-2020.pdf; Year 2008, https://dretssocials.gencat.cat/web/.content/03ambits_tematics/15serveissocials/estadistiques/persones_discapacitat/any_2008/Estadistica_Discapacitat_-2008.pdf.

Concluding remarks

Since Catalonia regained legislative competence in the civil sphere, and especially with the approval of Law 25/2021 of July 29 on Book II of the Catalan Civil Code concerning the person and the family,[34] work has been done to harmonise autonomous legislation as far as possible with the UN Convention on the Rights of Persons with Disabilities, especially with regard to Article 12. Book II of the CCCat already included the principles of the Convention in its preamble and was a pioneer in introducing an institution – then called protection – such as assistance, which was not of an incapacitating nature. It was not until the reform of State Law 8/2021 modified the procedural aspects[35] that further progress could be made in the implementation of Article 12. Decree-Law 19/2021 was a step forward and at the same time a break with the traditional institutions of guardianship, curatorship and de facto guardianship. The final reform – the harmonisation of the whole Book II – is in process. We have dealt with the principles – contained in the basis drafted by the section on the person and the family of the Codification Commission – which are being used for the new drafting of Book II of the Catalan Civil Code relating to the person and the family. This transitory situation should not lead us to believe that the mandate of Article 12 is not being fulfilled. In terms of content, the reform of Decree-Law 19/2021 marked the culmination of the process.

34 https://www.boe.es/eli/es-ct/l/2010/07/29/25/con.

35 See in this sense Implementation of art. 12 of the un convention on the rights of persons with disabilities into the legal system of Spain, from María José Bravo Bosch and Inés Celia Iglesias Canle, and especially its Annex II and in procedural matters.

7 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in the Republic of Chile

*Gissella López Rivera**

General remarks

Act No. 18.600 (concerning established rules regarding mental deficiencies) was published in the Official Gazette on February 19, 1987, and was the first act, in addition to the Civil Code, that established some rules regarding legal capacity. Its original wording declared that the protection, treatment, education, training, physical development, recreation and social security of the mentally handicapped persons constitute civil rights for them and duties to be assumed by their family (Article 1). The brutality of its spirit can be noted, too, in Article 2, that defined a mentally deficient people as those

> who have an incomplete or arrested evolution of the mind, initiated during the period of psychomotor development, characterized by a subnormality of intelligence and a concurrent deficit in their adaptive behaviors.

This act was progressively amended since the year 2004. For example, the word 'handicap' was replaced by 'disability'; it changed the definition of 'mentally disabled person'; it included Article 18bis, which will be explained, and it derogates the exemption granted to employers to pay minimal salary amount to persons with disabilities. However, none of these amendments were the result of the ratification on July 29, 2008, by Chile, without reservations, of the UN Convention on the Rights of Persons with Disabilities ('the Convention') and its Optional Protocol.

The Convention was previously enacted as Chilean Act by the National Congress on July 2, 2008 (as a mandatory procedure according to article 54, no. 1, of the Constitution of Chile). The passed Decree No. 201 stated that the Convention and Optional Protocol would have been in force since August 28, 2008.[1]

Chile has gradually implemented the Convention. A particular concern for the Committee on the Rights of Persons with Disabilities ('the Committee') was that the Chilean Civil Code of 1857, which denies persons with disabilities the right to legal capacity, has continued being in force. The Chilean Civil Code of 1857 and the Act No. 18.600 concerning the procedure for revoking legal capacity based on a psychiatric report is legally

* I am grateful to Carolina Vera and Francisca Muster for their assistance in this chapter.

1 The Convention was enacted by the President of the Republic on August 25, 2008, and the presidential order containing the Convention's text was published in the Official Gazette on September 17, 2008.

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doubtful from the point of view of Article 12 of the CRPD and that is why the Committee requested:

> the State party to repeal all legal provisions that partially or completely limit the legal capacity of adults with disabilities, and to adopt specific measures to establish a supported decision-making model that respects the autonomy, will and preferences of persons with disabilities, in keeping with article 12 of the Convention and the Committee's general comment No. 1 (2014).[2]

In conclusion, both acts deny the right recognised in Article 12 of the Convention to persons with disabilities.

Specific implementation

The essential and first institutional change in Chile was *Act No. 20.422* of *Equal Opportunities and Social Inclusion of Persons with Disabilities*, enacted on February 10, 2010.

It recognises relevant rights and principles of the Convention, assuming, in general terms, the definition of a person with a disability contained in the Convention. It also creates, for the first time in Chile, an institutional framework for formulating and implementing public policies and legal rules regarding disability. Likewise, it incorporates governmental institutions, i.e. Comité de Ministros (Secretaries Committee), Servicio Nacional de la Discapacidad, or Senadis (National Disability Service), and Registro Nacional de Discapacidad (National Registry of Disability). Senadis oversees promoting equal opportunities, social inclusion, participation and accessibility of persons with disabilities.

This new institutional framework influenced new and diverse regulations. However, none of these legal reforms is aimed to create new legal capacity in the light of private law rules, as will be explained in the following section.

A concept of active legal capacity in a country law – introductory remarks

According to its original text, since the year 1857, articles 1445, 1446 and 1447 of the Chilean Civil Code rule the *legal capacity* as the specific capacity of a person to be 'able to act with full legal effect in the way of effecting some legal transaction', in MacCormick words.[3] Chilean classical scholars generally do not note the rule's specificity and, following non-legal but doctrinaire terms, distinguish between two types of legal capacity that the legal order would contain: *capacidad de goce* and *capacidad de ejercicio*.

The *capacidad de goce*[4] or *legal capacity in restricted terms* is a kind of passive capacity that allows a person to be a rights-holder. On the other hand, the *capacidad de ejercicio*,[5] or *legal competence*, following Kurki's terminology,[6] is a kind of active capacity referred exclu-

2 ONU, *Concluding observations on the initial report of Chile*, § 23 (2016).
3 Neil MacCormick, *Institutions of law: An essay in legal theory*, Oxford University Press, Oxford, 2007, p. 89.
4 *Rechtsfähigkeit* in German, and *capacité de jouissance* in French.
5 *Geschäftsfähigkeit* in German, and *capacité d'exercice* in French.
6 Visa Kurki, *A theory of legal personhood*, Oxford University Press, Oxford, 2019, p. 9.

sively to as the capacity to act with full effect in the way of effecting some legal transaction, i.e. contracts, and undertaking obligations without the authorisation of a third person.[7]

Even though Chilean law does not make the terms 'person' and 'subject of rights' synonymous, classical scholars assume this account.

Claro Solar affirms that 'is a person any being capable of acquiring rights and bear duties, that means, the active and passive subject of a right', and 'that person is par excellence the man'.[8]

Alessandri and Somarriva repeat this definition, adding that '[s]ynonymous with a person is the expression a subject of right', but those authors further mention that '[t]he men are not the only subject of rights' because the law considers men's collectivities or a set of assets legally organised as a subject of rights, too.[9] Corral follows those authors[10] and Figueroa and Schmidt specify that '[i]t is not the same natural person and subject of rights'.[11] Lyon asserts,

> Person and man are substantially different concepts. The word man reflects a reality. The concept of a person reflects a legal abstraction that only expresses the *center of convergence* of a set of rights and duties. Therefore, the person is commonly defined as an entity capable of acquiring (center of convergence) rights and duties.[12]

For classical Chilean scholars, the concept of personhood and *capacidad de goce* are coextensive, considering that the last is a 'personhood attribute'. That means that every person possesses it by the mere fact of being a person.[13]

Alessandri and Somarriva think that '[b]eing a person, in fact, is to have *capacidad de goce*; any individual susceptible of being a subject of rights is a person'.[14] Corral states that the law cannot conceive a general *incapacidad de goce*, because it would imply the absence of personhood.[15] Also, Claro Solar assumes that any individual has personhood and can have rights, but not everybody can exercise rights by themselves.[16] Lyon also claims that the *capacidad de goce* and *ejercicio* are not different things but are in a relation of *genus* (*capacidad de goce*) and *species* (*capacidad de ejercicio*).[17] León, on other side, notes that

7 MacCormick proposed to speak in active and passive terms; however, the senses of both terms are extensive in MacCormick's explanations, cf. Neil MacCormick, *Institutions of law: An essay in legal theory*, Oxford University Press, Oxford, 2007, pp. 77–99.

8 Luis Claro Solar, *Explicaciones de Derecho Civil chileno y comparado. De las personas, tomo primero*, 2nd ed., Editorial Jurídica de Chile, Chile, 1978, p. 171.

9 Arturo Alessandri, Manuel Somarriva, *Derecho civil: Parte preliminar y parte general. Tomo primero*, Ediar, Conosur Ltd., Santiago de Chile, 1990, pp. 335–336, 338.

10 Cf Hernán Corral, *Curso de Derecho Civil: Parte General*, Thomson Reuters, Santiago de Chile, 2018, p. 237.

11 Gonzalo Figueroa, Claudia Schmidt, El derecho de la persona: Pasado, presente y futuro, in: *El Código Civil de Chile (1855–1005)*, ed. Alejandro Guzmán Brito, Lexis Nexis, Santiago, 2005, p. 332.

12 Alberto Lyon, *Personas Naturales*, 3rd ed., Ediciones Universidad Católica de Chile, Chile, 2007, p. 18.

13 Gonzalo Figueroa, *Curso de Derecho Civil: Teoría de los actos jurídicos*, 5th ed., Editorial Jurídica de Chile, Chile, 2011, p. 105.

14 Arturo Alessandri, Manuel Somarriva, *Derecho civil: Parte preliminar y parte general. Tomo primero*, Ediar, Conosur Ltd., Santiago de Chile, 1990, p. 390; Antonio Vodanovic, *Manual de Derecho Civil: Segundo volumen de las partes preliminar y general*, Editorial Jurídica Conosur Limitada, 2001, p. 112.

15 Hernán Corral, *Curso de Derecho Civil: Parte General*, Thomson Reuters, Santiago, 2018, p. 386.

16 Luis Claro Solar, *Explicaciones de Derecho Civil chileno y comparado. De las personas, tomo primero*, 2nd ed., Editorial Jurídica de Chile, Chile, 1978, p. 172.

17 Alberto Lyon, *Personas Naturales*, 3rd ed., Ediciones Universidad Católica de Chile, Chile, 2007, p. 173.

the *capacidad de ejercicio* presupposes the *capacidad de goce*, being the distinction something 'artificial'.[18]

The *capacidad de goce* is the passive capacity and the *capacidad de ejercicio* the active capacity. According to article 1445, first paragraph, no. 1 of the Chilean Civil Code, the *capacidad de ejercicio* is a necessary condition to be bound by a declaration of the will, that means, a contract. In its last paragraph, this article defines legal capacity as the capacity to be self-obligated – undertake obligations (duties) on their own – without the authorisation of any other person.

The Chilean Civil Code and other acts also rule special requirements for some legal transactions. For example, the capacity needed to act concerning the law of succession and the institutions of testate – as will author or will witness – and intestate succession; to get married or commit to other forms of civil partnership; to acknowledge paternity or motherhood – assume the filial status – of a child. Different special rules ascribe capacity for civil wrongdoing and for being responsible for wrongs governed by tort law or criminal law. For example, children under the age of seven and persons who are not sound of mind are not responsible for tort law – however, the responsibility of the persons in charge of them may be established. Additionally, civil and criminal procedural rules establish the capacity to stand in courts, e.g. sue in their own name, be part of the procedure, make some petitions and be a witness.

In Hart's terms, the referred Article 1445 contains a secondary rule, a rule of change 'which empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules', but specifically in Chilean legal terms, to be bound.[19]

Chilean law declares that the general rule is that every person has an active legal capacity (Article 1446 of the Chilean Civil Code) but immediately after mentions that the law can declare persons as incapable. The objective of Article 1447 is to institute two types of legally incapable persons: absolute and relative. The first type includes (1) severely mentally disabled individuals (named as *dementes*), (2) girls under 12 years of age and boys under 14 years of age, and (3) deaf and deaf-mute persons who cannot make themselves understood clearly. The second type includes (1) girls between 12 years of age and under 18 years of age and boys between 14 years of age and 18 years of age and (2) wasteful persons declared interdicted by a judge.

The *absolute incapable persons* have passive legal capacity and do not have active legal capacity: they cannot enter into any agreement or contract by themselves. They always must act represented by their legal representative, a person appointed by a judge (except for children subject to paternal authority, as I will explain), who is not obliged to take into account the will of the person it represents, but its best interest. On the other hand, the *relative incapable persons* have passive legal capacity and active legal capacity in a strict sense: they may act, alternative, represented by their legal representative or on their own, but in the last case, they always have to be previously authorised by their legal representative or the last must after approve.

With this regulation, the Chilean state denies legal personhood to small children and several mentally disabled individuals – absolute incapable persons – and confers limited

18 Avelino León, *La voluntad y la capacidad en los actos jurídicos*, 3rd ed., Editorial Jurídica de Chile, Chile, 1979, p. 293.

19 H. L. A. Hart, *The Concept of Law*, 2nd ed., Clarendon Press, 1994, New York, p. 95.

legal personhood to teenagers and some mentally disabled individuals (prodigals) – relative incapable persons. This regulation is in open contradiction with the international obligations assumed by Chile.

Private law regulation of active legal capacity and its amendments adopted in the course of implementing of the Article 12 of the UN Convention on the Rights of Persons with Disabilities (in particular in the light of reservations and declarations on interpretation and their impact on the scope of the amendments adopted)

Article 9 of the recently approved Act No. 21.331, named 'On the recognition and protection of rights of persons in mental health care', published in the Official Gazette on May 11, 2021, regarding mental health rights, expressly declares the following:

> The person with mental illness or psychological or intellectual disability is the holder of the rights guaranteed by the Political Constitution of the Republic. In particular, this Law assures him/her the following rights:
>
> 1. to always be recognized as a subject of rights.
> 2. to participate socially and to be supported to do so, if necessary.

This act derogates and amends some acts in force in Chile, granting special medical support assistance in case of health consent. However, it does not derogate the essential rules that will recognise, in real legal terms, the will of persons with intellectual or psychological disabilities and his/her capacity and legal status as a subject of rights. This law should have derogated the institution of interdiction and curators and replaced it with an assisted consent system.

The Committee on the Rights of Persons with Disabilities warned Chile in 2016 about the lack of implementation in the list of issues before submission of the combined second to fourth reports of Chile in 2020. The Committee requested Chile to derogate all legal provisions that partially or wholly limit the legal capacity of adults with disabilities, and adopt specific measures to establish a supported decision-making model that respects the autonomy, will and preferences of persons with disabilities.[20]

As stated, Chilean law has not been changed to grant adequate active legal capacity to persons with disabilities. Senadis has undertaken in the year 2021 to present a proposed act to regulate 'legal capacity which creates a Statute of Facilitators and Assistants, a new interdiction procedure, and amendments to the Civil Code and other legal bodies'.[21] However, up to this date, Senadis has not presented any bill to the National Congress.

It should be taken into consideration that Chile has been formulating a new constitution since the year 2019. In 2020, 80% of Chilean citizens decided to have a new Constitution, and, in 2021, they elected to have a constitutional convention. This assembly proposed a new text in July 2022, the Bill of Constitution, which has been rejected by the

20 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Chile*, UN, Geneva, 2016.

21 SENADIS, *Balance of comprehensive management*, 2021, p. 12, https://www.senadis.gob.cl/pag/8/1150/bgi_historicos, accessed July 21, 2022.

people in a referendum which took place on September 4, 2022.[22] The first paragraph of Article 28 of the Bill of Constitution expressly mentions and recognises that persons with disabilities are entitled to all the rights contained in the Constitution – for the first time in constitutional history. In its second paragraph, it acknowledges the right of those persons to enjoy and exercise their legal capacity, with support and safeguards, as appropriate, to have universal accessibility, social inclusion, labour insertion and rights to political, economic, social and cultural participation.

However, this Bill has not been approved. Chilean people are in sync with the proposed constitutional text regarding disability. So, in my opinion, the future text should contain the rules indicated earlier.

Implementation of the Article 12 of the UN Convention on the Rights of Persons with Disabilities outside private law

However, Chile has not implemented the Convention as complete as it should have been done, it is possible to identify four areas of regulation passed to incorporate in our legal order the principles and duties set forth in the Convention.

The inclusion area contains the acts that have been passed in order to implement the Convention directly. On the other hand, areas identified in the following sections, such as discussing access to justice, informed consent in healthcare, women's non-discrimination and miscellaneous regulation, contain regulations that indirectly implemented the Convention. The indirect implementation means that it does not have the explicit objective to comply with the Convention but to address and solve other national problems inspired by the general principle of non-discrimination.

1. Inclusion

a. Act No. 21.331, 2021, on the recognition and protection of the rights of persons in mental healthcare, declares that a person with mental illness or mental or intellectual disability is the holder of the rights guaranteed by the Political Constitution of the Republic of Chile and ensures the following rights:

   i. To be recognised as a subject of rights.
   ii. To participate socially and to be supported to do so, if necessary.
   iii. To be respected in their right to privacy, freedom of communication and personal liberty.
   iv. To actively participate in their treatment plan, having expressed their free and informed consent. Persons with limitations in expressing their will and preferences should be assisted in doing so. In no case shall any treatment be carried out without considering their will and preferences.
   v. To express free and informed consent for any medical or scientific intervention of invasive or irreversible nature, including those of a psychiatric nature, unless they are in the case of letter b of Article 15 of Act No. 20.584.
   vi. To have their sexual and reproductive rights recognised and guaranteed, to exercise them within the scope of their autonomy, to be guaranteed accessibility conditions

22 https://www.chileconvencion.cl, accessed July 21, 2022.

and to receive support and guidance for their exercise without discrimination based on their situation.

vii. To not be sterilised without their free and informed consent. Sterilising children and adolescents as a fertility control measure is prohibited.

Only reversible contraceptive methods could be used when the person cannot express his/her will, or when it is not possible to express his/her preference, or when the person is a child or adolescent.

viii. To receive comprehensive and humanised healthcare and equal and equitable access to the necessary benefits to ensure the recovery and preservation of health.

ix. To receive care with a rights-based approach. Institutions that provide psychiatric services in the closed care modality must have an ethics committee, as in Article 20 of Law No. 20.584.

x. To receive treatment with the most effective and safe therapeutic alternative that least restricts their rights and freedoms, promoting family, work and community integration.

xi. To have their mental health condition not considered unchangeable.

xii. To receive financial compensation for their participation in activities carried out within the framework of therapies involving producing objects, works or services to be marketed.

xiii. To receive individual and family education on their health condition and the forms of self-care and to be accompanied during the recovery process by their relatives or by whomever the person freely designates.

xiv. To have their personal information and data protected per Act No. 19.628.

xv. Not to be discriminated against for suffering a mental illness or mental or intellectual disability.

xvi. Not to be discriminated against regarding health benefits or coverage and their educational or labour inclusion.

b. Act No. 20.845, 2015, establishes an inclusive school system that regulates the admission of students, eliminates shared financing and prohibits for-profit educational establishments that receive state subsidies.
This act establishes the following:

i. The state must ensure inclusive quality education for all people, to promote the creation of the necessary conditions for the access and permanence of students with special educational needs in regular or special education establishments, according to the best interest of the child or ward.

ii. The Chilean educational system must be based, among others, on the principle of integration and inclusion; it will tend to eliminate all forms of arbitrary discrimination that impede the learning and participation of students. Likewise, the system shall encourage educational institutions to be a meeting place for students from different socio-economic backgrounds, cultures, ethnicities, genders, nationalities or religions.

iii. All educational institutions that provide education at the kindergarten, elementary and high school levels must have an educational project, which, in any case, must safeguard the principle of non-arbitrary discrimination and may not include conditions or rules that affect the dignity of the person, or that are contrary to the human rights guaranteed by the Constitution and international treaties ratified by Chile and that are in force, especially those that deal with the rights of children.

In the same line, Act No. 21.091, 2018, of superior education, establishes the principle of inclusion of persons with disabilities.

Likewise, Act No. 21.164, 2019, amended the General Education Act to prohibit conditioning the incorporation, attendance and permanence of students to the consumption of any type of medication to treat behavioural disorders, such as attention deficit and hyperactivity disorder.

c. Act No. 21.015, 2017, encourages the inclusion of people with disabilities in the labour market. It sets forth a 1% working quota for persons with disabilities. The act requires all government agencies, the armed forces, public agencies and companies with 100 or more employees to reserve 1% of their workforce for workers with disabilities. After April 2019, this act obliges all corporations in Chile to hire 1% of workers with disabilities. As of April 2020, the companies must justify the reasons for not complying with the obligation referred.
d. Act No. 20.138, 2007, established the right of persons with disabilities to be accompanied, to receive assistance, to freely select the person who may assist in casting their ballot and to vote freely.
e. Act No. 21.303, 2021, amends Act No. 20.422 to promote the use of sign language. It recognises Chilean Sign Language as an essential element of culture and individual and collective identity. It also declares such language the official language of deaf people, establishing that the state recognises and is obliged to promote, respect and enforce the cultural and linguistic rights of deaf people, ensuring their access to public and private services, education, labour market, health and other areas of life in society in sign language.
f. Act No. 21.398, 2021, obliges providers of adhesion contracts to include accessibility measures for the visually and hearing impaired.
g. Act No. 21.089, 2018, establishes the compulsory provision of non-mechanical playground equipment in public and private spaces for children with disabilities in public and private areas.

2. Access to justice

a. Act No. 20.609, 2012, grants a legal action as a remedy of any arbitrary discrimination conduct. This act declares the duty of the state to create and implement public policies aimed to guaranteeing to all persons, without arbitrary discrimination, the enjoyment and exercise of their civil rights.
b. Senadis program. Since 2015, Senadis has implemented a program of access to justice for persons with disabilities. It consists in the establishment of a network of collaborators who have experience in legal advice and who specialise for these purposes, in matters of law of persons with disabilities in order to provide a timely and quality defence to those who have been victims of discrimination or violation of their rights because of their disability.

3. Informed consent in healthcare and women's non-discrimination

a. Act No. 20.584 on Patients' Rights, 2012, provides two crucial concerns. First, every patient must be informed in a timely and understandable manner by the medical doctor about the state of his/her health, the medical treatment and associated risks, the expected prognosis and the post-surgery process. However, when (1) the condition of

the person, in the opinion of the treating physician, does not make possible the direct reception of the information, or (2) the patient suffers difficulty understanding, or (3) the patient is in a state of consciousness disturbance, the indicated information must be given to the legal representative of the person or to whoever takes care of the patient. The information is given to the legal representative, assuming the legal model of will replacement. Second, every patient shall grant his/her informed consent to be subject to any medical treatment. Unless this act does not have an explicit rule for persons with disabilities, and they would consent, the medical team provides the information and must obtain his/her consent from the legal representative.

b. Act No. 21.030, 2017, regulates the decriminalisation of the voluntary interruption of pregnancy on three grounds. This law legalised abortion in Chile (for the first time) for three reasons, providing that every woman must give her previous, express and written consent to undergo an abortion. The general rule establishes that if the patient cannot grant her consent, Article 15, letters b and c, of Act No. 20.584 on patients' rights, 2012, shall be applied. This article provides that every patient must grant his/her informed consent. Only when the patient cannot give his/her consent, the legal representative must grant it; if the representative is unavailable or the patient does not have a legal representative, the consent is not required. However, Act No. 21.030 has a special rule for the abortion procedure for women with some sensory, mental or intellectual disability that distinguishes two different situations:

   i. If the woman has not been declared interdicted, and if she cannot make themselves understood in writing, her consent shall be granted by alternative means of communication, in conformity with Act No. 20.422 and the Convention.
   ii. If she has been declared interdicted by dementia, her legal representative must authorise her the undergo an abortion and must consider the woman's opinion unless her incapacity impedes knowing her opinion.

4. Miscellaneous regulation

a. Act No. 21.319, 2021, allows exemption from duties on election days in polling stations for being in the care of an older person in a situation of dependency or a person in a situation of disability.
b. Act No. 21.380, 2021, recognises caregivers' right to preferential healthcare.
c. Act No. 21.380, 2021, establishes telecommuting or teleworking modality for the care of children and persons with disabilities, in cases of constitutional exception, such as a state of catastrophe, public calamity or sanitary alert, such as an epidemic or pandemic due to a contagious disease.

Opinion regarding the actual Chilean legal order

As a result of initiatives of Chilean government, Chilean law has changed essential aspects of its regulation of disability. Chile has implemented a new institutionalism that recognises, makes visible and protects persons with disabilities and seeks to involve the civil society and compromise the state with new rights recognised to the first. However, the Chilean legal system has not created a full recognition of the legal capacity according to the standards contained in Article 12 of the Convention.

As it has been explained, the Chilean legal system is 'binary', which means that it classifies persons between two opposed categories: capable and non-capable. That is a direct disregard for the international order that Chile assumed years ago. The most relevant current intent to change this system is the Bill No. 12.441. The bill was presented in March 2019 by a group of representatives, but it has not been discussed since January 2021. Its purpose is to eliminate discrimination against people with intellectual, cognitive and psychosocial disabilities and to enshrine their right to autonomy, granting legal capacity. The bill proposes to declare that all persons are capable and that the legal capacity is presupposed (that means that it is legally assumed but not indisputable). However, it states that the law could restrict this capacity in certain cases. The most significant aspect of this bill is that it proposes to implement a system of supportive measures and safeguards related to the exercise of legal capacity.

However, I agree with the opinion of the *Instituto Nacional de Derechos Humanos* (INDH, National Human Rights Institute of Chile),[23]

> While the INDH appreciates the presentation of this Bill and its subsequent discussion to advance in the implementation of the CRPD [the Convention], it also notes the need for discussion to increase the implementation of the CRPD, and it also warns of the need to address a comprehensively reform of the approach in our legal system to the legal capacity legal system. The goal of a legal reform would be to consider all the legal capacity restrictions which go beyond mental and psychosocial disabilities, and should encompass psychosocial disabilities, and should also include certain variables related to aging, such as dementia. This would satisfy the obligations outlined in the CRPD and the ICPD [Inter-American Convention on the Protection of the Human Rights of Older Persons and Other Persons with Disabilities Older Persons].[24]

As long as the Chilean legal rules of legal incapacity are not repealed, Article 12 of the Convention will not be effective within Chilean legal system. In simple terms, everything related to legal capacity is still to be done in Chile.

The role of psychology, psychiatry and neurology in the course of implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities

According to the public information on the legislation proceeding in the National Congress, it is possible to review the history of any law and the status of any bill.[25] With the

23 It is an nonlucrative autonomous public law institution created to promote and protect the human rights of all persons living in Chile. Unlike other public institutions, the INDH is not under the authority of the government (Presidente of the Republic), National Congress or courts of justice, and although it is financed with public funds, it is autonomous and independent.

24 INDH, *Informe sobre el proyecto de ley que modifica diversos textos legales con el objeto de eliminar la discriminación en contra de personas con discapacidad intelectual, cognitiva y psicosocial, y consagrar su derecho a la autonomía*, 2019, p. 12, https://bibliotecadigital.indh.cl/handle/123456789/1391.

25 Cf https://www.camara.cl/legislacion/ProyectosDeLey/proyectos_ley.aspx; https://www.senado.cl/appsenado/templates/tramitacion/index.php.

agreement of the respective commission, or by invitation of any congressman or congresswoman part of the commission, a specialist in the field of the legal reform may assist the commission. The specialists can give their impressions of the bill or may make some advice or recommendations.

The intervention of each expert is recorded in the minutes of the session in which the bill is discussed. However, their intervention and advice or recommendation are not directly reflected in the law text but would serve as a guiding criterion for the legislator. Given this, it is not possible to know in what extent the participation of an expert has have influence in the drafting of some aspects of any act.

Table 7.1 Kinds of experts that participated in bills deliberations in the National Congress[26]

Act or bill	*Psychologist*	*Psychiatrist*	*Neurologist*	*Other professionals*	*No stance of referred professionals*
Act No. 18.600					x
Act No. 20.422					x
Act No. 21.015					x
Act No. 20.584			x	Orthopedists	
Act No. 21.030	x	x		Healthcare professionals	
Act No. 21.298					x
Act No. 21.303				Speech-language therapists	
Act No. 21.331	x	x	x		
Act No. 21.015				Occupational therapists	
Act No. 21.091					x
Act No. 21.275					x
Bill No. 12.901–07					x
Merged Bills Nos. 14.123–07 and 14.107–07					x
Bill No. 14.218–35					x
Bill No. 14.262–06					x
Merged Bills Nos. 14.310–35 and No. 14.549–35	x	x		Speech-Language Therapy, Psy-cho-pedagogues	
Merged Bills Nos. 14.445–13, 14.449–13 and 13.011–11					x
Merged Bills Nos. 14.455–35 and 14.504–35				Otolaryngologist	
Bill No. 14.711–07					x

26 Table prepared by the author based on data obtained from the web page of the Chamber of Deputies, that index all the bills introduces and their current status, https://www.camara.cl/legislacion/ProyectosDeLey/proyectos_ley.aspx.

Act or bill	*Psychologist*	*Psychiatrist*	*Neurologist*	*Other professionals*	*No stance of referred professionals*
Bill No. 13.965–35					x
Bill No. 13.945–04					x
Bill No. 13.906–07					x
Bill No. 13.844–07					x
Bill No. 13.826–13					x
Bill No. 13.726–11					x
Bill No. 13.454–03					x
Bill No. 13.442–31					x
Bill No. 13.297–17					x
Bill No. 13.411–07					x
Bill No. 12.982–04					x
Bill No. 12.901–07					x
Bill No. 12.817–31					x
Bill No. 12.816–07					x
Merged Bills Nos. 12.759–07, 10.522–18 and 11.866–18					x
Bill No. 12.747–11					x
Bill No. 12.716–15					x
Bill No. 12.715–07					x
Bill No. 12.618–13					x
Bill No. 12.441–17					x
Bill No. 12.436–04	x			Early Childhood Educators	
Bill No. 12.345–07					x
Bill No. 12.317–04					x

Active legal capacity of natural persons and its restrictions for the sake of disabilities – procedural aspects (court or outside court mode of taking decision)

Following the distinction between absolute and relative incapable persons, the regulation in Chile of the active legal capacity of natural persons and its restrictions are explained in the following sections.

Absolute incapable persons

In general terms, Chilean private law does not recognise any progressive capacity to do legal actions to absolute incapable persons. Persons with mental or intellectual disabilities

that fit the definition of a *demente* cannot decide anything by themselves.[27] That means that Chilean law does not distinguish grades of capacity to do legal actions to the mental or intellectual impairments persons, being the private legal order a binary and all-or-nothing regulation.

According to the Civil Code, a severe mental illness or intellectual impairments suffered by a person transforms him/her into a person who is considered having *no will*. That is why he/she should be declared 'interdicted' by a court in a proceeding that confirms the mental condition and appoints a curator to him/her.

The Chilean Civil Code does not define a *demente* but does mention in Act No. 18.600,

> A person with a mental disability is considered to be any person who, as a consequence of one or more congenital or acquired psychic limitations, foreseeably of a permanent nature and regardless of the cause that originated them, has at least one-third of his or her educational, labor or social integration capacity hindered (article 2nd).

Chilean law determines that a *demente* shall be declared interdicted and subject to the interdiction declaration and the curatorship rules.

The interdiction declaration deprives persons of the active legal capacity: they cannot manage their possessions and goods (and in some cases the law, grants to the curator the care of them and legal representation), 'vote, grant the last will, get married, work . . . , be a witness, etc.', because by this declaration the person with a disability is 'canceled and deprived of its status as a subject of law'.[28]

Exceptional actions that recognise kinds of the scope of legal capacity enacted after the Convention ratification are the following:

1. Act No. 20.584, on patients' rights, 2012; Act No. 21.030, 2017; and Act No. 21.331, 2021, provide that every patient must grant his/her informed consent, including those with a disability, when they will be subject to medical procedures.
2. Act No. 21.298, 2020, to ensure and promote the participation of persons with disabilities in the election of the representatives for the new Political Constitution Convention, imposed the obligation to include every candidate's list at least 5% of persons with disabilities – proved by a certificate of disability issued by *Compin*.

There are three mechanisms to declare the interdiction of a person over 18 years old and appoint to him/her a curator: (1) a judicial process (Article 458ss of the Chilean Civil Code, which sets forth an adversary procedure and Article 4, paragraph 2, of Act No. 18.600, which sets forth an *ex parte* procedure), (2) an administrative process (Article 18bis of Act No. 18.600), and (3) a legal institutive procedure (Article 457 of the Chilean Civil Code).

The *Registro Nacional de Discapacidad* is a public legal entity that depends on the *Servicio del Registro Civil e Identificación* (the national and public agency that registers the birth, death and marriage of any person who lives in Chile) that depends on the secretary of justice. It has legal personality and patrimony.

27 Please note that in consideration of the new paradigm of children's rights, Chilean law considers grades of capacity for children and teenagers under the idea of their progressive autonomy and development of their will according to their ages.

28 Paula Silva, *La capacidad jurídica de las personas con discapacidad intelectual*, Thomson Reuters, Santiago de Chile, 2017, p. 145.

According to Article 56 of Act No. 20.422 and Article 2 of Decree No. 945, 2010, of the Secretary of Justice, the *Registro Nacional de Discapacidad* must

1. register persons who have disabilities after the certification of disability granted by the *Compin*;
2. register persons who care for persons with disabilities;
3. register legal entities that, by their objectives, act in the field of disability;
4. grant the registration credentials and certificates determined by the Reglamento;
5. cancel the registration of the persons indicated in letters a, b and c in the cases indicated in the Reglamento; and
6. sub-register judicial curator appointed in cases of persons with mental disabilities.

Any registration can be made by request of the interested person; however, the indicated in letter a can be made by request of the person with a disability or by his/her legal representative or by the persons that take care of the first.

The registration has three steps: (1) qualification and classification of the disability of the person, (2) certification of the disability condition (1 and 2 made by the *Compin*), and (3) registration. Registro Nacional de Discapacidad would make the last step after the request of the interested person. However, the act provides the delivery to the *Servicio del Registro Civil e Identificación* of the resolution of qualification by the Compin, with the order to register and issue the credentials (that must be delivered to the address indicated by the person in the procedure before the *Compin*).

Act No. 20.422 does not refer to the privacy of the data contained in the register. Still, it is possible to deduce it is confidential since this data qualifies as personal and sensitive data according to the provisions of Act No. 19.628, imposing the obligation to keep it secret on the person in charge.[29] Nonetheless, the data owner may access to such information through the issue of a certificate of registration directly requested at the offices of the *Servicio del Registro Civil e Identificación* (Article 14 of Decree No. 945).

Even though the registry is secret, Article 3 of Decree No. 945 sets forth that the national director of the *Servicio del Registro Civil e Identificación* may enter into agreements with public agencies that administer programs, benefits, rights or other benefits of those established in Act No. 20.422 to allow access to the information contained in the *Registro Nacional de Discapacidad*.

1. Judicial process

The use of an adversary or *ex parte* procedure depends on whether or not the claim accompanies the certificate of disability in force concerning the person subject to the declaration duly registered in the *Registro Nacional de la Discapacidad*.

The certificate should declare that the person has at least a 70% mental disability. If the certificate is attached to the claim application, the procedure follows the rules of Act No. 18.600. If the certificate is not presented, it will follow an adversary procedure, so the interested party shall submit all legal evidence of the disability that would be declared.

29 The qualification of personal and sensitive data depends on the fact that the data is provided by its owner and not collected from sources accessible to the public (Article 7).

The problematic issue from a legal point of view of the adversary procedure is that the judge will decide the declaration of interdiction with his/her conviction without an official statement of the disability grade.

2. Administrative process

It has been established in Article 18bis of Act No. 18.600 and grants *ipso iure* the curatorship of a person with mental disability to the one who cares for the former when she/he is registered in the *Registro Nacional de la Discapacidad*.[30]

According to the Chilean Civil Code rules, this administrative procedure grants a temporary curatorship that will be in force until the person with a mental disability does not have a definite curatorship (Article 18bis, paragraph 4). Still, it could be maintained indefinitely. In the opinion of Silva, this kind of guardianship appointment has been used by the caregivers of the declared interdict persons to speed up the process and avoid legal proceedings.[31]

3. Legal institutive

A particular case is contemplated in Article 457 of the Chilean Civil Code. Chilean law has a 'declarative rule' that applies without a judicial or administrative procedure or declaration. Any man between 14 and 18 years old and any woman between 12 and 18 with a mental or psychiatric disability may be declared under curatorship for the sole fact of being an underage disabled person. The father of the young person is appointed by the declaration of the law.[32] However, the Civil Code declares in the second paragraph of Article 457 that when the child reaches the age of majority, 'an interdiction process must be filed', but it does not declare the *eo ipso* expiration of the curatorship. Thus, if nobody claims that the curatorship is illegal (or not following legal rules), the father-curator may continue to represent the child.

The opinion of the young person and of his/her mother has no relevance to this rule, nor the administration of the patrimony of the underage, in a clear violation of the international rights of a child to be heard and to act in its best interest.

Relative incapable persons

In the case of relative incapable persons, specifically prodigal persons, Chilean law establishes a higher scope to act than absolute incapable persons' range of action.

The relative incapable persons can enter into any contract or agreement by themselves with the previous authorisation or the later ratification of the agreement by his/her legal representative.

In general terms, Article 453 of the Civil Code establishes that persons interdicted by prodigality will keep his/her liberty and will have the free administration of a sum of money to his/her expenses, determined by the judge considering his/her assets.

30 Cf Paula Silva, *La capacidad jurídica de las personas con discapacidad intelectual*, Thomson Reuters, Santiago de Chile, 2017, p. 153; Fabiola Lathrop, Discapacidad intelectual: Análisis crítico de la interdicción por demencia en Chile, *Revista de Derecho (Valdivia)*, 2019, vol. XXXII, no. 1, pp. 117–129.

31 Paula Silva, *La capacidad jurídica de las personas con discapacidad intelectual*, Thomson Reuters, Santiago de Chile, 2017, pp. 153, 155–160.

32 Fabiola Lathrop, Discapacidad intelectual: Análisis crítico de la interdicción por demencia en Chile, *Revista de Derecho (Valdivia)*, 2019, pp. 121–122.

This rule has been recently derogated. Deprived-of-reason persons and those with a psychiatric disorder or anomaly that makes them incapable of shaping, in an absolute way, the living community of a marriage cannot get married. That means that the case of prodigal persons, not expressly mentioned in the act, may be reviewed case by case to determine if his/her conditions limit or not, in fact, his/her *ius conubii* right. However, the relative incapable person with a prodigality condition is specially authorised to agree to a civil joint agreement – *acuerdo de unión civil* – which is an agreement like a marriage with minor legal requirements or conditions to be entered and to be dissolved.

Regarding the procedure of interdiction, Article 445 of the Chilean Civil Code states that a judicial adversary must be procured, in which the prodigal condition may be proved by recurrent wasteful acts that denote a total lack of prudence. To gamble considerable portions of their assets, make significant donations with no cause and incur ruinous expenses are situations that authorise the judicial interdiction declaration of a person.

Organisation and institutional aspects of the assistance and guardianship for the purpose of doing legal acts by persons with disabilities

Chilean law does not establish a procedure or mechanism that allows persons with *incapacidad absoluta* to make their own decisions. In the case of the relative incapable persons, the law does set a process through which the guardians give their authorisation to them to celebrate the contract or ratify the same.

Article 338 of the Chilean Civil Code defines *curatorship* as a charge imposed on certain persons in favour of those who cannot self-administrate or cannot administrate their businesses with competence and are not under a paternal or maternal authority that can give them duly protection.

The Chilean Supreme Court has declared that curatorship is an institution that protects incapable persons, and the most effective way to attend to their interests is the appointment of a legal representative that may safeguard their rights and may remedy, in some way, that incapacity that they suffer.[33] The figure of guardianship in the Chilean Civil Code focuses on the management of the incapable person's assets. The former shall not have responsibilities nor be accountable for any other interest of the incapable person, such as non-monetary or personal interests.

Regarding health decisions, Article 4 of Act No. 21.331 declares that

> persons have the right to exercise free and informed consent regarding treatments or therapeutic alternatives proposed to them. For this purpose, support for decision-making to safeguard their will and preferences will be articulated.

This assistance model has not been extended to other areas of consent granting, but it could be understood as an initial stage of legal and institutional reform.

33 Rol No. 36160-2017, June 22, 2018.

Active legal capacity of the persons with disabilities and its restrictions in the light of statistical data before the UN Convention on the Rights of Persons with Disabilities was ratified and afterwards

Number of cases concerning the active legal capacity of natural persons

One of the problems of the Chilean institutional framework for persons with disabilities is the absence of official data.

The last official report is from 2015. It consisted in a survey made by the Secretary of Social Development and Family, titled *Segundo Estudio Nacional de la Discapacidad 2015* (Second National Study of Disability 2015).[34] The study estimates that 16.7% of the Chilean population over two years old is in a situation of disability; that means that in Chile, 2,836,818 persons have a disability.[35]

Among the adult population in Chile, 51.6% declared having a permanent and/or long-term disability, or 1,345,593 persons,[36] and among these, 9.5% declared having a mental or intellectual disability.[37] Regarding the type of difficulty in children and adolescents, 21.5%, or 49,520 people, declared having a mental or intellectual disability.[38]

The National Disability Registry grants other official data. The *Servicio del Registro Civil e Identificación* 396,201 persons with disabilities are registered (as of December 2020). However, this number represents only 13.9% of the total amount of persons in Chile with any kind of disability.

An essential but not actualised input is the Statistical Report of the Annual Report on Justice prepared in 2018 by the Chilean National Institute of Statistics (INE) in collaboration with the Administrative Corporation of the Judicial Power.[39] According to the annual report, between 2013 and 2018, the 1,290 suits for dementia interdiction were submitted to Chilean courts, and the average number of cases terminated for dementia interdiction between 2013 and 2018 was 963. In 2018 – based on 2013 data – the variation of the cases submitted was reduced by 13.7%; likewise, the number of cases decreased by 25.7%.[40]

Prodigal-persons interdiction suits submitted in 2013 were 23, and the average number of cases terminated between 2013 and 2018 was 14. In 2018 – based on 2013 data – the variation of the number of cases submitted increased by 34.8% and the terminated cases increased by 200%.[41]

The causes for the termination of the procedure by the are varied; only 40.8% of dementia interdiction suits and 19% of the prodigal-persons interdiction suits were terminated with a judgment (see the chart no. 4).[42]

In *ex parte* judicial procedures, in the year 2018, 75 suits have been applied, representing 7.5% of the total amount of ended causes related to all the kinds of interdiction procedures established by the Chilean legal order.[43]

34 https://www.ine.cl/estadisticas/sociales/condiciones-de-vida-y-cultura/discapacidad, accessed July 24, 2022.

35 Secretary of Social Development and Family Second National Study of Disability 2015, 9.

36 Ibid., 150.

37 Ibid., 152.

38 Ibid., 168.

39 INE, Statistical Report of the Annual Report on Justice, 2018, https://www.ine.cl/estadisticas/sociales/seguridad-publica-y-justicia/justicia, accessed July 25, 2022. Please note that INE and the Chilean Judicial Power do not inform disaggregated data regarding interdiction causes since 2019.

40 Ibid., 12–13.

41 Ibid., 14.

42 Ibid.

43 Ibid.

2. National budget of Senadis[44]

Table 7.2 Budget of Senadis in the years 2017–2022

Year	*Eecution of Act No. 20.244 Ch$ M*	*Corporación de Ayuda al Niño Limitado (Corporation for Aid to Handicapped Children) Ch$ M*	*Atención Temprana (Early Attention) Ch$ M*	*Acceso a la Justicia de las Personas con Discapacidad (Access to Justice for Persons with Disabilities) Ch$ M*	*Participación Inclusiva Territorial (Territorial Inclusive Participation) Ch$ M*	*Desarrollo de Organizaciones Inclusivas (Inclusive Organizations Development) Ch$ M*	*Tránsito a la Vida Independiente (Transit to Independent Living) Ch$ M*	*Residencias para Adultos con Discapacidad (Residence for Adults with Disabilities) Ch$ M*	*Apoyo al Cumplimiento a la Ley de Inserción Laboral (Support Compliance with the Law on Labor Market Integration) Ch$ M*	*Organismos Internacionales (International Organizations) Ch$ M*
2022	9.652.828	1.024.549	944.244	379.180	492.762	61.689	2.166.696	11.947.339	103.786	11.171
2021	9.246.004	981.369	904.448	363.199	471.994	59.089	2.075.379	8.392.791	99.412	8.222
2020	9.042.547	959.774	884.546	355.207	461.608	57.789	2.029.711	8.208.108	97.224	9.136
2019	8.813.399	935.452	862.131	346.206	449.910	56.325	1.978.276	2.520.377	94.760	9.136
2018	9.042.547	959.774	884.546	355.207	461.608	57.789	2.029.711	8.208.108	97.224	9.136
2017	8.342.802	889.526	819.804	329.209	427.822	217.303	1.587.251	132.994	N/A	8.687

44 Table prepared by the author based on data obtained from the National Budget Act of each year, published in the web page of Dipres, https://www.dipres.gob.cl/, accessed July 25, 2022. Amounts in thousands of Chilean pesos.

The relations between private law restrictions of active legal capacity and protection of persons with disabilities under criminal law (against crimes which can be committed as a result of doing legal acts)

Chilean criminal law does not protect persons with disabilities against exploitation, especially in concluding a contract.

Under Chilean law, there is no specific crime/offense regarding the abuse of the disability by someone to conclude a contract that is glaringly or obviously unfavourable for a person with a disability. However, there are some general and specific rules:

1. If the conclusion of an agreement has been done by a mistake generated by deceit, the act would constitute an offense of false pretence (No. 4 of Article 470 and Articles 468 and 473 of Chilean Criminal Code).
2. If a person misuses a blank sheet signed by the victim in detriment of the latter or another third party, it would constitute an offense called 'signature abuse' (No. 3 of Article 470 of Chilean Criminal Code).
3. More generally, if the perpetrator has concluded the agreement to assume the position of administrator of the assets or goods of a person with a disability, this act would constitute – according to the circumstances – a crime of 'unloyalty administration'; this has a severe penalty if the administrator is a curator of the victim or if the unloyalty administration has occurred in the course of the administration of the assets of an incapable person.

The punishment provided depends on the defrauded amount. They are *presidio menor en su grados, mínimos, medios o máximos*, which means a range between 61 days and 5 years. However, please note that the established punishment may be modified – decreasing or increasing – depending on the kind of participation of the offending person, his/her personal condition and the particular condition of the offense perpetration.

In 2019 a bill was presented to the National Congress to amend the Criminal Code in order to add Article 473bis, which will increase in one grade the penalty for false pretences and other forms of defrauding when a victim is a person with a disability or an elderly adult (Bill No. 12901–07). Until September 2022, this bill has not been discussed by the National Congress.

Concluding remarks

Chile has ratified and gradually implemented the Convention since the year 2008.

The essential and first institutional change was *Act No. 20.422* of *Equal Opportunities and Social Inclusion of Persons with Disabilities*, enacted on February 10, 2010, which recognises relevant rights and principles of the Convention. It creates a new institutional framework for formulating and implementing public policies and legal rules regarding disability and incorporates governmental institutions, i.e. the Comité de Ministros, *Servicio Nacional de la Discapacidad* (Senadis) and the *Registro Nacional de Discapacidad*. Senadis oversees promoting equal opportunities, social inclusion, participation and accessibility for persons with disabilities.

Notwithstanding the legal improvements to the rights and status of persons with disabilities, none of the legal reforms made by Chile and explained in this chapter have instituted in fact a new legal capacity system. In this line, the Committee advised that maintaining

the Civil Code of 1857 denied the right to legal capacity according to Article 12 of the Convention and requested Chile to repeal all legal provisions that partially or completely limit such legal capacity.

In the light of Article 12 of the Convention, Chile must derogate the Civil Code rules regarding disability, in the following sense:

1. The Chilean law needs to replace the terms *demente* and *incapaz* (uncapable) with the expressions *persona con una discapacidad mental o sicológica* ('person with mental or intellectual disability') and *persona con discapacidad* ('person with disability').
2. It must review in general its legal order to create a new regimen that
    a. derogates the category of 'uncapable person' (absolute and relative) and grant and guarantee to all persons the full legal capacity to enter contracts, be a holder of property and enjoy such rights.
    b. creates a system of support measures and safeguards related to the exercise of legal capacity for persons with mental or intellectual disability; and
    c. includes the elderly person in a category of persons that must be protected, to apply some aspects support measures and safeguards.

8 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in China's Mainland

Yi Huang and Bo Chen

1. Introduction

The chapter investigates into the implementation of the United Nations Convention on the Rights of Persons with Disabilities (CRPD or Convention)[1] with a focus on legal capacity, both the capacity for having rights and the capacity for exercising rights,[2] in Chinese civil and criminal law. The relevant provisions of Chinese law primarily appear on the Civil Code,[3] the Mental Health Law (MHL),[4] the Criminal Law[5] and the relevant procedural law.

As there is not an explicit rule that addresses the effect of international human rights conventions in Chinese law in general, it is thus widely accepted that the main approach to give effect to these international human rights instruments is to transform the rights and obligations prescribed therein into the domestic legal system by making changes to existing domestic law or creating new law.[6]

The legal capacity of persons with intellectual disabilities and psychosocial disabilities is denied through these provisions for adult guardianship and the application of involuntary admission and treatment under the Chinese non-criminal mental health law. In addition, a person with mental health problems who committed criminal offenses but bears no criminal responsibility is governed by a special procedure under the Criminal Procedural Law,[7] which authorises compulsory psychiatric treatment in closed facilities. However, due to the limited scope of application of the compulsory treatment under Criminal Procedure

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

2 I. Bantekas, M. A. Stein, D. Anastasiou, eds., *The UN convention on the rights of persons with disabilities: A commentary*, Oxford University Press, Oxford, 2018. It is worth noting that the authentic text of Article 12 of the CRPD in Chinese refers legal capacity as *falv quanli nengli* (法律权利能力), which is more likely to be interpreted as only the capacity for having rights rather than capacity for exercising rights. The influence of this choice of terminology on law reform and implementation in China is unclear and require further observation.

3 Civil Code of the People's Republic of China (adopted by the National People's Congress on May 28, 2020; entered into force on January 1, 2021).

4 Mental Health Law of the People's Republic of China (adopted by the Standing Committee of the National People's Congress on October 26, 2012; entered into force on May 1, 2013).

5 Criminal Law of the People's Republic of China (adopted by the National People's Congress on July 1, 1979; latest amended on December 26, 2020).

6 Hanqin Xue, Qian Jin, International treaties in the Chinese domestic legal system, *'Chinese Journal of International Law*, 2009, vol. 8, p. 299.

7 Criminal Procedural Law of the People's Republic of China (adopted by the National People's Congress on July 1, 1979; most recently amended in 2018).

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Law, which is mostly perceived as an issue of access to justice rather than legal capacity, the chapter will focus on the restrictions of active legal capacity through adult guardianship and non-criminal involuntary commitments.

China ratified the CRPD without any reservation in 2008. Law reform in relation to legal capacity, among other disability rights issues, is expected to enhance respect for the autonomy of persons with disabilities. It is partly true that China indeed introduced new laws that governs legal capacity, but the chapter will also raise questions about the extent to which these changes in the civil and criminal aspects have been translated into practice.

It is particularly worth mentioning that there is little, if not non-existent at all, evidence suggesting that psychologists, psychiatrists or neurologists have been substantively involved in the legislative process of the Civil Code, where the rule on recognition of one's legal capacity is stipulated. On the other hand, the drafting history of the MHL, which provides the legal bases of involuntary hospitalisation and treatment that may constitute de facto infringement of one's legal capacity, is generally seen as led by the Ministry of Health, at least before handing the draft to the State Council in 2007. It has been observed that the psychiatric professionals in China have been strongly against the idea of 'voluntariness' in mental health services and advocated for 'therapeutic or paternalistic' mode.[8] The final MHL, as the result, will be discussed later in the chapter.

Finally, it is equally important to note that there is no official data provided by the government on the number of people who have been put under adult guardianship, which is most likely due to their disabilities, or involuntary commitment authorised by the MHL, before or after the entry into force of the CRPD. It is problematic, considering the state's obligations under Article 31 of the CRPD on statistics and data collection. It also arguably reflects a lack of awareness among the government agencies that the information in this regard is in fact a disability or CRPD-related issue.

2. Legal capacity under civil law

The most relevant areas of domestic law to be examined in relation to the implementation of Article 12 of the CRPD are laws on adult guardianship under Chinese law, which addresses whether and on what basis a person cannot make legally binding decisions in civil affairs for him or herself but requires a legal guardian as an agent.[9] It also relates to Civil Procedure Law, which governs the procedural issues in declaring one's legal capacity.[10] The following subsections examine the legal standards of legal capacity and guardianship and the legal consequences of being denied full legal capacity. Same to many other jurisdictions, the MHL authorises and regulates psychiatric treatment without the person's own informed consent. The following section will also briefly discuss this another form of intervention to one's legal capacity under Chinese law.

8 Xiju Zhao, John Dawson, The new Chinese mental health law, *Psychiatry, Psychology and Law*, 2014, vol. 21, p. 669.

9 See Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of China, Adopted by the Committee at Its Eighth Session (September 17–28, 2012)*, CRPD/C/CHN/CO/1, para 21 (Concluding Observation on China 2012).

10 Civil Procedure Law of the People's Republic of China (adopted by the National People's Congress on April 9, 1991; most recently amended in 2021).

2.1. General standards and procedures of restricting legal capacity in the Civil Code

Articles 13 to 22 of the Civil Code provide substantive rules on how to determine one's legal capacity. Citizens have legal capacity as a right holder from birth to death,[11] and all citizens are recognised as a right holder before the law on an equal basis.[12] These two articles arguably reflect the legal capacity to be a right holder prescribed in Article 12 of the CRPD. Article 18 provides that a person over the age of 18 shall be considered as adult and recognised by law as having full legal capacity, i.e. to participate independently in civil affairs,[13] reflecting the legal capacity to act in Article 12 of the CRPD.

The exception is that an adult who is unable to account for his own conduct shall be a person having no capacity for civil conduct[14] or a person with limited capacity for civil conduct if he or she is unable to fully account for his own conduct.[15] In such a determination, the factors to consider include the degree of connection of the conduct with his/her own life, whether they can understand the conduct and foresee the consequence, whether they can understand the amount or objects of the conduct, and to what extent they have the ability of judgement and self-protection.[16]

Therefore, under Chinese law, a person's legal capacity in civil affairs can be denied based on an assessment of his or her mental capacity, which is against the interpretation provided by the United Nations Committee on the Rights of Persons with Disabilities in its first general comment.

The procedural requirements of legal capacity assessment and declaration are provided in the Civil Procedure Law. By the current law, only the court can declare if a person is partially or fully denied legal capacity, initiated by his or her close relatives or other interested parties with facts and evidence.[17] After accepting this application, the court shall require or examine judicial assessment on the individual's legal capacity.[18] The case is heard by a single judge and the judgment of the first instance shall be final, which means there is no opportunity to appeal.[19] The person is represented in the trial by a close relative other than the one who submits the application.[20] It is important to note that the compulsory requirement that the person whose legal capacity is being challenged and examined in the court should have close relatives as their agent's ad litem may constitute a significant barriers for the person to access to justice. The court is under an obligation to hear the opinion of the person concerned given his or her health condition permits.[21] If through the trial the court finds that the application is based on solid facts, the court will declare that the person is with limited or no legal capacity; otherwise, the application will be rejected.[22]

11 Civil Code, Article 13.
12 Ibid., Article 14.
13 Ibid., Article 18.
14 Ibid., Article 21.
15 Ibid., Article 22.
16 Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation), 1988, para 4–5.
17 Civil Procedure Law, Article 194.
18 Ibid., Article 195.
19 Ibid., Article 178.
20 Ibid., Article 189.
21 Ibid., Article 196.
22 Ibid.

In contrast to Article 12 of the CRPD and General Comment No. 1, which explicitly provides equal recognition before the law as an individual's right and, based on which, people with disabilities have the right to exercise legal capacity on an equal basis with others,[23] Chinese law does not specify whether the recognition of one's legal capacity to act is right protected by law or (arbitrary) deprivation of legal capacity is an infringement of rights. This chapter holds the position that this is the one of the fundamental gaps between Chinese law and CPRD requirements on legal capacity.

Once the person is determined as having no or limited capacity to act, they shall be represented by their guardians, as agent ad litem,[24] in civil activities.[25] By a strict interpretation of the current law, guardianship can be assigned only after a person is determined to have limited or no legal capacity by the court, without which guardianship should not be imposed on any adult. Candidates of guardians of a person with limited or no legal capacity are provided by Article 28 of the Civil Code in the following order: (1) spouse, (2) parent and adult child, (3) any other close relative, and (4) any other person or organisations willing to bear the responsibility of guardianship and having approval from the unit to which the person belongs or from the neighbourhood or village committee in the place of his residence.[26]

It is also possible for a person has full legal capacity to pre-arrange guardianship that takes effect when he or she is determined to be losing part or all capacity, based on Article 33 of the Civil Code and relevant provisions of the Law on Protection of the Rights and Interests of the Elderly.[27] The pre-arrangement of guardianship could be argued to serve a similar function of power of attorney in civil affairs such as signing informed consent forms or entering contracts. As a relatively new mechanism, the enforcement of pre-arranged guardianship requires further observation.

In addition to a number of obligations, such as protecting the person's health, managing their property[28] and even bearing the responsibility for any damage caused by the person under guardianship,[29] Article 35 of the Civil Code requires that the guardian be guided by the principle of best interests of the person concerned and, most importantly, maximum respect for the will and preference of the person under guardianship, arguably representing some progress in light of Article 12 of the CRPD. However, more detailed guidelines are urgently needed. For example, to what degree the guardianship is monitored and whether the person under guardianship can complain about their guardian are unclear.

It is somehow evident that guardianship under Chinese law in most cases are categorised into substitute decision-making regimes referenced in the General Comment No. 1.[30]

23 Committee on the Rights of Persons with Disabilities, *Convention on the rights of persons with disabilities general comment no. 1 (2014): Article 12: Equal recognition before the law*, 2014, CRPD/C/GC/1 para 11–13 (General Comment No. 1).

24 Civil Code, Article 21.

25 Ibid., Article 23.

26 Ibid., Article 28.

27 Ibid., Article 33; Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly (adopted by the Standing Committee of the National People's Congress on August 29, 1996; most recent amendment in 2018), Article 26.

28 Civil Code, Article 34–37,1188–1189; Interpretation of the Civil Law, para 10.

29 MHL, Article 9, 36, 45, 49 and 59; Law of the People's Republic of China on the Protection of Disabled Persons (adopted by the Standing Committee of the National People's Congress on December 28, 1990; most recent amendment in 2018), Article 9.

30 General Comment No. 1, para 27.

The UN Committee expressed concern that there is no provision for supported decision-making for exercising legal capacity.[31]

2.2. Restrictions on legal capacity under Mental Health Law

A detailed account of the law and its provisions in China, as well as its history and socio-legal analysis, on coercive psychiatric measures have been provided elsewhere.[32] In brief, the MHL embraced the principle of voluntary inpatient treatment. and involuntary inpatient treatment is still permitted under the 'dangerousness standard', as an exception to the voluntary principle. Article 30 of the MHL provides that if the psychiatric evaluation indicates that a person has a severe mental disorder, the medical facility may impose inpatient treatment if the persons concerned poses harm or risk to self or others.[33]

Interestingly, if the dangerousness targets others, the ultimate decision of inpatient treatment shall be made by the medical facility, and the guardian could apply for a re-examination and medical certification if the guardian disagrees with the decision of inpatient treatment made by the medical facility.[34] But if the person is dangerous to him- or herself, the decision of involuntary inpatient treatment, as well as discharge, shall be made by their guardian. Interestingly, MHL does not provide any internal review or oversight mechanism for the person to challenge the guardian's decision. It is evident that the MHL grants significant decision-making power to guardians, mostly assumed by family members in China who have been traditionally acknowledged as the primary protector for people with mental health issues.[35] Indeed, it is true in most cases, but the presumption of no conflict of interest between service users and family members leaves the law vulnerable to abuse.

Another side of guardian's decision-making power is the full responsibility and liabilities assumed by family members. Article 21 of the MHL affirms and reinforces this 'tradition', providing that family members shall be concerned about each other and help persons with mental health issues obtain prompt medical care, provide for their daily needs and assume responsibility for their supervision and management.[36] Moreover, if guardians 'fail to fulfil their responsibilities as guardian' and this causes harm to the patients or other people, the guardians are liable to pay compensation.[37]

2.3. The consequence of the denying one's legal capacity

The General Comment No. 1 recognises and affirms that the equal recognition of legal capacity is closely connected to the enjoyment of many other rights.[38] It is also the case under Chinese law that many restrictions are imposed on a person's rights once his or her legal capacity is denied.

31 Ibid., para 21.
32 Bo Chen, *Mental health law in China: A socio-legal analysis*, Routledge, London, 2022.
33 MHL, Article 30.
34 Ibid., Article 32.
35 Xiju Zhao and John Dawson, The new Chinese mental health law, *Psychiatry, Psychology and Law*, 2014, vol. 21, p. 669.
36 MHL, Article 21.
37 Ibid., Article 28.
38 Ibid., para 31.

As a general restriction in civil affairs provided in the Civil Code, civil conduct is not legally valid if it is performed by a person with no legal capacity or a person with limited capacity but the conduct is believed to be beyond his or her capacity.[39] In addition, there are also other restrictions stipulated in various pieces of legislation at different levels. For example, Article 60 of the Civil Procedure Law provides that the participation of people without legal capacity to a lawsuit should be represented by the guardian. Moreover, Article 16 of the Regulation on Legal Aid provides that if the applicant of legal aid has been denied full legal capacity their guardian can apply for the legal aid on the person's behalf.[40] However, if a person does not have an agent ad litem who makes such an application, the access to justice of the person concerned is significantly restricted.[41] Only in criminal procedures, legal aid is explicitly required by the court for defendants with disabilities.[42]

There also exist explicit restrictions on the rights of people determined to be without full legal capacity. In other words, the law delegates decision-making or consenting powers to the guardian, thereby in fact undermining the rights of the person to make decisions in all aspects of their lives – for example, the right to select the beneficiary of the insurance,[43] the right of association[44] and the right to get occupational qualifications.[45] Legal capacity could also be restricted indirectly. In the context of mental health services, for example, the healthcare providers can fulfil their obligation by providing information to only the guardians,[46] and the right to informed consent of the person concerned can be lawfully ignored. Similar situations include issues such as using the person's name or image in advertising;[47] consenting to treatment, including surgeries, that result in loss of function of body organs and experimental clinical treatments of mental disorders;[48] consenting to disclose personal information of people who are HIV positive;[49] and consenting to the termination of pregnancy or performance of tubal ligation operations.[50]

39 Ibid., Article 144–145.

40 Regulation on Legal Aid (adopted by the State Council on July 16, 2003), Article 16.

41 See Concluding Observation on China 2012, para 23–24. In evaluating China's performance under Article 13, access to justice, the Committee indicates concerns about the establishment of legal aid services.

42 Criminal Procedure Law, Article 34.

43 Insurance Law of the People's Republic of China (adopted by the Standing Committee of the National People's Congress on June 30, 1995; most recently amended in 2015), Article 39.

44 Regulation on Registration and Administration of Social Organizations (adopted by the State Council on September 25, 1998; most recent amendment in 2016), Article 13.

45 Law of Lawyers of the People's Republic of China (adopted by the Standing Committee of the National People's Congress on May 15, 1996; most recent amendment in 2017), Article 7; Law of the People's Republic of China on Certified Public Accountants (adopted by the Standing Committee of the National People's Congress on October 31, 1993; most recent amendment in 2014), Article 10.

46 MHL, Article 39.

47 Advertising Law of the People's Republic of China (adopted by the Standing Committee of the National People's Congress on October 27, 1994; most recent amendment in 2021), Article 33.

48 MHL, Article 43.

49 Regulation on the Prevention and Treatment of HIV/AIDS (adopted by the State Council on January 29, 2006; amended in 2019), Article 39.

50 Law of the People's Republic of China on Maternal and Infant Health Care (adopted by the Standing Committee of the National People's Congress on October 27, 1994; most recent amendment in 2017), Article 19. In two cases in 2005, the guardian consented and arranged for a woman with mental illness to have a hysterectomy. The guardian did so because of their concern that if the mentally ill woman was to have a child, the burden of care for the guardian would be increased. The guardian was then prosecuted by the procuratorate.

3. Legal capacity under criminal law and criminal procedure law

The text of the Criminal Law in China does not provide special protection for persons whose legal capacity is denied or in doubt. However, the Law of the People's Republic of China on the Protection of Disabled Persons, before being amended in 2008, provided guidelines in applying the general criminal law. For example, the outdated Article 52 of the Law said that abusing persons with disabilities or abandoning persons with disabilities who are unable to be self-sustaining shall be punished according to the relevant provisions of the Criminal Law. It also stated that anyone who has intercourse with a person with disability who is unable to recognise her own actions due to intellectual or mental disability is guilty of rape and shall be held criminally liable in accordance with the relevant provision in the Criminal Law. However, these provisions were replaced with a much more abstract and general provision after the 2008 amendment.[51] It means that the legal capacity of victims of crime may be taken into consideration only in an indirect fashion.

On the other hand, the legal capacity of defendants is also relevant here. Article 18 of the Criminal Law provides that if a mentally ill patient causes harmful consequences at a time when he is unable to recognise or control his own conduct, upon verification and confirmation through legal procedure, he or she shall not bear criminal responsibility but will be put under strict control and medical treatment, the procedure of which is provided in the Article 302–307 of the Criminal Procedure Law. Article 18 also provides a lighter or mitigated punishment for those defendants with mental health problems who have not completely lost the ability of recognising or controlling his or her own conduct commit a crime and, accordingly, bear criminal responsibility.

4. Discussion and conclusion

As examined, the current civil law in China on legal capacity provides the ground for denying one's legal capacity for disability-related reasons and largely conflates it with 'mental capacity'. Chinese civil law adopts a normative framework of legal capacity and guardianship under which a person can exercise his or her legal capacity in some decision-making areas without intervention from guardians. The principle of 'maximum respect' for the wills of persons under guardianship is another piece of positive reform that requires the guardian to empower the person in engaging in civil activities as much as possible. In addition, the pre-arranged guardianship significantly expands the autonomy of persons under guardianship and moves the law in the direction of better respecting all persons' legal capacity. It is also the case for the China's mental health law reform that voluntary principle is adopted and involuntary commitment and treatment should be only exceptions now. However, there is little evidence that this progressive law reform has been well implemented in practice.

The criminal aspect indicates even less law reform motivated by the CRPD. Criminal responsibilities of and the diversion system for defendants with intellectual disabilities and

51 The Law of the People's Republic of China on the Protection of Disabled Persons (most recent amended in 2018), Article 67. The unofficial translation of the provision reads '[w]here the lawful rights and interests of persons with disabilities are infringed upon in violation of the provisions of this Law, other laws and regulations shall provide for administrative penalties in accordance with their provisions; where property loss or other damage is caused, civil liability shall be incurred in accordance with the law; where a crime is committed, criminal liability shall be investigated in accordance with the law'.

mental health problems have not been a focus of scrutiny from the perspective of the CRPD.

Therefore, the chapter argues it is necessary to modify the current law on legal capacity guardianship in line with its requirements considering China's obligation under the CRPD to achieve the full implementation of Article 12 at the national level.[52] However, same to other jurisdictions, law reforms and their implementation depend on a combination of complex political, social and cultural factors. For example, the practice of legal capacity and guardianship under Chinese law may be explained by the prioritisation of social stability over individual freedom, the reality that most support a person with disability could receive is from their own family rather than the government, and finally, the Chinese tradition that older family members have higher moral authority in directing the life of the younger generations. All these factors will certainly affect the prospect of implementing Article 12 of the CRPD in China, warranting continuous observation and research.

52 General Comment No. 1, para 24–30, 50.

9 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in the Czech Republic

Dita Frintová

I. Introduction

Under paragraphs 1 and 2, Article 12, states parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law and recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. This question in the Czech Republic is traditionally regulated by the Civil Code.

First of all, it should be noted that at the time the Convention was adopted, the preparation of legislation to recodify private law as a whole was in progress. This recodification resulted in repealing the then applicable Civil Code (Act No. 40/1964 Sb., '1964 Civil Code', or '1964 CC') and adopting a new Civil Code (Act No. 89/2012 Sb., 'Civil Code', or 'CC'). Other laws adopted in relation to the new Civil Code were, in particular, (1) Act No. 90/2012 Sb., on companies and cooperatives (the Business Corporations Act), and (2) Act No. 91/2012 Sb., on private international law, and later Act No. 303/2013 Sb., to amend certain acts in relation to the adoption of recodification of private law. Since the recodification process took about 12 years (from 2000 until 2012, when the CC was adopted), it is natural that its final version changed over the years, and this is where the effect of the Convention becomes evident. Although the original intent was to preserve almost exactly the word-for-word definition of legal capacity used in the 1964 Civil Code,[1] the concept was changed substantially over the years, especially in terms of abandoning the institution of legal incapacitation, preserving the institution of restricting legal capacity, and adding various supportive measures for cases where the ability to make juridical acts is impaired. The materials available to the author suggest that the original concept of legal capacity was still included in the working version from November 2008, whereas the version from December 2008 already contains the new concept.[2] The final version of the explanatory memorandum also confirms that the concept had been changed,

1 Cf K Eliáš and M Zuklínová, *Principy a východiska nového kodexu soukromého práva [Principles and foundations of the new private law code]*, Linde Praha, Praha, 2011, p. 137.

2 For the sake of completeness, it is worth noting that the Government Commissioner for Human Rights addressed this question during one of the stages of the comment procedure, which was closed at the turn of August and September 2008. In his key comment, he specifically said, "The proposed legal regulation clearly goes against the modern understanding of legal capacity and curatorship, following from the Convention on the Rights of Persons with Disabilities, as well as documents produced by the Council of Europe. We demand a revision of the proposed legal regulation and the opening of a wider debate on the issue." Quoted based on the materials provided by O. Frinta, then member of the recodification commission at the Ministry of Justice. Non-governmental organisation such as the League of Human Rights, Committee of Good Will – Olga Havlová Foundation, and the Mental Disability Advocacy Centre also addressed the question, adopting a similar

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with reference to the Convention. The explanatory memorandum to §§ 55 to 63 of the CC states,

> The concept of the institution also diverges significantly from the concept in totalitarian law and takes into consideration the Convention on the Rights of Persons with Disabilities. At the same time, it reflects modern legal frameworks already adopted in some European countries.[3]

The Convention played a key role in revising the original legal regulation of legal capacity and replacing it with the new concept, based on our modern understanding of this question, in accordance with the Convention. Compare with the following for more details.

The (Czech) theory of private law recognises four different terms describing the basic characteristics of an individual from the perspective of the law. These are (1) legal competence, (2) legal personality, (3) legal capacity and, in some cases,[4] (4) capacity to make wrongful acts (delictual capacity):

1. Legal competence is understood as the broadest term that encompasses legal personality, legal capacity, and also delictual capacity (unless it is understood as part of legal capacity [to make any juridical acts]). It is basically an umbrella term which is not even explained in legal textbooks as a separate term and is used only to designate the explanation of legal personality and legal capacity.[5]
2. Legal personality is the capacity to have rights and duties within the limits of the legal order. Whereas the current Civil Code designates legal personality as 'právní osobnost' (§ 15(1) of the CC), the 1964 Civil Code used the term 'způsobilost mít práva a povinnosti' (capacity to have rights and duties) (§ 7(1) of the 1964 CC), referred to as 'právní subjektivita'[6] in legal theory.
3. Legal capacity is the capacity to acquire rights by one's acts (conduct, actions) and to commit oneself to duties. Whereas the current Civil Code uses the term 'způsobilost právně jednat' for legal capacity, referred to as 'svéprávnost' in Czech (§ 15(2) of the CC), the 1964 Civil Code designated legal capacity as 'způsobilost k právním úkonům' (§ 8 *et seq.* of the 1964 CC; cf. footnote no. 15).
4. Delictual capacity means the capacity to bear the consequences of wrongful conduct. Whereas the 1964 Civil Code included provisions on delictual liability as part of the

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position. Cf K. Eliáš et al., *Nový občanský zákoník s aktualizovanou důvodovou zprávou [New civil code with an updated explanatory memorandum]*, Nakladatelství Sagit, Ostrava, 2012, p. 15.

3 Ibid., 94.

4 In some cases, delictual capacity is considered a separate category, in other cases, legal capacity is understood broadly as incorporating both the capacity to act in accordance with and contrary to the law (that is, to act wrongfully).

5 Cf., for example, M. Knappová et al., *Občanské právo hmotné. Díl 1 [Substantive civil law: Part 1]*, 4th edn, ASPI, Prague, 2005, p. 187; J. Švestka et al., *Občanské právo hmotné. Díl 1 [Substantive civil law: Part 1]*, 5th ed., ASPI, Prague, 2009, p. 161; J. Dvořák et al., *Občanské právo hmotné. Svazek 1. Díl první: Obecná část [Substantive civil law. Vol. 1. Part one: General part]*, 2nd ed., Wolters Kluwer ČR, A. S., Praha, 2016, p. 215.

6 Translator's note: 'právní osobnost' and 'právní subjektivita' are both translated as 'legal personality' into English.

legal regulation of liability for damage (in particular § 420[7] and 422[8] of the 1964 CC), in the current Civil Code, this principle is first defined in general as liability for any acts (in § 24 of the CC[9]), and later other legal rules are added within the duty to pay damages (in particular in § 2920 *et seq.* of the CC[10]).

The relationships between the individual categories are best illustrated in relation to the legal status of a person. There are different theoretical approaches to defining the legal status of an individual. For the purposes of this chapter, the most convenient one seems to be the definition of legal status as the legal position of a specific individual in real time and real space (in relation to other persons) who disposes of a specific, defined set of legal options that the individual may or may not use.[11] Legal status comprises two components: a passive component and an active component.

The passive component consists of (1) the capacity to have rights and duties (that is legal personality) and (2) the set of fundamental rights and freedoms provided for in the constitution (in particular the Charter), which are considered by the current Civil Code (as opposed to the 1964 Civil Code) as natural (inherent) rights of individuals, perceptible by reason and instinct itself (§ 19), and therefore, these rights are only recognised, rather than granted, by the legislature. The legal regulation also includes detailed provisions on the protection of personality rights[12] of an individual (§ 81 *et seq.* of the CC).

The active component consists of (1) legal capacity (capacity to make juridical acts) and (2) delictual capacity.

7 § 420 of the 1964 CC stipulated: Everyone is liable for damage caused by their violation of legal duty.

8 § 422(1) of the 1964 CC stipulated: A minor or an individual suffering from a mental disorder is liable for the damage caused if such minor or individual can control his or her acts and understand their consequences; they are liable jointly and severally with the person obligated to supervise them. If the person who caused the damage is not able to control his or her acts and understand their consequence due to minority age or mental disorder, the person obligated to supervise them is liable for the damage caused.

9 Everyone is responsible for his or her acts if the person is able to understand and control them. All persons who, through their own fault, cause themselves to be in a condition that would otherwise exclude liability for their acts, are liable for the acts made in this condition.

10 § 2920 of the CC stipulates: (1) Minors who have not yet acquired full legal capacity or individuals suffering from a mental disorder must compensate the damage caused if they were able to control their acts and understand their consequences; the injured party is entitled to damages unless the injured party did not defend himself or herself due to being considerate to the wrongdoer. (2) If a minor who has not yet acquired full legal capacity or an individual suffering from a mental disorder is not able to control his or her acts and understand their consequences, the injured party is entitled to damages if such compensation is fair with regard to the property circumstances of the wrongdoer and the injured party. § 2921 of the CC stipulates: A person who has neglected due supervision over the wrongdoer is liable to pay the damages jointly and severally with the wrongdoer. If the wrongdoer is not liable to pay damages, the compensation is to be paid to the injured party by the person who neglected supervision over the wrongdoer.

11 For more details, cf. J. Hurdík, Komentář k § 15 [Commentary to § 15], in: *Občanský zákoník I. Obecná část (§ 1–654). Komentář [Civil code I. General part (§§ 1–654)]*, ed. P. Lavický et al., C.H. Beck, Prague, 2014, p. 137.

12 In the context of the 2012 Civil Code, it is necessary to always distinguish between 'legal personality' within the meaning of § 15 of the CC, as the capacity to have rights and duties, and 'personality of an individual' within the meaning of § 81 *et seq.*, as the unique combination of biological, psychological and social aspects or the values of a human being. Cf. P. Šustek et al., *Občanské právo hmotné. Svazek 1. Díl první: Obecná část [Substantive civil law. Vol. 1. Part one: General part]*, 2nd ed., Wolters Kluwer ČR, A. S., Praha, 2016) 253.

For the sake of completeness, a note on terminology is required in this context. The current Civil Code refers to the capacity to acquire rights by one's juridical acts and commit oneself to duties as 'způsobilost právně jednat', or 'svéprávnost' (legal capacity) for short, whereas the 1964 Civil Code referred to this capacity as 'způsobilost k právním úkonům'[13] in Czech. The terminological change was made because in the new Civil Code, 'právní úkon' was replaced by 'právní jednání'.[14] Even though both these terms have essentially[15] the same meaning – a manifestation of will that causes legal consequences – they must be distinguished in Czech legal terminology to make it clear whether the author is referring to the 1964 Civil Code or the current Civil Code. Given the difficulties that might arise if the English translation attempted to reflect the terminological differences between the two Codes and since both these terms ('právní úkon' and 'právní jednání') mean essentially the same, the term 'legal capacity' is used consistently in the English version of this chapter as the context always makes it clear whether the author is referring to the 1964 Civil Code or the 2012 Civil Code.

Conditions determining the extent of legal capacity under Czech private law are as follows:

1. Intellectual and volitional maturity based on the age of an individual determines the extent of legal capacity by the law. There are no differences in the legal regulation under the 1964 Civil Code and the current 2012 Civil Code in this respect. For the sake of completeness, we could add that in Czech legal theory, intellectual maturity means recognition (anticipation), or the intellectual ability to understand the consequences of one's actions, and volitional maturity means command, or the ability to control one's behaviour.
2. Majority, that is, reaching the age of 18, results in the acquisition of full legal capacity (under both § 8 of the 1964 CC and § 30 of the CC).
3. Mental disorder may be defined as a group of illnesses and disorders that affect, in particular, human thought, experience and interaction with the environment.[16] It may have legal consequences that are provided for either directly in the law or consequences arising out of a judicial decision. The law states that a juridical act made by an individual acting under the influence of a mental disorder that makes the individual unable to make juridical acts is invalid (under both § 38(2) of the 1964 CC and § 581 of the CC). Mental disorders which are not only of a temporary nature may become grounds for restricting legal capacity by a judicial decision (cf. previous details). This was the case under the 1964 Civil Code (§ 10(2)), as well as under the current 2012 Civil Code (§ 55 *et seq*., in particular § 57). As has already been stated, unlike under the previous legal regulation (§ 10(1) of the 1964 CC), an individual may no longer be incapacitated due to a mental disorder.
4. Judicial decision may be grounds for extending legal capacity from partial to full capacity, as well as for restricting legal capacity from full to partial or restricted capacity. § 37 of the CC provides for judicial emancipation, which means that legal capacity

13 Translator's note: both terms mean 'capacity to make juridical acts'.

14 Translator's note: both terms mean 'making juridical acts' in English.

15 There are slight differences between the concept of 'právní úkon' and the (new) concept of 'právní jednání', but these are not significant with regard to this chapter.

16 P. Hartl, H. Hartlová, *Psychologický slovník [Dictionary of psychology]*, Portál, Praha, 1993, p. 424.

is extended from partial to full legal capacity (cf. previous discussion). This is a new provision that was not part of the 1964 Civil Code. The restriction of legal capacity by judicial decision due to a mental disorder has already been explained. For the sake of completeness, it is worth noting that restricted legal capacity may be extended, or the restriction may be revoked, again by judicial decision.

5. Marriage also constitutes grounds for the acquisition of full legal capacity (under both § 8 of the 1964 CC and § 30 of the CC). For the sake of completeness, this applies to marriage entered into by a minor above the age of 16, which requires the consent of the court (under both legal regulations, cf. § 13 of Act No. 94/1964 Sb., the Family Act [repealed] and § 672 of the CC). Both legal regulations also stipulate that an individual acquires full legal capacity where a marriage is contracted by a minor above the age of 16 without the prior consent of the court (for example, as a result of an error of the registrar). The legal regulation of conditions determining the extent of legal capacity is, in general, identical in the 1964 Civil Code and the 2012 Civil Code.

In conclusion, on the one hand, the original legal regulation and current legal regulation is not identical, as the current Civil Code differs significantly from the 1964 Civil Code (for example, in the regulation of legal capacity and a much more detailed regulation of the protection of personality rights in § 81 *et seq.* of the CC). On the other hand, the basic paradigm of dividing legal status into two components – active and passive – and the basic content of these two components remains the same in both the 1964 Civil Code and the 2012 Civil Code.

II. Private law regulation of active legal capacity and its amendments adopted in the course of implementing Article 12 of the UN Convention on the Rights of Persons with Disabilities (in particular in the light of reservations and declarations on interpretation and their impact on the scope of the amendments adopted)

The legal regulation of active legal capacity in the Czech Republic is best explained by classifying legal capacity into different categories based on the extent thereof. Moreover, this interpretation is convenient also because the current legal regulation in the 2012 Civil Code provides for the same variants of legal capacity as the 1964 Civil Code. Legal capacity can be divided into (1) full legal capacity, (2) restricted (partial) legal capacity and (3) (full) legal incapacity. However, the legal regulation differs in some respects.

1. Full legal capacity. Just like under the previous legal regulation, the basic rule states that an individual acquires full legal capacity upon reaching the age of majority, and majority is attained upon reaching the age of 18 (§ 30(1) of the CC). Full legal capacity may be acquired even before reaching majority by marriage (§ 30(2) of the CC), which was also the case under the previous legal regulation. However, there is a major difference in that whereas under the 1964 Civil Code, an individual (1) attained majority by marriage and therefore (2) acquired full legal capacity, the current Civil Code stipulates that an individual acquires full legal capacity by marriage but does not attain majority – meaning that the individual is still a minor, but with full legal capacity. Unlike under the former legal regulation, a minor may also acquire full legal capacity by judicial

emancipation.[17] This is possible in cases where a minor without full legal capacity, who has reached the age of 16 years, petitions the court for judicial emancipation, and it is proved that the minor is able to maintain himself or herself, take care of his or her own affairs, and the legal representative of the minor agrees with the petition. Where the petition is, due to serious reasons, in the interest of the minor, the court will grant it even without the consent of the legal representative (§ 37 of the CC). Even in this case, the individual remains a minor and attains majority only by reaching the age of 18. On the one hand, the current legal regulation that distinguishes minors who have not yet acquired full legal capacity and minors who have acquired full legal capacity has raised some controversy because a minor who has acquired full legal capacity (by marriage or by judicial emancipation) is still a child within the meaning of the Convention on the Rights of the Child, which was not the original legislative intent.[18] On the other hand, the 2012 Civil Code elaborates this concept in depth, so even minors who have already acquired full legal capacity are protected in certain provisions, which was not possible with the old concept.[19] As a result, minors enjoy more protection than under the previous regulation.[20]

2. Restricted legal capacity (partial). Just like under the previous legal regulation, legal capacity may be restricted by law or by a judicial decision.

   The first case applies to the restricted (partial) legal capacity of minors. Both the previous and the current legal regulation are based on the concept of the gradual acquisition of legal capacity based on the intellectual and volitional development of the child. It is presumed that minors who have not acquired full legal capacity may make juridical acts appropriate in nature to the intellectual and volitional maturity of minors of that age (§ 31 of the CC). However, unlike under the previous legal regulation, additional rules are added to this general rule: (1) Where the legal representative gives consent to a minor who has not acquired full legal capacity, in accordance with the customs of private life, to make a certain juridical act, or to achieve a certain purpose, the minor may make juridical acts independently within the scope of this consent, unless this is expressly prohibited by law; the consent may later be limited or withdrawn. If there are more legal representatives, it suffices if at least one of them manifests their will vis-à-vis a third party. However, where more legal representatives act jointly vis-à-vis another person and they contradict each other, their manifestations of will are disregarded (§ 32 of the CC). (2) Where the legal representative gives consent to a minor who has not acquired full legal capacity to independently operate a business undertaking or a similar gainful activity, the minor acquires legal capacity to make juridical acts related

17 For a discussion on the judicial emancipation of minors or the concept of the acquisition of legal capacity in general, cf. details in V Zvánovec, Právní úprava svéprávnosti nezletilců v návrhu občanského zákoníku [Legal regulation of legal capacity of minors in the draft new civil code], *Bulletin advokacie*, 2011, vol. 1–2, p. 53; cf critically O. Frinta, Právní úprava svéprávnosti v návrhu občanského zákoníku [Legal regulation of legal capacity of minors in the draft new civil code], *Bulletin advokacie*, 2011, vol. 1, p. 58.

18 Cf. Article 1 of the Convention on the Rights of the Child: For the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier. Note: emphasis added by the author.

19 For example, § 854 regulating the adoption of a minor who has already acquired full legal capacity.

20 Cf S. Radvanová et al., *Rodina a dítě v novém občanském zákoníku [Family and the child in the new civil code]*, C.H. Beck, Prague, 2015, p. 25.

to the given activity. Such consent requires a leave of the court to become valid. The leave of the court replaces the requirement of reaching a certain age where such age is stipulated for the performance of a specific gainful activity by another legal regulation. The consent given by the legal representative may be revoked later only with the leave of the court (§ 33 of the CC). (3) Dependent work by minors below the age of 15 or minors who have not completed their compulsory school education is prohibited. These minors may only perform activities in art, culture, advertisement, or sports under the conditions set forth in another legal regulation. Minors who have reached the age of 15 may oblige themselves to perform dependent work under another legal regulation. The date of commencement of work may not be set on a date preceding the date on which this individual completes compulsory school education (§§ 34 and 35 of the CC). (4) Regardless of any other provisions, a minor who has not acquired full legal capacity is never competent to act independently in matters for which even the legal representative would require the leave of the court (§ 36 of the CC).[21]

In the second case (just as in the previous legal regulation), legal capacity is restricted by a judicial decision. Unlike the former legal regulation, the current Civil Code provides for a much more detailed regulation, which clearly emphasises that this is a last-resort option (*ultima ratio*), which may be used only in the interest of protecting the individual and in cases where it is not possible to take other, less drastic measures. The key provisions regarding the restriction of legal capacity include the following principles:

a. Legal capacity may be restricted only in the interest of the individual whose legal capacity is to be restricted, after seeing the individual in person, and with full recognition of the rights and uniqueness of the personality of such individual. The extent and level of inability of the individual to take care of his or her own affairs must be given careful consideration. The legal capacity of an individual may be restricted only where the individual would otherwise be at risk of suffering significant harm and where less invasive and less restrictive measures would not suffice with respect to the interests of the individual (§ 55 of the CC).
b. The legal capacity of an individual may be restricted only by the court. The court takes all the necessary steps to ascertain the opinion of an individual whose legal capacity is subject to its determination, using a mode of communication chosen by the individual (§ 56 of the CC). The court may restrict the legal capacity of an individual in the extent to which the individual, due to a mental disorder which is not only of a temporary nature, is not able to make juridical acts, and it determines the extent to which it restricts the capacity of the individual to make independent

21 These juridical acts are defined in § 898: (1) Juridical acts related to the existing or future assets and liabilities or individual assets and liabilities of the child require the parents to receive the consent of the court, unless these acts involve ordinary matters, or exceptional matters affecting only a negligible financial value. (2) The consent of the court is necessary, in particular, to make juridical acts by which the child (a) acquires immovable property or its part and disposes of it; (b) encumbers property as a whole or a substantial part of the property; (c) acquires gift, inheritance or legacy of a substantial financial value, or refuses such gift, inheritance or legacy, or makes such a gift or a gift constituting a substantial part of the child's property; or (d) enters into a contract creating an obligation to provide a recurring long-term performance, a loan contract or a similar contract, or a contract concerning housing, in particular a lease. (3) A juridical act made by a parent without the consent of the court is disregarded.

juridical acts. The fact that an individual has difficulties communicating does not in itself constitute grounds for restriction of legal capacity (§ 57 of the CC).

c. The court may restrict legal capacity in relation to a specific matter for the period necessary to settle the matter, or for a period determined otherwise, but only for a period not exceeding three years. Where it is evident that the condition of the individual has not improved during this period, the court may extend the period of restriction of legal capacity, but only for a period not exceeding five years. The legal effects of the restriction terminate upon the expiry of the period of restriction of legal capacity. If proceedings regarding the extension of the period of restriction are commenced within the period, the legal effects of the original decision continue until a new decision is made, but only for a period not exceeding one year. This applies even on a person without a possibility to recover – the only way how to keep the effects of original decision is to start a new proceeding within the period of three (or five) years and then to decide again. This 'cycle' can be repeated without any limit (even for the whole life of the person). The aim of this regulation is to re-examine the conditions of the person (at least) in regular periods of time (§ 59 of the CC). If the circumstances change, the court changes or revokes its decision without delay, also of its own initiative (§ 60 of the CC).
d. The court appoints a curator to act for the individual for the purposes of such decision. In the selection of the curator, the court takes into consideration the wishes of the person under curatorship, the needs of such individual and the suggestions made by persons close to the person under curatorship if these persons act in the interest of the individual, and in selecting the curator, the court takes care to ensure that the person under curatorship does not distrust the curator (§ 62 of the CC).
e. The decision to restrict legal capacity does not deprive the individual of the right to make independent juridical acts in ordinary matters of everyday life (§ 64 of the CC).

For the sake of completeness, another note on terminology is necessary with regard to the term 'restricted' *a contrario* 'partial' legal capacity. Two different approaches to the interpretation of the term 'partial legal capacity' are to be found in the literature dealing with the current legal regulation. (1) Using the narrow definition, partial legal capacity refers only to the cases where a minor may make his or her own juridical acts subject to the fulfilment of another condition, which is consent given either by the legal representative (§ 32 of the CC, cf. previous discussion) or by the court. In general, the legal capacity of a minor within this meaning is then referred to as restricted legal capacity.[22] (2) In other cases, the terms are distinguished based on the traditional difference between partial and restricted legal capacity, where partial legal capacity is used to refer to minors in general (who have not yet acquired full legal capacity), whereas the term restricted legal capacity is reserved only for legal capacity restricted by a judicial

22 According to R Šínová, 'Komentář k § 30' [Commentary to § 30], in: *Občanský zákoník – velký komentář. Svazek I. § 1–117 [Civil code – comprehensive commentary. Vol. I. §§ 1–117]*, ed. F Melzer et al., Leges, Praha, 2013, p. 351.

decision under § 55 *et seq.* of the CC.[23] The latter concept is supported also by Zuklínová, who comments on the narrow definition:

> The legal capacity of minors is sometimes referred to as restricted legal capacity. However, we believe that it is more appropriate to use the term 'partial' (which has, after all, been used in the past), and reserve the term 'restricted' for situations where the legal capacity of an individual with full legal capacity, or of a minor, has been restricted due to a mental disorder by a judicial decision. If we think through the term 'restricted legal capacity of a minor' as used today, then, for example, if the legal capacity of a 14-year-old minor is restricted due to a mental disorder, the restricted legal capacity of a minor is further restricted. That is certainly not appropriate or correct for that matter.[24]

The author agrees with the approach taken by Zuklínová, which also seems to prevail in the literature.

3. (Full) legal incapacity. The current legal regulation also provides for situations where an individual does not have any legal capacity. This is the case of minors of a very young age, to whom the concept of gradual acquisition of legal capacity based on intellectual and volitional maturity applies (§ 31 of the CC). However, unlike under the previous legal regulation, the 2012 Civil Code does not allow for an individual (despite suffering from a mental disorder) to be (fully) incapacitated. This is an important change to the legal regulation that was made as a result of the adoption of the Convention (cf. previous discussion). The minimum extent of legal capacity that an individual always has in accordance with the law covers ordinary matters of everyday life (e.g. everyday shopping, buying a cinema ticket, ticket for public transport; cf. § 64 of the CC, previously discussed).

In conclusion, the main difference between the current legal regulation of legal capacity under the 2012 Civil Code and the previous regulation lies predominantly in the detailed provisions governing the legal capacity of minors, restriction of legal capacity and the related introduction of less restrictive supportive measures for cases where the ability to make juridical acts is impaired. Minors, as well as persons suffering from mental disorders, now enjoy more protection and their rights are respected more than under the previous regulation.

III. Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities outside private law

The legal protection of persons with disabilities outside the scope of civil law is provided by the Anti-Discrimination Act.[25] Under the Anti-Discrimination Act, disability means

23 According to M Hrušáková in M. Hrušáková et al., *Rodinné právo [Family law]*, C.H. Beck, Prague, 2015, p. 31ff; also O. Frinta et al., *Občanské právo hmotné. Svazek 1. Díl první: Obecná část [Substantive civil law. Vol. I. Part one: General part]*, 2nd ed., Wolters Kluwer ČR, A. S., Praha, 2016, p. 220ff, in particular 222; S. Radvanová et al., *Rodina a dítě v novém občanském zákoníku [Family and the child in the new civil code]*, C.H. Beck, Prague, 2015, p. 26.

24 M Zuklínová, *Právní jednání podle občanského zákoníku č. 89/2012 Sb. – Komentář, srovnání se zahraničím a vybraná platná judikatura [Making juridical acts under act no. 89/2012 Sb., the civil code – commentary, comparison with other countries and selected applicable case-law]*, 2nd ed., Linde Praha, Praha, 2013, p. 134.

25 Act No. 198/2009 Sb., providing for equal treatment and legal remedies for protection against discrimination and for amendment to certain laws ("Anti-Discrimination Act").

(only for the purposes of the Act) physical, sensory, intellectual, mental or other disability that prevents or may prevent persons from exercising their right to equal treatment in areas set forth in the Act; it must be a long-term disability that lasts or should last, based on scientific knowledge in medicine, for at least one year (§ 5(6) of the Act). As for the legal order of the Czech Republic, § 2 of the Anti-Discrimination Act stipulates that for the purposes of the Act, the right to equal treatment means the right not to be discriminated against on the grounds laid down by the Act or the directly applicable regulation of the European Union in the area of freedom of movement of workers, and that discrimination can take the form of direct and indirect discrimination. Discrimination is defined as harassment, sexual harassment, victimisation, instruction to discriminate and inciting discrimination. Direct discrimination means an act, including omission, where one person is treated less favourably than another is, has been, or would be treated in a comparable situation, on grounds of race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, belief or opinions and, in legal relationships governed by the directly applicable regulation of the European Union, on the freedom of movement of workers, as well as on grounds of nationality. Discrimination on grounds of pregnancy, maternity and paternity and on grounds of sexual identity is also considered to be discrimination on grounds of sex.

Discrimination on the basis of disability is regulated by the Anti-Discrimination Act adopted around the same time as the Convention. However, it is inconceivable that the principle of non-discrimination on grounds of disability would not have been laid down by this Act had the Convention not been adopted. Moreover, it should be noted that in the Czech Republic, the principle of equal treatment (and non-discrimination) has been understood as a general principle of the constitutional order from the very beginning of its existence, i.e. since January 1, 1993. This conclusion follows from Article 3 of the Charter of Fundamental Rights and Freedoms (Resolution of the Presidium of the Czech National Council No. 2/1993 Sb., 'Charter'), which guarantees fundamental human rights and freedoms to everyone irrespective of sex, race, colour, language, belief and religion, political or other opinion, national or social origin, membership of a national or ethnic minority, property, birth or other status. Even though the definition does not expressly mention disability, the list is clearly non-exhaustive (cf. 'or other status'), so the imperative in this provision may be, without a doubt, applied also to persons with disabilities (which can be considered 'other status' within the meaning of the provision).

Under § 67 of Act No. 435/2004 Sb. on employment, a person with disability means (again only for the purposes of the Act) an individual recognised by a body of the social security system as (1) a person with a third-degree disability[26] ('person with severe disability'), (2) a person with first-degree or second-degree disability or (3) a person with a health impairment. Persons with a health impairment are defined as individuals who still have the ability to be employed or carry out a different gainful activity, but their ability to be or stay employed, to carry out their profession and to use their qualifications, or to improve their qualifications, is substantially limited due to their long-term ill health. For the purposes of this Act, long-term ill health means a health condition that, based on scientific knowledge in medicine, should last for more than one year and limits the person's physical, sensory or mental abilities substantially, resulting in limited ability to find employment. Discrimination on grounds of, *inter alia*, health (which also includes on

26 Degrees of disability are defined in § 39 of Act No. 155/1995 Sb., on pension insurance.

grounds of disability) in the exercise of the right to employment is prohibited under § 4 of this Act, which is an example of an act adopted prior to the adoption of the Convention.

Employment relationships between employees and employers arising out of performance of dependent work are regulated by Act 262/2006 Sb., the Labour Code. The principle of equal treatment and non-discrimination on any grounds, including on grounds of disability, was set out by this Act already in its original version from 2006 (§ 13(2)(b), or in § 1a in the amended version applicable today).[27]

Act No. 561/2004 Sb., to regulate preschool, primary, secondary, tertiary technical and other education, originally defined disability (for the purposes of the Act) as intellectual, physical, visual or hearing disability, speech disorder, a combination of more impairments at the same time, autism, and developmental learning or behavioural disorders. However, the applicable version provides for children, pupils or students with special educational needs, defined as persons who require supportive measures to complete their education and to exercise or enjoy their rights on an equal basis. Supportive measures mean necessary accommodations in education and school services reflecting the health, cultural environment or living conditions of the child, pupil or student (§ 16 of the Act).

Act No. 108/2006 Sb., on social services, defines disability as physical, intellectual, mental, sensory or combined disability which results or may result in making the person dependent on another person's help.

Legal regulations in the area of transportation of persons (where a number of obstacles and problems inherently arise in this context) refer to persons with disabilities, but also to persons with diminished capacity of movement and orientation (cf., for example, Act No. 111/1994 Sb., on road transport; Act No. 266/1994 Sb., on rail transport; Act No. 49/1997 Sb., on civil aviation; Act No. 194/2010 Sb., to regulate public services in transportation of persons and to amend other laws; Regulation of the Ministry of Transport No. 175/2000 Sb., providing for the rules of transportation in public rail and road passenger transport). However, there is no definition of a person with diminished capacity of movement and orientation in these legal regulations. The concept is defined in § 1(1) of Regulation of the Ministry of Regional Development No. 398/2009 Sb., regulating the technical requirements ensuring the barrier-free use of constructions. Under this regulation, persons with a diminished capacity of movement and orientation mean persons with physical, visual, hearing or intellectual disability, elderly persons, pregnant women and persons accompanying children in baby carriages, and children below the age of three.

As for criminal (and delictual) law, compare with the following point VIII.

This brief overview[28] shows that the legal regulation of the protection of persons with disabilities is dispersed across the Czech legal order. There are different definitions used in the individual areas of the regulations related to disability in the Czech Republic (reflecting the particular area of regulation), which was for the most part the case already before

27 For the sake of completeness, it should be noted that applicable legal regulation provides for a mandatory quota of employees with disabilities. § 81(1) of Act No. 435/2004 Sb., on employment, stipulates that employers with more than 25 employees in an employment relationship must employ a mandatory quota of persons with disabilities from the total number of their employees. The mandatory quota is 4%.

28 Given the scope of the chapter, this overview does not aspire to be complete and is limited to basic information on the legal regulations regarding persons with disabilities without explaining the individual provisions in detail. Briefly and on a general level, the provisions in the relevant legal regulations aim to fully integrate persons with disabilities, without any discrimination, into everyday life (i.e. integration into the working process, education, social assistance for these people or their transport).

the Convention was adopted. The fact that there is no single definition of a person with disability is not to be considered a shortcoming since such definition would be so general that it would lack any meaning in practice, and it would be necessary to specify the definition in the individual areas of regulation anyway.

In conclusion, the implementation of the content of Article 12 of the Convention in the Czech Republic did not require extensive or major conceptual legislative changes outside private law.

IV. The role of psychology, psychiatry and neurology in the course of implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities

The preparation of government bills in the Czech Republic is governed by the Government Rules of Legislative Drafting ('Rules of Legislative Drafting').[29] All legal regulations which were part of the recodification of private law (including the Civil Code) were drafted according to these rules. With regard to drafting bills (Part Two of the Rules of Legislative Drafting), Article 5 lists the bodies and entities which may submit comments to bills. They are provided with the intended subject matter of the bill, as well as the bill subdivided into sections (Article 5 in conjunction with Article 8(1) of the Rules of Legislative Drafting).

The bodies and entities which may submit comments to bills are:

1. ministries (ministers);
2. other central bodies of the state administration, and also the Czech National Bank, Office for Government Representation in Property Affairs, Security Information Service, Office for Foreign Relations and Information, Inspectorate General of Security Forces, Office of the Financial Arbitrator, Academy of Sciences of the Czech Republic, Institute for the Study of Totalitarian Regimes, Public Defender of Rights and the Government Commissioner for Human Rights where the intended subject matter concerns them in terms of their competence or as organisational units of the state;
3. regions, the capital city of Prague, and the association of municipalities with national competence, or the association of regions with national competence where the intended subject matter concerns the autonomous or delegated competence of regions, the capital city of Prague or municipalities;
4. Office of the President of the Republic, Office of the Chamber of Deputies, Office of the Senate, and the Supreme Audit Office where the intended subject matter concerns them as organisational units of the state or their competence if they act in their capacity of a state body;
5. Constitutional Court, Supreme Court, Supreme Administrative Court, and the Prosecutor General's Office where the intended subject matter concerns them as organisational units of the state, or their competence, or the procedural rules governing them;
6. Union of Czech and Moravian Housing Co-operatives where the intended subject matter concerns the system of co-operatives, the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic where the intended subject matter

29 Resolution of the Government of 19 March 1988 No. 188, as amended, available, for example, www.vlada.cz/assets/jednani-vlady/legislativni-pravidla/LEGISLATIVNI-PRAVIDLA-VLADY_platne-od-1-2-2018.pdf.html, accessed April 14, 2022.

concerns the legal regulation of business, and professional chambers established by law where the intended subject matter concerns the legal regulation or the competence of these chambers;
7. trade unions and associations of employers where the intended subject matter concerns important interests of workers, in particular economic, production, working, wage, cultural and social conditions (§ 320(1) of the Labour Code), and bodies and authorities which may submit comments to bills established by international agreements binding on the Czech Republic; and
8. the Department for Compatibility with EU Law of the Office of the Government.

In the case of drafting the Civil Code, the list of bodies and entities which may submit comments was

> extended with courts, professional chambers, and various interest organisations. The bill was also published on the internet, and the ministry gathered comments from the public. . . . The comments were then evaluated by the recodification commission, and relevant comments were incorporated in the draft. As for the bodies and entities submitting comments, it is worth highlighting the comprehensive and complex commentary regarding the protection of persons with disabilities provided by the international non-governmental organisation Mental Disability Advocacy Centre. There was a number of other non-governmental organisations that joined with their comments, for example, the League of Human Rights, Committee of Good Will, Olga Havlová Foundation, etc. Due to their initiative, the provisions regulating the restriction of legal capacity, assisted decision-making, or representation by a member of the household were elaborated and improved significantly. Based on the comments submitted by the Mental Disability Advocacy Centre, the then overused concept of full incapacitation of an individual was replaced by the restriction of legal capacity the extent of which must be determined by the court in its judgment.[30]

Detailed records of the changes made to the draft, which are available to the author, do not suggest that there were opinions or comments on the draft Civil Code of a purely medical nature submitted by psychologists, psychiatrists, or neurologists. However, at the same time, it is apparent that the interests of persons with disabilities were at the centre of attention of many different non-governmental organisations that certainly closely cooperate with specialists in these fields.

V. Active legal capacity of natural persons and its restrictions for the sake of disabilities – procedural aspects (court or outside court mode of taking decision)

Under Article 13, states parties to the Convention shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including

30 Cf K. Eliáš et al., *Nový občanský zákoník s aktualizovanou důvodovou zprávou [New civil code with an updated explanatory memorandum]*, Nakladatelství Sagit, Ostrava, 2012, p. 14ff.

at the investigative and other preliminary stages. The Czech Republic adheres to the general principle of equality of parties to proceedings. The principle is enshrined in Article 37 of the Charter, which stipulates that (1) everyone has the right to refuse testimony if testifying would incriminate themselves or a close person; (2) everyone has the right to legal assistance in proceedings before the courts, other state bodies, or bodies of public administration from the commencement of the proceedings; (3) all parties are equal in the proceedings; and (4) if anyone states that they do not command the language in which the proceedings are conducted, they have the right to an interpreter. This clearly shows that equality, as defined earlier, prevents discrimination on grounds of disability in any proceedings (cf. administrative justice, discussed further here).

Civil procedure in the Czech Republic is regulated primarily by Act No. 99/1963 Sb., the Code of Civil Procedure ('CCP'), and by Act No. 292/2013 Sb., on special judicial proceedings ('SJPA'). The CCP stipulates the rules for hearing civil disputes (i.e. contentious trial proceedings), the SJPA stipulates the rules for special proceedings expressly stated in § 2 of the Act, including proceedings regarding supportive measures and legal capacity (§ 2(a) of the Act).

§ 18(1) of the CCP lays down that parties to civil judicial proceedings are equal and that the court must ensure equal opportunities for the parties to exercise their rights. Under § 19 of the CCP, all persons with legal personality (and persons who acquire legal personality by law) have the capacity to be a party to proceedings. Under § 20(1) of the CCP, all persons may act independently before the court, as parties to proceedings (procedural capacity) in the extent of their legal capacity. Individuals who may not act independently before the court must be represented by their legal representative or curator (§ 22 of the CCP) and, where circumstances of the case so require, the presiding judge may decide that individuals without full legal capacity (that is individuals who may not make juridical acts in the full extent) must be represented by their legal representative or curator even in cases where these individuals may otherwise act independently (§ 23 of the CCP). This provision allows the single or presiding judge to make such decision in cases where acting before the court would present difficulties for the specific individual.

The original concept of civil procedure was based on the premise of unified civil proceedings, meaning the elimination of differences between contentious and non-contentious trial proceedings.[31] This is why the original regulation of proceedings regarding legal capacity in the special provisions of the Code of Civil Procedure was changed (those provisions also included other proceedings that are non-contentious in nature).

Proceedings regarding legal capacity were regulated in §§ 186 to 191 of the CCP. The most important aspects of the proceedings are described in the following:[32] (1) The petition to commence the proceedings regarding legal capacity (incapacitation, restriction or restoration of legal capacity) could also be filed by a healthcare facility, which would then act as a party to the proceedings (but also by any other person, such as a person close to the person concerned). However, where the petition to commence the proceedings was not filed by a state body or a healthcare facility, the court could require the petitioner to

31 Cf., for example, A. Winterová et al., *Civilní právo procesní. Díl první: Řízení nalézací [Civil procedure. Part one: Trial proceedings]*, 9th ed., Leges, Praha, 2018, p. 55.

32 The explanation that follows is based on the wording of the relevant provisions applicable on the date they were repealed – on December 31, 2013, cf. below.

present, within a reasonable period, a medical certificate regarding the mental condition of the individual whose legal capacity was being examined ('person under investigation'); in the event of a failure to present such medical certificate within the set period, the court discontinued the proceedings. The petition to restore legal capacity could also be filed by the incapacitated individual. However, if the petition was dismissed and improvement of the condition of such individual could not be expected, the court could decide on depriving the individual of this right for a reasonable period, but only for a period not exceeding one year as of the legal effect of such decision (§ 186 of the CCP). (2) The person under investigation as a party to the proceedings was entitled to be represented by a representative chosen by the individual; the person under investigation was to be advised about this right and other procedural rights and duties. If the person under investigation failed to choose a representative, the court appointed, as curator *ad litem*, a parent or another person close to the person under investigation whose legal capacity was being examined, unless there were special reasons preventing such representation, in particular conflicting interests between the person under investigation and the parent or another close person, or between the parent and the close person. Where it was not possible to appoint a parent or another person close to the person under investigation as curator, the presiding judge appointed an attorney to act as curator *ad litem* (§ 187(1) of the CCP). (3) The court had the discretion to waive the examination of the person under investigation where it was not possible to examine the individual at all, or without causing harm to the health of the person under investigation. However, if the person under investigation so required, the court always examined the person (§ 187(2) of the CCP). (4) The court had the duty to examine an expert on the health of the person under investigation. Based on the expert's conclusion, the court could order that the person under investigation be investigated in a healthcare facility, where this was necessary for examining the health of the individual (§ 187(3) of the CCP). (5) The court had the discretion to waive the delivery of the decision on the legal capacity where the conclusions of the expert opinion stated that the individual was not able to understand the meaning of such decision (§ 189 of the CCP). (6) The court revoked its decision if it was later found that the requirements for incapacitation or restriction of legal capacity had not been met (§ 190 of the CCP).

The recodification of private law also included amending the legal regulation of civil procedure. However, it was not a complete recodification, and the main change was that special judicial proceedings were newly regulated in a different act – Act No. 292/2013 Sb., on special judicial proceedings (SJPA).[33] The most important aspects of the recodified regulation of proceedings regarding legal capacity (§§ 34 to 43 of the SJPA) are described in the following: (1) The petition to commence proceedings to restrict or restore legal capacity may also be filed by a healthcare institution. The petition must clearly state the facts and legal grounds on the basis of which the petitioner justifies the petition, **and that it is not possible to take less invasive and less restrictive measures**.[34] However, where the petition to commence the proceedings was not filed by a state body or a healthcare institution, the court may require the petitioner to present, within a reasonable period, a medical certificate regarding the mental condition of the individual whose

33 Special provisions of the Code of Civil Procedure were repealed by Act No. 293/2013 Sb., to amend Act No. 99/1963 Sb., the Code of Civil Procedure, as amended, and certain other acts.

34 Emphasis of the subsidiarity of restriction of legal capacity as a last-resort measure.

legal capacity is being examined ('person under evaluation'[35]); in case of failure to present such medical certificate within the set period, the court discontinues the proceedings. The petition to revoke or change the decision by which the legal capacity was restricted may also be filed by the individual whose legal capacity has been restricted. However, if such petition has been dismissed repeatedly and an improvement of the condition of such individual cannot be expected, the court may decide to deprive the individual of this right for a reasonable period, but only for a period not exceeding six months[36] as of the legal effect of such decision (§ 35 of the SJPA). The court may decide *ex officio* (if the court decides to do so in particular case, no proposal is needed). (2) The court appoints a curator for the person under evaluation. This does not prevent the person under evaluation from choosing a representative, also without the consent of the curator. The person under evaluation must be advised about this right and other procedural rights and duties. Where there is a conflict between the acts of the curator and the chosen representative, the court determines which act is in the interest of the person under evaluation (§ 37 of the SJPA). (3) The court examines the person under evaluation; an expert; the physician treating the person under evaluation, where appropriate; and the curator, and presents any other evidence as appropriate. The court has the discretion to waive the examination of the person under evaluation where it is not possible to examine the individual at all, or without causing harm to the health of the person under evaluation; however, the court must always see the individual under evaluation in person.[37] If the person under evaluation so requires,

35 The Czech term for 'person under investigation' (*vyšetřovaný*) used in the previous legal regulation suggests criminal law, which is obviously not the case. (Translator's note: the difference is reflected also in the English translation.) This is why it was replaced by the term 'person under evaluation' (*posuzovaný*).

36 The period for which the person under evaluation is deprived of the right to file a petition to re-evaluate the condition of such individual was reduced by six months compared to the previous legal regulation.

37 Cf. also § 55(1) of the CC. Due to the workload of judges in the Czech Republic, the person was often seen by their assistants and senior court officers instead of the judges. This was criticised in the relevant literature, for example: 'It [the act of seeing the individual in person] should not be performed by other employees of the court. It cannot be ruled out that the individual is seen and examined by the court at the same time (§ 38(1) and (2) of the SJPA), or as the attempt to establish the opinion of the individual on how the court should decide in the matter (§ 56(1)). However, it is necessary to remember that seeing the individual in person follows a specific purpose, eg, establishing the condition of the individual (ability to respond to stimuli, ability of logical reasoning, etc.), and it should not be limited to an examination or establishing the opinion of the individual'. Quoted from: K. Svoboda, Komentář k § 55 [Commentary to § 55], in: *Občanský zákoník. Komentář. Svazek I [Civil code. Commentary. Vol. I*, ed. J. Švestka et al., 2nd ed., Wolters Kluwer ČR, Praha, 2020, p. 216. Cf Opinion of the Supreme Court of the CR Case No. Cpjn 201/2015, according to which the person under evaluation under § 55(1) of the CC and under § 38(2) of the SJPA in the proceedings regarding the legal capacity of the individual is seen, in principle, by the judge. The wording makes it clear that the intention of the Supreme Court of the CR was to provide for exceptions where the person is seen by someone other than the judge (the term 'in principle' in this context means regularly, that is it is possible to derogate from the rule in exceptional, special cases). The Supreme Court of the CR in its judgment in Case No. 30 Cdo 5125/2016 described the duty of the judge to see the person under evaluation in more detail: 'The presumption that, for example, the person under evaluation may be seen in some cases also by a senior court officer or assistant to the judge (§ 11 of Act No. 121/2008 Sb., on senior court officers and senior officers at the public prosecutor's office and to amend related acts, as amended, § 36a of the Judiciary Act) is limited by the fact that it is not possible to convey the overall conclusion ("impression") reached by the senior court officer or assistant to the judge (and recorded in the report on this act) in full to the judge, who is to decide the case taking this conclusion into consideration. The aforementioned legal regulation emphasises respect for the person under evaluation . . . , expressed also by personal contact between the court (judge) and the individual. The legal regulation clearly stresses the role of the judge as the person representing the court that is, in principle, designated to perform these acts. Also, the case law of the European Court of

the court always examines the individual. Based on the expert's conclusion, the court may order that the person under evaluation be investigated in a healthcare institution for a period not exceeding four weeks,[38] where this is necessary to examine the health of the individual and where it is not possible to carry out the examination otherwise. Where the court is deciding on the extension of the period of restriction of legal capacity and where it is evident that the condition of the person under evaluation has not changed since the decision to restrict legal capacity or the last decision to extend the period of restriction, the court may waive the presentation of evidence by a new expert opinion and examination of an expert witness, and replace this evidence with other evidence, in particular a written report by the treating physician accompanied by an expert opinion; examination of the expert who has drafted the opinion is not required in this case (§ 38 of the SJPA). (4) Where the court deems that less invasive and less restrictive measures would suffice with respect to the interests of the person under evaluation, it may, in particular, approve a decision-making assistance agreement or representation by a member of household or appoint a curator in the course of the proceedings[39] (§ 39 of the SJPA). (5) In a judgment restricting legal capacity, the court determines the extent to which it restricts the capacity of the person under evaluation to make independent juridical acts, and the period of the legal effect of the restriction (§ 40(2) of the SJPA). (6) The court takes other appropriate measures to enable the person under evaluation to understand the content of the decision in a convenient form[40] and to make it available to the person (§ 41 of the SJPA). (7) The court revokes its decision if it is later found that the requirements for restriction of legal capacity have not been met (§ 42 of the SJPA).

There is an important note that should be made regarding procedural capacity in relation to administrative justice. This question is regulated by Act No. 150/2002 Sb., the Code of Administrative Justice ('CAJ'). In the administrative justice system, courts provide protection of the public-law rights of individuals and legal entities in the manner stipulated by this Act and make decisions in other matters stipulated by this Act.[41]

In its original version, § 33(3) provided for a different definition of procedural capacity than in the Code of Civil Procedure. The original provision stipulated that parties are competent to act independently in the proceedings only if they have full legal capacity.

Human Rights provides for the rule under which "judges adopting decisions with serious consequences for a person's private life" (such as restriction of legal capacity but also, for example, interference with the personal liberty of the individual) "should in principle also have personal contact with those persons" (for example, *X and Y v. CROATIA*, Application No. 5193/09, judgment of November 3, 2011)'. Emphasis added by the author, who also agrees with the reasoning that it should always be the judge who sees the person under evaluation.

38 Period reduced by two weeks compared to the previous legal regulation.

39 Emphasis of the possibility to apply less restrictive measures (again subsidiarity of restriction of legal capacity as a last-resort measure).

40 Possibility to adopt an informal procedure that reflects the condition of the person under evaluation.

41 Courts of administrative justice decide on (1) actions against decisions made in public administration by an executive body, a body of a self-governing unit, as well as by an individual or legal entity or another body if entrusted with decision-making about the rights and duties of individuals and legal entities in public administration (hereinafter 'administrative body'), (2) protection against the failure to act on the part of the administrative body, (3) protection against unlawful intervention by an administrative body, (4) actions regarding conflict of competence, (5) issues connected with elections and local and regional referenda, (6) issues concerning political parties and political movements, and (7) annulment of a general measure due to its conflict with the law (§ 4 of the CAJ). In principle, protection by administrative justice may be sought only upon application and after having exhausted all ordinary remedial measures within administrative proceedings (§ 5 of the CAJ).

As a result, individuals with a restricted legal capacity always had to be represented in proceedings. The Constitutional Court delivered a judgment regarding this provision in Case No. Pl. ÚS 43/10. The Court stated, *inter alia*,

> The question of disabilities is an important topic in today's discussion on human rights and freedoms. This is proved not only by the UN Convention[42] quoted by the petitioner, which is the first legally binding international instrument in the area of human rights, binding on the European Union and its member states . . . , but also by the growing case-law of the European Court in the area of disability law. . . . Considering today's views on procedural capacity expressed by the Constitutional Court and the European Court of Human Rights, the comparison of individual applicable legal regulations governing procedural capacity below the level of constitutional law and the analysis provided by the petitioner clearly show that the challenged provision is contrary to the principle of proportionality and to the maxim that interference with rights must reflect the specific circumstances of individual cases.

Based on this statement, the Constitutional Court repealed the relevant part of § 33(3) of the CAJ. The reasoning of the Court clearly shows that the Convention was one of the factors leading to remedying the no longer acceptable situation. For the sake of completeness, it should be noted that the legislature then reacted to the mentioned judgment by amending the Code of Administrative Justice by Act No. 303/2011 Sb., to amend Act No. 150/2002 Sb., the Code of Administrative Justice, as amended, and certain other acts. The amendment defined procedural capacity in § 33(3) based on the definition of this institute in the Code of Civil Procedure. In its wording applicable today, the provision stipulates that parties are competent to act independently in the proceedings in the extent that they are competent to acquire rights and commit themselves to duties by their own acts.

The author highlighted the changes made to the previous legal regulation under the Code of Civil Procedure (and briefly compared them in the footnotes), which clearly show that the current legal regulation takes more into consideration the rights of the person under evaluation and strives to minimise interference in the life of the individual.

In conclusion, the legal regulation of civil procedure also follows the trend apparent in the recodification of private law, and the new legal regulation has brought changes to increase respect for the rights of the person under evaluation and offers more protection to the individual (in particular by emphasising the personal contact between the judge and the person under evaluation).

VI. Organisation and institutional aspects of the assistance and guardianship for the purpose of doing legal acts by persons with disabilities

Assistance to persons with disabilities takes many different forms. In private law, the assistance covers the juridical acts of these persons (and related issues) and is regulated in the 2012 Civil Code. From the perspective of the 2012 Civil Code, it is necessary to distinguish between assistance provided to, on the one hand, a person with a disability but without restricted legal capacity by the court or, on the other hand, a person whose legal capacity has been restricted due to a mental disorder.

42 That is the UN Convention on the Rights of Persons with Disabilities.

It was already mentioned that the restriction of legal capacity is a last-resort measure that may be used only where less invasive measures would not suffice to provide adequate protection to the interests of the individual. These measures should be used if restricting the person's legal capacity is not appropriate. They are as follows: (1) *Declaration in anticipation of incapacity* basically means that in anticipation of their incapacity to make juridical acts, individuals may manifest their will to have their affairs managed in a certain manner, or to have them managed by a specific person, or to have a specific person appointed as curator (§ 38 *et seq.* of the CC). (2) *Assisted decision-making* may be used where an individual has problems in decision-making due to a mental disorder, but it is not necessary to restrict the legal capacity of the individual. An individual may enter into a decision-making assistance agreement with the assisting person to provide for the terms governing the provision of support; there may be more than one assisting person. By entering into a decision-making assistance agreement, the assisting person agrees to be present, with the consent of the assisted person, when the assisted person makes juridical acts, to procure the necessary information and communications and to provide advice. The agreement becomes effective on the date of its approval by the court (§§ 45, 46 *et seq.* of the CC). (3) *Representation by a member of household* may be used where an adult who does not have any other representative and is not able to make independent juridical acts due to a mental disorder. In this case, the individual may be represented by his or her descendant, ascendant, sibling, spouse or partner or by a person who has lived with the represented person in one household for at least three years before the commencement of the representation. The representative informs the represented person about the representation and clearly explains the nature and consequences of such representation to the represented person. If the person refuses to be represented, the representation fails to commence; refusal in the form of expressing a wish is sufficient. Commencement of the representation must be approved by the court (§§ 49, 50 *et seq.* of the CC).

However, the fundamental institution of protection is still the appointment of a curator (guardian) by the court. The underlying rule is stated in § 465 of the CC. This provision stipulates that the court appoints a curator for an individual where it is necessary to protect his or her interests or where required by the public interest. This general rule is further specified in an illustrative list according to which the court appoints a curator, in particular, for an individual whose legal capacity has been restricted by the court or whose whereabouts are unknown, for an unknown individual participating in a certain juridical act, or for an individual who, due to his or her health condition, has difficulties administering his or her assets and liabilities or defending his or her rights. Importantly, it follows that a curator is appointed for an individual whose legal capacity has been restricted, but a curator may also be appointed for a person whose legal capacity has not been restricted.

The general rules governing curatorship are defined in § 465 *et seq.* of the CC. Where the court decides on the appointment of a curator for an individual, it may do so only after seeing the individual, unless this is impossible due to an insurmountable obstacle; the court must also hear the statement of the individual, or otherwise learn his or her opinion, and base its decision in it. The court appoints, as curator, the person proposed by the person under curatorship. Where it is not possible, the court normally appoints a relative or a person close to the person under curatorship, who must show long-term and serious interest in the person under curatorship and show that such interest will last in the future. Where this is not possible either, the court appoints another person who meets the requirements as curator, or a public curator under another act.[43] The municipality where

43 Cf § 149b(3) of Act No. 128/2000 Sb., regulating municipalities (local government).

the person under curatorship has residence, or a legal entity established by the municipality to perform these tasks, has the capacity to become a public curator; appointment of a public curator under another act is not subject to the public curator's consent (§ 471 of the CC).

The curator's duties include, in particular, maintaining regular contact with the person under curatorship in a convenient manner and necessary scope, expressing real interest in the individual, caring about his or her health and making sure that his or her rights are performed and interests protected. Where the curator makes decisions regarding the affairs of the person under curatorship, the curator explains in a comprehensible way the nature and consequences of such decisions to the individual (§ 466 of the CC). A curator performs his or her duties by exercising the legal declarations of the person under curatorship and respects his or her opinions, including those previously expressed by the individual, as well as his or her beliefs and religion, takes them into account continuously, and acts accordingly while arranging the affairs of the person under curatorship. Where this is not possible, the curator acts in the interests of the person under curatorship. The curator ensures that the individual's way of life is not in conflict with his or her abilities and in accordance with his or her specific ideas and wishes unless there are justified reasons not to do so (§ 467 of the CC).

A curator is subject to two control mechanisms. He or she is obligatorily supervised by the court and optionally also by a curatorship board. The idea of 'tutorship boards' was born already during the First Republic (i.e. Czechoslovakia before the Second World War). There was to be one tutorship board established at each court, which would supervise all tutors and persons under tutorship in the court's jurisdiction. The current Civil Code revived this idea, however, in a different form – it requires that each person under curatorship have his or her own curatorship board (which is, undoubtedly, more demanding on the court in terms of administration than the model based on which there would be only one such board in its jurisdiction). Further details are stipulated in § 472 *et seq.* of the CC. Where a curator is appointed, the person under curatorship, or any other person close to him or her, may request that a curatorship board be established; the curator calls a meeting of persons close to the person under curatorship and his or her friends if they are known to the curator so that the meeting takes place within thirty days of receiving the request (§ 472 of the CC). A curatorship board is composed of at least three members (§ 474 of the CC). The meetings of a curatorship board are held at least once a year (§ 478 of the CC). § 480 of the CC provides for juridical acts which require the curator to receive consent from the curatorship board.[44]

44 Without the consent of the curatorship board, the curator may not decide in the following matters: (1) changing the residence of the person under curatorship, (2) placing the person under curatorship in an institution he or she cannot leave or in a similar facility if it is not clearly required due to his or her health, or (3) interfering with the physical integrity of person under curatorship, unless the intervention is without any serious consequences. Without the consent of the curatorship board, the curator may not dispose of the property of the person under curatorship in the following cases: (1) acquisition or alienation of property of a value exceeding hundredfold the minimum living amount of an individual under another legal regulation; (2) acquisition or alienation of property exceeding one third of the property of the person under curatorship, unless such third corresponds to only a negligible value; or (3) acceptance or provision of a loan for consumption, a loan or a security of the value under (1) or (2), unless the consent of the court is also required for such decisions. Where it is in the interest of the person under curatorship, the curatorship board may agree that further decisions made by the guardian are to be subject to its consent; such measure must not limit the curator to an unreasonable extent considering the circumstances (§ 480 of the CC).

Where it is not possible to establish the curatorship board due to a lack of interest of a sufficient number of persons under § 472(1), or due to other similar reasons, the court may decide, upon application of one of those persons, that the powers of the curatorship board will be performed by only one of those persons, and at the same time, the court appoints such person. Where the curatorship board is not established and where it is not possible for at least one person to perform the powers of the curatorship board, measures regarding the person under curatorship and his or her assets and liabilities taken by the curator are approved by the court instead of the guardianship board (§ 482 of the CC).

Regardless of whether a curatorship board has been established for the person under curatorship, the curator is always subject to the supervision of the court. The range of juridical acts for which the curator is required to receive the consent of the court (to represent the person under curatorship in making these acts) is provided for in § 483 of the CC.[45]

In the event of restricting the legal capacity of an individual, the rules under §§ 62 and 63 of the CC apply in addition to the provisions mentioned earlier. A curator is appointed for an individual whose legal capacity is restricted directly in the decision to restrict legal capacity. The court takes into consideration the wishes of the person under curatorship when selecting the curator and his or her needs, as well as suggestions made by persons close to the person under curatorship, if these persons act in his or her interest, and the court takes care to ensure that the selection of the curator does not make the person under curatorship distrust the guardian. An incapacitated person, a person whose interests are in conflict with the interests of the person under curatorship, and an operator of the facility in which the person under curatorship stays or which provides services to him or her, or a person dependent on such facility, may not be appointed guardian (cf § 62 and 63 of the CC).

It is clear that the purpose of these provisions is to ensure that the performance of curatorship is not merely formal but that it is performed with respect to the individuality of each person under curatorship.

45 The curator may only agree with the change in the personal status of the person under curatorship with the approval of the court. Where the curator administers the assets and liabilities of the person under curatorship, the curator may not, unless the court approved further restrictions, (1) oblige the person under curatorship to provide performance to one of the members of the curatorship board or a person close to such member; (2) acquire for the person under curatorship an immovable thing or an interest in it, or alienate or encumber the individual's immovable thing or an interest in it; (3) acquire for the person under curatorship a business enterprise, an interest in a business enterprise or an interest in a legal entity, or alienate or encumber such property (this provision does not apply to the acquisition of participating or similar securities providing a safe yield); (d) enter into a contract obliging the person under curatorship to provide continuous or recurring performance for a period exceeding three years; (e) refuse inheritance or other performance from a decedent's estate; or (f) oblige the person under curatorship to provide gratuitous performance to another person, unless it is a customary gift given the occasion, in accordance with good manners to a reasonable extent, and the person under curatorship is capable of judgement and approved the gift. Notwithstanding the preceding provisions, the curator may not, without the approval of the court, dispose of the property of the person under curatorship in the following cases: (1) acquisition or alienation of property exceeding fivefold the minimum living amount of an individual under another legal regulation; (2) acquisition or alienation of property exceeding one half of the individual's property, unless such half corresponds to only a negligible value and it is not a thing of sentimental value for the person under curatorship; or (3) acceptance or provision of a loan for consumption, a loan or a security of the value under (1) or (2).

VII. Active legal capacity of the persons with disabilities and its restrictions in the light of statistical data before the UN Convention on the Rights of Persons with Disabilities was ratified and afterwards

Since the turning point in the Czech legal order in terms of interferences in the legal capacity of persons with disabilities was not the adoption of the UN Convention on the Rights of Persons with Disabilities, but the adoption and effect (on January 1, 2014) of the current Civil Code, which reflects the Convention (cf in the text), the following data is divided into data gathered prior to the Civil Code coming into effect (i.e. from 2009 to 2013) and after the Code became effective (i.e. from 2014 to 2020). At the time this chapter was completed, statistical data up to 2019 (for Tables 9.1 and 9.2), up to 2021 for Table 9.3, and up to 2020 for Table 9.4 was available. Unless indicated otherwise, the data was obtained from the statistical year books published by the Czech judiciary.[46]

Table 9.1 Number of proceedings terminated by the delivery of a final judgment

Year	*Decisions to restrict legal capacity*	*Decisions to incapacitate a person*	*Decisions to change the extent of the restriction (incapacitation to restriction and vice versa)*	*Decisions to restore legal capacity*	–
2009	770	2.298	(not recorded)	65	–
2010	816	2.045	110	45	–
2011	860	2.171	128	59	–
2012	938	2.252	129	51	–
2013	1342	2.273	162	77	–
XXXX	XXX	XXX	XXX	XXX	XXX
Year	*Decisions to restrict legal capacity*	*Decisions to extend the restriction*	*Decisions to change the extent of the restriction*	*Decisions to restore legal capacity*	*Curator without the restriction of legal capacity due to health reasons*
2014	2.683	307	864	222	866
2015	5.577	1.793	4.542	689	1.479
2016	4.902	2.323	6.017	1.242	2.842
2017	4.104	1.848	4.455	755	2.730
2018	4.077	6.715	2.325	242	2.235
2019	4.104	8.886	1.643	171	2.137

Note to Table 9.1:

- Under § 27 of the 1964 CC (2009 until 2013) and under § 62 of the 2012 CC, a curator is appointed for each person whose legal capacity has been restricted (or who has been incapacitated under the 1964 CC). The number of persons with a curator, therefore, corresponds to the numbers presented in the table. It is necessary to distinguish curators appointed for various reasons for minor children who have not yet acquired full legal capacity, and curators appointed for adults for reasons other than the restriction of legal capacity (for example, curators appointed due to absence under § 465 of the CC). These guardians are not relevant in this case as they have been appointed for reasons which are not studied in this chapter.

46 https://cslav.justice.cz/InfoData/statisticke-rocenky.html.

Table 9.2 Duration of proceedings (i.e. number of proceedings terminated by the delivery of a final judgment in the given year according to their duration)

Year	*Less than 1 month*	*1–2 months*	*2–3 months*	*3–4 months*	*4–5 months*	*5–6 months*	*6–12 months*	*1–2 years*	*More than 2 years*
2009	6	20	61	136	283	397	1.675	496	59
2010	3	13	45	130	229	341	1.592	600	63
2011	5	12	35	147	230	362	1.752	610	65
2012	3	18	20	110	449	414	1.880	609	91
2013	8	21	29	97	265	434	2.100	805	95
XXXX	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX
2014	111	358	254	250	396	476	2.388	658	51
2015	111	460	470	511	594	918	7.641	3.290	154
2016	100	339	545	664	814	1.007	7.209	5.762	886
2017	84	458	782	756	781	729	4.962	3.911	1.429
2018	77	561	1.321	1.931	2.129	1.771	4.756	1.918	1.130
2019	78	632	1.649	2.527	2.518	2.110	5.537	1.375	515

Notes to Table 9.2:

- Data for 2009 is the aggregate of decisions to incapacitate an individual, decisions to restrict the legal capacity of an individual and decisions to restore the legal capacity of an individual.
- Data for 2010 to 2013 is the aggregate of decisions to incapacitate an individual, decisions to restrict the legal capacity of an individual and decisions to change the extent of the restriction of legal capacity (from incapacitation to restriction and vice versa).
- Data for 2014 and the following years cover decisions to restrict the legal capacity of an individual, decisions to extend the restriction of legal capacity, decisions to change the extent of the restriction, decisions to restore legal capacity (incapacitation is no longer possible; cf. previous discussion) and decisions to appoint a curator for persons who have difficulties due to their health condition but whose legal capacity has not been restricted.

Table 9.3 Number of persons with restricted legal capacity (and until 2013 also incapacitated persons)

Year	*Number of persons with restricted legal capacity*	*Number of incapacitated persons*
2009	1.209	32.158
2010	2.165	32.431
2011	3.114	32.817
2012	3.899	33.256
2013	5.142	33.366
XXXX	XXX	XXX
2014	38.315	–
2015	37.635	–
2016	36.877	–
2017	37.399	–
2018	41.052	–
2019	42.847	–
2020	43.830	–
2021	44.342	–

Notes to Table 9.3:
- Based on reports V(MS)-120 'Report on the agenda in register P of district courts' and their summaries. The relevant data in these registers is called 'number of incapacitated persons – live registry'. Data solely on persons aged 18 and above.
- As of 2014, it is not possible to incapacitate a person.[47]

VIII. The relations between private law restrictions of active legal capacity and protection of persons with disabilities under criminal law (against crimes which can be committed as a result of doing legal acts)

Under Article 16, paragraph 5, of the Convention, the states parties must put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where relevant, prosecuted. A new Criminal Code (Act No. 40/2009 Sb., the Criminal Code), replacing the old Criminal Code (Act No. 140/1961 Sb., the Criminal Law Act), was adopted at the same time as the Convention.[48]

In relation to Article 16, paragraph 5, we should note the general definition of aggravating circumstances provided for in § 42 of the Code. Under this provision, the court considers it an aggravating circumstance in particular where the offender commits the crime, *inter alia*, against a child, a close, pregnant or ill person, a person with disabilities

47 Cf. § 3023 of the CC: (1) As of the date of effect of this act, an individual who has been incapacitated under the previous legal regulations is deemed to be an individual with restricted legal capacity under this act. (2) As of the date of effect of this act, an individual whose legal capacity has been restricted under the previous legal regulations is deemed to be an individual with restricted legal capacity under this act and is hereafter competent to make juridical acts in the extent determined by the previous legal regulations unless the court decides otherwise under this act.

48 In contrast to the recodification of private law, the author does not have detailed records from the drafting of the Criminal Code, but there are justified reasons to assume that the Convention was at least one of the factors influencing the legal regulation of aggravating circumstances.

Table 9.4 Amounts allocated in the budget and actual expenses from public funds for the assistance of persons with disabilities

342.	*Disability pension 345.*	*Disability benefits in CZK million*		*Care allowance under the Social Services Act in CZK million*		*Support for employment of persons with disabilities in CZK million*	
354.	*Actual expenses*	*Budget*	*Actual expenses*	*Budget*	*Actual amount*	*Budget*	*Actual amount*
2009	61.386	5.950	5.751	18.581	18.898	2.350	2.257
2010	47.457	6.179	5.903	19.580	19.800	2.560	2.712
2011	47.703	7.112	7.060	18.000	18.241	2.760	3.282
2012	46.361	9.193	9.333	19.381	18.428	3.424	3.468
2013	44.772	2.094	1.940	19.957	19.589	3.728	3.670
XXXX	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX
2014	43.975	2.449	1.944	20.690	20.442	3.939	4.019
2015	44.447	2.468	1.976	21.350	21.213	3.700	4.320
2016	42.767	2.100	2.045	23.160	23.105	4.530	4.953
2017	43.856	2.200	1.997	25.300	25.174	5.390	5.676
2018	45.005	2.900	2.666	26.200	26.068	6.050	6.755
2019	48.458	2.800	2.691	30.000	29.822	7.390	7.405
2020	51.364	2.800	2.681	33.350	33.153	8.500	8.406

Notes to Table 9.4:

- Data obtained from the State Final Accounts (https://www.mfcr.cz/cs/verejny-sektor/statni-rozpocet).
- Amounts allocated in the budget after changes (i.e. based on the final version of the budget).
- Amounts do not include the expenses of the regions, purchases of low-floor vehicles, etc.
- In the case of disability pension, only the actual amount of the expenses is indicated.
- Disability benefits: from 2009 to 2012 together with assistance provided in cases of material destitution.

or an elderly or infirm person (paragraph (h) of the aforementioned provision).[49] The explanatory memorandum to this provision does not refer to the Convention at all, not even as a source of inspiration for including this aggravating circumstance. Also, under § 200 of the Criminal Code, the crime of abducting a child or a person suffering from a mental disorder is committed by a person who takes a child or a person suffering from a mental disorder away from the custody of a person who, in accordance with another legal regulation or administrative decision, has the duty to provide care for such child or person. For the sake of completeness, in the case of participation in suicide (§ 144 of the Criminal Code: a person who encourages or assists another to commit suicide), the commission of this crime against a person suffering from a mental disorder is a reason for imposing a harsher punishment (§ 144(3) of the Criminal Code).

Having in mind the protection of persons with disabilities against exploitation while entering into a contract, we should consider, in particular, the crime of causing harm to the rights of another, which is committed by a person who causes significant harm to the rights of another by misrepresentation or by exploiting another's mistake (§ 181 of the Criminal Code), or fraud, which is committed by a person who enriches himself or herself or another person by misrepresentation, by exploiting another's mistake or by concealing a material fact, and thereby causes higher-than-negligible damage to the property of another (§ 209 of the Criminal Code). Commission of these crimes against a person with disabilities is considered to be an aggravating circumstance.

In connection with fraud, it should be added that the commission of this crime in the capacity of a person who has a special obligation to act in the interest of another is grounds for imposing a harsher penalty. In the case of persons with disabilities, for example, the curator who commits a fraud against the person under curatorship might be liable to harsher punishment.

We should also mention administrative law in this context, specifically Act No. 250/2016 Sb., on liability for administrative infractions and proceedings thereon. In analogy to the Criminal Code, the Act also provides a general definition of aggravating circumstances. § 40(f) stipulates that it is considered an aggravating circumstance where the transgressor commits the infraction against a child, a pregnant or ill person, a person with disabilities, or an elderly or infirm person.

In conclusion, Czech criminal law does not provide for a special crime whereby a person would exploit the vulnerability of a person with disabilities (for example, by entering into a contract with the person). The special interest in providing more protection to these persons is realised on the general level – that is, it applies to all crimes as provided for in the general definition of aggravating circumstances. This basic (general) mechanism of protection of persons with disabilities is further complemented in the definitions of certain crimes.

49 The previous Criminal Law Act did not expressly refer to a person with disabilities in the list of aggravating circumstances; cf. § 34(d), which stipulated that it was considered an aggravating circumstance, *inter alia,* where the offender commits the crime against a person below the age of fifteen or a pregnant, severely ill, elderly or infirm person.

Concluding remarks

The recodification of private law brought a fundamental increase in the standard of protection of persons suffering from a mental disorder in the Czech Republic. This was so, among other things, because within the recodification debates many non-governmental organisations that deal with the protection of the interests of persons with disabilities were involved and at the same time provisions of the UN Convention on the rights of persons with disabilities were taken into account. With regard to the legal regulation of substantive law, it is necessary to highlight the abolition of the former possibility of (complete) deprivation of legal capacity and the introduction of a regular review (re-examination) of the decision after three (or five) years of the life of a person with restricted legal capacity. When it comes to the regulation of the procedure before a court on the restriction of legal capacity, it should be highlighted that the legislator puts the emphasis on the personal contact of the judge with the assessed person – the judge in person has to see the assessed person. Although the current legislation is not completely free of interpretation problems (cf. in particular the issue of the type of invalidity of legal actions of person suffering from a mental disorder made in violation of a decision restricting his legal capacity), it can be concluded that the Czech legislation currently provides a high standard of protection to persons suffering from a mental disorder.

10 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in the Republic of Estonia

Kärt Pormeister

1. Introductory remarks

In Estonian law, legal capacity is regulated in the General Part of the Civil Code Act[1] (hereinafter GPCCA). Under the GPCCA, legal capacity is divided into passive and active legal capacity. Passive legal capacity is defined as the capacity of a human being to have civil rights and perform civil obligations.[2] All human beings have uniform and unrestricted passive legal capacity, which begins with the live birth of a human being and ends with their death.[3] A foetus can in certain cases have passive legal capacity from conception if the child is born alive, but only in the specific cases provided by law (e.g. under inheritance law[4]).[5]

In contrast to passive legal capacity, active legal capacity – defined as the capacity to enter independently into valid transactions – depends on the age and mental state of the person.[6] Persons under the age of 18 and those who, due to mental illness, mental disability or other mental disorder, are permanently unable to understand or direct their actions, have restricted active legal capacity.[7] In Estonia, having restricted active legal capacity has legal significance first and foremost in private law, although certain implications can be noted in the context of administrative and criminal procedure as well. Regarding private law, restricted active legal capacity of an adult affects the validity of the transactions entered into by the person, although only to the extent in which he or she is unable to understand or direct his or her actions.[8]

1 *Tsiviilseadustiku üldosa seadus* (General Part of the Civil Code Act) (GPCCA), RT I, March 22, 2021, p. 8. The English translation of the GPCCA as of April 1, 2021, https://www.riigiteataja.ee/en/eli/501042021006/consolide, accessed November 17, 2021.
2 Ibid., § 7(1).
3 Ibid., § 7(1)–(2).
4 *Pärimisseadus* (Law of Succession Act), RT I 2008, 7, 52. The English translation of this act as of January 14, 2021, https://www.riigiteataja.ee/en/eli/514012021002/consolide, accessed February 14, 2022, § 5(4).
5 GPCCA, § 7(3).
6 Ibid., § 8.
7 Ibid., § 8(2).
8 Ibid.

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The ratification of the Convention on the Rights of Persons with Disabilities[9] (hereinafter 'the Convention') and its Optional Protocol[10] by Estonia in 2012[11] was seen as an important step forward regarding progressive recognition of and respect for the rights of people with disabilities in Estonia.[12] However, it did not impact the concept of (restricted) active legal capacity under the GPCCA concerning persons with mental disabilities. Instead, the most significant development in this regard was the adoption of the current GPCCA in 2002, which, in contrast to its predecessor emulating Soviet attitudes and approaches, no longer allowed for people with mental disabilities to be declared to lack active legal capacity entirely.

2. The evolution of the concept of active legal capacity in Estonian private law

2.1. From no active legal capacity to restricted active legal capacity in 2002

The most significant change concerning (restricted) active legal capacity in Estonian law regarding people with mental disabilities occurred when the 1994 GPCCA was replaced with the current GPCCA. The current GPCCA was adopted in 2002, and although it has been subject to numerous changes throughout the last two decades, the approach to (restricted) active legal capacity has remained much the same.

The first Estonian GPCCA was adopted in 1994.[13] Following the approach of its predecessor from Soviet times,[14] the 1994 GPCCA enabled courts to declare a person to completely lack active legal capacity if the person was permanently unable to understand or direct their actions due to mental illness or mental disability.[15] In such cases, a guardian was to be appointed, who had the right to conduct transactions on behalf of the person having been stripped of their active legal capacity – although it was still in the power of the courts to determine which, if any, transactions could be entered into personally by the person under guardianship.[16]

The 1994 GPCCA also established the concept of 'restricted active legal capacity'; however, in regard to adults, this was limited to cases where a person was putting their family in financial hardship due to squandering or consumption of alcohol or narcotic substances.[17] For persons who were permanently unable to understand or direct theirs actions due to mental illness or mental disability, the only option was for a court to declare them to completely lack active legal capacity. In a sense, persons with mental disabilities were in

9 Convention on the Rights of Persons with Disabilities, New York, December 13, 2006, 2515 UNTS 3.

10 Optional Protocol to the Convention on the Rights of Persons with Disabilities, New York, December 13, 2006, 2518 UNTS 283.

11 *Puuetega inimeste õiguste konventsiooni ratifitseerimise seadus* (Act on the Ratification of the Convention on the Rights of Persons with Disabilities), RT II, April 4, 2012, p. 5.

12 Karin Hanga, *ÜRO puuetega inimeste õiguste konventsioon ja puuetega inimeste õigused Eestis (The UN convention on the rights of persons with disabilities and the rights of persons with disabilities in Estonia)*, ed. Monika Haukanõmm and Piret Kamber, The Estonian Chamber of Disabled People, 2013, p. 1, http://www.inclusion-europe.eu/the-un-crpd-what-our-members-have-been-doing/.

13 *Tsiviilseadustiku üldosa seadus* (General Part of the Civil Code Act) (1994 GPCCA), RT I 1994, 53, 889.

14 *Eesti NSV tsiviilkoodeks* (Civil Code of the Estonian Soviet Socialist Republic), RT 1964, 25, 115, § 17.

15 1994 GPCCA, § 13(1).

16 Ibid., § 13(1)–(2).

17 Ibid., § 12.

a situation comparable with children. Children under the age of 7 were deemed by the 1994 GPCCA to lack active legal capacity, with the exception of minor transactions (e.g. buying sweets).[18] Children from ages 7 to 18 were deemed to have restricted active legal capacity, hence having the ability to do transactions with the permission of their guardian, or independently if they had received the funds for the transaction for a certain purpose or to use as they wished from the guardian or with the guardian's permission from a third party.[19] In this light, under the 1994 GPCCA, people with mental disabilities were treated much like children under the age of 7, although the latter were automatically considered to lack active legal capacity, whereas for the former it was conditional on a court decision. To sum this up, under the 1994 GPCCA, the concept of restricted active legal capacity was reserved for children from the ages of 7 to 18 and adults who were putting their family in financial hardship due to squandering or consumption of alcohol or narcotic substances.

Thus, under the 1994 GPCCA, it was possible for courts to declare people with mental disabilities (i.e. those with permanent difficulties in understanding or directing their actions) to lack any active legal capacity at all. When the current GPCCA was adopted in 2002, this was no longer possible.

As of 2002, the notion of lacking active legal capacity entirely no longer exists in Estonian law. The current GPCCA regards people under the age of 18 and persons who due to mental illness, mental disability or other mental disorders are permanently unable to understand or direct their actions, to have restricted active legal capacity – and this is not contingent on a court decision, but a factual determination.

However, it must be noted that the adoption of the current GPCCA in 2002 did not entail an automatic review mechanism to annul all decisions that had previously declared individuals to lack active legal capacity per the 1994 GPCCA. The review of such decisions would have presumed the persons themselves, their guardian or guardianship institution, or a person interested in the matter to turn to court. If the persons themselves lacked civil procedural legal capacity, they would not have been able to petition the court on their own.[20]

2.2. Amendments to the GPCCA in 2009

As noted, much of the regulation on (restricted) active legal capacity has remained the same as of the adoption of the current GPCCA in 2002, with one exception. Prior to 2009, GPCCA § 8(2) consisted of two sentences, the first of which stated that persons who have attained 18 years of age (adults) have full active legal capacity. The second sentence established that persons who are under 18 years of age (minors) and persons who, due to mental illness, mental disability or other mental disorder, are permanently unable to understand or direct their actions, have restricted active legal capacity. GPCCA § 8(3) stated that if a guardian is appointed by a court to a person who due to mental illness, mental disability or other mental disorder is permanently unable to understand or direct his or her actions, the person is presumed to have restricted active legal capacity.

In 2009, a third sentence was added to GPCAA § 8(2), stating that the restricted active legal capacity of an adult affects the validity of the transactions entered into by the person

18 Ibid., § 11.

19 Ibid., § 10.

20 Eve Pilt, Isiku õigustest tema teovõime piiramise protsess (About a person's rights in the process of restricting their legal capacity), 2004 issue 4, *Juridica*, first p. 223.

only to the extent in which he or she is unable to understand or direct his or her actions. At the same time, GPCCA § 8(3) was extended to set out that if a guardian is appointed by a court to a person who due to mental illness, mental disability or other mental disorder is permanently unable to understand or direct his or her actions, the person is presumed to have restricted active legal capacity *to the extent in which a guardian has been appointed to him or her*.

These changes in the GPCCA were introduced during revisions of the Code of Civil Procedure in 2008. The official commentary regarding these described changes in the GPCCA was brief. According to the relevant explanatory note, the changes in GPCCA § 8 were introduced to 'clarify for the sake of the protection of personal rights that factually a person's active legal capacity may be partially restricted' (as opposed to entirely restricted). The changes were meant to harmonise substantive and procedural law, as under procedural law courts already had to set out specific tasks and competences for guardians when establishing guardianships.[21] In a sense, these comments show that the shift in the understanding of changes in substantive law from the concept of 'lack of active legal capacity' before 2002 to 'restricted active legal capacity' thereafter was a gradual one. Although the concept of 'lack of active legal capacity' was abolished in 2002, it was not until the additions to the GPCCA in 2009 that solidified in writing that the concept of 'restricted active legal capacity' was not a simple name change to the prior regime but a shifting in the understanding that most adults factually and legally have active legal capacity at least to a certain extent.

Thus, the last changes in the GPCCA regarding (restricted) active legal capacity occurred in 2009. As the law stands since then, restricted active legal capacity of adults affects validity of their civil transactions to the extent that the person is unable to understand or direct their actions.[22] Unilateral transactions of a person with restricted active legal capacity are void if they are made without the prior consent of the legal representative.[23] Multilateral transactions are void without prior consent or subsequent ratification by the legal representative, unless: (1) no direct civil obligations arise from the transaction for the person or (2) the person performed the transaction by means which his or her legal representative or a third person with the consent of the legal representative had granted to him or her for such purpose or for free use.[24]

2.3. The impact of the ratification of the Convention on the concept of active legal capacity in Estonia

Estonia ratified the Convention and its Optional Protocol in 2012.[25] However, no legislative changes in national law followed. It is noted in the Explanatory Note to the Act on the Ratification of the Convention (hereinafter 'Explanatory Note') that Estonian national

21 *Seletuskiri "Tsiviilkohtumenetluse seadustiku ja sellega seotud seaduste muutmise seaduse eelnõu" juurde* (*Explanatory note on the act on amendments to the code of civil procedure and related laws*), 60. Available online (in Estonian), https://www.riigikogu.ee/tegevus/eelnoud/eelnou/57af5aca-06a7-159e-7d61-03607a2dce5e/Tsiviilkohtumenetluse%20seadustiku%20ja%20sellega%20seotud%20seaduste%20muutmise%20seadus, accessed January 7, 2022.

22 GPCCA, § 8(2).

23 Ibid., § 10.

24 Ibid., § 11(3).

25 Act on the Ratification of the Convention on the Rights of Persons with Disabilities, April 4, 2012.

law – both the Estonian Constitution and other relevant national laws – was deemed to already comply with the Convention at the time of ratification.[26] The Explanatory Note states that no immediate legislative reform was needed, and instead an aim of progressive legislative improvement would be set.[27] The only immediate action to be taken was to set up a supervisory and monitoring mechanism as required by the Convention.[28]

Regarding Article 12 of the Convention, Estonia made the following declaration upon ratification:

> The Republic of Estonia interprets article 12 of the Convention as it does not forbid to restrict a person's active legal capacity, when such need arises from the person's ability to understand and direct his or her actions. In restricting the rights of the persons with restricted active legal capacity the Republic of Estonia acts according to its domestic laws.[29]

This declaration enabled Estonia to ratify the Convention without having to review or amend national private law concerning active legal capacity. The Explanatory Note emphasises that under GPCCA § 8(2) (which, in this regard, has remained unchanged since 2009) restricting active legal capacity is not dependent upon the existence of a disability, but upon a person's ability to understand their actions.[30] According to the Explanatory Note, by this logic, it is not the disability *per se* that is the basis for determination of whether active legal capacity of a person is restricted or not. As an example, the Explanatory Note highlights that a *physical* disability would not render a person to have restricted active legal capacity.[31]

In terms of mental disabilities, the line of argumentation presented in the Explanatory Note is less convincing. The Explanatory Note asserts that people with mental disabilities and people without mental disabilities are treated equally since for both groups the restriction of active legal capacity rests on the person's factual ability to understand their actions. This argument is *a priori* suspicious from an empirical point of view, seen as the very ability to understand one's actions according to societal norms would be presumably different for people with mental disabilities.

The English translation of the GPCCA makes this point particularly ironic. The law uses in GPCCA § 8(2) the Estonian words '*vaimuhaigus*', '*nõrgamõistlikkus*' and '*psüühikahäire*'. The latter is translated in the English version of the GPCCA as 'mental disability', although it could also be translated as 'mental disorder' or in the most direct

26 *Seletuskiri "Puuetega inimeste õiguste konventsiooni ratifitseerimise seaduse" eelnõu kohta* (*Eplanatory note on the act on ratification of the convention on the rights of person with disabilities*), 46. Available online (in Estonian), https://www.riigikogu.ee/download/4a47268b-c68a-4211-a124-125051a4c37d, accessed December 21, 2021.

27 Ibid.

28 Ibid., 45.

29 Act on the Ratification of the Convention on the Rights of Persons with Disabilities, April 4, 2012, § 2. The English translation of the declaration is available on the official website of the United Nations Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&clang=_en, accessed December 21, 2021.

30 Eplanatory Note on the Act of Ratification of the Convention on the Rights of Person with Disabilities, p. 18, https://www.riigikogu.ee/download/4a47268b-c68a-4211-a124-125051a4c37d, accessed December 21, 2021.

31 Ibid.

translation as 'psychiatric disorder'. The Explanatory Note emphasises that a '*psüühikahäire*' does not always mean a disability, whereas, ironically, the English translation of the law uses the exact phrase 'mental disability' for '*psüühikahäire*', thereby literally establishing that if a person is unable to understand or direct their actions due to a mental disability, they have restricted active legal capacity. The Explanatory Note emphasises that even in cases where a person has a '*psüühikahäire*', the determination of whether active legal capacity of that person is restricted still depends on whether they can understand their actions. Whereas simple logic would lead to the conclusion that if a mental disability negatively impacts one's understanding of one's actions, and the inability of understanding one's actions leads to active legal capacity being restricted, then it is, in fact, the mental disability that leads to the restriction of active legal capacity. Ignoring this logic, the Explanatory Note neatly concludes that under Estonian private law determination of restricted active legal capacity is not dependent on the existence of a disability and that people with disabilities are treated equally with others in this regard.[32] Ultimately, the Explanatory Note states that Estonia retains the right to continue its existing practice of the determination of restricted active legal capacity and appointment of guardianship if and to the extent necessary.[33]

From this one can confidently conclude that the ratification of Article 12 of the Convention had no direct or immediate impact on the Estonian legal system, as per the declaration made by Estonia upon ratification, existing Estonian private law on active legal capacity was deemed to be compliant with the Convention (as interpreted by Estonia).

2.4. A need for reform for compliance with the Convention?

In 2004, after the introduction of significant changes in the GPCCA concerning active legal capacity in 2002, and when Estonia was about to join the European Union, the existing system was scrutinized by an Estonian lawyer and human rights advocate E. Pilt.[34] Amongst other issues, Pilt criticised the language used in GPCCA § 8, which has remained the same to this date in the relevant part since 2002. For example, Pilt emphasises that there are no clear rules on how to establish the point in time as of which a person can be deemed to have restricted active legal capacity. On this note, Pilt questions the use and meaning of the word 'permanently' (*kestvalt*) in GPCCA § 8(2) regarding restricted active legal capacity resting upon whether a person is 'permanently unable to understand or direct their actions'. Pilt notes that 'permanent' (*kestev*) in the Estonian language could mean continuous or ever-present, and that there are presumably few people who at all times are able to fully comprehend and direct their own actions.[35]

In 2015, Estonia submitted its first report to the UN Committee on the Rights of Persons with Disabilities (hereinafter 'the 2015 Report').[36] In the 2015 Report, much like in the Explanatory Note, it is emphasised that under Estonian private law,

32 Ibid.

33 Ibid., 19–20.

34 Eve Pilt, Isiku õigustest tema teovõime piiramise protsess (About a person's right in the process of restricting their legal capacity), 2004 issue 4, *Juridica*, first p. 223.

35 Ibid., 225.

36 Committee on the Rights of Persons with Disabilities, *Initial report submitted by Estonia under article 35 of the convention, due in 2014*, CRPD/C/EST/1, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fEST%2f1&Lang=en, accessed December 21, 2021.

> [t]he restriction of legal capacity is not determined based on the existence of a disability or any diagnosis, but rather is solely based on the ability of a person to comprehend the nature and consequences of his or her actions. Under no circumstances can the active legal capacity of a person be restricted merely because the person has a physical, sensory, mental or intellectual impairment.[37]

The 2015 Report furthermore stresses, 'The restriction of active legal capacity must not lead to unnecessary consequences or go beyond what is actually necessary'.[38] The 2015 Report then goes on to explain how if the appointment of a guardianship is deemed necessary by a court, the respective court order must set out clearly to what extent the guardianship is established and which actions it covers. The 2015 Report explains how the rights of the person concerned are protected in the process of appointing a guardian (which shall be addressed in detail in § 4 of this chapter).

Ultimately, regarding the implementation of Article 12 of the Convention, the 2015 Report makes a concluding remark that Estonia will continue to act in accordance with the declaration made upon ratification and that, under Estonian law, 'the person's active legal capacity cannot be restricted because of the person's disability, but the person's ability to understand and direct his or her actions'.[39] Thus, based on the 2015 Report, the Estonian government does not seem to recognise any need for reforms regarding the implementation of Article 12 of the Convention. However, legal scholars and practitioners seem to be of a different opinion.

In 2015, Müller and Parrest pointed to the obvious discrepancy between Article 12 of the Convention and GPCCA § 8.[40] Although the latter 'merely' allows active legal capacity to be restricted as opposed to entirely denied, Article 12 of the Convention establishes that 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'. The UN Committee on the Rights of Persons with Disabilities (hereinafter 'the Committee') interprets this as meaning that 'all persons with disabilities have full legal capacity'.[41] The Committee has emphasised,

> All practices that in purpose or effect violate article 12 must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.[42]

The Committee particularly addresses the 'functional approach' taken by many contracting parties of the Convention, where based on an assessment of mental capacity legal capacity is denied accordingly, which, according to the Committee, is often based on a person's ability to understand the 'nature and consequences of a decision'. The Committee deems

37 Ibid., § 73.
38 Ibid., § 75.
39 Ibid., § 79.
40 Nele Parrest and Kärt Müller, ÜRO puuetega inimeste konventsioon lõhkumas eestkostesüsteemi (The UN convention on persons with disabilities breaking down the guardianship system), *Sotsiaaltöö*, 2015 issue 1, p. 51.
41 Committee on the Rights of Persons with Disabilities, *General comment no. 1 (2014), article 12: Recognition before the law*, CRPD/C/GC/1, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en, accessed December 21, 2021.
42 Ibid., § 9.

such practices discriminatory as they result in limiting the right to equal recognition before the law, which the Committee considers a core human right. The Committee concludes that instead of denial of legal capacity, support should be provided in its exercise.[43] This critique of the Committee is clearly applicable to the Estonian context, as Estonian law allows precisely what the Committee finds non-compliant with Article 12 of the Convention. Namely, Estonian law allows active legal capacity to be restricted, and to that extent be exercised by another person if a guardian is appointed, rather than providing for mechanisms of support.

In 2019, the Estonian Chamber of Disabled People (hereinafter 'the ECDP') submitted a shadow report to the Committee concerning the implementation of the Convention.[44] Regarding Article 12 of the Convention, the ECDP noted that there is a widespread problem in Estonia regarding persons with court-appointed guardians not being involved in decision-making processes concerning their lives.[45] The ECDP further noted that when establishing guardianships, courts face problems with sufficiently analysing each individual's capabilities to properly determine the necessary scope for the guardianship.[46] As a result, guardians are often mandated to execute all actions, thereby solidifying a substituted judgement model where the legal guardian alone makes all decisions.[47] Ultimately, the ECDP emphasised the need for Estonia to start moving towards a supported decision-making model, as required by Article 12 of the Convention. In doing so, the ECDP recommends, inter alia, for Estonia to withdraw the declaration made upon ratification of the Convention.[48]

In 2020, Arrak and Uusen-Nacke published a detailed review criticising the current system regarding the concept of restricted active legal capacity and guardianship under Estonian private law.[49] They note[50] that the terms used in GPCCA § 8(2), 'mental illness' (*vaimuhaigus*) and 'weak-mindedness' or 'mental disability'[51] (*nõrgamõistlikkus*) are not concepts recognised by modern medicine.[52] Thus, as a very fundamental problem in the

43 Ibid., § 15.

44 Estonian Chamber of Disabled People, *Shadow report on the implementation of the UN convention on rights of persons with disabilities*, Shadow Report, 2019, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fICO%2fEST%2f33965&Lang=en, accessed December 22, 2021.

45 Ibid., 13.

46 Ibid.

47 Ibid.

48 Ibid., 14.

49 Liis Arrak, Triin Uusen-Nacke, Piiratud arusaamisvõimega täisealise isiku eneseteostusvabadus ja kaitse: Kas piiratud teovõime ja eestkoste regulatsioon vajab ümberhindamist? (The freedom of self-realization and protection thereof of an adult person with a limited capacity to understand: Is the regulation on restricted active legal capacity and guardianship in need of revisions?) *Juridica*, 2020 issue 6, p. 482.

50 Ibid., 484.

51 In the English version of the GPCCA, the Estonian term '*nõrgamõistlikkus*' is translated as 'mental disability'; however, a direct translation would be 'weak-mindedness'. An even more accurate counterpart from the English language would be 'feeble-mindedness', which as a translation reflects the outdateness of the text of GPCCA § 8(2) far more accurately than 'mental disability', which is a much more contemporary phrase and is quite often used.

52 Andres Lehtmets, Kinnisesse asutusse paigutamine psühhiaatriliselt näidustusel (Proceedings for placement in a closed insitution based on a pyschiatric indication), in: *The 2011 yearbook of courts*, ed. Rutt Teeveer et al., the Supreme Court of Estonia, Tartu, 2012, pp. 99, 103.

current system, the criteria for determining when a person has restricted active legal capacity are unclear.

Arrak and Uusen-Nacke further note that under the current system, for people with limited capacity to understand, decisions will be made or must be ratified by other people, based on the presumed best interests of the person concerned rather than their own wishes and will. Under GPCCA § 11(1), multilateral transactions entered into by a person with restricted active legal capacity without the prior consent of his or her legal representative are void unless the legal representative subsequently ratifies the transaction. Based on GPCCA § 11(3), the only exceptions to this general rule are (1) if no direct civil obligations arise from the transaction for the person or (2) if the person performed the transaction by means which his or her legal representative or a third person with the consent of the legal representative had granted to him or her for such purpose or for free use. Thus, restricted active legal capacity has a considerable effect on a person's freedom and ability to enter into valid civil transactions.

Arrak and Uusen-Nacke emphasise that the determination of restricted legal capacity must be made separately for each individual transaction and that a person is merely presumed to have restricted legal capacity if a guardian has been appointed as established under GPCCA § 11(3).[53] However, the problem is still, they note, that ultimately someone else will be in control of the life of a person with a limited capacity to understand, whereas the aim should be creating a system in which the person's decision-making process is supported rather than substituted by someone else's decisions. Arrak and Uusen-Nacke conclude that the concept of restricted active legal capacity and the guardianship system in Estonia need thorough analysis and possibly revisions.[54]

From the above it is clear that Estonian private law, and GPCCA § 8 in particular, is, in fact, not truly compliant with Article 12 of the Convention, regardless of the wishful declaration made by Estonia upon ratification of the Convention. The current system in Estonia does not align with the Committee's vision of a supported decision-making model and instead still utilises a substituted decision-making model, thereby rendering persons with mental disabilities unequal to others in this regard.

3. Active legal capacity outside of private law

The implementation of Article 12 of the Convention seems to have had no impact on the Estonian legal system. As laid out earlier, there was no impact on private law since Estonia made a declaration upon ratification to emphasise that it deems its laws on restricted active legal capacity to be in line with Article 12 of the Convention. Neither this declaration nor the Explanatory Note or the 2015 Report make any reference to anything outside of the realm of private law as it pertains to Article 12 of the Convention. This is somewhat curious given that restricted legal capacity impacts a person's right to actively partake in civil and administrative procedures. Although civil procedure arguably falls into the realm of private law, it shall be addressed here as part of procedural rights of persons with mental

53 Liis Arrak and Triin Uusen-Nacke, Piiratud arusaamisvõimega täisealise isiku eneseteostusvabadus ja kaitse: Kas piiratud teovõime ja eestkoste regulatsioon vajab ümberhindamist? (The freedom of self-realization and protection thereof of an adult person with a limited capacity to understand: Is the regulation on restricted active legal capacity and guardianship in need of revisions?), *Juridica*, 2020 issue 6, 489.

54 Ibid., 491–492.

disabilities that are impacted by the notion of restricted active legal capacity under the GPCCA. Criminal law will be addressed separately in § 6 of this chapter.

Under the Code of Civil Procedure[55] (hereinafter 'CCP') § 202(2), persons with restricted active legal capacity do not have active civil procedural legal capacity, except if the restriction of active legal capacity of an adult does not relate to the exercise of civil procedural rights and performance of civil procedural obligations. However, as it pertains to proceedings for establishing a guardianship or placing a person in a closed institution, the person has active civil procedural legal capacity regardless of whether they have general active legal capacity, if the person is at least 14 years of age (CCP § 202(4)). As to any other civil proceedings, a person with restricted legal capacity would need a legal representative. If an adult with active civil procedural legal capacity is represented in proceedings by his or her guardian, the represented person is deemed to have no active civil procedural legal capacity (CCP § 202(3)).

In the same vein, under the Administrative Procedure Act[56] (hereinafter 'APA') § 12(2), a person with restricted active legal capacity cannot perform procedural acts in administrative proceedings independently unless otherwise prescribed by law. However, according to the same rule, in administrative proceedings the relevant administrative authority shall ensure legal representation. A person with restricted active legal capacity could appoint a representative (APA § 13); however, this would presume that the person has active legal capacity for this specific type of action of appointing a representative. The exception of 'unless otherwise provided by law' seems in practice to pertain to persons under the age of 18 who have restricted active legal capacity due to their age. For example, the Identity Documents Act[57] § 10(3) establishes that a person of at least 15 years of age may perform the procedural acts provided for in that act independently.

Hence, although the concept of (restricted) active legal capacity in private law is clearly tied into procedural rights in civil and administrative proceedings, this was not addressed during the adoption of the Convention and the making of the declaration as regards to Article 12. Having restricted active legal capacity will generally limit the person's ability to represent themselves in civil and administrative proceedings unless the restriction of active legal capacity does not extend to such actions. This, however, is a tricky matter since as outlined in the next section of the chapter, the determination of restricted active legal capacity and the extent of the restriction is a factual matter rather than a legal question. This means that unless a guardian has been appointed, whose roles and tasks are clearly set in place, there is little clarity as to whether and to what extent a person's active legal capacity is restricted.

55 *Tsiviilkohtumenetluse seadustik* (Code of Civil Procedure) (CCP), RT I, April 9, 2021, 17. The English translation of the CCP as of April 13, 2021, https://www.riigiteataja.ee/en/eli/513042021008/consolide, accessed December 22, 2021.

56 *Haldusmenetluse seadus* (Administrative Procedure Act) (APA), RT I, March 13, 2019, 55. The English translation of the APA as of March 15, 2019, https://www.riigiteataja.ee/en/eli/527032019002/consolide, accessed December 22, 2021.

57 *Isikut tõendavate dokumentide seadus* (Identity Documents Act), RT I, October 15, 2021, 3. The English translation of the Identity Documents Act as of October 25, 2021, https://www.riigiteataja.ee/en/eli/501112021001/consolide, accessed December 22, 2021.

4. Procedural aspects of restricted active legal capacity

Restricted active legal capacity has significant practical implications, as in addition to limitations to procedural rights described earlier, it affects the validity of civil transactions made by the person.[58] Thus, if a guardian has not been appointed to a person with restricted active legal capacity, the validity of transactions made by them comes into question and depends on whether their active legal capacity is restricted regarding that specific type of transaction.

As previously noted, the determination of restricted active legal capacity is a factual matter under Estonian law. If a guardian is appointed by a court to a person who, due to mental illness, mental disability or other mental disorder, is permanently unable to understand or direct his or her actions, the person is presumed to have restricted active legal capacity to the extent in which a guardian has been appointed to him or her.[59] Thus, restricted active legal capacity does not automatically mean that a guardian is appointed; however, if a guardian has been appointed, there is a presumption of restricted active legal capacity. If a guardian has not been appointed, it could practically only be a court within court proceedings determining whether and to what extent active legal capacity of a person is restricted, and if, and how, that affects whatever transactions or other legal action is under dispute in those court proceedings. This could happen during civil or administrative court proceedings, as the dispute could relate to either a civil transaction (the validity of which may be affected by restricted active legal capacity), or to a legal action undertaken by the person in civil or administrative proceedings (again, the validity of which may be affected by restricted active legal capacity). As will be shown in § 6 of this chapter, the concept of (restricted) active legal capacity within the meaning of private law and the GPCCA is not tied into criminal law and proceedings; hence, it is unlikely that a determination of restricted active legal capacity could occur within criminal court proceedings (unless the validity of a civil transaction could impact the outcome of criminal court proceedings, in which case there might be a need to assess the active legal capacity of the person who made the civil transaction).

Thus, the question of whether a person has restricted legal capacity and to what extent is stuck in limbo until and unless (1) someone petitions for a guardian to be appointed to the person or (2) there is a court dispute about the validity of a civil or administrative legal action or transaction during which a party raises the argument of another having had restricted active legal capacity when making the legal action or transaction.

Theoretically, if a person can foresee their active legal capacity becoming restricted during their lifetime, it is possible for them to grant authorisation to another person to represent them in certain (or all) transactions once their active legal capacity becomes restricted. That would nullify the need for the appointment of a guardian. Of course, this kind of pre-emptive authorisation would presume that the person granting the authorisation can anticipate a loss in mental capabilities resulting in restricted active legal capacity and is thus able to make the necessary arrangements whilst still having the required active legal capacity. This could be the case with a loss in mental capabilities due to old age or due

58 GPCCA, § 10–11.
59 Ibid., § 8(3).

to a later onset of a predictable genetic condition. However, these types of authorisations are not common in Estonia.[60]

If the person concerned has not made such pre-arranged authorisations to appoint a legal representative for the case of a loss in mental capabilities resulting in restricted active legal capacity, concluding valid transactions would presume the appointment of a guardian who becomes the legal representative of the person in matters to which the restriction of active legal capacity extends. The guardian is appointed by a civil court in a procedure referred to under the CCP as an 'action by petition' (as opposed to 'action by claim', i.e. regular civil court proceedings where a court claim is brought by a claimant).[61] Proceedings for an action by petition can be initiated by the court of its own motion or on a petition of an interested party or agency.[62] The Family Law Act (hereinafter 'FLA') specifies that for adults who are permanently unable to understand or direct their actions due to mental illness, mental disability or other mental disorder, a petition for the appointment of a guardian can be submitted by the persons themselves, their parent, spouse or adult child, or rural municipality or city government or on the court's own initiative.[63] The FLA emphasises that establishing a guardianship is not necessary if the interests of an adult can be protected by granting authorisation and through family members or other assistants.[64] If establishing a guardianship is necessary, a guardian shall be appointed only for the performance of the functions for which guardianship is required.[65] The FLA further specifies, that upon establishment of a guardianship, the court shall assess the person's capability to understand the legal consequences of contraction of marriage, acknowledgement of paternity and other transactions concerning family law.[66] The FLA adds that a guardian's duties may include the exercise of a ward's rights against third persons.[67]

The court procedure for the appointment of a guardian is regulated in Chapter 53 of the CCP. Once the court proceedings have been initiated, the court will have to assess whether there is a need to appoint a representative to the adult with alleged restricted active legal capacity for the purposes of the court proceedings.[68] Generally, the court will have to order an expert assessment to determine the need for the appointment of a guardian if the court has information or doubt that a person has a mental illness or mental disability.[69] The only exception to this general rule is if all of the following conditions apply: (1) the petition

60 Liis Arrak, Triin Uusen-Nacke, Piiratud arusaamisvõimega täisealise isiku eneseteostusvabadus ja kaitse: Kas piiratud teovõime ja eestkoste regulatsioon vajab ümberhindamist? (The freedom of self-realization and protection thereof of an adult person with a limited capacity to understand: Is the regulation on restricted active legal capacity and guardianship in need of revisions?), *Juridica*, 2020 issue 6, p. 486.

61 CCP, § 475(1)(5).

62 Ibid., § 476(1).

63 *Perekonnaseadus* (Family Law Act) (FLA), RT I, December 22, 2021, 15. The English translation of the FLA as of January 1, 2022, https://www.riigiteataja.ee/en/eli/505012022007/consolide, accessed January 10, 2022, § 203(1).

64 Ibid., § 203(2).

65 Ibid.

66 Ibid.

67 Ibid., § 203(3).

68 CCP, § 520.

69 Ibid., § 522(1).

for appointment of a guardian was submitted by the person in need of guardianship and the documents reflecting his or her state of health are appended to the petition, and (2) the person waives the right to undergo expert assessment, and (3) conducting the expert assessment is, considering the volume of the guardian's duties, unreasonably costly or labour intensive.[70]

A guardianship for an adult with restricted active legal capacity can be established for a maximum of five years.[71] However, this period can be extended without a new expert assessment if, based on the hearing of the person under guardianship and the documents reflecting the state of his or her health, it is clear that the need for guardianship has not ceased to exist.[72]

The period of reconsideration for decisions on establishing guardianship used to be three years under the FLA; however, in 2014 the FLA was revised in this regard to be in sync with the maximum five-year period established under the CCP for guardianships.[73] The current FLA requires that a court verify at least once every five years whether the continuation of a guardianship over a ward is necessary for the protection of the interests of the ward and whether grounds exist for extension or restriction of the duties of the guardian by making a respective ruling.[74] It is noted in the relevant explanatory note accompanying the act that brought about this change in the FLA that the Ministry of Social Affairs was concerned about the extension of the guardianship period from three to five years, effectively limiting the rights of the person under guardianship for another two years.[75] As a counterargument, the authors of the explanatory note emphasised that if a person were to regain (part of) their active legal capacity before the end of the five-year period, that the person can petition the court themselves for a reconsideration of (the extent of) their guardianship.[76] This, of course, would presume that the person has civil procedural legal capacity to do so – which might not be the case.

5. Statistical data on persons with court-appointed guardians in Estonia

The statistical data was obtained from the Estonian Population Register on November 30, 2021. The population of Estonia as of 2021 was 1,330,068.[77]

70 Ibid., § 522(5).
71 Ibid., § 526(3).
72 Ibid., § 528(4).
73 Compare the current FLA, § 203(4) with the same paragraph in the version of the FLA that was in force prior to July 9, 2014, https://www.riigiteataja.ee/en/eli/ee/530102013016/consolide, accessed January 10, 2022.
74 Ibid.
75 *Seletuskiri perekonnaseaduse muutmise ja sellega seonduvalt teiste seaduste muutmise seaduse eelnõu juurde* (*Explanatory note on the act on amendments to the family law act and related laws*), 18, available online (in Estonian), https://www.riigikogu.ee/tegevus/eelnoud/eelnou/be809fb2-34b3-4079-aa84-807c020db2b4, accessed January 10, 2022.
76 Ibid.
77 The official website of Statistics Estonia, https://www.stat.ee/en/avasta-statistikat/valdkonnad/rahvastik/population-figure, accessed January 10, 2022.

Table 10.1 Persons with restricted active legal capacity in Estonia

*Restriction****	*Year*	*Number of people*
Restricted (right to vote retained)	2007	6*
Restricted (right to vote lost)	2007	60*
No active legal capacity**	2007	2*
Restricted (right to vote retained)	2008	9*
Restricted (right to vote lost)	2008	105*
Restricted (right to vote lost)	2009	178*
Restricted (right to vote retained)	2009	18*
Restricted (right to vote lost)	2010	406
Restricted (right to vote retained)	2010	51
No active legal capacity**	2010	2
Restricted (right to vote lost)	2011	1395
No active legal capacity**	2011	17
Restricted (right to vote retained)	2011	155
Restricted (right to vote retained)	2012	109
Restricted (right to vote lost)	2012	767
Restricted (right to vote retained)	2013	102
Restricted (right to vote lost)	2013	585
Restricted (right to vote retained)	2014	137
Restricted (right to vote lost)	2014	878
Restricted (right to vote lost)	2015	916
Restricted (right to vote retained)	2015	147
No active legal capacity**	2016	1
Restricted (right to vote retained)	2016	205
Restricted (right to vote lost)	2016	1031
No active legal capacity**	2017	1
Restricted (right to vote lost)	2017	904
Restricted (right to vote retained)	2017	228
Restricted (right to vote retained)	2018	224
Restricted (right to vote lost)	2018	735
Restricted (right to vote lost)	2019	777
Restricted (right to vote retained)	2019	235
No active legal capacity**	2020	15
Restricted (right to vote retained)	2020	350
Restricted (right to vote lost)	2020	884
No active legal capacity**	2021	6
Restricted (right to vote lost)	2021	709
Restricted (right to vote retained)	2021	370

* The accuracy of data before July 1, 2010 is unknown. According to the official who submitted the data to the author, there is no certainty that all relevant court rulings were adequately submitted prior to this date.

** The entries of 'No active legal capacity' are errors made by clerks who entered the data. These should be read as restricted active legal capacity. It is not clear whether the right to vote was retained or lost; however, CCP § 526(5) sets out that if a court establishes a guardianship for managing all the affairs of a person under guardianship or if the scope of duties of a guardian is extended in such manner, the person under guardianship is also deemed to be without active legal capacity with regard to the right to vote, and he or she loses his or her right to vote. This means that if clerks erroneously made entries of 'No active legal capacity', these were presumably cases where a guardianship was established for all affairs of the person, including thereby losing the right to vote.

*** These statistics reflect the total number of persons with court-appointed guardianships, and not the total number of persons with restricted active legal capacity, which is a factual matter under Estonian law.

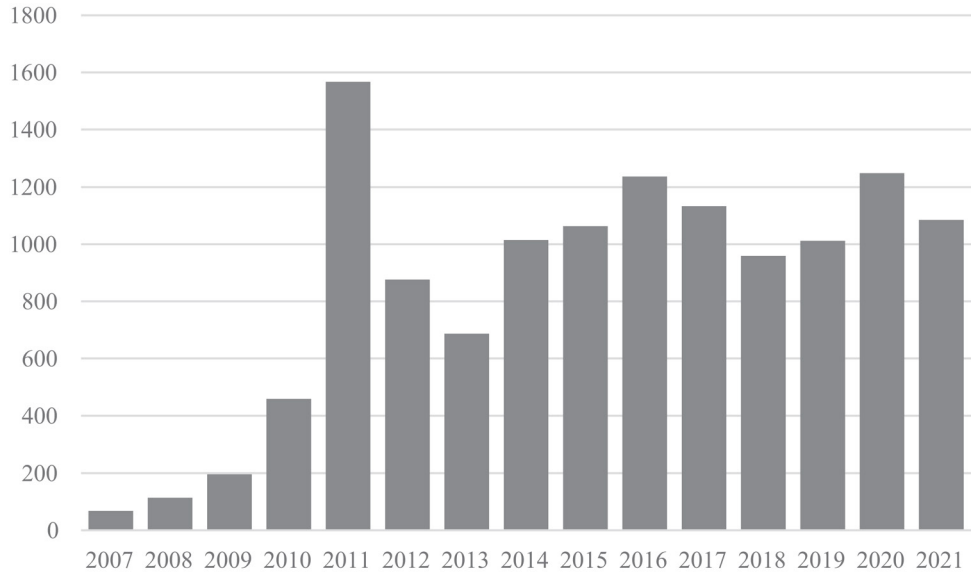

Chart 10.1 Comparison of annual statistics of persons with court-appointed guardians due to restricted active legal capacity in Estonia.

A comparison of statistics on an annual basis does not allow for definite conclusions to be made. As noted, the data from before July 1, 2010, is not reliable; hence, the spike in 2011 is more likely attributable to inaccuracy of the data from previous years. Whereas on the surface one could assume a connection between the drop of the number of people with court-appointed guardians due to restricted active legal capacity in 2012 and the ratification of the Convention, this is highly unlikely since the implementation of the Convention brought about no changes in Estonian law regarding the conditions for or process of determining restricted active legal capacity.

Furthermore, it must be kept in mind that these numbers only reflect court-appointed guardianships, whereas the matter of active legal capacity being restricted is a factual one. Hence, the true number of adults with restricted active legal capacity in Estonia is unknown.

6. Persons with disabilities and criminal law

Under Estonian criminal law, there are only few rules pertaining specifically to persons with disabilities. From the perspective of the victim, Penal Code[78] (hereinafter 'PC') § 58(3) sets out as an aggravating circumstance the commission of an offence knowingly against a person who is less than 18 years of age, pregnant, in an advanced age or in need of assistance or has a severe mental disorder. However, as explicitly stated, this only concerns persons with *severe* mental disorders, which might seem like a limited concept, although a deeper look at it proves otherwise. Namely, within the meaning of PC § 58(3), a person with a 'severe mental disorder' is understood as a person not mentally capable as defined

78 *Karistusseadustik* (Penal Code) (PC), RT I, May 21, 2021, 9. The English translation of the PC as of May 31, 2021, https://www.riigiteataja.ee/en/eli/502062021003/consolide, accessed December 22, 2021.

in PC § 34 or a person with diminished mental capacity as set out in PC § 35.[79] This does not provide much insight into the meaning of 'severe mental disorder', as, for example, PC § 34 lists as reasons for lack of mental capacity: (1) mental illness, (2) temporary severe mental disorder, (3) mental disability, (4) feeble-mindedness or (5) other severe mental disorder. Thus, all these then seem to fall under the general concept of 'severe mental disorder' within the meaning of PC § 58(3).

Pertaining to perpetrators, PC § 32 establishes that a person can only be punished for an unlawful act if the person is guilty, which is possible if the person is capable of guilt and if there are no circumstances provided by law that would preclude guilt. PC § 33 sets out that guilt capacity is dependent on age (the threshold being 14 years of age) and on mental capacity. Under PC § 34, a person is not mentally capable if at the time of the commission of an act he or she was incapable of understanding the unlawfulness of the act or incapable to act according to such understanding due to (1) mental illness, (2) temporary severe mental disorder, (3) mental disability, (4) feeble-mindedness or (5) other severe mental disorder.

Regarding procedural rules, the Code of Criminal Procedure[80] (hereinafter 'CCRP') § 137^2(1) sets out that if it becomes evident, as a result of expert assessment, that a person held in custody committed an unlawful act in a state of mental incompetence, is mentally ill or feeble-minded, or has another severe mental disorder, he or she shall be immediately released from custody by an order of the Prosecutor's Office, unless otherwise provided for in § 395^1 of the CCRP.

Regarding participation in criminal procedure, CCRP § 41(1) does not distinguish between people with full and restricted active legal capacity but instead simply states that a victim, civil defendant or third party who is a natural person may participate in criminal proceedings personally or through a representative. CCRP § 41(3^1) adds that the body conducting proceedings shall designate a representative to a victim with restricted active legal capacity under state legal aid, inter alia, if it may be presumed under the circumstances that the interests of the legal representative of the victim conflict with the interests of the victim. Thus, a person with restricted active legal capacity could participate in criminal proceedings personally or through a representative; however, the representative can be replaced with someone providing state legal aid by the body conducting the proceedings if the latter may presume that there is a conflict of interest. Since CCRP § 41(3^1) references to a possible conflict of interests between the victim and their legal representative, this presumes the existence of a guardian (i.e. a court-appointed guardian in the case of a person of at least 18 years of age). This seems to be the only reference in criminal law to the concept of restricted active legal capacity within the meaning of private law. CCRP § 41 does not seem to be concerned with scenarios in which an adult may have restricted active legal capacity within the meaning of private law, but without having been appointed a guardian by a court.

Another specific nuance addressed in criminal procedure is that under CCRP § 138^1(2) for persons with restricted active legal capacity fines may be imposed on their guardian instead of the person themselves. Again, the application of this rule for an adult person

79 Jaan Sootak, § 58 in *Karistusseadustik. Kommenteeritud väljaanne* (*Penal code: Commented edition*), ed. Jaan Sootak and Priit Pikamäe, Juura, 2021, https://books.google.com/books/about/Karistusseadustik.html?id=1CWmGAAACAAJ.

80 *Kriminaalmenetluse seadustik* (*Code of criminal procedure*) (CCRP), RT I, December 22, 2021, 45. The English translation of the CCRP as of December 27, 2021, https://www.riigiteataja.ee/en/eli/527122021006/consolide, accessed January 10, 2022.

with restricted active legal capacity presumes the existence of a guardian, and thus, it would have no bearing on a person with restricted active legal capacity without a court-appointed guardian.

In sum, nothing in criminal law particularly addresses persons with mental disabilities and/or restricted active legal capacity within the meaning of private law, other than CCRP § 41(3^1) regarding the replacement of the representative of a person with restricted active legal capacity in criminal proceedings (whether as a victim, a civil defendant or a third party) in case of a conflict of interests. Rather than restricted active legal capacity within the meaning of private law, criminal law is concerned with the mental state of the person – whether victim or perpetrator. Criminal procedure seems to be concerned with restricted active legal capacity of an adult only if the adult has a court-appointed guardian.

7. Concluding remarks

As is evidenced by the specific declaration made by Estonia upon the ratification of the Convention, it was the intent and purpose of the Estonian government for Article 12 of the Convention not to have any impact on national law concerning rules on restricted active legal capacity. Expressed in this declaration is a twisted interpretation of Article 12 of the Convention that it allows active legal capacity to be restricted 'when such need arises from the person's ability to understand and direct his or her actions', whereas Article 12 literally reads that 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'. Based on the Explanatory Note accompanying the Estonian Act on Ratification of the Convention, the requirement of an 'equal basis' established in Article 12 was seen by the Estonian government as being met via the fact that the determination of active legal capacity being restricted rests upon whether a person can understand and direct his or her actions.

Although pertaining to guardianships of adults, Estonian law requires for the guardian's rights and duties in representing the ward to be specified and limited to the extent that the active legal capacity of the ward is truly restricted (as a factual matter), this appears to be an ideal rather actual reality. Legal scholars, practitioners and the Estonian Chamber of Disabled People have all pointed to the fact that this requirement is oftentimes not met in practice. The reality is that courts struggle with determining the exact extent of the restriction of active legal capacity. However, even in an ideal scenario, where courts could always manage to pinpoint and establish exactly to which extent a person is unable to understand or direct his or her actions, and thereby limit the guardian's range of rights and duties accordingly, this would still be a system of substituted decision-making where a guardian makes the decisions on the ward's behalf (even if only to a limited extent). This is not in line with Article 12 of the Convention.

The UN Committee on the Rights of Persons with Disabilities made it clear already in 2014 that Article 12 of the Convention allows for no restrictions of legal capacity for people with disabilities. Based on the Committee's explanations, the aim of Article 12 is that substituted decision-making systems be abolished, and instead supported decision-making systems should be adopted. Yet still, in its 2015 Report, Estonia persisted that its national law complies with the Convention per the declaration made upon ratification. However, legal scholars, practitioners and the Estonian Chamber of Disabled People seem to agree that Estonian law does currently not align with the aims of Article 12 of the Convention and needs revisions.

11 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in the Republic of Finland

Tuulikki Mikkola

Introductory remarks

Finland is a democratic state governed by the rule of law, with the Constitution (731/1999, in Finnish: *perustuslaki*) giving every individual strong protection for human dignity, self-determination and integrity, in addition to other fundamental rights. The rule of law is based on legislation that protects fundamental and human rights and is applied in independent courts and authorities. Finland is committed to complying with international human rights treaties and EU provisions on fundamental rights.[1]

When a person is able to make decisions that affect his/her rights and duties, he/she is said to have a legal capacity and competence – i.e. to manage assets and enter into legal transactions (in Finnish: *oikeustoimikelpoisuus*). Competence and capacity of a person are deemed as cornerstones of a well-functioning democratic state that is governed by the rule of law. The main rule is that each has a right of exercising free will, and each person is respected as an autonomous rights-holding agent.

In Finland, the state's responsibility to promote welfare, health and security is rooted in the Constitution. This enshrines the right of everyone to income and to care, if they are unable to manage adequately.[2] Accordingly, the *Finnish legal system protects individuals in case they lose their ability to make sound decisions concerning their assets or personal issues. Guardianship services are part of the protection that society has organised for children, elderly and the disabled, and it is for those people who are without support and assistance unable to take care of their affairs*. The legislation on guardianship (in Finnish: *edunvalvontaoikeus*) defines provisions and principles according to which the matters of an individual in need of support (a ward, in Finnish: *päämies*) are taken care of.

The legislation on guardianship and the guardianship system were reformed in 1999. The previous Guardianship Services Act had been in force just one month shy of 100 years. It severely restricted the financial activities of the ward. He/she essentially lacked legal capacity, with the exception of certain very minor juristic acts. The old law clearly reflected substituted decision-making and not supported decision-making. *Ahti Saarenpää* has written that typical of the attitudes and practices associated with the previous act were the subjugated state of the ward and society's lack of interest in guardianship as an issue. As late as the 1970s, the Parliamentary Ombudsman was forced to conclude that guardianship was

1 See the webpages of a Finnish government, https://valtioneuvosto.fi/en/marin/government-programme/safe-and-secure-finland-built-on-the-rule-of-law.

2 https://stm.fi/en/social-and-health-services/legislation.

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the area of public administration that was most poorly handled. The primary responsibility for guardianship at the time laid with the municipal guardianship boards. As Saarenpää has further noted, they were political boards, but not awakening interest in political parties. As the legislation was amended, the responsible official in guardianship is the Register Office. This is a government authority whose principal duties are registration-related matters. Since 2020 those offices have been parts of the Digital and Population Data Services Agency (www.dvv.fi).[3]

The provisions concerning the organisation of guardianship are included in the Guardianship Services Act (442/1999, in Finnish: *holhoustoimilaki*).[4] There is also a separate act dealing with the continuing power of attorney (648/2007, in Finnish: *laki edunvalvontavaltuutuksesta*).[5] Naturally, the latter act is a part of the guardianship legislation as the continuing power of attorney can replace and complement the legal guardianship. Even though the continuing power of attorney is deemed as a civil law authorisation, its purpose and mainly also its legal effects are the same as the legal guardianship according to the Guardianship Services Act. Provisions of the Guardianship Services Act on personal matters are only few and for instance the status and rights of medical patients and clients of social services are protected by the Act on the Status and Rights of Patients (785/1992)[6] and the Act on the Status and Rights of Social Welfare Clients (812/2000).[7]

Today the guardianship legislation can be deemed as a safeguard of autonomy and personal liberty. Here private law and human rights interconnect and share the aim of protecting vulnerable individuals and giving them a right to self-determination to a highest degree possible. Thus, the present Guardianship Services Act proceeds from essentially the opposite premise to its predecessor. Stigmatising concepts in guardianship legislation was decreased. *The ward is a principal, who should be served by a guardian*.

A concept of active legal capacity in Finland and organisation of guardianship services

I. Minors

A capacity of a minor is limited and it is not full until person reaches majority. If a person is under 18 years of age, he/she needs a legal representation in order to enter into binding legal transactions. Each child has a guardian whose duties include looking after the child's financial interests. The custodians (in Finnish: *huoltaja*) of a minor are his/her guardians unless the court appoints another person for the task. Therefore, the main rule is that custodians of a minor are also responsible for the administration of the child's property as

3 For the development of the Finnish guardianship legislation, see Ahti Saarenpää, Henkilö- ja persoonallisuusoikeus, in: *Oikeusjärjestys III*, ed. Risto Haavisto, Lapin yliopisto, Rovaniemi, 2000, pp. 299–390, 328–329. The article can be found, https://docplayer.fi/329246-Henkilo-ja-persoonallisuusoikeus.html.

4 In English, https://www.finlex.fi/fi/laki/kaannokset/1999/en19990442.pdf.

5 In English, https://www.finlex.fi/fi/laki/kaannokset/2007/en20070648.pdf.

6 See especially § 6 of the Act for the Patient's Right to Self-determination. The act can be found in English: https://www.finlex.fi/en/laki/kaannokset/1992/en19920785_20120690.pdf.

7 For the access to justice and protection of disabled individuals in different procedures, see Finland's initial report on the implementation of the convention on the rights of persons with disabilities, pp. 18–20. The report can be found in https://um.fi/documents/35732/0/CRPD+initial+report+Finland.pdf/959fa430-9e7e-9fe0-76d1-c435f47181ea?t=1565948791606.

guardians of the child (the Guardianship Services Act, § 4). It is possible, though, that a special guardian is appointed in order to administer the child's property.[8]

When a person is under 18 years of age, he/she is, thus, competent to enter into transactions if they are – in view of the circumstances – usual and of little significance (the Guardianship Services Act, § 24). For instance, if a child enters a contract concerning necessities, the contract is usually valid and enforceable.[9]

In addition, a person who is over 15 years of age may enter into, terminate or cancel an employment contract. A minor also has a right to administer his/her own earnings and may dispose of this property by a will (the Inheritance Code (40/1965), chapter 9, § 1 and the Guardianship Services Act, § 25). Furthermore, a child has the right to decide upon how he/she is medically treated if he/she has reached an age and maturity which allow him/her to understand the treatment and the consequences of it (the Act on the Status and Rights of Patients, § 7).[10]

II. Adults

If an adult – due to illness or some other comparable reason – is unable to take care or look after of his/her financial interests or personal matters, a guardian is appointed to support a ward in decision-making or – under certain circumstances – even to make decisions on behalf of a ward. A guardian may be nominated in case a person is disabled because of for instance a degenerative neurological disease which has weakened his/her capacity.

In addition to financial affairs, a guardian has to make sure that the ward is suitably treated and receives proper care and rehabilitation (the Guardianship Services Act, § 42).

III. Appointment of a guardian

A private person may be appointed to the task of a guardian in case he/she consents and has sufficient skills for the task (the Guardianship Services Act, § 5). In the assessment of suitability, the skill and experience of the nominee and the nature and extent of the task is taken into account.

Previously, guardianship was mainly an arrangement managed by the family and extended family, and still, there are many cases in where a spouse and children manage an elderly person's affairs as his or her ability to do so declines. It is usual that a child or

8 Custody of a child covers matters relating to the person of a child. Custody can be decided on the basis of marriage, a court decision or an agreement between the parents. Custody of a child can be exercised either jointly by the parents of the child or by only one of the parents. The purpose of child custody is to ensure the well-being and balanced development of a child in accordance with the child's individual needs and wishes (see § 1 of the Act on Child Custody and Right of Access [352/2019]). See the webpages of Digital and Population Data Services Agency, at dvv.fi, stating that 'the guardians of the minor are usually the minor's parents, who have custody of the minor. If two people have custody of a minor, both of them are guardians regardless of which parent the minor lives with. They must take care of the duties of a guardian together. Sometimes, a person who does not have custody of the minor may be appointed as the guardian. The same responsibilities apply to all guardians of minors'.

9 See also Kirsti Kurki-Suonio, *Parental responsibilities – Finland*, Commission on European Family Law, http://ceflonline.net/wp-content/uploads/Finland-Parental-Responsibilities.pdf.

10 For the right to self-representation of a child in civil, criminal and administrative proceedings, see Tuulikki Mikkola, *Family and succession law in Finland*, Wolters Kluwer, Warszawa, 2018, pp. 26–27.

a spouse/partner or other person close to the person in need of support and help will be nominated to the task of the guardian. Thus, a guardian cannot perform transactions on behalf of a ward in which he/she – or a person close to him/her – is a party. In order to perform these transactions, a substitute guardian is needed.

Not all persons in need of support are in a relationship or even have other close relations.[11] With the decline of the family and its significance, for over 100 years – starting in the big cities – *public guardianship* was arranged such that the guardian is not a private individual but a public official. Today, the public guardian is usually a public official employed by a public guardianship office.[12] The public authorities must ensure that every needy person has access to the services of a public guardian close to where they live. In some regions a public guardian may be employed by a provider of outsourced services (Act on Districts for Legal Aid and Guardianship, 477/2016).

However, arranging guardianship through the public guardianship is not without problems as here we are talking about a large-scale activity. The public discussion on guardianship mostly focuses on the limited public resources available for guardianship in general or for the supervision of the guardians. A single public guardian can have an average of over 200 principals. Previously, when municipalities bore the responsibility for guardianship, the number of principals per guardian was even higher, but caseloads have declined somewhat since the Parliamentary Ombudsman reviewed the situation and strongly emphasised that guardians should know each ward at least somehow. This derives from the obligation of the guardians to cooperate with each ward to the highest degree possible.[13]

IV. Tasks of a guardian, different levels of competency and the ward's right to self-determination

In applying Finnish guardianship legislation, it is important to note that there are two leading principles. Firstly, *a person has a right to self-determination* (in Finnish: *itsemääräämisoikeus*) which means an equal right of every capable person to make decisons in issues concerning him or her. On the other hand, *a person has a right to protection*. In case an appointment of a guardian is considered necessary, any interference in the status of the person in question occurs in accordance with the principle of minimal interference. An individual's rights may be restricted *only to the extent that is necessary* to safeguard his or her interests and rights.[14] Legal competence is therefore not deemed in a black-and-white manner or as an either/or concept. *Competency can be supported and restricted at different*

11 It has been estimated that some 32,000 people with dementia are living alone in Finland, some of whom are truly lonely with no safety net to protect them. See A. Mäki-Petäjä-Leinonen, Protecting a person with dementia through restrictions of freedom? Notions of autonomy in the theory and practice of elderly care, in: *Subjectivity, citizenship and belonging in law: Identities and intersections*, eds. A. Griffiths, S. Mustasaari, A. Mäki-Petäjä-Leinonen, Routledge, London, 2017, pp. 146–170, at p. 164, with references.

12 The Handbook on Public Guardianship Services (2020) describes the activities, principles and values of the public guardianship offices. The Handbook contains recommendations on how public guardianship services should be provided so that they protect the clients' interests in the best possible manner. The Handbook is available in Finnish and Swedish at the Institutional Repository for the Government: https://julkaisut.valtioneuvosto.fi/handle/10024/162426.

13 Ahti Saarenpää, Henkilö- ja persoonallisuusoikeus, in: *Oikeusjärjestys III*, ed. Risto Haavisto, Lapin yliopisto, Rovaniemi, 2000, pp. 348–349.

14 Hanna-Maria Niemi, The use of human dignity in legal argumentation: An analysis of the case law of the Supreme Courts of Finland, *Nordic Journal of Human Rights*, 2021, vol. 39, pp. 280–299.

levels, at all of which the principle of respect for human dignity must be considered in light of the circumstances of each individual case.[15]

At the first level, a guardian only *supports* a ward in his/her transactions. The ward's own competency is not restricted by the appointment of a guardian and does not lead to disqualifying the ward entering into transactions by himself/herself. The second option is to restrict ward's competency but not more than what is necessary in order to protect the ward's interests. There are three possibilities in this respect. Firstly, a ward may enter into a transaction only in conjunction with the guardian, or a ward is not competent to enter into *certain* transactions or to administer *certain* property. The third option is that a person is declared incompetent (see the Guardianship Services Act, § 18). Declaring a ward incompetent is seldom used in Finland.[16]

A restriction of competency of a ward becomes relevant principally when it is known that the individual in question, in spite of his/her condition, is actively and clearly against his/her own interests making transactions that weaken his/her financial position, such as by donating assets or by incurring debt. Competency must not be restricted more than what is necessary for safeguarding the interests of that person.

The rationale behind the legislation is not to restrict the rights of an individual unnecessarily and therefore restrictive use of a guardianship is always the last resort (necessity principle). *A guardian cannot be appointed if one's affairs are properly managed in other ways* (the Guardianship Services Act, § 8.1).[17] The court as well as the guardianship authority generally requires further evidence of the need for the appointment of a guardian, in practice information on the individual circumstances of the person and proof indicating that the person's problems could not be solved by less restrictive means. An individual cannot therefore be forced into guardianship against their will where they have made suitable arrangements on their own in an acceptable manner – for example, if a person has invested his/her assets with the assistance of a bank.[18] This, as well as the requirement for specific-

15 Ahti Saarenpää, Henkilö- ja persoonallisuusoikeus, in: *Oikeusjärjestys III*, ed. Risto Haavisto, Lapin yliopisto, Rovaniemi, 2000, pp. 337–338.

16 See more closely Tuulikki Mikkola, *Family and succession law in Finland*, Wolters Kluwer, Warszawa, 2018, pp. 28–29, with references, and also Finland's initial report on the implementation of the convention on the rights of persons with disabilities, pp. 16–18. A person who has been declared legally incompetent may, however, self-decide on matters pertaining to their person, if they are able to understand the significance of the matter. An incompetent person may enter into transactions which, in view of the circumstances, are usual and of little significance. An incompetent person has the right to decide on the proceeds of their own work earned during the incompetency.

17 See Salla Silvola, *Finland*, https://assets.vu.nl/7099fcf9-715f-0061-5726-009a48410fee/2e0dda55-648d-4098-818a-a4f856b504ae/Finland.pdf, who writes, 'There are alternative ways of handling the affairs of for example, an aging person of deteriorating capacity. In practice, spouses have the possibility to continue to handle the affairs of the other spouse, if they share a common bank account. Written authorizations governed by the general Contracts Act (228/1929) for different transactions are sometimes used by near relatives even after the capacity to give new authorizations may already be questioned. Municipal social authorities also use brokering accounts where social benefits are paid and which are used for the benefit of the beneficiary and/or his/her family. In chapter 18, § 10 of the Code of Commerce, there is also a historical statutory provision on *negotiorum gestio*, which allows a relative or a friend to act on behalf of another in a situation where the circumstances (for example due to extreme urgency) do not allow official authorization. Under *negotiorum gestio*, the person who acts as a representative for another without due authorization, bears the responsibility of his actions in damages'.

18 For the necessity and proportionality principles, see travaux préparatoires of the legislation: Report 20/1998 of the Law Committee, p. 3 and HE 45/2008 vp, p. 17. Also Hanna-Maria Niemi, The use of human dignity in legal argumentation: An analysis of the case law of the Supreme Courts of Finland, *Nordic Journal of Human Rights*, 2021, vol. 39, pp. 290–293.

ity, was underlined in a Supreme Court precedent KKO 2009:7. A mere medical diagnosis does not in itself give the right to restrict anyone's competence to decide on matters concerning their own assets. The prerequisite is that the risk to important interests is clearly shown in a concrete way.[19]

The number of valid guardianship arrangements and powers of attorney continues to increase every year. Guardianship legislation is systematically connected to elder law as typically the guardian is appointed for an aging person of deteriorating capacity.[20] It is notable, though, that it seems that the number of guardianships in all age groups is increasing, and guardianship clients include also young individuals due to, for example, substance abuse.[21] In 2020, the total number of registered guardianship arrangements was almost 82,000.[22] The population of Finland is approximately a little over 5.5 million.

V. Continuing power of attorney

By providing a continuing power of attorney (in Finnish: *edunvalvontavaltuutus*), individuals can prepare in advance for the management of their affairs in the event that they are at a later time unable to manage them themselves. It is even possible to include personal matters, such as type of living and form of healthcare in the document. Systematically it is, with respect to guardianship, primary and enabling way to organise a guardianship.

The main idea behind the continuing power of attorney is to *support and strengthen a person's right to self-determination*. A person is able to arrange the management of his/her affairs in advance in case he/she becomes incapable of managing them self for instance due to an illness. The act regulating the document came into force in 2007. Its enactment stems from the recommendations of the Council of Europe on the protection of the adult population. Additional socio-economic rationale for the act lies in the scanty resources of the public guardianship system. The person appointed is usually someone close to a donor or even advocate in cases of more complicated wealth planning.

There are several reasons for making the power of attorney. It is an efficient and flexible way of making estate and tax planning. The donor may allow gifts in the document in order to transfer his/her assets through donations by an anticipated inheritance. The continuing power of attorney is a way to keep the financial matters of the donor private; the donee does not need to draw up a separate annual statement for the management of affairs to the authority, unless the donor has entered a requirement for this into the power of attorney. The donor decides what is required in terms of supervision arrangements.

The general precondition for drawing up a power of attorney is that the donor has reached the age of 18 and is able to understand the significance of the power of attorney. Naturally, it would be wise to start preparing a power of attorney at latest when the initial symptoms of impaired functional capacity have emerged. However, in this case, it may already be necessary to request a medical certificate to ensure that the donor is able to understand the significance of the power of attorney.

19 Finland's initial report on the implementation of the convention on the rights of persons with disabilities, p. 17.

20 Pertti Välimäki, *Edunvalvontaoikeus*, Alma Talent, 2013, pp. 1–2.

21 Salla Silvola, *Finland*, https://assets.vu.nl/7099fcf9-715f-0061-5726-009a48410fee/2e0dda55-648d-4098-818a-a4f856b504ae/Finland.pdf, also The Handbook of Public Guardianship Services Act 2020, p. 11.

22 See The Handbook of Public Guardianship Services Act 2020, p. 13.

Preparing a continuing power of attorney has similar strict formalities as a will. It has to be made in writing and it requires two witnesses. The witnesses have to know that the document is a continuing power of attorney, but since it is a private document, its contents does not have to be disclosed to them.

In order to enter into force, the guardianship authority has to verify the document. The requirement for the confirmation of the power of attorney is that the donor has become unable to management his/her affairs – for instance, due to deteriorating health. The original document must be presented to a registrar who, after reviewing medical documents of the donor's health, can verify authority of guardianship.[23]

It must be noted that a continuing power of attorney loses its power at the time of death, so the only tool to manage a person's assets after death is by a will (the Guardianship Services Act, § 17).[24]

VI. Personal matters

Although a guardian or a donee may also be appointed for personal matters, legislation on health and social care include additional provisions on decision-making in the matters of health and social care.

In addition, a guardian or a donee is not competent to give consent to marriage or adoption on behalf of the client, nor to acknowledge paternity, consent to an acknowledgement of paternity, make or revoke a will or represent the client in other matters of a comparable personal and individual nature (the Guardianship Services Act, § 29 and the Act on Continuing Powers of Attorney, § 2).[25]

Implementation of the Article 12 of the UN Convention on the Rights of Persons with Disabilities

Finland signed the UN Convention on the rights of persons with disabilities in 2007 but did not ratify it until 2016. The ratification was postponed as it was deemed that there were certain parts of Finnish legislation that did not mirror the articles of the Convention well enough.[26] Specifically, it had to be ensured that the domestic legislation fulfilled the conditions for ratification of Article 14 of the Convention. Following this, amendments were made to the Act on Special Care for Persons with Intellectual Disabilities (519/1977).[27]

23 See in detail https://dvv.fi/en/continuing-power-of-attorney.

24 See also Pekka Tuunainen, *Finland: International estate planning guide*, IBA, 2021, pp. 2–3.

25 Salla Silvola, *Finland*, https://assets.vu.nl/7099fcf9-715f-0061-5726-009a48410fee/2e0dda55-648d-4098-818a-a4f856b504ae/Finland.pdf.

26 In order to ratify the Convention, a working group was appointed in 2011. The working group included representatives from different ministries, the Office of the Parliamentary Ombudsman, the Association of Finnish Local and Regional Authorities, the National Disability Council, the Finnish Disability Forum and the Threshold Association. Representatives of the Human Rights Centre (HRC) and the Finnish Association of the Deaf served as permanent experts in the working group.

27 In the reform of the legislation on equality and non-discrimination carried out in 2015, refusing reasonable accommodations was defined as discrimination and the scope of the obligation to provide reasonable accommodations in order to ensure the equality of persons with disabilities was broadened. The Municipality of Residence Act (201/1994) and the Social Welfare Act (710/1982) were amended in 2010 in order to strengthen the right of persons with disabilities to choose their place of residence. A provision was added providing that persons in long-term care relationships, i.e. lasting more than one year, living outside their

The purpose was to strengthen the right of self-determination of persons in special care and to reduce the use of restrictive measures and restrictions of freedom.[28] When approving the amendments, Parliament required the government to monitor the impacts of the legislation on the implementation of the rights of persons with intellectual disabilities and to continue developing the regulation concerning the right of self-determination.[29]

It is notable, though, that the implementation process of the Convention has been criticised by stating, i.e. that the rights of people with dementia were ignored as the Intellectual Disability Act does not usually apply to people with dementia – even though it seems clear that the UN convention is applied to people with dementia. This is a challenge as older people with dementia makes them particularly vulnerable to unjust treatment. It has been emphasised in legal literature that a better way of securing care for people with dementia is to apply disability legislation to them equally. This means treating them in the same way as people in other illness and disability groups.[30]

The Convention and its Optional Protocol (Treaty Series 27/2016) entered into force in Finland on June 10, 2016. Finland did not submit any reservations or declarations to Article 12. The legislation on guardianship and the guardianship system was reformed in 1999, and as a result, no reform to the Guardianship Services Act was deemed necessary due to the ratification process. In this respect the implementation of the Convention should, in general, emphasise the fulfilment of already existing obligations of authorities in order to ensure that the rights of disabled persons are realised in practice.

The Parliamentary Ombudsman together with the Human Rights Centre and its Human Rights Delegation serve as an independent national mechanism tasked to promote, protect and monitor the implementation of the Convention. A provision on this task is contained in the Parliamentary Ombudsman Act, § 19f.[31] In addition, Finland has published a National Action Plan on the Convention. Its purpose is to effectively implement

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municipality of residence have the right to choose their municipality of residence. Another added provision gave persons in long-term need of institutional care, residential services or family care the right to apply for a service needs assessment from another municipality than their municipality of residence. According to the provision, a change of the municipality of residence may also be based on the person's own decision to seek residence in another municipality and to receive its services. See Finland's initial report on the implementation of the convention on the rights of persons with disabilities, https://um.fi/documents/35732/0/CRPD+initial+report+Finland.pdf/959fa430-9e7e-9fe0-76d1-c435f47181ea?t=1565948791606.

28 See the webpages of the Finnish Institute for Health and Welfare, https://thl.fi/en/web/handbook-on-disability-services/disability-rights-and-legislation/rights-and-legislation. Also H.-K. Hoppania, Anna Mäki-Petäjä-Leinonen, H. Nikumaa, (Un)equal treatment? Elderly care and disability services for people with dementia in Finland, *European Journal of Social Security*, 2017, vol. 19, pp. 225–241, at p. 234.

29 See Finland's initial report on the implementation of the convention on the rights of persons with disabilities, https://um.fi/documents/35732/0/CRPD+initial+report+Finland.pdf/959fa430-9e7e-9fe0-76d1-c435f47181ea?t=1565948791606.

30 It has been stated in legal literature that from the perspective of equality, it would have been vital to update the legislation from the perspective of all disability groups in Finland before the UN Disability Convention was ratified. In essence, this means that, for example, the practices involved in restricting the freedom of people with dementia in Finland are contrary to the UN Convention. See A. Mäki-Petäjä-Leinonen, Protecting a person with dementia through restrictions of freedom? Notions of autonomy in the theory and practice of elderly care, in: *Subjectivity, citizenship and belonging in law: Identities and intersections*, eds. A. Griffiths, S. Mustasaari, A. Mäki-Petäjä-Leinonen, Routledge, London, 2017, pp. 146–170.

31 For national monitoring, see Finland's initial report on the implementation of the convention on the rights of persons with disabilities, https://um.fi/documents/35732/0/CRPD+initial+report+Finland.pdf/959fa430-9e7e-9fe0-76d1-c435f47181ea?t=1565948791606, pp. 68–69. See also the webpages of the Parliamentary Ombudsman, https://www.oikeusasiamies.fi/en_GB/web/guest/the-rights-of-persons-with-disabilities.

the Convention. The following is stated in the webpages of the Finnish Ministry of Social Affairs and Health:

> The aim and objective of the action plan is to raise awareness of the rights of persons with disabilities and to take account of their rights in all activities in the different administrative branches and in society at large. Accessibility, availability and participation are essential when implementing the rights of persons with disabilities. . . . The Action Plan contains 82 measures that the ministries are committed to implement. Part of the measures will be implemented during the current Government's term of office. Some measures take a longer time to carry out.[32]

Also, the Finnish Institute for Health and Welfare (THL) maintains the Online Handbook on Disability Services in Finland. The Handbook covers the rights and social services of persons with disabilities in Finland and the phases and tasks of the social work process. It describes disability as a phenomenon in society and the problems of disability research, and it supports the management and supervision of disability services.[33]

Active legal capacity of natural persons and its restrictions for the sake of disabilities – procedural aspects (court or outside-court mode of taking decision)

I. Introductory remarks concerning the appointment process of a guardian

A guardian is appointed by a guardianship authority or by a court. An application for the appointment of a guardian can be submitted to the court by a relative or a person close to the individual concerned. On the other hand, an application for the appointment of a guardian can be submitted to the guardianship authority. When needed, the guardianship authority submits the application to the court (the Guardianship Services Acts, §§ 7–8, 10).

Processing of a guardianship matter by the guardianship authority will vary depending on whether the matter has been initiated via an application by the person in need of guardianship or via a notification from a third party. The issue of an appointment of a guardian may be decided by the guardianship authority in case a person himself/herself wants a guardian to be appointed and understands the significance of the matter. Additional requirement is that he/she requests that a named person can be appointed as the guardian (the Guardianship Services Act, § 12). The authority will hear the petitioner in person before it makes a decision on the petition.

32 https://stm.fi/en/-/suomen-ensimmainen-yk-n-vammaissopimuksen-toimintaohjelma-vahvistaa-vammaisten-henkiloiden-oikeuksia. The Advisory Board for the Rights of Persons with Disabilities (VANE) was responsible for drawing up the National Action Plan, and the Advisory Board will also coordinate the national implementation of the convention. There are representatives of disability organisations, labour market organisations and the ministries with key significance to the rights of persons with disabilities in the Advisory Board. Disability organisations and persons with disabilities were heard when the Action Plan was being prepared.

33 The Online Handbook can be found in https://thl.fi/en/web/handbook-on-disability-services/contact/what-is-the-online-handbook-on-disability-services-.

Anyone is able to submit a notification with the guardianship authority stating that a person is in need of guardianship. A notification can be given by anyone (notwithstanding confidentiality). There have to be reasons in the notification explaining why it is necessary for a guardian to be appointed for the person in question. The notification must be well-reasoned and justified – i.e. it should state why it is necessary for a guardian to be appointed for the person in question and what kind of problems the person has encountered in managing his/her own affairs. Inability is usually determined on the basis of a medical opinion.[34] It is thus notable that guardianship is not an open social service. One must exceed *the guardianship threshold* to be eligible for the appointment of a guardian.

In a Supreme Court judgment, KKO 2005:2, the argumentation emphasised the rights-based approach to the question of guardianship services, and the principle of respect for human dignity was visibly brought out in the argumentation (in Finnish: *ihmisarvon kunnioittaminen*).[35] Also, one must take into account the principles of necessity and proportionality. The Supreme Court underlined the respect of basic rights and right to self-determination. In the organisation of guardianship services, individual circumstances and the possibility that the person's interests are in danger must be assessed from his/her point of view. A guardian cannot be appointed in order to ease the authority's operations even if a person is difficult to deal with. Instead, it should be shown how the person's interests are in danger under the individual circumstances. It was made visible in the argumentation of the Supreme Court that in each case *individual rights have to overcome the public good*.[36]

The Parliamentary Ombudsman (in Finnish: *oikeusasiamies*) has given an important decision in a case where the Register Office received an e-mail, including a demand that a guardian should be appointed for the couple named in the e-mail. The mail included the following claims:

> I have known A from childhood. . . . Unfortunately she is my sister. She never understood the difference between what is hers and what isn't. She has gone through life by cheating. . . . Stealing my money from the estate. . . . Now she has found a like-minded B (spouse) . . . a guardian should be appointed for that scumbag, too.

It seems clear that the application as such had insubstantial grounds because the e-mail did not explain how A and B (the couple) was unable to look after their financial or other interests or if there were reasons to expect that they were at risk of being taken advantage of financially. The e-mail message mainly contained bitter and defamatory comments about the couple. It even referred to criminal activity. Still, the Local Register Office had initiated the process for investigating the couple's need for guardianship services.

The Register Office requested couple's medical certificates from the health centre and only after the complainant had contacted the Register Office, had the application been noted groundless. At this point the request for medical certificates was cancelled. Still, the health centre had been in touch with the complainant and his spouse (A and B) for the

34 See for the process in detail, https://dvv.fi/en/processing-of-a-guardianship-matter. Also Kati Juva, Mäki-Petäjä-Leinonen, Of sound mind? Dementia and aspects of assessing legal capacity, *European Journal of Health Law*, 2015, vol. 22, pp. 13–37.

35 For the importance of human dignity as a building block of the guardianship law, see travaux préparatoires of the legislation: Report 20/1998 of the Law Committee, p. 3.

36 For the principle of human dignity, see also the Supreme Court precedent KKO 2009:7.

purpose of assessing the requirement of guardianship services. Notification of this was also included in their patient documents.

The Parliamentary Ombudsman stated that the Register Office had begun its investigation on obviously insubstantial grounds and the health centre was routinely contacted without first contacting applicant for additional information or consulting the couple in question. Therefore, the Ombudsman found that the Register Office had, without proper cause, violated the interested parties' protection of privacy and right to self-determination. It was emphasised in the decision of the Ombudsman that

> the mere investigation of the need for guardianship services may in many ways violate a person's fundamental rights, as an investigation of his or her state of health, housing conditions and financial circumstances is initiated. The Register Office should pay particular attention to whether or not, based on the petition, it is obvious that the person in question needs a guardian to protect his or her interests and rights. The purpose of the petition for guardianship services is that those in need of protection can have access to the services. It is not intended as an instrument of harassment.[37]

II. A register of guardianship

The register of guardianship affairs provides information on whether someone is under guardianship, who their guardian is and what the duties of the guardian are. Information on any restrictions on the person's capacity is also recorded in the register. The register also includes information on valid power of attorney mandates for the management of financial affairs and the assignees that have been granted power of attorney (see Chapter 7 of the Guardianship Services Act). It serves as a medium for both the exchange and the control of the organisation of guardianship.

Register discloses information to various authorities, associations and private persons. State or municipal authorities, as well as associations or entrepreneurs, who continuously need data from the register for an approved purpose, can access information via a technical user interface.[38] As the register includes mainly data that is deemed as sensitive and private, it is not in all respects open for everybody.

Ahti Saarenpää has stated that the register is a problematic one. It makes available information on the guardianship of individuals and limitations on their legal capacity, which may attract untoward interest from the markets. In the process, it reveals something essential of our privacy and self-determination. An ordinary power of attorney in civil law is a more discrete solution in this regard.[39]

37 Parliamentary Ombudsman Petri Jääskeläinen's decision no 3746/4/15 (https://www.oikeusasiamies.fi, available only in Finnish).

38 See https://dvv.fi/en/extracts-from-the-register-of-guardianship-affairs.

39 Ahti Saarenpää, Henkilö- ja persoonallisuusoikeus, in: *Oikeusjärjestys III*, ed. Risto Haavisto, Lapin yliopisto, Rovaniemi, 2000, pp. 357–359.

Organisation and institutional aspects of the assistance and guardianship for the purpose of doing legal acts by persons with disabilities

I. Introductory remarks

Functionally the guardianship system operates in two ways. Firstly, there is a level of practical activity where a guardian supports and helps a ward and, if necessary, represents him/her in different transactions and in the management of financial issues. The provisions of the Guardianship Services Act concerning this practical activity are generally deemed as belonging to civil law. Secondly, essential parts of the organisation of guardianship are supervision and accountability as the guardian is accountable for the management of his/her duties to the Digital and Population Data Services Agency, which is the guardianship authority. A guardian also needs a permit from the guardianship authority for actions that are the most important from the perspective of their ward. This part of the organisation of guardianship belongs mainly to administrative law.

As some of the cases concerning guardianship organisation are heard in the district courts and some in the administrative sector, meaning the guardianship authority, appeals are directed down to different paths. For instance, an appeal against a decision of a district court on appointment of a guardian is lodged in the court of appeal. If a guardianship authority has given a decision, an appeal must be made to the administrative court.

It is also important to note that the Parliamentary Ombudsman oversees the legality of actions taken by the authorities, also by the guardianship authority and all public guardians.[40] The Ombudsman can take matters under investigation on his/her own initiative or by investigating complaints received from for instance a ward or his/her relative. During recent years a very large proportion of the Ombudsman's oversight of legality is currently targeted at the organisation of guardianship. Each year the ombudsman gives approximately 100 decisions on cases concerning guardianship. Cases that are deemed as being most important are published in the annual reports.[41]

II. Accountability and supervision

A guardian is under a duty to keep accounts of the client's assets, debts and liabilities and of the events and transactions of each financial period, normally annually. In the beginning of his or her appointment, the guardian has to provide the guardianship authority an inventory of the ward's assets and liabilities. The guardian must submit regular, normally annual, accounts to the guardianship authority.

A guardian cannot freely perform any transaction on behalf of the ward. The permission of the guardianship authority is needed e.g. for selling or buying real estate or a residence, for pledging property as collateral for a debt and for taking out some other loan than a state-guaranteed student loan (see, in detail, the Guardianship Services Act, § 34).

40 According to § 109 of the Constitution, the Ombudsman shall ensure that the courts of law, the other authorities and civil servants, public employees and other persons, when the latter are performing a public task, obey the law and fulfil their obligations. See the webpage of the Parliamentary Ombudsman, even in English, https://www.oikeusasiamies.fi/en/eoa.

41 Pertti Välimäki, *Edunvalvontaoikeus*, Alma Talent, 2013, p. 12. Summaries of the annual reports are published in English, https://www.oikeusasiamies.fi/en_GB/web/guest/toimintakertomukset1.

The guardian is not empowered to donate the property of the client. A transaction beyond the competence of the guardian is not binding on the ward.

The guardianship authority also supervises the actions of the donee of the continuing power of attorney. When the donee begins his/her task, he/she has to submit a list of assets and debts of the donor – that are in the remit of the power of attorney – to the guardianship authority. At the request of the guardianship authority, the donee has to submit a report on the management of the donor's assets. The continuing power of attorney can, thus, include provisions on the extent of supervision applied by the guardianship authority.

In case it is noted that a guardian is not fit for the task, he/she is released by a court. The court will also terminate a guardianship upon petition, once there no longer is need for one. In order to ensure that no one is under guardianship without proper reasons, the guardianship authority reviews all guardianships every four years and determines whether they should continue. The tasks of a guardian and a donee under a continuing power of attorney are terminated, if the client dies. A guardian whose task is terminated or whose task has been restricted has to provide the guardianship authority with a statement of accounts relating to the property no longer managed by the guardian, for the period that has not yet been accounted for (final statement).

The guardian is liable to provide compensation to their client for any damage that they have caused intentionally or through negligence in the performance of their duties. A claim for damages based on the actions of the guardian will expire three years after the final statement has been given to the person entitled to it.

The provisions on accountability and supervision of a guardian are included in chapter 6 of the Guardianship Services Act.

III. Opinion of a ward

The ward's right to self-determination is strong even after a guardian is appointed as *a guardian must strive to work in cooperation with each ward*. Before making any important decisions that will affect the ward, the guardian must inquire his/her opinion if this is possible considering the ward's condition.[42]

Although the legislation has been reformed, as explained earlier in this chapter, in practice the old attitudes still figure prominently. The Guardianship Services Act has even been interpreted to mean that a guardian whose role is only to assist the ward can, through his or her actions, bypass the ward's will. This has been noted in the decisions of the Parliamentary Ombudsman who has handed down a considerable number of decisions in cases where public guardianship has meant that bureaucratic expediency has seemingly been a more worthy goal than protecting the ward's right to be consulted in matters that affect his/her interests.

One of the Ombudsman's decisions concerned a case where the Public Guardianship Services had carried out a thorough clean-up in the complainant's (the ward) flat while she was being treated at the hospital. The cleaner had disposed of some of the ward's belongings without consulting her. The guardian did not even claim that consulting the principal would have been impossible because of her state of health or of any other reason.

42 The Guardianship Services Act, § 43: Before the guardian makes a decision in a matter falling within his/her task, he/she shall inquire the opinion of the ward, if the matter is to be deemed important from the ward's point of view and if the hearing can be arranged without considerable inconvenience.

According to the Parliamentary Ombudsman, this has led to the violation of the ward's private life. The Parliamentary Ombudsman summarised that it had not been enough that the hospital staff had discussed the clean-up with the ward. It had been the duty of the guardian *to consult the ward in person in order the ward to express her own view*. This duty was not cancelled out by the fact that having the flat cleaned had been as such required.[43]

Accordingly, in the decision of a Supreme Court, KKO 2015:31, the question was whether there were reasons to dismiss the guardian and to appoint a new guardian and – especially – whether the ward's opinion needed to be considered. The court stated that although the individual concerned has no right to dictate who is appointed as guardian, his/her opinion must be given weight and especially since appointing a new guardian was against the wishes of the ward in a case at hand. The rights-based approach is clear from the reasonings of the Supreme Court, and it was emphasised that *one's right to participate in decision-making concerning oneself must be respected as far as possible*.

The relations between private law restrictions of active legal capacity and protection of persons with disabilities under criminal law (against crimes which can be committed as a result of doing legal acts)

A person lacking capacity cannot self administer property or enter into contracts or other transactions. An incompetent person may only enter into transactions which, in view of the circumstances, are usual and of little significance. A transaction beyond the competency of the person is not binding on him/her, unless the guardian or, after the end of incompetency, the person himself/herself ratifies the same.[44]

Also, a person who is not declared incompetent might suffer from physical, mental or intellectual impairment which may, de facto and under certain circumstances, weaken his/her capacity and make him/her vulnerable to exploitation. A person with diminishing legal capacity can be faced with *different situations requiring different types and degrees of capacity for decision-making*. As written by *Kati Juva* and *Anna Mäki-Petäjä-Leinonen*, stock trading and risk investment, for instance, require a much greater capacity for decision-making than drafting a simple will or choosing a nursing home. When assessing the capacity of such people, the determining factor is whether a person understands the meaning and consequences of the decision he or she is about to make:

> Therefore, a person with diminishing legal capacity also has a right to make decisions insofar he or she can understand the meaning and consequences of the specific act. It should be self-evident that the mere diagnosis of a disease which may weaken a person's legal capacity does not automatically remove their autonomy. As long as the person is capable of making valid decisions, those decisions have to be given priority over the opinion of a legal guardian or a close relative. There is a legal presumption of capacity unless shown to the contrary.[45]

43 Parliamentary Ombudsman Petri Jääskeläinen's decision no 3050/4/15 (https://www.oikeusasiamies.fi, available only in Finnish).

44 Ahti Saarenpää, Henkilö- ja persoonallisuusoikeus, in: *Oikeusjärjestys III*, ed. Risto Haavisto, Lapin yliopisto, Rovaniemi, 2000, p. 345.

45 Kati Juva, Anna Mäki-Petäjä-Leinonen, Of sound mind? Dementia and aspects of assessing legal capacity, *European Journal of Health Law*, 2015, vol. 22, p. 15. Also Antti Kolehmainen, Edunvalvojan edustusvalta ja päämiehen itsemääräämisoikeus, *Lakimies*, 2019, pp. 289–312.

Usury (in Finnish: *kiskonta*) refers to situations of exploitation in which the usurer is aware of the vulnerability of the exploited person. Usury is sanctioned under the Criminal Code, chapter 36, § 6.[46] The provision pertaining to usury was reformed in connection to the first 'instant-loan regulation package', and it came into force in 2010. The provision states that a person who – by taking advantage of the financial or other distress, position of dependence, lack of understanding or thoughtlessness of another, in connection with a contract or other transaction – obtains or requires for himself or herself or another person economic benefit that is clearly disproportionate to the remuneration, shall be sentenced for *usury* to a fine or to imprisonment for at most two years.

The Criminal Code, chapter 36, § 7, rules on the aggravated usury. If the usury (1) involves the seeking of considerable benefit, (2) causes considerable or particularly significant loss, (3) involves the offender taking unscrupulous advantage of a special weakness or other insecure state of another or (4) is committed in a particularly methodical manner, and the usury is aggravated also when assessed as a whole, the offender shall be sentenced for *aggravated usury* to imprisonment for at least four months and at most four years.

There are also civil law remedies against usury. The remedies are designed for contractual relations and allow for annulment or adjustment of a contract or a specific part of the contract.[47] Accordingly, legal act may be invalid if someone has taken advantage of the weakened capacity of a contracting party at the time of the legal transaction. Such a legal act can be declared invalid based on the provisions of invalidity in the Finnish Contracts Act (228/1929). Therefore, a court may declare a legal transaction invalid if there is enough evidence that a person, while performing the legal act, in practice turned out to be incapable of understanding its meaning and consequences (*de facto* legal incapacity).

According to the Contracts Act, § 31,

> If anyone, taking advantage of another's distress, lack of understanding, imprudence or position of dependence on him/her, has acquired or exacted a benefit which is obviously disproportionate to what he/she has given or promised or for which there is to be no consideration, the transaction thus effected shall not bind the party so abused.

The essential elements of usury may be fulfilled for instance in a case where a party takes advantage of the fact that the other party is seriously ill and this causes a lack of understanding. The requirement for applying § 31 of the Contracts Act is that the stronger party had acquired benefit which is obviously disproportionate to what he/she has given or promised. The imbalance of a contract must be a result of the blameworthy behaviour of the stronger party.

In a Supreme Court case, KKO 2003:48, A and B owned an apartment together. A (the wife) owned bigger part, 61%, and B (the husband) smaller part, 39%. In 1997 A allegedly had sold her part of the apartment to B. The price was 200,000 Finnish mk (markka), but

46 Can be found in English, https://www.finlex.fi/fi/laki/kaannokset/1889/en18890039.pdf.

47 Finnish contract law is based on the principle of freedom of contract. Thus, there are three other principles that should be taken into account: loyalty, balance and the protection of the weaker party. In case a contract is invalid – for instance, due to defects in the declaration of intent – it is conceived as an allor nothing situation. However, if the provision on the adjustment of a transaction is applied, it is possible to leave the contract in force and to adjust only some of the contract clauses. For Finnish contract law (in English), see e.g. Soili Nystén-Haarala, *The long-term contract: Contract law and contracting*, Finnish Lawyers Publishing, Helsinki, 1998; Petra Sund-Norrgård, *Contract law in Finland*, Kluwer Law International, 2017, https://books.google.com/books/about/Contract_Law_in_Finland.html?id=XQHfswEACAAJ.

it could not be proven that the sum was ever paid to A. At the time of the transaction, the value of the apartment was at least 700,000 Finnish mk. Both spouses died soon after the purchase, in 1998. A's daughter C laid a claim before a district court against the shareholders of B's estate and demanded that the transaction should be declared invalid. According to the published reasonings of a court, A suffered from a stroke in 1993 and had become dependent on B's help, even in daily activities. Witnesses were heard, and they all said that A had been in a weaker position to her husband, and B had been trying to isolate A from her relatives and friends. The case ended up being decided by the Supreme Court which found that B, in connection with the transaction, had abused A's physical and psychological dependence on him and made her transfer her share of the apartment without any compensation. A's interests had been violated through this transfer. The contract of purchase was declared invalid according to regulation 31 of the Contracts Act and did not thereby bind the heir C of A.

According to the Contracts Act, § 36, it is also possible to adjust the contract (in Finnish: *sopimuksen sovittelu*). If a contract term is unfair or its application would lead to an unfair result, the term may be adjusted or set aside. In determining what is unfair, the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, and other factors are taken into consideration. In this respect, judges have wide discretion of adjusting contract terms or even setting them aside.[48]

Cases of criminal usury are seldom prosecuted in courts. Civil law is usually thought to give enough protection to the exploited party.

Summary

The idea behind the Finnish guardianship legislation is that a guardian can be defined as the ward's trusted advisor. The guardian takes care of the property and financial and personal affairs of the person for whom the guardian has been appointed, in cooperation with the person himself or herself. No matter in which way the guardianship is organised and whether a guardian is a friend of a ward or a public guardian, from a legislative point of view guardianship is deemed as a personalised service that respect the clients' right to self-determination without posing any unnecessary restrictions. Supported decision-making underlines a respect to human dignity, which means that instead of objectively evaluating best interests of a person, one is required to respect the will of a person in question as far as possible. The appointment of a guardian does not usually prevent a person from entering into transactions. If legal capacity of a ward is exceptionally restricted, the primary alternative is to perform the legal act together with the guardian. When making decisions, the guardian must hear the client. Therefore, acting for the benefit of the person requires keeping in contact with him/her.

Accordingly, from the legislative point of view, guardianship is strongly being viewed as having a rights-based dimension. The basics of Finnish guardianship legislation form an essential part of the law of personality which respects the principles of self-determination, individuality, personal liberty and privacy. The goal is to protect vulnerable individuals – and give them a right to self-determination to a highest degree possible. The challenge is, thus, how to ensure that the goals are achieved in practice.

48 The Contracts Act can be found in English: https://www.finlex.fi/fi/laki/kaannokset/1929/en19290228_19990449.pdf.

12 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in France

Sylwia Castillo-Wyszogrodzka

1. The concept of capacity to perform acts in law in France – introductory notes

At the outset, it should be noted that the equivalent of Polish capacity to perform acts in law is, in the French legal system, cumulatively the capacity to enjoy rights (*capacité de jouissance* – e.g. the owner's capacity to use goods) and the capacity to exercise rights (c*apacité d'exercice*, the capacity to perform assets-disposing legal transactions), jointly referred to as *capacité juridique* (which literally translates as 'legal capacity', a term not used in this context in French law). In French legal theory, it is emphasised that a lack of capacity to enjoy rights is an outright deprivation of the legal capacity.

French law, therefore, draws a distinction between the concept of *capacité*, indicating the capacity to enjoy and exercise rights (active legal capacity) and the concept of *personnalité juridique,* indicating legal personality (passive legal capacity).[1]

In French law, pursuant to Article 414 of the Civil Code, full capacity to perform acts in law is obtained at the age of 18, gender being irrelevant in this regard. Article 388, sentence 1, of the Civil Code stipulates that a minor is a person who has not yet reached **the age of 18**.

Pursuant to Article 388-1-2 of the Civil Code, a minor that has reached the age of 16 may be authorised by its legal representative(s) to independently perform management-related acts in law required to establish and operate a sole proprietorship with limited liability or a sole proprietorship. In this case, assets-disposing legal transactions may only be performed by the legal representative(s). Other acts in law may be performed independently by a minor.

In light of Article 413–6 of the French Civil Code, **an emancipated minor enjoys full capacity to perform acts in law**, similarly to an adult. Article 413–1 of the Civil Code stipulates that a minor is automatically emancipated by marriage, while Article 413–2 provides that a minor may be emancipated upon attaining the age of 16, even without entering into marriage. After hearing the minor, such emancipation shall be granted, if there are reasonable grounds for doing so, by the guardianship court judge upon the request of the father and mother or one of them. The emancipated minor must, however, observe

1 Among others, David Noguéro, Pour la protection à la française des majeurs protégés malgré la Convention des Nations unies relative aux droits des personnes handicapées, *Revue de droit sanitaire et social*, 2016, vol. 5, p. 964.

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the same rules as if such a minor had not been emancipated, in the event of marriage or adoption.

Concerning emancipation by marriage, it should be noted that Article 144 of the French Civil Code provides that a marriage cannot be entered into before attaining the age of 18, but under Article 145, a public prosecutor of the place of marriage may consent to a marriage before the age of 18 for reasonable grounds, regardless of gender. Moreover, Article 148 of the Civil Code stipulates that minors may not marry without their parents' consent.

Pursuant to the provisions of Decree No. 53–192 of March 14, 1953, on the ratification and publication of international agreements signed by France, France ratified on **February 18, 2010**, the United Nations Convention on the Rights of Persons with Disabilities, produced in New York on December 13, 2006, and signed by this country on March 30, 2007.

To ratify this convention, the following procedures were completed: on December 31, 2009, the French Parliament passed Law No. 2009–1791 on the ratification of the United Nations Convention, published in the French Journal of Laws of January 3, 2010, and, on February 18, 2010, the application for ratification was submitted.

France ratified the Protocol Additional to the Convention along with the convention itself, i.e. on **February 18, 2010**, pursuant to the Law 2009–1791 on Ratification dated December 31, 2009. However, in French jurisprudence databases there is no mention of an individual complaint on the basis of the Protocol Additional, in cases governed by Article 12 of the United Nations Convention on the Rights of Persons with Disabilities.

France submitted two interpretative statements, but neither of them was directly related to Article 12 of the Convention. The first referred to Article 15 and the meaning of the term 'consent' (*consentement*). The latter interpretative statement, making only indirect reference to Article 12, provides that the ability to exercise active and passive voting rights, a component of legal capacity (*capacité juridique*), may only be limited under the conditions provided for in Article 12 of the Convention.

The United Nations Convention on the Rights of Persons with Disabilities, produced in New York on December 13, 2006, entered into force in France on March 20, 2010, and constitutes a source of law in French legal order. Publication of the text of the Convention with the Protocol Additional in the French Journal of Laws took place on April 3, 2010, under Decree No. 2010–356 of April 1, 2010; the decree itself mentions that the Convention entered into force on March 20, 2010. Pursuant to Article 55 of the Constitution of France, however, international treaties or agreements correctly ratified or approved acquire, effective from the moment of their publication, legal validity superior to that of legislative acts.

Despite the fact that France ratified the United Nations Convention on the Rights of Persons with Disabilities in 2010, the vast majority of changes regarding the capacity to perform acts in law of persons with disabilities were implemented much earlier, by the Act of March 5, 2007. A French author, David Noguéro, published a paper on this issue under the meaningful title *'Pour la protection à la française des majeurs protégés malgré la Convention des Nations unies relative aux droits des personnes handicapées'*,[2] which can be translated as 'Advocating for the protection of adults requiring such protection within

2 Ibid., 964. The author takes a critical stance towards the assumptions of the convention and argues that the excessive desire to respect the autonomy of disabled persons hinders the effective protection of their interests in many cases.

the French system, despite the United Nations Convention on the Rights of Persons with Disabilities'.

In July 2011, the French government entrusted the Ombudsman with the role of an 'independent mechanism' under Article 33 of the Convention to promote, protect and monitor the implementation of the convention.

The French Ombudsman observes[3] that with the ratification of the United Nations Convention, the French state undertook to 'guarantee and promote the full implementation of human rights and basic freedoms of all persons with disabilities without any discrimination on the grounds of disability' and to take all relevant measures to effectively implement the rights recognised in the convention. While the French legislator has indisputably implemented many improvements in recent years, such as full recognition of the right to vote or the right of adults that are subject to legal protection to independently enter into marriage, there are still serious shortcomings in this area. Therefore, the Ombudsman finds that France has not yet fully embraced the new approach based on observance of the rights and freedoms of persons with disabilities when developing and implementing political decisions. Unfortunately, in many areas there are obstacles to recognising and respecting the autonomy of persons with disabilities and their inclusion in community life. As an example, in 2020, disability was for the fourth consecutive year the main reason for discrimination complaints submitted to the Ombudsman, representing 21% of all complaints.[4]

2. Private law regulation of the capacity to perform acts in law and the changes introduced by the implementation of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities

French law grants particular protection to those who are incapable of independently managing their affairs. Circumstances justifying such protection include disruption of mental operations, impairment or advanced age. Physical disability is regarded the same as mental disability if it results in one's inability to express intent.

The legislation in force on capacity to perform acts in law (contract obligations and acquire rights) before the ratification and implementation of the United Nations Convention on the Rights of Persons with Disabilities into French legal system was primarily governed by Law No. 2007–308 of March 5, 2007, which entered into force on January 1, 2009, and thoroughly reformed the legal protection of adults.[5] This law introduced the requirements of necessity, proportionality and subsidiarity into the French Civil Code for the application of safeguard measures that limit the capacity to perform acts in law.

This reform, despite the fact that it preceded the ratification and implementation of the convention, largely complied with its requirements. The previous Law of 1968, passed in different circumstances, to serve the needs of a mere few thousand people, failed to satisfy

3 Rapport – La mise en oeuvre de la Convention relative aux droits des personnes handicapées, 2020, https://defenseurdesdroits.fr/sites/default/files/atoms/files/rap-cidph-num-16.07.20.pdf, accessed September 26, 2022.

4 Rapport parallèle – Examen du rapport initial de la France sur la mise en œuvre de la CIDPH, 2021, https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/rapport_parallele_ddd_examen_du_rapport_initial_de_la_france_sur_la_mise_en_oeuvre_de_la_cidph_juillet_2021.pdf, accessed September 26, 2022.

5 Loi n° 2007–308 du 5 mars 2007 portant réforme de la protection juridique des majeurs.

the needs of adults seeking legal protection, estimated in France in the early 2000s at around 700,000.

The aim of the reform of 2007 was to focus the system of guardianship (*tutelle*) and curatorship (*curatelle*) on those who were truly not self-reliant due to a medical impairment of their personal abilities.

Article 415 of the French Civil Code, as amended by the Law of March 5, 2007, provides that adults shall be granted protection of their own person and property if required by their condition or situation, in accordance with the procedures provided for in the Civil Code. This protection is established and performed with respect for personal freedom, basic rights and human dignity. Its purpose it to safeguard welfare of the protected person. It supports, to the extent possible, the autonomy of an adult. The said protection is the responsibility of families and community.

Pursuant to Article 425 of the Civil Code, as amended by the Act of March 5, 2007, those who are incapable of managing their own affairs as a result of the diagnosed mental or physical deterioration that prevents them from expressing their intent may benefit from legal protection. Unless otherwise provided, the measure adopted shall protect persons and their economic interests. It may, however, be explicitly limited to one of the specified purposes.

Among new developments of the Act of March 5, 2007, was the establishment of a so-called *mandat de protection future*, or **mandate of future care**, under which an adult may appoint in advance, for the future, one or more representatives and define the conditions for supervising the execution of the said mandate in the future.

The Law of March 5, 2007, also introduced changes in terminology in the current legal order, moving away from the term *imperfect* or *incapable* and replacing it with *a minor or an adult under guardianship* (*un mineur ou un majeur en tutelle*).

However, it has been repeatedly indicated that the requirements of necessity, proportionality and subsidiarity introduced by the Law of 2007 have not been implemented, as French courts have usually applied measures limiting one's capacity to perform acts in law, where other mechanisms could have been applied. The Ombudsman, in a report on the legal protection of vulnerable persons released in 2016,[6] indicated that the removal of capacity to perform acts in law denies vulnerable persons their basic rights guaranteed by the Constitution, such as the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to consent to intimate relations and medical care, and the right to liberty.

The ratification and implementation of the United Nations Convention on the Rights of Persons with Disabilities produced in New York on December 13, 2006, within the French legal system consolidated the need to draw a distinction between the terms 'legal personality' (*personnalité juridique*) and 'the capacity to perform acts in law' (*capacité juridique*). While legal personality cannot be limited in any way, the ability to acquire rights and contract obligations may be limited for overriding interests. A measure limiting the capacity to perform acts in law is not considered discriminatory if it is dictated by rational and objective reasons and is imposed for a legitimate purpose, proportionate and

6 Rapport – Protection juridique des majeurs vulnérables, 2016, https://www.defenseurdesdroits.fr/fr/publications/rapports/rapports-thematiques/protection-juridique-des-majeurs-vulnerables, accessed September 26, 2022.

adequate to the situation of a particular person. Such a measure shall also include appropriate and effective safeguards to prevent abuse.

As a result of the ratification and implementation of the Convention, the concept of disability itself has also evolved in French legal order: based on human rights, it implies a shift from a system of 'substitutive decision-making' towards a system of 'supportive decision-making'. French legal theory underlines that a support (*accompagnement*) in performing acts in law should respect rights, intent and preferences of persons with disabilities and should never come down to making decisions in lieu of the disabled person.[7]

Partial changes adapting the private law regulation of the capacity to perform acts in law to the requirements of the Convention were introduced in France under the following legal acts:

- Decree-Law (ordonnance) No. 2015–1288 of October 15, 2015, on simplification and modernisation of family law;[8]
- Law No. 2015–1776 of December 28, 2015, on adapting society to an ageing population;[9] and
- Law No. 2019–222 of March 23, 2019, on the 2018–2022 programming and reform of the justice system.[10]

Among the institutions aimed at facilitating the support of vulnerable adults (*majeurs vulnérables*) is so-called **family authorisation (*habilitation familiale*)**, introduced into the French Civil Code under Articles 494–1 to 494–12, by Decree-Law No. 2015–1288 of October 15, 2015.

Pursuant to Article 494–1 of the French Civil Code,

> *If a person is incapable of expressing their intent due to any of the reasons specified in Article 425,*[11] *the guardianship court judge may authorize one or more persons selected from among their relatives within the meaning of 2° I of Article 1 of Law No. 2015–177 of 16 February 2015 to represent them or to perform one or more acts on their behalf subject to conditions and in accordance with the rules provided for in this Chapter and in Title XIII of Book III which are not to the contrary, to ensure sufficient protection of their interests.*

The Regulation of October 15, 2015, also introduced changes with regard to the so-called **mandate for future care (*mandat de protection future*)**. Article 477 of the French Civil Code, as amended, states,

7 Marie Baudel, Repenser la protection des majeurs protégés au regard de la Convention relative aux droits des personnes handicapées, *Droit de la famille*, 2018, vol. 4, p. 8.

8 Ordonnance n° 2015–1288 du 15 octobre 2015 portant simplification et modernisation du droit de la famille.

9 Loi n° 2015–1776 du 28 décembre 2015 relative à l'adaptation de la société au vieillissement.

10 Loi n° 2019–222 du 23 mars 2019 de programmation 2018–2022 et de réforme pour la justice.

11 Pursuant to Article 425 of the French Civil Code, those who are incapable of managing their own affairs as a result of a diagnosed mental or physical deterioration that prevents them from expressing their intent may benefit from legal protection.

> *An adult or an emancipated minor who is not subject to a safeguard measure or family authorisation may authorize one or more persons, under the same mandate, to represent them in the event that, for one of the reasons specified in Article 425, they could no longer independently manage their own affairs.*

Mandate for future care prevails over other safeguard measures. However, such mandate terminates if guardianship (*tutelle*), curatorship (*curatelle*) or family authorisation (*habilitation familiale*) is granted by virtue of a court decision. Law No. 2015–1776 of December 28, 2015, on adapting society to an ageing population, published in the French Journal of Laws on December 29, 2015, supplements the provisions of the Civil Code concerning the mandate for future care and enables, inter alia, the registration of such mandate in a dedicated register. Unfortunately, this register, which was to be established by a decree of the State Council, has not been founded so far, something that is often criticised by, in particular, the French notarial community.[12]

Furthermore, Law No. 2019–222 of March 23, 2019, on 2018–2022 programming and reform of the justice system also introduced significant changes on limiting the capacity to perform acts in law of natural persons, allowing, among other things, a person placed under guardianship or curatorship to enter into a marriage without the requirement to obtain judicial authorisation (Article 460 of the French Civil Code).

However, the French Ombudsman, acting as an 'independent mechanism' under Article 33 of the Convention, points out that these changes are still insufficient. For example, Article 475 of the Civil Code conditions the capacity to perform actions in court proceedings by persons remaining under guardianship on the authorisation of a judge or family council (*conseil de famille*). By limiting direct access to the court, the legislator denies the disabled person's right to exercise the capacity to perform acts in law on an equal basis with other entities. The Ombudsman stresses the need to introduce a system of protection based on the presumption of capacity to perform acts in law of the protected adult and to support the person in accordance with their wishes and preferences.[13]

In 2021, the Committee on the Rights of Persons with Disabilities commented on the implementation of the Convention by France[14] and noted regarding the equal rights of persons with disabilities (Article 12 of the Convention) that

12 Rapport du 116e Congrès des notaires de France: Protéger, 2020, https://rapport-congresdesnotaires.fr/2020-rapport-du-116e-congres/, accessed September 26, 2022.

13 Rapport parallèle – Examen du rapport initial de la France sur la mise en œuvre de la CIDPH, 2021, https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/rapport_parallele_ddd_examen_du_rapport_initial_de_la_france_sur_la_mise_en_oeuvre_de_la_cidph_juillet_2021.pdf, accessed September 26, 2022. In another example, quoted in the 'Rapport parallèle', the Convention provides for the right of persons with disabilities to manage their own finances and to have access to loans on equal terms with other persons. The French Ombudsman acknowledges that these rights are not always respected, and among the cases reported to the Ombudsman was the bank branch's refusal to issue a payment card to an adult under guardianship to cover daily expenditures (French Ombudsman Decision No. 2018–103 of April 19, 2018).

14 Comité des droits des personnes handicapées, Observations finales concernant le rapport initial de la France, adoptées par le Comité à sa vingt-cinquième session, 2021, https://www.cnape.fr/documents/onu_-observations-finales-du-comite-des-droits-des-personnes-handicapes_-2021-fr/, accessed September 26, 2022.

1. certain legal provisions, notably Article 459 of the French Civil Code,[15] do not recognise legal personality of persons with disabilities on an equal basis and provide for loss of capacity to perform acts in law and autonomy as well as placement under guardianship (*tutelle*) or curatorship (*curatelle*) subject to the person's mental status examination; and
2. there is no 'supportive' mechanism for decision-making that is consistent with the Convention, and some legal safeguard measures reinforce substitutive decision-making and do not take into account intent and preferences of persons with disabilities.

The Committee advises France to

1. revise its approach to legal protection and adopt a disability model based on human rights to ensure equal rights of persons with disabilities, and repeal legislation permitting substitutive decision-making; and
2. redirect its human and institutional resources dedicated to substitutive decision-making mechanisms toward establishing mechanisms that support decision-making that respects the dignity, autonomy, intent and preferences of persons with disabilities, regardless of the scope and type of assistance they could need.

3. Implementation of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities outside of private law

The implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities has also attracted a considerable response in France beyond private law. According to Article 12 of the Convention, 'States Parties confirm that persons with disabilities have the right to be recognised as persons with legal capacity' and 'persons with disabilities have legal capacity, on equal basis with other persons, in all aspects of life'.

Despite the criticism, it should be noted that the French report on the implementation of the Convention has been positively received by the Committee on the Rights of Persons with Disabilities.[16] In fact, in recent years, the French legislator, by the virtue of the Law of March 23, 2019, has provided for various measures to promote the rights of persons with disabilities, most notably **by recognising the right to vote** of persons under legal guardianship (*tutelle*).[17] The right to vote is subject to a specific regulatory framework: an adult under guardianship votes in person and cannot be represented in this matter by the guardian. Such a person therefore cannot authorise an employee of their healthcare facility who is assigned to them or an employee who provides direct care them. The said entities cannot assist in the voting booth either.

These provisions are aimed at preventing any influence on the adult's voting. Violation of the provisions is punishable by up to two years' imprisonment and a fine of EUR 15,000 (Article L. 111 of the French Electoral Code).

15 This document provides, among other things, that the court may, following a decision to grant a family authorisation or guardianship, authorise the person entrusted with the execution of a safeguard measure to represent the person covered by the measure, even with regard to actions that could have a significant impact on a serious breach of the person's bodily integrity.

16 Observations finales concernant le rapport initial de la France, adoptées par le Comité à sa vingt-cinquième session, 2021, https://www.cnape.fr/documents/onu_-observations-finales-du-comite-des-droits-des-personnes-handicapes_-2021-fr/, accessed September 26, 2022.

17 Loi n° 2019–222 du 23 mars 2019 de programmation 2018–2022 et de réforme pour la justice.

In order to make the said right to vote effective, it has been proposed that an obligation should be introduced for candidates to make their election materials available in an easy-to-read and easy-to-understand digital form. It was also recommended to implement solutions that facilitate access to voting for persons with sight defects, such as light codes on ballots or to use the Braille alphabet to mark ballots.

The implementation of the Convention's provisions has also manifested itself through the introduction of Article L. 5213–6 of the Labour Code, a provision that imposes an obligation to provide reasonable accommodation to persons with disabilities and provides that denial of such accommodation shall constitute a form of disability discrimination.

With regard to the guarantee of access to banking and financial services, Article 427 of the French Civil Code, as amended by the Law of March 23, 2019, safeguards the bank accounts of adults under legal protection. These persons are entitled to keep the bank accounts that were opened prior to the application of the safeguard measure and to receive due benefits. The Law of March 5, 2007, intended to prevent a situation in which the guardian would deposit all the income of the person under guardianship in one account; a new account could only be opened upon consent of the court. Despite the existing civil law legislation, persons with disabilities often face various impediments that prevent them from effectively managing funds kept in their bank accounts. Difficulties might relate to the possibility of consulting bank balance, as banks often send statements of accounts only to the representatives of the protected persons, who also have access to digital services. Difficulties also relate to the ability to withdraw cash in situations where a person is incapable of remembering their card PIN and is unable to withdraw money at the cash desk. Some banks, however, offer cards with no PIN, withdrawal limits or balance control and even cards that can be topped up by the protected person's representative.

According to French law, **the accommodation of a disabled person** with limited capacity to perform acts in law is subject to special protection under Article 426 of the Civil Code, as adopted by Law No. 2015–177 of February 16, 2015.[18] This provision states that where necessary or if the protected person has an interest in transferring rights to their apartment or furniture, either the judge or the family council shall consent to such a legal transaction. If the purpose of the legal transaction is to admit a person with disabilities to the care centre, it is necessary to obtain the prior opinion of a medical doctor who does not work or hold any position in the care centre. Memorabilia, personal belongings items necessary for the persons with disabilities or to provide custody shall be placed at the protected person's disposal and, if necessary, stored by the care centre to which such a person is admitted.

With regard to healthcare and consent to treatment by a person with limited capacity to perform acts in law, the French legislator envisaged certain instruments of legal protection, in accordance with the Convention's requirements, such as the following:

- **Guidelines for the future (*directives anticipées*):** Law No. 2016–87 of February 2, 2016, establishing new rights for the benefit of patients and persons at the end of life[19] stipulated in Article L. 1111–11(1), sentence 1, of the Public Health Code that *'any*

18 Loi n° 2015–177 du 16 février 2015 relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures.

19 Loi n° 2016–87 du 2 février 2016 créant de nouveaux droits en faveur des malades et des personnes en fin de vie.

adult can write guidelines for the future in case they could one day be unable to express their intent'.

- **Designation of a trustworthy person (*personne de confiance*):** this was implemented into the Public Health Code by Law No. 2002–303 of March 4, 2002,[20] and amended by Law No. 2016–87 of February 2, 2016.[21] Article L 1111–6 of the Public Health Code stipulates that an adult can appoint a trustworthy person, such as a parent, relative or attending physician, should they be unable to express their own intent. The trustworthy person should reflect the intent of the person who appointed him/her. The appointment of the trustworthy person is made in writing and signed by the appointed person. It can be amended and revoked at any time. If the patient so desires, the trustworthy person supports and participates in medical interviews and supports the patient in decision-making.

Certain changes have also been introduced by Decree No. 2021–684 of May 28, 2021, on the decision-making system for healthcare, custody, social or medical-social assistance for adults subject to a legal protection measure.[22] The decree introduced changes to the Public Health Code[23] and the Social and Family Activity Code.[24] The word 'guardianship' (*tutelle*) is substituted by the words 'legal protection with representation of the person' (*protection juridique avec représentation relative à la personne*). The term 'the legal representative of the person' (*représentant légal*) is substituted by the words 'the person entrusted with a legal protection measure with a representation concerning that person' (*la personne chargée à son égard d'une mesure de protection juridique avec représentation relative à la personne*). The decree provides, in particular, that a medical doctor called to an adult who is subject to the safeguard with the representation of the person is required to obtain the adult's consent, with the assistance of the person entrusted with the safeguard measure if necessary. When an adult is subject to a legal protection measure with representation concerning that person and is unable to express his/her intent, the medical doctor must obtain the consent of a responsible person indicated in the safeguard measure, who will consider the opinion expressed by the person subject to medical intervention. Except for emergency situations, in the event of disagreement between the adult subject to protection and the person responsible for the adult's protection, the judge shall authorise one of them to make a decision. The said decree concerns healthcare facilities, social or medical-social care facilities, healthcare employees, adults covered by the legal protection measure, and persons entrusted with the execution of the legal protection measure.

In 2021, changes were also made to the issue of applying for an ID card, allowing a person with disabilities with limited capacity to perform acts in law[25] to handle this mat-

20 Loi n° 2002–303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé.

21 Loi n° 2016–87 du 2 février 2016 créant de nouveaux droits en faveur des malades et des personnes en fin de vie.

22 Décret n° 2021–684 du 28 mai 2021 relatif au régime des décisions prises en matière de santé, de prise en charge ou d'accompagnement social ou médico-social à l'égard des personnes majeures faisant l'objet d'une mesure de protection juridique.

23 Code de la santé publique.

24 Code de l'action sociale et des familles.

25 Arrêté du 13 mars 2021 portant application de l'article 4–4 du décret n° 55–1397 du 22 octobre 1955 modifié instituant la carte nationale d'identité.

ter independently, now the only document required is a statement made by the guardian confirming that the guardian has been informed of the measures taken.

France has also introduced other measures to ensure and supervise the implementation of the convention on its territory, in particular the appointment of disability clerks among senior officers of the ministry and the establishment of an Inter-Ministerial Committee on Disability in 2018. Furthermore, as already mentioned, the Ombudsman acts as an independent monitoring mechanism for the implementation of the convention and operates in coordination with other independent monitoring authorities, such as the French National Consultative Commission on Human Rights

4. The role of psychology, psychiatry and neurology in the implementation of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities

Legislative changes in France regarding the performance of legal transactions by persons with disabilities have often taken into account the findings of reports by various associations and organisations. The opinions of different communities were taken into account in the legislative process preceding the adoption of the 2007 reform, as well as in the implementation of further changes.

For example, in July 2000 UNAPEI, the French federation of associations representing and defending the interests of people with mental disabilities and their families, published 'the White Book' on mistreatment and violence against persons with mental disabilities.[26]

During the adoption of the 2007 reform, legal-comparative analysis was taken into account, the French legislator used the examples of reforms launched in the 1990s in Germany, England, Denmark, Spain, Italy and Sweden,[27] which influenced particularly the implementation of solutions enabling customisation of the imposed measures and their adaptation to the specific needs of persons under legal protection, as well as the introduction of the possibility of arranging their own legal protection for the future (the so-called *mandat de protection future*).

The National Agency for Social and Socio-Medical Services Assessment and Quality published recommendations in 2012 on the necessity of taking into account the opinions of persons with disabilities when imposing safeguard measures on them.[28]

The 2018 inter-ministerial report, under the guidance of a judge working for the French Ministry of Justice, Anne Caron Déglise, is based, among other things, on the conclusions of the medical community and contains proposals for changes to the legal protection of persons who are in great need of such protection.[29] The author notes in the report that

26 UNAPEI, *Maltraitances des personnes handicapées mentales dans la famille, les institutions, la société: Prévenir, repérer, agir. Livre blanc*, 2000, https://www.senat.fr/rap/r02-339-1/r02-339-12.html.

27 Sénat, Service des études juridiques, *Étude de législation comparée n° 148 – La protection juridique des majeurs*, 2005, http://www.senat.fr/lc/lc148/lc1480.html, accessed September 26, 2022.

28 ANESM Agence nationale de l'évaluation et de la qualité des établissements et services sociaux et médico-sociaux, *Participation des personnes protégées dans la mise en œuvre des mesures de protection juridique*, 2018, https://www.has-sante.fr/upload/docs/application/pdf/2018–03/anesm_09_protection-juridique_cs4_web.pdf, accessed September 26, 2022.

29 Anne Caron Déglise, *Rapport de mission interministérielle. L'évolution de la protection juridique des personnes. Reconnaître, soutenir et protéger les personnes les plus vulnérables*, 2018, https://www.vie-publique.fr/sites/default/files/rapport/pdf/184000626.pdf, accessed September 26, 2022.

almost a decade after it came into force, the Law of March 5, 2007, supplemented by the Regulation of October 15, 2015, is subject to criticism both on its compliance with Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and on the implementation of the Convention regarded as insufficient in reports released by the French Court of Auditors (*la Cour des comptes*) and the Ombudsman. These conclusions are backed by numerous prompts from associations of persons with disabilities and their families and also from federations of entities involved in the legal protection of adults. In this very context, the Minister of Justice, the Minister of Health and Solidarity and the Secretary of State for Persons with Disabilities have established a special interdepartmental commission.

As a result of the testimonies of persons with disabilities collected by their institutional representatives and the Confcap-Capdroits[30] collective, combined with the results of work conducted by researchers, practitioners and representatives of the medical, social and legal communities, the objectives of the aforementioned interdepartmental committee focused on the integration of the actual expectations of custodians and persons subject to the safeguard measures and on a comprehensive understanding of the position of a person affected by a severe disability making independent decision-making impossible. The commission was also tasked with determining possibilities for legislative changes and introduction of new solutions to improve the integrity and effectiveness of legal protection for particularly vulnerable persons while accommodating human dignity and the principle of legal certainty.[31] The report, therefore, recommended

- harmonisation of certain provisions of the Civil Code, the Public Health Code, and the Social and Family Action Code so that the principle of each person's capacity to perform acts in law is effectively recognised in all fields and a priority is given to providing them with support in exercising their rights;
- greater respect of one's fundamental rights to be covered by the legal protection in personal matters by, among other things, strengthening information obligations of the person responsible for protection; and
- organisation of legal protection, which would give priority to the person subject to such protection and provide them with an effective guarantee of the right to appeal to the judge in case of difficulties or violations of their rights and freedoms.

French President Emmanuel Macron, during the ceremonial session of the Court of Cassation on January 15, 2018, indicated the need to expand autonomy and the possibility of satisfying the will and intent of protected persons, and urged to take into account the criticism voiced by the national and international institutions regarding the excessive number of safeguard measures applied, which strip adults of their capacity to perform acts in law.[32]

30 The Confcap-Capdroits collective published in 2017 a 'civic science' book entitled, *L'autonomie de vie comme droit humain* or *Life autonomy as a human right*, 2017, https://confcap2017.files.wordpress.com/2022/06/mepfc10.pdf, accessed September 26, 2022.

31 Anne Caron Déglise, *Rapport de mission interministérielle. L'évolution de la protection juridique des personnes. Reconnaître, soutenir et protéger les personnes les plus vulnérables*, 2018, p. 9, https://www.vie-publique.fr/sites/default/files/rapport/pdf/184000626.pdf, accessed September 26, 2022.

32 Ibid.

These recommendations were considered in the legislative process in recent years, particularly in the course of preparing Law No. 2019–222 of March 23, 2019, regarding the 2018–2022 programming and reform of the justice system.

5. Capacity to perform acts in law of natural persons and its limitations on grounds of disability – procedural aspects (judicial and non-judicial procedure)

Pursuant to Article 425 of the French Civil Code, as amended by the Act of March 5, 2007, 'Those who are incapable of managing their own affairs as a result of a diagnosed mental or physical deterioration that prevents them from expressing their intent may benefit from legal protection provided for in this chapter'.

The Law of March 5, 2007, specified that placement under guardianship (meaning that a person cannot exercise their rights and must be represented in civil law transactions) or placement under curatorship (while exercising rights, such a person must be informed and supervised by the curator) is only possible if disability is confirmed by a detailed medical certificate. The French legislator, therefore, eliminated reasons such as 'profligacy', 'intemperance' or 'idleness' to justify limitation or removal of the capacity to perform acts in law.

It should be noted that in the light of the 2022 case law, the mentioned medical certificate must be justified by the circumstances and prepared only with regard to the safeguard measure applied (*certificat médical spécialement circonstancié*).[33]

Pursuant to Article 428 of the French Civil Code, as amended by the Law of March 23, 2019, a judicial safeguard measure can be applied by a judge only if necessary and only if the protection of the person's interests cannot be sufficiently ensured through the application of a mandate of future care (*mandat de protection future*) concluded by the person concerned or through the application of the general provisions on representation or provisions pertaining to the spouses' mutual rights and obligations and to marital property regimes, in particular as provided for in Articles 217, 219, 1426 and 1429, or by the application of another, less restrictive safeguard measure. The measure is proportionate and customised to the degree of the person's disability.

Protection of adults can be exercised as permanent guardianship (*tutelle*) or curatorship (*curatelle*), covering assistance in some activities or under the so-called family authorisation (*habilitation familiale*) or judicial protection (*sauvegarde de justice*).

Article 430 of the French Civil Code, introduced by the Law of March 5, 2007, and entered into force on January 1, 2009, stipulates that the application for a safeguard measure could be submitted to the guardianship court judge (*juge des tutelles*) by the person seeking protection or, where appropriate, their spouse, partner or cohabitant, unless they do not live together as partners, a relative by affinity or consanguinity or a person who maintains close and lasting ties with them, or a person who has already been entrusted with a safeguard measure. An application can also be submitted by the public prosecutor ex officio or at the request of a third party.

33 Cass civ (1), March 2, 2022, at 20–19767, D 2022, 461: an application for enhanced guardianship shall be rejected when it is supported by a medical certificate initially prepared for the purpose of establishing a mandate for future protection.

The application of a safeguard measure is made available to the public by a mention of it placed on the person's birth certificate in the register office records (Article 1233 of the French Civil Procedure Code).

In the French legal system, legal transactions, performed by a person under guardianship or curatorship **beyond the scope of their capacity to perform acts in law** (to contract obligations and acquire rights) **are, as a general rule, null and void.** This solution was already in place before the ratification and implementation of the United Nations Convention on the Rights of Persons with Disabilities produced in New York on 13 December 2006 within the French legal system.

Article 464 of the French Civil Code (effective January 1, 2009) provides,

> The scope of obligations arising from legal transactions performed by the person subject to protection more than two years prior to the publication of the court order applying safeguard measure can be reduced on the basis of evidence indicating that the person's inability to independently protect their interests resulted from the person's disability and was generally known or known to the other party to the legal transaction at the time of that transaction.
>
> These legal transactions can, under the same circumstances, be invalidated if there is evidence that the protected person has suffered damage.

By way of exception to ex Article 2252 of the French Civil Code, according to which the period of limitation does not start for minors and adults under guardianship, a claim for the invalidation of a legal transaction or limitation of its effects must be filed within five years from the date of the court order applying the safeguard measure.

Conversely, in the light of Article 465 of the French Civil Code:

> From the publication of the court order applying the safeguard measure, the invalidity of the acts performed by the person subject to protection or the person entrusted with protection shall be subject to sanctions pursuant to the following rules.
>
> 1° If a protected person has independently performed a legal transaction that they could have performed without the assistance or representation of the person entrusted with protection, the transaction may be the subject of a claim for the invalidation of a legal transaction or reduction of its effects provided for in Article 435, as if it had been performed by the person under judicial protection (*sauvegarde de justice*), unless they have been expressly authorised to perform this transaction by a judge or by a family council, if one was established;
> 2° If the protected person has independently performed a legal transaction for which the protected person should receive assistance, such a transaction can only be invalidated if it is determined that the protected person has suffered damage;
> 3° If the protected person has independently performed a legal transaction in the performance of which they should be represented by another person, the transaction is null and void by virtue of law with no need to prove damage;
> 4° If the guardian or curator has independently performed a legal transaction that should have been performed by the protected person independently or with their assistance, or that could have been performed only if authorised by the judge or family council, such legal transaction is null and void, without the need to prove damage.

A guardian or curator can, upon consent of a judge or a family council, if one was established, independently file a claim to determine the invalidity, to declare invalidity or mitigate the legal effects of the transaction as provided for in 1°, 2° and 3°.

In all these cases, the claim, if necessary, should be filed before the lapse of the five-year limitation period provided for in Article 2224 of the French Civil Code. During this period and as long as the safeguard measure is in place, the act provided for in 4° can be validated upon the consent of the judge or family council, if one has been established.

6. Organisational and institutional aspects of assistance and representation of persons with disabilities in the performance of legal transactions

The present trend in France is moving toward deinstitutionalisation of the protection of persons with disabilities, as evidenced in particular by the increasing number of family authorisations.

The scope of capacity to perform acts in law depends on the type of safeguard measure (*mesure de protection*) applied to a person and the type of legal transaction performed.

The French legal system establishes the following mechanisms designed to protect persons unable to perform independent legal transactions:

- guardianship (*tutelle*)
- curatorship (*curatelle*)
- judicial protection (*sauvegarde de justice*)
- family authorisation (*habilitation familiale*)

French law distinguishes three categories of legal transactions based on the possible threat to the person's property:

- assets-disposing legal transactions (*actes de disposition*)
- administrative legal transactions (*actes d'administration*)
- preservative legal transactions (*actes de conservation*)

However, it is worth noting that despite the application of one of the safeguard measures, the person concerned can independently perform so-called private sphere activities, considered irreducible (*sphère personnelle irréductible*). French legal provisions stipulate that, irrespective of any limitation of capacity to perform acts in law, each person decides for themselves on strictly personal matters, and everyone is presumed to enjoy a sufficient degree of autonomy for this purpose (Article 459 of the French Civil Code). The private sphere includes fundamental freedoms, such as freedom of movement, choice of residence, freedom of religion, freedom to express an opinion, freedom of association, freedom to decide on interests and entertainment and freedom to decide whether to undergo medical procedures. Article 458 of the French Civil Code enumerates some of the legal transactions (it is not an exhaustive list) belonging to the private sphere, such as the statement of birth (*déclaration de naissance d'un enfant*), acknowledgement of a child (*reconnaissance d'un enfant*), parental authority acts involving the child, the declaration of choice or change of the child's name, and consent to be adopted or adopt a child. However, the issue of having children by persons with disabilities raises considerable controversy in French

legal system.[34] There have been some critical voices in French legal theory against the forced sterilisation of persons with disabilities as inconsistent with Article 23 of the United Nations Convention on the Rights of Persons with Disabilities, which aims to ensure that persons with disabilities preserve their reproductive potential on an equal basis with others. Article L. 2123–2 of the French Code of Public Health stipulates that if there is an absolute medical contraindication for the use of contraception or a documented inability to use contraception effectively, the court can consent to the tubal ligation or vasoligation of the adult whose mental retardation or other disability justifies the application of such a safeguard measure. Whilst the legal act itself does not authorise a decision on sterilisation if a person with disability expressly objects, this decision can be made by the court if a person with disability is unable to express their intent.

The French legislator has provided for various types of measures that support the process of autonomous decision-making, such as, in particular, the right to information of persons with disabilities, as stipulated in Article 457–1 of the Civil Code:[35]

> The protected person is provided by the person responsible for their protection, in a manner appropriate to their condition and regardless of the information that third parties are legally obliged to provide to them, with all the information pertaining to their personal situation, on the legal transactions performed, their purpose, the degree of urgency, the effects and consequences of a possible refusal.

In the light of French case law, autonomy in the private sphere also applies to the ability to file a claim. Despite the fact that, as a general rule, legal representation of the person under guardianship in the court is mandatory (Article 475 of the French Civil Code), and all pleadings should also be served on their guardian under the pain of nullity,[36] a claim involving the private sphere, as an exception, can be filed by the person under guardianship, unaccompanied by the guardian. An appeal against the judge's decision that limits the exercise of the protected adult's parental rights is also an act in law of a purely personal nature that this person can perform without any assistance or representation.[37]

In the light of the current legislation, the capacity to perform acts in law is limited to the greatest extent in the case of guardianship (*tutelle*) and in relation to the assets-disposing legal transactions.

Guardianship (*tutelle*), in principle, removes the capacity to perform acts in law of the person to whom it is applied, and it is imposed when, given the circumstances listed in Article 425 of the French Civil Code, the person concerned requires permanent substitution (representation) for the performance of legal transactions and no other measure – i.e. curatorship or judicial protection is sufficient.

Except in cases where law permits such a person to perform acts in law independently, the person is represented by a designated guardian (Articles 473, 474, 496 of the French

34 Sophie Prétot, Vers une reconnaissance du parent protégé? *Droit et Patrimoine*, 2020, at 305.
35 Provision introduced by Law No. 2007–308 of March 5, 2007, effective January 1, 2009.
36 Cass civ (2), February 1, 2018, at 16–24.173, D 2018, 1458.
37 Cass civ (1), November 6, 2013, at 12–23.766, D 2014, 467.

Civil Code). The guardian is under an obligation to exercise caution and diligence (Article 496(2) of the French Civil Code).

Independent performance of legal transactions by a person under guardianship is allowed only within the so-called private sphere (*sphère personnelle*). Regarding entering into marriage, the latest reform introduced by the Law of March 23, 2019, allowed a person under guardianship or curatorship to enter into a marriage without having to obtain the consent of the court (Article 460). A person subject to guardianship or curatorship is only obliged to inform their guardian or curator of their intention to marry, allowing them to express their objections if necessary.

The opening sentence of Article 496 of the French Civil Code provides that the guardian represents the person under guardianship in all legal transactions required to manage their property. It therefore follows that, with the exception only of legal transactions performed in minor activities of daily living (*actes de la vie courante*) or with the judge's consent as part of the personalisation of the applied safeguard measure (Article 473 of the French Civil Code), only the guardian performs legal transactions in substitution of and on behalf of the person protected in the sphere of property.

It should be noted that Articles 467, 504 and 505 of the French Civil Code draw a distinction between administrative and asset-disposing legal transactions. The guardian can independently perform, on behalf of the person under guardianship, administrative legal transactions, but in case of the assets-disposing legal transactions, a consent, given by the court or the family council, if one is established, is required. Article 496 of the French Civil Code defines administrative legal transactions as those relating to the daily management of property, and assets-disposing legal transactions as those that encumber property in a permanent and substantial way. For a detailed list of legal actions falling into each of the mentioned categories, refer to the Decree of December 22, 2008.[38]

Curatorship (*curatelle*) is applicable to persons who can independently perform legal transactions, but need continuous assistance or supervision, on account of the circumstances listed in Article 425 of the French Civil Code, in the performance of legal transactions of substantial importance (Article 400 of the French Civil Code). Curator is applied when another measure – i.e. temporary judicial protection (*sauvegarde de justice*)– is deemed insufficient.

According to Article 467(1) of the French Civil Code, a person under curatorship cannot, without the assistance of the curator, perform any legal transactions that, in the case of a guardianship (*tutelle*), would require the court's or family council's consent. The asset-disposing legal transactions must therefore be performed with the assistance of the curator. If the curator refuses to assist, the protected person can initiate civil proceedings to obtain permission to independently perform a given legal transaction (Article 469(3) of the French Civil Code). A person under curatorship can perform independently administrative and preservative legal transactions (Article 467 of the French Civil Code). The judge may also, as an exception, indicate additional legal transactions that the person under curatorship would be able to perform independently or, on the contrary, indicate additional transactions for which the assistance of the

38 Décret n° 2008–1484 du 22 décembre 2008 relatif aux actes de gestion du patrimoine des personnes placées en curatelle ou en tutelle, et pris en application des articles 452, 496 et 502 du code civil.

curator will be required (Article 471 of the French Civil Code). The French Court of Cassation, in a preliminary ruling, indicated that no legal provision prevents a person under curatorship from conducting business activity, but the person must be assisted by their curator in the performance of assets-disposing legal transactions carried out during business activity.[39]

Judicial protection (*sauvegarde de justice*), as a general rule, does not prejudice or limit the capacity to perform acts in law, but it permits an adult subject to it to evade the adverse consequences of the legal transaction. However, to protect the property of a person subject to judicial protection, the court can appoint the special administrator (*mandataire*), with the authority to perform all necessary actions in the name of and on behalf of the protected person, thus limiting the protected person's capacity to perform acts in law (Article 437 of the French Civil Code).[40]

Substitution in the performance of legal transactions can also arise from the so-called **family authorisation (*habilitation familiale*)**, which is becoming increasingly popular in France. Article 494–1 of the French Civil Code, as amended by the Law of March 23, 2019, stipulates that if a person is unable to manage their own affairs due to a medically diagnosed impairment of mental or physical abilities that prevents them from expressing their intent, the guardianship judge may appoint one or more persons selected from among the protected person's ascendants or descendants or siblings or his/her spouse, partner or concubine, as long as the cohabitation between them has not ended, to represent or assist them under conditions stipulated in Article 467 or to perform one or more legal transactions.

Although the legal environment before the reform of March 5, 2007, entered into force provided for three basic principles, i.e. necessity, subsidiarity and proportionality of the measure applied, the French courts usually imposed on persons with disabilities the capacity-removing mechanism – i.e. guardianship (*tutelle*). The French legislator therefore introduced additional instruments of protection post-2007, capable of replacing guardianship or curatorship.

French judicial bodies play an important role in the legal protection of persons with disabilities.[41] Pursuant to Article 416 of the French Civil Code, the guardianship judge and the public prosecutor exercise general supervision over legal protection measures. They can visit protected persons and persons covered by the application for protection for this purpose. Persons responsible for protection are obliged to comply with their summons and provide them with all the required information. The guardianship judge can issue restraining orders against persons responsible for protection and impose a civil fine, pursuant to the Code of Civil Procedure, for non-compliance with the order (Article 417 of the French Civil Code). The public prosecutor can request imposition of the safeguard measure (Article 430(2) of the French Civil Code) and compile a list of medical doctors authorised to issue a medical certificate, which must be attached to any application for the safeguard measure (Article 431 of the French Civil Code).

In terms of guardianship and curatorship, Article 447 of the French Civil Code grants the guardianship judge a large scope of discretion allowing the judge to customise the

39 Cass civ (1), December 6, 2018, at 18–70.011.
40 Fabien Marchadier, Majeur protégé, *Répertoire de droit civil. Dalloz*, 2022, at 110.
41 Ibid.

safeguard measure imposed to the condition of the protected person's property and the difficulty of its management. The judge can appoint a number of guardians or curators (Article 447(2) of the French Civil Code) – e.g. award guardianship to both parents of an adult with disabilities and appoint a professional administrator to manage the property alone. It is therefore possible to separate the custody over the person and the supervision of the property.

The judge, however, is obliged to appoint a guardian or curator according to the order provided in Articles 448, 449 and 450 of the Civil Code – i.e. the judge should first consider the protected person's intent. Then a spouse, partner or concubine, next of kin or other close relative can become a guardian or curator, or as a last resort, a professional custodian can assume this role *(mandataire professionnel)*. The Court of Cassation also underlines in its judicial practice that the protected person's intent and preferences must be taken into account when appointing a guardian,[42] and most importantly, their welfare must be taken into account (*l'intérêt du majeur*, Article 451 of the French Civil Code). Therefore, for the benefit of the person under guardianship, a guardian can be appointed by the court, against the protected person's intent, if too long geographical distance would prevent a close relative from exercising proper guardianship and managing the protected person's property.[43] In some instances, assigning guardianship to a professional entity guarantees a certain continuity, and the lack of emotional ties facilitates rational management of the property, especially when it involves making difficult decisions.[44] Placing priority on family care often seems more like a symbol than a practical choice. For instance, in 2015, in 55% of cases, the execution of safeguard measures was entrusted to professional institutions or entities instead of the family.[45] It should be noted that in accordance with Articles 445 and 395 of the Civil Code, the following persons cannot be appointed as guardians or curators: unemancipated minors, adults subject to a legal protection measure (including judicial protection), persons deprived of parental authority, persons prohibited from performing care duties under Articles 131–26 of the Penal Code, medical and pharmaceutical professionals with regard to their patients, and in the trusteeship, the trustee with regard to the entrusting party.

If guardianship (*tutelle*) is awarded, a so-called family council (*conseil de famille*) can be established by the judge. Article 456 of the French Civil Code stipulates that the family council should be established only in exceptional circumstances, whenever there is a need for the protection of the person or their property, and if the family composition or environment of the protected person allows it. The council decides on court actions that require representation of a person subject to guardianship (Article 475(2) of the French Civil Code) and on the matters concerning the management of their property (Articles 500–502 of the French Civil Code), and the council also authorises the guardian

42 Cass civ (1), December 5, 2012, at 11–26.611, D 2013, 2196, RTD civ 2013, 89, JCP 2013, 104.

43 Like a Cass civ (1), September 25, 2013, at 12–22.300, D 2014, 2268, RJPF 2013.12, 12, where the court, against the protected person's intent, entrusted the exercise of the safeguard measure to a professional entity instead of the daughter, a decision justified by the protected person's welfare. Similarly: CA Grenoble, October 30, 2015, RG at 15/1782, Dr. fam. 2016, Comm. 13, and also Cass civ (1) 19 December 2018, No. 18–10.582, D 2019, 1412.

44 Fabien Marchadier, Majeur protégé, *Répertoire de droit civil. Dalloz*, 2022, at 120.

45 Ministère de la Justice, *Bulletin d'information statistique*, 2018, p. 162, http://www.justice.gouv.fr/art_pix/stat_Infostat_162.pdf, accessed September 27, 2022.

to perform certain legal transactions. As a general rule, however, if a guardianship (*tutelle*) is awarded, no family council should be established, making it much easier to exercise the safeguard measure.

7. Capacity to perform acts in law of persons with disabilities and its limitations in light of empirical data before and after the ratification of the United Nations Convention on the Rights of Persons with Disabilities

As mentioned, the ratification of the United Nations Convention on the Rights of Persons with Disabilities has not triggered massive changes in the French legal system. The 2007 reform, effective January 1, 2009, was a breakthrough in this regard. For this reason, it would seem more appropriate to compare statistics before and after the mentioned law entered into force, as well as to indicate empirical data relating to subsequent legislative changes.

The previous Law of 1968, passed in different circumstances, to serve the needs of a mere few thousand people, failed to satisfy the needs of adults seeking legal protection, estimated in France in the early 2000s at around 700,000. However, the reform's adoption and entry into force has been postponed several times do to the enormous financial expenses associated with it.

In 2006, shortly before the reform was adopted, it was estimated that the trend of continued application of some 50,000 new safeguard measures each year would result in nearly one million persons under legal protection in 2010. Meanwhile, guarantees of proper guardianship and curatorship have been clearly insufficient because of the limited number of guardianship judges (only 80 nationwide), unable to exercise effective control over the administration property of the person subject to guardianship or curatorship.[46]

Large amounts of empirical data were released on the French Senate's website as part of the legislative process for the bill on legal protection of adults,[47] as well as during the adoption of subsequent amendments.[48]

Initially, the aggregate statistics indicated a significant increase in the number of safeguard measures, limiting or removing the capacity to perform acts in law, that courts have applied.

46 Jean-Paul Delevoye, Médiateur de la République 'Réforme des tutelles: une réforme importante à mettre en œuvre', *Revue Le Lamy Droit civil*, 2006, at 27.

47 The French Senate Rapport n° 212 (2006–2007) de M. Henri de RICHEMONT, fait au nom de la commission des lois, déposé le 7 février 2007, Projet de loi portant réforme de la protection juridique des majeurs, https://www.senat.fr/rap/l06-212/l06-2126.html, accessed September 27, 2022.

48 As an example Caroline Abadie, Aurélien Pradié, *Rapport d'information déposé en application de l'article 145 du Règlement par la Commission des lois constitutionnelles, de la législation et de l'administration générale de la République, en conclusion des travaux d'une mission d'information sur les droits fondamentaux des majeurs protégés*, 2019, https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b2075_rapport-information, accessed September 27, 2022.

In 2004, almost 650,000 adults were subject to the safeguard measure (*tutelle*, *curatelle*, *sauvegarde de justice*), that is, limitation or removal of the capacity to perform acts in law, amounting to 1.3% of the total adult population in France at the time. In the years 1990–2004, the number of adults under the safeguard measure increased by 56.8%.

The following graph illustrates an increase in the number of persons subject to legal protection:

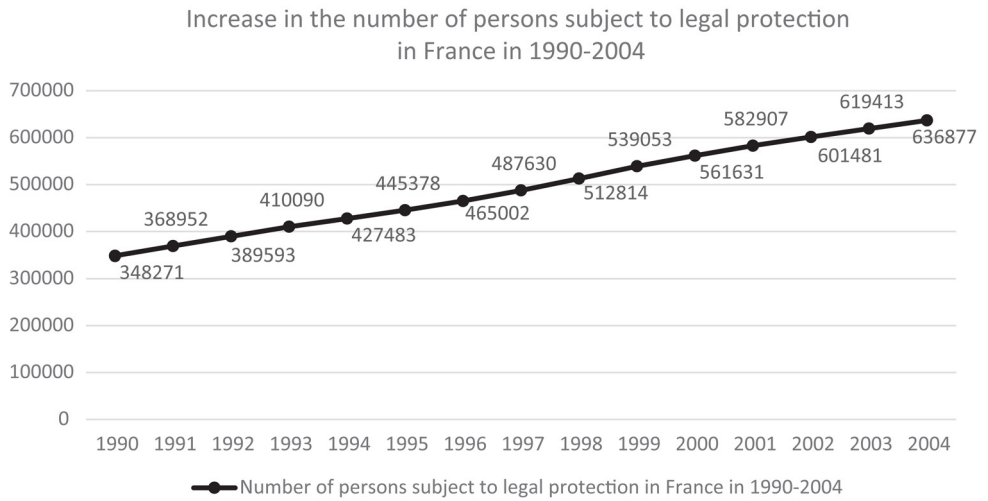

Chart 12.1 Increase in the number of persons subject to legal protection in France in the years 1990–2004.

Source: French National Institute for Demographic Studies, INED (Institut National d'Etudes Démographiques[49])

This situation was partly explained by ageing population and more frequent medical care for age-related disorders, such as particularly Alzheimer's disease, both in the context of home care and when placed in the health or social care facility. However, according to France's National Institute for Demographic Studies (INED), in 2004 only 19.7% of persons covered by the safeguard measure exceeded 80 years. Persons under the age of 60 represented 50.6% of all protected adults, while 43.2% of safeguard measures were imposed on persons in the age group of 30–59.

49 The graph uploaded on the website of the French Senate, https://www.senat.fr/rap/l06-212/l06-2126.html, accessed September 27, 2022.

The following graph illustrates the increase in the number of guardianship (*tutelle*) and curatorship (*curatelle*) cases awarded annually by the courts in the years 1990–2004:

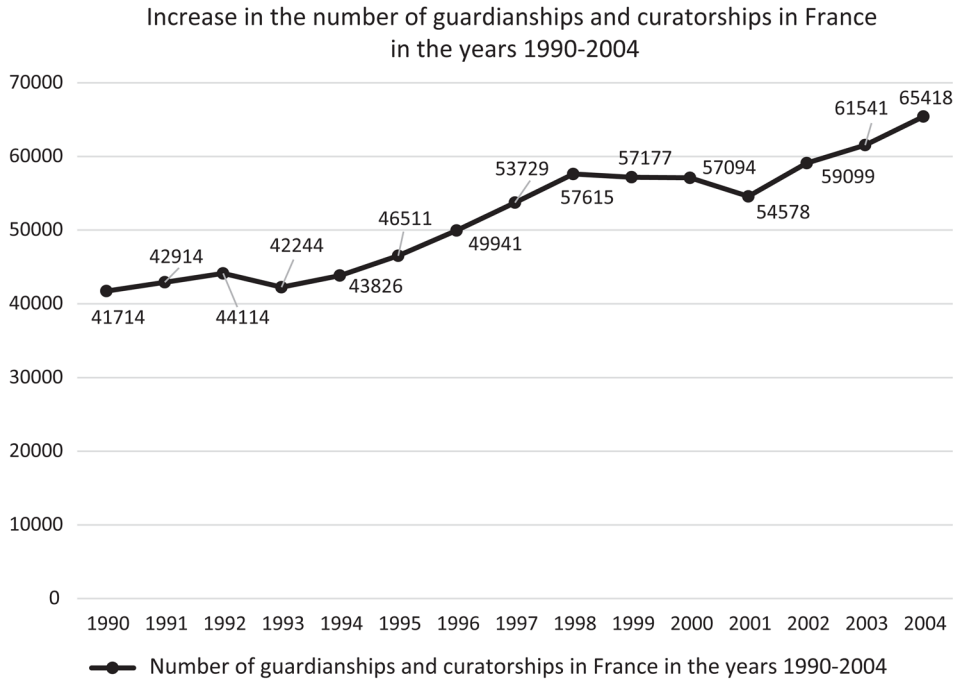

Chart 12.2 Increase in the number of guardianships and curatorships in France in the years 1990–2004.
Source: French Ministry of Justice data[50]

Two reasons were indicated as to why the observed state of affairs necessitated further reform.

Most importantly, attention was drawn to the improper application of the safeguard measures provided by the Civil Code. Limitation or removal of the capacity to perform acts in law was enacted by the courts not only in instances of genuine loss of capacity to make decisions or express intent but also in cases of economic hardship, like being in default on rent payments for months or years or living in health-damaging conditions (what was referred to as *détresse sociale*). Placement under so-called social protection (*tutelle aux prestations sociales*) was applied cumulatively with limitation or removal of the capacity to perform acts in law.

It is further noted that the gradation of measures applied, as prescribed by the law, has not always been observed by the courts. According to this principle, an adult should be subject to the appropriate safeguard measure, adjusted to their state of mental or physical disability. For this reason, the legislator established in 1968 not only ordinary guardianship and curatorship but also the gradation of these measures. However, in practice, in 2004, despite the ability to award an alleviated guardianship or curatorship, 49.3% of the

50 Ibid.

measures applied were full guardianship and 44.9% were enhanced curatorship. Alleviated guardianship, ordinary curatorship and alleviated curatorship together comprised only 5.7% of the total safeguard measures applied.

The following table illustrates the number and type of safeguard measures applied in the years 1990–2004:

Table 12.1 Number and type of safeguard measures applied in France in the years 1990–2004

Type and severity of safeguard measure	*1990*		*2002*		*2003*		*2004*	
	Count	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
Placement under guardianship (*tutelle*)	**27,739**	**66,5**	**29,798**	**50,4**	**30,928**	**50,4**	**32,408**	**49,5**
Guardianship (tutelle)	27.161	65.1	29,639	50,2	30.799	50,2	32,280	49,3
Alleviated guardianship (*tutelle allégée*)	578	1.4	159	0.3	129	0.2	129	0.2
Placement under curatorship	**13,975**	**33,5**	**29,300**	**49,6**	**30,614**	**49,9**	**33,009**	**50,5**
Enhanced curatorship (*curatelle aggravée*)	11.161	26,8	25.397	43.0	26.692	43.5	29,367	44.9
Ordinary curatorship (*curatelle simple*)	2.434	5.8	2.943	5,0	2.906	4.7	2,714	4.1
Alleviated curatorship (*curatelle allégée*)	380	0.9	961	1.6	1,015	1.7	928	1.4
Total	**41,714**	**100.0**	**59,098**	**100.0**	**61,541**	**100.0**	**65,418**	**100.0**

Source: French Ministry of Justice[51]

As for the latest data, one report published on the French Parliament's website, as of June 26, 2019,[52] addresses the fundamental rights of adults subject to legal protection and describes the situation following the ratification of the United Nations Convention on the Rights of Persons with Disabilities by France. In France as of 2017, some 730,000 persons were under a legal safeguard measure. Among them, as many as 725,000 were affected by the mechanism limiting capacity to perform acts in law (*tutelle*, *curatelle*, *sauvegarde de justice*). In light of the 2017 statistics, the most frequently applied measures were the ones that restricted independent capacity to perform acts in law to the greatest extent – i.e. guardianship (*tutelle*) at 53.6% and enhanced curatorship (*curatelle renforcée*) at 42.7%.

The 2018 inter-ministerial report by Anne Caron Déglise,[53] mentioned earlier in this study, describes a continued increase in the number of safeguard measures applied that limit one's capacity to perform acts in law, despite the ratification of the United Nations

51 Ibid.

52 Caroline Abadie, Aurélien Pradié, *Rapport d'information déposé en application de l'article 145 du Règlement par la Commission des lois constitutionnelles, de la législation et de l'administratsion générale de la République, en conclusion des travaux d'une mission d'information sur les droits fondamentaux des majeurs protégés*, 2019, https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b2075_rapport-information, accessed September 27, 2022.

53 Anne Caron Déglise, *Rapport de mission interministérielle. L'évolution de la protection juridique des personnes. Reconnaître, soutenir et protéger les personnes les plus vulnérables*, 2018, https://www.vie-publique.fr/sites/default/files/rapport/pdf/184000626.pdf, accessed September 26, 2022.

Convention by France. Ageing population is one of the reasons for this state of affairs. As estimated by the French Ministry of Solidarity and Health, some 20 million people will reach the age of 60 in 2030 and nearly 24 million in 2060, up from 15 million in 2018. The number of people over 85 will grow from 1.4 million in 2018 to 5 million in 2060. Therefore, safeguarding the rights of the elderly with no autonomy remains a fundamental issue for the future of society. The increase in the number of safeguard measures applied by the courts is attributed to the insufficient efficiency of various mechanisms introduced by the Law of March 5, 2007, like the function of a 'filter' entrusted to the public prosecutor's office, mandatory medical assessment or the application of alternative measures like mandate for future care (*mandate de protection future*) or social care measures. Disappointing results of these mechanisms can be largely attributed to insufficient financial resources allocated for their implementation.

As mentioned before, the United Nations Convention on the Rights of Persons with Disabilities postulates the introduction of supportive measures for adults with disabilities, in place of substitutive decision-making, and respect for their intent and preferences, even if they differ from the choices their representative would make with their best interests in mind. Law No. 2019–222 of March 23, 2019, regarding the 2018–2022 programming and reform of the justice system facilitated the strengthening of certain fundamental rights of persons with disabilities. It acknowledged, among other things, the right to vote of persons under guardianship (*tutelle*), despite the fact that more than 80% of persons under guardianship have been deprived of this right by virtue of the court's decision. Persons subject to legal protection now can decide for themselves whether to enter into a marriage or partnership. The aforesaid changes, however, do not address all issues concerning the fundamental rights and freedoms of persons with disabilities.

The 2018 report by Anne Caron Déglise indicates that in 2017 the annual number of safeguard measure awards declined for the first time in many years. In 2017, the courts awarded 93,154 new safeguard measures, while as many as 98,613 were awarded in 2016. Rare utilisation of alternative safeguard measures, provided for in the Law of 2007 is explained by their limited scope, insufficient supervision and lack of information on their existence. Only the family authorisation *(habilitation familiale)* is becoming increasingly applicable. In 2016, 6,000 applications for family authorisation were processed, while in 2017 the figure rose to 17,000. In 2016, the authorisation was approved in 1,600 cases, and in 2017 it was 13,120, 95% of which took form of a general authorisation, and only 5% established a specific authorisation.[54] According to statistics provided by the *Pôle évaluation justice*, the number of guardianship and curatorship awards dropped by 9% for guardianship and 4.8% for curatorship in the same period.

54 Ibid., 34–35.

The following table also illustrates certain rise in case of mandates of future care (*mandat de protection future)*[55]:

Table 12.2 Rise in case of mandates of future care in France in the years 2009–2017

Year	*2009*	*2010*	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*	*2017*
Number of mandates for future care	140	284	394	536	680	747	909	1083	1164
Notarial deed	114	226	333	465	595	655	822	992	1054
Ordinary written form	26	58	61	71	85	92	87	91	110

It is worth noting that, as a general rule, safeguard measures are not awarded by the court for an indefinite term, but only for a specific period of time. Article 441 of the French Civil Code[56] stipulates that the judge shall determine the measure's duration, which may not exceed five years. In the case of permanent mental disability of the person subject to guardianship, without hope of improvement in the light of current state of knowledge, the judge imposing the guardianship (*mesure de tutelle*) may, in a specially reasoned decision and upon the consent of a doctor entered into the list mentioned in Article 431 of the French Civil Code, determine a longer duration of the measure, which may not exceed ten years. According to Article 442 of the Civil Code, a given measure can be extended for the same duration. Under exceptional circumstances, if the person's condition shows no hope of improvement, on the basis of a reasoned medical opinion, the court can extend the measure applied for a period of up to 20 years.

The excessive duration of measures applied is often subject to criticism as it prevents the appropriate measure from being modified to meet changing circumstances or even removed. In the light of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, safeguard measures 'shall be applied for the shortest possible duration and shall be subject to regular review by the competent, independent and impartial authorities or judicial body'.

According to the French Ministry of Justice, the average duration of guardianship awarded for the first time is 7 years and in the case of curatorship it is 5 years; guardianship is extended for an average of 11 years and curatorship for 7 years.

In recent years, however, the number of cases in which the safeguard measure has been removed has increased. In 2017, 5,141 measures were removed, and in 2016, 4,821. Nevertheless, as compared to the total number of measures applied by the court, the numbers are still negligible. In situations of severe disability or lack of independence on account of old age, it is difficult to expect an improvement in the protected person's condition, but in other cases, assistance and appropriate support could be oriented more towards the

55 Caroline Abadie, Aurélien Pradié, *Rapport d'information déposé en application de l'article 145 du Règlement par la Commission des lois constitutionnelles, de la législation et de l'administration générale de la République, en conclusion des travaux d'une mission d'information sur les droits fondamentaux des majeurs protégés*, 2019, https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b2075_rapport-information, accessed September 27, 2022.

56 As amended by Law No. 2015–177 of February 16, 2015.

revocation of the safeguard measure and the maintenance, preparation or restoration of autonomy. According to the authors of the 2018 Report, seeking to revoke the measure should be its ultimate objective, the custody provided would then focus on the protected person's autonomy. Representatives of the judicial environment note that this perspective would require changes in the training of custodians to perform their assigned tasks (e.g. changes in their professional training) and the need for support once the safeguard measure is revoked. It should be noted that in France, the performance of a safeguard measure is usually entrusted to a member of the disabled person's family or, more often, to a professional custodian (*mandataire professionnel*), either sole proprietor or employed by the association or other institution. In 2016, the courts entrusted professional entities with 41.1% of guardianship cases and 75.4% of curatorship cases.

Professional service providers entitled to exercise safeguard measures are entered into a list prepared and updated by the department's national representative. The financial resources available to these entities, however, are thought to be insufficient to ensure effective protection of the fundamental rights and freedoms of persons with disabilities.[57]

The increase in the number of safeguard measures imposed in France has not always been followed by a corresponding increase in the financing of the safeguard measures supervision and control. In 2015, about 3,500 cases of limitation of the capacity to perform acts in law were assigned to each guardianship court. As for professional custodians, according to UNAPEI records, each professional custodian employed by the associations is responsible for the implementation of about 60 safeguards. Such accumulation of cases impedes the proper implementation of standards imposed by the United Nations Convention on the Rights of Persons with Disabilities. Since costs of custody are substantial in France, around 2,000 of the protected adults are placed in Belgian facilities near the French border. In such cases, it is practically impossible for a judge to maintain control over the applied safeguard measure.

To address these challenges, the Law of March 23, 2019, provided for an increase in funds allocated for the legal protection of persons with disabilities.

8. Relationship between the limitations of the civil capacity to perform acts in law and the criminal-law protection of persons with disabilities (against crimes involving legal transactions)

In the French legal system, a person with a disability may be protected against exploitation when entering into agreements by the civil and criminal legal provisions.

Article 223-15-2 of the French Penal Code stipulates that it is punishable by three years' imprisonment and a fine of EUR 375,000 to fraudulently abuse the state of ignorance or weakness of a minor or a person whose particular vulnerability arising from age or illness, disability, physical or mental impairment, or the state of pregnancy is obvious or known to the perpetrator, or fraudulent abuse of the state of a person under mental or physical subordination resulting from the exercise of serious or repeated pressure or techniques intended to change the person's judgement, in order to induce the person to act or refrain from acting, which results in serious harm to the person.

57 Caroline Abadie, Aurélien Pradié, *Rapport d'information*, https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b2075_rapport-information, accessed September 27, 2022.

If such an offence is committed by a person who, in law or in fact, manages an institution engaged in activities with the aim or effect to produce, maintain or exploit mental or physical dependence of the persons involved in its activities, the penalties shall be increased to five years' imprisonment and a fine of EUR 750,000.

Entering into an agreement that is clearly and grossly detrimental to the person with disabilities (i.e. leading to an act that is seriously detrimental to the person with disabilities, abusing their state of vulnerability) may therefore constitute a crime pursuant to the aforementioned provision.

The fact that the agreement with disabled person is null and void is irrelevant in the context of the penal law, provided that the act or omission in question is of serious detriment to the disabled person.

Summary

In the French legal system, the scope of the capacity of persons with disabilities to perform acts in law, effective prior to the implementation of the United Nations Convention on the Rights of Persons with Disabilities, somewhat resembled the present one and was based, in a large part, on the Law of March 5, 2007, effective January 1, 2009.

Legislative changes in recent years have promoted an extension of autonomy to the so-called private sphere. The current trend in French law, in legislation and case law, is to abandon mechanisms of the protected person's substitution of intent. Recent developments in France are also shifting toward deinstitutionalising the protection of persons with disabilities, as evidenced in particular by the increase in family authorisations. Two positions are presented on these issues in French legal theory. Some authors stress the need to ensure the protection of the person even against their will and intent, and note that the excessive desire to respect the autonomy of disabled persons hinders the effective protection of their interests in many cases. According to the majority of authors, however, adults subject to legal protection should primarily enjoy respect for their rights and freedoms, thus ensuring maximum capacity to perform acts in law.

Reference list

Books

Confcap-Capdroits (2017) 'L'autonomie de vie comme droit humain'

UNAPEI 'Maltraitances des personnes handicapées mentales dans la famille, les institutions, la société: Prévenir, repérer, agir. Livre blanc' (2000)

Papers

Baudel M, 'Repenser la protection des majeurs protégés au regard de la Convention relative aux droits des personnes handicapées' (2018) 4 Droit de la famille 8

Baillon-Wirtz N, 'Réforme de la justice. La loi du 23 mars 2019 et les nouvelles mesures de déjudiciarisation du droit des personnes et de la famille' (2019) 5 Revue Juridique Personnes et Famille

Boujeka A, 'La Convention des Nations unies relative aux droits des personnes handicapées et son protocole facultatif' (2007) RDSS 799

Denizot A, 'Le législateur doit-il respecter à la lettre les recommandations du Comité des droits des personnes handicapées?' (2020) RTD Civ. 210

Delevoye J.-P., 'Réforme des tutelles: une réforme importante à mettre en œuvre' (2006) 27 Revue Le Lamy Droit civil

Genevois-Malherbe P, 'Les incidences de la loi du 5 mars 2007 sur la population des majeurs protégés', (2014) 2 Retraite et société 68

Marchadier F 'Majeur protégé' (2022) Répertoire de droit civil Dalloz

Mercat-Bruns M, 'Comment repenser la capacité de la personne majeure vulnérable? Perspectives transatlantiques au croisement du droit civil et du droit social' (2018) Revue de droit du travail 31

Monéger F, 'Brèves remarques sur la portée de la Convention des Nations unies relative aux droits des personnes handicapées' (2020) RDSS 73

Noguéro D, 'Pour la protection à la française des majeurs protégés malgré la Convention des Nations unies relative aux droits des personnes handicapées' (2016) 5 RDSS 964

Noguéro D, 'Agitation ou tempête pour le droit des majeurs protégés?' (2018) 25 La Semaine Juridique Edition Générale 698

Pecqueur E, Caron-Déglise A, Verheyde T, 'Capacité juridique et protection juridique à la lumière de la Convention des Nations Unies relative aux droits des personnes handicapées. La loi n° 2007–308 du 5 mars 2007 est-elle compatible avec l'article 12 de cette Convention?' (2016) Recueil Dalloz 958

Prétot S 'Vers une reconnaissance du parent protégé?' (2020) 305 Droit et Patrimoine

Reports

The French Senate, Rapport n° 212 (2006–2007) de M. Henri de RICHEMONT, fait au nom de la commission des lois, déposé le 7 février 2007 'Projet de loi portant réforme de la protection juridique des majeurs' <https://www.senat.fr/rap/l06–212/l06–2126.html>

Schulze M Rapport 'Comprendre la Convention des Nations Unies relative aux droits des personnes handicapées' (2010) <https://www.internationaldisabilityalliance.org/sites/default/files/documents/comprendrelacdph.pdf>

Sénat, Service des études juridiques 'Étude de législation comparée n° 148 – La protection juridique des majeurs' (2005) < http://www.senat.fr/lc/lc148/lc1480.html >

Blatman M'L'effet direct des stipulations de la Convention internationale relative aux droits des personnes handicapées' (2016) <https://defenseurdesdroits.fr/sites/default/files/atoms/files/02._rapport_de_michel_blatman.pdf>

'Rapport – Protection juridique des majeurs vulnérables' (2016) <https://www.defenseurdesdroits.fr/fr/publications/rapports/rapports-thematiques/protection-juridique-des-majeurs-vulnerables>

ANESM Agence nationale de l'évaluation et de la qualité des établissements et services sociaux et médico-sociaux 'Participation des personnes protégées dans la mise en œuvre des mesures de protection juridique (2018), <https://www.has-sante.fr/upload/docs/application/pdf/2018–03/anesm_09_protection-juridique_cs4_web.pdf>

Anne Caron Déglise 'Rapport de mission interministérielle. L'évolution de la protection juridique des personnes. Reconnaître, soutenir et protéger les personnes les plus vulnérables' (2018) <https://www.vie-publique.fr/sites/default/files/rapport/pdf/184000626.pdf>

Ministère de la Justice, Bulletin d'information statistique (2018) 162 < http://www.justice.gouv.fr/art_pix/stat_Infostat_162.pdf >

Abadie C, Pradié A 'Rapport d'information déposé en application de l'article 145 du Règlement par la Commission des lois constitutionnelles, de la législation et de l'administration générale de la République, en conclusion des travaux d'une mission d'information sur les droits fondamentaux des majeurs protégés' (2019) <https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b2075_rapport-information>

'Rapport du 116e Congrès des notaires de France: Protéger' (2020) < https://rapport-congres-desnotaires.fr/2020-rapport-du-116e-congres/>

'Rapport – La mise en oeuvre de la Convention relative aux droits des personnes handicapées' (2020) <https://defenseurdesdroits.fr/sites/default/files/atoms/files/rap-cidph-num-16.07.20.pdf>

'Rapport parallèle – Examen du rapport initial de la France sur la mise en œuvre de la CIDPH' (2021) <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/rapport_parallele_ddd_examen_du_rapport_initial_de_la_france_sur_la_mise_en_oeuvre_de_la_cidph_juillet_2021.pdf >

Comité des droits des personnes handicapées 'Observations finales concernant le rapport initial de la France, adoptées par le Comité à sa vingt-cinquième session (2021)' < https://www.cnape.fr/documents/onu_-observations-finales-du-comite-des-droits-des-personnes-handicapes_-2021-fr/>

Important legislation

- Loi n° 2002–303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé
- Loi n° 2007–308 du 5 mars 2007 portant réforme de la protection juridique des majeurs
- Décret n° 2008–1484 du 22 décembre 2008 relatif aux actes de gestion du patrimoine des personnes placées en curatelle ou en tutelle, et pris en application des articles 452, 496 et 502 du code civil
- Loi n° 2015–177 du 16 février 2015 relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures
- Ordonnance n° 2015–1288 du 15 octobre 2015 portant simplification et modernisation du droit de la famille
- Loi n° 2015–1776 du 28 décembre 2015 relative à l'adaptation de la société au vieillissement
- Loi n° 2016–87 du 2 février 2016 créant de nouveaux droits en faveur des malades et des personnes en fin de vie
- Loi n° 2019–222 du 23 mars 2019 de programmation 2018–2022 et de réforme pour la justice
- Décret n° 2021–684 du 28 mai 2021 relatif au régime des décisions prises en matière de santé, de prise en charge ou d'accompagnement social ou médico-social à l'égard des personnes majeures faisant l'objet d'une mesure de protection juridique

List of referenced judgments and decisions

Cass civ (1) 5 December 2012, at 11–26.611, D 2013, 2196, RTD civ 2013, 89, JCP 2013, 104
Cass civ (1) 25 September 2013, at 12–22.300, D 2014, 2268, RJPF 2013.12, 12
Cass civ (1) 6 November 2013, at 12–23.766, D 2014, 467.
Cass civ (2) 1st February 2018, at 16–24.173, D 2018, 1458
Cass civ (1) 6 December 2018, at 18–70.011
Cass civ (1) 19 December 2018, nr 18–10.582, D 2019, 1412
Cass civ (1), 2 March 2022, at 20–19767, D 2022
CA Grenoble, 30 October 2015, RG at 15/1782, Dr. fam. 2016, Comm. 13
The Ombudsman's Decision: Décision 2018–103 du 19 avril 2018 <https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=25269>

13 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Georgia

Irine Kurdadze and Mariam Kevlishvili

1. Introductory remarks

Georgia is one of the first countries of the former Eastern Bloc, which has recognised the primacy of international law in Georgian legislation upon restoration of independence while being formally still under the conditions of existence of the Soviet Union by the Act of Restoration of State Independence of Georgia (April 9, 1990)[1] that enshrine the following:

> The primacy of international law over the laws of the Republic of Georgia and the direct effect of its norms in the territory of Georgia has been declared as one of the basic constitutional principles of the Republic of Georgia.
>
> The Republic of Georgia, striving for a dignified position in the world community of nations, recognises and ensures equally all the fundamental rights and freedoms of individuals, including national, ethnic, religious and linguistic groups, envisaged by international law, as required by the Charter of the United Nations, the Universal Declaration of Human Rights, and international pacts and conventions.

With this historically significant provision, Georgia recognised the primacy of international law as a cornerstone principle of state policy and legal administration, thereby, instating itself among other advanced democracies.[2]

The core rational under this approach was reinforced in Articles 6 and 7 of 1995 the Constitution of Georgia (hereinafter referred to as 'the Constitution') and retained in the new version of the 2018 Constitution in Article 4, paragraphs 2 and 5.

This provision enshrines the correlation between international law and domestic law and consists of the following narratives:

> [T]he legislation of Georgia shall comply with the universally recognised principles and norms of international law. An international treaty of Georgia shall take precedence over domestic normative acts unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia.

1 Formally the Soviet Union dismissed on December 24, 1991.

2 Irine Kurdadze, Stages of development of scientific concepts on correlation between international and domestic law and contemporary events, *Journal of International Law*, 2008, vol. N1, p. 21.

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According to the Constitution, 'An international treaty of Georgia shall take precedence over domestic normative acts unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia'. The Constitution represents the supreme law of the state, providing for universally recognised human rights and freedoms. In accordance with paragraph 5 of Article 4 (ex. article 6, paragraph 2.) of the Constitution, 'the legislation of Georgia corresponds with universally recognized norms and principles of international law. International treaties or agreements concluded with and by Georgia, if they do not contradict the Constitution of Georgia, take precedence over domestic normative acts'.

Apart from the Constitution of Georgia, the issue of the hierarchy of international and domestic law is determined by Article 7, paragraph 4, of 'The Law of Georgia on Normative Acts'[3] and Article 6 of 'The Law of Georgia on International Treaties'. The following hierarchy is established in accordance with the legal force of the present normative acts of Georgia:

1. the Constitution of Georgia and the constitutional law of Georgia;
2. international treaties and agreements of Georgia; and
3. laws and other legal acts of Georgia.

Under Article 6 of 'The Law of Georgia on International Treaties',[4] the international treaties are the source of the domestic legislation:

> Art. 6.1. Treaties shall be an integral part of the legislation of Georgia.
>
> 2. Treaties of Georgia shall prevail over domestic normative acts unless the treaties contradict the Constitution, constitutional law, and constitutional concordat of Georgia.
> 3. Provisions of the gazetted treaties determining the specific rights and obligations and not requiring transposition in domestic legislation by adopting specific acts, shall be directly applicable in Georgia.

Thereby, firstly, international treaties are recognised as part of Georgia's legislation. Generally, the rights and freedoms provided in the human rights–binding documents may be derived for natural and legal persons.

Secondly, a procedure of accession (e.g. signature, ratification, approval/acceptance of an international treaty) requires firstly bringing the legislation in compliance with the norms under consideration and starting the procedure of accession.

> Georgia, even when undergoing the procedure of ratifying or accessing the international treaties, would first require harmonization of the Georgian legislation with the latter and undertake the procedures only afterwards. However, the practice of the Georgian Parliament has confirmed that it is also possible that the country first ratifies the international treaty and only afterwards harmonizes the domestic legislation with the instrument.[5]

3 Document number 1876, Date of issuing October 22, 2009, *The Legislative Herald of Georgia*, 33, November 9, 2009.

4 Document number 934, Date of issuing October 16, 1997, *Parliamentary Gazette, 44*, November 11, 1997.

5 See footnote 2 of this chapter.

Human rights and freedoms envisaged under Article 4, paragraph 2, of the Constitution of Georgia have a direct and immediate effect in Georgian legislation:

> The State acknowledges and protects universally recognised human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law. The Constitution shall not deny other (not listed in the Constitution, author) universally recognised human rights and freedoms that are not explicitly referred to herein, but that inherently derive from the principles of the Constitution.

To sum up, the words 'the Constitution of Georgia corresponds to the universally recognised principles and norms of international law. The state recognises the universally recognised human rights and freedoms' must imply the recognition of the primacy[6] of international law not only over the constitutional, organic and other laws of Georgia and hierarchically subordinated legal acts but in terms of the Constitution as well. By formulating the term of 'universal principles and rules' in the Constitution, the legislator has indicated that Georgia, being a member of a modern civilised community, shares the ideas recognised by international law, which have ensured the correspondence between international and domestic law. The legal system of the State is not bound by the unity of legal rules. The legal system implies both legal rules (treaties, which are recognised by the State in due procedure), understanding (which must be derived from the content of the universal principles and rules of international law), legal relations raised based on the rules (among them international legal relations), and the process of application of norms (through which 'the reception' of the rules of international law are included in national law). Regulation of all these processes without universal principles and rules is impermissible. The legislator of Georgia is obliged to be guided by the universal principles and norms in the lawmaking process since they represent the grounding pillars for national legislation. In addition, in cases where public relations are not regulated by the legal norms of the state (legal vacuum), these principles are to be used as a direct normative rule for a judgment on a particular legal case. Therefore, the action of universal principles and norms are extended not only over domestic law but over the whole legal system as well.[7]

2. UNCRPD

The UN Convention on the Rights of Persons with Disabilities was adopted in New York, on December 13, 2006 (hereinafter referred to as the UNCRPD). It was signed by the Georgian side on July 10, 2009, it was ratified by the Parliament of Georgia on December 26, 2013, and entered into force on April 12, 2014.[8] After the UNCRPD was ratified and the document entered into force, the Government has begun the process of implementation in domestic legislation in order to harmonise national legislation with the

6 The term 'the primacy of international law' must be distinguished from the term 'priority', with which we deal, when there is a conflict between international and domestic norms. Such a condition is based on the will of the state, which is entitled to come out of the treaty in an extreme case and ignore its 'priority', but even in these cases, the state is also bound by those rules which are recognised universally by international customary law or multilateral treaty.

7 See footnote 2 of this chapter.

8 Law on the Rights of Persons with Disabilities, Article 37.

international obligations. The process is divided into phases and should be fully completed in 2035.

Georgia also has adopted the domestic Law on the Rights of Persons with Disabilities on July 14, 2020, which was amended on March 16, 2021. It has to be mentioned that the main part of the law (except the Transitional Provision) entered into force on January 1, 2021. The adoption of the domestic law was a vital step forward in order to improve the environment of persons with disabilities (hereinafter referred to as 'PWD'), simultaneously while transitional provisions give the relevant responsible institutions of the government a quite long period of time to fulfil their obligations, as it could be exceeded in the upcoming even decades. Among others, the approval of the plan of activities to be implemented with respect to the introduction of a biopsychosocial model mechanism for establishing disability status should have been supplied before January 1, 2023 (but on March 9, 2023 Ministry of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia issued an Order on the approval of the 2023–2025 action plan of measures to be implemented in connection with the implementation of the biopsychosocial model of the mechanism for determining the status of disability); the approval of standards and procedures for the management of personal assistant services, including the criteria for the selection of personal assistants, should be ensured by January 1, 2024; a draft programme of personal assistant services provision, determination of the scope of the services, and evaluation of procedures for the delivery thereof to persons with disabilities before January 1, 2025; the provision of personal assistant services should be provided only from January 1, 2025. By the end of 2035, the authority should gradually adapt buildings and other types of infrastructure existing before the entry into force of this law, as well as existing services, to universal design in order to ensure full access thereto for persons with disabilities;

Georgia has also signed the Optional Protocol to the UNCRPD (hereinafter referred to as 'UNCRPD-OP') at the same time (on July 10, 2009) but ratified it later than the convention on April 12, 2021.

In June 2020, the Parliament officially addressed the government and adopted a resolution recommending initiation of the process on the ratification of the CRPD-OP. The government approved the recommendation and tasked the Ministry of Foreign Affairs to prepare the case. The Ministry of Foreign Affairs of Georgia, with other relevant field ministries, has conducted the procedure according to 'The Law of Georgia on International Treaties'.

The preparatory process of the ratification of the Optional Protocol was completed in March 2021. The Parliament ratified UNCRPD-OP on April 12, 2021, entered into force on May 12, 2021, establishing yet another vital mechanism for protecting the rights of persons with disabilities in Georgia. Simultaneously with the adoption of the new Law on Rights of Persons with Disabilities in 2020, the ratification of the Optional Protocol strongly demonstrates Georgia's efforts to align national policies and regulatory frameworks with the UNCRPD. It is a commitment to take another step towards creating a barrier-free and inclusive society.[9]

9 Due to the fact that CRPD-OP entered into force in spring 2021, there is no case in the Committee yet.

As remarked by the UNCRPD's General Comment No. 1:

> Article 12 [of the CRPD] does not set out additional rights for people with disabilities; it simply describes the specific elements that States parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

It is important to have a clear understanding of the exact scope of the Article 12 of the CRPD in order to implement the human-rights-based model of disability that implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making. Given the importance of this article, Georgia reasoned to implement the provision of Article 12 of the CRPD in application with other international obligations ensued from such significant acts as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as domestic law. It (declaration) specifies that the right to equal recognition before the law is operative 'everywhere' and applies to the whole legislation of Georgia.

Proper implementation of the UNCRPD and the Optional Protocol to the Convention is one of the major current challenges which the state has been working on in order to overcome gaps existing in the legislation regulating accessibility. These gaps were caused by the absence of appropriate enforcement and supervision mechanisms.

Georgia had made significant progress in adopting legislative changes and implementing policy reforms to implement and endorse UNCRPD, furthermore to establish an effective administration mechanism by domestic law. Significant measures had been taken to fight the stigmatisation of and discrimination against persons with disabilities and to promote their inclusion and participation in society.[10] All these actions are oriented to support persons with disabilities to aid live more self-sufficiently and be integrated into the broad society.

In this regard numerous steps were done by the state agencies/institution:

1. The Constitution of Georgia prohibits discrimination on all grounds (article 11, right to equality), including on the grounds of disability. Amendment to the Constitution (2017) provides new further provision pointing to a positive obligation of the state towards PWD: 'The State shall create special conditions for persons with disabilities to exercise their rights and interests'. The previous version of the same right (former article 14) did not provide a complete list, among them PWD, based on the well-established practice of the Constitutional Court of Georgia, in particular, 'the aim of the said Article of the Constitution is greater in scope, than the prohibition of discrimination based on the limited list provided'.
2. In 2020, the Law on the Rights of Persons with Disabilities (RPD Law) had been adopted, incorporating the Convention on the Rights of Persons with Disabilities into national legislation.
    a. This law had increased the standards for the protection of the rights of persons with disabilities. An important novelty of the new law is to shift from a medical approach to a bio-psychosocial model in determining the status of a person with a disability. It

10 A/HRC/47/15, para 137, April 1, 2021.

is an approach whereby a person's disability status and quality, together with medical testimony, are determined based on an assessment of their needs. The same principle determines the amount of relevant social security guarantees.

b. This law recognises Georgian Sign Language as a means of communicating with deaf and hard of hearing persons in Georgia and obliges the state to create all necessary preconditions for its proper use by those who need it (previously, only the Law of General Education distinguished Braille, sign language and other communication tools as the source of teaching and learning processes). Furthermore, pursuant to Article 16 (j) of the Law on Broadcasting, a public broadcaster shall take the interests of PWD into consideration during election campaigns and ensure sign language translation in programs related to elections/referendum/plebiscite.
   It is obligation of the Ministry of Education, Science, Culture and Sport of Georgia to ensure the development and approval of a programme for the certification of sign language interpreters. The first steps in the development of Georgian Sign Language have already been taken and the word bank already exists. The process of elaborating the textbooks has been started, and a sign language training program, including the training of interpreters, was developed. The decree on the approval of the certification program for sign language translators was adopted by the same ministry in June 2021.
c. This law obliges the central executive government and local municipalities to ensure the development and approval of a unified strategy for 2021–2035 and annual action plans indicating the measures to be taken by the relevant institutions. Instead, a separate strategy on PWD, in 2022 state adopted the Human Rights Strategy 2022–2030, which includes a specific chapter of the state vision on PWD.[11] Currently all state agencies – ministries, local governments (among them Tbilisi City municipality), legal entities of public law – had already adopted their annual action plans.
d. This law is an important innovation is the notion of 'universal design' as it is indicated/specified by UNCRPD. According to the definition provided by law, universal design is the design of a product, environment, training, program or service that allows all people to access it without special adaptations and special designs. Universal design does not preclude, if necessary, the use of assistive devices and/or various types of support by a particular group with disabilities, and reasonable design is the principle of making necessary and appropriate changes in each case to avoid disproportionate or excessive burden or obligation and ensures the realization of the rights and freedoms of a PWD on an equal term with others. The obligation to implement standards related to both the public and private sectors. Simultaneously, according to some NGOs recommendations the notion of universal design should be more determined/specified in order to implement properly and timely.
e. This law will expand the coverage of the Legal Aid Service (LAS). As a result, all PWD in Georgia have access to charge free legal aid services offered by LAS within its mandate.

The status of the special plaintiff as a novelty for the Georgian legislation was elaborated and adopted by the RPD law (Article 19). According to this legislative innovation, organisations holding such status are authorised to conduct legal representation of persons with

11 See point 5 of this chapter.

disabilities in administrative bodies, administrative and civil courts. Thus, such organisations do not need any additional confirmation of their mandates, while representing PWD in courts and administrative bodies. Even though it is a very newly established mechanism, it already has been used in practice, even in courts.

In order to fulfil its obligations based on the mentioned law, the Ministry of Justice of Georgia adopted the amendment to the decree 'About registration of entrepreneurs and non-entrepreneurial (non-commercial) legal entities' (December, 30, 2020) that approves form and procedures for the submission of documents certifying the activity in the field of civil and/or administrative proceedings for obtaining/extending the status of a special plaintiff in order to protect the rights of persons with disabilities.

The law covers the obligation to set important domestic standards and create relevant legislative and institutional frameworks in order to ensure the protection of the rights of persons with disabilities. Despite of numerous positive changes provided by law, there are some spaces for criticism mainly toward the implementation period of the law. The implementation process is divided into phases and should be fully completed in 2035. Transitional provisions include the time frame for their adoption and enforcement, which delays the fulfilment of obligations taken by the state under the Convention and makes it unbearable to improve the rights of persons with disabilities.

A very important element of the Georgian implementation of the CRPD is the National Monitoring System. This system is comprehensive and comprises of the institutions described in the following.

Georgia established the national coordination mechanism – the State Coordination Council working on the issues of persons with disabilities (Coordination Council)– under the Convention on the Rights of Persons with Disabilities and ratified the Optional Protocol to the Convention. The Coordination Council is working on the issues of persons with disabilities). It was established on December 15, 2009, after the Parliament of Georgia approved the Concept Paper on Social Integration of Persons with Disabilities and is composed of ministers, members of Parliament and representatives of CSOs working on the issues related to persons with disabilities. In 2014, at the sixth meeting of the Coordination Council, the government of Georgia defined the institutions responsible for the implementation of the UNCRPD at the national level (focal point), the coordination mechanism of the implementation process and an independent mechanism for promotion, protection and monitoring of the implementation of the convention. The Coordination Council was assigned the responsibility for the implementation of the UNCRPD. The Human Rights Secretariat under the administration of the government of Georgia was determined as a coordination agency for the implementation process of the Convention, while the Public Defender's Office of Georgia was named as the monitoring body. After the ratification of the UNCRPD, coordination councils working on the issues related to persons with disabilities have been set up in self-governing bodies. The establishment of these councils at the local level represents one of the activities envisaged by the Government Action Plan on Ensuring Equal Opportunities for Persons with Disabilities for 2014–2016. In March 2016, UNDP selected an international expert to conduct a study of the international practice of implementation of the Convention and its coordination mechanism and carry out a survey of all stakeholders and identify challenges of the existing mechanisms in Georgia. The experts elaborated recommendations on the best models of implementation of the UNCRPD and its coordination mechanisms. Later on, the government of Georgia developed such mechanisms based on the experts' recommendations.

Since 2015, according to structural amendments made in the Public Defender's Office, a special department for protection of rights of persons with disabilities was established. The Department for the Rights of Persons with Disabilities acts on behalf of the Public Defender's Office of Georgia when performing its functions. The mandate of the department is to promote the protection of universally recognised rights of persons with disabilities by the Public Defender's Office of Georgia in accordance with the Constitution of Georgia and the general principles and norms of international law; promote, protect and monitor the implementation of the 2006 UNCRPD in Georgia; monitor the protection of the rights of persons with disabilities in Georgia; ensure constant contact and close cooperation with state and private bodies/organisations, as well as civil society representatives working on the rights of persons with disabilities; and raise civic awareness in the direction of the protection of the rights of persons with disabilities. In order to achieve this mission, the functions of the department are to examine applications/complaints received by the Public Defender's Office relating to the violations of the rights of persons with disabilities and draft relevant reports/recommendations/proposals, monitor the implementation of the measures of promotion and protection of the Convention on the Rights of Persons with Disabilities in Georgia, study and generalise problems in the field of protection of the rights of persons with disabilities in Georgia, lobby the interests of persons with disabilities in the process of development of state policy, control the practical implementation of the recommendations issued by the Public Defender's Office of Georgia according to the areas within its competence, cooperate with similar services of other countries to study their practices, develop relevant recommendations/proposals for the establishment of international standards in Georgia, actively cooperate with the media relating to the topics of the rights of persons with disabilities, and perform other functions that are inherently related to the specifics of the department.

The department elaborated a concept of promotion, protection and monitoring of the implementation of the Convention in 2015. According to the concept, the Consultation Council, operating since July 2015, represents an advisory body defining priorities for monitoring of the implementation of the Convention. The Consultation Council and the Public Defender's Office are deeply involved in the process of implementation of both documents UNCRPD and CRPD-OP.

The Interagency Coordinating Committee for Implementation of the Convention on the Rights of Persons with Disabilities was established by the Ordinance No. 551 of the Government of Georgia on November 29, 2021, and it is the mechanism responsible for coordinating the implementation of the United Nations Convention on the Rights of Persons with Disabilities and the Law of Georgia on the Rights of Persons with Disabilities. The Interagency Committee is accountable to the government of Georgia and, among other important functions, within its competence, ensures the fulfilment and coordination of international obligations undertaken by Georgia in terms of the rights of persons with disabilities, including the recommendations of the Committee of the United Nations Convention on the Rights of Persons with Disabilities and national obligations.

In order to ensure the involvement of persons with disabilities, organisations working on disability rights and organisations representing persons with disabilities in the activities of the committee, the committee established a Consultative Council.

In order to coordinate and monitor the implementation of the Convention and the implementation of the governmental action plan for the protection of human rights, the Committee, through coordination with the Coordination Council, creates thematic working groups with a specific purpose and for a defined time.

It is significant that in the Consultative Council and the thematic working groups involve a wide range of specialised NGOs and experts.

The selection of members of the Consultative Council is made by the competition commission, on the basis of submitting an application to the Human Rights Secretariat of the government of Georgia, passing the minimum threshold. The number of participants in the Consultative Council is not limited, and any interested person who meets the requirements set up can join it.

A thematic working group may include members of the Consultative Council, representatives of the state or municipal body/institution (administrative body), representatives of international organisations, as well as scientists, experts and representatives of the relevant target group depending on the goals of the working group.

Additionally, the implementation process of UNCRPD roots the adoption of and/or amendments to the different statutory laws and subordinate normative acts of Georgia, among them are as follows:

1. On May 2, 2014, the Parliament of Georgia adopted the Law of Georgia on the Elimination of All Forms of Discrimination, which consolidated and harmonised the relevant anti-discrimination provisions interspersed in the legislation of Georgia. The aim of the law is to eliminate all forms of discrimination and to ensure that rights established by the legislation of Georgia are equally enjoyed by any physical and legal person, regardless of race, skin color, language, sex, age, citizenship, origin, place of birth, place of residence, property, title of nobility, religion or faith, national, ethnic and social origin, profession, marital status, health condition, disability, sexual orientation, gender identity and expression, or political and other beliefs.
2. Criminal Code declares it a crime to refuse to exercise the right granted to a person with a disability by law and/or an international agreement of Georgia, which substantially violates his/her right (article 142 2); committing a crime, including on the grounds of disability (motive of intolerance), is an aggravating circumstance for liability for all crimes. The term of imprisonment for such an offense shall be at least one year longer than the minimum term of the sentence for the offense committed (article 53 1).
3. The Child Rights Code (adopted in 2019) establishes a system of protection tailored to the individual needs of children with disabilities and a system of support for children with disabilities.
4. Division of Human Rights Protection of the General Prosecutor's Office of Georgia developed and distributed to prosecutors and investigators 'Recommendation on Investigating Criminal Cases Involving Persons with Disabilities' in order to implement the standard provided by article 13 of the Convention.
5. On July 14, 2020, Parliament adopted the Law on Employment Promotion. It regulates state activities related to employment promotion and defines the institutions responsible for active labour market policies and employment promotion issues. According to law, a person with a disability enjoys a pre-emptive right in the labour market. A protected workplace is created for PWD. In agreement with the State Employment Promotion Agency, a protected workplace is a work environment that is adapted to a person with a disability. To this end, the agency is authorised to subsidise the employer, if that the work environment would be functioning for at least three years.
6. In order to promote equal access to education, the government had decided in 2006 to give priority to integrative education for children with disabilities. The national reform was based on a number of particular programmes, such as creating teams of social

workers throughout the country, establishing nurseries and day centres for mothers and their babies, awarding higher education scholarships, placing children in foster families, personnel training, and introducing standards for children's services. Since the ratification of UNCRPD Georgia continues to strengthen the policy towards promoting the rights of children with disabilities. The relevant ministry is implementing a programme that provided a second opportunity at receiving education through social inclusion, which targeted vulnerable children (such as children in street situations, Roma, children with disabilities and other vulnerable groups). In order to ensure access to higher education, the Ministry of Education had implemented students' social support programme through which representatives of various vulnerable groups are financed by the state (e.g. according to the Ministry's Decree in 2021, 25 students with disabilities would be financed under this programme). According to the Law on Vocational Education, the Ministry of Education, Science, Culture and Sport of Georgia developed the methodology of 'job coaching' and delivered it to the Ministry of Health, Labour and Social Affairs of Georgia. Within each vocational education program, at least 15% of the quota is set for the persons with special educational needs and disabilities.

Service Lab was established within the Public Service Development Agency of Georgia (PSDA) in 2015 aiming at ensuring maximum inclusiveness in the process of public services design and development, which itself is possible through the continuous involvement of service users and stakeholders in this process. The websites of the PSDA and Community Centres (www.voice.sda.gov.ge, www.voice.centri.gov.ge) were adapted for persons with visual impairments; a guideline, 'Serving persons with disabilities in Public Service Hall, was elaborated in order to specify the rules of communication and behaviour with PWD.

On the basis of the decision of the High Council of Justice (June 25, 2018), all common courts have been tasked to designate a staff member responsible for providing necessary information to the PWD. For these purposes, since January 2019, the employees have been selected in all big courts and assigned to facilitate communication and to provide appropriate assistance to the PWD.

Georgia *continues* taking the necessary measures to address concerns over the rights of vulnerable groups, including among others persons with disabilities, for their social cohesion.

3. Private law regulation of active legal capacity and its amendments adopted in the course of implementing of the Article 12 of the UN Convention on the Rights of Persons with Disabilities

Georgia, during the ratification process, uses declaration for numerous international treaties, and they are not always legally binding. Georgia makes a declaration to the UNCRPD as to understanding the particular matter of Article 12 under the jurisdiction of the state. It is universally recognised that unlike reservations, declarations merely clarify the state's position and do not purport to exclude or modify the legal effect of a treaty.[12] Declaration to the CRPD was made at the time of the ratification by Georgia's Parliament and is

12 Glossary of terms relating to Treaty actions: https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#declarations accessed October 25, 2022.

deposited at the UN as the corresponding instrument of the document. In this particular case, the declaration was deliberately chosen to indicate that state wants to declare certain aspirations in the proper sense of the Article 12 of UNCRPD. It can be considered as an interpretative instrument that is annexed to a treaty with the goal of interpreting or explaining the provisions of the document of the latter. Such interpretative declaration does not purport to exclude or to modify the legal effects of any provision of the UNCRPD treaty in its application to the state. Furthermore, as it states by the declaration,

> Georgia interprets Art. 12 of the CRPD in conjunction with respective provisions of other international human rights instruments and its domestic law and will therefore interpret its provisions in a way conferring the highest legal protection for safeguarding the dignity, physical, psychological and emotional integrity of persons and ensuring the integrity of their property.

Before Georgia ratified and implemented the UNCRPD, in 1995 the Parliament of the Republic of Georgia had passed a law 'on Social Protection of Persons with Disabilities', based on the 1975 UN Declaration on the Rights of Disabled Persons and the 1993 Standard Rules on the Equalization of Opportunities for Persons with Disabilities.

Some jurisdictions make a distinction between the capacity to have rights and the capacity to act or exercise these rights. The first part includes the right to be a subject before the law and to be someone who can own property and possess human rights and other rights provided for by domestic legislation. The second part (to exercise rights) goes further and includes the power to dispose of one's property (i.e. to use it, sell it, give it away or destroy it) and claim one's rights before a court.

Georgian legislation also distinguishes the **legal capacity** and the **capacity to do legal actions** (undertake obligations and acquire rights) as regards natural persons. According to the Civil Code of Georgia, before the UNCRPD was ratified and implemented, article 12, paragraph 5, of the Civil Code of Georgia defined 'mental retardation' and 'mental illness' of a person as a basis for qualifying a person without capacity to do legal actions. According to the Civil Procedure Code of Georgia, a person was to be declared to be legally incapable by the court decision. An application to the court could have been submitted by a close relative of the person, his/her statutory representative, an agency of guardianship, and custody, or a psychiatric facility. The basis for the application was considered to be the diagnosis of a person's mental disorder. In order to check the psychological condition of a person, the court was ruling psychological expertise and in case of confirmation of the diagnosis, a person was deemed to be without capacity to do legal actions.

Furthermore, recognition of a person as legally incapable was considered by the court without his/her participation in most cases (a person's participation in court proceedings, whose capacity to do legal actions was to be defined, was not required in every case, and a decision on inviting the person to the court proceedings was decided based on his/her health condition; therefore, the decision on each case was made based on individual assessment).

After granting a person the status of legally incapable, the agency of guardianship and custody had to appoint a guardian.

A guardian represented the rights and interests of award with a third person, including in the court, without special authorisation. As soon as a person was recognised legally incapable, he/she was immediately deprived of all civil rights, including the right to acquire and sell property, to participate in elections, referendum, and plebiscite, and to appeal to

the court. Moreover, an incapacity was considered to be an impeding circumstance, and because of it, marriage was not allowed between individuals out of which, at least, one was deemed to be without legal capacity. A legally incapable person was not allowed to make a decision about his/her own treatment. Furthermore, recognition of a person as legally incapable was considered to be the legal ground for the adoption of his/her child.

As mentioned, Georgian legislation differentiates legal capacity from the capacity to do legal actions. In 2015 Georgia made relevant amendments to the numerous laws as a result of the ratification of UNCRPD and the relevant decision of the Constitutional Court of Georgia, and this process has been known as a 'legal capacity to do legal actions system reform'.[13] Upon imposing amendments in over 200 statutory laws as well as through ensuring the implementation of the Decision of the Constitutional Court of Georgia, the legal capacity system reform brought national legislation in compatibility with Article 12 of the Convention.

As a consequence of the reform, a new concept of 'a person with psychosocial needs' (**recipient of support**) was introduced to the Civil Code of Georgia instead of a previous term of a legally incapable person. The law defines a person with psychosocial needs as a person with significant psychological, mental and intellectual disabilities which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Furthermore, the procedure of recognition of a person as a recipient of support has been prescribed in details. An application for eligibility to receive the support of 'a person with psychosocial needs' shall be submitted to the court by the person himself/herself, family member, legal representative, guardian and curator body, psychiatric or specialised institution, based on the place of residence of the person. If the person is in a medical facility – based on the address of the medical facility. The application on the recognition of a person as a recipient of support shall indicate the area within which a person needs support. Upon receipt of the application, the court appoints a forensic examination in accordance with the Law of Georgia on the Conduct of Forensic Science based on psychosocial needs. In special circumstances, the court has a right to make a decision on assigning a person to a mandatory forensic examination, only in certain circumstances the court has a right to assign a mandatory forensic examination. The examination is conducted by a multidisciplinary group composed of the following: psychiatrist, psychologist, social worker and occupational therapist.

What is more remarkable, this norm has an ex post facto law status, which means that persons who were recognised as legally incapable before the reform are not limited in applying to the court in order to change their scope of capacity to do legal acts.

Based on the findings of multidisciplinary group members and the outcomes of their questioning, in accordance with the requirements stipulated in Article 1277[1] of the Civil Code of Georgia, the court appoints supporter(s). The supporter shall be a family member,

13 The Constitutional Court of Georgia adopted a landmark judgment (October 8, 2014) in the case *Citizens of Georgia – Irakli Kemoklidze and David Kharadzev. the Parliament of Georgia*. The claimants were disputing the constitutionality of the provision governing legal incapacity under civil law in more than a few ways. According to their statement, the existing model contradicted the requirements of the rights to free development and equality. The Constitutional Court partially upheld the lawsuit allowing the state a period of six months to implement an appropriate amendment. The case is considered as a starting point for reforming the notion of legal capacity. For more information, see https://www.constcourt.ge/en/judicial-acts?legal=561, accessed October 25, 2022.

relative, friend, or specialist and shall be appointed only by consent of the person concerned and if a supporter meets requirements defined by the Code. If a supporter could not be selected from the categories listed in the article, the court appoints a person authorised by the agency of guardianship and custody, and if a recipient of support is in a specialised facility, the court appoints a representative of that facility. While appointing a supporter, the court defines the scope of support, such as reaching small contracts, conducting business activities, managing/disposing of real estate, identifying a place of residence, consent to medical treatment, preventing damage and exercising other rights and responsibilities defined by the court based on individual assessment. In other words, the court shall clearly indicate the right exercise of which authorises the person concerned to become a recipient of support and the scope of support. To sum up, the appointment of a supporter automatically means that a recipient of support loses the capacity to do legal acts in this scope and this capacity transfers to the supporter, without any additional proceedings.

The court decisions on appointment supporters are registered in a public electronic system: https://ecd.court.ge/. This is an electronic system, where all judicial decisions are registered. It is available to search decisions by different criteria, including by keywords.

As a result of the reform of a 'recipient of support', the capacity to do legal actions is a right of a person, and it can be restricted only in exceptional circumstances.

Before the reform, persons with incapable status to do legal actions did not have a legal basis for marriage, child adoption, voting, legal transactions, financial transactions, lodging an application in the court, and getting information on one's health condition.

Legislative reform implemented by the Parliament in response to the international obligations and the judgment of the Constitutional Court according to a 'recipient of support' replaces the medical model with a new, social approach to disability and more importantly the concept of the capacity to do legal actions. It is considered an important right of a person and can be restricted only by the court individually as exceptional conditions. This right can be supported by someone and it shall not be substituted. Disability shall not be the ground for restriction or abolition of someone's legal capacity. Any person with a disability is fully entitled to civil and political rights. Therefore, amendments have fully incorporated the notions enshrined in the Convention.

According to Civil Code, the court appoints a supporter for support receiver based on certain conditions, which would not impede the equal participation of the person in society. In its decisions, the court defines the limits of the support and the rights and obligations of the supporter. Courts guide themselves by Georgian legislation and international treaties.

Supervising the activities defined by the legislation of the guardian/caregiver/supporter is the function of the LEPL Agency for State Care and Assistance of the (Statutory) Victims of Human Trafficking (hereinafter – the Agency) and its territorial units (hereinafter – the local body of guardianship and custody). The guardianship/care/support oversight process involves monitoring the implementation of the guardian/caregiver/supporter duties.

The local guardianship and custodial authority shall reflect the results of the supervision or the information obtained about the guardian/custodian/support recipient in the database, or provide it electronically to the agency providing its reflection in the database.

The main prerequisite influencing the scope of the capacity to do legal actions (undertake obligations and acquire rights) by force of law, regardless of any court decision is issued, is age. There are three age categories by the Civil Code of Georgia: under 7 years (with no capacity to do legal actions), 7–18 years (with limited capacity to do legal actions)

and over 18 years (with capacity to do legal actions). Before the UNCRPD was ratified and implemented in country law, persons with psychosocial needs were considered as incapable to do legal actions. As for now, they have full capacity to do legal actions, except in the circumstances when the court has recognised him/her as a recipient of support and appointed supporter. During this procedure, the court has to state the scope of support. The court should list the rights and obligations of supporter towards permitted legal acts. In each case, the court should guide by particular circumstances.

The court defines reporting period for a supporter to the agency of guardianship and custody, which shall not exceed six months, and defines the term of guardianship and revision period, which shall not exceed five years.

If there is a ground for changing the scope of or termination of the support, a court shall be authorised to make a decision on changing the scope of or termination of support upon the application submitted by the recipient of support, his/her family member or supporter, psychiatric medical facility or the agency of guardianship and custody, in accordance with the forensic findings.

According to Article 58[1] of the Civil Code of Georgia,

> If a beneficiary of support concludes a transaction without having received the support defined by the court decision, the validity of the transaction shall depend on whether the supporter approves it or not, except when the beneficiary of support benefits from the transaction.

Before a contract made by a beneficiary of support is approved, the other party may repudiate the contract.

If the other party knew the circumstances (that person was recipient of support), then he/she may repudiate the contract only if the person deceived him/her by claiming that consent from the legal representative had been obtained.

A unilateral transaction made by a beneficiary of support without the necessary consent of the legal representative shall be void. Such a transaction shall be void also if the legal representative gave his/her consent but the beneficiary of support failed to present a written document confirming it, and for this reason, the other party repudiates the transaction without delay. Such repudiation shall not be allowed if the other party has been informed of the consent of the legal representative.

Again, despite the fact, that according to RPD Law Georgia took a time until 2035 to make universal design, the state already has court decisions obliging different actors to make adaptations.

On February 25, 2021 the City Court substantially considered the case of a blind woman who went to Liberty Bank to pick up a plastic card, the bank employee told her that she would not be able to provide the service without another person accompanying her. The court found that 'imposing such a condition [requiring an accompanying person], especially when there are many aids and technical means that can be used to provide individual services to the customer without any third-party intervention, is unequal treatment'. A bank was assigned to each district and region of Tbilisi with the adaptation of at least one branch in the city with a text reader program, a voice ATM, a tactile path and a simplified form of providing a signature, and also was ordered to pay moral damages in favour of PWD.

It is also worth to note, that on October 31, 2022, there was a parliamentary hearing of the amendment of the law regulating the confirmation of the authenticity of the will

(signature) of the blind when concluding a transaction. Also, it must be noted that this amendment will apply only to blind persons, but there is an expectation that in the near future, the aforementioned will also apply to other (not blind) disabled persons in other laws.

4. Implementation of the Article 12 of the UN Convention on the Rights of Persons with Disabilities outside private law

Despite that,

> The right to vote is granted to all citizens who have reached 18 years of age by election day . . . those who have been declared legally incapacitated by a court decision and placed in an inpatient care are disenfranchised. The denial of the right to vote for persons declared legally incompetent by a court on the basis of an intellectual or psychosocial disability is at odds with international standards.

As it is stated by paragraph 48 of General Comment No. 1 to Article 12 of the CRPD, 'a person's decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising'.[14]

Despite efforts of Georgia to improve accessibility to polling stations for persons with disabilities, IEOM observers evaluate that 59.6% of the polling stations visited as difficult to access for wheelchair users. However, voters could request voting in adapted polling stations within their majoritarian district. Paragraph 41.5 of the 1991 OSCE Moscow Document calls on participating States 'to encourage favourable conditions for the access of persons with disabilities to public buildings and services'. CRPD Article 29 requires state parties to ensure that 'voting procedures, facilities and materials are appropriate, accessible and easy to understand and use'.[15]

5. The role of psychology, psychiatry and neurology in the course of implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities

The government ranked mental healthcare as one of the top priorities in the healthcare sphere. On January 18, 2022, the government adopted the new (second) strategy on mental health for 2022–2030, prepared by the Ministry of Health, Labour and Social Affairs of Georgia, and its action plan for 2022–2024. The strategy summarised the challenges drown up from the previous strategy and action plan for 2015–2020 and defines the vision of the state for 2022–2030. The main goal of the 2022–2030 strategy is to reduce the burden of disease and disability of people with mental health problems. The strategy and the action plan aims to fulfil six specific goals in upcoming years: (1) taking care of the mental health of children and adolescents, supporting them and ensuring the well-being of their families; (2) protecting the rights of people with mental health problems and reducing stigma; (3) providing quality mental health services as close as possible to their

14 Final Report an International Election Observation Mission (IEOM): GEORGIA, LOCAL ELECTIONS, October 2 and 30, 2021, ODIHR Election Observation Mission, Warsaw, April 8, 2022, p. 11.

15 Ibid., 27.

homes; (4) providing mental health services to people with addiction in the mental health system; (5) facilitating the treatment of individuals and developing human resources in the mental health system; and (6) regulating, managing, controlling and providing financial resources for the mental health system. Having in mind that mental-health-related issues are still a threat in the country, the effective and timely implementation of the Strategy and AP became one of the most important directions in which the government has to work. It is planned that the implementation of the strategy will improve access to mental health qualified services for both adults and children; special attention will be paid to consideration of individual needs of people with mental health; the process of decentralisation of the system will continue, based on developing small community services instead of large psychiatric institutions; etc.

The ministry determines the specific regulations of the psychiatric system, in cooperation with the Mental Health Policy-Making Council. The council is composed by all relevant stakeholders, such as governmental institutions, civil society institutions, representatives of the psychiatric medical institutions and experts in this field. So the strategy was developed with the enrollment of all agencies/institutions working on mental health issues.

In addition, by January 1, 2023, the state has committed to ensuring the approval of the action plan to be implemented in connection with the introduction of the biopsychosocial model of the disability status determination mechanism; for this purpose, the action plan was developed by Ministry of Health, Labour and Social Affairs of Georgia in 2021. In order to improve the system's management and transparency, the ministry regularly publishes statistical data that reflect the number of cases/services funded by state healthcare programs for persons with disabilities by program, sex and age group; the number of persons with disabilities financed within the framework of state healthcare programs by program, sex and age group; the number of persons with disabilities benefited medication within the framework of the state healthcare program; the number of cases/services funded by state healthcare programs for persons with disabilities by region and sex; etc.[16]

6. Organisation and institutional aspects of the assistance[17] and guardianship[18] for the purpose of doing legal acts by persons with disabilities

Chapter IV (transitional and final provisions) of the RPD Law determines the measures related to the fulfilment of the obligations established by the law and divided the stages and deadlines for the fulfilment of individual obligations, which are necessary for the full implementation of the law. For this purpose, all relevant bodies/institutions, within the scope of competence, must gradually adapt buildings and other types of infrastructure, as well as existing services, in accordance with the universal design within a 15-year period, and in the case when the building cannot be adapted due to objective technical reasons, which should be confirmed by appropriate expert opinion, the annual plan should additionally take into account alternative means of action to ensure full accessibility for persons with disabilities. The obligations of transitional provisions at this stage have been partially provided by the state but failed to ensure timely compliance with statutory deadlines on all

16 Official statistics, https://nha.gov.ge/ge/c/statics, accessed November 1, 2022.
17 Additionally, see point 3 of this chapter.
18 See point 3 of this chapter.

issues. It should be noted that with regard to such an important issue as the introduction of personal assistant services, the state has taken a number of significant steps.[19]

The activity and participation of the non-governmental sector and the interim measures indicated by the ECtHR toward PWD child in Georgia, force the processes on a national level, such as the adjudication of the cases by the national courts to expedite the appointment of the personal assistant and the enforcement of the obligation by the state towards the personal assistant services. This process began with an interim measure of the European Court of Human Rights (ECtHR) and was followed by the national court decisions that set an important precedent. The ECtHR on October 8, 2021, indicated an interim measure forces the state to appoint a 12-hour personal assistant for a 17-year-old disabled child in order to save his and his mother's life and health. The ECtHR also obliged the government to increase hours for personal assistance while making amendments to legislation. After that, while the child was involved in a home care sub-program, within the framework of which he had assigned personal assistants for 18 hours a day, on January 20 the child should become an adult, after which he would be without any services because the state does not have appropriate services for adults with disabilities. As an alternative to this, the state had large orphanages and psychiatric hospitals. None of them met the needs of the child, and in fact, it was unacceptable for the child to live and spend time in these institutions. According to the lawyer, in the case they demanded that the child should receive services, including personal assistants and therapists, to be maintained even after January 20, 2022. On January 17, 2022, the Tbilisi city court adopted a decision according to which the government and the Ministry of Internally Displaced Persons from the Occupied Territories' Labor, Health and Social Affairs were obliged to provide the mentioned services to the person until the state created appropriate programs focused on adult disabled persons. After all this, on October 12, 2022, the city court approved the application of a PWD to provide an 18-hour personal assistant. As another result of the national court decision, in December 2020 the government approved the 2021 State Program of Social Rehabilitation, which provides that the needs for individual home-care services for children with disabilities would be identified by a multidisciplinary team and children would be able to receive personal assistant services at government expense.

At this stage, standards for the management of personal assistant services for persons with disabilities have been approved.[20] Municipal authorities have begun (in some cases with the involvement of international partners and the civil sector) the programming of the personal assistant service, defining the scope of the service and developing rules for its provision to persons with disabilities, as well as the services themselves. However, this process requires more human and, more importantly, financial resources to ensure the sustainability and effectiveness of the service. Simultaneously, in accordance with the HR strategy for 2022–2030, state bodies and institutions must implement all necessary measures in the given period to ensure the fulfilment of their obligations and the implementation of the law.

In addition, the state announced that, taking into account that the full implementation of the requirements of the Convention in the legislation of Georgia is associated with a large amount of financial and administrative burden, the relevant obligations will

19 The law provides for the completion of the implementation of the personal assistant service by 2025.
20 Approved on February 18, 2022, although the law sets a maximum deadline of January 1, 2024.

enter into force gradually and the law will finally be fully implemented in the period until December 31, 2035.

7. Active legal capacity of the persons with disabilities and its restrictions in the light of statistical data before the UN Convention on the Rights of Persons with Disabilities was ratified and afterwards

In 2015 the state started the process of the specification of individual needs of incapable persons. According to the first steps made in this direction, the official responsible person (individuals or representatives of a medical institution) of an incapable person became liable for applying to the court for individual assessment to define the quality and scope of support provided.

> To date [August 2020], there are 6116 registered support recipients of which 2923 were declared incapacitated before the reform, at the same time, 6647 supporters have been registered since the reform, out of which 5779 persons hold active status. Given the number of support recipients, as well as the need for the protection of their rights, it is important to maintain and refine the relevant legislative and policy framework and existing practices.[21]

According to the information provided by the Supreme Court of Georgia for the year 2021 and the first half of 2022, totally there were 2,987 applications for recognition of a supporting person, 1,904 cases were examined on the merits by the courts and 1,881 cases were granted the claim.[22]

Approximately 1,250 persons with disabilities were registered on the Worknet public employment portal in 2020–2021, leading to 37 persons with disabilities being hired in 2020 and 63 in 2021. The Labor, Health and Social Affairs' Employment Support Agency, under the Ministry of Internally Displaced Persons from the Occupied Territories, cooperated with a range of large companies to find employment for persons registered in the portal.[23]

8. The relations between private law restrictions of active legal capacity and protection of persons with disabilities under criminal law

The Criminal Code of Georgia criminalises the violation of the equality of humans, that has substantially prejudiced human rights, due to their race, color of skin, language, sex, religious belonging or profession, political or other opinions, national, ethnic, social, rank or public association belonging, origin, place of residence or material condition.

21 Assessment of the Legal Capacity Reform, *Legislation and practice, human rights education and monitoring center (EMC)*, 2020, https://socialjustice.org.ge/uploads/products/pdf/%E1%83%A5%E1%83%9B%E1%83%94%E1%83%93%E1%83%A3%E1%83%9C%E1%83%90%E1%83%A0%E1%83%98%E1%83%90%E1%83%9C%E1%83%9D%E1%83%91%E1%83%90_ENG_1611911197.pdf.

22 Official correspondence from the Analytical Department of the Supreme Court of Georgia, September 12, 2022 Nð-1120-22.

23 Georgia 2021 Human Rights Report of US Embassy in Georgia, https://ge.usembassy.gov/wp-content/uploads/sites/165/313615_GEORGIA-2021-HUMAN-RIGHTS-REPORT.pdf?fbclid=IwAR0MvOVjkQjphGnK2z7le0hJ-vsq6gKtbM6rYSgJ0SI3fgf5BzCDP0UJ4A, accessed November 1, 2022.

The term of imprisonment for such an offense shall be at least one year longer than the minimum term of the sentence for the offense committed.

Furthermore, the Criminal Code of Georgia makes the definitions of aggravating factors for punishment: 'Commission of crime on the basis of . . . disability . . . or other signs of discrimination with the reason of intolerance shall be an aggravating factor for liability for all respective crimes'.

The Criminal Code of Georgia defines as offence case of 'restriction of rights of persons with disabilities', when 'refusing a person with disabilities to exercise the right granted by law and/or an international agreement of Georgia based on his/her disabilities, which substantially encroached on his/her right, [and which] shall be punished by a fine or house arrest for a term of six months to two years and/or by imprisonment for a term of up to three years'.

9. Conclusion

In 2014, Georgia ratified the UN Convention on the Rights of Persons with Disabilities, thus, on the one hand, the country recognised international standards for the protection of persons with disabilities, and on the other hand, it assumed a number of obligations both at the national and international levels. As a result of the ratification of the international treaty and the decision of the Constitutional Court in October of the same year, the norms for regulating persons with disabilities were completely changed, and at the first stage, a radical reform of the legal capacity system began.

As a result of the reform, the Constitution of Georgia strengthened the obligation of the state to ensure the necessary conditions for the realisation of the rights and interests of persons with disabilities. Also in 2020, the Law on the Rights of Persons with Disabilities was adopted, which significantly improves the legal guarantees of persons with disabilities at the national level. The following important changes and innovations in the law should be positively assessed:

- The legal status of persons with disabilities is regulated by law, and legislative guarantees are created to protect their rights and freedoms.
- The law provides for specific obligations to state bodies, taking into account the scope of their activities.
- For the first time, the notion of universal design as an important innovation is reflected by the national legislation.
- The law provides assistance to persons with disabilities in the legal process, such as the possibility of obtaining state legal aid for a person with a disability.
- The concept of the biopsychosocial model has been developed/implemented.

In addition, in the second national strategy for the protection of human rights for 2022–2030, a separate subsection defines the need to strengthen systemic guarantees for the protection of the rights of persons with disabilities and expand their participation in all spheres of public life. The document is aimed at the effective implementation of a unified, systemic and internationally compliant policy for the protection of the rights of persons with disabilities. The strategy emphasises the effective participation of persons with disabilities directly in the development and implementation of such policies.

In general, it should be positively assessed that the legislation of Georgia increases the level of protection of the rights of persons with disabilities. Despite the implemented legislative innovations, the rights of persons with disabilities are still not fully protected and properly ensured, which is recognised by the state themselves: 'the current reality in Georgia, taking into account both statistical and content studies, hardly allows people with disabilities to live independently'.[24]

It is especially important to implement the changes established by law in a timely manner. This is especially true of those obligations, the fulfilment of which is determined by law until 2035. With regard to this issue, the current practice is creditable, which shows that, despite the fact that the state has set specific rather distant deadlines at the national level, the fulfilment of obligations under international law forces the state to provide services for persons with disabilities even before the deadline sets by national law.

24 Explanatory report on the draft law on the rights of PWD, 2021.

14 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in the Federal Republic of Germany

Richard Giesen

I. Introduction to the concept of active legal capacity in German law

1. Explanation of terms

In German law, a first distinction must be made between the right to be a subject before the law (*Rechtsfähigkeit*) and the capacity to act or exercise these rights (*Geschäftsfähigkeit*). The first is according to § 1 of the German Civil Code (*Bürgerliches Gesetzbuch*) granted to every human being with the completion of birth. Some areas the law also grants a legal position to the human being who has been conceived but not yet born, to the human being who has not even been conceived yet or to the human being who has already died.[1]

Furthermore, the term 'legal capacity' in German law includes not only the capacity to carry out legal actions (*Geschäftsfähigkeit*) but also the capability to be responsible for caused damage (*Deliktsfähigkeit*), the capability to be responsible for the breach of obligations (*Zurechnungsfähigkeit*) and the capability, for example, to consent to medical interventions (*Einwilligungsfähigkeit*).[2] In this contribution, active legal capacity shall only mean the capacity to acquire rights and undertake obligations, i.e. the capacity to do legal actions. A person that does not have the capacity to undertake legal actions is a subject before the law notwithstanding.

2. Kinds of scope of active legal capacity

a. Unrestricted active legal capacity

Generally, the German Civil Code provides for three levels of active legal capacity. A person in principle is of full and unrestricted capacity to undertake legal actions when he or she reaches the age of majority. Majority begins at the age of 18 (cf. § 2 of the German Civil Code).

b. Active legal incapacity

A person is not legally capable if he or she is not yet seven years old (§ 104, no. 1, of the German Civil Code) or if he or she is in a state of pathological mental disturbance,

1 See more closely Stephan Lorenz, Grundwissen – Zivilrecht: Rechts- und Geschäftsfähigkeit, *JuS*, 2010, p. 11.
2 Klaus Lachwitz, Auswirkungen der UN-Behindertenrechtskonvention auf das deutsche Geschäftsfähigkeits- und Betreuungs-recht, *KJ*, 2012, pp. 385, 388.

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which prevents the free exercise of will, unless the state by its nature is a temporary one (§ 104, no. 2, of the German Civil Code). There is no general procedure (any longer) to deprive a person of his or her active legal capacity in German law: On January 1, 1992, § 104, no. 3, of the German Civil Code was abolished, according to which a judicial incapacitation (*Entmündigung*) also resulted in the legal incapacity of the person concerned without exceptions and to all matters.[3] Incapacitation did not become effective by operation of law but was imposed in a separate court proceeding detached from any specific case. In contrast, if the requirements of § 104, no. 2, of the German Civil Code are met, a person is already incapable by operation of law without the need for a court decision declaring this. However, disputes are likely to arise as to whether the requirements of § 104, no. 2, of the German Civil Code are met in a specific case. If, for example, a debtor subsequently refuses to pay the purchase price after a contract has been concluded, citing his incapacity and the resulting invalidity of the contract, the creditor must take legal action. A court will then have to clarify ex post whether the requirements of § 104, no. 2, of the German Civil Code were fulfilled when the contract was concluded and thus the contract was invalid or not. In this case, the court judgment merely confirms the legal capacity or incapacity, which already results from the law. In this context, incapacity under § 104, no. 2, of the Civil Code is not a medical finding but a legal concept, the prerequisites of which the court must determine with a critical appraisal of the expert opinion.[4] Corresponding statements in a medical expert opinion or a certificate can therefore only be an indication. Nevertheless, medical expert assistance for the determination of a pathological mental disorder is required at the latest in case of dispute.[5]

Pursuant to § 105, paragraph 1, of the German Civil Code the declaration of intent of a person incapable of contracting is void – i.e. it does not have the legal effects intended according to its content from the beginning. A contract based on such a declaration of intent is invalid. If benefits have already been exchanged with regard to the declaration of intent, these benefits can in principle be reclaimed according to §§ 812 ff. of the German Civil Code. An exception for everyday transactions applies according to § 105a of the German Civil Code if a person of full age incapable of contracting enters into an everyday transaction that can be effected with funds of low value. Then, the contract he or she enters into is regarded as effective, as soon as performance has been effected and consideration rendered. This exception does, however, not apply in the case of considerable danger to the person or the property of the person incapable of contracting.

§ 104 of the German Civil Code applies in principle to all legal acts under private law, but there are special rules for marriage (§§ 1303, 1304 and 1314, para. 2, no. 1, of the German Civil Code) and the making of wills (§§ 2064, 2229 and 2247 of the German Civil Code).[6] For example, according to § 1304 of the German Civil Code, a person who is incapable of contracting may not enter into a marriage. According to § 2229 of the German Civil Code, a person who is incapable of realising the importance of a declaration of intent made by him and of acting in accordance with this realisation on account of pathological mental disturbance, mental deficiency or derangement of the senses may

3 BGBl (German Federal Law Gazette) 1990 I, 2002.

4 BGH (Federal Court of Justice) NJW 2021, 63, 65.

5 Andreas Spickhoff, *Münchner Kommentar zum BGB (MüKo)*, vol. 10, 9th ed., 2021, BGB (German Civil Code) s 104 note 32.

6 Jürgen Ellenberger, *Grüneberg Bürgerliches Gesetzbuch*, 81st ed., 2022, BGB, introduction to s 104 note 5.

not make a will. § 104 of the German Civil Code does not apply to the consent regarding medical measures since consent is not a legal act according to German legal understanding; therefore, for the consent to be effective, it is not the patient's active legal capacity that is required, but his or her natural capacity of will.[7]

If a declaration of intent is made to an incapable person, it does not become effective until it has reached his legal representative (§ 131, paragraph 1, of the German Civil Code). The parental custody of one parent is suspended if he or she is incapable of contracting according to § 1673, paragraph 1, of the German Civil Code. As long as the parental custody is suspended, a parent is not entitled to exercise it (§ 1675 of the German Civil Code). In this case, parental custody will be exercised by the other parent (§ 1678, paragraph 1, of the German Civil Code) or, if there is no other parent, by a guardian (§ 1773 of the German Civil Code) or a curator (§ 1809 of the German Civil Code).

c. Limited active legal capacity

In German law there is a state in between the legal capacity and the legal incapacity, where a person is of limited capacity to do legal actions. Generally, this only relates to minors who have reached the age of seven (§ 106 of the German Civil Code). Those need the consent of their legal representative for a declaration of intent as a result of which they do not receive only a legal benefit (§ 107 of the German Civil Code). For reasons of legal certainty, it does not matter in this context whether the declaration of intent is economically advantageous to the minor.[8] For example, a person with limited active legal capacity cannot make a declaration of intent to conclude a purchase agreement because this also creates an obligation for him or her (to pay the purchase price). On the other hand, he or she may conclude a donation agreement without consent, because this does generally not give rise to any obligation for the recipient.

Adult persons under custodianship are largely treated the same as persons with limited active legal capacity if a reservation of consent is expressly ordered.[9] However, the appointment of a custodian by itself does not affect the active legal capacity of the person under custodianship. Whether a person is legally capable of making an effective declaration of intent is determined solely in accordance with §§ 104 ff. of the German Civil Code. This will be discussed in more detail in a moment.

d. Partial active legal incapacity

In addition to the three levels of the German Civil Code, German case law also assumes partial incapacity to do legal actions in special cases if the state of pathological mental disturbance, which prevents the free exercise of will according to § 104, no. 2, of the German Civil Code, is limited to specific, objectively separable areas of life.[10] Courts have assumed partial active legal incapacity – for example, in the case of quarrelsome

7 Gerhard Wagner, *Münchner Kommentar zum BGB (MüKo)*, vol. 5, 8th ed., 2020, BGB (German Civil Code) s 630d note 21.

8 Stephan Lorenz, Grundwissen – Zivilrecht: Rechts- und Geschäftsfähigkeit, *JuS*, 2010, 11–12 f.

9 Ibid.

10 BVerfG (Federal Constitutional Court) NJW 2003, 1382, 1383; BGH NJW 1970, 1680, 1681; BGH NJW 1959, 1587.

mania for conducting lawsuits,[11] in the case of pathological jealousy for matrimonial matters,[12] and in the case of sexual addiction for calling sex hotlines.[13] Vice versa, a person who is incapable according to § 104, no. 2, of the German Civil Code can also be legally competent for individual areas if he or she is able to form his or her will in these areas freely and uninfluenced by the existing disorder: Marriage is an example of this, especially since the freedom of marriage under article 6 of the Basic Law for the Federal Republic of Germany must still be observed here.[14] However, these decisions are always case-by-case.

II. Private law regulation of active legal capacity in the course of implementing Article 12 of the Convention on the Rights of Persons with Disabilities

1. Process of ratification

Pursuant to Article 59, paragraph 2, of the Basic Law for the Federal Republic of Germany treaties that regulate the political relations of the federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. The respective federal law concerning the Convention on the Rights of Persons with Disabilities done in New York, December 13, 2006 (**CRPD**), was adopted by German Parliament on December 21, 2008, has been published in the German Federal Law Gazette on December 31, 2008, and entered into force on January 1, 2009.[15] Pursuant to Article 45, paragraph 2, of the CRPD, the Convention entered into force in Germany on the 30th day after the deposit of the instrument of ratification on March 26, 2009.[16]

Germany has not submitted any reservations or understanding/interpretation declarations to Article 12 of the CRPD.

2. General measures

a. Legal effect of the Convention on the Rights of Persons with Disabilities

According to the jurisdiction of the Federal Constitutional Court and the prevailing opinion in experts' literature, the act of federal law which ratifies the international treaty only contains a command to apply the international treaty. It does not transform the principle of international law (the treaty) into a principle of domestic law but merely orders the application of the principle of international law in domestic law.[17] This means that the

11 BSG (Federal Social Court) BeckRS 2019, 10922.
12 BGH NJW 1955, 1714.
13 BGH NJW-RR 2002, 1424.
14 BVerfG NJW 2003, 1382, 1383.
15 BGBl 2008 II, 1419.
16 BGBl 2009 II, 812.
17 Rudolf Streinz, *Sachs Grundgesetz*, 9th ed., 2021, GG art 59 note 65; Paulina Starski, *v. Münch/Kunig Grundgesetz-Kommentar*, 7th ed., 2021, GG art 59 note 102; Bernhard Kempen, *v. Mangoldt/Klein/Starck Grundgesetz*, 7th ed., 2018, GG art 59 note 90.

question of the implementation of the CRPD depends on further legal measures and cannot be judged on the basis of the federal law ratifying the CRPD.

b. Focal points

The CRPD sets procedural requirements for the implementation at the national level. According to Article 33 CRPD, three different national bodies are to ensure the implementation of the CRPD in Germany:

- A focal point located at the Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales*).
- The German Institute for Human Rights (*Deutsches Institut für Menschenrechte*) as an independent body (monitoring body): It is an independent body that promotes compliance with the rights of persons with disabilities and monitors the implementation of the CRPD in Germany. To this end, the monitoring body issues statements and recommendations on political, official or judicial decisions and – if necessary – reminds of compliance with the CRPD.
- The State Coordination Office located at the Federal Government Commissioner for Matters relating to Persons with Disabilities (*Staatliche Koordinierungsstelle bei dem Beauftragten der Bundesregierung für die Belange von Menschen mit Behinderungen*): Its purpose is to facilitate the implementation of the CRPD and to actively involve persons with disabilities and the broad civil society in the implementation process. The coordination office is thus the interface between civil society and the state level. It performs its task in particular through public relations work and awareness-raising measures.

c. National Action Plan 1.0 and 2.0

For the implementation of the CRPD, the federal government has drawn up a National Action Plan (NAP). The NAP 2.0 from June 2016 is a further development of the first National Action Plan from 2011. All federal ministries are involved in the NAP 2.0 with different activities, projects and initiatives. A total of 175 new measures are described in 13 fields of action such as work and employment, education, rehabilitation and care or children and family.[18] As of December 17, 2020, of the 347 measures in the NAP (1.0 and 2.0), 137 measures (40%) have been completed, 77 measures (22%) have been implemented and are ongoing, 129 measures (37%) have been launched and are ongoing, two measures (under 1%) have not yet been launched, and two measures (under 1%) are not being implemented.[19]

18 Federal Ministry of Labour and Social Affairs, *Maßnahmenkatalog nach Handlungsfeldern des Nationalen Aktionsplans 2.0*, https://www.gemeinsam-einfach-machen.de/GEM/DE/AS/NAP/NAP_20/Massnahmen_NAP_20/massnahmen_nap_node.html, accessed July 18, 2022.

19 Federal Ministry of Labour and Social Affairs, *Statusbericht zum Nationalen Aktionsplan zur UN-Behindertenrechtskonvention*, 20, https://www.gemeinsam-einfach-machen.de/SharedDocs/Downloads/DE/AS/NAP2/Statusbericht_NAP.pdf?__blob=publicationFile&v=2, accessed July 18, 2022.

The current status of all measures can be viewed on the National Action Plan website.[20] For example, with effect to the January 1, 2021, the terms 'feeble-mindedness' and 'abnormality' in § 20 of the German Criminal Code were replaced by the terms 'intelligence impairment' and 'disorder' in relation to a person's lack of criminal responsibility. With effect from January 1, 2020, the so-called inclusion service posts were established in the area of responsibility of the Federal Ministry of Defence. As of January 1, 2020, there were 117 inclusive service posts at the Bundeswehr.

In 2021, the German Institute for Human Rights called for a comprehensive new edition in the form of a NAP 3.0 in the next (i.e. current) election period.[21] However, such a NAP has not yet been launched.

d. Federal Participation Act and Federal Equal Opportunities for Persons with Disabilities Act

Furthermore, a Federal Participation Act (*Bundesteilhabegesetz*) was drafted, and the Federal Equal Opportunities for Persons with Disabilities Act (*Behindertengleichstellungsgesetz*) was modified. According to the explanatory memorandum to the Federal Participation Act,[22] the following goals, inter alia, have been achieved with regard to the CRPD:

- The understanding of an inclusive society was taken into account through a new definition of disability.
- Services were to be provided from a single source, and time-consuming conflicts of responsibility between the institutions were to be avoided.
- The incentives to take up an occupation on the general labour market were to be improved on a personal and institutional level.
- Benefits for participation in education were to be improved, especially with regard to people with disabilities who are studying.

3. Measures concerning active legal capacity

a. No material changes of active legal capacity

It should be noted right at the outset that the prerequisites for the assumption of active legal incapacity have not changed in German law since the CRPD was ratified. The compatibility of the German regulations regarding active legal capacity with the CRPD is

20 Federal Ministry of Labour and Social Affairs, *Maßnahmenkatalog nach Handlungsfeldern des Nationalen Aktionsplans 2.0*, https://www.gemeinsam-einfach-machen.de/GEM/DE/AS/NAP/NAP_20/Massnahmen_NAP_20/massnahmen_nap_node.html; Federal Ministry of Labour and Social Affairs, *Maßnahmenkatalog nach Handlungsfeldern des Nationalen Aktionsplans 1.0*, https://www.gemeinsam-einfach-machen.de/GEM/DE/AS/NAP/NAP_10/Massnahmen_NAP/massnahmen_nap_node.html, accessed July 18, 2022.

21 German Institute for Human Rights,'*Institut fordert umfassenden Nationalen Aktionsplan 3.0 in der nächsten Wahlperiode*, May 5, 2021, https://www.institut-fuer-menschenrechte.de/aktuelles/detail/institut-fordert-umfassenden-nationalen-aktionsplan-30-in-der-naechsten-wahlperiode, accessed July 18, 2022.

22 Explanatory memorandum (September 5, 2016) German Bundestag document no 18/9522, 2 f.

disputed in German literature;[23] however, the remarks under § I in this contribution had been the standard before the CRPD was ratified and have not changed since then.

b. Reform of legal custodianship

The area in which the impact of the CRPD on the German legal system is most strongly discussed is the law concerning legal custodianship/guardianship. For example, in 2011, the Federal Constitutional Court questioned the German regulations on compulsory treatment of mentally ill persons who are housed.[24] On February 26, 2013, an amendment to the law came into force that implemented the need of consent to medical measures under custodianship that the Federal Constitutional Court had taken from the CRPD (then § 1906, paragraphs 3 and 3a, of the German Civil Code, now § 1832).

However, the most significant adaptation of the German legal system to Article 12 of the CRPD entered into force on January 1, 2023. The German parliament passed a law on March 5, 2021 that comprehensively reformed legal custodianship in Germany. The legal changes are described as 'the biggest reform of the law of parent and child, guardianship, care and custodianship since 1900'.[25] Concerning legal custodianship, the changes are aimed at strengthening the self-determination and autonomy of people in need of support in the early stages. Through the amendments, the German legislator has clarified that custodianship primarily ensures support for the person in need of care in the management of his or her affairs through his or her own self-determined action and that the custodian may only use the means of representation insofar as it is necessary. The priority of the desires of the person under custodianship is regulated as a central standard of custodianship law. The person concerned is also to be better informed and more involved in all stages of the custodianship procedure, in particular in the court decision on whether and how to appoint a custodian, in the selection of the specific custodian, but also in his or her control by the custodianship court.[26]

The principle of 'support before representation' has replaced the previously prevailing representation solution.[27] In addition, the term of the well-being of the person under custodianship has been replaced by the term of the desire and the will of the person under custodianship for as the decisive criterion for the custodian's actions. In general, custodianship law has moved from 'substituted decision-making' to 'supported decision-making'.[28]

Both points can be well illustrated by § 1901 of the German Civil Code, which became § 1821 of the German Civil Code on January 1, 2023. In the opinion of the legislator, the provision, as the central norm of custodianship law, contains the substantive standard for every action of the custodian and is thus the 'magna carta' for the entire legal custodianship system.[29]

23 Klaus Lachwitz, Auswirkungen der UN-Behindertenrechtskonvention auf das deutsche Geschäftsfähigkeits- und Betreuungsrecht, *KJ*, 2012, pp. 385, 397; Adrian Schmidt-Recla, *BeckOGK*, February 1, 2022, BGB s 1896 note 45.1.

24 BVerfG NJW 2011, 2113; BVerfG NJW 2011, 3571.

25 Claus-Henrik Horn, Die Reform des Vormundschafts- und Betreuungsrechts, *ZEV*, 2020, p. 748.

26 Explanatory memorandum (November 18, 2020) German Bundestag document no 19/24445, 3.

27 Ibid., 2.

28 Ibid., 249.

29 Ibid.

Table 14.1 Changes of the custodianship system in Germany, BGBl, 2021 I, 873

§ 1901 (until December 31, 2022)	*§ 1821 (since January 1, 2023)*
Para. 1: The custodianship includes all activities that are necessary to attend to the affairs of the person under custodianship from a legal point of view in accordance with the following provisions.	Para. 1: The custodian shall undertake all activities that are necessary to legally manage the affairs of the person under custodianship. The custodian shall assist the person under custodianship for to manage his or her legal affairs by his or her own and shall only make use of his or her power of representation under § 1823 insofar as this is necessary.
Para. 2: The custodian must attend to the affairs of the person under custodianship in a manner that is conducive to his welfare. The best interests of the person under custodianship also includes the possibility for him, within his capabilities, to shape his life according to his own wishes and ideas.	Para. 2: The custodian shall manage the affairs of the person under custodianship in such a way that he or she can organise his or her life according to his or her wishes within the scope of his or her possibilities. To this end, the custodian shall ascertain the wishes of the person under custodianship.

III. Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities outside private law

Outside of issues relating to active legal capacity, the influence of Article 12 of the CRPD on German law is limited. At most, it could be argued that the norm has contributed to the admission of people under custodianship in federal elections. As recently as the 2013 Bundestag elections, a total of 81,220 persons under full custodianship were affected by an exclusion from the right to vote pursuant to § 13, no. 2, of the Federal Electoral Law (*Bundeswahlgesetz)*.[30] According to this standard, a person shall be disqualified from voting if a custodian has been appointed to attend to all his or her affairs. The Federal Constitutional Court declared this norm to be unconstitutional in a decision[31] from 2019, whereby it also dealt with Article 12 of the CRPD in this decision. However, the Federal Constitutional Court did not base the unconstitutionality precisely on Article 12 of the CRPD but rather stated that no absolute prohibition of exclusions from the right to vote can be derived from the norm.[32] The unconstitutionality followed from other considerations: The Federal Constitutional Court justified its decision by stating that § 13, no. 2, of the Federal Electoral Law violated both the principle that every citizen must be able to exercise his or her right to vote in an equal manner (Article 38, paragraph 1, sentence 1, of the Basic Law for the Federal Republic of Germany) and the prohibition of discrimination on the grounds of disability (Article 3, paragraph 3, sentence 2, of the Basic Law for the Federal Republic of Germany).[33]

30 Federal Ministry of Labour and Social Affairs, ed., *Studie zum aktiven und passiven Wahlrecht von Menschen mit Behinderung*, 2016, p. 22, https://www.bundesregierung.de/breg-de/service/publikationen/studie-zum-aktiven-und-passiven-wahlrecht-von-menschen-mit-behinderung-1838186.

31 BVerfG NJW 2019, 1201.

32 Ibid., 1208.

33 Ibid., 1209.

This reflects the general approach of the Federal Constitutional Court, which emphasises that it takes into account the CRPD as an aid to interpretation in determining the content and scope of the fundamental rights and constitutional principles of the Basic Law for the Federal Republic of Germany.[34] Therefore, a national court should argue in good faith with the views of the Committee on the Rights of Persons with Disabilities, but it does not have to adopt them, as the Committee on the Rights of Persons with Disabilities has not been given a mandate to interpret the text of the treaty in a binding manner.[35] As a result, German courts hardly ever find violations of the CRPD. The implementation of the CRPD is thus purely a matter of the political willingness of the legislator.

IV. The role of psychology in the course of implementing Article 12 of the Convention on the Rights of Persons with Disabilities

1. Support before representation

For some time now, associations have been calling for not replacing the decisions of a person under custodianship, especially with regard to Article 12 of the CRPD, but assisting him or her in exercising the decision: In this way, the person concerned can actually exercise his or her right to self-determination. The Central Ethics Committee at the German Medical Association, for example, referred to positive experiences in disability care and psychiatric care: there, many people with mental disabilities could be empowered to make self-determined decisions through the use of 'easy language' and trained recovery companions are successfully used to support acutely mentally ill patients.[36] These considerations were considered in the German reform of legal custodianship. As mentioned, the replacement of the previously prevailing representation solution by the principle of 'support before representation' was one of its biggest aims and thus responded to the associations' demands.

As far as the use of plain language is concerned, the National Action Plan 2.0 for the field of 'Access to Information and Communication/Digital Accessibility' aims to develop explanations of administrative acts, forms and other documents in easy language. Communication with the administration in particular can prove to be complicated. Since January 1, 2018, § 11, paragraph 2, of the Act on Equal Opportunities for Persons with Disabilities has stipulated that public authorities should explain administrative acts, general orders, public law contracts and forms in easy language to persons with intellectual disabilities and persons with mental disabilities upon request. According to the explanatory memorandum, this was also intended to meet the requirements of the CRPD.[37]

2. Trust through inclusion

Personal contact between the custodian and the person under custodianship is of outstanding importance for a successful custodianship: from a psychological standpoint, a

34 BVerfG NJW 2011, 2113, 2115.

35 BVerfG NJW 2017, 53, 58.

36 Statement of the Central Ethics Committee at the German Medical Association (Bundesärztekammer), Entscheidungsfähigkeit und Entscheidungsassistenz in der Medizin, *Deutsches Ärzteblatt*, 2016, p. A1.

37 Explanatory memorandum (March 9, 2016) German Bundestag document no. 18/7824, 22.

case study, which is also referred to in the explanatory memorandum to the reform of the custodianship law, shows that a procedure is trust-promoting and personalised if the wishes and intentions of the individual are determined in an open-ended process, if it is checked whether they have been correctly understood and if the decision on whether to follow the wishes is then made discursively and by examining the basis of the facts.[38]

Involving the person under custodianship in both factual and communicative terms from the outset can be an important foundation stone for the relationship of trust. This relationship of trust between all actors also includes the judicial officer (*Rechtspfleger*): supervision in custodianship law is carried out by the custodianship court and in particular in the person of legal officers. Therefore, it is a weighty concern of people under custodianship not to perceive the custodianship court as a faceless institution.[39] If the judicial officer in charge is already known personally, the inhibition threshold to approach the court with a concern in the custodianship proceedings is significantly lowered.[40] On the other hand, it is only by getting to know the person in question personally that the custodian gets a more accurate picture of the person, his or her wishes and also any obstacles.[41]

In order to give a boost to communication between all parties involved, § 1863, paragraph 1, of the German Civil Code provides since January 1, 2023, that upon taking over the custodianship, the custodian must draw up a report on the personal circumstances of the person being under custodianship, containing in particular information on the personal situation of the person under custodianship, the goals of the custodianship, measures already taken and intended and the wishes of the person under custodianship for with regard to the custodianship. This report is to be sent to the custodianship court, which in turn may discuss it with the person under custodianship and the custodian in a personal meeting. In addition to this initial report, § 1863, paragraph 3 of the German Civil Code also provides for an annual report, the contents of which the custodian must discuss with the person under custodianship.

This is an example of how a procedural regulation can strengthen communication between the parties involved and thus increase the quality of custodianship with regard to Article 12 of the CRPD.

V. Restrictions of active legal capacity – procedural aspects

1. No general procedure to deprive a person of his or her active legal capacity

Since 1992, there is no general procedure to deprive a person of his or her active legal capacity in German law. The appointment of a custodian does not affect the active legal capacity of the person under custodianship. Therefore, Germany holds a special position today with its custodianship law and preserves the active legal capacity to a greater extent than almost any other legal system.[42] Whether a person is legally capable of making an

38 Federal Ministry of Justice, ed., *Qualität in der rechtlichen Betreuung*, Final Report, 2018, p. 436, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/DownloadDraft.aspx?key=gmqpViJkVZfCteOsbUBadgTDBoTroeQCglIqEoP1O4uZ/UBNgcSUaklXUTS2bI1ztxhy/C/dWgs1iolvns4oaA=.

39 Explanatory memorandum (September 25, 2020) German Bundesrat document no 564/20, 398 ff.

40 Ibid.

41 Ibid.

42 Volker Lipp, UN-Behindertenrechtskonvention und Betreuungsrecht, *BtPrax*, 2010, p. 263.

effective declaration of intent is determined solely in accordance with §§ 104 ff. of the German Civil Code (see I.2.a.).

2. Appointment of a custodian

a. General remarks

If a person of full age, by reason of a mental illness or a physical, mental or psychological handicap, cannot in whole or in part take care of his legal affairs, the custodianship court, on his application or ex officio, appoints a custodian for him or her (cf. § 1814, paragraph 1, of the German Civil Code). Therefore, a suitable person can be appointed as custodian in formal proceedings before a court by means of an individual decision of a judge which can be challenged and corrected by legal remedies. This procedure is governed by §§ 271 et seq. of the Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*). The appointment of a custodian does not in itself take away the legal capacity of the person concerned. He or she remains capable of doing legal acts alongside the custodian, both to make and to receive declarations of intent.

b. Procedure

The appointment of a legal custodian is (simplified) as follows:[43]

1. A custodianship is initiated by the person concerned (rarely) or by third parties, such as family members or institutions (assisted living, nursing home, etc.).
2. The custodianship court orders a medical report with the aim of determining whether there is an illness or disability that medically justifies custodianship.
3. The custodianship authority writes a social report. This report discusses whether other support measures (instead of legal custodianship) should be considered or how the custodianship should be structured. This report is based on a discussion with the person concerned.
4. The custodianship court decides whether the proposed custodianship is necessary. The basis for the decision is the social report, the medical report and the personal interview with the person concerned. The court may also appoint guardian ad litem for the custodianship proceedings – namely, if it is necessary to safeguard the interests of the person concerned, in particular if he or she is obviously unable to express his or her will.
5. If custodianship is required, the custodianship court shall determine the scope of the legal custodianship (areas of responsibility), the period of time and the person providing custodianship.

This procedure has hardly changed; since January 1, 2013, the authority may only use force against the person concerned who refuses to cooperate in the proceedings and may only open, enter and search the person's home without the person's consent if the court

43 Report of the German Institute for Human Rights, *Entwicklung der Menschenrechtssituation in Deutschland: Juli 2020 – Juni 2021*, December 23, 2021, German Bundestag document no 20/280, 94.

has expressly ordered this (cf. § 278, paragraphs 6 and 7 of the Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction).

3. Order of a reservation of consent

a. General remarks

In case there is a substantial danger for the person or the property of a person under custodianship, the custodianship court orders that the person under custodianship requires the consent of the custodian for a declaration of intent that relates to the group of tasks of the custodian (cf. § 1825, paragraph 1, sentence 1, of the German Civil Code). The result of the reservation of consent is that the person under custodianship requires the custodian's consent to a declaration of intent that concerns the custodian's area of responsibility. This means that the situation of a person in respect of whom a reservation of consent has been ordered and who is not already incapable to do legal actions in accordance with § 104, no. 2, of the German Civil Code is largely similar to a person with limited capacity (see I.2.c.). The person nevertheless does not have limited capacity according to his or her status, but the same rules are applied if this is expressly provided for in custodianship law.[44]

The order of a reservation of consent is always restricted to the area of responsibility that has already been assigned to the legal custodian (so-called accessoriness of the reservation of consent).[45] According to § 1815, paragraph 1, of the German Civil Code, a custodian may be appointed only for groups of tasks in which the custodianship is necessary. The German Civil Code deliberately does not provide a catalogue of possible or practically frequent or sensible areas of responsibility but attempts to enable the judge with the criterion of necessity to identify areas of life individually related to the needs of the person concerned in which legal custodianship appears to be necessary.[46] Accordingly, it Is up to the court – with the assistance of expert opinions – to determine areas of responsibility customised to the individual case. Nevertheless, according to § 1825, paragraph 2, of the German Civil Code, a reservation of consent may not extend to a number of declarations of intent that concern the highly personal sphere of life, such as declarations of intent that are directed to entering into a marriage or creating a civil partnership, to dispositions mortis causa and to declarations of intent for which a person with limited capacity to contract under the provisions of Books Four (Family Law) and Five (Law of Succession) does not need the consent of his legal representative. This list is not exhaustive, however.

A reservation of consent may not be ordered against the free will of the adult (cf. § 1825, paragraph 1, sentence 2, of the German Civil Code).

b. Procedure

In principle, the same procedural rules apply as for the initial appointment of a custodian. In contrast to the appointment of a custodian, the order of a reservation of consent is

44 Angie Schneider, *MüKo*, 8th ed., 2020, BGB s 1903 note 5; Gabriele Müller-Engels, *BeckOK*, 62th edn, February 1, 2022, BGB s 1903 note 18.

45 Ibid., note 2.

46 Adrian Schmidt-Recla, *BeckOGK*, February 1, 2022, BGB s 1896 note 145.

always made ex officio.[47] In any case, an expert opinion must be obtained; a medical certificate is not sufficient.[48] In urgent cases, the ordering of a provisional reservation of consent by means of a temporary order pursuant to §§ 300 ff. of the Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction may be considered.

VI. Institutional aspects of legal custodianship

1. Principle of single appointment

Pursuant to § 1816, paragraph 1, of the German Civil Code the custodianship court appoints as custodian a natural person who is suited to take care of the affairs of the person under custodianship from a legal point of view within the group of tasks determined by the court and to take care of his person to the extent necessary. In addition, according to § 1819, paragraph 3, of the German Civil Code, it is also possible to appoint the employee of a custodianship association (association custodian) or the employee of a public authority competent in custodianship matters (public authority custodian) if those are solely or partly employed there as custodian. However, this requires the consent of the association or the authority.

All of the variants have in common that a single person is appointed as custodian. The association or the authority itself can only be appointed as a legal custodian in exceptional cases where the single appointment as a primary option is not effective.[49]

2. Principle of volunteerism

A person who conducts custodianships as part of the exercise of his occupation or profession should be appointed custodian only if no other suitable person is available who is prepared to conduct the custodianship on a voluntary basis (cf. § 1816, paragraph 5, of the German Civil Code). However, if a person wishes to have a professional custodian, although a volunteer custodian is available, the volunteer custodian would not be a suitable person within the meaning of this standard and the court could appoint a suitable professional custodian and thus ultimately also take into account the right of self-determination of the person concerned.[50]

3. Principle of suitability

If a person of full age suggests a person who may be appointed as his or her custodian, this suggestion should be followed unless it is inconsistent with the best interests of the person of full age (cf. § 1816, paragraph 2, of the German Civil Code, which has been in force since January 1, 2023 and, in comparison with the previous § 1897, paragraph 4, emphasises the importance of the wishes of the person under custodianship). However, what is always required is that the custodian has the necessary professional and personal suitability.

47 Gabriele Müller-Engels, *BeckOK*, 62th ed., February 1, 2022, BGB s 1903 note 26.
48 Ibid.
49 Ibid., s 1900 note 1.
50 Explanatory memorandum (September 25, 2020) German Bundesrat document no 564/20, 327.

With regard to professional suitability, the courts currently have a wide margin of discretion. There are no minimum requirements; in principle, it is not necessary – although this is widely demanded – to complete a corresponding course, training or even an internship.[51] On January 1, 2023, § 23 of the newly drafted Custodianship Organisation Act (*Betreuungsorganisationsgesetz*) came into force, which requires professional custodians to be registered and to provide a proof of expertise. This change by the legislature was a reaction on the UN Committee of Experts' Concluding Observations on Germany's First State Report that recommends in paragraph 26 (b) to 'develop professional quality standards for supported decision-making mechanisms'.[52]

VII. Active legal capacity and its restrictions in the light of statistical data

1. Legal custodianship

Once again, a distinction must be made between legal custodianship and the ordering of a reservation of consent. The latter alone leads to a restriction of active legal capacity (see previous discussion).

a. Legal custodianships in total

However, how many people in Germany are currently under legal custodianship is unclear even to the German Institute for Human Rights (DIMR), which acts as a monitoring body under Article 33 CRPD.[53] The available figures are outdated. As of December 31, 2015, legal custodianship existed for about 1,280,900 people.[54] No more nationwide figures are available for 2016 and the following years. The reason for this is a change in statistics. From 2018, a detailed data collection in legal custodianship proceedings was actually planned. So far, however, the German Federal Ministry of Justice has not been able to publish any figures because many federal states do not report their figures. Legal custodianship thus affects a significant proportion of the total population in Germany. At the end of 2015, this was approximately 1.55%.[55]

In 1995, the number of legal custodianships was still around 625,000, so it has doubled in the last 20 years.[56] The reasons given are that the average age is growing, family structures are dissolving, and social institutions can provide less due to financial constraints.[57] In addition, it is becoming increasingly difficult to apply for and receive social support services. The number of people with disabilities and complex problems is also increasing. Since 2012, however, there has been a slight decline in the number of people under custodianship.

51 Martin Weber, Die Entwicklung des Betreuungsrechts seit 2019, *NZFam*, 2021, pp. 993, 995.
52 Explanatory memorandum (September 25, 2020) German Bundesrat document no 564/20, 507.
53 Report of the German Institute for Human Rights, *Entwicklung der Menschenrechtssituation in Deutschland: Juli 2020 – Juni 2021*, December 23, 2021, German Bundestag document no 20/280, 95.
54 Ibid.
55 Ibid.
56 Federal Association of Professional Custodians, *Rechtliche Betreuung: Daten und Fakten*, https://www.berufsbetreuung.de/berufsbetreuung/was-ist-rechtliche-betreuung/daten-und-fakten/, accessed July 18, 2022.
57 Ibid.

b. First-time appointments

However, if one wants to understand whether something has changed in practice as a result of the ratification of the CRPD, it is particularly useful to look at the number of first-time appointments of a custodian. This refers to cases where a person is placed under custodianship for the first time.

One can clearly see that the numbers have decreased significantly after the ratification of the CRPD, after 17 years of continuous increase before. Whether there is a connection between the two aspects is speculative in the end, but it would seem obvious.

c. Principle of volunteerism

Although the law on custodianship provides for custodianships to be conducted on a voluntary basis (see previous discussion), the number of custodianships conducted on a voluntary basis has been declining for years: in Baden-Württemberg, for example, of the custodianships established in 2011, around 63% were conducted on a voluntary basis and just under 37% on a professional basis. In 2020, only 53% of the newly established custodianships were run on a voluntary basis, while almost 47% were run on a professional basis.[58]

2. Reservation of consent

The order of a reservation of consent leads to a restriction of the legal capacity (see previous discussion). Therefore, the number of these orders is particularly interesting in the context of this contribution. However, since 2001 the figures for first-time orders, expansions and extensions have been combined in this context and no longer shown separately.

At first glance, it seems that the development in the number of custodianships is also reflected in the number of order of reservations: From 2011 to 2015, the number – in percentage terms – decreased sharply. However, 2016 was the year with the most ordered reservations of consent, so this appearance may be deceptive. All in all, I believe that the number of reservations of consent is not influenced by the CRPD because the legal prerequisites for active legal capacity have not changed as a result (see previous discussion). The picture is different when it comes to the appointment of custodians, however.

Overall, the number of orders of reservation of consent is also very low, especially in comparison to the first-time appointments of a custodian. This shows that the courts handle this instrument very carefully.

3. State expenditure

In Germany, so-called inclusion assistance (*Eingliederungshilfe*) is provided to disabled people who do not receive the required service from others or from providers of other social welfare. According to § 90 of Book IX of the Social Code – Rehabilitation and Participation of Disabled Persons (*Sozialgesetzbuch IX*), the task of inclusion assistance is to enable persons entitled to benefits to lead an individual life in accordance with human dignity and to promote full, effective and equal participation in life in society. The benefit is intended to enable them to plan and lead their lives in a manner as self-determined and responsible as possible.

58 Municipal Association for Youth and Social Affairs Baden-Württemberg, *Betreuungsbehördenstatistik Baden-Württemberg*, https://www.kvjs.de/soziales/service-betreuungsrecht/betreuungsstatistik/#c29716, accessed July 18, 2022.

Table 14.2 First-time appointments of a custodian in Germany

Year	*First-time appointments of a custodian*	*Note*
1992	75,170	First major custodianship reform
1993	104,511	
1994	113,106	
1995	123,316	
1996	141,997	
. . .	. . .	
2004	218,254	
2005	223,365	
2006	222,843	
2007	224,079	
2008	237,591	
2009	239,962	Climax; ratification of the CRPD
2010	239,068	
2011	233,332	
2012	221,579	
2013	210,978	
2014	198,832	
2015	197,739	
2016	192,014	Lowest figure since 1999

Source: Federal Office of Justice, Compilation of Federal Results[59]

Table 14.3 Order of a reservation of consent in Germany

Year	*Order of a reservation of consent*	*Note*
2004	10,843	
2005	11,652	
2006	11,371	
2007	12,039	
2008	13,318	
2009	14,132	Ratification of the CRPD
2010	14,860	
2011	14,207	
2012	13,582	Decreasing numbers
2013	13,278	
2014	13,189	
2015	12,429	
2016	15,638	Climax

Source: Federal Office of Justice, Compilation of Federal Results[60]

59 Federal Office of Justice, *Betreuungsverfahren: Zusammenstellung der Bundesergebnisse für die Jahre 1992 bis 2001*, https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Betreuungsverfahren.pdf?blob=publicationFile&v=14, accessed July 18, 2022.

60 Federal Office of Justice, *Betreuungsverfahren: Zusammenstellung der Bundesergebnisse für die Jahre 1992 bis 2001*, November 30, 2018, https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Betreuungsverfahren.pdf?blob=publicationFile&v=14, accessed July 18, 2022.

In 2020, state expenditure on inclusion assistance amounted to EUR 21,630,700,000.[61] In 2005, the amount was 11,288,144,000; in 2009, it was 13,287,204,000; and in 2019, it was 20,972,740,000. The number of people who received inclusion assistance benefits amounted to 939,680.[62] In 2005, the number of recipients was 585,465; in 2009, it was 724,655; and in 2019, it was 950,450.[63] However, the numbers of 2020 and the years before can be compared only to a certain degree because inclusion assistance has been regulated in § 90 of Book IX of the Social Code just since 2020, but before that in a different form in § 53 of Book VII of the Social Code.

Further data on the topic of this contribution could not be found.

VIII. The relation between private law restrictions of active legal capacity and protection of persons with disabilities under criminal law

In Germany, there is no legal norm that is specifically designed to protect people with disabilities when concluding contracts. However, some cases fall within the scope of § 291 of the German Criminal Code (*Strafgesetzbuch*), and the assets of disabled persons are also protected by §§ 263 and 266 of the German Criminal Code.

1. Usury

According to § 291 of the German Criminal Code, anyone who exploits the predicament, lack of experience, lack of judgement or substantial weakness of will of another by allowing pecuniary benefits to be promised or granted to them or a third party (1) for the letting of residential premises or additional services connected therewith, (2) for the granting of credit, (3) for any other service or (4) for the procurement of one of the previously indicated services which are in striking disproportion to the value of the service or its procurement incurs a penalty of imprisonment for a term not exceeding three years or a fine (*usury*). The provision aims at protecting against blatant economic abuse in cases where the contractual parity is disturbed due to structural inferiority of the other party.[64] According to § 291 of the German Criminal Code, the victim's situation of weakness may lie in his or her lack of judgement. This is the case if the victim is incapable of making reasonable decisions in business life due to permanent mental deficits because he or she cannot be guided by reasonable motives and is unable to evaluate the mutual benefits and the economic consequences.[65] The intellectual deficiency does not have to be permanent on the part of the victim; it is sufficient if he was mentally incapable of understanding the

61 Federal Statistical Office of Germany, *Ausgaben und Einnahmen der Eingliederungshilfe nach dem SGB IX*, 2021, https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Soziales/Sozialhilfe/Tabellen/22162-eh-ausg-einn-2020.html, accessed July 18, 2022.

62 Federal Statistical Office of Germany, *Empfängerinnen und Empfänger von Eingliederungshilfe nach dem SGB IX in Deutschland im Laufe des Berichtsjahres 2020*, 2021, https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Soziales/Sozialhilfe/Tabellen/22161-eh-empf-laender-ilj-2020.html, accessed July 18, 2022.

63 Federal Statistical Office of Germany, *Empfänger von Eingliederungshilfe für Menschen mit Behinderung nach Altersgruppe in den Jahren 2005 bis 2020*, https://de.statista.com/statistik/daten/studie/1260781/umfrage/empfaenger-von-eingliederungshilfe-nach-alter/, accessed July 18, 2022.

64 Panos Pananis, *MüKo*, 4th ed., 2022, StGB (German Criminal Code) s 291 note 1.

65 OLG Brandenburg BeckRS 2019, 31132.

transaction at the time of the offence.[66] However, most often the lack of judgement will be the result of a mental deficiency.[67]

The fact that the victim's legal transaction is ineffective – for example, due to lack of active legal capacity – according to §§ 104 ff. of the German Civil Code, is irrelevant for criminal liability according to § 291 of the German Criminal Code.[68] Criminal and civil law protection stand side by side in this context.

2. Fraud and embezzlement

In chapter 22 of the German Criminal Code, there are the two central criminal norms that concern pecuniary offences regardless of the mental condition: fraud and embezzlement. Pursuant to § 263, paragraph 1, of the German Criminal Code, a person who, with the intention of obtaining an unlawful pecuniary benefit for themselves or a third party, damages the assets of another by causing or maintaining an error under false pretences or distorting or suppressing true facts incurs a penalty of imprisonment for a term not exceeding five years or a fine (*fraud*). Pursuant to § 266, paragraph 1, of the German Criminal Code, a person who abuses the power conferred on them by law, by commission of an authority or legal transaction to dispose of the assets of another or to make binding agreements for another or whoever breaches their duty to safeguard the pecuniary interests of another which are incumbent upon them by reason of law, by commission of an authority, legal transaction or fiduciary relationship, and thereby adversely affects the person whose pecuniary interests they were responsible for, incurs a penalty of imprisonment for a term not exceeding five years or a fine (*embezzlement*).

Taking advantage of a mental weakness is not a criterion of the embezzlement under § 266 of the German Criminal Code. The decisive factor is the abuse of a legal power to dispose of the assets of another or to make binding agreements for another (§ 266, para. 1, var. 1, of the German Criminal Code) or the breach of the duty to safeguard the pecuniary interests of another – even on the basis of a de facto fiduciary relationship (§ 266, para. 1, var. 2, of the German Criminal Code). Therefore, a custodian who is appointed to look after property matters of the person under custodianship has basically the legal power in accordance with § 266, para. 1, var. 1, of the German Criminal Code to commit an act of embezzlement at the expense of the person under custodianship, even if he or she does not exploit the mental weakness of the person under custodianship to do so.[69]

The offence of fraud under § 263 of the German Criminal Code is determined by the characteristics of deception and the disposal of assets. Taking advantage of mental weakness instead of deception is not a criterion of the offence.[70] Whether the victim is particularly gullible is irrelevant.[71] A disposal of assets is any action, tolerance or omission that attributably causes a reduction of property. Any actual influence on the property is sufficient in this regard; a disposition in the sense of civil law or even a declaration of intent is not required. Even a person who is incapable of doing legal actions can make such a

66 Heiner Christian Schmidt, *BeckOK*, 49th ed., May 1, 2022, StGB s 291 note 26.
67 cf Explanatory memorandum (October 4, 1962) German Bundestag document no 4/650, 439.
68 Panos Pananis, *MüKo*, 4th ed., 2022, StGB s 291 note 6.
69 Heinz Holzhauer, Betrügerisches Ausnutzen von Unwissenheit oder Schwäche, *ZRP*, 2010, p. 87.
70 Ibid., 88.
71 Kristian Kühl, *Lackner/Kühl/Heger Strafgesetzbuch*, 29th ed., 2018, StGB s 263 note 20.

disposition of assets, whereas in civil law such a disposition would be void according to § 105 of the German Civil Code.[72] Here, too, there is thus double protection of persons who do not have full legal capacity.

IX. Concluding remarks

The ratification of the CRPD has not led to any drastic changes in the prerequisites for active legal capacity in German law. However, it was already well positioned in this regard: The removal of incapacitation from § 104, no. 3, of the German Civil Code already took place in 1992. From this date on, there was no general procedure to deprive a person of his or her legal capacity detached from a specific case in German law. It should also be emphasised that the appointment of a legal custodian does generally not lead to the deprivation of the legal capacity of the person concerned. The ordering of a reservation of consent is an absolute exception which is reflected in the statistical data.

With regard to Article 12 of the CRPD, the Committee on the Rights of Persons with Disabilities recommended to Germany in its concluding observations on the initial report of Germany that all forms of substitute decision-making should be abolished and replaced by a system of assisted decision-making.[73] Germany responded to this with a comprehensive reform of the law on legal custodianship. The principle of support before representation replaced the previously prevailing representation solution in German custodianship law on January 1, 2023. In addition, the term of the well-being of the person under custodianship has been replaced by the term of the desire and the will of the person under custodianship for as the decisive criterion for the custodian's actions. In general, custodianship law has moved from substituted decision-making to supported decision-making as demanded by the committee. Even before that, the declining number of legal custodian appointments showed that the CRPD has probably led courts to be even more cautious about not hastily appointing a custodian for a person concerned. The number of reservations of consent leading to a deprivation of legal capacity is at a consistently low level.

Overall, I am therefore of the opinion that Germany maintains a system that is generally in line with Article 12 CRPD. The difficult task of balancing the duty to protect people with impairments while at the same time giving them the greatest possible autonomy is, in my opinion, mastered. I see a need for improvement in the statistical data situation regarding legal custodianship: more recent data must finally be provided here. In addition, I doubt that the principle of volunteerism is still appropriate in the face of constantly increasing challenges for custodians and shifting realities if you look at the data. Lastly, the hesitant approach of the courts to actually use the CRPD as a yardstick for their decisions can be criticised.

72 Walter Perron, *Schönke/Schröder Strafgesetzbuch*, 30th ed., 2019, StGB s 263 note 55.

73 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Germany*, May 13, 2015, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/096/31/PDF/G1509631.pdf?OpenElement, accessed July 18, 2022.

15 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in India

Syed Ashfaq Hussain and Shaik Nazim Ahmed Shafi

1. Introduction

India has signed the United Nations Convention on the Rights of Persons with Disabilities, 2006 (hereinafter CRPD), and ratified the same in October 2007.[1] To give effect to the principles enshrined in the CRPD, the government has adopted the Rights of Persons with Disabilities Act, 2016 (hereinafter RPWD, 2016).[2] This is not to say that India did not have any national policy or legislation to address issues relating to persons with disabilities. It has in fact adopted a couple of laws in the past.[3] But the impetus to look at this neglected area has come from the United Nations since the time it was involved in promoting human rights for disabled persons in 1975.[4]

Article 12 of the CRPD affirms that persons with disabilities, including disability due to mental illness, have the right to recognition everywhere as persons before the law. The genesis of this principle is found in the notion of equality which permeates the human rights law that requires equal recognition of rights of disabled persons before the law and which allows them the right to 'enjoy legal capacity on an equal basis with others in all aspects of life'.[5] This is a significant change since it abandons the presumption of incompetence which legally exists against persons with physical or mental disability in India. Consequently, the concept of legal capacity, in its traditional form has been transformed. The recently adopted RPWD, 2016, and Mental Healthcare Act, 2017 (MHCA, 2017), are a manifestation of this endeavour. We shall pursue a more detailed discussion later in this regard. Nevertheless, we must examine to what extent this change, often described as a 'paradigm shift', has been realised in India.

1 The United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted on December 13, 2006, at the headquarters in New York. See, A/RES/61/106. It was opened for signature on March 30, 2007. India signed the Convention on the very opening day itself, which after its ratification, has come into force from May 3, 2008. However, India has not signed the Optional Protocol to the Convention.

2 This act has come into force since April 19, 2017. In order to implement this legislation, the government has also adopted the Rights of Persons with Disabilities Rules in 2017.

3 See the text accompanying footnotes, 28, 33 and 92–97.

4 See the UN Declaration on the Rights of Disabled Persons, UNGA Res. 3447(XXX) of December 9, 1975.

5 Equality before the law is a basic principle of human rights protection and is indispensable for the exercise of all human rights. It is grounded in the International Covenant on Civil and Political Right, 1966, which asserts that '[e]veryone shall have the right to recognition everywhere as a person before the law'. Article 16 of the ICCPR.

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It is also significant to mention that the disability rights movement in India has put the Indian government under pressure to address the challenges confronted by persons with disabilities.[6] This was a pressing need, not only from the point of view of the disability itself but more so from a human rights perspective, since people with disabilities have been highly stigmatised with negative stereotypes and barriers that practically excluded them from participating in mainstream society. Presumption of helplessness, incapacity and even superstitious beliefs were barriers which denied and deprived such persons their fundamental right to equality and equal protection before the law.[7]

The Supreme Court has also been unremitting in its efforts to put an end to several discriminatory practices against persons with disabilities in society. It has delivered several exemplary judgments, exercising its judicial wisdom and relying upon the fact that India was a party to the CRPD even though there was no enabling national legislation at that point in time.[8] We shall review some of these cases decided by the Court, bearing in mind that the decisions rendered by the Supreme Court are the law of the land. Article 141 of the Constitution provides, 'The law declared by the Supreme Court shall be binding on all courts within the country of India'.

Before we proceed further, we must clarify the scope of the study and identify its objectives. As stated earlier, Article 12 of the CRPD confers legal capacity upon persons with disabilities in all aspects of life. This has fostered a new paradigm shift in protecting the rights of physically and mentally challenged people in the world. It is in this perspective that the main object of this chapter is limited to an examination of the implementation of this provision within the framework of the Indian legal system. How far India has succeeded or responded to this fundamental change would be the subject matter of inquiry for the purposes of this chapter. This will enable us to gauge the progress that has been made in line with the new paradigm shift that is seen as a turning point in attributing legal capacity to protect the rights of persons with disabilities in India. Hence, the focal point of discussion is on legal capacity under Article 12 of the CRPD and its impact or influence on laws practiced in relation to differently challenged people in India.

6 Martand Jha, The history of India's disability movement, *The Diplomat*, https://thediplomat.com/2016/12/the-hitory-of-indias-disability-rights-movement, accessed August 28, 2022. The important role played by the non-governmental organizations and members of the civil society actively campaigning to educate and sensitise people on the rights of persons with disabilities has also been significant. See, for example, Nilika Mehrotra, Disability right movement in India, *Economic and Political Weekly*, February 5–11, 2011, vol. 46, no. 6, pp. 65–72; Aatika Singh, Yashvi Ganeriwal, Disability and social exclusion: The right to access, discourse and impoverishment, in: *Disability Laws in India*, eds. Nuzhat Parveen Khan, Faizanur Rahman, Satyam Law International, New Delhi, 2018, pp. 47–64.

7 This is also practiced on the basis of religious doctrines. For example, as one author notes, 'In the Hindu doctrine of Karma Phala disability is sought to be linked with the retribution for the sins committed by individuals in the past'. See, G. N. Karna, *United Nations and Rights of the Disabled Person: A study in Indian Pperspective*, A.P.H. Publishing Corporation, New Delhi, 1999, pp. 23–24; Martand Jha, *Indian mythology has a problem with disability*, https://thewire.in/rights/indian-mythology-problem-disability, accessed August 28, 2022. It may also be pointed out that such practices and beliefs are also found among other communities, including minorities in India.

8 The Court was simply guided by the spirit of the law when it stated, 'Our conclusions in this case are strengthened by some norms developed in the realm of international law. . .. In respecting the personal autonomy of mentally retarded persons with regard to the reproductive choice of continuing or terminating a pregnancy. . .. We must also bear in mind that India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) on October 1, 2007 and the contents of the same are binding on our legal system'. Ibid., para. 25–26.

Bearing in mind the contours of this study, Part 2 of this chapter begins with a discussion of the concept of legal capacity followed by some reflections on the Indian legal system in this regard; Part 3 discusses the obligation that India has after the ratification of the CRPD under the Constitution; Parts 4, 5 and 6 examines implementation of Article 12 in the realm of private law and public law. An analysis of the case law is undertaken here in order to find out the judicial response to protect the rights of persons with disabilities. This will also reveal as to what extent international norms and standards, resulting from the CRPD, have been absorbed and enforced by the courts in India; Part 7 discusses the role of psychology, psychiatry and neurology in implementing Article 12 of the Convention; Part 8 and 9 elaborates on the organisation and institutional assistance given to disabled persons, including the role of the non-governmental organisations; Part 10 includes a short presentation of the available statistical data; Part 11 throws light on legal capacity in relation to criminal law; and Part 12 presents our concluding remarks.

2. The concept of active legal capacity – introductory remarks

'Legal capacity' can simply be understood as an attribute of personhood which allows a person to have his or her rights and obligations recognised under a legal system. It can be defined as 'a person's power or possibility to act within the framework of the legal system'.[9] There are two constituent elements of legal capacity. The first refers to 'legal standing' in the sense of being viewed as a person before the law; the second to 'legal agency' which may be referred to as 'active legal capacity' – meaning the capacity to acquire rights and undertake obligations.[10] Legal capacity is therefore 'a construct, assigned to most people of majority age enabling them to have rights and obligations, to make binding decisions and have them respected'.[11] It facilitates personal freedom and enables everyone to enter into various activities or aspects of life – for example, to get married, inherit property or engage in trade and commerce.

Legal capacity, in relation to persons with disabilities, has more profound significance when such people have to make fundamental decisions regarding their health, education and work. The denial of legal capacity to such differently challenged persons has in many cases led to their being deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty.

Under the Indian legal system, as a general rule, every person domiciled in India has legal capacity, both as a holder of right and an actor under the law. This right accrues ordinarily to a person who has attained the age of majority, which is 18 years according to the Indian Majority Act, 1875.[12] Until then any person who has not attained the age of majority is treated as a minor, except in two situations, where the age of minority is extended

9 Commissioner for Human Rights, *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilties*, Council of Europe, Strasbourg, 2012, pp. 10–11.

10 Ibid. The concept has also been explained as 'Active legal capacity of a natural person is the capacity to enter independently into valid transactions', which depends upon the mental status of a person or his intellectual capacity, *i.e.* a minimum level of intelligence and mental maturity. See K. Zweigert, H. Kotz, *An introduction to comparative law*, trans. Tony Weir, 3rd ed., Oxford University Press, Oxford, 1998, p. 348.

11 Commissioner for Human Rights, *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilties*, Council of Europe, Strasbourg, 2012.

12 § 3 of the Indian Majority Act, 1875.

to 21 years: (1) a minor of whose person or property a guardian has been appointed by a court of justice before he attained the age of 18 years and (2) a minor whose property is under the superintendence of a court of wards before he attained the age of 18 years.[13] Under such circumstances, the age of minority is extended until the age of 21 years so as to provide continued legal protection to such minor.[14] Several laws pertaining to various fields define a minor for the purposes of that legislation as a person who has not completed the age of 18 years. All these laws are in conformity with the Indian Majority Act, 1875 in so far as the age of a minor is concerned. For example, § 11 of the Indian Contract Act, 1872; § 2 of the Indian Succession Act; Immoral Traffic (Prevention) Act, 1956, along with its amendment in 1987, which curbs trafficking of boys and girls who are below the age of 18 years; Child Labour (Prohibition and Regulation) Act, 1986; § 2(1) (k) of the Juvenile Justice (care and protection) Act 2000; and the Protection of Children from Sexual Offences Act, 2012.

Similarly, specific legislations concerning persons with disabilities also have the age of majority as 18 years. Pursuant to the RPWD, 2016, § 31, and MHCA, 2017, § 2(t), a person below the age of 18 years is a minor.

In relation to Criminal law, there is no definition of a minor. However, § 82 of the Indian Penal Code, 1860 (IPC) states that 'nothing is an offence done by child under 7 years of age'.

Be that as it may, persons who are deprived of legal capacity may broadly be divided in to **two categories**. They are **minors** and persons with an **unsound mind**. Both of whom, for the purposes of law, require to be supported with mechanisms that provide or compensate them for their immaturity and lack of comprehension to understand the consequence of their action. Under the legal system, such persons are generally accorded protection through the system of guardianship, which operates to protect the interest of the minors and persons of unsound mind. Thus, the law treats a minor differently and provides him with a guardian to conduct his affairs with responsibility.

The term 'guardian' has been defined under § 4(2) of the Guardians and Wards Act, 1890 (hereinafter, GWA, 1890), which means 'a person having the care of the person of a minor or of his property, or both his person and property'. An important feature of this legislation is that the act does not affect the rights and obligations of guardians under the personal law to which a minor belongs.[15] When an application is made to the court for the appointment of a person as a guardian, the court is required to take into consideration the personal law of the minor.[16] However, once a person is appointed or declared as guardian of a minor, irrespective of the fact whether the minor is Hindu, Muslim or Christian, such guardian will be subject to the provisions of the said act, in which case the powers of natural guardian or testamentary guardian under the personal laws stands suspended. But if the personal law in not in conflict with any provisions of the act, personal law would apply. However, it is important to bear in mind that the legal capacity of a person to act in matters governing personal law – for example, marriage, dower, divorce and adoption – is

13 Ibid.

14 The extension of this age is not affected by the resignation, removal, discharge or death of the guardian. See, generally, M. N. Das, *B.B. Mitra: Guardians and wards act 1890*, 14th ed., Eastern Law House, New Delhi, 1995; Paras Diwan, *Law of Adoption, Minority Guardianship & Custody*, 3rd ed., Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2000, pp. 447–758.

15 § 6 of the GWA, 1890.

16 § 19, GWA, 1890.

not affected. And it is equally important to stress that the age of majority under personal laws varies in relation to such matters practiced by different communities in India.[17]

The Guardians and Wards Act of 1890 is one of the earliest legislations in India which dealt with the guardianship of the person and property of minors. It is a complete code defining the rights and obligations of the guardian, including their appointment and removal as well as the rights and remedies available to the wards under the said act.[18] The GWA, 1890, is a secular legislation in the sense that a guardian can be appointed for a minor who may belong to any religion. Nevertheless, the rights of the natural guardians, who are the parents in the first place, under all personal laws for that matter, are preserved. See the discussion later. It is another thing, however, that the courts have disregarded this provision in the interest of a minor, whose welfare is of paramount consideration.

A 'person of unsound mind' is an adult who, because of infirmity of mind, is incapable of managing himself or his affairs.[19] This can clearly be inferred from a plain reading of § 12 of the Indian Contract Act, 1872, which says that a person of sound mind is a person who is capable of understanding and forming a rational judgement as to its effect on his/her interests. This is also implied under § 84 of the IPC which says that a person of unsound mind is a person who, by reason of unsoundness of mind, is not able to know the nature and consequence of his/her act, whether it is right or wrong. Consequently, soundness of mind is one of the quintessential requirements of law, invariably referred to both in private and public law legislation. We shall pursue this matter in a more elaborate manner later.

3. The ratification of the CRPD and implementation of Article 12 under Indian laws

The Indian Constitution is a federal constitution. There is a clear division of power between the Union and the States. Institutional safeguards for the protection of rights enshrined in the Constitution include an independent judiciary. Exercise of executive power and legislation is subject to judicial review by the courts. In respect of ratification of the CRPD, the Indian practice is based upon the doctrine of dualism in international law, which requires that in order to implement or enforce an international treaty or an agreement an enabling legislation should be passed by the Parliament. Customary international law, on the other hand, is directly incorporated into municipal laws, provided it is not inconsistent with such laws. In case of a conflict between international and national laws, courts have opted for a harmonious construction so as to make the rule of international law effective. This is based on constitutional obligations that India has under Article 51, since it directs the state 'to foster respect for the international law and treaty obligations'. Further, Article 253 confers power on the Parliament to make laws for the state in order to give effect to its international treaties and agreements.

It is also imperative to mention that the judiciary has given effect to international norms and obligations under certain situations even in the absence of an enabling legislation.[20]

17 *Infra note*, 55–60. For a detailed discussion, see the text accompanying these footnotes.

18 See § 17–19 of the GWA, 1890.

19 See Black's Law Dictionary, Thomson Reuters, United Kingdom.

20 See, for example, *Vishaka v. State of Rajasthan,* AIR 1997 SC 3011, which is a leading judgment of the Supreme Court in this perspective, relating to sexual harassment of women at workplace, where the Court heavily relied upon international norms laid down in the UN Convention on Elimination of all Forms of Discrimination Against Women (CEWAD), 1979. India had only signed the said Convention and had no specific national legislation to deal with the problem at that point in time.

In practice, this approach has been more pronounced and accentuated by the judiciary, which is also reflected in the protection of the rights of the disabled people in India. See the discussion later.

India is a party to International Human Rights Covenants.[21] It has also enacted Protection of Human Rights Act, 1993, which has come into force since September 28, 1993.

4. Implementation of Article 12 of the CRPD in private law

In the realm of private law, the issue of legal capacity is crucial for the exercise of the rights. Consequently, many laws contain specific provisions along with restrictions for persons with impaired legal capacity; though most of them do not define or provide a standard criterion of the vague terms, such as 'unsound mind'.[22] An exception to this is the concept of legal capacity within the framework of the Indian Contract Act, 1872, which provides an objective standard criterion to comply with the essential elements of legal capacity that confers upon a person with *locus standi* under the legal system.

The Indian Contract Act, 1872, states that every person is competent to enter into a contract.[23] It says that a contract is a legally enforceable agreement which is entered into with the free consent of the parties competent to contract for a lawful purpose and consideration.[24] Two more conditions are to be satisfied: (1) the person must be of sound mind, and (2) he must be of the age of majority for the purposes of making a contract, provided he is not disqualified to exercise his powers under the act.[25] As for the first requirement, a person is of sound mind at the time of making a contract if he is capable of understanding the nature of his act and forming a rational judgement as to its effect upon his interest. The law allows a person who is usually of unsound mind but occasionally of sound mind, to contract when he is of sound mind. Conversely, a person who is generally of sound mind but sometimes of unsound mind cannot contract when he is of unsound mind.[26] These principles laid down in the law of contract are regarded as well settled principles in law. However, there are some exceptions. For example, a contract entered into by a person of unsound mind is void because of his impaired legal capacity. Nevertheless, a claim for necessaries supplied to a person incapable of contracting, or on his account can be reimbursed from the property of such a person.[27] Similarly, minors and lunatics are entitled to special

21 India is a party to all major International Human Rights treaties and covenants, which include International Covenant on Civil and Political Rights ICCPR), 1966; International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; the Convention on Elimination of All Forms of Discrimination (CERD), 1965; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishment (CAT), 1984; the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), 1979; and the Convention on the Rights of the Child (CRC), 1989.

22 Courts in India have examined these terms whenener they have come up for interpretation in a purposive manner to meet the scales of justice. See the discussion later.

23 § 11 of the Indian Contract Act, 1872.

24 § 10 of the Indian Contract Act, 1872.

25 *Supra note*, 23.

26 § 12 of the Indian Contract Act, 1872.

27 § 68 of the Indian Contract Act, 1872. This provision reads, 'If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person'. The basis of the action is deemed to be a quasi-contractual obligation to pay rather than a contract. See Chapter V of the Indian Contract Act. Further, the term 'necessaries' has not been defined under the Indian Contact Act. However, it is understood or determined in the light of the

rights and protection under Order 32 (Rules 1 to 16) of Civil Procedure Code (CPC), 1908, which protects the interests of such persons while ensuring that they are equally represented in civil suits or proceedings.

We shall first examine the legislation in relation to legal capacity which is exclusively enacted for the purposes of protecting the rights of the persons with disabilities. In this context we shall review the two legislations that have been adopted quite recently mainly to align and augment with the norms established under the CRPD. They are RPWD, 2016, and MHCA, 2017. These two legislations would also require us to reflect upon the two more enactments, now repealed (MHA, 1987, and PWD 1995), to gauge the progress that has been made under the present legislations compared to the past. Besides, we shall also discuss the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999, (hereinafter NTA, 1999), which is related to persons with disabilities. Apart from these, we shall also discuss some of the personal laws that impinge upon the rights of the disabled persons insofar as they concern the issue of legal capacity and which require immediate reforms.[28]

The issue of legal capacity is dealt with under § 13 of the RPWD, 2016. It states that persons with disabilities, including mental illness, have the right to legal capacity on an equal basis with others in all aspects of life and have the right to equal recognition everywhere, like any other person, before the law.[29] The RPWD, 2016, is a manifestation of the human rights norms and standards that have been enunciated under the CRPD. Accordingly, the RPWD, 2016, ensures that the persons with disabilities also have the right to own or inherit property, movable or immovable, control their financial affairs and have access to bank loans, mortgages and other forms of financial credit.[30]

The RPWD, 2016, also provides for **limited** or **total guardianship** under § 14, depending upon the circumstances of a person with disabilities. Limited guardianship has been explained as a system of joint decision which operates on mutual understanding and

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facts and circumstances of a particular case. An illustrative meaning of the term, which has become classic, is found in the explanation provided by Alderson, B: 'Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral and religious information may be a necessity also. Again, as man lives in society, the assistance and attendance may be the subject of an infant's contact. Then the classes being established, the subject matter and extent of the contract may vary according to the state and conditions of the infant himself. His clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill; and the medicines will depend on the illness with which he is afflicted, and the extent of his probable means when of full age. So again, the nature and extent of the attendance will depend on his position in society. But in all these cases it must first be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus, article of *mere luxury* are always excluded, though luxurious articles of utility are in some cases allowed'. See *Chapple v. Cooper* (1844) 13 M. & W. 252, at 258.

28 For a number of suggestions on several legislative reforms in the field of both private and public law, consult generally, Roma Bhagat, a position paper on the rights of persons with intellectual and developmental disabilities in India, in *Harmonizing laws with the UNCRPD*, ed. Amita Dhanda, Rajine Raturi, a report prepared by the Centre for Disability Studies, Nalsar University of Law, published by Human Rights Law Network, New Delhi, 2010, pp. 180–200.

29 The definition of disability under the RPWD, 2016, is based on how disability has been defined under Article 1 of the CRPD. § 2(s) of RPWD defines a person with disability as 'a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others'.

30 § 13 of RPWD, 2016.

the trust between the guardian and the person with disability.[31] This arrangement is permissible for a specific period and for specific situation and operates according to the will of the person with disability. It is also important to mention that every guardian appointed under any other law in force would be deemed to function as a limited guardian.[32]

Earlier, total guardianship was provided for under the MHA, 1987, wherein once it was determined, upon complete inquisition by the district court under § 52 of the said act, that a person was affected with mental illness and is unable to manage oneself or property due to his or her disability, a guardian of the person (§ 53) and manager of the person's property (§ 54) was appointed. A more flexible and need-based system was provided under the NTA, 1999, for the appointment of a guardian. It stated that a parent of a person with disability or his relative could make an application to the local level committee for the appointment of any person of his choice to act as a guardian of the person with disability. § 13 required the appointing authority to consider whether the individual person with intellectual, developmental or multiple disabilities requires a guardian and, if so, whether such guardian should have the authority to take legal decisions in respect of all areas of life or should it be permitted only for those purposes for which the person with disability may require support. The appointment of such persons was through local level committees consisting of the district magistrate; representative from a registered disability organisation and a person with disability.[33] This regulation remains in force; however, a close reading of the RPWD, 2016, shows that it falls short of the standard provided for under CRPD. This is because the latter does not provides for substituted decision-making regimes (guardianship) but clearly emphasises that only if the disabled person is in need of help, they must be supported by such appropriate measures which are necessary to exercise their legal capacity.[34] This means that while the CRPD permits supported decision-making regimes, it prohibits any substituted decision-making regimes in order to uphold an overarching principle under the Convention that disabled persons have the right to enjoy legal capacity on an equal basis with others in all aspects of life. Thus, the RPWD, 2016, clearly falls short of providing legal capacity to its fullest extent compared to CRPD.

The RPWD, 2016, also has a major drawback in the sense that it does not foresee a situation, for instance, when a disabled person is in a comatose position. The act does not specifically address the issue as to how such a person would operate his bank account to fund for his treatment or take care of his property. The assumption that in such instances it would be covered by substituted decision-making regime under the act, would be incorrect since CRPD primarily mandates that persons with disabilities must 'at all times, including the crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected'.[35]

India had also enacted the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter PWD, 1995), which has been

31 See, Explanation to § 14 of RPWD, 2016.
32 § 14(2) of RPWD, 2016.
33 § 14–17 of NTA, 1999.
34 Article 12(3) of CRPD, 2006.
35 General Comment No. 1 (2014) on Article 12 of the CRPD, UN Doc. CRPD/C/GC/I para. 18.

repealed. It was the first legislation dealing with the differently challenged people.[36] But it also did not confer legal capacity upon them.[37] It was also completely silent on the fundamental rights, such as the civil and political rights.[38] The right to life, liberty and personal security, equality and non-discrimination, freedom of speech and expression, and freedom of movement were all not mentioned. Moreover, the PWD 'reflected a medical model of disability' since it equated disability with the restrictions of activity in an individual.[39] Judicial treatment of the subject, at that point in time, was also no different since the courts failed to distinguish between imputed disability and the resulting incapacity while protecting the rights of the disabled persons.[40] Later, however, 'a shift from medical mode to the social model of disability', considering the fact that 'disability does not lie in individuals, but in interactions between individuals and society',[41] gathered momentum and eventually was incorporated under the RPWD, 2016 to meet the challenges faced by persons of disabilities.

Subsequently, India enacted the Mental Health Act, 1987 (MHA, 1987), which also did not provide for legal capacity of the disabled persons.[42] Instead, it provided for plenary system of guardianship, laying down the procedure under which a guardian for the person and property could be appointed for persons living with mental illness. Once that was done, any action taken by a person affected by mental disability would have no legal validity, and that situation continued until the guardian was removed from the office. It was the guardian alone who was responsible for any decision concerning such persons affected by the disability. Although a guardian is expected to perform his duties in the best interest of such a person, there was no legal obligation to consult with the person suffering with mental disability.

The MHA, 1987, also suffered from other drawbacks which included, *inter alia*, compulsory hospitalisation of persons with mental illness in psychiatric institutions. With no

36 India has passed this legislation after it has signed the regional instrument: the Asia and Pacific Decade of Disabled Persons, 1993–2002. This was organised by the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), at Beijing. See Asia-Pacific governments launch a new Decade of disability-inclusive development, UNESCAP, http://www.enescape.org/asia-pacific-governments-launch-new-decade–disability-inclusive-development, adopted in Beijing, China.

37 The PWD defined disability to include blindness, low vision, leprosy-cured, hearing impairment, locomotor disability, mental retardation and mental illness. See § 2(i) of the Act. RPWD however does not distinguish between physical and mental disability.

38 For a critical and insightful examination of the PWD, 1995, see, generally, Jayna Kothari, *The future of disability law in India*, Oxford University Press, New Delhi, 2012.

39 *Manual on disability statistics* (Ministry of Statistics and Programme Implementation), Government of India, New Delhi, 2012.

40 See, generally, Amita Dhanda, *Legal order and mental disorder*, Sage Publication, New Delhi, 2000. The author argues how truncated is the approach which relies only on medical opinion, leaving aside several other important considerations which equally contribute to disability of a person. See also Renu Adlakha, Saptarshi Mandal, Disability law in India: Paradigm shift or evolving discourse? *Economic & Political Weekly*, October 10, 2009, vol. XLIV, no. 41, pp. 62–68. (Discussing case law, for example, *Naveen Kumar vs. University of Delhi* (Writ Petition (civil) 4657/2000) and the other.

41 See The Biwako Millennium Framework for Action towards an Inclusive, Barrier-Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific, see UN Doc. /ESCAP/APDDP/Rev.1, 24 January 2003, Otsu City, Shiga, Japan. Also, Biwako Plus Five, instrument adopted in 2007.

42 § 2(1) of the MHA defines a mentally ill person as 'a person who is in need of care and treatment by reason of any disorder other than mental retardation'.

proper procedure to review where less restrictive alternatives were possible, hospitalisation of such persons in some cases even resulted in a lifelong stay at such institutions.[43] Because of these and other shortcomings, the MHA was repealed in any case.

It Is also important to mention about the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, And Multiple Disabilities Act, 1999 (hereinafter NTA, 1999), which was enacted with the objective of empowering persons with disabilities also did not confer legal capacity upon such persons.[44] It provided for the appointment of guardians and trustees for persons who were in need of special assistance through a flexible system. However, the NTA, 1999, is credited with the fact that it was for the first time that limited guardianship was recognised in India. This type of arrangement was in relation to persons suffering from cerebral palsy and multiple disabilities, who required only limited guardianship because of the availability of enabling mechanisms and scientific facilitations, which enable such persons to function with varying degrees of independence. The appointment of a guardian was through a local level committee consisting of the district magistrate and a representative from a registered disability organisation.[45]

This enactment was also provided for such activities as training, awareness and capacity building programmes, besides providing shelters, caregiving and empowerment centres. It was mainly enacted with certain objectives which, *inter alia*, include (1) to enable and empower persons with disabilities to live as independently and as fully as possible within the community, (2) to strengthen facilities to provide support to persons with disabilities to live within their own families, (3) to evolve procedures for the appointment of guardians and trustees for persons with disabilities requiring such protection and (4) to facilitate the realisation of equal opportunities, protection of rights and full participation of persons with disabilities.

More recently, the Mental Healthcare Act, 2017 (MHCA, 2017), was enacted bearing in mind the purpose and objectives of the CRPD, which has an astute human rights perspective. It has therefore transformed the rights of the individuals, for it recognises the legal capacity of persons suffering with mental illness to make decisions, if they are able to understand the relevant information,[46] and reasonably foresee the consequence of their decision.[47] In this manner, the MHCA, 2017, promotes individual autonomy and choice for those with the ability to make decisions, irrespective of the level of risk involved.[48] In the same spirit, § 4(3) of the act provides that where a decision is made by such person,

43 For critical examination and analysis of MHA, see James T. Antony, On drafting a new mental health act, *Indian Journal of Psychiatry*, January–March 2010, vol. 52, no. 1, pp. 9–12.

44 Disability under § 2(j) of NTA is defined as 'a person suffering from any of the conditions relating to autism, cerebral palsy, mental retardation or a combination of any two or more of such conditions and includes a person suffering from severe multiple disability'.

45 For complete procedure of appointment of a guardian, see § 13–17 of NTA, 1999.

46 § 2(s) of MHCA defines 'mental illness' as 'a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterized by sub normality of intelligence'.

47 See § 4 of the Mental Healthcare Act, 2017. The words 'shall be deemed' should have been avoided, however, if full import of the provision was intended by the legislation.

48 MHCA was passed in 2017 pursuant to CRPD and its Optional Protocol (A/RES/61/106) adopted on December 13, 2006.

even if perceived as wrong by others, would not deprive that person of his legal capacity to make decisions.

The MHCA, 2017, also provides for a supported decision-making regime which may vary from minimal or no support to complete support. This is done by introducing certain new concepts in addition to guardianship, which may be explained as follows:

Advance directive is a procedure which allows individuals with mental disorder to retain their autonomy over how they want to be treated in the future during the periods of their illness. To this effect, § 5(1) of MHCA states that every person suffering with mental illness has a right to make an advance directive in writing specifying the way he wishes to be cared for and treated for mental illness. It is important to observe that such a person loses his autonomy only when he ceases to have the ability to make mental healthcare decisions. Such a person can also express his choice in advance as to whom he wants to appoint as his nominated representative under § 5(1)(c). Furthermore, such an advance directive can be made irrespective of the mental illness or treatment of such a person in the past (§ 5(2)), and it can be revoked, amended or cancelled by such person at any point in time (§ 8(1)). Additional safeguards to look into the validity of such advance directives are possible through a scrutiny by the medical officer and the psychiatrist in charge before finally reviewed by central and state medical authorities under §§ 10–13 of the act.

Nominated representative is a procedure which allows every person suffering with mental illness the right to appoint a nominated representative (§ 14 of the act). Except for a minor, a nominated person should be competent to discharge the duties or perform the functions assigned to him under the act. An order of precedence is prescribed as to who can be a nominated representative of a person with mental illness. This includes (1) a person who is mentioned in the advance directive (§ 5(1) (c)); or (2) a relative; or (3) a caregiver; or (4) a suitable person appointed by the concerned medical board. In the absence of any one of them, the director of the Department of Social Welfare or his designated representative can be temporarily appointed as a nominated representative by the concerned medical board.

It is important to mention that the MHCA, 2017, guarantees every person a right to access mental healthcare and treatment from mental health services run or funded by the government.[49] As a result of this assurance, every person with such disability will be able to access services and facilities such as medication free of cost, treatment and rehabilitation facility and funding for private consultation where no district health services are available. More importantly, persons with mental illness will have a right to live with dignity.[50] They are also entitled to receive free legal services to exercise their rights, which is very commendable.[51] The MHCA, 2017, also mandates the government to plan and implement programs which seek to promote the concept of mental health and reduce the stigma attached to it.[52]

49 § 18 of MHCA, 2017.

50 § 20, Ibid. They also have the right not to be segregated from the society, § 19.

51 § 27, Ibid.

52 § 29, Ibid. This act has also approved for the medical insurance of persons with mental illness and is the same is now confirmed by the Insurance Regulatory and Development Authority of India (IRDAI).

The MHCA, 2017, is a more human-rights-oriented legislation protecting the rights of the persons with mental and intellectual disabilities in every respect in all aspects of life, including right to privacy, confidentiality and emergency services, besides discrimination and prejudice in the society.[53] These are the areas which stand as an improvement over the repealed MHA, 1987, legislation. Thus, the approach to mental healthcare system in India has undergone a substantial change, transforming the rights of the persons affected with mental disability from being treated as lunatics and criminals to one that requires them to be treated with equality before law and equal protection of laws and more importantly with human dignity and worth. This dramatic change in the law and perception is mainly due to the enactment of MHCA, 2017, which provides for a rights-based approach to secure equality and dignity of the disabled persons. Consequently, under the new legislation recognition of the legal capacity of a person with mental illness to make informed choices is an important step towards recognition of his human value and dignity. This development was in pursuance of Article 12 of the CRPD – with a view to assimilate and synchronize the provisions of MHCA, 2017, with the objectives of the CRPD.

However, MHCA, 2017, also has certain drawbacks. No standing procedure is laid down under the act to furnish advanced directives. This could lead to ambiguity and arbitrary procedures followed in practice. Similarly, the act is also silent on how nominated representatives, once appointed, can be removed. Furthermore, no specific qualifications are prescribed for the appointment of medical and mental health professions. Another major drawback flows from the fact the MHCA, 2017, is not applicable to cases pending under the MHA, 1987, an act which has already been repealed.[54]

5. Restrictions on legal capacity under various personal laws

India is a country with many religions. Issues of legal capacity vary under various Personal laws according to the religious practices of the community to which a person belongs. Although most of the personal laws have been codified after India gained its independence, some of them still remain in the form of an uncodified law. The right to marry, procreate and adopt children, for example, has restrictions on the legal capacity which disqualify persons, including persons with disabilities, from exercising their rights. We may illustrate this with a few examples.

Under Hindu Marriage Act, 1955 (HMA), a marriage between two parties can be solemnised only if neither party 'has been suffering from mental disorder of such a kind or to such an extent so as to be unfit for marriage and the procreation of children', even though they may be capable of giving 'valid consent' under § 5 of the act. This may lead to ambiguous results since persons suffering with mental disorder may still be capable of giving valid consent. Besides, the term 'unsound mind' and 'recurrent attacks of insanity' are not defined under the HMA, though the term 'mental disorder' and 'psychopathic disorder' are explained in § 13 as grounds for divorce under the act. Similar is the situation under § 4 of the Special Marriage Act, 1954, which applies to people of India and all Indian nationals in foreign countries, irrespective of their faith or religion.

53 § 18–20 of the MHCA Act.

54 § 126, 2(f) of the MHCA Act. This situation squarely arose before the Delhi High Court, see *Meenu Seth v. Binu Seth*, FAO No. 411/2017, decided on October 27, 2017), where the court did not apply MHCA.

Again, similar anomaly arises under the Muslim personal law, where a marriage can be dissolved on the ground that the husband has been 'insane' for a period of two years, § 2(vi) of the Dissolution of Muslim Marriages Act, 1939. Similarly, under Christian law, a marriage may be declared as null and void if either party is a 'lunatic or idiot' at the time of the marriage, according to the Indian Divorce Act, 1869.

Under the Hindu Adoptions and Maintenance Act, 1956 (HAMA): 'Any male Hindu who is of sound mind and is not a minor has the capacity to take son or a daughter in adoption'.[55] This means no adoption is valid unless both persons – one who is adopting and the other who is giving the child in adoption – has the legal capacity to do so.[56] But the act does not define or clarify what is meant by 'capacity', though the Central Adoption Resource Authority (CARA) Guidelines for adoption say that the parents must be 'mentally stable', without clarifying what exactly that means.[57]

The Hindu Minority and Guardianship Act, 1956 (HMGA), recognises various forms of guardianship, which include natural guardianship, testamentary guardianship, court-appointed guardianship and guardianship by affinity. The act provides for guardianship of minor children who are under the age of 18 years.[58] A guardian under this act is an individual who is responsible for the person of the child and his property or both.[59] While dealing with the property of a minor, a guardian is required to take prior permission of a court.

Under Muslim law, as a general rule, a person who is at least 15 years of age is considered, without distinction of sex, to be adult and *sui juris*.[60] This is in relation to personal laws governing marriage, dower and divorce. However, regarding all other matters, for instance, guardianship, they are governed by the age of majority that is 18 years as provided under the Indian Majority Act, 1875. The father is the sole and supreme guardian of his children as along as he is alive. The mother is not considered as a natural guardian even upon the death of the father. She may have the custody of the child, but she would not become a guardian. In case of the death of the father, the guardianship will be vested in the grandfather of the child, if he is alive. And in the absence or death of the grandfather, the executor, who is appointed by the grandfather, will become the guardian of the child.

Muslim law also recognises a testamentary guardian. In the absence of the father and his appointed executor, the grandfather has the power to appoint a testamentary guardian. The mother again has no such right except in two situations: (1) where she has been named as executrix by her father in his will or (2) where she owns a property, which passes on to her children upon her death. A guardian, under Muslim law, can also be appointed by the court, in the absence of natural and testamentary guardian.

In relation to Christian community, the law prescribed under the GWA legislation is followed. This act, as stated earlier, lays down the law and the procedure for the appointment and responsibilities of a guardian. According to the Indian Christian Marriage Act, 1872, a minor is a person who is not yet 21 years of age and who is not a widower or widow.

55 § 7 of HAMA, 1956.

56 § 6(i) and (ii) of HAMA, 1956.

57 Regulation 5(1), the Adoption Guidelines 2017.

58 § 4(a) of the HMGA, 1956. Other persons, such as Sikhs, Jains and Buddhist are also covered by this legislation.

59 § 4(b) of the HMGA, 1956.

60 Under Muslim law, puberty is assumed in the absence of other evidence, upon reaching the age of 15 years. See Sir Dinshaw F. Mulla, *Principles of Mahomedan law*, 23rd ed., LexisNexis, New Delhi, 2014, p. 320.

We can also refer to the Prohibition of Child Marriage Act, 2006 (earlier Child Marriage Restraint Act, 1926, now repealed) wherein a person is a minor up to 18 years in the case of girls and 21 years in the case of boys.

6. Implementation of Article 12 of the CRPD in public law

The Constitution of India applies uniformly to all citizens of the country, whether they are touched by a disability or not – either physically or intellectually. Every individual citizen is guaranteed social, economic and political justice; liberty and freedom of thought and expression, belief, faith and worship; and equality before law and equal protection of laws. It is significant, therefore, to bear in mind that most of the rights enumerated in the UN Convention on Disability are grounded in the constitutional values of equality, human dignity and non-discrimination, which form the bedrock of fundamental rights provided to all the citizens under the Constitution. Although these fundamental rights do not specifically mention persons with disabilities, there is ample of scope to include them within the ambit of these rights guaranteed under Part III of the Constitution. (See the discussion later.)

The first and the foremost is Article 14 of the Constitution, which provides for equality before the law and equal protection of the laws; Articles 15 and 16 provide special measures, including reservations and affirmative action, especially for the women, children and the weaker and vulnerable sections of the society. More importantly, Article 21 guarantees the fundamental right to life, personal liberty and security,[61] while Article 24 guarantees the right against exploitation of children. These fundamental rights are enforceable in a court of law under Articles 32 and 226 of the Constitution whenever they are violated or trampled upon by the state.[62] All these fundamental rights can equally be invoked by people with disabilities.

We may also refer to the Directive Principles of State Policy enshrined under Part IV of the Constitution, which must be taken into consideration along with the fundamental rights.[63] Courts have relied upon them while adjudicating upon disability matters. The state is obliged 'to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life'.[64]

It is also imperative to mention that the Constitution, while distributing legislative powers between the centre and the states has made disability a state subject, conferring power and responsibilities of the local bodies, such as municipalities, in relation to persons with disabilities. Article 243-G mentions 'social welfare, including welfare of the

61 See the discussion and accompanying text, *infra notes*, 69 and 70.

62 This provision, which provides remedies for the enforcement of fundamental rights, is known as 'the heart and soul of the Constitution'. Dr. Ambedkar, chairman of the Drafting Committee of the Indian Constitution. See *Constituent Assembly Debates*, vol. VIII, 953, *quoted* in Mahendra Pal Singh, *V.N. Shukla's constitution of India*, 13th ed., Eastern Book Company, Lucknow, 2015, at 341.

63 The Directive Principles of State Policy are not enforceable in a court of law; they are nevertheless fundamental in the governance of the country. See Article 37 of the Constitution. The Supreme Court has held in many cases that the directive principles must be read into the fundamental rights guaranteed to all citizens under the Constitution.

64 See Article 38 of the Constitution. Article 41 is also pertinent, which reads, 'The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want'.

handicapped and mentally retarded'.[65] Again, Article 243-W requires, 'safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded'.[66]

In the public law domain, initially, cases on disability were largely filed under Articles 32 and 226 of the Constitution. This has been the dominant practice whenever fundamental rights were infringed, notwithstanding the fact that, as stated earlier, 'disability' as such is not specifically mentioned as a prohibited ground of discrimination under the Constitution. However, non-discrimination on grounds analogous to and not specified under these provisions – for example, Articles 15 and 16 – has been read as a facet of 'equality before the law and equal protection of laws' under Article 14 of the Constitution. For example, in *Indra Sawhney v. Union of India*,[67] the Court, while dealing with the issue of legality of reservations, held that although Articles 15 and 16 do not cover persons with disabilities, the notion of equality under Article 14 of the Constitution allows for affirmative action in favour of persons with disabilities.[68]

In *Suchita Srivastava v. Chandigarh Administration*,[69] the Court was asked to decide whether the reproductive rights of a mentally retarded woman, who had become pregnant due to rape by an in-house staff member at a government-run welfare institution, should be allowed to carry on the pregnancy to full term. The Supreme Court, while deciding the case under the Medical Termination of Pregnancy Act, 1971, referred to fundamental right to life and personal liberty under Article 21 of the Constitution and made the following pertinent observation:

> There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected.[70]

This decision of the Court is indeed in conformity with the mandate of the CRPD, which recognises that 'persons with disability enjoy legal capacity on an equal basis with others in all aspects of life'.[71] And that states must ensure that all measures relating to legal capacity have appropriate and effective safeguards as provided for under the international human rights law.[72]

65 See Entry No. 26, Eleventh Schedule of the Constitution.
66 See Entry No. 9, Twelfth Schedule of the Constitution.
67 1992 Supp. 2 SCR 454; AIR 1993 SC 447.
68 This case is famously known as Mandal case since it dealt with the issue of reservations in securing seat in the educational and professional institutions.
69 (2009) 14 SCR 989; 2009 (9) SCC 1.
70 14 SCR 989 (2009) 9 SCC 1. Article 21 of the Constitution reads, 'No person shall be deprived of his life or personal liberty except according to procedure established by law'. This fundamental right is guaranteed even to non-citizens in the country.
71 Article 12(2) of the CRPD, 2006.
72 Ibid., Article 12(4).

In *Aruna Shanbaug v. Union of India*,[73] the Supreme Court invoked the doctrine of *parens patriae*, which says that the state has a duty and corresponding right to make decisions for persons who lack legal capacity. Here the Court observed that

> in the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as *parens patriae*, which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight.[74]

In *Samira Kohli v. Dr. Prabha Manchanda*,[75] the Court held that the substituted consent given by the mother of a patient who was unconscious was invalid on the ground that the patient was only temporarily unconscious under anaesthesia. Besides, consent given by the mother was not warranted by any medical emergency. Therefore, the court said that the consent obtained should be both real and valid. The patient should have the capacity and the competence to consent, and such consent must be voluntarily given.

In *Ravinder Kumar Dhariwal v. Union of India*,[76] a person serving in armed forces who was suffering with mental disability challenged that the disciplinary proceedings were discriminatory and violated the provisions of the RPWD, 2016. The court held that mental disability impairs the ability of persons to comply with workplace standards in comparison to their able-bodied counterparts. And initiation of disciplinary proceedings against persons with mental disabilities is a facet of indirect discrimination. The appellant was, therefore, entitled to protection under the said act (§ 20(4)) and was given a suitable alternative post which did not pose a danger to persons around the workplace. The Court also pointed out that there is an international consensus that persons with mental health disorder have a right against workplace discrimination and that the CRPD has been instrumental in shaping mental health legislation in many countries.[77]

In *State of Kerala v. Leesamma Joseph*,[78] the respondent was given employment on compassionate grounds after her brother had passed away during service in the police department. Although she had permanent disability resulting from post-polio residual paralysis, her entry into the services was not based on PWD Act, 1995. Subsequently, after joining, she had cleared several departmental tests for promotion, which were carried out by the department, but her claim that she was entitled to benefits as a senior clerk from an earlier date was denied. It was argued, in this context, by the appellant state that reservation was to be applied with reference to vacancies and not in respect of reservation in promotion of the disabled persons and that her appointment was not a direct recruitment through the Public Service Commission. It was further alleged by the state that PWD, 1995, was itself silent on the matters of reservation in promotion. Against this background, the Supreme

73 Writ Petition (Criminal) No. 115 of 2009 (decided March 7, 2011).

74 *Aruna Shanbaug v. Union of India*, para. 132.

75 Appeal Civil (1949 of 2004), date of judgment, January 16, 2008.

76 Civil Appeal No. 6924 of 2021 (decided on December 17, 2021).

77 The Court also referred to the ILO Code of Practice in Managing Disability at Workplace. The ILO has defined a disabled person as 'an individual whose prospects of securing, returning to, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical, sensory, intellectual or mental impairment'. See, ILO: Code of practice on managing disability in the workplace, Geneva, Switzerland, October, 2001–2002, at 2.

78 Civil Appeal No. 59 of 2021 (decided on June 28, 2021).

Court, relying on the notion of 'non-discrimination in employment'[79] and the concept of 'reasonable accommodation'[80] under the RPWD, 2016, held that 'it would be discriminatory and violative of the mandate of the Constitution if the respondent is not considered for promotion in the PWD quota' and that 'once the respondent has been appointed, she is to be identically placed as others in the PWD cadre. . .. Source of recruitment ought not to make any difference but what is material is that the employee is a PWD at the time for consideration for promotion'. Further, in the light of Article 16 of the Constitution, the Court held that 'reasonable accommodation' must include reservations in promotion, even if it is not mentioned in the service rules of the department, since the same flows from the intent of the legislation.[81]

In *Ranjit Kuma Rajak v. State Bank of India*[82] the petitioner in this case underwent a renal transplant in 2004. Subsequently he applied for the post of a probation officer in the State Bank of India. After a medical examination, the bank rejected him because he was found medically unfit for the post. In arriving at this decision, it was argued by the bank that, since the petitioner required regular medical check-ups, his medical expenses would be very high, making it extremely difficult for the bank to reimburse the amount incurred for his treatment. The Supreme Court, however, decided the case in favour of the petitioner since no evidence was presented by the bank that financial burden would fall upon them, if 'reasonable accommodation' was made for the petitioner, even if the bank had undertaken to pay for his medical expenses. Further, the Court observed that '[r]easonable accommodation, if read into Article 2 of the CRPD, would not be in conflict with municipal law. It would give added life and dimension to the ever expanding concept of life and its true enjoyment'.[83] The Court clearly relied upon CRPD and India's international obligation in this regard.[84]

In *Jeeja Ghosh & Anr. v. Union of India & Ors.*,[85] the petitioner, Ms. Jeeja Ghosh was herself affected by cerebral palsy. She has been an eminent activist involved in disability rights in India. The case arose from a PIL filed after Spice Jet forcefully deboarded Jeeja Ghosh due to her impairment. The Supreme Court, however, delivered a powerful judgment in favour of the petitioner and ruled that the airlines action was illegal and asked them to reimburse the petitioner with Rs. 10 lakhs. In deciding the case, the Court heavily relied upon international norms for the protection of disabled persons.

In *Javed Abidi v. Union of India*,[86] the Supreme Court clarified that one of the purposes of the legislation was to create a barrier free environment, to make special measures for the integration of persons with disabilities into the mainstream, besides protection of

79 § 20 of RPWD, 2016.

80 § 2(y) of RPWD, 2016. For an explanation of the concept of 'reasonable accomodation' see *infra note*, 89.

81 The *lacuna* resulting from absence of 'reservation in promotion' under PWD, 1995, is now addressed under § 34 of the RPWD, 2016.

82 Civil Appeal No. 1149 of 2010 (decided on November 3, 2020).

83 Ibid., para. 21.

84 The Court referred to the concept of 'reasonable accommodation' and 'undue burden' mentioned in the CRPD. It has also made a pertinent observation: 'The law is now well settled that though the United Nations Convention may not have been enacted into the Municipal Law, as long as the convention is not in conflict with the Municipal Law and can be read into Article 2 thus making it enforceable. Therefore, in the absence of any conflict it is possible to read the test of reasonable accommodation in employment contracts'.

85 Writ Petition (Civil) No. 98 of 2012 (decided on May 12, 2016).

86 AIR 1999 SC 512.

their rights and provisions for their medical, educational and rehabilitation purposes. In *Justice Sunanda Bhandare Foundation v. Union of India & Another*,[87] the Supreme Court emphasised upon the changing perceptions of disability resulting from their social acceptance and reiterated its earlier stand that there should not only be equality in law but also equality in fact when it comes to treatment of disabled persons in the society.

In a more recent case, the Supreme Court, in *Vikash Kumar v. Union Public Service Commission*,[88] held that an individual suffering from writer's cramp, or dysgraphia, is entitled to a scribe in Indian Civil Services Examination. The Court said that absence of benchmark disability cannot be used to deny other forms of disabilities affecting the persons, for this would be contrary to fundamental guarantee of equality under the Constitution. The Court also referred to 'reasonable accommodation' as a facet of substantive equality.[89] It also assured equality of opportunity to all persons with disabilities, including those suffering from writer's cramp disability.[90] Similarly, in *Disabiliy Rights Group & Anr v. Union of India*,[91] the Supreme Court directed the University Grants Commission to ensure guidelines inspection of educational institutions and that the RPWD, 2016, is properly implemented. Also, in *Rajive Raturi v. Union of India and Others*,[92] the Court gave detailed directions for making appropriate provisions for accessibility of handicapped persons, though the case was mainly confined to persons suffering from visual impairment.

In brief, to sum up, it is imperative to mention that judicial interpretation has greatly changed, since a broader concept of the notion of disability is now widely accepted. Increased awareness of the international human rights norms and obligations has made the judiciary realise that disability can also be grounded in the cultural norms and values, which cannot be ignored. Besides, and more importantly, most of the rights enumerated in the UN Convention on Disability are rights enshrined in the Indian Constitution, and to that extent, the judiciary has an unfettered constitutional obligation to realize the goal of equality and human right for all without distinctions whatsoever.

The Supreme Court has indeed taken an activist stand from a human rights perspective even before the RPWD, 2016, was adopted. It has pronounced a number of decisions which bear a stamp of imprimatur of law under the impact and influence of the international obligations and the commitment undertaken by the government. Consequently, a noticeable change in the judicial sensitivity and treatment of the cases can be seen, which

87 (2014) 14 SCC 383.

88 Civil Appeal No. 273 of 2021, Special Leave Petition (c) No. 1882 of 2021 (decided on February 11, 2021).

89 Article 2 of the CRPD mentions, 'Reasonable accommodation means necessary and appropriate modification and adjustment not imposing a disproportionate or undue burden, where needed in a particular case, to ensue to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. The principle of reasonable of accommodation has further been expounded by the Committee on the Rights of Persons with Disabilities. See General Comment 6 (2018) on Equality and non-discrimination, UN Doc. CRPD/C/GC6, dated 26 April, 2018, paras. 23–27.

90 It is also significant to note that the Court brushed aside the argument made by the state that providing a scribe could lead to an undue advantage to persons with disabilities. It stated, such unfound suspicion, in the absence of any data only perpetuates stereotypes against persons with disabilities. In delivering this judgment, the Court relied upon the landmark precedent, where it was held that equality is not only limited to preventing discrimination but also embraces a wide ambit of positive rights, including reasonable accommodation. See *Jeeja Ghosh v. Union of India & Ors.*, AIR 2016 SC 2393. See also *Avni Prakash v. National Testing Agency* (NTA), Civil Appeal No. 7000 of 2021 (decided on November 23, 2021).

91 Writ Petition (Civil) No. 292/2006 and 997 of 2013 (decided on January 10, 2022).

92 Writ Petition (Civil) No. 243 of 2005 (decided on December 15, 2017).

demonstrates a landslide shift in the approach adopted by courts, from one which relied heavily upon medical opinion to one that is propelled by the international human rights norms of equality and human dignity.

7. The role of psychology, psychiatry and neurology in implementing Article 12 of the CRPD

As regards persons with mentally disabilities, the Indian Lunacy Act, 1912 (hereinafter ILA), can be regarded as the first legal instrument which governed mental health issues in India. This legislation was premised on the ground that persons with mental disability were dangerous for the well-being of the society. Hence, wide powers were given to the police to arrest them on mere suspicion and send them to mental hospital or asylums.[93] This act also dealt with the disposal of the property of such persons.[94] Application for such inquisition could be made by any relative of the alleged lunatic or by the advocate-general, but no legal capacity to do action was available to a lunatic.[95]

Prior to this ILA enactment, a few laws concerning mental illness were passed by the British administration, such as the Lunacy (Supreme Courts) Act, 1858; the Lunacy (District) Act of 1858; and the Indian Lunatic Asylum Act 1858. Implementation of these enactments, however, resulted in an indefinite confinement of the patients. These enactments conferred the responsibility upon the courts to deal with mentally ill persons, but human rights concerns were entirely neglected at that point in time.

The only act which mentioned the terms 'lunacy' and 'disabled' was the Calcutta Police Act of 1866. This act also recognised autism and Down syndrome as disabilities for their violent and unpredictable outbursts. The police officers were vested with a duty to afford every assistance within their power to disabled or helpless persons in the streets and to take charge of intoxicated persons and lunatics at large who appear to be dangerous or to be incapable of taking care of themselves.[96] Later, many years after independence, the government had launched the National Mental Health Programme (NMHP) in 1982 in order to address the problems arising from the heavy burden of mental illness in the country. This programme, however, did not take off in any concrete sense.

To remedy this aforementioned situation, Parliament enacted MHA in 1987.[97] This act was also silent on the legal capacity of the disabled persons. In 1996 the District Mental Programme (DMHP) was started with the objectives, which, *inter alia*, included (1) to provide sustainable basic mental health services to the community, (2) to reduce the

93 § 13 of the Indian Lunacy Act 1912.

94 Muhammad M. Firdosi, Zulkarnain Z. Ahmad, Mental health law in India: Origins and proposed reforms. *BJPsych International*, 2016, pp. 13–93, 65–67, https://doi.org/10.1192/s2056474000001264.

95 In *Ab Rashid Dar* v. *Aisha*, LAWS (J&K)- 1987-3-20. The Supreme Court directed the district court to take steps to take accounts of the estate of the lunatic from the appellant as the manager of the property since 1975.

96 § 10A(g), Calcutta Police Act 1866 (Repeal of Acts 13 of 1856 and 48 of 1860 in Calcutta).

97 Establishment or maintenance of psychiatric hospitals and psychiatric nursing homes; inspection of psychiatric hospitals and psychiatric nursing homes and visiting of patients; a right of admission into any psychiatric hospital or a psychiatric nursing home; right of treatment; right to access mental healthcare; right to community living; right to protection from cruel, inhuman and degrading treatment; right to equality and non-discrimination; right to information; right to confidentiality; restriction on release of information in respect of mental illness; right to access medical records; right to personal contacts and communication; right to legal aid; and right to make complaints about deficiencies in provision of services.

stigma of mental illness through public awareness and (3) treat and rehabilitate mental patients within the community. Later, a National Health Policy was launched in 2002, which incorporated some of the provisions on mental health. But there was no separate policy on mental health, and the question of legal capacity was far removed. Again, in 2003 some renewed efforts were made for modernisation of state mental hospitals and upgradation of the psychiatric wings of general hospitals. A Mental Health Policy Group (MHPG) was appointed by the Ministry of Health and Family Welfare (MoHFW) in 2012 to prepare a draft of DMHP for Twelfth Five-Year Plan (2012–2017).

However, as a result of the many drawbacks in the earlier attempts, including the MHA, 1987 the Ministry of Health and Family Welfare (MoHFW) chose to draft a new bill governing mental healthcare issues in India. The drafting of the new bill and consultation process included a psychiatrist, Mr. Soumitra Pathare, director of the Centre for Mental Health and Policy, ILS, Pune, who provided technical assistance to the Ministry of Health and Family Welfare in the drafting of the MHCA, 2017.[98] This was though mainly due to human rights activists and the non-governmental organisations, while professional organisations, such as Indian Psychiatric Society (IPS), who are a major stakeholder in the delivery of mental healthcare, were excluded. The bill was finally adopted in the form of legislation, namely, MHCA, 2017, which came into effect on May 29, 2018.

India had also adopted National Mental Health Policy (NMHP) in 2014, which was meant to guide and check all actions plans concerning the mental health programs in the country. This policy was commendable especially because it laid much emphasis on the mental health needs of the vulnerable groups, such as orphans with mental illnesses, children of persons with mental illness and children in a custodial institution. It is regrettable, in this context, that the MHCA, 2017, does not specifically mention any of these vulnerable groups.

One of the major drawbacks of MHCA, 2017, is that the Indian Psychiatric Society was not invited to take part in the drafting of this legislation, though they were consulted on a number of issues at different points of time. In any event, the IPS has been very critical about the new concepts as 'ambiguous and ill defined'.[99] They have pointed out that the 'advance directive' is a form of medical will which the mental health professionals have to follow when there is a loss of capacity to consent for treatment. They argue that this will bring new challenges to the professionals as the instructions therein are not in alliance with the best practice guidelines. Besides, this will be more expensive, adding extra burden to the caregivers and the family treating such persons. Similar arguments have been made in relation to 'nominated representative', which they claim will strain the Indian family system.[100]

One of the most important aspects of MHCA, 2017, is the decriminalisation of suicide, which was in fact because of the initiative and the consistent stand taken by the IPS. The presumption of severe stress in case of attempt to commit suicide is incorporated under § 115 of the act, and people will no longer be punished under § 309 of the Indian Penal Code. Earlier, the IPS has also greatly contributed in the recognition of equal rights and dignity of the lesbian, gay, bisexual, transgender and queer (LGBTQ) community in India,

98 See A. Jagadish, Furkhan Ali, Mahesh R. Gowda, Mental healthcare act 2017 – the way ahead: Opportunities and challenges, *Indian Journal of Psychological Medicine*, 2019 March–April, vol. 41, no. 2, pp. 113–118.

99 Ibid., 113–118, at 116.

100 Ibid., 116–117.

which eventually led § 377 of the Indian Penal Code to be repealed in 2018.[101] The IPS has also strongly criticised MHCA for having imposed a ban on the use of electroconvulsive therapy even in high-risk cases where there is threat to life of the person suffering with mental disability.

A psychiatrist is often called upon by the court to give his opinion. It is his duty to conduct mental health evaluation objectively and suggest treatment, which becomes relevant for any legal action and entitlement. However, it is regrettable that there is no standard evaluation procedure of patients who plead insanity as defence in India.[102] It must also be stressed that the relationship between mental health and law is both dynamic and sensitive. A psychiatrist is concerned primarily with the diagnosis of mental disorders and the welfare of the patient, while a court is mainly concerned with competency, dangerousness, diminished responsibility and the welfare of the society.[103] Mental health professionals must, therefore, be fully aware of the legal aspects of psychiatry and understand their role as an expert when summoned. Having written and informed consent and maintaining all documents can greatly protect them from litigation. In terms of restricted, regulated and prohibited procedures, they must seek prior permission from the concerned medical authorities and also follow the guidelines issued by the Indian Society for Stereotactic and Functional Neurosurgery and the Neuromodulation Society. It is imperative in this context to obtain informed consent for the patient or the guardian for use of certain neurosurgical procedures for psychiatric disorders.[104] Physical restraints can only be used when there is no other means to control the patient and must be recorded in their medical records by mental health professionals.

The problem is that mental healthcare in India is usually not perceived as an important aspect of public health system. People suffering with this ailment are amongst the most vulnerable and their social inclusion is not regarded as priority by local administration. This poignant situation is lamented by several authors who are of the opinion that lack of mental healthcare facilities generally and 'insufficiency of psychiatric rehabilitation services have led the government mental hospitals to become dumping ground of PMI'.[105] One can refer to the World Health Organisation (WHO) report in this context which says that the average number of psychiatrists in India is only 0.2 per 100,000 people, compared with a global average of 1.2 per 100,000 population. Also, the figures for psychologists, social workers and nurses working in mental healthcare are 0.03, 0.03 and 0.05 per 100,000 people in India, compared with global averages of 0.60, 0.40 and 2.00 per 100,000 people, respectively.[106] We may also add that a recent survey by the National Mental Health Survey (NMHS) shows prevalence of 13.7% lifetime and 10.6% current

101 See *Nevtej Johar v. Union of India*, AIR 2018 SC 4321.

102 S. B. Math, C. N. Kumar, S. Moirangthem, Insanity defence: Past, present and future, *Indian Journal of Psychological Medicine*, 2015, vol. 37, pp. 381–387.

103 A. K. Agrawal, Mental health and law, *Indian Journal of Psychiatry*, 1992, vol. 4, 65–66.

104 This includes ablative surgery and deep brain stimulations as an experimental treatment for patients with chronic severe and highly treatment-refractory obsessive-compulsive disorder, major depressive disorder and Tourette syndrome. See Suresh Bada Math et al., Mental health care act, 2017: How to organise the services to avoid legal complications? *Indian Journal of Psychiatry*, March 2022, vol. 64, (Suppl I), pp. S16–S24.

105 Suresh Bada Math et al., The rights of persons with disability act, 2016: Challenges and opportunities, *Indian Journal of Psychiatry*, 2019, vol. 61, pp. S809–S815, citing M. Maj, The rights of people with mental disorders: WPA perspective, *Lancet*, 2011, vol. 378, pp. 1534–1535.

106 World Health Organisation, 2005, cited in Muhammad M. Firdosi, Zulkarnain Z. Ahmad, Mental health law in India: Origins and proposed reforms. *BJPsych International*, 2016, p. 66.

mental morbidity in India.[107] These figures are confirmed again by WHO report submitted in September 2022.[108]

8. Active legal capacity of natural persons and its restrictions for the sake of disabilities – procedural aspects

The scope of the capacity to do legal actions (undertake obligations and acquire rights) under various legislations[109] prior to the year 2006 was limited and restrictions were laid down with the persons trading under lunacy or the mental illness or the disabilities. In civil cases, the capacity was limited and restricted only to the courts and in criminal cases it was with the state. However, under the dictum of the CRPD, the RPWD Act, 2016, removed all the restrictions which were laid down in the previous legislations by appointing a 'limited guardian' under § 14 of the RPWD, 2016.[110] Although no distinction is drawn between a limited or a total guardianship under the GWA, 1890, a guardian is generally appointed if the court deems it necessary for the welfare of the minor. It can appoint a guardian in various ways; for example, if the law to which the minor is subject admits of his having two or more joint guardians of his person or property, or both, the court may, if it thinks fit, appoint or declare them (S. 15 [1]) or separate guardians may be appointed or declared of the person and of the property of a minor (S. 15 [4]), or if a minor has several properties, the court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties (S. 15 [5]). If the court appoints or declares a guardian for any property situated beyond the local limits of its jurisdiction, the court, having jurisdiction in the place where the property is situated, shall, on production of a certified copy of the order appointing or declaring the guardian, accept him as duly appointed or declared and give effect to the order (S. 16). A collector, by virtue of his office, can be appointed as a guardian of the person or property by the court (S.18)

A guardian is also appointed under the NTA, 1999, through a parent of a person with disability or his relative or by any registered organisation by making an application to a local committee constituted through a board (S.14). This act also does not differentiate between a limited or total guardianship. However, a procedure is established under the RPWD, 2016, for limited guardianship[111] through a district court or a designated authority as notified by the state government for the persons with disabilities who cannot take legally binding decisions.

It may also be pointed out that the GWA, 1890; the NTA, 1999; and the RPWD, 2016 are central acts and are applicable uniformly to all the states except where rules are framed by the respective states. Per the National Centre for Promotion of Employment for

107 See G. Gururaj et al., *National mental health survey of India 2015–16: Summary: National institute of mental health and neuro science*, NIMHANS Publication No. 128, Bengaluru, 2016, p. 14.

108 See, *Addressing Mental Health in India*, WHO Report prepared for the Ministerial Roundtable of the 75th session of the WHO Regional Committee for South-East Asia, submitted on September 6th, 2022, at 5.

109 The Lunacy (Supreme Courts) Act, 1858; the Lunacy (District) Act, 1858; the Indian Lunatic Asylum Act, 1858; the Indian Divorce Act, 1869; the Court of Wards Act, 1879; the Evidence Act, 1872; the Indian Contract Act, 1872; the Lunacy Act, 1912; the Income Tax Act, 1922; the Indian Succession Act, 1925; the Mental Health Act, 1987; the Rehabilitation Act, 1992; the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995; the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, and Multiple Disabilities Act, 1999; and the National Policy for Persons with Disabilities, 2006.

110 §§ 13 and 14 of the RPWD, 2016.

111 For a discussion of the concept of limited guardianship, see the text accompanying the footnotes 31and 32.

Disabled People (NCPEDP), only one-third of India's States have notified rules under the RPWD, 2016. Some of the states which have undertaken this exercise include Telangana, Orissa, Chhattisgarh, Bihar, Gujarat, Uttar Pradesh and Meghalaya. This can be illustrated with an example, for instance, under Rule (5) of the Telangana State Rights of Persons with Disabilities Rules, 2017, while granting the support of such limited guardianship, the court or the designated authority would consider a suitable person to be appointed as a limited guardianship in the following preference of merit: (1) the parents or adult children of the person with disability, (2) immediate brother or sister or (3) other blood relatives or caregivers or prominent personality of the locality.

It is also imperative to mention that the guardianship can be challenged through a court of law under all the three enactments. Under the Guardian and Wards Act 1890, a guardian appointed or declared through a court can be removed by any person interested by making an application to the court showing the reasons like abuse of trust; continued failure to perform the duties of his trust; incapacity to perform the duties of his trust; ill-treatment or neglect to take proper care of his ward; contumacious disregard of any provision of the GWA, 1890, or any order of the court; conviction of an offence implying, in the opinion of the court, a defect of character which makes him unfit to be the guardian of his ward; having an interest adverse to the faithful performance of his duties; ceasing to reside within the local limits of the jurisdiction of the court; bankruptcy or insolvency, in the case of a guardian of the property; or the guardianship of the guardian ceasing, or being liable to cease, under the law to which the minor is subject (§ 39).

Under the NTA, 1999, whenever a parent or a relative of a person with disability or a registered organisation finds that the guardian is abusing or neglecting a person with disability or misappropriating or neglecting the property, it may in accordance with the prescribed procedure apply to the committee for the removal of such guardian. Upon receiving such application, the committee may, if it is satisfied that there is a ground for removal and for reasons to be recorded in writing, remove such guardian and appoint a new guardian in his place or if such a guardian is not available make such other arrangements as may be necessary for the care and protection of person with disability. Any person removed under subsection (2) shall be bound to deliver the charge of all property of the person with disability to the new guardian and to account for all moneys received or disbursed by him (§ 17).

Under RPWD, 2016, the district court or any other authority designated by the state government can appoint guardian for persons with varying degrees of disabilities. This enactment, as mentioned earlier, provides for 'limited guardianship', which is a system of joint decision operating on mutual understanding and trust between the guardian and the ward and is limited to a specific period and for specific decisions. Any person with disability aggrieved by the decision of the designated authority appointing a legal guardian may appeal to such appellate authority, which is notified by the state government for the purpose. It may also be pointed out that the lower courts, such as district courts, are competent to entertain the cases of the rights of persons with disabilities. Psychologists and psychiatrists are not involved in the proceedings of the case, except when a reference is made to them under § 45 of the Evidence Act, 1872, for their opinion as an expert in relation to disability of a person.[112]

Prior to the RPWD, 2016, a visually challenged person who was declared successful for the civil services examination conducted by the Union Public Service Commission and

112 For an assessment of the role played by Psychologists and Psychiatrist in any legal proceedings, see, generally, Amita Dhanda, *Legal order and mental disorder*, Sage Publications, New Delhi, 2000, pp. 121–126.

who stood at no. 5 of the merit list of visually impaired candidates was denied employment because he was 'not identified for persons with disabilities', and also the government did not have any reservations for such persons.[113] In another case, the court interpreted § 33 of the RPWD, 2016, and stated that it provides for a minimum level of representation of persons with disabilities of 3% in the establishments of appropriate government, and the legislature intended to ensure 5% of representation of persons with disabilities in the entire workforce both in public and private sectors.[114] The Supreme Court held that transport allowance to speech- and hearing-impaired persons must be granted at par with the blind and orthopedically disabled government employees.[115]

9. Organisation and institutional aspects of the assistance and guardianship for the purpose of doing legal acts by persons with disabilities

Assistance and protection provided to persons with disabilities in India can broadly be of two kinds:

1. Firstly, the assistance provided by the government is with an aim to promote psychological, social, physical, educational and economic rehabilitation and development of such persons to enhance their quality of life with dignity. Several programs and schemes are provided by the Ministry of Social Justice and Empowerment,[116] which, *inter alia*, include rehabilitation of persons with disabilities pertaining to physical, sensory, intellectual, psychiatric or socio-functional levels; creating equal opportunities and social justice;[117] encouraging voluntary action for ensuring effective implementation of the RPWD, 2016;[118] providing cochlear implant surgeries; distribution of motorised tricycle and wheelchair;[119] scholarships schemes;[120] and schemes for the implementation of RPWD, 2016.[121]

113 *Government of India v Ravi Prakash Gupta* (2010) 7 SCC 626.
114 *Union of India v National Federation of the Blind*, (2013)2 SCC 772.
115 *Deaf Employees Welfare Association v Union of India*, 2014 (3) SCC 173.
116 https://socialjustice.gov.in.
117 Deendayal Disabled Rehabilitation Scheme.
118 Model projects under DDRS Scheme include Project for Pre-school and Early Intervention and Training (for children up to 6 years of age); Special Schools for Intellectual Disability, Hearing and Speech Disability and Visual Disability; Project for Rehabilitation of Leprosy Cured Persons; Half-way Home for Psycho-Social Rehabilitation of Treated and Controlled Mentally Ill Persons; Home Based Rehabilitation Programme/Home Management Programme; Project for Community Based Rehabilitation; and Project for Low Vision Centres.
119 Assistance to Disabled Persons for Purchase/Fitting of Aids/Appliances (ADIP).
120 § 31 (1) & (2) of the RPWD Act, 2016.
121 For a very comprehensive and detailed discussion of several of these programs and schemes, see, generally, Annual Report of the Department of Empowerment of Persons with Disabilities for the Year 2021–22, Government of India, Ministry of Social Justice and Empowerment, www.disabiltyaffairs.gov.in (Hereinafter Annual Report, 2021–22).

Non-governmental organisations have also assisted people with disabilities in a number of ways.[122] This includes, *inter alia*, vocational training[123] providing equipment to empower children and adults with a range of disabilities, including locomotive difficulty, spinal cord injury, speech and hearing impairments, cerebral palsy and also, to some extent, mental issues.[124] The NGOs serve with the aim of helping the deaf and the blind children and adults to become full and active members of the society ensuring access to advice, opportunities and support;[125] rendering quadriplegic (paralysis of all the four limbs) for life by a an injury to his/her cervical spine;[126] developing a Disability Resource Manual, a training material for *Asha* and *Anganwadi* workers in spreading the information relating to the 21 disabilities;[127] training, placement and working towards the empowerment of people with disabilities through early intervention;[128] and providing technology-based development, an equal access to education and employment opportunities by providing soft skills, life skills and digital literacy for disabled persons.[129]

2. Secondly, appointing guardians for the purposes of doing legal acts by persons with disabilities under § 14 of the RPWD, 2016. An adequate, appropriate, limited or repeated support is provided to such persons with disabilities. In *Gopalan P.V. Union of India*[130] an issue concering the appointment of a guardian for the purpose of dealing with the fixed deposits of a person with disabilities was referred under the NTA, 1999. However, the Supreme Court held that the act of guardian is of 'limited purpose', and hence, the matter was referred under § 14 of the RPWD, 2016.

In *Uma Mittal v. Union of India*[131] the issue was whether a person under 'comatose' situation should be regarded at par with a person of disability so that a guardian can be appointed under the said § 14 of the RPWD, 2016.[132] The learned counsel for the petitioner, while referring to various legislative enactments has submitted that none of the provisions of any of the acts provide for appointment of guardians for a person in a comatose state,[133] unlike legislations for the appointment of guardians for minors and persons with other multiple disabilities or mental illnesses, like mental retardation. Thus, taking a cue from the decision of *Shobha Gopalakrishnan v. State of Kerala*,[134] the Court has laid

122 For more detailed information of these NGOs and the grant-in-aid released by the government, see, generally, the Annual Report, 2021–22.
123 Diya Foundation.
124 Association of People with Disability.
125 Sense International India.
126 Family of Disabled.
127 Vision for Health Welfare and Special Needs.
128 Sarthak Educational Trust.
129 Youth 4 Jobs Foundation.
130 Writ Petition (c) No. 19536 of 2020 (decided on October 27, 2020).
131 Writ Petition (c) No. 40096 of 2019 (decided on June 15, 2020).
132 Ibid.
133 The Guardians and Wards Act, 1890; the Code of Civil Procedure, 1908; the Indian Lunacy Act, 1912 (repealed); the Hindu Minority and Guardianship Act, 1956; the Mental Health Act, 1987 (repealed); the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1955 (repealed); the National Trust Act for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999; the RPWD Act, 2016; and the MHCA, 2017.
134 Writ Petition (Civil) No. 37278 of 2018 (decided on February 20, 2019).

down the following guidelines as a temporary measure until a legislation as to how guardians (petitioners) are to be appointed *vis-à-vis* an individual who is lying in comatose state is enacted by Parliament. These guidelines, *inter alia*, include the following:

1. The petitioner should disclose the particulars of the property of the person lying in comatose state. This should include the details as to their location and approximate market value.
2. The court can order such a person to be examined by a medical board, which includes a neurologist.
3. The court shall direct the revenue authorities to establish the veracity of the assertion and to gather material particulars concerning the person who approach the court for being appointed as guardians.
4. The person seeking appointment as a guardian should disclose the particulars of all legal heirs of the person lying in comatose.
5. Only that person shall be appointed as a guardian who is competent to act as a guardian.
6. The court is empowered to modify the order and bring within its sweep other assets, if required, in the interest of the person lying in comatose state.
7. The person appointed as a guardian will file every six months a report with the Registrar General of the court. The report shall advert to the transactions undertaken by the guardian in respect of the assets of the person lying in comatose state.
8. It will be open to the court to appoint a guardian either temporarily or for a limited period.
9. If the guardian misuses the power or fails to utilise the assets in the best interest of the person lying in comatose state, the court can remove him and appoint another. The substituted person can also be a public officer, such as a social welfare officer or an officer holding an equivalent rank. Such substituted persons can approach the court for issuance of appropriate direction, including removal of the guardian.

10. Active legal capacity of the persons with disabilities and its restrictions in the light of statistical data before the CRPD was ratified and afterwards

In relation to the statistical records concerning various factors relevant to legal capacity, there is no data available since the RPWD, 2016, is of recent origin. However, as per the census in 2011, there were over 26.8 million persons with disabilities in India, which constituted at that time 2.21% of the population.[135] These figures show that there were 14.9 million men with disabilities as compared to 11.9 million women in the country. It may also be pointed out that the Ministry of Social Justice and Empowerment deals with the disadvantaged and marginalised sections of the society, which include persons with disabilities. A separate Department of Empowerment of Persons with Disabilities was created in 2012 to focus on issues related to disabilities in India.[136] According to the annual report,

135 Annual Report, 2021–22, at 2. The latest census, which was due in 2021, has been postponed time and again because of the controversial National Register of Citizens (NRC) process introduced in some of the states in India.

136 For more details, see the First Country Report on the Status of Disability in India (submitted in pursuance of Article 35 of the CRPD), Government of India, Ministry of Social Justice and Empowerment Department of Empowerment of Persons with Disabilities.

the budget estimated by the government of India for the financial year 2021–2022 was Rs. 1,171.77 crore and the revised estimate was 1,044.31 crore.[137] In relation to National Funds for Persons with Disability, the government, as of December 31, 2021, has fixed deposits of 351.95 crore and savings of 22.88 crore.[138]

The annual report also mentions that in state/union territories, funds were released under DDRS during the last three years: 2018–2019 to 2021–2022.[139] The break-up for these financial years is 4,1803 (2018–2019), 38,004 (2019–2020), 31,542 (2020–2021) and 16,266 (as of December 31, 2021).[140]

11. The relation between private law restrictions of active legal capacity and protection of persons with disabilities under criminal law (against crimes which can be committed as a result of doing legal acts)

Restrictions on active legal capacity and protection of the persons with disabilities under various laws, both civil and personal have already been discussed earlier. We may now refer to some of the restrictions on active legal capacity of persons with disabilities under criminal law. In this context, we must first refer to the general principles relating to criminal responsibility of mentally ill persons under criminal law which is based on McNaughten Rules[141] and is incorporated under § 84 of the Indian Penal Code 1860. This provision reads, 'Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law'.[142]

To put it simply, the said provision lays down the test of responsibility in case of an alleged crime was done by a person with mental illness.[143] There is no definition of 'unsoundness of mind' in IPC, and the courts have treated this expression as equivalent to 'insanity', which again is subject to different meanings in different contexts with varying degrees of mental disorders.[144] Nevertheless, § 84 is based on a fundamental principle of criminal jurisprudence which is found in the maxim *actus non facit reum nisi mens sit rea* – meaning that an act does not constitute guilt unless done with a guilty intention.[145] This principle is again complemented with another fundamental principle of criminal law, which says *furiosi nulla voluntas est* – meaning that a person with mental illness has no free

137 See Annual Report, 2021–22, at 11, para. 2.7.

138 Annual Report, 2021–22, at 119, para. 8.5 The overall management of the national funds is under the chairmanship of the secretary of the Department of PwD, which is a governing body constituted by the central government. § 86 of the RPWD, 2016.

139 Annual Report, 2021–22, Annexure-7B, at 149. Total figures are given for each year.

140 Ibid., at 82, para.8.1.5. Figures are in lakhs in Indian rupees.

141 R v. Daniel M'Naughten (1843) Revised Reports Vol. 59:8 ER 718 (HL).

142 O. Somasundaram, Guilty but insane: Some aspects of psychotic crimes, *Indian Journal of Psychiatry*, 1960, pp. 80–85.

143 A Wahab, The concept: Criminal responsibility. *Journal of Karnataka Medico Legal Society*, 2003, vol. 11–12, pp. 30–32.

144 *Hari Singh Gond v. State of Madhya Pradesh*, 2008, 16 SCC 109. A distinction, however, is made by the courts between legal insanity and medical insanity. The courts are concerned with legal insanity and not with medical insanity. See, generally, S. B. Math, C. N. Kumar, S. Moirangthem, Insanity defense: Past, present and future, *Indian Journal of Psychological Medicine*, 2015, vol. 37, 381-387 (discussing several cases).

145 Francis E. Camps et al., *GradWohl's legal medicine*, 3rd ed., John Wright & Sons, Bristol, 1976, p. 494.

will. The embodiment of these two principles fastens no culpability on persons with mental illness since guilty intention (*mens rea*) is absent while committing the act (*actus reus*).[146]

Consequently, based on this reasoning, the principles are applicable to persons with mental disability. However, since 'unsoundness of mind' is not defined in the IPC, 'insanity' has to be sufficiently established before a court of law for a person to be absolved from criminal responsibility, and in which case, he will be sent to a psychiatric hospital for treatment, under § 471(1) of the Criminal Procedure Code (1973). Hence, in the enforcement of these principles of criminal jurisprudence, the courts have imposed lesser sentence on account of mental illness. In a case, for example, where due to unbearable conditions of life, on account of domestic quarrels, a woman (accused) jumped into a well along with her children. The court, in such a case, has held that it could only pass a lesser sentence of imprisonment for life.[147]

Similarly, a woman suffering from mental or physical disability is also granted protection against the offence of rape under § 376 (2) (l) of the IPC. The said Section reads, 'Whoever . . . commits rape on a woman suffering from mental or physical disability' shall be awarded with a rigorous imprisonment of either description for a term which shall not be less than ten years, but may extend to imprisonment for life, and shall also be liable to fine. Apart from these provisions, it is also imperative to mention that § 115 of the MHCA, 2017, provides, 'Notwithstanding anything contained in § 309 of the IPC any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code'. This development, decriminalising attempt to commit suicide, as stated earlier, is a significant contribution under the new enactment on mental health.

It may also be pointed out that, in light of the protests in the 2012 Delhi gang rape case, an ordinance was promulgated by the president of India on April 3, 2013, which led to passing of the Criminal Law (Amendment) Act 2013 (*Nirbhaya* Act), resulting in simultaneous amendments to the Indian Penal Code, the Indian Evidence Act and the Code of Criminal Procedure.[148] This amendment has also led to recognition of several specific offences that have now been incorporated under the IPC and have a bearing upon rights of persons with disabilities. These offences include acid attack (§ 326 A & B), voyeurism (§ 354C), stalking (§ 354D), attempt to disrobe a woman (§ 354B), sexual harassment (§ 354A) and sexual assault which causes death or injury causing a person to be in persistent vegetative state (§ 376A).

146 Ratanlal & Dhirajlal, *The code of criminal procedure*, 23rd ed., Lexis Nexis, New Delhi, 2019.

147 *Gyarsibai W/O Jagannath v The State*, 1953 CriLJ 588.

148 The Delhi gang rape and murder case is known as *Nirbhaya* case, which shocked the conscience of the nation. A 22-year-old physiotherapy student in 2012 was gang-raped by six men on a moving bus in the capital city of India. She was brutally beaten and tortured before thrown out of the bus along with her boyfriend. She later succumbed to her injuries. This incident, galvanised a movement against such crimes, and which resulted in the criminal law amendment, is often referred to as the *Nirbhaya* Act (meaning fearless, because of the courage shown by the victim). Four of the adult convicted persons were sentenced to death, which was carried out in March 2020.

12. Concluding remarks

We have made an attempt to examine the subject of 'legal capacity' in relation to persons with physical and mental disability under the Indian legal system. We may now summarise and recapitulate some of the critical issues by way of conclusion.

India has a strong legal regime to protect the rights of persons with disabilities. However, in relation to legal capacity of persons challenged with physical and mental disabilities, it is still lagging behind the goal set forth by the CRPD in this regard. Nevertheless, a *carte blanche* presumption of lack of decision-making power in every case, without looking into specificity of the varying circumstances faced by the persons with disabilities, would be detrimental to the notion of equality under human rights law.

The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. To that extent, in terms of implementation, legal provisions, notwithstanding the progress made under RPWD, 2016, and MHCA, 2017, would fall short of the norms established under the CRPD.

Although judicial interpretation of the rights of the people with disabilities has been greatly influenced by changing perceptions of disability, the remnants of misconception and the resultant opprobrium generated by public perception on legal capacity of disabled persons are still wide spread in India. Moreover, many of the laws are outdated and are often affected with ambiguity when it comes to legal capacity. This has often led to abuse of power and authority, especially in the realm of private laws in respect of the rights exercised by guardians on behalf of the disabled persons. There may also be cases of genuine feeling of patriarchy, especially in relation to personal laws governing guardianship (relying on different interpretations and authorities), but most of them are contrary to equality of sexes under human rights law.

Therefore, despite having a sound legal system to protect the rights of persons with disabilities, including new legislation, much remains to be done. Although the mental healthcare system in India has undergone a substantial change, transforming the rights of the persons affected with mental disability, still more improved regulatory mechanisms must be adopted, including various methods of sensitisation and capacity building measures to strengthen the decision-making processes at various levels. Unless the government undertakes more relentlessly appropriate measures, overhauling some of the laws that deprive people with disabilities from exercising their legal capacity, a paradigm shift may only be elusive and illusory.

The Committee on Disability, in expressing its views on India's first report, has recommended that India should replace substituted with supported decision-making regimes. This is true; India must eventually develop new and more transparent supportive regimes that uphold the will, preference and autonomy of the disabled people; until then, all efforts will only be murky. This situation can possibly change with more sensitisation and massive campaign of dissemination of the rights of the disabled persons and through a vigorous implementation of the laws by the courts.

The MHCA, 2017, has the potential of bringing some radical changes in the mental healthcare system of India since it is progressive, patient-centric and rights-based legislation. However, on the flip side, it is feared by some that since admission procedures, treatment options and decision-making would become legalised under the MHCA, 2017, regime, it will only increase the social stigma, stereotypes and hesitation to seek treatment of mental illness. This could especially be the case in rural parts of the country where, due

to cultural, educational and social barriers, a large population of the country would still inhibit or fear visiting mental health professionals for their treatment. Another problem may also arise due to weak social security system and the fragile healthcare industry in India,[149] which will further expose persons with disabilities to higher levels of risk.[150]

Finally, has India succeeded in achieving the international norms, in terms of the paradigm shift in relation to legal capacity, enshrined under the CRPD? The answer is not unambiguous, for the law on legal capacity has not fundamentally changed. There are though mixed results following the enactment of the RPWD Act, 2016, and the active stand taken by the judiciary, which cannot be ignored. However, the shift from a substitute decision-making model to one based on supported decision is still a distant reality in spite of the progressive reforms undertaken by the government. On the other hand, a paradigm shift may not be possible overnight, especially in relation to mentally and intellectually challenged people, for supportive regimes may still be more effective and a better option in certain circumstances. The success of any legislation largely depends upon proactive and conscientious measures undertaken by the government – a factual reality which must always be taken as a threshold test to assess any essential progress in protecting the rights of the disabled persons.

India has of course set itself on the path of providing relief to the people with disabilities, which is certainly an uphill task, given the fact that India has one of the largest disabled populations in the world.[151] Bearing this in mind, as well as the fact that legislative reforms are often slow, the road to legal capacity to its fullest extent is very difficult and slippery. India still has a long way to go. But on a positive note, since a beginning towards supported decision-making regimes has already been made, we may conclude that there is always a light at the end of the tunnel.

149 It is reported that the annual health expenditure of India is 1.15% of the gross domestic product, and the mental health budget is 1% of India's total health budget, V. Patel et al., The magnitude of and health system responses to the mental health treatment gap in adults in India and China, *Lancet*, 2016, vol. 388, pp. 3074–3084. See, G. Gururaj et al., *National mental health survey of India 2015–16: Summary*, National Institute of Mental Health and Neurosceince, Bengaluru, 2016.

150 This was especially the situation during the recent pandemic caused by the COVID-19 virus. See, for example, Lest We Forget: COVID-19, Persons with Disabilities and an (Un)Inclusive Healthcare System, Report prepared by *Vidhi centre for legal policy*, New Delhi, http://vidhilegalpolicy.in.

151 Latest disability figures for the year 2021 can be found in the Global Health Observatory section, World Disability Report, 2011, WHO, http://who.int/data/gho/country-details/GHO/India.

16 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Ireland

Charles O'Mahony and Aisling de Paor

Introduction

The right to autonomy and self-determination are central principles in allowing everyone to participate as members of society. However, legal capacity can only be achieved in circumstances where the law facilitates decision-making.[1] Irish law has been wholly insufficient in facilitating persons requiring support in making legally effective decisions and has operated for generations to deny the legal capacity of persons whose mental capacity has been called into question. Persons labelled as having intellectual disabilities or mental health problems, older persons and persons who have an acquired brain injury have been vulnerable to the denial of legal capacity and equal recognition before the law. As the Irish law currently stands, a person's legal capacity can be restricted through the wards of court system, a type of plenary guardianship operating under antiquated legislation, known as the Lunacy Regulation (Ireland) Act 1871 (1871 Act). This chapter considers how the Assisted Decision-Making (Capacity) Act 2015 (2015 Act), which at the time of writing has yet to be commenced (come into force), complies with Ireland's obligations under Article 12 of UN Convention on the Rights of Persons with Disabilities (CRPD). While the law currently in force does not comply with the CRPD, it is envisaged that when enacted the new legislation will bring Ireland into closer compliance with the CRPD but will still fall through the inclusion of provisions on substitute decision-making. This chapter also considers the Assisted Decision-Making (Capacity) (Amendment) Act 2022 (2022 Act). The 2022 Act which was enacted in December 2022 significantly amends the principal legislation. However, both pieces of legislation as not yet commenced at the time of writing. This legislation raises concerns in respect of discriminatory provisions that prohibit persons involuntarily detained under Part 4 of the Mental Health Act 2001 from making advance healthcare directives. In consideration of this background and emerging legislative framework, this chapter evaluates Ireland's compliance with Article 12 of the CRPD.

1 Mary Keys, Legal capacity law reform in Europe: An urgent challenge, in: *European yearbook of disability law*, ed. G. Quinn, L. Waddington, vol. 1, Intersentia, Antwerp, 2009, p. 59.

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Ireland and the CRPD

Ireland signed the CRPD in 2007 and ratified it in 2018[2] but deferred ratification of the Optional Protocol (OP).[3] Ireland adheres to the common law tradition of not ratifying treaties until such time that it is considered that Irish domestic law is in general conformity with the treaty. This has been the justification for the delayed ratification of the CRPD and the refusal to ratify the OP. When ratifying the CRPD in 2018, Ireland entered a declaration and reservation on Article 12,[4] the text of which states that Ireland recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. However, it declares its understanding of the CRPD permits both supported and substitute decision-making arrangements, subject to appropriate and effective safeguards. It went on to state that 'the extent article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Ireland reserves the right to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards'.[5] This understanding of Article 12 is clearly at odds with the established jurisprudence of the CRPD Committee.[6]

Ireland's declaration in respect of Articles 12 and 14 reads as follows:[7]

> Ireland recognises that all persons with disabilities enjoy the right to liberty and security of person, and a right to respect for physical and mental integrity on an equal basis with others. Furthermore, Ireland declares its understanding that the Convention allows for compulsory care or treatment of persons, including measures to treat mental disorders, when circumstances render treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards.

Before ratification the Department of Justice and Equality indicated that Ireland, when ratifying the CRPD, would enter an interpretative declaration in respect of Article 12 (similar to the declarations of other States Parties such as Canada, Australia, and Norway).[8] This was not a surprise given that the 2015 Act when it is commenced (see the following

2 Ireland was the last country in the EU to ratify the CRPD largely due to the delay in reforming outdated capacity legislation (The Lunacy Regulation [Ireland] Act [1871]), which does not comply with international human rights standards. This will be replaced by the Assisted Decision-Making (Capacity) Act 2015, which is yet to be commenced (see the following discussion).

3 The protocol allows for complaints to be submitted directly to the CRPD Committee, which is a UN body of independent experts which monitors implementation of the CRPD by countries that have become party to it. A person can make a complaint alleging the violation of CRPD rights if the state has ratified the optional protocol.

4 United Nations, Ireland's 'Declaration: Articles 12 and 14' (March 20, 2018), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en, accessed November 28, 2022.

5 Ibid.

6 General Comment No. 1, *Equal recognition before the law (Article 12)*, UN Committee on the Rights of Persons with Disabilities, Geneva, April 11, 2014.

7 United Nations, *Ireland's 'Declaration: Articles 12 and 14'*, March 20, 2018, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en, accessed November 28, 2022.

8 Roadmap to Ratification of the United Nations Convention on Persons with Disabilities (Dublin: Department of Justice and Equality, October 2015).

discussion) provides for substitute decision-making. The declaration and reservation on Article 12 reads as follows:[9]

> Ireland recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Ireland declares its understanding that the Convention permits supported and substitute decision-making arrangements which provide for decisions to be made on behalf of a person, where such arrangements are necessary, in accordance with the law, and subject to appropriate and effective safeguards.
>
> To the extent article 12 may be interpreted as requiring the elimination of all substitute decision making arrangements, Ireland reserves the right to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards.

Ireland's initial state report under Article 35 of the CRPD, sets out the domestic position with respect to each article of the Convention.[10] In the report, Ireland highlighted recent developments in public policy and legislation that it considered to bring the state into compliance with the CRPD. Ireland highlighted '[t]he Comprehensive Employment Strategy for People with Disabilities 2015–2024', which outlines a whole-of-government agenda for increasing access to employment for persons with disabilities. 'The National Disability Inclusion Strategy 2017–2021', was also highlighted as this policy seeks to address broader equality and inclusion issues such as the need for joined up public services to meet the needs of people with disabilities.[11] Of particular note for the purposes of this chapter, the Irish government also spotlighted its work on the development of the Assisted Decision-Making (Capacity) Act 2015, which when commenced will provide for a new Decision Support Service to support the rights and interests of people who may need support with decision-making (see the following discussion). Other legislation, such as the Irish Sign Language Act 2017, which conferred official language status on Irish Sign Language, was also referenced.

The Irish government also pointed to the creation of the public sector equality and human rights duty as evidence of compliance with obligations arising from the CRPD. This duty is set out in § 42 of the Irish Human Rights and Equality Commission Act 2014. The duty requires all public bodies to set out in its strategic/corporate plan an assessment of the equality and human rights issues relevant to its purpose and functions, in a manner that is accessible to the public. A public body is required to report annually on developments and achievements regarding the equality and human rights issues and actions, and act in an oversight capacity.

As mentioned earlier, Ireland did not ratify the Optional Protocol. This failure to ratify the OP to the CRPD means that Ireland is an outlier amongst EU member states (along with the Netherlands and Poland). The OP to the CRPD essentially provides for two

9 United Nations, *Ireland's 'Declaration: Articles 12 and 14'*, March 20, 2018, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en, accessed November 28, 2022.

10 See the initial report under the Convention on the Rights of Persons with Disabilities: Ireland, Initial Report to the Committee on the Rights of Persons with Disabilities, Dublin, December 2020.

11 Both these policy frameworks were developed in consultation with Irish and international disability stakeholder groups and wider civil society and the monitoring mechanisms for both strategies also include disability stakeholders.

procedures to strengthen it: the individual communications procedure and the inquiry procedure.[12] The failure to ratify the OP to the CRPD has been criticised by non-governmental organisations, disabled persons organisations and the Irish Human Rights and Equality Commission as undermining Ireland's commitment to implementing and realising the rights contained in the CRPD. Louise Arbour, the former United Nations high commissioner for human rights, highlighted the importance of Optional Protocol to human rights treaties as bolstering 'the current system of treaty monitoring [and] help[ing] to clarify what is – and what is not – required of States, while providing effective remedies to aggrieved individuals'.[13] The failure to ratify the OP means that persons subject to the 2015 Act will be denied access to the mechanism to make individual complaints directly to the CRPD Committee should their right to exercise their legal capacity be interfered with. The delayed ratification is regrettable as the OP encourages Ireland as a state party to implement the CRPD effectively, to address human rights concerns and provide remedies to law and policy that is at odds with the Convention. Additionally, the failure to ratify means that an essential layer of accountability is absent, thereby further diluting the rights of persons with disabilities in this context in Ireland.

Restricting legal capacity in Ireland

It is recognised that the rights of persons subject to the 1871 Act are not sufficiently set out in Irish law and that significant barriers prevent equal recognition before the law for persons with disabilities.[14] The invisibility of persons with disabilities and the failure to realise their human rights is a global issue.[15] Traditionally there were three main approaches to restricting legal capacity: the status approach, the outcome approach and the functional approach.[16] The status approach operates by assuming that a person lacks legal capacity as they are labelled, for example, as having a disability (in particular an intellectual disability, psychosocial disability or a diagnosis of dementia). Having a 'diagnosis' of 'intellectual disability' may be sufficient to strip a person of their legal capacity and provide for the imposition of substituted decision-making by a third party in Ireland. Under the status approach, a person either has full mental capacity or lacks mental capacity entirely. The outcome approach is rooted in the belief that in circumstances where a person makes a bad decision or several bad decisions, that person should lose the right to continue to

12 The ratification of the OP is *optional* in that states are not obliged to become parties to the protocol, even if they are party to the parent treaty (the CRPD).

13 United Nations, Chapter three: Monitoring the convention and the optional protocol, in: *From exclusion to equality, realizing the rights of persons with disabilities: Handbook for parliamentarians on the convention on the rights of persons with disabilities and its optional protocol*, Office of the High Commissioner for Human Rights, Geneva, 2007.

14 See Law Reform Commission, Consultation Paper on Vulnerable Adults and the Law: Capacity (LRC (37) 2005.

15 See Strengthening older persons rights: Towards a UN convention, A resource for promoting dialogue on creating a new UN convention on the rights of older persons, 2010, p. 6; General comment no. 1: Equal recognition before the law (article 12), UN Committee on the Rights of Persons with Disabilities, Geneva, April 11, 2014, and Guidelines on deinstitutionalization, including in emergencies, Committee on the Rights of Persons with Disabilities, Geneva, CRPD/C/5, October 10, 2022).

16 Amita Dhanda, Legal capacity in the disability rights convention: Stranglehold of the past or lodestar for the future? *Syracuse Journal of International Law and Commerce*, 2007, vol. 34, no. 2, pp. 429–462.

make decisions.[17] This approach to capacity is now outdated, as there is recognition that 'we all have the right to make our own mistakes' and that it is unjust to set the decision-making bar higher for persons with disabilities or indeed older persons.[18] The functional approach was viewed as a more progressive approach and involves a consideration of a person's mental capacity to make decisions on an issue-specific basis. A person might not be considered able to make decisions of a financial nature but might be considered to have mental capacity to make personal care decisions. This approach rejects the status approach and outcome approach. The functional approach presumes that a person has mental capacity unless proven otherwise and may involve the provision of supports for the person to exercise decision-making. As will be discussed, this approach was seen as desirable by Irish policy-makers and lawmakers.

However, Article 12 of the CRPD has superseded the functional approach. Article 12 requires a 'paradigm shift' away from these approaches to legal capacity to a supported decision-making model.[19] As we will outline further here, the current legal position under Irish law is a mix of the functional, status and outcome approaches.[20] It is widely recognised that the current legal position is at odds with Ireland's obligations under international human rights law and law reform is urgently needed as it fails to meet the needs of persons who require support to make decisions.[21]

The CRPD and the wards of court system

Equal recognition before the law for persons with disabilities is crucial as recognition of legal capacity is a gatekeeper right to the enjoyment of other fundamental human rights. It is clear from the examination of the wards of court system that the current safeguards for legal capacity fall well short of the standards set out in Article 12 of the CRPD. The wards of court system leave no space to reflect the rights, will and preferences of persons subject to this system. For example, the normal court practice of not meeting with the person subject of a wardship application is not sufficient in safeguarding against conflicts of interests and the exertion of undue influence on the person subject to the application. In addition, the archaic and complex nature of the wardship system means that restrictions on capacity are not proportional or tailored to person individual circumstances.

17 Gerard Quinn, Personhood & legal capacity perspectives on the paradigm shift of Article 12 of the CRPD, Harvard Project on Disability Conference, Harvard Law School, February 20, 2010.

18 Ibid.

19 See General comment no. 1: Equal recognition before the law (article 12), UN Committee on the Rights of Persons with Disabilities, Geneva, April 11, 2014) and the developing jurisprudence of the UN Committee on the Rights of Persons with Disabilities through its concluding observations to State Parties to the Convention, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5, accessed November 28, 2022.

20 The ward of courts system operates from a status and outcome approach, and the Irish courts, in Fitzpatrick v FK, The Attorney General [2008] IEHC 104, have developed jurisprudence on the functional assessment of mental capacity in the context of decision-making in healthcare.

21 See Irish Human Rights Commission, *Observations on the assisted decision-making (capacity) bill 2013*, Irish Human Rights Commission, Dublin, March 2014; Amnesty International, *Decision-making capacity in mental health: Exploratory research into the views of people with personal experience*, Amnesty International, Dublin, December 2009; Amnesty International, *A citizen's jury on legal capacity law*, Amnesty International, Dublin, October 2012.

In the absence of legislation, the wards of court system remain the current and exclusive mechanism for managing the affairs of persons considered to be lacking decision-making capacity in Ireland for generations.[22] The president of the High Court in Ireland has responsibility for the wards of court system, and the Registrar and staff of the Office of Wards of Court administer the system. The criteria for wardship and the procedure for bringing a person into wardship are set out in the Lunacy Regulation (Ireland) Act 1871 and Order 67 of the Rules of the Superior Courts 1986.[23] Wardship proceedings are most commonly brought in respect of an adult who is considered to have substantially lost mental capacity through physical illness or mental illness, intellectual disability or injury, and the person has a certain amount of money or property that requires protection and use for their maintenance.[24] The Irish Supreme Court has acknowledged that being made a ward has significant consequences. For example, in the Re A Ward of Court (No. 2), the Supreme Court stated, 'When a person is made a ward of court, the court is vested with jurisdiction over all matters relating to the person and estate of the ward'.[25] A person who is made a ward loses the right to make any decisions about their person and property and is in complete denial of their legal capacity and related rights under the CRPD.

The current position is that the court will have regard to the views of the ward's committee and family members and the court will make decisions on the basis of the 'best interests' of the ward.[26] However, as the Law Reform Commission noted, there is generally no effort to consult the ward in relation to those decisions.[27] The Law Reform Commission also noted that the 'criteria for wardship and the procedure for bringing a person into wardship are archaic and complex'.[28] A significant issue with the wardship procedure is that it does not contain sufficient procedural safeguards in terms of protecting the human rights of the ward. In addition to the archaic and complex procedure for wardship, there are paternalistic concepts at the heart of the wardship system, and these do not accord with human rights law and the more progressive understanding of legal capacity. The focus of the wards of court system is on the property and estate of a ward, as opposed to the fundamental human rights of the ward.[29]

Another major deficiency with the wardship system is that an order of wardship is of indefinite duration. There is no requirement for the regular review of a ward or for periodic review of the ward's welfare. § 56 of the Lunacy Regulation (Ireland) Act 1871 merely provides that the president of the High Court can instruct a 'medical visitor' to visit a person after they have been made a ward. The Registrar does have a power to require the committee of the person to provide details of the ward's residence and physical and mental

22 The only form of advance planning for persons who fear impairment of their decision-making capacity in the future is provided for in the Power of Attorney Act 1996, which provides for a donor to create an enduring power of attorney.

23 S.I. No. 15 of 1986.

24 For a comprehensive discussion of the wards of court system, see Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC (37) 2005) 78 and Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC (23) 2003) 87.

25 [1996] 2 IR 79.

26 The concept of 'best interests' developed in child and family law and is not a suitable concept to be applied to the decision-making of adults.

27 Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC (83) 2006) 29.

28 Ibid.

29 Often it is only when the issue of protecting the property of the ward becomes an issue that the person is made a ward of court, and the focus from then on is on the protection of property.

condition on a periodic basis.[30] In practice, review of a ward's situation is only likely to be examined when the Office of Wards of Court receives a specific complaint.[31]

The High Court can discharge a person from wardship where satisfactory medical evidence is provided in relation to the ward's mental capacity. If the court grants a discharge, then a ward's legal capacity and control of the person and property can be restored. However, this does not constitute an adequate review mechanism to address continuing detention in a long stay care facility or psychiatric residence.[32] Therefore, it is evident that the wards of court system is wholly inconsistent with Article 12 of the CRPD.

The acknowledgement of the need to repeal and replace the wards of court system has resulted in an evolving public policy discourse around the concept of personhood and legal capacity in Ireland.[33] It is important to recognise that the recognition of legal capacity makes personal choices possible. So, issues such as the ability to enter contracts and managing financial affairs are important expressions of freedoms, which recognition of legal capacity is required. While human rights require the state not to intrude into a person's personal life, it correspondingly places an obligation on the state to prevent third parties interfering with the enjoyment of rights. The CRPD requires the state to protect the rights of persons whose decision-making has been questioned. The CRPD also requires the abolition of laws that mandate substitute decision-making, such as the wards of court system. There has been a gradual recognition in Ireland to make provision for support to facilitate persons to make decisions where needed.

It is clear from the jurisprudence that the introduction of national laws that comply with the requirements of Article 12 are very challenging. The Committee noted that there was a general misapprehension amongst state parties to the CRPD 'to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making'.[34] This certainly has been the case in Ireland. When the CRPD entered into force in 2007 the Irish government were

30 When a judge decides to make a person a ward, it is normal practice to make an order appointing a committee of the ward. The committee is the person to whom the supervision of the ward's person and affairs and is typically a family member of the ward. A committee of the estate can also be appointed; however, the same person is normally appointed to both roles.

31 Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC (37) 2005) 91. The current regime does not make provision for the periodic review of the mental capacity or welfare of a person who has been made a ward.

32 See the judgments of the European Court of Human Rights in Winterwerp v the Netherlands (1979–1980) 2 EHRR 387 and Shtukaturov v Russia App. No. 44009/05, 27/06/2008. The principles formulated by the Committee of Ministers of the Council of Europe regarding the legal protection of incapable adults support the concept of fair procedures (Council of Europe Recommendation R(99)4 of the Committee of Ministers to member states on principles concerning the legal protection of incapable adults). Principle 13 provides that persons 'should have the right to be heard in person in any proceedings which could affect his or her legal capacity'. Principle 15 recognises that provisional measures might be necessary in the case of an emergency. Under these circumstances, the application of certain procedural safeguards, including the right to be heard in person, may be restricted but should be applicable as far as possible. The reality with the wards of court system is that persons subject to an application for wardship are rarely heard, as such the wards of court system is not consistent with the principles set out by the Committee of Ministers of the Council of Europe.

33 See Gerard Quinn, *Personhood & legal capacity perspectives on the paradigm shift of article 12 CRPD*, Harvard Project on Disability Conference, Harvard Law School, February 20, 2010, http://www.nuigalway.ie/cdlp/staff/gerard_quinn.html, accessed November 28, 2022.

34 Ibid., 1.

of the view that guardianship laws, such as the ones that operate in England and Wales (Mental Capacity Act 2005) complied with the requirements of Article 12 of the CRPD. However, this misapprehension was gradually realised as the CRPD Committee clarified that substitute decision-makers take decisions on what is believed to be in the objective 'best interests' of the person concerned, as opposed to being based on the person's own will and preferences, and these systems did not comply with Article 12 of the CRPD.

The Assisted Decision (Capacity) Act 2015

The Irish government have accepted for quite sometime there are significant deficiencies with the wards of court system and have committed to the introduction new legislation.[35] Despite many commitments, new legislation has not commenced. The Department of Justice, Equality and Law Reform published the scheme of the Mental Capacity Bill in 2008. The 2008 Heads of the Bill were largely based on the Law Reform Commission of Ireland's recommendations in its body of work in this area.[36] The 2008 Bill sought to reform the wards of court system insofar as it applies to adults and replace it with a guardianship system that would regulate decision-making of persons considered to lack mental capacity. The government at the time considered that the 2008 Bill would 'give effect to the Convention insofar as it applies to the legal capacity issues in Article 12 of the Convention'.[37] The draft scheme of the 2008 Bill sought to strike a balance between autonomy and protection. However, much of the commentary on the Scheme of the 2008 Heads of Bill recognised that it fell significantly short of complying with the requirements of Article 12 of the CRPD.[38]

A range of interest groups, professionals and other stakeholders were centrally involved in the law reform process through feeding into the Law Reform Commission's consultation process and subsequently through engaging in discussion with government on the resultant legislation to repeal and replace the wards of court system. Amnesty International Ireland partnered with the Centre for Disability Law and Policy at the University of Galway and a range of organisations and individuals representing the views of older persons and persons with disabilities, coming together in 2011 to impact the law reform process. The coalition engaged with the Joint Oireachtas Committee on Justice, Defence and Equality public hearings on 2008 Bill.[39] This coalition of stakeholders also produced a document that set forth their views as to essential principles that ought to underpin

35 See, for example, Second disability high level group report on implementation of the UN convention on the rights of persons with disabilities, June 2009, p. 96, http://ec.europa.eu/social/main.jsp?catId=431&langId=en, accessed November 28, 2022.

36 See Law Reform Commission *Report Vulnerable Adults and the Law* (LRC (83) 2006), Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC (37) 2005), Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC (23) 2003), www.lawreform.ie accessed November 28, 2022.

37 Second disability high level group report on implementation of the UN convention on the rights of persons with disabilities, June 2009, p. 96, http://ec.europa.eu/social/main.jsp?catId=431&langId=en, accessed November 28, 2022.

38 See, for example, Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality, Centre for Disability Law & Policy, NUI Galway, Galway, August 2011.

39 See Report on Hearing in Relation to the Scheme of the Mental Capacity Bill, Joint Oireachtas Committee on Justice, Defence and Equality, Dublin, May 2012.

and run throughout the new legislation.[40] These principles were based on the emerging understanding of Article 12 of the CRPD as interpreted by the UN Committee on the Rights of Persons with Disabilities. The written and oral submissions made by civil society organisations on the Mental Capacity Bill 2008 had a significant impact as evidenced by the Oireachtas Committee's Report on how the 2008 Bill needed to be reformulated.[41] The Committee acknowledged the need to move away from a substitute decision-making model as proposed in the 2008 Bill to a supported decision-making model as required by Article 12 of the CRPD.[42]

The government subsequently published the Assisted Decision-Making (Capacity) Bill 2013.[43] There was a consensus amongst civil society organisations that the revised bill represented a 'significant improvement' on the Mental Capacity Bill 2008.[44] On publication of the 2013 Bill the then Minister for Justice Alan Shatter considered that the Assisted Decision-Making (Capacity) Bill 2013 was sufficiently 'framed to meet Ireland's obligations under Article 12 of the Convention in line with the Government's commitment in the Programme for Government to introduce this legislation'.[45] However, the 2013 Bill has been described as 'an interesting mix of supports . . . and substitute decision-making' falling short of the requirements of Article 12.[46]

The bill was enacted as the Assisted Decision-Making (Capacity) Act 2015. The 2015 Act provides for substitute but also includes several provisions that support persons to make legally effective decisions. The provisions on substitute decision-making are at odds with the CRPD. Nevertheless, there is explicit recognition in the guiding principles of the centrality of respecting the will and preferences of the person. This inclusion in the guiding principles reflects the paradigm shift in thinking around legal capacity required by Article 12 of the CRPD. In that regard it is important to recognise that the guiding principles do not contain the 'best interests' principle. This is a positive development that may facilitate interpretation of the legislation in a manner that recognises the person's legal capacity and defend against attempts to interfere with a person's decision-making. The provisions in the 2015 Act on supported decision-making have the potential when enacted to support the exercise of legal capacity where a person's mental capacity has been called into question. As mentioned earlier, the 2015 Act articulates the guiding principles underpinning the legislation in a manner that aligns with Article 12 of the CRPD, which is a vast improvement to those in the Mental Capacity Bill 2008.

40 See Essential Principles: Irish Legal Capacity Law, Centre for Disability Law and Policy, University of Galway, Galway, 2012, http://www.nuigalway.ie/cdlp/documents/principles_web.pdf, accessed November 28, 2022.

41 Report on Hearing in Relation to the Scheme of the Mental Capacity Bill, Joint Oireachtas Committee on Justice, Defence and Equality, Dublin, May 2012.

42 Ibid.

43 For a discussion on the bill, see Brendan Kelly, The assisted decision-making (capacity) bill 2013: Content, commentary, controversy, *Irish Journal of Medical Science*, 2015, vol. 184, pp. 31–46.

44 See, for example, Equality, dignity and human rights: Does the decision-making (capacity) bill 2013 fulfil ireland's human rights obligations under the convention on the rights of persons with disabilities? Centre for Disability Law and Policy, University of Galway, Galway, 2013.

45 See Alan Shatter, *Speech by minister for justice, equality & defence at the assisted decision – making (capacity) bill 2013*, Consultation Symposium, Printworks Conference Centre, Dublin Castle, Dublin, September 25, 2013.

46 Elionóir Flynn, Anna Arstein-Kerslake, The support model of legal capacity: Fact, fiction, or fantasy? *Berkeley Journal of International Law*, 2014, vol. 32, no. 1, pp. 124, 134.

The framework contained in the 2015 Act is considered by some commentators as more flexible by providing a functional definition of capacity than the wards of court system.[47] The legislation provides that capacity is assessed only in relation to the matter in question and only at the time in question. If a person is found to lack decision-making capacity in relation to one matter, this will not necessarily mean that they lack capacity in another decision-making area. The legislation recognises that a person's mental capacity can fluctuate. However, the functional approach adopted in the legislation is not in compliance with the CRPD. Jonas Ruskus, a member of the CRPD Committee on the Rights of Persons with Disabilities, criticised a statement made by the minister for equality (who has responsibility for the legislation), who stated in the Irish Parliament that the legislation followed the requirements of the CRPD.[48] In addition, civil society groups and human rights advocates lobbied for the functional approach to capacity to be removed from the legislation and several amends were tabled but defeated.[49] Civil society groups and human rights advocates advised government that the functional approach to capacity adopted in the legislation does not comply with Article 12. They referenced the CRPD Committee's General Comment No. 1, which explicitly states the functional approach is contrary to the Convention. There is concern that the functional approach in assessing mental capacity will result in the denial of legal capacity for those persons subject to the new legislation.

Essentially the 2015 Act when commenced offers three new categories of decision-making options. The three decision-making support options decisions can be made on personal welfare, property and finance or a combination of both. *Assisted decision-making* permits a person may appoint a decision-making assistant. It is envisaged that a family member or trusted person will generally undertake this role. This support is managed through a formal decision-making assistance agreement to support the person in accessing information to understand, make and express decisions. Importantly, decision-making responsibility remains with the person and the decision-making assistant will be supervised by the director of a new regulator called the Decision Support Service.

The second category of decision-making is *co-decision-making*. Co-decision-making involves a person appointing a trusted family member or friend as a co-decision-maker to make decisions jointly with them under a co-decision-making agreement.[50] Decision-making responsibility is shared jointly between the person and the co-decision-maker. The legislation regulates the performance of functions of co-decision-maker, registration of co-decision-making agreements, objections to registration, review of co-decision-making agreements, reports by co-decision-maker and variation of co-decision-making agreements and revocation of co-decision-making agreement. Again, the co-decision-maker will be supervised by the director of the Decision Support Service.

The third category is that of *decision-making representative*, which is a form of substitute decision-making, which is at odds with Article 12 of the CRPD. It is envisaged that

47 See § 3 of the 2015 Act.

48 Elaine Loughlin, UN disability committee member calls for O'Gorman to clarify Dáil remarks, *Irish Examiner, Cork*, July 13, 2022, https://www.irishexaminer.com/news/arid-40917536.html.

49 See Seanad debate (Upper House of the Irish Parliament), https://www.oireachtas.ie/en/oireachtas-tv/seanad-eireann-live/.

50 It is important to note that co-decision-makers or decision-making representatives appointed will not be able to make AHDs as there is a presumption that a person has capacity to make an AHD. People with decision-making assistants can make an AHD with the support of their decision-making assistant. For a more details on advance healthcare directives, see the following discussion.

the decision-making representative provisions will apply to a small minority of persons who are not able to make decisions even with the provision of support. The 2015 Act provides for the Circuit Court to appoint a decision-making representative. A decision-making representative will make decisions on behalf of the person but must abide by the guiding principles set out in § 8 of the 2015 Act, which includes having regard to their will and preferences where known or reasonably ascertainable. Decision-making representatives must reflect the person's will and preferences, where possible. The functions of decision-making representatives will be as limited in scope and duration as is reasonably practicable. The decision-making representative will also be supervised by the director of the Decision Support Service.

There are also provisions in the 2015 Act relating to enduring powers of attorney. The Powers of Attorney Act 1996, permits a person to create an enduring power of attorney by appointing an attorney to make decisions on their behalf in relation to property and finance or personal welfare or a combination of both. The 2015 Act as originally enacted significantly expanded these powers to include healthcare matters. However, the Assisted Decision-Making (Capacity) (Amendment) Act 2022 has removed healthcare decisions from the scope of enduring powers of attorney. The rationale being that advance healthcare directives are a better tool for healthcare decisions and having both legal mechanisms will create confusion.[51] It requires attorneys appointed under the act to abide by the guiding principles and to be subject to supervision by the director of the Decision Support Service who will also have the role of registering new enduring powers of attorney.

The 2015 Act also introduces for the first-time provision for advance healthcare directives (AHD) into Irish law. The purpose of the advance healthcare directive is to enable a person to be treated according to their will and preferences and to provide healthcare professionals with important information about the person in relation to their treatment choices. The 2015 Act permits a person to develop an advance healthcare directive and appoint a designated healthcare representative to take healthcare decision on their behalf when they are no longer considered to have the capacity to make decisions, in accordance with their specific treatment instructions and/or will and preferences. The directive maker can confer powers on the designated healthcare representative to refuse/consent to treatment, including life-sustaining treatment. A specific statement must be included for the designated healthcare representative to have powers in relation to life-sustaining treatment. Again, the designated healthcare representatives will be supervised by the director of the Decision Support Service. An oversight with the legislation is that there is no register for advance healthcare directives with the Decision Support Service or anywhere else. As such, the regulator does not have any supervisory powers over designated healthcare representatives, as they will not be able to identify them.

The 2015 Act provides that the Circuit Court will have jurisdiction on most issues arising under the act. The specialist judges will undertake this work. Importantly the legislation provides that the High Court will continue to have jurisdiction in relation to serious matters relating to withdrawal of life-sustaining treatment and donation of an organ from a living donor.

51 § 51(e) of the Assisted Decision-Making (Capacity) (Amendment) Act 2022 amends § 59 of 2015 Act to expressly prohibit authority for an enduring power of attorney to consent or refuse treatment for the relevant person.

Assisted Decision-Making (Capacity) (Amendment) Act 2022

It was expected that it would take several years for the 2015 Act to be commenced, given the complexity of the legislation, the allocation of the resources required and the establishment of the new regulator the Decision Support Service. However, the significant and ongoing delays in commencement of the 2015 Act have been widely criticised by a range of stakeholders. Part of the delay can be explained with reference for the need for an amending piece of legislation to address outstanding issues identified after the enactment of the principal legislation. The explanatory memorandum to the amending legislation stated that its purpose was to 'streamline existing provisions in the 2015 Act and will also improve safeguards, reduce bureaucracy for those using options under the Act and enable the Decision Support Service (DSS) to undertake its role more effectively'.[52] In preparing for the commencement of the original 2015 Act to come into force, the Department of Justice, which has responsibility for the legislation, identified additional provisions that needed to be addressed in the amending legislation, as will be discussed further here.

The 2022 Act is extremely complex and provides for both technical and procedural amendments deemed necessary before 2015 Act can be commenced. The 2022 Act retains the provisions on assistant decision-making, co-decision-making and for the appointment of a decision-making representative. The legislation amends definitions of personal welfare and treatment decisions, to allow for participation by persons with capacity difficulties in health research and to clarify which persons are vested with the authority to make decisions regarding actual medical treatment or clinical care, where another person is deemed to have a problem with their mental capacity. Many of the amending provisions also seek to improve safeguarding provisions in the 2015 Act. The amending legislation permits the Decision Support Service to draw up its own forms and to give greater control over the director of the Decision Support Service in respect of its own administrative procedures. The 2022 Act provides additional powers to the director of the Decision Support Service to investigate issues and seek informal resolution of complaints. The 2015 Act is extremely complex and the significant number of amendments required in the 2022 Act underscore the intricacy and the implications its commencement has for a range of other pieces of legislation.[53]

52 Explanatory memorandum: Assisted decision-making (capacity) (amendment) bill 2022, Irish Parliament, Dublin, May 30, 2022.

53 This is a list of other statutes affected by the 2022 Bill: Adoptive Leave Acts 1995 and 2005, Assisted Decision-Making (Capacity) Act 2015 (No. 64), Carer's Leave Act 2001 (No. 19), Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (No. 13), Civil Service Regulation Acts 1956 to 2005 Companies Act 2014 (No. 38), Data Protection Act 2018 (No. 7), Data Sharing and Governance Act 2019 (No. 5), Disability Act 2005 (No. 14), Electoral Act 1992 (No. 23), Ethics in Public Office Acts 1995 and 2001 Freedom of Information Act 2014 (No. 30), Garda Síochána Act 2005 (No. 20), Irish Human Rights and Equality Commission Act 2014 (No. 25), Juries Act 1976 (No. 4), Lunacy Regulation (Ireland) Act 1871 (34, 35 Vict., c. 22), Maternity Protection Acts 1994 and 2004, Minimum Notice and Terms of Employment Acts 1973 to 2005, National Disability Authority Act 1999 (No. 14), Organisation of Working Time Act 1997 (No. 20), Parent's Leave and Benefit Act 2019 (No. 35), Parental Leave Acts 1998 to 2019 Paternity Leave and Benefit Act 2016 (No. 11), Protection of Employees (Fixed-Term Work) Act 2003 (No. 29), Protection of Employees (Part-Time Work) Act 2001 (No. 45), Public Service Management (Recruitment and Appointments) Act 2004 (No. 33), Redundancy Payments Acts 1967 to 2014 Succession Act 1965 (No. 27), Terms of Employment (Information) Acts 1994 to 2014, Unfair Dismissals Acts 1977 to 2015.

Advance healthcare directives, discrimination and exclusion

One of the most contentious issues that has arisen in the parliamentary process around the Assisted Decision-Making (Capacity) (Amendment) Act 2022 has related to advance healthcare directives (AHDs). AHDs are essential in supporting persons to articulate their will and preferences in health treatment decision-making, including in mental health treatment decisions.[54] This is essential when a person's views may become unclear or unknown. Under the 2015 Act, people who are involuntarily detained in hospital under Part 4 of the Mental Health Act 2001 are specifically excluded from making legally binding AHDs. The Assisted Decision-Making (Capacity) (Amendment) Act 2022 has expanded legally binding AHDs to people detained under § 3(b) (i) and (ii) of the 2001 Act, but still excludes people detained under § 3 (a), the significant risk to self or other grounds. As such, persons under this category have no legal right to have their advance wishes respected, even though they had mental capacity to make decisions about their mental healthcare and treatment at the time of making their AHD. There is no other group of individuals that are specifically excluded from this legal right – an inadequacy that is clearly contrary to the CRPD. Essentially, AHDs, as provided for in the 2015 Act, cover decisions regarding future healthcare treatment in the event the person is unable to communicate or make such decisions. This includes decisions regarding future mental health treatment. AHDs are considered a critical support to enable people to exercise their legal capacity in treatment/care decisions and avoid the need for coercion and non-consensual treatment, which is prohibited under the CRPD. The research suggests the process of developing an AHD confers recovery and capacity building benefits for the person.[55] An international systematic review reported that AHDs reduced involuntary admissions by 23%.[56] AHDs are also associated with a reduced need for readmission into hospital[57] and enhanced recovery.[58] This is particularly relevant in the Irish mental health system where 60% of admissions are readmissions.[59]

There is an ongoing law reform process to make significant changes to the Mental Health Act 2001, responsibility for which is vested in the Department of Health. This culminated in the publication of a Heads of Bill in 2021. In that Heads of Bill, it is proposed to amend s. 57 of the 2001 Act to provide for 'designated healthcare representatives' per s. 88(1)(b)(ii) of the 2015 Act. The explanatory note that accompanies s. 57 states that this amendment seeks to introduce 'designated healthcare representatives' per subsection 88(1)(b)(ii)' of the 2015 Act. It notes that s. 85(7) and s. 136 of the 2015 Act will need

54 Dr Charles O'Mahony, Dr Fiona Morrissey, *Human rights analysis of the draft heads of a bill to amend the mental health act 2001 summary of recommendations*, Mental Health Reform, Dublin, October 2021.

55 Marvin Swartz, Jeffrey Swanson, Commentary: Psychiatric advance directives and recovery-oriented care, *Psychiatric Services*, 2007, vol. 58, p. 1164.

56 Mark de Jong et al., Interventions to reduce compulsory psychiatric admissions: A systematic review and meta-analysis, *JAMA Psychiatry*, 2016, vol. 73, no. 7, p. 657.

57 Claire Henderson et al., Effect of joint crises plans on use of compulsory treatment in psychiatry: Single blind randomised controlled trial, *British Medical Journal*, 2004, vol. 329, p. 13; Chris Flood et al., Joint crisis plans for people with psychosis: Economic evaluation of a randomised controlled trial, *British Medical Journal*, 2006, vol. 333, p. 729.

58 Marvin Swartz, Jeffrey Swanson, Commentary: Psychiatric advance directives and recovery-oriented care, *Psychiatric Services*, 2007, vol. 58, p. 1164.

59 There were 16,710 admissions to Irish psychiatric units and hospitals in 2019. Sixty per cent of these were readmissions and 14% were involuntary. Health Research Board, *National inpatient reporting system bulletin*, Health Research Board, Dublin, 2020.

to be amended to ensure these provisions can operate and will ensure parity of treatment for those with mental health issues. Therefore, it appears that the intention in the Heads of Bill is to provide parity in terms of the application of AHD in respect of both voluntary and involuntary categories. An approach that would align with the requirements of Article 12 of the CRPD.

As discussed earlier, under the Assisted Decision-Making (Capacity) (Amendment) Act 2022, AHDs are not legally enforceable for people detained under s. 3(a) and are considered significant risk to self or others but are enforceable for people detained under s. 3 b (i) and (ii) (non-risk grounds). AHDs are legally enforceable for people admitted voluntarily for mental health treatment. While the exclusion would appear to only effect a small proportion of people, in practice it impacts a 100% of people admitted to hospital for mental health treatment due to regrading powers under the 2001 Act to change a person's status from voluntary to involuntary, and powers conferred on clinicians the grounds on which a person is detained i.e. under s. 3 (a) or s. 3 b (i) and (ii) or both. The exclusion impacts the legal enforceability of AHDs for everyone admitted to the mental health system given that a person may be regraded or the grounds for detention can be changed if you are refusing a proposed treatment leaving the person at risk of human rights violations and forcible treatment.

An AHD can be taken into consideration, but it is not legally enforceable in these circumstances. The exclusion of persons detained under the 2001 Act violates the CRPD as it discriminates on the grounds of disability. Similar legislative provisions were litigated as discriminatory under the American with Disabilities Act in the United States.[60] The Assisted Decision-Making (Capacity) Amend Bill 2019 proposed to remove this exclusion from the 2015 Act. The bill reached Seanad stage (upper house of the Irish Parliament) but lapsed with the dissolution of the Irish Parliament in March 2020.

The responsible minister stressed that this amendment 'was not the final word on this matter' and 'that more is needed to achieve full parity of care' and indicated that the legislation to reform of the 2001 would further address this area.[61] However, the approach adopted in the 2022 Act calls into question the government's commitment to realising the rights provided for in the CRPD. In addition, the proposed amending legislation to the 2001 Act retains involuntary detention and treatment of persons subject to the mental health legislation, which is at odds with Article 14 and allied provisions in the CRPD. It is also in conflict with other rights in the CRPD – specifically, Article 12, the right to exercise legal capacity on an equal basis with others; Article 15, the right to be free from torture, cruel and inhuman treatment; Article 17, the right to physical and mental integrity; and Article 25, the right to health.

Therefore, this exclusion from AHD places persons admitted for mental health treatment in Ireland at significant additional risk and they will face further stigma due to this exclusion. In no other area of healthcare in Ireland involves persons being given treatment without their consent (outside of emergency situations). As such, this exclusion is discriminatory and feeds into the stereotype that people experiencing mental distress are

60 Hargrave v State of Vermont, No.2: 99-CV 128 (2001); Hargrave v State of Vermont, 340 F 3d 27 (2nd Cir 2003).

61 Ibid.

a risk when in fact they are more likely to be the victims of violence than perpetrators.[62] There is no evidence to show any increased risk for this group, yet they are not allowed to exercise their legal capacity and have their treatment wishes in their AHD respected on an equal basis with others in general healthcare.[63] This discriminatory exclusion urgently needs to be removed from the 2015 Act by way of the amending legislation. Equal access to AHDs should be provided for in both the 2015 Act and in the legislation amending the 2001 Act. AHDs are a critical support measure which should be made equally available to everyone, particularly those who are involuntarily detained under Irish mental health legislation. The research exploring this area in Ireland suggests that the group who need AHDs the most to increase trust and respect are excluded from the legislation.[64] The retention of this exclusion could lead to further discrimination and alienation for a group of vulnerable people who live in fear of being subjected to unwanted treatment with serious long-term side effects should they become unwell again in the future, leaving this group at high risk of human rights violations. Therefore, it is essential that AHDs should be provided for all persons on an equal basis, and the legislation requires further amendment. The failure to do so is at odds with Ireland's obligations under Article 12 of the CRPD and allied rights, as discussed earlier.

Conclusion

Ireland was one of the first countries to sign the CRPD, when it opened for signature in 2007 and was the last EU member state to ratify it, in 2018. Despite firm commitments from successive governments, the failure to progress the legislation to repeal and replace the wards of court system endangers the rights of persons subject to the legislation. The continued delay in commencement of the legislation places persons in a very precarious legal position. As discussed earlier, recognition of the legal capacity of persons with disabilities is crucial as legal capacity is a gatekeeper right to the enjoyment of a range of other human rights. The imminent commencement of the Assisted Decision-Making (Capacity) Act 2015 will be a significant moment in the law reform process, representing an improvement on both the existing law and preceding proposals for law reform. Nevertheless, the legislation falls short of its goal of complying with Article 12 of the CRPD. The supported decision-making provisions in the 2015 Act have the potential to provide safeguards against substitute decision-making and the denial of legal capacity. Conversely, the provisions on substitute decision-making may undermine other positive provisions on supported decision-making. It is hoped that the guiding principles, with their enumeration to the will and preferences of the person, will ensure that the paradigm shift required in Article 12 will guide the effective implementation and interpretation of the legislation. The exclusion of persons involuntarily detained for mental health treatment from making legally enforceable AHD on an equal basis with others raises further questions about Ireland's commitment to progressing with its obligations under the CRPD.

62 Karen Hughes et al., Prevalence and risk of violence against adults with disabilities: A systematic review and meta-analysis of observational studies, *The Lancet*, 2012, vol. 379, no. 9826, p. 1621.

63 John Monahan et al., *Rethinking risk assessment: The MacArthur study of mental disorder and violence*, Oxford University Press, Oxford, 2001.

64 Fiona Morrissey, The introduction of a legal framework for advance directives in the UN CRPD era: The views of Irish service users and consultant psychiatrists, *Ethics, Medicine and Public Health*, 2015, vol. 1, p. 325.

17 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Italy

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1. The concept of capacity to perform acts in law in domestic law – introductory notes

Italian law distinguishes between the concepts of legal capacity (*capacità giuridica*), capacity to perform acts in law (*capacità di agire*) and capacity to understand and decide (*capacità di intendere e di volere*).

Pursuant to Article 1 of the Italian Civil Code, legal capacity is acquired at birth. The acquisition of legal capacity (also known as legal personality) indicates that the person becomes a legal entity and acquires the capacity to be the subject of rights and obligations provided for and protected by the legal system.

Italian law does not allow foan absolute legal incapacity, and so-called 'civil death', equivalent to a complete loss of rights, is currently forbidden by Article 22 of the Italian Constitution, which states that no person can be stripped, for political reasons, of legal capacity, citizenship or name.

The capacity to perform acts in law, or, in literal translation, 'the capacity to act' (*capacità di agire*), is acquired, pursuant to Article 2 of the Italian Civil Code, at the age of legal majority – i.e. as a general rule, at 18 – and it usually exists alongside the capacity to understand and decide (*capacità di intendere e di volere*).

The capacity to perform acts in law is expressed in the ability to perform legal acts deemed legitimate and protected by the legal system; in other words, it is the ability to create, modify and cause termination of legal relationships. The reasons for absence or limitation of capacity to perform acts in law are related to age or to the institution of injunction (*interdizione*) or partial incapacitation (*inabilitazione*).

The capacity to understand and decide (*capacità di intendere e di volere*) can be understood as a basic premise of the capacity to perform acts in law included in various civil law provisions as a sine qua non condition to enter into an agreement or attribute tort liability to the perpetrator. It is associated with the minimal mental capacity to recognise the meaning and consequences, including adverse ones, of one's own behaviour.

In most cases, the categories of capacity to perform acts in law and capacity to understand and decide intersect.

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majority – i.e. as a general rule, at 18 – regardless of gender. With the age of majority, a person acquires the capacity to perform all acts in law for which there are no other age-related restrictions, subject to specific legal provisions that set a lower age for the capacity to enter into employment contract. In this case, a minor is entitled to exercise rights and perform actions that arise from the employment contract.

According to Article 390 of the Italian Civil Code, a minor is emancipated ex lege by marriage. Pursuant to Article 84 of the Italian Civil Code, a minor, regardless of gender, can enter into marriage with the court's consent if they have attained the age of 16 and for substantial and compelling reasons.

According to Article 394 of the Italian Civil Code, by becoming emancipated, a person acquires the capacity to perform acts in law that do not exceed the scope of ordinary management. This article refers only to the capacity of a person who is emancipated to perform acts in law of a financial nature, not of a personal nature. Through emancipation, such a minor acquires the capacity to perform acts in law with certain limitations specified by the legislator – for example, this minor has to be assisted by a guardian in matters pertaining to denial of paternity. The emancipated minors, if they become parents, shall exercise parental authority over their children, with the capacity to perform all acts within their capability, pursuant to the provisions of the Civil Code.

The emancipated minors can manage funds with the assistance of the guardian, provided that the funds are appropriately invested and they can perform actions in court proceedings as claimants and defendants. In the case of other acts exceeding the scope of ordinary management, the consent of the guardianship court judge is required in addition to the consent of the guardian. In the event of a conflict of interests between the minor and the guardian, a special guardian is appointed.

Italy ratified on May 15, 2009, the United Nations Convention on the Rights of Persons with Disabilities, produced in New York on December 13, 2006, and signed by this country on March 30, 2007. Italy was therefore one of the first countries to ratify the Convention.[1]

In order to ratify this Convention, the Italian Parliament passed Law No. 18 of March 3, 2009, on authorising ratification. This law approved the ratification of the Convention and its Protocol Additional. Italy ratified the Protocol Additional to the Convention along with the Convention itself – i.e. on May 15, 2009.

It should be noted that Italy has not made any reservation or interpretative declaration to Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, produced in New York on December 13, 2006.

The United Nations Convention on the Rights of Persons with Disabilities, produced in New York on December 13, 2006, entered into force in Italy on June 14, 2009 – i.e. pursuant to Article 45 of the Convention on the 30th day following its ratification.

Italy has implemented the United Nations Convention on the Rights of Persons with Disabilities, produced in New York on December 13, 2006, into its legal system.

1 Irene Ambrosi, Marta D'Auria, La l. n. 18 del 2009 di ratifica della Convenzione delle Nazioni Unite sui diritti delle persone con disabilità, *Famiglia, persone e successioni*, 2009, vol. 5, p. 476.

2. Private law regulation of the capacity to perform acts in law and changes introduced by the implementation of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities

Italian legal regulations on capacity to perform acts in law (contract obligations and acquire rights) originate largely from Decree No. 262 of March 16, 1942,[2] establishing the new Civil Code, and Law No. 6 of January 9, 2004, introducing the institution of the so-called supportive management[3] into the Civil Code. Following the ratification and implementation of the United Nations Convention on the Rights of Persons with Disabilities produced in New York on December 13, 2006, there has been no major Italian law reform on this issue. The changes after 2009 primarily refer to the judicial interpretation of existing provisions, consistent with the Convention's demands.

In its ruling, the Italian Court of Cassation concluded that legal regulations regarding the so-called supportive administration (*amministrazione di sostegno*, Article 404 of the Italian Civil Code) institution are fully compliant with the United Nations Convention on the Rights of Persons with Disabilities, produced in New York on December 13, 2006, and ratified by Italy under Law of March 3, 2009, No. 18 (Articles 1 and 12), in the part concerning the obligation of the states to ensure that measures related to the implementation of capacity to perform acts in law are adequate to the extent that they affect rights and interests of persons with disabilities and that they are implemented without undue delay and are subject to periodic review by an independent and impartial authority.[4]

Italian legal theory underlines that the Law of 2004 departed from a system of guardianship and curatorship primarily aimed at protecting the incapacitated person's assets or financial interests of incapacitated person's family in favour of implementing protective measures oriented towards respect for human dignity and comprehensive concern for the person's well-being. According to the provisions of this law, persons who lack all or some autonomy in the exercise of their daily living activities should be protected with the least possible limitation of their capacity to act (*capacità di agire*) by ad hoc or permanent support. In this way, the logic that preceded the 2004 reform, based on complete or partial removal of the capacity to perform acts in law, has been replaced by the principle of presumption of capacity to perform acts in law and the possibility of its limitation in certain spheres indicated by provisions on the appointment of the supportive administrator. In this way, the relationship between capacity and incapacity to perform acts in law, fixed in the previous legislation, has been made flexible, tailored to each situation and circumstances.

Currently, courts are more inclined to impose measures that limit the protected person's freedom to a lesser extent. However, the Court of Cassation, in its decision of June 18, 2014, noted that if a person is completely or partially unable to live independently, the judge, pursuant to Article 404 of the Italian Civil Code, shall appoint a supportive administrator since legal discretion vested in the judge only concerns the selection of the most appropriate measure (supportive administration, incapacitation or injunction) and does

2 Regio Decreto marzo 16, 1942, n. 262, Approvazione del testo del Codice civile. (042U0262), Gazzetta Ufficiale n.79 del aprile 4, 1942.

3 Legge 9 gennaio 2004, n. 6, Introduzione nel libro primo, titolo XII, del codice civile del capo I, relativo all'istituzione dell'amministrazione di sostegno e modifica degli articoli 388, 414, 417, 418, 424, 426, 427 e 429 del codice civile in materia di interdizioni e di inabilitazione, nonche' relative norme di attuazione, di coordinamento e finali, pubblicata nella Gazzetta Ufficiale n. 14 del 19 gennaio 2004.

4 Cassazione civile, Sez. I sentenza n. 18320, ottobre 25, 2012.

not include the possibility of not applying any safeguard measure at all, which would result in denying the disabled person any form of protection of their interests, including the least invasive form.[5]

Article 404 of the Italian Civil Code provides that a person who, due to illness or physical or mental disability, is unable, even partially or temporarily, to manage their own affairs, can be assisted by the supportive administrator appointed by the judge of the guardianship court of the protected person's place of residence. Article 408 of the Italian Civil Code specifies that the guardianship judge appoints as administrator, preferably, if possible, a spouse,[6] a cohabitant, father, mother, child, brother or sister, a relative by consanguinity up to the fourth degree, or a person appointed during the lifetime of a parent e.g. in a will. The administrator can be appointed by the protected person, who, anticipating his/her possible incapacity, has done so in the past by means of an official or notarial act.

Pursuant to Article 405 of the Italian Civil Code, the guardianship court shall, within 60 days from the date of the application, appoint a supportive administrator by a decision specifying, inter alia,

- the duration of the administration or an indication that it is appointed for an indefinite period;
- the scope of tasks entrusted to the administrator and the activities the administrator is allowed to perform in the name of and on behalf of the protected person;
- activities that the protected person could perform only with the administrator's assistance;
- limits, including periodic limits, under which the administrator can manage the protected person's funds; and
- how often the administrator should report to the court on the activities performed and the personal and social situation of the protected person.

If the duration of administration is expressly specified, the guardianship court can extend it by reasoned decision, even before the expiration of the previously specified term.

Pursuant to Article 412 of the Italian Civil Code, legal transactions performed during the supportive administration (*amministrazione di sostegno*) in violation of the law or beyond the scope of authorisation assigned to the administrator can be invalidated by the judge at the request of the supportive administrator, public prosecutor, person under supportive administration or their heirs and legal successors.

Related claims cannot be filed after five years from the expiration of the supportive administration.

It is worth noting here that Article 413 of the Italian Civil Code provides for the possibility of dismissal of the administrator by the guardianship court, even ex officio, if the administration proves to be inadequate to the realisation of complete protection of the person subject to it. Should there be a need for an injunction or partial incapacitation, the court shall notify the public prosecutor, and the administration shall terminate with the appointment of a guardian or curator.

Article 427 of the Italian Civil Code stipulates that the court decision establishing an injunction or partial incapacitation, or other subsequent judicial decisions, could specify

5 Cassazione civile, Sez. VI-1, ordinanza n. 13929 del giugno 18, 2014.

6 Unless a separation has been granted.

that certain legal transactions of ordinary management could be performed by the person subject to injunction either independently or with the assistance of a guardian or specify that certain transactions exceeding the scope of ordinary management can be performed by the incapacitated person without the assistance of a guardian.

Legal transactions exceeding the scope of ordinary management performed by the incapacitated person without complying with the required formalities, or such transactions performed following the declaration of incapacitation or the appointment of a temporary guardian, can be invalidated at the request of the incapacitated person or their heirs or legal successors, if it preceded partial incapacitation (*inabilitazione*).

Legal transactions performed by the person covered by injunction (*interdizione*) following the decision to establish such injunction can be invalidated at the request of the guardian, the person covered by the injunction or their heirs or legal successors. Legal transactions performed by the person covered by the injunction following the appointment of a temporary guardian can also be invalidated if the injunction is issued after the appointment of a temporary guardian.

In the light of Article 428 of the Italian Civil Code, legal transactions performed by a person who is not subject to the injunction, but it is evidenced that such a person was for any reason, even temporarily, incapable of understanding and deciding (*incapace d'intendere o di volere*) at the time the transaction was performed, can be invalidated. Legal transactions are invalidated at the request of the person concerned or their heirs or legal successors, provided that they have suffered serious damage as a result of the legal transaction. The agreement can be made null and void if the damage suffered by the person incapable of understanding and deciding is caused by bad faith on the part of the other party to the agreement. The claim for invalidation of the legal transaction can be filed within five years from the date of performance of the legal transaction.

3. Implementation of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities outside of private law

The Italian Parliament, by Law No. 18 of March 3, 2009, authorised the ratification of the United Nations Convention on the Rights of Persons with Disabilities. Under that same legislation, Italy established the National Observatory on the Condition of Persons with Disabilities (*Osservatorio nazionale sulla condizione delle persone con disabilità*), acting as an 'independent mechanism' under Article 33 of the Convention, to promote, protect and monitor the implementation of the Convention. The Observatory is chaired by the Minister of Labour and Social Policy and performs advisory, technical and scientific functions to support the development of national disability policies. It includes a technical and scientific commission responsible for the analysis and direction of the Observatory's work and eight working groups dedicated to the in-depth research of specific issues.[7]

The first two-year action programme for the promotion of the rights and integration of persons with disabilities developed by the Observatory was approved by the Italian

7 Irene Ambrosi, Marta D'Auria, La l. n. 18 del 2009 di ratifica della Convenzione delle Nazioni Unite sui diritti delle persone con disabilità, *Famiglia, persone e successioni*, 2009, vol. 5, p. 476; Veronica Bongiovanni, La tutela dei disabili tra Carta di Nizza e Convenzione delle Nazioni Unite, *Famiglia e Diritto*, 2011, vol. 3, p. 310.

Council of Ministers on September 27, 2013, and adopted by decree of the President of the Republic (Italy) on October 4, 2013.

The implementation of the United Nations Convention on the Rights of Persons with Disabilities and its Article 12 involved in Italy, inter alia, the introduction of legislation in 2017[8] requiring the intent of the protected person to be taken into account upon **giving consent to medical procedure and treatment**.[9] Article 3 of the Law of December 22, 2017 ('Standards for Informed Consent and Guidance for Future Medical Treatment'), stipulates that if the supportive administrator is appointed, the administrator is a sole representative of the protected person in the healthcare sector. It grants consent for a medical procedure or treatment, while taking into account the person's intent, with respect to their capacity to understand and decide (*capacità di intendere e di volere*). It is noted in Italian legal theory that this provision does not deprive a person partially or entirely incapable to perform acts in law of the right to self-determination.[10] Such a person should be provided with information regarding decisions concerning their condition in a way enabling them to express their own intent.

4. The role of psychology, psychiatry and neurology in the implementation of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities

In Italy, the position of psychologists and psychiatrists was taken into account during the legislative process of enacting the reform of 2004[11] and also in earlier legislation aimed at combating social exclusion and marginalisation of vulnerable, mentally ill and disabled persons.

Changes were triggered by the so-called psychiatric reform, introduced by Law No. 180 of 1978 on mandatory and voluntary medical procedures[12] and then supplemented by Law No. 104 of 1992 on disability[13] and Law No. 328 of 2000,[14] reforming the rules for providing assistance to persons with disabilities. In 1978, mental asylums were decommissioned, while aid and care tasks were assigned to psychiatric wards operating in hospitals and mental health centres. Patient isolation mechanisms have been replaced by mechanisms aimed at patient recovery while maintaining contact with society. The Law of 1992, in its Article 1, indicates that the Italian Republic safeguards full respect for human dignity and the rights to freedom and autonomy of the disabled persons and promotes their full integration with family, school, work and society.[15]

8 Legge dicembre 22, 2017, n. 219 'Norme in materia di consenso informato e di disposizioni anticipate di trattamento'.

9 Enrico Daly, Amministratore di sostegno e rappresentanza in ambito sanitario, *Famiglia e Diritto*, 2020, vol. 7, p. 757.

10 Ibid.

11 Gilda Ferrando, L'amministrazione di sostegno nelle sue recenti applicazioni, *Famiglia, persone e successioni*, 2010, vol. 12, p. 836.

12 Legge maggio 13, 1978, n. 180 Accertamenti e trattamenti sanitari volontari e obbligatori. Pubblicata nella Gazz. Uff. 16 maggio 1978, n. 133.

13 Legge febbraio 5, 1992, n. 104 Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate, Pubblicata nella Gazz. Uff.17.2.1992, n. 39.

14 Legge novembre 8, 2000, n. 328 Legge quadro per la realizzazione del sistema integrato di interventi e servizi sociali pubblicata nella Gazzetta Ufficiale n. 265 del 13 novembre 2000 – Supplemento ordinario n. 186.

15 Raffaella Grisafi, I diritti e doveri (risarcitori) del disabile, *La Responsabilità Civile*, 2010, vol. 7, p. 536.

Medical and psychiatric sciences have drastically changed the approach to the treatment of psychiatric disorders in Italy. Therapeutic and rehabilitation programs are aimed at the complete or partial restoration of autonomy and at maintaining relationships with relatives of persons struggling with mental disorders. From the perspective of psychiatry, the traditional civil law institutions prescribing complete or partial incapacitation of a mentally ill person in the case of a chronic mental illness (*abituale infermità di mente*) do not reflect the reality, as mental illness often manifests itself in a volatile and fluctuating manner. Lack of flexibility and adaptability of these legal solutions, inspired by the all-or-nothing thinking, makes it impossible to adapt to different situations. The prospects for the patient's recovery often involve gradual restoration of the patient's autonomy and responsibility, which also requires the implementation of appropriate legal instruments to assist in the process of regaining the ability to look after one's property and well-being.

For this reason, the aforementioned psychiatric reform was complemented by the reform of civil law institutions in the field of capacity to perform acts in law. Initiation of the treatment process no longer indicates that a person is ex lege deprived of the capacity to perform acts in law, as was the case pursuant to the repealed legal provisions (notably previous Article 420 of the Italian Civil Code).

It should be noted that with medical advances, the average human life expectancy has increased, giving rise to new phenomena such as an increase in the number of seniors and chronically ill persons, which necessitated the implementation of appropriate legal solutions.

Some authors also note that the position of psychologists and neurologists should be taken into account when providing care for persons with disabilities so that the measures applied reflect the actual loss of autonomy of the person under legal protection.[16]

The use of scientific data, not only psychiatric but also cognitive, would make it possible to control the person's state of incapacity to manage their own affairs, in order to ensure that their dignity is respected. Neurology has developed tools that can be employed to understand the intent and preferences of a person who is conscious but is unable to communicate with the outside world. The reference to this field of medicine would therefore allow direct consent (or refusal) to a medical procedure, which could be of particular use in the case of people in a state of minimal awareness, mistakenly regarded as if they were in a permanent vegetative state, where brain activity, albeit 'declining', is nevertheless detectable. This approach would comply with the requirements laid down in Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, which provides, inter alia, that

> measures involving the exercise of capacity to perform acts in law shall respect the rights, intent and preferences of the person, shall be free from conflict of interest and illegitimate pressure, shall be proportionate and appropriate to the situation of the person concerned, shall be applied for the shortest possible duration and shall be subject to regular review by the competent, independent and impartial authorities or judicial body.

Indeed, only continued compliance with the proportionality, temporality and modifiability of legal safeguard measures can ensure that the autonomy of the person with disabilities is respected.

16 Carolina Perlingieri, Amministrazione di sostegno e neuroscienze, *Rivista di Diritto Civile*, 2015, vol. 2, p. 10330.

Brain activity monitoring can be helpful in determining both the severity and permanence of the disease – i.e. in establishing the premise required in Italy to issue an injunction. If a certain brain area, revealed by CT scan (often believed to be the cause of schizophrenia), is damaged, if this damage is not permanent or severe, then supportive administration or partial incapacitation may be preferable to the injunction.

The well-being of the protected person with disabilities therefore requires constant cooperation between legal community and medical personnel.

5. Capacity to perform acts in law of natural persons and its limitations on the grounds of disability – procedural aspects

Procedure for limiting the scope of capacity to perform acts in law (contract obligations and acquire rights) is provided for in the Italian Civil Code of 1942, as amended by the Law of 2004, and in the Code of Civil Procedure of 1940. The Law of 2004 provided, inter alia, for the gradation and convertibility of the safeguard measures for persons with disabilities.

The injunction (*interdizione*) is the most serious and severe safeguard measure, which postulates a state of absolute incapacity and implies complete removal of the capacity to perform acts in law. Legal regulations applicable to the injunction appear in Articles 414 et seq. of the Italian Civil Code. They provide for the appropriate application of the provisions on the protection of unemancipated minors. As to procedural matters, however, Articles 712 et seq. of the Italian Code of Civil Procedure apply. The petition to establish the injunction can be filed by the person seeking legal protection, by their spouse, by a person with whom they maintain a stable relationship, by next of kin up to the fourth degree of consanguinity or second degree of affinity, by a guardian (*tutore*) or curator (*curatore*) or by the public prosecutor.

In the case of an injunction, the lack of capacity to perform acts in law (*incapacitazione legale*) is complete and absolute. As a general rule, all acts in law are performed on behalf of the person under injunction by their guardian (*tutore*), save for acts of ordinary management which, under a specific court order, may be performed by the person covered by the injunction without or with the assistance of their guardian.

The guardian prepares a list of the incapacitated person inventory, performs legal transactions of ordinary management on the basis of a monthly budget, submits a yearly report and requires the court's approval several legal acts of major significance, as provided for in Articles 374 and 375 of the Italian Civil Code, such as, for example, purchase and sale transactions (excluding those involving items of negligible value) or the acceptance or refusal of donations.

Partial incapacitation (*inabilitazione*) is an indirect mechanism, yet one producing significant legal effects. This measure is adjudicated in cases of partial disability or in situations that threaten a given person's interests. Legal regulations applicable to the partial incapacitation appear in Articles 415 et seq. of the Italian Civil Code. They provide for the appropriate application of the provisions on the protection of unemancipated minors. As to procedural matters, however, Articles 712 et seq. of the Italian Code of Civil Procedure apply.

The lack of capacity to perform acts in law of a partially incapacitated person is relative. The curator exercises control over acts exceeding the scope of ordinary management, which require the curator's and court's approval for their validity.

Certain responsibilities are also incumbent on the curator in matters relating to property, although the curator is not required to draw up an inventory or report of the protected

person's property. The curator, in fact, acts as an intermediary and notifies the court of the need to authorise legal transactions exceeding the scope of ordinary management.

Supportive administration (*amministrazione di sostegno*) is the least restrictive measure of limitation of the capacity to perform acts in law and is designed to ensure that the person with disabilities is provided with the appropriate assistance necessary to manage their affairs. Legal regulations applicable to this institution were introduced in the Law of 2004 and appear in Articles 404 et seq. of the Italian Civil Code. These regulations, as to selected issues, provide for the appropriate application of the provisions on the injunction. As for procedural matters, however, Articles 712 et seq. of the Italian Code of Civil Procedure apply.

A petition to establish supportive administration can be filed by the person seeking legal protection, by their spouse, by a person with whom they maintain stable relationship, by next of kin up to the fourth degree of consanguinity or second degree of affinity, by a guardian (*tutore*) or curator (*curatore*), public prosecutor or by a public or private healthcare or a social care institution.

The limitation of capacity to perform acts in law only affects the acts mentioned in the order of the court. A person under supportive administration retains full capacity to perform legal transactions of everyday life and, as a general rule, all other acts not specifically reserved to the exclusive responsibility or assistance of the supportive administrator.

The guiding principles of the supportive administration institution are flexibility and proportionality. Flexibility means that it is the judge – given the disabled person's protection needs and extent of that person's area of awareness – who indicates in the order the acts to be performed by the supportive administrator for and on behalf of the person with disabilities, as well as conditions and term of administration.[17] Article 410 of the Civil Code provides that, as a general rule, the supportive administrator is not required to continue performing entrusted tasks for more than ten years.

The distinction between capacity (*capacità*) and incapacity (*incapacità*) to perform acts in law, once clearly established in the Italian Civil Code, becomes fluid and not fully defined as regards supportive administration. Incapacitation of the person with disabilities, which, according to the traditional procedure constituted the moment when legal protection was established, now stands as one of the applicable measures, as long as it is required for the protection of such a person.

Proportionality, in turn, indicates that the measure must be adjusted to the protected person's situation: it must not remove their capacity to perform acts in law to the extent greater than necessary to guarantee protection of their personal and financial interests, providing all the necessary assistance to fulfil their basic existential needs. It is therefore essential to balance the conflicting needs of freedom and protection of the person with disabilities, thereby ensuring possible and necessary freedom and protection while avoiding any unnecessary, harmful and unjust interference.[18] The protection of the person with disabilities should therefore permit progressive participation in the management of their financial interests and should take into account the independent performance of acts on a

17 As to the reform of 2004 see Gilda Ferrando, L'amministrazione di sostegno nelle sue recenti applicazioni, *Famiglia, persone e successioni*, 2010, vol. 12, p. 836.

18 Ibid.

personal, family and intimate level, in accordance with their capabilities.[19] The protected person keeps mainly the capacity to perform activities of everyday living and to make a will, as long they are able to understand and decide (*capace di intendere e di volere*); they can also enter into marriage and recognise a child.

It is observed in Italian legal theory that, although the court can grant the supportive administrator the exclusive right to represent the protected person, the delegation of competences on a highly personal level should be subject to a very prudent assessment, taking into account the individual character of any particular case.[20]

The Law of January 9, 2004, introduced the institution of supportive administration but did not remove the traditional institutions of injunction and partial incapacitation. Thus, the institution of supportive administration today plays a central role in the legal protection of persons with disabilities, marginalising other legal safeguard measures.[21]

In the case of serious mental disorders, the decision to issue the injunction or establish supportive administration should rely on qualitative rather than quantitative criteria.[22] According to recent case law of the Italian Court of Cassation, the conclusive argument should not be the severity of disorder but rather relevance of the safeguard measure to the needs of the protected person.[23]

Another matter is also to choose the appropriate legal protection instrument for the person suffering from only physical difficulties that do not compromise their mental abilities. Supportive administration offers the advantage of providing judicial control of the actions performed by the representative, and therefore, it could serve as an alternative instrument to the traditional power of attorney. In such cases, the sole representation of the supportive administrator can be excluded, thus avoiding a situation where the administrator's actions would result in the incapacity to perform acts in law by the protected person.

In Italian law, just as in the French system, it is possible to establish so-called future guidelines concerning specifically medical procedures (*disposizioni anticipate in relazione a futuri trattamenti medici*). A person who appoints the supportive administrator, out of fear of losing their capacity to perform acts in law in the future (Article 408 of the Italian Civil Code), can also indicate their preference for future medical procedures.

19 Angelo Venchiarutti, La sfera affettiva e sessuale della persona fragile: Il ruolo per l'amministratore di sostegno, *Rivista di Diritto Civile*, 2022, vol. 2, p. 379.

20 Enrico Daly, Amministratore di sostegno e rappresentanza in ambito sanitario, *Famiglia e Diritto*, 2020, vol. 7, p. 757.

21 Among others Paolo Ientile, L'impedimento matrimoniale dell'interdizione per infermità di mente dopo la l. 9.1.2004, n. 6 sull'amministrazione di sostegno, *Famiglia, persone e successioni*, 2011, vol. 6, p. 461; Mauro Tescaro, I confini applicativi dell'amministrazione di sostegno comparati con quelli della Sachwalterschaft austriaca e della Betreuung tedesca, *Famiglia, persone e successioni*, 2010, vol. 10, p. 645; Veronica Bongiovanni, La tutela dei disabili tra Carta di Nizza e Convenzione delle Nazioni Unite, *Famiglia e Diritto*, 2011, vol. 3, p. 310.

22 Gilda Ferrando, L'amministrazione di sostegno nelle sue recenti applicazioni, *Famiglia, persone e successioni*, 2010, vol. 12, p. 836.

23 Cassazione civile, sez. I, 12 giugno 2006, n. 13584, in Famiglia e dir., 2007, 31, con nota di Sesta; Cassazione civile, sez. I, 22 aprile 2009, n. 9628, in Famiglia e dir., 2010, 15, con nota di Gozzi; Cassazione civile, sez. I, 24 luglio 2009, n. 17421, in Famiglia e dir., 2009, 1085, con nota di Rossi; Cassazione civile, sez. I, 1 marzo 2010, n. 4866, in Fam. pers. succ., 2010, 325; Cassazione civile, sez. I, 29 novembre 2006, n. 25366, in Famiglia e dir., 2007, 19, con nota di Tommaseo.

6. Organisational and institutional aspects of assistance and representation of persons with disabilities in the performance of legal transactions

The institution of 'supportive administration' (*amministrazione di sostegno*) was incorporated into Italian law by the Law of January 9, 2004, a legislation which also introduced changes to other legal regulations concerning the capacity of persons with disabilities to perform acts in law – i.e. as regards 'injunction' (*interdizione*), partial incapacitation (*inabilitazione*) and natural incapacity (*incapacità naturale*).

The institution of partial incapacitation (*inabilitazione*) is designed to protect persons who, due to their mental disorders not severe enough to be subject to the injunction, are unable to manage their own affairs. This mechanism is also intended to protect those who, through prodigality (defined as a tendency to mismanage funds, drug addiction or alcoholism), expose themselves or members of their family to serious property damage. Those who are deaf and blind from birth or early childhood can also be declared 'partially incapacitated' if they have not received sufficient education, whereby if they are found to be completely unable to manage their own affairs, they could be subject to an injunction.

Under partial incapacitation, the limitation (or partial lack) of capacity to perform acts in law occurs, in cases where the disabled person is capable of making an important decision but is unable to express it (see Article 415 of the Italian Civil Code).

The institution of an injunction (*interdizione*) is designed to protect persons who, due to the state of mental illness, are completely incapable of acting or managing their own affairs. It concerns adults and minors affected by mental illness and is described as the court injunction, as incapacity is assessed by the court. The person subject to such injunction (*interdetto*) is stripped of the capacity to perform acts in law (Article 2 of the Italian Civil Code).

7. Capacity to perform acts in law of persons with disabilities and its limitations in light of empirical data before and after the ratification of the United Nations Convention on the Rights of Persons with Disabilities

Certain empirical data concerning the capacity to perform acts in law of persons with disabilities are published by the National Observatory on the Condition of Persons with Disabilities (*Osservatorio nazionale sulla condizione delle persone con disabilità*), acting as an 'independent mechanism' under Article 33 of the Convention.[24] These data are based on information gathered by the Italian National Institute of Statistics (Istat, *Istituto Nazionale di Statistica*) as part of the Register of Persons with Disabilities project. The project's objectives derive directly from the Law of 2009 on ratification of the United Nations Convention on the Rights of Persons with Disabilities. The Convention obliges all signatory states to monitor the process of social inclusion of persons with disabilities, while Article 31 focuses on 'the statistics and data collection' as tools for 'formulation and implementation of policies to implement . . . the Convention'.

24 Audizione dell'Istat presso il Comitato Tecnico Scientifico dell'Osservatorio Nazionale sulla condizione delle persone con disabilità Audizione del Presidente dell'Istituto nazionale di statistica Prof. Gian Carlo Blangiardo Presidenza del Consiglio dei ministri Roma, Marzo 24, 2021, https://www.osservatoriodisabilita.gov.it/media/1382/istat-audizione-osservatorio-disabilita_24-marzo-2021.pdf, accessed September 30, 2022.

In general, the data published by the Institute draw attention to the difficult position of persons with disabilities.

The number of persons with disabilities – i.e. those who suffer from medical disorders or serious impairments that prevent them from performing everyday activities – was estimated at around 3,150,000 in Italy in 2019, accounting for 5.2% of the Italian population. The elderly accounted for the largest group, with almost 1,500,000 persons over the age of 75 (22% of the population in this age group), who were found to have disabilities, one million of whom were women. 'The geography of disability' places the islands at the top of the list, by a margin of 6.5%, compared to 4.5% in the North West. Umbria and Sardinia represent the regions where this trend is most prevalent (6.9% and 7.9% of the population respectively). Conversely, Lombardy and Trentino Alto Adige are the regions with the lowest prevalence of disabilities: 4.1% and 3.8%, respectively.

Twenty-nine per cent of persons with disabilities live alone, 27.4% with a spouse, 16.2% with a spouse and children, 7.4% with children but no spouse, approximately 9% with one or both parents, and the remaining 11% live in a different family setup.

Another important aspect for identifying the living conditions of the elderly is the type of functional limitations and the degree of personal autonomy limitation in self-care (bathing, dressing up, eating without assistance, etc.) or performing daily domestic activities (preparing meals, shopping, using the phone, taking medication, etc.).

In the population aged 15 and above, 2% suffer from severe vision defects, 4.1% from hearing defects and 7.2% have problems with walking. Of the elderly people, 11.2% report severe limitations in at least one self-care activity. Majority of these people are aged over 75 (1,200,000). It is estimated that, in general, 30.3% of elderly people experience serious difficulties in performing daily activities; above the age of 75, this percentage goes up to 47.1%.

The family plays an important role in caring for persons with disabilities in Italy, reducing the risk of social exclusion. Notwithstanding the foregoing, according to the National Institute of Statistics, the average annual income of disabled persons' households is 7.8% lower as compared to the national income.

The Italian social welfare system attributes a central role to the local government authorities (Framework Law No. 328 of 2000) and particularly to the municipalities, which guarantee care and support for social inclusion. The expenses incurred by the municipalities for welfare benefits towards persons with disabilities in the years 2003–2018 have increased from around EUR 1,022,000,000 in 2003 to over EUR 2,005,000,000 in 2018. This increase is mainly due to the establishment of the National Fund for Persons with Disabilities. Day care centres for persons with disabilities (approx. EUR 312,000,000) and care institutions (approx. EUR 366,000,000), which provide assistance to persons with disabilities and support for their families as part of day care and round-the-clock care, are at the top of the list of expenditure. In 2018, municipal care facilities accommodated more than 27,000 persons with disabilities and 16,500 persons benefited from municipal allowances for admission to private care facilities. Permanent residents in municipal and private care centres amounted to more than 30,000.

8. Relationship between the limitations of the civil capacity to perform acts in law and the criminal-law protection of persons with disabilities

In the Italian legal order, a person with disability is protected by criminal law against exploitation when entering into agreements.

Article 643 of the Italian Penal Code stipulates that disability abuse is punishable by law (*circonvenzione di persone incapaci*). In light of this provision, any person who, to obtain a benefit for themselves or others, by abusing the needs, feelings or inexperience of a minor or by abusing the medical condition or mental disability of a person, even if that person is not completely or partially incapacitated, induces that person to perform an act producing legal effects harmful to that person or any third party, is subject to the penalty of deprivation of liberty from two to six years and a fine of EUR 206 to EUR 2065.

According to the dominant view in Italian legal theory, the justification for this provision is the need to protect the injured party's property; however, some authors are also inclined to consider the freedom of self-determination as the object of protection.

A conduct constituting the offence is an act arising from the abuse of a position of mental vulnerability. In the case of a minor, this abuse has to involve abuse of the minor's needs, feelings or inexperience.

For example, it has been recognised as a crime to induce an incapacitated person to establish a 'trust', a legal act resulting in the establishment of a separate property governed by the 'trustee'.[25] In another judgment, the Italian courts recognised as an act harmful in its effects and subject to punishment under Article 643 of the Penal Code, the solicitation of a bank transfer order to a third party, regardless of the actual completion of the transfer.[26]

The fact that the contract with disabled person is void and invalid is irrelevant in the context of the penal law, provided that the act or omission in question is of serious detriment to the disabled person. The Italian Court of Cassation concluded that a determination of the crime of abuse against the disabled persons results in the nullity (rather than invalidation) of the agreement concluded by the disabled person on the grounds of contradiction with mandatory legal provisions, pursuant to Article 1418[27] of the Italian Civil Code.[28]

9. Concluding observations

The Italian legal system was already compliant with most of the provisions of the United Nations Convention on the Rights of Persons with Disabilities at the time of its ratification. The dynamic interpretation of law made it possible for the Italian courts to adapt already existing instruments for the legal protection of persons with disabilities to the requirements of the Convention. Legal measures limiting or removing capacity to perform acts in law, such as incapacitation and injunction, are very seldom used in Italy nowadays, while as a result of the implementation of the Convention, the importance of so-called supportive administration (*amministrazione di sostegno*), which was introduced by the Law of 2004, has increased.

Supportive administration is now recognised as the most appropriate safeguard measure in situations of physical or mental disability and is used even in cases of severe and permanent disability.

25 Cassazione penale, Sez. II, sentenza n. 18295 del aprile 11, 2017.
26 Cassazione penale, Sez. II, sentenza n. 48908 del dicembre 21, 2009.
27 An agreement is null and void when it is in conflict with mandatory legal provisions.
28 Cassazione penale, Sez. II, sentenza n. 19665 del maggio 16, 2008.

In the Italian legal order, a person with disability is also protected by the provisions of the penal law. Article 643 of the Penal Code stipulates that disability abuse is punishable by law (*circonvenzione di persone incapaci*).

Reference list

Papers

Ambrosi I, D'Auria M 'La l. n. 18 del 2009 di ratifica della Convenzione delle Nazioni Unite sui diritti delle persone con disabilità, Famiglia, persone e successioni' (2009) n. 5, 1 maggio 2009, p. 476

Bongiovanni V 'La tutela dei disabili tra Carta di Nizza e Convenzione delle Nazioni Unite' 3 (2011) Famiglia e Diritto 310

Daly E 'Amministratore di sostegno e rappresentanza in ambito sanitario' (2020) 7 Famiglia e Diritto 757.

Paladini L, 'Disabilità e acquisto della cittadinanza – Diritto alla cittadinanza e tutela dei disabili, tra diritto interno e norme interposte' (2018) 12 Giurisprudenza Italiana 2614

Paladini M, „*L'amministrazione di sostegno nella protezione dei soggetti deboli', in VIVALDI E., Disabilita' e Sussidiarieta'*. Il Mulino, Bolonia 2012, pp. 243 – 264.

Visintini G, „*Incapacità di intendere o di volere: dai dogmi della tradizione alle nuove regole*', in „*L'amministrazione di sostegno. Una nuova forma di protezione dei soggetti deboli*', editor G. Ferrando, Giuffré, 2005

Ferrando G 'L'amministrazione di sostegno nelle sue recenti applicazioni' (2010) 12 Famiglia, persone e successioni 836

Grisafi R 'I diritti e doveri (risarcitori) del disabile' (2010) 7 La Responsabilità Civile 536

Ientile P 'L'impedimento matrimoniale dell'interdizione per infermità di mente dopo la l. 9.1.2004, n. 6 sull'amministrazione di sostegno' (2011) 6 Famiglia, persone e successioni 461

Perlingieri C 'Amministrazione di sostegno e neuroscienze' (2015) 2 Rivista di Diritto Civile 10330

Tescaro M 'I confini applicativi dell'amministrazione di sostegno comparati con quelli della Sachwalterschaft austriaca e della Betreuung tedesca' (2010) 10 Famiglia, persone e successioni 645

Venchiarutti A, 'La sfera affettiva e sessuale della persona fragile: il ruolo per l'amministratore di sostegno' (2022) 2, Rivista di Diritto Civile 379

Reports

'Primo Rapporto alternativo del Forum Italiano sulla Disabilità al Comitato delle Nazioni Unite sulla Convenzione sui diritti delle persone con disabilità', 18 gennaio 2016 <https://www.osservatoriodisabilita.gov.it/it/documentazione-relativa-alla-convenzione-delle-nazioni-unite/> accessed 30 september 2022

Audizione dell'Istat presso il Comitato Tecnico Scientifico dell'Osservatorio Nazionale sulla condizione delle persone con disabilità Audizione del Presidente dell'Istituto nazionale di statistica Prof. Gian Carlo Blangiardo Presidenza del Consiglio dei ministri Roma, 24 marzo 2021 < https://www.osservatoriodisabilita.gov.it/media/1382/istat-audizione-osservatorio-disabilita_24-marzo-2021.pdf > accessed 30 september 2022

Important legislation

Regio Decreto 16 marzo 1942, n. 262, Approvazione del testo del Codice civile. (042U0262), Gazzetta Ufficiale n.79 del 4 aprile 1942

Legge 9 gennaio 2004, n. 6, Introduzione nel libro primo, titolo XII, del codice civile del capo I, relativo all'istituzione dell'amministrazione di sostegno e modifica degli articoli 388, 414, 417,

418, 424, 426, 427 e 429 del codice civile in materia di interdizioni e di inabilitazione, nonche' relative norme di attuazione, di coordinamento e finali, pubblicata nella Gazzetta Ufficiale n. 14 del 19 gennaio 2004

Legge 13 maggio1978, n. 180 Accertamenti e trattamenti sanitari volontari e obbligatori. Pubblicata nella Gazz. Uff. 16 maggio 1978, n. 133

Legge 5 febbraio 1992, n. 104 Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate, Pubblicata nella Gazz. Uff.17.2.1992, n. 39.

Legge 8 novembre 2000, n. 328 Legge quadro per la realizzazione del sistema integrato di interventi e servizi sociali pubblicata nella Gazzetta Ufficiale n. 265 del 13 novembre 2000 – Supplemento ordinario n. 186

Judgements

Cassazione civile, Sez. I, 12 giugno 2006, n. 13584

Cassazione civile, Sez. I, 29 novembre 2006, n. 25366

Cassazione civile, Sez. I, 22 aprile 2009, n. 9628

Cassazione civile, Sez. I, 24 luglio 2009, n. 17421

Cassazione civile, Sez. I, 1 marzo 2010, n. 4866

Cassazione civile, Sez. I sentenza n. 18320 del 25 ottobre 2012

Cassazione civile, Sez. VI-1, ordinanza n. 13929 del 18 giugno 2014

Cassazione penale, Sez. II, sentenza n. 19665 del 16 maggio 2008

Cassazione penale, Sez. II, sentenza n. 18295 del 11 aprile 2017

Cassazione penale, Sez. II, sentenza n. 48908 del 21 dicembre 2009

18 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Kuwait

Anadel Al Matar

Introduction

For the sake of clarity, it can be stated that Kuwaiti Civil Law follows the civil manner of the French legal system, and according to Article 2 of the Constitution of Kuwait, the state religion is Islam, and Islamic sharia[1] is a major source of legislation.

I. Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities into the legal systems of Kuwait

The UN Convention on the Rights of Persons with Disabilities (hereinafter referred to as '**the CRPD**') is one of those referred to in paragraph 2 of article (70) of the Kuwaiti Constitution,[2] which stipulates,

> *The Amir enters into a convention with a decree and informs it immediately to the National Assembly accompanied with a proper declaration, the convention shall have the power of law after conclusion and ratification and publication in the Gazette, however, the agreements on peace, alliances and agreements relating to the State properties or its natural resources or the general or specific rights of the citizens . . . or those that include an amendment to the laws of the State of Kuwait, to be implemented, a law must be issued.*

Consequently, following accession to the CRPD, formal procedures had to be implemented by acts of Kuwaiti domestic law.

To achieve this goal, Law 35 of 2013 was drafted and published in the Gazette on May 26, 2013 (hereinafter referred to as '**Law 35**'), which includes two reservations and the interpretative declarations.

Article 1 of Law 35 stipulates the following:

> *Approval of the State of Kuwait's membership to the Convention on the Rights of Persons with Disabilities (CRPD) drafted in the United Nations in New York on December 13, 2006, and approving the texts of the law with showing reservations to paragraph (A) of*

1 *Sharia* is an Islamic term that refers to the commands and prohibitions that God has legislated for his Muslim followers, which are the rulings, rules and regulations legislated by God to establish a just life and manage people's interests and security in beliefs, transactions and different systems of life.

2 The Kuwaiti Constitution was signed on November 11, 1962, by His Highness Sheik Abdulla Al-Salem Al-Sabah.

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article 18, para (2) of the article (23) of the convention and issuing interpretative declarations regarding para (2) of the article (12), and para (A) of the article (19) and para (A) of the article (25) of the convention.

The explanatory memorandum of Law 35 of 2013 for the approval of the accession of the State of Kuwait to the CRPD included reservations as it affirmed that this convention would achieve the interests of the State of Kuwait and would not come into conflict with its Arab and international principles, which had thus far shaped the Kuwaiti legal system. Thus, the Ministry of Foreign Affairs saw the need to add reservations to the following provisions of the CRPD:

The reservation to paragraph (A) of the article (18) of the CRPD stipulates,

The right of gaining citizenship, change it and not depriving them of their right of citizenship in an arbitrary manner or based on their disability.

Paragraph 2 of the article (23) contains the following text:

States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

As a result of these reservations, Kuwait did not intend to be bound by the provisions of the CRPD. Kuwait did not accept those provisions of the CRPD, because these issues are regulated in Kuwaiti domestic law which were intended to remain unchanged.

In addition, the State of Kuwait has made interpretative declarations concerning the Article 12, paragraph 2, of the CRPD, stating, '*The state parties approve that persons with disability have the legal capacity on an equal basis with others in all aspects of life'*. Article 19, paragraph (a), of the CRPD states, '*Providing the opportunity for those with a disability to choose the place of their residence and accommodation and those who live with them on an equal basis with others and not forcing them to live within a specially arranged form of living'*. Article 25, paragraph (a), of the CRPD states, '*Providing free health programs at a reasonable cost for persons with disability that in scope, quality and standard are equal to those provided for others, including the sex and productive and public health program services provided for the population'*. The interpretative declaration concerning Article 12, paragraph 2, of the CRPD stipulates, '*The enjoyment of legal capacity shall be subject to the conditions applicable under Kuwaiti law'*. The interpretative declaration concerning Article 19, paragraph (a), of the CRPD stipulates, '*This paragraph shall not be interpreted to permit illicit relations outside legitimate marriage*'. The interpretative declaration concerning Article 25, paragraph (a), of the CRPD stipulates, '*The care in question shall not imply recognition of illicit relations outside legitimate marriage'*.

The State of Kuwait did not ratify the Optional Protocol to the CRPD drafted in the United Nations in New York on December 13, 2006.

As this chapter is on implementation of Article 12 of the CRPD in the Kuwaiti legal system, further considerations concern the Kuwaiti law provisions and institutions connected with legal capacity, its scope and limitations.

II. Private law regulation of active legal capacity

The legal issues which are subject to the Article 12 of the CRPD had been regulated in Kuwaiti Civil Law,[3] in the provisions concerning the competence to perform legal actions (articles 84–109 of the Kuwaiti Civil Law).

The Kuwaiti Civil Law relating to competence is a flexible system that contains a high degree of protection and self-independence for persons; therefore, this system has not witnessed any changes relating to the law after the ratification of the CRPD.

The general rule governing how to gain legal personality in the Kuwaiti Civil Law provides that a person gains this when he/she is born alive and continues to live until his/her death (article 9 of the Kuwaiti Civil Law).[4] The notion of legal personality needs to be distinguished from the notion of a competence in the law.

Competence in the law means the capability of the person to gain rights and bear commitments; that is the legal standing: the rights of persons and their duties. It may also mean not just the competence[5] of receiving these rights and bearing the duties, but also the ability to establish rights and obligations through performing different legal actions, then we encounter what is called the competence of performance.[6] Legal competence is divided into two parts: **legal standing** and **legal eligibility**.

Legal standing

Legal standing is held by every individual in being a human being as soon as they are born alive and is guaranteed for all individuals regardless of their age, perception and ability to judge.

Legal standing does not require the human being to reach a certain age and does not require thinking, recognition or distinction. Therefore, a person who lacks competence in general and in particular a person with disabilities, either mental or physical, is provided with legal standing.

The legal standing is full and equal for all human beings within private law, yet the legislator provides that certain groups of people, such as non-citizens, are excluded from enjoying some rights such as political rights. Furthermore, to gain certain rights, certain conditions are required, such as getting married at a certain age. For example, it is prohibited to notarise or certify a contract of marriage with a young girl under 15 years or a young man under 17 years at the time of execution of such a contract (article 26[7] of Kuwaiti personal law). These restrictions may vary depending on the different types of rights.

Legal eligibility

In the Kuwaiti Civil Law, legal eligibility means the competence of the person to exercise the legal actions that bring them rights and bear duties. Legal eligibility relies on the perfection of the perception, which is the person's ability to realise and distinguish.[8]

3 Kuwaiti Civil Law, Decree-Law No. 67 for 1980.
4 Kuwaiti Civil Law, Decree-Law No. 67 year 1980.
5 Ebrahim Al-Desouqi Abu Al-Lail, *Fundamentals of law*, Kuwait International Law School, Kuwait, 2014, p. 422.
6 Ibid., 423.
7 The Personal Status Act No. 51 of 1984, which governs the rights relating to marriage, divorce and inheritance.
8 Ebrahim Al-Desouqi Abu Al-Lail, *Fundamentals of law*, Kuwait International Law School, Kuwait, 2014, p. 424.

As a result, based on the formation of distinction and perception in the person, it is possible to distinguish between three stages of legal eligibility: **the stage of no legal eligibility**, in which the ability to perform is not granted or lost entirely; **the stage of limited legal eligibility**, which is connected with a lack of distinction; and the stage of **full legal eligibility**, where the legal eligibility is full, unless something happens to the person that has the effect of preventing them from carrying it out.

Stage of no legal eligibility: The legislator has regulated this stage in Article 86 of the Kuwaiti Civil Law which stipulates the following:

1. The competence of the minor who cannot effect any legal actions and all his legal actions are regarded void.
2. Whoever has not completed seven years of age, is regarded as a person who cannot effect any legal actions.

The Kuwaiti legislator has regulated the guardianship system on money in the provisions of Articles 110–146 of the Kuwaiti Civil Law[9] accordingly. In particular, the law appoints a person as a guardian on the person with no legal eligibility to manage their legal actions on their behalf.

Stage of limited legal eligibility: Article 87 of the Kuwaiti Civil Law has established a general rule that governs the capacity of a minor (young person) who can effect some kinds of legal acts and who has attained seven years but has not reached the age of majority. The persons with limited legal eligibility are allowed to effect legal acts if they are purely and utterly beneficial. If the legal acts effected by persons with limited legal eligibility are purely and utterly harmful, then they are totally void. If the legal acts turn out from the one hand beneficial and from the other hand harmful for a person with limited legal eligibility (such as feeble-minded), they might be void for the interest of such a person.

Stage of full legal eligibility: Article 96 of the Kuwaiti Civil Law has set out the following:

1. Any person who reaches the age of majority has full competence to carry out legal actions unless an order has been issued previously for someone else to have custody or guardianship of their money.
2. The age of majority is 21 calendar years of age.
3. The person who reaches the age of majority continues to enjoy full capacity unless they undergo a certain condition stated in the law.

As can be noted from the law, the conditions of full competence are as follows:

First condition: Reaching the age of majority which is twenty-one calendar years.

Second condition: Non-continuation of ruling custody or guardianship on the person. This condition relates to the case where the person reaches 21 years of age but is diagnosed with one of the symptoms of insanity, dementia, foolishness and negligence, which affect performance of competence (hereinafter '**symptoms of competence performance**') and eventually the court rules upon the request of the custodian or the guardian or the Public Authority of Minors or those competent parties to continue custody on their money, as their competence will not be full as a result of the court's decision.[10]

9 Kuwaiti Civil Law, Decree-Law No. 67 year 1980.

10 Ebrahim Al-Desouqi Abu Al-Lail, *Fundamentals of law*, Kuwait International Law School, Kuwait, 2014.

Symptoms of competence performance

The term 'symptoms of competence performance' refer to the disturbances that might occur to the individual and influence their legal capacity and their ability and competence to carry out legal actions. The symptoms can be divided into two types:[11]

One type affects the person's ability of perception and distinction. The symptoms of this type prevent a given person from doing any legal acts in fact without incapacitating her in the legal sense. The other type of symptoms influence control of the person's movements, the ability to control the person's behaviour.

The first type: These are symptoms that inflect the individual's mind and cause loss of understanding and distinction which, in accordance with article (98/1/Kuwaiti Civil Law), results in loss of legal eligibility. Therefore, all the person's actions are null, regardless of whether they are favourable or beneficial, such as accepting a simple donation; harmful for them, such as a handing out a gift from their property; or somewhere between beneficial and harmful, such as selling and trading. A person having such symptoms is treated by law as legally incompetent (incapacitated by force of law)[12] and placed under guardianship without the need of any court decision. If such a person's actions are limited or placed under guardianship on the basis of a court decision, a curator must be appointed to manage their actions.

The second type: These are symptoms that inflect the mind and weaken the ability of distinction and the senses without losing the ability in this regard. In this case the person has an impairment and is not able to distinguish between the beneficial and the harmful. The general rule applying to minors, who have attained seven years of age, who are capable of distinguishing, shall be applied to their actions, as stated in article 78 of the Kuwaiti Civil Law. Regarding the competence of persons with the second type symptoms, the Kuwaiti Civil Law makes a distinction between legal acts, which are purely beneficial to them, which are valid, and those which are purely harmful to them, which are null, and at the same time beneficial and harmful to some extent, which might be nullified for their own good.

Legal acts that are purely beneficial

Legal acts are purely beneficial if they increase the rights of the person or decrease their obligations for nothing in exchange. For example, a gift without any expectations or obligations to a person lacking any legal eligibility. If a person with second type symptoms accepts such a donation, the law deems this approval effective. As a result, the donation is valid even though the person lacks legal eligibility. This is because the gift is purely beneficial to them. These legal acts that are beneficial to the person lacking competence can be carried out without the need for consent of a guardian. They are regarded as valid, binding and irrevocable and cannot be contested.[13]

11 Ibid., 456.

12 Article 98 of the Kuwaiti Civil Law No. 67 year 1980.

13 Ebrahim Al-Desouqi Abu Al-Lail, *Fundamentals of Law,* Kuwait International Law School, Kuwait, 2014, p. 436.

Purely harmful acts

Purely harmful acts are ones that damage the person lacking legal eligibility; they reduce their rights or increase their obligations with nothing in return or exchange. Such acts include, for example, making irreversible concessions of their rights, making donations or releasing a debtor from a debt. The legal eligibility of a person with second type of symptoms in relation to such acts is excluded fully and as a result the acts are null with no legal consequences. They cannot be amended nor corrected regardless of whether the guardian or curator consents or not.

Simultaneously beneficial and harmful acts

Some acts can turn out to be both part beneficial and part harmful at the same time. These may include, for instance, a contract of sale, a lease contract or a partnership. Such cases, must be resolved on a case-by-case basis if a given contract may lead to a huge losses. According to Article 87 of Kuwaiti Civil Law these acts effected by a person with second type symptoms are considered right and valid in origin and lead to legal consequences, unless it is nullified by a person with the symptoms of the second type or by a representative of such a person. This is because the validity of such an act is not final. The certainty of the act may be ensured either through the permit that was given by the guardian or the curator to the person who lacks the competence to act. If such a permit is issued the legal act becomes valid and stable. It must be carried out and performed accordingly.

The legislator has allowed the curator to invoke the nullification of the action by resorting to the judiciary, the verdict of nullification leads to the nullification of the contract altogether, and the parties to the contract shall return to the situation upon entering the contract.

These symptoms of competence performance may affect the legal eligibility by force of law as described earlier. Nevertheless, they can also be a reason for a **court to execute a decision to put the affected person under guardianship**. As a result of a court decision to put a given person under a guardianship, the legal eligibility of such a person is limited to the extent determined in the court decision. The decision on guardianship and on limitation of the legal eligibility can be made in the same court decision.

According to article 85 of Kuwaiti Civil Law, persons who suffer from psychological disorders are not put under guardianship, unless a judge decides to do so. In addition, the law also provides that the rule of the court on placing the person under guardianship is to be made public. As long as the decision on placing a person under guardianship is not to be made public, it is not effective. By making this decision open to the public all the other entities may become aware of the limitations on legal eligibility applied by the court to a given person. The minister of justice issued resolution number (63) in 1981 regarding publication of the court's decision.[14]

If a decision to place a given person under guardianship has not been issued or if the decision has not been made public, the person whose legal eligibility is in question enjoys full capacity and their actions are dully valid.

14 Where it is established in the court a record of numbers for the decisions of the guardianship.

Based on what has been stated so far, the actions of a person with symptoms of competence performance enjoys full legal eligibility, unless a court passes a decision restraining them (placing them under guardianship) and makes this decision available to the public. The acts of a person with symptoms of competence performance may be questioned on the general rules of private law and on a case-by-case basis. In order to question such an act, it must be proved that the symptoms affected the person in question to the extent that makes the symptoms a relevant cause of invalidity or voidability of a legal act.

III. Active legal capacity and restrictions resulting from disability – procedural aspects

Article 84 of the Kuwaiti Civil Law establishes the general limits of legal eligibility for the purpose of undertaking legal actions. This article states that the legal eligibility of a person is taken for granted, unless the law decides otherwise.

Again, one must have reached the age of majority to become competent. For a person who attained the age of majority, it is required that no order of custody had been issued previously on their money. If the person is capable of carrying out all legal acts effectively without the need for intervening procedures, unless some type of incident of capacity occurs, this is determined by the law. Only such incidents relevant here are those that affect the brain and the ability to distinguish in a manner that sometimes deprives the person of capacity at times and at other times affects capacity without diminishing it.

The law of custody or guardianship in Kuwaiti law is regarded as a legal means to provide protection for the person in need.

Article 138 of the Kuwaiti Civil Law sets out the authority entrusted to provide custody for persons with no or limited legal eligibility. The first paragraph of article 138 of the Kuwaiti Civil Law clarifies that the competent court has the competence to appoint a guardian and is named as a custodian. The court decision on the establishment of a guardianship is made upon the request of whoever has an interest or upon the request of the Department of Minors' Affairs.[15]

It is noted that appointing a custodian for the money of a person with limited or no legal eligibility is the competence of the court in the first place, in contrast to appointing a guardian for the money of a child who can be, from the beginning, the father or the grandfather of the child in question. This guardianship does not need the any verdict passed by the court. This guardianship is established automatically by force of law.

Article 139 of the Kuwaiti Civil Law clarifies that the authority of the court in appointing a custodian is not ultimate in that it cannot choose whomever it desires. Its authority in this issue is restricted.

In the procedure of appointing the custodian over the interdicted, the court shall take into consideration the most rational from their male children, then the father, then grandfather, then whom it deems in the interest of the interdict. If there is more than one of his children who is eligible for custody, the court appoints the most righteous of all of them for custody. If they are equal in their righteousness, the court has the right to choose whomever it desires to look after the affairs of the interdicted. If, among their

15 The Public Authority for Minors Affairs was established in 1939 in the era of the late Sheikh Ahmed Al-Jaber Al-Sabah, Prince of the State of Kuwait, to provide the custody of those who haven't any guardians, including minors.

children, none is capable of custody, then the court would appoint the father as a custodian; if the father is absent or if he is there but not capable of custody, then the custody is entrusted to the biological grandfather. If there is no biological grandfather or if he exists but is not capable of custody, then the court will choose whomever it deems right for custody.

Article 140 of the Kuwaiti Civil Law sets out the provisions for a custodian. It stipulates that the provisions for a custodian are the same as a guardian, as their affairs are like a guardian. Therefore, it is stipulated that the person who is appointed as a custodian should act pursuant to the same rules as a guardian. The custodian has the same authority and duties as a guardian. The court may appoint a supervisor to monitor the custodian in managing the affairs of the interdicted, within the same limits that it has the right to appoint a supervisor on the affairs of a guardian. The supervisor of the custodian has the same authority that the supervisor over the guardian has.

Articles 107–109 of the Kuwaiti Civil Law govern the procedures and terms of appointing a legal assistant when a person is affected with one of the impediments of competence.

Article (107) of the Kuwaiti Civil Law stipulates the following:

1. If the person suffers from a severe physical disability that makes it difficult for such a person to know the circumstances of entering into a contract, or if they find it difficult to express their own will, especially if they were dumb-deaf, blind-deaf or blind-dumb, the court may appoint a judicial assistant to aid them in the acts that the court views as requiring aid.
2. The decision to appoint a judicial assistant is declared in a manner decided the minister of justice.

Under article 108 of the Kuwaiti Civil Law, which clarifies that any action made without the aid of judicial assistance is voidable whenever the person takes the action without the aid of the assistant one month after the court decision unless the court has permitted solely to enter a contract.

Article 109 of the Kuwaiti Civil Law also stipulates that

> if the person, due to his physical or health condition, is unable to conclude a contract even with the aid of an assistant, then the court may permit the legal assistant to conclude on behalf of the person with disability in case that not concluding might threaten his interests into danger.

The Kuwaiti Civil Law governs the procedures and terms of appointing a legal assistant when a person is affected with one of the impediments of competence, such as severe physical disability that prevents them from carrying out their legal actions, or without being independent in carrying them out.

Impediments of competence have no impact on the person's distinction and recognition, as they do not have an impact on the capacity to perform or legal eligibility, yet they relate to the material and physical ability to carry out this capacity due to the difficulties of expression of will or of being aware of the circumstances surrounding the concluding of a contract.

The Kuwaiti law has made it clear that in severe physical disability, in certain conditions, the court **may appoint a legal assistant** who assists the person with the disability in the actions that require aid. The court is competent to do so, if three conditions are met:

First: If the person is affected with a severe physical disability, the physical disability should be so severe that the person is unable to know the circumstances of concluding a contract or to express their own will. Article 107 of the Kuwaiti Civil Law contains some examples of severe disability, such as where the person is dumb-deaf, blind-deaf or blind-dumb or has two disabilities involving impaired hearing, speech or vision.

Based on these examples, other cases of severe disability may be measured such as the person might be paraplegic or suffer from severe weakness or feebleness. Each case could influence the capacity of the person to know the circumstances of concluding a contract or the yesability to express their own will. The assessment of severe physical disability is left to the discretion of the court examining the application for a legal assistant after presenting medical reports that prove the severe physical disability.

Second: The disability influences the ability of the person with disablity to conclude a contract. The Kuwaiti legislator, in addition to the condition that the person should be affected with a severe physical disability, also requires that this disability influence their ability to conclude a contract as they find it difficult to maintain awareness of the circumstances surrounding the contract or find it difficult to express themselves precisely and correctly where legal assistance is not imposed. This is one of the issues that the competent court may take into consideration when deciding on whether to appoint a legal assistant.

Third: According to Article 107 of the Kuwaiti Civil Law, the legal assistance system is not decided by default as soon as the person is affected with a physical disability. The appointing of a legal assistant must be demanded either by the affected person themselves or a person who has an interest in the issue. Then the court is empowered to decide on whether the disabled person needs assistance or not by its discretionary authority in light of the circumstances surrounding the disability and the degree of the disability.

Article 108 of the Kuwaiti Civil Law provides that the decision of appointing a legal assistant is a protection for others so that they may be aware of the issuance of the decision to establish legal assistance and the decision taken by the court to annul the legal assistance. For this reason, these decisions are to be made public.

The effect of appointing a legal assistant

The role of the legal assistant is restricted to assisting the person with a disability to conclude legal actions, and the assistant may not act on the person's behalf by undertaking legal acts. The person who concludes a legal act and bears all its legal consequences is the person with a disability themselves with their own will. The role of the legal assistant is restricted to aiding the person with a disability to express his or her will and to be aware of the circumstances surrounding the contract. The legal assistant shall not conclude on their own behalf any legal action; otherwise, it would be infective in relation to the person with disability.

As an exemption from this rule, article 108 of the Kuwaiti Civil Law allows the court to permit a person with a disability, for whom a legal assistant has been established, to effect certain acts solely.

Article 109 of the Kuwaiti Civil Law designates that in case of severe physical disability, the court may allow the legal assistant to conclude solely on behalf of the person with a disability if the following two conditions are met:

The first condition: the person with a disability is unable to conclude the action even with the assistance of a legal assistant.

The second condition: there are risks to the interests of a person with a disability if the action is not concluded.

If these two conditions are met, then in this case the position of the legal assistant is a representative of the person with the disability and not just an assistant to them.[16]

IV. Organisation and institutional aspects of the assistance and guardianship to do legal acts by persons with disabilities

As regards organisation and institutional aspects of the assistance to do legal acts by persons with disabilities in Kuwait the role of the Public Authority for Disability Affairs should be highlighted. The Public Authority for Disability Affairs was established by Law No. 8 in 2010 issued in the official gazette *Kuwait Alyoum* No. 964, dated February 28, 2010. It is a legal authority subject to the supervision of the minister of social affairs and labour.

In particular, the authority specialises in approving the general policy for the care of persons with disabilities, following up on its implementation and development reports, setting regulations and defining procedures related to implementing the country's obligations stipulated in Law No. 8 of 2010.

In addition, to ensure the rights of children with disabilities, build their capabilities, develop their skills, promote their inclusion in society and ensure equal opportunities and lack of discrimination in rights based on disability, the Law No. 8 of 2010, regarding the rights of persons with disabilities, was enacted after reviewing the Kuwaiti Constitution and the Penal Code promulgated by Law No. 16 of 1960 and its amending laws.

The Public Authority for Disability Affairs functions through the affiliated committees granting persons with disabilities cards. These disability cards are evidence that the holder is entitled to all the services and privileges stated in the law.

The Medical Committee

The Medical Committee, affiliated with the Public Authority for Disability Affairs, assesses the health and psychological condition of the person who has applied for disability status and issues a decision on their inability to decide whether they suffer from any disability or not and the degree of this disability.

The Committee is made up of physicians, each of them specialising in a relevant field, such as ophthalmology, orthopedics, psychiatry, pediatrics, speech therapy and audiology.

16 Dr. Ebrahim Al-Desouqi Abu Al-Lail, *Fundamentals of law*, Kuwait International Law School, Kuwait, 2014, p. 476.

Each specialist studies the medical file of the person who has applied for disability status and examines the development of the disease and the impact on the person's daily life in general.

Medical reports presented by public hospitals in the State of Kuwait (last updated on May 21, 2023) show there was a total of 58,922 persons granted disability status by the Public Authority for Disability Affairs.[17] This group of people includes 13,714 persons with mental disabilities, 9,707 persons with physical disabilities, 1,395 persons with psychosocial disabilities and 4,449 persons with hearing impairment.

V. Private law restrictions on active legal capacity and protection of persons with disabilities under criminal law

With regard to criminal issues and penalties, the provisions of the Kuwaiti Criminal Code Number 16 in 1960 are on the crimes that are committed against people without and with disabilities. In addition, Law 8 of 2010,[18] relating to the rights of persons with disabilities, includes Chapter Nine of Articles 59–64 providing some penalties.

These penalties include the violations and actions that individuals commit, such as forgery of the disability card, impersonating a disabled person or using the parking space specified for the persons with disabilities. In addition, it provides for punishment for any person or official who refuses without a legitimate reason to employ a person with a disability. Article 61 of Law 8 of 2010 provides for punishment by imprisonment for not more than one year and a fine of not more than 1,000 Kuwaiti dinars, or one of these two penalties, for whoever is entrusted to look after a person with a disability, whatever is the source of this commitment, and stops performing his duties or does not take the proper measures to carry out these duties.

The Kuwaiti Criminal Code does not include explicit or aggravated provisions on a crime which is committed towards persons with disabilities, except the provisions of article 187 of the Code, which increases the penalty for whoever has sex with a female without force, threat or deception knowing that she is insane, feeble-minded or under the age of 15 or lacks the will for any other reason, or that she is not aware of the nature of the action that she is undergoing, or she believes in its legitimacy. In such cases, the perpetrator will be imprisoned for life.

It is to be noted that even though there may not exist special or aggregated provisions when committing one of the crimes stated against persons with disabilities, it is common for the judiciary while issuing a verdict to impose a tougher sentence for the perpetrators of these special crimes, when it is proven that the perpetrator is aware of the condition and circumstances of the victim (her disability) and exploited these circumstances.

As for the responsibility of the persons with disabilities for the crimes that they commit, article 22 of the Kuwaiti Criminal Code regulates this issue. This article stipulates the following:

> *Whoever is incapable of realizing the illegal nature or the class of the crime, or he is incapable of directing his willpower, due to an intellectual illness, shortage in his mental growth, or any other abnormal mental state, is not held penally accountable.*

17 Statistics (pada.gov.kw).

18 Law of the Rights of Persons with Disabilities No. 10 of 2018.

Summary

The State of Kuwait has ratified the Convention on the Rights of Persons with Disabilities (CRPD) drafted in New York on December 13, 2006, by issuing Law 35 in 2013 expressing reservations to paragraph (2) of Article 12 of the Convention which concerns the legal capacity for persons with disabilities. Kuwait intended to keep unchanged the Kuwaiti Civil Law 67 of 1980, providing certain restrictions which could be imposed on persons with disabilities and their legal eligibility (active legal capacity). It pertains to persons with different disabilities, in particular those suffering from mental, psychological and social disabilities.

In its final notice, the Regulatory Medical Committee[19] of the Rights of Persons with Disability has hailed the primary report of the State of Kuwait in September 2019, regarding some of the positive aspects that were adopted by the State of Kuwait to prepare some legislations, policies, programs and establishing entities as legal and institutional solutions in addition to a highly established system to provide social protection for persons with disabilities. However, the aforementioned committee also expressed concerns towards the reservation of the State of Kuwait towards Article 12, paragraph 2, of the CRPD and the need to take legal action to support their right to recognise the rights equally before the law which means that all persons with disabilities, including those with mental and intellectual disabilities, should have opportunities to enjoy legal competence with others in all aspects of life.

The committee recommended reconsidering the legislation in the State of Kuwait, including the Kuwaiti Civil Law and Law 8 of 2021, and retiring the legislation providing substitute decision-making mechanisms and replacing it with the provisions on support decision-making institutions. The stress should be put on the ability to take and adapt the mechanisms supporting the decision-making of persons with disabilities instead of taking decisions on their behalf without their active participation.

The committee also recommended removing all the practical barriers that prevent persons with disabilities from exercising their competence equally with others, including those relating to properties and banking services and managing assets.

It is to be noted that there are good chances of securing the rights of persons with disabilities in Kuwait through the Kuwait 2035 Vision.[20] This aims at implementing the developmental plan and goals of sustainable development in addition to the National Development Plan. One of the most ambitious aspirations included in the vision is to provide infrastructure and proper legislation and a favourable and motivational work environment for comprehensive and balanced human development that aims to consolidate societal values and protect the identity and promote citizenship and achieve justice and political participation and freedoms.

19 Final Declaration of the United Nations Mission on the Rights of Persons with Disabilities December 5, 2018.

20 New Kuwait or Kuwait Vision 2035 is a governmental development plan in the State of Kuwait, announced by the Kuwaiti government on January 30, 2017.

19 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in the Netherlands

Sonia Dominika Rovers

1. Introductory remarks

1.1. Introduction to the Dutch legal system

The legal system of the Netherlands derives from the civil law tradition characterised by a strong role of legislature and the primacy of statutory law, the majority of which is codified.[1] As such, Dutch law combines elements characteristic for French and German legal families, where the latter is considered to have predominant influence on the Dutch legal system.[2] Although statutory law remains the primary source of law in the Netherlands, the legal doctrine plays an important role, setting the course for Dutch legislature and judiciary.[3] Significant prominence is given to the judiciary itself, whose jurisprudence determines the course of interpretation and development of statutory law.

The Netherlands is a parliamentary constitutional monarchy with a decentralised unitary structure, where multiple competences are delegated to the local authorities, at the provincial and municipal level.[4] The Dutch legal framework is based on the Constitution of the Kingdom of the Netherlands (hereinafter also referred to as Constitution)[5] as the national supreme statute. The present Constitution has been in force since 1983 (with several subsequent amendments) and covers matters such as the fundamental rights and freedoms, the national governance system and the principles of functioning of the decentralised state authorities.[6] Interestingly, many constitutional practices related primarily to the appointment of the executive and legislative authorities are based on customary law.[7]

1 K. Zweigert, H. Kötz, *Introduction to comparative law*, 3rd ed., Oxford University Press, Oxford, 1998, pp. 63–64.

2 This stems from, amongst others, the new Dutch Civil Code of 1992. The general part of the Code and the (rather abstract) way it is formulated reminds the reader much more of the German than the French Civil Code. See: J. M. Smits, *Elgar Encyclopaedia of Comparative Law*, Edward Elgar Publishing, Cheltenham, 2006, p. 493.

3 Ibid.

4 Dutch: *gemeente*.

5 The Constitution for the Kingdom of the Netherlands of 1815 (Dutch: *Grondwet voor het Koninkrijk der Nederlanden van 24 augustus 1815)*.

6 See: J. M. Smits, *Elgar Encyclopaedia of Comparative Law*, Edward Elgar Publishing, Cheltenham, 2006, p. 494.

7 Ibid.

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Counter to most European states, the Netherlands has no delegated judicial body mandated to conduct constitutional revision of national legislature.[8] Article 120 of the Constitution explicitly prevents the national courts from assessing compliance of the national statues (*wetten*) with the Constitution; however, it does not entail prohibition on all forms of constitutional control. In the first stance, the ex ante control of both formal and material quality of a bill is exercised by the national legislator.[9] After such bill is enacted, the national courts are required to interpret its provisions in line with the Constitution in case of legislative ambiguity (but they cannot to assess the constitutionality of these norms).[10] The judicial constitutional control by national courts is permitted in the field of local legal acts (the so-called delegated legal acts) issued at the provincial and municipal level, as well as regulations and guidelines of the national legislator.[11]

In the Netherlands, the relationship between international and domestic law is rooted in the monistic[12] tradition.[13] According to the Constitution, the so-called self-executing provisions of international treaties are binding upon all persons and have supremacy over national law.[14] This means that such international provisions, due to their self-executing nature, may be directly applied by the national courts.[15] At the same time, provisions of international treaties ratified by the Netherlands that are deemed to have a binding effect solely between the state parties are not directly enforceable. In such instances, the national courts' duty is to interpret and apply national law in line with the international provisions.[16] The national courts shall thus use the indirect effect of public international law by applying national law in such a manner that a potential conflict with international

8 The matter of Dutch constitutional exceptionalism and the national debate thereon has been recently analysed by G. van der Schyff, The prohibition on constitutional review by the judiciary in the Netherlands in critical perspective: The case and roadmap for reform, *German Law Journal*, 2020, vol. 21, p. 892.

9 The Senate (*Eerste Kamer*) is obliged to test the constitutionality of a draft statue, following detailed guidelines. This legal construction is based on the assumption that the legislator would never enact a statue that would be inconsistent with the Constitution. The (actual) role of the Senate has been discussed by G. van der Schyff. The prohibition on constitutional review by the judiciary in the Netherlands in critical perspective: The case and roadmap for reform, *German Law Journal*, 2020, vol. 21.

10 Ibid., 893.

11 Ibid.

12 In its pure form, monism holds that international law and domestic law form part of a single universal legal system, where international law is superior to domestic law and thus prevails in any conflict between the two laws. See M. Chiam, Monism and dualism in international law: Introduction, *Oxford Bibliographies*, 2018, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml.

13 G. van der Schyff, The prohibition on constitutional review by the judiciary in the Netherlands in critical perspective: The case and roadmap for reform, *German Law Journal*, 2020, vol. 21, p. 890.

14 F. M. C. Vlemminx, A. C. M. Meuwese, Commentaar op Artikel 93 van de Grondwet, *Artikelsgewijs Commentaar op de Grondwet*, 2018, p. 2. See also: J. Fleuren, The application of public international law by Dutch courts, *Netherlands International Law Review*, 2010, pp. 252–259.

15 International legal acts become part of the Dutch law upon their ratification. See: B. Oomen, Between signing and ratifying: Preratification politics, the disability convention, and the Dutch, *Human Rights Quarterly*, 2018, p. 429; F. M. C. Vlemminx, A. C. M. Meuwese, Commentaar op Artikel 93 van de Grondwet, *Artikelsgewijs Commentaar op de Grondwet*, 2018, p. 2.

16 G. van der Schyff, The prohibition on constitutional review by the judiciary in the Netherlands in critical perspective: The case and roadmap for reform, *German Law Journal*, 2020, vol. 21, pp. 890–891; J. Fleuren, The application of public international law by Dutch courts, *Netherlands International Law Review*, 2010, pp. 258–260.

provisions is avoided.[17] In practice, the Dutch courts tend to refrain from grounding their verdicts on international provisions, unless their self-executing nature is unquestionable or in case such provisions have been incorporated into the national framework by the legislator.[18] This tendency presumably stems from the fact that the national courts are at no times permitted to conduct constitutional review of the national legislation nor authorised to fill the shoes of the legislator in its obligation to steer the implementation of the treaty and enact laws.[19]

Notwithstanding the challenging assessment of the self-executing nature of international provisions, in the last years a gradual, albeit slow, movement towards judicial interpretation of the national legislation through an international lens could be observed.[20] This tendency is also visible in the human rights domain.[21] Importantly, since 2011, claims based on (international) human rights can be submitted to the Netherlands Institute for Human Rights (*College van de Rechten van de Mens,* hereinafter also referred to as: the Institute).[22] Although the rulings of the Institute are not of a legally binding nature, they have an impact on the interpretation of international acts by the Dutch jurisprudence.[23]

1.2. The applicability of CRPD in the Dutch legal system

The Netherlands signed the UN Convention on the Rights of Persons with Disabilities (hereinafter also referred to as CRPD or the Convention)[24] on March 30, 2007, making several interpretative declarations to the selected provisions of the Convention, including Article 12 on the right to equal recognition before the law.[25] The pre-ratification period was relatively long as the Netherlands decided to ratify the treaty almost a decade after its adoption.[26] Ultimately, the Convention entered into force in the European part of the

17 Ibid.

18 J. Fleuren, The application of public international law by Dutch courts, *Netherlands International Law Review*, 2010, pp. 258–259. Similarly: M. Waltz, T. Mol, E. Gittins, A. Schippers, Disability, access to food and the UN CRPD: Navigating discourses of human rights in the Netherlands, *Social Inclusion*, 2018, pp. 56–57.

19 J. Fleuren, The application of public international law by Dutch courts, *Netherlands International Law Review*, 2010, p. 158. Similarly G. van der Schyff, G. van der Schyff, The prohibition on constitutional review by the judiciary in the Netherlands in critical perspective: The case and roadmap for reform, *German Law Journal*, 2020, vol. 21, p. 890; F. M. C. Vlemminx, A. C. M. Meuwese, Commentaar op Artikel 93 van de Grondwet, *Artikelsgewijs Commentaar op de Grondwet*, 2018, p. 9.

20 M. Waltz, T. Mol, E. Gittins, A. Schippers, Disability, access to food and the UN CRPD: Navigating discourses of human rights in the Netherlands, *Social Inclusion*, 2018, pp. 56–57.

21 Ibid.

22 Ibid.

23 Ibid.

24 United Nations – Human Rights Office of the High Commissioner, *Convention on the Rights of Persons with Disabilities,* adopted on 13 December 2006 and opened for signatures on March 30, 2007.

25 The Dutch government made interpretative statements to Articles 10, 12, 14, 15, 23, 25 and 29. The declaration concerning Article 12 will be discussed in the following section of the paper.

26 The ratification of the Convention was preceded by an extensive public debate on the amendments to the national law. On the pre-ratification process of the CRPD in the Netherlands. B. Oomen, Between signing and ratifying: Preratification politics, the disability convention, and the Dutch, *Human Rights Quarterly*, 2018, p. 429.

Netherlands on July 14, 2016.[27] Upon ratification, the treaty became part of the Dutch legal system.[28]

It is important to note that the Optional Protocol to the Convention, which allows the individuals to bring their complaints based on the rights laid down in the Convention directly to the UN Committee on the Rights of Persons with Disabilities,[29] has not been ratified by the Netherlands. As late as in March 2021, the Dutch government, urged by the domestic associations for the rights of persons with disabilities, presented the outline of potential steps towards the ratification of the Optional Protocol,[30] which sparked off a parliamentary discussion on this matter.[31] Thus far, the ratification procedure of the Protocol has not been finalised.

With regard to the process of implementation of the Convention into the national framework, in parallel to the revision and development of laws at the national level, the implementation efforts also take place locally. As a decentralised unitary state, the Netherlands delegates multiple competences to its administrative subunits, provinces and municipalities. Those units, provided with a large degree of regulatory freedom in social matters, play an important role in implementation of the provisions of the Convention and development of inclusionary projects at a local level.[32] Both national and local authorities have thus joint obligation to implement the guarantees of the Convention in the field of social welfare, including the provision of support and assistance to persons with disabilities.[33][34]

Another vital role in the implementation process is held by the Netherlands Institute for Human Rights. The Institute is responsible for the monitoring of the implementation

27 It was decided that ratification would not include the Caribbean Netherlands. Aruba, Curacao and St. Maarten as independent countries of the Kingdom of the Netherlands were to decide on their own how and at what pace they wish to implement the CRPD. For the islands of Bonaire, St. Eustatius and Saba, on the other hand, it was decided to implement the Convention gradually. It was agreed that transformation would first take place at the local level to improve the actual situation of persons with disabilities. See The Netherlands, *Initiële rapportage over de implementatie door Nederland van het VN Verdrag inzake de rechten van personen met een handicap*, July 12, 2018, pp. 4–7, https://www.eerstekamer.nl/overig/20180713/initiele_rapportage_over_de/meta.

28 B. Oomen, Between signing and ratifying: Preratification politics, the disability convention, and the Dutch, *Human Rights Quarterly*, 2018, pp. 434–436.

29 J. R. E, Stolk, Het individueel klachtrecht bij het VN-comité voor de rechten van mensen met een beperking, *Handicap & Recht af.*, 2019, vol. 2.

30 Dutch Ministry of Health, *Wellbeing and sport, stand van zaken besluitvorming facultatief protocol*, March 17, 2021, https://www.rijksoverheid.nl/documenten/kamerstukken/2021/03/17/kamerbrief-over-stand-van-zaken-besluitvorming-facultatief-protocol, accessed January 15, 2022.

31 See the responses of the Dutch government to the questions raised by the member of the Dutch Parliament regarding the ratification of the Optional Protocol (*Antwoorden op Kamervragen Schriftelijk overleg stand van zaken besluitvorming facultatief protocol VN-verdrag handicap*), September 27, 2021, https://www.rijksoverheid.nl/documenten/kamerstukken/2021/09/27/beantwoording-vragen-schriftelijk-overleg-inzake-stand-van-zaken-besluitvorming-facultatief-protocol-vn-verdrag-handicap, accessed January 15, 2022.

32 The Netherlands, *Initiële rapportage over de implementatie door Nederland van het VN Verdrag inzake de rechten van personen met een handicap*, July 12, 2018, pp. 4–7, https://www.eerstekamer.nl/overig/20180713/initiele_rapportage_over_de/meta.

33 Ibid.

34 For recent reports on implementation of CRPD at the municipial level see: *Inventarisatie implementatie VN-verdrag Handicap in gemeenten Inhoudelijke rapportage van de resultaten van de peiling van 2021, vervat in een trendrapportage van de periode 2018 – 2021*, https://www.movisie.nl/sites/movisie.nl/files/2021-06/Trendrapportage-Implementatie-VN-verdrag%20Handicap-gemeenten2018–2021.pdf, accessed January 26, 2022.

of the Convention into the national framework and was given this mandate in July 2016, upon the treaty's ratification. As a supervisor of the CRPD implementation, the Institute monitors (1) whether domestic laws and policies meet the standards of the Convention, (2) which national and local bodies are involved in the implementation of the treaty and how they carry out their tasks, (3) whether the overall situation of persons with disabilities is improving, and (4) whether the society becomes more inclusive. The Institute prepares annual reports on the progress of the implementation, selecting different right guaranteed by the Convention as the main focus of each report. Recently, the Institute presented its 2021 annual report to the UN Committee on the Rights of Persons with Disabilities, as a preparation for the second review of the implementation of the Convention in the Netherlands, scheduled for the fall of 2022 and spring of 2023.[35] The Institute provided insights on the actual status of the implementation and drew attention to, amongst others, the importance of and need for structural measures ensuring that persons with disabilities can effectively exercise their rights.[36]

In the ongoing implementation process, challenges of twofold nature may be observed. Firstly, the Dutch legislator tends to take a selective approach towards implementation of the CRPD, focusing on incorporation of certain provisions into the national framework while refraining from recognising and implementing others.[37] This approach leads to the second challenge related to the enforcement of the rights outlined in the Convention. As mentioned earlier, despite of the monistic nature of the Dutch legal system and a slow shift towards wider applicability of international human rights, the national courts tend to primarily rely on national law, especially when a self-executing nature of such rights may be dubious.[38] In this course, also Article 12(4) of the Convention has been recently determined by Dutch courts as non-self-executing.[39] The enforcement of the said provision and other rights laid down in the Convention therefore depends largely on the (future) amendments to the national legislation.[40]

2. The notion of legal capacity under Dutch private law

In many legal systems, particularly those deriving from the civil law tradition like the Netherlands, the capacity of being a subject of rights and obligations and the capacity of being

35 College for Human Rights (*College voor de Rechten van Mens*), *College informeert het VN-comité in Genève over de stand van zaken van de positie van mensen met een beperking in Nederland in een aanvullend rapport,* https://www.mensenrechten.nl/actueel/nieuws/2022/03/29/college-informeert-het-vn-comite-in-geneve-over-de-stand-van-zaken-van-de-positie-van-mensen-met-een-beperking-in-nederland-in-een-aanvullend-rapport, accessed January 26, 2022.

36 Ibid.

37 B. Oomen, Between signing and ratifying: Preratification politics, the disability convention, and the Dutch, *Human Rights Quarterly*, 2018, pp. 442–446.

38 J. Fleuren, The application of public international law by Dutch courts, *Netherlands International Law Review*, 2010, pp. 258–259.

39 The judgment of District Court of North Netherlands dated April 17, 2020, case no. AWB – 19_2233. The court has assessed whether Article 12(4) of the Convention on the Rights of Persons with Disabilities has direct effect. As outlined by the court, the provision can have direct effect only if it is unconditional and sufficiently precise to be applied without question in the national legal order as an objective law and no further act is required for its implementation or effect. The court is of the opinion that Article 12(4) of the Convention does not fulfil the said conditions, so that that provision does not have direct effect.

40 M. Waltz, T. Mol, E. Gittins, A. Schippers, Disability, access to food and the UN CRPD: Navigating discourses of human rights in the Netherlands, *Social Inclusion*, 2018, pp. 56–57.

an actor in law are perceived as co-related but distinct rights, conferred separately by the law and referred to as *passive* and *active* capacity.[41] From a private-law perspective, such differentiation entails that the first notion grants recognition of legal personhood understood as an attribute of being a holder of rights and obligations (*passive legal capacity*), e.g. being an owner of a real estate, while the latter enables one to act upon those rights and obligations by making legally binding decisions, such as entering contracts, making donations or writing a will (*active legal capacity*). While all individuals are subjects of rights and obligations, their active legal capacity might be limited due to certain factors, and consequently, they may be restricted in their right to undertake legal acts.[42]

The right to legal capacity and equal recognition before the law were reaffirmed by the Netherlands in the interpretative declaration made at the time of the adoption of the Convention.[43] With regard to Article 12 of the CRPD, the Netherlands confirmed that persons with disabilities enjoy legal capacity on an equal basis with other individuals in all aspects of life. Simultaneously, the Dutch state reserved the right to introduce supportive or substitute decision-making measures which are to be applied in accordance with the law and in appropriate circumstances.[44] It was further clarified that the substitute decision-making arrangements may be ordered only when necessary: as a last resort solution and subject to safeguards.[45] Those reservations of the Dutch state may be regarded as a confirmation of the dualistic approach to the notion of legal capacity, with a full guarantee of passive legal capacity and a limited guarantee of active legal capacity which may be restricted in extraordinary circumstances ('last resort solution, subject to safeguards').

2.1. Legal capacity and its restrictions in Dutch Civil Code

The reform of private law in the Netherlands gained its momentum in the early 1950s, as a result of a wider debate on the need for modernisation of the Dutch Civil Code.[46] Preparatory works on a new statue commenced already in the late 1940s, yet most of the provisions of the new Civil Code entered into force on January 1, 1992. The contemporary Dutch Civil Code[47] (hereinafter also referred to as DCC) contains a comprehensive private-law regulation that serves as an axis for the civil and commercial domains of law. The

41 M. Hesselink, Capacity and capability in European contract law, *European Review of Private Law*, 2005, p. 493.

42 A. Arstein-Kerslake, E. Flynn, Legislating personhood: Realising the right to support in exercising legal capacity, *International Journal of Law in Context*, 2014, vol. 10, no. 1, pp. 81–104.

43 See: The Netherlands – Declarations and Reservations to the CRPD, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4#EndDec, accessed January 27, 2022.

44 The enactment of the Convention shed a new light on the concept of legal capacity and exposed the differences in perception of the notion and the related challenges across legal systems worldwide. Through the introduction of the right of equal recognition before the law, Article 12 of the CRPD brings forth the notion of legal capacity as a guarantee of equality among all individuals, ensuring the so-called paradigm shift. Following a debate at international level, it has been clarified by the UN Committee on the Rights of Persons with Disabilities that legal capacity is a uniform notion. Hence, in the light of the Convention, two dimensions of legal capacity are seen as one complex attribute, i.e. being a subject of rights and obligations and an actor in law. In consequence, the right to equal recognition before the law expressed in Article 12 compels the state parties to ensure that legal capacity in its full scope is recognised and granted without limitations to all individuals.

45 Ibid.

46 Dutch Civil Code of 1838 (*Het Burgerlijk Wetboek 1838)* Stb. 1822 10.

47 Dutch Civil Code of 1992 (*Het Nieuw Burgerlijk Wetboek van 1992*) Stb. 2020 507.

DCC consists of ten books and covers matters such as personal and family law, property law, corporate law, contract and tort law, and private international law.[48] Naturally, the notion of legal capacity and its limitations, constituting part of personal and family law, also found their way to the statute.

Legal capacity is granted by article 1 of the first book of DCC whose first paragraph states that all individuals that reside in the Netherlands are free and entitled to hold civil rights.[49] Although the Dutch legislator does not explicitly use the term *legal capacity*, the said provision may be seen as a guarantee of (passive) legal capacity.[50] Second paragraph of the same article compliments that all private-law relationships of personal servitude (*persoonlijke dienstbaarhedenare*) are unlawful as they deprive one of freedom and ability to possess rights.[51] Article 1 in its entirety may be thus perceived as a basic guarantee of personal freedom and legal capacity in the sphere of private law.[52]

Active legal capacity is regulated by article 32 of third book of DCC. Pursuant to the first paragraph of article 3:32, every natural person is entitled to make legally binding decisions, unless otherwise provided by law. The consequences of legal acts undertaken by a person whose legal capacity is restricted are determined in the second paragraph of the same article. The second paragraph states that bilateral legal arrangements entered into by a person who – in the light of law – is incompetent of legal performance, are voidable (*vernietigbaar)*. Simultaneously, a unilateral act that is not addressed to one or more specific persons, undertaken by a person who is lacking active legal capacity, is *ex lege* null and void (*nietig)*.

In this course, the Dutch Civil Code distinguishes two categories of natural persons with restricted active legal capacity. The first category, which does not fall within the scope of this analysis, are persons under 18 years of age (minors).[53] The second category refers to adults for whom guardianship has been established by the court, per article 1:378 of DCC.[54] A person who has been placed under guardianship is claimed incompetent to make legally binding decisions in the sphere of private law and must be therefore represented by an appointed legal representative – a guardian. The Dutch Civil Code further recognises two additional protective measures, i.e. fiduciary administration and mentorship, which limit one's active legal capacity with regard in specific areas of law. The institution of guardianship, fiduciary administration and mentorship, alongside the matter of voidability of legal acts performed by persons restricted in their active legal capacity, are discussed in § 3.

48 The Dutch Civil Code of 1992 consists of ten books: (1) Personal and Family Law, (2) Legal Persons (Dutch Law of Legal Persons), (3) General Property Law, (4) Inheritance Law, (5) Property Rights, (6) General Part of Contract Law, (7) Special Contracts, (8) Special Contracts; continued, (9) Means of Traffic and Transport, and (10) Private International Law.

49 Dutch: *genoten*. The verb can also be translated as 'enjoying [rights]'.

50 The definition of a natural person under Dutch law, according to which such person is a legal subject capable of being the holder of rights and obligations, seems to stay in line with this approach. M. A. Kakebeeke-van der Put, P Neleman, *Compendium van het personen- en familierecht*, Kluwer, Deventer, 1978, par 7–8.

51 Such as slavery, or serfdom. V. M. Smits, *Tekst & Commentaar Burgerlijk Wetboek, art. 1:1 BW*, Wolters Kluwer, online, 2021.

52 Ibid.

53 The legal situation of minors is regulated in article 1:233 et seq. of the Dutch Civil Code.

54 Dutch: *meerderjarigen die onder curatele zijn gesteld*.

2.2. Amendments to the Dutch Civil Code upon signing of CRPD

As previously mentioned, the Netherlands issued an interpretative declaration to Article 12 of the CRPD, in which it indicated that the provision is interpreted by the state in such way that it allows for introduction of supportive and substitute measures in appropriate circumstances, provided that such measures are limited to situations where their application is necessary and treated as a last resort solution, ensuring that the rights of these persons are safeguarded. In the first report on the implementation of the Convention,[55] the Netherlands confirmed its standpoint stating that the application of the substitute decision-making measures in some cases serves the exact purpose of protecting persons with disabilities against violation of their rights.[56] Nonetheless, in order to reflect the last-resort nature of these measures, the Dutch legislator undertook steps to adjust respective provisions of the Civil Code.

The first draft of the proposed amendment to guardianship, fiduciary administration and mentorship regulations was submitted to the Council for the Judiciary (*Raad voor de Rechtspraak*), the Dutch Association for the Judiciary (*Nederlandse Vereniging voor Rechtspraak*), the Association for Professional Administrators and Income Managers (*Branchevereniging voor Professionele Bewindvoerders en Inkomensbeheerders*) and the Dutch Mentorship Network (*Mentorschap Netwerk Nederland*) for their review and advice.[57] Further, the Dutch legislator conducted an online public consultation during which more than thirty responses were received, most of which concerned the proposed provisions on fiduciary administration.[58]

Recommendations and reservations provided in the course of the expert and public consultation process had impact on the final version of the amendment proposal.[59] Amongst others, the Dutch legislator stated that the proposal was revised as to the grounds on which guardianship and fiduciary administration may be pronounced as well as the regulation regarding the quality requirements. Further, the wording of several provisions was revised facilitating unambiguous interpretation.[60] Concurrently, per the documentation published together with the amendment proposal,[61] no expertise of psychologists, psychiatrists or neurologists had been requested. The consultations conducted by the legislator seemed thus to be primarily focused on the juridical and social angle of the proposed changes.

The provisions of the Dutch Civil Code on guardianship and other protective measures were finally amended by the Law of October 16, 2013,[62] which entered into force

55 The Netherlands, *Initiële rapportage over de implementatie door Nederland van het VN Verdrag inzake de rechten van personen met een handicap*, July 12, 2018, pp. 34–37, https://www.eerstekamer.nl/overig/20180713/initiele_rapportage_over_de/meta.

56 Interestingly, the Netherlands Institute for Human Rights disagreed with this statement, arguing that it defeats the nature and purpose of the UN CRPD. See College for Human Rights, Submission to the committee on the Rights of Persons with Disabilities, December 2018, 6.

57 Parliamentary Documents (*Kamerstukken*) II 2011/12, No. 33054, 3, 14.

58 The public consultation results are accessible via the following website of the Dutch government, https://www.internetconsultatie.nl/curatele_bewind_mentorschap/details, accessed January 25, 2022.

59 Ibid.

60 Ibid.

61 Parliamentary Documents (*Kamerstukken*) II 2011/12, 14–15.

62 Act of October 16, 2013 amending guardianship, guardianship and mentorship (*Wet van 16 oktober 2013 tot wijziging curatele, beschermingsbewind en mentorschap*) Stb. 2013, 414.

on January 1, 2014. As stated in the preamble to the said statue, the changes resulted directly from the implementation of the provisions of the Convention. In particular, the rationale behind the revision of the existing regulations was to (1) ensure that the available protection measures are adequate and, as far as possible, will promote the independence of the person concerned; (2) support the involvement of the people closest to the person with disabilities; (3) improve the quality of work provided by statutory representatives, and (4) streamline and demarcate the rules on guardianship, fiduciary administration and mentorship.

Per the said amendment, it became imperative that protective measures may be established only if an adequate protection of the person's interests cannot be achieved by a less intrusive form of protection.[63] To this end, the judge shall examine ex officio whether a milder measure may be applied and if concluded affirmatively, such milder measure shall be established instead. To ensure that the protective measures are not applicable longer than necessary, they must be lifted when the conditions for its establishment are no longer in place.[64] In this course, legal representatives are required to submit a periodic evaluation of the necessity of the protective measure to the subdistrict court, which largely reflects the pre-existing judicial practice, now formalised in the DCC.[65]

Furthermore, the grounds for establishment of protective measures have been adjusted. Per the amendment, 'prodigality' as a ground for guardianship was evoked and, together with 'having problematic debts', became a ground for establishment of fiduciary administration. At the same time, drug abuse became a new ground for establishment of guardianship. Further, the list of persons entitled to request order or termination of a protective measure was expanded and the remuneration of the guardian, administrator and mentor was increased. Finally, a number of quality requirements for the candidates to meet before being appointed as a legal representative (guardian, administrator or mentor) was introduced.

The present regulations on guardianship, fiduciary administration and mentorship are discussed further in § 3.

2.3. Evaluation of the amendments to Dutch Civil Code

On July 4, 2019, the Ministry of Justice and Security presented to the lower chamber of the Dutch Parliament (*Tweede Kamer*) an external evaluation report on the functioning of the current legal regulations for guardianship, fiduciary administration and mentorship.[66] The subject of the evaluation was the aforementioned amendment to DCC and its working in practice. The research was conducted in collaboration with representatives of the judiciary – namely, individual subdistrict court judges, a discussion group consisting of subdistrict court judges and members of the Expert Group of the National Consultation Subject Content Civil and Cantonal and Supervision (*Landelijk Overleg van Voorzitters*

63 M. J. C. Koens, *T&C BW, commentaar op titel 16 Boek 1 BW – Inleidende algemene opmerkingen*, Wolters Kluwer, online, 2021.

64 Ibid.

65 In the view of the Dutch legislator, the fact that automatic continuation of the protective measures cannot be taken for granted also follows from Article 12 of the Convention. See Parliamentary Documents (*Kamerstukken*) II 2011/12, 12.

66 Bureau Bartels, *Werking Wet wijziging cbm, Besluit kwaliteitseisen cbm en Regeling beloning cbm – Eindrapport*, Bureau Bartels, Amersfoort, 2018.

van Civiele en Kantonsectoren en Toezicht, LOVCK&T, hereinafter Expert Group) as well as the chairman and a few employees of the National Quality Office for Guardianship, Fiduciary Administration and Mentorship (*Landelijk Kwaliteitsbureau CBM*).

The main conclusions of the evaluation report were that the amendment in question brought positive effects, yet the execution of the protective measures required further improvements, primarily with regard to the quality of work performed by statutory representatives and the administrative and judicial supervision of their performance.[67] With regard to the changes on the conditions of establishment of protective measures, the research has shown that these changes appeared to be adequate and led to the intended effect. More strict conditions on the establishment of guardianship and 'having problematic debts' as an additional criterion for establishment of a fiduciary administration have resulted in guardianship being ordered less often.[68] As a result of the introduction of an interim review conducted by the court as to whether another, less severe protective measure can be established, it has been concluded that many persons with disabilities have been indeed ordered a less severe measure.[69]

Subdistrict court judges, professional administrators and debt counsellors assessed positively 'having problematic debts' as a new legal ground for protective regime due to its connection to an important social issue where, as declared, government could play an important role.[70] Further, debt management seemed to have developed more dynamically: although not yet in large numbers, the fiduciary administration was being lifted after the debt issue was solved or under control. Municipal representatives saw this new ground as a plausible explanation for the strong increase of (the costs of) fiduciary administration. Simultaneously, the Expert Group acknowledged the risks of the dominant position of the fiduciary administrator as many complaints come from the persons for whom this measure has been ordered.[71]

In parallel to the outcomes of the evaluation report, it is worth noting that the Dutch Supreme Court, in one of its judgments on the conditions for appointing a legal guardian, confirmed that the discussed amendment to the Dutch Civil Code triggered the modernisation of already existing mechanisms of legal protection of adults.[72] In the Dutch Supreme Court's view, those changes have resulted in a successful implementation of the provisions of the Convention into the national legal framework and that the current solutions available under the Dutch Civil Code are in line with the objectives of the treaty.

At the same time, a more critical view on the reform has been presented in the Dutch legal scholarship.[73] It was pointed out that although the national legislation does formulate the obligation to respect for the autonomy of persons with disabilities, the current regulations seem to be insufficient to enhance the paradigm shift compelled by the

67 Ibid.
68 Ibid.
69 Ibid.
70 Ibid.
71 Ibid.
72 Judgement of the Dutch Supreme Court of October 6, 2017, HR, 06-10-2017, No. 17/00322.
73 K. Blankman, K. Vermalen, *Conformiteit van het VN-Verdrag inzake de rechten van personen met een handicap en het EVRM met de huidige en voorgestelde wetgeving inzake vertegenwoordiging van wilsonbekwame personen in Nederland*, 2015, https://publicaties.mensenrechten.nl/file/6a853233-2646-4c5c-9dcb-294da7e3c362.pdf. Similarly, H. N. Stelma-Roorda, C. Blankman, M. V. Antokolskaia, A changing paradigm of protection of vulnerable adults and its implications for the Netherlands, *Familie & Recht*, 2019, pp. 1–8.

Convention.[74] The discord between the national law and the goal of emancipation of persons with disabilities, advocated through the Convention, was marked as particularly evident in the restriction of legal capacity as a consequence of the establishment of guardianship, fiduciary administration or mentorship. It was assessed that the provisions of Chapters 16, 19 and 20 of Book 1 of DCC did not remove the contradiction with the provisions of the Convention regarding the substitute decision-making model.[75] Hence, it was proposed to abolish the institution of (partial) incapacitation as an element of establishment of legal protection. It is considered that the restriction of legal capacity should be limited to minors, and it is no longer necessary for the protection of adults.[76] A similar view has been presented by the representatives of domestic human rights organisations.[77]

3. Protective measures of persons with disabilities under Dutch private law

Following the general rule established in article 3:32 of DCC, all adults, including persons with disabilities, have an equal right and capacity to make legally binding decisions in all aspects of life. Consequently, persons with disabilities have the right to own properties and to inherit them, to manage their financial assets and to take bank loans or mortgages. The scope of legal capacity to independently exercise these rights can, however, be restricted by a judicial decision. In the circumstances stipulated by the law, the court may decide it is necessary to impose protective measures and restrict one's active legal capacity. In that regard, the Dutch legislator provides three protective measures for persons with disabilities, i.e. guardianship (articles 1:378–391 of DCC), fiduciary administration (articles 1:431–449 of DCC) and mentorship (articles 1:451–462 of DCC).

3.1. Guardianship

3.1.1. Conditions

Chapter 16, Book 1 of DCC regulates the most intrusive form of private-law protective measures: guardianship (*curatele*). The aim of guardianship is to protect persons who are not capable to fully represent their own interests despite having reached the age of majority.[78] Per article 1:378 of DCC, it may be established for an adult, (1) who is temporarily or permanently unable to take care of his or her own (financial and other) interests independently or (2) who may endanger his or her own safety or the safety of others, (3) due to his or her physical or mental condition, alcohol addiction or drug abuse. Thus, the third condition refers to the state of the person concerned (mental or physical condition, addition), while the first two define the implications of such state on the actual abilities

74 K. Blankman, K. Vermalen, *Conformiteit van het VN-Verdrag inzake de rechten van personen met een handicap en het EVRM met de huidige en voorgestelde wetgeving inzake vertegenwoordiging van wilsonbekwame personen in Nederland*, 2015, pp. 70–71, https://publicaties.mensenrechten.nl/file/6a853233-2646-4c5c-9dcb-294da7e3c362.pdf.

75 Ibid.

76 Ibid.

77 Alliantie VN-Verdrag Handicap, Schaduwrapportage Verdrag inzake de rechten van personen met een handicap in Nederland, *Libertas Pascal*, 2019, p. 22.

78 H. N. Stelma-Roorda, C. Blankman, M. V. Antokolskaia, A changing paradigm of protection of vulnerable adults and its implications for the Netherlands, *Familie & Recht*, 2019, pp. 1–8.

or behaviour of the person (temporary or permanent inability to take care of one's own interests or danger to one's or others' safety).

3.1.2. Scope

The institution of guardianship encompasses the protection of both financial and personal interests of a person[79] who, in consequence of the judicial decision, is restricted in its legal capacity to make legally binding decisions. The guardian acts as a legal representative of the person placed under their custody (pupil), with the objective to protect the proprietary and the non-proprietary interests of such person. Acting within the assigned legal mandate, the scope of which is discussed further here, the guardian has extensive competences to safeguard both the assets and personal interests of the pupil. Importantly, in performing his or her duties, the guardian must always respect religious affiliation, philosophy of life and cultural background of the pupil.

Per article 1:381, paragraph 2, of the DCC, the person placed under guardianship loses his or her legal capacity to undertake legally binding acts.[80] The following paragraph of the said provision specifies that the pupil may perform legal acts (conclude legally binding agreements, enter obligations, etc.) only with the written permission of the guardian. If a pupil does enter into an agreement without such permission, the guardian is authorised to cancel the agreement (voidability of a legal act).[81] To this end, the guardian must inform the contractor of the pupil that the agreement is invalid because of the guardianship measure in place.[82] Such notification does not have to be given in writing; it is sufficient that the guardian makes it clear to the party with whom such agreement has been concluded that their contractor has been placed under guardianship and that the legal act is cancelled.[83] In case the guardian wishes for the agreement of the pupil to be validated, he or she does not notify the third party that the act has been cancelled, and as a result thereof, the act is automatically validated within three years after the guardian became aware of the existence of such act (article 3:52 of DCC).

Article 1:381 of DCC states that, in property (financial) matters, the pupil is legally incapacitated, unless (1) the legal act concerns finances that the pupil receives for living expenses (the so-called pocket or living money) or (2) the pupil obtains permission to undertake a disposition legal act going beyond the living expenses. In case of certain disposition legal acts, however, solely the guardian is authorised to undertake obligations, and in some cases, an additional judicial authorisation for the guardian is required.[84]

The guardian Is not authorised to act as a substitute of the pupil in the sphere that is considered highly personal. Among the examples of legal actions that are considered to have a highly personal nature are filing for divorce, making a will, adoption or acknowledging a child, sterilisation, taking part in medical research, registering as a donor, making a

79 Ibid.

80 Landelijk Overleg Vakinhoud Toezicht (LOVT), *Aanbevelingen curatele*, 2021, p. 3, https://www.rechtspraak.nl/SiteCollectionDocuments/aanbevelingen-curatele.pdf.

81 Ibid.

82 Ibid.

83 Ibid.

84 Article 1:345 of the Dutch Civil Code shall be interpreted together with article 1:386 BW (see: Landelijk Overleg Vakinhoud Toezicht (LOVT), *Aanbevelingen curatele*, 2021, p. 7, https://www.rechtspraak.nl/SiteCollectionDocuments/aanbevelingen-curatele.pdf).

euthanasia statement or non-resuscitation statement. Yet the guardian may decide on the place of residence if – and for insofar as – the person concerned in the specific case is not capable of making a reasonable evaluation of his or her interests.[85]

The voting right (Iding giving a proxy to the exercise the voting rIght) is also deemed to be a legal act of a highly personal nature. In this context, the guardian is not authorised to act on behalf the pupil. The pupil has the right to execute his or her voting right by voting personally or giving another person a proxy to vote (if desired by the pupil, yet the proxy does not have to be given to the guardian and may be given to a third party instead). Even if the pupil cannot form an opinion on his or her election choice, the guardian is not allowed to make such decision on their behalf.[86]

Also in family law cases, the guardian is not authorised to represent the pupil, unless otherwise provided by law.[87] The pupil sometimes needs permission from the guardian or the court in order to perform a family-law legal act. The limited mandate of the pupil within the sphere of family law may be determined by the cause of establishment of guardianship, such as mental disability or addiction.[88]

With regard to care, nursing or medical treatment, the person placed under guardianship or mentorship is not allowed to make decisions regarding his or her own, yet it does not entail that the guardian decides on such matters alone. Guardians and mentors must always consult further steps with the person under guardianship. If in a particular matter the pupil is capable of making a decision independently, the guardian must accept and follow such decision. Whether the person in custody is capable of reasonably evaluating his or her own interests in specific cirmustances shall be determined by the care provider in consultation with the guardian or a mentor. In case the pupil resists a serious medical intervention, such intervention can only be performed if it is clearly necessary to avoid serious medical harm to the person in custody.[89] The recent developments in the mental and physical healthcare law will be further discussed in § 4.

In legal proceedings, a guardian acts as the legal representative of the pupil. An exception to the general rule of legal representation of the guardian are administrative cases. The administrative court may admit the pupil as a party to the legal proceeding in case the pupil is deemed capable of a reasonable evaluation of his or her interests and therefore can represent those interest personally.[90] Furthermore, the pupil may independently lodge an appeal against establishment of guardianship or a decision on the termination of guardianship.

The performance of the guIrdian is subject to judicial control.[91] The court supervises the guardian and is at all times entitled to request a hearing to evaluate their performance. It may also request evidence in a form of track records and other administrative

85 Landelijk Overleg Vakinhoud Toezicht (LOVT), *Aanbevelingen curatele*, 2021, p. 5, https://www.rechtspraak.nl/SiteCollectionDocuments/aanbevelingen-curatele.pdf.

86 Ibid., p. 6.

87 For instance, in case of a proceeding for the change of surname as stated in article 1:7, paragraph 1, DCC.

88 For instance, in case the guardianship is established due to a physical or mental condition, the pupil can only draft a will, acknowledge a child or get married with the permission of the sub-district court (respectively, article 4:55, paragraph 2; article 1:204, paragraph 4; and article 1:38 of the Dutch Civil Code).

89 Landelijk Overleg Vakinhoud Toezicht (LOVT), *Aanbevelingen curatele*, 2021, p. 5, https://www.rechtspraak.nl/SiteCollectionDocuments/aanbevelingen-curatele.pdf.

90 Ibid., 7.

91 Ibid., 8.

information. The guardian is obliged to report to the court on the performance (on ad hoc, yearly or biannual basis). Simultaneously, the court is obliged to conduct a revision of the guardianship in place in order to assess whether the protective measure is still necessary, or a less intrusive measure could be introduced. This judicial review takes place every five years.

3.1.3. Procedure

The establishment of guardianship is ordered through a judicial decision issued by a subdistrict court (*kantonrechter*) in the area in which the person concerned lives. The court starts the procedure subject to receipt of a formal request for establishment of guardianship. Per article 1:379 of DCC, the request can be submitted by the spouse, registered partner (or other life companion), direct blood relatives and those in the collateral line up to the fourth degree, as well as by the guardian of the person concerned, the care institution that provides help to the person concerned or the public prosecutor. The person concerned may also make the request himself or herself. The request does not have to be submitted by a legal professional yet must follow an official request form.[92]

After receiving the request, the court will appoint an oral hearing, to which it will summon the person concerned but also other interested parties such as a spouse, a registered partner, another life companion, a child and a guardian. If the family members have indicated in writing that they agree with the guardianship order, they will usually no longer be summoned for the oral hearing. During the oral hearing, the court will obtain information about the life situation of the person for whom a guardianship order has been requested.

Due to the fact that guardianship results in severe limitation of one's rights, the court shall always interview the person concerned before the decision on establishment of the guardianship is taken.[93] If the person concerned cannot appear in court, the hearing shall be conducted at the person's place of residence. The hearing might be omitted if a medical examination (confirmed by medical certificate) indicates the person is not able to be interviewed due to his or her physical or mental condition. Furthermore, there are two situations in which the court may postpone the hearing of the person concerned. Firstly, the court may find that further investigation is necessary before issuing a guardianship order, yet the interests of the person concerned shall be protected while the investigation is taking place. On other occasion, in exceptionally urgent cases, the court may decide that immediate establishment of protective measures is necessary, and thus, the person will be interviewed after ordering temporary measures.[94]

In those circumstances, an instant procedure (*spoedprocedure*) is applied, and the court may order a provisional appoint an administrator (a provisional administrator). The court assigns the duties and powers of the provisional administrator that remain in force until the final appointment decision.[95] The court must always try to keep the provisional pro-

92 De Rechtspraak, *Onderwerpen. Curatele aanvragen: Procedure*, https://www.rechtspraak.nl/Onderwerpen/Curatele/paginas/procedure-curatele-aanvragen.aspx, accessed August 28, 2023.

93 Landelijk Overleg Vakinhoud Toezicht (LOVT), *Aanbevelingen curatele*, 2021, p. 3, https://www.rechtspraak.nl/SiteCollectionDocuments/aanbevelingen-curatele.pdf.

94 Ibid., pp. 3–4.

95 Often the provisional administrator's mandate is the same as the one of the fiduciary administrator. See § 3.2. on fiduciary administration.

tection measures as limited as possible. It is important to note that as long as there is no guardianship pronounced, the person concerned remains legally competent.[96]

When the investigation is completed or if the court has interviewed the person concerned, it shall proceed with taking the decision about the guardianship as soon as possible. In case the request to establish guardianship is granted, the person placed under guardianship losses legal capacity to perform legal acts as far as the law does not provide otherwise. In case a guardianship request is rejected, the court may, to protect the interests of the person, allow the provisional administration to continue until the rejecting decision is final (i.e. has the force of res judicata). The decision is final when the period for appeal has expired (three months) without appeal being lodged.

As to the selection of a person to be appointed as the guardian, both legal and natural persons might hold this role, after meeting several requirements. First of all, the court shall be guided by the choice of the person concerned in appointing a guardian, unless there are valid reasons not to do so. In that case, the court will state why it decided not to follow the preferences of the person concerned in the decision, as the second condition states that such person must be deemed suitable for the role by the court. Finally, the person cannot fall under any of the following categories: (1) being themselves under guardianship or mentorship (plus not under protective administration for protective administrators), (2) simultaneously being the administrator of the person concerned (both bankruptcy and protective administrator), (3) being directly involved or treating care provider, (4) belonging to the management or staff of the institution where the person concerned is being cared for, and (5) being organisationally connected with the healthcare institution. For natural persons, an additional age condition applies – such person must be of legal age, i.e. at least 18 years old.

The court may also appoint two persons as guardians (so-called co-guardians). If the court determines that issues in the cooperation between the proposed co-guardians are likely to arise, the court will appoint, if necessary, person other than a family member. The co-guardians can independently fulfil the duties, yet they are at all times jointly accountable for their performance. As long as they may decide to divide the tasks among themselves, each of the guardians remains responsible for their own and the co-guardian's actions.

The judicial decisions regarding guardianship are subject to publication in the Government Gazette and the Central Guardianship and Fiduciary Administration Registry (*Centraal Curatele- en Bewindregister*, hereinafter the Register). The following decisions concerning guardianship are made public: (1) decisions by which guardianship is established; (2) decisions by which the guardianship is extended, amended or terminated; (3) decisions appointing a provisional administrator; and (4) decisions by which the appointment of a provisional administrator is amended or withdrawn. The Register, however, does not include judicial decisions on establishment of guardianship or fiduciary administration pronounced before January 1, 2014, unless the court decided otherwise. Persons placed under guardianship or fiduciary administration due to physical or mental circumstances, of which the district court has decided that publication is not necessary, are also not included in the Register.[97]

96 Landelijk Overleg Vakinhoud Toezicht (LOVT), *Aanbevelingen curatele*, 2021, p. 4, https://www.rechtspraak.nl/SiteCollectionDocuments/aanbevelingen-curatele.pdf.

97 Ibid.

The rationale behind publishing judicial decisions regarding guardianship (and fiduciary administration) in the Register is to ensure protection against entering into legally unsound contracts, for both the person placed under guardianship and the third parties (legal certainty of business transactions).[98] It allows the contractors to check in the Register whether a person with whom they are supposed to enter a contract with is placed under guardianship. In such case, the contractor may decide to only conclude the contract with the approval of the guardian.[99]

3.2. Fiduciary administration

3.2.1. Conditions

The institution of fiduciary administration (*beschermingsbewind*), regulated in Chapter 19 of Book 1 of DCC, is a private-law protection measure of a purely financial nature. It is intended to provide protection to adults who, due to their physical or mental condition, are unable to independently exercise their property rights.[100] With the amendment of 2014, the legal basis for the establishment of fiduciary administration was extended to include prodigality (*verkwisting*) and having problematic debts (*het hebben van problematische schulden*) by adults who for these reasons are unable to properly represent and guard their property interests.

On January 1, 2021, a new statute on the right to consultation for municipalities in fiduciary administration proceedings (Debt Relief Act) entered into force.[101] Under the statue, the duty to provide legal advice on debt relief falls within the competence of municipalities which are obliged to provide their residents with appropriate support in debt management and reduction. The statute aims to enable municipalities to better fulfil their advisory role with regard to debt settlement and is oriented towards improvement of cooperation between municipalities, courts and administrators.

3.2.2. Scope

Per article 1:483 of DCC, once fiduciary administration is established, the person to whom it applies does not lose his or her active legal capacity but can no longer independently manage the property that has been placed under the administrator's custody by the judicial decision. As long as the fiduciary administration lasts, the person may only act in cooperation with the administrator or, if the administrator refuses to provide the necessary

98 De Rechtspraak, *Register: Centraal curatele- en bewindregister,* https://ccbr.rechtspraak.nl/#!/zoeken, accessed July 20, 2022.

99 Ibid.

100 The court may decide to establish fiduciary administration not only in a case in which a person suffers from a mental disorder but also in cases of a disorder of a purely physical nature. Until the new statue (Stb. 2013, 414) came into force on January 1, 2014, fiduciary administration was only available for persons suffering from a mental disorder. Since the entry into force of the new statue, this distinction has disappeared, as since then receivership can be adjudicated on the basis of both physical and mental conditions. See M. J. C. Koens, *T&C BW, commentaar op titel 16 Boek 1 BW – Inleidende algemene opmerkingen*, Wolters Kluwer, online, 2021.

101 Debt Relief Act of 30 September 2020 (*Wet van 30 september 2020 inzake een adviesrecht voor gemeenten bij de procedure rond beschermingsbewind wegens verkwisting of wegens problematische schulden*) Stb. 2020, 389).

cooperation, with authorisation of the court, transfer or encumber assets which are placed under the fiduciary administration.

In order to ensure a transparent overview of the assets owned by the person concerned, shortly after the court's appointment, the administrator is required to make an inventory list of all goods that fall under the fiduciary administration. A copy of the inventory must be sent to the court that established the fiduciary administration (article 1:436, paragraph 1, of DCC).

The principal task of the adminiItrator is to manage all the property that has been placed under the custody. In fulfilling this task, the administrator is obliged to ensure that all the possessions are maintained and well operated. This means, inter alia, that the funds must be invested wisely, the loan interest must be paid on time or that the house to must be painted when necessary. The administrator must also ensure that the income of the person under fiduciary administration is in first place used in the benefit of the person concerned. Further, the responsibilities of the administrator cover management of the financial administration of the possessions under fiduciary administration. This includes, for example, filing a tax return, but also applying for (special) assistance, housing benefit or a personal budget, called PGB.[102]

When a person for whom fiduciary administration has been established wishes to undertake a dispositive legal act towards any of the items placed under administration (for instance, sell a house or stock shares), he or she must obtain the permission of the administrator. In case the administrator refrains from giving their permission, it is possible to request such permission from the court. A judicial decision may overrule of the decision of the administrator and allow the person to perform a dispositive legal act. Similarly, in case the administrator wishes to undertake a dispositive legal act towards the property in the custody, he or she must first obtain permission from the person for whom the custody is established. In case the person does not want or is unable to give permission, the administrator must seek judicial authorisation for each dispositive act. Incidentally, the court may immediately order a continuous authorisation to the administrator, yet it may make such authorisation subject to specific conditions (article 1:441, paragraph 3, of DCC).

Per article 1:439 of DCC, if a legal act was performed by the proprietor despite of the existence of a fiduciary administration, its voidability can be only claimed against the contracting party if such party was or should have been aware of the existence of the said measure. Further, if an asset under administrator's custody is alienated or encumbered by a person who, as a result of an existing fiduciary administration, had no legal capacity to perform a dispositive act, the lack of legal capacity can only be invoked against a party who acquired this asset or a limited property right on it if that party was or should have been aware of the measure in place.

In terms of contractual liability, the proprietor remains liable for all obligations arising from legal acts that the administrator in his function has performed on behalf of the proprietor. Where the proprietor points out assets under fiduciary administration which provide sufficient recourse for a debt, he or she is not required to satisfy this debt from other property, i.e. one falling outside of the fiduciary administration (article 1:442 of DCC). Simultaneously, the administrator is liable towards the proprietor if he or she has failed to take care of the proprietor's interests in a way that could be expected from a prudent

102 These elements of the social support will be further discussed in § 4.

administrator, unless this failure is not attributable to the administrator (article 1:444 of DCC).

Administrators are obliged to report to the court on their performance (on ad hoc, yearly or biannual basis). Simultaneously, the court is obliged to conduct a revision of the fiduciary administration in place in order to assess whether the protective measure is still necessary, or a less intrusive measure could be introduced. This judicial review takes place every five years.

3.2.3. Procedure

The establishment of fiduciary administration is ordered through a judicial decision issued by a subdistrict court in the area of residence of the person for whom this protective measure is to be established. The court starts the procedure subject to receipt of a formal request.

The request for establishment of fiduciary administration can be submitted by the spouse, registered partner (or other life companion), direct blood relatives and those in the collateral line up to the fourth degree, the guardian of the person concerned, the care institution that provides help to the person concerned or the public prosecutor. The person concerned may also make the request him or herself. The request does not have to be submitted by a legal professional yet must follow an official form request.

The judicial decisions regarding fiduciary administration, similarly to those related to guardianship, are subject to publication in the Government Gazette and the Register.

3.3. Mentorship

3.3.1. Conditions

Mentorship (*mentorschap*), regulated in Chapter 20, Book 1 of DCC, is a protective measure of a non-financial nature. It is established by the court in cases where a person of age, due to his or her mental or physical disability, is temporarily or permanently unable to represent his or her non-pecuniary interests or when the self-representation is deemed burdensome.[103] Mentorship may be also established when it is expected that a person of age within a foreseeable period will find him or herself in the situation described earlier.

3.3.2. Scope

Mentors are responsible for the care, nurturing, treatment and the provision of assistance and support of their mentees. They also fulfil the role of an advisor and a guardian of the non-financial interests of the mentees and shall involve them, as far as possible, in the decision-making on the matters falling within the mentorship mandate.[104] Due to the non-pecuniary nature of the institution of mentorship, mentors are not authorised to manage the financial interests of the mentee.[105]

103 M. C. J. Koens, *T&C BW, commentaar op titel 20 Boek 1 BW – Inleidende opmerkingen*, Tekst & Commentaar Burgelijk Wetboek, Wolters Kluwer, online, 2021.
104 Ibid.
105 Ibid.

In particular, mentor's duties and obligations include (1) arranging care with care providers and practitioners (read more about the decision about corona vaccination); (2) maintaining personal contact with the person concerned so that the mentor knows how the person concerned is doing; (3) supporting or representing the mentee during discussions with care providers, practitioners or institutions; (4) taking intervention in case the mentee does not receive the care needed; and (5) intervening in case the condition of mentee worsens, such as when the health of the mentee health deteriorates or when the mentee is no longer able to continue living independently.[106] At the same time, the mentor shall refrain from making decisions in matters that are considered highly personal.

As long as the mentorship remains in force, the mentee has no legal capacity to perform legal acts in matters concerning care, nursing, treatment and the provision of assistance and support, unless otherwise stated by the law (article 1:453, paragraph 1).[107] The mentor represents the mentee in judicial and extra-judicial matters, yet the mentor may authorise the mentee to act on his or her own behalf. As to the legal acts outside of the care and treatment scope, the mentor shall act on behalf of the mentee as far as the nature of the legal act allows it (article 1:453, paragraph 3). In case the mentee opposes a legal act of a far-reaching nature that the mentor intends to perform, such act may only be carried through if it is clearly necessary in order to prevent serious harm to the mentee (article 1:453, paragraph 5).

In terms of contractual liability, as provided in article 1:455, the mentee is liable for all obligations arising from legal acts which the mentor, within the scope of the mentorship mandate, has performed on behalf of the mentee. At the same time, the mentor remains liable towards the mentee if he or she has failed to take care of the mentee's interests in a way as could be expected from a prudent mentor, unless this failure cannot be attributable to the mentor.

Mentors are obliged to report to the court on their performance (on ad hoc, yearly and biannual basis). Simultaneously, the court is obliged to conduct a revision of the mentorship in place in order to assess whether the protective measure is still necessary, or a less intrusive measure could be introduced. This judicial review takes place every five years.

3.3.3. Procedure

Mentorship is established by a judicial decision of a subdistrict court in the area of the residence of the person who is subject to the procedure. The court starts the procedure subject to receipt of a formal request for establishment of mentorship. Similarly to the other two protective measures, the request for establishment of mentorship can be submitted by the spouse, registered partner (or other life companion), his or her direct blood relatives and those in the collateral line up to the fourth degree, the guardian of the person concerned, the care institution that provides help to the person concerned or the public prosecutor. The person concerned may also make the request him or herself. The request does not have to be submitted by a legal professional yet must follow an official form request.

The mentorship commences on the day after the court decision is sent or the appointment has been issued, or at a later date, as specified in the decision of the court. In contrary

106 Ibid.
107 See § 4 on Dutch physical and mental healthcare law.

to guardianship and fiduciary administration, judicial decisions regarding mentorship are not registered in a public register.

3.4. Living will

A few final remarks are dedicated to an emerging form of legal protection of the rights of persons whose capacity to self-determination may be limited in the future as a result of illness or accident, an event for which such persons wish to prepare by authorising another person to make legally binding decisions on his or her behalf.[108]

In the Netherlands, it is currently possible to make a pro futuro declaration of intent in the form of a so-called living will (*levenstestament*), which includes the administration of rights and obligations by an appointed third party. The living will may include not only dispositive and administrative arrangements but also arrangements related to commercial, tax, family, procedural or contractual matters.

Thus far, the institution of living will has not been regulated in the Dutch Civil Code.[109] In the absence of a separate statutory regulation, the only legal basis and guidance is provided by notarial practice and provisions on general power of attorney set forth in the Dutch Civil Code.[110] Under Dutch law, living will may be regarded as a combination of power of attorney and personal wishes, such as in relation to medical and financial decisions that apply when a person is no longer able to manage his or her own affairs.[111,112] The legal representative appointed in a living will may represent the interests of the principal as a patient. In the living will, the principal may express his or her preference for resuscitation or no resuscitation, palliative sedation or euthanasia.

A living will can be written on one's own, yet many of the legal arrangements listed therein may require a notarised deed to be valid.[113] In order to ensure the enforcement of the living will, the principal may thus decide to draft the whole document in the form of a notarial deed, which is subject to registration with the Central Register of living wills, administered by the Royal Notary Public (KNB).[114]

It is important to note that, in the event of legal proceedings for the establishment of protective measures, the court is not bound by the arrangements stated in the living will but must take into account the wishes and preferences expressed therein.[115] In the light

108 C. G. C. Engelbertink, Het levenstestament, *Ouderenmishandeling, Justitiële verkenningen*, 2015, p. 61.

109 H. N. Stelma-Roorda, C. Blankman, M. V. Antokolskaia, A changing paradigm of protection of vulnerable adults and its implications for the Netherlands, *Familie & Recht*, 2019, pp. 1–8.

110 Ibid.

111 M. C. J. Koens, *T&C BW, commentaar op titel 20 Boek 1 BW – Inleidende opmerkingen*, Tekst & Commentaar Burgelijk Wetboek, Wolters Kluwer, 2021.

112 To a certain extent, the fulfilment of personal wishes may be also seen a stipulation of the assignment under title 7 of Book 7 of the Civil Code. See: C. G. C. Engelbertink, Het levenstestament, *Ouderenmishandeling, Justitiële verkenningen*, 2015, pp. 67–68.

113 In the Netherlands, banks usually require a notarised power of attorney to allow another person to hold a bank account, and a notarised deed is also required for a sale by power of attorney of a home or a mortgage modification.

114 M. C. J. Koens, *T&C BW, commentaar op titel 20 Boek 1 BW – Inleidende opmerkingen*, Tekst & Commentaar Burgelijk Wetboek, Wolters Kluwer, 2021.

115 K. Blankman, K. Vermalen, *Conformiteit van het VN-Verdrag inzake de rechten van personen met een handicap en het EVRM met de huidige en voorgestelde wetgeving inzake vertegenwoordiging van wilsonbekwame personen in Nederland*, 2015, p. 24, https://publicaties.mensenrechten.nl/file/6a853233-2646-4c5c-9dcb-294da7e3c362.pdf.

of the non-binding nature of a living will with respect to protective measures, Dutch legal scholarship advocates for introduction of a statutory regulation that would allow the individuals to determine their future in the event of accident or illness, as an alternative to the statutory protective measures of guardianship, fiduciary administration and mentorship.[116] The need for a statutory regulation that would require a court to follow the statements made in a living will has also been expressed by the Dutch Ministry of Justice and Security.[117] To date, no amendments to the Dutch Civil Code have been made.

3.5. Statistical data

With regard to expenditures on the overall care of persons with disabilities, in 2019 the Dutch state spent around 9,638 million euros on persons with intellectual disabilities. Almost all expenditures (97% equalling 9,353 million euros) were made within the care sector.[118] Out of the remaining sum, 1.8% was allocated to management (174 million euros) and approximately 0.8% (72 million euros) was spent on primary care.[119] In the same year, the expenditures on persons with disabilities of psychiatric nature reached an amount of 4.2 billion euros. The greatest absolute growth was noted in specialised mental healthcare, with an increase of almost 168 million euros in 2019 compared to 2018. Expenditures on primary mental healthcare, basic mental healthcare and long-term mental healthcare also increased in the same period.[120]

With regard to the statistics concerning establishment of protective measures, in 2017 the overall number of ongoing protection measures for adults totalled approximately 351,400 cases.[121] This number has slightly increased through years, reaching 384,400 cases in 2021. At the same time, a gradual decline in number of requests for establishment of protective measures has been noted, with a total number of 49,100 requests in 2017 and 43,400 requests in 2021. Almost 67% of the requests concern fiduciary administration, 30% concern mentorship and only 3% concern guardianship.

In 2019, the Ministry of Justice conducted research on the practical consequences of the amendments to the Dutch Civil Code with regard to the protective measures.[122] As a part of the research study, judges of the subdistrict courts, under whose jurisprudence the establishment of guardianship falls, have been surveyed. Many interviewees confirmed that due to the changes to the national law and ratification of the Convention, they have acknowledged a positive development that guardianship is ordered less frequently. While half of the interviewed judges stated that the amendment to the DCC has resulted in

116 Ibid.

117 Ibid.

118 The Netherlands, *Verstandelijke beperking – Zorguitgaven*, https://www.vzinfo.nl/verstandelijke-beperking/zorguitgaven, accessed July 25, 2022.

119 Ibid.

120 Dutch Healthcare Authority (*Nederlandse Zorgautoriteit*), *Kerncijfers ggz*, https://www.nza.nl/zorgsectoren/geestelijke-gezondheidszorg-ggz-en-forensische-zorg-fz/kerncijfers-geestelijke-gezondheidszorg-ggz, accessed July 25, 2022.

121 The statistical data on protective measures cover the last five-year period (2017–2022) and were provided by the Dutch National Council of Judiciary (*Raad van Rechtspraak*).

122 Tweede Kamer, *Wijziging van enige bepalingen van Boek 1 van het Burgerlijk Wetboek inzake curatele, onderbewindstelling ter bescherming van meerderjarigen en mentorschap ten behoeve van meerderjarigen en enige andere bepalingen (Wet wijziging curatele, beschermingsbewind en mentorschap)*, 2018–2019, 33 054, nr. 24.

ordering fewer guardianships, the other half stated that they have already noticed this trend had started before the amendment of the law.

The opinion of the representatives of Dutch judiciary finds its confirmation in the recent statistical data. While the numbers for other protective measures are increasing, the number of people placed under guardianship has been stable and even slightly decreasing in the last five years.[123] In 2017, the total number of persons under guardianship equalled 25,500, in 2018 ca. 23,700, in 2019 ca. 22,800, and in 2020 ca. 21,900, in order to finally decrease to 21,200 cases in 2021.[124] Simultaneously, the number of requests for establishment of legal guardianship oscillated around 1,350 per year in the last five years, with 1,500 requests in 2017 and 1,200 in 2021.

Out of the total number of persons placed under guardianship, for 100 of them guardianship was ordered due to alcohol and/or drug abuse (that number has not changed in the last five years). The number of persons placed under guardianship due to a mental disorder (a previous, repealed ground of guardianship) steadily decreased from 9,800 in 2017 to 7,400 cases in 2021. Finally, the number of persons placed under guardianship due to their mental of physical condition increased slightly from 6,000 to 8,300 cases. The grounds for the remainder of the guardianship orders have not been published.

In 2017, the total number of persons under fiduciary administration equalled 256,000 and steadily increased in the last five years from 265,200 in 2018, 271,600 in 2019 to 274,600 in 2020 and finally decreased to 273,600 cases in 2021.[125] At the same time, the number of requests for establishment of fiduciary administration has decreased in the last five years from 37,100 in 2017 to 29,000 in 2021.

Out of the total of fiduciary administration cases, 100 was ordered for persons declared as missing (the number has not changed in the last five years). The number of persons placed under fiduciary administration due to mental of physical condition increased from 204,900 in 2017 to 210,100 cases in 2021. A new ground for establishment of fiduciary administration, having of problematic debts, had the highest increase, from 51,000 to 63,300 cases in 2021. Overall, the number of people who have been placed under the supervision of a fiduciary administrator due to problematic debts has risen sharply in comparison to a decade ago.[126] While in 2013 there were ca. 35,000 persons for whom, due to their debts, a measure in a form of fiduciary administration has been established, in 2018 there were already more than 56,000.[127] This constitutes an increase of about 60%. The total group of people from whom a fiduciary administration has been established is much larger: in 2018 there were 255,150 persons whose property has been put under custody of an administrator, in comparison to 94,000 in 2009.[128]

123 Raad voor de Rechtspraak, *Nieuws Raad voor de rechtspraak*, https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Weer-meer-mensen-onder-bewind.aspx, accessed July 20, 2022.

124 The Netherlands – the Lower Chamber, *Wijziging van enige bepalingen van Boek 1 van het Burgerlijk Wetboek inzake curatele, onderbewindstelling ter bescherming van meerderjarigen en mentorschap ten behoeve van meerderjarigen en enige andere bepalingen (Wet wijziging curatele, beschermingsbewind en mentorschap)*.

125 The data referred to were shared by the Dutch National Council of Judiciary (*Raad voor de Rechtspraak*).

126 Raad voor de Rechtspraak, *Aantal mensen met schulden onder bewind neemt fors toe*, https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Aantal-mensen-met-schulden-onder-bewind-neemt-fors-toe.aspx, accessed July 25, 2022.

127 Ibid.

128 Ibid.

Finally, a gradual surge in requests and judicial orders on mentorship could be observed in the recent years. Firstly, the number of ongoing mentorships increased from 69,900 in 2017 to 89,600 in 2021. Simultaneously, this protective measure has been requested more often in the last five years, from 10,500 cases in 2017 to 13,100 in 2021.[129]

4. Implementation of Article 12 of the Convention in the Netherlands outside of private law

4.1. Constitutional law

As late as in March 2022, the vast majority of the lower chamber of the Dutch Parliament (*Tweede Kamer*) voted in favour of an amendment to Article 1 of the Constitution to extend the scope of the principle of equality stated therein by adding disability and sexual orientation as additional grounds for non-discrimination.[130]

Article 1 sets forth the principle of equality and prohibition of discrimination. Per the first paragraph of the said provision, all state powers (legislature, executive and judiciary) are obliged to lay down rules and take decisions in an equal way for all citizens. Differentiation is only permitted in relevant and justified circumstances.[131] The second paragraph states that discrimination based on religion, belief, political opinion, race, sex or any ground whatsoever is not allowed. The phrase 'any ground whatsoever' is interpreted as an extension of the prohibition of discrimination to other grounds than those mentioned in the said paragraph.[132] Nevertheless, with the proposed amendment in force, the prohibition on discrimination on the basis of disability would warrant explicit protection of persons with disabilities at a constitutional level.

Discrimination on the basis of disability is already prohibited by the Dutch law at a lower level, by national legal acts such as General Equal Treatment Act (*Algemene Wet Gelijke behandeling*)[133] and the Equal Treatment Based on Disability or Chronic Illness Act (*Wet Gelijke Behandeling op basis van handicap of chronische ziekte*).[134] However, the advocates of the proposed amendment claim that persons with disabilities are still often hindered from fully participating in social life.[135] By adding 'disability' to the grounds for non-discrimination under article 1 of the Constitution, the Dutch legislator would receive

129 The data referred to were shared by the Dutch National Council of Judiciary (*Raad voor de Rechtspraak*).

130 The Netherlands – The Senate, Initiatiefvoorstel-Hammelburg, Bromet en De Hoop Handicap en seksuele gerichtheid als non-discriminatiegrond.

131 Montesquieu Instituut, Artikel 1: Gelijke behandeling en discriminatieverbod: Formele Toelichting.

132 Ibid.

133 Act of March 2, 1994, containing general rules for protection against discrimination based on religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or marital status (*Wet van 2 maart 1994, houdende algemene regels ter bescherming tegen discriminatie op grond van godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht, nationaliteit, hetero- of homoseksuele gerichtheid of burgerlijke staat)* Stb 1994, 230.

134 Act of April 3, 2003 establishing the Equal Treatment Act on the basis of disability or chronic illness (*Wet van 3 april 2003 tot vaststelling van de Wet gelijke behandeling op grond van handicap of chronische ziekte*) Stb 2003, 206.

135 Letter from Ieder(in) to the Senate (January 18, 2021), https://iederin.nl/wp-content/uploads/2021/02/21-0653-Brief-EK-Uitbreiding-GWartikel1.pdf, accessed July 25, 2022.

an important incentive to further improve and strengthen the position of persons with disabilities.[136]

The said amendment proposal was reviewed by the higher chamber of the Dutch Parliament, the Senate. In May 2022, the Senate presented a preliminary report with a list of concerns addressed to the authors of the proposed amendment.[137] In particular, the Senate expressed its concern with regard to the choice of additional grounds for non-discrimination, requesting further elaboration on the reasons for the choice made and justification for not including other grounds for non-discrimination in the proposal.[138] The Senate pointed out that discrimination on the basis of disability is protected through national laws and the Charter of Fundamental Rights of the European Union, and requested evidence that the already existent protection has been determined as insufficient.[139] In their response to the queries raised by the Senate, the authors of the bill argued that the current legal protection was indeed insufficient and presented a case from national jurisprudence where the protection was not guaranteed.[140]

In January 2023, the Senate deliberated on the response of the authors of the bill and eventually decided to proceed with the proposed amendment to article 1 of the Constitution. In result thereof, the amended constitutional provision includes an express reference to disability as a ground for non-discrimination.

4.2. Mental and physical healthcare law

In the course of the last few years, the Dutch mental and physical healthcare law has undergone several changes. While it does not seem entirely clear whether the current regulations, including Mental Treatment Agreement Act, Compulsory Mental Health Act and Compulsion and Care Act, have been formally tested against their compliance with the Convention,[141] they do intend to, at least partially, reflect the shift in the approach towards care and treatment of persons with (mental) disabilities, reinforcing their right to self-determination.[142]

136 Ibid.

137 The Netherlands – The Senate, Voorstel van wet van de leden Hammelburg, Bromet en De Hoop houdende verandering in de Grondwet, strekkende tot toevoeging van handicap en seksuele gerichtheid als non-discriminatiegrond (35741)– Voorlopig Verslag van de Vaste Commissie voor Binnenlandse Zaken en de Hoge Colleges van Staat/Algemene Zaken en Huis van de Koning, May 9, 2022.

138 Ibid.

139 Ibid.

140 See: The Netherlands – the Senate, Memorie van Antwoord: Voorstel van wet van de leden Hammelburg, Bromet en De Hoop houdende verandering in de Grondwet, strekkende tot toevoeging van handicap en seksuele gerichtheid als non-discriminatiegrond, September 7, 2022.

141 Alliantie VN-Verdrag Handicap, Schaduwrapportage Verdrag inzake de rechten van personen met een handicap in Nederland, *Libertas Pascal*, 2019, p. 22.

142 K. Blankman, K. Vermalen, *Conformiteit van het VN-Verdrag inzake de rechten van personen met een handicap en het EVRM met de huidige en voorgestelde wetgeving inzake vertegenwoordiging van wilsonbekwame personen in Nederland*, 2015, p. 35, https://publicaties.mensenrechten.nl/file/6a853233-2646-4c5c-9dcb-294da7e3c362.pdf.

4.2.1. Compulsory mental healthcare law

On January 1, 2020, the Special Admissions to Psychiatric Hospitals Act (*Wet Bopz*)[143] was replaced by two new compulsory mental healthcare laws. The Compulsory Mental Health Act (*Wet verplichte geestelijke gezondheidszorg*, hereinafter Wvggz)[144] regulates the matters related to compulsory care of persons with a psychiatric disorder. The Care and Compulsion Act (*Wet zorg en dwang regelt de rechten bij onvrijwillige zorg of onvrijwillige opname van mensen met een verstandelijke beperking en mensen met een psychogeriatrische aandoening*, hereinafter WZD),[145] on the other hand, sets forth rules for compulsory care for persons with an intellectual disability or psychogeriatrics (such as dementia). Both bills had undergone public consultations with multiple stakeholders, inter alia, the Dutch Psychiatric Association (*Nederlandse Vereniging voor Psychiatrie – NVvP*) and other experts in the field of psychiatric healthcare. The underlying rationale for enacting separate acts for the two groups of individuals was, in principle, to reflect the nuances related to the care provided to each group of patients which the previous statute (Special Admissions to Psychiatric Hospitals Act) did not recognise.[146]

The principles of the new statues differ from those of the Special Admissions to Psychiatric Hospitals Act. Both WZD and Wvggz aim to regulate the procedures on the preparation, decision-making, implementation and termination of involuntary care and the forced admission of patients with the objective of strengthening their legal position in the process. To begin with, the new statues are based on the principle 'no, unless'. This means that medical care must be provided on a voluntary basis as much as possible. Involuntary care may be thus solely applied if it is required by the circumstances and only when there are no other (voluntary) options left.[147] In that regard, the Dutch legislator adopted into the WZD the suggestion of the Dutch Psychiatric Association to evaluate restrictions on freedom in a form of involuntary care in a multidisciplinary way.[148]

Like the Wvggz, the WZD is based on a self-harm criterion instead of the (previous) danger criterion. Involuntary care may only be used as an ultimate measure and only if there is a risk of serious harm to the patient or his environment. Both legal acts allow for external involuntary care, meaning that the care can be provided not only in the event of involuntary stay in an accommodation of a care provider but also at home or during daytime activities. WZD and Wvggz are therefore 'person-following' instead of 'location-related'.

Pursuant to the WZD, a care provider must be appointed to draw up an involuntary care plan for every patient which must further be diligently followed. Such care plan must

143 The Special Admissions to Psychiatric Hospitals Act (*Wet bijzondere opnemingen in psychiatrische ziekenhuizen*).

144 The Compulsory Mental Health Act (*Wet verplichte geestelijke gezondheidszorg)* Stb 2021, 523.

145 The Care and Compulsion Act (*Wet zorg en dwang regelt de rechten bij onvrijwillige zorg of onvrijwillige opname van mensen met een verstandelijke beperking en mensen met een psychogeriatrische aandoening)* Stb 2019, 197.

146 Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst (KNMG), *Dossier: Wet zorg en dwang psychogeriatrische en verstandelijk gehandicapte cliënten (Wzd)*.

147 Involuntary care is defined by the law; it is care that can be applied despite resistance from the patient or the legal representative (mentor or guardian) if there is or threatens serious harm to the patient. There are three forms of care that, even if the patient does not resist and the legal representative agrees, is still considered involuntary care: (1) restriction of freedom of movement (e.g. fixation), (2) inclusion, (3) forced administration of medication, if not applied in accordance with professional guidelines.

148 Parliamentary Documents (*Kamerstuk*ken) 2008–2009, 31996 nr. 3.

be regularly assessed as to whether the form(s) of involuntary care should remain in place or may be lifted. The mentor (or guardian) of the person undergoing involuntary care is involved in these assessments and must advise whether involuntary care may be replaced with less drastic or even voluntary measures. In situations where there is no care plan yet or when the care plan does not foresee specific involuntary measure, involuntary measures can also be provided, but additional conditions apply (such as time limitation of two weeks).

The Wvggz goes further in applying the principle of self-determination of the patient and setting the boundaries to involuntary care than the WZD. An important difference between the Wvggz and WZD is that, per WZD, involuntary care may be applied without the prior approval of the court while Wvggz explicitly states that coercion may only be applied in extreme cases. It includes general principles that mandatory care must comply with, such as proportionality, subsidiarity, efficiency and safety. The Wvggz aims to strengthen the legal position of the patient but also that of his family and close relatives, in particular by involving them more in the organisation of the involuntary care. For instance, the patient can draw up a care plan together with the care provider and the legal representative, in which he records his or her wishes and preferences. The patient may also draw up his own care plan of care in order to avoid involuntary care in the future.

4.2.2. Medical Treatment Agreement Act (WBGO)

The so-called Medical Treatment Agreement Act (*Wet op de geneeskundige behandelovereenkomst*, hereinafter WGBO) constitutes part of the Dutch Civil Code which regulates one of the specific civil agreements – the medical treatment agreement. The WGBO is crucial for all individuals seeking medical care since as of the moment an individual undergoes medical examination or treatment, he or she is deemed to have automatically entered a medical treatment agreement with the care provider. The WGBO sets out the rights and obligations of the patients and care providers.

The WBGO was amended in 2019, in order to strengthen the collaborative (or relationship) medical model, which enables dialogue between the care provider and the patient, and thus enhances the importance of patients' wishes in the decision-making process. The authors of the proposed amendment stated that the rationale behind the new WGBO regulations was the need for modernisation of the provisions and a complete shift from the classical medical model where the opinion of the care provider outweighs the wishes of the patient. The ratification of the CRPD has not been explicitly mentioned, yet the changes to the WGBO seem to reflect the principles set out in the Convention, in particular Article 12 and the right to self-determination.

The Dutch legislator decided to enhance the collaborative medical model by supplementing the current information obligations laid down in § 7:448 of the Dutch Civil Code. In particular, the following elements have been added to the existing obligations of the care provider: (1) the medical consultation must take place in a timely manner; (2) in addition to the consequences and risks of the treatment, the care provider must discuss the option of not undergoing a treatment; (3) alternative examinations and treatments shall also include examinations and treatments that can be provided by other care providers; (4) the care provider must discuss the term within which investigations or treatments can be performed and the expected duration thereof; (5) the care provider must be aware of the patient's situation and personal needs; and (6) the care provider must invite the patient to ask questions.

It is important to note that in cases where the patient stays voluntarily in a psychiatric care institution, the relationship between the institution and the patient is based on the so-called medical treatment agreement, regulated by the Medical Treatment Agreement Act.[149] An involuntary stay in a psychiatric care institution is governed by the rules of the Wvggz and the WZD. Yet insofar as these statues do not lay down rules applicable to a particular situation, the WGBO provisions apply.

4.3. Social security law

As previously mentioned, the Netherlands delegates multiple competences to its administrative subunits – provinces and municipalities which, provided with a large degree of regulatory freedom in social matters, play a key role in implementation of the CRPD provisions.

Amongst others, the municipalities are obliged to provide social support to the persons with disabilities, per the Social Support Act (*Wet maatschappelijke ondersteuning 2015*, hereinafter WMO) enacted in 2015 in the course of the preparatory stage, preceding the ratification of the Convention.[150] Although Article 12 of the Convention is not explicitly mentioned, it seems undoubtful that WMO is oriented towards ensuring greater self-determination of persons with disabilities. The underlying principle of WMO, as set forth in the preamble to the statue, is to enhance self-determination of individuals with disabilities, chronic psychological or psychosocial problems and the expectation that other members of the society will assist in achieving this objective. It is further acknowledged that individuals who – individually or together with persons in their close environment – are insufficiently self-reliant or insufficiently able to participate in the social life should be able to call on government-organised support. Article 2.1.2. (h) of WMO specifically states that the support to be provided at the municipal level is part of the CRPD implementation process.

Based on WMO, the municipalities have the obligation to promote and take general measures to promote social cohesion, the accessibility of facilities, services and spaces for persons with disabilities, safety and quality of life in the municipality, as well as to prevent and combat domestic violence (article 2.2.1. of WMO). The overall municipal social support is aimed at enabling people to remain in their own living environment as long as possible.

Each municipality organises access to support in its own way, based on a municipal social support plan they are ought to develop per article 2.1.2. of WMO. Many municipalities choose delegated neighbourhood social support groups that persons eligible for social support can turn to with request for help. The scope of the municipal social support group's responsibilities is defined by and differs per municipality.

Before establishing means of support, the municipality must investigate the personal situation of the individual. Per article 2.3.3 of WMO, in urgent cases where there is no time for investigation, the municipality must provide assistance within 24 to 48 hours. In such cases, the municipality arranges a temporary customized facility such as (extra) domestic help, support at home or other forms of care and support. The municipality also

149 K. N. M. G, Dossier, *Behandelingsovereenkomst (WGBO)*, https://www.knmg.nl/advies-richtlijnen/dossiers/behandelingsovereenkomst-wgbo.

150 Social Support Act of 2015 (*Wet maatschappelijke ondersteuning 2015)*.

immediately starts an investigation into the personal situation of the individual, after such support is granted.

Per article 2.3.6 of WMO, the municipality can grant a personal budget (PGB) to the individual under certain conditions, stipulated in the said provision. With an awarded PGB, the individuals can choose and hire the support themselves, without the municipality acting as an intermediary. The Social Insurance Bank facilitates the payment of PGB, which is paid directly to the care provider.

5. Legal protection of persons with disabilities against exploitative agreements under Dutch criminal law

The substantive criminal law in the Netherlands is regulated by the Criminal Code of 1886 (hereinafter the Criminal Code or the Code).[151] Since its enactment, the Criminal Code had undergone considerable reforms, majority of which referred to juvenile criminal law, the extension of suspended sentences, the introduction of early release, the reform of fines and the reform of serious offences against public morals.[152] On a whole, the Code can be characterised by its simplicity, practicality, faith in the judiciary, adherence to egalitarian principles, absence of specific religious influences and recognition of an autonomous legal consciousness.[153]

The Criminal Code consists of three books. The first book introduces general provisions that determine matters, such as, inter alia, the scope of applicability, basic rules and principles of substantive criminal law such as non bis in idem, types of sanctions that can be imposed on the offender and cases for reduction and aggravation of sentences. The second (articles 92–423) and third (articles 424–476) book of the Code introduce core offences and crimes punishable under Dutch criminal law.

5.1. Financial exploitation and abuse under Dutch criminal law

Financial exploitation and abuse constitute offences that are punishable under the Criminal Code.[154] Depending on their actual form, exploitative and abusive practices of financial nature may be classified as a crime of: theft (article 310), deception (article 326), extorsion (article 317), embezzlement (article 321) or a crime against personal liberty, in case of exploitative employment or service contracts (article 273f § 1.4.).[155,156]

151 *Wet van 3 maart 1881 – Wetboek van Strafrecht*, Stb. 2021, 26.

152 P. J. P. Tak, *The Dutch criminal justice system*, Wolf Legal Publishers, Nijmegen, 2008, pp. 25–38.

153 Ibid.

154 The Netherlands, *Initiële rapportage over de implementatie door Nederland van het VN Verdrag inzake de rechten van personen met een handicap*, July 12, 2018, pp. 42–43, https://www.eerstekamer.nl/overig/20180713/initiele_rapportage_over_de/meta.

155 The issue of applicability of article 273f to exploitative contracts has been discussed in the literature. See: L. B. Esser, *Mensenhandel, uitbuiting en de Hoge Raad: Een overzicht en waardering*, Nederlands Tijdschrift voor Strafrecht, January 2020, https://www.bjutijdschriften.nl/tijdschrift/NTS/2020/1/NTS_2666-6553_2020_035_001_005; L. van de Watering, *De (in)effectiviteit van artikel 273f bij 'overige' uitbuiting – vier jaar na inwerkingtreding*, 2009, https://documentation.lastradainternational.org/lsidocs/1019%20ScriptieLindavdWatering20091.pdf.

156 The matter of applicability of article 273f to exploitative practices has been also undertaken in the Dutch jurisprudence. The Dutch Supreme Court specified the conditions for determining unfair (exploitative) contracts as human trafficking offence in case from 2015, HR 2015 13/04569 and 2016, HR 2016, RvdW

The Criminal Code does not provide a separate category for offences of financial exploitation and abuse committed against persons with disabilities. Consequently, all the mentioned offences are prosecuted regardless of the characteristics of the victim. Nonetheless, it is worth noting that lack of statutory division between financial exploitation against persons with disabilities and other members of the society does not entail that the court is not required to take into account the victim's individual position and condition (including mental or physical disability). Furthermore, the fact that an offence was committed against a vulnerable victim as a result of abuse of power by offender may be classified as an aggravating circumstance. This will be discussed in the following subsection.

Contrary to the financial exploitation and abuse offences, discrimination against persons on the grounds of their disabilities is classified a standalone offence. It became punishable by the law already in 2005, before the enactment of the Convention on the Rights of Persons with Disabilities. The Criminal Code expresses the reprehensibility of publicly offending and infringing the dignity of a group of people based on their physical, psychological or mental disability (Article 137d). The participation in and the support for activities aimed at discrimination against individuals due to their physical, psychological or intellectual disability are also considered an offence under Dutch law (Article 137f).[157]

Since discrimination is classified as a crime against public order, it entails that the punishable act shall involve discrimination of a group of people based on a defect or disorder that is considered a violation of human dignity. Solely a deed of unjustified discrimination on the basis of sufficiently objectifiable disability is seen as an offence of discrimination and therefore punishable by the law.[158] Such deed must be committed against a group of people and include more than a subjective experience of an individual. It shall specifically be based on shortcomings or disorders that everyone would reasonably perceive as disability.[159]

5.2. Disability of the victim as an aggravating circumstance under Dutch criminal law

In criminal proceedings, the Dutch courts are granted considerable discretion with regard to their sentencing decisions, in terms of the assessment and the validity of special circumstances applicable in each case.[160] The sentence proposed in an indictment of the Public Prosecution Service (hereinafter referred to as OM)[161] is not formally binding upon the

2016/509. In 2019, the Supreme Courted issued another judgment and its interpretation of article 273f in the context of exploitative employment relationships (case HR 19-03-2019, NJ 2019/207). The Supreme Court confirmed that "exploitation" must be regarded as an implicit element of art. 273f.1.4.

157 The legislative history contains no further description of the disability component. While it is considered undesirable to include a conclusive definition of the term in other regulations, some concretisation seems desirable in the context of criminal law. This is partly provided by the Dutch legislator through the addition of 'physical, psychological or intellectual' component. Yet it is considered crucial to further clarify what should be the common understanding of the term 'disability' in the society. J. M. Ten Voorde, *T&C Strafrecht, Tekst & Commentaar op art. 137c Sr*, Wolters Kluwer, Warsaw, 2021.

158 Parliamentary Documents (*Kamerstukken*) II 2001/02, 28221, 3, 4.

159 Ibid.

160 P. M. Schuyt, *T&C Strafrecht*, *Tekst & Commentaar op titel II Sr – Inleidende opmerkingen*, Wolters Kluwer, Warsaw, 2021. See also: H. Kaal, *Met zorg naar de politie: Over besluitvorming rond aangifte van strafbaar gedrag binnen de LVB-zorg*, Brave New Books, Amsterdam, 2019, pp. 29–30.

161 *Openbaar Ministerie (OM)* is the Dutch prosecuting authority.

court, yet the judicial practice shows that the judges tend to attach much importance to the OM's sentence proposal.[162] In order to enhance consistency of sentencing in the Netherlands, the OM has issued several criminal procedure guidelines to be followed by the courts.[163] Amongst others, a document called the Instruction Framework for Criminal Procedure for Adults (hereinafter IFCPA) was published in 2019.[164]

The IFCPA consists of a set of guidelines for the judiciary on how to interpret and weigh various sentencing factors such as, *inter alia*, recidivism, characteristics of the offender and the victim, and the circumstances of the offence. A separate paragraph of the IFCPA is dedicated to vulnerability of the victims as an aggravating factor. It defines vulnerable victims as persons who, due to their age, physical or mental disabilities or social-cultural circumstances, find themselves in a position of dependence on the surrounding environment. The vulnerability factor, together with the abuse of the relationship of dependence by the offender, must be taken into consideration by the court in the sentencing process. Under the IFPCA (specifically with regard to the offence of theft), the fact that a vulnerable victim is deliberately selected by the offender is seen as an indicator of higher culpability.[165] Similarly, per the moral and legal guidelines related to offences, such as human trafficking, the abuse of a vulnerable position of the victim is considered an aggravating circumstance.[166]

In several provisions of the Criminal Code, the victim's dependence on the offender is explicitly mentioned as an aggravating circumstance. For instance, in case of assault (*mishandeling*) punishable under article 301 et seq. of the Code, the fact that the assault was committed as a result of abuse of a factual or legal relationship with the victim may lead to aggravation of punishment (article 304).[167] Further, in case of embezzlement (*verduistering*) punishable under article 321 et seq. of the Code, the fact that the offence was committed by a person who has a personal, professional relationship with the victim (an example of which can be guardianship), is classified as a qualified crime (article 323 of the Code).[168]

5.3. Practical considerations regarding reporting offences against persons with disabilities

Persons with disabilities, equally to other victims of crime, are entitled make use of all available legal, practical and social support services made available by the Dutch state. Further to the implementation of the EU directive on minimum standards[169] and the requirement included therein that victims of crime must be protected by the state, it became essential to assess their vulnerability consistently and structurally and, where appropriate, to take

162 P. M. Schuyt, *T&C Strafrecht*, *Tekst & Commentaar op titel II Sr – Inleidende opmerkingen*, Wolters Kluwer, Warsaw, 2021.

163 Ibid.

164 Guidelines for Criminal Procedure for Adults (Dutch: *Aanwijzing kader voor strafvordering meerderjarigen)*, Government Gazette 2019, 14890.

165 Guidelines for Criminal Procedure for Adults.

166 Ibid.

167 C. P. M. Cleiren, *T&C Strafrecht, commentaar op art. 304 Sr*, Wolters Kluwer, Warsaw, 2021.

168 Van der Velden, De Jonge, *T&C Strafrecht, commentaar op art. 322 Sr*, Wolters Kluwer, Warsaw, 2021.

169 Act of March 8, 2017, implementing Directive 2012/29/EU of the European Parliament and the Council of October 25, 2012, establishing minimum standards on the rights, the support and the protection of victims of crime.

specific protective measures. Some victim groups, such as persons with disabilities, are seen as extra vulnerable and therefore require special protection.

When initiating an investigation, police officers are expected to know how to reduce or prevent the risk of repeated victimisation, intimidation and retaliation. The police officer must timely recognise special protective measures and determine if, and to which extent, the victim is entitled to obtain those.[170] In order to make an accurate estimate of the vulnerability of victims and to protect them, the Individual Assessment instrument[171] has been developed, which the police in the Netherlands has been using since June 1, 2018.[172]

In the context of financial exploitation of vulnerable adults (the significant part of which constitutes elderly), the obstacles that may be encountered in the reporting and investigation process have been discussed in the Dutch legal scholarship.[173] It has been noted that the investigation is often initiated only after the exploitative practices had been taking place for a long time and the victims had already lost a significant amount of money.[174] It is considered that an important role in the fight against financial exploitation of vulnerable adults may be played by legal professionals as, in practice, the investigation often commences after the exploitative practices are witnessed by them. The remaining question is whether the current supervision of legal professionals is organised in a satisfactory manner. It has been suggested that a greater engagement of legal professionals could lead to a wider awareness of the problem of financial exploitation.[175]

6. Concluding remarks

This chapter aimed to depict the notion of legal capacity and its restrictions and the mechanisms of legal protection of persons with disabilities under the legal framework of the Netherlands, specifically in the light of the implementation of UN Convention on the Rights of Persons with Disabilities and its Article 12.

The initial section of the chapter provided a brief introduction to the Dutch legal system and the position of the Convention therein. Per the monistic approach, the Convention became part of the national framework upon ratification, yet the enforcement of the rights stated therein, in particular Article 12, relied to a significant extend on its implementation into the national legislation. In that regard, the Dutch legislator has undertaken several steps to transform the existing legal mechanisms of protection of persons with disabilities so that they reflect the right of equal recognition before the law guaranteed by Article 12 of the Convention.

170 For example, in the case of a mild mental disability, communication takes place using understandable language or, if someone is unable to visit Victim Support Netherlands themselves due to a physical disability, a home visit can be arranged.

171 Dutch: *Individuele Beoordeling, IB.*

172 See Dutch Inspection of Justice and Security, *Een kwetsbaar recht. Een onderzoek naar de toepassing van de Individuele Beoordeling van slachtoffers door de politie*, 2021.

173 L. M. Cremers, E. J. H. de Kluijs, Een kwestie van integraal slim slaan? *Ouderenmishandeling, Justitiële verkenningen*, 2015, pp. 73–84.

174 Ibid., 82.

175 The known examples of the involvement of legal professionals lead to a conclusion that maintaining close ties with the fellow professionals, by sharing experiences and knowledge, has a positive effect on attitude, capacities and mutual understanding of all involved parties. L. M. Cremers, E. J. H. de Kluijs, Een kwestie van integraal slim slaan? *Ouderenmishandeling, Justitiële verkenningen*, 2015, p. 84.

The subsequent sections of the chapter focus on the substantive and procedural aspects of the present regulations on the protective measures (guardianship, fiduciary administration and mentorship). It has been noted that while the national legislator amended the respective provisions, it decided not to entirely revoke mechanisms based on the substitute decision-making model perceiving them as a last-resort solution. Hence, both substantive and supportive mechanisms coexist in the Dutch private-law framework, with an indicative preference for the application of the latter.

Finally, the last two sections of the chapter reflected upon the implementation of Article 12 of the Convention outside of the private-law context, focusing on constitutional, physical and mental healthcare, as well as social and criminal law regulations relating to equal recognition and legal protection of persons with disabilities. It has been concluded that the Dutch legislator has undertaken various steps to strengthen the position of persons with disabilities and enhance the principle of equality in the mentioned areas of law, yet the amendments did not expressly stem from the implementation of the UN Convention into the national legal framework.

20 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in New Zealand

*Bill Atkin**

1. Introduction

New Zealand signed the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) on March 30, 2007, and ratified it on September 25, 2008. New Zealand acceded to the Optional Protocol to the UNCRPD on October 5, 2016. It came into force in New Zealand on November 4, 2016.

To ensure domestic law was in line with the UNCRPD, New Zealand reviewed its law for consistency with the Convention and passed two acts of Parliament shortly before ratification. The Disability (United Nations Convention on the Rights of Persons with Disabilities) Act 2008 amended 23 statutes. This was to remove references to disability in provisions that concerned disqualification from certain public offices. An amendment to the Human Rights Act 1993[1] was passed to remove any ambiguity in the prohibition relating to discrimination. Specifically, the amendment clarified that partnerships, professional and trade associations, qualification and vocational bodies, educational establishments and dealers in land, housing and accommodation are required to accommodate or to take account of the needs of disabled people to an extent that is reasonable. All other law was considered consistent with the UNCRPD, and so no other changes were needed prior to ratification.

New Zealand has resisted prompts from the United Nations Committee to change its domestic law to align with the Committee's interpretation of Article 12.[2] This would involve replacing New Zealand's current law, which allows for substituted decision-making, with supported decision-making.[3] As discussed later, the current law already contains a version of supported decision-making but a review process is nevertheless now under way.

In terms of the UNCRPD as a source of law, New Zealand follows a dualist approach to the domestic effect of international treaties. This is similar in approach to other British Commonwealth countries, such as the United Kingdom, Canada and Australia. The dualist system means that, in order for the treaty obligations to be given the force of law

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1 Human Rights Amendment Act 2008.

2 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014): Article 12–Equal recognition before the law* UN Doc CRPD/C/GC/1 (May 19, 2014).

3 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of New Zealand* CRPD/C/NZL/CO/1 (2014) [22].

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domestically, they cannot simply be ratified – they must be incorporated into domestic legislation.

International law has an indirect effect on domestic law. New Zealand courts apply a rule of statutory interpretation whereby domestic statutes are read, insofar as their wording allows, consistently with international obligations. This is because of a presumption that Parliament does not intend to enact legislation that is inconsistent with New Zealand's unincorporated international obligations.[4] This rule is engaged only when there is ambiguity in the wording of the legislation or discretion given to a decision-maker so that it is relatively minor in its effect.[5]

One statute that expressly references the UNCRPD is the Oranga Tamariki Act 1989 (also known by the English title the Children's and Young People's Well-being Act 1989), which relates to child protection by the state. The UNCRPD must be 'respected and upheld' as part of ensuring that the well-being of a child is at the centre of decision-making under the act.[6] The Convention is also mentioned in the Children's Act 2014 (as amended in 2018). The act provides for a 'strategy for improving children's well-being' and under § 6A it is stated that the strategy is designed inter alia to meet obligations under the UNCRPD.

Further aspects of the way in which the UNCRPD has been implemented are discussed later.

New Zealand's current law on intellectual capacity is spread across a wide range of statutes as well as the common law. Some of the main statutes foreshadow the UNCRPD but have not been significantly reformed since then. The common law is where many topics such as contract and testamentary capacity are to be found. The law has been developed over a long period of time. There is nevertheless a recognition that the time is right for a review to be undertaken in the light of the UNCRPD and societal changes. The Law Commission has therefore been asked to carry out such a review, and it published a Preliminary Issues Paper towards the end of 2022.[7] After consultation and promulgation of options, the Commission is due to submit a final report by June 30, 2024.

The terms of reference for the 'Review of Adult Decision-making Capacity Law'[8] acknowledge the UNCRPD but also ask about the compatibility of the law 'with ao Māori perspectives, te Tiriti o Waitangi | the Treaty of Waitangi and the rights of tāngata whaikaha Māori (Māori disabled people), their whānau, hapū, and iwi'.[9] Indeed, the first two

4 *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269, 289 (CA). See also Law Commission, *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996) [43].

5 See Alice Osman, Demanding attention: The roles of unincorporated international instruments on judicial reasoning, *New Zealand Journal of Public and International Law*, 2014, vol. 122, 345 for a detailed account of how international treaties can affect interpretation of domestic law.

6 Oranga Tamariki Act 1989, s 5(1)(b)(i), as inserted on July 1, 2019.

7 *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke Review of Adult Decision-Making Capacity Law* (NZLC IP 49, 2022).

8 https://huarahi-whakatau.lawcom.govt.nz.

9 'Ao Māori' means 'Māori worldview'; te Tiriti o Waitangi was signed in 1840 between tribal leaders and representatives of the British Crown; 'whānau', 'hapū' and 'iwi' very roughly translate to 'family', 'subtribe' and 'tribe', respectively.

items under the heading 'Scope of the review' are about the perspectives of the indigenous population.[10] It is only in the third item that we find reference to the UNCRPD:

> How the law should protect and promote human rights, including consideration of:
>
> - Aotearoa New Zealand's international human rights commitments, particularly under the Disability Convention and the United Nations Declaration on the Rights of Indigenous Peoples; and
> - Domestic human rights laws, particularly the New Zealand Bill of Rights Act 1990 and Human Rights Act 1993.

In an overall sense, the review will consider

> whether our law and practice strike an appropriate balance between:
>
> - enabling people to make decisions about their own lives (including with appropriate support from whānau, family, carers and caregivers, other professionals or the wider community); and
> - safeguarding people from harm.

In many ways, this echoes the language of Article 12 of the UNCRPD.

A final point of note by way of introduction is the creation of a new Whaikaha Ministry for Disabled People. Although announced in 2021, it is the 'Prime Minister's Statement' on February 8, 2022, that confirmed the implementation of this important policy. She said,

> The Government will support the estimated 1.1 million disabled people in New Zealand through the new Ministry for Disabled People, stand-alone accessibility legislation that identifies, prevent, and removes barriers to participation, and the national rollout of the Enabling Good Lives approach, which puts the voice of disabled people and their families at the heart of decision making.[11]

2. Private law on capacity[12]

The law on legal capacity and human rights has not substantially changed since the UNCRPD was ratified by New Zealand. As noted, the Law Commission has begun a review of the law. What follows therefore continues to be the law in New Zealand.

The law on capacity in New Zealand is found in a variety of places and varies depending on the subject matter. There is a spectrum of matters that raise capacity issues ranging from

10 The UNCRPD is not strong on indigenous issues. New Zealand adopted the United Nations Declaration on the Rights of Indigenous Peoples in 2010.

11 Rt Hon Jacinda Ardern, *Prime Minister's statement*, February 8, 2022, pp. 6–7, https://www.parliament.nz/resource/en-NZ/PAP_118559/e21b720ba3bb7051714af1416f12465434bdf488. On *Enabling good lives*, see https://www.enablinggoodlives.co.nz.

12 See especially Iris Reuvecamp and John Dawson, eds., *Mental capacity law in New Zealand*, Thomson Reuters, Santiago, 2019; Bill Atkin, Protection of personal and property rights, in: *Family law service*, LexisNexis, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2538252; Alison Douglass, *Mental capacity: Updating New Zealand's law and practice*, NZ Law Foundation, 2016, http://www.nzlii.org/nz/journals/NZLFRRp/2016/2.html; Alison Douglass et al., eds., *Assessment of mental capacity: A New Zealand guide for doctors and lawyers*, Victoria University Press, Wellington, 2020.

simple contracts, to voting, health decisions, marriage, wills, criminal responsibility, and most recently in New Zealand euthanasia. Capacity is a moveable feast, so that a person may have capacity to do some things and not others. There are often shades of grey, yet at times the law demands a black and white answer, as in the case of testamentary capacity. All this needs to be borne in mind as we explore the law. The position of children also needs to be addressed as a separate item.

The starting point is that everyone is presumed to have capacity. The onus is therefore on the person wishing to challenge capacity. The rule is found in §§ 5, 24 and 93B of the Protection of Personal and Property Rights Act 1988 (PPPRA) and Right 7(2) of the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996. Although these provisions relate to the operation of the PPPRA and the Code, they reflect the general approach of the common law. The PPPRA also talks about both capacity and competence, but these two words are regarded as synonyms.

While the PPPRA has the presumption of capacity as its starting point, the main point of the act is to provide for people who lack capacity, wholly or partially. It covers three main topics: (1) personal matters, (2) property matters and (3) enduring powers of attorney. People who lack capacity may be the subject of a specific court order in relation to the particular action or may act through a substitute decision-maker. These points are expanded in Part 5.

The Mental Health (Compulsory Assessment and Treatment) Act 1992 deals with those suffering from mental disorder.[13] Apart from being subject to compulsory assessment and treatment on the determination of health professionals, a person falling under the act still has all the rights and powers of other people. Further, the act contains a set of 'rights of patients', such as a right to be informed, a right to cultural identity, a right to legal advice and so forth. A further act is the Substance Abuse (Compulsory Assessment and Treatment) Act 2017. It deals with people with a severe substance addition, such as alcoholism or drug dependency. As with the mental health legislation, a person's general capacity is not affected, but a person may be subject to compulsory treatment for their addiction if their capacity to make informed decisions about their addiction is severely impaired.

Apart from legislation, the law on capacity can be found in the common law as developed by the courts. This is true, for example, of the law on capacity to marry, to enter contracts and to make wills. The common law can also affect defences to civil liability such as in tort cases. For example, the House of Lords decided that the defence of necessity could be used to allow a woman who lacked capacity because of severe intellectual disabilities to be the subject of a sterilisation operation.[14] This particular situation falls under the PPPRA in contemporary New Zealand law, but it illustrates how the common law can have an impact on the law of capacity. Taking this further, we must note that the High Court has inherent jurisdiction to make a wide range of decisions where the law is otherwise silent. This includes what has historically been known as the parens patriae jurisdiction of the High Court. § 14 of the Senior Courts Act 2016 expressly saves the inherent powers for the purposes of New Zealand law.

13 See John Dawson, Kris Gledhill, *New Zealand's mental health act in practice*, Victoria University Press, Wellington, 2013.

14 *In re F* [1990] 2 AC 1 (HL).

Children

The law relating to capacity of children differs from that relating to adults. In short, children lack the capacity that adults have but this is subject to a myriad of differing rules. The first difficulty is that, while the age is majority is 20,[15] for very many purposes a child has adult capacity at the age of 18, in line with the United Nations Convention on the Rights of the Child. One of the main pieces of legislation in this respect is the Care of Children Act 2004. Under § 8, a child 'means a person under the age of 18 years'. This is the age at which parents cease being guardians of the child and thus cease their role in making decisions on behalf of the child. Such decisions may relate to education, religion, residence and many other important matters. However, under § 36 a child of or over the age of 16 can consent or refuse to consent to medical, surgical and dental procedures. Furthermore, as the child gets older, the exercise of the guardianship role is supposed to be one of making decisions with the child rather than for the child: § 16(1)(c). For children under 16, it is now generally accepted that the landmark judgment of the House of Lords in *Gillick*[16] applies in New Zealand. This means that a child of any age who has the necessary level of competence can make the decision in question. Another way of putting this is that such a child's views should be followed. A qualification is where the child may face physical or psychological harm, in which case the child's views may be overridden and in some instances the child may be placed under the guardianship of the court.[17] A special rule applies to abortions: a female child's consent or refusal to consent to abortion has the same effect as if she were of full age (Care of Children Act 2004, § 38).

The law on minors' contracts is found in sub-part 6 of part 2 of the Contract and Commercial Law Act 2017.[18] A minor is defined as a child under 18. § 86(1) states, 'Every contract entered into by a minor is unenforceable against the minor but otherwise has effect as if the minor were of full age'. A court may however inquire into the fairness and reasonableness of a contract, and it may allow a contract to be enforced against a child (§ 87 and following). Furthermore, under § 98, the District Court may approve a contract in advance, in which case it is binding as if the child were of full age. Contracts for life insurance are another exception, and likewise employment contracts are presumed to be enforceable.

3. Public law on capacity

The New Zealand Bill of Rights Act 1990 affirms the nation's commitment to the International Covenant on Civil and Political Rights and sets out a number of rights relating to life and security of the person, democratic and civil rights, including freedom of expression and religion, non-discrimination and minority rights, and rights relating to search, arrest and detention.[19] These rights apply to everyone and are not restricted by age. From the

15 Age of Majority Act 1970.

16 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL); *Hawthorne v Cox* [2008] 1 NZLR 409 (HC); and *Moore v Moore* [2015] 2 NZLR 787 (HC).

17 Care of Children Act 2004, ss 30–35.

18 This replaced the Minors' Contracts Act 1969.

19 See, generally, Andrew Butler, Petra Butler, *The New Zealand bill of rights act: A commentary*, 2nd ed., LexisNexis, Wellington, 2015. Paul Rishworth et al., *The New Zealand bill of rights*, Oxford University Press, Oxford, 2003.

capacity point of view, § 11 states, 'Everyone has the right to refuse to undergo any medical treatment'. The rights in the Act such as the refusal of treatment are not absolute. § 5 permits justified limitations on the rights, so long as they are reasonable and 'prescribed by law as can be demonstrably justified in a free and democratic society'. This means that the response of public agencies is to be proportionate, and accommodation for those with disabilities must be reasonable and not total.

The accompanying Human Rights Act 1993 (originally the Human Rights Commission Act 1977) provides detailed provisions relating to discrimination. Under § 21 one of the prohibited grounds of discrimination is 'disability', which means the following:

1. physical disability or impairment;
2. physical illness;
3. psychiatric illness;
4. intellectual or psychological disability or impairment;
5. any other loss or abnormality of psychological, physiological or anatomical structure or function;
6. reliance on a guide dog, wheelchair or other remedial means;
7. the presence in the body of organisms capable of causing illness.

A range of exceptions is found in the act, including ones that take account of disability.[20]

The act establishes the Human Rights Commission and the Human Rights Review Tribunal that can investigate and hear complaints relating to discrimination. Since 2011 one of the human rights commissioners must be a disability rights commissioner. In addition, the Health and Disability Commissioner Act 1993 created another new role, and rights in the context of health and disability are found in a patients' code: Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996. Everyone, irrespective of age and capacity, has the rights contained in the code. One of the most important is Right 7: the right to make an informed choice and give informed consent about the provision of health services.

4. Psychology, psychiatry and neurology

Specialist health professionals have not had any special place in the development of the law in New Zealand. They have of course played a general role in the past as have many other people. They will doubtless make submissions to the Law Commission as it undertakes its project on capacity and key professionals will be invited to do so.

Under the current law, evidence from health professionals is significant but not decisive when a court has to decide the issue of capacity, such as testamentary capacity or capacity under the PPPRA. In general, the activation of an enduring power of attorney depends on certification of incapacity by a health practitioner (enduring powers are discussed further in the next part). In other areas, such as under the Mental Health (Compulsory Assessment

20 E.g. Human Rights Act 1993, ss 29, 52, 56, 58, and 60. For an example of writing that explores this, see Rebecca McMenamin, Reasonable accommodation: Equal education for learners with disabilities, *NZPubIntLawJ*, 2017, vol. 4, p. 5.

and Treatment) Act 1992, discussed earlier, the clinician responsible for a patient plays a key role in the initial assessment and treatment of the person, before a judge is involved. This role continues during later treatment. §§ 58 and 59 are especially important as the responsible clinician has powers to require compulsory treatment during initial assessment and later when a compulsory treatment order by the court is in force. However, if the patient does not consent to treatment after a court order is made, it can occur only if a second psychiatrist agrees.

5. Restrictions on capacity and procedures

a. Restrictions

The prerequisites for mental capacity in New Zealand are found in numerous places, the PPPRA being the principal but not the only statute. The law has not changed with the UNCRPD.

The PPPRA, as already noted, contains a presumption of capacity/competence. The court may have jurisdiction where this is rebutted. For personal matters, the test is found in § 6, which refers to a person who

> (a) lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; or
> (b) has the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare, but wholly lacks the capacity to communicate decisions in respect of such matters.

A rider states the following:

> The fact that the person in respect of whom the application is made for the exercise of the court's jurisdiction has made or is intending to make any decision that a person exercising ordinary prudence would not have made or would not make given the same circumstances is not in itself sufficient ground for the exercise of that jurisdiction by the court.

For property matters, the test is in § 25, which refers to a person:

> who, in the opinion of the court, lacks wholly or partly the competence to manage his or her own affairs in relation to his or her property so situated.

A rider similar to the one quoted for personal matters is included, but in addition, there is an important reference in subsection (4) to undue influence:

> In determining whether or not it should exercise its jurisdiction under this Part in relation to any person, a court may have regard to the degree to which the person is subject, or is liable to be subjected, to undue influence in the management of his or her own affairs in relation to his or her property.

One judge has explained this as follows:

> [W]hat s 25(4) signals is that, if a person has been found to be lacking in competence, the Court's power to make an order is more likely to be exercised if that person is, or is likely to be, subjected to undue influence.[21]

In relation to both personal and property matters, two significant objectives guide a court in exercising jurisdiction under the Act. § 8 states:

> The primary objectives of a court on an application for the exercise of its jurisdiction under this Part shall be as follows:
>
> (a) to make the least restrictive intervention possible in the life of the person in respect of whom the application is made, having regard to the degree of that person's incapacity:
> (b) to enable or encourage that person to exercise and develop such capacity as he or she has to the greatest extent possible.

§ 28 says much the same in relation to property management mutatis mutandis.

The Mental Health (Compulsory Assessment and Treatment) Act 1992 affects capacity only in the sense that a person's lack of consent to assessment and treatment for mental disorder can be overridden. Under § 2, the key definition of 'mental disorder'

> means an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it –
>
> (a) poses a serious danger to the health or safety of that person or of others; or
> (b) seriously diminishes the capacity of that person to take care of himself or herself.

Importantly in terms of rights and competence, under § 4 the Act cannot be used

> by reason only of –
>
> (a) that person's political, religious, or cultural beliefs; or
> (b) that person's sexual preferences; or
> (c) that person's criminal or delinquent behaviour; or
> (d) substance abuse; or
> (e) intellectual disability.

The law on substance addiction likewise does not affect capacity except in relation to compulsory assessment and treatment. One of the criteria for compulsion found in § 7 of the Substance Abuse (Compulsory Assessment and Treatment) Act 2017 is that 'the

21 *Wilson v Wilson* [2014] NZHC 2766, [2015] NZFLR 104 at [21] per Brown J.

person's capacity to make informed decisions about treatment for that addiction is severely impaired'. The test for this is found in § 9 and is whether the person is unable to

(a) understand the information relevant to the decisions; or
(b) retain that information; or
(c) use or weigh that information as part of the process of making the decisions; or
(d) communicate the decisions.

In regard to euthanasia, a person must be competent to make an informed decision about assisted dying. For this purpose, not unlike the test for substance addiction, the person must be able to[22]

(a) understand information about the nature of assisted dying that is relevant to the decision; and
(b) retain that information to the extent necessary to make the decision; and
(c) use or weigh that information as part of the process of making the decision; and
(d) communicate the decision in some way.

Under § 31 of the Family Proceedings Act 1980 a marriage or civil union will be void unless both parties consented. If 'by reason of duress, mistake, or insanity, or for any other reason' there is an absence of consent, the marriage or civil union will be void. Capacity to marry or enter a civil union will affect consent and is determined by case law. A classic statement of the test is as follows:

> [W]hether the person in question was capable of understanding the nature of the contract into which he is entering, or whether his mental condition was such that he was incapable of understanding it; in order to ascertain the nature of the contract of marriage he must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage.[23]

Testamentary capacity is not automatically affected where a person is subject to the PPPRA, but the court may direct that a person subject to a property order may make a testamentary disposition only with the leave of the court (§ 54). Further, under § 55, the court can authorise a manager to make a will on behalf of the person under management.[24]

The test for testamentary capacity is laid out by case law. A classic statement is from *Banks v Goodfellow*:

> As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his

22 End of Life Choice Act 2019, s 6.
23 *J v J* [1974] 2 NZLR 498 at 499 (SC).
24 See Bill Atkin, Will-making and capacity, in: *Mental capacity law in New Zealand*, ed. Iris Reuvecamp, John Dawson, Thomson Reuters, Santiago, 2019.

> bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms.[25]

The New Zealand Court of Appeal has added:

> In order to establish capacity, when in issue, those seeking probate must demonstrate the maker of the will had sufficient understanding of three things:
>
> (a) that he or she was making a will and the effect of doing so ('the nature of the act and its effects')
> (b) the extent of the property being disposed of
> (c) the moral claims to which he or she ought to give effect when making the testamentary dispositions.[26]

A person is presumed to have testamentary capacity, and, in the usual case, the executors do not have to prove capacity. They need to do so only if a doubt is raised, such as when an unexplained significant change in a person's will is made on their deathbed.[27]

As a general rule, the law of contract requires parties to be legally competent to enter a contract, but this is complicated by the effects on innocent second parties. As noted in Part 2 of this chapter, contracts by minors are governed by subpart 6 of part 2 of the Contract and Commercial Law Act 2017. Minors' contracts are not necessarily void but may be unenforceable against the minor. Under various conditions discussed earlier, such contracts may be enforceable and upheld by the courts. A contract entered into by someone of unsound mind, that is someone who cannot understand the nature of the agreement, is not binding upon that person. In other words, it may be voidable at the suit of the person lacking capacity. An exception is where the contract is one for necessaries or where the PPPRA has been used for instance to appoint a property manager to act on behalf of the person or an attorney under an enduring power has authority to act (discussed further here).

A leading case that discusses contractual capacity is the Court of Appeal judgment in *Scott v Wise*.[28] It was held that the test was not as high as that for testamentary capacity. A person must be able to understand the nature of the transaction when it is explained to the person. 'It follows that the capacity required is related to the transaction'.[29] The person need not understand 'the whole detail' so long as the general nature of the deal is understood. Another leading case on when a contract is voidable is the Privy Council judgment in *O'Connor v Hart*.[30] A contract for the sale of land was entered into by a man with dementia. The purchaser did not know that the seller lacked contractual capacity. The Privy Council upheld the contract. The test for enforceability is not one of fairness.

25 *Banks v Goodfellow* (1870) LR 5 QB 549, 567.
26 *Bishop v O'Dea* (CA 120/99, 20 October 1999) [4].
27 E.g. *Loosley v Powell* [2018] NZCA 3, [2018] 2 NZLR 618 (six days before death, the deceased changed her will to benefit just two nephews instead of all of them; held that she lacked capacity when all the facts were considered).
28 *Scott v Wise* [1986] 2 NZLR 484 (CA).
29 Ibid., 491.
30 *O'Connor v Hart* [1985] 1 NZLR 159 (PC).

Instead, a higher standard is needed: such things as actual fraud, undue influence, abuse of confidence or unconscionable bargain must show the following:

> An unconscionable bargain in this context would be a bargain of an improvident character made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction. 'Fraud' in its equitable context does not mean, or is not confined to, deceit; 'it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties'; *Earl of Aylesford v Morris* (1873) 8 Ch App 484, 490. It is victimisation, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.[31]

The court summarised the position as follows, though not in ideal language:

> To sum the matter up, in the opinion of their Lordships, the validity of a contract entered into by a lunatic who is ostensibly sane is to be judged by the same standards as a contract by a person of sound mind, and is not voidable by the lunatic or his representatives by reason of 'unfairness' unless such unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane.[32]

Elaboration is found in the Court of Appeal judgment in *Nichols v Jessup*:

> [A court] should [not] disregard a very marked imbalance of benefits in determining whether to set aside as unconscionable a contract with a grantor or vendor whom the grantee or purchaser knew or ought to have known to have been at a significant disadvantage in appreciating the relative consequences of the bargain.[33]

Capacity in the context of the criminal law is relevant in particular in relation to a person's fitness to stand trial. The law is found in the Criminal Procedure (Mentally Impaired Persons) Act 2003, subpart 1 of part 2. A court may make a finding of unfitness to stand trial at any stage after proceedings have commenced until all the evidence has been presented. 'Unfitness to stand trial' is defined in § 4:

> (a) [It] means a defendant who is unable, due to mental impairment, to conduct a defence or to instruct counsel to do so; and
> (b) includes a defendant who, due to mental impairment, is unable –
>
> (i) to plead:
> (ii) to adequately understand the nature or purpose or possible consequences of the proceedings:
> (iii) to communicate adequately with counsel for the purposes of conducting a defence.

31 Ibid., 171.
32 Ibid., 174.
33 *Nichols v Jessup* [1986] 1 NZLR 226, 229 (CA).

Evidence from two health assessors that the defendant is mentally impaired is necessary.

Fitness to stand trial is different from the defence of insanity. The latter was developed by case law over many years and is now found in § 23 of the Crimes Act 1961:

> (1) Every one shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved.
> (2) No person shall be convicted of an offence by reason of an act done or omitted by him or her when labouring under natural imbecility or disease of the mind to such an extent as to render him or her incapable –
>
> (a) of understanding the nature and quality of the act or omission; or
> (b) of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.
>
> (3) Insanity before or after the time when he or she did or omitted the act, and insane delusions, though only partial, may be evidence that the offender was, at the time when he or she did or omitted the act, in such a condition of mind as to render him or her irresponsible for the act or omission.
> (4) The fact that by virtue of this section any person has not been or is not liable to be convicted of an offence shall not affect the question whether any other person who is alleged to be a party to that offence is guilty of that offence.

Where a person has been found unfit to stand trial or has been acquitted because of insanity, § 23 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 provides for inquiries to be made to determine what should happen to the person. They may be detained as a 'special patient' under the mental health legislation or as a 'special care recipient' under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

The rules relating to criminal responsibility of children are found in § 272 of the Oranga Tamariki Act 1989. A child aged 10 or over can be charged with murder or manslaughter. Children aged 12 and 13 can be charged with other serious offences under the Criminal Procedure Act 2011, typically where the maximum penalty is imprisonment for life or at least 14 years. Where a 'young person' (aged 14–17 inclusive) is charged with (most) other offences, the case goes to the Youth Court, and usually includes a 'family group conference'.

b. Procedure

The procedures relating to mental capacity vary depending on the subject matter. The focus here is on the main legislation where issues arise. No changes have been made as a result of the UNCRPD.

Under the PPPRA, the Family Court has jurisdiction to determine issues relating to personal and property matters. The court may grant a one-off order to address a particular situation, such as a specific health procedure. Another important order is the appointment of a welfare guardian. Subject to the terms of the order, the welfare guardian can make decisions on behalf of the person concerned, but only after consulting relevant people including the person concerned. During the court hearing, the person must be represented by a lawyer, typically paid for by the state. The person, if possible, can attend the hearing. The court can also appoint a property manager. Subject to the terms of the order and to appropriate consultation, the manager has wide-ranging powers to deal with the person's property.

The procedure for enduring powers of attorney (EPA) is quite different (PPPRA, part 9). Creating an EPA does not involve the court. Instead, it is done through a lawyer. A competent person can create two kinds of EPAs: for personal matters and for property matters. Both are usually done at the same time. The donor has a free choice of attorney, who does not have to have any specific qualifications. A personal EPA will come into effect only when the person has lost capacity (this will often but not always require medical certification). A property EPA may come into effect earlier but depends on the terms of the EPA. An attorney can act on behalf of the person, and this may forestall the need to go to court. The court is unlikely to be involved unless there is some subsequent challenge to the attorney's decisions.

The do-it-yourself procedure for creating an EPA is not unlike that for making a will, except that a valid will can be made without the involvement of a lawyers. Two people must witness a will, but where this or some other condition (such as the will-maker's need to sign) has not been fulfilled, the High Court has power, in appropriate situations, to nevertheless approve the will under § 14 of the Wills Act 2007.[34]

Under the Mental Health (Compulsory Assessment and Treatment) Act 1992, the procedure is different again. In essence for the first month, the decision to compulsorily assess and treat a person is a medical one. Court orders are needed for treatment to continue after that time.

6. Organisational and institutional aspects

The earlier reference was made to the Human Rights Commission and the Human Rights Review Tribunal that can investigate and hear complaints relating to discrimination. They came into existence well before the UNCRDP. Since 2011 one of the human rights commissioners must be a disability rights commissioner, who works to promote and protect the rights of disabled New Zealanders. In addition, there is the Health and Disability Commissioner appointed under the Health and Disability Commissioner Act 1993.

New Zealand has had a robust framework for improving the lives of disabled people since 2002, and this was improved in 2010 to better give effect to the UNCRPD.[35] Since 2002, New Zealand law has required a national Disability Strategy, currently the New Zealand Disability Strategy 2016–2026. Under this, the minister for disability issues must report to Parliament annually on progress made. The Disability Strategy, which includes initiatives across government, is reviewed on an ongoing basis.

There are several mechanisms within government to achieve the Disability Strategy. The Office for Disability Issues is the government focal point on disability (a function it has performed since its establishment in 2002 under the New Zealand Disability Strategy). In order to implement the Strategy, there is a Disability Action Plan 2019–2023, which includes priorities in terms of work programmes developed by government agencies,

34 An example is *Singleton v Marshall* [2019] NZHC 2486, [2019] NZFLR 273; *Marshall v Singleton* [2020] NZCA 450, [2020] NZFLR 556. (The deceased had not signed the will in question. He was held to lack testamentary capacity. That ends the matter, but if he had had capacity, the failure to sign would not as such have been fatal. However, he wanted to explain the reason for disadvantaging two of his children to them before signing but died before doing so. It was held that his testamentary intention was provisional, and thus, the will was not to be validated under § 14.)

35 Office for Disability Issues, *Framework to promote, protect and monitor implementation of the convention*, www.odi.govt.nz/united-nations-convention-on-the-rights-of-persons-with-disabilities/nzs-monitoring-framework/.

disabled people and their representative organisations. The Ministerial Committee on Disability Issues, headed by the minister for disability issues, coordinates government agencies to implement its recommendations.

Independence in promoting, protecting and monitoring implementation is achieved by

- a disability rights commissioner, already noted;
- the Office of the Ombudsman;
- the Disabled Persons Organisation Coalition (DPO) Coalition, a grouping of disabled people's organisations monitoring rights of disabled people that is funded by government (since 2010); and
- The creation of a new Ministry for Disabled People in 2022, as noted in the Introduction.

7. Statistics

The number of orders made in relation to the protection of personal and property rights was 2,738 in 2011/2012 (July to June) and 4,769 in 2020/2021. For mental health, the equivalent figures were 4,486 and 5,520, and substance addiction 86 and 67.

More detailed statistics for personal and property rights are available up to the calendar year 2017. In that year 236 applications for specific personal orders were made plus 1,716 welfare guardian appointments. Applications for personal orders to administer small amounts of property came to 514. There were 1,042 applications for orders appointing property managers. Applications in relation to enduring powers (e.g. requesting a review of the attorney's actions) came to 80.

Enduring powers do not have to be lodged in any central place, with the result that there are no figures on how many exist. However, anecdotally, many people, especially in the older age brackets, have granted such powers.

8. Private law restrictions and the criminal law

Safeguards for people with disabilities tend to be those that apply to people in general. The only relevant criminal offence that relates to contracts and exploitation is the offence of 'obtaining by deception or causing loss by deception' (Crimes Act 1961, § 240). 'Obtaining' relates to possession or legal title of property, a debt or credit or a pecuniary advantage from a document.[36] The offence is so broad as to include 'causing loss to any other person'.[37] 'Deception' means a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person. They must also know or must be reckless to whether the representation is false in a material way.[38] 'Deception' also includes an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it and the offender knows that it is false in a material particular, or a fraudulent device, trick or stratagem used with intent to deceive any person.[39] Forgery of a document to obtain a benefit is also a

36 § 240(1)(a)-(c).
37 § 240(1)(d).
38 § 240(2)(a).
39 § 240(2)(b)-(c).

criminal offence.[40] There is no criminal offence that relates to exploiting another person's disability.

The following is a brief summary of the relevant private (not criminal) law doctrines that are relevant to exploitation of disabled persons during negotiating a contract.

Common law doctrines

The courts have developed three doctrines that deal with the attempted exploitation of one contracting party by the other.[41] These are duress, undue influence and unconscionable bargain. A contract that has been obtained by improper pressure is voidable at common law on the ground of duress.[42] A contract which is made as a consequence of a wrongful and unconscientious use of power by a stronger party over a weaker, either by an actual exertion of power or by an abuse of a relationship of trust and confidence existing between the parties, is also voidable in equity on the ground of undue influence.[43] Further, where an agreement has been obtained not by improper influence or pressure but by one party taking advantage of the other in a way that can be seen as reflecting upon the conscience of that party, it is voidable as constituting an unconscionable bargain.[44]

Fair Trading Act 1986

§ 9 of the Fair Trading Act 1986 requires that no person engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Intention is not relevant; it is akin to a strict liability tort. Loss must have been suffered or is likely to occur as a result of the misleading conduct. This provision relates to conduct done 'in trade'. It only applies to business contexts and not private dealings.

§ 23 of the Fair Trading Act prevents the use of 'physical force or harassment or coercion' in connection with the supply or payment of goods or services. This could apply to exploitative contractual negotiations.

9. Conclusion

The New Zealand law on capacity and the rights of persons with disabilities is spread across various pieces of legislation, the common law and practice by government and non-government agencies. It is not easy to summarise the law in a short space: there are inevitable gaps in this chapter. While New Zealand has ratified the UNCRPD, much of the pre-existing law has remained in place. As noted, the Law Commission has started a project on

40 Crimes Act 1961, s 256.

41 See Matthew Barber, Stephen Todd, *Burrows, finn and todd on the law of contract in New Zealand*, 7th ed., LexisNexis, New Delhi, 2022, ch 12.

42 The elements of duress are contained in *Pharmacy Care Systems Ltd v Attorney-General* CA198/03; 16 August 2004 [98]. See also *McIntyre v Nemesis DBK Ltd* [2010] 1 NZLR 463 (CA) [22]. See, generally, Rick Bigwood, When exegesis becomes excess: The newborn problematics of contractual duress law in New Zealand, *JCL*, 2005, vol. 21, p. 208; Rick Bigwood, Contractual duress and the Supreme Court, *NZLJ*, 2005, p. 140.

43 A leading statement of principle is that of Richardson J in *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157, 165 (CA).

44 See *Gustav and Co Ltd v Macfield Ltd* [2007] NZCA 205, [2008] NZSC 47, [2008] 2 NZLR 735, and *O'Connor v Hart* [1985] AC 1000, [1985] 1 NZLR 159 (PC).

this very question. After it submits its final report with a raft of recommendations in 2023, the government then needs to consider the proposals and see what it decides to proceed with. Some may be controversial: various lobby groups have strong views on how the law should be reformed. Indigenous rights, on which the UNCRPD is not strong, will be a vital part of the evaluation. Legislative reform may therefore be some time away. The end of this decade is a likely timeframe.

21 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Norway

Karl Harald Søvig and Anna Vasslid Valvatne

1. A concept of active legal capacity in Norwegian law – introductory remarks

The right to self-determination is a fundamental and universal human right in Norwegian and international law, with historical roots that trace all the way back to King Christian V's Norwegian Law of 1687.[1] There are two different sides to it. First, it entails a right to self-determination per se, meaning a right to make one's own decisions and decide over one's own life. Second, it prohibits others from interfering in the right to self-determination. Today, both these aspects are protected by the Norwegian Constitution, the European Convention on Human Rights (ECHR) and the UN Convention on the Rights of Persons with Disabilities (CRPD).[2] In addition, it is also protected by several other provisions in Norwegian legislation, including the Human Rights Act,[3] the Patient and User Rights Act,[4] the Abortion Act[5] and the Children's Act.[6]

An important and integral part of the right to self-determination is the concept of 'legal capacity'. International law does not universally define this term, but a group of renowned legal experts describe it as 'the capacity to hold a right and the capacity to act and exercise a right, including capacity to sue based on such right'.[7] In Norwegian law, it is the capacity to act and exercise a right – the *active* legal capacity – which is of interest and may be subject to limitations. This term pertains to a person's ability to carry out legally binding dispositions and undertake obligations in his or her own name, such as entering into an agreement, setting up a will or entering into marriage.[8] Thus, the interplay between the

1 King Christian V's Norwegian Law, April 15, 1687, § 2.

2 Constitution of the Kingdom of Norway May 17, 1814, Article 102; the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 4, 1950, Article 8 (1); the UN Convention on the Rights of Persons with Disabilities, New York, December 13, 2006, Article 12, cf. Article 3a.

3 Act relating to the strengthening of the status of human rights in Norwegian law (the Human Rights Act), May 21, 1999 no. 30, Appendix 4, art. 1, and Appendix 6, art. 1. The Act stipulates that the International Convention on Economic, Social and Cultural Rights and the International Convention on Civil and Political Rights with Protocols shall apply as Norwegian law, cf. § 2.

4 Patient and User Rights Act, July 2, 1999, no. 63. See, for example, § 4A-1 (2), which states that healthcare must be arranged with respect for the individual's physical and mental integrity and, as far as possible, be in accordance with the patient's self-determination.

5 Abortion Act, June 13, 1975, no. 50; see, for example, § 2.

6 Children Act, April 8, 1981, no. 7.

7 Ilias Bantekas, Michael Ashley Stein, Dimitris Anastasiou, eds., *The UN convention on the rights of persons with disabilities*, Oxford University Press, Oxford, 2018, p. 351.

8 Nikolaus Gjelsvik, *Norsk personrett: Forelesninger*, 2nd ed., Nikolai Olsens Boktrykkeri, Oslo, 1934, p. 13.

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right to self-determination and the concept of legal capacity is clear. The right to self-determination is exercised through legally binding actions, and limitations on the legal capacity to act therefore interferes with the right to self-determination.

Under Norwegian law, the general rule is that all people over the age of 18 have a legal capacity to act pursuant to § 2 (1) (a) of the Guardianship Act,[9] unless they are completely or partially deprived of this capacity in compliance with other provisions of the act. There are two different circumstances that may authorise such deprivation: age, and mental illness.

Age as a ground for deprivation of legal capacity is stipulated in the Guardianship Act, § 2 (1) (a) and § 9. Children under the age of 18 are minors and automatically subject to statutory guardianship, according to § 2 (1) (a). This means that they cannot take legal action on their own or dispose of their own funds, unless otherwise specifically provided (cf. § 9). Exceptions regarding economic activities apply to the minor's right to enter into employment contracts, the minor's right to conduct business activities, the minor's disposal of funds they have earned or received themselves, and minors with their own household, according to § 10 to § 13, respectively. Exceptions regarding personal matters apply to different areas of personal life. A minor has an exponentially growing right to self-determination until he or she turns 18, according to § 33 of the Children's Act.[10] This is reflected in several different provisions that provide children and young people over a given age decision-making competence, such as the minor's right to consent to adoption and name change when over the age of 12,[11] the right to be admitted to a psychiatric hospital and consent to different types of medical treatment when over the age of 16,[12] the right to request termination of pregnancy regardless of age[13] and so forth.

The rationale is that until the age of 18, a person undergoes a severe mental and emotional development.[14] It is not until the age of majority that a person is assumed to understand the consequences of their choices, and thus act rationally. Prior to this point, the minor needs one or more persons who can assist in making necessary decisions and ensure that their personal and financial interests are taken care of. Under Norwegian law, this responsibility falls to the minor's guardian, normally the person who has parental responsibility according to the rules in the Children's Act of 1981.

Mental illness as a ground for deprivation of legal capacity is stipulated in the Guardianship Act, § 20 (1), cf. § 22. A person's active legal capacity may be limited due to mental illness, including dementia, mental retardation, substance abuse, severe gambling addiction or severely impaired health, and an inability to care for own interests, according to § 20 (1), cf. § 22. The same rationale as for the general rule regarding minors' lack of legal capacity applies. Like children, some adults need help to take care of their financial or personal interests.[15] These adults form a complex and composite group. Some are born

9 The Guardianship Act, March 26, 2010, no. 9.
10 Children Act, April 8, 1981, no. 7, § 33.
11 Cf. the Names Act, June 7, 2002, no. 19, § 12, and the Adoption Act, June 16, 2017, no. 48, § 6.
12 Cf. the Mental Health Care Act, July 2, 1999, No. 62, § 2–1, and the Patient and User Rights Act, July 2, 1999, no. 63, § 4–3, first paragraph letter b, respectively.
13 Cf. the Abortion Act, June 13, 1975, no. 50, § 4.
14 Ot.prp.nr. 110 (2008–2009)) Om lov om vergemål (vergemålsloven) [Proposition to the Odelsting no. 110 (2008–2009) On the Guardianship Act] p. 17.
15 Ibid., 38.

with mental disabilities or diagnoses that make it difficult for them to act in their own best interest, others may lose or have their mental capacity reduced during their adult life. Some are defined as active and capable of making several legal dispositions themselves; others are passive and unable to act on their own behalf. The common denominator is that they need help, to varying degrees. Under Norwegian law, it is the guardianship scheme with supplementary deprivation of legal capacity that seeks to provide this assistance.

However, in light of the fundamental and universal right to self-determination, there are limits for to what extent national legislation may allow for people with disabilities to be deprived of their active legal capacity. The UN Convention on the Rights of Persons with Disabilities (CRPD), signed by Norway in 2007 and ratified on June 3, 2013, with the unanimous consent of the Norwegian Storting (Norwegian Parliament),[16] is particularly important in this regard. Article 12 of the Convention states that persons with disabilities have the right to equal recognition before the law and that they have the same legal capacity as others in all aspects of life. Despite this, Norway retained the guardianship scheme and the supplementary rule on deprivation of legal capacity for persons subject to guardianship, albeit somewhat revised after the ratification of the convention.

Against this background, this article will describe how the CRPD Article 12 has been implemented into Norwegian law. This includes which changes were required to bring Norwegian law in accordance with the convention, which reservations the Norwegian state made to retain the arrangement of guardianship and subsequent deprivation of legal capacity when necessary, and what role psychology, psychiatry and neurology played in the implementation process. Furthermore, the article will also provide an overview of the statutory conditions and the legal process for being subject to guardianship and deprived of active legal capacity in Norway, both before and after the CRPD was ratified and implemented. Finally, it will give some insight into the assistance provided by the guardian, the legal result if a person acts beyond his or her legal capacity, statistical trends in cases on legal capacity in Norway, and the relations between private law restrictions of active legal capacity and protection of persons with disabilities under criminal law. The overall purpose is to show how the Norwegian legislators through the new Guardianship Act of 2010 have tried to balance the fundamental right to self-determination against the need to provide adequate assistance to those who cannot sufficiently take care of their own interests, in light of the requirements of the CRPD.

2. The ratification of the UN Convention on the Rights of Persons with Disabilities and implementation of Article 12 into Norwegian law – from an archaic two-track system to an individually tailored guardianship

The fundamental starting point is that Norway is a dualistic state, meaning that international law and Norwegian law are two different legal systems.[17] International law must

16 In accordance with Innst. 203 S (2012–2013) om samtykke til ratifikasjon av FN-konvensjonen av 13. desember 2006 om rettighetene til mennesker med nedsatt funksjonsevne [Recommendation to the Storting no. 203 S (2012–2013) on consent to the ratification of the UN Convention of December 13, 2006 on the rights of people with disabilities].

17 Morten Ruud, Geir Ulfstein, *Innføring i folkerett*, 5th ed., Universitetsforlaget, Oslo, 2018, p. 55.

be made a part of Norwegian law for it to be directly applied in Norwegian courts. This means that even though the government has legally bound the state by ratifying a treaty, a rule of international law is not a part of the Norwegian domestic law that the courts must base their decision on before the rule is implemented.

However, even if an international instrument is not made part of Norwegian law through implementation, its rules can still be valid legal arguments in domestic law due to the principle of presumption. The principle of presumption is well established in case law. The core content of the principle is that even if international law is not implemented, it is binding upon Norway as a state within international law. Domestic legislation should therefore be applied in a manner that is consistent with the international obligation, unless there is no leeway of discretion under the interpretation of the statutory provision.[18]

Implementing a rule of international law into Norwegian law can be done using two different methods: implementation by incorporation and implementation by transformation.

Implementation through incorporation means that a law or regulation refers to a convention and stipulates that it shall apply as Norwegian law. An example is the Norwegian Human Rights Act, § 2.[19] The Human Rights Act was adopted by the Storting in 1999 and elevates five key human rights conventions to a special status in Norwegian law. These are the European Convention on Human Rights (ECHR), UN Convention on Civil and Political Rights (ICCPR), the UN Convention on Economic, Social and Cultural Rights (ICESCR), the UN Convention on the Rights of the Child (UNCRC), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). According to § 2 of the act, all five conventions apply as Norwegian law per se. According to § 3, all five also take precedence in the event of a conflict with regular domestic legislation. The precedence is linked to how the rule is practiced and interpreted by its own enforcement body in international law, as decided by the Norwegian Supreme Court.[20]

Implementation through transformation can be divided into active and passive transformation. Active transformation takes place by translating and introducing a corresponding Norwegian rule of law.[21] Passive transformation occurs when the government assesses if and states that Norwegian law already complies with the convention, either fully through an already existing rule or through a slight adjustment of an existing rule.[22]

All three methods result in the same result: that the international rule becomes a source of law that the Norwegian courts are obliged to apply. However, only implementation through incorporation makes the source Norwegian law per se. This is important if there is a conflict between the international source and other Norwegian legal provisions. Only international law implemented through incorporation takes precedence over Norwegian law in the event of conflict, not international law implemented through transformation.

The CPRD was implemented through passive transformation, meaning that the Norwegian legislators found Norwegian law to already comply with the provisions of the convention in most areas. For the most part, this processed without difficult. Still, all of six

18 Marius Mikkel Kjølstad, Sören Koch, Jørn Øyrehagen Sunde, An introduction to Norwegian legal culture, in: *Comparing legal cultures*, ed. Sören Koch and Jørn Øyrehagen Sunde, Fagbokforlaget, Bergen, 2020, p. 138 ff.

19 Benedikte Moltumyr Høgberg, *Statsrett. Kort forklart*, 3rd ed., Universitetsforlaget, Oslo, 2020, p. 123.

20 See, for example, HR-2022-883-A (Paragraph 48).

21 Ibid.

22 Ibid.

years passed between the signing of the convention in 2007 and the ratification in 2013. This is because the Norwegian government considered the then applicable guardianship legislation[23] to be in conflict with Article 12 of the Convention, for two different reasons. Firstly, the legislation did not prescribe a sufficiently individually adapted guardianship but used an unadaptable two-track system instead.[24] At one extreme, a person could be fully incapacitated and subject to guardianship, which entailed a complete deprivation of legal capacity. At another extreme, a person could be given an auxiliary guardian (conservator) subject to consent, which did not entail any deprivation of legal capacity. In other words, one had no intermediate solution between these two extremes. Secondly, the legislation did not provide adequate legal security mechanisms related to the decision of a guardianship.[25]

To remedy this, the Norwegian legislators found it necessary to revise the entire guardianship scheme and draw up a new regulatory framework to implement Article 12 of the Convention in practice. This resulted in the new Guardianship Act of 2010, which brought on several important changes. As a means of securing adequate legal security mechanisms related to the decision of a guardianship, the act provided a new appeals and supervisory body for guardianship decisions named The Norwegian Civil Affairs Authority. This body supervises the county governors' discharge of responsibilities pursuant to the Guardianship Act and deals with appeals against the county governors' decisions, pursuant to § 7 of the act. This means that the responsibility now lies with a government body with broad, interdisciplinary competence.

Furthermore, the act governs three new and different measures for people who need help looking after their own interests: provisions regarding powers of attorney, provisions for a special right of representation, and a modern individually tailored guardianship.

The powers-of-attorney scheme is defined in § 78 and § 80 of the act, and is a private-law, user-controlled measure and an alternative to an officially appointed guardian.[26] The decision to establish a power of attorney and the scope of the power of attorney lies with the person who needs help himself or herself and does not affect his or her legal capacity to any extent. This is advantageous compared to a traditional guardianship because the person concerned will themselves be able to define their own needs for assistance and designate the person(s) who will provide this assistance.

If a person has not established a power of attorney or had a guardian appointed, the provisions regarding a special right of representation come into effect. This right of representation follows directly from § 94 of the act and applies to close family members of persons who due to mental illness, including dementia, or severely impaired health, are no longer able to look after their own financial interests. Hence, it is named 'legal representation'. Close family members in this respect include his or her spouse or partner, children,

23 An act relating to the declaring of a person as incapable of managing his own affairs, November 28, 1898 (Incapacitation Act), and an act relating to guardianship for persons who are legally incapable, April 22, 1927 (Guardianship Act).

24 Ot.prp.nr. 110 (2008–2009)) Om lov om vergemål (vergemålsloven) [Proposition to the Odelsting no. 110 (2008–2009) On the Guardianship Act], p. 39.

25 Ibid.

26 See Regjeringen, Norway's initial report to the committee on the rights of persons with disabilities, *The Norwegian Government's Website*, July 2, 2015, p. 26, para. 82, https://www.regjeringen.no/contentassets/26633b70910a44049dc065af217cb201/crpd-initial-report-norway-english-01072015.pdf, accessed July 23, 2022.

grandchildren and parents, who have reached the age of 18 and who are not under guardianship themselves. The order of appearance of family members in the provision is a binding priority. If a person of lower priority shall act as representant, persons of higher priority must waive their right to represent in writing. Since this legal representation is stipulated by law, a decision by the authorities is not to be made. However, contract partners may ask for documentation, e.g. a medical certificate, in order to prove that the person concerned is in such a condition as decribed by the provision. The competence assigned is narrow to avoid abuse but includes absolutely necessary dispositions, such as making financial dispositions on behalf of the family member concerning the family member's housing and daily maintenance, and providing for the payment of public taxes and loan fees. The advantage is that the need to appoint a guardian is postponed or reduced, and the person's interests are taken care of even without a power of attorney.[27] The purpose is to let the person continue with their life according to their own preferences and will. If there is a need for major changes because, for example, the family member wants to invest, move or sell an apartment or a car, then a guardian must be appointed instead.

For this purpose, and to comply with Article 12 of the CRPD, the third and final measure introduced by the Guardianship Act § 20 and 21 was a new form of 'individually tailored guardianship'. This contrasts the previous two-tracked system of either full incapacitation with deprivation of active legal capacity or an auxiliary guardian subject to consent, as it allows for the guardianship to be better adapted to the individual's diagnosis and health, future prospects and actual need for help. According to the preparatory works of the Act, the aim is to limit the guardian's mandate and ensure that the deprivation of active legal capacity is never made more extensive than necessary.[28] The guardian's responsibility is only to supplement the specific person in areas where he or she is in need of assistance so that the person – provided tailored assistance – is able to exercise his or her legal capacity to act on an equal basis with others. The person's integrity, will and preferences are the focal point.

As a consequence of this, the starting point is that a person subject to an individually tailored guardianship retain a full legal capacity to act on an equal basis with others, according to § 21 (cf. § 22 of the act). This means that the person in question may still undertake legal obligations and acquire rights, dispose of their funds and revoke dispositions made by their guardian. However, the District Court is authorised to make exceptions and deprive a person of their legal capacity to a necessary degree if certain conditions are met, pursuant to § 22 (cf. § 20 of the act. These restrictions may apply to the legal capacity to act in financial matters (cf. § 22 (2)), and/or the legal capacity to act in personal matters (cf. § 22 (3)).

In other words, the new Guardianship Act replaced the archaic two-track system with a scheme of individually tailored guardianships without deprivation of legal capacity but retained the possibility to supplement the guardianship with deprivation of legal capacity when certain conditions are met. This shows that Norway finds it to be in accordance with the CRPD to have a system where people with disabilities are deprived of their legal capacity when absolutely necessary, which is why Norway also issued a declaration

27 Ot.prp.nr. 110 (2008–2009)) Om lov om vergemål (vergemålsloven) [Proposition to the Odelsting no. 110 (2008–2009) On the Guardianship Act], p. 159.

28 Ibid., 52.

of interpretation when ratifying the Convention to clarify that Norway would fulfil the requirements of Article 12. The declaration reads as follows:

> *Norway recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Norway also recognizes its obligations to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. Furthermore, Norway declares its understanding that the Convention allows for the withdrawal of legal capacity or support in exercising legal capacity, and/or compulsory guardianship, in cases where such measures are necessary, as a last resort and subject to safeguards.*[29]

This understanding that Norway's obligations under the CRPD do not preclude restrictions on legal capacity as long as the restriction is necessary has also been confirmed by the Norwegian Supreme Court in case HR-2016-2591-A (paragraphs 53–63). In this case, the Supreme Court ruled that a woman who was a psychiatric patient should be deprived of her legal capacity in financial matters pursuant to § 22 (2) of the Guardianship Act, regardless of whether or not the provision violated the CRPD. The convention is not incorporated into Norwegian law and therefore not Norwegian law per se, and the general rule is that if the Storting has expressly stated that a national law is to be applied in a certain way without regard to whether this is in conflict with international obligations, then the courts must apply the law in that way, even if it violates these international obligations.[30] The Storting has clearly expressed how Article 12 of the CRPD is to be applied in the declaration of interpretation quoted earlier, stating that it allows for the withdrawal of legal capacity. Furthermore, the provision was also found to not violate article 102 of the Constitution or article 8 of the ECHR. Thus, the woman could be deprived of her legal capacity when the conditions for this were met, without regard of Article 12 or other provisions.

However, there is an ever-increasing discussion among Norwegian legal scholars and other professionals in the field whether the Norwegian scheme of guardianship and deprivation of legal capacity must be changed because it violates Article 12 of the Convention, as it compromises persons with disabilities right to self-determination and autonomy to an excessive degree. The Equality and Anti-Discrimination Ombud is among those who have been critical. They advocate that the traditional guardianship must be abolished because in practice, decisions are made based on what the guardian believes to be the most sensible and best solution, and the guardian has the final say.[31] Therefore, they think that the Norwegian guardianship scheme must be replaced with a system for supported decision-making to comply with Article 12 of the Convention. The idea is that persons

29 United nations treaty collection, Convention on the rights of persons with disabilities, *The United Nations Treaty Collection's Website*, May 3, 2008, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-15.en.pdf, accessed July 23, 2022. The Norwegian declaration of interpretation is found on p. 10.

30 HR-2016-2591-A (paragraph 60-62), with further reference to Ot.prp.nr.79 (1991–1992) Om lov om gjennomføring i norsk rett av hoveddelen i Avtale om Det europeiske økonomiske samarbeidsområde (EØS), mv. [Proposition to the Odelsting no. 79 (1991–1992) On the Act on the implementation in Norwegian law of the main part of the Agreement on the European Economic Area (EEA), etc.] and Rt-2000-1811 (Finanger I).

31 Report from The Equality and Anti-Discrimination Ombud, The right to self-determination – from guardianship to decision support, *The Equality and Anti-Discrimination Ombud's Website*, 2021, https://www.ldo.no/globalassets/_ldo_2019/_bilder-til-nye-nettsider/rapporter/ldo_retten_til_selvbestemmelse_elektronisk_utgave.pdf, accessed July 13, 2022.

with disabilities and other challenges shall receive adequate support to exercise their right to self-determination but retain their legal capacity to act and only receive help to act on the basis of their own will and preferences. In other words, the goal is to move away from the paternalistic thinking where the disabled person must be controlled and cared for and establish a system that to a greater extent facilitates rather than intervenes in the right to self-determination.

Others who support this view and criticise the current guardianship scheme include the Norwegian Association for Persons with Intellectual Disabilities (NFU),[32] professor Bjørn Henning Østenstad,[33] and a committee appointed by Royal Decree on October 3, 2014, to analyse and assess what changes are necessary to ensure the fulfilment of the fundamental rights of people with developmental disabilities.[34] The committee concluded that the Guardianship Act is discriminatory and consequently violates the CRPD because the authority to deprive someone of their legal capacity is directly linked to a medical diagnosis or disability. Furthermore, it found that the legislation does not ensure that people with developmental disabilities receive sufficient support to exercise their right to self-determination.[35] On this basis, the committee proposed several different measures to bring Norwegian legislation in accordance with the Convention, including to replace the guardianship scheme with a system for decision support, and to change the legal conditions for deprivation of legal capacity by no longer basing the decision on a diagnosis but a concrete assessment of whether a person has decision-making ability in a given situation (a function test).[36]

It remains to be seen in the future whether the Norwegian authorities choose to follow these recommendations, or whether the Norwegian guardianship system will remain unchanged. As of today, the status is that the legislation allows for deprivation of legal capacity for disabled people when certain conditions are met and that this has been found in accordance with Article 12 of the CRPD by the Norwegian Supreme Court.

It also remains to be seen whether the convention will be incorporated into Norwegian law and thus made Norwegian law per se. A proposal to incorporate the Convention in the Human Rights Act has been up for discussion in the Storting on three separate occasions, most recently in March 2021 where it was voted down by 42 votes to 45.[37] This shows a clear development towards incorporation, as the proposal only received 8 votes in the previous deliberations. The current government has stated in its platform that it will incorporate CRPD into Norwegian law, and it is expected that necessary legal assessments and recommendations regarding implementation will be completed by the end of 2023.

Finally, it remains to be seen whether the Norwegian Storting ultimately decides to ratify the Optional Protocol to the UN Convention on the Rights of Persons with Disabilities.

32 Jens Petter Gitlesen, A law on decision support, *The Norwegian Association for Persons with Intellectual Disabilities's Website*, September 30, 2017, https://www.nfunorge.org/Om-NFU/NFU-bloggen/en-lov-om-beslutningsstotte/, accessed July 13, 2022.

33 Bjørn Henning Østenstad, Individtilpassa verjemål – er vi i mål? *Tidsskrift for familierett, arverett og barnevernrettslige spørsmål*, 2016, vol. 14, no. 4, pp. 227–231.

34 NOU 2016: 17 På lik linje – Åtte løft for å realisere grunnleggende rettigheter for personer med utviklingshemming [Norwegian Official Report 2016: 17 On an equal footing – Eight lifts to realize fundamental rights for people with developmental disabilities], pp. 137–139.

35 Ibid., 181.

36 Ibid., 181–184.

37 See Innst. 267 S (2020–2021) [Recommendation to the Storting no. 267 S (2020–2021)].

The Norwegian authorities are increasingly reluctant to transfer power to international enforcement bodies, and do not want legalisation of issues that are considered political. Consequently, an interesting and prominent feature of the Norwegian ratification and implementation of the Convention is that Norway has not yet ratified the Optional Protocol. Given the growing number of politicians who are in favour of incorporating the Convention and how all the proposals that have been up for a vote in the Storting to incorporate the convention have also included proposals to ratify the Optional Protocol, it is not unlikely that the Optional Protocol will also be ratified at a later date.

3. The role of psychology, psychiatry and neurology when implementing Article 12 of the UN Convention on the Rights of Persons with Disabilities in Norway

An important part of the implementation work was done by the so-called Guardianship Committee. Prior to and regardless of the adoption of the UN Convention on the rights of persons with disabilities by the UN General Assembly in 2006, a new and independent committee was appointed by Royal Decree of April 6, 2001, to revise the Norwegian Act of November 28, 1898, on incapacitation and the act of April 22, 1927, No. 3 on guardianship of minors. Initially, their task was to carry out a fundamental review and modernisation of these outdated laws to improve the legal security of those whom the laws aim to protect, but after 2006 they were also heavily involved in the implementation of Article 12 of the CRPD into Norwegian law. More specifically, they drafted the preparatory work that was sent out to several different stakeholders for input and eventually formed the basis for the new Guardianship Act of 2010.[38]

The committee consisted of a number of prominent professionals with diverse backgrounds. These were Peter Lødrup, professor of law at the University of Oslo and head of the committee; Regine Ramm Bjerke, a judge at the Borgarting Court of Appeal; Eirik Bunæs, department director of the Norwegian Financial Supervisory Authority; Sidsel Grasli, leader of the Norwegian Association for the Mentally Handicapped; Anne Margrete Grøsland, an advisor for the organisation Save the Children; Dr. Bjarne A. Waaler, professor at the University of Oslo; Marianne Lianes, a public trustee at the Public trustee's office in Molde; and Odd J. Pettersen, a former public trustee. Professor Dr. Bjarne A. Waaler specialised in physiology, the study of how the human body works. Hence, none of the committee members who helped shape the new law were trained psychologists, psychiatrists or neurologists.

However, input from these occupational groups were still obtained during the hearing for the Norwegian Official Report NOU 2004: 16, where all relevant stakeholders were given the opportunity to comment on the preparatory work. The Norwegian Psychological Association and the Norwegian Psychiatric Association were among those asked to contribute.[39] Their point of view is admittedly not explicitly reflected in the preparatory work and the bill that followed the NOU 2004: 16,[40] but there may be several dif-

38 NOU 2004: 16 Vergemål [Norwegian Official Report 2004: 16 on Guardianship].

39 See Ot.prp.nr. 110 (2008–2009)) Om lov om vergemål (vergemålsloven) [Proposition to the Odelsting no. 110 (2008–2009) On the Guardianship Act], p. 14, which provides an overview of which public bodies, organisations and agencies that recieved the NOU 2004: 16 to give their input.

40 Ibid.

ferent reasons for this. The associations may not have had any major objections to the preparatory work, or their input may already be represented by other stakeholders. For example, the National Association for the Mentally Handicapped and Relatives provided several objections, more specifically regarding the issue of consent connected to the legal conditions for establishing a guardianship and regarding the committee's proposal that deprivation of legal capacity shall be decided by the district court.[41] This may have reduced the need to explicitly express the views of the Norwegian Psychological Association and the Norwegian Psychiatric Association but does not automatically mean that they have not made valuable and significant contributions.

Furthermore, Dr. Marja Sigurd-Jonsdottir, chief physician and psychiatrist, and Dr. Anne Brækhus, a specialist in neurology and chief physician at the Department of Neurology and the Memory Clinic at Oslo University Hospital and at the National Center for Aging and Health, participated in a separate phase of the preparatory work which concerned the need for special solutions for active, adult people subject to guardianship.[42] This group consists of people over the age of 18 who to a greater or lesser extent during all or parts of their lives need help to manage their funds or to look after their personal interests but who, in contrast to the group of passive people in need of guardianship, are able to actively oppose their own interests regardless of their diagnosis or disability. To much criticism from different consultative bodies, the Guardianship Committee did not propose any special provisions for this group. Therefore, the Ministry of Justice held a formal meeting on June 14, 2006, to discuss what type of problems this group typically encounters and what solutions should be considered. The said Dr. Marja Sigurd-Jonsdottir and Dr. Anne Brækhus attended the brainstorming session and may have provided valuable input, but the meeting did not result in any concrete separate set of rules.

To briefly summarise, it is somewhat unclear what role psychology, psychiatry and neurology has played in the implementation of the CRPD Article 12 in Norway. Members of these professions have clearly provided input to the preparatory work and thus helped to shape the new guardianship scheme, but none of these professions were directly involved in the committee that drafted the new law. Moreover, their point of view is not explicitly expressed in the preparatory documents. Therefore, it is unclear to what extent the stance of psychologists, psychiatrists and neurologists were obtained and taken into account during the legislative process, although it is clear that they have contributed.

4. The statutory conditions for being subject to guardianship and deprived of active legal capacity in Norway

In Norway, the various conditions for being subject to guardianship and deprived of legal capacity to act are laid down in law issued by the Norwegian Storting. Before the CRPD was ratified and implemented, § 1 of the Incapacitation Act of 1898[43] provided three separate legal grounds for people to be placed under guardianship and thus deprived of their active legal capacity: first, when a person, due to mental illness, alcoholism or destructive use of morphine or other intoxicants or narcotics, lacked the ability to take care of themselves or their property (cf. § 1 (1)); second, when a person, due to blindness,

41 Ibid., 47, 57.
42 Ibid., 43.
43 Incapacitation Act November 28, 1898.

inability to speak or other physical infirmity or fragility, lacked the ability to take care of themselves or their property and consented to the guardianship, or this was considered necessary to protect them from demonstrable danger of selfish pursuits of others (cf. § 1 (2)); third, when a person, by drinking, gambling, other extravagances, or clear unwise conduct, destroyed or wasted their property in a manner that would or most likely would put themselves or their families in difficulties if they were not placed under guardianship (cf. § 1 (3)).

Today, after the implementation of the CRPD, Article 12, in Norway through the new Guardianship Act, the legal situation regarding deprivation of active legal capacity is different. Being subject to guardianship no longer automatically means that you are deprived of your active legal capacity. If a person is to be deprived of their legal capacity, he or she must first be subject to an individually tailored guardianship by fulfilling the statutory conditions governing this scheme. Thereafter, the person must also fulfil the statutory conditions for being deprived of his or her active legal capacity.

The conditions for being subject to guardianship are set forth in § 20 of the new Guardianship Act of 2010. According to the first paragraph, a person who has reached the age of 18 may be placed under guardianship if he or she is unable to look after their interests due to mental illness, including dementia, mental retardation, substance abuse, severe gambling addiction or severely impaired health and if guardianship is deemed necessary. In addition, the person who is placed under guardianship must give written consent to the decision of the guardianship, the scope of the guardianship and who is to be the guardian, unless he or she is unable to understand what a consent entails or the guardianship includes deprivation of legal capacity (cf. the second paragraph).

The conditions for being deprived of legal capacity are set forth in § 22. The guardianship can include restrictions on the legal capacity to act in financial matters if this is necessary to prevent him or her from putting their wealth or other financial interests at the risk of being significantly impaired, or he or she is being financially exploited in an improper manner (cf. § 22 (2)). The deprivation may be limited to certain assets or certain dispositions. Furthermore, the guardianship can include restrictions on the legal capacity to act in personal matters if there is significant risk that the person will act in a manner that may be materially detrimental to his or her interests (cf. § 22 (3)).

In summary, the statutory conditions for being subject to guardianship and deprived of active legal capacity are essentially the same after the CRPD was ratified and implemented in Norway as before. The decisive factor is whether the person in question due to certain specified diagnoses or his or her mental condition in general lacks the ability to take care of themselves or their property, and whether guardianship and/or deprivation of legal capacity is necessary to protect said person's interests. Having a disability is a common reason these statutory conditions are met but not in itself sufficient.

5. The legal process for being subject to guardianship and deprived of active legal capacity in Norway

The actual decision on whether the statutory conditions for being subject to guardianship and deprived of legal capacity has been attributed to various competent bodies throughout Norwegian history. Before the CRPD was ratified and implemented in Norway, it was first allocated to a separate Norwegian guardianship court. Even though a separate court, the same judges as in the ordinary courts took seat. Later, it was reallocated to the ordinary district courts (cf. § 2 of the Incapacitation Act) consisting of one professional judge and

two lay judges. Every case started with a motion to incapacitate. This could be put forward by the person in question himself or herself if he or she was of age, as well as by his or her guardian, spouse, relatives in ascending or descending line, siblings and equally close relatives (cf. § 3 of the act). In addition, a decision to incapacitate could also be requested by the county governor and the public trustee's office (cf. same).

The procedural rules applicable in incapacitation cases were different from the procedural rules applicable in ordinary civil cases.[44] The principle of party disposition did not apply because the public has a special interest in making materially correct decisions when deciding such serious matters.[45] Therefore, the judge had a duty to ensure that the case was as well explained as possible (cf. § 6 of the Incapacitation Act). Witnesses had to be questioned, and it was the court's duty to ensure that an expert opinion was obtained if such a statement did not already exist. The court also had the opportunity to request assistance from the police if this was necessary to obtain sufficient information about the case (cf. § 6).

However, the court's duty to gather information did not apply if the motion to incapacitate was put forward by the person in question himself or if he or she was admitted to a psychiatric hospital and the chief attending physician had submitted a statement saying that the person was unable to take care of his or her own interests due to mental illness (cf. § 5 of the Incapacitation Act). In these situations, the request for incapacity could be readily granted. Furthermore, the court could also reject the motion without further investigation if the legal grounds stated were inadequate to justify incapacitation pursuant to the Incapacitation Act. In other words, the court could settle for a summary hearing.

Other procedural requirements included that a statement from a doctor regarding the grounds for incapacity had to be obtained before the main hearing was scheduled (cf. § 7 of the Incapacitation Act). In addition, the court had to notify both the person who put forward the motion to incapacitate and the person who was requested to be incapacitated, so that he or she could get legal representation or communicate his or her views (cf. § 10).

The court made its decision by ruling, cf. § 14, and not by judgment, as was the general rule when a court decides on the merits of the case (cf. the Civil Procedure Act of 1915, § 137).[46] The court's ruling came into force immediately (cf. § 14, second paragraph) in contrast to most judicial decisions which only came into force when they could no longer be opposed with ordinary legal remedies.

The main legal remedy was the right to appeal. Regardless of whether the court's decision resulted in incapacitation, rejection of the motion or revocation of a guardianship, it was always subject to appeal (cf. § 15 of the Incapacitation Act). The appeal was submitted to the Court of Appeal, in accordance with the general rules of the Civil Procedure Act of 1915. Both the incapacitated person, his guardian and the one who put forward the motion to incapacitate had the right to appeal, depending on the result (cf. § 15 (2)).

44 Regarding the principle of party disposition, see Jens Edvin, A. Skoghøy, *Tvisteløsning*, 3rd ed., Universitetsforlaget, Oslo, 2017, pp. 570–572; Act relating to mediation and procedure in civil disputes (The Dispute Act) 17 June 2005 no. 90 § 11–2 (1) (2) on whether it is the parties or the court (or both) that are responsible for presenting evidence to enlighten the case.

45 Ot.prp.nr. 110 (2008–2009)) Om lov om vergemål (vergemålsloven) [Proposition to the Odelsting no. 110 (2008–2009) On the Guardianship Act], p. 132.

46 Act on the procedure for civil cases (the Civil Procedure Act) August 13, 1915 no. 6.

Furthermore, the decision of the Court of Appeal could be appealed to the Norwegian Supreme Court.

Another legal remedy was the right to have the case tried again in accordance with § 31 ff. of the Incapacitation Act, regardless of the result. This applied even if the incapacitated person was unable to bring legal action on his own regarding other legal matters. If the prerequisites for a new trial were met, the court had to rule based on the facts and circumstances at the time of the ruling. In other words, the court had to make a new legal assessment of whether the conditions for incapacity were still met.

With the ratification and implementation of the CRPD through the new Guardianship Act of 2010, the Norwegian authorities intended to strengthen the aforementioned legal security mechanisms that safeguard those who are subject to guardianship. This is explicitly stated in the preparatory works of the act.[47] Therefore, the act brought about extensive changes in the structure and organisation of the Norwegian guardianship scheme, especially concerning which bodies have the competence to rule in guardianship cases.[48]

Regarding guardianship cases where the person in question is not deprived of his legal capacity to act, the local authority to impose guardianship was transferred from the district courts to the county governors (cf. § 55 of the Guardianship Act of 2010). Furthermore, the Norwegian Civil Affairs Authority was appointed as the central guardianship authority. This body supervises the county governors' execution of responsibilities pursuant to the Guardianship Act and handles appeals against the county governors' decisions (cf. § 64). This means that the responsibility for guardianship cases of this nature now lies with a government body with broad, interdisciplinary competence.

Regarding guardianship cases where the person in question does get his legal capacity to act deprived or restricted, the county governor now has the authority to temporary deprive someone of their legal capacity if the conditions put forth in § 22 are presumed to be met. However, the general authority to permanently rule still lies with the district courts (cf. § 68 of the Guardianship Act of 2010). This is because restriction or deprivation of legal capacity is a significant breach of someone's personal autonomy and therefore requires the security mechanisms that legal proceedings before the courts entail.[49] With the same reasoning, the district courts also have the final say in the county governors' decisions on guardianship pursuant to § 55 and requests for revocation pursuant to § 63 (cf. § 68 (2)). In other words, the district court acts as a final appeal body regarding all guardianship decisions. They decide by judgment, not by ruling as before (cf. § 73 (1) of the Guardianship Act of 2010).

In our view, this division of power between the courts and the county governors ensures that guardianship cases are predominantly decided by a local government body with broad, interdisciplinary competence but also allows the courts to control that no one is deprived of their legal capacity or put under guardianship in a more extensive degree than their individual situation requires.

47 NOU 2004: 16 Vergemål [Norwegian Official Report 2004: 16 on Guardianship], p. 22.

48 Eldbjørg Kluften, Kort om den nye vergemålsloven, *Tidsskrift for familierett, arverett og barnevernrettslige spørsmål*, 2012, vol. 10, no. 1, pp. 51–64.

49 NOU 2004: 16 Vergemål [Norwegian Official Report 2004: 16 on Guardianship] p. 22; Ot.prp.nr. 110 (2008–2009)) Om lov om vergemål (vergemålsloven) [Proposition to the Odelsting no. 110 (2008–2009) On the Guardianship Act], p. 131; Eldbjørg Sande, Trine Eli Linge og Mona Choon Rasmussen, *Vergemålsloven og utlendingsloven kapittel 11 a med kommentarer*, Gyldendal Norsk Forlag, Oslo, 2017, p. 577.

Apart from this, most of the fundamental principles regarding the decision of a guardianship remain unchanged from before the ratification and implementation of the CRPD. A request for guardianship can be put forward by both the person in question himself or herself, his or her spouse or partner, relatives in ascending or descending line, siblings, a guardian if he or she is already subject to guardianship, and a treating or supervising doctor if he or she is committed to a hospital (cf. § 56 of the Guardianship Act of 2010). Furthermore, the principle of party disposition does not apply in any court proceedings, so the court must ensure that the case is as well informed as possible (cf. § 71 (5) of the Guardianship Act of 2010).

The main legal remedy remains the right to appeal. The county governor's decision may be appealed to the Norwegian Civil Affairs Authority by the person put under guardianship, by his or her guardian, by the person who requested the guardianship and by those who may request guardianship pursuant to § 56 (1) (b) (cf. § 64 of the Guardianship Act of 2010). The court's judgment may be appealed by the same category of individuals (cf. § 73 of the Guardianship Act of 2010) – first to the Court of Appeal and then to the Supreme Court, like before.

There is no system of automatic review. If the conditions no longer are fulfilled, or if there has been a major shift of the factual circumstances, a decision of guardianship may be repealed or changed (cf. § 63 of the Guardianship Act of 2010). If the guardianship is based on consent and the consent is withdrawn, the guardianship shall be lifted. If the guardingship is established by judgement by the court, request for revision is to be made by lawsuit. However, the county governor may, under certain conditions, lift a guardianship even if established by judgement.

Since legal remedies may call for legal expertise to exercise them, some explanations regarding the system of legal aid are appropriate. Free legal aid means that the authorities cover expenses for legal advice and proceedings in certain cases. The scheme is regulated in the Norwegian Act on Free Legal Aid[50] and aims to ensure that people who do not have the financial means to meet their need for legal aid in matters of great personal and welfare importance still get necessary legal assistance. Cases on deprivation of legal capacity are one of the areas covered. Free legal aid shall be granted regardless of the applicant's income and assets for anyone who is put on trial to be deprived of their legal capacity and anyone who themselves request a decision on deprivation of legal capacity revoked under the Guardianship Act, according to the Free Legal Aid Act, § 16 (1) (5).

6. The assistance provided by the guardian and to what extent persons with disabilities themselves have the ability to complete legal acts when subject to guardianship and deprived of their legal capacity to act

Norwegian guardianship legislation has always been based on the fundamental principle of using the 'least restrictive means', meaning that the interference with the person's right to self-determination and autonomy shall not be more extensive than necessary.[51] In cases regarding incapacitation before the CRPD was ratified and implemented in Norway, this was confirmed as a rule of law in a Supreme Court judgment from 1982. Incapacitation

50 Free Legal Aid Act June 13, 1980 no. 35.

51 Ot.prp.nr. 110 (2008–2009)) Om lov om vergemål (vergemålsloven) [Proposition to the Odelsting no. 110 (2008–2009) On the Guardianship Act], p. 49.

could not be decided where less intrusive measures were sufficient (cf. Rt-1982–1776). Today, after the ratification and implementation of the CRPD, the principle is explicitly laid down in § 21 (3) (2) of the new Guardianship Act. Moreover, it also pervades the entire modern guardianship scheme, with individually tailored guardianships.

As a result, the fundamental starting point is that each guardianship imposed under Norwegian law is individually tailored. The purpose is to assist the person in areas where help is needed, but not to a greater extent than necessary.[52] Therefore, it is specified directly in the act that each decision on guardianship must be individually tailored, explicitly state the guardian's mandate in object and time, and not be made more extensive than the situation requires, according to § 21 (3). The aim is for the guardianship to be a supplement, enabling the person to exercise his or her legal capacity on an equal footing as everyone else (cf. § 21 (1) (2)). Therefore, the person being subjected to guardianship must himself of herself give written consent to the establishment and the scope of the guardianship and to who is appointed as guardian, unless he or she is not able to understand what consent entails or is deprived of his or her legal capacity (cf. § 20 (2)). Furthermore, the clear general rule is that the guardian cannot make dispositions to which the person in need of assistance is opposed (cf. § 21 (1) (3)).

The mandate may include both financial and personal matters (cf. § 21 (2)). Financial matters refer to handling the person's income, expenses, debt, real estate through renting or selling, running a business and other similar activities. Personal matters include all endeavors and forms of representation beyond the purely financial, such as applying for services and benefits from the municipality or the state and appealing against decisions taken by administrative bodies. The mandate includes what is necessary. This was also the case before the ratification and implementation of the convention (cf. § 38 and 39 of the Guardianship Act of 1927), but at that time the legislation was primarily designed to safeguard the financial interests of those placed under guardianship. The general rule was that the guardian should act on behalf of the incapacitated person in financial matters and that the guardian should manage his funds. Therefore, an incapacitation did not in principle mean that the incapacitated person lost his or her ability to act in personal matters. However, if the person in question was unable to properly care for himself, the guardian had to do so. Thus, the law also did allow for the guardian to act on behalf of the incapacitated person in personal matters.

Today, however, after the ratification and implementation of the convention, the guardian's mandate is limited in particularly personal matters. The mandate can never include the competence to vote in elections, enter into marriage, acknowledge paternity, consent to the donation of organs, create or revoke a will, consent to coercion or act in other very personal matters (cf. § 21 (3)). Thus, not all personal competences can be transferred to a guardian. Even if a person is deprived of legal capacity in all personal matters, he or she will still retain a full legal capacity in the aforementioned areas. In addition, the person subject to guardianship will always have a 'residual legal capacity to act', according to § 23 of the act. This includes the right to enter into employment contracts, dispose of self-employed funds, and enter into agreements related to the household and possible upbringing of children, in accordance with § 10 to § 13, respectively.

Who is appointed guardian varies from case to case. He or she must be suitable for the position and must consent to the appointment (cf. § 25 of the Guardianshop Act).

52 NOU 2004: 16 Vergemål [Norwegian Official Report 2004: 16 on Guardianship], p. 23.

There are four categories of guardians currently in use in Norway. The most common solution is that a close relative is appointed, such as spouses, partners or cohabitants, children, parents or siblings. This is advantageous because close relatives often have better insight into what the person in question needs and wants compared to a stranger. If a close relative does not exist or is willing to be appointed, the competent authority tries to find a guardian among others who surround the person – for example, more peripheral relatives or others. Next, the third option is to appoint a guardian from a body of regular, professional guardians. Finally, authorised lawyers can be guardians, but the new act aims to restrict the use of lawyers as guardians to situations where there is a need for legal expertise.[53]

If a person in addition to being subject to an individually tailored guardianship is also fully or partially deprived of his/her legal capacity to act, then the scope of the guardian's mandate and the assistance provided becomes more comprehensive. It is no longer just a matter of helping the person exercising his or her legal capacity themselves, and the clear and fundamental rule that the guardian cannot make dispositions to which the person in need of assistance is opposed does no longer apply. On the contrary, a person who has been deprived of his legal capacity in a specific area can no longer freely take legal action or dispose of his or her funds in the area in question (cf. § 23). Do, however, note that the guardian must still attach weight to the views of the person (cf. § 33 (2)), and any spouse or cohabitant must be allowed to have a say. If the person disagrees with the guardian's decision, he or she may bring the issue before the county governor (cf. § 33 (2) (2)).

To summarise, it is a delicate and demanding endeavor to find the right balance between providing adequate assistance to persons with disabilities in need of help with financial or personal matters without compromising their right to self-determination and personal autonomy to an intolerable degree. The right to self-determination is important and strong, but it is also important to provide a safe form of help to those who need it to navigate their everyday life. If not, they risk losing rights or benefits they are entitled to and being exploited by others who do not have their best intentions at heart. Therefore, it is important to have a public system with a clear framework to support those who are not able to adequatly take care of their own interests. In Norway, it is the guardianship scheme and the possibility to deprive someone of their legal capacity that constitute such a system, together with other public healthcare programs and benefits. Whether or not this is the best way to balance the right to self-determination and the need for help is disputed, but to this date, no other alternatives have been launched by the Norwegian authorities besides the previously mentioned scheme of private-law, user-controlled powers of attorney (cf. § 78 and § 80 of the Guardianship Act).

7. The legal result if a disabled person who is subject to guardianship and has had his or her legal capacity reduced or deprived acts beyond his or her legal capacity

Before the CRPD was ratified and implemented in Norway, the legal results of a legal act excercised by a person beyond the scope of his or her legal capacity to act was regulated in

53 Ot.prp.nr. 110 (2008–2009)) Om lov om vergemål (vergemålsloven) [Proposition to the Odelsting no. 110 (2008–2009) On the Guardianship Act], p. 185.

§ 36 and 37 of the Guardianship Act of 1927. The general rule was that if an incapacitated person entered into an agreement beyond the scope of his legal capacity to act, and the agreement was not yet validly fulfilled, the other party could withdraw from the agreement according to § 36. However, if the other party knew that the incapacitated person lacked the legal capacity to act, he could not withdraw from the agreement until after it was expired, unless the guardian refused to approve the agreement during that time. Nor could the other party withdraw from an agreement regarding the employment of the incapacitated person, as long as the person in question fulfilled his work obligations.

The effect of an agreement being deemed invalid, or of the other party being allowed to withdraw from the agreement pursuant to § 36, was regulated in § 37. Each of the parties had to return what was received. If this was not possible, they had to replace the value. However, the incapacitated person was not obliged to replace what he had received to a greater extent than it had benefited him.

After the ratification and implementation of the CRPD, the situation is regulated in §§ 14 and 15 of the Guardianship Act of 2010 (cf. § 24). If a person deprived of his legal capacity to act disposes of money that he or she has in his or her possession, the other party can enforce the agreement even if the disposal goes beyond the person's legal capacity to act (cf. § 14 (1)). However, this does not apply if the other party knew that the person lacked the right to dispose of the money or the other party was not as careful as he or she should be given the circumstances.

Regarding other general agreements, the guardian and the county governor can approve the disposition if they see it fit (cf. § 14 (2)). An approved disposition is legally binding from the moment the disposition was made. To remedy this, the other party can declare himself unbound of the agreement but only if he did not understand and should not have understood that the person in question lacked the legal capacity to enter into the agreement (cf. § 14 (3)). If he did understand or should have understood, he can only relinquish his obligations after the expiry of the deadline stipulated in the agreement (cf. § 14 (4)). Nor can the other party withdraw if the agreement has already been fulfilled with binding effect (cf. § 14 (3)).

As before, the effect of an agreement not being legally binding for the person lacking legal capacity to act is that each of the parties must return what they have received (cf. § 15 (1)). If this is not possible, they must replace the value. However, the person in question is still not obliged to replace what he has received to a greater extent than it has benefited him. In addition, if the person has given incorrect information regarding his legal capacity to act and thereby misled the other party, he may be subject to liability and forced to compensate the loss to a reasonable extent (cf. § 15 (2)).

Shortly summarised, no major substantial changes have taken place regarding these questions since the ratification and implementation of the CRPD in Norway.[54] The general rule is still that the agreement is invalid without the consent of the guardian or the county governor. If consent is given, the other party may withdraw from the agreement unless he or she knows or should have known that his counterpart lacks the legal ability to act and undertake obligations, or the agreement is fulfilled.

54 Eldbjørg Kluften, Kort om den nye vergemålsloven, 10(1) *Tidsskrift for familierett, arverett og barnevernrettslige spørsmål*, 2012, vol. 10, no. 1, pp. 51–64.

8. Active legal capacity of the persons with disabilities and its restrictions in the light of statistical data before the UN Convention on the Rights of Persons with Disabilities was ratified and afterwards

The guardianship reform that followed the ratification and implementation of the UN Convention on the Rights of Persons with Disabilities entered into force on July 1, 2013, through the aforementioned Guardianship Act of 2010. As of July 1, 2013, approximately 250 persons were registered as having been deprived of their legal capacity to act in Norway.[55] By July 1, 2016, all these cases were reviewed as required by the new Act. The majority of the reviews resulted in the decision on deprivation of legal capacity either being amended to guardianship without deprivation of legal capacity or fully annulled, meaning that the person no longer had a guardian. In the remaining cases, the decision to retain the deprivation of legal capacity were brought before the district court.

However, the figures regarding how many people have been deprived of their legal capacity in Norway have remained stable since the new act entered into force in 2013. By January 2015, less than 250 persons were registered as being subject to partial or full restrictions on their legal capacity to act.[56] This accounted for less than 0.7% of a total of 36,200 registered guardianships for adults. By 2019, five years after the ratification and implementation of the Convention and the entry into force of the new Guardianship Act, approximately 42,000 adults were subject to guardianship – around 20,500 women and 21,600 men.[57] Of these, approximately 220 persons were also partially or completely deprived of their legal capacity. Today, the number is approximately 300 persons, out of a total of 42 000 who are subject to guardianship.[58] These figures show us that the reform of the guardianship system and the implementation of the Convention have not had much impact on the number of deprivations of legal capacity – this is still imposed when absolutely necessary, but only then.

Regarding the reason people in Norway are deprived of their legal capacity, little or no statistics are kept that differentiates between different types of disabilities. The largest groups appear to be persons with intellectual disabilities, dementia or other mental illnesses, but the statistical breakdown by type of disability is uncertain.[59]

55 United Nations Human Rights Bodies, Replies of Norway to the list of issues (CRPD/C/NOR/Q/1/Add.1, The United Nations Human Rights Bodies' website, January 21, 2019, pp. 7–8, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fNOR%2fQ%2f1%2fAdd.1&Lang=en, accessed July 23, 2022.

56 See Regjeringen, Norway's initial report to the committee on the rights of persons with disabilities, *The Norwegian Government's Website*, July 2, 2015, p. 29, para. 91, https://www.regjeringen.no/contentassets/26633b70910a44049dc065af217cb201/crpd-initial-report-norway-english-01072015.pdf, accessed July 23, 2022.

57 United Nations Human Rights Bodies, *Replies of Norway to the list of issues*, CRPD/C/NOR/Q/1/Add.1, The United Nations Human Rights Bodies' Website, January 21, 2019, pp. 7–8, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fNOR%2fQ%2f1%2fAdd.1&Lang=en, accessed July 23, 2022.

58 Statens Sivilrettsforvaltning, *Årsmelding Vergemål 2021*, Vergemal.no, 2021, https://www.vergemal.no/arsmeldinger-paa-vergemaalsomraadet.6084938-447438.html, accessed July 23, 2022.

59 United Nations Human Rights Bodies, *Replies of Norway to the list of issues*, CRPD/C/NOR/Q/1/Add.1, The United Nations Human Rights Bodies' website, January 21, 2019, pp. 7–8, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fNOR%2fQ%2f1%2fAdd.1&Lang=en, accessed July 23, 2022.

9. The relations between private law restrictions of active legal capacity and protection of persons with disabilities under criminal law (against crimes which can be committed as a result of doing legal acts)

There is no provision in the Norwegian Penal Code of 2005[60] that specifically applies to the situation when a disabled person is misled to conclude a contract outside the scope of their legal capacity to act. Nevertheless, there are other provisions in the Penal Code that provide protection, both when a disabled person is exposed to crime and when a disabled person commits a crime himself or herself.

The most general rule is the penal provision regarding fraud. Fraud is punishable pursuant to § 371 of the Penal Code and applies to any person who, with intent to obtain an illicit gain for himself, herself or others' causes, strengthens or exploits a mistaken belief and thereby deceives someone into doing or omitting to do something by which someone suffers a loss or risks a loss (cf. § 371 (2) (a)).

Another prominent rule applies when sentencing a criminal act. In sentencing, it shall be considered as an aggravating circumstance that the offense in question was perpetrated by the offender exploiting or misguiding a person who is mentally disabled or in a dependent relationship with the offender (cf. § 77 (g) of the Penal Code). This provision applies to all offences, and thereby strengthens the protection of disabled people and works to prevent crimes committed against this group.

Finally, there is a set of rules of great practical importance that apply to the situation when the perpetrator himself or herself is a disabled person. A mental disability at the time of the crime can mitigate or fully remove criminal accountability (cf. respectively § 78 (d), § 80 (f) and § 20 of the Penal Code).

The most defining rule is § 20, regarding criminal accountability. A person who at the time of the act suffers from *severe* mental disability is not criminally liable per Norwegian law (cf. § 20 (2) (c)). This means that the person in question is exempt from criminal responsibility for his or her actions and therefore cannot be sentenced to ordinary imprisonment.[61] However, if a person is criminally unaccountable for their actions but has committed certain serious breaches of the law, he or she may nonetheless be sentenced to a special sanction on specific conditions. Under Norwegian criminal law, there are two special sanctions currently in use: committal to psychiatric care (cf. § 62) and committal to compulsory care (cf. § 63).[62]

Committal to psychiatric care can be imposed by court order on an offender who is criminally unaccountable pursuant to § 20, second to fourth paragraphs, when three cumulative statutory conditions are met (cf. § 62 (1)). First, he or she must have committed or attempted to commit an offence that violates another person's life, health or freedom or that might endanger these legal interests. Second, the special sanction must be necessary to protect society. Third, the risk of another serious violation of someone's integrity must seem likely. In addition, there are other, alternative conditions that may entail psychiatric care. An offender who is exempt from criminal liability pursuant to § 20, second to fourth paragraphs, may also be committed to psychiatric care by court order when he or she has committed repeated offences that are harmful to society or particularly bothersome, the special sanction is necessary to protect society against such offences, the

60 The Penal Code Act May 20, 2005 no. 28.

61 Johs. Andenæs et al., *Alminnelig strafferett*, 6th ed., Universitetsforlaget, Oslo, 2016, p. 290.

62 Magnus Matningsdal, *Nytt i ny straffelov*, Universitetsforlaget, Oslo, 2015, p. 89.

risk of further offences of the same type seems particularly likely, and other measures have proven clearly unsuitable (cf. § 62 (2)).

Committal to compulsory care by court order is largely dependent on the same conditions as committal to psychiatric care, but particularly applies to severely mentally disabled offenders.[63] Like committal to psychiatric care, the same three cumulative statutory conditions specified in § 62 must be met. The offender must be exempt from criminal liability due to psychological deviations, have committed or attempted to commit a particularly serious crime, the special sanction must be necessary to protect society, and there must be a risk of recidivism. The difference lies in the reason that the person is exempt from criminal liability. To be sentenced to committal to psychiatric care pursuant to § 62, the offender must have been psychotic or unconscious at the time of the act (cf. § 20 (a) and (b)). To be sentenced to committal to compulsory care pursuant to § 63, the offender must have been severely mentally disabled (cf. § 20 (c)).

The purpose of introducing these two special sanctions is clear. The legislative aim is to protect society where there is an extraordinary danger that a severely mentally disabled offender will again commit serious violent crime, while at the same time helping the offender instead of punishing him or her.[64] The underlying principle is that the well-being and security of seriously mentally ill and disabled people is subject to the health services responsibility, also when they have committed a criminal offense or pose a danger to other interests in society. Therefore, the healthcare services are virtually free to design the scope and content of the special sanctions imposed, and the reaction shall not have a punitive character but be undergone in an expert unit of the specialist health service constituted for the purpose. In other words, the special sanctions are an important part of the set of rules aimed at strengthening the protection and legal status of disabled people.

There are also other provisions in the Penal Code with the same purpose that apply in similar but slightly different circumstances. If the offender at the time of the act had an impaired perception of reality because of a mental disability but not enough to be exempt from criminal responsibility pursuant to § 20 (2), the special criminal sanctions cannot be imposed by court order. In such cases, the offender may be sentences to normal prison sentence, despite his or her condition. However, the disability can still be a mitigating circumstance in sentencing pursuant to § 80 (f) and § 78 (d) of the Penalty Code. If the perception of reality is *significantly* impaired because of a mental disability, the penalty may be set below the minimum penalty of the penal provision or to a less severe penalty type, according to § 80 (f). If the perception is impaired because of a *mild* mental disability, the penalty may be reduced to a lower level than the crime itself indicates, according to § 78 (d).

To shortly summarise, there are a number of rules in Norwegian criminal law that directly and indirectly aim to strengthen the protection and legal status of disabled people and prevent crimes committed against this group. The most important of these are the rules on criminal responsibility, which have been the subject of great discussion during the last decade in Norwegian law. In January 2013, in the aftermath of the July 22 trial,[65] a

63 Johs. Andenæs et al., *Alminnelig strafferett*, 6th ed., Universitetsforlaget, Oslo, 2016, p. 545.

64 NOU 2014: 10 Skyldevne, sakkyndighet og samfunnsvern. [Norwegian Official Report 2014: 10 Capacity to be held accountable, expertise and protection of society], p. 305.

65 Wikimedia foundation, *Trial of Anders Behring Breivik*, Wikipedia, July 27, 2022, https://en.wikipedia.org/wiki/Trial_of_Anders_Behring_Breivik, accessed August 3, 2022.

committee was appointed by royal decree to conduct a broad-based review of the General Civil Penal Code's[66] provisions on the lack of personal capacity as a ground for excluding criminal responsibility. Their report has been submitted,[67] and the committee makes several interesting observations. Particularly interesting are their remarks on the existence and the design of these rules, and on the relationship between the rules on criminal responsibility and Norway's obligations under international law.

Regarding the CRPD, the committee made a thorough analysis of whether Norway's obligations under the convention limits how Norwegian legislation on criminal responsibility may be designed, particularly whether the existing rules on criminal responsibility conflict with the non-discrimination principle in Article 12. In this analysis, the committee referred to a statement made by the UN high commissioner for human rights in 2009.[68] The gist of the statement is that Article 12 prohibits the state parties from having criminal responsibility provisions that are based either exclusively or partly on the occurrence of a medically defined condition in the accused. Every person must be judged individually based on disability-neutral standards, such as requirements for criminal intent. Interpreted in a literal manner, this indicates that significant changes must be made to most state parties' legal systems, including § 20 (2) (c) of the Norwegian Penal Code which allows for the exemption from criminal liability due to a severe mental disability at the time of the act.

However, the committee still found the Norwegian system to be in accordance with the convention. Several other prominent international law regulations link the assessment of criminal responsibility to the occurrence of medical conditions.[69] This is accepted as long as the diagnosis does not in itself determine the question of liability. In the preparatory works for the new Norwegian Penal Code of 2005, the Ministry of Justice and Public Security set an IQ of 55 and below as the indicative limit for who should be exempt from criminal liability due to a 'severe mental disability' (cf. § 20 (2) (c) of the Penal Code) while people with an IQ between 55 and 60 may also be considered exempt. At first glance, it does seem like the ministry links the assessment of criminal responsibility directly to a medical diagnosis, in violation of the CRPD. However, the ministry clarifies that IQ tests alone shall not determine whether the person in question is criminally liable or not. A concrete assessment must always be done in each individual case, with a particular focus on the person's daily, social and cognitive functioning, as highlighted in § 20 (3).[70]

10. Concluding remarks

A revision of the Norwegian system was overdue when the new Guardinship Act was introduced in 2010. The former regulation was rather inflexible and the society had changed in various ways during the last century. In addition, the wording of the provisions was quite

66 Act on The General Civil Penal Code May 22, 1902 no. 10.

67 NOU 2014: 10 Skyldevne, sakkyndighet og samfunnsvern. [Norwegian Official Report 2014: 10 Capacity to be held accountable, expertise and protection of society].

68 Human Rights Council – General Assembly (A/HRC/10/48, January 26, 2009), p. 15 para. 47.

69 See, for example, the Rome Statute of the International Criminal Court article 31 (1) (a); UN Standard Minimum Rules on the Treatment of Prisoners paragraph 82 (1).

70 Prop. 154 L (2016–2017) Endringer i straffeloven og straffeprosessloven mv. (skyldevne, samfunnsvern og sakkyndighet) [Proposition to the Storting 154 L (2016–2017) Amendments to the Criminal Code and the Criminal Procedure Act, etc. (culpability, social protection and expertise)], p. 229.

old-fashioned. Consequently, the area of law was ripe for a significant modernisation and system change while at the same time some aspects of the old act were largely retained.

In order to make the Norwegian law more coherent with the standard set forth in Article 12 of the CRPD the new Guardianship Act replaced the archaic two-track system with a scheme of individually tailored guardianships without deprivation of legal capacity but retained the possibility to supplement the guardianship with deprivation of legal capacity when certain conditions are met. This shows that Norway finds it to be in accordance with the CRPD to deprive people with disabilities of their legal capacity when absolutely necessary, which is why Norway also issued a declaration of interpretation when ratifying the Convention to clarify that Norway would fulfil the requirements of Article 12 of the CRPD.

Professionals with expertise in psychology, psychiatry and neurology have clearly provided input to the preparatory work and thus helped to shape the new guardianship scheme, but none of these professions were directly involved in the committee that drafted the new law. However, in individual cases a medical certificate by a physician or other expert is required in order to start a process of guardianship.

The statutory conditions for being subject to guardianship and deprived of active legal capacity are essentially the same after the CRPD was ratified and implemented in Norway as before. The decisive factor is whether the person in question due to certain specified diagnoses or his or her mental condition in general lacks the ability to take care of themselves or their property and whether guardianship and/or deprivation of legal capacity is necessary to protect said person's interests. Having a disability is a common reason these statutory conditions are met, but not in itself sufficient.

It is a delicate and demanding endeavor to find the right balance between providing adequate assistance to persons with disabilities in need of help with financial or personal matters without compromising their right to self-determination and personal autonomy to an intolerable degree. The right to self-determination is important and strong, but it is also important to provide a safe form of help to those who need it to navigate their everyday life. If not, they risk not getting to enjoy the rights or benefits they are entitled to and being exploited by others who do not have their best intentions at heart. Therefore, it is imperative to have a public system with a clear framework to support those who are not able to adequatly take care of their own interests. In Norway, it is the guardianship scheme and the possibility to deprive someone of their legal capacity that constitute such a system, together with other public healthcare programs and benefits. Whether or not this is the best way to balance the right to self-determination and the need for help is disputed, but to this date no other alternatives have been launched by the Norwegian authorities besides the aforementioned scheme of private-law, user-controlled powers of attorney (cf. § 78 and § 80 of the Guardianship Act).

No major substantial changes have taken place regarding the effectiveness of agreements concluded by persons lacking legal capacity since the ratification and implementation of the CRPD in Norway. The general rule is still that the agreement is invalid without the consent of the guardian or the county governor. If consent is given, the other party may withdraw from the agreement unless he or she knows or should have known that his counterpart lacks the legal ability to act and undertake obligations, or the agreement is fulfilled.

There are a number of rules in Norwegian criminal law that directly and indirectly aim to strengthen the protection and legal status of disabled people and prevent crimes committed against this group. The most important of these are the rules on criminal

responsibility, which have been the subject of great discussion during the last decade in Norwegian law.

Overall, the Guardinship Act was a major shift in the regulative framework of this field. However, the fundamental purpose is still to balance between protecting autonomy and self-determination on the one side and the right to protection from society when having limited capacity to make informed decisions on the other side. Whether the new guardianship scheme succeeds in this is debated, but as of today, it is difficult to imagine other alternatives that would strike a better balance.

22 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in the Republic of Peru

César Edwin Moreno More

I. Introductory remarks about the concept of active legal capacity in Peruvian law

The Peruvian legal system contains a regulation of legal capacity that follows rather a particular concept of it. If it is compared to some European legal systems, such the German, Italian or Polish systems, the scope of legal capacity regulation in the Peruvian legal system is much greater. For the aforementioned foreign legal systems, legal capacity begins at birth, hence legal capacity is a concept consubstantial to that of legal personality, in the sense that only the person (natural or legal) has legal capacity.

On the contrary, in the Peruvian legal system, legal capacity begins, not with birth, but with conception. Article 2.1 of the Political Constitution of Peru provides that 'the conceived is a subject of law in everything that favors him'. In accordance with the Peruvian Constitution, the second paragraph of article 1 of the current Peruvian Civil Code (1984) provides, 'Human life begins with conception. The conceived is a subject of law for everything that favors him'. The recognition of the legal subjectivity of the conceived implies the recognition of his capacity. Hence, it is affirmed that 'one is capable from conception to death'.[1] From this, it derives that legal capacity is not a concept consubstantial to that of person (whose existence begins at birth, according to article 1 of the Peruvian Civil Code) but to that of subject of law.[2] This allows affirming a greater scope of the legal capacity in the Peruvian legal system. The scope of the notion of a subject of law is wider than of the notion of a person natural as well as legal one.

The concept of legal capacity, which under the Peruvian legal system is called enjoyment capacity (*capacidad de goce*), is understood as the suitability or aptitude to be a holder of legal relationships.[3] This includes but is also distinguished from active legal capacity, called in Peruvian law as exercise capacity (*capacidad de ejercicio*). The exercise capacity, understood as the suitability or aptitude to carry out legal acts, in turn, is distinguished into full exercise capacity (*plena capacidad de ejercicio*) and restricted exercise capacity

1 Carlos Fernández Sessarego, ¿Existe un ser humano jurídicamente "incapaz"? ¿Existe un sujeto de derecho "sin personas" que lo integren? *Advocatus*, 2017, vol. 35, p. 231.

2 Carlos Fernández Sessarego, *Derecho de las personas*, 13th ed., Instituto Pacífico, Lima, 2016, p. 285; Juan Espinoza Espinoza, *Derecho de las personas. Concebido y personas naturales*, 8th ed., Instituto Pacífico, Lima, 2019, p. 1217; Enrique Varsi Rospigliosi, *Tratado de derecho de las personas. Capacidad*, 1st ed., Universidad de Lima Fondo Editorial, Lima, 2021, p. 36.

3 Juan Espinoza Espinoza, *Derecho de las personas. Concebido y personas naturales*, 8th ed., Instituto Pacífico, Lima, 2019, p. 1217.

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(*capacidad de ejercicio restringida*). The first is a necessary requirement for the celebration of any legal act. Indeed, article 140 of the Peruvian Civil Code requires as a condition for the validity of the legal act the full exercise capacity. The second implies the restriction of being able to enter legal acts only through a representative (tutor or guardian).

Under the Peruvian legal system, as a general rule, only persons who have reached the age of majority (18 years) acquire full exercise capacity, which includes persons with disabilities. Exceptionally, in accordance with articles 43 and 46 of the Peruvian Civil Code, minors between 16 and 18 years old will acquire full exercise capacity if they get married or obtain an official title that allows them to practice a trade or profession, and minors over 14 years old will also acquire exercise capacity from the birth of their own son or daughter, but only for the performance of some legal acts related to the exercise of parenthood. These exceptional situations of acquisition of exercise capacity also apply to persons with disabilities.

1.1. The legal regime of the active legal capacity before the implementation of the Convention on the Rights of Persons with Disabilities

The legal regime of the active legal capacity (exercise capacity) is contained in the Book I: Rights of the Persons, of the Peruvian Civil Code of 1984. This regime, before its reform in 2018, was designed in accordance with the capacity/incapacity binomial.[4] Thus, a distinction was made between absolute and relative incapacity in the Peruvian Civil Code of 1984. According to this regime, persons acquired the exercise capacity at 18 years of age. However, persons with disabilities indicated in articles 43 and 44 of the Peruvian Civil Code were excepted from this rule. This was established by article 42 of the Peruvian Civil Code:

> Art. 42 of the Peruvian Civil Code. Persons who have attained eighteen years of age have full exercise capacity of their civil rights, except as provided in articles 43 and 44.

As regards persons with disabilities, in accordance with article 43 of the Peruvian Civil Code, those who for whatever reason were deprived of discernment were absolutely incapacitated (*furiosus*), as well as the deaf-mute, blind-deaf and blind-mute who could not express their will in an indubitable way. For its part, article 44 of the Peruvian Civil Code provided that mentally retarded and persons suffering from mental impairment that prevents them from expressing their free will were relatively incapacitated.

Under this model, persons with these disabilities could not enter valid legal acts. If a legal act was entered into by an **absolutely incapacitated** person, article 219 of the Peruvian Civil Code sanctioned it with nullity; however, if this was celebrated by a **relatively incapacitated** person, article 221 of the Peruvian Civil Code sanctioned it with annulment. According to the article 274.1 of the Peruvian Civil Code, the marriage celebrated by the mentally ill was void, even if said condition manifested itself after the celebration of the marriage or if he had intervals of lucidity. And if this disability ceased, his or her spouse could bring an annulment action within a period of one year. In addition, the article 274.2 of the Peruvian Civil Code extended this provision to the deaf-mute, blind-deaf

4 Enrique Varsi Rospigliosi, *Tratado de derecho de las personas. Capacidad*, 1st ed., Universidad de Lima Fondo Editorial, Lima, 2021, p. 72.

and blind-mute if they learned to express their will indubitably. Likewise, article 687 of the Peruvian Civil Code provided for the annulment of the will made by a person who lacked mental lucidity, even if this was transitory.

For these persons incapacitated absolutely as well as relatively to be able to enter valid legal acts, it was necessary, in accordance with the article 45 of the Peruvian Civil Code, that they act through their legal representative, known for these purposes as a guardian. Guardianship was specifically designed for incapacitated adults, within which persons with disabilities indicated in articles 43 and 44 of the Peruvian Civil Code were included. In accordance with article 566 of the Peruvian Civil Code, for the appointment of a guardian, it was necessary for the person with a disability to be judicially declared an interdict. Consequently, the regime embraced by the Peruvian Civil Code was the exclusive substitution system,[5] based on the medical-biological[6] or rehabilitative[7] model of disability.

Under this view, physical or mental disability was connected and identified with legal incapacity; thus, the regulations had been in force before the Convention on the Rights of Persons with Disabilities was implemented had been based on the assumption of a 'paternalistic and welfare perspective of disability, which looked at and took the person as a dependent and needy being'.[8] In this scenario, 'the guardian was in charge of protecting the incapacitated, providing for their recovery and, if necessary, for their internment in a specialised establishment, in addition to exercising their representation or assistance in their business, depending on the degree of incapacity'.[9] It is worth noting that this incapacity system, which has been defined as the old paradigm, conceived 'the incapacity as an illness or defect that renders the person suffering it to an object of charity and protection, subject to plenary guardianship based on best interests which constrains her personal life and the control of her property'.[10]

II. Private law regulation of active legal capacity in the course of implementing Article 12 of the Convention on the Rights of Persons with Disabilities

The regime of legal capacity started to shift towards a social model, which stops explaining disability as a deficiency of the person to focus on the disability or deficiency of society to adapt to the needs of persons with disabilities,[11] with the implementation by the Peruvian legal system of the UN Convention on the Rights of Persons with Disabilities (henceforth,

5 Ibid., 74.

6 Andrea Padilla-Muñoz, Discapacidad: Contexto, concepto y modelos, *Revista Colombiana de Derecho Internacional*, 2010, vol. 16, p. 402.

7 Agustina Palacios, Una introducción al modelo social de la discapacidad y su reflejo en la Convención Internacional sobre los Derechos de las Personas con Discapacidad, in: *Nueve conceptos claves para entender la Convención sobre los Derechos de las Personas con Discapacidad*, ed. Elizabeth Salmón, Renata Bregaglio, Pontificia Universidad Católica del Perú, Perú, 2015, p. 12.

8 Enrique Varsi Rospigliosi, *Tratado de derecho de las personas. Capacidad*, 1st ed., Universidad de Lima Fondo Editorial, Lima, 2021, p. 129.

9 Leysser León Hilario, *Derecho privado. Parte general. Negocios, actos y hechos jurídicos*, 1st ed., Pontificia Universidad Católica del Perú Fondo Editorial, Peru, 2019, p. 71.

10 Kristin Booth Blen, Changing paradigms: Mental capacity, legal capacity, guargianship, and beyond, *Columbia Human Rights Law Review*, 2012, vol. 48, p. 98.

11 Agustina Palacios, Una introducción al modelo social de la discapacidad y su reflejo en la Convención Internacional sobre los Derechos de las Personas con Discapacidad, in: *Nueve conceptos claves para entender la Convención sobre los Derechos de las Personas con Discapacidad*, ed. Elizabeth Salmón, Renata Bregaglio, Pontificia Universidad Católica del Perú, Perú, 2015, p. 14.

UN Convention). This started with the ratification of the UN Convention and its Optional Protocol on December 30, 2007, entering into force on 3 May 2008. In this regard, it should be noted that, in accordance with article 55 of the Peruvian Constitution, the UN Convention, after its ratification, becomes part of national law. In this way, since May 3, 2008, the incapacity regime would have been tacitly repealed.[12] Despite this, its application as an immediately applicable norm would not be carried out until much later. This is mainly due to the fact that judges and officials are not used to working with international law. Furthermore, civil legislation will not immediately adapt to the new paradigm established by the UN Convention.[13]

During the period beginning in 2008 and lasting until 2012, we can only find timid advances by jurisprudence. In a constitutional process of *habeas corpus*, in which the plaintiff (guardian) requested the release of his mentally disabled sister from the nursing home where he had previously admitted her, the Peruvian Constitutional Court affirms that '[m]ental disability is not synonymous, *prima facie*, with inability to make decisions'.[14] In other words, what this court would apparently be ordering is the end of the discriminatory identification[15] between disability and incapacity. However, despite noting that the decisions of persons with disabilities must be considered as a manifestation of their self-determination, it fails to break with the incapacity system, considering that the decision on their release must be taken by the family council, whose conformation orders for these purposes.

The next step of this paradigm shift would be the enactment of the Act No. 29973, named General Law on Persons with Disabilities, on December 13, 2012, which aim was to clarify the application of the Article 12 of the UN Convention. Its Article 9 states,

> Art. 9. Equal recognition as a person before the law
>
> 9.1. The person with a disability has legal capacity in all aspects of life, under the same conditions as others. The Civil Code regulates the support systems and the reasonable adjustments that they require for decision-making.
> 9.2. The State guarantees the right of persons with disabilities to property, inheritance, to freely contract and to access insurance, bank loans, mortgages, and other forms of financial credit on equal terms with others. Likewise, it guarantees their right to marry and to freely decide on the exercise of their sexuality and fertility.

As I indicated, prior to this act, the blind-deaf, deaf-mute and blind-mute who cannot undoubtedly express their will were considered absolutely incapacitated of entering juridical acts. This situation after the UN Convention has come into force in Peru violates the

12 Leysser León Hilario, *Derecho privado. Parte general. Negocios, actos y hechos jurídicos*, 1st ed., Pontificia Universidad Católica del Perú Fondo Editorial, Peru, 2019, p. 73.

13 Enrique Varsi Rospigliosi, Valeria Chávez Romero, Antecedentes de la reforma de la capacidad en el código civil peruano, *Ius et Praxis*, 2021, vol. 53, p. 304.

14 Peruvian Constitutional Court, Exp. 2313-2009-HC/TC, September 24, 2009.

15 Benjamín Aguilar Llanos, La interdicción y la curatela deben pasar al olvido, *Gaceta Civil & Procesal Civil*, 2015, vol. 28, p. 14.

'essence of an inclusive democracy and has become unconstitutional'.[16] As it was confirmed by the doctrine,

> persons who suffered from any of these sensory deficiencies, congenitally or supervening, and who could not undoubtedly express their will, were legally considered completely incapacitated of exercise, which meant that they could not exercise their rights or obligations by themselves, or perform validly effective acts, but through their representatives, except in what refers to the specific cases of making wills, as seen before.[17]

With the enactment of the General Law on Persons with Disabilities, the provision that stated the absolute incapacity of the blind-deaf, deaf-mute and blind-mute (the third paragraph of the article 43 of the Peruvian Civil Code) was abolished. In addition, in application of its First Modifying Complementary Provision, some articles about the active legal capacity to make wills and to get married were modified. For example, it is currently accepted that a person with a disability due to visual impairment can make a holographic will using the Braille system or that a blind-deaf, deaf-mute or blind-mute who cannot undoubtedly express their will can get married.[18] Notwithstanding, the interdiction regime remained in force for the rest of persons with disabilities. Thus, for example, if a mentally retarded[19] person wanted to exercise his civil rights in court, he first had to be declared interdict, then a guardian is appointed, and later the latter replaced his will in court proceedings.

Likewise, although Article 9.1 of the General Law on Persons with Disabilities referred to the regulation contained in the Peruvian Civil Code of support systems and the reasonable adjustments, it is necessary to point out that this regulation will not exist until the total modification of the capacity regime occurred in 2018. It is not surprising, then, that part of the doctrine was perplexed in this regard:

> [I]t is not clear to me what these support systems that the Civil Code supposedly regulates consist of, it seems rather an aspiration, since our Civil Code does not establish support systems for the disabled, unless you want to give the name of support systems to family protection institutions such as guardianship, conservatorship, family council or it is claimed that interdiction is a support system that is obviously not.[20]

16 Samuel Abad Yupanqui, Discapacidad, derechos humanos y reforma del Código Civil. Un estado de cosas inconstitucional, Cuadernos de análisis y crítica a la jurisprudencia constitucional, 2016, vol. 11, p. 83.

17 Romina Santillán Santa Cruz, La capacidad de los discapacitados no incapacitados, Ius. Revista de Investigación Jurídica, 2014, vol.8, p. 164.

18 Juan Espinoza Espinoza, La Ley General de la Persona con Discapacidad y el derecho de autodeterminación de las personas con discapacidad mental, Vox Juris, 2015, vol. 29, p. 61.

19 In accordance with article 40 of Supreme Decree No. 016-2019-MIMP that establishes the regulations that control the granting of reasonable adjustments, designation of supports and implementation of safeguards for the exercise of legal capacity of persons with disabilities, the person with disabilities who requires support must present a legalised copy of the disability certificate. The certificate of disability, according to article 76 of the General Law on Persons with Disabilities, is the document that 'proves the status of a person with disabilities and it is granted by certifying doctors registered in the Institutions Providers of Health Services, public, private and mixed at the national level'. Registration in the National Registry of Persons with Disabilities is optional, and in no case is it a requirement for the designation of support.

20 Jairo Cieza Mora, La discapacidad mental y la necesidad de una regulación más humanista en el Perú. Una mirada desde el Derecho de Personas, *Gaceta Civil & Procesal Civil*, 2014, vol. 24, p. 179.

Despite this legislative lack, in this period, the work of jurisprudence will be essential in the implementation of the UN Convention. In a case in which the plaintiffs, who had visual disabilities, demanded the removal of a supermarket's prohibition on entering its stores with guide dogs, the Peruvian Constitutional Court, after acknowledging that animal care for blind persons constitutes a reasonable adjustment, considered that the defendant's denial of its enjoyment and exercise is contrary to the UN Convention.[21] With this pronouncement, the Peruvian Constitutional Court also recognises the obligation of the Peruvian state to implement reasonable adjustments that allow the exercise of the rights of persons with disabilities.

The path laid out by the Peruvian Constitutional Court would be followed by the common jurisdiction. José Antonio Segovia Soto (plaintiff) was declared interdict and his sister was appointed as his guardian. The plaintiff alleges that, with the declaration of interdiction, his fundamental rights were violated, since the UN Convention had not been applied. The judge, despite affirming that the UN Convention implies the implementation of 'a support system for the person with disabilities, based on a vision (determination) of the minimum restriction of the rights of these persons',[22] insists that interdiction is the regime applicable to the case, however, mitigating its incidence by consisting of a minimum restriction of the rights of the person with disabilities through the establishment of a support system appropriate to the person's physical and mental state.

A much more daring attitude would be taken by a civil judge. A mother (Marta Rosalvina Ciprian de Velásquez) requested the declaration of interdiction of her two adult sons (Wilbert and Rubén Velásquez Ciprian), both with mental disabilities (paranoid schizophrenia). The interdiction was requested so that Wilbert and Rubén receive an orphan's pension and enjoy health insurance as heirs of their deceased father since it is a requirement for these effects the declaration of interdiction and the appointment of a guardian. It is worth noting that both expressed their concern about the effects that the declaration of interdiction would have on the exercise of their civil rights, and although they are not satisfied, they declare that they have no other option to be able to enjoy the aforementioned hereditary rights. What is relevant in this case lies in the fact that the judge analyses the compatibility of the interdiction regime, in force at that time, with Article 12 of the UN Convention. In the opinion of the judge, the regulation of the capacity of persons with disabilities contained in the Peruvian Civil Code

> is an attack on the right to equality in the recognition of the legal capacity of persons with psychosocial and intellectual disabilities, not being able to be interpreted in any way that is compatible with the fundamental rights already indicated as they are clearly contradictory, therefore, declaring a partial interdiction or only for certain aspects of life affects the intrinsic right of the person with disabilities and the spirit of Art. 12 of the UN Convention by not taking into account the decision and autonomy of persons with disabilities.[23]

In this way, applying the doctrine of conventionality control, the judge did not apply the interdiction regime, as it was contrary to Article 12 of the UN Convention and, as a

21 Peruvian Constitutional Court, Exp. 02437-2013-PA/TC, April 16, 2014.
22 Second Constitutional Court of Lima, Exp. 25158–2013, August 26, 2014.
23 Third Family Court of Cusco, Exp. 1305–2012, June 15, 2015.

result, recognised the full capacity of exercise of Wilbert and Rubén but also, as a result of the direct application of the UN Convention, ordered the establishment of a temporary support system made up by the plaintiff, Marta Rosalvina Ciprian de Velásquez, the sister of the disabled, Milagros Velásquez Ciprian, and the multidisciplinary team of the Superior Court of Justice of Cusco, made up, in turn, by a psychiatrist, a psychologist and a social worker.

Despite the great progress in the judicial implementation of the UN Convention represented by this judgment, the Peruvian Supreme Court ordered its invalidity,[24] after considering that the declaration of incapacity (absolute or relative) of a person with a disability does not imply a reduction of their legal capacity or enjoyment and therefore does not constitute a violation of Article 12 of the UN Convention. In this pronouncement of the Peruvian Supreme Court, there is evidence of confusion regarding the matter regulated by the UN Convention.[25] According to the Peruvian Supreme Court, the recognition of the equal legal capacity of persons with disabilities provided by this international instrument refers not to active legal capacity but to the enjoyment capacity (passive legal capacity).

Afterwards, on September 4, 2018, the whole system of legal capacity, contained in the Peruvian Civil Code, was modified by the enactment of the Legislative Decree No. 1384, named Legislative Decree that Recognizes and Regulates the Legal Capacity of Persons with Disabilities in Equal Conditions. As it is established in its article 1, this Legislative Decree modifies the articles 3, 42, 44, 45, 140, 141, 221, 226, 241, 243, 389, 466, 564, 566, 583, 585, 589, 606, 610, 613, 687, 696, 697, 808, 987, 1252, 1358, 1994 and 2030 of the Peruvian Civil Code in order to recognise full exercise capacity to the persons with disabilities. That full exercise capacity includes the following acts: marriages, wills, contracts and any other juridical act, including the capacity to adopt children. This surprised the legal community, especially the working group that at that time, by appointment of the executive branch, was working on the reform of the Peruvian Civil Code.[26] Thus, the legislator modified the general provision about the legal capacity in the following terms:[27]

> Art. 3 of the Peruvian Civil Code. Every person has the legal capacity to enjoy and exercise their rights.
>
> Exercise capacity can only be restricted by law. Persons with disabilities have the exercise capacity under equal conditions in all aspects of life.

This legislative decree not only eliminates persons with disabilities from the lists established by articles 43 and 44 of the Peruvian Civil Code – persons who, for whatever reason, were deprived of discernment, persons who are mentally retarded and persons suffering from mental impairment that prevents them from expressing their free will – but also puts

24 Permanent Constitutional and Social Law Chamber of the Peruvian Supreme Court, Exp. 1833-2017-Cusco, April 7, 2017.

25 Renata Bregaglio Lazarte and Renato Constantino Caycho, Un modelo para armar: La regulación de la capacidad jurídica de las personas con discapacidad en el Perú a partir del Decreto Legislativo 1384, *Revista Latinoamericana en Discapacidad, Sociedad y Derechos Humanos*, 2020, vol. 4, p. 45.

26 Enrique Varsi Rospigliosi, Valeria Chávez Romero, Antecedentes de la reforma de la capacidad en el código civil peruano, *Ius et Praxis*, 2021, vol. 53, p. 310.

27 The previous text of the Art. 3 of the Peruvian Civil Code was: "Every person has the enjoyment of civil rights, except for the exceptions expressly established by law".

an end to the capacity/incapacity binomial,[28] as well as the identification of disability with incapacity.[29] Thus, the new article 42 of the Civil Code provides the following:

> Art. 42 of the Peruvian Civil Code. Every person over the age of eighteen has full exercise capacity. This includes all persons with disabilities, on equal terms with others and in all aspects of life, regardless of whether they use or require reasonable accommodation or support to express their will.

As it is highlighted by the doctrine,

> this norm addresses the institution of the exercise capacity of persons with disabilities – also called: functional diversity – to accommodate the new approaches established by the Convention on the Rights of Persons with Disabilities – hereinafter, the 'Convention' – approved in the 2006, of which Peru is a part.[30]

In other words, with this comprehensive modification of the legal capacity regime, the Peruvian Civil Code finally conforms to the social model of disability, as required by the UN Convention.[31]

Likewise, Legislative Decree No. 1384 implements the provisions of the Article 9.1 of the General Law on Persons with Disabilities, established in 2012 and creates the legal regime of reasonable adjustments, of the support and safeguards system. This consolidates, at least at the legislative level, the paradigm shift. In this way, the new capacity regime presupposes the full exercise capacity of persons with disabilities, 'which means that disability should not be a reason for restriction or limitation of legal capacity'.[32] 'With the recognition of the full legal capacity of the persons with disabilities, the substitute system of will is banished from them. There is no longer any interdiction, nor the establishment of a guardianship, for persons with disabilities'.[33] According to this assumption, the system

28 The concept of incapacity is still maintained by the modified Art. 43 of the Peruvian Civil Code, but it only includes those under 16 years of age.

29 Romina Santillán Santa Cruz, Comentario Art. 45.- Ajustes razonables y apoyo, in: *Código Civil comentado. Tomo I: Título Preliminar. Derecho de las Personas. Acto Jurídico*, ed. Manuel Augusto Muro Rojo, Manuel Alberto Torres Carrasco, Gaceta Jurídica, Peru, 2021, p. 272.

30 Aníbal Torres Vásquez, Capacidad jurídica en el nuevo artículo 3 del Código Civil, Advocatus, 2019, vol. 38, p. 155.

31 Enrique Varsi Rospigliosi, Valeria Chávez Romero, Antecedentes de la reforma de la capacidad en el código civil peruano, *Ius et Praxis*, 2021, vol. 53, p. 311; Enrique Varsi Rospigliosi, Marco Torres Maldonado, El nuevo tratamiento del régimen de la capacidad en el código civil peruano, *Acta Bioethica*, 2019, vol. 25, p. 212; Juan Enrique Sologuren Álvarez, La reciente reforma del Código Civil en materia de reconocimiento de plena capacidad de ejercicio en favor de las personas con discapacidad. Su incidencia en la humanización del Derecho contractual, *Gaceta Civil & Procesal Civil*, 2019, vol. 67, p. 217.

32 Enrique Varsi Rospigliosi, Marco Torres Maldonado, El nuevo tratamiento del régimen de la capacidad en el código civil peruano, *Acta Bioethica*, 2019, vol. 25, p. 311; Juan Espinoza Espinoza, Comentario Art. 42.- Capacidad de ejercicio plena, in: *Nuevo Comentario del Código Civil Peruano. Tomo I: Título Preliminar y Derecho de las Personas*, ed. Juan Espinoza Espinoza, Instituto Pacífico, Lima, 2021, p. 490; Jairo Cieza Mora, María José Olavarría Parra, Nosotros, los normales. Errores y aciertos de la reciente legislación acerca de la discapacidad en el Perú, *Gaceta Civil & Procesal Civil*, 2018, vol. 64, p. 55.

33 Romina Santillán Santa Cruz, Comentario Art. 45.- Ajustes razonables y apoyo, in: *Código Civil comentado. Tomo I: Título Preliminar. Derecho de las Personas. Acto Jurídico*, ed. Manuel Augusto Muro Rojo, Manuel Alberto Torres Carrasco, Gaceta Jurídica, Peru, 2021, p. 275; Renata Bregaglio Lazarte and Renato Constantino Caycho, Un modelo para armar: La regulación de la capacidad jurídica de las personas con discapacidad en el Perú a partir del Decreto Legislativo 1384, *Revista Latinoamericana en Discapacidad, Sociedad y Derechos Humanos*, 2020, vol. 4, p. 47.

of support and safeguards for persons with disabilities, as a general rule, will be free and voluntary. This is established by the new Art. 45 of the Peruvian Civil Code:[34]

> Art. 45 of the Peruvian Civil Code. Every person with a disability who requires reasonable adjustments or support to exercise their legal capacity may request or designate them according to their free choice.

As confirmed by the explanatory memorandum,

> the appointment of support for persons with disabilities will always be voluntary and does not imply the substitution of persons for the exercise of their rights, but rather, on the contrary, it is a mechanism that helps the person in decision-making and his actions, as long as he considers it so.35

The person with a disability can designate, before the notary or the judge,[36] a natural or legal person as their support, establishing its form, identity, scope, duration and amount.[37] The exception to the rule of the voluntariness of the appointment of support is constituted by that situation in which the person with disability is unable to manifest his will expressly or tacitly, in which case it is the judge who designates the support.[38] It should be clear that, as a general rule, the support is not a representative of the person with a disability, unless the person with a disability expressly designates it or the judge establishes it in cases where the person with a disability cannot manifest his will.[39]

Despite the far-reaching scope of the reform of the capacity regime for persons with disabilities, and while some consider it successful,[40] this has been harshly criticised. These criticisms respond to dogmatic,[41] practical,[42] sociological[43] and even legislative policy per-

34 This is also provided by the new Art. 659-A of the Peruvian Civil Code. The person of legal age can freely and voluntarily access the support and safeguards that he considers pertinent to contribute to his exercise capacity.

35 Explanatory Memorandum of the Legislative Decree No. 1384.

36 Art. 659-D of the Peruvian Civil Code. The person of legal age who requires support to exercise their legal capacity can designate it before a notary or a competent judge.

37 Art. 659-C of the Peruvian Civil Code. The person requesting the support determines their form, identity, scope, duration and amount of support. The support may fall on one or more natural persons, public institutions or non-profit legal persons, both specialised in the matter and duly registered.

38 Juan Espinoza Espinoza, Comentario Art. 42. Capacidad de ejercicio plena, in: *Nuevo Comentario del Código Civil Peruano. Tomo I: Título Preliminar y Derecho de las Personas*, ed. Juan Espinoza Espinoza, Instituto Pacífico, Lima, 2021, p. 490; Andrés Sánchez Ramírez, Comentario Art. 45.- Ajustes razonables y apoyo, in: *Nuevo Comentario del Código Civil Peruano. Tomo I: Título Preliminar y Derecho de las Personas*, ed. Juan Espinoza Espinoza, Instituto Pacífico, Lima, 2021, p. 522.

39 This is established by the Art. 659-E of the Peruvian Civil Code.

40 Renata Bregaglio Lazarte and Renato Constantino Caycho, Un modelo para armar: La regulación de la capacidad jurídica de las personas con discapacidad en el Perú a partir del Decreto Legislativo 1384, *Revista Latinoamericana en Discapacidad, Sociedad y Derechos Humanos*, 2020, vol. 4, p. 58.

41 Eric Palacios Martínez, Capacidad, declaración de voluntad y negocio jurídico: La 'óptica' del Decreto Legislativo N° 1384, *Gaceta Civil & Procesal Civil*, vol. 65, 2018, p. 118.

42 Enrique Varsi Rospigliosi, Valeria Chávez Romero, Antecedentes de la reforma de la capacidad en el código civil peruano, *Ius et Praxis*, 2021, vol. 53, p. 319.

43 Leysser León Hilario, *Derecho privado. Parte general. Negocios, actos y hechos jurídicos*, 1st ed., Pontificia Universidad Católica del Perú Fondo Editorial, Peru, 2019, p. 73.

spectives.[44] Nevertheless, there are two critical aspects that I would like to highlight. The first refers to the fact that the reform of the capacity regime equates all persons with disabilities, without any distinction. In other words, it establishes the same regime for all of them, without taking into consideration that some of them present mental disabilities that deprive them of their capacity for self-government, making it necessary, with respect to them, greater protection.[45] Since the remedies for the vices of consent are not enough,[46] I consider that if one of these persons enters into a legal act, it should be declared void, not for lack of full exercise capacity but for lack of manifestation of will, in accordance with article 219.1 of the Peruvian Civil Code, to the extent that he would be acting without discernment.[47] Neither the UN Convention nor its implementation through Legislative Decree No. 1384 can make subjects worthy of greater protection disappear from the scene.[48] Claiming otherwise is nothing more than blindly following a fashionable ideology. Only when the taboo according to which any restriction of the capacity of persons with disabilities necessarily implies a discriminatory measure[49] is put aside, we will be able to obtain a truly egalitarian regime of capacity.

The second aspect includes the effective application of this new regime by the courts. As Bergaglio Lazarte and Constantino Caycho have shown, when analysing 34 judicial decisions to designate support, in practice, a series of factors lead to the conclusion that the substitution of guardianship for the support system has only been nominal. In principle, the judges do not distinguish between the regulation of the voluntary recognition process and the exceptional appointment of support; they do not assess whether the person with a disability is a person who can express his will or not; disability is equated to the impossibility of expressing will, paying special attention to the medical reports requested by the judge; the declarations of the relatives are determinant for the appointment of the support; the judge does not take into consideration the will of the disabled or his preferences. All this determines that, even though the UN Convention has been implemented at the legislative level, in fact 'the Peruvian reform has not produced a substantial change. Its scope

44 Yuri Vega Mere, La reforma del régimen legal de los sujetos débiles *made by* Mary Shelley: Notas al margen de una novela que no pudo tener peor final, *Gaceta Civil & Procesal Civil*, 2018, vol. 26, p. 27.

45 Romina Santillán Santa Cruz, Comentario Art. 45. Ajustes razonables y apoyo, in: *Código Civil comentado. Tomo I: Título Preliminar. Derecho de las Personas. Acto Jurídico*, ed. Manuel Augusto Muro Rojo, Manuel Alberto Torres Carrasco, Gaceta Jurídica, Peru, 2021, p. 277; Juan Espinoza Espinoza, Las nuevas coordenadas impuestas en el Código Civil en materia de capacidad . . . o el problema de la 'falta de discernimiento' en una reforma legislativa inconsulta y apresurada, *Gaceta Civil & Procesal Civil*, 2018, vol. 64, p. 25.

46 Renato Constantino Caycho, The flag of imagination: Peru's new reform on legal capacity for persons with intelectual and psychosocial disabilities and the need for new understandings in private law, *The Age of Human Rights Journal*, 2020, vol. 14, p. 171.

47 Héctor Campos García, El impacto de la Convención de los Derechos de las Personas con Discapacidad en el Código Civil de Perú, in: *Capacidade jurídica, deficiência e direito civil na América Latina*, ed. Joyceane Menezes, Editora Foco, Chile, 2021, p. 415.

48 Juan Espinoza Espinoza, Las nuevas coordenadas impuestas en el Código Civil en materia de capacidad . . . o el problema de la 'falta de discernimiento' en una reforma legislativa inconsulta y apresurada, *Gaceta Civil & Procesal Civil*, 2018, vol. 64, 17; Jairo Cieza Mora, María José Olavarría Parra, Nosotros, los normales. Errores y aciertos de la reciente legislación acerca de la discapacidad en el Perú, *Gaceta Civil & Procesal Civil*, 2018, vol. 64, p. 56.

49 Romina Santillán Santa Cruz, Exégesis del artículo 3 del Código Civil tras su reforma en materia de discapacidad: Capacidad jurídica vs. Capacidad de goce, *Gaceta Civil & Procesal Civil*, 2018, vol. 65, p. 242.

translates into a change of formal denomination from "guardian" to "support", without the substitution mechanisms of the will having been eliminated'.[50]

III. Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities outside private law

Outside of private law, the implementation of Article 12 of the UN Convention has implied modifications in notarial, procedural and sanitary legislation. Legislative Decree No. 1049, called the Notary Law, was modified by Legislative Decree No. 1384 to adapt it to the requirements of the UN Convention. Thus, article 16.q of the Notary Law, regarding the obligations of the notary, establishes that the notary must 'provide the necessary accessibility measures, reasonable adjustments and safeguards that the person requires'. Likewise, article 30 of the Notary Law establishes that the notary 'must ensure the intervention of an interpreter for the deaf or an interpreter guide in the case of deafblind persons, if necessary'. Lastly, in the public documents issued by the notary, the reasonable accommodations, and safeguards that the person with disabilities have required must be indicated (article 54.j). But perhaps the most relevant of this regulation is the implementation of the notarial appointment of support. This procedure was introduced by Supreme Decree No. 016-2019-MIMP, dated August 25, 2019.

In general terms, the Peruvian Civil Procedural Code was modified by Legislative Decree No. 1384 so that all the procedural regulation would be adapted to the UN Convention. Article 749 of the Peruvian Civil Procedure Code was modified to include within non-contentious processes, the judicial appointment of support. Likewise, articles 841 to 847 were added, where the non-contentious procedure of judicial appointment of support and safeguards is regulated.

Finally, in health matters, Supreme Decree No. 007-2020-SA, which approves the Regulation of Law No. 30947, Mental Health Law, establishes a series of measures for the benefit of persons with mental disabilities. Among these are the obligations for the Ministry of Health to provide information in an accessible format for persons with disabilities; implement sheltered homes and residences to provide temporary services for persons with intellectual and/or psychosocial disabilities in the process of rehabilitation and social integration, who do not have sufficient family support; adequately establish the internment and hospitalisation environments that do not violate the right to free movement, privacy and all other rights recognised by the UN Convention; and deinstitutionalising persons with psychosocial disabilities, among other sanitary measures.

IV. Intervention of other disciplines in the implementation of Article 12 of the Convention on the Rights of Persons with Disabilities

There is no evidence that reports or opinions from other disciplines have been taken into consideration in the implementation of Article 12 of the UN Convention through Act No. 29973, General Law on Persons with Disabilities, or through Legislative Decree No. 1384. Legislative implementation of the UN Convention corresponds solely to the

50 Renata Bregaglio Lazarte, Renato Constantino Caycho, La capacidad jurídica en el derecho peruano: Análisis cualitativo de las decisiones judiciales de restitución de capacidad jurídica y designaciones de apoyo en aplicación del Decreto 1384, *Revista de Derecho Privado*, 2023, vol. 44, p. 43.

requirements of the Concluding Observations of the Committee on the Rights of Persons with Disabilities of April 2012, in which the Committee

> recommends that the State party abolish the practice of judicial interdiction and review the laws allowing for guardianship and trusteeship to ensure their full conformity with article 12 of the Convention and take action to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will, and preferences.[51]

However, its early implementation through the sentence of the Constitutional Court, dated September 24, 2009, which recognises the right to self-determination of persons with disabilities, was based on the 'Mental health care law: ten basic principles' of the World Health Organization. Division of Mental Health and Prevention of Substance Abuse (1996). As stated in this sentence,

> In point 5 of this document, the self-determination of persons with mental illnesses is directly recognized. It explicitly states that 'patients are to be assumed to be capable of making their own decisions, unless proven otherwise'. In the same way, it indicates that it must 'Ensure that mental health care providers do not systematically consider that patients with mental disorders are incapable of making their own decisions' and also establishes that a patient should not be considered 'systematically incapable of exercising self-determination with respect to all the components (e.g. integrity, freedom) due to the fact that he was found incapable with respect to one of them (e.g. the authority for an involuntary hospitalization does not automatically imply an authority for an involuntary treatment especially if that treatment is invasive).[52]

V. Restrictions of active legal capacity – procedural aspects

In the current Peruvian law, in general terms, there is no procedure to limit, change or deprive the active legal capacity of persons with disabilities. However, some clarifications should be made. In the case of a person with a disability who can express his will, the appointment of the support will be free and voluntary. The support will only facilitate the exercise of his rights. He will not replace his will unless the person with a disability himself names him as his representative. This appointment can be made by a notary or judicially. In this last case, the route will be the non-contentious procedure. In accordance with article 845 of the Peruvian Civil Procedure Code, the requirements for the appointment of support are (1) the reasons that motivate the request and (2) the certificate of disability that proves the condition of disability.

Notwithstanding, in the case of a person with a disability who cannot express his will, the appointment of support can be made *ex officio* by the judge, at the request of the public prosecutor or any other interested person with full capacity to exercise. In this case, unlike the previous one, the judge may, if he deems it necessary, establish the support as a representative of the person with a disability.

51 Concluding observations of the Committee on the Rights of Persons with Disabilities – Peru, April 16–20, 2012, para. 25.

52 Peruvian Constitutional Court, Exp. 2313-2009-HC/TC, September 24, 2009.

In any of the cases, in accordance with article 2030 of the Peruvian Civil Code, the notarial or judicial appointment of support and safeguards must be registered in the public records.

It should be noted that, even though the interdiction and guardianship regimes have been eliminated for persons with physical and mental disabilities, they remain in force for the persons indicated in article 44, numerals 4 to 8, of the Peruvian Civil Code, that is, for prodigals, those who incur mismanagement, habitual drunkards, drug addicts and those who suffer a penalty that is attached to the civil interdiction. With respect to these persons, the model of substitution of the will continues in force.

VI. Institutional aspects of support

As has been highlighted earlier, in general, the appointment of support responds to the voluntary nature of the person with disabilities. However, in the case of an exceptional designation of support, in cases in which the person with disabilities cannot express his will, it will be the judge, in accordance with article 659-E of the Peruvian Civil Code, who determines 'the person or support persons taking into account the relationship of coexistence, trust, friendship, care or kinship that exists between her or them and the person who requires support'.

Despite this marked difference between the principles that guide the designation of support based on the possibility of expressing their will for the person with disabilities, as Bergaglio Lazarte and Constantino Caycho have shown, the judges are not aware of said difference, and in both cases disregard the will and preferences of the person with disabilities, and take into consideration the opinion of their relatives, medical reports or the Public Ministry.[53]

VII. Statistical data about restrictions of active legal capacity of the persons with disabilities

In the Peruvian system, persons with disabilities may register in the administrative registry called the National Registry of Persons with Disabilities, run by the National Council for the Integration of Persons with Disabilities (CONADIS). This registration does not automatically imply the designation of support for the person with a disability.

In accordance with the Statistical Report of January 2022 of the National Registry of Persons with Disabilities, based on the Specialized National Survey on Disability carried out in 2012, it is estimated that by 2022 the population with disability would amount to 1,737,865 people. By January 2022, of this population, only 19.3% have registered in this registry.[54]

As Bergaglio Lazarte and Constantino Caycho report in their study, by February 25, 2021, 1,351 support had been registered in the public records.[55] There is no further statistical data.

53 Renata Bregaglio Lazarte, Renato Constantino Caycho, La capacidad jurídica en el derecho peruano: Análisis cualitativo de las decisiones judiciales de restitución de capacidad jurídica y designaciones de apoyo en aplicación del Decreto 1384, *Revista de Derecho Privado*, 2023, vol. 44, p. 43.

54 CONADIS, *Informe estadístico del Registro Nacional de la Persona con Discapacidad – Reporte enero 2022*, https://conadisperu.gob.pe/observatorio/estadisticas/informe-estadistico-mensual-del-registro-nacional-de-la-persona-con-discapacidad-enero-2022/#:~:text=La%20poblaci%C3%B3n%20con%20nivel%20de,34.7%25%20(enero%202022).

55 Renata Bregaglio Lazarte, Renato Constantino Caycho, La capacidad jurídica en el derecho peruano: Análisis cualitativo de las decisiones judiciales de restitución de capacidad jurídica y designaciones de apoyo en aplicación del Decreto 1384, *Revista de Derecho Privado*, 2023, vol. 44, p. 28.

VIII. Criminal law aspects related to the protection of persons with disabilities

In the Peruvian legal system, there is no special criminal law protection for persons with disabilities when they suffer abuse or exploitation while concluding a contract. There is no crime or offence when someone abuses the condition of disability of the person while concluding a contract. When it happens, there could be a case of civil fraud (*dolus*), that is sanctioned with the annulment of the contract (as it is established by the article 221 of the Peruvian Civil Code).

The only relevance of the criminal order regarding the abuse of a person with a disability occurs if the fact constitutes a fraud crime. As it is established by the first paragraph of the article 196-A of the Peruvian Criminal Code:

> Art. 196-A of the Peruvian Criminal Code. The penalty will be deprivation of liberty not less than four nor more than eight years and with ninety to two hundred fine days, when the fraud:
>
> 1. It is committed to the detriment of minors, persons with disabilities, women in a state of pregnancy or the elderly.

IX. Concluding remarks

The Peruvian legal system did not undergo any modification as a direct result of the ratification of the UN Convention. The capacity/incapacity binomial will remain in force until the modification of the entire legal capacity system carried out in 2018. During this period, in general terms, the attitude of the judges towards persons with disabilities will continue to be paternalistic, guided by a rehabilitative conception of disability. Very few sentences will adopt a social concept of disability.

The implementation of Article 12 of the UN Convention was gradual. First, through the promulgation of the General Law on Persons with Disabilities in 2012 and later with the promulgation of Legislative Decree No. 1384 in 2018. However, it was only with the latter that the capacity/incapacity binomial could be broken. The interdiction system was replaced by the system of the full exercise capacity of persons with disabilities, and the guardianship system was replaced by the system of support and safeguards. This normative change is one of the most ambitious in the Latin American experience since no limitations are established for the exercise of the active legal capacity of persons with disabilities.

Despite this, there is evidence that in practice a regime of substitution of the will of persons with disabilities continues to be maintained. In other words, the substitution of the guardianship regime for the support system regime would have been only nominal. It is necessary to strengthen the safeguards system that guarantees that the support do not commit abuses. Otherwise, the reform carried out through the implementation of Article 12 of the UN Convention will remain on paper.

23 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Singapore

Allen Sng Kiat Peng

A. Introduction

1. It is often said that the true measure of any society can be found in how it treats its most vulnerable members. Singapore recognises the need to foster greater inclusivity and has proactively taken steps to ensure that persons with disabilities are integral and contributing members of society. On July 18, 2013, Singapore ratified the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD), which later came into force on August 18, 2013.[1] Even prior to ratification of the CRPD, Singapore was already taking steps to advance disability issues in Singapore. In September 2006, the Enabling Masterplan Steering Committee was formed to review the services and programmes in the disability sector. From this, the first Enabling Masterplan (EMP1) was developed in 2007 as a five-year national roadmap which outlined Singapore's approach to support persons with disabilities.[2] The second Enabling Masterplan (EMP2), which is for the period from 2012 to 2016, builds on the foundation of EMP1, and aims to progressively realise Singapore's obligations under the CRPD.[3] Singapore is currently implementing the third Enabling Masterplan from 2017 to 2021.[4]
2. This chapter seeks to provide an overview on how Singapore has implemented Article 12 of the CRPD and its impact on the rights of persons with disabilities in Singapore (as of October 20, 2021). Before outlining the sections in this chapter, it is necessary to take a short detour to explain briefly how Singapore implements international law. It should be noted from the outset that the CRPD is not automatically part of Singapore domestic law. Singapore adopts a dualist system whereby international treaties and law do not give rise to rights and obligations until transposed into domestic law.[5] The Singapore Court of Appeal has expressed a preference, without deciding the point, for

1 Republic of Singapore, *Implementation of the convention of the rights of persons with disabilites – initial report submitted by state parties under article 35 of the Convention*, CRPD/C/SGP/1, June 30, 2016, Part I, para 1.1, https://www.msf.gov.sg/policies/International-Conventions/Pages/UN-Convention-on-the-rights-of-persons-with-disabilities-UNCRPD.aspx, accessed December 4, 2020 (CRPD Initial Report).

2 Ibid., Pt I, paras 3.3–3.4.

3 Ibid., Pt I, para 3.5. For a summary of the key initiatives under EMP1 and EMP2, see Ibid., Pt I, para 1.5.

4 Republic of Singapore, *Replies of Singapore to the list of issues in relation to its initial report*, CRPD/C/SGP/RQ/1, Advanced Unedited Version, September 29, 2020, at para 1, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fSGP%2fRQ%2f1&Lang=en, accessed December 4, 2020 (CRPD Replies).

5 *Yong Vui Kong v Public Prosecutor* [2015] SGCA 11, [2015] 2 SLR 1129 [29]; *Kong Hoo (Pte) Ltd v Public Prosecutor* [2019] SGCA 21, [2019] 1 SLR 1131 [92].

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the transformation doctrine. Under the transformation doctrine, international law only becomes part of domestic law when it is adopted by the domestic courts through the development of common law[6] or adopted by domestic legislation.[7]

3. In implementing the CRPD, Singapore uses both non-binding and legislative measures, with a primary emphasis on non-binding measures. As noted earlier, Singapore has developed various Enabling Masterplans which serve as the roadmaps for addressing disability issues in Singapore. Specific policies are subsequently developed by the relevant government ministries and agencies, to give effect to the recommendations in the Enabling Masterplans.[8] On the legal system front, Singapore's treaty obligations under the CRPD are met by existing legislation or through transformative legislation, following Singapore's dualist approach towards international law. Singapore generally makes discrete amendments to existing primary and secondary legislation to further comply with her CRPD obligations.[9] It may also be possible for the Singapore courts to rely on international treaties such as the CRPD to develop the common law.[10]
4. Turning back to the main discussion, Article 12 of the CRPD is concerned with how legal systems enable or disable people as legal actors.[11] The recognition of legal capacity is linked to the enjoyment of many other human rights in the CRPD and without such recognition, the ability to assert, exercise and enforce these rights is significantly compromised.[12] The legal capacity of persons (that is, individuals) may be understood as comprising of two components: (1) a person's capacity to enjoy rights or to be subject to duties (passive legal capacity) and (2) the capacity to undertake obligations and acquire rights (active legal capacity).[13] Singapore law recognises the passive legal capacity of all persons[14] and does not appear to have a process for the prospective removal

6 Meaning judge made law. This is in contradistinction to legislation.

7 The preference for the transformation doctrine lies in the fact that the courts need to ensure that the international law obligations are not inconsistent with domestic rules, and that this approach is more logically consistent with the dualist approach to international law. See *Yong Vui Kong v Public Prosecutor* [2015] SGCA 11, [2015] 2 SLR 1129 [31]–[32].

8 For example, SG Enable was set up in 2013 as an agency dedicated to enabling persons with disabilities, with the aim of enhancing the employability and employment options for persons with disabilities. SG Enable provides information and referral services, training and job options, and administering grants and other forms of support to persons with disabilities and their caregivers. See Republic of Singapore, CRPD Initial Report, Pt I, para 1.5 and Pt II, para 1.22.

9 See, for example, amending the Copyright Act (Cap 63, 2006 Rev Ed Sing) to allow persons with reading disabilities greater opportunities to access copyright works. See Republic of Singapore, CRPD Initial Report, Pt II, paras 16.7–16.8.

10 Although there is no local decision on point, there is Australian authority suggesting that this is permissible; see *Mabo v State of Queensland (The Mabo Case)* [1992] HCA 23, [1992] 107 ALR 1 [29].

11 Lucy Series, Anna Nilsson, Article 12 CRPD: Equal recognition before the law, in: *The UN convention on the rights of persons with disabilities: A commentary*, ed. Ilias Bantekas, Michael Ashley Stein, Dimitris Anastasiou, Oxford University Press, Oxford, 2018, p. 340.

12 For the full list of how Article 12 of the CRPD interacts with other provisions of the CRPD, see Committee on the Rights of Persons with Disabilities, *General comment no 1 (2014) article 12: Equal recognition before the law*, CRPD/C/FC/1, May 19, 2014, paras 31–48, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en, accessed June 24, 2021 (General Comment No 1).

13 See, for example, Santos Cifuentes et al., *Legal opinion on article 12 of the CRPD*, University of Leeds Disability Studies Group Archives, June 21, 2008, https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/legal-opinion-LegalOpinion-Art12-FINAL.pdf, accessed December 4, 2020.

14 *Central Christian Church v Chen Cheng* [1994] SGHC 220, [1994] 3 SLR(R) 342 [1].

of a person's general active legal capacity.[15] What Singapore has, however, is a range of rules which apply to restrict specific decisions taken (or to be taken) by a person, on the basis that the person lacks mental capacity to make that decision. These rules may render decisions taken by (or objections from) a mentally incapacitated person ineffective in law. Different legal tests for mental capacity may apply depending on whether it relates to a decision made in the past or a decision to be made in the present or the future. Beyond mental incapacity, there are also rules which may restrict the active legal capacity of persons with disabilities, for the purposes of safeguarding persons with disabilities in situations of high risk and the protection of the public.

5. The CRPD Committee has, in its list of issues in 2019, called for Singapore to amend any laws that restrict the legal capacity of persons with disabilities and to harmonise them with the CRPD.[16] There is significant debate over what Article 12 of the CRPD requires state parties to do, such as whether the abolition of all forms of substituted decision-making is necessary.[17] While the CRPD Committee has stated that utilising the functional approach towards mental incapacity to restrict a person's legal capacity is not permitted by Article 12 of the CRPD,[18] this view is heavily contested.[19] Compulsory detention and medical treatment has also been regarded by the CRPD Committee to be contrary to Article 12 of the CRPD, with the CRPD Committee stating that the CRPD requires states parties to ensure that decisions relating to the treatment and the physical or mental integrity of a person be taken only with the free and informed consent of the person concerned,[20] a view which is contested as well.[21] This chapter does not seek to resolve these debates and it suffices to say that Singapore appears to take a more permissive interpretation of Article 12: that it permits the use of functional tests to limit the legal capacity of a person, substituted decision-making in cases of mental incapacity, and compulsory detention and medical treatment where there are countervailing concerns.[22] It should also be noted that Singapore has placed a reservation to Article

15 See para 62.

16 Committee on the Rights of Persons with Disabilities, *List of issues in relation to the initial report of Singapore*, CRPD/C/SGP/Q/1, October 29, 2019, para 10(a), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FSGP%2FQ%2F1&Lang=en, accessed December 4, 2020 (CRPD List of Issues).

17 For a summary, see Lucy Series, Anna Nilsson, Article 12 CRPD: Equal recognition before the law, in: *The UN convention on the rights of persons with disabilities: A commentary*, ed. Ilias Bantekas, Michael Ashley Stein, Dimitris Anastasiou, Oxford University Press, Oxford, 2018, p. 340.

18 Committee on the Rights of Persons with Disabilities, General Comment No 1, para 15.

19 See Wayne Martin et al., *Achieving CRPD compliance: Is the mental capacity act of England and Wales compatible with the UN convention on the rights of persons with disabilities? If not, what next?* An Essex Autonomy Project Paper: Report submitted to the Ministry of Justice on September 22, 2014, University of Essex, Essex, April 23, 2015.

20 Committee on the Rights of Persons with Disabilities, General Comment No 1, paras 40–42 and 45.

21 See, for example, Australia, Ireland, Netherlands, and Norway have declared their interpretation of the CRPD to allow for compulsory health interventions under limited circumstances. United Nations, *Treaty series*, vol. 2515, May 3, 2008, p. 3, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4, accessed July 28, 2020.

22 Singapore has stated that 'it does not intend to remove provisions in the [Mental Capacity Act (Cap 177A, 2010 Rev Ed Sing)] allowing court-appointed deputies to take decisions on behalf of a person who lacks mental capacity, as this would lead to superficial equality and could critically affect decision-making'; see Republic of Singapore, CRPD Replies, para 53. See § E II on decision-making on behalf of individuals lacking mental capacity and § C III on involuntary admissions and treatment of mental disorders.

12(4) of the CRPD, which requires states parties to regularly review the decisions made on behalf of persons with disabilities.[23]

6. The impact of Article 12 of the CRPD on the rights of persons with disabilities in Singapore will be considered from a few areas of the Singapore legal system. § B looks at Singapore's regulation of a person's active legal capacity in the realm of private law and whether the law has changed following Singapore's implementation of Article 12 of the CRPD. § C considers the same issues outside the realm of private law. § D describes the frameworks in Singapore for supporting the decision-making of or making decisions on behalf of persons with mental disabilities. § E outlines the judicial and non-judicial processes in Singapore pertaining to restricting a person's active legal capacity. § F provides some statistics relating to restrictions of active legal capacity, LPAs and deputies appointed under the Mental Capacity Act (MCA).[24] § G considers to what extent a person with disability is protected by criminal law against exploitation in the course of private law transactions and its relation to private law restrictions of a person's active legal capacity. § H goes on to look at the role of psychology, psychiatry and neurology in influencing how Singapore's implements of Article 12 of the CRPD. § I concludes the Singapore's experience in implementing Article 12 of the CRPD.

B. Active legal capacity under Singapore private law

7. Every person in her private life must make decisions and needs to exercise her active legal capacity to do so. These decisions include entering contracts, dealing with land, consenting to acts that would otherwise be tortious (such as undergoing medical treatment), appointing agents, making wills and other similar testamentary dispositions, entering marriage and conducting court proceedings. Such persons are also, by virtue of their active legal capacity, liable for any tortious acts which they may commit. With respect to persons with disabilities, only the lack mental capacity of a degree required by the rules in question may result in a limitation of that person's active legal capacity in private law (save for the special case of unfitness for marriage).[25] Mental capacity refers here to the mental condition a person must possess for his decisions to be considered autonomous and hence valid.[26] Under Singapore private law, it is generally presumed by law (save for the special case of wills and similar testamentary instruments) that the person has mental capacity. The onus is on the party alleging otherwise to prove so in court, when challenging the validity of acts taken by the person in the past.[27] For private law decisions to be made on behalf of persons lacking mental capacity going forward, this is primarily governed by the MCA.

23 See para 58 on the reservation.
24 (Cap 177A, 2010 Rev Ed Sing).
25 See para 18.
26 *Wong Meng Cheong v Ling Ai Wah* [2011] SGHC 233, [2012] 1 SLR 549 [27]; *Leow Li Yoon v Liu Jiu Chang* [2015] SGHC 290, [2016] 1 SLR 595 [25].
27 See *Wong Meng Cheong v Ling Ai Wah* [2011] SGHC 233, [2012] 1 SLR 549 [30].

Contract law

8. A person may attempt to set aside a contract which she had entered into on the ground that she lacked mental capacity at the time of contracting.[28] This depends on whether that person was able to understand the transaction.[29] Mere mental incapacity, however, is not sufficient to set aside the contract, as the law needs to protect counterparties who have no reason to suspect of the person's mental incapacity. As such, the person must further prove that her counterparty knew or ought to have known about her mental incapacity.[30] The fact that the contract was substantively unfair would not be sufficient to set aside the contract if the counterparty had no knowledge of the person's mental incapacity.[31] If it is the case the contract is only voidable and there may be bars to setting aside the contract, such as *restitutio in integrum* being impossible.[32] In addition, even if the contract is set aside, the counterparty may still recover a reasonable sum if the goods or services supplied relate to necessaries.[33]
9. Where a contract is signed, a party labouring under a mental disability may seek to set aside the contract under the doctrine of *non est factum*. Under this doctrine, that party must show that her mental incapacity was so severe that she had no real understanding of the contractual document if explained to her, which is different from the general plea of mental incapacity stated earlier.[34] That party must also show that she was not negligent in signing the document.[35] The doctrine of *non est factum* does not require further proof that the counterparty had knowledge of the person's lack of understanding, unlike the general plea of mental incapacity in contract law. If the plea of *non est factum* is successful, the contract is rendered void.[36] The counterparty, however, can still recover reasonable sums for necessary goods or services supplied.[37]

Land law

10. The position regarding dealings with land by persons with mental disabilities is similar to that under contract law. Under the Land Titles Act,[38] § 46(1) confers an indefeasible title on any person who becomes the proprietor of registered land. If a person becomes a proprietor of registered land, even though the instrument passing any estate or interest in land was made by another lacking the required mental capacity,

28 *Che Som bte Yip v Maha Pte Ltd* [1989] SGHC 62, [1989] 2 SLR(R) 60 [24].
29 Ibid., [22].
30 Ibid., [29]; *North Star (S) Capital Pte Ltd v Megatrucare Pte Ltd* [2021] SGHC 110.
31 *Che Som bte Yip v Maha Pte Ltd* [1989] SGHC 62, [1989] 2 SLR(R) 60 [28].
32 Ibid., [46].
33 See MCA, s 9(1) and the Sale of Goods Act (Cap 393, 1999 Rev Ed Sing), s 3(2).
34 *Ford v Perpetual Trustees Victoria* [2009] NSWCA 196, [2009] 257 ALR 658 [65]–[77], cited in *North Star (S) Capital Pte Ltd v Megatrucare Pte Ltd* [2021] SGHC 110 [107]. It should be noted that the court's interpretation of the doctrine of *non est factum* in *North Star* is not the same as that taken in *Ford*. In *North Star*, the court considered the "no real understanding" test under the doctrine of *non est factum* as the absence of a cognitive function necessary for mental incapacity at common law (the other cognitive functions being processing and weighing information), at [108]. In *Ford*, the "no real understanding" test however refers to a higher degree of impairment than the common law test of mental incapacity (at [65] and [75]).
35 *North Star (S) Capital Pte Ltd v Megatrucare Pte Ltd* [2021] SGHC 110 [103].
36 Ibid., [108].
37 See MCA, s 9(1) and the Sale of Goods Act (Cap 393, 1999 Rev Ed Sing), s 3(2).
38 Land Titles Act (Cap 157, 2004 Rev Ed Sing) (LTA).

the new proprietor's title cannot be impugned. The new proprietor's title can only be challenged if any of the exceptions to indefeasibility under § 46(2) of the LTA is made out. In particular, if the new proprietor acquired land from a person under a legal disability which was known to new proprietor at the time of dealing, the person under a legal disability may recover that land from the new proprietor.[39] Legal disability here includes mental incapacity,[40] and the test for mental capacity for the purposes of land law is the same[41] as that under § 4(1) of the MCA. The court may, if the exception to indefeasibility is established, order the land-register to be rectified.[42]

11. Outside of the court, if a person appears to the Registrar to be under a legal disability and is acquiring title under any instrument, the Registrar shall notify the disability in the memorial of registration and in any new folio which may be created in favour of that person.[43] Such evidence of legal disability may include a court order made under the MCA authorising a deputy to acquire title under an instrument on behalf of an individual lacking the requisite mental capacity to do so. Once the disability has been notified, the Registrar shall not register any instrument executed by that person under disability, unless the instrument gives effect to a transaction approved by the court or otherwise proved to the Registrar's satisfaction to be within the capacity of that person.[44]

Tort law

12. There is limited authority on the tortious liability of defendants with mental disabilities in Singapore. It has been suggested that such defendants are liable to the same extent as persons without mental disabilities unless their conduct is involuntary due to their mental disability and a voluntary act is required for the tort such trespass to the person.[45] Where the circumstances are such that the defendant, though labouring under a mental disability, knew the nature and the quality of her act at the relevant time of the commission of the tort, her mental disability would not operate as a defence.[46] In the context of negligence liability, only a defendant whose mental disability had the effect of entirely or completely eliminating any responsibility or that she had wholly lost control could be excused. A defendant who was merely impaired by medical problems could not escape liability for her actions if, however irrational, she had caused injury by failing to exercise reasonable care.[47]
13. Beyond tortious liability, a patient's mental disability may mean that her active legal capacity to give consent or refuse certain acts (such as medical treatment) could be limited. If a patient previously did not provide consent to or refused medical treatment but a medical practitioner continues to treat the patient, the doctor may be liable

39 Ibid., s 46(2)(d).
40 *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] SGCA 30, [2006] 4 SLR(R) 884 [6].
41 *Wong Meng Cheong v Ling Ai Wah* [2011] SGHC 233, [2012] 1 SLR 549 [27]–[30].
42 LTA, s 160(1)(b); see also *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] SGCA 30, [2006] 4 SLR(R) 884 [50].
43 LTA, s 39(1).
44 Ibid., s 39(2).
45 This includes assault, battery and false imprisonment; see Gary Chan, Lee Pey Woan, *The law of torts in Singapore*, 2nd ed., Academy Publishing, Singapore, 2016, para 02.001.
46 Ibid., para 18.022, citing *Morriss v Marsden* [1952] 1 All ER 925 (QB).
47 *Stephanie Tang Swan Leen v Tan Su San* [2018] SGDC 218 [13] and [18].

under tort law for trespass to the person, unless some other defence applies. Where there was prior refusal, the patient's refusal could be challenged on the basis that the patient lacked mental capacity to decide whether to undergo the medical treatment. The mental capacity required is commensurate with the gravity of the decision the patient purported to make. The more serious the decision, the greater the capacity required. If the patient had the requisite capacity, the medical practitioner is bound by her decision.[48] Where consent from the patient is not obtained, the decision-making framework under the MCA will be applicable.[49]

Agency law

14. Where a principal lacking mental capacity purports to appoint an agent, the position on the effectiveness of the appointment is uncertain and the authorities are in a state of some confusion.[50] Australian authority suggest that such an appointment remains good as between the principal and agent, unless the agent knows or ought to know of her principal's mental incapacity.[51] However, there is English authority stating that the principal's supervening mental incapacity terminates the agency, whether or not it is known to the agent.[52] Extending the latter to the initial appointment, it follows that the agent's appointment would not be valid whether or not the agent knows about the principal's mental incapacity.[53] In Singapore, there is authority holding that the principal's mental incapacity itself would be sufficient to render the appointment of the agent void, but no authorities were cited for that proposition.[54] There is academic suggestion that the mentally incapacitated principal may be bound by the acts of the agent, notwithstanding the agent's lack of actual authority, if the principal had represented to the third party as to the effectiveness of the agent's authority. This is so, unless the third party is aware of the principal's mental incapacity at the time of the representations.[55] The test for mental capacity for the purposes of agency law is the same as that under § 4(1) of the MCA.[56]

48 Gary Chan, Lee Pey Woan, *The Law of Torts in Singapore*, 2nd ed., Academy Publishing, Singapore, 2016, para 02.056, citing *Re T (adult: refusal of medical treatment)* [1992] 3 WLR 782 (CA) 799.

49 See § E II.

50 Tan Cheng Han, *The law of agency*, 2nd ed., Academy Publishing, Singapore, 2017, [03.004], citing *Dunhill v Burgin (Nos 1 and 2)* [2014] UKSC 18, [2014] 1 WLR 933 [31].

51 *McLaughlin v Daily Telegraph Newspaper Co Ltd (No 2)* [1904] HCA 51, (1904) 1 CLR 243.

52 *Yonge v Toynbee* [1910] 1 KB 215 (CA). This does not apply to lasting powers of attorney created under the Mental Capacity Act (Cap 177A, 2010 Rev Ed Sing), Pt IV.

53 *Dunhill v Burgin (Nos 1 and 2)* (n 50) [31]; see also Tan Cheng Han, *The law of agency*, 2nd ed., Academy Publishing, Singapore, 2017, para 03.006, which prefers the same position.

54 *Goh Yng Yng Karen (executrix of the estate of Liew Khoon Fong (alias Liew Fong), deceased) v Goh Yong Chiang Kelvin* [2021] SGHC 195, [2021] 3 SLR 896 [101].

55 Peter Watts, F. M. B. Reynolds, *Bowstead and reynolds on agency*, 22nd ed., Sweet & Maxwell, London, 2021, para 2.009; see also Tan Cheng Han, *The law of agency*, 2nd ed., Academy Publishing, Singapore, 2017, para 03.006.

56 *Goh Yng Yng Karen (executrix of the estate of Liew Khoon Fong (alias Liew Fong), deceased) v Goh Yong Chiang Kelvin* [2021] SGHC 195, [2021] 3 SLR 896 [30]–[34].

Wills and probate law

15. Wills or other instruments with testamentary characteristics such as a central provident fund (CPF) nomination[57] by a testator with mental disability may be set aside on the basis that the testator lacked testamentary capacity (that is, the mental capacity to make that instrument).[58] A testator has testamentary capacity if she (1) understands the nature of the act and what its consequences are, (2) knows the extent of her property of which she is disposing, (3) knows who her beneficiaries are and can appreciate their claims to her property and (4) is free from an abnormal state of mind (for example, delusions) that might distort feelings or judgements relevant to making the testamentary instrument.[59]
16. The law pertaining to testamentary dispositions aims to, on the one hand, uphold the testator's wishes and, on the other, ensure that her decision was an autonomous and informed one. These dual aims produce evidential challenges because such cases are usually brought about by the fact that the testator is no longer around to give evidence. The rules on the burden of proof regarding testamentary capacity aims to address these evidential challenges.[60] Unlike other areas of private law, the legal burden is on the propounder of a will to prove that the testator had mental capacity to make a will, if this is challenged during the probate process.[61] Testamentary capacity, however, will generally be presumed when the will was duly executed in ordinary circumstances and the testator was not known to be suffering from any kind of mental disability.[62] The evidential burden then shifts to the party challenging the will to raise a real doubt by adduce evidence to the contrary, such as evidence that the testator was suffering from a mental illness that was serious enough to cause her testamentary capacity to be impaired.[63] The same principles apply to other instruments with testamentary characteristics.[64]

57 This is a comprehensive social security system that enables working Singapore citizens and permanent residents to set aside funds for retirement.

58 Balasundaram et al., A practical approach to testamentary capacity and undue influence assessment in persons with dementia, *SAL Prac*, 2021, vol. 10, para 4. This is one of the three requirements for the validity of a testamentary instrument, the other two being that the testator had knowledge and approval of the contents of that instrument and was free from undue influence or the effects of fraud. See the oft cited decision of *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] SGCA 27, [2010] 4 SLR 373 [37]. See also the recent decisions of *UWF v UWH* [2021] SGHCF 22, [2021] 4 SLR 314 [134] and *ULV v ULW* [2019] SGHCF 2, [2019] 3 SLR 1270 [23] in the context of wills, and *Leow Li Yoon v Liu Jiu Chang* [2015] SGHC 290, [2016] 1 SLR 595 [29] in the context of CPF nominations.

59 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] SGCA 27, [2010] 4 SLR 373 [37], endorsing a restatement of the testamentary capacity test in *Banks v Goodfellow* (1870) LR 5 QB 549 (QB).

60 *Leow Li Yoon v Liu Jiu Chang* [2015] SGHC 290, [2016] 1 SLR 595 [30].

61 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] SGCA 27, [2010] 4 SLR 373 [52].

62 Ibid., [40], [46]. See also *Lian Kok Hong* [65].

63 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] SGCA 27, [2010] 4 SLR 373 [40]. See also *Leow Li Yoon v Liu Jiu Chang* [2015] SGHC 290, [2016] 1 SLR 595 [32].

64 *Leow Li Yoon v Liu Jiu Chang* [2015] SGHC 290, [2016] 1 SLR 595 [39], in the context of CPF nominations.

Marriage law

17. Under the Women's Charter (WC),[65] a marriage that fulfils all the critical prescriptions of formation between a person with mental disability and another may be annulled on two grounds, although it is valid until such an annulment (that is, the marriage is voidable).[66] The first is that the spouse with mental disability did not validly consent to the marriage. A spouse's consent may not be valid because of her mental disorder,[67] which is defined in the Mental Health (Care and Treatment) Act 2008 broadly as 'any mental illness or any other disorder or disability of the mind'.[68] This ground applies if, at the time of the solemnisation of the marriage, the bride or groom could not understand the nature of the contract being entered and appreciate its basic responsibilities.[69] That spouse can be said to lack mental capacity to consent to the marriage.
18. The second ground that may cause a marriage to be annulled is that either spouse at the time of the solemnisation, though capable of giving valid consent, was suffering from a mental disorder (as defined in the Mental Health (Care and Treatment) Act 2008) so as to be unfit for marriage.[70] Unlike the absence of consent, the focus on this ground is whether the spouse labouring under a mental disability is able to discharge her role and responsibilities in marriage. Her mental disorder must be so serious as to render her incapable of living in the married state and carrying out the ordinary duties and obligations of marriage. It is not enough that the spouse was merely difficult to live with because of the mental disorder.[71]
19. Where the marriage is voidable, the right to raise the fact that the marriage concerned is voidable is personal to the parties only and can only be raised during the lifetime of the other spouse.[72] Either spouse in the voidable marriage has the choice to decide whether to obtain a judgment of nullity of the marriage[73] or to ignore the grounds for annulment in which case the solemnisation of the marriage would be valid.[74] A spouse's right to obtain a judgment of nullity of the marriage is subject to bars. Even if one spouse proves one of the grounds that render a marriage voidable, a judgment will not be granted where that spouse, with the knowledge it was open to her to have the marriage avoided, conducted herself so as to lead the other spouse reasonably to believe that she would not seek to do so and where it would be unjust to the other spouse to grant the judgment of nullity.[75] For the grounds relating to a spouse's mental disorder (resulting in a lack of consent by that spouse, or that spouse's

65 Women's Charter (Cap 353, 2009 Rev Ed Sing) (WC).
66 Ibid., ss 106, 110.
67 Ibid., s 106(c). Prior to the amendments introduced by the Mental Health (Care and Treatment) Act 2008 (No 21 of 2008), the phrased used instead of "mental disorder" was "unsoundness of mind".
68 Mental Health (Care and Treatment) Act 2008 (Cap 178A, 2012 Rev Ed Sing), s 2(1).
69 Leong Wai Kum, *Elements of family law in Singapore*, 3rd ed., LexisNexis, New Delhi, 2018, para 2.104, citing *Re Park's Estate; Park v Park* [1953] 2 All ER 1411 (CA).
70 WC, s 106(d).
71 Leong Wai Kum, *Elements of family law in Singapore*, 3rd ed., LexisNexis, New Delhi, 2018, para 2.109, citing *Bennett v Bennett* [1969] 1 All ER 539 (HC).
72 *ADP v ADQ* [2012] SGCA 6, [2012] 2 SLR 143 [51], citing *Tan Ah Thee and another (administrators of the estate of Tan Kiam Poh (alias Tan Gna Chua), deceased) v Lim Soo Fong* [2009] SGHC 101, [2009] 3 SLR(R) 957.
73 WC, s 104.
74 Leong Wai Kum, *Elements of family law in Singapore*, 3rd ed., LexisNexis, New Delhi, 2018, para 2.060.
75 WC, s 107(1).

unfitness for marriage), there is also a time bar of three years from the date of the marriage for an application for a judgement of nullity.[76]

20. The judgment of nullity of a voidable marriage takes effect only upon the date of its grant.[77] This has certain implications. First, certain testamentary instruments are automatically revoked by marriage,[78] and it is unclear under Singapore law whether a judgment of nullity of a voidable marriage obtained prior to the testator's death[79] would revive the earlier testamentary instrument.[80] Second, the testator's spouse may have a claim to the testator's estate under intestacy laws, if the testator did not subsequently make a new testamentary instrument and a judgment of nullity was not obtained. This may be problematic in cases of predatory marriages, whereby the testator did not validly consent to the marriage due to her mental disorder, which the spouse took advantage of in procuring the marriage.[81] Third, if any benefit had accrued to the spouses or their child before the grant of the judgment of nullity, this benefit is secure.[82]

Conducting court proceedings

21. Persons with mental disability may have their active legal capacity to conduct court proceedings limited under the procedural rules governing civil and family courts in Singapore.[83] Actions cannot be brought or defended by a person lacking capacity unless they are represented by a litigation representative.[84] A person lacking capacity is someone who lacks the capacity within the meaning of the MCA in relation to matters concerning her property and affairs.[85] Where after proceedings have begun and a party to the proceedings becomes a person lacking capacity, an application must be made to the court for the appointment of a litigation representative.[86] A deputy appointed under the MCA with the authority to conduct proceedings on behalf of the person lacking capacity is entitled to act has that person's litigation representative.[87] Other-

76 Ibid., s 107(2).

77 Ibid., s 110(2).

78 See, for example, the Wills Act (Cap 352, 1996 Rev Ed Sing) (Wills Act), s 13(2), in the context of wills and the Central Provident Fund Act (Cap 36, 2013 Rev Ed Sing) (CPF Act), s 25(5)(a), in the context of CPF nominations. It should be noted that the Wills Act, s 13(2), allows for the testator to exclude its operation, but the same is not found in the CPF Act, s 25(5)(a).

79 By the testator, or where the testator lacks mental capacity to conduct legal proceedings, by a litigation representative. See para 21.

80 Under English law, the position is legislatively provided for and there is no revival of the earlier will; see the Wills Act 1873 (c 26), s 18A. Singapore does not have an equivalent position.

81 See, for example, *Re Roberts, Roberts v Roberts* [1978] 1 WLR 653 (CA), cited with approval in *Tan Ah Thee and another (administrators of the estate of Tan Kiam Poh (alias Tan Gna Chua), deceased) v Lim Soo Fong* [2009] SGHC 101, [2009] 3 SLR(R) 957 [40].

82 Leong Wai Kum, *Elements of family law in Singapore*, 3rd ed., LexisNexis, New Delhi, 2018, paras 2.120 and 2.127–2.128. See also WC, s 111(1), which provides that a child who was born after the attempt at marriage but before it was annulled would be deemed the legitimate child of her parents, which re-affirms the effect of WC, s 110(2).

83 See, generally, Rules of Court (Cap 322, R 5, 2014 Rev Ed Sing) (ROC), O 76, and Family Justice Rules 2014 (S 813/2014) (FJR), Div 39.

84 ROC, O 76 r 2 and FJR, r 656.

85 ROC, O 76 r 1 and FJR, r 654.

86 ROC, O 76 r 3(5) and FJR, r 657(5).

87 ROC, O 76 r 3(7)(b) and FJR, r 657(7)(b).

wise, any other person willing and fit to act and has no interest in the cause or matter in question adverse to the person lacking capacity may apply to be a litigation representative.[88] Generally, an order appointing a person litigation representative is not necessary, except where there is a need to substitute an earlier litigation representative, where the party to the proceedings becomes a person lacking capacity or where no appearance is entered into for a person lacking capacity.[89]

22. A litigation representative cannot settle the case without the approval of the court.[90] Similarly, no acceptance of an offer made by a person lacking capacity, or acceptance by her of an offer made by another party, is binding on her until the settlement is approved by the court.[91] The rules governing settlements are meant to (1) protect persons lacking capacity from any lack of skill or experience of their lawyers that may lead to a settlement for far less than it is worth, (2) provide the means by which the counterparty can obtain valid discharge from a person lacking capacity's claim, (3) ensure that lawyers acting for the person lacking capacity are paid their proper costs and no more and (4) make sure that money recovered by a person lacking capacity is properly looked after and wisely applied (if necessary).[92]
23. Any non-compliance with the procedural rules is treated an irregularity and does not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein. However, the court has a broad discretion to make orders dealing with the proceedings, including setting aside the proceedings wholly or in part and cost orders.[93]

Generalising the mental incapacity tests under common law

24. Although it appears that the tests for mental incapacity at common law are formulated differently in different areas of private law, the tests (apart from unfitness for marriage)[94] could be generalised to two propositions: first, that mental capacity required by the law is issue-specific (that is, it is considered in relation to the transaction which is to be effected); second, what is required is the capacity to understand the nature of that transaction when it is explained.[95] For the latter proposition, this requires a person to have the ability to recognise a problem, obtain and receive, understand and retain relevant information, including advice; the ability to weigh the information and advice (including that derived from advice) in the balance in reaching a decision, and the ability to communicate that decision.[96]

25. Following the enactment of the MCA in Singapore in 2008, the Singapore courts have on occasion applied the statutory definition of mental incapacity under the MCA

88 ROC, O 76 r 3(7)(c) and FJR, r 657(7)(c).
89 ROC, O 76 r 3(2) and FJR, r 657(2).
90 ROC, O 76 r 10 and r11 and FJR, r 664, 665.
91 ROC, O 22A r 7 and FJR, r 452.
92 Cavinder Bull, ed., *Singapore civil procedure 2021*, Sweet & Maxwell Asia, London, 2021, para 76/11/1.
93 See, generally, ROC, O 2 r 1 and FJR, r 10.
94 See para 18.
95 *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2002] EWCA Civ 1889, [2003] 1 WLR 1511 [58] and [62]. (Chadwick LJ).
96 Ibid [26] (Kennedy LJ), [79] (Chadwick LJ).

to the common law, given that the statutory rules are consistent with the common law principles.[97] Under the MCA, a person lacks mental capacity if (1) she is unable to make a decision for herself in relation to a matter at a material time (functional component) and (2) that inability is due to an impairment of or a disturbance in the functioning of her mind or brain (clinical component).[98]

26. Under the functional component, a person is unable to make a decision if she is unable[99]

    a. to understand information relevant to the decision;
    b. to retain that information;
    c. to use or weigh that information as part of the process of making the decision; or
    d. to communicate her decision.

27. As with the common law principles, a person's inability is issue specific. A person may have the ability to decide on some property and affairs matters, but not others.[100] Mere unwise decisions made by a person do not reflect that person's inability to make the decision.[101]
28. A question arises as to what extent the MCA definition of mental incapacity can be extended to the common law mental incapacity tests. Under § 3(3) of the MCA, a person is not to be treated as unable to make a decision unless all practicable steps to help her to do so have been taken without success. This is similar with § 5(2) of the MCA, which states that a person is not regarded as being unable to understand information relevant to a decision if she is able to understand an explanation of it given to her in a way that is appropriate to her circumstances (such as using simple language, visual aids or any other means). It is unclear whether these considerations are relevant in determining if a person had the requisite mental capacity, in relation to past acts taken by that person.[102] The MCA was enacted with the focus on decision-making on behalf of persons who lack mental capacity going forward, and not about decisions made by such persons in the past, which may have been made in absence of support.[103] Even if a person may have mental capacity to make a decision with support,

97 *Wong Meng Cheong v Ling Ai Wah* [2011] SGHC 233, [2012] 1 SLR 549 [27], applying the test in the context of transfers of property; *Leow Li Yoon v Liu Jiu Chang* [2015] SGHC 290, [2016] 1 SLR 595, applying the test in the context of CPF nominations; *Goh Yng Yng Karen (executrix of the estate of Liew Khoon Fong (alias Liew Fong), deceased) v Goh Yong Chiang Kelvin* [2021] SGHC 195, [2021] 3 SLR 896 [30], applying the test in the context of ascertaining the validity of power of attorneys for the sale of land; *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] SGCA 27, [2010] 4 SLR 373 [45] holding that the definitions under the Mental Capacity Act (Cap 177A, 2010 Rev Ed Sing) (MCA) are consistent with the common law principles regarding testamentary capacity.

98 MCA, s 4(1); see *Re BKR* [2015] SGCA 26, [2015] 4 SLR 81 [134].

99 MCA, s 5(1).

100 See *Re BKR* [2015] SGCA 26, [2015] 4 SLR 81 [208], where the Court of Appeal found a person to lack mental capacity only for substantial sums, but not for small sums.

101 MCA, s 3(4).

102 In *Wong Meng Cheong v Ling Ai Wah* [2011] SGHC 233, [2012] 1 SLR 549 [27]–[30], the aspect of facilitative support was not considered in the case.

103 Allen Sng, Tan Kah Wai, The deputyship regime under Singapore's mental capacity act: An introduction, *SAcLJ*, 2020, vol. 32, p. 167, paras 40–41. See also Tan Kah Wai, A tale of two capacities, *SAcLJ*, 2021, (e-First) paras 56–60 for similar arguments made in the context of testamentary dispositions.

this does not change the fact that such a person had no support when the transaction was entered into in the past.

29. Whilst certain cases had cited § 5(2) of the MCA in the context of the common law, it does not appear to have been a relevant consideration in ascertaining whether a person had mental capacity for a particular transaction. For example, in the case of *Chee Mu Lin Muriel v Chee Ka Lin Caroline* involving the validity of a will, the Court of Appeal cited § 5(2) of the MCA in ascertaining whether the testator had mental capacity to make the will.[104] The Court of Appeal held that the testator was not shown to have mental capacity when she was drafting the will, given the inadequacy of the support that she had at the time of drafting.[105] The Court of Appeal went on further to specify what further steps must be taken by solicitors who prepare wills and/or witnessing the execution of wills, to ensure that their duties to their clients are discharged.[106] This lends support to the view that § 5(2) (and the related § 3(3)) of the MCA does not apply in the context of the common law Mental Incapacity Rules.
30. The clinical component, on the other hand, requires, for establishing that a person lacks mental capacity, that the person was labouring under a medical condition which affects her mental functioning. Medical evidence will be required and professionals will need to testify if the person has a mental impairment, based on the observable symptoms and the diagnostic tools available.[107]
31. There is overlap between the clinical component and the functional component, given that medical conditions are defined in terms of a person's impaired functioning. Given that the clinical component is only a diagnostic threshold, aimed at avoiding catching 'large numbers of people who make unusual or unwise decisions',[108] any detailed analysis on the severity of the person's impaired functioning should be done at the functional component stage.[109] As such, the mere fact that a person is labouring under a medical condition does not necessarily mean that the person lacks mental capacity as a matter of law.[110]

Impact of Article 12 of the CRPD on persons' active legal capacity in private law

32. The rules relating to private law, as summarised earlier, can be viewed as restrictions on a person's active legal capacity. Decisions made by persons who are adjudged to

104 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] SGCA 27, [2010] 4 SLR 373 [44]. In this case, the testator was suffering from dementia, and her condition varied in severity and fluctuated over time, with moments of lucidity, at [50].

105 Ibid., [58], where the Court of Appeal observed that the provisions in the will were not properly explained to the testator.

106 Ibid., [60].

107 *Re BKR* [2015] SGCA 26, [2015] 4 SLR 81 [134].

108 MCA, s 4(1) is derived from the English Mental Capacity Act 2005 (c 9), s 2(1). As such, the English legislative history is relevant in interpreting Singapore's Mental Capacity Act. The diagnostic threshold view was taken by the English Law Commission; see Law Commission, *Mentally incapacitated adults and decision-making* (Law Com No 128, 1993) para 3.8, and Law Commission, *Mental incapacity* (Law Com No 231, 1995), para 3.15.

109 This was the approach taken in *Re BKR* [2015] SGCA 26, [2015] 4 SLR 81 [170]–[172].

110 *Goh Yng Yng Karen (executrix of the estate of Liew Khoon Fong (alias Liew Fong), deceased) v Goh Yong Chiang Kelvin* [2021] SGHC 195, [2021] 3 SLR 896 [87].

lack mental capacity for that decision could be challenged and subsequently set aside. Their development till date do not appear to have been influenced by Article 12 of the CRPD, given that the CRPD is not cited for developing Singapore common law in the cases reviewed in this section.

33. What might account for this lack of development? This could perhaps be attributed to the uncertainty of ascertaining exactly what Article 12 of the CRPD permits for the purposes of private law. Whilst the CRPD Committee has stated that utilising the functional approach towards mental incapacity to restrict a person's legal capacity is not permitted by Article 12 of the CRPD,[111] this view is heavily contested.[112] One strong argument is that while the CRPD Committee is correct in insisting for supported decision-making, it failed to consider the position where decisions are taken outside of this support framework by persons who lack mental capacity to make that decision.[113] Even assuming that the functional approach is not compliant with Article 12 of the CRPD, what would the alternative disability-neutral approach be?[114] It is unfortunate that the CRPD Committee did not provide further guidance on the definition or scope of the incapacity defences. How should the aims of Article 12 of the CRPD be balanced against other policies such as the need to rescue persons from decisions made while they lack mental capacity, and upholding the certainty of transactions? Such persons may require rescue not only in instances where they are exploited by their counterparties, but also when their own actions due to their mental disability results in self-harm without any exploitation by the counterparty.[115] Without these issues being satisfactorily resolved, it would appear to be difficult for any further development in private law to arise.

111 Committee on the Rights of Persons with Disabilities, General Comment No 1, para 15.

112 See Wayne Martin et al., *Achieving CRPD compliance: Is the mental capacity act of England and Wales compatible with the UN convention on the rights of persons with disabilities? If not, what next?* An Essex Autonomy Project Paper: Report submitted to the Ministry of Justice on September 22, 2014, University of Essex, Essex, April 23, 2015.

113 Eliza Varney, Redefining contractual capacity? The UN convention on the rights of persons with disabilities and the incapacity defence in English contract law, *OJLS*, 2017, vol. 37, pp. 493, 502. See also para 15 for the same argument.

114 See Lucy Series, Anna Nilsson, Article 12 CRPD: Equal recognition before the law, in: *The UN convention on the rights of persons with disabilities: A commentary*, ed. Ilias Bantekas, Michael Ashley Stein, Dimitris Anastasiou, Oxford University Press, Oxford, 2018, pp. 354, 358.

115 A useful illustration of self-harm can be seen in persons suffering from bipolar disorder. Such persons may incur debt due to excessive shopping during an episode of mania; see Karen Fong, This is what it's like living with bipolar disorder, *Her World*, Singapore, October 16, 2020, https://www.herworld.com/gallery/life/wellness/bipolar-disorder/, accessed June 13, 2022. These may occur without their counterparties knowing of the person's condition or any exploitation. Should the law not rescue such persons, although this may promote the immediate autonomy of such persons, the long-term autonomy and well-being of such persons may be compromised.

C. Active legal capacity outside of Singapore private law

Criminal liability, fitness to stand trial and safe custody

34. An accused's criminal liability may be limited due to her mental disability under Singapore criminal law. Under the Penal Code,[116] an accused may have limited capacity to commit crimes, if at the time of doing it, by reason of unsoundness of mind, she is[117]

    a. incapable of knowing the nature of the act;[118]
    b. incapable of knowing that what she is doing is wrong (whether wrong by the ordinary standards of reasonable and honest persons or wrong as contrary to law); or[119]
    c. completely deprived of any power to control her actions.[120]

35. An accused who successfully raises the defence of unsoundness of mind against her charge would be acquitted that charge. However, the court is required to make a finding of whether the accused had committed the act alleged.[121] If the accused had committed the act alleged and that act would but, for the incapacity, have constituted an offence, the court must order the accused to be committed to safe custody.[122] The rationale for this is to provide special procedures for accused persons with special needs. The procedures balance the need to ensure that such persons are not a danger to themselves or others, the fact that such persons are not convicted of any offence, and to provide such persons with the best possible opportunities of recovery in a controlled environment.[123]
36. Beyond criminal liability, an accused's ability to stand trial may also be limited due to her mental incapacity. Such an accused may be unable to plead and even when represented, defend herself. The court is thus under a duty to ascertain whether the accused is of an unsound mind, so that certain modifications to the trial may be made if needed. The court's duty to carry out an investigation arises, when the court holding or about to hold any inquiry or trial or any other proceeding has reason to suspect that the accused may be unfit to plead.[124] To avoid any pain and embarrassment, the investigation may be held in the absence of the accused if the court is satisfied that owing to the state of the accused's mind, it would be in the interests of the safety of the accused or of other persons or in the interests of public decency that she should be absent.[125] If the court is not satisfied that the accused is capable of making her defence, the court shall postpone the inquiry or trial and remand the accused for a period not exceeding one month in a psychiatric institution for observation.[126] This remand may

116 (Cap 224, 2008 Rev Ed Sing) (PC).
117 Ibid., s 84.
118 Ibid., s 84(a).
119 Ibid., s 84(b).
120 Ibid., s 84(c).
121 Criminal Procedure Code (Cap 68, 2012 Rev Ed Sing) (CPC), s 251.
122 Ibid., s 252(1).
123 *Tan Kok Meng v Public Prosecutor* [2021] SGCA 55, [2021] 2 SLR 403 [26].
124 CPC, s 247(1).
125 Ibid., s 247(2).
126 Ibid., s 247(3).

be extended to a further period not exceeding two months, if the designated medical practitioner is unable to form an opinion on the accused's state of mind.[127]

37. An accused is fit to stand trial if she is able to understand the charge, plead to it or exercise her right of challenge. She must also be able to understand generally the nature of the proceeding, that it is an inquiry as to whether she did what she is charged with. She needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though she may not understand the specific purposes of all the various court formalities. She must be able to understand the substantial effect of the evidence that may be given against her and must be able to make her defence or answer to the charge. Where she is represented, she must be able to give necessary instructions and provide her version of the facts and if necessary, inform the court as to her version. She need not be conversant with court procedure and need not have the mental capacity to make an able defence but must have sufficient capacity to be able to decide what defence she will rely on and to make her defence and her version of the facts known to the court and to her counsel, if any.[128]
38. If an accused is found to be of unsound mind and incapable of making her defence, the trial must be stayed.[129] If the accused were charged with a bailable offence, the accused may be released on sufficient security being given that the accused would be properly taken care of, be prevented from injuring herself or any other person, appear in court or before a court-appointed officer when required, and any other condition that the court may require.[130] If the offence charged is not bailable or if sufficient security is not given, the court shall report the case to the minister, who has the discretion to order the accused to be confined in a psychiatric institution or any other suitable place of safe custody.[131] The release of the accused or her custody (as the case may be) is only temporary. Where the accused is released on bail, she may be required to appear before the court and be subject to an inquiry on her fitness to stand trial and make her defence.[132] If the accused is in custody, her trial must resume if she is certified by the principal officer and two of the visitors of the psychiatric institution to be capable of making her defence.[133] Given that the determination of unsoundness of mind is not intended to be final, the court may at any begin the inquiry or trial or other proceeding afresh and require the accused to appear or be brought before the court.[134]
39. Although General Comment No. 1 is silent on criminal law issues,[135] the UN high commissioner has taken the view that Article 12 of the CRPD requires abolishing defences based on the negation of criminal responsibility because of the existence of a mental or intellectual disability. Instead, disability-neutral doctrines on the subjective

127 Ibid., s 247(4).

128 *R v Presser* [1958] VR 45 (Supreme Court of Victoria) 48, cited with approval in *Ong Teng Siew v PP* [1998] SGHC 121 [20].

129 CPC, s 248(2). Here, if the designated medical practitioner certifies that the person is of unsound mind and incapable of making her defence, the court shall, unless satisfied to the contrary, find accordingly.

130 Ibid., s 249(1).

131 Ibid., s 249(2).

132 Ibid., s 250(2).

133 Ibid., s 254(1).

134 Ibid., s 250(1).

135 Lucy Series, Anna Nilsson, Article 12 CRPD: Equal recognition before the law, in: *The UN convention on the rights of persons with disabilities: A commentary*, ed. Ilias Bantekas, Michael Ashley Stein, Dimitris Anastasiou, Oxford University Press, Oxford, 2018, p. 358.

element of the crime should be applied, which take into consideration the situation of the individual defendant.[136] The CRPD Committee has also expressed the view that derogatory terminology such as 'persons of unsound mind' should be abolished.[137] Singapore has taken steps to review legislative terminology and has pledged to continue doing so in consultation with stakeholders.[138] For example, in December 2020, Singapore has removed derogatory terminology[139] in the Income Tax Act.[140] However, in the specific domain of criminal law, Singapore has declined doing so as the meaning of 'unsoundness of mind' has acquired a specific legal meaning developed by the courts over decades. This meaning is easily understood and has not led to difficulties in practice. Disability organisations consulted during the review of the PC in 2018 did not raise any issues concerning this term as well.[141] The CRPD Committee also identified the CPC as a law that restricts the legal capacity of persons with disabilities and has called for its amendment.[142] However, it does not appear that Singapore will do so, as the criminal procedure laws relating to accused or convicted persons with severe mental health conditions are intended to balance the rights and interests of these persons against the need to protect the public from serious crime.[143] Safeguards are also in place to prevent abuse on two fronts. First, for persons confined under §§ 249 or 252 of the CPC, that person must be visited by two of the visitors of a psychiatric institution at least once every 6 months, and the visitors must make a special report to the Minister as to the person's state of mind.[144] Second, persons who believe that they are wrongly confined under the CPC may bring legal challenges against their confinement, such as seeking judicial review of the minister's confinement orders.[145]

40. It should be noted that reforms to the CPC were passed in 2018, although these have yet to be brought into force.[146] The amendments under Criminal Justice Reform Act 2018 (CJRA)[147] aims to enhance and rationalise the fitness to plead and unsoundness of mind regime, introducing significant amendments to the present law. The amendments allow the courts and medical professionals to play a more involved role in determining the most appropriate action to take in respect of persons who are incapable of making their defence at the time of trial and persons who are acquitted on the defence

136 United Nations High Commissioner for Human Rights, *Annual report of the United Nations high commissioner for human rights and reports of the office of the high commissioner and the secretary general: Thematic study by the office of the united nations high commissioner for human rights on enhancing awareness and understanding of the convention on the rights of persons with disabilities*, A/HRC/10/48, January 26, 2009, para 47, https://digitallibrary.un.org/record/647817/files/A_HRC_10_48-EN.pdf, accessed July 22, 2021 (UNHCHR Report).

137 Committee on the Rights of Persons with Disabilities, CRPD List of Issues, para 1(c).

138 Republic of Singapore, CRPD Replies, paras 8–10.

139 Income Tax (Amendment) Act 2020 (No 41 of 2020). See also Ibid., para 9.

140 (Cap 134, 2014 Rev Ed Sing).

141 Republic of Singapore, CRPD Replies, para 8.

142 Committee on the Rights of Persons with Disabilities, CRPD List of Issues, para 10(a).

143 Republic of Singapore, CRPD Replies, para 54.

144 CPC, s 253.

145 Republic of Singapore, CRPD Replies, paras 55.

146 The CJRA does not appear in the Republic of Singapore, CRPD Initial Report, or the Republic of Singapore, CRPD Replies.

147 No 19 of 2018.

of unsoundness of mind.[148] These amendments also allow the minister to make more nuanced orders and to avoid confining such persons for extended periods of time. Briefly, these amendments include[149]

a. extending the unfitness to plead procedures to cover accused persons who are incapable of making their defence due to any physical or mental condition;
b. requiring a designated medical practitioner to assess whether an accused person who is incapable of making her defence or a person acquitted by operation of the defence of unsoundness of mind may be released without danger of injuring herself or others, whether with or without any conditions;
c. allowing the minister to make orders for the release of an accused person who is incapable of making her defence or a person acquitted by operation of the defence of unsoundness of mind, with or without any conditions (such conditions may include requiring the person to be delivered to the care of a relative or friend);
d. imposing maximum durations for confinements pursuant to the minister's orders; and
e. instituting safeguards for persons acquitted by operation of the unsoundness of mind defence but confined under the order of the minister (the minister may, at first instance [subject to the earlier maximum durations on confinement], order a confinement of up to 12 months; further confinements will require an application by the minister to the court for permission before the expiry of any period of confinement, which the court may grant for a maximum of 12 months each period [subject to the earlier maximum durations on confinement]).

Voting in elections

41. Singapore citizens who are ordinarily resident in Singapore and above the age of 21[150] are under a duty to vote in parliamentary[151] and presidential elections.[152] However, persons with mental disabilities may be disqualified from voting in parliamentary and presidential elections if they are found or declared under any written law to be of unsound mind.[153]
42. In General Comment No. 1, the CRPD Committee stated that a person's decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote, under Articles 12 and 29 of the CRPD. To fully realise the equal recognition of legal capacity in all aspects of life, it is important to recognise the legal capacity of persons with disabilities in public and political life.[154] The CRPD Committee has also called for Singapore to amend the Parliamentary EA to facilitate and improve access to voting and the electoral

148 *Second Reading of the Criminal Justice Reform Bill*, *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol. 94 (Ms Indranee Rajah, Senior Minister of State for Law).
149 CJRA, ss 64–73.
150 Parliamentary Elections Act (Cap 218, 2011 Rev Ed Sing) Parliamentary EA), s 5 and the Presidential Elections Act (Cap 240A, 2011 Rev Ed Sing) (Presidential EA), s 2(1).
151 Parliamentary EA, s 43.
152 Ibid., s 26.
153 Ibid., s 6(1)(c) and s 2(1).
154 Committee on the Rights of Persons with Disabilities, General Comment No. 1, para 48.

participation of persons with intellectual or psychosocial disabilities[155] and to withdraw her reservation to Article 29 (a)(iii) of the CRPD.[156] In response, Singapore noted that persons with disabilities in general are aided by election officials, who can provide assistance and explain voting procedures to voters with disabilities.[157] Singapore will maintain her reservation to Article 29 (a)(iii) in order to keep voting secret and to safeguard the integrity of voting. This is achieved by only allowing persons with disabilities to be assisted in voting by an election official.[158] That said, Singapore has stated that it is reviewing how it can better support voters with disabilities in elections.[159] New accessibility initiatives are regularly introduced, taking into account feedback from the public. For example, in the recent 2020 general election, portable lap voting booths were provided for wheelchair uses to enable them to mark their ballot papers independently in private. Voting pens were replaced with stamp-pens to make it easier to mark ballot papers. Funnels were also installed on ballot boxes to make it easier to slot ballot papers into the boxes.[160]

Involuntary admission and treatment of mental disorders

43. In Singapore, it is generally recognised that care and treatment for most of the mentally ill is best done in the community setting. However, it may be necessary to detain some mentally disordered persons[161] in a psychiatric institution, to safeguard the health and safety of that person or to protect others in the community.[162] The Mental Health (Care and Treatment) Act (MHCTA),[163] originally enacted in 2008 and came into force on March 1, 2010,[164] regulates the involuntary admission of persons in psychiatric institutions for treatment of their mental disorder.[165] Matters pertaining to

155 CRPD List of Issues, para 29(b).

156 Ibid., para 3(a). CRPD (n 1) art 29(a)(iii) requires State Parties let persons with disabilities be aided by a person of their own choice when voting.

157 Republic of Singapore, CRPD Replies, para 128.

158 Ibid., para 18.

159 Ibid.

160 For a full summary of initiatives, see Republic of Singapore, CRPD Replies, paras 126–128.

161 Mental disorder is defined as any mental illness or any other disorder or disability of the mind; see Mental Health (Care and Treatment) Act (Cap 178A, 2012 Rev Ed Sing), s 2(1) (MHCTA).

162 *Second Reading of the Mental Health (Care and Treatment) Bill*, *Singapore Parliamentary Debates, Official Report* (September 15, 2008) vol. 85 (Mr Kaw Boon Wan, Minister for Health) col 61.

163 Mental disorder is defined as any mental illness or any other disorder or disability of the mind; see Mental Health (Care and Treatment) Act (Cap 178A, 2012 Rev Ed Sing), s 2(1) (MHCTA).

164 Mental Health (Care and Treatment) Act Notification 2009 (S 636/2009).

165 *Mah Kiat Seng v Attorney-General* [2019] SGHC 108, [2020] 3 SLR 918 [1]. It is noted that the the applicant appealed against the judge's decision to deny him leave to commence civil proceedings against the respondents. The Court of Appeal allowed the appeal on March 5, 2020, with no written grounds of decision rendered, after the respondents indicated that they would not be resisting the appeal in light of new evidence that had surfaced after the decision below had been rendered. The applicant was granted leave under MHCTA, s 25 to commence proceedings against the respondents within two weeks of March 5, 2020. No further information of the case was found on Lawnet, a portal containing decisions and reported judgments from the Singapore courts. Not all cases are contained on Lawnet, however.

any treatment for mental disorder regulated under the MHCTA are excluded from the purview of the MCA.[166]

44. Under § 7 of the MHCTA, police officers are under a duty to apprehend any person who is reported to be mentally disordered and believed to be dangerous to herself or other persons, by reason of mental disorder. The police officer is obliged to take the person, together with a report of the facts of the case, without delay to any medical practitioner or a designated medical practitioner at a psychiatric institution for an examination.[167] § 9 of the MHCTA allows medical practitioners[168] who has under her care a person believed to be mentally disordered or to require psychiatric treatment, to send the person to a designated medical practitioner[169] at a psychiatric institution for treatment.[170] § 10 of the MHCTA allows a designated medical practitioner[171] at a psychiatric institution who has examined any person suffering from a mental disorder to order the admission or detention[172] of that person (as the case may be), if she is of the opinion that the mentally disordered person should be treated or continue to be treated as an inpatient at the psychiatric institution.[173] In all cases, a person shall not be detained at a psychiatric institution for treatment unless that person suffers from a mental disorder warranting the detention of that person for treatment, and it is necessary in the interests of the health or safety of the person or for the protection of other persons that the person should be so detained.[174]
45. Depending on the person's mental state, the mentally disordered person could be detained initially for up to 72 hours.[175] If the designated medical practitioner is of the opinion that the person requires further treatment at the psychiatric institution, the person may be detained for a further period of 1 month commencing from the expiration of the period of 72 hours.[176] The person may be further detained for a period of up to 6 months, if two designated medical practitioners (of one must be a psychiatrist) after examining the person separately, are satisfied that the person requires further treatment.[177] Thereafter, the person can only be detained on a magistrate's order further periods of up to 12 months each, on application by the visitors of the psychiatric institution.[178] Two or more visitors (of one must be a medical practitioner) must visit at least once every 3 months to inspect the psychiatric institution, examine (as far as

166 Mental Capacity Act (Cap 177A, 2010 Rev Ed Sing) (MCA), s 27. However, all other medical treatment matters (subject to MCA, s 26) are within the remit of the MCA.
167 MHCTA, s 7; see also *Mah Kiat Seng v Attorney-General* [2019] SGHC 108, [2020] 3 SLR 918 [49].
168 Medical practitioner means any person who is registered as a medical practitioner under the Medical Registration Act (Cap 174, 2014 Rev Ed Sing); see MHCTA, s 2(1).
169 Psychiatric institution means a psychiatric institution designated by the minister under the MHCTA, s 3; see MHCTA, s 2(1). As at July 22, 2021, these institutions are the Institute of Mental Health and the Changi Prisons Complex Medical Centre.
170 MHCTA, s 9.
171 Designated medical practitioner, in relation to any psychiatric institution, means a medical practitioner who is working in the psychiatric institution and who is designated by name or office in writing by the director or such public officer as he may appoint, for the purposes of the MHCTA; see MHCTA, s 2(1).
172 Where the person was already an inpatient with the psychiatric institution, see MHCTA, s 10(1)(a).
173 MHCTA, s 10(1).
174 Ibid., 10(6).
175 Ibid., s 10(1).
176 Ibid., s 10(2).
177 Ibid., s 10(3).
178 For the initial extension, see Ibid., ss 13(1), (2) and (3). For subsequent extensions, see Ibid., s 3(6).

circumstances permit) any patient therein and the order for admission of every patient admitted since the last visitation of the visitors, and report to the director on their findings.[179] Two visitors (of one must be a medical practitioner) may together order the discharge of any patient from the psychiatric institution.[180]

46. A person who has done anything under the MHCTA is protected from civil or criminal liability, unless that person has acted in bad faith or without reasonable care.[181] No proceedings may be brought against such a person without leave of court, which is only granted where the court is satisfied that there is substantial ground for believing that the person had acted in bad faith or without reasonable care.[182]
47. The CRPD Committee stated that the detention of persons with disabilities in institutions against their will, either without their consent or with the consent of a substitute decision-maker constitutes arbitrary deprivation of liberty and violates Articles 12 and 14 of the CRPD.[183] Forced treatment denies the legal capacity of a person to choose medical treatment and is a violation of Article 12 of the CRPD as well.[184] The UN high commissioner for human rights has expressed the opinion that detention is permissible under Article 14 of the CRPD, provided that the detention is de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis.[185] In line with this interpretation, the CRPD Committee has called for Singapore (in the context of Article 14 of the CRPD) to amend the MHCTA to prohibit deprivation of liberty and forced treatment on the basis of intellectual or psychosocial disability, ensure that medical treatment is based on the free and informed consent of persons with disabilities, and abolish the practice of institutionalisation without consent of persons with disabilities, especially persons with intellectual or psychosocial disabilities, including the establishment of independent monitoring and review systems.[186] When asked in parliament if there are plans to review the MHCTA in light of Singapore's ratification of the CRPD, the minister for health stated that the Ministry of Health has no plans to amend the MHCTA, as the legislation is in compliance with the requirements of Article 14 of the CRPD.[187] This suggests that Singapore adopts an interpretation different from what the CRPD Committee and the UN high commissioner for human rights have proffered.

Protection of vulnerable adults

48. Beyond the narrow ambit of the MHCTA, which is concerned with the health and safety of persons with mental disorders and the protection of the public, Singapore has passed the Vulnerable Adults Act 2018 (VAA) which seeks to safeguard vulnerable

179 Ibid., s 5.
180 Ibid., s 14.
181 Ibid., s 25(1).
182 Ibid., s 25(2).
183 Committee on the Rights of Persons with Disabilities, General Comment No 1, para 40.
184 Ibid., para 42.
185 UNHCHR Report, at para 49.
186 Committee on the Rights of Persons with Disabilities, CRPD List of Issues, para 12.
187 *Written answers to questions, Singapore parliamentary debates, official report* (February 2, 2021), vol. 95 (Mr Gan Kim Yong, Minister for Health).

adults from abuse, neglect or self-neglect.[188] Vulnerable adults here refers to individuals above the age of 18 who are incapable of protecting themselves from abuse, neglect or self-neglect, by reason of mental or physical infirmity, disability or incapacity.[189] The VAA allows for some state interventions even if the vulnerable adult refuses to consent to those interventions, thereby limiting that vulnerable adult's Active Legal Capacity.

49. The VAA provides the director-general or protectors investigatory powers which may be exercised where there is reason to believe that an individual is a vulnerable adult and the individual has experienced, is experiencing, or at risk of abuse, neglect or self-neglect.[190] These powers include (1) requiring an individual to be assessed,[191] (2) entering premises[192] and (3) obtaining information and examining records.[193] In cases where the individual refuses to be assessed, the director-general or protector may proceed with assessment if there is reason to believe that the individual lacks mental capacity to refuse the assessment and the assessment would be in that individual's best interests.[194] Where the individual has mental capacity to refuse, a court order will be required to overcome that individual's refusal.[195] In addition, the director-general or protector may remove an individual from her residence for the purposes of assessment if the individual consents; it is in the best interests of that individual if she lacks mental capacity to consent or in accordance with a court order.[196]
50. The VAA also empowers the director-general or a protector to remove a vulnerable adult from the place where she is residing, if the director-general or protector is satisfied on reasonable grounds that the vulnerable adult has experienced, is experiencing or at risk of abuse, neglect or self-neglect. As with the more intrusive investigatory powers, the removal can only be carried out if the vulnerable adult consents; it is in the best interests of the vulnerable adult if she lacks mental capacity to consent or in accordance with a court order.[197] If a vulnerable adult is removed, the vulnerable adult must be committed to a place of temporary care and protection or to the care of a fit person.[198] Safeguards are in place to protect the vulnerable adult. The director-general is required to apply to the court within 14 working days after the day of the removal, for a court order.[199] For all committals, the Review Board is required to review cases of vulnerable adults committed for the purposes of ensuring that a proper care plan is in place and to advise the director-general on whether the vulnerable adult may be discharged at any time before the completion of the period of committal.[200]
51. Before or during the committal, the vulnerable adult may be required to undergo necessary medical or dental treatment.[201] Any such treatment can only be administered

188 (No 27 of 2018).
189 Ibid., s 2(1).
190 Ibid., s 5(a).
191 Ibid., ss 6(1)(a), (b) and (c).
192 Ibid., s 8.
193 Ibid., s 9.
194 Ibid., s 7(2)(a).
195 Ibid., s 7(2)(b).
196 Ibid., s 6(1)(d).
197 Ibid., s 10(1).
198 Ibid., s 11(1)(a).
199 Ibid., s 11(1)(b) and (2).
200 Ibid., s 20(2).
201 Ibid., s 18(1).

with the vulnerable adult's consent unless: (1) the vulnerable adult is assessed to lack the mental capacity to consent an\\\\d the registered medical practitioner or dentist reasonably believes it is in the best interests to receive the treatment or (2) it is not practicable to obtain consent from the vulnerable adult, and the registered medical practitioner or dentist reasonably believes that a medical or dental treatment (as the case may be) exists and is of the view that it is in the vulnerable adult's best interests to receive the treatment.[202] If a donee or deputy was appointed for a vulnerable adult lacking mental capacity to consent to the treatment, the registered medical practitioner or dentist can only administer treatment without their consent, if consent cannot be obtained within a reasonable time or consent is being unreasonably withheld by the donee or deputy.[203]

52. The VAA empowers the court to make a spectrum of orders[204] for the protection of the vulnerable adult, where the vulnerable adult has experienced, is experiencing, or at risk of abuse, neglect or self-neglect, and the orders are necessary for the protection and safety of the vulnerable adult. These orders include

    a. committing the vulnerable adult to a place of temporary care and protection, or the care of a fit person, for a period not exceeding 6 months;[205]
    b. committing the vulnerable adult to a place of safety, or the care of a fit person for a specified period exceeding 6 months, if it is in the best interests of the vulnerable adult;[206]
    c. requiring a person to produce the vulnerable adult for medical or dental treatment necessary to enable the committal of the vulnerable adult;[207]
    d. placing the vulnerable adult under the supervision of a protector, approved welfare officer or a person appointed by the court for a specified period;[208]
    e. restraining abusers from abusing or further abusing the vulnerable adult;[209]
    f. granting the vulnerable adult exclusive occupation of the premises or a specified part of the premises where the vulnerable adult ordinarily resides;[210]
    g. prohibiting a person from entering and remaining in, for a specified period, an area outside the vulnerable adult's residence or any other place frequented by the vulnerable adult;[211]
    h. prohibiting a person from visiting or communicating with the vulnerable adult;[212]
    i. requiring persons, including the vulnerable adult, to attend counselling and such other programme as directed by the court;[213] and

202 Ibid., s 18(2).
203 Ibid., s 18(3). Contrast with Ibid., s 6(2), which allows the director-general or a protector to exercise their investigatory powers without the consent of a donee or deputy appointed for a person believed to be a vulnerable adult or vulnerable adult. Ibid., s 10(2) similarly allows the director-general or a protector to remove the vulnerable adult without the consent of the vulnerable adult's donee or deputy.
204 See, generally, ibid., Part 2, Division 3.
205 Ibid., s 14(1)(a).
206 Ibid., s 14(1)(b).
207 Ibid., s 14(1)(c).
208 Ibid., s 14(1)(d).
209 Ibid., s 14(1)(e).
210 Ibid., s 14(1)(f).
211 Ibid., s 14(1)(g).
212 Ibid., s 14(1)(h).
213 Ibid., s 14(1)(i).

j. where the condition of the vulnerable adult's residence poses a risk to the safety or health of the vulnerable adult, authorising the director-general, protector or another person to make the residence a safe living environment (including the disposal of any article or thing in the residence without the consent of its owner).[214]

53. The performance of any duty or exercise of any power under the VAA must be subject to the following principles:[215]

a. the duty is being performed or the power is being exercised for the purpose of protecting the vulnerable adult from abuse, neglect and self-neglect;
b. a vulnerable adult, where not lacking mental capacity, is generally best placed to decide how he or she wishes to live and whether or not to accept any assistance;
c. if a vulnerable adult lacks mental capacity, the vulnerable adult's views (whether past or present), wishes, feelings, values and beliefs, where reasonably ascertainable, must be considered;
d. regard must be had to whether the purpose for which the duty is being performed or the power is being exercised can be achieved in a way that is less restrictive of the vulnerable adult's rights and freedom of action; and
e. in all matters relating to the administration or application of this act, the welfare and best interests of the vulnerable adult must be the first and paramount consideration.

54. While Article 12 of the CRPD was not cited as a consideration in the drafting of the VAA,[216] the considerations taken by the Singapore government in developing the VAA is consistent with Singapore's interpretation of what Article 12 of the CRPD permits. The VAA seeks to strike a balance between the need to protect vulnerable adults (which Singapore states as an example of how it implements Article 16 of the CRPD)[217] and their right to autonomy and self-determination.[218] In the second reading of the Vulnerable Adults Bill, the minister for social and family development emphasised that the bill was premised on 'the vulnerable adult's autonomy to make his own decisions'. However, in exceptional situations, intervention may be necessary to ensure the vulnerable adult's safety despite her refusal to consent due to 'under duress or undue influence'. The powers under the VAA will be exercised as a last resort, 'where family and community intervention has failed'. These powers are also not be exercised in isolation and social intervention, such as therapy and counselling sessions, will complement the VAA to ensure that that the vulnerable adult will be able to 'turn to the love and care of his family eventually'.[219]

214 Ibid., s 14(1)(j). These orders can only be made with the consent of the owners of the residence and of the vulnerable adult. However, the court may make an order without their consent, if they lack mental capacity to consent, or such an order is necessary for the protection and safety of the vulnerable adult; see Ibid., ss 14(2) and (3).

215 Ibid., s 4.

216 The CRPD was not mentioned during the parliamentary debates on the Vulnerable Adults Bill: *Second reading of the vulnerable adults bill*, *Singapore parliamentary debates, official report* (May 18, 2018) vol. 94 (Mr Desmond Lee, Minister for Social and Family Development).

217 See Republic of Singapore, CRPD Replies, paras 76–77.

218 *Second reading of the vulnerable adults bill*, *Singapore parliamentary debates, official report* (May 18, 2018) vol. 94 (Mr Desmond Lee, Minister for Social and Family Development).

219 Ibid.

D. Frameworks for supported and substituted decision-making in Singapore

55. The MCA, originally enacted in 2008 and came into force on March 1, 2010,[220] is the prevailing legislation[221] that governs decision-making on behalf of persons who are mentally incapacitated. Prior to the enactment of the MCA, the Mental Disorders and Treatment Act (MDTA)[222] governed these matters and was perceived to have several shortfalls.[223] First, the MDTA adopted a status based approach towards mental incapacity, allowing a court to declare a person incompetent if he is 'of unsound mind and incapable of managing himself and his affairs'.[224] Upon such declaration, that person would be deprived of her active legal capacity and any transaction entered into by her would be void, regardless whether she was functionally able to make that decision, or whether her counterparty knew of her status.[225] Second, the MDTA did not allow persons to plan in advance and choose whom they would like to make decisions on their behalf, should they lose mental capacity in the future as well.[226] The MCA was thus necessary to, *inter alia*, achieve a better balance between respecting the autonomy and protection for people who are unable to make their own decisions.[227]

Supported decision-making under the MCA and AMDA

56. Article 12(3) of the CRPD requires states parties to provide access by persons with disabilities to the support they may require in exercising their legal capacity. The CRPD Committee has stated that such support might include measures relating to universal design and accessibility and providing advance planning mechanisms for persons with disabilities to state their will and preferences which should be followed at a time when they may not be in a position to communicate their wishes to others.[228] It would appear from General Comment No. 1 that not all forms of decision-making by another person on behalf of a person amounts to substituted decision-making. The CRPD standard is met in particular where the decision-maker was appointed by that

220 Mental Capacity Act (Commencement) Notification 2009 (S 637/2009).

221 Any derogation or deviation from the MCA's provisions by other legislation pertaining to substituted decision-making would need to be clearly spelt out; see *SGB Starkstrom Pte Ltd v Commissioner of Labour* [2016] SGCA 27, [2016] 3 SLR 598 [25].

222 (Cap 178, 1985 Rev Ed Sing).

223 For a critique of the MDTA, see Law Reform Committee of the Singapore Academy of Law, *Civil inquiries into mental incapacity: The report of the sub-committee of the law reform committee of the singapore academy of law for the review of proceedings under the mental disorders and treatment act (Cap 178)* (Singapore Academy of Law, November 1999).

224 MDTA, s 7. See also Ibid., 13.

225 *Re Walker* [1905] 1 Ch 160 (Court of Appeal of England and Wales). See also Law Reform Committee of the Singapore Academy of Law, *Civil inquiries into mental incapacity: The report of the sub-committee of the law reform committee of the singapore academy of law for the review of proceedings under the mental disorders and treatment act (Cap 178)* (Singapore Academy of Law, November 1999), 31 n 25.

226 *Second reading of the mental capacity bill*, *Singapore parliamentary debates, official report* (September 15, 2008) vol. 85 (Dr Vivian Balakrishnan, Minister for Community Development, Youth and Sports) col 108.

227 Chief Justice Chan Sek Keong, *Keynote address* (Mental Capacity Act: Code of Practice Seminar, Singapore, October 7, 2011).

228 Committee on the Rights of Persons with Disabilities, General Comment No 1, para 17.

person and the decision-maker bases her decision on the best interpretation of the person's will and preferences.[229]

57. In Singapore, the MCA gives some recognition to supported decision-making in two areas. First, supported decision-making is relevant in determining whether a person lacks mental capacity and whether the MCA is applicable.[230] Under § 3(3) of the MCA, a person is not to be treated as unable to make a decision unless all practicable steps to help her to do so have been taken without success. § 5(2) of the MCA further states that a person is not regarded as being unable to understand information relevant to a decision if she is able to understand an explanation of it given to her in a way that is appropriate to her circumstances (such as using simple language, visual aids or any other means). However, the duty to provide support is a limited one and is only triggered when a person wishes to make a decision on behalf of a person purporting to lack mental capacity for that decision.[231]
58. Second, the MCA allows for a person (donor) who has attained the age of 21 years and has the requisite mental capacity[232] to execute a lasting power of attorney appointing a person (donee) to act on her behalf when she lacks the mental capacity to do so.[233] The lasting power of attorney regime, however, is unlikely to be considered by the CRPD Committee to be a form of supported decision-making that is fully compliant with Article 12 of the CRPD. While the CRPD Committee has expressed that Article 12 of the CRPD requires supported decision-making regimes to allow persons to refuse support and terminate or change the support relationship at any time, under the MCA the donor can only revoke a lasting power of attorney when she has mental capacity to do so.[234] Where the donor lacks mental capacity, the lasting power of attorney may only be revoked on certain grounds by the court.[235] In addition, the donee is not required to make decisions based on the donor's will and preferences but is obliged to act in the best interests of the donor.[236] The donor's will and preferences will be considered as a factor in the best interest analysis.[237] Singapore has reserved its right to apply her current legislative framework in lieu of the regular review in Article 12(4) of the CRPD[238] and the CRPD Committee has called for the removal of this reserva-

229 Lucy Series, Anna Nilsson, Article 12 CRPD: Equal recognition before the law, in: *The UN convention on the rights of persons with disabilities: A commentary*, ed. Ilias Bantekas, Michael Ashley Stein, Dimitris Anastasiou, Oxford University Press, Oxford, 2018, p. 365.

230 See para 25 above for the definition of mental incapacity under the MCA.

231 See Mental Capacity Act (Cap 177A, 2010 Rev Ed Sing) (MCA), s 7(1)(a) for caregivers and medical treatment providers, MCA, s 13(1) for Donees of lasting powers of attorney, MCA, s 25(1) for deputies and MCA, ss 19 and 20(1) for the court.

232 Ibid., s 11(2)(c).

233 Ibid., s 11(1).

234 Committee on the Rights of Persons with Disabilities, General Comment No 1, para 29(g).

235 MCA, s 17(4)(b). For the grounds of revocation, see MCA, s 17(3).

236 Ibid., s 11(4)(a). The donee's failure to act in the best interests of the donor may be grounds for revoking the lasting power of attorney; see Ibid., ss17(3)(b)(i) and (ii).

237 Ibid., s 6(7).

238 Under Singapore's reservation, it is provided, 'The Republic of Singapore's current legislative framework provides, as an appropriate and effective safeguard, oversight and supervision by competent, independent and impartial authorities or judicial bodies of measures relating to the exercise of legal capacity, upon applications made before them or which they initiate themselves in appropriate cases. The Republic of Singapore reserves the right to continue to apply its current legislative framework in lieu of the regular review referred to in Article 12, paragraph 4 of the Convention'; see United Nations, *Treaty series*, vol. 2515, May 3, 2008, p. 3, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4, accessed July 28, 2020.

tion.[239] Singapore has expressed that it will maintain its reservation on the basis that it is consistent with the spirit of the CRPD and its domestic context. Regular reviews of decisions made under a lasting power of attorney may undermine the assumption of trust and goodwill underscoring the social bond between the donor and the chosen donee(s). Existing safeguards in limiting the acts or decisions of donees and others who act on behalf of persons lacking mental capacity, as well as whistleblower protections, are sufficient to protect vulnerable persons.[240] That being said, the Ministry of Social and Family Development has received feedback from the public on the need for further measures to protect the donor from abuse, such as requiring donees to notify the public guardian of their intention to exercise their authority before doing so and has expressed that it will study these feedback further.[241]

59. Outside of the MCA, the Advance Medical Directive Act (AMDA)[242] allows persons to plan whether they would wish to be subjected to extraordinary life-sustaining treatment in the event of their suffering from a terminal illness. Should a person who is not mentally disordered and has attained the age of 21 years desire not to be subjected to such extraordinary life-sustaining treatment, she may make such an advance medical directive in accordance with the AMDA.[243] The advanced medical directive will only come into force if the person has been determined to have a terminal illness and a certificate of terminal illness has been issued.[244] Matters relating to the making or revoking of an advance medical directive are excluded from the MCA.[245] As with the lasting power of attorney regime, it is unlikely that the AMDA is fully compliant with the CRPD Committee's interpretation of Article 12 of the CRPD, given that an advance medical directive can only be made[246] or revoked[247] by a person who is not mentally disordered and not at any time by the person.[248]
60. Singapore also has the Advance Care Planning (ACP) programme run by the Agency for Integrated Care (AIC), a government-linked agency that seeks to create a vibrant care community enabling Singapore residents to live well and age gracefully.[249] Intro-

239 Committee on the Rights of Persons with Disabilities, CRPD List of Issues, para 3.

240 Republic of Singapore, CRPD Replies, para 19.

241 Ministry of Social and Family Development, Public consultation on mental capacity (amendment) bill 2020, *Reach Government Feedback Unit*, para 9, https://www.reach.gov.sg/participate/public-consultation/ministry-of-social-and-family-development/public-consultation-on-mental-capacity-amendment-bill-2020, accessed August 4, 2021.

242 Advance Medical Directive Act (Cap 4A, 1997 Rev Ed Sing) (AMDA), s 3(1),

243 Ibid., s 3.

244 Ibid., s 9 for the procedures pertaining to the certification of terminal illness. Ibid., s 9(1)(c) states that it is a prerequisite for the medical practitioner to have reason to believe that the person is unconscious or incapable of exercising rational judgment, before the medical practitioner may issue a certificate of terminal illness. See also Ministry of Health, Advance medical directive, *Ministry of Health Singapore*, January 23, 2019, https://www.moh.gov.sg/policies-and-legislation/advance-medical-directive, accessed August 2, 2021.

245 Mental Capacity Act (Cap 177A, 2010 Rev Ed Sing) (MCA), s 26(j).

246 AMDA, s 3(1).

247 Ibid., s 7(1) allows a patient who has made an advance medical directive to revoke it in accordance with provisions of the AMDA. Patient is defined as a person who is not mentally disordered, who has attained the age of 21 years and who has made or desires to make an advance medical directive in accordance with the AMDA; see AMDA, s 2.

248 Committee on the Rights of Persons with Disabilities, General Comment No 1, para 29(g).

249 Agency for Integrated Care, About us, *Agency for Integrated Care*, https://www.aic.sg/about-us, accessed August 31, 2021.

duced in 2011,[250] ACP allows an individual to document their will and preferences on their future health and personal care and to nominate a person (nominated healthcare spokesperson) that may inform healthcare providers on the individual's will and preferences in the event that individual loses mental capacity in the future.[251] However, unlike the LPA and the advance medical directive, ACP is not legally binding.[252] ACP may be documented with an ACP provider who can make the ACP available to future treating healthcare teams when needed, and can be reviewed and updated by the individual.[253] In 2018, there were 4,500 instances of ACP completed, double the number from 2015.[254]

Substituted decision-making under the MCA

61. Under the MCA, there are four classes of decision-makers who may make decisions on behalf persons lacking mental capacity. These decision-makers may make both personal welfare[255] and property and affairs decisions[256] and will be discussed in the order of their potential scope of powers.[257]

    a. **Courts** – Under the MCA, the court has the broadest powers with respect to decision-making on behalf of persons lacking mental capacity. Subject to certain excluded decisions,[258] the court is granted wide powers to make decisions regarding that person's personal welfare or property and affairs.[259] These include the power to execute testamentary instruments such as wills, nominations under the Insurance Act,[260] and memorandums or nominations under the CPF Act. The court, however, cannot act *suo motu* and can only exercise its powers under the MCA where an application has been commenced under the MCA and the applicable rules.[261]

250 Agency for Integrated Care, Advance care planning, *Agency for integrated care*, https://www.aic.sg/care-services/advance-care-planning, accessed August 31, 2021.

251 Agency for Integrated Care, Simple steps for ACP, *Agency for Integrated Care*, https://www.aic.sg/care-services/simple-steps-for-acp, accessed August 31, 2021. ACP providers consist of hospitals, selected polyclinics, and community care providers.

252 Tan Shen Kiat, With advance care planning, your loved ones' care wishes matter, *Agency for Integrated Care*, https://www.aic-blog.com/Advance-Care-Planning-Your-Loved-Ones-Care-Wishes-Matter, accessed August 31, 2021.

253 Agency for Integrated Care, Simple steps for ACP, *Agency for Integrated Care*, https://www.aic.sg/care-services/simple-steps-for-acp, accessed August 31, 2021. ACP providers consist of hospitals, selected polyclinics, and community care providers.

254 Agency for Integrated Care, *More Singaporeans opting for advance care plans*, https://www.primarycarepages.sg/news-and-publications/news/more-singaporeans-opting-for-advance-care-plans, accessed August 31, 2021.

255 This refers to lifestyle decisions, such as deciding where one wishes to live, what contact one wishes to have with others and giving or refusing consent to any medical treatment; see MCA, s 22(1).

256 Property and affairs decisions refer to decisions relating to one's financial affairs and property, such as controlling one's property, acquiring property, entering or carrying out of any contract and conducting legal proceedings; see MCA, s 22(1).

257 See, generally, Allen Sng, Tan Kah Wai, The deputyship regime under Singapore's mental capacity act: An introduction, *SAcLJ*, 2020, vol. 32, paras 8–18.

258 See MCA, s 26 which lists the decisions that all decision-makers are excluded from making under the MCA.

259 Ibid., s 20.

260 (Cap 142, 2002 Rev Ed Sing).

261 *Peter Edward Nathan v De Silva Petiyaga Arther Bernard* [2016] SGHC 70, [2016] 3 SLR 361 [36].

b. **Donees of lasting power of attorney** – A donee of a lasting power of attorney on the other hand has much more limited powers than the courts.[262] For instance, a donee of the LPA is not entitled to execute wills for their donor when she lacks mental capacity,[263] and the scope of her powers are determined by what was conferred by the donor in the lasting power of attorney.[264]

c. **Deputies** – In cases where the decisions required to be made on behalf of a person lacking mental capacity are of an ongoing nature or relate to decisions which are to be made in the future, the court may choose to delegate its decision-making powers to a deputy. The court is empowered to do so under S20(2)(b) of the MCA. The scope of delegated powers depends on the terms of the court order and are subject to various statutory restrictions imposed by the MCA.[265] The deputy has much more limited powers compared to a donee of an LPA. A deputy may not prohibit a named person from having contact with a person lacking mental capacity or to make gives out of that person's assets.[266] A deputy may not be given powers which are within the scope the authority granted to a donee.[267]

d. **Caregivers and medical treatment providers** – Caregivers and medical treatment providers may make decisions pertaining to care and treatment on behalf of persons lacking mental capacity under the MCA. § 7 of the MCA provides these caregivers and medical treatment providers with immunity from civil or criminal liability if they act in accordance with the MCA, but the statutory protection does not extend to criminal or civil liability arising from negligence.[268] Caregivers or medical treatment providers may be reimbursed out of the person's assets if they had borne expenditure for the person for necessary goods or services.[269] The combined effect of immunity from liability and a right of reimbursement has been said to amount to a statutory authorisation of such acts of care and treatment.[270]

62. As discussed earlier, the MCA adopts a functional approach in assessing whether a person lacks mental capacity[271] and replaces the status-based approach towards mental incapacity under the MDTA. While there is English authority[272] suggesting that the MCA may allow the courts to remove a person's active legal capacity in general, the better

262 See, generally, MCA, s 13.

263 See Ibid., ss 13(9) and 13(9A).

264 Ibid., s 11(4)(b). As such, a donee who is only conferred powers to make decisions on personal welfare matters will be unable to make decisions on property and affairs matters.

265 Ibid., s 25.

266 Ibid., ss 25(2)(a) and 25(3)(a).

267 Ibid., s 25(4).

268 Ibid., s 7(3)(a).

269 Ibid., s 9, 10(1).

270 Allen Sng, Tan Kah Wai, The deputyship regime under Singapore's mental capacity act: An introduction, *SAcLJ*, 2020, vol. 32, para 13.

271 See para 25 above.

272 See *Bashir v Bashir* [2019] EWHC 1810 (Ch), [2019] All ER (D) 108 (Aug) [44]–[47]. In this case, the court was of the view that if a person were declared to lack mental capacity under the English equivalent of the MCA, control over the property and affairs of that person would pass over to the court or to a proxy decision-maker appointed by the court. Any purported disposition or dealing by the person of her property would be void. This was so, even if the person had regained capacity during the relevant period – she could not, as a matter of law, enter into a binding agreement.

view is that the MCA does not do so.[273] The MCA contemplates the possibility that a person may have fluctuating capacity[274] or capacity for some decisions but not others.[275] The court's (and any deputy's) decision-making powers are limited only to matters which the person lacks mental capacity for.[276] As such, the MCA does not remove a person's Active Legal Capacity in general, unlike the former status based approach.[277]

63. In exercising their decision-making powers, the decision-makers are obliged to comply with §§ 3 and 6 of the MCA.[278] Under § 3 of the MCA, these decision-makers must act in the best interests of the person lacking mental capacity.[279] They must consider whether the purpose for which their acts are needed could be effectively achieved in a way that is less restrictive of the person's rights and freedom of action.[280] § 6 of the MCA lays down the steps in which the decision-maker must take in approaching the best interests analysis. The decision-maker must, *inter alia*,

    a. consider whether the person may have capacity in relation to the matter in question in the future and, if it appears likely that she will, when that is likely to be;[281]
    b. as far as reasonably practicable, permit and encourage the person lacking mental capacity to participate, or improve her ability to participate, as fully as possible in any act done for her or any decision affecting her;[282]
    c. where the determination relates to the disposition or settlement of the person's property, be motivated by a desire to ensure, insofar as reasonably practicable, that the property is preserved for application towards the costs of the person's maintenance during her life;[283]
    d. consider, insofar as is reasonably ascertainable, the person's past and present wishes and feelings, the beliefs and values that would likely influence the person's actions if she had capacity, and other factors which the person would be likely to consider if she were able to do so;[284] and
    e. Consult, if practicable and appropriate, with relevant persons (such as those previously specified by the person, caregivers of the person, donees of a lasting power of attorney granted by the person, and any deputy appointed for the person by the court) as to what would be in the person's best interests.[285]

273 For a criticism of *Bashir* on this point, see the case comment at 39 Essex Chambers, Bashir v Bashir, *39 Essex Chambers*, July 18, 2019, https://www.39essex.com/copcases/bashir-v-bashir/, accessed June 13, 2022.

274 MCA, s 4(1); the person must lack capacity 'at the material time'.

275 Ibid; the person must lack capacity 'in relation to a matter'.

276 Ibid., s 20(1), s 25(1).

277 This is also implicit in *Re BKR* [2015] SGCA 26, [2015] 4 SLR 81, where the Court of Appeal granted the deputies authority to make decisions on behalf of the person for substantial sums (which the person lacks mental capacity for) but not for smaller transactions which the person could decide for herself. See *Re BKR* [2015] SGCA 26, [2015] 4 SLR 81 [208].

278 See the following sections of the MCA: s 20(3) for the court, s 11(4) for a donee of a lasting power of attorney, s 25(5) for a deputy appointed by the court and s 7(1)(b) for caregivers and medical treatment providers.

279 Ibid., s 3(5).

280 Ibid., s 3(6).

281 Ibid., s 3(3). If the person has fluctuating or temporary mental incapacity to make the decision, the decision-maker should generally postpone making the decision on behalf of that person. Situations such as emergencies, however, may weigh against such postponing, requiring the decision-maker to act instead.

282 Ibid., s 6(4).

283 Ibid., s 6(6).

284 Ibid., s 6(7).

285 Ibid., s 6(8).

64. Substituted decision-making has been interpreted by the CRPD Committee as any system whereby (1) legal capacity is removed from a person; (2) a substituted decision-maker can be appointed against a person's will, by someone other than the person; or (3) any decision made by a substituted decision-maker is based on the objective best interests of the person, rather than her will and preferences.[286] The CRPD Committee has called on Singapore to abolish the guardianship model of substituted decision-making and to replace it with supported decision-making models so that persons with disabilities may enjoy legal capacity on an equal basis with others in all aspects of life.[287] Singapore has expressed that it has no intention to remove provisions in the MCA allowing court-appointed deputies to take decisions on behalf of a person who lacks capacity, as this would lead to superficial equality and could critically affect decision-making.[288] In addition, there is authority to suggest that a person's ability to make a particular decision is conceptually different from her ability to decide who should make decisions on her behalf when she lacks mental capacity to make that particular decision. In the High Court judgment of *Re BKR*, the court suggested that the two are different and the latter involves considerations of whom the individual trusts, how she places her trust in someone and how she evaluates or responds to someone.[289] As such, a person with mental disability may lack mental capacity for the former but not the latter and still be able to exercise her active legal capacity to appoint a decision-maker of her choice to act on her behalf. More recently, one member of Parliament has called for the government to give some thought in developing instruments to facilitate supported decision-making alongside the options currently provided for, citing the CRPD in support for a shift to a supported decision-making paradigm.[290]

Substituted decision-making outside the MCA

65. Beyond the MCA, there are other legislation that contains characteristics which brings them within the definition of substituted decision-making as defined by the CRPD Committee.[291] Two such legislation have been discussed earlier: first, a litigation representative is required to act on behalf of a person lacking mental capacity in court proceedings; second, the VAA allows the court, the director-general and a protector

286 Committee on the Rights of Persons with Disabilities, General Comment No 1, para 27, as modified by the Committee on the Rights of Persons with Disabilities, *General comment no 1 (2014) article 12: Equal recognition before the law – corrigendum*, CRPD/C/GC/1/Corr 1, January 26, 2018, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1/Corr.1&Lang=en, accessed June 24, 2021.

287 CRPD List of Issues, para 10.

288 Republic of Singapore, CRPD Replies, para 53.

289 *Re BKR* [2013] SGHC 201, [2013] 4 SLR 1257 at [187]–[188]. See also Allen Sng, Tan Kah Wai, The deputyship regime under Singapore's mental capacity act: An introduction, *SAcLJ*, 2020, vol. 32, paras 35–36 for a discussion of that dictum and the English authorities which support such an approach.

290 *Second Reading of the Mental Capacity (Amendment) Bill*, *Singapore Parliamentary Debates, Official Report* (July 5, 2021) vol 95 (Mr Leon Perera, Member of Parliament for Aljunied GRC).

291 See para 64.

to make certain decisions on behalf of a vulnerable adult lacking mental capacity, if it is in the vulnerable adult's best interests to do so.[292]

66. Another example of decision-making on behalf of persons lacking mental capacity is the Voluntary Sterilization Act (VSA),[293] which governs treatment for voluntary sexual sterilisation in Singapore. Prior to the amendments in 2012, the VSA allowed for sexual sterilisation to be carried out on persons with 'any hereditary form of illness that is recurrent, mental illness, mental deficiency or epilepsy', if consent is obtained from that person's spouse if the person is married[294] or from that person's parent or guardian where the person is not married.[295] Amendments were made in 2012 to align the VSA by removing provisions which may lead to discrimination against disabled persons,[296] with an aim to return autonomy to those with mental or hereditary illnesses but still have mental capacity to give their own consent, bringing the VSA in line with the CRPD and allowing Singapore to accede to the CRPD.[297] Under the present VSA, a registered medical practitioner may only carry out sexual sterilisation on a person lacking mental capacity to consent to the treatment, if the court orders that such treatment is necessary in the best interests of that person.[298]

E. Judicial and non-judicial processes to restrict a person's active legal capacity

67. Singapore's legal system uses a mix of judicial and non-judicial processes to restrict a person's active legal capacity. In the case of challenging a person's past acts under private law, applications to the court are generally necessary. First, a court order may be needed to set aside that person's past acts, such as rectifying the land register,[299] annulling the marriage between that person and her spouse,[300] setting aside court proceedings for private law matters[301] and rescinding contracts in equity.[302] Second, for probate matters, an executor of a will is required to undertake formal court proceedings to obtain a grant of probate. Any challenge to the testator's will for lack of mental capacity is resolved as part of the probate proceedings.[303] For rules that renders

292 See § C IV.

293 (Cap 347, 2013 Rev Ed Sing).

294 *Voluntary Sterilization Act* (Cap 347, 1985 Rev Ed Sing) (VSA), s 3(d).

295 Ibid., s 3(e).

296 Explanatory Statement to the *Voluntary Sterilization (Amendment) Bill* (Bill No 26/2012).

297 *Second Reading of the Voluntary Sterilization (Amendment) Bill*, *Singapore Parliamentary Debates, Official Report* (October 16, 2012) vol. 89 (Mr Gan Kim Yong, Minister for Health).

298 VSA, s 3(2)(d) and (e).

299 Land Titles Act (Cap 157, 2004 Rev Ed Sing), s 160(1)(b), see also *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] SGCA 30, [2006] [50]. See also para 10.

300 WC, s 104. See also para 19.

301 See, generally, ROC, O 2 r 1 and FJR, r 10. See also para 23.

302 Recission at equity adopts a less restrictive approach on the bars to rescission, in particular that precise restoration of the parties to their original position is not necessary before rescission is granted. The court may impose conditions to ensure that parties are restored substantially. See *Alati v Kruger* (1955) 94 CLR 216 (High Court of Australia). See also para 8.

303 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] SGCA 27, [2010] 4 SLR 373 [52]. See also para 16.

the acts of a person lacking mental capacity void *ab initio* (such as the doctrine of *non est factum*[304] and under agency law[305]), no application to the court is required in order to set aside that person's acts. Similarly, if a contract can be rescinded at common law due to the rescinding party's mental incapacity at the time of contract, the rescinding party may communicate her decision to rescind to the other party and no court order is required to effect rescission.[306] However, in practice, it is often necessary for the affected parties to go to court, given that there may be disputes as to the facts and how the law is to be applied in the circumstances.

68. For a person's active legal capacity outside of private law, matters pertaining to a person's fitness to stand trial,[307] criminal liability[308] and voting in elections[309] would involve judicial proceedings. For matters pertaining to involuntary admission and treatment of mental disorders, intervention under the MHCTA at first instance does not require judicial sanction.[310] However, where further detention beyond the period allowed at first instance is required, a court order authorising the further detention and treatment will be necessary.[311] For the matters regarding vulnerable adults, intervention under the VAA at first instance does not require judicial sanction, save for the specified situations under the VAA where a court order is necessary to override a refusal from a vulnerable adult with the requisite mental capacity to refuse.[312] A court order will be needed for any further intervention outside of the powers that may be exercised at first instance.[313]

69. In the context of decision-making on behalf of persons lacking mental capacity, this is allowed without the need for judicial sanction in two situations under the MCA. The first situation relates to the provision of caregiving services and medical treatment under § 7 of the MCA,[314] and the second is where a donee was previously appointed by the donor under a lasting power of attorney.[315] For all other mat-

304 *North Star (S) Capital Pte Ltd v Megatrucare Pte Ltd* [2021] SGHC 110 at [108]. See also para 9.

305 *Goh Yng Yng Karen (executrix of the estate of Liew Khoon Fong (alias Liew Fong), deceased) v Goh Yong Chiang Kelvin* [2021] SGHC 195, [2021] 3 SLR 896 [101]. See also para 14.

306 Neil Andrews et al., *Contractual Duties: Performance, Breach, Termination and Remedies*, 2nd ed., Sweet & Maxwell, London, 2017) at paras 1.010–1.012 and 2.036, citing *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599 (CA). See also para 8.

307 Criminal Procedure Code (Cap 68, 2012 Rev Ed Sing) (CPC), s 247 of the CPC. See also para 36.

308 Ibid., ss 251 and 252. See also para 35.

309 For a person to be disqualified from voting, that person must be found or declared under any written law to be of unsound mind; see Parliamentary Elections Act (Cap 218, 2011 Rev Ed Sing) Parliamentary EA), s 6(1)(c) and the Presidential Elections Act (Cap 240A, 2011 Rev Ed Sing), s 2(1). See also para 41.

310 Mental Health (Care and Treatment) Act (Cap 178A, 2012 Rev Ed Sing), ss 7, 9 and 10. See also paras 44–45.

311 Ibid., s 13. See also para 45.

312 See, generally, Vulnerable Adults Act 2018 (No 27 of 2018) (VAA), Divisions 1 and 2, Part 2. See also paras 49–51.

313 Ibid., Division 3, Part 2. See also paras 49–50 and 52.

314 See also para 61.d.

315 Mental Capacity Act (Cap 177A, 2010 Rev Ed Sing) (MCA), Pt IV. See also para 61.b.

ters under the MCA,[316] a court order is necessary for the court to either make the decision on behalf of that person, or to appoint a deputy to act on behalf of that person.[317] For private law proceedings on behalf of a person lacking mental capacity, court sanction is not required for the appointment of a litigation representative, except where there is a need to substitute an earlier litigation representative, where the party to the proceedings becomes a person lacking capacity or where no appearance is entered into for a person lacking capacity.[318] Court sanction is also necessary to confirm any settlement of the case by a litigation representative.[319] The VAA permits some intervention on behalf of vulnerable adults lacking mental capacity without court sanction[320] but requires court sanction for others.[321] Lastly, court sanction is required for the sterilisation of adults lacking mental capacity to consent to the sterilisation under the VSA.[322]

F. Statistics on restrictions of active legal capacity, LPAs and deputies appointed under the MCA

70. In Singapore, there is little publicly available statistics about cases on restrictions of active legal capacity. One possible reason is because the Singapore courts do not have a general duty to issue written judgments for all their decisions.[323] As such, while court cases with written judgments are available on Lawnet,[324] these cases only form a subset of all cases and do not necessarily provide a comprehensive picture on all the cases pertaining to active legal capacity. In contrast, more information is available on LPAs and deputies appointed under the MCA, as the Office of Public Guardian (OPG)[325] makes this information publicly available.

316 This may include situations such as the matter is beyond the scope of MCA, s 7, beyond the scope of a Donee's authority under the LPA regime, or where there is no Donee was previously appointed.

317 MCA, s 20. See also paras 61.a and 61.c.

318 ROC, O 76 r 3(2) and FJR, r 657(2). See also para 21.

319 ROC, O 22A r 7, O 76 r 10 and r 11, and FJR, r 452, r 664 and 665. See also para 22.

320 Such as the removal of an individual or vulnerable adult from her place of residence for the purpose of assessment (VAA, s 6(1)(d)), conducting medical assessments (VAA, s 7(2)), the removal of an individual or vulnerable adult from her place of residence (VAA, s 10(1)(b)), or administering medical or dental treatment (VAA, s 18(2)(a)). See also paras 49–51.

321 Such as orders to make the vulnerable adult's residence a safe living environment, including the disposal of any article or thing in the residence (VAA, s 14(3)). See also paras 49–50 and 52.

322 Voluntary Sterilization Act (Cap 347, 1985 Rev Ed Sing) (VSA), s 3(2)(d) and (e). See also para 66.

323 *Ten Leu Jiun Jeanne-Marie v National University of Singapore* [2015] SGCA 41, [2015] 5 SLR 438 [41].

324 Lawnet is Singapore's online portal for legal research for primary legal materials such as reported judgments in the Singapore Law Reports and unreported written judgments.

325 The OPG supports the public guardian in carrying out her functions under the MCA. These functions include maintaining a register of LPAs and a register of court orders, appointing deputies, supervising deputies and receiving reports from Donees and deputies.

71. For the statistics that are available, these should be interpreted in light of the population changes in Singapore between 2007 and 2020, as shown in the following table:

Table 23.1 Statistics on the Singapore population[326]

	2007	*2008*	*2009*	*2010*	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*	*2017*	*2018*	*2019*	*2020*
Total population ('000)	4,589	4,839	4,988	5,077	5,184	5,312	5,399	5,470	5,535	5,607	5,612	5,639	5,704	5,686
Resident Population ('000)	3,583	3,643	3,734	3,772	3,789	3,818	3,845	3,871	3,903	3,934	3,966	3,994	4,026	4,044
Age structure of resident population														
Below 20 years ('000)	936	934	931	918	898	885	870	855	845	836	827	818	813	803
20–64 years ('000)	2,342	2,393	2,473	2,515	2,539	2,554	2,570	2,584	2,598	2,610	2,622	2,629	2,631	2,626
65 years and over ('000)	306	316	330	338	353	379	404	432	460	488	517	548	582	614
Old age support ratio (Number of residents aged 20–64 per resident aged 65 years and over).	7.7	7.6	7.5	7.4	7.2	6.7	6.4	6.0	5.7	5.4	5.1	4.8	4.5	4.3

Generally, the Singapore total population increased by about 24% from 2007 to 2020. However, the Singapore resident population is also rapidly greying, evident by the doubling in the number of residents aged 65 years and over and the decreasing old age support ratio over the same period.

326 Statistics obtained from Department of Statistics Singapore, Population and population structure, *Department of Statistics Singapore*, https://www.singstat.gov.sg/find-data/search-by-theme/population/population-and-population-structure/latest-data, accessed August 31, 2021.

Active legal capacity outside of Singapore private law

72. Limited figures are available on the restrictions of active legal capacity outside Singapore private law. Between 2018 and 2020, only two accused persons were found by the courts to have committed the acts alleged but were acquitted by operation of the defence of unsoundness of mind and were then ordered to be confined in a psychiatric institution. Of the two persons, one was discharged around 2 years and 6 months of detention, while the other has been detained for around 2 years and 6 months, as of January 4, 2021.[327]
73. Limited information is available for involuntary admission of mentally disordered individuals under the MHCTA and its predecessor MDTA. In 2007, the Institute of Mental Health had more than 3,000 admissions under the MDTA. Five per cent of these cases required detention beyond 72 hours, and only 5 cases required further detention beyond one month. Magistrate's orders for extended detention were observed to be rare.[328] In 2019 there were 2,768 admissions under the MHCTA and 2,510 in 2020.[329] Between 2016 to 2020, the number of cases that required detention beyond 72 hours and up to one month averaged 1,460 a year. An annual average of 128 and 14 were detained between 1 and 6 months and more than 6 months, respectively.[330] The absolute number of admissions appears to have dipped from 2007 to 2020, notwithstanding the increase in population over the same period. On the other hand, the length of detention has increased over the same period. For admissions to adult disability homes under the VAA, between 2019 and 2020, there have been more than 800 individuals who voluntarily admitted themselves to adult disability homes, and only 2 court-ordered admissions under the VAA.[331]

LPAs and deputies appointed under the MCA

74. The OPG collects and publishes statistics on the LPAs and deputies appointed under the MCA.

327 *Written Answers to Questions, Singapore Parliamentary Debates, Official Report* (January 5, 2021) vol. 95 (Mr K Shanmugam, Minister for Law).

328 *Second Reading of the Mental Health (Care and Treatment) Bill*, *Singapore Parliamentary Debates, Official Report* (September 15, 2008) vol. 85 (Mr Kaw Boon Wan, Minister for Health) col 100.

329 Jean Lau, Individuals can be detained if they refuse treatment and pose risk, *The Straits Times*, Singapore, April 30, 2021.

330 *Written Answers to Questions, Singapore Parliamentary Debates, Official Report* (February 2, 2021) vol. 95 (Mr Gan Kim Yong, Minister for Health).

331 Republic of Singapore, CRPD Replies, para 65.

Table 23.2 Statistics on LPAs and deputies appointed under the MCA[332]

	FY 2010	*FY 2011*	*FY 2012*	*FY 2013*	*2014*	*2015*	*2016*	*2017*	*2018*	*2019*	*2020*
Number of LPA applications received (FY 2010–2013) and LPAs registered (2014–2020).	655	977	1,930	2,594	2,681	8,049	8,215	12,031	23,645	24,488	21,552
Number of donees	N/A	N/A	N/A	N/A	3,895	11,348	11,891	17,232	34,063	35,536	31,797
Number of court orders appointing deputies	171	225	204	248	270	251	293	350	434	571	566
Number of deputies	2,992[333]	344	317	N/A	427	335	461	567	651	817	837

75. There has been an overall increase in the number of LPAs registered and court orders appointing deputies over the years. For LPAs, the significant increase over the years can be attributed to the government's initiatives to promote uptake of LPAs. In 2014, the LPA forms were cut from 15 pages to 8 pages and less legal jargon was used, simplifying the LPA making process.[334] Registration fees for Singapore citizens making LPAs using the standardised LPA Form 1 have been waived from 2014 up to March 14, 2023.[335] The OPG has also worked with various organisations to raise awareness on LPA in the community. The outreach activities include engaging elder-care service providers, conducting talks at senior activity centres and distributing collaterals at community touch points.[336] More recently, the MCA was amended[337] to

332 For statistics between FY 2010 to FY 2013, these were obtained from the OPG Annual Reports in the respective financial years. For statistics between calendar years 2014 to 2020, these were obtained from the Indicators of Activities published by the OPG, https://www.msf.gov.sg/opg/Pages/Indicators-of-Activities.aspx, accessed August 31, 2021.

333 This includes newly appointed deputies, as well as committee of persons and/or estate under the previous MDTA who are now deemed as deputies under the MCA.

334 Priscilla Goy, Parliament: 8,360 signed up for lasting power of attorney last year, 160% increase from 2014, *The Straits Times*, Singapore, January 28, 2016.

335 Form 1 is a standardised LPA application form that donors may use to grant donees general powers with basic restrictions. For donors who wish to grant donees customised powers, Form 2 is to be used instead and no fee waiver is available. See Office of the Public Guardian, The lasting power of attorney (LPA), *Ministry of Social and Family Development*, January 30, 2020, https://www.msf.gov.sg/opg/Pages/The-LPA-The-Lasting-Power-of-Attorney.aspx, accessed August 31, 2021. A small fee, however, is still required to engage an LPA certificate issuer to witness and certify the donor's LPA application.

336 See *Written Answers to Questions, Singapore Parliamentary Debates, Official Report* (February 5, 2018) vol. 94 (Mr Desmond Lee, Minister for Social and Family Development).

337 Mental Capacity (Amendment) Act 2021 (No 16 of 2021).

allow LPAs to be made online so as to cater for the expected increase in submissions.[338] Most online LPA applications can be immediately processed upon submission, a cut from the previous three weeks processing time. For cases requiring manual processing, this will take about eight working days.[339] Nevertheless, the take-up rates remain low when compared to the total population in Singapore, prompting further calls from members of Parliament to increase outreach and making the LPA application process more accessible to the public.[340] Given the greying population in Singapore, there is an increasingly pressing need to encourage the population to plan early for their future care, with the LPA being an important tool that complements the advanced medical directive and ACP.

76. Similar initiatives were also undertaken to support deputyship applications.[341] In 2015, the Ministry for Social and Family Development piloted the Assisted Deputyship Application Programme with the Movement for the Intellectually Disabled in Singapore (MINDS),[342] whereby parents of children lacking mental capacity are assisted by student volunteers from the National University of Singapore in their deputyship applications. This allowed the cost of applications ranging from SGD 3,000 to more than SGD 10,000 to be reduced to between SGD 300 to SGD 500 (excluding fees for medical report), while allowing such parents to continue making care arrangements and decisions on behalf of their child.[343] In 2019, changes to the Integrated Family Application Management System now allows straightforward and uncontested deputyship applications to be filed using a simplified track online, with the cost of applications reduced to $40 (excluding fees for medical report). The processing time is much shorter as it takes within three weeks from the time an application is filed to when an order is issued, down from between two and three months under the old system.[344]

338 Nabilah Awang, Over 40,000 Lasting Power of Attorney registrations expected in 2021 as Govt proposes online submission system, *Today*, Singapore, May 10, 2021.

339 *Second Reading of the Mental Capacity (Amendment) Bill*, *Singapore Parliamentary Debates, Official Report* (July 5, 2021) vol. 95 (Mr Eric Chua, Parliamentary Secretary to the Minister For Social and Family Development).

340 Malavika Menon, More needs to be done to improve low take-up rates for lasting power of attorney: Denise Phua, *The Straits Times*, Singapore, July 5, 2021.

341 The author declares his interest as a student volunteer previously of and now faculty advisor to the Assisted Deputyship Application Programme. The author also declares his interest as a student researcher previously assisting the Singapore family justice courts in reforming the Integrated Family Application Management System for deputyship applications.

342 MINDS was founded by a group of philanthropists to provide education for children with intellectual disabilities in 1962. It is now one of the largest and oldest social service agencies in Singapore caring for persons with intellectual and developmental disabilities and their families; see MINDS, About us, *MINDS*, https://www.minds.org.sg/about-us/, accessed August 31, 2021.

343 Allen Sng, Tan Kah Wai, The deputyship regime under Singapore's mental capacity act: An introduction, *SAcLJ*, 2020, vol. 32, paras 83–84.

344 Theresa Tan, Family justice Courts launch cheaper and faster way for users to file applications, *The Straits Times*, Singapore, October 2, 2019.

77. The expenditure and permanent staff headcount of the Office of the Public Guardian has risen over the financial years 2010 to 2015 as well, indicating the increasing financial support for the LPA and deputyship regimes. This is shown in the following table:

Table 23.3 Expenditure and permanent staff headcount of the Office of the Public Guardian[345]

	FY 2010	*FY 2011*	*FY 2012*	*FY 2013*	*FY 2014*	*FY 2015*
Total expenditure ($ '000)	1,518	2,235	2,641	2,379	3,341	3,719
Expenditure on international and public relations, public communications ($ '000)	92	559	705	228	751	600
Expenditure on permanent staff ($ '000)	1,067	1,307	1,626	1,878	1,977	2,056
Number of permanent staff	12	16	21	22	22	22

G. Criminal law protections against exploitation of persons with disabilities in private law transactions

78. Persons with disabilities (in particular, mental disability) may be more vulnerable to potential exploitation by those who interact with them in private law transactions. Such exploitation may be through aggression, threat, deception or manipulation from their counterparties or those who support them in their decision-making. Singapore private law affords protection to all (including persons with disabilities) by recognising vitiating factors that allows persons to set aside their private law transactions. In the context of contract law, this includes the vitiating factors of misrepresentation,[346] duress, undue influence and unconscionability.[347] Similar vitiating factors are also recognised in marriage law, as § 106(c) of the WC allows a marriage to be annulled on the ground that a party to the marriage did not validly consent to it, in consequence of duress, mistake, mental disorder or otherwise.
79. Singapore, however, does not broadly criminalise the exploitation of persons with disabilities while concluding private law transactions. Singapore only criminalises certain forms of exploitation, such as extortion under § 383 of the PC[348] or cheating under § 415 of the PC.[349] In the Parliament debates on the Vulnerable Adults Bill, it

345 These were obtained from the Ministry of Finance archives of the Singapore Budget, for Budgets 2012 to 2017, https://www.mof.gov.sg/singapore-budget/budget-archives, accessed August 31, 2021. The information on the OPG was consolidated with other programmes from Budget 2018 onwards and are unavailable.

346 See Burton Ong, Benjamin Wong, *Contract law in Singapore: Cases, materials and commentary*, Academy Publishing, Singapore, 2019, at paras 09.001–09.004 for an overview.

347 See Ibid., paras 11.001–11.010 for an overview.

348 Penal Code, (Cap 224, 2008 Rev Ed Sing) (PC), s 383 provides, 'Whoever intentionally puts any person in fear of any harm to that person or to any other person, in body, mind, reputation or property, whether such harm is to be caused legally or illegally, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion" '.

349 PC, s 415 provides, 'Whoever, by deceiving any person, whether or not such deception was the sole or main inducement, fraudulently or dishonestly induces the person so deceived to deliver or cause the delivery of any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property, is said to "cheat" '.

was noted by a member of Parliament that the finance-related offences, such as cheating or extortion, under the PC 'may not be sufficiently nuanced to address financial exploitation in the context of an existing relationship of trust or dependency'.[350] In response, the Minister for Social and Family Development stated that the government will 'continue to study the complex issue of financial exploitation among family members', and to propose ideas in the future.[351]

80. To ensure greater deterrence against crimes being committed against persons with disabilities, the VAA enhances the penalties for most offences under the PC[352] committed against vulnerable persons.[353] This enhancement applies if the offender knew or ought reasonably to have known that the victim was a vulnerable person[354] and that the victim was incapable of protecting herself from the offender in respect of the harm caused by the offence in the same manner as an ordinary person.[355]

H. Role of psychology, psychiatry and neurology in the implementation of Article 12 of the CRPD in Singapore

81. Singapore adopts a multi-stakeholder approach in developing the successive Enabling Masterplans to support persons with disabilities. In the most recent third Enabling Masterplan, 3 out of the 22 committee members were professionals in the fields of psychology, psychiatry and neurology (PPN).[356] The third Enabling Masterplan committee had recommended in 2017, *inter alia*, simplifying the LPA and deputyship processes. This included assessing the effectiveness of ADAP and considering whether ADAP could be expanded to more caregivers outside of MINDS.[357]
82. When introducing law reform proposals, Singapore routinely conducts public consultations to solicit feedback from members of the public (which may include professionals in the fields of PPN). Feedback and comments received are usually consolidated and summarised to ensure confidentiality of the contributors.[358] The following table lists the law reform proposals in areas of law that are relevant to Article 12 of the CRPD and their respective consultation dates.

350 *Singapore Parliamentary Debates, Official Report* (May 18, 2018) vol. 89 (Mr. Louis Ng Kok Kwang (Nee Soon)).

351 *Singapore Parliamentary Debates, Official Report* (May 18, 2018) vol 89 (Mr. Desmond Lee, Minister for Social and Family Development).

352 See PC, s 74A for offences which do not attract enhanced penalties.

353 Vulnerable person means an individual who is, by reason of mental or physical infirmity, disability or incapacity, substantially unable to protect herself from abuse, neglect or self-neglect; see PC, s 74A(5).

354 PC, s 74A(2). PC, s 47A applies where the accused is convicted on or after the date of commencement of the Vulnerable Adults Act 2018 (No 27 of 2018) (VAA).

355 PC, s 74A(2A). The onus is on the accused to establish that the victim was incapable of protecting herself.

356 They are Mr Abdul Majeed Bin Abdul Khader (senior consultant psychologist, Singapore Police Force), Prof Chong Siow-Ann (vice chairman of the Medical Board (Research) and senior consultant psychiatrist, Institute of Mental Health) and Dr Winnie Goh (senior consultant in the Department of Paediatrics, Neurology Service, KK Women's and Children's Hospital); see Ministry of Social and Family Development, *3rd enabling masterplan 2017–2021: Caring nation, inclusive society*, December 2016, p. 10, https://www.msf.gov.sg/policies/Disabilities-and-Special-Needs/Documents/Enabling%20Masterplan%203%20%28revised%2013%20Jan%202017%29.pdf, accessed August 31, 2021.

357 Ibid., 90.

358 See, for example, Ministry of Law, Public consultation on proposed amendments to the penal code, *Ministry of Law Singapore*, September 9, 2018, https://www.mlaw.gov.sg/news/press-releases/public-consultation-on-proposed-amendements-to-the-penal-code, accessed August 31, 2021.

Table 23.4 List of law reform proposals, areas of law and public consultation dates

No.	*Law reform proposals*	*Area of law*	*Consultation dates*
1.	Draft Mental Capacity Bill[1]	Lasting powers of attorney and decision-making on behalf of persons lacking mental capacity[2]	Aug 15–Oct 31, 2007
2.	Proposed amendments to the Voluntary Sterilization Act[3]	Court sanctioned sterilisation of persons lacking mental capacity[4]	Jun 4–Jul 2, 2012
3.	Draft Vulnerable Adults Bill[5]	Protection of vulnerable adults[6]	Jul 27–Aug 23, 2016
4.	Proposed amendments to the Criminal Procedure Code and Evidence Act[7]	Fitness to plead and acquittal of persons due to defence of unsoundness of mind[8]	Jul 24–Aug 24, 2017
5.	Proposed amendments to the Penal Code[9]	Defence of unsoundness of mind[10]	Sep 9–Sep 30, 2018
6.	Proposed amendments to the Mental Capacity Act[11]	Lasting powers of attorney[12]	Oct 28–Nov 18 2020

83. Aside from public consultations, Singapore may also directly engage and consult with relevant stakeholders in the lawmaking process. For example, in the development of the Mental Capacity Bill in 2007, the then Ministry of Community Development, Youth and Sports consulted extensively with stakeholders from the medical fraternity, including the Institute of Mental Health, the Academy of Medicine, the College of Family Physicians, the Singapore Medical Association and various acute hospitals.[13] Similar consultations are likely to have taken place for the other law reform proposals as well.

1 National Archives of Singapore, Media release, draft mental capacity bill to be revised based on input from medical, legal, banking and social service sectors, *National Archives of Singapore*, March 5, 2008, https://www.nas.gov.sg/archivesonline/data/pdfdoc/20080305966.pdf, accessed August 31, 2021.
2 See paras 55–58 and 61–63.
3 Ministry of Health, Launch of public consultation on proposed amendments to the voluntary sterilization act (VSA), *Ministry of Health Singapore*, June 4, 2012, https://www.moh.gov.sg/news-highlights/details/launch-of-public-consultation-on-proposed-amendments-to-the-voluntary-sterilization-act-(vsa), accessed August 31, 2021.
4 See para 66.
5 Ministry of Social and Family Development, Public consultation on draft vulnerable adults bill 2016, *Ministry of Social and Family Development*, July 27, 2016, https://www.msf.gov.sg/media-room/Pages/Public-Consultation-on-Draft-Vulnerable-Adults-Bill-2016.aspx, accessed August 31, 2021.
6 See para 48.
7 Ministry of Law, Public consultation on proposed amendments to the criminal procedure code and evidence act, *Ministry of Law Singapore*, July 24, 2017, https://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-proposed-amendments-to-the-criminal-proce, accessed August 31, 2021.
8 See para 40.
9 Ministry of Law, Public consultation on proposed amendments to the penal code, *Ministry of Law*, September 9, 2018, https://www.mlaw.gov.sg/news/press-releases/public-consultation-on-proposed-amendements-to-the-penal-code, accessed August 31, 2021.
10 See para 39.
11 Ministry of Social and Family Development, MSF proposes amendments to mental capacity act, *Ministry of Social and Family Development*, October 28, 2020, https://www.msf.gov.sg/media-room/Pages/MSF%20Proposes%20Amendments%20To%20Mental%20Capacity%20Act.aspx, accessed August 31, 2021.
12 See para 39.
13 National Archives of Singapore, Media release, draft mental capacity bill to be revised based on input from medical, legal, banking and social service sectors, *National Archives of Singapore*, March 5, 2008, https://www.nas.gov.sg/archivesonline/data/pdfdoc/20080305966.pdf, accessed August 31, 2021.

I. Conclusion

84. This chapter has closely examined the impact of ArtICLE 12 of the CRPD on Singapore's legal system. Significant changes have taken place in Singapore's legal landscape from 2007 till the present. Taken as a whole, the general trend of the legal reforms following Singapore's ratification of the CRPD in 2013 is clear: the reforms place a greater emphasis on respecting the autonomy and rights of persons with disabilities. These reforms include introducing less restrictive intervention options such as allowing persons with mental disability at risk of harming themselves or others to be treated within the community, as opposed to institutionalising these persons.[14] Where intrusive intervention is necessary to protect such persons and those around them, more safeguards against abuse have been introduced such as increasing the level of judicial supervision.[15] Changes were introduced to facilitate and encourage the making of LPAs, such as simplifying the process of making LPAs and allowing LPAs to be made online.[16] As Singapore reviews her existing laws, further changes to the law are likely to come along these directions. More time will be needed, however, to ascertain the impact of the reforms, given that many were only passed into law in recent years and some of the reforms are not yet in force.
85. Some divergences remain between Singapore's interpretation of Article 12 of the CRPD and the CRPD Committee's interpretation. These divergences stem from the unresolved debates over the precise scope of Article 12 of the CRPD.[17] As such, Singapore still retains laws which uses the functional approach towards mental capacity to restrict a person's active legal capacity, substituted decision-making in cases of mental incapacity and compulsory detention and medical treatment where there are countervailing concerns. Some aspects of present law may well be easier to reform, such moving away from the best interest standard in decision-making on behalf of a person with disability to one that is based on the will and preferences of that person.[18] Reforms to other aspects, such as doing away with tests of mental incapacity and prohibiting compulsory detention and medical treatment are less likely to occur in the near future, given the recent statements from the Singapore government.[19] Any further development in these difficult areas will require grappling with the policy tensions and resolution of the debates surrounding Article 12 of the CRPD.

14 See paras 40 and 48.
15 See paras 40 and 66.
16 See para 75.
17 See paras 5, 33, 39, 47 and 54.
18 It has been suggested in the UK that the best interests decision-making framework could be amended to establish a rebuttable presumption that, when a decision must be made on behalf of a person lacking in mental capacity and the wishes of that person can be reasonably ascertained, the best-interests decision-maker shall make the decision that accords with those wishes; see Wayne Martin et al., *Achieving CRPD compliance: Is the mental capacity act of England and Wales compatible with the UN convention on the rights of persons with disabilities? If not, what next?* An Essex Autonomy Project Paper: Report submitted to the Ministry of Justice on September 22, 2014, University of Essex, Essex, April 23, 2015 48–52; Wayne Martin et al., *Three jurisdictions report: Towards compliance with CRPD Art 12 in capacity/incapacity legislation across the UK*, An Essex Autonomy Project Position Paper, University of Essex, Essex, January 18, 2017, p. 1. The same suggestions are applicable to Singapore.
19 See paras 39, 47 and 64.

24 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Spain

María José Bravo Bosch and Inés Celia Iglesias Canle

1. Introduction

The United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol were approved on December 13, 2006, at the United Nations Headquarters in New York and were opened for signature on March 30, 2007 (hereinafter referred to as 'the Convention' or 'the CRPD').

The CRPD thus became the first human rights treaty of the 21st century whose negotiation is noteworthy for its speed since it took only five years for negotiation and entry into force. The preparatory process was extraordinary because of the participation of civil society. It was the first time that the presence of organisations of people affected by the treaty and of people with disabilities was allowed. The text of the Convention was subject to unanimity achieved not only among the states but also among the organisations that defend the rights of people with disabilities that are absolutely diverse and different from each other.

In spite of this, different reservations and interpretative declarations were presented. The latter concealed on many occasions true reservations, which were foreshadowed before the moment of ratifying the Convention in view of the intensity of the debate that took place around the elaboration of the Article 12 of the CRPD.

It was a shock in the legal systems of the states parties because a new model of care for people with disabilities has been provided therein. The impact of the Convention did not occur immediately, nor was it automatically reflected by the different states in their internal law, since the reluctance of the legislator of each State meant a slow process of penetration into their legal system, but the mediate impact produced results and the juridical success of the Convention translated into new legislation for the effect of the States that accepted the new model provided in the Convention.

The new paradigm of disability, conceptualised socially from human rights, has as its main objective the relationship of people with disabilities with the environment that discriminates against them, for which the Convention assumes the need to protect their rights and not their limitations, with a revolutionary Article 12 of the CRPD that develops 'equal recognition as a person before the law'.

The wording of Article 12 of the CRPD enshrines a right that the legal systems of practically all the countries of the world had been denying: the right that all persons with disabilities have to see their legal capacity recognised under the same conditions as others, a legal capacity that must be understood in the double sense of capacity to be the holder of rights and capacity to be able to exercise them, always with the support they require. The essential content of the quoted Article is aimed at safeguarding the

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effectiveness of the right to equal treatment in the exercise of the capacity of the people with disabilities.

It is necessary to know the origin, content and scope of Article 12 of the Convention, as well as the enormous impact it is having and is destined to have in the Spanish legal system, with a future that is committed to the protection of equality of people with disabilities before the law, as a symbol of the modern and inclusive legislation that must be applied in today's Spain.

The truth is that in Spain we have taken longer than it should to implement the necessary internal rules to comply with the mandates of the Convention and its Monitoring Committee, a body that systematically reminds us of the breach of our conventional duties. But it is no less true that notable progress has been made in Spain in relation to Article 12 of the CRPD, although there are still several pending challenges. The laws and regulations that have been designed to meet the objectives of the international treaty are not negligible, as we will see further here, but the Spanish legislation is slow in accepting the statement of Article 12 of the CRPD and converting it into specific Spanish regulations of the reluctance to recognise the necessary capacity of people with disabilities in an equal position.

2. Ratification of the CRPD by Spain

The CRPD was signed by Spain on March 30, 2007, and ratified on November 23, 2007. The instrument of ratification was deposited on December 4, 2007, and was published in the BOE on April 21, 2008,[1] entering into force on May 3, 2008.

After Spain published in BOE no. 97 of April 22, 2008, pages 20750 to 20752, the instrument of ratification of the Optional Protocol to the Convention,[2] it entered into force generally and for Spain on May 3, 2008, in accordance with the provisions of Article 13 (1) thereof.

Since May 3, 2008, the CRPD has been part of the Spanish internal legislation, which means not only that it can be applied by Spanish courts but also that the Spanish regulations that include fundamental rights must be interpreted in the light of this treaty. From this, it is extracted both that the legislation must adapt to what is established in the CRPD, as well as that judges and courts must decide according to it.

Since that date, the Convention is fully part of the Spanish legal system and is invokable before the political, judicial and administrative authorities. Its guarantee, protection and protection devices are in force, and now is the time to make it known and disseminate it, so that people with disabilities become aware and aware that they have a new instrument for the effectiveness of their rights.

Subsequently, in 2019, May 3 was established as the National Day of the United Nations International Convention on the Rights of Persons with Disabilities in Spain.

3. Legal capacity and capacity to act in Spanish law

In the Spanish legal system, the concept of 'legal capacity' is also closely related to the concept of 'legal personality' since every person, by virtue of being one, has legal capacity. In

1 https://www.boe.es/boe/dias/2008/04/21/pdfs/A20648-20659.pdf.
2 https://www.boe.es/boe/dias/2008/04/22/pdfs/A20750-20752.pdf.

Spanish law, legal capacity was defined by De Castro y Bravo as the 'quality of the person of being the holder (unifying and independent centre) of the different legal relationships that affect him'.[3]

But, on the other hand, the Spanish system contemplates the 'capacity to act', which is the ability to exercise or fulfil such rights or obligations by oneself and presupposes that the person has some additional requirements such as being of legal age, without which their legal acts cannot be considered valid for the law. Legal capacity in Spanish law cannot be subject to any limitation. However, the ability to act does.[4]

In Article 12 of the CRPD, the issue regarding the concept of legal capacity was settled in the text, after intense debates, which would be equivalent to both the traditional legal capacity and the capacity to act – that is, the capacity to be the holder rights and obligations and the ability to exercise them.[5]

In spite of this, at present there are still those who maintain that the precept supports the distinction between legal capacity and capacity to act, so that both legal meanings continue to give rise to differences of opinion in international scientific doctrine with regard to legal capacity and capacity to act.[6]

4. Active legal capacity of persons with disabilities in Spanish legal system

Active legal capacity of persons with disabilities in Spanish legal system had been shaped before the reform introduced in the Law 26/2015 of July 28, 2015,[7] modifying the child and adolescent protection system of the organic Law 1/1996 on legal protection of minors.

The protection of minors was regulated, as a higher-rank regulation, by Organic Law 1/1996 of January 15, on the legal protection of minors, partially amending the Civil

3 A. De Castro y Bravo, *Derecho Civil de España. Tomo II Derecho de la Persona*, Cizur Menor, Navarra, España, 1952, Aranzadi, S. A, 45.

4 M. P. García Rubio, La persona en el derecho civil. Cuestiones permanentes y algunas otras nuevas, *Teoría y Derecho. Revista de Pensamiento Jurídico*, 2013, 95–97. Despite the fact that the distinction between legal capacity and capacity to act has been fundamental for civil law, currently the consideration of subjects traditionally branded as lacking capacity to act – minors and incapable – has changed radically. The author cites the STC 174/2002 of October 9 as significant of said change.

5 The interpretation of Article 12 had to be carried out from then on assuming that the concept of legal capacity includes that of acting. Therefore, there is no room for any substitution model in decision-making, not even partially and not even in cases of more intense needs. However, this new way of understanding capacity has been contested by Spanish doctrine, such as, for example, C. Martínez de Aguirre Aldaz, Curatela y representación: cinco tesis heterodoxas y un estrambote, in: *Claves para la adaptación del ordenamiento jurídico privado a la Convención de Naciones Unidas en materia de Discapacidad*, ed. S. de Salas Murillo, M. Mayor del Hoyo, Tirant lo Blanch, Valencia, 2019, p. 264, where he maintains that there are mentally disabled people who do not have the natural capacity to make any decision, or who can only make the simplest ones, being incapable of making more complex ones, or running a serious risk of making decisions not just wrong, but directly harmful to themselves or also to third parties. From a certain threshold of impairment of the natural ability to make decisions, it is necessary to include mechanisms for substituting the ability among these enabling systems because, if not, either the decisions would not be made or the disabled person who chose to make them would be harmed.

6 I. Sánchez-Ventura Morer, Reflexión acerca de una posible compatibilidad entre los mecanismos sustitutivos de la capacidad de obrar y el art. 12 de la Convención sobre los Derechos de las Personas con Discapacidad, in: *La Convención Internacional sobre los Derechos de las Personas con Discapacidad. De los derechos a los hechos*, ed. G. Álvarez Ramírez, y E. Alcaín Martínez, 1st ed., Tirant lo Blanch, Valencia, España, 2020, pp. 585–596, 595; Pereña Vicente y Pallarés Neila, *La Convención de Nueva York y su incidencia en la medida de protección. Código de Buenas Prácticas en el ejercicio de las medidas de protección jurídica*, Fundación Manantial, Madrid, España, 2016, pp. 143–145.

7 https://www.boe.es/buscar/pdf/2015/BOE-A-2015-8470-consolidado.pdf.

Code and Civil Procedure, which is not repealed, only modifies by the Law 26/2015 of July 28. Since then, many state and regional regulations have been approved, international agreements have been signed and important social changes have taken place that affect the situation of minors, which requires reform, as confirmed in various reports.

Therefore, this new law aims to introduce the necessary legal-procedural and substantive changes in those areas considered organic matter, by influencing fundamental rights and public freedoms. It has two articles that respectively affect the Organic Law of Legal Protection of Minors and the Law of Civil Procedure. In Spanish law, the evolution of the treatment of disability towards a social model had already taken place, before the approval and entry into force of the Convention (in May 2008).[8]

This evolution is reflected, even with the limitations, in Law 51/2003,[9] on Equal Opportunities, Non-Discrimination and Universal Accessibility of People with Disability (LIONDAU) and in a whole series of implementing regulations.

In reality, the Convention ratifies and consolidates this trend towards a social approach, underlining, in any case, the need to adopt a human rights perspective. And it is precisely this that makes the Convention highly valued.

The Spanish Constitution of 1978 addresses the treatment of people with disabilities from two perspectives that are understood to be complementary. Thus, on the one hand, it considers people with disabilities as holders of the same fundamental rights recognised to all people and, on the other, as members of a group that requires special protection for the enjoyment of the same.

In principle, the combination of both perspectives seems adequate and in line with the philosophy that presides over the Convention. However, there are some differences in the treatment that the Constitution and the Convention offer to the phenomenon of disability that it is important to highlight in order to understand the general contribution of the international text to the understanding of constitutional rights.

The Constitution only contains an explicit reference – that contained in article 49[10] – to the rights of persons with disabilities. Spanish constitutional text is characterised by using generic formulas in the recognition of rights. The Constitution refers to 'everyone' and 'Spaniards' categories in which it is understood that people with disabilities are included. However, the constitutional norm does not establish in what way and to what

8 Article 35 of the CRPD provides that the states parties must submit to the Committee a comprehensive report on the measures they have adopted to comply with the obligations imposed by the CRPD and on the progress made in this regard. The deadline for submitting the initial report will be two years from the entry into force of the Convention in the state in question. For the following reports, the precept establishes a minimum term of at least every four years or when the Committee requires it. On May 3, 2010, just two years after the entry into force of the Convention, Spain sent the Committee its initial report 239, being the first state party to present it.

9 I. Campoy Cervera, *El reflejo de los valores de libertad, igualdad y solidaridad en la Ley 51/2003, de 2 de diciembre, de igualdad de oportunidades, no discriminación y accesibilidad*, vol. 3, Universitas, Universidad Complutense de Madrid, Madrid, 2004, p. 77: 'En todo caso, el que se considere que lo fundamental sea reconocer, respetar y proteger la voluntad de la persona en la toma de aquellas decisiones que afectan al desarrollo de su vida, abre, en realidad, dos cuestiones, estrechamente vinculadas, de trascendental importancia: el problema de determinar cuál es la voluntad de la persona y el problema de determinar cuándo está legitimado que actuemos paternalistamente con una persona ycuándo no'.

10 Spanish Constitution, article 49: 'The public powers will carry out a policy of anticipation, treatment, rehabilitation and integration of the physically, sensory and mentally handicapped, to whom they will provide the specialized attention they require and will protect them especially for the enjoyment of the rights that this Title grants to all citizens' ('Los poderes públicos realizarán una política de previsión, tratamiento, rehabilitación e integración de los disminuidos físicos, sensoriales y psíquicos, a los que prestarán la atención especializada que requieran y los ampararán especialmente para el disfrute de los derechos que este Título otorga a todos los ciudadanos').

extent people with disabilities can exercise and enjoy the rights suffering in this area from a lack of specificity that may be detrimental to real equality of this group.[11]

In our system, the concept of legal capacity presupposes a static attitude of the subject, who, by the mere fact of being a person and because of their dignity as such, the legal system invests in a broad legal capacity, both in the personal sphere, as in the family or patrimonial. However, in Spanish law, legal capacity should not be confused with the capacity to act or exercise capacity, understood as the ability to set in motion by itself the powers and faculties that arise from the rights or to fulfil itself himself with his legal duties.

The ability to act refers to the ability of the person to perform legal acts directly and validly. In other words, the ability to act is a quality that is predicated on the person when he is able to exercise his own rights by himself and, in general, to function autonomously in legal life. Unlike legal capacity, the capacity to act, in Spanish law, may be subject to limitations. In this way, it is possible to distinguish between full capacity to act (which is the norm) and limited or restricted capacity to act. The first is defined as the ability to perform by himself any act that interests the legal sphere of the subject. It is acquired upon reaching the age of majority (18 years in Spain) and also includes the full capacity to dispose of. The limited or restricted capacity to act is a capacity that, with respect to the previous one, is not full to the extent that certain acts cannot be performed except with the assistance of other people. In Spanish, the connotation of the term 'legal capacity' seems to refer, in a restricted way, only to the passive legal capacity, while Article 12 of the Convention, when it speaks of legal capacity, is also referring to the capacity to act.

Spanish law contemplated the figure of incapacitation. The incapacitation is a legal mechanism that comes to limit the capacity to act of certain people, those whose disability prevents them 'to govern themselves'. The incapacitation may well entail the appointment of a guardian, who acts as the legal representative of the incapacitated person, substituting for him in decision-making – well, that of a curator who complements his limited capacity of him. In addition, judicial practice, instead of establishing the limitation of capacity, as required by law, only to the extent necessary to protect the interests of the person and taking into account their specific circumstances and needs, has been limited to creating two degrees of disability: (1) absolute or total disability, which entails the subjection to guardianship of the disabled person, supposes as a general rule that she is deprived of her capacity to act, both in her patrimonial sphere and in her personal sphere, and may be prevented even from exercising her fundamental rights and making decisions in this area; (2) relative incapacity, on the other hand, entails the subjection to curatorship of the incapacitated

11 https://www.congreso.es/public_oficiales/L14/CONG/BOCG/A/BOCG-14-A-54-1.PDF. Right now there is a project to reform article 49 of the Spanish Constitution, which is expected to be finalised in 2023, despite the rejection for political reasons by some parliamentary groups, which changes the statement, which from the reform would be the following: Article 49 of the Spanish Constitution is written in the following terms: 'Article 49.1. Persons with disabilities are holders of the rights and duties provided for in this Title in conditions of freedom and real and effective equality, without the possibility of discrimination. 2. The public authorities will carry out the necessary policies to guarantee the full personal autonomy and social inclusion of people with disabilities. These policies will respect their freedom of choice and preferences, and will be adopted with the participation of representative organizations of people with disabilities in the terms established by law. Particular attention will be paid to the specific needs of women and girls with disabilities. 3. The special protection of persons with disabilities will be regulated for the full exercise of their rights and duties. 4. People with disabilities enjoy the protection provided for in international treaties ratified by Spain that ensure their rights'.

person, usually understanding that the curator must assist the incapacitated person in carrying out the generality of acts of disposition of a patrimonial nature.

In this way, through the institution of incapacitation as regulated in Spanish law, the person with a disability could in practice lose a large part of her rights (the right to decide where to live, their freedom, the right to vote, the right to decide who to marry, and even the right to decide on his own physical integrity).

This vision collides with the provisions of the Convention. Thus, the international instrument analysed required modifying the concept of the incapacitation process in Spanish law and, of course, its practical application. Disability by itself cannot be a reason to limit or restrict the ability to exercise fundamental rights freely.[12]

The exercise of fundamental rights cannot be made impossible or limited a priori to subjects who are, really, in adequate conditions to do so and these conditions will have to be assessed in each situation.

We have another Law 26/2011,[13] of August 1, 2011, of normative adaptation to the CRPD, important for the concept of equal opportunities in raport with the Article 12 of the Convention:

> Article 1. Modification of Law 51/2003, of December 2, 2003 on equal opportunities, non-discrimination and universal accessibility for people with disabilities is amended as follows:
>
> Article 1, paragraph 2 is amended as follows:
>
> *2. Persons with disabilities are those with long-term physical, mental, intellectual or sensory deficiencies that, by interacting with various barriers, may prevent their full and effective participation in society, on equal terms with others.*
>
> *The defense, arbitration and judicial measures contemplated in this Law will be applicable to people with disabilities, regardless of the existence of official recognition of the situation of disability or its transitory nature. In any case, the public administrations will ensure to avoid any form of discrimination that affects or may affect people with disabilities.*
>
> *Notwithstanding this, for the purposes of this Law, those who have been recognized as having a degree of disability equal to or greater than 33 percent shall be considered persons with disabilities. In any case, Social Security pensioners who have a recognized permanent disability pension in the degree of total, absolute or severe disability, and those who are pensioners of passive classes who have a recognized retirement or retirement pension due to permanent disability for service or uselessness.*
>
> *The accreditation of the degree of disability will be carried out in the terms established by regulation and will be valid throughout the national territory.*

The truth is that Spain did not meet the expectations that were expected of it as a state party, and the UN Committee on the Rights of Persons with Disabilities (hereinafter referred to as 'the Committee') made several observations in which it made clear its disagreement with the vision that Spain had regarding the conformity of its domestic legal system with the Convention.

12 M. E. Torres Costas, *La capacidad jurídica a la luz del artículo 12 de la Convención de Naciones Unidas sobre los Derechos de las Personas con Discapacidad*, Agencia Estatal Boletín Oficial del Estado, Madrid, 2020, s 86.

13 https://www.boe.es/buscar/pdf/2011/BOE-A-2011-13241-consolidado.pdf.

One of the strongest criticisms came from the chair of the working group for the follow-up to the day of general discussion on Article 12 of the CRPD (in particular from Edah Wangechi, the president of the working group), who underlined that the declaration of disability mentioned in the resolution of the Supreme Court of Spain passed on April 29, 2009, STS 282/2009[14] constituted a violation of Article 12 of the Convention, and that the guardianship of a person with a disability or other types of protection violated their right to live independently in a family or in a community. In addition, she noted that guardianship was derived from court rulings, and no mechanism or process had been established to ensure that persons with disabilities had to consent to their placement under guardianship or the choice of guardian.

She also highlighted that in the report presented by Spain there was not enough data to be able to determine that the institutions in which people with disabilities were interned were specialised centres. For all these reasons, it asked the Ministry of Justice about the measures to recognise the legal capacity of persons with disabilities and establish mechanisms that guarantee support for them in decision-making, also requesting information on the deadline set to prohibit any practice contrary to Article 12 of the CRPD among which was the declaration of disability and substitution in decision-making.

It is clear that since that first meeting, the Committee was categorically opposed to the incapacitation and guardianship regime provided for in the Spanish legal system, considering it totally incompatible with the Convention. In fact, the distrust aroused by the Spanish position led to requests for information about

1. the number of adults subject to state guardianship;
2. the possible use of coercion measures, electric shocks, isolation measures and psychosurgery as treatment; and
3. the treatment of people with disabilities in psychiatric centres, in order to know if they could be carried out without their prior consent.

With the intention of gaining an in-depth knowledge of the Spanish legal regime, the Committee wanted to know in which cases the guardian was empowered to decide to withdraw food or any other means of vital support to the person under guardianship and the guardianship surveillance mechanisms and again on existing safeguards in case of conflicts of interest. In the same direction, the Committee warned that 'the detention of people due to "psychiatric crises" is incompatible with Article 14 of the Convention'. Finally, the Committee wanted to know the criteria set by the legal system to allow the withdrawal of the right to vote of people with disabilities.

Regarding the issues raised at the meeting, the Spanish delegation reported that it was not possible to apply treatments, such as coercion measures, electric shocks and isolation, since the treatments were only applied by medical prescription. It also acknowledged that there were no data on the number of guardianships, and with regard to the right to vote, it was reported that their deprivation could only be declared through a court ruling. With all the data obtained, the Committee issued its final observations on the report presented by the Spanish state. After noting that Law 26/2011 established one year from its entry

14 In this resolution the Supreme Court of Spain *recalled that the capacity modification procedure consisted of protecting the rights of people with disabilities and that the capacity modification be graduated, proceeding to define a support mechanism based on the natural capacities of people with disabilities.*

into force for the presentation of a bill that would regulate the scope and interpretation of Article 12 of the CRPD, he expressed his concern that the necessary measures had not yet been adopted to replace the current model of substitution in decision-making by assistance for decision-making in the exercise of legal capacity. For this reason, it already recommended to the Spanish state that it review the laws that regulate guardianship and guardianship and that it take measures to adopt laws and policies by which substitution regimes in decision-making are replaced by assistance in decision-making that it respect the autonomy, the will and the preferences of the person with disabilities, as ordered by the new social paradigm of disability incorporated by the Convention.

In addition, it was proposed that training on this issue be provided to all government officials and other relevant stakeholders. Regarding the compatibility of the Spanish legal system with the right to liberty and security of the persons with disabilties according to the wording and the spirit of Article 14 of the CRPD, the Committee took note of the legal system that allowed the internment of persons with disabilities, including persons with intellectual and psychosocial disabilities (mental illness) in special facilities and expressed concern about the tendency to resort to urgent detention measures that contain only ex post facto safeguards for the affected persons. He also expressed concern about reported ill-treatment of persons with disabilities in residential facilities or psychiatric hospitals.

For all these reasons, it then recommended that Spain

1. review the legislative provisions of its legal system that authorised the deprivation of liberty for reasons of disability, including mental, psychological or intellectual disabilities;
2. repeal the provisions that authorised forced internment due to manifest or diagnosed incapacity, and
3. adopt measures so that medical services, including all services related to mental health, are based on the informed consent of the interested patient.

With regard to the right to choose where to live, advocated by Article 19 of the Convention, the Committee also expressed its concern that institutionalised persons remain in residential centres due to the lack of other alternatives; and in relation to the right to vote, he was equally concerned about the fact that people with disabilities, especially intellectual or psychosocial, could be deprived of the right to vote at the moment in which they have been deprived of their legal capacity or have been institutionalised.

The right to vote was one of the issues on which the Committee expressed the greatest concern, since it imposed on Spain

to review all relevant legislation so that all persons with disabilities, regardless of their disability, their legal status or of their place of residence, have the right to vote and to participate in public life on an equal footing with others. The Committee requested Spain to modify article 3 of Organic Law 5/1985, which authorises judges to deny the right to vote based on decisions adopted in each particular case. The amendment must make all people with disabilities the right to vote. In addition, it is recommended that all persons with disabilities who are elected to public office be provided with all necessary assistance, including personal assistants.

Since the issuance of the first report and the observations and recommendations made by the Committee, different regulations have been developed in order to gradually adapt and harmonise the Spanish legal system to the principles established in the CRPD. Among others, these were Law 26/2011 of August 1, which we have just named, of normative adaptation to the International Convention on the Rights of Persons with Disabilities; Royal

Decree 1276/2011 of September 16, of normative adaptation to the International Convention on the Rights of Persons with Disabilities 269, or Royal Legislative Decree 1/2013 of November 29, approving the Consolidated Text of the General Law on the Rights of Persons with Disabilities; and the Organic Law 2/2018 of December 5, for the modification of Organic Law 5/1985 of June 19, of the General Electoral Regime (LOREG) to guarantee the right to vote of all people with disabilities. We can also cite Organic Law 1/2015, of March 30, modifying the Penal Code; Law 15/2015 of July 2, on the voluntary jurisdiction, which dedicates three chapters of Title II to disability; the approved reform of the Organic Law of the Jury Court, in order to guarantee the participation of people with disabilities; and Law 20/2011 of June 21, on the Civil Registry, which involves the implementation of a single registry for all of Spain, computerised and accessible, where the modification of capacity and its revocation are registered.[15] Finally, on April 30, 2021, the Civil Registry Law of July 21, 2011 (hereinafter referred to as 'the LRC'), has entered into force, in accordance with the reform introduced by Law 6/2021 of April 28, which modifies the aforementioned Law 20/2011 of July 21, of the Civil Registry.

The new Civil Registry Law constitutes one of the reforms of greatest social and legal importance in the law of the natural persons since the entry into force of the Constitution.

The said legal text has had the merit of transforming a pre-constitutional Civil Registry, turning it into a modern 21st-century Civil Registry, which articulates its 100 precepts, composing a modern, coherent and solid legal system, which constitutes a paradigm of a moderate legislative position and change.

The aforementioned Law 20/2011 had partially entered into force; thus, article 30 of the Civil Code, in force on July 23, 2011, and articles 44, 45, 46, 47, 49.1 and 49.4, 64, 66, 67.3 of the Civil Registry Law, amended by Law 19/2015 of July 13, entered into force on October 15, 2015. Article 49.2 the Civil Registry Law (which repeals the historical prevalence of the paternal surname) and article 53 the Civil Registry Law entered into force on June 30, 2017.

The new legal architecture of the Civil Registry is based on various principles that can be summarised in the following notes:

It is a single Civil Registry for all of Spain (art. 3.1 LRC); its axis is the person and his or her vital trajectory; it is at the service of the general interest (for the first time in the history of registry legislation, rights and duties of citizens before the RC are regulated); it is computerised and electronically accessible (art. 3.2 LRC); it is individual, personalised and continuous and goes beyond the traditional division into sections and creates an individual record for each person, who is assigned a personal code from the first registration (birth) (arts. 2, 5 and 6 LRC); it is dejudicialised, following the majority model in comparative law; with a new organisational model, it is modern and streamlined, made up of a central office, consular offices and general offices; it enshrines the growing importance of the foreign element; and it is faithful to the Constitution and international treaties, which reflects current trends in family law and personal law.

Without being exhaustive, it is convenient to focus on some relevant novelty of the new law, in relation to disability (because of the amendments in the Civil Registry Law in

15 M. E. Torres Costas, *La capacidad jurídica a la luz del artículo 12 de la Convención de Naciones Unidas sobre los Derechos de las Personas con Discapacidad*, Agencia Estatal Boletín Oficial del Estado, Madrid, 2020, p. 146, affirms that it was not a law that delved into the concept of legal capacity at all, but it did adapt access to justice for persons with disabilities in accordance with the principles of the CRPD and, particularly, with the right set forth in its Article 13.

its articles: 4, 11, 44, 71, 72, 73, 75, 77, 83 and 84): article 4 of the LRC (Civil Registry Law), which lists the facts and acts that can be registered, is inspired by its preceding article 1 of the LRC 1957. However, it systematically completes and orders the list of said facts and acts and introduces technical improvements and of content.

The aforementioned article 4 of the LRC, even with a short period of validity, was modified by Law 8/2021, which reforms civil and procedural legislation to support people with disabilities in the exercise of their legal capacity.

According to the new article 4,

> Facts and acts that can be registered.
>
> They have access to the Civil Registry the facts and acts that are refer to identity, marital status and other person's circumstances. They are therefore registrable:
>
> 1. Birth.
> 2. Affiliation.
> 3. Name and surnames and their changes.
> 4. Sex and change of sex.
> 5. Nationality and civil residence.
> 6. Emancipation and the benefit of old age.
> 7. Marriage. Separation, annulment and divorce
> 8. Legal or agreed matrimonial economic regime.
> 9. Parent-child relationships and their modifications.
> 10. The powers and preventive mandates, the proposal of a person to be appointed as a curator and the support measures intended by a person with respect to himself or his assets of hers.
> 11. The judicial resolutions issued in procedures for the provision of judicial measures of support for people with disabilities.
> 12. The acts related to the constitution and regime of the protected heritage of people with disabilities.
> 13. Guardianship (or curator) of the minor and legal defense of the minor emancipated.
> 14. Declarations of insolvency of persons physical injuries and the intervention or suspension of their faculties.
> 15. Declarations of absence and death.
> 16. Death.

We see, therefore, that Spain has complied with the mandate of Article 12 of the Convention to a large extent, albeit with reprehensible initial slowness, but with significant progress in recent times, although the latest legislative changes are of recent creation and they need a time of force to be able to raise the positive effects with respect to the content of Article 12 of the Convention.

As a consequence of the first lack of legislative adaptation, the Spanish courts were the ones that issued sentences interpreting the regulations in force in light of the Convention. Thus, we can cite, among others, the STS of April 29, 2009,[16] and those issued from it,[17]

16 https://vlex.es/vid/-60279937.

17 Interesting, P. de Pablo Contreras, https://www.boe.es/biblioteca_juridica/comentarios_sentencias_unificacion_doctrina_civil_y_mercantil/abrir_pdf.php?id=COM-D-2009-12.

all of which have been carrying out a repeated interpretation of the legal regulations on modification of capacity and the legal custody regime to adapt them to the Convention, generating a very complete jurisprudence according to which the legal regime of modification of capacity (incapacitation) and legal guardianship (tutelage and curatorship) is compatible with the Convention as long as it is interpreted as a system of protection of the person with disability and according to her needs and interests.

The second judgment important for interpretation of the CRPD and its impact on the Spanish legal system is the judgment passed by the European Court of Human Rights in the case of *Caamaño Valle v. Spain*. In Spain the case of Caamaño has not been commented broadly in the Spanish doctrine. The Spanish Supreme Court and the majority of the judges have not considered this case as relevant in the context of the Spanish country law.

5. Case of *Caamaño Valle v. Spain*

In Spain, one of the aspects that derives from the social approach to the disability and that is presenting the most difficulties in implementation is the recognition of legal capacity on equal terms with the others (article 12.2). This right obliges states to recognise the ability of people with disabilities to decide for themselves in all aspects of life and to provide the support required in decision-making. Likewise, it questions the widespread model of substitution in decision-making as a protection mechanism for people with intellectual and psychosocial disabilities or with cognitive impairment and as a guarantee of the safety of economic traffic.

The entry into force of the CRPD causes a change in the name of the incapacitation procedures, which are beginning to be called modification of the capacity to act. The change extends to the content of the incapacitation sentences, which the Supreme Court considers a 'tailored suit' for which the guardianship allows greater flexibility – STS, Civil Division, 282/2009, of April 29. In this framework, the conditions begin to arise so that the deprivation of the suffrage, on which the judge must rule in the processes of modification of legal capacity, is not contrary to the CRPD.

The conclusion is that capacity must be evaluated on a case-by-case basis, and it is on a case-by-case basis as the judicial body has to assess whether the person can discern the meaning of his vote and whether, due to his personal situation, he is free from the influence of other people.

Examples of this line are STS 421/2013 of June 24 and STS 341/2014 of July 1, in which the Supreme Court expressly introduces the expression 'tailored suit'.

In general terms, the reasons behind the Spanish regulations applied in these judgments and subsequently modified, specifically in December 2018 (Reform of the Organic Law of the General Electoral System, LOREG), are of two types. On the one hand, it is about preserving the democratic system, and on the other, it is about protecting people with disabilities from possible undue influence.

One of the cases that has had the most impact is the case of *Caamaño Valle v. Spain*[18] (application no. 43564/17), of deprivation of the right to vote of a person with a disability

18 X. Urizarbarrena Pérez, Crónica de Jurisprudencia del Tribunal Europeo de Derechos Humanos, *Revista de Derecho Comunitario Europeo*, 2021, vol. 70, pp. 1121–1140, TEDH, Caamaño Valle v. Spain, nº 43564/17, 11 de mayo de 2021, recalls that in the specific case of the applicant's daughter, the court considered that there was a legitimate purpose in the restriction imposed on her right to vote. Regarding proportionality, it took into account that Spanish legislation does not apply an absolute and automatic prohibition on the right to vote of people with intellectual disabilities but rather that the measure corresponding to the applicant's daughter was taken after thoroughly examining her specific individual situation.

in the Spanish state, within the framework of an incapacitation process and after conducting a capacity test on Ms. Caamaño's daughter:

The application concerns the right to vote of the applicant's daughter, placed under partial guardianship owing to her intellectual disability. The applicant relied on Article 3 of Protocol No. 1, read alone or in conjunction with Article 14 of the Convention and Article 1 of Protocol No. 12.

The facts of the case

The applicant was born in and lives in Santiago de Compostela. She is the mother of M., a mentally disabled young woman born in A Coruña (La Coruña) in 1996. The applicant was represented by Ms L. Gonzalez-Lagana Vicente, a lawyer practising in A Coruña.

The government were represented by their agent, Mr R.-A. León Cavero, state counsel and head of the Human Rights Department at the Ministry of Justice.

The facts of the case, as submitted by the parties, may be summarised as follows.

In December 2013, given the fact that M., the applicant's daughter, would soon turn 18, the applicant lodged a request with a judge of First-Instance Court No. 6 of Santiago de Compostela ('the first-instance judge') that she be deprived of her legal capacity. The applicant requested that her legal guardianship over her daughter be extended, but specifically asked that her daughter not be deprived of her right to vote.

On September 2, 2014, the first-instance judge decided that the applicant's daughter should be placed under the extended partial legal guardianship of her mother and that, in the light of the evidence and the case file, M.'s right to vote should be revoked.

In an extensively reasoned judgment, the first-instance judge held that, given the specific circumstances of the case, the applicant's daughter was not capable of exercising her right to vote. Having examined the Convention on the Rights of Persons with Disabilities (CRPD) (see the following paragraph 23) in the light of the Spanish legal system, the first-instance judge explained the difference between the CRPD's general concept of disability and the Spanish legal institution of incapacitation (incapacitación), which is intended to guarantee the rights of disabled people. He also referred to the case law of the Supreme Court (according to which the CRPD and the institution of incapacitation, as regulated under the Spanish legal system, are compatible). He furthermore stated that a person who has been declared incapacitated (incapacitado) in the course of judicial proceedings (and who is not able to manage himself or herself) cannot be compared to a person who suffers a disability but is capable of managing himself or herself.

The first-instance judge considered that in respect of the instant case, the limitations imposed on M. in respect of her right to vote were based neither on the requirement of a higher cognitive or intellectual capacity nor on M.'s lack of knowledge regarding her voting options (that is to say her choice of candidate or party) nor on any hypothetical irrationality in respect of such choices, but on the strict and objective establishment of her lack of capacity in respect of political affairs and electoral matters. The court's medical expert and the first-instance judge had ascertained the notable – and at that time insuperable – deficiencies of M. (without, in accordance with § 761 of the Civil Procedural Law, prejudging any possible subsequent change in her capacity) in respect of her exercising an electoral choice. The first-instance judge acknowledged that depriving a person of her voting rights could not be an automatic consequence of a judicial declaration of legal incapacity and that decisions dealing with such situations had therefore to be extensively reasoned. He noted that the task at hand was not that of examining the knowledge of the applicant's daughter about a specific political system but to assess the circumstances of the case. The

restriction of her right to vote was not justified by the fact that she hardly knew anything about the Spanish political system but because she was highly influenceable and not aware of the consequences of any vote that she might cast. The first-instance judge emphasised in his judgement that such decisions were always subject to judicial review.

In October 2014, the applicant lodged an appeal with the Regional Court (*Audiencia Provincial*) of A Coruña. She asked the court to expressly recognise her daughter's right to vote, submitting that under Articles 12 and 29 of the CRPD, the right to vote of persons with disabilities was recognised and that states had to provide them with the support necessary for the full exercise of that right to be guaranteed.

On March 11, 2015, the Regional Court of A Coruña dismissed the applicant's appeal. The Regional Court considered that a decision to deprive a person of his or her right to vote was legal and compatible with the CRPD, provided that person's capacity to exercise the right to vote had been subjected to individual review by a judicial body; it noted that the first-instance judgment had been sufficiently reasoned. The Regional Court emphasised that the intellectual ability of the applicant's daughter was equivalent to that of child aged between six and eight.

In April 2015, the applicant lodged an appeal on points of law with the Supreme Court. She argued that all citizens had the right to vote under article 23 of the Spanish Constitution (taken in conjunction with article 10, § 2, thereof, which provided that fundamental rights recognised under the Constitution should be interpreted in accordance with the international conventions ratified by Spain). Moreover, she considered it to be contrary to the principle of non-discrimination that disabled people were prevented from exercising the fundamental right to vote.

On March 17, 2016, the Supreme Court dismissed the applicant's appeal, upholding the decision of the Regional Court and ruling that the reasoning of the contested judgment had contained a thorough analysis of the case and had correctly balanced the interests at stake.

On April 28, 2016, the applicant lodged an *amparo* appeal alleging a violation of Article 23 of the Spanish Constitution, defending her daughter's right to vote. It was dismissed by the Constitutional Court on November 28, 2016 (announced on December 22, 2016).

In its reasoned decision (*auto*), the Constitutional Court stated as follows:

> 2. With regard to doubt about the constitutionality of §§ 3(1)(b) and 2 of Institutional Law 5/1985 . . . on the general electoral system (the LOREG) under Article 23 § 1 of the Spanish Constitution, the applicant assumes that this constitutional provision guarantees to all citizens the right of active suffrage, without any limitation or exception. . . .
>
> §§ 2 and 3 of the LOREG limit the right to vote to those who, besides holding Spanish nationality . . ., have reached the minimum legal age, have been included in the electoral census, and are not affected by the circumstances provided by § 3 (including having been judicially deprived of the right to vote in incapacity proceedings or being confined owing to a psychiatric disorder). Thus, the constitutional model of universal suffrage is not *per se* incompatible with an individual being deprived of the right to vote for a reason legally provided for, especially when such deprivation is covered by the standard legal guarantees.
>
> On the basis of the considerations listed in the previous paragraph, the arguments employed in the appeal are insufficient to effectively question the constitutionality – owing to the infringement of Articles 23 §§ 1 and 14 of the Spanish Constitution – of

the above-mentioned legal provisions (paragraphs (1)(b) and (2) of § 3 of the LOREG), which enable courts and tribunals to restrict the exercise of a person's right to vote on the basis of that person's legal incapacity – in particular, on the basis of the specific circumstances of each person and after the completion of the appropriate judicial procedure determining his or her incapacity (or the authorisation of his or her confinement on the basis of mental illness).

With regard to the alleged interpretation of Article 23 of the Spanish Constitution in accordance with the CRPD – and, in particular, in accordance with Article 29 thereof – which was adopted in New York on 13 December 2006 and ratified by Spain . . . on 9 April 2008 . . ., it is necessary to take into account, first of all, the distinction between 'disability' (a) in the sense of the Convention – a very broad concept that includes any 'long-term physical, mental, intellectual or sensory impairment' that may prevent any actual equality, and (b) 'disability' in the sense of the Spanish Civil Code (CC)– that is to say 'persistent physical or mental illnesses or impairments that prevent the person from caring for himself/herself' (Article 200 of the CC) with regard to his/her exercise of the right in question under § 3 of the LOREG. The latter deals with the ability of . . . each person to cast a vote as a 'free expression of the will of the elector', which is also guaranteed by the CRPD (Article 29 (a) (iii)), the purpose of which is . . ., in line with the mandate specified by Article 9 § 2 of the Spanish Constitution: to remove obstacles that prevent or hinder free and secret voting without fear (Article 29 (a) (ii) and (iii)) by persons with disabilities and to ensure that they are 'assisted in voting by a person of their choice . . . where necessary and at their request'.

The Constitutional Court concluded that there had not been any violation of the fundamental rights alleged.

The underlying issue is that the Institutional Law of the General Electoral System, LOREG, 5/1985 of June 9, in force at that time, said the following:

All Spanish citizens of legal age not falling within any of the categories listed in the following section have the right to vote.

§ 3 of LOREG – Disenfranchisement

1. The following have no right to vote:

. . .

b) Persons declared incapacitated by a final judicial decision, provided that decision specifically declares the person in question incapable of exercising suffrage.
c) Persons residing in a mental hospital by order of a court, in the event that the court explicitly declares in its order that the person in question is incapable of exercising the right to vote.

For the purposes of this section, courts or tribunals having jurisdiction to declare a person's legal incapacity or to order a person's residence in a mental hospital must specifically decide whether that person is incapable of exercising the right to vote, and if that is the case, they shall require that fact to be noted in the Civil Registry.

In view of the foregoing, the court concluded that there had been no violation of either Article 14 of the Convention, read in conjunction with Article 3 of Protocol No. 1, or Article 1 of Protocol No. 12.

The ECHR legal justification and dissenting opinion of Judge Lemmens

For these reasons, the European Court of Human Rights declared unanimously the application admissible, held by six votes to one that there had been no violation of Article 3 of Protocol No. 1, and held by six votes to one that there had been no violation of either Article 14 of the Convention, read in conjunction with Article 3 of Protocol No. 1, or Article 1 of Protocol No. 12.

There was no unanimity in the decision, as the president of the court, Judge Lemmens issued his dissenting opinion and considered that under Articles 12 and 29 of the CRPD and the interpretation made by the Committee on the Rights of Persons with Disabilities, all persons with disabilities, without exception, must have the right to vote. Thus, no one should be deprived of that right for any perceived or actual intellectual disability. In the opinion of the dissenter, Spain's decision pursued legitimate purposes but produced disproportionate effects, affecting the right to vote of the applicant's daughter, summarised as follows:

> The majority conclude that there has been no violation of either Article 14 of the Convention or Article 1 of Protocol No. 12. They basically hold that the reasons which justified an interference with the right to vote as guaranteed by Article 3 of Protocol No. 1, 'are equally valid within the context of Article 14 [and Article 1 of Protocol No. 12]' . . . I feel compelled to disagree on this point as well. In electoral matters, equality is of particular importance. By barring the applicant's daughter from the exercise of her right to vote, the State reduced her to a second-class citizen. Unlike other citizens, she cannot make her voice heard, not even via a trusted person.
>
> I cannot see an objective and reasonable justification for the impugned difference in treatment. In my opinion, there has been a violation of Article 14 of the Convention and Article 1 of Protocol No. 12.
>
> . . . To reconsider the case-law is sometimes necessary. The present case evidently offered an opportunity to do so. Article 12 § 2 of the CRPD obliges the States Parties to the CRPD to recognise the legal capacity of all persons with disabilities, on an equal basis with others. While the States Parties to Protocol No. 1 enjoy a certain margin of appreciation in the sphere of limitations of the right to vote, the Court has already accepted that margin is relatively narrow when the restriction applies to the mentally disabled (see paragraph 55 of the judgment, referring to Alajos Kiss, cited above, § 42). Given the obligations imposed on the States by Article 12 of the CRPD, as clarified by the CRPD Committee, the Court should have indicated that the margin for restrictions under Article 3 of Protocol No. 1 has been further reduced.
>
> The irony of this case is that while the Court is reluctant to update its case-law in accordance with the CRPD, the respondent State has in the meantime already adapted its legislation.

And this is true, because shortly after, Organic Law 2/2018 of December 5 was promulgated to reform the Institutional Law of the General Electoral System (LOREG),[19] to guarantee the right to vote for all people with disabilities, deleted letters (b) and (c) of the

19 https://www.boe.es/boe/dias/2018/12/06/pdfs/BOE-A-2018-16672.pdf.

article 3.1 of the LOREG, which deprived of the right to vote to 'those declared incapable by virtue of a final judicial sentence, provided that it expressly declares the incapacity to exercise the right to vote' and 'those interned in a psychiatric hospital with judicial authorization, during the period of their internment, provided that in the authorization the judge expressly declares the incapacity to exercise the right to vote'.

The reform also affected article 3.2, which attributed jurisdiction to judges and courts within the framework of incapacitation or internment procedures to pronounce on the incapacity to exercise the right to vote and established their obligation to communicate the incapacitation decision to the Civil Registry for the corresponding annotation, in the cases in which he appreciated it. Instead, the current wording of article 3.2 LOREG states that 'everyone may exercise their right to vote actively, consciously, freely and voluntarily, whatever the way they communicate it and with the means of support they require'.

The reform of the law,[20] promoted by the associative movement through the Spanish Committee of Representatives of People with Disabilities (Cermi),[21] allowed the 100,000 people with intellectual disabilities, mental illness or cognitive impairment who were deprived of it to exercise the right to vote.[22]

In this relevant case, we must also point out the participation of the commissioner for human rights of the Council of Europe, as a third party in the procedure of the European Court of Human Rights,[23] indicated that the right to vote of the young woman 'should have been defended without exception'.

We support the idea that the right to vote of a disabled person must be defended in any case, although there are some exceptions within disability that should be the subject of debate apart from the recognition in the course of which not only country law context, but also the international, in particular European, context should be taken into consideration.

20 M. León Alonso, La Ley Orgánica 2/2018, de 5 de diciembre, de Reforma del Régimen Electoral General: Una revisión del concepto de capacidad electoral, *IgualdadES*, 2019, vol. 1, pp. 205–218, https://doi.org/10.18042/cepc/IgdES.1.07, says about the reform carried out: 'Issue that has been resolved, in my opinion partially and unsatisfactorily, with Organic Law 2/2018, of December 5. Partial, because it leaves several issues unsolved, as we will see later. Unsatisfactory, because although the original wording of art. 3 LOREG was perfectible, its content did not violate the 2006 Convention or the Spanish Constitution of 1978'.

21 https://www.cermi.es/es/actualidad/noticias/el-tribunal-europeo-de-derechos-humanos-se%C3%B1ala-que-la-reforma-de-la-loreg-de.

22 https://www.cermi.es/actualidad/noticias/aprobada-definitivamente-la-reforma-que-permitir%C3%A1-el-voto-100000-personas-con.

23 M. C. Barranco Avilés, Democracia, sufragio universal y discapacidad, *IgualdadES*, 2019, vol. 1, pp. 196–197, https://doi.org/10.18042/cepc/IgdES.1.06, points out how the commissioner for human rights, when making his speech, insisted on the discriminatory nature of the deprivation of the right to vote of people with disabilities, even when it comes to determining the capacity of a specific person through a test that could not be accepted in general in a democratic scenario: 'In a modern European democracy, it would be unthinkable for citizens after coming of age (a criterion applied to everyone indistinctly) to have to prove their knowledge of the political system in order to be able to vote, for example, through questions similar to those raised to the applicant's daughter. Voters are also not expected to justify their vote in any way, including whether it was rational or well-informed, which would be against the obligation enshrined in art. 3 of Protocol 1 to the Convention to hold elections by secret ballot. Similarly, voters are not expected to prove that their vote is free from undue influence. Certainly, it is an accepted part of our democracy that politicians and various interest groups somehow influence and sway many voters, even sometimes against their objective best interest; and all voters are influenced by other people's opinion to some degree'.

6. Law 26/2015 of July 28[24] modifying the child and adolescent protection system of the organic Law 1/1996, legal protection of minors

Organic Law 1/1996 of January 15,[25] on the legal protection of minors partial modification of the Civil Code and the Law of Civil Procedure, hereinafter Organic Law for the Legal Protection of Minors constitutes, together with the provisions of the Civil Code in this matter, the main regulatory framework for the rights of minors, guaranteeing them uniform protection throughout the territory of the state. This law has been referent of the legislation that the Autonomous Communities have been approving subsequently, in accordance with their competences in this matter.

However, almost 20 years after its publication, there have been important social changes that affect the situation of minors and that demand an improvement of the instruments of legal protection, for the sake of the effective fulfilment of the cited article 39 of the Constitution and the aforementioned international standards.[26]

The capacity to act can be full, as in the case of persons of legal age not legally incapacitated, who can perform all acts of civil life, except those explicitly excepted. In the case of Spain, the age of majority is acquired at 18 years of age (article 12 of the Spanish Constitution).

But the capacity to act may be limited by virtue of certain causes, among which the minority of age stands out. Minors cannot carry out all acts with legal effectiveness, and this defect in the capacity to act must be made up for by means of parental authority or guardianship.

The issue is not as simple as stating that all persons of legal age not legally incapacitated are qualified to carry out any legal act and that minors cannot do it themselves, requiring the intervention of their legal representatives. On the one hand, there are cases in which the legal system limits the ability to act of those of legal age, requiring qualified ages (for example, to adopt it is required to be at least twenty-five years old). On the other hand, because although the capacity of minors to act is certainly limited, there are multiple legal provisions in which the possibility of action of the minor is admitted and recognised. Thus, the minor has the capacity to act, either to act personally and directly with full efficiency or simply to intervene or be heard or because, in addition to the consent of his legal representatives, his is required.

All this means that it is not possible to set out in general the rules relating to the capacity of minors, which must be determined on a case-by-case basis. However, it is possible to collect some general rules that can be taken into account to determine whether a minor can consent to a legal act by himself, without the intervention of her parents or guardians. But these rules are, in turn, subject to certain principles that may involve the application of exceptions. All this leads to an enormous casuistry, not without inconsistencies (sometimes minors are allowed to perform acts of great importance and are prevented from performing others that, in principle, seem to have less relevance).

A first circumstance that must be taken into account is whether or not the minor is emancipated. Emancipation occurs, in addition to reaching the age of majority, by the marriage of the minor (which can occur, in some cases, with 14 years), by concession of those who exercise parental authority (in which case, the minor must be at least sixteen

24 https://www.boe.es/buscar/pdf/2015/BOE-A-2015-8470-consolidado.pdf.
25 https://www.boe.es/buscar/pdf/1996/BOE-A-1996-1069-consolidado.pdf.
26 Preamble of Law 26/2015.

years old) or by judicial concession. Emancipation enables the minor to govern his person and property as if he were older, although there are exceptions: in some cases, the intervention of an adult is required (who will normally be the parents); in other cases, the minor is prevented from carrying out the act in question since the legislation requires, in any case, the age of majority or a certain age.

On the other hand, not all unemancipated minors are subject to the same legal regime. In some cases, the legislation enables them to carry out certain acts by themselves (or with the intervention of their legal representatives) after a certain age. In other cases, the possibility of exercising one's own rights is generally linked to the natural capacity of judgement, regardless of the age of the subject, which raises new problems. For example, how can the natural capacity of judgement of the minor be proven? Who should do it? Does this authorisation eliminate any action by the minor's legal representatives?

In relation to the foregoing, article 162.II of the Civil Code, according to which

> Parents who have parental authority have the legal representation of their minor, non-emancipated children. The exceptions are: 1st. Acts related to personality rights or others that the child, in accordance with the laws and with the conditions of maturity thereof, can perform by himself.

Thus, the highly personal nature of personality rights prevents the phenomenon of representation. The express recognition of the natural capacity in this field, as an exception to the inability to act fully, is aimed, in short, not to impede the exercise of fundamental rights to subjects who are, really, in adequate conditions for it, excluding, at the same time, to the legal representatives of this legal sphere of the minor. In addition, this conclusion is also supported by LO 1/1996 of January 15, on the legal protection of minors, the partial modification of the Civil Code and the Civil Procedure Law, among whose essential purposes the promotion of the autonomy of the child stands out. Minor, full recognition of the ownership of their rights and the progressive exercise of them.

Capacity must be established on a case-by-case basis. Some author has put this limit on the capacity discernment or understanding, which is generally recognised for the family and guardianship matters between 12 and 14 years of age and which the civil law system expressly recognises at 12 years (to consent to adoption). This presumption is in any case *iuris tantum* and there is proof to the contrary regarding the immaturity of the minor with a higher age or the maturity of someone under 12 years of age. Maturity conditions cannot be established in the abstract and based on general and aseptic principles and criteria, but the question must be redirected to a singular consideration and assessment. The capacity for discernment is also a relative concept since an individual may have the capacity for discernment to perform some acts and not for others, since the necessary capacity differs according to the nature and consequences of the act in question.

All of these do not mean that parents cannot in any case make decisions regarding these rights with respect to their minor children – for example, about the health of the children and the measures to be taken. What happens is that, when parents act in this sphere, they do so not as legal representatives of their children but in function of their duty to watch over them.

In this regard, the article 39 of the Spanish Constitution establishes that 'parents must provide assistance of all kinds to children born within or outside of marriage, during their minority and in other cases where it is legally appropriate'. As Spaniards are of legal age at 18 years of age, although minor children have a sufficient natural capacity for judgement,

this does not eliminate the duty of their parents to provide them with the assistance they require at all times. The duty of parents to watch over their children cannot disappear by their will.

In the same sense, in accordance with article 154 of the Civil Code, parents have the duty to watch over minor children while they are under their parental authority (that is, while they are not emancipated). Parents may, in the exercise of their authority, seek the assistance of public institutions.

From all that has been said so far, some conclusions concerning the current Spanish regulation of the active legal capacity can be drawn:

1. All people have recognised a series of rights.
2. Only non-disabled persons of legal age (18 years old, regardless of a gender) have full capacity to exercise such rights by themselves, without prejudice to the fact that, exceptionally, the legal system may have established a qualified age.
3. As a general rule, minors must exercise their rights through their legal representatives (parents or guardians), without prejudice to the fact that they must be heard when they have sufficient judgement.
4. Exceptionally, when minors are emancipated, they are considered, for legal purposes, as adults. However, there are still some differences since they are not of legal age, and for certain types of actions, the legal system requires the age of majority.
5. Furthermore, within the group of non-emancipated minors, not all subjects are subject to the same rules: on the one hand, the legal system may allow them to directly exercise their rights by themselves, without the intervention of legal representatives from a certain age, or it may be required that their wills be united; on the other hand, it can be established that the ability to act in relation to certain matters is not linked to age but to the natural capacity of judgement, as happens in relation to the exercise of personality rights (which affects the field of health and body interventions)

Despite what has been said, even in the case of emancipated minors, or not emancipated but to whom the legal system recognises the capacity to exercise any of their rights by themselves, exceptions may be found, either preventing their exercise in certain cases (for example, to undergo sterilisation or assisted reproductive techniques you must necessarily be of legal age, and no one can consent to the minor) or requiring the intervention of a third party to validate the decision (for example, to consent to an abortion). And this can occur, in turn, either because it is expressly established by a legal norm or because it is understood as a requirement derived from the duty of the minor's parents and guardians to safeguard their interests, which necessarily implies a relativisation of the capacity for self-determination that to a greater or lesser extent may have been established by law.

As can be seen from the previous considerations, it is impossible to establish a list of behaviours that minors are able to do or not since the system is configured around certain criteria of general rule-exception so complex that it requires a case-by-case analysis, in which both the conduct that the minor wants to carry out, as well as their legal situation (emancipated or not), as well as the judgement capacity of the child must be taken into account a minor in question. And in any case, given that the legislation relating to minors is enormously dispersed and has been configured with different criteria, by different people and at different historical moments, it is not strange to find important value contradictions, in such a way that minors of age are able to carry out certain acts themselves and not to carry out others that, in principle, may seem of much less importance.

7. Procedural aspects of the reform brought about by Law 8/2021 of June 2,[27] reforming civil and procedural legislation to support persons with disabilities in exercising their legal capacity

Introductory remarks

As stated in the preamble to the reform introduced by Law 8/2021 of June 2, the reform of civil and procedural legislation aims to take a decisive step towards bringing our legal system into line with the Convention – an international treaty which in Article 12 of the CRPD proclaims that persons with disabilities have legal capacity on an equal basis with others in all aspects of life and obliges states parties to take appropriate measures to provide persons with disabilities with access to the support they may need in exercising their legal capacity. The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity.[28]

In manifesting this objective, the convention introduces important new developments in the treatment of disability, as well as requiring states parties to ensure that all measures relating to the exercise of legal capacity provide adequate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, that there is no conflict of interest or undue influence, that they are proportionate and tailored to the person's circumstances, that they are implemented within the shortest time possible and that they are subject to periodic review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportionate to the degree to which such measures affect the rights and interests of individuals.

It is therefore necessary to change from a system such as the one in force until now in Spanish legal system, in which substitution predominates in decision-making affecting people with disabilities, to one based on respect for the will and preferences of the person who, as a general rule, will be responsible for making his or her own decisions.[29]

This law represents a fundamental milestone in the work of adapting Spanish legal system to the New York Convention, as well as in the updating of Spanish domestic law on an issue, such as respect for the right to equality of all persons in the exercise of their legal capacity, which has been the subject of constant attention in recent years, both by the United Nations, the Council of Europe and the European Parliament itself and, as a logical consequence, also by the state legal systems of our environment.

The new regulation is inspired, as our Constitution in article 10 requires, by respect for the dignity of the person, the protection of their fundamental rights and respect for the free will of the person with disabilities, as well as the principles of necessity and proportionality of the support measures which, where appropriate, this person may need in order

27 C. Guilarte Martín-Calero, *Comments on Law 8/2021 by which civil and procedural legislation on disability is reformed*, Navarra, Aranzadi, 2021, passim.

28 B. Ureña Carazo, El nuevo proceso de apoyo a las personas con discapacidad: Un enfoque humanista, *La Ley Derecho de Familia: Revista jurídica sobre familia y menores*, 2022, no. 33 (Issue dedicated to: La humanización de la justicia civil de familia), pp. 189–200.

29 F. De Asís González Campo, Procesos de adopción de medidas de apoyo a personas con discapacidad: Valoración de la reforma procesal del Anteproyecto de 2018, in: *Claves para la adaptación del Ordenamiento Jurídico privado a la Convención de Naciones Unidas en materia de discapacidad*, dir. S. Salas Murillo, V. Mayor del Hoyo, Tirant lo Blanch, Valencia, 2019, 467–499.

to exercise their legal capacity on an equal footing with others. In this regard, it should be taken into consideration that, as highlighted by the General Comment of the United Nations Committee of Experts in 2014, this legal capacity encompasses both the ownership of rights and the legal standing to exercise them.

This law consists of eight articles, two additional provisions, six transitional provisions, one repealing provision and three final provisions.

The first article amends the Law on Notaries with eight paragraphs; the second article, with 67 paragraphs, amends the Civil Code; the third article affects the Mortgage Law and consists of nine paragraphs; the fourth article amends Law 1/2000 of January 7, on civil procedure, with 29 paragraphs; the fifth article modifies Law 41/2003 of November 18, on the patrimonial protection of persons with disabilities and the modification of the Civil Code, the Law on Civil Procedure and tax regulations for this purpose and is divided into six sections; the sixth article modifies Law 20/2011 of July 21, on the Civil Registry, and is divided into ten sections; the seventh article, referring to Law 15/2015 of July 2, on voluntary jurisdiction, is divided into 20 sections; finally, the eighth article, referring to the Commercial Code, is divided into three sections.

Title XI of Book One of the Civil Code is rewritten and renamed. The old name of the title 'Age and emancipation' was replaced by the following new name: 'Measures to support persons with disabilities in the exercise of their legal capacity'. The pivotal element of the new regulation will be neither the incapacitation of those who are not considered sufficiently capable, nor the modification of a capacity that is inherent to the condition of a human person and, therefore, cannot be modified. On the contrary, the central idea of the new system is that of support for the person who needs it, support which the aforementioned General Comment of 2014 recalls. The support is a broad term that encompasses all kinds of actions: from friendly accompaniment, technical assistance in the communication of declarations of will, the breaking down of architectural and other barriers, advice or even the taking of decisions delegated by the person with disabilities. It should even be added that in situations where support cannot be provided in any other way and only in the face of such a situation of impossibility, it can take the form of representation in decision-making. It is important to point out that anyone who needs support measures can benefit from them, regardless of whether their disability has obtained administrative recognition. It is also relevant that, unlike the 19th-century codes, which were more concerned with the financial interests of the person than with their integral protection, the new regulation tries to attend not only to matters of a financial nature but also to personal aspects, such as those relating to decisions on the vicissitudes of their ordinary life (home, health, communications, etc.).

It is not, therefore, a mere change of terminology that relegates the traditional terms 'incapacity' and 'incapacitation' to more precise and respectful ones but rather a new and more accurate approach to reality, which points out something that has long gone unnoticed: that people with disabilities have the right to make their own decisions, a right that must be respected; it is, therefore, a question of human rights.

Following the precedents of other European legal systems and the guidelines of the Council of Europe, when specifying support, the new regulation gives preference to voluntary measures, i.e. those that can be taken by the person with a disability himself/herself. Within the voluntary measures, preventive powers and mandates acquire special importance, as well as the possibility of self-care. Outside of these, it is worth highlighting the strengthening of the figure of de facto guardianship, which is transformed into a legal institution of support, as it ceases to be a provisional situation when it proves to be

sufficient and adequate for safeguarding the rights of the person with disabilities. Reality shows that in many cases the person with disabilities is adequately assisted or supported in decision-making and the exercise of their legal capacity by a de facto guardian – usually a family member, as the family remains in our society the basic group of solidarity and support among the people who compose it, especially with regard to its most vulnerable members – who does not require a formal judicial investiture that the person with disabilities does not want either. In cases where the guardian is required to take representative action, the need for *ad hoc* judicial authorisation is foreseen so that it will not be necessary to open a whole general procedure for the provision of support, but the authorisation for the case, after examination of the circumstances, will be sufficient.

The institution subject to more detailed regulation is guardianship, the main support measure of judicial origin for persons with disabilities.

Following this same criterion, not only is guardianship eliminated from the field of disability, but parental authority and rehabilitated parental authority are also extended, figures that are too rigid and poorly adapted to the system of promoting the autonomy of adults with disabilities that is now being proposed. In this regard, it should be remembered that the new concepts of the autonomy of people with disabilities cast doubt on whether parents are always the most appropriate persons to encourage the adult child with disabilities to acquire the greatest possible degree of independence and to prepare him or her to live in the future without the presence of his or her parents, given the foreseeable survival of the child; in addition, when the parents grow older, extended or rehabilitated parental authority can sometimes become too burdensome. This is why, in the new regulation, when the minor with a disability reaches the age of majority, he/she will be provided with the support he/she needs in the same way and by the same means as any adult who requires it.

The new text also includes the figure of the legal defender, especially foreseen for certain types of situations, such as those in which there is a conflict of interests between the support figure and the person with disabilities or those in which it is temporarily impossible for the usual support figure to provide it.

All judicially adopted support measures shall be reviewed periodically within a maximum period of three years or, in exceptional cases, up to six years. In any case, they may be reviewed in the event of any change in the person's situation that may require their modification.

Procedures aimed at providing support for persons with disabilities

A. From incapacitation to support measures

From a procedural point of view, it should be noted that the procedure for the provision of support can only lead to a judicial decision that determines the acts for which the person with disabilities requires support but in no case to a declaration of incapacitation or, much less, to the deprivation of rights, be they personal, patrimonial or political.

Finally, prodigality is abolished as an autonomous institution, given that the cases covered by it are covered by the rules on support measures approved with the reform.

B. De facto guard

In accordance with the new regulation, article 52 of the Law on Voluntary Jurisdiction establishes de facto guardianship as the first solution to assist the person with disabilities;

to this effect, it states that at the request of the public prosecutor, of the person who needs support measures or of anyone who has a legitimate interest, the judicial authority that has knowledge of the existence of a de facto guardian may require him/her to report on the situation of the person and assets of the minor or of the person with disabilities and his/her actions in relation to them.

The judge may establish such measures of control and supervision as he deems appropriate, without prejudice to promoting proceedings for the constitution of guardianship in the case of minors, if appropriate. Such measures shall be adopted, after an appearance, summoning the person concerned by the de facto guardianship, the guardian and the Public Prosecutor's Office.

In cases where, in accordance with the applicable civil law, the de facto guardian of a person with a disability must apply for judicial authorisation, before taking a decision, the judicial authority shall itself interview the person with a disability and may request an expert report in order to prove the situation of the person with a disability. It may also summon to the hearing as many persons as it deems necessary to hear depending on the act for which authorisation is requested.

C. Curatela and other stable support measures

Next, article 42 bis (a) of the Law on Voluntary Jurisdiction contemplates the situation of the person with disabilities who requires stable support measures and the assistance of the de facto guardian is insufficient; to these effects, this precept does not detail any measure as it considers that the judicial decision must attend to each specific case and adapt to the needs of each person with disabilities. However, the institution of constant and stable support is the guardianship.

Where the provision of a stable judicial support measure for a person with a disability is appropriate, the procedures provided for in this chapter shall be followed.

The Court of First Instance of the place where the person with disabilities resides shall be competent to hear this case. If, before the hearing is held, there is a change in the habitual residence of the person to whom the file refers, the proceedings shall be referred to the corresponding court in the state in which they are found.[30]

This file may be initiated by the Public Prosecutor's Office, the disabled person himself, his spouse not separated in fact or legally or whoever is in an assimilable de facto situation and his descendants, ascendants or siblings. Any person is entitled to bring to the attention of the Public Prosecutor's Office the facts that may be determinant of a situation that requires the judicial adoption of support measures. The authorities and public officials who, by reason of their duties, become aware of the existence of such facts in respect of any person shall bring them to the attention of the Public Prosecutor's Office. In both cases, the latter shall initiate the present case file[31].

The person with a disability may act in his/her own defence and representation. If it is not foreseeable that he/she will be able to make such an appointment himself/herself,

30 A. M. Lorca Navarrete, La competencia territorial del Tribunal en los procesos sobre la adopción de medidas judiciales de apoyo a personas con discapacidad, *Revista Vasca de Derecho procesal y arbitraje*, 2021, vol. 33, no. 4, pp. 448–450.

31 A. M. Lorca Navarrete, La intervención del Ministerio Fiscal en los procesos sobre la adopción de las medidas judiciales de apoyo, *Revista Vasca de Derecho procesal y arbitraje*, 2021, vol. 33, no. 5, pp. 672–673.

the application shall include a request for the appointment of a legal counsel, who shall act through a lawyer and solicitor.

The lawyer of the Administration of Justice shall make the necessary adaptations and adjustments so that the person with a disability understands the object, purpose and procedures of the file that affects him/her, in accordance with the provisions of article 7 bis of this law.

With regard to the procedure, Article 42 bis (b) of the Law on Voluntary Jurisdiction establishes that the application shall be accompanied by the documents accrediting the need for the adoption of support measures, as well as an expert opinion from specialised professionals in the social and health fields, advising on the support measures that are suitable in each case. Likewise, any evidence that is considered necessary to be taken at the hearing shall be proposed.[32]

Once the application has been admitted for processing by the lawyer for the Administration of Justice, the latter shall summon to the appearance the Public Prosecutor's Office, the person with disabilities and, where appropriate, their spouse who is not legally or de facto separated or who is in an assimilable de facto situation and their descendants, ascendants or siblings. The interested parties may propose, within a period of five days from receipt of the summons, those measures of evidence that they consider necessary to be taken at the hearing. Certification shall also be sought from the Civil Registry and, where appropriate, from other public registers considered relevant, regarding the support measures registered.

Before the appearance, the judicial authority may request a report from the public entity that, in the respective territory, is entrusted with the function of promoting the autonomy and assistance to persons with disabilities or from an entity of the third sector of social action duly authorised as a collaborator of the Administration of Justice. The entity shall inform on the possible alternatives of support and on the possibilities of providing it without requiring the adoption of any measure by the judicial authority.

The judicial authority may also order an expert opinion before the hearing, if it considers it necessary in view of the circumstances of the case.

At the hearing, an interview shall be held between the judicial authority and the person with a disability, who, in view of his or her situation, may be informed of the existing alternatives for obtaining the support he or she needs, either through his or her social or community environment or through the granting of support measures of a voluntary nature.

Likewise, any evidence that has been proposed and is admitted shall be heard and, in any case, those persons who have appeared and express their wish to be heard shall be heard.

If, following the information provided by the judicial authority, the person with a disability opts for an alternative support measure, the file shall be closed.

The opposition of the person with disabilities to any type of support, the opposition of the Public Prosecutor's Office or the opposition of any of the interested parties to the adoption of the support measures requested shall terminate the file, without prejudice to the judicial authority being able to provisionally adopt the support measures for the person with disabilities or his or her assets that it deems appropriate. These measures may

32 A. M. Lorca Navarrete, La práctica de la prueba por el Tribunal en los procesos sobre la adopción de medidas judiciales de apoyo a personas con discapacidad, *Revista Vasca de Derecho procesal y arbitraje*, 2021, vol. 33, no. 5, pp. 674–676.

be maintained for a maximum period of 30 days, provided that the corresponding application for the adoption of support measures has not been filed beforehand in a contentious lawsuit.

In this case, when opposition to the file has been raised, special proceedings will be opened to determine and order support measures in accordance with Article 756 LEC, to which we will return in the following section.

An objection for the purposes of the preceding paragraph shall not be deemed to be an objection solely to the appointment of a specific person as guardian.

In relation to the order and subsequent review of the judicially agreed measures, the regulation is contemplated in article 42 bis (c) of the Law on Voluntary Jurisdiction.

The measures adopted in the order closing the case shall be in accordance with the provisions of the applicable civil legislation on this matter. Such measures shall be subject to periodic review within the period and in the manner provided for in the order granting them, and the procedure provided for in this article shall be followed.

Any of the persons referred to in article 42a(3)(a) of the Law on Voluntary Jurisdiction, as well as the person exercising support, may request a review of the measures before the expiry of the time limit provided for in the order.

The court that ordered the measures shall also be competent to hear the aforementioned review, provided that the person with a disability continues to reside in the same district. Otherwise, the court of the new residence shall request a complete record of the case from the court that previously heard the case, which shall forward it within ten days of the request.

In the review of the measures, the judicial authority shall seek an expert opinion when it deems it necessary in view of the circumstances of the case, shall interview the person with disabilities and shall order such other actions as it deems necessary. For these purposes, the judicial authority may request a report from the entities referred to in article 42a(2)(b) of the Law on Voluntary Jurisdiction. The outcome of these proceedings shall be communicated to the person with disabilities, to the person exercising the support functions, to the Public Prosecutor's Office and to the interested parties involved in the preliminary proceedings so that they may present any arguments they deem relevant within a period of ten days, as well as provide the evidence they deem appropriate. If any of the aforementioned parties file an objection, the file shall be closed and a review of the measures may be requested in accordance with the provisions of the Civil Procedure Act.

Once the allegations have been received and the evidence has been taken, the judicial authority shall issue a new order with the appropriate content, taking into account the circumstances of the case.

With regard to the competence for voluntary jurisdiction proceedings for the provision of support, the Court of First Instance of the domicile or, failing that, of the residence of the minor or person with disabilities shall be competent to hear these proceedings.

The judicial body that has heard a file on guardianship, curatorship or de facto guardianship shall be competent to hear all the incidents, formalities and adoption of measures or subsequent reviews, provided that the minor or person with disabilities resides in the same district. Otherwise, in order to hear any of these incidents, it will be necessary to request full testimony of the file from the court that previously heard the case, which will send it within ten days of the request. With regard to the postulation, the intervention of a lawyer and procurator will not be required in these proceedings, except in those relating to the removal of the guardian or curator and the extinction of preventive powers, in which the intervention of a lawyer will be necessary (article 43 of the Voluntary Jurisdiction Law).

Finally, in addition to these stable measures, it will sometimes be necessary to seek judicial authorisations for specific legal acts and, for this purpose, article 52.3 of the Voluntary Jurisdiction Law, in cases in which, in accordance with the applicable civil legislation, the de facto guardian of a person with disabilities must request judicial authorisation, before taking a decision, the judicial authority shall itself interview the person with disabilities and may request an expert report to accredit the situation of the person with disabilities. It may also summon to the hearing as many persons as it deems necessary to hear depending on the act for which authorisation is requested.

Finally, in certain cases it will be necessary to appoint a legal representative, as provided for in article 250 of the Civil Code and in accordance with the procedure established in article 28 et seq. of the Voluntary Jurisdiction Law, which confers competence to the legal secretary of the Administration of Justice for the processing of this procedure. The legal adviser for the Administration of Justice shall summon the applicant, the interested parties listed as such in the file, those whose presence is deemed relevant, the minor or person with a disability if they are sufficiently mature and, in any case, the minor if they are over 12 years of age and the Public Prosecutor's Office to appear. In the decision granting the request, the legal guardian shall be appointed to whoever the legal adviser of the Administration of Justice deems most suitable for the position, with a determination of the powers conferred upon him/her. The certified copy of the decision appointing a legal representative in the case provided for in article 27(1)(c) of the Law on Voluntary Jurisdiction shall be sent to the competent civil registry for registration.

The regulatory adaptation to the Convention must also be extended to the procedural sphere so that the traditional proceedings to modify capacity are replaced by those aimed at providing support for persons with disabilities. This circumstance also makes it possible to introduce some modifications in the regulation of proceedings in which such a claim is made, aimed at solving some problems that have been detected in forensic practice and which give rise to different interpretations among the courts.

Law 1/2000 of January 7, on civil procedure, has undergone an overall revision in which, in addition to the necessary terminological revisions, the adjustments required by the adaptation to the Convention have been introduced in the exercise of actions to determine or contest filiation, in separation and divorce proceedings and in the procedure for the division of inheritance.

The first relevant amendment is to be found in article 7 bis, which is also introduced in the Voluntary Jurisdiction Act. This article regulates adaptations and adjustments in proceedings in which persons with disabilities participate, regardless of whether they do so as a party or in a different capacity, and which will be carried out in all phases and procedural actions in which it is necessary, including acts of communication. In addition, it is expressly mentioned that the person with a disability will be allowed, if he or she so wishes and at his or her own expense, to make use of an expert professional who, as a facilitator, will carry out adaptation and adjustment tasks.

Periodic reports shall be issued every six months, unless the court, having regard to the nature of the disorder for which the detention was ordered, determines a shorter period.

Once the aforementioned reports have been received, the court, after having carried out, where appropriate, the actions it deems necessary, shall decide whether or not to continue the internment.

Without prejudice to the provisions of the preceding paragraphs, when the medical practitioners attending the person interned consider that it is not necessary to continue the internment, they shall discharge the sick person and shall immediately inform the competent court thereof.

Also important is § 1 of article 756 of the Civil Procedure Act, which establishes that in those cases in which, in accordance with civil legislation, the appointment of a guardian is appropriate and opposition has been made in the previous voluntary jurisdiction proceedings or when the proceedings have not been resolved, the processes for the adoption of judicial measures of support for persons with disabilities shall be governed by the provisions of the said chapter.[33] In the absence of opposition, the judicial provision of support shall be governed by the provisions of the legislation on voluntary jurisdiction.

That is to say, apart from the cases in which the person with a disability has established support mechanisms of his or her own, appropriate to his or her assistance and needs, procedures are articulated to provide him or herself with the necessary assistance in his or her vital development. These are measures of a voluntary nature in which the person with a disability designates who should provide support and to what extent. In the absence of these measures provided by the person with a disability or when they are insufficient for a specific act, the Spanish legal system offers three measures: de facto guardianship, curatorship and legal guardianship. Law 15/2015 on voluntary jurisdiction regulates these institutions and establishes the procedural mechanisms for their adoption.

It is, therefore, an ambitious reform that opts for the voluntary jurisdiction channel in a preferential manner, considering the participation of the person himself/herself as essential, making it easier for him/her to express his/her preferences and actively intervene and, where the judicial authority is interested in the necessary information, always adjusting to the principles of necessity and proportionality. This is without prejudice to the transformation of the procedure into an adversarial one. For its part, § 3 of the same precept provides a solution to the problem derived from the change of habitual residence of the person with disabilities when the process of providing support is pending. Following the criterion established by the Civil Division of the Supreme Court, in such cases the proceedings should be referred to the judge of the new residence, provided that the hearing has not yet been held. This facilitates the development of the process and brings it closer to the place where the person with a disability is actually located.

§§ 3 and 4 of article 757 of the Civil Procedure Act also provide a response to situations that were giving rise to different practices in the courts. On the one hand, it allows the presentation of allegations by the person who appears in the lawsuit as the proposed guardian of the person with a disability, which makes it possible to have more information about their availability and suitability to take on such a task. On the other hand, the intervention at their own expense in the process of any of the legitimised parties who are not the promoter of the procedure or any subject with a legitimate interest is allowed, thus avoiding the creation of situations of inequality between the relatives of the person with disabilities, as was previously the case, where some could act fully in the process given their status as a party and others, on the other hand, could only be heard in the evidence phase.[34]

The following amendments are contained in article 758 of the Civil Procedure Act and refer to the time of admission of the claim and the appearance of the defendant. Firstly, it is established that, once the claim has been admitted, the existing information on the

33 A. M. Lorca Navarrete, Ámbito de aplicación del proceso civil sobre adopción de medidas judiciales de apoyo a personas con discapacidad, *Revista vasca de derecho procesal y arbitraje = Zuzenbide prozesala ta arbitraia euskal aldizkaria*, 2021, vol. 33, no. 5, pp. 665–667.

34 E. Rivera Mendoza, Legitimación e intervención procesal en los procesos sobre la adopción de medidas judiciales de apoyo a personas con discapacidad, in: *Problemática jurídica de las personas con discapacidad intelectual*, dir. R. M. Moreno Flórez, Dykinson, Madrid, 2022, pp. 79–86.

support measures adopted must be obtained from the public registers in order to respect the will of the person with a disability. And secondly, it prescribes the appointment of a legal defender when the person concerned, i.e. the person with disabilities, does not appear, within the period granted to answer the claim, with his or her own defence and representation. This ensures that there is always someone to defend the interests of the person with a disability in the proceedings.

The regulation of the evidence that must be taken in this type of process is reordered in the new text and, in addition, article 759.2 of the Civil Procedure Act introduces the possibility of not carrying out the mandatory hearings when the claim is presented by the interested party and these may invade their privacy by revealing to their family intimate information that they prefer to keep confidential. In addition, the process should move away from the traditional scheme towards a system of inter-professional or 'round table' collaboration, with specialised professionals from the social, health and other fields who can advise on the support measures that are suitable in each case. Finally, in contrast to the previous legislation, the content of the sentence to be handed down by the judge refers to the applicable rules of civil law, as it is considered to be a matter of substantive rather than procedural law.

D. Conclusions

The reform of Law 15/2015 of July 2, on voluntary jurisdiction, is justified both by the introduction of the new file for the provision of judicial support measures for people with disabilities, and by the need for there to be no discrepancy between the various legal texts, all in the interests of the effective protection of people's rights.

In this way, an adjustment is established between the Law on Voluntary Jurisdiction and the substantive civil legislation with regard to the appointment of the ombudsman for minors or persons with disabilities.

Secondly, a new Chapter III bis is incorporated relating to the file for the provision of judicial support measures for persons with disabilities for those cases in which, in accordance with civil regulations, the provision of a stable judicial support measure is appropriate and there is no opposition. This file may be promoted by the Public Prosecutor's Office, the person concerned, his or her spouse not legally or de facto separated or whoever is in an assimilable de facto situation, and his or her descendants, ascendants or siblings.

In relation to the file for the appointment of guardian (for the minor) or curator (for the person with a disability), in addition to some terminological adaptations, the procedure for the rendering of accounts of the guardian or curator is modified, in order to solve some dysfunctions detected during these almost three years that the Law on Voluntary Jurisdiction has been in force. On the one hand, the appearance before the judge does not always have to take place, but only when the interested party requests it, thus avoiding the current proliferation of hearings that in most cases are meaningless in the absence of complexity and opposition to the accounts presented. On the other hand, it allows the court to order ex officio, at the expense of the estate of the ward or assisted person, an expert accounting or auditing test even when no one has requested the hearing, if the report describes complex operations or those that require technical justification. This responds to a need that the courts have repeatedly highlighted in order to achieve greater protection of the interests of the minor or person with a disability.

Another aspect of the judicial authorisation or approval of acts of alienation or encumbrance of assets belonging to minors or persons with disabilities has also been modified. In

accordance with the new regulation of article 62.3 of the Law on Voluntary Jurisdiction, the intervention of a lawyer and solicitor will no longer be mandatory in all cases in which the amount of the transaction exceeds 6,000 euros, but only when this is necessary due to the complexity of the transaction or the existence of conflicting interests. In this way, the aim is to save costs for the minor and the person with a disability in relation to acts that lack technical or legal difficulty, given that in this type of action there will always be a judicial control at the time of deciding on the approval of the request.

8. Active legal capacity of the persons with disabilities and its restrictions in the light of statistical data before the UN Convention on the Rights of Persons with Disabilities was ratified and afterwards

As the new legislation has entered into force recently, there are no judicial statistics in this regard available.

In Spain there are more than 4.3 million men and women with some kind of disability. This is revealed by the figures of the National Statistics Institute (INE), in the survey 'Disability, Personal Autonomy and Dependency Situations', with figures for 2020 and published in 2022.

Data from the survey published in 2008 showed that, compared to 1999, the number of persons with disabilities increased by 320,000. However, as the growth of persons with disabilities was lower than that of the total population, the rate of disability decreased. However, the 2022 survey showed an increase of 11.8% for men and 5.4% for women.

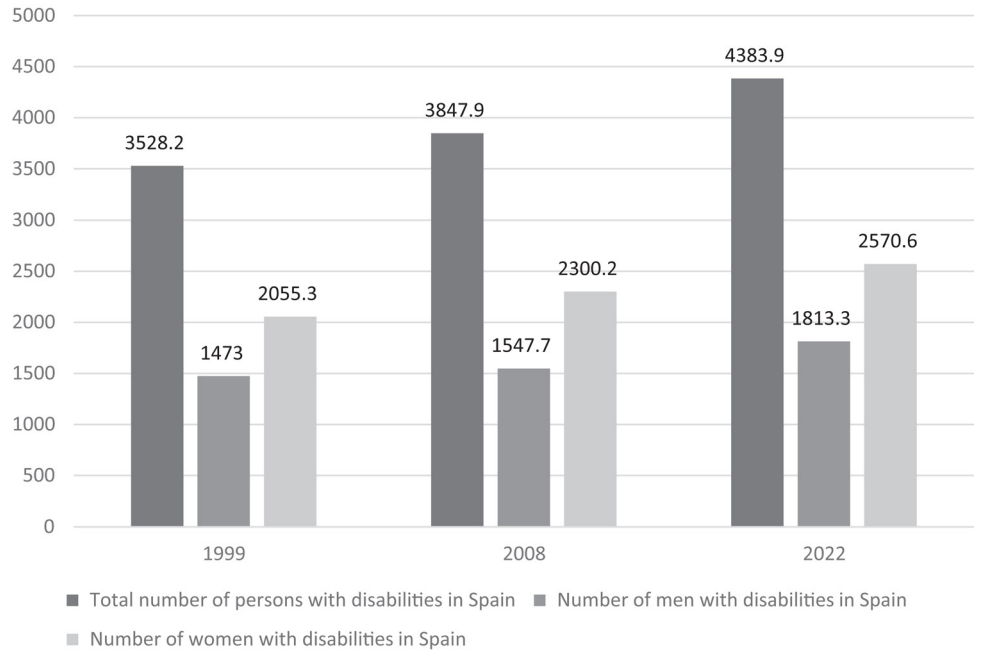

Chart 24.1 Number of persons with disabilities in Spain in the years 1999–2022 (thousands of persons).

Source: INE, www.epdata.es

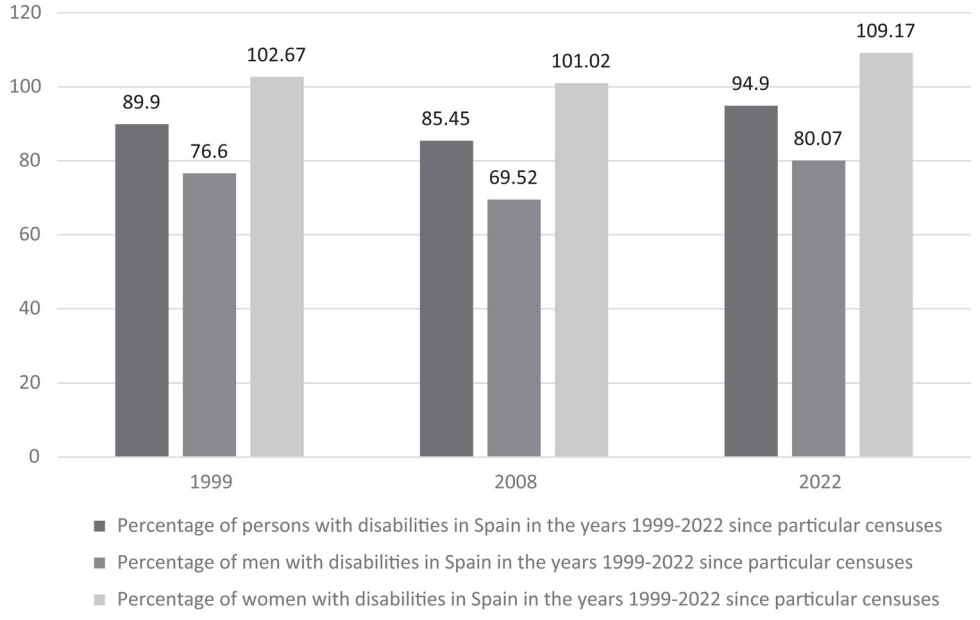

Chart 24.2 Changes of the percentage of persons with disabilities in Spain in the years 1999–2022 since particular censuses.

Source: INE, www.epdata.es

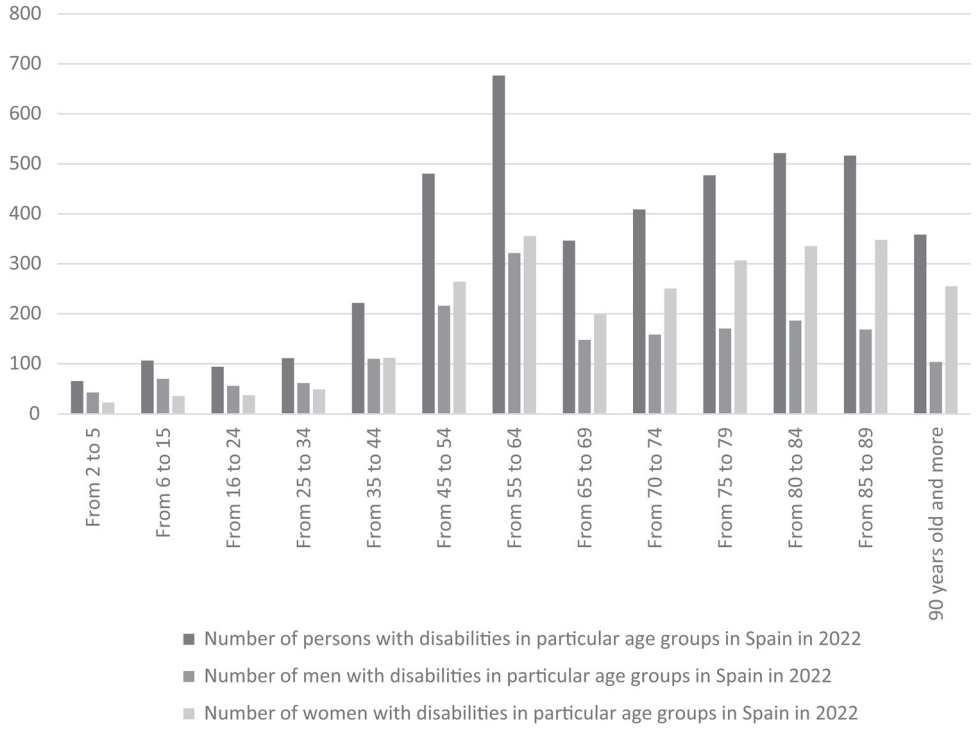

Chart 24.3 Numbers of persons with disabilities in particular age groups in Spain in 2022 (thousands of persons).

Source: INE, www.epdata.es

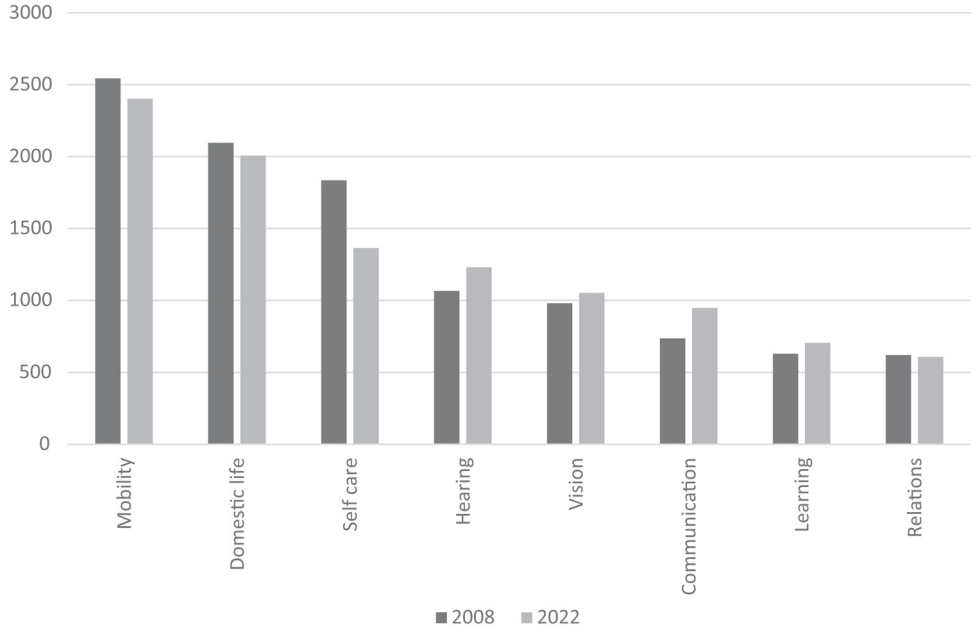

Chart 24.4 The main disability groups of persons aged 6 and over living in households in Spain in the years 2008 and 2022 (thousands of persons).

Source: INE, www.epdata.es

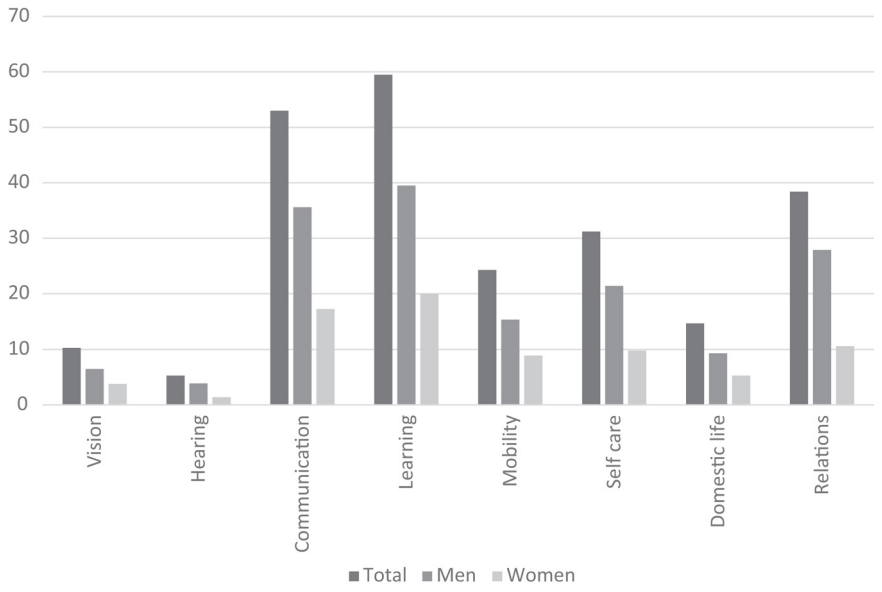

Chart 24.5 The main disability groups of persons between 6 and 15 years old in Spain in 2022 (thousands of persons).

Source: INE, www.epdata.es

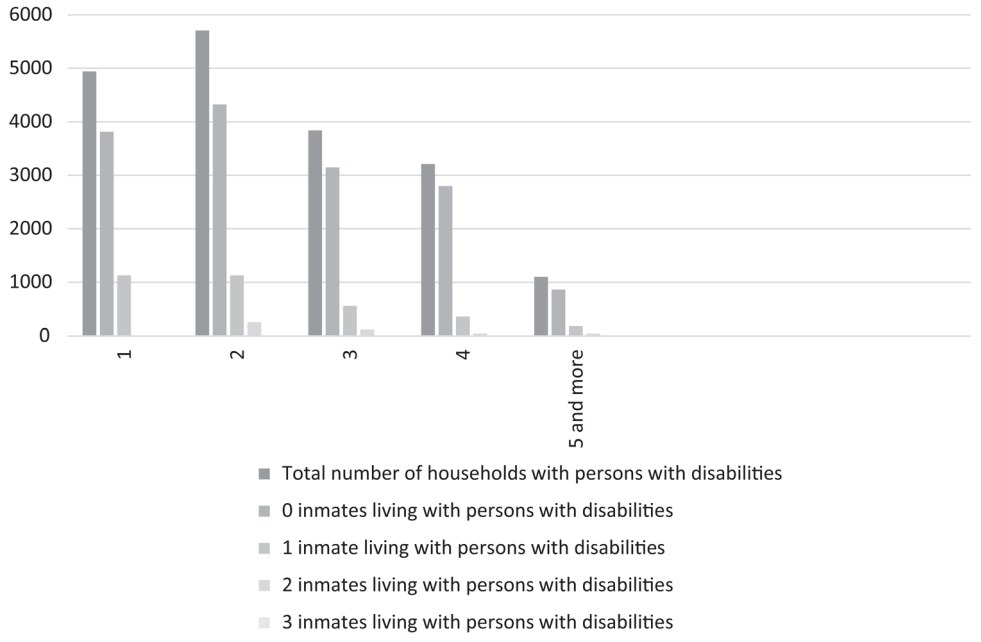

Chart 24.6 Number of inmates living with persons with disabilities in Spain in one household (thousands of persons).

Source: INE, www.epdata.es

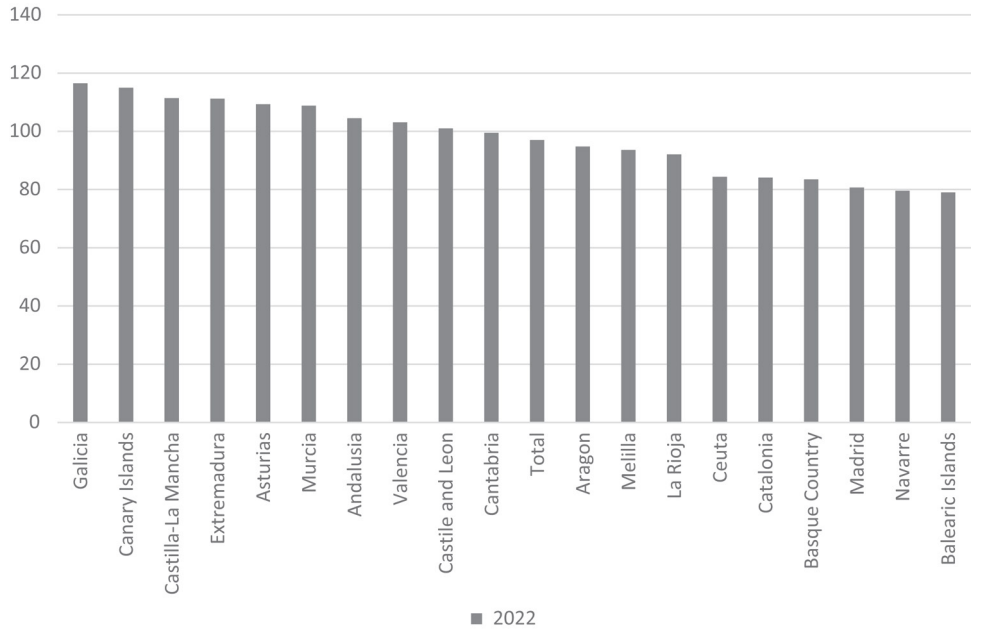

Chart 24.7 Number of persons with disabilities per 1,000,000 inhabitants in particular regions of Spain in 2022 (thousands of persons).

Source: INE, www.epdata.es

On the other hand, the number of persons with disabilities increases from the age of 45:

The main disability groups of persons aged 6 and over living in households were mobility, domestic life and self-care.

In the case of the population aged 6 to 15, the most frequent types of disability have to do with learning:

The majority of persons with disabilities live in households with one and two persons, as does the rest of the population.

According to the INE, the regions with the highest rates of people with disabilities per 1,000 inhabitants are Galicia, the Canary Islands and Castilla-La Mancha.

9. The relations between private law restrictions of active legal capacity and protection of persons with disabilities under criminal law

The consequences derived from a contract are governed by civil law, although fraud can have criminal consequences, aggravated by the fact of being a person with a disability.

In relation to the guardianship of disabled persons, the most relevant rules of the Spanish Penal Code in this matter provides an aggravating circumstance of criminal responsibility:

> *4. Committing the offence for racist, anti-Semitic, anti-Roma or any other kind of discrimination based on the ideology, religion or beliefs of the victim, the ethnic group, race or nation to which they belong, their sex, age, sexual or gender orientation or identity, reasons of gender, aporophobia or social exclusion, the illness they suffer from or their disability, regardless of whether these conditions or circumstances are actually present in the person who is the object of the conduct.*

For its part, in relation to crimes of trafficking in human beings, the current regulation establishes an aggravated penalty for cases of vulnerability of the victim or disability; see in this sense the following article:

Article 177ª of the Spanish Criminal Code

1. *Anyone who, either in Spanish territory, or from Spain, in transit or bound for Spain, using violence, intimidation or deception, or abusing a situation of superiority, need or vulnerability of the national or foreign victim, or by giving or receiving payments or benefits to achieve the consent of the person who has control over the victim, recruits, transports, transports, transfers, harbours, or receives, including the exchange or receipt of goods or services, shall be sentenced to five to eight years' imprisonment for the crime of human trafficking, including the exchange or receipt of goods or services, or by giving or receiving payments or benefits to achieve the consent of the person who has control over the victim, captures, transports, transfers, harbours or receives them, including the exchange or transfer of control over such persons, for any of the following purposes:*
   - *(a) The imposition of forced labour or services, slavery or practices similar to slavery, servitude or begging.*
   - *(b) Sexual exploitation, including pornography.*
   - *(c) exploitation for the purpose of criminal activity.*
   - *(d) the removal of their bodily organs.*
   - *(e) The celebration of forced marriages.*

A situation of need or vulnerability exists when the person concerned has no real or acceptable alternative but to submit to the abuse.

When the victim of trafficking in human beings is a minor, the penalty shall be, in any case, special disqualification from any profession, trade or activity, whether paid or unpaid, which involves regular and direct contact with minors, for a period of between six and twenty years longer than the duration of the custodial sentence imposed.

2. *Even if none of the means set out in the preceding paragraph are used, any of the actions referred to in the preceding paragraph shall be considered trafficking in human beings when carried out with respect to minors for the purpose of exploitation.*
3. *The consent of a victim of trafficking in human beings shall be irrelevant where any of the means referred to in paragraph 1 of this Article have been used.*
4. *The penalty which is higher in degree than that provided for in the first paragraph of this Article shall be imposed when:*

   (a) the life or physical or mental integrity of the persons who are the object of the offence has been endangered;
   (b) the victim is particularly vulnerable because of illness, pregnancy, disability or personal situation, or is a minor.

   If there is more than one circumstance, the penalty shall be imposed in the upper half of the sentence.
5. *The penalty higher in degree than that provided for in paragraph 1 of this article and absolute disqualification of six to twelve years shall be imposed on those who carry out the acts taking advantage of their status as an authority, agent thereof or public official. If any of the circumstances provided for in paragraph 4 of this Article are also present, the penalties shall be imposed in the upper half of the sentence.*
6. *The penalty higher in degree than that provided for in paragraph 1 of this Article and special disqualification for profession, trade, industry or commerce shall be imposed for the duration of the sentence, when the offender belongs to an organisation or association of more than two persons, even of a temporary nature, which engages in such activities. If any of the circumstances provided for in paragraph 4 of this Article apply, the penalties shall be imposed in the upper half of the sentence. If the circumstance provided for in paragraph 5 of this Article is met, the penalties provided for in this Article shall be imposed in the upper half.*

   In the case of the heads, administrators or managers of such organisations or associations, the penalty shall be applied to the upper half of the sentence, which may be increased to the next higher degree. In any case, the penalty shall be increased to the next higher degree if any of the circumstances provided for in paragraph 4 or the circumstance provided for in paragraph 5 of this Article apply.
7. *Where, in accordance with the provisions of Article 31a, a legal person is liable for the offences referred to in this Article, it shall be liable to a fine of three to five times the amount of the benefit obtained. In accordance with the rules laid down in Article 66a, the judges and courts may also impose the penalties set out in Article 33(7)(b) to (g).*
8. *Provocation, conspiracy and proposal to commit the offence of trafficking in human beings shall be punishable by a penalty one or two degrees less than that of the corresponding offence.*
9. *In any case, the penalties provided for in this article shall be imposed without prejudice to those applicable, where appropriate, for the offence of Article 318 bis of this Code and other offences actually committed, including those constituting the corresponding exploitation.*

10. *Convictions by foreign judges or courts for offences of the same nature as those provided for in this Article shall produce the effects of recidivism, unless the criminal record has been or may be cancelled under Spanish law.*
11. *Without prejudice to the application of the general rules of this Code, the victim of trafficking in human beings shall be exempted from punishment for the criminal offences committed in the situation of exploitation suffered, provided that his or her participation in them was a direct consequence of the situation of violence, intimidation, deception or abuse to which he or she was subjected and that there is adequate proportionality between that situation and the criminal act committed.*

In relation to crimes against workers, disability is considered an aggravating factor for criminal liability, as established in article 314 **of the Spanish Criminal Code**:

> *Those who cause serious discrimination in public or private employment against any person because of their ideology, religion or beliefs, their family situation, their belonging to an ethnic group, race or nation, their national origin, their sex, age, sexual or gender orientation or identity, reasons of gender, aporophobia or social exclusion, the illness they suffer from or their disability, for holding the legal or trade union representation of the workers, for being related to other workers in the company or for using one of the official languages within the Spanish State, and do not re-establish the situation of equality before the law following a requirement or administrative sanction, repairing the economic damage that has resulted, shall be punished with a prison sentence of six months to two years or a fine of twelve to twenty-four months.*

Chapter III of Title X, 'Crimes against privacy, the right to one's own image and the inviolability of the home', § 3ª of abandonment of the family, minors or disabled persons in need of special protection, of the Criminal Code, contemplates the crime of abandonment of the family with special mention of the disabled, as regulated in the following articles of the Criminal Code.

Article 226 of the Spanish Criminal Code

1. *Anyone who fails to fulfil the legal duties of assistance inherent to parental authority, guardianship, custody or foster care or to provide the necessary assistance legally established for the support of their descendants, ascendants or spouse, who are in need, shall be punished with a prison sentence of three to six months or a fine of six to 12 months.*
2. *The judge or court may impose on the offender the penalty of special disqualification from exercising the right of parental authority, guardianship, guardianship or foster care for a period of between four and ten years.*

Article 227 of the Spanish Criminal Code

1. *Anyone who fails to pay for two consecutive months or four non-consecutive months any type of financial benefit in favour of their spouse or children, established in a judicially approved agreement or judicial decision in cases of legal separation, divorce, declaration of nullity of marriage, filiation proceedings, or child support proceedings, shall be punished with a prison sentence of three months to one year or a fine of six to 24 months.*

2. *The same penalty shall be imposed on anyone who fails to pay any other financial benefit established jointly or solely in the cases provided for in the previous paragraph.*
3. *Reparation of the damage resulting from the offence shall always entail payment of the sums owed.*

Article 228 of the Spanish Criminal Code

The offences provided for in the two previous Articles shall only be prosecuted following a complaint by the aggrieved person or his or her legal representative. When the latter is a minor, a disabled person in need of special protection or a helpless person, the Public Prosecutor's Office may also file a complaint.

Article 229 of the Spanish Criminal Code

1. *The abandonment of a minor or a disabled person in need of special protection by the person responsible for his or her care shall be punished by imprisonment for a term of one to two years.*
2. *If the abandonment is committed by the parents, guardians or legal custodians, the penalty shall be imprisonment for a term of eighteen months to three years.*
3. *A prison sentence of two to four years shall be imposed when, due to the circumstances of the abandonment, the life, health, physical integrity or sexual freedom of the minor or of the disabled person in need of special protection has been specifically endangered, without prejudice to punishing the act accordingly if it constitutes another more serious offence.*

Article 230 of the Spanish Criminal Code

The temporary abandonment of a minor or of a disabled person in need of special protection shall be punished, in their respective cases, with the penalties lower in degree than those provided for in the previous article.

Article 231 of the Spanish Criminal Code

1. *Anyone who, being responsible for the upbringing or education of a minor or a disabled person in need of special protection, hands them over to a third party or to a public establishment without the consent of the person who has entrusted them to him or her, or of the authority, failing this, shall be punished with a fine of six to twelve months.*
2. *If the surrender would have put the life, health, physical integrity or sexual freedom of the minor or of the disabled person in need of special protection in concrete danger, a prison sentence of six months to two years shall be imposed.*

Article 232 of the Spanish Criminal Code

1. *Those who use or lend minors or disabled persons in need of special protection for the practice of begging, even if this is concealed, shall be punished with imprisonment from six months to one year.*
2. *If, for the purposes of the previous paragraph, minors or disabled persons in need of special protection are trafficked, violence or intimidation is used against them, or substances harmful to their health are supplied to them, a prison sentence of one to four years shall be imposed.*

Article 233 of the Spanish Criminal Code

1. *The judge or court, if it deems it appropriate in view of the minor's circumstances, may impose on those responsible for the offences provided for in Articles 229 to 232 the penalty of special disqualification from exercising parental authority or the rights of guardianship, tutorship, curatorship or foster care for a period of between four and ten years.*
2. *If the guilty party has custody of the minor as a public official, he shall also be sentenced to special disqualification from public employment or office for a period of between two and six years.*
3. *In any case, the Public Prosecutor's Office shall request from the competent authority the relevant measures for the due custody and protection of the minor.*

Finally, the murder of a disabled person also carries a heavier penalty in accordance with **Article 140 of the Spanish Criminal Code**: '*1) That the victim is under sixteen years of age, or is a person who is particularly vulnerable due to age, illness or disability'.*

10. Concluding remarks

Spain has worked seriously and with legal rigor for the implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities into the legal system of Spain. It is true that it has taken several years. However, it should be taken into consideration that Spain has state legislation, and various regional legislation that had to be modified (as an example, the figure of the curator does not exist in Catalonia, and there is in the rest of Spain).

Therefore, despite the obvious delay in adapting the content of Article 12 of the CRPD, we have done it correctly and across the entire legal system, up to its ultimate consequences.

Annex I

Selection of case law

STS 282/2009 of April 29, in which a cassation appeal is resolved against the judgement issued by the Provincial Court of Salamanca, of March 20, 2006, in which a person was declared incapable in an absolute and permanent way to govern his person and property, naming his daughters as guardians. This judgement confronted the figure of guardianship in Spain with the new social model promoted by the CRPD.

Constitutional Court 132/2010 of December 2 declares the unconstitutionality of certain sections of the LECrim which regulate 'non-voluntary internment for reasons of mental disorder'.

STS 1976/2017 of December 14 appeal 2965/2016. The right of a child with autism spectrum disorder to attend school in an ordinary centre is recognised. A specific provision of means is required for administrations to ensure the integration into the ordinary educational system of people with dysfunction or conduct disorder, with the appropriate adaptations depending on the needs of the interested party. It is only possible to go to the special education centre system if it is justified that once the efforts for this integration have been exhausted, the appropriate option is that under these conditions it would justify a different treatment. The appeal is dismissed.

Constitutional Court 10/2014 of January 27. Appeal for amparo 6868–2012. Alleged violation of the rights to equality and education: sufficient motivation of the administrative and judicial resolutions that ordered the minor's schooling in a special education centre.

STS 4505/2015 of November 4, on standing and procedural intervention (article 757 of the LEC). Disability: lack of intervention of a parent. Assessment of the evidence: 65% mental retardation and myopia: rehabilitation of parental authority in favour of the mother. Guardianship regime reinterpreted in the light of the New York Convention. Available at https://www.poderjudicial.es/search/openDocument/553069d504fc51cf

Constitutional Court 31/2017 of February 27 declares, as a result of the already existing judgment of the Constitutional Court 7/2011 of February 14 and Article 13 of the CRPD, the existence of a violation of the fundamental right of the person with disability to not be defenseless and to have a process with all the guarantees.

Constitutional Court 3/2018 of January 22. Appeal for amparo 2699–2016. Promoted by don A.R.S. in relation to the decisions of the Community of Madrid and of the contentious-administrative chambers of the Superior Court of Justice of Madrid and the Supreme Court that rejected his request for recognition of the situation of dependency and determination of the individual care program that correspond. Violation of the right not to suffer discrimination based on age and disability: administrative and

judicial decisions that, when examining a request for help for a situation of dependency, improperly apply an age exclusion rule.

STS 940/2022 of March 14, on perceptive evidence in first and second instance (article 759 of the LEC). Modification of the capacity of persons. Fixation of support. Nullity of the appeal judgment due to the lack of the legal evidence required for its determination. Available at https://www.poderjudicial.es/search/openDocument/b61e0d1dd248706b

Annex II

Provisions on procedure of judicial support measures

In relation to the processes of judicial support measures, the current regulation is as follows:

Article 756. Scope of application and jurisdiction

1. In those cases in which, in accordance with the applicable civil legislation, the appointment of a guardian is relevant and in the voluntary jurisdiction proceedings directed to that effect, opposition has been formulated, or when the proceedings have not been able to be resolved, the adoption of judicial measures of support for persons with disabilities shall be governed by the provisions of this Chapter.
2. The judicial authority that heard the previous non-contentious proceedings shall have jurisdiction to hear applications for the adoption of support measures for persons with disabilities, unless the person to whom the application refers subsequently changes residence, in which case the judge of first instance of the place where he resides shall have jurisdiction.
3. If before the hearing there is a change in the habitual residence of the person to whom the proceedings relate, the proceedings shall be transferred to the court concerned in the state in which they are pending.

Article 757. Standing and procedural intervention

1. The process for the judicial adoption of support measures for a person with disabilities may be initiated by the person concerned, by his or her spouse who is not legally or de facto separated or who is in a similar de facto situation, or by his or her descendant, ascendant or sibling.
2. The Public Prosecutor's Office shall promote such proceedings if the persons mentioned in the previous paragraph do not exist or have not filed the corresponding application, unless it concludes that there are other channels through which the person concerned can obtain the support he or she needs.
3. Where the application requests the initiation of the procedure for the provision of support, the corresponding support measures and a guardian, the guardian shall be notified of the application in order to enable him or her to submit his or her views on the matter.
4. Persons entitled to institute proceedings for the adoption of judicial support measures or who demonstrate a legitimate interest may intervene at their own expense in proceedings already instituted, with the effects provided for in Article 13.

Article 758. Registration certificate and appearance of the defendant

1. Once the application has been admitted, the counsel for the Administration of Justice shall obtain certification from the Civil Registry and, where appropriate, from other public registers that he considers relevant regarding the support measures registered.
2. Once the claim has been notified by means of delivery or delivery, or by edicts when the interested party could not be notified personally, if the interested party does not appear before the court with his own defence and representation after the time limit for replying to the claim, the lawyer for the Administration of Justice will proceed to appoint a legal defender, unless he has already been appointed or his defence corresponds to the Public Prosecutor's Office as it is not the promoter of the procedure. The legal representative will then be given a further period of twenty days in which to reply to the application if he considers it appropriate.

The lawyer for the administration of justice shall take the necessary steps to ensure that the person with a disability understands the object, purpose and formalities of the proceedings, in accordance with the provisions of Article 7a.

Article 759. Compulsory evidence at first and second instance

1. In proceedings for the adoption of support measures referred to in this Chapter, in addition to the evidence to be taken in accordance with Article 752, the Court shall take the following evidence:
   1st You will meet with the person with a disability.
2. The spouse who is not legally or de facto separated or whoever is in a similar situation, as well as the closest relatives of the person with a disability, shall be given a hearing.
3. It shall agree on the necessary or relevant expert opinions in relation to the claims in the application, and may not decide on the measures to be adopted without a prior expert opinion agreed by the Court. In all cases, specialist professionals from the social and health fields shall be involved in this mandatory opinion, and other specialist professionals may also be involved to advise on the support measures that may be appropriate in each case.
4. In cases where the application has been made by the person with a disability himself or herself, the Court may, upon his or her request and on an exceptional basis, waive the mandatory hearings if it is more appropriate for the preservation of the privacy of the person with a disability.
5. When the appointment of a guardian is not proposed, the person with disabilities, the spouse who is not de facto or legally separated or who is in a similar de facto situation, his/her closest relatives and any other persons that the Court deems appropriate shall be heard on this matter, the provisions of the previous section also being applicable.
6. If the judgment deciding on the support measures is appealed, the mandatory tests referred to in the preceding paragraphs of this Article shall also be ordered ex officio in the second instance.

Article 760

The measures taken by the judicial authority in the judgment shall be in accordance with the relevant provisions of the applicable rules of civil law.

Article 761. Review of support measures judicially adopted

The measures contained in the judgment issued shall be reviewed in accordance with the provisions of civil legislation, and the procedures laid down for this purpose in the Voluntary Jurisdiction Act shall be followed.

In the event of opposition in the voluntary jurisdiction proceedings for review referred to in the previous paragraph, or if such proceedings have not been able to be resolved, the corresponding contentious proceedings shall be initiated in accordance with the provisions of this Chapter, and may be brought by any of the persons mentioned in § 757(1), as well as by whoever is supporting the person with disability.

Article 762. Precautionary measures

1. When the competent court becomes aware of the existence of a person in a situation of disability requiring support measures, it shall adopt of its own motion such measures as it deems necessary for the adequate protection of that person or his or her assets and shall inform the Public Prosecutor's Office so that it may initiate, if it deems it appropriate, a voluntary jurisdiction proceeding.
2. The Public Prosecutor's Office may also, in the same circumstances, request the Court to immediately adopt the measures referred to in the previous paragraph.

   Such measures may be taken, ex officio or at the request of a party, at any stage of the proceedings.
3. Whenever the urgency of the situation does not prevent it, the measures referred to in the previous paragraphs shall be agreed upon after hearing the persons with disabilities. For this purpose, the provisions of Articles 734, 735 and 736 of this Act shall apply.

Article 763. Non-voluntary internment due to mental disorder

1. The internment, on grounds of mental disorder, of a person who is unable to decide for himself, even if he is subject to parental authority or guardianship, shall require judicial authorisation, which shall be obtained from the court of the place where the person affected by the internment resides.

   The authorisation shall be prior to such detention, unless reasons of urgency make the immediate adoption of the measure necessary. In this case, the person in charge of the establishment where the detention has taken place shall report it to the competent court as soon as possible and, in any case, within twenty-four hours, in order to proceed with the mandatory ratification of the said measure, which shall be carried out within a maximum period of seventy-two hours from the time the detention comes to the court's knowledge.

   In cases of urgent detention, jurisdiction for the ratification of the measure shall lie with the court of the place where the establishment where the detention has taken place is located. This court shall act, where appropriate, in accordance with the provisions of Article 757(3) of this Act.
2. The placement of minors shall always take place in a mental health institution appropriate to their age, subject to a report from the child welfare services.
3. Before granting authorisation or ratifying detention that has already taken place, the court shall hear the person concerned by the decision, the Public Prosecutor's Office and any other person whose appearance it considers appropriate or who is requested

to appear by the person concerned by the measure. In addition, and without prejudice to any other evidence it deems relevant to the case, the court shall itself examine the person concerned and hear the opinion of a medical practitioner appointed by it. In all proceedings, the person affected by the detention measure may be represented and defended in accordance with the terms set out in Article 758 of this Act.

In any case, the decision of the court concerning detention shall be subject to appeal.

4. The same decision ordering the detention shall state the obligation of the medical practitioners attending the detained person to report periodically to the court on the need to maintain the measure, without prejudice to any other reports that the court may require when it deems it appropriate.

25 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in the Kingdom of Sweden

Yana Litins'ka

1. Introduction

This chapter aims to provide an overview of implementing Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter – UN CRPD or the Convention) in Sweden. The list of the issues the chapter addresses has been predecided by the book's editors and follows the same structure as other national comparative chapters. The introductory section will present the Swedish system in the disability-related context and explain the domestic status of the UN CRPD.

Sweden is a country in Northern Europe, with a territory of over four hundred thousand square kilometres and a population of approximately ten and a half million inhabitants.[1] Among five Nordic countries (Denmark, Finland, Iceland, Norway), Sweden is thus the largest. It is estimated that 10–30% of the national population has disabilities.[2]

Like other Nordic countries, Sweden categorises itself as a welfare state. Nordic welfare is often described as a system where access to social rights, such as social and medical services, is based on the principle of universalism. The entitlements are granted based on the residence status and the principle of equality, despite the size of the financial contributions to the system.[3]

The responsibility for providing welfare services is divided between the state, county councils and municipalities. For instance, it is 21 county councils primarily responsible for delivering healthcare services; they also have other responsibilities, such as those related to transport. On the other hand, it is 290 Swedish municipalities that have primary responsibility for delivering social welfare services, including those provided to persons with

1 Sveriges befolkning, *Swedish Statistical Authority SCB*, April 8, 2022, https://www.scb.se/hitta-statistik/sverige-i-siffror/manniskorna-i-sverige/sveriges-befolkning/, accessed July 7, 2022; Land-och vattenareal per den 1 januari efter region och arealtyp. År 2012 – 2022, *Swedish Statistical Authority SCB*, April 8, 2022, https://www.statistikdatabasen.scb.se/pxweb/sv/ssd/START__MI__MI0802/Areal2012N/table/tableViewLayout1/, accessed July 7, 2022.

2 A unified register of persons with disabilities is currently absent in the country. How many have disabilities is also dependent on the defintion of disability, Statistik om personer med funktionsnedsättning, *Swedish Agency for Participation*, November 11, 2021, https://www.mfd.se/resultat-och-uppfoljning/statistik-om-personer-med-funktionsnedsattning/, accessed July 7, 2022.

3 See e.g. Nanna Kildal, Stein Kuhnle, The Nordic welfare model and the idea of universalism, in: *Normative foundations of the welfare state: The Nordic experience*, ed. Nanna Kildal, Stein Kuhnle, Routledge, London, 2005, pp. 13–14.

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disabilities.[4] The state may co-finance some services provided to persons with disabilities that enable independent living, such as personal assistance over 20 hours per week.[5] Even though local self-governments (municipalities and county councils) have certain decision-making powers, Sweden shall still be categorised as a unitary state. The powers that local self-governments have are delegated from the state.[6]

As a welfare state, where the principle of equality plays an important role, Sweden has signed and ratified the vast majority of the United Nations core human rights treaties. The UN CRPD is not an exception to this general rule. Sweden signed the UN CRPD in 2007 without reservations concerning Article 12 and ratified it in 2008. The ratification of the treaty came into force in 2009. The state has also chosen to sign and ratify the Optional Protocol to the Convention, which allows submitting individual complaints against Sweden to the Committee on the Rights of Persons with Disabilities (henceforth – the CRPD Committee). Signature and ratification of the Protocol and the Convention were conducted simultaneously.[7]

In Swedish legal tradition, government-appointed committees or commissions of inquiry would usually investigate the possibilities of passing new legislation before adopting any legislative act. These analytical reports are part of preparatory works and are considered essential sources for further interpretation of the legislation passed. Similarly, before the conclusion of the UN CRPD, inquiries were started. Firstly, in Ds 2008:23 the Ministry of Health and Social Affairs analysed the meaning of the provisions of the UN CRPD and how Swedish legislation related to this treaty. Then the Government provided its proposition 2008/09:28, where it suggested to Parliament (Riksdag) to consent to the conclusion of the Convention, which Parliament (Riksdag) subsequently did. Proposition 2008/09:28 concluded that Sweden was already compliant with most of the UN CRPD's provisions, and any significant legislative changes were not suggested.

The status of the international treaties is not directly regulated in the Swedish constitutional acts. However, the higher courts gradually developed a dualistic approach to the national effect of international treaties.[8] This approach means that ratified international treaties are not considered a source of domestic law; the rights enshrined in the treaties cannot be directly demanded via courts or other authorities. To provide a possibility for persons to invoke the rights enshrined in the international treaties in the national legal system, Parliament (Riksdag) can decide to enact the treaties as a domestic legal act. The UN CRPD has not acquired the status of a domestic act so far, though the questions of

4 As will be seen further in this chapter (§ 7), the municipalities also have to create guardianship authorities, that have certain responisibilities, related to the exercise of active legal capacity.

5 See Socialförsäkringsbalk (SFB) (2010:110) [Social Insurance Code 2010] Ch 51.

6 SOU [State Public Inquires] 2020:8. Starkare kommuner – med kapacitet att klara välfärdsuppdraget [Stronger Municipalities – with the Capacity to Cope with the Welfare Mission] 101.

7 Riksdagens protokoll 2008/09:27 (den 13 november 2008) [Protocol of Riksdag 2008/09:27 (of 13 November 2008)].

8 NJA [Paxis of Swedish Supreme Court] 1973 p. 423; NJA 1973 p. 438; RÅ [Praxis of Swedish Supreme Administative Court] 1974 ref. 61; SOU 2008:125. En reformerad grundlag [Reformed constitution] 484; Ove Bring, Monism och dualism i går och i dag, in: *Folkrätten i svensk rätt*, ed. Rebecca Stern, Inger Österdahl, Liber, Malmö, 2012, p. 24; Inger Österdahl, Kreativt kaos? Den svenska rätten möter internationell rätt, in: *Allmänt och enskilt – offentlig rätt i omvandling: Festskrift till Lena Marcusson*, ed. Thomas Bull, Olle Lundin and Elisabeth Rynning, Iustus förlag, 2013, p. 476, https://iustus.se/book/allmant-och-enskilt-festskrift-till-lena-marcusson/; see also Anna-Sara Lind, Folkrätten i den svenska konstitutionen, in: *Folkrätten i svensk rätt*, ed. Rebecca Stern, Inger Österdahl, Liber, Malmö, 2012, p. 148. Bring clarifies that during some periods of history, Sweden could be characterised as a state with monistic approach.

implementation of the Convention to the national legal system have been raised.[9] Among international human rights conventions, only the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms and the United Nations Convention on the Rights of the Child have received the status of national acts, and only after a relatively long period of consideration.[10] The fact that the UN CRPD has not received the status of domestic law is, therefore, rather usual within the Swedish legal tradition.

The fact that the UN CRPD lacks the status of national law does not mean that the treaty has no value within the legal order. International conventions that have not been transformed into domestic law can still have relevance through a so-called convention-conform interpretation principle (*konventionskonform tolkning* or *fördragskonformtolkning*). The convention-conform interpretation principle means that as far as possible, the authorities and courts shall interpret the national rules in the most harmonious way feasible with an international treaty.[11] However, if domestic acts directly contradict an inter-

9 Several legislative proposals (motions of members of Parliament) concerning the implementation of the UN CRPD were registered, but Parliament (*Riksdag*) declined them. At the moment of writing, there are no governmental inquiries or bills concerning the possibilities of implementing the UN CRPD. Thomas Hammarberg, Respekt för den internationella funktionsrättskonventionen (Motion till riksdagen 2019/20:2332); Anders Österberg and Laila Naraghi FN:s konvention om rättigheter för personer med funktionsnedsättning till svensk lag (Motion till riksdagen 2017/18:2617); Anders Österberg, FN:s konvention om rättigheter för personer med funktionsnedsättning till svensk lag (Motion 2016/17:946), Niclas Malmberg, FN:s konvention om rättigheter för personer med funktionsnedsättning i svensk lag (Motion 2016/17:1335). See also debate on the implementation of the UN CRPD Independent Living Institute, 'Andrea Bondesson, jurist – "Bästa sättet att garantera rättigheterna är att säkerställa dem i svensk lag" (*Assistanskoll*, December 14, 2017), www.assistanskoll.se/20171214-Bondesson-rettigheterna-svensk-lag.html, accessed July 15, 2021; Beatrice Larsson et al., Gör konventionen för funktionsnedsatta till lag, *ETC*, February 22, 2020, www.etc.se/debatt/gor-konventionen-funktionsnedsatta-till-lag, accessed July 19, 2021; Sven Aivert, Aktion et al Aktion gör funktionsrättskonventionen (CRPD) till lag nu, *Marschen för funktionsnedsattas mänskliga rättigheter*, January 15, 2020, www.mffmr.se/2020/01/15/aktion-gor-funktionsrattskonventionen-crpd-till-lag-nu/, accessed July 19, 2021; Independent Living Institute, Intervju: Ett rättighetsinstrument som gör skillnad – Anna Bruce om CRPD, *Artikel 19 som verktyg*, 2017, https://lagensomverktyg.se/2017/anna-bruce-crpd/, accessed July 21, 2021; Vilka partier vill utreda frågan om att säkerställa funktionsrätt i lagen? *Funktionsrätt*, 2018, https://funktionsratt.se/funktionsratt-ratten-att-fungera-i-samhallet-pa-lika-villkor/valet-2018/fem-fragor-till-riksdagspartierna/vilka-partier-vill-utreda-fragan-om-att-sakerstalla-funktionsratt-i-lagen/, accessed July 21, 2021; Lika Unika, Värdefullt att barnkonventionen blir lag – Vi måste göra mer för barns rättigheter! *Likaunika*, 2016, https://www.likaunika.org/lika-unikas-nyheter.html?news=39189, accessed July 22, 2021.

10 The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms came into force on January 1, 1995, and the United Nations Convention on the Rights of the Child as a domestic act came into force only recently on January 1, 2020. Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna [Act on the Convention for the Protection of Human Rights and Fundamental Freedoms 1994]; Lag (2018:1197) om Förenta nationernas konvention om barnets rättigheter [Act om the UN Conventinon on the Rights of the Child 2018].

11 NJA 2013 s. 1143; NJA 2012 s. 1038; NJA 2005 s. 805; NJA 2007 s. 747; NJA 2005 s. 463; NJA 1984 s. 903; RÅ 1987 ref. 160; RÅ 1988 ref. 79; NJA 1989 s. 131; NJA 1990 s. 636; NJA 1993 s. 111; NJA 1994 s. 657; SOU 2016:19. Barnkonventionen blir svensk lag [The UN Conventinon on the Rights of the Child Becomes Swedish Law] 133, 284 and 352; Skr. 2016/17:29. Regeringens strategi för det nationella arbetet med mänskliga rättigheter [The Government's Strategy for National Work on Human Rights] 10; Tomas Bull. Frederik Sterzel, *Regeringsformen: En kommentar*, Studentliteratur AB, 2019, p. 89, https://www.bokus.com/bok/9789144159164/regeringsformen-en-kommentar/; Lotta Lerwall, *Könsdiskriminering: en analys av nationell och internationell rätt*, Iustus förlag, Uppsala, 2001, p. 40; Elisabeth Rynning, Juridiken som rättesnöre, in: *Professionell utveckling: Inom läkaryrket*, ed. Sven-Olof Andersson et al., Liber, Malmö, 2012, p. 279; Ian Cameron, *The Swedish experience of the European convention on human rights since incorporation*, Cambridge University Press, Cambridge, 1999, p. 24; SOU 2016:19 133, 284 and 352; Skr. 2016/17:29 10.

national treaty or are specific, convention-conform interpretation is impossible. Therefore, the national courts and authorities can refer to the UN CRPD to give a treaty-conform interpretation. Yet references to the treaty are rarely seen in practice.[12]

Because the UN CRPD is a treaty adopted by the European Union, the references to the Convention can also be visible in the case practice that interprets European Union legislation. For instance, the case law on non-discrimination in work-related relations referred to the UN CRPD.[13]

Therefore, Sweden has signed and ratified the UN CRPD and the Optional Protocol. Yet ratifying the UN CRPD does not mean that the treaty is directly applicable within the jurisdiction. However, the Convention can be used when it is a part of EU law binding for Sweden and indirectly through the convention-conform interpretation principle.

2. A concept of legal capacity in Swedish law

In this section, the Swedish concepts of active legal capacity will be introduced.

The questions related to legal capacity are considered an equally important part of private and public law and were occasionally described as social civil law.[14] The notion of legal incapacity was used in the legislation of the first part of the 20th century but was subsequently abolished. The definition of legal (in)capacity is not currently enshrined within the Swedish legal system. There are several terms for describing legal capacity in Swedish doctrine. The relevant terms include *rättskapacitet*, which means legal capacity; *rättshandlingsförmåga*, which can be translated as the ability to undertake legal actions; *beslutskompetens* or the competence to decide.[15] These notions have been used to describe the properties of natural persons that enable them to make legally valid decisions in different contexts (such as within private and public law relations). They can be therefore seen as Swedish analogues of active legal capacity or capacity to act.

Swedish doctrine considers that active legal capacity includes two elements. These are the formal power to act (*behörighet*)[16] and its material substance, depending on whether a

12 General observations about the role of the international human rights treaties in different areas of Swedish law can be found in Rebecca Stern, Inger Österdahl, eds., *Folkrätten i svensk rätt*, Liber, Malmö, 2012, p. 301. See also Patrik Bremdal, Maria Grahn-Farley, Jane Reichel, Principen om fördragskonform tolkning förhållande till Sveriges konventionsåtaganden om mänskliga rättigheter, *Artikel 19 som verktyg*, 2017, https://lagensomverktyg.se/2018/fordragskonform-tolkning/, accessed July 3, 2022.

13 See e.g. AD [Praxis of Swedish Labour Court] 2017 nr 51; AD 2020 nr 3.

14 Torbjörn Odlöw, Skylle sig själv, som sig ej bättre föreså̊g? – Om framtidsfullmakter, anhöriga ställföreträdare och tillsynen över ekonomisk förvaltning, in: *Socialrätt under omvandling: Om solidaritet och välfärdsstatens gränser*, ed. Thomas Erhag, Pernilla Leviner, Anna-Sara Lind, Liber, Malmö, 2018, p. 240.

15 The term rättsinkapabla (legally incapable) can be found in some, no longer valid sources of law. See, for example, Socialstyrelsens allmänna råd (SOSFS 1989:6) om tillämpning av abortlagen [National Boards of Health and Welfare General Guidelines on Application of the Abortion Law 1989], SOU 1933:22. Förslag till lag om sterilisering av vissa sinnessjuka, sinnesslöa eller av annan rubbning av själsverksamheten lidande personer [Proposal for a Law on the Sterilization of Certain Mentally Ill, Mentally Retarded or Other Persons Suffering from Mental Disorders] 16; Therése Fridström Montoya, *Leva som andra genom ställföreträdare: En rättslig och faktisk paradox*, Iustus förlag, Uppsala, 2015, p. 110; Torbjörn Odlöw, *Ställföreträdare för vuxna: Kamrer eller handledare?* Jure Förlag AB, Stockholm, 1 uppl., 2005, p. 23; Elisabeth Rynning, *Samtycke till medicinsk vård och behandling. En rättsvetenskaplig studie*, Iustus förlag, Uppsala, 1994, p. 278.

16 Formal capacity to act (*behörighet*) means simply that the will of a person has legal consequences in this legal system. See also Therése Fridström Montoya, *Homo juridicus: Den kapabla människan i rätten*, Iustus förlag, Uppsala, 2017, p. 62.

specific person possesses particular abilities.[17] The material substance may depend on the decision-making abilities, often described as *beslutsförmåga*.[18] The term *beslutsförmåga* can be thus translated as decision-making capacity or mental capacity. It may also depend on other factors, such as age or the absence of a specific disease.

The law may establish various thresholds to have active legal capacity. These thresholds are often different depending on the sphere of legal relations. Moreover, the thresholds set for children might not be the same as those for adults. Legal incapacity to act is not necessarily a fact established by a court. In some spheres, such as appointing a special type of guardian – the administrator – or recognising civil contracts as void, a court establishes that the person did not possess legal capacity to act. In most other spheres, a representative of authority or a third person will have to decide whether a person in question has relevant components of legal capacity to act.

Whether persons' legal actions should be considered void – and a person legally incapable of deciding – is regulated in a segmented manner in Swedish law: different pieces of Swedish legislation may recognise that a person's actions are void in certain circumstances.

Several examples of using different thresholds for enjoying active legal capacity are provided in the following.

In accordance with the Act (1924:323) on the Effect of Agreements, Concluded under the Influence of a Mental Disorder, a contract concluded by a person under the influence of his or her mental disorder is recognised as invalid if there is a causal connection between mental disorder and conclusion of a contract. Therefore, a mental disorder and the causal relationship between the disorder and the conclusion of the contract are used as thresholds hindering the exercising of active legal capacity in this area of law. A person might be considered as lacking testamentary capacity, and the last will can be recognised as void if there is a causal connection between signing the last will and having a mental disorder.[19] Here, a mental disorder and causal relations between it and the signing of the will is again used as a threshold that might hinder the exercise of legal capacity. Appointment of a particular type of guardian – the so-called administrator – may mean invalidity of certain transactions and, therefore, legal incapacity in these specific relations.[20] However, the appointment of an administrator does not mean that a person is automatically incapable of deciding in all areas of civil law.

In public law relations, the thresholds related to mental or intellectual disabilities for exercising active legal capacity are often less pronounced. For instance, everyone who reaches the age of majority has the right to vote in elections. This includes persons who

17 Elisabeth Rynning, *Samtycke till medicinsk vård och behandling. En rättsvetenskaplig studie*, Iustus förlag, Uppsala, 1994, p. 278; Therése Fridström Montoya, *Homo juridicus: Den kapabla människan i rätten*, Iustus förlag, Uppsala, 2017, p. 43; Torbjörn Odlöw, *Ställföreträdare för vuxna: Kamrer eller handledare?* Jure Förlag AB, Stockholm, 1 uppl., 2005, p. 28.

18 The term is not defined but is used in the context mentioned in SOU 2015:80. Stöd och hjälp till vuxna vid ställningstaganden till vård, omsorg och forskning [Support and Help for Adults by Taking the Position on Care and Research] 27. Note that not all authors distinguish between *beslutskompetens* and *beslutsförmåga*. For example, in her doctoral thesis *Kindström Dahlin* uses these terms interchangeably to indicate the decision-making ability of a patient. Moa Kindström Dahlin, *Psykiatrirätt: Intressen, rättigheter & principer*, Jure Förlag, Stockholm, 2014, p. 38.

19 Ärvdabalken (ÄB) (1958:637) [Inheritance Code 1958], Ch 13 s. 2.

20 Föräldrabalk (FB) (1949:381) [Family Code 1949].

have mental disabilities and guardians appointed.[21] For decision-making in general healthcare – the area considered to be regulated by public law – a person can decide to refuse physical medical intervention even if she or he does not possess the mental abilities to understand the significance of the decision and that healthcare is life-saving.[22] At the same time, the legislation on organ transplantation requires that an adult person have the mental capacity to decide about donating his or her biological materials to another living person. Children cannot make some decisions related to the donation of their biological materials.[23] In this area of medical law, several different thresholds hindering the enjoyment of active legal capacity are visible: age for children and not possessing certain mental properties for adults. The legal threshold of mental capacity is not explicitly established in the area of secrecy and access to personal data. However, such a threshold is considered to exist in the practice of authorities and doctrine.[24]

This brief overview indicates that a standard definition of active legal capacity is absent in Swedish law. The thresholds for exercising the legal capacity to act vary from one area of relations to another and depend on how specific relations are regulated. Occasionally, the thresholds hindering exercising legal capacity may be a mental disorder, mental inabilities, appointing of an administrator (special guardian), age and so on. The occurrence of many different thresholds in various segments of law urges attentiveness and cautiousness in identifying who the capable legal subject is.

3. Private law regulation of active legal capacity

This section will explain the regulation of the capacity to act in Swedish private law.

As clarified in the previous section, the Swedish notion of the capacity to act is segmented and regulated differently depending on the area of legal relations. Before 1989, Swedish civil law provided a more homogeneous view of active legal capacity: there was a possibility for total legal incapacitation of an adult person. The procedure was called *omyndigförklaring,* which can be translated as 'pronouncement as being underaged'. On January 1, 1989, the Act (1988:1251) on Amending the Family Code came into legal force. This act abolished the possibility of declaring a person totally legally incapable. The abolition of the institute of total legal incompetence was due to the stigmatising and traumatic effects of total legal incapacity on persons.[25] Since then, a formal declaration of full legal incapacity has been illegal in Sweden.[26]

Instead of proclaiming a person totally incapable of acting, Swedish family law legislation nowadays provides at least four other options. A person can receive an administrator (*förvaltare*) or a special representative (*god man*) appointed. A court's decision appoints

21 Prop. 1987/88:124. Om god man och förvaltare [On Special Representative and Administrator]; Jonas Hultin Rosenberg, Anna-Sara Lind and Johan Wejryd, Allmän rösträtt 30 år?: En tvärvetenskaplig blick på rätten till politiskt inflytande för barn, funktionshindrade och mottagare av försörjningsstöd, *Nordisk socialrättslig tidskrift*, 2020, vol. 25–26, p. 71.

22 Yana Litins'ka, *Assessing Capacity to Decide on Medical Treatment: On Human Rights and the Use of Medical Knowledge in the Laws of England, Russia and Sweden*, Uppsala University, Uppsala, 2018, p. 485.

23 Lag (1995:831) om transplantation m.m. [Transplantation Act 1995] paras 8–9.

24 See e.g. JO [Decisions of the Parliamentary Ombudsman] 2019/20 126, Ulrika Sandén, *Sekretess och tystnadsplikt inom offentlig och privat hälso- och sjukvård: Ett skydd för patientens personliga integritet*, Iustus förlag, Uppsala, 2012, p. 297.

25 Prop. 1987/88:124 131.

26 Ibid., 1.

both administrator and a special representative. The third option is *ex lege* representation of adults not capable of deciding. Finally, a person can provide a lasting power of attorney for the cases when he or she becomes unable to decide in future. These options are discussed in the next paragraph.

An administrator and special representative can be appointed if the following preconditions are met. Firstly, a person must have ***a disease or mental disorder, a weakened health or a similar condition***. I will refer to these conditions further as a diagnostic threshold. Although mental disorders, including intellectual disability, are not seen as the sole reason for the limitation of active legal capacity, initially, it was a primary reason for the appointment of these legal representatives.[27] However, with the change in legislation and practice, it was considered that physical disease could also be included.[28] Preparatory works also mention that substance and alcohol abuse and old age can meet the mentioned diagnostic threshold.[29] The Supreme Court of Sweden has also considered that chronic fatigue syndrome,[30] gambling addiction,[31] being a wheelchair user, and speech disability[32] can fulfil the mentioned precondition. Yet in the summer 2022, the Supreme Court altered its previously adopted approach, stating that only those states that influence cognitive abilities can lead to the appointment of an administrator or special representative.[33] Due to such a diagnostic threshold, there is no need for a medical expert' appointment; a doctor's certificate suffices.[34]

The preparatory works also consider that the diagnostic threshold should not have a temporary character.[35] However, in the practice of the Supreme Court, this approach has been rejected as not following the legislation's text. The disorders, therefore, can have a temporary character. Yet it is considered impractical when the disease has too short a character, as less invasive measures can be more appropriate.[36]

The second precondition is that a person's **needs** must be extensive and require the legal representative's appointment (an administrator or a special representative). The appointment of an administrator or special representative is seen as an intrusion into private life. These measures are, therefore, applied restrictively. Appointing the administrator is more intrusive and requires that a person has more significant needs than appointing a special representative. In line with this logic, Chapter 11, § 7 of the Family Code states that to appoint an administrator, the threshold of needs for a special representative prescribed in Chapter 11, § 4 shall be met first. The appointment of a special representative becomes relevant if the person ***needs help to protect his or her rights or administer his or her property***

27 Prop. 1987/88:124 145; SOU 2004:112. Frågor om förmyndare och ställföreträdare för vuxna [Questions about Guardians and Representatives for Adults] 422 ff; Fridström Montoya (n 16) 108 ff.

28 NJA 2018 s. 350.

29 Prop. 1987/88:124 145 and 168.

30 NJA 2018 s. 825, the decision concerns the appointment of the special representative; however, the formulation of the diagnostic threshold is the same. The issue of the diagnosis was not the main issue, the Supreme Court decided on the merits, but no question as to the diagnostic threshold of chronic fatigue syndrome were raised by the Court.

31 NJA 2019 s. 837.

32 NJA 2018 s. 350.

33 NJA 2022 s. 623.

34 FB (1949:381), Ch 11 s. 17 and NJA 2018 s. 350.

35 Prop. 1987/88:124 145.

36 NJA 2018 s. 350; see also Torbjörn Odlöw, *Ställföreträdare för vuxna: Kamrer eller handledare?* Jure Förlag AB, Stockholm, 1 uppl., 2005, p. 180.

or take care for himself or herself. The Supreme Court has emphasised that the need for help in the meaning of the Family Code does not arise as a general rule if a person can give a valid power of attorney and instruct and supervise the agent who received the decision-making power.[37] The appointment of special representatives is only relevant after a thorough overall assessment, considering various individual factors, such as the presence of third persons who can support decision-making as agents.[38]

As mentioned, to appoint an administrator, the needs in support must be even more significant than the general needs of the legal representative. Chapter 11, § 7 of the Family Code requires that for the appointment of an administrator, the person shall ***be unable*** *to take care of him- or herself or his or her property*. This inability has been described in various sources of law as a lack of decision-making capacity.[39] The administrator's appointment is regarded as a measure with the most invasive character. Therefore, for this limitation of legal capacity to be proportional means for achieving a legitimate aim, the inability shall have a pervasive nature.[40] A more ample clarification of how this inability shall be manifested or assessed is not provided in the sources of law.[41]

A causal connection between the first and the second criterion is the third precondition for appointing an administrator or special representative. For an administrator's appointment, it is required to show a causal connection between the diagnostic threshold (first criterion) and the inability of a person to take care of him- or herself or his or her property (second criterion).[42]

Furthermore, there are special conditions for appointing special representatives and administrators. Chapter 11, § 4 of the Family Code establishes a general rule: a decision about a special representative's appointment should be based on a person's consent. However, after an individual assessment, if a person's state does not allow to receive valid consent, the special representative may be appointed without it.

According to Chapter 11, § 7 of the Family Code, the administrator can be appointed if only a special representative's appointment ***does not suffice or other less invasive means are not accessible***. Similarly, an administrator's appointment appears irrelevant if a person can give a valid power of attorney. This precondition again stresses the principle of proportionality: the less invasive means should be tried first. Appointment of a special representative due to which legal capacity to act is not denied is thus seen as a less intrusive means.

To summarise, for a special representative's appointment, the following criteria must be met:

- a person has a disease or mental disorder, weakened health or similar conditions, and
- the person needs help to protect his or her rights or administer his or her property or take care of him or herself, and

37 NJA 2015 s. 851; NJA 2018 s. 825.

38 NJA 2018 s. 825.

39 SOU 2004:112 422 ff; NJA 2018 s. 825; Therése Fridström Montoya and Moa Kindström Dahlin, Förvaltarskap som skydd mot beslut fattade under förälskelse?: En analys av NJA 2018 s. 350, *Svensk Juristtidning*, 2019, p. 354.

40 Prop. 1987/88:124 230 f and 250; Torbjörn Odlöw, *Ställföreträdare för vuxna: Kamrer eller handledare?* Jure Förlag AB, Stockholm, 1 uppl., 2005, p. 189 ff.

41 See analysis of the old case practice and similar conclusions in Therése Fridström Montoya and Moa Kindström Dahlin, Förvaltarskap som skydd mot beslut fattade under förälskelse?: En analys av NJA 2018 s. 350, *Svensk Juristtidning*, 2019, p. 116 ff.

42 Prop. 1987/88:124 230 f and 250.

- there is a causal connection between a person's conditions and needs, and
- a person consents to the special representative's appointment or cannot consent due to his or her conditions.

For an administrator's appointment, the following prerequisites shall be fulfilled:

- a person has a disease or mental disorder, weakened health or similar conditions, and
- the person needs help to protect his or her rights or administer his or her property or take care of him or herself, and
- the person is unable to take care of him- or herself or his or her property, and
- there is a causal connection between the conditions and a person's inability to care, and
- appointment of a special representative will not suffice, or other less invasive means are not accessible.

The appointment of a special representative means that the special representative and a person should agree on how to act (unless a person who needs a special representative cannot consent or the decision concerns daily household transactions).

Appointment of an administrator can mean that persons lose the power to have their decisions recognised as legally valid (legal capacity to act) in spheres of legal relations for which the administrator was deemed necessary. According to the Swedish Family Code, the limitation of legal capacity to act by appointing the administrator shall be accommodated for individual needs. The restriction of active legal capacity may be made concerning the specific property, property that costs more than a specific value, or particular types of affairs.[43] The active legal capacity's limitations are usually regulated in the court's decision. However, in some instances, such as when there is a need to change the property's value, a court may assign a special municipal authority to regulate the scope of the administrator's task.[44]

Notably, the administrator cannot represent the person for whom he or she was appointed in various matters of a distinctly personal nature, which again indicates that understanding the legal capacity to act is segmented. The role of the administrator relates to economic issues mostly. In particular, these actors cannot represent a person in question concerning marriage, confirmation of paternity, or making a will (however, a person who has an administrator cannot waive to receive inheritance),[45] except under extraordinary circumstances.[46]

As a general rule, the person who needs an administrator or a special representative shall also be able to enter into labour relations and manage money received due to work.[47]

As mentioned previously, in the preparatory works suggesting the conclusion of the UN CRPD, the government decided that the legislative changes were unnecessary. In the

43 FB (1949:381), Ch 11 s. 7.
44 FB (1949:381), Ch 11 s. 7.
45 See ÄB (1958:637), Ch 17 s. 2.
46 In NJA 2021 s. 547, the Supreme Court in considered the question whether a special representative and administrator may submit the application concerning divorce. The question of divorce is not regulated explicitly in the Family Code. The Supreme Court found that the question of divorce is a question of a distinct personal nature. However, in extraordinary circumstances where a person cannot represent herself or himself in a court, and there is a question of a distinct personal nature, administrator or a special representative shall be able to represent the person's interests even in these areas of relations.
47 FB (1949:381), Ch 11 s. 8.

area related to Article 12, this conclusion can be explained by the reform of 1989, where total incapacitation was already deemed impossible. The government, therefore, interpreted the Swedish legislation in this area as fully compliant with Article 12 because full legal incapacitation was already impossible in Sweden for a long time. However, in 2014 Sweden received criticism from the UN CRPD Committee for non-abolition of guardianship in the form of appointing an administrator and not substituting the institute with the mechanisms for support in exercising legal capacity.[48] The recent government inquiry suggests some amendments to national legislation, in particular, that administrators shall consult with the persons to whom they were established.[49] The bill on this issue has not been submitted to Riksdag yet.

As mentioned at the beginning of this section, there is an additional option of *ex lege* representation. This option was introduced in Swedish law relatively recently, only in 2017. This option means that if a person, due to his or her state of health or similar conditions, cannot take care of the financial matters, a relative is legally authorised to act on the person's behalf. The actions the relative is authorised to make should have ordinary nature and be connected with the daily activities of the person concerned. Swedish law also prescribes certain orders and turns in which the relatives can represent a person in question: (1) a spouse or cohabitant, (2) children, (3) grandchildren, (4) parents, (5) siblings or (6) nieces and nephews. If a person does not have a relative in the first category, the relatives of the next category shall be in turn. If there are several relatives in one category – for example, a person had several children – the *ex lege* representation shall be made by all of them together. There is also a possibility to provide a power of attorney to one relative to represent the interest of all relatives together.

Finally, in 2017, the lasting power of attorney (*framtidsfullmakt*) was introduced to the national legal system. The reform was made thanks to the introduction of the Act (2017:310) on the Lasting Power of Attorney. The lasting power of attorney is a document that a person can provide to determine what assignments other persons should fulfil if he or she becomes mentally incapable of deciding. The lasting power of attorney can concern economic and personal matters. However, never the questions of medical care and matters of a distinctly personal nature, these categories of issues are expressly excluded from the scope of the act.[50] What points are considered to be distinctly personal have been discussed in the previous section. The lasting power of attorney shall be signed in the presence of two witnesses. As a general rule, the document is activated when the person empowered to act decides that the person who gave it cannot decide for him- or herself.

4. Implementation of UN CRPD outside private law

This section overviews significant amendments related to implementing the UN CRPD in public law. As explained earlier, when Sweden decided to implement the UN CRPD, the government considered that no major legislative changes were necessary and that Sweden

48 UN CRPD, Concluding Observations on the Initial Report of Sweden (CRPD/C/SWE/CO/1, 12 May 2014), paras 33–34.

49 SOU 2021:36. Gode män och förvaltare – en översyn [Special Representatives and Administrators – A Review].

50 Lag (2017:310) om framtidsfullmakter [Act on the Lasting Power of Attorney 2017], para 2.2; Prop. 2016/17:30. Framtidsfullmakter – en ny form av ställföreträdarskap för vuxna [Lasting Powers of Attorney for the Future – a New Form of Representation for Adults] 29 ff.

was compliant with the Convention. Yet after the Convention was accepted, some changes in the domestic legal order were deemed necessary. Such changes concern the issue of active legal capacity only indirectly.

One of the significant legislative changes introduced after the adoption of the UN CRPD is the new form of discrimination against persons with disabilities. This reform was conducted via amendments to the Discrimination Act. This new form of discrimination is called inadequate accessibility (*bristande tillgänglighet*). The definition of inadequate accessibility is as follows:

> a person with a disability is disadvantaged through a failure to take measures for accessibility to enable the person to come into a situation comparable with that of persons without this disability where such measures are reasonable on the basis of accessibility requirements in laws and other statutes, and with consideration to
>
> - the financial and practical conditions,
> - the duration and nature of the relationship or contact between the operator and the individual, and
> - other circumstances of relevance.

Inadequate accessibility as a form of discrimination was supposed to be synonymous with a reasonable accommodation under the UN CRPD.[51] However, the UN CRPD definition of reasonable accommodation is aimed primarily at the level of an individual. The Swedish preparatory works to the Discrimination Act emphasise that inadequate accessibility is aimed at a group rather than an individual level.[52] The Swedish definition can also be seen as more specific and, thus, narrower when it comes to the circumstances that may impose a disproportionate or undue burden.

In addition, the Discrimination Act was also amended to impose further obligations on employers to actively prevent discrimination, including discrimination based on disability.

In Sweden, a new organisation – the Swedish Agency for Participation – was created in 2014.[53] The functions of this organisation include the promotion of respect and awareness of the rights of persons with disabilities and acting for their full participation in society. The Agency for Participation also contributes to knowledge development in the questions related to accessibility, participation and the living conditions of persons with disabilities.

In 2018, amendments were made to the School Act to guarantee children with disabilities studying in preschool and elementary school access to the support they need for their development.[54]

Furthermore, Article 33.2 of the UN CRPD calls for the states to establish independent mechanisms to promote, protect and monitor the implementation of the Convention. In 2021, an act of Parliament establishing the new authority – the Institute for Human

51 Prop. 2013/14:198. Bristande tillgänglighet som en form av diskriminering [Lack of Accessibility as a Form of Discrimination] 16 and 19–20; Susanne Fransson and Eberhard Stüber, *Diskrimineringslagen: En kommentar*, (Norstedts Juridik AB 2015) 79.

52 Prop. 2013/14:198 62 and 64–65.; Lagrådet, *Bristande tillgänglighet som en form av diskriminering* (Proposal 2014) 5.

53 Förordning (2014:134) med instruktion för myndigheten för delaktighet [Ordinance with Instructions for the Swedish Agency for Participation 2014].

54 Lag (2018:1098) om ändring i skollagen (2010:800) [Act on Amendments in the School Act 2018].

Rights – was proclaimed. Under § 1 of the act, the Institute for Human Rights will fulfil, *inter alia,* the function of the independent national mechanism following Article 33.2 of the UN CRPD.[55]

The UN CRPD has been impacting national disability policies. The purpose of the UN CRPD has been integrated as a purpose of the disability policy in Sweden.[56] Four areas imminently linked with the UN CRPD are targeted explicitly in Swedish disability policy. These are universal design, accessibility, access to individual support and solutions for promoting self-determination and non-discrimination.

This brief overview confirms that no significant changes related to the implementation of Article 12 of the UN CRPD were made. Still, those changes that were made can be helpful in bringing the UN CRPD home. For instance, the changes in the school and discrimination legislation can be indirectly linked with the obligation to provide support in the exercise of legal capacity under Article 12.3 of the UN CRPD. The institutional changes can help better monitor Article 12 of the UN CRPD.

5. The role of psychology, psychiatry and neurology

This section addressed whether psychology, psychiatry and neurology had any particular role in implementing the Convention.

In Sweden, professionals, including psychologists, psychiatrists and neurologists, can participate in the legislative process. Usually, the government, before creating a bill, asks different authorities, professional organisations and other parties to analyse the suggested legislation and comment on it. The formal process is called referrals (*remiss*). Although the government usually determines where the referrals will be sent, any interested organisation or person can submit such a referral, which promotes public debate. When the question about ratification of the UN CRPD was submitted for the review of Parliament, the government did not specially refer the issue to the professional organisations in the field of psychology, psychiatry and neurology, and they have not provided their separate opinions.[57]

In appointing an administrator or special representative, the health professionals may play a role, in particular, in presenting the evidence of whether a person meets the criteria for appointing an administrator or special representative. As explained previously in § 3, the evidence of such professionals does not have a deciding role. In accordance with Chapter 11, § 17 of the Family Code, the courts must obtain a medical certificate for the appointment of administrators or special representatives when the person cannot provide consent to such special representation.

Therefore, it cannot be stated that healthcare professionals (as scientists or as practitioners) had any unique role in the processes related to ratification or further implementation of the UN CRPD.

55 Lag (2021:642) om Institutet för mänskliga rättigheter [Act on the Institute for Human Rights 2021], s. 1; prop. 2020/21:143. Institutet för mänskliga rättigheter [The Institute for Human Rights] 17–19.

56 SOU 2019:23. Styrkraft i funktionshinderspolitiken [Steering Disability Policy] 15.

57 Prop. 2008/09:28. Mänskliga rättigheter för personer med funktionsnedsättning [Human Rights for People with Disabilities] 162.

6. Procedural aspects of restricting active legal capacity

This section reviews the procedure for appointing administrators and special representatives under Swedish law.

As explained in the previous section, in Sweden, the appointment of an administrator limits civil capacity. To some degree, the appointment of a special representative can be seen as a limitation of legal capacity to act since the person shall decide with the special representative. It is exclusively the power of the courts of general jurisdiction to appoint an administrator or special representative.

The questions as to the appointment of a special representative or administrator may be raised, in particular, by

- a person him- or herself, if he or she reached the age of 16;
- a civil partner;
- close relatives of the person;
- a special municipal authority dealing with the question of guardianship;
- a proxy, specified in the advanced directive;
- the initiative of a court; or
- a special representative may apply to a court with the application to appoint an administrator.[58]

Some requirements for the personality of the special representative and administrator are laid down in Chapter 11, § 12 of the Family Code: those are that these persons shall be just, experienced and otherwise suitable for the role. As a general rule, if the person in need of an administrator or special representative wishes to have a particular person for this role, the potential administrator or special representative is appropriate for this role and consents to this appointment, the person's wishes shall be satisfied.[59] Several such actors can be appointed if there is a need for more than one administrator or special representative. A special municipal authority shall also assist the court in choosing the appropriate administrator or special representative upon the court's request.[60]

While deciding on a need for a special representative or administrator, the court must allow the person concerned to express his or her opinion about this issue. This obligation can be waived if participation in the court proceeding may be harmful to the person or if it is evident that the person does not understand the essence of the case.[61] In addition, the court shall receive opinions of the civil partners, children, other close persons, proxy, a special municipal authority, and healthcare and social service providers, if appropriate.[62] The court is also obliged to obtain a certificate from a doctor or other similar document concerning the person's state of health.[63]

As a general rule, a special representative shall be appointed when a person who needs support provides his or her consent. Yet a special representative can be selected without

58 FB (1949:381), Ch 11 s. 15; see also NJA 2020 s. 179.
59 FB (1949:381), Ch 11 s. 12.
60 FB (1949:381), Ch 11 s. 17a.
61 FB (1949:381), Ch 11 s. 16.
62 FB (1949:381), Ch 11 s. 16.
63 FB (1949:381), Ch 11 s. 17 and NJA 2018 s. 350.

the person's permission if the approval cannot be obtained due to the person's health.[64] Consent of the person concerned is not required for the administrator's appointment. If the court finds that the person needs an administrator or a special representative, it shall appoint these actors at once.[65]

The court can also cancel a special representative or administrator's appointment if the appointment is no longer needed.[66] The actors mentioned who can apply for a special representative or administrator appointment may also request the court cancel the appointment.[67] In addition, if special municipal authorities – guardianship authorities – find out that a special representative or administrator is neglecting or abusing his or her powers or for other reasons is not fit to fulfil the assignments, these shall be dismissed. In such a case, it is not the court but the guardianship authority that dismisses the special representative or administrator.[68]

7. Organisation and institutional aspects

As mentioned in the introductory section, the Swedish system divides responsibility for the welfare of persons with disabilities among many actors, such as the state, county councils and municipalities. This section will present the main public law actors responsible for matters related to incapacity based on disability.

In the previous section, it was already presented that the courts of general jurisdictions can appoint administrators and special representatives or decide about the cancellation of such appointments. The system of the courts of general jurisdiction consists of the Supreme Court (*Högsta domstolen*), courts of appeal (*hovrätterna)* and the court of the first instance (*tingsrätterna*).[69] Apart from cases on limitation of capacity to act, discrimination, contract, tort and criminal cases are heard within the system of the courts of general jurisdiction.

Apart from the courts, another crucial actor is the guardianship authorities. These organisations are local administrative authorities, which every Swedish municipality must create or have a joint one with another municipality. In particular, they have the power to apply to a court to appoint an administrator or a guardian and provide suggestions for appropriate ones.[70] They also employ administrators and guardians and provide possibilities for their education.[71] Notably, the guardianship authority fulfils certain supervisory functions concerning administrators and special representatives. It shall annually examine the activities of special representatives to conclude whether there are reasons for the termination of guardianship authority.[72] The guardianship authority can also decide on the administrators' and special representatives' dismissal or replacement.[73]

64 Torbjörn Odlöw, *Ställföreträdare för vuxna: Kamrer eller handledare?* Jure Förlag AB, Stockholm, 1 uppl., 2005, p. 207 ff.
65 FB (1949:381), Ch 11 s. 7 para 4.
66 FB (1949:381), Ch 11, s. 19 and Chapter 11 § 19 b.
67 FB (1949:381), Ch 11 s. 21.
68 FB (1949:381), Ch 11 s. 20.
69 Regeringsformen (RF) (1974:152) [Instruments of Government 1974] Ch 11 Article 1.
70 FB (1949:381) Ch 11 s. 15 p. 1 and s. 17.
71 FB (1949:381) Ch 19 s. 18.
72 Förmynderskapsförordning (1995:379) [Regulation on Guardianship 1995] para 5.
73 FB (1949:381) Ch 16 s. 1 and Ch 11 s. 19 b.

Other important actors here are the county administrative boards (*Länsstyrelser*), which are responsible for state administration in the county, in the area where other authorities have no responsibilities.[74] In this area of law, the county administrative boards fulfil supervisory functions over guardianship authorities and support them with advice. They must also see that the education provided to administrators and special representatives is satisfactory.[75]

Several authorities have supervisory functions. Among these are the parliamentary ombudsman, the chancellor of justice (*justitiekansler*) and the equality ombudsman (*diskrimineringsombudsman*).

The chancellor of justice is appointed by the government and is seen rather as a representative of the state and the government. It provides external supervision of the authorities and civil servants on its own initiative or as a result of a complaint. The chancellor's criticism cannot alter the decision of authority in a specific case. Yet the chancellor of justice may appoint compensation in tort cases against the state.[76]

The parliamentary ombudsman is an independent authority under Parliament that has supervisory functions over the correct applications of the laws by various public authorities, including courts.[77] The authority's functions are closely connected to human rights issues, such as protection against unlawful deprivation of liberty or bodily integrity or when authorities act breaching the principle of legality.[78] The parliamentary ombudsman cannot change the decisions of other authorities, but the decisions of the parliamentary ombudsman are considered to be characterised as authoritative within the system.[79]

The equality ombudsman is responsible for the supervision of compliance with the Discrimination Act. Only the equality ombudsman (and certain non-profit organisations)

74 Förordning (2017:868) med länsstyrelseinstruktion [Regulation on County Board Instruction 2017] § 1. For more detailed description of the functions of this authority, see Patrik Bremdal and Moa Kindström Dahlin, Normprövning och kommunal självstyrelse – med anledning av länsstyrelsens beslut att upphäva Vellinge kommuns tiggeriförbud, *Förvaltningsrättslig tidskrift*, 2018, vol. 2, pp. 185, 196–197.

75 FB (1949:381) Ch 19 s. 17 p. 2.

76 Lag (1975:1339) Om justitiekanslerns tillsyn [Act on the Chancellor of Justice Supervision 1975] s. 2 and 6; Lena Marcusson, 'Gränslös tillsyn? JO som extraordinärt tillsynsorgan på universitets- och högskoleområde' in Jesper Ekroths och Kjell Swanström (eds), *JO – Lagarnas väktare* (Riksdagens ombudsmän – JO 2009) 261; Ulf Bernitz et al, *Finna rätt: juristens källmaterial och arbetsmetoder* (15th edn, Norstedts Juridik AB 2020) 141. See also Anna Ramberg, 'Justitiekanslern – med uppdrag i statens, regeringens och den enskildes tjänst – en väl utförd balansakt i rollkonflikter' in Ulf Göranson (ed) *Justitiekanslern 300 år* (Iustus förlag AB 2013) 176 ff.

77 RF (1974:152) Ch 13 Article 6; see also Nils-Olof Berggren, 'JO och politiken' in Jesper Ekroth och Kjell Swanström (eds), *JO – lagarnas väktare* (Riksdagens ombudsmän – JO i samarbete med Riksbankens jubileumsfond 2009) 9; Katarina Alexius Borgström, *JO och tjänstemännen: en laghistorisk studie* (Iustus 2003) 232 ff.

78 Lag (1986:765) med instruktion för Riksdagens ombudsmän [Act with Instructions for the Parliamentary Ombudsmen 1986] s. 3; see also SOU 2008:117. Patientsäkerhet Vad har gjorts? Vad behöver göras? [Patient Safety. What Has Been Done? What Needs to Be Done?].

79 Wiweka Warnling-Nerep, 'JO som ett värn för den enskildes rätt till personlig integritet' in Jesper Ekroths och Kjell Swanström (eds), *JO – Lagarnas väktare* (Riksdagens ombudsmän – JO 2009) 297; Lotta Lerwall, 'JO och 1 kap. 9 § regeringsformen' in Jesper Ekroths och Kjell Swanström (eds), *JO – Lagarnas väktare* (Riksdagens ombudsmän – JO 2009) 229; Tomas Bull, *Mötes- och demonstrationsfriheten: en statsrättslig studie av mötes- och demonstrationsfrihetens innehåll och gränser i Sverige, Tyskland och USA* (Acta Universitatis Upsaliensis 1997) 295. *Warnling-Nerep* further notes that the trustworthiness of the decisions of the JO, in particular, is confirmed by the fact that authorities attempt to follow the decisions and to publish references to the conclusions of the JO concerning the issues that the authorities are dealing with. Warnling-Nerep 300.

can bring discrimination cases to the courts of general jurisdiction.[80] Since denial of legal capacity can be viewed as discrimination based on disability, this actor fulfils important functions within the legal order.

Finally, as mentioned in § 4, the Institute for Human Rights was recently created in Sweden (the authority started functioning in 2022). It was also mentioned that the authority serves, in particular, as the independent national mechanism following Article 33.2 UN CRPD. Yet its functions are broader: it is assigned to promote human rights laid down in international human rights treaties, the European Union Charter on Fundamental Rights and national constitutional law. The Institute shall monitor, investigate and report on the realisation of human rights in Sweden. It also promotes education, research, capacity building and awareness-raising on human rights. It also makes proposals to the government concerning the measures that shall be taken to ensure the realisation of human rights.

8. Statistics

This section presents statistics on the appointment of administrators and special representatives and other support measures for persons with disabilities.

Table 25.1 presents the number of adjudicated cases in the courts of the first instance from 2004 to 2021.[81] The table indicates an increase in the number of cases for the appointment of administrators and special representatives after the adoption of the UN CRPD. The number of court cases concerning the appointment of administrators has increased from 1,466 in 2004 to 3,745 in 2021. As to the special representative, there is also the tendency to increase the number of their appointments. In 2004 there were 11,395 cases, whereas, in 2021, there were 18,063 cases on the appointment of special representatives.

The cases concerning the appointment of administrators and special representatives correspond to about half of the courts of the first instance workload.[82] The statistics do not provide more detailed information about the reason for appointing administrators or special representatives.[83]

The average processing time has increased from 2004 to 2021 (see Chart 25.2 and Table 25.2). It currently takes on average 3.9 months for the courts of the first instance to decide on the administrator's appointment and 2.8 for decisions concerning special representatives.

Among the major instruments for empowering persons with disabilities is various support measures created for persons with disabilities per the Act (1993:387) on Support and Service to Certain Disabled Persons. The act's purpose is to enable the persons with disabilities to whom the act applies to live like others. In addition, all activities in accordance with the act should promote equality in living conditions and full participation in social life for persons with profound disabilities. Though stated long before creating the UN CRPD, these aims appear to have common purposes with the international treaty.

The act provides the following measures: (1) counselling and other personal support, (2) personal assistance, (3) escort services, (4) assistance from a contact person, (5) home replacement services, (6) short-term stays outside the home, (7) short-term supervision of schoolchildren over 12 years of age outside their own home in connection with the school

80 Diskrimineringslag (2008:567) [Discrimination Act 2008] Ch 4 s. 1 and Ch 6 s. 2.

81 Information presented in the table 1 and 2, and chart 1 and 2 is obtained from the Swedish Courts Administration. Swedish Courts Administration, Letter from 8 July 2022.

82 SOU 2021:36 382.

83 Ibid.

Table 25.1 The number of adjudicated cases of the courts of the first instance on the appointment of administrators and special representatives in Sweden

Year	*Number of cases on administratorship*	*Number of cases on special representation*
2004	1,466	11,395
2005	1,505	12,235
2006	1,693	12,760
2007	1,715	13,141
2008	1,920	13,918
2009	2,093	14,410
2010	2,221	14,948
2011	2,375	14,955
2012	2,514	15,978
2013	2,678	16,263
2014	2,667	15,976
2015	2,810	16,315
2016	3,001	16,303
2017	3,191	16,245
2018	3,301	16,723
2019	3,476	17,494
2020	3,770	18,764
2021	3,745	18,063

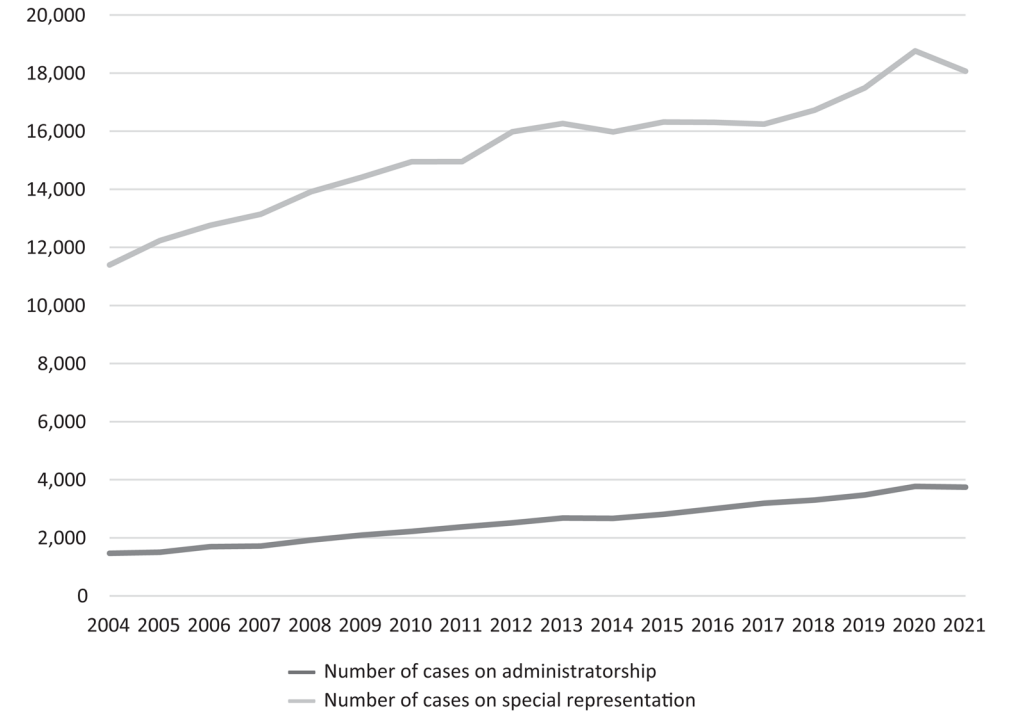

Chart 25.1 Increase of the number of cases over time in Sweden.

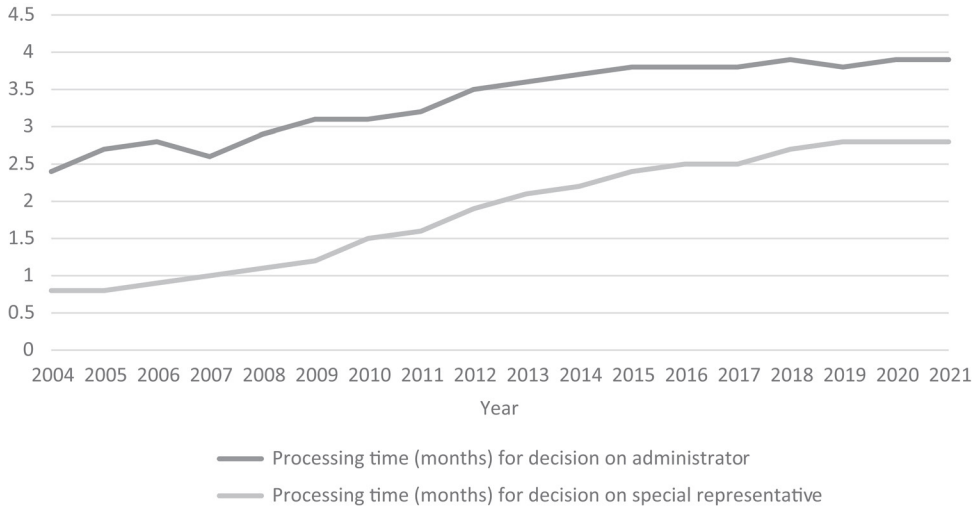

Chart 25.2 Processing time for appointment of administrators and special representatives in Sweden.

Table 25.2 Processing time in the courts of the first instance for deciding on administratorship and special representation in Sweden

Year	*Processing time (months) for the decision on an administrator*	*Processing time (months) for the decision on a special representative*
2004	2.4	0.8
2005	2.7	0.8
2006	2.8	0.9
2007	2.6	1.0
2008	2.9	1.1
2009	3.1	1.2
2010	3.1	1.5
2011	3.2	1.6
2012	3.5	1.9
2013	3.6	2.1
2014	3.7	2.2
2015	3.8	2.4
2016	3.8	2.5
2017	3.8	2.5
2018	3.9	2.7
2019	3.8	2.8
2020	3.9	2.8
2021	3.9	2.8

day and during holidays, (8) accommodation in a family home or in accommodation with special services for children or young people who need to live outside the parental home (9) accommodation with special services for adults or other specially adapted accommodation for adults, (10) daily activities for working-age persons who are not engaged in gainful employment or education. All these measures are relevant for persons with certain severe disabilities, whether or not they have the full legal capacity or have a decision about an administrator or special representative appointed. According to the National Board

of Health and Welfare (Socialstyrelsen), on October 1, 2021, 76,700 persons in Sweden received at least one measure under the Act (1993:387) on Support and Service to Certain Disabled Persons.[84] One of four persons received two measures. Table 25.3 indicates the distribution of how often different measures in accordance with the act are provided in 2021.

Table 25.3 Number of persons receiving special services in 2021 in Sweden[85]

Measure	*Number of persons receiving the measure*
Escort services	6,669
Contact person	17,549
Home replacement services	4,095
Short-term stays outside the home	8,800
Short-term supervision of schoolchildren	4,565
Accommodation for children	872
Accommodation for adults	29,551
Daily activities for working-age persons who are not engaged in gainful employment or education	40,064

Table 25.4 Personal assistance per year in Sweden[86]

Year	*Number of persons entitled to personal assistance*	*The average amount of hours per week for which the assistance is guaranteed*
2021	13,683	131.2
2020	13,867	130.0
2019	14,159	128.9
2018	14,508	128.9
2017	14,886	128.5
2016	15,691	127.5
2015	16,142	127.1
2014	16,158	123.9
2013	15,866	121.2
2012	15,892	118.2
2011	15,967	115.5
2010	15,932	113.1
2009	15,748	110.3
2008	15,274	108.2
2007	14,896	105.9
2006	14,146	103.3
2005	13,393	101.2
2004	12,544	98.7

84 Statistik om insatser enligt lagen om stöd och service till vissa funktionshindrade 2021, *Socialstyrelsen*, April 7, 2022, https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/statistik/2022-4-7847.pdf, accessed June 4, 2022.

85 Ibid.

86 Statistik inom området funktionsnedsättning, *Försäkringskassan*, 2022, https://www.forsakringskassan.se/statistik/statistikdatabas/!ut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfIjo8ziLQI8TDy8DIx8Ddy8jQwCfZ3dLUxDPY1dnE30w8EKDHAARwP9KEL6o8BKTDxcnA3dnQ283b083QwcQ4L8TD2NfA0Ngo2hCvBYUZAbYZDpqKgIAP7D_6I!/#!/fn, accessed June 4, 2022; Statistik om insatser enligt lagen om stöd och service till vissa funktionshindrade 2021, *Socialstyrelsen*, April 7, 2022, https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/statistik/2022-4-7847.pdf, accessed June 4, 2022.

Table 25.5 Certain Swedish budget expenses in SEK

	2017	*2018*	*2019*	*2020*	*2021*	*2022*
Disability policy	246,625,000	248,090,000	248,693,000	249,638,000	250,306,000	250,822,000
State aid in the area of disability	411,514,000	767,514,000	767,514,000	797,514,000	782,514,000	785,514,000
Assistance costs	25,931,000,000	25,693,300,000	24,486,588,000	24,450,971,000	24,747,898,000	25,043,066,000

Appointing personal assistance is one of the most costly but also most empowering measures since it gives possibilities for personalised support. This measure is provided to persons who, because of a severe and enduring disability, need help with breathing, personal hygiene, meals, dressing and undressing, communicating with others or for other assistance requiring detailed knowledge of the person with a disability. The assistance is granted for a certain number of hours per week. Municipalities have financial responsibility for providing personal assistance for less than 20 hours per week. If the number of hours exceeds 20, it is the state's responsibility – via the Social Insurance Agency (*Försäkringskassan*)– to pay for the assistance. Table 25.4 shows the number of persons granted personal assistance from 2004 to 2021. As seen from the table, there is a decrease in the number of persons who have been given personal assistance in Sweden from 2016 to 2021. However, the number of hours provided for personal assistance gradually increases yearly.

As to budgetary spending, it is difficult to estimate the exact amount related to realising the rights of persons with disabilities. Swedish state budget finances the possibility for independent living with different means, not necessarily directed to persons with disabilities. The following expenses, presented in table 25.5, appear to be relevant to indicate expenditure on the disability policy and the right to assistance.

9. The relations between private law restrictions of active legal capacity and protection of persons with disabilities under criminal law

This section provides an overview of the criminal law provisions in Sweden aimed to protect persons with disabilities from the undue influence of third parties in contracts.

Generally, Swedish criminal law does not express the distinction between persons with disabilities and others; the provisions apply to everyone. This includes an absence in the Swedish criminal law of the insanity defence.[87] The most relevant criminal offence that relates to contracts and exploitation is usury. Chapter 9, § 5 of the Penal Code contains the provisions as follows:

> A person who in connection with a contract or other legal transaction, takes advantage of someone's distress, innocence or thoughtlessness or dependent relationship to him or her in order to obtain a benefit which is clearly disproportionate to the consideration afforded or for which no consideration will be provided, shall be sentenced for usury to a fine or imprisonment for at most two years.

87 Tova Bennet, *Straffansvar Vid Atypiska Sinnestillstånd* (Norstedts Juridik AB 2020) 15–16.

> A person shall also be sentenced for usury in connection with the granting of credit in a business activity or other activity that is conducted habitually or otherwise on a large scale, procures interest or other financial benefits which is manifestly disproportionate to the counter-obligation.
>
> If the crime is gross, imprisonment for at least six months and at most four years shall be imposed. In assessing whether the crime is serious, special consideration shall be given to whether the deed has intended significant value or has been particularly dangerous or ruthless.

The crime of usury will be committed, particularly if a person takes advantage of someone's innocence (in Swedish *oförstånd)*. By someone's innocence is meant, *inter alia*, a situation when a person lacks intellectual capacity.[88] The victim of the crime may be persons with intellectual or psycho-social disabilities. Therefore, this and other criminal law provisions protect persons with intellectual or psycho-social disabilities, but they are not explicitly named in the text.

The benefit obtained shall be disproportionate for qualifying the deed as a crime. It appears that contracts that are obviously and glaring unfavourable for a person with a disability fall within the definition of usury under Swedish law.

As the text indicates, usury is relevant for legal contracts and other types of legal transactions. It does not matter whether the transaction concerns the legal title to the property or the transfer of possession. The wording indicates that a legal transaction may be done by a victim of a crime, a preparator or both.

Chapter 10, § 5 of the Criminal Code also criminalises the breach of trust (*trolöshet mot huvudman*). To qualify for this crime, a person shall have a position of trust related to managing financial matters. Such a position is often occupied by administrators and special representatives by virtue of lasting power of attorney. If such a position of trust is abused, in particular, through selling the property the legal representatives are not entitled to sell or through not fulfilling the functions they should do, the deed of the trusted person may be qualified as a crime.[89] In cases if economic damage to the person with disabilities occurs, the deed can be qualified as a criminal offence. It can lead to a fine or imprisonment of up to two years, and in especially gross cases, it may be up to six years of imprisonment.

10. Concluding remarks

The discussion in this section indicates that the UN CRPD is not fully incorporated into the Swedish dualistic legal system. The Convention can be foremost used through the convention-conform interpretation principle. This means that the authorities and courts should interpret the national rules in the most harmonious way feasible with the UN CRPD. However, they cannot use the Convention if domestic legislation contains specific rules that directly or indirectly contradict the Convention. The application of the UN CRPD is limited in Sweden.

The analysis in this chapter indicates that Sweden has not been extensively focusing on the implementation of Article 12 of the UN CRPD, foremost because the government's inquiry indicated that the state is compliant with the treaty. In Sweden, the institute of

88 Nils Jareborg and Sandra Friberg, *Brotten mot person och förmögenhetsbrotten*, (Vol 3, Iustus 2010) 206.
89 Sandra Friberg, *Rättegångsbalk (1942:740) 10 kap. 5§* (Karnov (JUNO) 2022).

legal capacity to act has been segmented. It depends on a specific piece of regulation in question. This segmentation often results in situations where a person with an administrator appointed remains capable of deciding in certain areas of social relations. For instance, a person can be considered incapable of selling real estate but remains fully capable of refusing all somatic medical intervention. This segmentation, as well as the absence of the possibility to declare a person incapable of deciding in certain areas of social relations, leads to milder restrictions on legal capacity to act compared to many other countries.

The interpretation of the UN CRPD, emphasised by the Committee on the Rights of the Persons with Disabilities, prohibits all forms of substituted decision-making. As the Committee rightly noted in its first concluding observations on Sweden, the Swedish legal system provides the possibilities for substituted decision-making, such as appointing an administrator. In a limited number of cases – for instance, if a person is considered mentally incapable to decide – even special representatives can be regarded as substituting a person's decision-making. Similarly, lasting power of attorney may signify that the legal capacity to act is not recognised fully. As statistics studied in the chapter indicate, the number of cases concerning the appointment of administrators increases yearly.

The Swedish legal system is often considered a good example of supported decision-making in the international literature. Indeed, various areas of Swedish legislation, such as the legislation on psychiatric care or social assistance, institutionalise multiple forms of support. However, the administratorship mechanism is not a support of a person in making a decision but rather a mechanism for making of decision for a person. As it stands, there has been no attempt to abolish the existing forms of substituted decision-making. The holistic institutional approach to supported decision-making, where a person can ask a state agent for voluntary support in any area of social relations, has not been created. Implementation of the UN CRPD in the public law concerned Article 12 of the treaty only indirectly, through the improvement of the mechanisms for recognising discrimination, supporting the school children and creating mechanisms for monitoring.

Reflecting on the ways to further implementation of the UN CRPD, apart from the abolition of substituted decision-making, the mechanisms for supervision of persons empowered to decide instead or together with a person with disabilities remain to be developed. Furthermore, the topic of protection of persons with disabilities from undue influence and creating a more clear-cut distinction between undue influence and due support is desired to be elaborated for fuller implementation of Article 12 of the UN CRPD.

26 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Switzerland

Philippe Meier and Vanessa Orville

Introduction

For the sake of clarity, in Swiss adult protection law, the term 'deputyship' refers to the state protection measure that may be issued by the Protection Authority, and the term 'deputy' refers to the person appointed by the authority. All references in this chapter are as of June 30, 2022.

I. Implementation of the Article 12 of the UN Convention of the Rights of Persons with Disabilities

Switzerland ratified to the UN Convention on the Rights of Persons with Disabilities effective as of April 15, 2014.[1] No other formalities have been completed to be bound by the Convention and Switzerland has not submitted any reservations or understanding/interpretation declarations to Article 12 of the Convention. Switzerland has not yet ratified the Optional Protocol to the UN Convention on the Rights of Persons with Disabilities. The Federal Council (the Swiss federal government) Dispatch on the UN Convention states that it does not intend to ratify it until Switzerland has, through its reports to the Committee, gained initial experience with the practice of this treaty.

The UN Convention on the Rights of Persons with Disabilities has become an integral part of Swiss national law in accordance with the principle of the monist regime. It has not been the subject of a Swiss implementing law. This was required in some specific cases to ensure the implementation of international law in the Swiss legal order (e.g. the Federal Act of June 22, 2001, on Intercountry Adoption ['LF-CLaH'][2] implemented the 1993 Hague Intercountry Adoption Convention and the Federal Act of December 21, 2007, on International Child Abduction and the Hague Conventions on the Protection of Children and Adults ['LF-EEA'][3] implemented of the Hague Convention of October 25, 1980,

1 Classified compilation, SR/RS 0.109. There are three official languages in Switzerland (German and Swiss German – around 63% of the population; French, 23%; and Italian, 8%). All federal legal texts are published in these three languages and all three versions have the same legal value. Some texts are also translated into English (https://www.fedlex.admin.ch/en/cc). This version has no official value. The authors will not necessarily use this governmental translation in this chapter. they, however, will indicate, whenever appropriate, the French versions of the terms used. The abbreviation RS ('recueil systématique du droit fédéral') stands for the classified (official) compilation of Federal acts and ordinances.

2 RS 211.221.31.

3 RS 211.222.32.

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on the Civil Aspects of International Child Abduction) but not with regard to the UN Convention on the Rights of Persons with Disabilities.

Switzerland's initial state report on the UN Convention describes the legislative, administrative and judicial or other measures for the implementation of the UN Convention.[4] In accordance with Swiss practice, the ratification of the UN Convention on the Rights of Persons with Disabilities took place after verification of the conformity of the Swiss legal order (at the level of the federal state as well as at the level of the cantons – i.e. of the 26 federated states of the country) with the obligations of the international treaty. The report states that the general orientation of the UN Convention and that of the elements of Swiss disability policy are in line with each other. The disability law in Switzerland is composed of different elements: the fundamental prohibition of discrimination in the Federal Constitution of the Swiss Confederation ('Cst. féd.')[5] (Art. 8 [2] Cst. féd.) and the corresponding legislative mandate given to the Confederation and the cantons (Art. 8 [4] Cst. féd.) are defined at the federal level. These legislative provisions are embodied in the Federal Act on the Elimination of Discrimination against People with Disabilities ('LHand'),[6] which has been in force since January 1, 2004, as well as in numerous provisions contained in special federal or cantonal laws. The Swiss social security system is a global system to ensure that the affected persons are covered for the harmful consequences attributable to the occurrence of an insured social risk. Social insurance, in particular the Federal Act on Invalidity Insurance ('LAI'),[7] also contributes to the full and effective participation and integration of disabled persons in society. In addition, they offer various measures aimed at strengthening the individual autonomy of these persons. Furthermore, the cantons legislate in their own areas of competence (construction, social welfare, education, and institutions for the integration of persons with disabilities). Swiss disability policy is a joint responsibility of the Confederation, the cantons, the municipalities and private bodies.

The initial report notes that Swiss law in favour of persons with disabilities is fragmented. The comprehensive approach of the UN Convention thus provides a solid basis for the interpretation, definition and implementation of equality law for persons with disabilities in Switzerland.

In recent years, Swiss disability policy has focused more and more on promoting integration and independence, with the entry into force on January 1, 2004, of the Federal Act on the Elimination of Discrimination against People with Disabilities and the Swiss adult protection law reform which came into force on January 1, 2013.

At the end of 2015, the Federal Council defined the future direction of Swiss disability policy, which aims to strengthen the equality and participation of persons with disabilities in all areas of social life. The Federal Act on the Elimination of Discrimination

4 The report is published on: https://www.humanrights.ch/cms/upload/pdf/2019/090712_Rapport_initial_CDPH_v1.0.pdf). The alternative report drafted by the NGO's (Inclusion Handicap) is available on: https://www.inclusion-handicap.ch/admin/data/files/asset/file_fr/424/rapport_alternatif_cdph_inclusion_handicap_1_0_23082017_f.pdf?lm=1503592225). For the answers given by the State to the additional queries of the Committee: https://documents-ddsny.un.org/doc/UNDOC/GEN/G21/296/34/PDF/G2129634.pdf?OpenElement. For the Concluding Observations of the Committee (March 25, 2022), https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/CHE/CRPD_C_CHE_CO_1_48261_E.docx.

5 RS 101.

6 RS 151.3.

7 RS 831.20.

against People with Disabilities has mainly improved the accessibility of buildings and public transport. The Federal Council intends to promote equality and participation in other areas such as employment. The Swiss disability policy focuses on coordinating the various measures taken by the Confederation and the cantons in this area and on systematically taking into account the equality of persons with disabilities in all areas of life and law that are important to them, such as work and education.

Following Switzerland's ratification of the UN Convention on the Rights of Persons with Disabilities, several cantons adopted new laws: The canton of Fribourg adopted a law on persons with disabilities that came into force in 2018. The canton of Basel-Stadt pioneered a new framework law on the rights of persons with disabilities in September 2019 that came into force on January 1, 2021. The canton of Valais passed a law on the rights and inclusion of persons with disabilities on May 6, 2021, with an expected entry into force on January 1, 2022. The canton of Neuchâtel enacted a law on the inclusion and support of persons with disabilities, which came into force on January 1, 2022.[8] Vaud parliament accepted two motions in May 2021 requesting a cantonal law on the rights of persons with disabilities, which aims to achieve inclusion, participation and respect for the rights of persons with disabilities. In the canton of Basel-Landschaft, the cantonal government adopted in August 2021 a draft law on the rights of persons with disabilities to be submitted to Parliament in spring 2022.

Furthermore, the ratification of the UN Convention on the Rights of Persons with Disabilities by Switzerland has an indirect effect on the prohibition of political rights for persons with disabilities as set forth by the cantonal laws. Geneva was the first canton to accept in November 2020 (popular vote, majority of 75%) to grant universal suffrage to persons with disabilities. Following the example of the canton of Geneva, the Vaud Parliament approved in October 2021 a motion aiming at restoring the right to vote for persons with disabilities under general deputyship.

II. Private law regulation of active legal capacity

The law that was applied before the ratification of the UN Convention on the Rights of Persons with Disabilities was the Swiss Civil Code ('CC')[9] which contained the provisions concerning capacity to do legal actions (Arts. 12–19d CC). Some of the provisions were amended at the time of the reform of the new Swiss adult protection law, which came into force on January 1, 2013. The changes were not related to or motivated by the UN Convention.

Swiss law on civil capacity and the adult protection is a flexible system that guarantees a high degree of autonomy for the affected person. For this reason, this system has not undergone major changes following the entry into force of the UN Convention. All these provisions still apply.

Swiss capacity law (in force since 1912 and largely unchanged) includes the legal capacity (Art. 11 CC), i.e. the ability of a person to be the subject of rights and obligations, and the capacity to do legal actions (Art. 12 CC), i.e. the ability to make his or her acts produce legal effects.[10]

8 RS NE 820.22.
9 RS 210.
10 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 68.

The legal capacity (Art. 11 CC) begins with the completed birth of a living child and ends with death (Art. 31 [1] CC). Moreover, every person has the same capacity to have rights and obligations. It is an ability recognised to every subject of law without any other condition and independently of any behaviour on his or her part, his or her possibility or his or her will to act. Equality in the legal capacity is however allowed only '*within the limits of the law*'; this means that the legislator may establish exceptions that limit the legal capacity in order to respect natural differences or to protect persons considered unfit in certain areas. These exceptions are justified notably for reasons of age or judgment (one must be 18 old to enjoy the right to marry).[11]

The capacity to do legal actions or capacity to act (Art. 12 CC) is the capacity to create rights and obligations through his or her actions.[12] Unlike the legal capacity, which derives from being a living human being, the capacity to do legal actions is a relative concept that is always assessed *in concreto* in relation to a specific act and in relation to a specific time frame.[13] Persons who are incapable of judgement do not have the capacity to do legal actions (Art. 17 CC). Such persons will have a legal representative (appointed by the law itself or by an authority, unless they have appointed in anticipation a proxy holder who will act on their behalf), who exercises their rights on their behalf. However, this representation is excluded with respect to certain personal rights, which are so closely linked to personality of the incapable person (so-called 'absolute highly strictly personal rights') that no one (including the legal representative) has the power to exercise them on their behalf (Art. 19c [2] CC). This is the case for the right to marry (Art. 94 [1] CC), to recognise a child (Art. 260 CC) and to make a will (Art. 467 CC).[14]

The existence of a mental disability *per se* does not have a direct effect on the capacity to act. The reference criterion for this assessment is the capacity or incapacity of judgement in relation to a specific act performed at a specific moment.[15]

It should be noted that some persons, although being capable of judgement, are nevertheless deprived of part of their legal capacity: this is the case of minors of age (as long as they are lacking capacity of judgement) and of adults that have been deprived of their capacity by the authority (protective measure). As regards minors, where and to the extent they are capable of judgement, they have a restricted active civil incapacity as described under the following item 4. This means that among other less important faculties they can exercise their strictly personal rights on their own (e.g. consent to a medical treatment).[16] Swiss law does not set any fixed threshold for this capacity of judgement of minors: according to the principle of relativity of judgement, it will depend on the type of action at stake. For medical decisions, case law presumes capacity of judgement as a rule at the age of 13.

According to Article 12 CC, a person who has the capacity to do legal actions has the capacity to create rights and obligations through his or her actions. However, the extent

11 Ibid., N 70 ff; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 11 N 1 ff.

12 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 87; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 12 N 4 ff.

13 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 90; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 12 N 9.

14 See, Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 146 ff; Hausheer/Regina, Aebi-Müller, *Das Personenrecht des Zivilgesetzbuches*, 5th ed., Stämpfli, Bern, 2020, N 244 ff.

15 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 97 et 102.

16 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 174 ff.

of the capacity to do legal actions varies from one person to another depending on age, possible limitations on the capacity to do legal actions and the individual's own abilities. Indeed, Swiss capacity law ensures both the possibility for individuals to organise their lives independently and to protect the weakest; only those capable of making an informed decision are accountable for the legal consequences of that decision.[17] Thus, Swiss doctrine distinguishes four 'categories' of active civil capacity.

1. ***Full** active civil capacity*, i.e. an adult who is capable of judgement and is not subject to a deputyship. In this situation, the adult has unrestricted use of the capacity to do legal actions (e.g. to enter into a contract), is liable for the damage caused by his or her actions (liability for unpermitted acts) and also has the capacity to litigate.[18]
2. ***Full** active civil incapacity*, i.e. an adult (whether or not under a general deputyship) or a minor who is incapable of judgement (see item 1). According to Article 17 CC, persons incapable of judgement do not have the capacity to do legal actions. The purpose of this legal rule is to protect the person against legally binding commitments that he or she might enter into when he or she is not able to understand their scope and could not fulfil them.[19] A person who is incapable of judgement will be provided with a legal representative, either the parents (Art. 304 CC) or a guardian (Art. 327a CC) for a minor or a deputy (appointed by the authority) for an adult (Arts. 390 et seq. CC; it has to be noted that for certain acts, e.g. medical decisions, the person incapable of judgement may be represented by a member of his or her family or another person close to him or her, that is either appointed by the law or by the person himself or herself when still capable of judgement, Arts. 360 et seq. CC). The legal representative will represent the person who is incapable of judgement, except for rights closely linked to the personality of the affected person (Art. 19c [2] CC), acts prohibited by law (Art. 304 [3], Art. 412 [1] CC), as well as acts for which there is a conflict of interest between the representative and the person represented (Art. 306 [2] and [3], Art. 403 CC). Furthermore, the legal representative of an adult must obtain the consent of the Protection Authority if he or she wishes to exercise certain specific rights on behalf of the protected person (Art. 416 [1] and [3] and Art. 417 CC).[20]

   Persons incapable of judgement are normally not liable for unpermitted acts. However, Art. 54 of Swiss Code of Obligations ('CO')[21] makes an exception when the person should be held liable on grounds of equity.[22]

   It should be noted that, due to the relativity of judgement in Swiss law, a 'full' incapacity of judgement should be rare in practice. Indeed, such a case presupposes that the person is in a particular physiological state that prevents him or her from expressing any will whichsoever (for example, a person in a coma).

17 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 88; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 12 N 7.

18 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 106 ff; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel 2018) Art. 12 N 24 ff.

19 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 130; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 18 N 6.

20 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 131.

21 RS 220.

22 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 142; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 18 N 21 ff.

3. ***Restricted*** *active civil capacity* is used for persons that are capable of judgement and as a rule have the capacity to do legal actions, save pertaining to certain specific acts (where they or members of their family need to be protected). There exist, for example, restrictions on the capacity to do legal actions for spouses so as to protect the marital union and the family (Art. 169 [1] CC and Art. 266m [1] CO require the express consent of both spouses to terminate the lease of or to sell the family house or flat, even where it belongs only to one of them). Swiss adult protection law also provides for various subtypes of deputyships which have distinct effects on the extent of the capacity to do legal actions of the affected persons:

   - Consenting deputyship (Art. 396 CC) automatically restricts the capacity to do legal actions of the affected person with regard to the acts listed in the decision of the Protection Authority. The legal representative must give his or her consent in order for the act to be valid and binding on the affected person.
   - Representative deputyship does not, in principle, have any effect on the capacity to do legal actions, unless otherwise decided by the Protection Authority and expressly stated in the decision and only with respect to certain specific acts (Arts. 394/395 CC).[23]

4. ***Restricted*** *active civil incapacity*, i.e. certain attributes of civil capacity are granted to persons who in principle are deprived of their capacity to do legal actions. This category encompasses the minors (Arts. 13 and 17 CC) and the adults under general deputyship (Arts. 17 and 398 CC), provided they are capable of judgement. They are granted a certain scope of autonomy by Arts. 19–19c CC.[24] They will be able to exercise all rights closely linked to their personality and to act alone with respect to these rights (e.g. make medical decisions, marry, make a will); there are only a very few exceptions where the assistance of the legal representative is nevertheless required (e.g. to recognise a child). Moreover, capacity to do legal actions may also be recognised in relation to a specific asset (Arts. 321–322 CC concerning property left at the disposal of the minor, Art. 409 CC for an adult under deputyship), subject to the person's capacity of judgement. The members of this category may also enter into contracts by themselves, but their legal validity requires the consent of the legal representative (prior authorization or ratification).[25]

The *full capacity* to do legal actions is subject to two positive conditions (Art. 13 CC). The first condition requires that the person is of age, i.e. that he or she has reached the age of 18 (Art. 14 CC). The second condition requires that the person be capable of judgement (Art. 16 CC), i.e. that he or she does not lack the capacity to do legal actions rationally by virtue of being underage, mental disability, mental disorder, drunkenness and other similar causes.[26] Mental disability covers cases of long-lasting and characterised mental disorders

23 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 111 and 116 ff; Philippe *Meier*, *Protection de l'adulte*, 2nd ed., Schulthess, Zurich/Geneva, 2022, N 818 ff, N 837 ff and N 871 ff.

24 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 164 ff; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 19 N 1 ff.

25 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 166.

26 Ibid., N 89 ff; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 13 N 2 ff.

that have obvious consequences on the person's outward behaviour, which are qualitatively disconcerting for the informed layperson. Mental disorders imply a quantitative rather than qualitative difference from a person with full discernment (e.g. congenital intellectual weakness).[27] Other similar causes include unconsciousness, coma, sleep, hypnosis or drug intoxication.[28] The faculty of acting reasonably requires two prerequisites: the faculty to recognise and understand the meaning, reasonable nature and effects of a specific act in a given situation (intellectual or cognitive element) and the capacity to do legal actions freely according to a reasonable understanding of the situation and to be able to form a will of one's own enabling it, if necessary, to oppose external pressures (volitional or characteristic element).[29] Furthermore, the emotional aspect must also be taken into account, particularly when determining capacity of judgement in the context of making a will.[30] Moreover, the impairing factors mentioned in Article 16 CC may be permanent or temporary.[31]

In addition to these positive conditions, there is a negative condition: the absence of general deputyship or of another restriction of civil rights (Arts. 13, 17, 19d CC).[32] General deputyship is the most incisive state protection measure, which deprives the person *ex lege* of the capacity to do legal actions (Art. 398 [3] CC – however, as stated, persons under general deputyship can exercise some rights autonomously provided they are capable of judgement).[33] The capacity to do legal actions can also be restricted by another deputyship – namely, the representative deputyship (Arts. 394/395 CC) with a limitation of the capacity to do legal actions[34] (Art. 394 [2] CC) and the consenting deputyship (Art. 396 CC) for the acts specifically listed by the authority.[35] The assistance deputyship (Art. 393 CC) never has any effect on the capacity to do legal actions.[36]

As seen before, under Swiss law, capacity of judgement (or discernment) exists or does not exist in relation to a given act, which means that a gradation of discernment is not allowed.[37] Capacity of judgement is also presumed in order to protect the trust and security of transactions. However, this presumption can be reversed, particularly with regard to persons of old age suffering from advanced senile dementia or young children.[38] Discernment will always be assessed in relation to an act determined at the time it was carried out (temporal and material relativity). Indeed, the conditions for the full capacity to do legal actions may change depending in particular on the discernment of the affected person in relation to the act in question, its nature and its importance (for example, in Swiss law,

27 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 99; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 16 N 31 ff.

28 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 101; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 16 N 10.

29 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva 2021) N 97; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 16 N 6, 10.

30 Ibid.

31 Ibid., N 97.

32 Ibid., N 89.

33 Ibid., N 116.

34 Ibid., N 118 ff.

35 Ibid., N 123.

36 Ibid., N 117.

37 Ibid., N 102; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 16 N 34 et 40.

38 Ibid., Art. 16 N 47 ff; Heinz Hausheer/Regina Aebi-Müller, *Das Personenrecht des Zivilgesetzbuches*, 5th ed., Stämpfli, Bern, 2020, N 198 ff.

making a will is normally considered to be a demanding act compared with the purchase of a low-priced everyday object or a medical decision).[39]

III. Active legal capacity of natural persons and its restrictions for the sake of disabilities – procedural aspects

The provisions on capacity to do legal actions are mandatory and cannot be amended by private agreement.

There is no need to go through a particular procedure to establish the capacity or incapacity of judgement.

However, it is possible to restrict the capacity to do legal actions by a State Protection Measure. Since the reform of Swiss adult protection law, the Protection Authority may be an administrative or judicial authority active at the cantonal, regional or even municipal level depending upon the choice made by each canton. It is competent to make decisions relating to the institution, implementation and cancellation of deputyship.[40]

Swiss law includes various sub-types of deputyships which regulate the restriction of the capacity to do legal actions in different ways:

1. The *assistance or supporting deputyship* (Art. 393 CC), i.e. the least incisive measure does not restrict the capacity to do legal actions of the affected person who continues to act on his or her own (Art. 393 [2] CC). It is merely supportive in nature. The deputy does not become the legal representative of the affected person, rather the deputy provides accompanying support for specific matters such as a housing search, setting up of a healthcare network or sorting out of tax issues. Unlike other deputyships, this one necessarily requires the consent of the affected person. Which means that it will not be suitable for a person already lacking the capacity of judgement.[41]
2. A *representative deputyship* (Arts. 394/395 CC) is pronounced when the person requiring assistance is not able to attend to certain matters on his or her own behalf and therefore requires representation. The Protection Authority may limit the person's capacity to do legal actions for some or all tasks entrusted to the deputy and expressly mentions in its decision to establish deputyship (Art. 394 [2] CC). Where the Protection Authority determines such limitation(s), the deputy retains an exclusive power to do legal actions. When no such restriction has been decided, both the person and the deputy may enter into legally binding commitments (parallel powers to do legal actions). The affected person shall be bound by the deputy's act even where his or her capacity to do legal actions has not been limited (Art. 394 [3] CC).

   The deputy can be appointed for a specific task (e.g. lodging an inheritance claim on behalf of the affected person) or for broader affairs, in particular with the duty of administering part or whole of the person's assets. It ought to be noted that some acts, although being part of the deputy's function, will require the consent of the Protection Authority (such as the liquidation of a household, long-term contracts concerning

39 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 102; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 16 N 34.

40 Philippe Meier, *Protection de l'adulte*, 2nd ed., Schulthess, Zurich/Geneva, 2022, N 68 ff.

41 Philippe Meier, *Protection de l'adulte*, 2nd ed., Schulthess, Zurich/Geneva, 2022, N 787 ff; Philippe Meier, *Zürcher Kommentar* (Schulthess, Zurich 2021) Art. 393 N 1 ff; Yvo Biderbost/Helmut Henkel, *Basler Kommentar Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 393 N 1 ff.

the affected person's accommodation, the acquisition, sale and mortgage of land and borrowing or lending significant sums of money). The law sets forth a list of risky or complex acts subject to this approval (Art. 416 CC), but the Protection Authority may decide to submit further acts to its consent (Art. 417 CC). Furthermore, some acts may never be performed by the deputy on behalf of the affected person being the provision of guarantees, establishing foundations or presenting any gifts from the person's assets, save for customary ordinary gifts (Art. 412 [1] CC).[42]

3. A *consenting deputyship* (sometimes called advisory deputyship) (Art. 396 CC) is pronounced to review certain acts made by the affected person and – if assessed to be in the latter's interest – to consent to these. Consent is required for the act to be legally valid and binding on the affected person. Thus, in relation to the acts listed in the decision of the Protection Authority, the capacity to do legal actions of the affected person is restricted accordingly (Art. 396 [2] CC). Unlike representative deputyship (Art. 394 [2] CC), the Protection Authority does not have to decide on a possible restriction of the capacity to do legal actions: it intervenes here by law. But the deputy has not power to represent the person in such a case.[43]
4. A *general deputyship* (Art. 398 CC), i.e. the most incisive measure, deprives the person *ex lege* of his or her capacity to do legal actions (Art. 398 [3] and 17 CC). In this all-encompassing measure, the deputy assumes responsibility for all aspects of personal and financial care, along with legal representation. The affected person's capacity to do legal actions is thus void by law, save for certain acts and rights when he or she is capable of judgement (see previous).[44]

All sub-types of deputyships, save for the general deputyship, can be combined with each other (Art. 397 CC). A deputy may thus be appointed to bring accompanying support for housing issues, representation and administration of financial assets and consent to an inheritance renunciation (it can be the same person, but several deputies might also be appointed for each sub-type of deputyship).[45]

In practice, the general deputyship is very rarely ordered, whereas representative deputyship with powers has become the 'flagship measure' since 2013.[46]

There is no official register of deputyships (one canton, the canton of Vaud, has such a register where protection measures are registered but only the Protection Authority and a few official services have access to it). Before 2013, the protection measures that

42 Philippe Meier, *Protection de l'adulte*, 2nd ed., Schulthess, Zurich/Geneva 2022, N 810 ff; Philippe Meier, *Zürcher Kommentar*, Schulthess, Zurich, 2021, Art. 394/395 N 1 ff; Yvo Biderbost/Helmut Henkel, *Basler Kommentar Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 394 and 395 N 1 ff.

43 Philippe Meier, *Protection de l'adulte*, 2nd ed., Schulthess, Zurich/Geneva, 2022, N 863 ff; Philippe Meier, *Zürcher Kommentar*, Schulthess, Zurich, 2021, Art. 396 N 1 ff; Yvo Biderbost/Helmut Henkel, *Basler Kommentar Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 396 N 1 ff.

44 Philippe Meier, *Protection de l'adulte*, 2nd ed., Schulthess, Zurich/Geneva 2022, N 890 ff; Philippe Meier, *Zürcher Kommentar*, Schulthess, Zurich, 2021, Art. 398 N 1 ff; Yvo Biderbost/Helmut Henkel, *Basler Kommentar Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 398 N 1 ff.

45 Philippe Meier, *Protection de l'adulte*, 2nd ed., Schulthess, Zurich/Geneva, 2022, N 880 ff; Yvo *Biderbost/* Helmut Henkel, *Basler Kommentar Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 397 N 1 ff.

46 See the 2020 statistics on on-going deputyships provided by KOKES/COPMA (Swiss Conference on Adult and Child Protection): https://www.kokes.ch/application/files/8616/3116/9183/COPMA_Statistiques_2020_adultes_mesures_en_cours_A3.pdf).

influenced the capacity to do legal actions were published in the local official gazette. Since 2013, Art. 452 [1] CC stipulates that an adult protection measure may be cited in opposition to all third parties even if they are acting in good faith. However, if a person subject to an adult protection measure induces other persons to accept his or her capacity to act in error, he or she is liable to them for any damage caused thereby (Art. 452 [3] CC).[47] Any person who shows a credible interest may request the adult protection authority to provide information on the existence and the effects of an adult protection measure (Art. 451 [2] CC). Third parties often request the person on whom they have certain doubts to obtain himself or herself a certificate of capacity delivered by the Protection Authority so as to avoid possible administrative costs.[48] There have been various steps taken in order to improve the security of transactions (for example, by registering the protection measures with the debt collection office), but they have failed so far. The aim not to stigmatise protected persons has prevailed, although a legal modification passed in 2016 (but still not in force) has extended the duty of the Protection Authority to communicate the pronouncement of a protection measure to certain state authorities.[49]

IV. Consequences of legal acts by a person beyond her/his scope of the capacity to do legal actions

According to Article 18 CC, acts performed by a person who is incapable of judgement are, with some exceptions, invalid by law with *ex tunc* effect.[50] This means that they are considered not to have taken place. Neither the legal representative who would consent to the act, nor the affected person who would regain the capacity of judgement, can subsequently validate the act, except by performing a new act similar to the first one if they are satisfied with its content.[51] In principle, invalidity by law may be invoked by any interested party at any time. However, the absolute nature of invalidity is called into question when it is applied to the detriment of a person incapable of judgement.[52] The *ratio legis* of Article 18 CC aims at protecting the person who is incapable of judgement; if the contracting party abuses the provision in order to get rid of a contract he or she no longer wants, the rules on the manifest abuse of a right may apply (Art. 2 [2] CC).[53]

Any competent authority must declare the invalidity *ex officio*. The good faith of third parties is not protected so that the contract is invalidated by law regardless of the fact that the contracting party knew or should have known of the incapacity of judgement. However, the law does provide for a few exceptions (Art. 18 [1] in fine CC). First of all, some acts nevertheless produce certain effects: the marriage of a person incapable of judgement is subject to a regime of annulment (Art. 105 [2], 106, 107 [1] and 108 CC)

47 Philippe Meier, *Protection de l'adulte*, 2nd ed., Schulthess, Zurich/Geneva, 2022, N 693 ff and Fn 1262 to the N 696.

48 Ibid., N 695.

49 Ibid., Fn 1259 to N 694.

50 Ibid., N 132; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 18 N 6; Heinz Hausheer/Regina Aebi-Müller, *Das Personenrecht des Zivilgesetzbuches*, 5th ed., Stämpfli, Bern, 2020, N 269.

51 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021. N 132; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art.18 N 3.

52 Philippe Meier, *Droit des personnes,* 2nd ed., Schulthess, Zurich/Geneva, 2021, N 133.

53 Ibid.; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 18 N 7.

with, in principle, an *ex nunc* effect; the same can be said of the making of a will by a person incapable of judgement, which may be voidable (with an *ex tunc* effect) but is not invalidated by law (Art. 519 [1] CC). Another exception is the situation in which facts caused by man independently of his or her will and conscience do produce legal effects: e.g. as a rule, the acquisition of an estate occurs by operation of law, without any declaration of will being necessary (Art. 560 [1] CC).[54] Furthermore, for reasons of equity, the legislator has provided for the civil liability of persons incapable of judgement under certain conditions (Art. 54 CO; see previous). Thus, a person who has temporary or permanent incapacity through no fault of his or her own may be ordered to provide total or partial compensation for the damage he or she has caused on the grounds of equity (Art. 54 [1] CO).[55]

Even when incapable of judgement, a person may express a wish which must be taken into account in the context of his or her rights to participate in the decision-making process (e.g. Arts. 377 [3], 382 [2], 406 CC). This is in particular the case for medical decision made by his or her representative on his or her behalf.[56]

It should also be noted that the person may adopt an advance provision when he or she is still capable of judgement; the provision shall apply when the incapacity occurs: this refers to the enduring powers of attorney (Art. 360–369 CC), the living will or patient decree (Art. 370–373 CC) and the power of attorney or mandate under the Swiss Code of Obligations with a clause on the maintenance of powers in the event of incapacity (Art. 35 [1] and 405 [1] CO).[57]

For persons capable of judgement who lack the capacity to do legal actions (i.e. minors and adults under a deputyship that deprives them, totally or in part, of their capacity), the legal consequences of an act lacking the consent of their legal representative are governed by Article 19b CC. The legal representative may consent expressly or tacitly in advance or approve the transaction retrospectively (Art. 19a [1] CC). As it the case with Article 18 CC, the good faith of third parties is not protected. Where no consent has been given, both contracting parties may demand restitution of any performance already made (Art. 19b [1] CC) on the basis of the obligations deriving from unjust enrichment (Arts. 62 et seq. CO). The extent of the duty of restitution of the affected person depends on his or her good or bad faith (Art. 19b [1] and [2] CC). In the case of good faith, the duty of restitution extends only to the amount of what is still available. In the event of bad faith on the part of the affected person, he or she is liable for the damage incurred.[58]

54 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 132 ff; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 18 N 7 and 11 ff; *Heinz* Hausheer/Regina Aebi-Müller, *Das Personenrecht des Zivilgesetzbuches*, 5th ed., Stämpfli, Bern, 2020, N 262 ff.

55 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 142 ff; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 18 N 4 and 20 ff.

56 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 145.

57 Philippe Meier, *Droit des personnes*, 2nd ed., Schulthess, Zurich/Geneva, 2021, N 145.

58 Ibid., N 198 ff; Roland Fankhauser, *Basler Kommentar, Zivilgesetzbuch I*, 6th ed., Geiser T./Fountoulakis C., Basel, 2018, Art. 19b N 1 ff.

V. Protection of persons with disabilities under criminal law

The Swiss Criminal Code ('CP')[59] contains an offence against Profiteering (Art. 157 of Swiss Criminal Law). The provision states that any person who, for his or her own or another's financial gain or the promise of such gain, exploits the position of need, the dependence, the weakness of mind or character, the inexperience or the foolishness of another person to obtain a payment or service which is clearly disproportionate to the consideration given in return shall be liable to a custodial sentence not exceeding five years or to a monetary penalty (Art. 157 [1] CP).

The repression of profiteering is a safeguard against abuses of contractual freedom. It requires the presence of an onerous contract and a disproportion between the services exchanged but also that this disproportion comes from a particular exploitation in which the other party finds himself or herself. The perpetrator must have intentionally exploited this situation of weakness, and it must have led the other party to provide or promise a pecuniary advantage in clear disproportion to the benefit received in exchange. The offence does not require the injured party to provide the promised benefit, it is sufficient that he or she promises the benefit (by a legal commitment) to the other party. In particular, a person is in a situation of weakness if he or she lacks the capacity to judge because of age, illness, congenital weakness, drunkenness, drug addiction or another similar cause. He or she is thus diminished in his or her ability to analyse the situation, to appreciate the scope of his or her actions, to form his or her will and to stick to it. The doctrine mentions the case of a minor, a person with diminished capacity, a person who is feeble-minded or susceptible to influence, or a person who, through weakness of character or thoughtlessness, is impaired in his or her ability to form a will independently.[60]

The contract may be invalidated and give rise to civil restitution according to the provisions of the Swiss Code of Obligations. However, the fact that there is Profiteering within the meaning of Article 157 CP does not necessarily mean that the contract will be invalid under civil law. Conversely, the fact that the contract may be invalidated under civil law does not yet mean that it is a case of Profiteering under criminal law.[61]

A person suffering from a disability may also be the victim of further offences against property, like unlawful appropriation (Art. 137 CP), misappropriation (Art. 138 CP), theft (Art. 139 CP) or fraud (Art. 146 CP). As regards certain offences, when the offender is the deputy of the person, he or she shall be liable to a higher custodial sentence or monetary penalty (e.g. Art. 138 [2] CP).

Other provisions of the Swiss Criminal Code establish a special regime in the presence of a person incapable of discernment. Among the offences against life and limb, the legislator wished to provide special protection in the case of simple bodily harm to any victim who, at the time of the offence, was, inter alia, *not in a position to defend himself or herself* (Art. 123 [2] CP). According to the case law, a person is unable to defend himself or herself if he or she has no chance of being able to confront his or her attacker and the

59 RS 311.0.

60 Miriam Mazou, *Commentaire Romand du Code pénal II* (Macaluso A./Moreillon L./Queloz N., Basel 2017) Art. 157 N 1 ff; Philippe Weissenberger, *Basler Kommentar Strafrecht II*, 4th ed., Niggli M. A./Wiprächtiger H., Basel, 2019, Art. 157 N 1 ff.

61 Miriam Mazou, *Commentaire Romand du Code pénal II* (Macaluso A./Moreillon L./Queloz N., Basel 2017) Art. 157 N 47; Philippe Weissenberger, *Basler Kommentar Strafrecht II*, 4th ed., Niggli M. A./Wiprächtiger H., Basel, 2019, Art. 157 N 60.

acts with which the latter threatens him or her. The incapacity may result from physical characteristics (age, weak constitution, somatic pathology) or psychological characteristics (psychological pathology). The victim may even be asleep or drunk. This is an aggravating factor, and the offence will then be prosecuted *ex officio* and punishable by a custodial sentence of three years or more or a monetary penalty.[62] Article 127 CP punishes with a custodial sentence of five years or more of a monetary penalty anyone who, having custody of a person who is unable to protect himself or herself or having the duty to look after him or her, exposes him or her to a danger of death that may be serious and imminent for his or her health or abandons him or her in such a danger. This duty may arise in particular from the law, with regard to the deputy towards the person concerned (Art. 406 CC).[63]

Among the offences against sexual liberty and honour, Article 191 of the Criminal Code provides that *any person who, in the knowledge that another person is incapable of judgement or resistance, has sexual intercourse with or commits an act similar to sexual intercourse or any other sexual act on that person shall be liable to a custodial sentence not exceeding ten years or to a monetary penalty*. The legislator thus wanted to strengthen the protection of the victim to avoid any *exploitation of pre-existing psychological or physical deficiencies* without age or sex being relevant. The use of drugs, alcohol or hypnosis are, in particular, cases where incapacity to resist can be retained. In all cases, the incapacity, even if temporary, must be total; a partial incapacity, such as in the case of light drunkenness, does not allow the offence to be retained.[64] Finally, Article 192 CP deals with the specific case of *sexual acts with persons in institutional care, prisoners and persons on remand*. This is the case, for example, of a resident of a hospital, a home for the elderly, a clinic, a psychiatric asylum, a health resort, an addiction treatment centre, a re-education and rehabilitation centre or a home for the disabled.[65]

Concluding remarks

Switzerland has not adopted any specific measures in its Civil Code to comply with the Convention. The Convention was not mentioned in the legislative work leading up to the adoption of the new law on adult protection, which celebrates its tenth anniversary in 2023.

As was to be expected, last March 2022 the Committee made the same criticisms of Switzerland with regard to Article 12 of the Convention that it has made for several years to all reporting States.[66] The Committee notes ('with concern' but erroneously) the lack of recognition of the right of persons with disabilities to equality before the law, including the existence of laws denying or restricting the legal capacity of persons with disabilities and placing them under guardianship, as well as the absence of measures to support persons

62 Marc Rémy, *Commentaire Romand du Code pénal II* (Macaluso A./Moreillon L./Queloz N., Basel 2017) Art. 123 N 18; Andreas Roth/Anne Berkemeier, *Basler Kommentar Strafrecht II*, 4th ed., Niggli M. A./Wiprächtiger H., Basel, 2019, Art. 123 N 25.

63 Aurélien Stettler, *Commentaire Romand du Code pénal II* (Macaluso A./Moreillon L./Queloz N., Basel 2017) Art. 127 N 10.

64 Nicolas Queloz/Federico Illànez, *Commentaire Romand du Code pénal II* (Macaluso A./Moreillon L./Queloz N., Basel 2017) Art. 191 N 8 ff.

65 Nicolas Queloz/Patricia Meylan, *Commentaire Romand du Code pénal II* (Macaluso A./Moreillon L./Queloz N., Basel 2017) Art. 192 N 4.

66 N 25 of the Concluding Observations (see above Fn. 4).

with disabilities to exercise their legal capacity on an equal basis with others. It recalls its General Comment No. 1 (2014) and recommends that Switzerland

> *amend the Civil Code and the law of the protection of the adult to repeal any laws and associated policies and practices that have the purpose or effect of denying or diminishing the recognition of any person with disabilities as a person before the law; (and) develop and implement, in close consultation and active involvement of persons with disabilities and their representative organisations, a nationally consistent supported decision-making framework that respects the will and preference and individual choices of persons with disabilities.*

Although some authors felt that Swiss law should be revised, the vast majority of them (and the Swiss government so far) believe that the Committee's demands are unrealistic.[67] There will always be a need for authoritative protection measures that allow the representation of a person who is unable to defend his or her own interests and who runs the risk of being exploited by others.

The principle of self-determination is absolutely central in the law that came into force in 2013. It is laid down as a general principle in Article 388, paragraph 2 CC,[68] and is manifested in particular by the priority given to the anticipated instruments (advance provisions) adopted by the person for his or her future incapacity over authoritative measures (Art. 389 [1] 2 CC), by the respect of the person's spheres of competence when choosing among the types of deputyship and, within these, when deciding on the tasks to be assigned to the deputy, when deciding whether or not to restrict the capacity to do legal actions, when choosing the person of the deputy guardian (right of proposal and right of veto of the person concerned, Art. 401 [1] and [3] CC) and throughout the exercise of the deputyship (respect for the will of the person concerned, cf. Arts. 406 and 409 CC). Moreover, the Swiss system of civil capacity, as seen earlier, grants a large degree of legal autonomy to the person under deputyship, provided he or she is capable of discernment (Art. 19 ff. CC., to which Art. 407 CC refers).

Finally, Swiss law includes an authoritative protection measure which is the archetype of the assisted decision-making advocated by the Committee: the assistance or supporting deputyship (Art. 393 CC), as outlined earlier. It is often not sufficient, but it at least has the merit of already existing in the Civil Code.

These observations should not lead us to ignore the contribution of the Convention. If one point in the current adult protection law were to be revised, it could involve abolishing the general deputyship, which is not tailored to the needs of the person concerned, which deprives him or her *ex lege* of the capacity to do legal acts and which has other collateral effects (e.g. it prevents the exercise of parental responsibility, Art. 296 [3] CC).

There is no doubt that in practice, deputies, who are very often overburdened, must continue to be encouraged to involve the person concerned in the management of the measure and to take the time to listen to his or her wishes and allow him or her to gradually develop his or her own autonomy. This is, however, a matter for the professional training of deputies (mostly social workers), not for a legislative revision.

67 On this debate in Switzerland, with many references: Philippe Meier, *Zürcher Kommentar* (Schulthess, Zurich 2021), Art. 388 N 46 ff. and N 58 ff.

68 *Official adult protection measures shall aim to secure the best interests and protection of persons in need [1]. Where possible, they should preserve and encourage the independence of the persons concerned [2].*

27 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Turkey

Günhan Gönül Koşar

Introduction

The Republic of Turkey signed the United Nations Convention on the Rights of Persons with Disabilities (CRPD) that promotes full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities (PwDs) on March 30, 2007. The ratification of CRPD was approved by the Law No. 5825 adopted by the Grand National Assembly of Turkey on December 3, 2008.[1] The ratification process was finalised by the Council of Ministers Decision No. 2009/15137 dated May 27, 2009.[2] After 30 days following the submission of documents by the Republic of Turkey to the UN Secretariat on September 28, 2009, CRPD entered into force in the Republic of Turkey on October 28, 2009.[3]

The Republic of Turkey signed the Optional Protocol to the UN CRPD on September 28, 2009. Ratification of the Optional Protocol was approved by the Law No. 6574 adopted by the Grand National Assembly of Turkey on December 3, 2014.[4] The ratification process was finalised by the Council of Ministers Decision No. 2015/7230 dated January 26, 2015.[5] Optional Protocol is in force in the Republic of Turkey as of April 26, 2015.[6]

Turkey has not submitted any reservation or understanding/interpretation declaration to Article 12 of the CRPD. So far,[7] no individual complaint has been submitted based on the Optional Protocol related to the issues provided in Article 12 of the CRPD.

The UN CRPD adopted in New York, December 13, 2006, is in force in Turkey. It is a source of law within Turkey's legal system.

1 The Law No. 5825, Date: 3.12.2008, Official Gazette 18.12.2008/27084, https://www.resmigazete.gov.tr/eskiler/2008/12/20081218-4.htm, accessed May 6, 2022.
2 The Council of Ministers Decision No. 2009/15137, Date: 27.05.2009, Official Gazette 14.07.2009/27288, https://www.resmigazete.gov.tr/eskiler/2009/07/20090714-1.htm, accessed May 6, 2022.
3 Initial report submitted by Turkey under article 35 of the Convention, N. 1, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=TUR&Lang=EN, accessed May 6, 2022.
4 The Law No. 6574, Date: December 3, 2014, Official Gazette December 12, 2014/29203, https://www.resmigazete.gov.tr/eskiler/2014/12/20141212-26.htm accessed May 6, 2022.
5 The Council of Ministers Decision No. 2015/7230, Date: 26.01.2015, Official Gazette 10.02.2015/29263, https://www.resmigazete.gov.tr/eskiler/2015/02/20150210-1.htm, accessed May 6, 2022.
6 https://insanhaklarimerkezi.bilgi.edu.tr/tr/blog/turkiye-bireylerin-ve-birey-gruplarnn-basvuru-olan/, accessed May 6, 2022.
7 As at May 7, 2022.

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According to Article 90/5 of Turkish Constitution,

> *International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.*[8]

As CRPD is an international agreement that has duly entered into force per Article 90 of the Turkish Constitution, it has the same force with laws in the hierarchy of norms. In fact, as CRPD is an international agreement regulating fundamental rights and freedoms, in case of a conflict between CRPD and Turkish law, CRPD shall prevail. Therefore, CRPD – as an international agreement regulating fundamental rights and freedoms – may be positioned over the laws. In other words, regarding hierarchy of norms, CRPD, technically, lies between the Constitution and the laws.

CRPD is a source of law that Turkish courts can directly refer to. The Turkish the Constitutional Court, the Turkish Court of Cassation (highest court for civil law affairs) and the Turkish Council of State (highest court for administrative law affairs) have cited CRPD in their judgments as a source of law several times. Some examples are as follows:

Turkish Constitutional Court

- The Constitutional Court based its judgment on CRPD in relation to national legislation as a source of law on an individual application regarding the violation of property right of a disabled person under the guardianship regime and ruled in favour of the applicant. In the concrete case, the guardian wanted to buy a vehicle to be used in the transportation of the disabled applicant who is restricted, by taking advantage of the special consumption tax deduction granted to the disabled, and donate this vehicle to the disabled person under guardianship. Although the guardian would donate the vehicle to the applicant under guardianship, the courts did not allow the guardian to purchase the vehicle by taking advantage of the guardian's special consumption tax deduction. The Constitutional Court, on the other hand, has ruled that the decisions of the courts, (which form the guardianship authorities) did not contain sufficient and relevant justifications, and that sufficient care was not given to the disabled in a reasonable manner, especially for the protection of the property rights of the disabled. In the context of the present case, the Constitutional Court concluded that the positive obligations of the state within the framework of the requirements for the protection of the right to property were not fully and effectively fulfilled.[9]
- According to the Constitutional Court, a legislation was unconstitutional and in violation of CRPD because it delayed the effectiveness date of provisions in favour of persons with disabilities. The provisions in favour of the persons with disabilities required

8 For details, see Ergun Özbudun, *Türk Anayasa Hukuku* [Turkish Constitutional Law], (20th edn, Yetkin Publishing 2020) 227 ff; Ali D. Ulusoy, *Yeni Türk İdare Hukuku* [New Turkish Administrative Law], (3rd edn, Yetkin Publishing 2020) 63 ff.

9 Turkish Constitutional Court, Application Number: 2015/17844 Date of Judgment: 7.3.2019, Official Gazette 19.04.2019/30750.

the public institutions and organisations to take the necessary measures to ensure the access of PwDs to public transportation services, to existing official structures, roads, pavements, pedestrian crossings, open and green areas, sports fields and similar social and cultural infrastructure areas and all kinds of structures built by real and legal persons providing public service. The lawmaker had passed a legislation that delayed the effectiveness of these provisions in favour of PwDs; however, the Constitutional Court found this legislation unconstitutional and annulled this enactment.[10]

- In an application before the Constitutional Court, a mentally disabled child was seriously injured by the electric current passing through the high-voltage line cables on the railway line. The application was about the violation of the right to life and the right to a fair trial due to the rejection of the compensation lawsuit related to this incident due to not being carried out within a reasonable time. The Constitutional Court ruled in favour of the applicants, referring to the CRPD as international law.[11]

Turkish Council of State

- On a lawsuit before the Council of State, the plaintiff challenged the regulation to become a teacher in a certain type of high school on the ground that the regulation was discriminatory against persons with disabilities. The Council of State ruled in favour of the visually disabled plaintiff. The Council of State based its judgment on CRPD in addition to national legislation (the Council of State, Plenary Session of the Administrative Law Chambers, E. 2008/2220 K. 2012/2239 Date of Judgement: 21.11.2012).

Turkish Court of Cassation

- On a lawsuit regarding the application for annulment of marriage on the grounds of absolute nullity due to claimed lack of capability of judgement, the Court of Cassation reviewed whether the provision in the Turkish Civil Code (Art 145), which allowed marriages to be annulled where '*one of the spouses had such mental illness preventing marriage*' was in violation of CRPD. The Court of Cassation ruled that said provision was not in violation of CRPD on the grounds that CRPD could not be interpreted in way to allow persons who lack capability of judgement to marry since free will and consent are required to be married. (The Court of Cassation, General Assembly of Civil Chambers, E. 2017/2–2672 K. 2018/1717 Date of Judgement: 15.11.2018).
- The Court of Cassation found the seizure of a vehicle to be lawful, as there is no prohibition in the CRPD or the Enforcement and Bankruptcy Law stating that the vehicles belonging to the disabled person cannot be seized and also because the vehicle in question was not compulsory for the disabled person.[12]

10 Turkish Constitutional Court, General Assembly, E. 2012/102 K.2012/207 Date of Judgment: 27.12.2012, Official Gazette 02.04.2013/28606.

11 The Constitutional Court, Application Number: 2014/11855, Date of Judgment 13.9.2017, Official Gazette 27.10.2017/30223.

12 The Court of Cassation, 12. Civil Chamber, E. 2011/7964 K. 2011/7497 Date of Judgment: 25.4.2011.

I. Persons with disabilities under Turkish law and CRPD

A. Amendments in Turkish Legislation for Harmonisation with CRPD

The Republic of Turkey has made several legislative changes to have its national legislation in harmony with CRPD with the purposes of enlarging rights-based approach for the benefit of the whole society and steering the relevant course of practices. The terms such as '*handicapped, faulty*' or '*impaired*' in 87 laws and 9 decree-laws were replaced with the phrase '*persons with disabilities*' to abandon derogatory terminology.[13] Also, there have been amendments in fundamental laws such as the National Education Basic Law[14] and Labor Law[15] to eliminate discrimination against disability.

In 2010, an amendment has been made in the Constitution to provide affirmative measures for, among others, persons with disabilities. In its Article 10, the Constitution secures the right to equal recognition before the law. According to Article 10, everyone is equal before the law without distinction as to language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such grounds. In 2010, the following paragraph was added to Article 10: '*Measures to be taken for children, the elderly, handicapped, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality*'.[16] Although this amendment is commended, the wording choice of '*handicapped*' instead of '*persons with disabilities*' is criticised.

The most prominent reform in Turkish law is the amendment in 2014 to the Law on Persons with Disabilities.[17] Various terms such as 'disability-based discrimination', 'direct discrimination', 'indirect discrimination' and 'accessibility' are defined in this law. The law is also amended with provisions to ensure PwDs live independently in society and not be forced to exclusion from society. Furthermore, prohibition of discrimination is regulated in a separate provision in detail. Although obligation to implement reasonable measures is foreseen in order to ensure equality, the law does not stipulate any sanctions to be imposed in case of discrimination based on disability. Moreover, with the amendment in the law, the medical-oriented definition of disability that emphasised inadequacies or lack of competence is abandoned and the definition that emphasises disability as difficulty in full and efficient participation to society is brought instead.

13 Replies of Turkey to the list of issues in relation to the initial report of Turkey, N. 3, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=TUR&Lang=EN, accessed May 6, 2022.

14 Article 4 of the National Education Basic Law now stipulates, '*Educational institutions are available to everyone, regardless of language, race, gender, disability and religion*'. https://www.mevzuat.gov.tr/MevzuatMetin/1.5.1739.pdf, accessed May 6, 2022. The previous version of the provision did not include the term "*disability*".

15 Article 5 of the Labor Law now stipulates, '*No discrimination based on language, race, color, gender, disability, political opinion, philosophical belief, religion and sect or similar reasons is permissible in the labor relationship*'. https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4857.pdf, accessed May 6, 2022. The previous version of the provision did not include the term '*disability*'.

16 https://global.tbmm.gov.tr/docs/constitution_en.pdf, accessed May 6, 2022.

17 For the current text of the Law on Persons with Disabilities No. 5378 please see, https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5378.pdf, accessed May 6, 2022.

B. Administrative efforts for the implementation of CRPD

For the implementation of CRPD, there have been several administrative efforts in Turkey. First, the General Directorate of Services for Persons with Disabilities and the Elderly under the Ministry of Family and Social Services of Turkey[18] has conducted various activities to this end. The General Directorate has constructed indicators, carried out awareness-raising activities through issuing press releases and reports, organising seminars and legislative efforts aimed at fighting against discrimination based on disability and promoting the implementation of CRPD.[19]

Moreover, in accordance with the requirements of CRPD, the Monitoring and Evaluation Board on the Rights of PwDs was established by the Prime Ministry Circular No: 2013/8 on July 19, 2013.[20] The Board held its known meeting in May 2014, yet there is no public information on the meetings held after that date.

As to independent mechanisms foreseen by Article 33/2 of CRPD, one can mention the Ombudsman Institution and the Human Rights and Equality Institution of Turkey. The Ombudsman Institution was established in 2012 with the objectives to establish an independent and efficient complaint mechanism with respect to the delivery of public services. Also, the Ombudsman Institution is entitled to investigate, to research and to make recommendations regarding the conformity of all kinds of administrative actions, acts, attitudes and behaviours with the law and human rights. One of the five ombudsmen is responsible for matters relating to women, children and PwDs.[21] Also, the Human Rights and Equality Institution of Turkey, founded in 2012 as the Human Rights Institution then restructured in 2016, was established with the tasks of fighting against ill-treatment, torture and discrimination, ensuring equality and protecting and promoting human rights. This Institution is also responsible for fighting against disability discrimination, and corresponds to the independent mechanism envisaged by CRPD.

C. Legislation that falls short of CRPD

Despite many amendments in Turkish legislation for harmonisation with CRPD, there are still discriminatory provisions in force. Some of these provisions that violate Article 12 of CRPD and undermine the legal capacity of persons with disabilities are as follows:

According to Turkish legislation, persons with disabilities may not hold positions such as secretary-general of chambers or commodity exchanges.[22] Also, persons with disabilities

18 Throughout last years, the Ministry of Family and Social Services has been structured in different forms such as the Ministry of Family and Social Policies, the Ministry of Family, Labor and Social Services. For the consistency, the ministry is referred as the Ministry of Family and Social Services throughout this chapter.

19 https://www.aile.gov.tr/eyhgm, accessed May 6, 2022.

20 https://www.aile.gov.tr/eyhgm/mevzuat/ulusal-mevzuat/genelgeler/2013-08-sayili-engelli-haklari-izleme-ve-degerlendirme-kurulu-hakkinda-basbakanlik-genelgesi/, accessed May 6, 2022.

21 However, non-governmental organisations have raised concerns over the application of recommendations by the ombudsman. An example regarding the lack of application of ombudsman's decision by the ministries and agencies can be given as follows: investigating a complaint, the ombudsman found the complaint of the applicant who had suffered from acodroplasia justified and recommended the Ministry of Family and Social Services to make the necessary legal arrangements for the applicant; however, the ministry has not yet made legal arrangements.

22 According to Article 74/e of the Law of the Union of Chambers and Commodity Exchanges of Turkey, and the Chambers and Commodity Exchanges (Law No. 5174), one of the conditions to be appointed the general secretary of chambers or commodity exchanges in not to have a disease, mental or physical disability that may prevent them from performing their duty continuously.

may not become judges or prosecutors. According to Article 8/g of the Law on Judges and Prosecutors,[23] one of the conditions to be a candidate to be a judge or prosecutor is not to have a physical or mental illness or disability that may prevent them from performing their duties as a judge and prosecutor all over the country and not to have difficulty in speaking and controlling the movement of their organs in an unusual way that the society would find strange.

According to Article 133 of the Turkish Civil Code, mentally ill people cannot be married unless it is established by an official medical board report that there is no medical problem in their marriage. According to Article 145/3 of the Turkish Civil Code, if one of the spouses has a mental illness that prevents marriage, the marriage is absolutely null, which means that the nullity of this marriage can be put forward *ex officio* by the public prosecutor or by anyone who has an interest in the matter.

According to Article 8/1 of the Law on Basic Provisions of Elections and Voter Registers, people under guardianship cannot vote in the elections.[24] Therefore, PwDs whose capacity has been restricted and have been assigned a guardian cannot vote in elections. This is a violation of PwDs' right to vote.

Due to these provisions in Turkish law, concerns have been raised by non-governmental organisations and the UN CRPD especially regarding the right to vote and right to be appointed to certain public official positions for persons with disabilities.[25]

D. Amendment in private law regarding capacity to act upon CRPD

An amendment that has been made in Turkish private law regarding active legal capacity concerns the visually disabled persons' exercise of capacity to act (to undertake obligations and acquire rights). By an amendment brought in the Law on the Persons with Disabilities[26] to Turkish Code of Obligations and Turkish Commercial Law, the exercise of the capacity to act for visually disabled persons has been facilitated. Prior to the said amendment, the signature of the visually disabled persons was subject to notarisation and two attesters were required for the notarisation procedure. Currently, according to Article 15/3 of Turkish Code of Obligations (TCO), '*On visually impaired persons' demand, an attester shall be present at the time of the signing. Otherwise their handwritten signature shall be sufficient*'.[27] Therefore, presence of attesters is optional. Moreover, according to Article 73 of Turkish Notary Code, if the notary realises that the person concerned is hearing, speaking or visually impaired, the proceedings are carried out in the presence of two witnesses, upon the request of the disabled person. In the event that the person concerned is

23 For the full text of the Law on Judges and Prosecutors No. 2802 https://www.mevzuat.gov.tr/MevzuatMetin/1.5.2802.pdf, accessed May 6, 2022.

24 According to Article 8/1 of the Law on Basic Provisions of Elections and Voter Registers (Law No. 298), persons under guardianship and persons banned from public service cannot vote in elections, https://www.mevzuat.gov.tr/MevzuatMetin/1.4.298.pdf, accessed May 6, 2022.

25 Concluding observations on the initial report of Turkey by the UN Committee on the Rights of Persons with Disabilities, especially N. 11 ff N. 25 ff.

26 Art 50 of Law on Persons with Disabilities.

27 For the full text of Turkish Law of Obligations please see https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6098.pdf, accessed May 6, 2022.

hearing- or speech-impaired and does not have the opportunity to communicate in writing, two attesters and sworn translators shall attend the proceedings.[28]

Although the requirement to bring witnesses during the notary operations of visually disabled persons was abolished, problems have emerged in the implementation of the law. In practice, notaries continue to require two witnesses for the notary transactions of persons with visual impairments, despite the law in force. The notaries refuse to carry out these transactions without the presence of witnesses on the ground that the transactions might be contested and that the notaries may be held liable in future. Therefore, necessary steps should be taken to address the gap between the law and practice.

E. Criminal law protection of persons with disabilities

With respect to criminal protection of persons with disabilities, the prominent provisions in Turkish Criminal Code[29] are Article 122, Article 157 and Article 117.

Disability-based discrimination is prohibited by the Law on Persons with Disabilities but there is no respective sanction under this law. Article 122 of Turkish Criminal Code imposes criminal sanctions for discrimination.

Article 122 of the Turkish Criminal Code titled '*Hatred and Discrimination*' is as follows:

> (1) *Any person who*
>
> (a) *prevents the sale, transfer or rental of a movable or immovable property offered to the public,*
> (b) *prevents a person from enjoying services offered to the public,*
> (c) *prevents a person from being recruited for a job,*
> (d) *prevents a person from undertaking an ordinary economic activity*
>
> *on the ground of hatred based on differences of language, race, nationality, color, gender,* ***disability,***[30] *political view, philosophical belief, religion or sect shall be sentenced to a penalty of imprisonment for a term from one year to three years.*

In 2014 there has been an amendment in the Article 122 and hatred objective has become a requirement for discrimination; accordingly, this provision is only applicable in cases where the motive for discrimination is based on 'hatred'. Therefore, Article 122 of the Turkish Criminal Code has become ineffective as it has been tied to the condition of being committed on the ground of hatred. To the best of the author's knowledge, to date, there is no court judgment rendered pursuant to Article 122 of the Turkish Criminal Code based on discrimination concerning a person with disabilities.

Another provision in the Turkish Criminal Code worth mentioning is Article 157 with respect to criminal law protection of persons with disabilities. Under the Turkish Criminal Code, there is no specific provision protecting a person with disabilities against crimes

28 For the full text of Turkish Notary Code https://www.mevzuat.gov.tr/MevzuatMetin/1.5.1512.pdf, accessed May 6, 2022.

29 The Law No. 5237, Date: 26.09.2004, Official Gazette 12.12.2014/29203, https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5237.pdf, accessed May 6, 2022.

30 Emphasis added by the author.

which can be committed resulting from legal acts. However, in such a case, Article 157 of the Turkish Criminal Code titled '*Fraud*' may be applied. According to Article 157:

> *Any person who deceives another person through fraudulent behavior and secures gain for themselves or for others by causing loss to the victim or another person shall be sentenced to penalty of imprisonment for a term from one to five years and judicial fine up to five thousand days.*

Article 117 of the Turkish Criminal Code titled '*Crime of Obstructing Freedom to Work*' regulates the violation of the freedom to work and labour. Second paragraph of this provision may be applicable for persons of disabilities. The mentioned paragraph is as follows:

> *Any person who employs another person, or persons, without payment or on a very low salary, which is clearly disproportionate to the service provided, or subjects such person, or persons, to conditions of work and residence which are incompatible with human dignity by exploiting his helplessness, isolation, or dependence shall be sentenced to a penalty of imprisonment for a term of six months to three years, or a judicial fine which will not be less than hundred days.*

Finally, under the Turkish Criminal Code, committing a crime against 'a person who cannot defend themselves physically or mentally' is regulated as a reason that aggravates the punishment for many crimes such as Articles 82/1-e, 84/4, 86/2-b and 94/2-a.

II. Legal capacity under Turkish law and CRPD

A. Terminology

Under Turkish law, legal capacity includes the capacity to hold rights, i.e. the right to be a subject before the law (henceforth referred to as 'legal capacity') and capacity to act/capacity to do legal actions. Legal capacity is regulated under the Turkish Civil Code (TCC) No. 4721.[31] The Article 8 of TCC is as follows: '*Every person has legal capacity. Accordingly, within the limits of the law, every person has the same capacity to have rights and obligations*'. Two main principles deducted from this provision regarding legal capacity are generality and equality.[32]

A noteworthy provision in Turkish civil law concerns personality and legal capacity. The beginning of personality and legal capacity differ under Turkish law. Under Article 28 of

31 For the full text of Turkish Civil Code, https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4721.pdf, accessed May 6, 2022.

32 Serap Helvacı, *Gerçek Kişiler* [*Natural Persons*], 8th ed., Legal Publishing, İstanbul, 2017, p. 44; Jale Akipek, Turgut Akıntürk, Derya Ateş, *Türk Medeni Hukuku Başlangıç Hükümleri Kişiler Hukuku Birinci Cilt* [*Turkish civil law introductory provisions law of persons first part*], 15th ed., Beta Publishing, İstanbul, 2019, p. 273; Hüseyin Hatemi, *Kişiler Hukuku* [*Law of persons*], 8th ed., Onikilevha Publishing, İstanbul, 2020, p. 5; İhsan Erdoğan, A. Dilşad Keskin, *Türk Medeni Hukuku* [*Turkish civil law*], 3rd ed., Gazi Publishing, Ankara, 2020, p. 224; M. Kemal Oğuzman, Özer Seliçi, Saibe Oktay-Özdemir, *Kişiler Hukuku Gerçek ve Tüzel Kişiler* [*Law of persons, natural and legal persons*], 20th ed., Filiz Publishing, İstanbul, 2021, p. 43; Mustafa Dural, Tufan Öğüz, *Kişiler Hukuku* [*Law of persons*], 22nd ed., İstanbul, Filiz Publishing, 2021, p. 39.

TCC, one's personality right[33] begins on the birth of the living child and this personality right ends on one's death. However, a person has legal capacity from the moment they fall into the mother's womb. In other words, if a child is born alive, then this person has legal capacity from the moment they fall into the mother's womb. However, personality and its protection begin on birth. The importance of this provision concerns the right to inherit. Provided that the child survives birth and is born alive, then they may claim the right to inherit from the moment they fall into mother's womb.

B. Capacity to act under Turkish law

1. Conditions of capacity to act

Under Turkish law, capacity to act means that a person has the capacity to acquire rights and obligations through their actions (capacity to do legal actions)[34] (Art 9 TCC). Persons who have capacity to act may acquire any right and may undertake any obligation by their own actions.

A person has the capacity to act if they fulfil the following three cumulative conditions: to be of age, to be capable of judgement and not to be restricted (Art 10 TCC). A person is of age if they have reached the age of 18 (Art 11 TCC). According to TCC, a person is capable of judgement if they do not lack the capacity to act rationally by virtue of being underage or because of a mental disability, mental weakness, intoxication or similar circumstances. (Art 13 TCC) In other words, capability of judgement means the power of discernment.[35]

Under Turkish law, a person under 18 can be deemed of age in two possibilities:

If the person under 18 is married, they are deemed of age, which could occur in two scenarios: A person may marry at the age of 17 with the legal representative's permission. Also, under extraordinary circumstances and only for very important reasons, the court may allow to marry at the age of 16. In that scenario, the mother and father or guardian are heard before the judgment of the court, if possible (Art 124 TCC).

Another possibility where a minor is deemed of age is the court's judgment: a minor who is fifteen years old can be declared of age by the court with their own request and the consent of their guardian (Art 12 TCC).

In the mentioned possibilities, a person under 18 (capable of judgement and not under guardianship) may be deemed of age and they shall have full capacity to act.

33 As opposed to common law, which recognises several personality rights, under Turkish law, one and general 'personality right' is recognised. This personality right is an absolute right, and it covers personal values, such as life, health, bodily integrity, name, image, honor and dignity. For further details, see Ferhat Canbolat, Günhan Gönül Koşar, Review of the criteria applied by Turkish court of cassation and by the European Court of human rights in cases of breach of personality rights via media [Basın Yoluyla Kişilik Hakkının İhlalinin Tespitinde Kullanılan Yargıtay ve Avrupa İnsan Hakları Mahkemesi Ölçütlerinin Değerlendirilmesi], *The Union of Turkish Bar Associations Review*, 2020, vol. 151, pp. 259–302.

34 Rona Serozan, *Medeni Hukuk Genel Bölüm/Kişiler Hukuku* [*Civil Law, General Part/Law of Persons*], 8th ed., Vedat Publishing, İstanbul, 2018, p. 429; Mehmet Ayan, Nurşen Ayan, *Kişiler Hukuku* [*Law of persons*], 9th ed., Ankara, Adalet Publishing, 2020, p. 51; Helvacı, p. 50; Akipek, Akıntürk and Ateş, p. 281; Hatemi, p. 15; Erdoğan and Keskin, p. 230; Oğuzman, Seliçi and Oktay-Özdemir, p. 51; Dural and Öğüz, p. 47.

35 Helvacı, p. 57; Serozan, p. 430; Akipek, Akıntürk and Ateş, p. 288; Erdoğan and Keskin, p. 236; Ayan and Ayan, p. 53; Oğuzman, Seliçi and Oktay-Özdemir, p. 56; Dural and Öğüz, p. 57.

2. Categories of capacity to act

Under Turkish law, the following distinctions are made regarding the capacity to act:[36]

1. Full capacity to act: A person has full capacity to act if they fulfil the following three cumulative conditions: to be of age, to be capable of judgement and not to be restricted.
2. Incapacity: Without prejudice to the discrete situations indicated in the law, acts of a person who is in capable of judgement do not have legal consequences (Art 15 of TCC). A legal representative is assigned to persons incapable of judgement to ensure their exercise of civil rights, with the exception of the strictly personal rights of a person incapable of judgement, which may not be exercised by their legal representative, such as, contracting a marriage. Regarding the legal results of a person with incapacity to act, the legal transactions of a person who is incapable of judgement are null and void and cannot be validated *ex post* through the consent of the legal representative.[37] A person with incapacity shall not be liable for tort due to lack of capability of judgement.[38]
3. Limited capacity: Persons who are capable of judgement but lack the capacity to act either due to being underage or being under guardianship fall under this category.

Persons with limited capacity may assume an obligation or waive a right only with the consent of their legal representative (Arts 15, 451 TCC). The legal representative may expressly or implicitly consent the transaction in advance or afterwards, unless the law provides otherwise. However, persons with limited capacity to act may exercise their strictly personal rights at their own will, without the need for the legal representative's consent, such as claim for non-pecuniary damages and termination of engagement. Also, they may accept gratuitous acquisitions without the need for the consent of the legal representative (Art 16 TCC).

According to Turkish law, if the person does not need to be restricted yet needs guidance and supervision on certain matters then the law authorises the court to appoint a curator (*kayyım*) for representation or for management of urgent, specific and temporary issues or to appoint a legal advisor (*yasal danışman*) for numbered transactions for mild mental difficulty (Art 426 ff. TCC). The appointment of a curator or a legal advisor to a person does not affect that person's right to exercise capacity to act except for the listed transactions in the law.[39]

According to Art 426 TCC, the guardianship authority (*vesayet makamı*) appoints a curator for representation (*temsil kayyımı*) upon the request of the person concerned or *ex officio* in the following cases or in other cases specified in the law:

1. if an adult is not able to perform an urgent job themselves or to appoint a representative due to illness, being in another place or similar reasons;

36 For further information see, Serozan, p. 429 ff; Dural and Öğüz, p. 65 ff.

37 Helvacı, p. 68; Serozan, p. 437; Hatemi, p. 28; Ayan and Ayan, p. 82; Erdoğan and Keskin, p. 250; Oğuzman, Seliçi and Oktay-Özdemir, p. 85; Dural and Tufan, p. 69.

38 Helvacı, p. 74; Serozan, p. 437; Akipek, Akıntürk and Ateş, p. 313; Hatemi, p. 27; Ayan and Ayan, p. 85; Erdoğan and Keskin, p. 252; Oğuzman, Seliçi and Oktay-Özdemir, p. 94; Dural and Öğüz, p. 75.

39 For the transactions, to which curator shall be appointed in detail, see Articles 426–427, TCC. For the transactions, to which legal advisor shall be appointed in detail, see Article 429, TCC.

2. if the interests of the legal representative and the interests of the minor or the restricted person conflict in a transactio; and
3. if there is an obstacle to the performance of the legal representative's duties.

According to Article 427, the guardianship authority takes the necessary measures for the goods whose management does not belong to anyone and appoints a curator for management (*yönetim kayyımı*), especially in the following cases:

1. if a person cannot be found for a long time and their place of residence cannot be known;
2. even if there is no sufficient reason to be placed under guardianship, if a person is unable to manage their assets on their own or unable to appoint a representative for it;
3. if the inheritance rights in an estate are not clear yet or if the interests of the fetus necessitate it;
4. if a legal entity has been deprived of the necessary organs and its management has not been achieved in any other way;
5. if means of administering or spending money or aid collected from the public for a charity or for other work for general benefit is not established.

Also, if there is a reason for optional restriction, a curator can be appointed to an adult person at their own request (Art 428 TCC).

According to Article 429, although there is no sufficient reason for restriction, a legal advisor is assigned to an adult person whose legal capacity is deemed necessary to be limited in terms of protection, in order to obtain their opinion on the following matters: (1) to sue and to settle; (2) to purchase, sell and pledge immovables and to establish another real right (right in rem) on them; (3) to purchase, sell and pledge commercial papers; (4) to have construction works outside the limits of ordinary administration; (5) to lend and to borrow; (6) to receive capital money; (7) to donate; (8) to undertake a bill of exchange; and (9) to be a surety. Under the same conditions, a person's authority to manage their assets can be revoked, without prejudice to their right to dispose of their income as they wish.

3. The legal results of a person with limited capacity to act

The legal results of a person with limited capacity to act are as follows.

The legal representative may expressly or tacitly consent the transaction in advance or afterwards, unless the law provides otherwise. If the transaction is not approved within a suitable period determined by the other party or by the judge upon application, the other party is discharged of any obligation (Art 451 TCC).

If the legal representative does not consent to transaction, either party may demand restitution of any performance already made. However, the person under guardianship is only liable for the amount of enrichment spent for their own benefit or for the amount available in their assets at the time of reclaiming or the amount they disposed of without good faith (Art 452/1 TCC). If the person under guardianship has misled the other party that they have the capacity to act, they will be liable for the damage the other party has suffered (Art 452/2 TCC).

The following three transactions are strictly prohibited for persons with limited capacity. Neither they nor their legal representative may establish a foundation, conclude a surety contract or make a major donation (Art 449 TCC).

Persons with limited capacity to act may personally exercise the following rights irrespective of the consent of their legal representative: They may exercise strictly personal rights, such as the request to be declared of age before reaching 18 years old or the termination of an engagement. Also, they may accept gratuitous acquisitions (Art 16 TCC), and they may administer specific items of their assets left to their personal discretion (Art 455 TCC). Moreoever, they may personally enter into all daily legal transactions which are required by the profession or artistic activity that they are permitted to exercise. In this case, the restricted person shall be liable for these transactions with all their assets (Art 453 TCC).

Persons with limited capacity are liable for tort arising out of a wrongful act as they are capable of judgement, in other words, they have power of discernment (Art 16/2 TCC).

4. Reasons to restrict capacity to act

The court may restrict a person's capacity to act and appoint a guardian (*vasi*) to protect the rights of those who are found incompetent to exercise their rights for numbered reasons:

1. A guardian (*vasi*) may be appointed to any adult who is incapable of taking care of their own affairs due to a mental illness or due to a mental weakness or to any adult who needs someone else's constant help to care for themselves or who jeopardises the safety of others (Art 405/1 TCC).
2. Any adult who is in constant need of protection and care or who threatens the safety of others because of their extravagance, alcohol or drug addiction, bad lifestyle or mismanagement of their assets, which threatens to put themselves or their family in distress or poverty shall also be restricted (Art 406 TCC). The court may not restrict this person unless they are heard before the court (Art 409/1 TCC).
3. Any adult sentenced to penalty of deprivation of liberty for one year or more shall be restricted *ex officio* (Art 407 TCC). When the execution of the convict's sentence begins, the execution prosecutor's office notifies the civil court of peace. Thereupon, the civil court of peace restricts the convict and assigns a guardian to them. However, the restriction automatically ends when the execution of the sentence ends and the convict is released from prison.[40] According to Art 471 TCC, the guardianship over the person who is restricted due to an imprisonment is automatically terminated upon the end of imprisonment. There is no need for an additional court order to revoke the restriction.[41]

40 Nuri Berkay Özgenç, The restriction as a result of being sentenced to imprisonment in Turkish law [Türk Hukukunda Özgürlüğü Bağlayıcı Bir Cezaya Mahkûmiyetin Sonucu Olarak Kişinin Kısıtlanması], *Marmara University Faculty of Law Journal of Legal Studies*, 2020, vol. 26, no. 2, pp. 652, 657. According to some authors who criticise Art 407 TCC, a person sentenced to imprisonment should not be restricted; rather it should be investigated whether this person really needs to be placed under guardianship. Where it is possible to solve the convict's problems by appointing a curator, the convict should not be restricted. Bilge Öztan, *Aile Hukuku* [*Family law*], 6th ed., Turhan Publishing, 2015, p. 1287; Mustafa Dural, Tufan Öğüz, Mustafa Alper Gümüş, *Aile Hukuku* [*Family law*], 17th ed., Filiz Publishing, 2022, p. 400.

41 Turgut Akıntürk, Derya Ateş, *Türk Medeni Hukuku İkinci Cilt Aile Hukuku* [*Turkish civil law second part family law*], 22nd ed., Beta Publishing, 2020, p. 542; Öztan, p. 1286; Özgenç, p. 661.

4. A guardian may also be appointed upon an adult's own justified request. Any adult who proves that they are incapable of duly fulfilling their tasks due to old age, disability, lack of experience or serious disease may request the restriction of their legal capacity (Art 408 TCC).

An amendment in Turkish law upon CRPD concerning the procedure for restriction of a person capacity to act is as follows: Under Turkish law, any adult who is not capable of taking care of their own affairs due to a mental illness or mental weakness or who needs someone else's continuous help to care for themselves or who jeopardises the safety of others shall be restricted and appointed a guardian which will lead to limited capacity to act. However, the court may restrict the capacity to act on the grounds of mental illness or mental weakness only upon an official medical board report (Art 409/2 TCC). In 2019, the following sentence was added to the provision: '*Bearing in mind the official medical board report, the court may hear the person whose legal capacity is to be restricted before rendering a judgment*'. This amendment is both commended and criticised. It is commended for giving the disabled person an opportunity to be heard by the court before being restricted, yet it is criticised as it is optional, not obligatory for the court to hear to the person under consideration to decide on restriction.

Guardianship rendered on the grounds of mental illness or mental weakness may be revoked only upon an official medical board report which establishes that restrictions grounds no longer apply (Art 474 TCC).

C. Guardianship regime in general

Guardianship regime is regulated under Turkish Law with the aim of protecting the rights of persons whose capacity is restricted.[42] Guardians protect the interest of persons under guardianship and represent them in their legal actions.

Under Turkish law, guardianship authorities are two specific courts (Art 396 TCC). These courts are civil court of peace (*sulh hukuk mahkemesi*) and civil court of first instance (*asliye hukuk mahkemesi*). The civil court of peace is the guardianship authority and it appoints an adult as the guardian for two years (Art 413, 456 TCC). The civil court of first instance is the supervisory authority (Art 397 TCC). Exceptionally, under certain conditions, instead of the civil court of peace, a family committee established of at least three members of the family may be authorised by the civil court of first instance to serve as (private) guardianship authority for four years (Arts 398–403 TCC).

Guardians are liable for protecting the interests of the restricted person, including their economic interests and for representing them (Art 403 TCC). The guardians are obliged to keep records of their guardianship administration and to regularly submit reports for the inspection and the approval of the guardianship authority. Certain transactions with significant financial, personal or professional consequences listed in TCC, such as buying or selling immovable property, giving credit and changing domicile require the additional permission of the guardianship authority.

42 For further details on Turkish guardianship regime, see Ahmet M. Kılıçoğlu, *Aile Hukuku* [*Family law*], 4th ed., Turhan Publishing, 2019, p. 560 ff; Öztan, p. 1257 ff; Akıntürk and Ateş, p. 482 ff; Dural, Öğüz and Gümüş, p. 422 ff.

If a guardian cannot protect the interests of the person under their guardianship, reassignment of another guardian can be requested any time. Also, if the guardian is unable to conduct their duty due to an obstacle, a curator is appointed *ex officio* or upon a request of the person concerned (Art 426 TCC).

III. Statistics

In Turkey, the largest study that reflects the demographical details of persons with disabilities is the 2002 Study on Persons with Disabilities in Turkey, carried out by Turkish Statistical Institute and Prime Ministry Administration for Disabled People. According to this survey, the ratio of persons with disabilities to overall population was 12.29%,[43] and the disabled population in Turkey is around 8.5 million.

Another research that provides an estimation of the number of PwDs in Turkey is the Population and Housing Survey carried out by Turkish Statistical Institute in 2011. This survey was a comprehensive sample survey based on administrative registers and was it was performed in line with UN recommendation on conducting population or housing censuses in order to obtain internationally comparable data. In this survey, disability questions were formed in coordination with the General Directorate of Services for Persons with Disabilities and the Elderly and were based on Washington Group recommendations. Two types of questionnaires were used: for households and for institutions. Within the scope of the household surveys, approximately 2.2 million households were interviewed. Within the scope of the institutional surveys, a complete census was made of nursing homes, university dormitories, military barracks, children's homes, prisons and similar places, and a survey was conducted with those residing at these addresses.

In the questionnaire, six body functions were asked, and the following options were presented in response to these questions: 'No difficulty', 'Yes, some difficulty', 'Yes, a lot of difficulty' or 'I cannot do it at all'. In evaluation of the responses, self-evaluation of the respondent was taken into account.[44] Functional difficulties were questioned without considering any aids, except for the questions about vision and hearing. Questions about vision and hearing were directed to people of all ages, while other questions only included those aged three and over. According to the survey results, 6.9% of the population at that time stated that they had at least one disability.[45]

With the aim of ensuring efficiency in services provided to persons with disabilities, 'National Disability Database of Persons with Disabilities' was established in 2006. The Database is operated under the General Directorate of Services for Persons with Disabilities and the Elderly, and it covers demographic, socio-economic and disability information obtained through public institutions authorised to enter data into the database. According

43 İstanbul Bilgi University Human Rights Application and Research Center, *Monitoring of disability-based discrimination report in Turkey, January 1–June 30, 2010*, İstanbul, 2011, p. 13, https://insanhaklarimerkezi.bilgi.edu.tr/tr/publication/14-turkiyede-engellilik-temelinde-ayrmclgn-izlenmesi-raporu/, accessed May 6, 2022.

44 Replies of Turkey to the list of issues in relation to the initial report of Turkey Addendum Statistics and data collection (Art 31) [Date received: January 14, 2019], Reply to Question 34, N. 82.

45 General Directorate of Services for Persons with Disabilities and the Elderly, 'Engelli ve Yaşlı İstatistik Bülteni Temmuz 2021 [Disabled and Elderly Statistics Bulletin July 2021]' 5, Table 1.1, https://www.aile.gov.tr/media/87735/eyhgm_istatistik_bulteni_temmuz_2021.pdf, accessed May 6, 2022.

to the Disabled and Elderly Bulletin July 2021, there is a total of 2,511,950[46] living disabled individuals registered in the National Database of Persons with Disabilities, whose address, disability group and disability health board report information are known. Among the disabled individuals, 1,414,643 are male and 1,097,307 are female. The proportional distribution of these numbers according to the disability type is as follows: 13.78% orthopedically disabled, 17.07% mentally disabled, 9.53% visually disabled, 7.97% hearing disabled, 1.49% with language and speech disorder, 7.57% spiritually and emotionally disabled, 40.63% with chronic diseases and 1.96% with other disabilities.[47] The number of people with severe disability is 775,012.

In 2010, the Ministry of Family and Social Services and Turkish Statistical Institute carried out the 'Survey on Problems and Expectations of Persons with Disabilities'.[48] This survey covered 280,014 PwDs registered in the National Disability Database of Persons with Disabilities with at least 20% disability rate according to their health report. The aim of this research was to identify the problems and expectations of disabled people registered in the National Disability Database of Persons with Disabilities in their daily lives. This survey reflects the status of education, health, employment, social services, etc. of disabled individuals registered in the National Disability Database of Persons with Disabilities.

Efforts to address the lack of information regarding PwDs and the monitoring of the disability policy have gained momentum recently, with projects such as 'Family and Social Policy Information System' conducted by the Ministry of Family and Social Services and Turkish Scientific and Technological Research Center. Moreover, the Research on Employment and Problems of PwDs in the public sector was conducted by the Ministry of Family and Social Services in 2015, but the results have not been shared with the public. Finally, the project 'Supporting the Implementation and Monitoring of CRPD in Turkey' (2013–2016) was conducted in cooperation between the Ministry of Family and Social Services and the UNDP in order to improve the quality of data on PwDs and to raise awareness of CRPD.

With respect to available statistical data regarding the restriction of legal capacity is as follows: By October 2018, the numbers of PwDs under guardianship are 612 persons in care centres affiliated with the Ministry of Family and Social Services and 13,872 persons with mental/psychological disabilities in private care centres supervised by the Ministry of Family and Social Services.[49] The courts appointed guardians to 615 persons in 2016, 37 of which were on request due to mental illness or weakness. This figure increased to a total of 794 guardianships, 54 of which were on request, in 2017, and it decreased to 455 people, 34 of which were on request, in 2018.[50]

46 It does not include individuals who have not applied to authorised hospitals to obtain a health board report for disability and who have not contacted the state for service.

47 General Directorate of Services for Persons with Disabilities and the Elderly, 'Engelli ve Yaşlı İstatistik Bülteni Temmuz 2021 [Disabled and Elderly Bulletin July 2021]' 16, Table 4.1, https://www.aile.gov.tr/media/87735/eyhgm_istatistik_bulteni_temmuz_2021.pdf, accessed May 6, 2022.

48 https://www.ailevecalisma.gov.tr/media/5602/ozurlulein-sorun-ve-beklentileri-arastirmasi-2010.pdf, accessed May 6, 2022.

49 Replies of Turkey to the list of issues in relation to the initial report of Turkey Addendum Equal Recognition before law (Art 12) [Date received: 14.01.2019], Reply to Question 13, N. 29.

50 Replies of Turkey to the list of issues in relation to the initial report of Turkey Addendum Equal Recognition before law (Art 12) [Date received: 14.01.2019], Reply to Question 13, N. 30.

According to the information obtained from the General Directorate of Criminal Records and Statistics of the Ministry of Justice of Turkey,[51] the number of cases filed between January 1, 2017, and December 16, 2021, for the appointment of a guardian in civil courts where a full admission decision or partial admission decision was given are as follows:

Table 27.1 The number of cases filed between January 1, 2017, and December 16, 2021, for the appointment of a guardian in civil courts where a full admission decision or partial admission decision was given

Year	*Number of Cases*
2017	57,609
2018	61,004
2019	66,073
2020	54,710
2021	60,741

However, the following point should be noted regarding this data: in accordance with Turkish law, the appointment of a guardian for restriction is not only due to disability, but also a person may be subject to the guardianship regime for the reasons explained earlier. For this reason, this data does not reflect the number of disabled people as it is given, yet some of these numbers concerns PwDs.[52]

Conclusion

Turkey's ratification of the United Nations CRPD and the Optional Protocol is quite significant for persons with disabilities for their enjoyment and access to human rights and fundamental freedoms.

For the harmonisation with CRPD, the initial step was the enactment of the Law on Persons with Disabilities; however, there are still steps to be taken for the effective implementation of CRPD. Some of the shortcomings regarding the implementation of CRPD are as follows:

Turkey's approach to disability is still the charity or the medical model and this should be altered. According to the medical approach to disability, people with a disability rate of less than 40% as established by medical reports are not recognised as persons with disabilities. This medical approach is contrary to the disability approach in CRPD.

Moreover, physical accessibility issues should be solved as soon as possible. In addition, persons with disabilities are not sufficiently informed about their rights and complaint mechanisms, and they should be made aware of the complaint mechanisms.

51 During the preparation of this chapter, an inquiry was made to the Directorate of Communications of Turkey for statistical data and this inquiry was replied by the Directorate with a letter dated 28.12.2021/E.74044743–252.01.884/72881.

52 During the preparation of this chapter, questions specific to the persons with disabilities were directed to the Ministry of Justice, but in the reply given, it was stated that statistical data on this subject could not be presented in detail because there was not enough data entry regarding the persons with disabilities.

Data collection is required to implement CRPD; however, there are no reliable, up-to-date, inclusive data on PwDs in Turkey, and even though some data is collected, sometimes data is not shared with the general public in accordance with CRPD.

Regarding the enjoyment of legal capacity, the provisions in Turkish law that violate Article 12 of the CRPD and undermine the legal capacity of PwDs regarding right to marry, right to vote, right to be appointed to certain public official positions and the provisions that limit exercise of legal capacity such as in transactions before the notaries should be amended to be in harmony with CRPD.

According to modern developments in the assessments of persons with disabilities, the focus is no longer whether the individual has sufficient mental capacity to exercise their legal capacity; the focus is rather to determine what type of support is needed for the individual to exercise their legal capacity. Therefore, the current approach to disability law is to eliminate discriminatory laws that deprive PwDs of their rights such as the right to vote, right to marry or right to hold public positions simply because of disability. This shift brings along a radical change in legal capacity laws.

In that regard, the amendments in Swiss law are worth mentioning both because of Swiss law's adoption of a less intrusive mechanism and because Turkish legislator has always followed the developments in Swiss law as the source law since Turkey had adopted the Swiss Civil Code in 1926 as a result of modernisation. In Switzerland, a new law on the protection of the adult has been in force since 2013. According to new legislation, the exercise of civil rights can now be restricted by official adult protection measures[53] (Swiss Civil Code, Arts 388–439). Guardianship (Swiss Civil Code, Arts 390–425) steps in in case of 'state of weakness' that results in inability to manage affairs, either fully or partially. One of the main purposes of the amendments made in Switzerland was the implementation of a guardianship system in which the person's ability to use civil rights would not be directly taken away. Even though the new system in Switzerland would not be entirely acquired by Turkey, it would be highly desirable to amend Turkish guardianship regime in such a more flexible and less intrusive way.[54]

Meanwhile, considering the guardianship regime applied in Turkey, judicial remedies should be reviewed to ensure that the individual under guardianship can raise legal objections against their guardian or the functioning of the guardianship system. This right to objection manifests itself especially in the practice of placing individuals in institutions with the consent of their guardians or legal representatives instead of their own consent. The institutionalisation of the individual in question without their consent is a practice of deprivation of liberty and legal amendments should be made to avoid the abuse of this practice.

In summary, the ratification of CRPD and the amendments in law for harmonisation with CRPD and the restructure of certain public entities such as the General Directorate of Services for Persons with Disabilities and the Elderly are commendable and reflect a significant progress for Turkey. However, there are still steps to be taken for full harmonisation with CRPD and for the improvement of the status of PwDs and their exercise

53 Initial State Report Procedure for Switzerland before the UN Committee on the Rights of Persons with Disabilities, Submission concerning the 'List of Issues', Art12, Bern, 06.05.2022, 12.

54 Turkish scholars have expressed their support for a less intrusive guardianship regime in Turkey, see, Aslı Açıkgöz, *Dar Anlamda Vesayeti Gerektiren Haller ve Vesayet Altına Almanın İşlem Ehliyeti Bakımından Sonuçları* [Cases for Legal Guardianship in the Narrow Sense and the Consequences of Legal Guardianship on the Capacity to Make Transactions], Onikilevha Publishing, İstanbul, 2017, p. 29.

of the legal capacity. In general, regarding the legal status and specifically regarding legal capacity of PwDs in Turkey, there should be a shift from substitute decision-making to supported decision-making mechanisms in accordance with CRPD. Easily accessible, supported decision-making alternatives on a voluntary basis should be developed. Effective participation of non-governmental organisations representing persons with disabilities should be ensured in the preparation of legislation on legal capacity. Finally, discriminatory laws should be repealed, and an overall action should be taken to increase the level of awareness of the problems of persons with disabilities.

28 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in England and Wales and in Northern Ireland

Charles O'Mahony

1. Introduction

This chapter examines the law on mental capacity in England and Wales and in Northern Ireland. It looks at the development of the Mental Capacity Act 2005 (MCA) and the Mental Capacity Act (Northern Ireland) 2016 (MCA NI). The MCA applies in England and Wales, the MCA (NI) applies to Northern Ireland, while Scotland has separate legislation that regulates this area.[1] This chapter considers whether the relevant legislation in England and Wales and in Northern Ireland complies with the United Kingdom's obligations under Article 12 of UN Convention on the Rights of Persons with Disabilities (CRPD). The legislation enacted in England and Wales has been heralded as a model of good practice by some commentators but is increasingly critiqued considering the jurisprudence of the CRPD Committee, which reveals deficits in the provision of supported decision-making and the retention of substitute decision-making. The 'fusion' model of legislation adopted in Northern Ireland represents an experimental and ostensibly 'radical' approach to law and policy in this area. This chapter considers whether the fusion approach brings Northern Ireland closer to compliance with Article 12 of the CRPD.

2. Background to the MCA in England and Wales

The MCA has been described 'a visionary piece of legislation for its time, which marked a turning point in the statutory rights of people who may lack capacity – whether for reasons of learning disability, autism spectrum disorders, senile dementia, brain injury or temporary impairment'.[2] The MCA was the result of a lengthy law reform process, which was led by the Law Commission. The Law Commission is an independent body that was established by the Law Commissions Act 1965, whose statutory obligation is to keep the law of England and Wales under review and to recommend reform where it is needed. The Law Commission made the decision to undertake research relating to 'mental incapacity' because of submissions from stakeholders who highlighted the problems with the law as it operated in England and Wales at that time. In particular, the Law Society (the professional association that represents the interests of solicitors practicing in England

1 The United Kingdom of Great Britain and Northern Ireland consists of England, Scotland, Wales and Northern Ireland. For the purposes of this chapter, the law as it relates to England and Wales and to Northern Ireland will be considered.

2 "House of Lords Select Committee on the Mental Capacity Act 2005 Report of Session 2013–14 Mental Capacity Act 2005: post-legislative scrutiny", at p.6.

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and Wales) published research in 1989, highlighting the need for law reform.[3] The Court of Appeal judgment in *Re* F[4] also highlighted the deficiencies with the law in failing to provide any mechanism that permitted a third party or the court to make decisions in the context of medical treatment in respect of an adult 'patient' who was considered to lack the mental capacity to make that decision.[5]

The Law Commission published a consultation paper, 'Mentally Incapacitated Adults and Decision-Making, in 1991, three more papers followed in 1993, which culminated in a final report in 1995.[6] In its 1995 Report the Law Commission ultimately recommended 'a unified approach', which required 'a carefully designed and well-constructed legal basket . . . of procedures . . . a single piece of legislation to make new provision for people who lack mental capacity; and to confer new functions on local authorities in relation to people in need of care or protection'.[7] Following the publication of the Law Commission's Report, the government undertook further consultation with green and white papers in 1997 and 1999, respectively.[8] These policy statements outlined the proposed law reform, which was largely based on the recommendations of the Law Commission's work. Subsequently a draft bill was published in 2003. There was broad support for the proposed legislation and for the recommendations of the Law Commission to define lack of capacity, to establish criterion for the taking of decisions on behalf of persons considered to lack capacity and allied matters.[9] In June 2004 the Mental Capacity Act was introduced in parliament.[10] The MCA received Royal Assent on April 7, 2005, and was commenced in 2007. The MCA has been an influential template for legislation that adopts a functional approach to persons whose decision-making has been called into question.[11] Some commentators have written about the MCA in an eulogising manner, describing it as 'a revolutionary project that still puts England near the forefront internationally of law and practice, and ground-breaking legislation of which England could be justly proud'.[12] However, as will be discussed, the MCA is out of step with the requirements of the CRPD, providing

3 The Law Society's Mental Health Sub-committee, Decision Making and Mental Incapacity: A Discussion Document (1989).

4 [1990] 2 AC 1.

5 The Court of Appeal in this case held that the provision of medical treatment on the basis of the 'best interests' of a person considered not able to consent did not constitute a battery under English law.

6 Law Commission, Mentally Incapacitated Adults and Decision-Making: An Overview CP119 (1991); Law Commission, Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction CP 128 (1993) (Law Commission (1993:128); Law Commission, Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research CP 129 (1993) (Law Commission (1993:129); Law Commission, Mentally Incapacitated Adults and Decision-Making: Public Law Protection Consultation Paper 130 (1993) (Law Commission (1993: 130); Law Commission, Mental Incapacity Law Com No 231 (1995) (Law Commission (1995).

7 Ibid., at page 29.

8 Lord Chancellor's Department, Who Decides? (London: HMSO, 1997); Lord Chancellor's Department, Making Decisions (London: HMSO, 1999).

9 HOUSE OF LORDS Select Committee on the Mental Capacity Act 2005 Report of Session 2013–14 Mental Capacity Act 2005: post-legislative scrutiny. Available at: https://publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf page 25.

10 HC Deb, 18 June 2004, col 68WS.

11 Series L, Nilsson A. Article 12 CRPD: Equal Recognition before the Law. In: Bantekas I, Stein MA, Anastasiou D, editors. The UN Convention on the Rights of Persons with Disabilities: A Commentary. Oxford (UK): Oxford University Press; 2018.

12 Peter, Bartlett "Re-thinking the Mental Capacity Act 2005: Towards the Next Generation of Law" 2022) 00(0) MLR 1–42 at page 1.

for substitute decision-making and the denial of legal capacity (albeit subject to procedural safeguards).

2.1 An overview of the Mental Capacity Act 2005

The MCA when enacted in 2005 established a legal framework that permits a broad number of decisions to be taken in respect of persons who are considered to lack mental capacity. The MCA adopts a functional approach to mental capacity, meaning that decisions to be made are time or issue specific. Under this approach, mental capacity is assessed according to a statutory test. The guiding principles underpinning the legislation spell out this approach. § 1(2) provides that a person must be assumed to have capacity unless it is established that they lack capacity. § 1(3) further provides that a person is not to be treated as unable to make a decision unless all practicable steps to help them do so have been taken without success. These are significant provisions, which speak to the objective of the legislation to respect persons rights and to empower persons subject to the MCA to make their own decisions. § 1(4) requires that a person is not to be treated as unable to make a decision merely because they make an unwise decision. The outcome approach is expressly rejected in the MCA with recognition that a person subject to the legislation is allowed to make unwise decisions on an equal basis with others. However, the extent to which this is realised in practice is not clear.[13] As Bartlett has noted, there is a serious concern that the outcome of an assessment of a person's mental capacity will be determined as to whether that person agrees with the professional who offers them advice and whether their own decision will lead to a bad outcome.[14]

§ 1(5) requires that any decision taken on behalf of a person subject to the MCA needs to be done in the persons 'best interests'. § 1(6) also requires that any decision taken in respect of someone whose mental capacity has been called into question but be taken 'in a way that is less restrictive of the person's rights and freedom of action'. The MCA also contains provisions that allow persons to advance plan in respect of decisions, should in the future they be considered to lack the capacity to make those decisions across different areas. The legal framework established by the MCA is supplemented by a code of practice.[15] Essentially, the code of practice provides guidance and information on the operation of the MCA. § 42 of the MCA placed a statutory obligation on the lord chancellor to produce a code of practice to guide the various persons with different duties and functions under the MCA.

§ 3 of the MCA relates to a person's inability to make decisions. The test set out in § 3(1) states that a person is unable to make a decision for themself if they are unable '(a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means)'. The MCA does contain requirements to consider support for the person in making decisions as part of the process for assessing their mental capacity. § 3(2) specifically requires

13 P. Bartlett, At the interface between paradigms: English mental capacity: Law and the CRPD, *Frontiers in Psychiatry*, 2020, vol. 11, at p. 4.

14 Ibid.

15 "Mental Capacity Act 2005: Code of Practice" (Department of Constitutional Affairs, Issued by the Lord Chancellor on 23 April 2007 in accordance with §§ 42 and 43 of the Act, 2007).

that '[a] person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means)'. § 3(3) also provides '[t]he fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision'. The provisions in §§ 3(2) and 3(3) align with the CRPD in requiring support to the person in determining whether they can make decisions for themselves. However, a key divergence with the requirements of Article 12 of the Convention is in respect of permitting a determination that a person lacks capacity to make a decision and to allow a substitute decision-maker to make decisions in the person's best interests.[16]

§ 4(4) of the MCA also requires that the process of making a decision in the persons best interest 'must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him'. The framing of 'best interests' does contain some positive elements. For example, the determination of the person's 'best interests' must include

> (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity), (b) the beliefs and values that would be likely to influence his decision if he had capacity, and (c) the other factors that he would be likely to consider if he were able to do so.[17]

Therefore, it is suggested that '[s]upport is . . . provided at all stages of the process, and there is a full chapter of the accompanying Code of Practice to the statute as to how to realize this'.[18] However, the centrality of substitute decision-making guided by the 'best interests' principle in the MCA means that the legislation falls short of the requirements of the CRPD, as is clear from the CRPD Committee's General Comment No. 1:

> Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the 'best interpretation of will and preferences' must replace the 'best interests' determinations. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The 'best interests' principle is not a safeguard which complies with article 12 in relation to adults. The 'will and preferences' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.[19]

The MCA clarified a number of legal gaps and updated the existing law and regulated substitute decision-making. The scope of the legislation as articulated in the explanatory note to the MCA states that the legislation governs decision-making where a person has either lost mental capacity at some point (EG as a result of dementia or brain injury) or

16 The provisions on "best interests" are set out in § 4 of the MCA.

17 See § 4(6.)

18 P. Bartlett, At the interface between paradigms: English mental capacity: Law and the CRPD, *Frontiers in Psychiatry*, 2020, vol. 11, at p. 4.

19 General Comment No. 1: Equal Recognition Before the Law (Article 12) (Geneva: UN Committee on the Rights of Persons with Disabilities, 11 April 2014), at para.21.

in circumstances where the lack of mental capacity has existed since birth.[20] The MCA covers a wide range of decisions, on personal welfare as well as financial matters and substitute decision-making by attorneys or court-appointed 'deputies', and clarifies the position where no such formal process has been adopted. The MCA includes rules that governs research involving people who are considered to lack capacity and provides for independent mental capacity advocates to represent and provide support in relation to certain decisions. The act provides recourse, where necessary, and at the appropriate level, to a court with power to deal with all personal welfare (including healthcare) and financial decisions on behalf of adults considered to lack capacity.[21]

Indeed, one of the significant developments introduced by the MCA was the creation of the Court of Protection (COP). The COP has the jurisdiction to consider cases relating to mental capacity, best interests and allied issues arising under the MCA. The jurisdiction to hear such matters before the MCA was vested within the High Court (health and welfare issues), and an office of the Supreme Court had the jurisdiction to consider property and other matters. The COP is dealt with under Part 2 of the MCA. The COP may sit at any place in England and Wales, on any day and at any time. The COP's are set out in the MCA, and it also has its own special court rules. The MCA confers the COP in the exercise of its jurisdiction the same powers, rights, privileges and authority as the High Court. The offices of the COP are based in London. Some matters under the MCA are required to be considered by the COP. For example, decisions regarding non-therapeutic sterilisation fall within the COP's jurisdiction.[22] The MCA provides that where conflict emerges in respect of a person's mental capacity or the expression of their best interests, then an application to the COP might be required in order to resolve the conflict. There has been criticism as to the implementation of the MCA.[23] The House of Lords in its 2014 Report emphasised the 'empowering ethos' underpinning the legislation. However, it acknowledged that there were failures in delivering upon the empowering ethos, realising the rights conferred by the act and the duties imposed by the legislation were are not widely followed.[24]

As mentioned, the scope of the legislation is in respect of adults. However, a court dealing with family proceedings or the COP can hear cases relating to persons aged 16 or 17 where a question arises as to their mental capacity to make decisions.[25] The COP can hear cases relating to persons under the age of 16 in certain circumstances. § 21 of the MCA provides that the COP can transfer cases relating to children to courts who have powers set out in the Children Act 1989.[26] Similarly, certain courts exercising their powers under the 1989 Act can transfer cases to the COP.

The European Court of Human Rights' judgment in *HL v the United Kingdom* found that English law governing deprivation of liberty of persons considered to lack mental

20 "Mental Capacity Act 2005: Code of Practice" (Department of Constitutional Affairs, Issued by the Lord Chancellor on 23 April 2007 in accordance with §§ 42 and 43 of the Act, 2007), at p. 1.

21 The Act replaces Part 7 of the Mental Health Act 1983 and the whole of the Enduring Powers of Attorney Act 1985. The MCA created a new Court of Protection with more comprehensive powers that its precursor.

22 See "Mental Capacity Act 2005: Code of Practice" (Department of Constitutional Affairs, Issued by the Lord Chancellor on 23 April 2007 in accordance with §§ 42 and 43 of the Act, 2007).

23 Mental Capacity Act 2005: post-legislative scrutiny, HL 139 (2014).

24 Ibid., 7.

25 "Mental Capacity Act 2005: Code of Practice" (Department of Constitutional Affairs, Issued by the Lord Chancellor on 23 April 2007 in accordance with §§ 42 and 43 of the Act, 2007), p. 139–140.

26 Ibid.

capacity was in breach of Article 5 of the European Convention on Human Rights.[27] The MCA as enacted did not contain any provisions that regulated the deprivation of liberty of persons such as the applicant in that particular case. The UK government subsequently amended the MCA by way of the Mental Health Act 2007. The 2007 Act introduced a system known as Deprivation of Liberty Safeguards (DoLS). DoLS essentially provided a framework for approving the deprivation of liberty of persons who have been assessed as lacking the mental capacity to consent to treatment in a hospital or care homes. Principally the DoLS framework provided for procedural protections in circumstances where deprivation of liberty issues arose. The provisions aligned with the approach in the MCA as it relates to mental capacity and the approach to 'best interests'. Subsequently the Law Commission published a report in March 2017, which was accompanied by a draft bill on DoLS. In its report the Law Commission made recommendations for the replacement of the DoLS framework with a new system called Liberty Protection Safeguards.

The Law Commission examiIed this issue as a result of the problems arising from the complex and excessively bureaucratic nature of the DoLS framework and the difficulties that arose in practice. In 2014 a House of Lords Select Committee published a detailed report on DoLS and concluded that the system was 'not fit for purpose' and recommended replacement of the system. The Law Commission published a report and draft bill recommending an overhaul of the DoLS process. It recommended that DoLS be replaced by a new scheme called the Liberty Protection Safeguards, which would streamline the process for approving a deprivation of liberty. Consequently, the United Kingdom government adopted those recommendations and enacted them by way of the Mental Capacity (Amendment) Act 2019.[28] Bartlett has noted that the government had initially adopted a more objective test of proportionality in the amending legislation but ultimately adopted an approach with more subjective elements that aligns with the best interests test provided for in the principal piece of legislation the MCA.[29]

3. Northern Ireland

The relevant legislation in place in Northern Ireland is the Mental Capacity Act (Northern Ireland) MCA (NI) 2016 (MCA (NI)), which received Royal Assent on the May 9, 2016. Despite the lengthy period required to develop and enact the MCA (NI), the legislation is not fully implemented and is being commenced at a glacial pace, on a phased basis.[30] Given the delayed implementation the pre-existing legislation, the Mental Health (NI) Order 1986 remains on the statute book and interfaces with the MCA (NI). This will remain the case until such time as the MCA (NI) is fully implemented and repeals the Mental Health (NI) Order 1986. Therefore, at the time of writing this chapter the two systems

27 Case 45508/99 *HL* v *the United Kingdom* (2005) 40 EHRR 32.

28 The implementation of the Liberty Protection Safeguards was delayed on the basis of COVID-19. The government commenced a 16-week public consultation on proposed changes in March 2022. The responses to this consultation were still under consideration by the UK government at the time of writing this chapter.

29 Peter, Bartlett "Re-thinking the Mental Capacity Act 2005: Towards the Next Generation of Law" 2022) 00(0) MLR 1–42 at page 4.

30 See The Mental Capacity (2016 Act) (Commencement No. 1) Order (Northern Ireland) 2019, 2019 No. 163 (C. 5), The Mental Capacity (Deprivation of Liberty) (No. 2) Regulations (Northern Ireland) 2019, The Mental Capacity (Research) Regulations (Northern Ireland) 2019, 2019 No. 193; and The Mental Capacity (Money and Valuables) Regulations (Northern Ireland) 2019.

continue to operate alongside each other. As will be discussed, the approach adopted in Northern Ireland is known as the 'fusion' approach, amalgamating mental health and mental capacity laws in a standalone piece of legislation. It has been suggested that the MCA (NI) represents 'an exciting and innovative development and there are substantial potential benefits, including the reduction of stigma, the protection of patient autonomy and the removal of confusing parallel mental health and mental capacity legislation'.[31] This approach diverges from the approaches adopted in England and Wales and Scotland and its compliance with Article 12 of the CRPD will be considered.

3.1 Background to the MCA (NI)

Like the law reform process in England and Wales, the journey to the enactment of the MCA (NI) has taken a long and winding path. One of the main drivers for law reform in Northern Ireland was recognition that it was out of step with the developments in the other jurisdictions of the UK (namely, England, Wales, and Scotland). Therefore, the Department of Health for Northern Ireland commissioned a number of studies and reports into this area of law and corresponding areas of 'mental health' and 'learning disability service delivery'. A report published in 2007, marked the culmination of this lengthy review process and the Report made recommendations that ultimately informed the MCA (NI).[32] This review process is known as the Bamford Review. One of the key recommendations from the report of the Bamford Review was the creation of 'a single comprehensive legislative framework for the reform of mental health legislation and for the introduction of capacity legislation in Northern Ireland'.[33] The rationale for this recommendation was that such an approach would support a reduction in stigma and prejudicial attitudes directed towards having separate mental health legislation, while simultaneously augmenting protections for persons considered to lack capacity and support them to make legally effective decisions relating to mental or physical health, personal welfare or financial decisions.[34] The Bamford Review identified that confusion arose as a result of having legislation covering mental illness and another piece of legislation covering mental capacity.[35] Therefore, it considered it desirable for

> one law for decisions about physical illness and another for mental illness is anomalous, confusing and unjust . . . the Review considers that Northern Ireland should take steps to avoid the discrimination, confusion and gaps created by separately devising two separate statutory approaches, but should rather look to creating a comprehensive legislative framework which would be truly principles-based and non-discriminatory.[36]

31 G. Lynch, C. Taggart, P. Campbell, Mental capacity act (Northern Ireland) 2016, *BJPsych Bulletin*, 2017, vol. 41, no. 6, pp. 353–357 at p. 357.

32 "A comprehensive legislative framework: the Bamford Review of Mental Health and Learning Disability (Northern Ireland)" Bamford Review of Mental Health and Learning Disability, Belfast, 2007.

33 Ibid.

34 Ibid.

35 Legal Issues Committee (2007) A Comprehensive Legislative Framework. Belfast: Bamford Review of Mental Health and Learning Disability (Northern Ireland) at page 36.

36 Ibid.

It is of note that the recommendations of the Bamford Review encompassed persons subject to the criminal justice system in Northern Ireland, which will be discussed further here.

The approach adopted in Northern Ireland is referred to in the literature as the 'fusion' or 'fused' approach as it brings together mental health and mental capacity laws together into a standalone piece of legislation.[37] Proponents of the fusion approach to mental health and capacity law suggest that it can enhance the rights of persons subject to the legislation and aligns better with the obligations arising from international human rights law, including the CRPD. However, the approach has proven controversial with many commentators critiquing the approach from a variety of different perspectives. As Campbell and Rix point out the 'fusion' model has been proposed and rejected in other jurisdictions of the United Kingdom.[38]

3.2 An overview of the MCA (NI)

Northern Ireland was the last jurisdiction in the United Kingdom to enact updated legislation regulating the area of mental capacity as it relates to health and welfare decision-making. Like the corresponding legislation in England and Wales, the Northern Ireland legislation provides for a presumption of capacity in respect of adults (persons aged 16 and over). The legislation also provides for a test of incapacity. In the context of medical decision-making, it provides for the 'doctrine of necessity'.[39]

While one of the purported benefits of the fusion approach is to reduce confusion and complexities in the legislation, the MCA (NI) nonetheless is a comprehensive and highly complex statute. Part 1 of the act sets out the key principles underpinning the legislation. These principles codify and expand the common law presumption of capacity of persons aged 16 and above. In addition, the principle of 'best interests' is placed on a statutory footing. Importantly, the provisions on the presumption of capacity and the 'best interests' principles place a premium on the need to support persons subject to the legislation to exercise their legal capacity and engage in decision-making. This is considered to be an improvement on the provisions that applied before the enactment of the MCA (NI). The legislation retains substitute decision-making, which applies in circumstances where a person is considered to lack the mental capacity to make a specific decision at a particular time.

The provisions of the MCA (NI) are set out in 15 parts consisting of 308 sections in total. In addition, there are 11 schedules accompanying the legislation. As mentioned, Part 1 of the MCA (NI) emphasises the key principles underpinning the legislation. The principles place on a statutory basis the common law presumption of capacity and the requirement that decisions made by a third party for a person considered to lack mental capacity need to be done in the person's 'best interests'. Part 1 of the MCA (NI) also seeks to recognise the obligations arising from the UK's ratification of the CRPD (which happened after the Bamford Review). In that regard, there is recognition of the need to take measures to support persons subject to the legislation to make decisions for themselves.

37 See G. Davidson, T. Adell, A. Morrison, The development of a non-discriminatory alternative to mental health law, the Mental Capacity Act (Northern Ireland) 2016, *Journal of Elder Law and Capacity*, 2020, vol. 2020, no. 1, pp. 68–78.

38 See P. Campbell, K. Rix, Fusion legislation and forensic psychiatry: The criminal justice provisions of the Mental Capacity Act (Northern Ireland) 2016, *BJPsych Advances*, 2018, vol. 24, no. 3, pp. 195–203.

39 See Mental Capacity Act (Northern Ireland) 2016: Explanatory Notes, Belfast, 2016.

As mentioned, Part 2 places the common law 'doctrine of necessity' on a statutory basis. The placing of the doctrine of necessity on a statutory basis was considered essential to address the concerns of persons who provide services and support to persons whose decision-making is called into question.[40] The rationale for this provision is that it insulates third parties from both civil and criminal liability when making decisions on behalf of a person. It is subject to the requirement that this protection is only available when that third party makes the decision in the person's best interests.[41] There are additional safeguards provided for in Part 2 of the MCA (NI). The legislation provides that where the intervention in respect of the person considered to lack capacity is more significant, the greater level of safeguards apply.[42] Before an intervention takes place, it has to be established that the person lacks the mental capacity and that the intervention by the third party has to be in that persons best interests. Therefore, the requirement to undertake a formal assessment of the relevant person's mental capacity and to appoint and consult with a nominated person are core safeguards.[43]

A further safeguard is the requirement for a second opinion with regard to serious medical treatments. Authorisation by a 'health and social care trust' panel and the obligation to appoint and consult with an independent mental capacity advocate are further safeguards that apply for the most significant interventions. These interventions include mandatory serious treatment and detention that constitutes a deprivation of liberty. The legislation also provides an additional safeguard in the form of a right to seek a review by a tribunal to review an authorisation made by a health and social care trust. Part 3 of the MCA (NI) contains provisions in respect of nominated persons. A nominated person is chosen by the person subject to the legislation if they are considered to have the mental capacity to make that choice. The nominated person could be any person, but it is envisaged that they will often be a friend or family member. Part 2 regulates their appointment and revocation, the default mechanism and the tribunal's powers to appoint or disqualify nominated persons. Part 4 of the MCA (NI) creates a new independent advocacy safeguard. Health and social care trusts are under a statutory obligation to ensure that independent mental capacity advocates are available when required under Part 2 of the legislation. Part 4 also outlines the procedures for the instruction advocates to act. Part 5 of the legislation provides for a new power of attorney system, which is called the lasting power of attorney.

Part 6 of the MCA (NI) sets out the powers of the High Court in respect of making decisions and the appointment 'deputies' for persons considered to lack capacity to make decisions in respect of their care, treatment, personal welfare or their property and affairs. Part 7 of the legislation provides for the establishment of a public guardian and sets out their functions. The legislation requires different stakeholders to notify the public guardian of certain circumstances in respect of a person subject to the act. Part 5 further makes provision for the appointment of court visitors. A court visitor has the power to visit the person subject to the legislation, interview that person and request the production of health and allied records relating to that person.

40 Ibid.
41 Ibid.
42 Ibid., 3.
43 Ibid.

The MCA (NI) does not apply to persons aged under the age of 16.[44] The rationale for this is rooted in the common law doctrine that presumes that adults have the mental capacity. The new legislation is supplemented by the Children (Northern Ireland) Order 1995 in respect of persons aged between 16 and 17 years of age. The 1995 Order provides additional safeguards in respect of 16- and 17-year-olds. However, the exclusion of persons under the age of 16 from the new legislation has been controversial. Harper, Davidson and McClelland have observed that '[i]n many ways the legal situation of younger children has not yet received the attention it deserves in discussions of the fusion approach to mental health law'.[45]

One of the notable features of the MCA (NI) is that its provisions extend to cover persons detained as forensic 'patients'.[46] Part 10 of the legislation contains the provisions relating to the criminal justice system, which include remand in hospital, powers of the Court on Conviction, detention under a public protection order, detention under a hospital direction, unfitness to be tried, transfer from prison to hospital, rights of review for detention under Part 10, and provisions on information, appeals and other procedural matters. Under Part 10, a person can be involuntarily detained on the basis of perceived 'mental impairment' and 'risk to others'; this is an exception to the rest of the legislation, which, as discussed, is rooted on assessments of capacity.[47] However, § 171(1)(c) provides that a decision as to the administration of treatment for a person detained under a 'public protection order' is decided in the same manner as if the person were not subject to such an order.

3.3 The fusion model

The leading proponents of the fusion approach have described the MCA (NI) as 'cleav[ing] quite closely to the "fusion" model . . . an important new development in health law'.[48] Champions of the fusion model argue for a law that applies to all persons who are considered unable to make important decision for themselves, irrespective of the reason for that 'inability'.[49] The main thrust of the argument for this approach is that it reduces or eliminates discrimination in respect of the persons subject to the legislation. Therefore, one of the main aims of the fusion approach is to eliminate discrimination against persons

44 For a discussion on this and some of the controversary relating to these provisions see G. Lynch, C. Taggart, P. Campbell, Mental capacity act (Northern Ireland) 2016, *BJPsych Bulletin*, 2017, vol. 41, no. 6, pp. 353–357 at p. 355.

45 C. Harper, G. Davidson, R. McClelland, No longer 'anomalous, confusing and unjust': The Mental Capacity Act (Northern Ireland) 2016, *International Journal of Mental Health and Capacity Law*, 2016, vol. 22, pp. 57–70, at p. 67.

46 For a discussion on this see J. Dawson, G. Szmukler, The 'fusion law' proposals and the CRPD, in: *Mental health, legal capacity, and human rights*, ed. M. Stein, F. Mahomed, V. Patel, C. Sunkel, Cambridge University Press, Cambridge, 2021, pp. 95–108; P. Campbell, K. Rix, Fusion legislation and forensic psychiatry: The criminal justice provisions of the Mental Capacity Act (Northern Ireland) 2016, *BJPsych Advances*, 2018, vol. 24, no. 3, pp. 195–203.

47 See J. Dawson, G. Szmukler, The 'fusion law' proposals and the CRPD, in: *Mental health, legal capacity, and human rights*, ed. M. Stein, F. Mahomed, V. Patel, C. Sunkel, Cambridge University Press, Cambridge, 2021, pp. 95–108 at page 107.

48 Ibid., at p. 107.

49 Ibid.

with a 'mental health disability', through fostering respect for the person's dignity.[50] It is suggested that an appropriate 'capacity' criterion is not discriminatory provided 'certain strict conditions are met' and that it can mean that the domestic law complies with international human rights law.[51] However, some commentators have expressed concern about the fusion approach and the potential that the assessment of whether the person has 'functional capacity' to understand and appreciate the nature and consequences in their decision-making can be excessively flexible, resulting in the erosion of the persons rights.[52]

Under the MCA (NI) non-consensual treatment for both mental or physical medical conditions is decided on the basis of the person's perceived incapacity to consent in conjunction with acting in person's 'best interests'.[53] Unlike other jurisdictions the non-consensual treatment of the person is not based on factors such as mental disorder or risk.[54] The MCA (NI) does however require that support has to be provided to the person to make the decision for themselves before a determination of a lack of capacity is made. § 1(4) requires that '[t]he person is not to be treated as unable to make a decision for himself or herself about the matter unless all practicable help and support to enable the person to make a decision about the matter have been given without success'. § 1(5) further requires that '[t]he person is not to be treated as unable to make a decision for himself or herself about the matter merely because the person makes an unwise decision'. An approach that is similar to that in the corresponding legislation in England and Wales.

Proponents of the fusion model, such as the one adopted in Northern Ireland, dispute the interpretation of the CRPD as outlined by the CRPD Committee in General Comment No. 1.[55] However, it is noteworthy that the fusion model predates the development of the CRPD and the jurisprudence that has emerged on legal capacity (Article 12) and the right to liberty (Article 14). The discourse surrounding the review of mental health and capacity law in Northern Ireland also precedes the drafting and entry into force of the CRPD. As such, the CRPD did not form an important aspect of the initial law reform dialogue on the development of the legislation.[56] However, some commentators have suggested that the CRPD became more important and prominent in development of the new legislation for Northern Ireland.[57]

Some supporters of the fusion approach have pointed to some of the conflicting interpretations of the relevant international human rights law in this area as a means of supporting their proposals for law reform.[58] For example, Szmukler has pointed to the statements

50 Ibid.

51 Ibid.

52 See P. Bartlett, A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention, *International Journal of Human Rights*, 2012, vol. 16, no. 6; Eilionoir Flynn, Mental (in)capacity or legal capacity? A human rights analysis of the proposed fusion of mental health and mental capacity law in Northern Ireland, *NILQ*, 2020, vol. 64, no. 4, pp. 485–505.

53 Ibid.

54 Ibid.

55 See General Comment No. 1: Equal Recognition Before the Law (Article 12) (Geneva: UN Committee on the Rights of Persons with Disabilities, 11 April 2014).

56 See Eilionoir Flynn, Mental (in)capacity or legal capacity? A human rights analysis of the proposed fusion of mental health and mental capacity law in Northern Ireland, *NILQ*, 2020, vol. 64, no. 4, pp. 485–505, at p. 496.

57 Ibid.

58 See George Szmukler, "Capacity", "best interests", "will and preferences" and the UN Convention on the rights of persons with disabilities, *World Psychiatry*, 2019, vol. 18, no. 1, pp. 34–41.

of other UN human rights bodies, such as the UN Human Rights Committee and the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which differ and diverge from the jurisprudence of the CRPD Committee.[59] Notwithstanding, the different interpretations the fusion model does not achieve compliance with Article 12 of the CRPD and the requirement for state parties to ensure that their domestic law ensures that persons with disabilities can exercise of their legal capacity on an equal basis with others.

The Essex Autonomy Project commenting on the MCA (NI) when it was a bill described it as a 'pioneering piece of legislation'.[60] However, the centrality of substitute decision-making and the 'best interests' principle underpinning the legislation means that the MCA (NI) requires significant amendment if it is to comply with Article 12 of the CRPD. The CRPD Committee have been clear as to what is required by Article 12 of the CRPD:

> State parties must holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others. Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.[61]

It is clear that the model developed in Northern Ireland while adopting a different approach to the other jurisdictions of the United Kingdom does not comply with Article 12 and allied articles in the CRPD.

4. The United Kingdom of Great Britain and Northern Ireland, state reporting and the CRPD's concluding observations

The UK signed the CRPD on March 30, 2007, and ratified shortly thereafter on June 8, 2009, and subsequently signed the Optional Protocol to the CRPD on February 26, 2009, and ratified it on August 7, 2009. The United Kingdom entered a reservation in respect of Article 12(4) of the CRPD at the time of ratification. However, it is important to note that this was not a reservation as to the substantive provisions contained in Article 12 of the CRPD. The rationale for this reservation was that the United Kingdom government was of the view that the system in place for appointing third persons to collect social security on behalf of a person with a disability was not consistent with the CRPD. Once this matter was addressed, the United Kingdom withdrew this reservation.[62]

In 2017 the CRPD Committee published its first report on the UK's application of the CRPD to domestic law and policy. The Committee's report was highly critical of a

59 Ibid.

60 See W. Martin, S. Michalowski, J. Stavert, A. Ward, A. Keene, C. Caughey, A. Hempsey, R. McGregor, Three jurisdictions report: Towards compliance with CRPD Art. 12 in capacity/incapacity legislation across the UK, *Essex Autonomy Project*, June 6, 2016. Ibid., 51.

61 General Comment No. 1: Equal Recognition Before the Law (Article 12) (UN Committee on the Rights of Persons with Disabilities, Geneva, April 11, 2014).

62 The United Kingdom withdrew this reservation, as a result of adopting a new procedure to manage this process in 2011.

number of areas of government policy. In respect of the United Kingdom's domestic laws on mental capacity, it was not surprising that the Committee expressed its concern about the legislation across the different jurisdictions. The Committee noted that the domestic laws restricted the legal capacity of persons with disabilities based on actual or perceived impairment. The Committee was critical of the 'prevalence of substituted decision-making in legislation and in practice, and the lack of full recognition of the right to individualized supported decision-making that fully respects the autonomy, will and preferences of persons with disabilities'.[63] The Committee further highlighted the insufficient support to all asylum seekers and refugees with psychosocial and/or intellectual disabilities in exercising their legal capacity. The Committee also focused on the research that reports that a higher number of black people with disabilities are compulsorily detained and treated against their will in the United Kingdom.[64] In respect of the United Kingdom's compliance with Article 12 the Committee recommended that the United Kingdom should closely consult with organisations of persons with disabilities, including those representing persons from black and minority ethnic groups and in line with the Committee's General Comment No. 1 (2014) on equal recognition before the law.[65] The Committee, in accordance with its existing jurisprudence, recommended the abolition all forms of substituted decision-making concerning all spheres and areas of life by reviewing and adopting new legislation in accordance with the Convention to initiate new policies in both mental capacity and mental health laws.[66] In addition, the Committee advised the UK to step up efforts to foster research, data and good practices and speed up the development of supported decision-making regimes.

The United Kingdom's next State Party Report is due in July 2023, and it remains to be seen how the government will frame its response to the criticisms and recommendations contained in the Committee's concluding observations on its divergence from the requirements contained in Article 12. The existing legislation in place in England and Wales and in Northern Ireland has not been reformed in order to implement the Committee's recommendations in the intervening period.

5. Conclusions

The development of the MCA in England and Wales in 2005 was seen as a milestone in the development of modern guardianship legislation that better recognised the rights of persons subject to its provisions. However, the human rights landscape has changed radically since the Law Commission completed its work on this area in the 1990s, which was subsequently enacted as the MCA. The MCA can no longer be considered international best practice and its deficits are increasingly apparent. It is clear that the MCA needs to be significantly amended in order to embed supported decision-making and comply with Article 12 of the CRPD. The fusion approach to mental capacity legislation that has emerged in Northern Ireland is an experimental law reform project. The approach in Northern Ireland differs from the approaches in other jurisdictions of the United Kingdom. The MCA

63 "Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland" (Geneva: Committee on the Rights of Persons with Disabilities, 3 October 2017), at para. 30.

64 Ibid.

65 Ibid., para. 31.

66 Ibid.

(NI) places the impairment of mental capacity and the requirement to act in the persons best interests at the centre of the new system. While some commentators argue that the MCA (NI) better aligns with the requirements of Article 12 of the CRPD, it is clear that it falls short of what is required. While there has been broad support for experimental fusion regime within Northern Ireland, the delayed implementation is regrettable. The excitement surrounding the MCA (NI) and the enthusiasm for its 'innovative' approach has been dampened by the delayed implementation and the inability to assess how it operates in practice. Given the complexity of the legislation, the delayed implementation and its divergence from the requirements of the CRPD it is hard to accept that the approach in Northern Ireland is a CRPD compliant one. The requirements of the CRPD and the jurisprudence of the CRPD Committee in interpreting Article 12 and allied rights provides a benchmark against which the legislation in England and Wales and Northern Ireland can be measured. It is clear that the provisions contained in the MCA and MCA (NI) fall short of the requirements of the CRPD.

29 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Venezuela

Patricia Leal Barros

Introduction

The UN Convention on the Rights of Persons with Disabilities (hereinafter referred to as 'the Convention') is a normative body that contemplates a series of rights for people with disabilities. Some of these rights have not been expressed explicitly in many legal systems. In the case of the Venezuelan legal system the equality of the law for all people, not being able to be discriminated against for reasons of sex, race, ideology, etc. is provided in the Venezuelan Constitution.

Then in 2007 the state promulgated the Venezuelan Law for People with Disabilities (hereinafter referred to as 'the LPCD')[1] in which it explicitly establishes a series of social, economic and labour rights that until now had not been duly contemplated for people with disabilities.

The Article 12 of the Convention regulates the issue of the capacity of people with disabilities, considering that they enjoy the same active legal capacity (negotiating capacity) as well as passive legal capacity (being subjects of rights and obligations). Within the Venezuelan legal system, the Venezuelan Law for Persons with Disabilities does not regulate the issue of the active legal capacity of persons with disabilities. In fact, the Venezuelan state, upon adhering to the Convention, made a declaration in which it maintains,

> The Bolivarian Republic of Venezuela reaffirms its absolute determination to guarantee the rights and protect the dignity of persons with disabilities. Accordingly, it declares that it interprets paragraph 2 of Article 12 of the Convention to mean that in the case of conflict between that paragraph and any provisions in Venezuelan legislation, the provisions that guarantee the greatest legal protection to persons with disabilities, while ensuring their well-being and integral development, without discrimination, shall apply.

This issue continues to be dealt with by the Venezuelan Civil Code (hereinafter referred to as 'the CC' or 'the Civil Code'),[2] which was enacted in 1982. Therefore, this issue finds some shortcomings as a result of its old date. This work will talk about the capacity of people with disabilities in the Venezuelan legal system, mainly contemplated in the light of Venezuelan Civil Code.

1 Promulgated in the Official Gazette No. 38,598. Caracas, Friday January 5, 2007.
2 Promulgated in the Extraordinary Official Gazette No. 2990, Caracas, July 26, 1982.

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1. A concept of active legal capacity in a country law – introductory remarks

When speaking of capacity, Venezuelan doctrine distinguishes between legal capacity *sensu largo* or passive legal capacity (legal capacity *sensu stricto*) and active legal capacity (capacity to do legal acts or exercise rights). Legal capacity 'is essential to the person, given that we cannot conceive of a person devoid of legal capacity, acquiring such a general possibility from the moment we are born alive, disappearing only when the person dies'.[3] Furthermore, legal capacity conforms the aptitude (legal) of the subjects of law for appropriation anything what is desired by them, insofar as this aptitude affects their own legal spheres, since legal capacity can only be manifested by the subject who enjoys it, never by a third party.[4]

The active legal capacity then comes to complement the legal capacity *sensu largo*. This general capacity to act

> consists of the ability of that person to carry out acts provided with legal effectiveness, while the special [capacity to act] would be the performance – with legal effectiveness – of a specific act. Consequently, the capacity to act (or to exercise) of the person must be qualified as a legal quality of that person that affects each of his acts.[5]

The lack of one of these elements prevents a subject of law from exercising his own capacity, since they are based on the 'natural capacity' which is a necessary, factual framework needed to materialise his legal capacity. Thus, for example, the adult – being 18 years old – has the legal capacity to act on his own, but if he suffers from mental weakness, which affects his understanding, the performance of an act by itself does not have legal effectiveness, since their reasoning capacity is lacking.[6]

Following what is established in articles 16 and 18 of the CC,[7] we can say that the active legal capacity constitutes the rule and disabilities might be causes for the exceptions to this rule. This implies that every natural person as a subject of law, at birth and born alive, is provided with a legal capacity and the limitations to the active aspect of a legal capacity are exceptional and must be expressly prescribed by law.[8]

The LPCD defines in article 5 disability as

> the complex condition of the human being constituted by biopsychosocial factors, which shows a decrease or temporary or permanent suppression of any of their sensory, motor or intellectual abilities that may manifest itself in absences, anomalies, defects, losses or difficulties in perceiving, moving around without support, seeing or hearing,

3 La Roche, Alberto José. Civil Law I. Second edition. Goals Editorial, Maracaibo, 1984, p. 66.
4 La Roche, Alberto José. Civil Law I. Second edition. Goals Editorial, Maracaibo, 1984, p. 66
5 Cf.: La Roche, Alberto José. Civil Law I. Second edition. Goals Editorial, Maracaibo, 1984, p. 67
6 La Roche, Alberto José. Civil Law I. Second edition. Goals Editorial, Maracaibo, 1984, p. 67
7 Article 16 of the CC establishes, 'All individuals of the human species are natural persons'. And article 18 of the CC establishes, 'Anyone who has reached eighteen (18) years of age is of a legal age. The adult is capable for all acts of civil life, with the exceptions established by special provisions'. The author's translation.
8 La Roche, Alberto José. Civil Law I. Second edition. Goals Editorial, Maracaibo, 1984, p. 68

communicating with others, or integrating into educational activities or work, in the family with the community, that limit the exercise of rights, social participation and the enjoyment of a good quality of life, or prevent the active participation of people in the activities of family and social life, without this necessarily implies incapacity or inability to insert themselves socially.[9]

In the following article 6, the LPCD defines people with disabilities in these terms:

are all those people who, due to congenital or acquired causes, present some impairments or absence of their physical, mental, intellectual, sensory capacities or combinations of them; of a temporary, permanent or intermittent nature, which, when interacting with various barriers, imply disadvantages that hinder or prevent their participation, inclusion and integration into family and social life, as well as the full exercise of their human rights on equal terms with others. The following are recognized as persons with disabilities: deaf, blind, deafblind, those with visual, auditory, intellectual, motor impairments of any kind, alterations in integration and cognitive capacity, short stature, autistic and with any combinations of some of the impairments or absences mentioned, and those who suffer from a disabling disease or disorder, scientifically, technically and professionally qualified according to the International Classification of Functioning, Disability and Health of the World Health Organization.[10]

9 *'Art. 5: Se entiende por discapacidad la condición compleja del ser humano constituida por factores biopsicosociales, que evidencia una disminución o supresión temporal o permanente, de alguna de sus capacidades sensoriales, motrices o intelectuales que puede manifestarse en ausencias, anomalías, defectos, pérdidas o dificultades para percibir, desplazarse sin apoyo, ver u oír, comunicarse con otros, o integrarse a las actividades de educación o trabajo, en la familia con la comunidad, que limitan el ejercicio de derechos, la participación social y el disfrute de una buena calidad de vida, o impiden la participación activa de las personas en las actividades de la vida familiar y social, sin que ello implique necesariamente incapacidad o inhabilidad para insertarse socialmente'* (original language), Law for people with disabilities, Official Gazette No. 38.598, January 5, 2007.

10 *'Art. 6: son todas aquellas personas que por causas congénitas o adquiridas presenten alguna disfunción o ausencia de sus capacidades de orden físico, mental, intelectual, sensorial o combinaciones de ellas; de carácter temporal, permanente o intermitente, que al interactuar con diversas barreras le impliquen desventajas que dificultan o impidan su participación, inclusión e integración a la vida familiar y social, así como el ejercicio pleno de sus derechos humanos en igualdad de condiciones con los demás. Se reconocen como personas con discapacidad: Las sordas, las ciegas, las sordociegas, las que tienen disfunciones visuales, auditivas, intelectuales, motoras de cualquier tipo, alteraciones de la integración y la capacidad cognoscitiva, las de baja talla, las autistas y con cualesquiera combinaciones de algunas de las disfunciones o ausencias mencionadas, y quienes padezcan alguna enfermedad o trastorno discapacitante, científica, técnica y profesionalmente calificadas, de acuerdo con la Clasificación Internacional del Funcionamiento, la Discapacidad y la Salud de la Organización Mundial de la Salud'* (original language), Law for people with disabilities, Official Gazette No. 38.598, January 5, 2007.

2. Private law regulation of active legal capacity and its amendments adopted in the course of implementing of Article 12 of the UN Convention on the Rights of Persons with Disabilities

A. Active legal capacity of people with disabilities in the Venezuelan legal system

The Constitution in its article 21 establishes the equality of all before the law, without discrimination on grounds of race, religion or social condition.[11] For its part, article 81 *ejusdem* recognises people with disabilities, highlighting the right to the full exercise of all their capacities.[12]

At the same time, the Organic Law for the Protection of Children and Adolescents (LOPNNA for his acronym in Spanish), establishes in its article 3 the principle of equality and non-discrimination, which consists in that its provisions apply equally to all children and adolescents, without any discrimination based on race, color, sex, age, language, thought, conscience, religion, beliefs, culture, political or other opinion, economic or social position, ethnic or national origin, disability, illness, birth or any other condition of children or adolescents, of their father, mother, representative or person in charge, or of their relatives.[13]

In Venezuela, all people with disabilities have a legal capacity *sensu largo*. It means that they can be holders of rights and exercise them on their own and only in cases of serious intellectual or mental disability they have to act through a guardian in order to exercise their active legal capacity. In Venezuela the Civil Code is the legal body that governs the issue of capacity. People with disabilities other than mental or intellectual, enjoy the full active legal capacity without any limitation. The CC limits the active legal capacity only of people with intellectual or mental disabilities. Two procedures are established to regulate

11 *'Art. 21 All persons are equal before the law; in consequence:*

1. *Discriminations based on race, sex, creed, social condition or those that, in general, have as their object or result the nullification or impairment of the recognition, enjoyment or exercise under conditions of equality, of rights will not be allowed. and freedoms of every person.*
2. *The law shall guarantee the legal and administrative conditions so that equality before the law is real and effective; adopt positive measures in favor of people or groups that may be discriminated against, marginalized or vulnerable; It will especially protect those people who, due to any of the conditions specified above, are in circumstances of manifest weakness and will punish the abuses or mistreatments that are committed against them.*
3. *Only the official treatment of citizen will be given; except for diplomatic formulas.*
4. *No noble titles or hereditary distinctions are recognized.*' Constitution of the Bolivarian Republic of Venezuela, Extraordinary Official Gazette No. 5453, Caracas, Friday, March 24, 2000.

12 *'Art. 81 Every person with a disability or special needs has the right to the full and autonomous exercise of their capacities and to their family and community integration. The State, with the joint participation of families and society, will guarantee respect for their human dignity, equal opportunities, satisfactory working conditions, and promote their education, training and access to employment in accordance with their conditions, in accordance with the law. Deaf or dumb people are recognized the right to express themselves and communicate through the Venezuelan sign language'.* Constitution of the Bolivarian Republic of Venezuela, Extraordinary Official Gazette No. 5453, Caracas, Friday, March 24, 2000. This article is in accordance with the provisions of the Law for people with disabilities.

13 *'Artículo 3. Principio de igualdad y no discriminación: Las disposiciones de esta Ley se aplican por igual a todos los niños, niñas y adolescentes, sin discriminación alguna fundada en motivos de raza, color, sexo, edad, idioma, pensamiento, conciencia, religión, creencias, cultura, opinión política o de otra índole, posición económica, origen social, étnico o nacional, discapacidad, enfermedad, nacimiento o cualquier otra condición de los niños, niñas o adolescentes, de su padre, madre, representante o responsable, o de sus familiares'* (original language), Organic Law for the protection of children and adolescents, Extraordinary Official Gazette No. 5859, of December 10th, 2007.

the active legal capacity of people with mental or intellectual disabilities. The first of them is the Interdiction Regime which operates in the cases of people with serious mental or intellectual disabilities or the active legal capacity is limited by the court for any reason provided by law (for example, serious mental illness, like Alzheimer's) other than serious mental or intellectual disability. As a result, the interdicted person is incapacitated fully, generally and uniformly for indefinite period of time.

The second procedure is the disqualification regime, which consists of a limited deprivation of active legal capacity due to a condition of intellectual disability that is not so serious as to cause the interdiction or in cases of prodigality. The disqualification can be general or partial. If a person is disqualified in general it means that she cannot effect any act that exceeds mere administration. If a person is disqualified it means that she is prevented from transferring, encumbering or mortgaging her assets, allowing other acts of administration and disposition.

In summary, the interdiction regime totally deprives from the active legal capacity, and the disqualification regime is connected only with limitations on the active legal capacity. In the case of disqualification, the judge will be able to assess the degree of incapacitation required by the individual and, consequently, will be empowered to determine the scope of limitations suitable for each disqualified person. That is why the disqualification regime is adaptable to each individual case.[14] The rules that regulate interdiction and disqualification belong to the legal norms of public order, so they cannot be modified or excluded between the parties in a contract.[15] We will delve into these regimes in successive points.

B. Incapacitation of a natural and legal origin

The legislator differentiates between natural incapacity and that which is of a legal origin. The naturally disabled persons are minors and people with intellectual disabilities but who have not yet been declared legally incapable. Therefore, they are naturally incapable but legally capable. However, if a given legal act is affected by a person incapable naturally, the act is ineffective because of the absence of a consent (absence the relevant declaration of will).

As regards incapacity of minors, the law follows an objective criterion, easy to prove, such as minority (not having reached the age of 18). As regards incapacity of interdicted or disqualified, the law follows the objective criterion of the sentence that declared a given person interdicted or disqualified. For example, the minor may have sufficient intellectual maturity or the interdicted/disqualified may have lucid intervals, but this does not confer to them active legal capacity. Natural incapacity may exist without legal incapacity: for example, the case of the person with serious mental disability who has not been declared interdicted. In this case, more than a situation of incapacity, we are faced with an absence of consent or even any declaration of will because someone who has no discernment cannot

14 INITIAL REPORT OF THE INTERNATIONAL CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES. PRESENTED BY THE BOLIVARIAN REPUBLIC OF VENEZUELA, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fVEN%2f1&Lang=es, accessed on: April 27, 2021, pp. 15 y 16.

15 INITIAL REPORT OF THE INTERNATIONAL CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES. PRESENTED BY THE BOLIVARIAN REPUBLIC OF VENEZUELA, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fVEN%2f1&Lang=es, accessed on: April 27, 2021, pp. 15 y 16.

give free consent/any declaration of will. It should be noted that the effects of legal incapacity can be extended to acts held prior to the interdiction when it is shown that the cause of the interdiction existed at the time when a given legal act was effected (art. 405 of the CC[16]) 'or when the proof of mental derangement results from the act that is challenged' (art. 406 of the CC[17]). A contract concluded prior to the interdiction may be challenged also in the event that the person with a serious and habitual mental defect has died[18] and the process for interdiction began before she passed away.

Regardless of the reason for incapacitation are of natural or legal origins, the incapacitated persons cannot effect any legal acts on their own. They must be represented by a person who acts on their behalf or they have to follow the assistance and authorisation regimes. In assistance and authorisation regimes, the person who provides the assistance does not replace the incapacitated person but assists her or completes her personality, having the power to approve or not a contract concluded by the incapacitated person, who retains the initiative by shaping and concluding a contract.[19]

The incapacitated persons can be held liable within the *ex delicto* liability regime for torts based on fault when they act with discernment, regardless of age, or intellectual defect that they present (art. 1186 CC). Tort liability based on fault can be established as long as there is discernment at the time of the wrongful act. However, as regards contractual liability (liability *ex contractu*), the legislator is stricter. The liability within *ex contractu* regime is not dependent on the natural capacity of a debtor but rather on objective and formal criteria, such as minority, interdiction or disqualification. The minor, the interdicted and the disqualified person can never accept their contractual liability by virtue of a contractual relationship, because, due to those objective circumstances, they are considered incapable.[20]

C. Protection regimes for people with general or partial mental disability

As it was mentioned, in the Venezuelan legal system, there are two protection regimes which can be applied to the persons with disabilities: interdiction (art. 393 to 408 of the CC) and disqualification (art. 409 to 412 of the CC). The interdiction regime is applicable in case of serious intellectual disability (art. 393 of the CC) even if lucid intervals take place from time to time. The disqualification regime is applied when the intellectual disability is not so serious that it gives rise to the interdiction and in the case of the prodigal. In these cases, the disqualified person is partially deprived of her capacity to act as established in article 409 of the CC. The disqualified person is not deprived of performing acts

16 Article 405 CC states, 'The acts prior to the interdiction may be annulled, if it is evidently proven that the cause of the interdiction existed at the time of the celebration of said acts, or provided that the nature of the contract causes that the serious damage results or may result there from to the interdict, or any other circumstance, demonstrate the bad faith of the one who contracted with the interdict'. The author's translation.

17 Article 406 CC establishes, 'After the death of a person, his acts may not be challenged due to a defect in his intellectual faculties, but only when the interdiction has been promoted before his death, or when proof of mental alienation results from the act itself that is challenged'. The author's translation.

18 Maduro Luyando, Eloy y Pittier Sucre, Emilio. *Obligations Course, Civil Law III*. Tomo II. 24ª reprint, Universidad Católica Andrés Bello, Caracas, 2011, p. 600.

19 Maduro Luyando, Eloy y Pittier Sucre, Emilio. *Obligations Course, Civil Law III*. Tomo II. 24ª reprint, Universidad Católica Andrés Bello, Caracas, 2011, p. 601.

20 Maduro Luyando, Eloy y Pittier Sucre, Emilio. Obligations Course, Civil Law III. Tomo II. 24ª reprint, Universidad Católica Andrés Bello, Caracas, 2011, p. 606.

concerning the simple administration. However, a judge may extend the inability, restricting acts of simple administration if is required for protection of a disqualified person.

As we can see, the main difference between interdiction and disqualification is the degree of mental incapacity and the degree of active legal capacity which a person in question has after she is interdicted or disqualified. Namely, in the interdiction the interdicted person is totally deprived of her active legal capacity, while in the case of the disqualified person she keeps active legal capacity limited to those acts that do not exceed simple administration.

The Venezuelan Civil Code in its article 410[21] provided an exceptional rule that the deaf-mute, the blind from birth or the one who had been blind during childhood would have been subject to the disqualification regime by force of law, unless a court has declared them capable of managing their business. In this sense the persons who were deaf and blind from birth or early age (art. 410 of the CC[22]) were treated as if they had been interdicted, unless the statutory limitation of their active legal capacity was removed by the court.

C.1 The interdiction

The doctrine has defined the interdiction as the deprivation of active legal capacity due to a habitual state of serious intellectual defect or a criminal conviction. As a result, the person declared interdicted is continually subjected to full, general and uniform active legal incapacity.[23]

There are two kinds of interdiction: judicial interdiction and criminal interdiction, also called by the doctrine: legal interdiction. The judicial interdiction is one that requires a judicial procedure in which the person with a disability should take part and a judgment passed by a competent judge. The legal interdiction is the result of a criminal conviction or imprisonment that is issued against a natural person. It is an accessory legal effect of the sentence, in which civil and political interdiction is established, whereas the judicial interdiction is the main element of a sentence handed down by a judge within the procedure pertaining to interdiction directly.[24] In this chapter we are going to focus on the **judicial interdiction**.

The persons who may be interdicted are the person of legal age of at least 18 years old who, according to the law, is in a habitual state of intellectual defect; the emancipated minor; and the minor in the last year of his minority – that is, at 17 years old.[25]

In the case of an adult with an intellectual defect, this defect must be so serious and so common that it makes it impossible for the person to take care of her own interests on her own. If the mental defect is less serious, even when it is permanent, and does not make it impossible for the person to take care of her own interests, then the judge will not declare her as interdicted but disqualified.[26]

For the person to be called interdicted, temporary or exceptional disruptions of her mental capacity are not enough. However, it is neither required that the defect is to be

21 Article 410 CC established "The deaf-mute, the blind from birth, or the one who has been blind during childhood, upon reaching the age of majority, will be subject to the same incapacity, unless the Court has declared them able to do so run their own businesses." The Author's translation.

22 Article 410 of the Venezuelan Civil Code has been repealed. See: *Concluding observations on the initial report of the Bolivarian Republic of Venezuela*, CRPD/C/VEN/CO/1, 20 May 2022, p. 5.

23 Aguilar Gorrondona, José Luis. *Civil Law. People*. 20ª edition. Universidad Católica Andrés Bello, Caracas, 2007, p. 397.

24 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 209.

25 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 210.

26 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 211.

manifested continuously since the law itself provides for the interdiction of people who 'have lucid intervals' (art. 393 of the CC). The disruptions do not have to be incurable, because if it were, it would be absurd for the law to indicate as the main obligation of the guardian of the interdicted persons that of taking care that he acquires or recovers the capacity.[27]

In the event that a contract had been concluded before the interdiction procedure started and a person in question was declared provisionally interdicted, the contract may be declared void.[28] This provision of the Civil Code follows the provisions of the Napoleonic Code. The provisional interdiction has retroactive effect to the legal acts that the incapacitated person had affected prior to the declaration of provisional interdiction under the condition that at the time when the act was done, the person was already incapable (suffered already from a serious and permanent mental defect).[29]

Likewise, when the interdiction procedure begins, it is forbidden to undertake or effect any legal business of administration, patrimonial disposition or pertaining to its person. Therefore, at the beginning of the procedure to declare the interdiction, the mentally incapable person cannot carry out any act, neither pertaining to her patrimony nor pertaining to her personal interests.[30]

Since contractual incapacity is an exception, its effects must be restricted to those cases which are specifically indicated by the legislator and cannot be extended to other cases by way of analogical interpretation.

The fundamental effect is contemplated in article 1142 of the CC,[31] which establishes the nullity of the contract when both parties or only one of them are incapable. This annulment is established for the benefit or protection of the incapable person, who is the party that can invoke it, and cannot be opposed or claimed by the party that is capable.[32]

In this regard, article 1145 of the CC provides,

> The person capable of being bound cannot oppose the incapacity of the minor, the interdict or the disabled person with whom she has contracted. The incapacity that derives from the interdiction due to criminal conviction, can be opposed by all those who are interested in it.

From the main effect of the annulment of the contract we can infer other effects derived from it, these are as follows:

1. The contract is affected by relative nullity, so it is not null and void *ab initio*, but the nullity must be declared by the judge. The annulment can be claimed lasts five years,

27 Aguilar Gorrondona, José Luis. *Civil Law. People*. 20ª edition. Universidad Católica Andrés Bello, Caracas, 2007, p. 399.

28 We will talk about the process of the declaration of provisional interdiction and the plenary stage in the point referring to the procedural aspects.

29 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 215 y 216; Maduro Luyando, Eloy y Pittier Sucre, Emilio. *Obligations Course, Civil Law III*. Tomo II. 24ª reprint, Universidad Católica Andrés Bello, Caracas, 2011, p. 600.

30 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 217.

31 The article 1142 CC established: "The contract can be annulled: 1st Due to legal incapacity of the parties, or of one of them, and 2nd for defects of consent". The autor's translation. El artículo 1142 CC establece: "El contrato puede ser anulado: 1º Por incapacidad legal de las partes o de una de ellas; y 2º Por vicios del consentimiento".

32 Maduro Luyando, Eloy y Pittier Sucre, Emilio. *Obligations Course, Civil Law III*. Tomo II. 24ª reprint, Universidad Católica Andrés Bello, Caracas, 2011, pp. 605–606.

except for a special provision of the law, applicable to the interdicts and disqualifications. Pursuant to the exceptions the five years period starts running out from the day the interdiction and disqualification was lifted according to the provisions of article 1346 of the CC.[33]

2. The declaration of nullity has a retroactive effect – that is, the contract is considered null since it was concluded and not since the nullity was declared by the judge.
3. The incapacitated person cannot be forced to comply, even if the nullity of the contract has not yet been declared; this is by virtue of what is established in the last paragraph of article 1346 of the CC.
4. The incompetent has action to repeat the services that he has made in the fulfilment of the contract.
5. The incapacitated person must restore the benefits received from the other party by virtue of the contract 'but only up to the limit in which those benefits have been granted for their benefit'.[34] This is by virtue of what is stated in article 1349 of the CC that establishes: 'No one can claim reimbursement of what has been paid to an incapable person, by virtue of an obligation that is annulled, if it is not proved that what has paid has become for the benefit of such a person'. This is by virtue of the principle of enrichment without cause, which is fundamental for the entire Venezuelan legal system, for which the incompetent may be held liable without having to take into account the subjective or objective imputability of the enriched, who can be an able or incapable person, because the claim for unjustified enrichment is based on the balance of the properties belonging to the person enriched and the person who made a transfer from her property.[35]

In order to annul acts prior to the provisional interdiction,[36] the conditions referred to in article 405 of the CC. This article said,

> The acts prior to the interdiction may be annulled, if it is evidently proven that the cause of the interdiction existed at the time of the execution of said acts, or provided that the nature of the contract that the serious damage that it results or may result in to

33 Article 1346 of the CC establishes: 'The action to request the annulment of a convention lasts five years, except for special provisions of the Law. This time does not begin to run in case of violence, but from the day in which it has ceased; in case of error or fraud, from the day they have been discovered; regarding the acts of those interdicted or disqualified, from the day on which the interdiction or disqualification has been lifted; and regarding the acts of minors, from the day they come of age. In any case, nullity can be opposite by the one who has been sued for the execution of the contract'. The autor's translation.

34 Maduro Luyando, Eloy y Pittier Sucre, Emilio. *Obligations Course, Civil Law III*. Tomo II. 24ª reprint, Universidad Católica Andrés Bello, Caracas, 2011, pp. 605–606.

35 Maduro Luyando, Eloy y Pittier Sucre, Emilio. *Obligations Course, Civil Law III*. Tomo II. 24ª reprint, Universidad Católica Andrés Bello, Caracas, 2011, p. 606.

36 This is the declaration of provisional interdiction, given that before the provisional declaration the person suffering from a mental disability is legally capable, because he has not yet been declared an interdict and could have carried out legal acts. That is why the declaration of provisional interdiction has retroactive effects, for the acts that the incapable person had consummated prior to the declaration of provisional interdiction with the condition that by the time of the consummation of the act prior to his (provisional) interdiction, already incapable in fact, that is, already suffering from a serious and permanent mental disability. La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 216

the interdict, or any other circumstance that demonstrates the bad faith of the one who contracted with the interdicted.

Otherwise, they cannot be overridden.[37]

The mere fact that the interdiction of a person is adjudicated produces legal effects. The interdicted person loses her active legal capacity entirely and is subject to guardianship.[38] Additionally, as a result of interdiction,

1. the celebration of the marriage is suspended until the judicial authority has definitively decided that it is possible (art. 48 of the CC), and
2. the general rule is that the acts of a person cannot be contested after her death, alleging a defect in her intellectual abilities or if the person admits an exception when the interdiction of the person whose act is in question was promoted before his death (Art. 406 of the CC) unless it had been withdrawn or it had been dismissed.

The judicial interdiction may be terminated as a result of mental rehabilitation, when the interdicted person has reacquired her mental ability. Consequently, through the procedure outlined in article 407 of the CC at the request of the spouse, of any relative within the fourth degree of consanguinity, of the municipal procurator trustee and of the same person, the rehabilitation procedure can be initiated.[39]

C.2 Disqualification

The disqualification can be applied in case of persons with a mental disability serious not enough to apply the interdiction (weak of understanding). The prodigal, the deaf-mute and the blind from birth or during childhood will also be considered disabled who can be disqualified once they reach the age of majority.[40]

When the legislator refers to the 'weak of understanding', the norm is addressed to all those people who, for one reason or another, are clearly unable to take care of their business or interests because of, for example, memory loss due to age or lack of a certain capacity for reasoning. The condition of weak of understanding can be established in case of a person with non-serious mental disabilities as well as who waste her assets without order, reason or legitimate justification.[41]

The inability includes not being able to take part in a trial, or perform acts of disposition (make transactions, give or take loans, receive credits, release, alienate or encumber their assets), or perform acts that exceed simple administration, without being assisted

37 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 217.

38 Aguilar Gorrondona, José Luis. *Civil Law. People*. 20ª edition. Universidad Católica Andrés Bello, Caracas, 2007, p. 404.

39 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 218; Aguilar Gorrondona, José Luis. *Civil Law. People*. 20ª edition. Universidad Católica Andrés Bello, Caracas, 2007, p. 407.

40 Maduro Luyando, Eloy y Pittier Sucre, Emilio. *Obligations Course, Civil Law III*. Tomo II. 24ª reprint, Universidad Católica Andrés Bello, Caracas, 2011, p. 603.

41 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 224; Aguilar Gorrondona, José Luis. *Civil Law. People*. 20ª edition. Universidad Católica Andrés Bello, Caracas, 2007, p. 412.

by a curator appointed by a judge. The incapacity can be extended even to acts of simple administration, when a judge deems it necessary.[42]

The disqualification can be requested by the same people who can demand the interdiction as established in article 409 of the CC.

There are two types of disqualification, the **judicial** one that must be declared by a judge to people with a moderate intellectual disability or to prodigal people, and the legal disqualification that applies **by force of law** to the deaf, blind from birth or those who they lost their vision at an early age.

JUDICIAL DISQUALIFICATION:

The judicial disqualification is a result of a judicial procedure, in which the competent court – the Civil Court of First Instance of the domicile of the alleged disabled person (article 409 of the CC) – formulates the corresponding judgment by which those persons are declared disqualified because they belong to the group of persons with weak of understanding or the prodigal persons.

The Venezuelan legislator has not established a common pattern to categorise the people who are to be considered weak of understanding. It has been the doctrine that has formulated certain orientation criteria, including, within this aspect, morphine addicts, alcoholics and people with some mental disability and, within the other group, the prodigals.[43]

The judicial disqualification involves a procedure that can be requested by the same people who can request the interdiction and the procedure is the same as that of the interdiction, with the difference that no decision is issued regarding the provisional disqualification.[44] In other words, the figure of provisional disqualification does not exist in the course of the trial, but in the sentence a judge decides whether the person is subject to the disqualification regime or not.

The judicial disqualification has the following effects. Firstly, the judicial disqualification does not deprive the person with disability of the capacity to govern her personal matters. The person who was disqualified judicially can continue to make personal decisions.[45] In the other matters the effects of judicial disqualification are variable. The persons disqualified do not have a uniform capacity, since Venezuelan legislator has established a flexible regime that allows a judge to shape the scope of the capacity and incapacity to the needs of an individual person, in accordance with the amendment introduced in article 409 of the CC quoted. Thus, the person with disability is empowered to perform any act of simple administration, by herself. Anything what is beyond this scope or constitutes an act of a disposition, it requires a participation or a consent of the curator.[46]

42 Maduro Luyando, Eloy y Pittier Sucre, Emilio. Obligations Course, Civil Law III. Tomo II. 24ª reprint, Universidad Católica Andrés Bello, Caracas, 2011, p. 604.

43 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 224.

44 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 225.

45 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 225; Aguilar Gorrondona, José Luis. *Civil Law. People*. 20ª edition. Universidad Católica Andrés Bello, Caracas, 2007, p. 413.

46 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 225; Aguilar Gorrondona, José Luis. *Civil Law. People*. 20ª edition. Universidad Católica Andrés Bello, Caracas, 2007, p. 413.

Unlike what happens with the interdiction, there is no rule that allows to challenge the acts prior to the disqualification, except for what is stated about marriage agreements and donations made to the other spouse on the occasion of the marriage (article 147 of the CC).[47]

The judicial disqualification will be revoked as the interdiction, when the cause that motivated it has ceased (article 412 of the CC and CPC article 741).

LEGAL DISQUALIFICATION:

This situation was provided for by article 410 of the CC[48] differed from the previous one in that the limited incapacity of the person occurred by law. The law provided this protection regime applicable regardless of any judicial decision for (1) deaf-mutes, (2) the blind from birth and (3) those who were blinded during childhood. The essence of the rule was that the person to whom it was applied was in a situation similar to the position of a person who did not enjoy full mental abilities. The legislator had established the protection regime for these people, provided that they were not subject to the parental authority or the guardianship regime.[49]

The basis of the norm was a presumption of the legislator that such physical defects usually affected a person's ability to an extent that the protection of her patrimonial interests required a limitation of her active legal capacity. As such, defects were easy to recognise, the legislator had not believed that a disqualification trial had been necessary. Thus, this type of disqualification applied by force of law.[50]

The legal disqualification placed the person under the same regime as the judicially disqualified, but only in terms of the need for assistance provided by the curator by doing acts that exceed the simple administration. The judge did not have powers to shape as more or less intensive this protection regime.[51]

The person who reached the age of majority and was in any of the cases that produced her legal disqualification redundant could have requested the judge of first instance in civil matters of her domicile to declare her capable. This court decision empowered the applicant to carry out all the typical acts of full active legal capacity.[52]

The judge took into consideration all the circumstances of the case and can declare the legally disabled person capable of managing her business. In these proceedings, the provisions for the revocation of the judicial disqualification should have been applied by analogy.[53]

If a person disqualified (judicially or legally) performed an act for which he required such assistance without the assistance of her curator, the act was ineffective. The relative

47 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 226; Aguilar Gorrondona, José Luis. *Civil Law. People*. 20ª edition. Universidad Católica Andrés Bello, Caracas, 2007, p. 414.

48 Article 410 of the Venezuelan Civil Code has been repealed. See: *Concluding observations on the initial report of the Bolivarian Republic of Venezuela*, CRPD/C/VEN/CO/1, 20 May 2022, p. 5.

49 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 226.

50 Aguilar Gorrondona, José Luis. *Civil Law. People*. 20ª edition. Universidad Católica Andrés Bello, Caracas, 2007, p. 415.

51 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 226 y 227.

52 La Roche, Alberto José. *Civil Law I. Second edition*. Goals Editorial, Maracaibo, 1984, p. 226 y 227.

53 Aguilar Gorrondona, José Luis. *Civil Law. People*. 20ª edition. Universidad Católica Andrés Bello, Caracas, 2007, p. 415.

nullity of this act could have only been invoked by the curator, the disabled person or his heirs or successors in title (Art. 411 of the CC[54]).[55]

D. Other aspects of the protection of the persons with disabilities and the incapable

The active legal capacity is considered in the Venezuelan legal system in some specific contexts also. One of them is the one concerning pre-nuptial agreements. The basic rule is that whoever is capable of entering into marriage is capable of entering into marriage agreements.[56] However, if a person, who is disqualified by force of law or who is disqualified by a sentence, wants to conclude a prenuptial contract, the assistance of the curator who should be mentioned and determined in this act is needed for the validity of such an agreement. If a disqualified person does not have any curator, he must be appointed; otherwise, the person is not able to conclude any marriage agreement. Moreover, a premarital agreement must be approved by the judge who must examine the agreement carefully (art. 146 CC).[57]

In the case of inheritances, article 836 of the CC states that 'all who are not declared incapable by law can dispose their property by will'. Therefore, all persons with full capacity are capable to make wills, except for those who have been declared interdicted or disqualified.

Article 837 of the CC establishes who is unable to make a will. In its second paragraph, it is indicated that the interdiction caused by an intellectual defect causes that the interdicted person cannot make a will. In the fourth paragraph of article 837 of the CC, it is established that the deaf and mute who do not know or cannot write cannot make any will.

The lack of capacity to make a will does not cause incapacity to inherit. Therefore, people with disabilities are able to inherit by will or intestate.

3. Implementation of the Article 12 of the UN Convention on the Rights of Persons with Disabilities outside private law

As it was said previously, the Convention has been accessed to by Venezuela and has been implemented in the Law for Persons with Disabilities promulgated on January 5, 2007, mainly.

Venezuela implemented a law called Law for People with Disabilities. In this law the rights of people with disabilities are protected. This law in its article 1, which deals with the object and the legal nature of the law, states,

> The purpose of this Law is to regulate the means and mechanisms that guarantee the integral development of people with disabilities in a full and autonomous way. In

54 Article 411 CC states: "The annulment of the acts executed by the disqualified person without the assistance of the curator, may not be attempted except for the annulment is effected by the curator, by the disqualified person himself or by his heirs or assignees." The Author's translation.

55 Aguilar Gorrondona, José Luis. *Civil Law. People.* 20ª edition. Universidad Católica Andrés Bello, Caracas, 2007, p. 416.

56 Grisanti Aveledo de Luigi, Isabel. Family Law Lessons. 15ª edition. Vadell Hermanos Editors, Valencia, 2002, p. 225.

57 Grisanti Aveledo de Luigi, Isabel. Family Law Lessons. 15ª edition. Vadell Hermanos Editors, Valencia, 2002, p. 226.

accordance with their capacities, the enjoyment of human rights and achieve integration into family and community life, through their direct participation as citizens with full rights and the joint participation of society and the family. These provisions belong to the public order clause.

The legislation on the capacity of people with disabilities has not changed since the law for people with disabilities only refers to the social, educational and labour rights that people with disabilities have, not referring to the ability to contract obligations or enter into legal relationships. This law seeks to guarantee the effective exercise of rights, access to assistance centres, the right to work, guarantees the right to equal treatment, etc. However, this law does not establish anything about the capacity of these people; it is therefore understood that they have the same capacity as any other natural person. This is especially clear from what is contemplated in article 21 of the Constitution that establishes the equality of all persons.

The applicable legislation before (and after) the Convention is the Civil Code. The Civil Code remains until now the applicable legislation regarding the capacity for people with disabilities. Consequently, people with disabilities have the same capacity as people without disabilities. The CC only refers to the active legal capacity of people with moderate and serious intellectual disabilities and deaf-mutes from birth, blind from birth or who were blind at an early age.

In the Venezuelan legal system, before the ratification of the Convention and afterwards, people with disabilities enjoy full legal capacity to contract obligations and acquire rights.

4. Active legal capacity of natural persons and its restrictions for the sake of disabilities – procedural aspects

The civil procedure to declare a person incompetent is the same before and after the ratification of the UN Convention on the Rights of Persons with disabilities since the Law for Persons with Disabilities does not contain, within its articles, norms regarding the capacity of persons with disabilities. As we said previously, this issue is regulated by the Civil Code.

The procedure to promote the interdiction is as follows

After the interdiction has been promoted or the civil judge has come to notice that there are circumstances that may give rise to it, the civil judge will open the respective process (article 733 of the CPC).

The declaration of provisional injunction is made in the summary stage, this stage – regulated in article 396 of the CC, in accordance with article 566 of the CPC – has a summary character, that is to say, quick and provisional, given that the judge before the specific request (request for declaration of interdiction) will open the corresponding inquiry to determine whether or not the person suffers from dementia and may be subject to interdiction. In this investigation, the judge must meet these requirements: (1) he must question the alleged insane person, (2) he must question four relatives or friends of the person who is being subjected to the provisional interdiction process, and (3) two doctors (experts) must be appointed to rule on the degree of insanity of the accused.[58]

58 La Roche, Alberto José. Civil Law I. Second edition. Goals Editorial, Maracaibo, 1984, p. 213

The judge appoints at least two physicians to examine 'the person noted for insanity' and, as a result of the whole proceeding, passes a judgment. The work of psychologists, doctors or neurologists is necessary in the interdiction and disqualification procedure since they are the ones who can examine and assess before the judge the mental condition of the person who is subject to a disability trial. On the work of these professionals, we will delve into the following point, when we explain the process for the declaration of the interdiction or disqualification of a person, according to the Venezuelan legal system.

The judge practices the interrogations required by the Civil Code and whatever else he deems necessary to examine the case properly (art. 733 of the CPC). Thus, the judge interrogates the person in question and hears four of her immediate relatives and in their absence, friends of her family (art. 396 of the CC). The minutes of the interrogation of the person with dementia will always contain not only the answers given, but also the questions asked.

Once these inquiries are made, if a judge does not find sufficient reason to continue the trial and apply interdiction, he decrees its termination. Termination of the interdiction proceedings does not prevent from reopening these proceedings later if new data are provided (art. 737 of the CPC). On the other hand, if the summary investigation results in sufficient data on the imputed claim, the judge will order to formally follow the process through the ordinary proceedings and will order the provisional interdiction and appoint an interim guardian (art. 734 of the CPC).

Based on the result obtained in the summary or investigative stage of the process, the judge may decree the provisional interdiction and designate an interim guardian; the provisional decree where the interdiction of the accused is recorded, must be published by the press and notarised in the Subordinate Registry Office of the District where the process is filed. Once the provisional or summary stage has been completed and once the decree containing the provisional interdiction has been issued, we arrive at the second stage called plenary, which is carried out in accordance with the procedures of the ordinary trial. This stage concludes with the executory sentence, either ratifying the previously decreed provisional interdiction or revoking it and declaring the accused fully capable.[59]

After the judge decrees the provisional interdiction, the case is open to evidence for the ordinary term. In the ordinary proceedings are involved (1) the interdicted person or her interim tutor; (2) the other party, if any (there will be no other party when the judge has proceeded ex officio); and (3) the judge (art. 567 of the CPC).

It should be borne in mind that the burden of proof does not fall on the person interdicted provisionally. Therefore, the person interdicted provisionally does not have to prove that she does not have a habitual and serious intellectual defect. The provisional interdiction does not reverse the burden of the proof.

The decision may consist of decreeing the definitive interdiction (or interdiction itself), declaring the disqualification, or declaring that there is no place for either one or the other (art. 740 of the CPC). The sentence handed down will always be appealed with the Superior Court (art. 736 CPC).

The competence to hear the interdiction trial corresponds to the first-instance judge who exercises jurisdiction in family matters.[60]

59 La Roche, Alberto José. Civil Law I. Second edition. Goals Editorial, Maracaibo, 1984, p. 213.

60 Aguilar Gorrondona, José Luis. Civil Law. People. 20th edition. Andrés Bello Catholic University, Caracas, 2007, pp. 401–403

The article 395 of the Civil Code establishes who are the people who can request the interdiction. These are the spouse of the person in question, any relative of the incapacitated person, the municipal attorney general and any person who is interested. The judge can also apply an interdiction *ex officio*.

The doctrine has discussed whether the same person who suffers from the intellectual defect can apply for her interdiction. To deny it, it is argued that said person does not appear in the enumeration of article 395 of the CC. It is replied that said person fits into the category 'anyone who is interested', but the truth is that if the legislator had wanted to recognise this power, it would have mentioned it separately as occurs when it indicates the people who can request the revocation of the interdiction (article 407 of the CC). In any case, if the interested party himself requests his interdiction, the judge, in view of this, may proceed *ex officio*.[61]

When the interdiction sentence becomes final and non-appealable, the interdicted person is subject to the judicial protection regime. So that the legal representative (guardian) is a representative of the person interdicted. Consequently, (1) the guardian represents the interdicted person in all acts pertaining to her personal interest and (2) the guardian manages the assets belonging to the interdicted person, who is not able to perform any acts that exceed simple administration, unless the interdicted person obtains the corresponding authorisation from the judge, with the intervention of the Guardianship Council, where his rights are extended. As a result, interdicted person starts being able to carry out acts that exceed simple administration.

The interdicted person cannot carry out by herself acts of any kind included the ones of a personal nature. All is to be carried out by the tutor. In the case of very personal acts, where the institution of the representation cannot function, the guardian is prohibited and the interdicted person is incapable to act alone. This is in the cases of such acts as recognising a child, getting married and exercising parental authority.

It should be noted that, unlike what happens with other processes, in terms of the effects of res judicata in interdiction matters, the effects are relative, given that if new antecedents or circumstances arise that determine a true situation of mental defect in a person, the opening of the process can be requested again, without the accused being able to allege the exception of res judicata, an issue that he could allege in another process as established in article 570 of the CPC.[62]

The interdiction can be revoked through a summary procedure that can be instituted by the interdicted person on her own. The interdiction is revoked where it is proved that the conditions that gave rise to the declaration of interdiction have ceased (art. 407 of the CC and art. 572 and art. 573 of the CPC).[63]

The procedure for decreeing disqualification is similar to that which applies to the judicial interdiction. However, according to the procedural law the provisional disqualification cannot be proceeded nor decreed *ex officio* (art. 740 of the CPC[64]) because the lesser

61 Aguilar Gorrondona, José Luis. Civil Law. People. 20th edition. Andrés Bello Catholic University, Caracas, 2007, pp 400–401

62 La Roche, Alberto José. Civil Law I. Second edition. Goals Editorial, Maracaibo, 1984, p. 213.

63 La Roche, Alberto José. Civil Law I. Second edition. Goals Editorial, Maracaibo, 1984, p. 214

64 Article 740 of the CPC establishes, 'In the disqualification, the same procedure will be followed as for the interdiction, except that it may not proceed ex officio nor may it be decreed provisional disqualification. When the Judge does not find sufficient merit to decree the interdiction, in the cases in which it was processed at the request of a party, he may decree the disqualification if, in his opinion, there is reason for it'.

nature of the defects allows waiting for the final judgment to decide without taking prior provisional measures. The disqualification will be revoked as the interdiction, when the cause that motivated it has ceased (art. 412 of the CC and arts. 739 and 741 of the CPC[65]).[66] The sentence that revokes the disqualification must be consulted with the Superior Court.

In the other hand, the act carried out by an incapable person can be annulled by their relatives or his heirs. The material aspect of the cases is different depending on one speaks of a disqualified (person with a moderate intellectual deficit) or an interdicted (a person with a serious intellectual deficit). The procedure is the same as that followed after the promulgation of the Convention because in the capacity aspect the law in Venezuela has not been reformed and the Civil Code and the Civil Procedure Code continue to govern.

In the interdiction, the interdicted person is affected by a full, general and uniform business incapacity. From the moment of the provisional interdiction, the final sentence decrees the interdiction are provided. If the final sentence does not decree the interdiction, the acts performed by whoever was subject to provisional interdiction are valid. Due to the foregoing, the acts of the interdict after the provisional interdiction are affected by relative nullity that can only be invoked in the interest of the interdicted person or her heirs or successors in title, whether by the guardian, the rehabilitated or the heirs or successors in title of the interdicted (art. 404 of the CC).[67]

Finally, the mere fact that the interdiction of a person is promoted produces these legal effects:

1. the celebration of the marriage is suspended until the judicial authority has definitively decided that it is possible (art. 48 of the CC); and
2. the general rule is that the acts of a person cannot be contested after her death alleging a defect in her intellectual abilities, admits an exception when the interdiction of the person whose act is in question was promoted before his death (art. 406 of the CC) unless it had been withdrawn or it had been dismissed.[68]

In the disqualification, unlike what happens with the interdiction, there is no rule that allows to challenge the acts prior to the disqualification, except for what is stated about marriage agreements and donations made to the other spouse on the occasion of the marriage.[69]

65 Article 739 of the CPC: 'The revocation of the interdiction will be decreed by the Judge who heard the case in the first instance, at the request of the same people who can promote the trial, or ex officio. To this end, an evidentiary proceeding will be opened for the period set by the Judge, and the decision will be consulted with the Superior Court'. Article 741 of the CPC: 'The revocation of the disqualification will be processed in accordance with the provisions of article 739 of the CPC'.

66 Aguilar Gorrondona, José Luis. Civil Law. People. 20th edition. Andrés Bello Catholic University, Caracas, 2007, pp. 412–414

67 Aguilar Gorrondona, José Luis. Civil Law. People. 20th edition. Andrés Bello Catholic University, Caracas, 2007, p. 403

68 Aguilar Gorrondona, José Luis. Civil Law. People. 20th edition. Andrés Bello Catholic University, Caracas, 2007, p. 404

69 Aguilar Gorrondona, José Luis. Civil Law. People. 20th edition. Andrés Bello Catholic University, Caracas, 2007, p. 414

5. Organisation and institutional aspects of the assistance and guardianship for the purpose of doing legal acts by persons with disabilities

The Venezuelan state has enacted laws and created organisations that ensure the protection and safeguarding of the rights of people with disabilities. These are as follows:

Law for People with Disabilities (promulgation date January 5, 2007): This law deals with access to health, education and work rights for people with disabilities. However, it does not mention anything about the active legal capacity of these people with respect to access to these rights.

This law in its first article establishes its object and legal nature, stating,

> *The present Law aims to regulate the means and mechanisms that guarantee the integral development of people with disabilities in a full and autonomous way, in accordance with their capacities, the enjoy human rights and achieve integration into family and community life, through their direct participation as citizens with full rights and the solidarity of society and the family. These provisions are of public order.*[70]

National Council for People with Disabilities (CONAPDIS for his acronym in Spanish) is an entity attached to the Ministry of People's Power of the Office of the Presidency and Monitoring of Government Management. It has a board of directors made up of five people, a director and **several substantive and support managements**: (1) Certification; (2) Orthosis and (3) Prosthesis Laboratory; (4) National Center of Medical Genetics of Venezuela (Dr. José Gregorio Hernández); (5) Juridical Consulting; (6) Labor Inclusion Services; (7) Care, Support and Training for Families of People with Disabilities; (8) Comprehensive Prevention in Disability Matters; (9) Comprehensive Care for Indigenous Peoples with Disabilities; (10) Conformation of the Community Committee; (11) Socio-productive Project Services; and (11) Choir CONAPDIS.[71]

The purpose of the National Council for People with Disabilities (CONAPDIS) is to contribute to the comprehensive care of people with disabilities, the prevention of disability and the promotion of cultural changes in relation to disability within the territory of the Bolivarian Republic of Venezuela.[72]

CONAPDIS promotes the Community Committees of People with Disabilities, in order to integrate this group in an organised way within the community where they live.

70 *'Art. 1: La presente Ley tiene por objeto regular los medios y mecanismos, que garanticen el desarrollo integral de las personas con discapacidad de manera plena y autónoma, de acuerdo con sus capacidades, el disfrute de los derechos humanos y lograr la integración a la vida familiar y comunitaria, mediante su participación directa como ciudadanos y ciudadanas plenos de derechos y la participación solidaria de la sociedad y la familia. Estas disposiciones son de orden público'* (original language), Law for people with disabilities, Official Gazette No. 38,598. Caracas, Friday January 5, 2007.

71 Informe del Instituto de Políticas Públicas y Derechos Humanos de Mercosur, p. 3, available in: http://si.ippdh.mercosur.int/si/web/uploads/Ficha%20Consejo%20nacional%20para%20las%20persons%20con%20discapacidad%20FINAL).pdf, consultado el: 7 de abril de 2020

72 Informe del Instituto de Políticas Públicas y Derechos Humanos de Mercosur, p. 7, available in: http://si.ippdh.mercosur.int/si/web/uploads/Ficha%20Consejo%20nacional%20para%20las%20persons%20con%20discapacidad%20FINAL).pdf, consultado el: 7 de abril de 2020

Thus, it generates self-management through socio-productive projects to improve the living conditions of the persons with disabilities.[73]

Mission José Gregorio Hernández is dedicated to the exhaustive study and registration of the entire population with some type of disability and genetic diseases.

Community Committees of People with Disabilities are organisations aimed at involving the people with disabilities in performing specific functions, examining their needs and developing their potentialities. Their spokespersons appear before the community councils and the local public planning councils. These committees function within the communal councils.

These laws and organisations ensure the accompaniment and protection of people with disabilities. However, they do not consider the active legal capacity of people with disabilities. Regarding this aspect, only the Venezuelan Civil Code refers.

6. Active legal capacity of the persons with disabilities and its restrictions in the light of statistical data before the UN Convention on the Rights of Persons with Disabilities was ratified and afterwards

In the last census carried out in Venezuela, a question was added about whether or not the people registered had a disability. The recruitment of people with disabilities, deficiencies or some special condition residing in Venezuela at the time of the census has been a theme incorporated into the general population censuses carried out in Venezuela, specifically since the 1990 census. In the 2011 census, the identification and assessment of the population with disabilities was made through the following question, do you have any of the following deficiencies, conditions or disabilities? The said question was the result of joint work between several institutions, especially with the National Council for Persons with Disabilities (CONAPDIS) – an organisation in charge of executing the guidelines, public policies, plans and strategies designed by the corresponding governing body, the Ministry of People's Power for the Communes and Social Protection.[74]

The response options were based on the definitions contained in the Law for Persons with Disabilities (LPCD), intending with the results of the 2011 census, to offer information in order to comply with article 68 of the same law. In this sense, the question admitted more than one response option by the person registered (options not mutually exclusive), which allowed quantifying and characterising the population residing in the country with at least one disability, condition or deficiency, as well as the one who, according to her statement, did not have any disability.[75]

Of the total number of people who in the 2011 census responded to the question of deficiency, condition or disability (27,019,815), a significant proportion 5.38%, declared to have at least one disability (1,454,845). Regarding this volume, it was possibly affected

73 Informe del Instituto de Políticas Públicas y Derechos Humanos de Mercosur, p. 11, available in: http://si.ippdh.mercosur.int/si/web/uploads/Ficha%20Consejo%20nacional%20para%20las%20persons%20con%20discapacidad%20FINAL).pdf, consultado el: 7 de abril de 2020

74 Boletín demográfico, Gerencia General de estadísticas demográficas, Instituto Nacional de Estadística, Caracas, diciembre 2013.

75 Boletín demográfico, Gerencia General de estadísticas demográficas, Instituto Nacional de Estadística, Caracas, diciembre 2013.

by the complementation of the options with the declaration of partial disability, which greatly differed from the magnitudes obtained in the 2001 census, where only total disability was asked. In this sense, it is important to highlight the possibility that the person had to declare a visual disability (partial or total) and also declare a cardiovascular deficiency (partial or total), both declarations being valid.[76]

Based on the definition established for the 2011 census, the response with the highest proportion among the population registered with at least one deficiency, condition or disability, highlights 1.7% of people who declared having at least one loss or decrease in visual function, total or partial, for one or both eyes, which was manifested even when wearing glasses (visual impairment). It is important to highlight that the totals for this disability could be affected by the declaration of people with minor or age-related visual problems (presbyopia), among others, which increased the number of declarations of this type.[77]

Of the registered population that answered the disability question, 1.1% declared having a limitation or difficulty in carrying out activities that require moderate effort (cardiovascular disability). Of the population that responded to the disability question, 0.9% declared total or partial loss or deformity of body parts (musculoskeletal disability). Here are contained the statements of people with missing arms and legs among others. In a smaller proportion are people with loss or decreased hearing function, even if they use hearing aids (hearing disability), who represented 0.4%. People with limitations to integrate situations that allow establishing interpersonal and social relationships, mental-psychosocial disability (0.3%), and those who declared loss or difficulty in emitting their voice and/or speech, voice and speech disability (0.2%).[78] In the case of voice and speech disabilities, the statements are regularly distributed throughout the different ages, only with a little more emphasis on children because disabilities of this type are mostly congenital and detected in the first years of life, when affected people begin the learning stage and significant problems with speech are manifested or the person's muteness is clinically confirmed.[79]

Regarding mental-intellectual disability, the information obtained allowed us to observe that more than 55.1% of the statements correspond to people under 30 years of age with some type of limitation for the development of intellectual functions.

The 2011 census was the last one carried out in Venezuela. It did not ask if people with disabilities had full business capacity (active legal capacity), if they were declared interdicted or disabled or if they were currently in a trial for the declaration of their interdiction or disability. In other words, the census only collected the number of people with disabilities who were in the country at the time of the census.

76 Boletín demográfico, Gerencia General de estadísticas demográficas, Instituto Nacional de Estadística, Caracas, diciembre 2013.

77 Boletín demográfico, Gerencia General de estadísticas demográficas, Instituto Nacional de Estadística, Caracas, diciembre 2013.

78 Boletín demográfico, Gerencia General de estadísticas demográficas, Instituto Nacional de Estadística, Caracas, diciembre 2013.

79 Boletín demográfico, Gerencia General de estadísticas demográficas, Instituto Nacional de Estadística, Caracas, diciembre 2013.

7. The relations between private law restrictions of active legal capacity and protection of persons with disabilities under criminal law

The Venezuelan Penal Code, in its article 464, establishes the crime of fraud and other fraud, along with the corresponding penalty for those who commit these crimes. In the following article 465, numeral 8, it establishes that those who 'abusing, for their own benefit or that of another, the needs, passions or inexperience of a minor, an interdict or a disabled person, who they are made to sign any act containing an obligation in charge of the minor or a third party, despite the nullity resulting from their incapacity'[80] will be punished with imprisonment from one to five years, and the sentence may be increased from two to six years if the crime has been committed by instilling an imaginary or erroneous fear in the person with some degree of cognitive disability or disability, and it will be increased from one-sixth to one-third if the crime was committed using an adulterated or forged public document or a check without providing funds.[81]

Therefore, the Venezuelan legal system grants protection to people with disabilities against situations and people who want to take advantage of the people with disabilities. However, the protection is not comprehensive since the disabled are only protected in matters of a patrimonial nature, not including protection in other types of crimes, such as inducing the person with a disability to carry out an act against their will where assaults or injures another person using deception or fear or their condition

80 *'Artículo 465.- Incurrirá en las penas previstas en el artículo 464 el que defraude a otro:*

1. *Usando de mandato falso, nombre supuesto o calidad simulada.*
2. *Haciéndole suscribir con engaño un documento que le imponga alguna obligación o que signifique renuncia total o parcial de un derecho.*
3. *Enajenando, gravando o arrendando como propio algún inmueble a sabiendas de que es ajeno.*
4. *Enajenando un inmueble o derecho real ya vendido a otras personas, siempre que concurra alguna de las siguientes circunstancias:*

   a) Que por consecuencia del registro de la segunda enajenación fuere legalmente imposible registrar la primera.
   b) Que no siendo posible legalmente el registro de la segunda enajenación, por estar registrada la primera, hubiere pagado el comprador el precio del inmueble o derecho real o parte de él.

5. *Cobrando o cediendo un crédito ya pagado o cedido.*
6. *Enajenando o gravando bienes como libres, sabiendo que están embargados o gravados o que eran objeto de litigio.*
7. *Ofreciendo, aunque tenga apariencias de negocio legítimo, participación de fingidos tesoros o depósitos, a cambio de dinero o recompensa.*
8. *Abusando, en provecho propio o de otro, de las necesidades, pasiones o inexperiencia de un menor, de un entredicho o de un inhabilitado, a quienes se les haga suscribir un acto cualquiera contentivo de una obligación a cargo del menor o de un tercero, a pesar de la nulidad resultante de su incapacidad'* (original language), Penal Code, October 20, 2000, Official Gazette No. 5494 Extraordinary.

81 *'Artículo 464.- El que, con artificios o medios capaces de engañar o sorprender la buena fe de otro, induciéndole en error, procure para si o para otro un provecho injusto con perjuicio ajeno, será penado con prisión de uno a cinco años. La pena será de dos a seis años si el delito se ha cometido:*

1. *En detrimento de una administración pública, de una entidad autónoma en que tenga interés el Estado o de un instituto de asistencia social.*
2. *Infundiendo en la persona ofendida el temor de un peligro imaginario o el erróneo convencimiento de que debe ejecutar una orden de la autoridad.*

   El que cometiere el delito previsto en este artículo, utilizando como medio de engaño un documento público falsificado o alterado, o emitiendo un cheque sin provisión de fondos, incurrirá en la pena correspondiente aumentada de un sexto a una tercera parte' (original language), Penal Code, October 20, 2000, Official Gazette No. 5494 Extraordinary.

Concluding remarks

The applicable legislation before (and after) the Convention is the Civil Code. The Civil Code remains until now the applicable legislation regarding the capacity for people with disabilities. Consequently, people with disabilities have the same capacity as people without disabilities. The Civil Code only limits ability to people with serious or moderate dementia. Within this concept, all types of mental disabilities have been included, in a general and unspecified way, this in part because the Civil Code has not been updated and adapted to the new legal instruments.

People with other disabilities enjoy full exercise of their business capacity, being able then to be owners, inherit assets, control their own economic affairs, and access bank loans, mortgages and other types of credits in accordance with the provisions of numeral 5 of Article 12 of the Convention.

People who suffer from a mental disability have two protection regimes, applicable according to the degree of seriousness of their mental disability. These are interdiction for cases of serious mental disability and disqualification for less serious cases of mental disability, which applies also to prodigals.

In addition to this regulation, the Venezuelan government has promoted the creation of various government agencies and institutions whose primary objective is to help people who suffer from any type of disability. However, none of these institutions are concerned with helping people with mental disabilities in the exercise of their business capacity, nor do they help the guardians or curators of people with disabilities when they act on their behalf. Regarding this aspect, only the Venezuelan Civil Code refers.

In addition, the last census carried out in Venezuela was carried out more than ten years ago, there data about people with disabilities were collected, but it did not ask if people with disabilities had full business capacity (active legal capacity), if they were declared interdicted or disqualified or if they were currently in a trial for the declaration of their interdiction or disqualification. In other words, the census only collected the number of people with disabilities who were in the country at the time of the census.

In criminal matters, the Venezuelan legal system grants a specific protection to people with disabilities against harmful situations and people who want to take advantage of the people with disabilities. However, the protection is not comprehensive since the disabled are only protected in matters of a patrimonial nature. The criminal law does not include any special protection for the persons with disabilities in other types of crimes, such as inducing the person with a disability to carry out an act against their will where assaults or injures another person using deception or fear or their condition.

In short, the protection of persons with disabilities in Venezuela is not sufficient, on the one hand, because the Civil Code has not adapted to the latest legislative and doctrinal developments in this field and, on the other hand, because it does not provide complete assistance and protection both in patrimonial and personal matters, where the rights of people with disabilities can also be violated.

Bibliography

Aguilar Gorrondona, José Luis, *Civil law, people*, 20th ed., Universidad Católica Andrés Bello, Caracas, 2007.

Boletín demográfico, *Gerencia General de estadísticas demográficas*, Instituto Nacional de Estadística, Caracas, December 2013.

Constitution of the Bolivarian Republic of Venezuela, Extraordinary Official Gazette No. 5453, Caracas, Friday, March 24, 2000.

Grisanti Aveledo de Luigi, Isabel. *Family law lessons*, 15th ed., Vadell Hermanos Editors, Valencia, 2002.

Informe del Instituto de Políticas Públicas y Derechos Humanos de Mercosur, p. 3, http://si.ippdh.mercosur.int/si/web/uploads/Ficha%20Consejo%20nacional%20para%20las%20persons%20con%20discapacidad%20FINAL).pdf, accessed April 7, 2021.

Initial report of the international convention on the rights of persons with disabilities, Presented by the Bolivarian Republic of Venezuela, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fVEN%2f1&Lang=es, accessed April 27, 2021.

Law for people with disabilities, Official Gazette No. 38,598, Caracas, Friday, January 5, 2007.

La Roche, Alberto José, *Civil law I*, 2nd ed., Editorial Goals, Maracaibo, 1984.

Organic law for the protection of children and adolescents, Extraordinary Official Gazette No. 5859, Caracas, December 10, 2007.

Maduro Luyando, Eloy, Emilio Pittier Sucre, *Obligations course, civil law III*, Tomo II, 24th reprint, Universidad Católica Andrés Bello, Caracas, 2011.

Penal code, Extraordinary Official Gazette No. 5494, Caracas, October 20, 2000.

Abbreviations

CC	Civil Code
CPC	Civil Procedure Code
CONAPDIS	National Council for People with Disabilities
CRBV	Constitution of the Bolivarian Republic of Venezuela
LOPNNA	Law for the Protection of Children and Adolescents
LPCD	Law for People with Disabilities

30 Comparative analysis of the transposition of Article 12 of the UN Convention on the Rights of Persons with Disabilities

Maciej Domański and Bogusław Lackoroński

1. Introductory remarks

A review of the 25 legal systems in place in twenty-four countries reveals that there is no one universal model for the implementation of CRPD Article 12. Amendments aimed at transposing that article into national law have been introduced at different times. Some countries recognised the need for changes to the provisions on the active legal capacity of natural persons many years before the CRPD came into effect. They stemmed from the recognition of the inadequacies of earlier regulations and the wish to find a balance between the need to assist persons with disabilities, to extend their autonomy wherever possible, to ensure their protection and to secure legal certainty. This was so particularly in Estonia, Finland, France, Germany, Italy, Norway, Sweden, Switzerland, and England and Wales. As a result of these changes, substitution mechanisms explicitly limiting legal capacity were significantly curtailed. The legal modifications that were gradually introduced thus constituted a kind of extended process over time, within which the entry into force of the Convention was simply the next step. In some countries, the Convention, by setting new standards for the protection of persons with disabilities, provided the impetus for further and ever deeper modifications to the regulation of active legal capacity (in countries like France, Germany, England and Wales, and Northern Ireland, for example). In Sweden, the regulation of active legal capacity introduced in 1989 was supplemented in 2017 with the institution of guardianship power of attorney (*framtidsfullmakt*).

2. Implementational problems

The degree, scope and complexity of the changes to national regulations on active legal capacity necessitated by unavoidable CRPD-driven adjustments, is, to a fundamental extent, determined by whether the legal system in question is rooted in the *common law* or the *civil law* (continental) tradition.

In common law systems, the distinction between active and passive legal capacity is not as clear-cut[1] as in continental systems, which distinguish between *passive legal capacity (legal standing*) and *active legal capacity (legal agency*). Active legal capacity is an element of *legal capacity* in the broad sense. In the *common law* tradition, there is a general

1 A. Heldrich, A. F. Steiner, in *International Encyclopedia of Comparative Law. Volume IV. Persons and Family,* ed. A. Chloros, M. Rheinstein, M. A. Glendon, Tübingen 2007, Ch. II, p. 9; P. Hellwege, in *The Max Planck Encyclopedia of European Private Law. Volume 1*, ed. J. Basedow, K. J. Hopt, R. Zimmermann, A. Stier, Oxford, 2012, p. 137.

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presumption of legal capacity enjoyed by every natural person. Active legal capacity depends on the actual and real capacity of a person making a declaration of will to act with sufficient discernment. This capacity can be referred to as natural active legal capacity.

In common law systems, active capacity is not a formal characteristic of an entity as defined by civil law but is derived from the true (factual) ability to discern the meaning of the act being performed. In cases subject to verification whether a party to a legal action had active legal capacity, a particular account is taken of his or her cognitive capacity in relation to the type of action being performed. The common law tradition distinguishes between three models for assessing active legal capacity: (1) the diagnostic model (the diagnostic approach or status approach), under which the lack of active legal capacity may be the result of the diagnosis of a particular disability regardless of whether the disability translates into decisions made by a particular person; (2) the outcome approach model, in which a lack of active legal capacity may be the result of a particular person making objectively unfavourable (bad) decisions; and (3) the functional approach model, in which active legal capacity is determined in relation to specific legal acts (issues), taking the presumption of legal capacity being factually open to challenge as the point of departure.

Nowadays, a move away from the diagnostic and outcome model and towards the functional model can be observed. However, not all legal systems rooted in the common law tradition have completely rejected the diagnostic and outcome model. By way of example, the Irish legal system is dominated by the functional model of assessing active legal capacity. However, it has retained some elements of both the diagnostic and outcome model. The evolution of the common law systems' approach to assessing active legal capacity is set out in Chapters 16, 20 and 28, respectively, dealing with the legal systems of Ireland, New Zealand, England and Wales, and Northern Ireland.

In legal systems belonging to the continental tradition, *active* legal capacity was commonly distinguished from *passive* legal capacity. Passive capacity implies the ability of anyone subject to civil law to possess rights and obligations and, in particular, any natural person regardless of age, state of health or individual characteristics. Active legal capacity, on the other hand, means the ability to acquire rights and incur obligations as a result of optionally taken individual legal action. It has a formal and strictly normative character, depending on age, incapacitation or, in more recent regulations, the appointment of a guardian or assistant. The constructive and formal nature of active legal capacity is due to its close connection with legal action as an abstract legal category. However, it should be emphasised that, in the continental tradition, the effectiveness of legal acts depended not only on the formal premises of active legal capacity but also on whether there were factual defects in the declarations of will that make up the legal act. The provisions on defects in declarations of will give grounds for questioning the effectiveness of legal acts in those cases in which the legal act was performed by a person formally possessing full active legal capacity, and yet it cannot be said that a fully effective declaration of will was made or it would be inadmissible to attribute the effects of the declaration of will to the person who made it. Defects in declarations of will include, in particular: the lack of awareness or freedom at the time of making decisions and declarations of will in error or under threat.

The legal provisions in the continental legal systems – that may provide a basis for challenging the effectiveness of a legal act on the grounds that the declaration of will is defective – allow for the factual capacity of the person making such a declaration of will to be taken into account. Functional considerations also speak in favour of taking into account the rules on defects in declarations of will in force in continental legal systems as determinants of the scope of active legal capacity. This makes it possible to see that the

regulation of active legal capacity in the continental systems has been based both on formal criteria (age, incapacitation or some such institution) characteristic of civil law systems, and on material criteria, allowing to examine with sufficient discernment the factual and true capacity of the person making the declaration of will, as is characteristic of common law systems.

An analysis of CRPD Article 12 leads to the conclusion that it was based on the assumptions underlying the concept of active legal capacity existing in common law systems.[2] For this reason, the changes resulting from the necessity to transpose CRPD Article 12 into national legal systems of continental provenance required much deeper interventions into those systems. It should be clearly emphasised that the transposition of CRPD Article 12 into common law systems did not require such profound changes (cf. the chapters on the Irish legal system [Chapter 16] and the English, Welsh and Northern Irish legal systems [Chapter 28]). Due to the differences separating the enumerated 'families' of legal systems, the extent of the necessary modifications was and is different.

In systems subscribing to the common law tradition, on the one hand, changes have been aimed at limiting or completely eliminating the admissibility of legal remedies falling under the substitution model – which involves replacing a person with a disability in the performance of a legal act. On the other hand, the way of verifying the possibility of independently performing effective legal acts was changed, limiting the use of the diagnostic and outcome approach in favour of the functional model. The range of legal instruments enhancing the applicability of the assisted model, in which the focus is on supporting a person with disabilities to make decisions and perform legal acts independently, has also been expanded.

The changes resulting from the need to transpose CRPD Article 12 into continental legal systems consisted in either reducing or eliminating incapacitation (which is one of the two formal determinants of active legal capacity). In addition, various types of institutions based on the assisted model – including persons with disabilities in the decision-making process – were introduced. Characteristically, no fundamental changes were introduced concerning defects in declarations of intent. As a result, the regulation of active legal capacity in the continental legal systems came closer to the common law systems. In our view, the changes introduced to accommodate the transposition of CRPD Article 12 into the continental legal systems are sufficiently significant, above all in qualitative terms, to be legitimately described as a paradigm shift.

Analyses of national solutions to changes in the regulation of the active capacity of natural persons put into relief several discernible general directions and trends regardless of the factual legal system in which the transposed CRPD Article 12 is analysed. Among the most important are

1. imposing strong limitations on the substitution model in the legal transactions of persons with disabilities (Austria, Autonomous Community of Catalonia, Czech Republic,

2 I. Hoffman, G. 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, *Loyola of Los Angeles International and Comparative Law Review* 2010/1, p. 163 *et seq.*; see also A. Dhanda, Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future? *Syracuse Journal of the International Law & Commerce* 2007/2, pp. 443 *et seq.*; B. McSherry, Legal Capacity Under the Convention on the Rights of Persons with Disabilities, *Journal of Law and Medicine* 2012 (20), pp. 23 *et seq.*

Estonia, Finland, France, Georgia, Germany, Ireland, Italy, Netherlands, Norway, Spain, Sweden, England and Wales, Northern Ireland);[3]

2. giving the substitution model of performing legal acts subsidiary status (the first priority is to support persons with disabilities to can carry out their desired actions themselves, and only when this is not possible should substitutes be appointed; substitution should not apply to all actions, but only to specific legal actions, and as narrowly as possible) (Austria, Autonomous Community of Catalonia, Czech Republic, Estonia, Finland, France, Georgia, Germany, Ireland, Italy, Netherlands, Norway, Singapore, Spain, Sweden, England and Wales, and Northern Ireland);
3. introducing fixed-term limits on the restriction of active legal capacity of persons with disabilities resulting from court rulings (Czech Republic – three years with the possibility of extending it to five years and establishing limitations for further periods);
4. imposing time bars on representing persons with disabilities resulting either directly from legislation or from court rulings (Austria [maximum three years, renewable for further periods]; Estonia [maximum five years, renewable]; France [as a general rule five years, in particularly justified cases ten years, and in exceptional cases twenty years]);
5. introducing regular reviews of the factual basis for maintaining statutory representation for persons with disabilities (Georgia [maximum every five years]; the Netherlands [every five years]);
6. increasing the range of instruments that enable persons with disabilities to make legal transactions taking into account their wishes and preferences to the fullest extent possible (Austria, Autonomous Community of Catalonia, Czech Republic, Finland, France, Germany, India, Ireland, Norway, Singapore, Sweden); and
7. extending assistance institutions, including social assistance, aimed at helping and protecting persons with disabilities in performing legal acts or appearing in judicial and administrative proceedings (Autonomous Community of Catalonia, Chile, Czech Republic, Finland, Germany, India, Ireland, New Zealand, Peru, Spain).

Only one legal system examined, that of Peru, attempted to eliminate the substitution model for people with disabilities while leaving only assistive solutions at least in the declaratory domain.[4]

A significant discernible change in the analysis of the various legal systems was the abolition of the institution of total legal incapacity or similar, where an individual is deprived of active capacity for executing all legal acts except, possibly, for minor everyday matters. This has been carried out in Austria, the Autonomous Community of Catalonia, the Czech Republic, Estonia, Finland, Germany, Ireland[5] and Sweden.[6] The remaining solutions based on the substitution model do not allow for such profound interference with the active legal capacity of persons with disabilities.

3 In the case of Italy, the limitation of the use of the substitute model of legal transactions and giving substitute legal remedies subsidiary status came not at the legislative level but as a result of a change in the practice of applying the law. Once the basis for more flexible legal remedies for disabled persons was introduced into the legal system, more far-reaching solutions began to be used much less frequently.

4 Firstly, however, the practice of the application of the amended laws indicates that the rejection of the substitution model for the performance of legal acts by persons with disabilities was only nominal (cf. Chapter 22, on the Peruvian legal system). Secondly, the changes to the Peruvian legal system introduced by Law No. 1384 did not completely exclude the possibility of depriving adults of their active legal capacity and appointing a legal representative for them.

5 From 26 April 2023.

6 Cf. also J. Drobot, Ubezwłasnowolnienie całkowite na tle rozwiązań europejskich, *Radca Prawny. Zeszyty Naukowe* 2020, no. 1, pp. 121–127.

It seems important to underline that some jurisdictions have registers that make it possible to determine whether a person with a disability has an appointed representative (Austria [*Österreichische Zentrale Vetretungsverzeichnis*, or ÖZVV]; Chile [*Registro Nacional de la Discapacidad*]; Finland [Registry for Care]; Netherlands [*Centraal Curatele – en Bewindregister*]; Spain [*Registro Civil*]). The registers have different degrees of public accessibility, but what they have in common is that they serve both to protect the interests of persons with disabilities and to ensure the security of civil law transactions.[7] Thanks to such registers, it is possible, on the one hand, to determine whether a given person has the right to represent a person with disabilities and, on the other hand, whether a person with disabilities needs the assistance of someone else when performing a given legal act.

Changes in private law concerning the active legal capacity of persons with disabilities have generally not been accompanied by changes in criminal law aimed at strengthening their protection. Securing, in private law, the widest possible scope of autonomy for persons with disabilities and tightening the premises for limiting their active legal capacity are linked to the increased exposure of persons with disabilities to falling victim to criminal deception, usury or exploitation.

In criminal law, persons with disabilities are explicitly specified as subject to its protection only exceptionally (France, Poland, Italy, Venezuela). Much more often, persons with disabilities have been given criminal law protection alongside all other vulnerable persons (Austria, Chile, China, Finland, Germany, New Zealand, Norway, Peru, Singapore, Sweden, Switzerland, Turkey). Sometimes a victim's disability is specified as one of the circumstances that could affect the penalty (Czech Republic, Estonia, Finland, Georgia, India, Norway, Spain, Turkey).

There are legal systems in which the regulation of active legal capacity and its limitations has not changed as a result of the Convention. Examples include Chile, Kuwait, Poland,[8] New Zealand,[9] Switzerland, Turkey and Venezuela.[10] In these countries, the transposition of CRPD Article 12 has sometimes taken the form of amendments to provisions other than those relating explicitly to active legal capacity (Chile, Switzerland, Turkey). It also happens that the lack of legislative changes shifts the burden of implementation, as far as possible, onto judicial decisions (an example of which practice can be found in Poland[11]).

7 Cf. deliberations in Polish private law doctrine on the openness of protection measures for disabled persons: L. Kociucki, Niektóre problemy nowelizacji polskiego prawa o ubezwłasnowolnieniu, *Studia Prawnicze* 2013, no. 2, pp. 107 and 110; M. Pasieka-Kuzara, Bliski koniec instytucji ubezwłasnowolnienia*?, Transformacje Prawa Prywatnego* 2021, no. 2, pp. 91 and 100.

8 Please note that Article 183 of the Polish FGC will have been amended as a result of the Act of July 28, 2023 on amendment of the FGC and some other acts, Journal of Laws 2023, item 1606. This amendment comes into force on February 15, 2024. As a result of this amendment the nature of the curatorship for a person with disability and the scope thereof are flexible. The nature and the scope of the curatorship for a person with disability is to be adequate for the needs of the person for whom it is established. This is to be decided by the court taking into account all the relevant circumstances on a case by case basis. The court is obliged to hear the person with disability before any decision on curatorship is taken, unless communication with this person is impossible. The person with disability may determine a candidate who can be a curator.

9 New Zealand is beginning to consider changes to the law on active legal capacity for people with disabilities in 2023.

10 Please note that Article 410 of the Venezuelan Civil Code which was one of the most criticised provisions of Venezuelan private law from the perspective of CRPD Article 12 has been repealed. See: *Concluding observations on the initial report of the Bolivarian Republic of Venezuela*, CRPD/C/VEN/CO/1, 20 May 2022, p. 5.

11 See the resolution of the Polish Supreme Court of 28 September 2016, III CZP 38/16, and the decision of the Supreme Court of 13 December 2018, V CSK 601/17. However, it is not always possible to reinterpret existing legal provisions in order to ensure compliance with the standards arising from the CRPD. Such a situation arises in particular when the resolution of the problem through reinterpretation of a specific provision requires amendments to other legal provisions, which cannot take place without legislative intervention. Cf. M. Dziurda, Zdolność procesowa małżonka ubezwłasnowolnionego częściowo w sprawie o rozwód, *Przegląd Sądowy* 2018, no. 6, pp. 55–56. For this reason, the resolution of the Supreme Court of 21 December 2017, III CZP 66/17, Legalis, stated that 'a partially incapacitated spouse does not have procedural capacity in a

One of the many special features of the regulation of active legal capacity is its interdisciplinary character. It is expressed in the fact that the concepts in themselves and as used to describe active legal capacity and the premises of application of legal protection measures for persons with disabilities, belong to the field of psychology, psychiatry and sometimes even sociology. The interdisciplinary character should – in our opinion – involve consulting specialists with the relevant knowledge of non-legal disciplines. Meanwhile, there is an almost universal lack of evidence that experts in psychology and psychiatry were involved in drafting this regulation in order to implement CRPD Article 12.[12] Examples of cooperation with specialists in the fields of psychology and psychiatry in shaping active legal capacity legislation only come by way of exception. And, to be sure, this has occurred in France, Italy, Norway and Singapore. But, on the whole, it is even rarer for contributions from psychologists and psychiatrists to be explicitly taken into account in the legislative process.

3. Conclusions

Primarily, it should be stated that solutions concerning the active legal capacity of natural persons adopted in individual countries vary to a considerable extent. It is difficult to speak of any harmonisation or standardisation of private law regulations in this respect. They are very much rooted in legal traditions, historical experiences and the general processes of development of given legal systems. For these reasons, comparative research aimed at producing general conclusions is extremely difficult. It is also impossible to develop a one-size-fits-all model for the transposition of CRPD Article 12 into the world's diverse national legal systems.

The main conclusion to be drawn from this analysis of the selected national legal systems is that, despite the unequivocal position of the UN Committee on the Rights of Persons with Disabilities[13] being accepted by part of the human rights doctrine[14] on the inadmissibility of any substitution mechanisms, virtually all of the systems examined provide for the use of such mechanisms to some, if varying, extent.[15]

However, one cannot overlook the profound changes that have been introduced by legislators in countries that have implemented CRPD Article 12. There is an unambiguous tendency to recognise the problems associated with the excessive restriction of the autonomy of persons with disabilities, particularly mental and intellectual disabilities. The direction taken is clear: it is to widening the scope of this autonomy, narrowing the scope of substitution mechanisms, and treating them as measures of last resort. At the same time, the scope of application of assistive mechanisms is being widened. In many jurisdictions, the principle of the subsidiarity of measures restricting the autonomy of those subjected to such mechanisms is being introduced as a legal norm.

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divorce case (Article 65 of the Code of Civil Procedure)'. A different ruling on this issue, due to the entirety of the procedural regulation, would lead to a serious threat to the essential interests of the incapacitated spouse.

12 In Poland, the work of the Codification Commission to amend the provisions of active legal capacity, including incapacitation, without the participation of psychiatrists and psychologists, was the subject of criticism by psychiatric specialists. The position *expressis verbis* concerned the Commission's original proposal involving the abolition of partial guardianship and leaving plenary guardianship. Cf. I. Markiewicz, J. Heitzman, A. Pilszyk, Ubezwłasnowolnienie – instytucja wciąż potrzebna?, *Psychiatria* 2014, no. 4, p. 209.

13 Expressed in *General comment No. 1. Article 12: Equal recognition before the law (2014)*.

14 See, for example, L. Series, A. Nilsson [in:] *The UN Convention on the Rights of Persons with Disabilities. A Commentary,* ed. I. Bantekas, M. A. Stein, D. Anastasiou, Oxford, 2018, pp. 364 et seq.

15 The exception is the Peruvian system, where the provisions allowing for substitution mechanisms explicitly referring to persons with disabilities have been removed. However, it should be emphasised that general grounds for limiting active legal capacity are still left for: prodigal and improvident persons, compulsive drunks, drug addicts or persons with criminal sentences that involve the suspension of civil rights.

Part III

Active legal capacity – Polish law perspective

31 Historical analysis of the regulation of active legal capacity which have been in force within Polish territory – historical regulatory models

Piotr Fiedorczyk

a. Introductory remarks

This study presents the evolution of provisions on the capacity to do legal acts in effect in the Polish lands since the partitions of Poland, preceded by some observations on how the issue was regulated in pre-partition Poland. It is worth remembering that a clear distinction between legal capacity (passive legal capacity) and the capacity to do legal acts (active legal capacity) had been developing in the legal theory for a long time, and it was not until the beginning of the 20th century, owing to the German Civil Code BGB, that it was popularised. There were, obviously, pre-existing regulations in this field, which will be described here. What is described by 'the distinction of historical normative models' is in fact an overview of the civil law regulations of the most prominent European countries in this field of legal capacity. All of these laws were in power on Polish territories during partitions.

An important part of these deliberations is a description of the regulations on the protection of one of the parties to a relation under civil law due to the non-equivalence of performances, resulting in the detriment to the vulnerable party. Here the concepts of excessive impairment and, above all, exploitation appear. The close link between these regulations and the provisions on the capacity to do legal acts was explained by one of the greatest Polish civil law experts, Roman Longchamps de Bérier, who stated,

> As a legislative motive for the reaction to legal transactions involving detriment, what can be derived from these legal systems is that there is either a belief that since a person has entered into an obviously detrimental legal transaction, it is evident that there are vices to the declaration of intent, resulting from recklessness, inexperience or some kind of duress, and therefore such legal transaction can be invalidated, as in case of an error or mental duress, or the perception that the legal transaction in which one party takes undue advantage of the other party's recklessness, inexperience or the fact that such party is under duress, is immoral and, as such, should be declared null and void by virtue of law. Furthermore, having more or less regard for the security of legal transactions and having more or less distrust in the judge's discretion lead to a greater emphasis on objective elements (the extent of the detriment), as in *laesio enormis* (abnormal harm), or on subjective moments, as in exploitation.[1]

1 *Komisja Kodyfikacyjna. Uzasadnienie projektu kodeksu zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu. W opracowaniu głównego referenta projektu prof. Romana Longchamps de Berier. Art. 1–167*, Warsaw 1934, p. 46.

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b. Regulation of the capacity to do legal acts in Polish civil law in the pre-partition period (before 1795)

Polish pre-partition private law was of customary nature and was not codified. The resolutions (constitutions) of the parliamentary assembly (Sejm) only slightly modified the customary nature of the law. The law was feudal and based on the legal inequality of the social classes. These remarks refer to the land law, i.e. the law of the nobility. Age was a decisive factor in determining the capacity to do legal acts. According to the provisions of the Warta Statute of 1423 in early Polish law, the guardianship would come to an end at the age of 12 for girls and 15 for boys. This was referred to as attaining 'functional years' or 'prudent years' (*anni discretionis*). Under the influence of the Revision of the Laws of 1532 (the so-called Taszycki Revision, a draft that has never became effective), as well as the Third Statute of Lithuania of 1588 and the so-called Prussian Revision of 1598, the minimum age for boys was increased to 18. There was also a prevailing belief (probably as early as the 16th century) that even an adult may not perform certain asset-disposing legal transactions if they have not reached 24 years of age;[2] hence, a distinction was made between:[3] minority, majority and adulthood.[4] The reign of King Stanisław August Poniatowski (1764–1795) saw a noticeable increase in the minimum age required to enjoy full capacity to do legal acts. An example includes the Constitution of 1768, which, in accordance with the tendencies voiced by judicial practice since the 17th century, established the age of majority at 18 or 20. However, it was only at the age of 24, i.e. of so-called adulthood, that one would acquire full capacity to do legal acts. Between the age of 18 or 20 and 24, the son needed a prior consent of the father to perform certain assets-disposing legal transactions, including sale or donation of real property.[5] It can be assumed that a division has thus been formed between the 'functional years' (18 or 20–24) and the years of adulthood (over 24). The unlimited capacity to do legal acts would therefore begin at the age of 25. Bogdan Lesiński aptly notes that the distinction was similar to that under Roman law, where the provisions distinguished between so-called *impuberes* and *puberes minores*.[6]

The law envisaged the possibility of early emancipation by the court ('adjudication of years'), but the nobility took an unfavourable view of this possibility. Further evolution of the regulations is noteworthy. The Constitution of 1775 imposed a high fee of 10,000 zloty (now PLN) for this privilege. Emancipation constituted release from the authority of a father or a guardian and was normally accompanied by the simultaneous appointment of a curator.[7]

The Draft Collection of Judicial Laws of 1778 by A. Zamoyski increased the minimum age of full capacity to do legal acts to 25 (the so-called decent age). However, the attainment of the so-called prudent years (19 onwards) resulted in the termination of a compulsory guardianship, replaced by the curatorship, which for men lasted until the age

2 B. Lesiński, W. Rozwadowski, *Historia prawa*, 4th ed., Warsaw 1985, p. 316.

3 Broader: P. Dąbkowski, *Prawo prywatne polskie*, vol. I, Lviv 1910, pp. 216–217.

4 A. Dziadzio, *Powszechna historia prawa*, Warsaw 2008, p. 291.

5 B. Lesiński, *Konstytucja sejmowa z 1768 roku o opiece i zdolności do czynności prawnych*, w: *Dawne prawo i myśl prawnicza. Prace historyczno-prawne poświęcone pamięci Wojciecha Marii Bartla*, eds. J. Malec, W. Uruszczak, Kraków 1995, pp. 230–231.

6 B. Lesiński, W. Rozwadowski, op. cit., p. 316.

7 P. Dąbkowski, op. cit., pp. 218–219.

of 24 and for women until they married and were placed under the guardianship of their husbands.[8] From the age of 19, men were permitted to manage their property, but all assets-disposing and liabilities-creating legal transactions as well as matters before the court required assistance of the guardian.[9] The draft never became a law, but it clearly indicated developing trends in accordance to the capacity to do legal acts. These tendencies were confirmed by the draft legislation as part of the project of Stanisław August Code created in the years 1791–1792, but work on it never progressed beyond the initial phase. From the preserved drafts, it can be concluded that the attainment of the age of 24 for men as the minimum age to acquire full capacity to do legal acts was maintained.[10]

In contrast, Polish city law, influenced by German law, provided for a limitation of the capacity to do legal acts on account of old age (the age of 70). Such a person could only perform legal transactions if assisted by their guardian.

Since the Middle Ages, attention has been drawn to mental and physical health as an important requirement for the effectiveness of a legal transaction. The party had to be 'of sound mind and body' (*corpore et mente*). At some point, however, this condition was limited to sound mind. This condition was included in *Formula processus iudiciarii* of 1523 (codification of the Polish judicial procedure pertaining to land law). Rules were also established for declaring a person unfit to do legal acts on account of mental illness (Constitution of 1638) and appointing a guardian for that person.[11] Perhaps the most shocking example of how these laws were used was the case of Stanisław Lubomirski (d. 1793), a prodigal who 'over the course of several years (1764–1769) sold or lost in a card game a number of real estates, in a more or less fraudulent manner'. He was placed under guardianship in 1769, forced to assign his entire estate to his sons in 1770 and was granted an annuity in the amount of 200,000 zloty. In 1774, at the meeting of Sejm (the Polish Parliament), S. Lubomirski, 'crying buckets', begged the king and both houses of the Parliament to terminate the guardianship and decide on his sound mind.[12] He did not succeed, yet he was allowed to conduct public activities.

Gender was the third essential factor that affected the capacity to do legal acts. Women, being characterised by being 'weak by nature', were to be protected from the negative consequences of conducting legal transactions. Women enjoyed a fairly independent position in Polish law, but from the 16th century onward there were progressive limits on women's capacity to do legal acts. The Constitution of 1581 clearly stated that married women shall remain under the guardianship of their husbands. The Constitution of 1775 provided for the appointment of a guardian for a widow at her request. The draft by Zamoyski further increased previous limitations of women's capacity to do legal acts by introducing compulsory guardianship for married, widowed and unmarried women.[13]

Among many specific limitations of the nobility's capacity to do legal acts, it is worth mentioning the so-called *mortis causa* laws, which prohibited the transfer of real property to ecclesiastical bodies. The Constitution of 1635 is known to address this issue best.[14] The

8 E. Borkowska-Bagieńska, *'Zbiór praw sądowych' Andrzeja Zamoyskiego*, Poznań 1986, p. 157.
9 Ibid., 157.
10 W. Szafrański, *Kodeks Stanisława Augusta*, Poznań 2007, p. 223.
11 S. Płaza, *Historia prawa w Polsce na tle porównawczym. Vol. I: X–XVIII century*, Kraków 1997, p. 222.
12 Based on the biographical note: W. Szczygielski, *Lubomirski Stanisław*, 'Polish Biographical Dictionary', vol. XVIII, pp. 50–54.
13 S. Płaza, op. cit., p. 221.
14 Text in: *Volumina Constitutionum*, vol. III 1611–1640, vol. II 1627–1640, ed. S. Grodziski, Warsaw 2013.

said laws attempted to preserve the right to land for the nobility and thwart the expansion of church property.

Another interesting example is provided by the Law on bills of exchange of 1775. It was intended to grant universal capacity to do legal acts involving bills of exchange irrespective of social class. However, as early as 1776, a parliamentary act prohibited the young members of nobility from issuing bills of exchange, and in 1780 the ban was extended to all members of nobility in an attempt to prevent the loss of property. Therefore, the nobility was stripped of its passive, not active, capacity to do legal acts involving bills of exchange.

To conclude these considerations, there was a clear tendency in the late First Republic of Poland to limit the capacity to do legal acts in order to counteract the dangers posed by the ever-expanding legal trade.

c. Regulation of the capacity to do legal acts in the Prussian Landrecht

The Landrecht (Common Laws for the Prussian States) of 1794,[15] effective in the Polish territory of the Prussian partition, was called the 'secular Bible' and governed private law in an extremely casuistic manner (15,000 articles). The casuistic nature of the legislation allows for the assumption that efforts were made at the time to legally regulate all factual circumstances and thus prevent judges from acting as legislators. Legal capacity and the capacity to do legal acts were also regulated in casuistic manner. However, there was no distinction between these two concepts. The basic provisions in this regard are included in Vol. 1, Title 1. The Landrecht set the age of majority at 24 (Article 26). It stipulated in Article 32 that children (up to the age of 7), minors (up to the age of 14), juveniles up to the age of 24, the mentally impaired, the crazy and the insane, as well as prodigals, 'shall remain under the particular supervision and guardianship of the government'. The government was to appoint a guardian for them (Article 33). The attention should be drawn to the definitions of 'crazy' and 'insane' who were 'completely devoid of reason' (Article 27). Prodigals, on the other hand, were those 'who, through unwise and unnecessary spending and by improper conduct, decrease value of their property and fall into debt' (Article 30). Pursuant to § 31, 'those, who are declared as prodigals by the court shall be treated as if they were juveniles'. Title 4 of Volume 1 of the Landrecht regulated declarations of intent. Declarations of intent made by children were considered legally non-existent (absolutely null and void, per Article 20). Declarations of intent made by minors had legal effect only insofar as the minors benefited from them and led to the acquisition of right(s) (Article 21); if they involved an obligation, then consent of the legal representative was required. 'Insane and mentally impaired shall be treated as if they were children under the age of seven' (Article 23). Meanwhile, 'those, who have been devoid of reason due to excessive use of alcohol, as long as they remain in the state of intoxication, shall be treated as if they were insane' (Article 28). An interesting institution of the Landrecht was the so-called counsellor (*Beistand*), who assisted certain groups of people, such as women, in performing certain legal transactions.[16] These regulations were in force in the Prussian partition of Polish territory until 1900.

15 I used translation fragments found in: A. Gulczyński, B. Lesiński, J. Walachowicz, J. Wiewiorowski, *Historia państwa i prawa. Wybór tekstów źródłowych*, ed., II, Poznań n.d., pp. 320–328.

16 K. Orzechowski, *Prawo cywilne*, in: *Historia państwa i prawa Polski, t. III od rozbiorów do uwłaszczenia*, eds. J. Bardach i M. Senkowska-Gluck, Warsaw 1981, p. 631.

d. Regulation of the capacity to do legal acts in the Napoleonic Code

The Napoleonic Code (NC) of 1804 became effective in the Duchy of Warsaw on May 1, 1808; in 1825, 'Book I: Of Persons' was repealed in the Kingdom of Poland and replaced by the Civil Code of the Kingdom of Poland (K.C. KP). Book III went out of force in 1934 with regard to law of obligations, while Book II remained in force until 1946 with regard to property rights and Book III with regard to succession and matrimonial property law. The NC in its complete version was therefore effective for only a very short time. Based on the principles of natural law, it established the equality of civil rights, with significant reservations.[17] A special form of loss of legal capacity, and thus, the loss of the capacity to do legal acts was the so-called civil death, as defined in Article 25. This provision was widely contested in the duchy, especially by the Catholic Church – given that the dissolution of marriage and the opening of inheritance were the consequences of the declaration of civil death.

In regard to the capacity to do legal acts, attention should be drawn to the following provisions: (1) Article 144, which establishes the minimum age for marriage, and Article 148, on the consent of the father and mother: a son under 25 and a daughter under 21 'may not marry without the permission of their father and mother; in the event of disagreement, the father's permission is decisive';[18] (2) Article 215, which stipulates that a wife could not go to court without the authorisation of her husband, 'even if she was engaged in public trade alone or she was not in the community of marital regime or had a separate estate in matrimony'; (3) Article 388, containing the definition of a minor: 'a minor is any person, of either sex, who is not yet 21'; (4) Article 476–7: on the so-called emancipation of a minor by marriage or by the will of their parents (upon attaining the age of 15) or by a decision of the family council if the minor was an orphan over the age of 18 (Art. 478); (5) Article 488 on the age of majority – after having attained the age of 21; (6) Articles 489–512: on the 'deprivation of one's own will' (incapacitation) with the key provision of Article 489, 'an adult left in a constant state of infirmity, confusion of senses, or insanity, should be deprived of their own will, even if at certain time intervals they were of sound mind'; (7) Articles 513–515 on a judicial advisor for the 'prodigal'. This advisor (appointed by the court *ex officio*) was to assist with court proceedings, executing agreements, incurring debts, collecting capital, alienating property, and mortgaging it.

The provisions on so-called 'detriment' are of particular importance. This term is similar to the term 'exploitation' in more modern civil law. The idea behind detriment under the Napoleonic Code was to protect the equivalence of performances when one of the parties proved detriment, with the Code always determining the extent of detriment as a fractional part. The invalidity of a legal transaction then occurred when the Code explicitly provided for it: 'Article 1118. Detriment shall not render agreements defective except in

17 K. Sójka-Zielińska, *Wielkie kodyfikacje cywilne. Historia i współczesność*, Warsaw 2009, pp. 201–203.

18 The provisions of the Napoleonic Code, effective until 1825, are quoted in F. K. Szaniawski's translation, since this was the text that, according to the king Frederick Augustus' decree, was to have 'gravity in the courts'. See the text in: K. Sójka-Zielińska, *Kodeks Napoleona. Historia i współczesność*. 2nd edition supplemented by the 1808 edition of the Napoleon Code, edited and with the preamble by Dr. Anna Rosner, Warsaw 2008, pp. 295–585.

certain agreements, or in respect of certain persons only, as will be explained in more detail in the Sub-chapter'.[19]

In the context of detriment, Article 1674 is of particular importance:

> If the seller has been wronged in the price of the property by more than seven-twelfths, it shall have the right to terminate the sale agreement, even if the seller has expressly waived the right to terminate the sale agreement, and even if the seller declared that it has forgiven the difference in value.[20]

Other cases of detriment involve the division of the estate (Articles 887, 1079) and the acceptance of the inheritance (Article 783).

By contrast, 'in respect of certain persons', the situation in the event of detriment was different. Article 1124 stipulated that 'incapable of entering into agreements are: minors, incapacitated persons, married women, in the cases provided by law, and in general all those legally prohibited from entering into certain agreements'. Articles 1304–1314 referred to the nullity and 'termination' of contracts. Article 1305 is essential for our analysis, stating that 'a simple detriment warrants termination of all kinds of agreements for the benefit of the unemancipated minor, and for the benefit of the emancipated minor – all agreements in excess of the capacity to do legal acts'.

e. Regulation of the capacity to do legal acts after the Napoleonic Code

The Civil Code of the Kingdom of Poland of 1825 (KP CC), despite its grand title, was merely a modification of the Book I of the Napoleonic Code. The work on the other two books has never been completed, so they remained in force – until the Code of Obligations of 1933 and the Unification Decrees of 1945–1946 became effective.

The Code abolished civil death and, instead, introduced incapacitation for those sentenced to the capital punishment (Articles 21 et seq.). The position of such a person's guardian was similar to other cases of a guardianship, but such a guardian was not supposed to make efforts for the incapacitated person; the revenue of the estate could not accrue to the incapacitated person and instead belonged to the incapacitated person's legal successors. The incapacitated persons were also deprived of the possibility to exercise curatorship and guardianship, to participate in family councils, or to act as a witness in the preparation of official acts.[21]

The provisions amended in KP CC usually had their equivalents in the NC, being merely their modified versions. Even the numbering of the articles remained the same. Article 345 stated that a minor is a person who has not yet attained the age of 21. Such a person, in the absence of parents, should have a guardian appointed to him, but according to Article 414, the guardian could not be a juvenile, except for the father and mother; an individual deprived of their own will as a result of mental incapacity, confusion or insanity;

19 This part of the NC is quoted after the compilation titled *Prawo cywilne obowiązujące na obszarze b. kongresowego Królestwa Polskiego. Zebrali i przypisami opatrzyli Jan Jakób Litauer i Walerian Przedpełski*, Warsaw 1930, pp. 161–443.

20 It is described with reference to the Polish law by J. M. Kondek, *Instytucja wyzysku w prawie polskim i na tle obcym w perspektywie prawnoporównawczej*, Warsaw 2019, pp. 7, 11.

21 K. Sójka-Zielińska, *Prawo cywilne*, in: *Historia państwa i prawa Polski,* vol. III, op. cit., p. 503.

or a woman, a monk, a foreigner, a non-Christian or a person who 'is engaged in some form of relationship with a juvenile'.

Articles 467 et seq. provided for the institution of the emancipation of a 15-year-old by their father or mother by means of a declaration made at the court. Articles 489–521 included in Title XI, 'On incapacitation and limitation of one's will', primarily concerned incapacitation and also regulated the procedure in this regard. Article 511 stated that 'a person deprived of their own will can be compared to a minor not yet emancipated as to their person and property'. In addition, such a person could not marry or create a will. A guardian was appointed (Article 504). The important Article 497 referred to partial incapacitation. The court, when rejecting the request for the incapacitation of an adult, could, if the circumstances required so, decide that the defendant would no longer be able, unassisted by a court-appointed advisor to: appear in court as a party, conclude settlements, incur obligations, receive funds and acknowledge payments, dispose of immovable property or mortgage it. Article 518 addressed the limitation of the prodigal's capacity to do legal acts. The prodigal had to have a court-appointed advisor (not a guardian as in other cases) if such a person wanted to: appear before the court as a party, conclude settlements, incur obligations, receive funds, dispose of immovable property or mortgage debts, or encumber mortgaged immovables. An important rule of conduct was found in Article 521: 'No judgment on the incapacitation or appointment of an advisor may be rendered, either in the first instance or following the appeal, except after hearing the submissions of the Crown Prosecutor'.

The scale of the limitations on women's capacity to do legal acts under the Civil Code of the Kingdom of Poland is highlighted best in the 'The Act of 1 July 1921 on amendment of certain provisions pertaining to the civil rights for women in the Kingdom of Poland' (Polish Journal of Laws No. 64, item 397). Implementation of the March Constitution in Polish Second Republic (1921) required that these provisions be repealed. They were rather a remnant of disempowerment of women typical of the Napoleonic Code[22] than a continuation of the old Polish legal tradition, to which the Civil Code of the Kingdom of Poland partly referred.

f. Regulation of the capacity to do legal acts in Allgemeine Bùrgerliches Gesetzbuch (ABGB)

The ABGB (the General Civil Code of Austria) of 1811 remained in force in the Polish territories of the Austrian partition in the field of the capacity to do legal acts until 1946. It should be mentioned that in the years 1914, 1915 and 1916, the so-called three amendments to the ABGB[23] were introduced, substantially modernising the Code after it had been in force for over a century.

The theory of nature law influenced, among other things, Article 16 of the Code, according to which every human being has inherent rights acquired at birth and discovered by reason alone and should therefore be considered a person. And Article 18 stated that

22 'Nature has made women our slaves' – Emperor Napoleon declared during the Council of State meeting. See K. Sójka-Zielińska, *Wielkie kodyfikacje cywilne. Historia i współczesność*, Warsaw 2009, p. 203.

23 Polish text after amendments and changes following the entry of the Code of Obligations into force: *Ustawy cywilne obowiązujące w Małopolsce i na Śląsku Cieszyńskim, zebrał i opracował A. Liebeskind, z przedmową prof. F. Zolla*, Kraków 1937. Earlier ABGB texts were published in Polish by S. Wróblewski.

'everyone is able to acquire rights under the conditions prescribed by the legal acts'. Article 21 of the Code, which originally listed the categories of persons subject to limitations – children under the age of 7, minors (7–14), juveniles (14–24), the insane, lunatics, prodigals and the infirm – was essential for the capacity to do legal acts. They were 'under special legal protection', as were the absentees and municipalities. Article 151 of the ABGB provided for the independently acquired limited capacity to do legal acts of the juvenile orphans, who could manage their property. Articles 244–248 and 252, in turn, addressed the capacity to do legal acts in term of juveniles, allowing them to perform many legal transactions. Article 273, on the other hand, concerned the 'insane and dumb', while Article 275 addressed the capacity to do legal acts in terms of deaf-mute persons (to a broader extent as compared to the other discussed regulations). An interesting institution that could apply, e.g. to prodigals, allowing for the extension of a guardianship after the person attained the age of majority, was regulated in Article 251.

The 1914–1916 amendments modified some 250 articles of the Code, including those on the capacity to do legal acts in regard to women and juveniles.[24] For example, pursuant to Amendment I, Articles 591 and 597, were amended to allow women to act as witnesses while making wills. Limitations on women's rights to exercise a guardianship have been lifted. Conversely, the amendment to Article 152 gave a non-dependent juvenile the right to independently commit to provide services. Consequently, only 'important' reasons resulted in the father's or guardian's right to cancel such an agreement under the amended Article 246 of the ABGB. The so-called general guardianship, exercised by the competent administrative authority (Article 208), was also introduced.[25]

The third revision of 1916, amending Article 879, introduced the BGB-based regulation of the invalidity of usury contracts

> if a person exploits the recklessness, duress, weakness of mind, inexperience or mental irritability in such a way that, in return for the performance rendered, such a person makes a third party promise or render the mutual performance, which is grossly inappropriate to the value of the performance rendered.

However, it is worth noting that this provision was first introduced in the Imperial Ordinance of October 12, 1914, on usury.[26] Furthermore, the original version of the Code already included Article 934 on detriment in excess of half the value (*laesio enormis*), pertaining to all reciprocal agreements and granting the authorisation to file an action to declare a contract invalid on the grounds of the objective disproportionality of performances.[27]

The Austrian Imperial Decree of June 28, 1916, on incapacitation is also worth noting. It consisted of 74 articles and regulated both substantive and procedural matters.[28] It was

24 K. Sójka-Zielińska, op. cit., p. 140.

25 Ibid., 141.

26 J. Andrzejewski, *Laesio enormis i wyzysk. Tradycja prawna a przeciwdziałanie nieekwiwalentności świadczeń w prawie prywatnym Austrii, Niemiec i Polski*. Doctoral thesis under the supervision of Prof. Wojciech Dajczak, PhD, Poznań 2015, pp. 63–66 (typescript).

27 *Komisja Kodyfikacyjna* . . ., op. cit., p. 45.

28 Polish text in: *Ustawy cywilne obowiązujące w Małopolsce i na Śląsku Cieszyńskim. Zebrał i opracował dr Adolf Liebeskind adwokat. Z przedmową prof. Fryderyka Zolla*, Kraków 1937, pp. 503–521.

inspired by German legal solutions and it probably served as a model on which post-WWII Polish regulations were based.

The Polish act of October 21, 1919, on the age of majority in the former Austrian partition (Polish Journal of Laws No. 87, item 472) stated in Article 1 that the age of majority is attained at the age of 21, and that a juvenile could be emancipated at the age of 18.

The Glossary of ABGB, available in the Polish literature, is a valuable source of information on the code.[29]

g. Regulation of the capacity to do legal acts in the Digest of Laws of the Russian Empire

The Digest of Laws the Russian Empire in Part I of Vol. X of 1835[30] regulated private law. The Digest's structure, albeit imperfect, referred to the Napoleonic Code's systematics. The content, however, reflected the Russian state's feudal and absolutist nature. In the chapter 'On the curatorship and guardianship of minors' (Article 213 et seq.), it is stipulated that minors are divided into three categories: the first includes minors up to the age of 14, the second from the age of 14 to the age of 17, and the third from the age of 17 to the age of 21. Article 217 stipulated that 'a minor may not directly manage or dispose of their property, or dispose of it by virtue of any legal transactions, or authorise others to do so on their behalf'. Article 219, in turn, stipulated that a minor, upon attaining the age of 14, may request the appointment of a guardian for advice and advocacy in all matters, with the same qualifications as those required of guardians, but the minor's rights to manage affairs shall not thereby expand, and any independently performed legal transaction shall still be null and void. Article 220 mentioned the limited capacity to do legal acts after attaining the age of 17: it never included contracting obligations, granting consents in writing, drafting any manner of deeds and agreements and disposing of assets. These actions were contingent upon the guardian's consent. Articles 225–231 regulated the establishment of guardianship and curatorship. Articles 365–382 regulated the capacity to do legal acts (or lack thereof) of the persons devoid of reason, the insane, the deaf-mute and the dumb. Separate legal acts of 1890 and 1911 regulated the status of the prodigals of both nobility and peasantry.[31] Articles 699–703 addressed the manner of acquisition of property rights. Article 700 stipulated that 'all manners of acquiring rights, as specified by law, shall only be deemed valid if based on free will and consent'. Freedom of consent could be affected by duress and deception (Article 701). Russian law was unfamiliar with the concept of exploitation (known as 'detriment' in then-current legal terminology). This was confirmed by the Polish Supreme Court in the ruling of 1927.[32] The Digest of Laws, however, deemed a contract that led to the 'usury abuse' (Article 1529) and the usurious loan (Article 2023) *ex lege* null and void, while referring to the concept of penal law usury.

29 *Glosariusz ABGB*, ed. J. Olszewski, Rzeszów 2014.

30 I'm using the best available translation into Polish language of: *Prawo cywilne ziem wschodnich. Tom X cz. I Zwodu Praw rosyjskich. Przekładu nowego dokonali i opracowali Z. Rymowicz i W. Święcicki*, vol. I., Warsaw 1931.

31 Z. Rymowicz, W. Święcicki, op. cit., pp. 124 –128.

32 Ibid., thesis 6 to Art. 1424, pp. 783–784. See the Supreme Court judgment of 19 October 1927, ref. S.N. I. C. 314/26, in: *Zbiór Orzeczeń Sądu Najwyższego. Orzeczenia Izby Pierwszej (Cywilnej). Rok 1927 (drugie półrocze)*, Warsaw n.d., No. 119, pp. 65–66.

h. Regulation of the capacity to do legal acts in Bürgerliches Gesetzbuch (BGB)

The provisions of the German Civil Code (BGB) of 1896 require particular attention primarily due to the fact that the BGB was produced at a different time than all the previously discussed legal regulations. It provided this particular piece of legislation with the advantage of almost a century of experience in the application of the early-19th-century codes. The lengthy legislation process also affected the quality of the adopted solutions.

As part of an entity's legal personality, the Code made a clear distinction between legal capacity (*Rechtsfähigkeit*) and the capacity to do legal acts (capacity to act –*Geschäftsfähigkeit*). In particular, it made the exercise of civil rights contingent upon factors such as personal dignity and virtues of character (e.g. in the removal of parental authority, limitation of maintenance claims, the refusal to pay). For example, a person who fell into bankruptcy could not be a guardian. According to Article 2, the age of majority was attained at 21.[33] A juvenile who has attained the age of 18 could be emancipated by the resolution of the guardianship court (Article 3). Article 4, in turn, stipulated that emancipation was only permissible upon the minor's consent. If the minor was under parental authority, the parents' permission was also required, unless the parents did not exercise any parental authority over the minor's person or property. A minor widow did not require permission of a person exercising parental authority.

According to Article 5, a juvenile should only be declared an adult if it contributed to their welfare. The limitation or removal of the capacity to do legal acts occurred as a consequence of incapacitation. According to Article 6, there were three grounds for incapacitation: mental state (mental illness [ground for full incapacitation, Article 104(3)]; mental weakness [ground for partial incapacitation, Article 114]), prodigality and excessive drinking. A consequence of partial incapacitation due to excessive drinking, prodigality and mental weakness was limitation of the capacity to do legal acts to the same extent as if such incapacitated person was a juvenile. This implied that every legal transaction made not only to the benefit of such a person required a consent of their legal representative (Article 107).[34] According to Article 104, the following were incapable of doing legal acts: (1) children under the age of 7; (2) those whose mental disability or disorder excludes free expression of intent, provided that the condition is not temporary; (3) those who have been deprived of their own will due to mental illness. Articles 104–114 of BGB are clearly the underlying model for the current regulations of Articles 4–22 of the Polish Civil Code.

Among the provisions of the BGB on declarations of intent, the modern regulation of exploitation is worth noting: according to Article 138, a legal transaction contrary to the principles of good conduct shall be null and void. In particular, a legal transaction in which a party, taking advantage of the hard predicament, recklessness or inexperience of the other party, benefits financially from a performance or demands a promise of financial benefit, to itself or a third party, that exceeds value of such performance so greatly that, pursuant to the circumstances, is grossly inadequate, shall be null and void. The Code, on the other

33 Provisions of the code according to: K*odeks cywilny obowiązujący na Ziemiach Zachodnich Rzeczypospolitej Polskiej, opr. Z. Lisowski*, ed. II, Poznań 1933.

34 K. Sójka-Zielińska, *Wielkie kodyfikacje* . . ., op. cit., p. 311.

hand, lacked separate provisions on excessive impairment.[35] However, it should be noted that the element of 'excessive detriment' is included in Article 138.[36]

According to Article 828, 'Anyone under the age of 7 shall not be liable for the damage to another person'.

'Anyone who has attained the age of 7 years, but is under the age of 18, shall not be liable for the damage to another person, if they had no understanding of the consequences of their actions. The same applies to the profoundly deaf'.

Articles 1906–1908 governed so-called **temporary guardianship**:

Article 1906: An adult, against whom a motion for incapacitation has been filed, may be placed under temporary guardianship if the full guardianship court deems it necessary in order to prevent imminent danger to that person or its property.
Article 1907: The provisions on the appointment of a guardian shall not apply to the temporary guardianship.
Article 1908: Temporary guardianship shall terminate upon withdrawal or final and binding dismissal of the motion for incapacitation.

If a person is incapacitated, the temporary guardianship shall terminate upon the appointment of a full guardianship.

The guardianship court should terminate temporary guardianship if a person no longer requires legal protection.

i. Regulation of the capacity to do legal acts during the period of codification and unification of civil law in Poland

Decree of August 29, 1945 – Personal law (Polish Journal of Laws No. 40, item 223)

The referenced decree was the first decree in chronological order issued as part of the unification of civil law after World War II.[37] It still requires further research.[38] The decree drew a clear distinction between legal capacity (Articles 1–2) and the capacity to do legal acts (Articles 3–11). Article 3(1) stipulated that a child under the age of 7 had no capacity to do legal acts. A juvenile who attained the age of 7 was recognised as having limited capacity to do legal acts (Article 2), whereas attaining the age of 18 indicated majority and full capacity to do legal acts (Article 3). A person could be emancipated by marriage (Article 4). This applied to both men and women, as Article 6 of the Marriage Law of 1945 stipulated that persons under the age of 18 could enter into matrimony. Full incapacitation could be imposed on a person who has attained the age of 7 if mental illness or mental impairment rendered that person incapable of managing their own affairs (Article 5(1)). A guardian was appointed for such a person. Partial incapacitation was imposed on

35 According to R. Longchamps de Bérier, in: *Komisja Kodyfikacyjna* . . ., op. cit., p. 46.
36 J. Andrzejewski, op. cit., pp. 98–99.
37 P. Fiedorczyk, *Unifikacja i kodyfikacja prawa rodzinnego w Polsce (1945–1964)*, Białystok 2014, pp. 38–39.
38 See unpublished doctoral thesis by A. A. Kozioł, *Prace nad unifikacją prawa cywilnego w Polsce w latach 1945–46*, Katowice 2006 (UŚ), promoted by A. Lityński. The practice of being declared dead under this decree was explored for Kraków in the doctoral thesis by S. Przewoźnik (Andrzej Frycz Modrzewski Kraków University, 2016, promoted by I. Lewandowska-Malec). See monograph S. Przewoźnik, *Uznanie za zmarłego w świetle akt Sądu Grodzkiego w Krakowie w latach 1946–1950*, Kraków 2020.

an adult who was in need of legal protection due to mental illness or mental impairment, but not to the extent that would justify full incapacitation (Article 6(1)). The grounds for partial incapacitation of an adult could also be (Article 2) prodigality resulting in privation, compulsive drunkenness or drug addiction resulting in privation, or if the person required assistance to manage their affairs or posed a threat to the safety of others. The partially incapacitated person had limited capacity to do legal acts, with their guardian acting as their legal representative (Article 6(3)). The legal effects of performing a legal transaction without the capacity to do legal acts: the declaration of intent of a person incapable of performing legal transactions was null and void (Article 7); the consent of the legal representative was required for the validity of a declaration of intent of a person with limited capacity to do legal acts by and/or through which they incurred obligations or disposed of property, unless further provisions stipulated otherwise (Article 8). A person with limited capacity to do legal acts could manage their income and property given to them for unrestricted use without the consent of their legal representative, but the guardianship authority (i.e. the court) could strip a partially incapacitated person of these powers (Article 9). A person with limited capacity to do legal acts could commit themselves to work against remuneration and perform legal transactions arising from such an agreement (Article 10(1)), but the legal representative could, following the court's authorisation, terminate an agreement to which the legal representative had not given consent, if the agreement was against the welfare of the person with a limited capacity to do legal acts (Article 10(2)).

The provisions of the Decree on Personal Law in the field of the capacity to do legal acts should be examined in combination with the provisions of the following decrees: the Guardianship Law of 1946 (Polish Journal of Laws No. 20, item 135),[39] the Family Law of 1946 (Polish Journal of Laws No. 6, item 52), and the Decree of 1945 on Proceedings in Cases of Incapacitation (Polish Journal of Laws No. 40, item 225).

Draft of the general part of the Civil Code of 1947 and the general provisions of the Civil Code of 1950

As part of the work on the codification of civil law in the 1947–1949 period, intended to be the culmination of the 1945–1946 unification of civil law, the draft provisions of the Civil Code's general part were produced.[40] Under the said draft, a person attained the age of majority at 18. A juvenile could also be emancipated by marriage (Article 10). Full incapacitation could be imposed on a person who has attained the age of 13 if mental illness or mental impairment rendered that person incapable of managing their own affairs (Article 11). However, an adult who, due to mental illness or mental impairment, although not completely incapable of managing their own affairs, required assistance to manage them, was subject to partial incapacitation (Article 12(1)). Additional grounds for partial incapacitation (Article 12(2)) were (1) prodigality resulting in privation, (2) compulsive drunkenness or drug addiction resulting in privation or (3) requiring assistance to manage their affairs or posing a threat to the safety of others. Title II of the said draft, titled 'Legal Transactions', included Chapter V, titled *Capacity to Perform Acts in Law* (Articles 79–87). Persons under the age of 13 and completely incapacitated could not exercise the capacity

39 P. Fiedorczyk, *Prawo opiekuńcze w pracach nad unifikacją prawa cywilnego w 1945–46 r.*, 'The Quarterly of Private Law' 2005, s. 3.

40 *Projekt części ogólnej kodeksu cywilnego*, 'Democratic Law Review' 1947, No. 12, pp. 19–23.

to do legal acts (Article 79). Persons who attainted the age of 13 and partially incapacitated could exercise limited capacity to do legal acts (Article 80). Except where special provisions stated otherwise, the consent of the legal representative was required for the validity of the legal transaction through which a person with limited capacity to do legal acts incurs obligations or makes assets-related dispositions (Article 81). A person with limited capacity to do legal acts could administer their earnings with the consent of their legal representative. However, for important reasons, the guardianship authority (i.e. the court) could strip them of this right (Article 82). Article 83 of the draft, in turn, specified the scope of capacity to do legal acts of a partially incapacitated person. Without the consent of the legal representative, that person could commit to provide services against remuneration and could perform legal transactions pertaining to the legal relationship arising from such a contract. However, if such a contract was harmful to the interests of the person with limited capacity to do legal acts, the legal representative could terminate it upon the authorisation of the guardianship authority. The contact was terminated by declaration submitted to the other party. The validity of the contract concluded by a person with limited capacity to do legal acts without the required consent of the legal representative was contingent on the confirmation of the contract by the legal representative (Article 84 (1)). A person with limited capacity to do legal acts could confirm the contract themselves once they have acquired full capacity to do legal acts (Article 84 (2)). However, the party which concluded the contract with a person with limited capacity to do legal acts could not invoke the lack of consent of their legal representative. That party could instead set a reasonable time limit for the legal representative to confirm the contract. Upon the ineffective lapse of the time limit, the contract was regarded as non-existent (Article 84(3)). If a person with limited capacity to do legal acts performed a unilateral legal action on their own, for which the consent of the legal representative was required, such a legal transaction was invalid (Article 85). In the light of Article 86(1) of the draft, if the legal representative of a person with a limited capacity to do legal acts gave that person certain items of property for unrestricted use, that person acquired full capacity to do legal acts in respect of those items. The exceptions to these were legal transactions for which the consent of the legal representative was insufficient. The guardianship authority could, for important reasons, deprive a person with limited capacity to do legal acts of that right (Article 86(2)).

As regards the capacity to do legal acts of legal entities, Article 87 of the draft stated that a legal entity shall act through its organs in the manner stipulated in the special provisions or in charters that define its structure.

These regulations were incorporated into the Act of July 18, 1950 – General Provisions of the Polish Civil Law (Polish Journal of Laws No. 34, item 311), abbreviated in the Polish language as POPC, in Articles 48–55 on the capacity to do legal acts. It should be noted that the present regulations of the Civil Code also make a reference to the solutions of the discussed draft.

The Act of July 18, 1950 – General Provisions of the Polish Civil Law was created somewhat by accident. In the 1949–1950 period, the Polish-Czechoslovak family code was drafted, and it was decided at that time to utilise the 1947 draft of the general part of the Civil Code to develop general provisions of civil law, supposedly free from the influence of the 'bourgeois law' and to derogate the general provisions from the Code of Obligations of 1933.[41] Conventionally, the POPC of 1950 is presented as evidence of

41 P. Fiedorczyk, *Unifikacja i kodyfikacja prawa rodzinnego w Polsce (1945–1964)*, Białystok 2014, pp. 235–236; A. Moszyńska, *Organizacja i przebieg prac nad kodeksem cywilnym w latach 1919–1964*, „The Quarterly of

the Stalinisation of Polish civil law, notably in light of the wording of Articles 1 and 3. In reality, however, it constituted the original work of the post-war unifiers and codifiers of civil law. Articles 8–11 set the age of majority at 18 and outlined the grounds for full and partial incapacitation, identical to those found in the draft of 1947. The legislator added that full incapacitation is associated with the establishment of a guardianship (Article 9(2), reference is made to the provisions of the Family Code on the guardianship of minors[42]), and partial incapacitation is associated with the establishment of a curatorship (*kuratela*, Article 10 (2)).

Two rulings of the Supreme Court should be mentioned here with respect to incapacitation: (1) the ruling of the Supreme Court of June 3, 1954, II C 1164/53: it is not enough to establish that the person concerned is mentally ill in order to declare full incapacitation, as it is necessary to establish that the person is incapable of managing their behaviour; (2) and similarly, the ruling of August 16, 1962, 1 CR 320/62, with the argument that not all persons affected by mental illness must be subject to incapacitation, even if it is only partial incapacitation. The aim of partial incapacitation is to assist the mentally ill person in managing their affairs to the fullest extent provided for by the law. Furthermore, another ruling of the Supreme Court expressed the view that partial incapacitation should not be imposed when the ill person has no major assets in their possession, which they could recklessly dispose of to the detriment of themselves and their family and otherwise normally handles their ordinary affairs – OSN IC, 12.11.1956 3CR 440/56.

j. Polish model of the regulation of the capacity to do legal acts

This review of normative solutions in the field of capacity to do legal acts allows us to formulate the following conclusions. The first conclusion relates to the close relationship between Polish legal solutions and regulations introduced in major European countries. This was primarily due to the geopolitical situation of Polish lands from the late 18th century and throughout the 19th century. As a consequence of the partitions, the main systems of civil law were present in our territories, which was of great importance for the development of the law. Various legal solutions have been implemented in the uniform law of the Second Polish Republic. According to our knowledge, however, civil law has not been fully codified in the Second Polish Republic; hence, in the field of legal capacity and the capacity to do legal acts, legal regulations from the partitions were still in force, with only slight amendments introduced by the laws of the Second Polish Republic. In terms of civil law, however, the Code of Obligations of 1933, considered to be the most notable work of the Codification Commission, was introduced. Article 42 regulated the concept of exploitation:

> If one party, exploiting the recklessness, indolence, duress or inexperience of the other party, accepts or reserves for itself or for any other party, in exchange for its performance, the performance grossly overvalued, at the time of the conclusion of the contract, in relation to the value of the mutual performance, the other party may request either a reduction in its performance or an increase in the mutual performance, or, if both are difficult, it may evade the legal effects of its declaration of intent.

Private Law' 2020, vol. XXIX, s. 3, pp. 465–466.

42 Polish Journal of Laws of 1950, No. 34, item 308, Art. 79–91.

Article 43, in turn, provided for a short one-year time limit to evade the legal effects of a declaration of intent submitted as a result of exploitation. The proposed approach was modern as it primarily involved modification of the performance and a shift away from the regulation of excessive impairment under separate legal provisions.[43] Although this provision has recently been criticised for its factual uselessness (burden of proof, short time limits) by J. Andrzejewski,[44] it served as a starting point for the present-day regulation of Article 388 of the Polish Civil Code. Perhaps J. Andrzejewski's arguments could justify a modification of this provision? Although the cited author advocates repealing the provision of Article 388 of the Civil Code as a whole[45] and allowing the courts to have discretion in such cases pursuant to Articles 58(2) and 353(1) of the Polish Civil Code, the government's draft amendment of the Polish Civil Code of June 2021[46] diagnoses the flaws of the current legislation in an identical manner. It proposes, however, a different approach – the amendment of Article 388 – and this approach certainly better takes into account the legal position of the exploited person. This is evident in the light of the results of the consultation and the comments on the draft, with critical ones being voiced by representatives of organisations of potential exploiters. The government's draft is not completely different from the current legal situation, which is a good indication of the continuity of domestic legal thought on civil law. The amendment of Article 388 of the Polish Civil Code was passed by the Polish Parliament on December 2, 2021, which has been in force since June 30, 2022. The amendment was to strengthen a position of a person which was exploited by someone else. As a result of the amendment of Article 388 of the Polish Civil Code the deadline for submitting a lawsuit aimed at protection of the exploited person's interests was extended from two years since the contract was concluded up to three years for all the entities except for consumers who can submit lawsuits based on Article 388 of the Polish Civil Code within the deadline of six years since the contract was concluded.

Another observation relates to the obvious impact of the BGB's regulations on the capacity to do legal acts on the Polish legal solutions in the unification decrees, in the general provisions of the Civil Law of 1950 and in the currently applicable Civil Code. This is by no means surprising due to the fact that the code is relatively new and modern, and of course, its solutions are preceded by decades of diligent research. As far as we are concerned, the influence of German solutions is indisputable. The post-war legislators figured that there is no shame in using proven and tested solutions.

43 This was the rationale for the draft of Article 42 K.Z R Longchamps de Bérier. See *Komisja Kodyfikacyjna* . . ., op. cit., p. 46.

44 'In the end, however, on a solid foundation of legal experience drawn from different legal systems, the Polish codifiers constructed an eclectic, lavishly decorated structure with a beautifully finished façade that attracted the attention of many specialists. However, the structure itself proved to be completely useless because, by putting the individual elements together, in the course of the creative process . . . they forgot to build an entrance'. J. Andrzejewski, op. cit., p. 166.

45 Ibid., 217.

46 *Sejm RP. IX kadencja. Projekt ustawy o zmianie ustawy – Kodeks cywilny oraz ustawy – Kodeks postępowania cywilnego* – print No. 1344.

k. Penal law regulations on exploitation in the period preceding the entry into force of the Penal Code of 1997

A cursory analysis of the penal law provisions reveals that there were penal provisions on fraud and usury in legal systems of all three partitioners. The legal acts gradually extended the concept of usury (not only predatory money lending), equating it with exploitation.[47] Such a regulation was present in the German Penal Code of 1871 (Articles 263–264). Article 302 a, which clearly corresponds to the civil regulation, is of particular importance:

> Article 302a. Anyone who, by exploiting another person's vulnerability, recklessness or inexperience in order to obtain a loan or to postpone the repayment of a financial liability or due to other bilateral legal transaction for temporary economic purposes, promises or gives or orders another person to promise or give a financial benefit exceeding the interest rate to such an extent that, according to the circumstances, the financial benefit is grossly inadequate to the performance, shall be tried for usury and subject to the penalty of deprivation of liberty of up to 6 months and a fine of up to 3000 marks. Such a person can also be deprived of their civil rights.[48]

A distinctive type of legal regulation is the so-called Tagancev Code, the Russian penal code effective in the Polish territories of the Russian partition from 1916 to 1932. According to Article 611, a person guilty of the following shall be subject to the penalty of deprivation of liberty: (1) inducing a person who is incapable of understanding the nature and significance of the legal transaction or disposition made, managing their affairs, or a person under legal age, of which fact the perpetrator was aware, to enter into a transaction pertaining to assets that Is detrimental to them, or to perform another assets-disposing legal transaction that is detrimental to them, having taken advantage of their ignorance or inexperience; (2) inducing to enter into an adverse transaction or perform other assets-disposing legal transactions by means of deception, taking advantage for this purpose of the victim's lack of clear understanding of the nature and significance of such transaction or disposition; or (3) enforcing debt arising from a document, partially or in its entirety, if the enforced debt has been waived, of which fact the perpetrator knew, if these acts were committed for the purpose of obtaining a pecuniary benefit for the perpetrator or another person. If the loss in assets exceeds 500 rubles, the culprit shall be locked up in the house of correction. Any attempts to commit offenses specified in the first and second paragraphs of this article shall be punished by law.[49]

During the development of the Polish Penal Code in the Second Polish Republic, its main author Juliusz Makarewicz formulated the thesis: 'Whoever exploits unawareness, ignorance of economic relations, weakness of mind to the detriment of a counterparty – commits fraud; whoever exploits their difficult economic position – commits usury'.[50]

47 K. Bokwa, *Historia aktualna – austriacka regulacja odsetek i lichwy w XIX–XX w.*, 'Student Papers in Law, Administration and Economics' 2017, vol. XXI, p. 42.

48 *Kodeks karny Rzeszy Niemieckiej z dnia 15 maja 1871 r. z późniejszymi zmianami i uzupełnieniami po rok 1918 wraz z ustawą wprowadczą do Kodeksu karnego dla Związku Północno-Niemieckiego (Rzeszy Niemieckiej) z dnia 31 maja 1870 r.* Official translation by the Justice Department of the Ministry of the Former Prussian Quarter, Poznań 1920.

49 *Kodeks karny z 1903 r. (przekład z rosyjskiego) z uwzględnieniem zmian i uzupełnień obowiązujących w Rzeczypospolitej Polskiej w dniu 1 maja 1921 r.,* Warsaw 1922, issue of the Ministry of Justice.

50 D. Fajgenberg, *Lichwa*, Szczęsne 2019, p. 185. The cited entry is a reissue of the 1932 edition.

The adopted distinction resulted in Article 268 of the Penal Code of 1932 (Polish Journal of Laws No. 60, item 571), included in Chapter 49, titled 'Crimes Against Property'. The provision's wording is as follows:

> Whoever, by exploiting the fact that another person is placed under duress, concludes a contract with that person, imposing an obligation to render a pecuniary performance that is obviously disproportionate to the mutual performance, shall be subject to imprisonment for up to 5 years or to arrest.

Advantages of such provisions include separation of usury from other crimes (exploitation of a disadvantageous position), tendency to generalise (all contracts as a background for usury) and the judge's freedom to evaluate the disproportionality of performances.[51] Juliusz Makarewicz in the Commentary added that 'duress has to be economically based'.[52] The Penal Code of 1969 (Polish Journal of Laws No. 13, item 94) defined the crime of usury in an identical manner (Article 207), but the commentary acknowledged the possibility that duress could also include other factual circumstances.[53] Both codes penalised the offence of fraud in a separate way and did so by two almost identical legal provisions (Article 266 of the Penal Code of 1932; Article 205 of the Penal Code of 1969).

Attention should also be drawn to the non-Code penal provisions on usury in times of war. These regulations were passed in all the states that existed in the Polish territories during the First World War[54] and by the revived Polish state.[55] In the Polish legal regulations adopted post-WWII, attention should be drawn to the provisions of the Act of June 2, 1947, on Combating High Prices and Excessive Profits in Trade (Polish Journal of Laws No. 43, item 213), issued as part of the so-called Battle for Trade. I elaborate on that issue in a broader context in my monograph on the Special Commission.[56] The legal act explicitly mentioned combating **exploitation**. However, its purpose was not to combat exploitation but to abolish private trade.

51 Ibid., 191.

52 J. Makarewicz, *Kodeks karny z komentarzem*, eds. A. Grześkowiak, K. Wiak, Lublin 2012, p. 619.

53 J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, vol. II, Warsaw 1987, p. 274.

54 J. Pokoj, *Zwalczanie lichwy wojennej na obszarze właściwości krakowskich organów sądowych i administracyjnych w latach 1920–32*. The doctoral thesis was written in the Department of History of Polish Law at the Jagiellonian University under the supervision of I. Lewandowska-Malec, Ph.D., Kraków 2021, pp. 49–53 (typescript).

55 D. Fajgenberg, op. cit., pp. 135–176.

56 P. Fiedorczyk, *Komisja Specjalna do Walki z Nadużyciami i Szkodnictwem Gospodarczym 1945–1954. Studium historycznoprawne*, Białystok 2002, pp. 120–128.

32 Characteristics of the Polish legal capacity regulatory model

Maciej Domański and Bogusław Lackoroński

The concept of legal capacity in Polish law

The historical-legal analysis of the Polish legal system clearly reveals that the area of active legal capacity is closely connected in Poland with various traditions of continental civil law. This is due to the history of Poland – as discussed in greater detail in Chapter 4 – and applicability of various traditions of continental civil law in Polish lands, in the period of the great continental codification initiatives (except for the Swiss *Zivilgesetzbuch* [ZGB]).

The first Polish provisions relating to active legal capacity established in the inter-war period after Poland regained her independence in 1918 were contained in the Code of Obligations (CO).[1] However, the regulation relating to active legal capacity in CO Art. 32, 53 and 54 was not complete or exhaustive. Pursuant to CO Art. 32, the provisions contained in the personal law – which dated back to pre-independence times and were still in force – stipulated what effect the lack of legal capacity or its limitation had on the validity of a declaration of will and how legal persons could make declarations of will.

Polish full and comprehensive normative solutions concerning active legal capacity and its limits came quite late. The first such regulation came in the Personal Law Decree of August 29, 1945, which entered into force on January 1, 1946 (PLD).[2] The Personal Law Decree, in force only until September 30, 1950, was replaced by the regulation contained in the General Provisions of the Civil Law Act of July 18, 1950 (GPCL).[3] The Personal Law Decree, however, set the Polish model for the regulation of active legal capacity, much of which, if not all, was subsequently incorporated in the Civil Code (CC) of April 23, 1964.

From the very beginning, the Polish legislator unambiguously distinguished between passive legal capacity, as the capacity to be the subject of civil law rights and obligations, and active legal capacity, initially referred to more broadly simply as 'active legal capacities'.[4] Since the entry into force of the General Provisions of the Civil Law of 1950, the

1 Decree of the President of the Republic of Poland (Rozporządzenie Prezydenta Rzeczypospolitej Polskiej) of 27 October 1933, Journal of Laws 1933, no. 82, item 598.

2 Journal of Laws 1945, no. 40, item 223.

3 Journal of Laws 1950, no. 34, item 311.

4 It should be borne in mind that 'active capacity', i.e. the capacity to act in a legal capacity, has both an active aspect understood as the capacity to make declarations of will and a passive aspect being the capacity to receive declarations of will. See R. Longchamps de Bérier, *Zobowiązania,* Księgarnia Wydawnicza Gubrynowicz i Syn, Lwów 1938, p. 70; A. Wolter, Zdolność osób fizycznych do działań prawnych, *Przegląd Notarialny* 2/1947, p. 25, on the basis of the current Civil Code: M. Giaro, Bierna strona zdolności do czynności prawnych, *Studia Iuridica* vol. 87, 2022, p. 67.

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term 'active legal capacity' has been used instead of 'active legal capacities', to denote the ability to acquire rights and incur obligations as a result of an independent declaration of will. This was modelled on Germanic legislation, in particular the German BGB.

The provisions of the PLD used the concept of 'active legal capacities' (Chapter II, PLD Art. 3 *et seq.*). This was a continuation of the terminology used in CO Art. 32, 53 and 54 and referred to the BGB concept of *Geschäftsfähigkeit* in § 104 *et seq.*[5] In the extremely sparse literature on the 1945 Personal Law Decree, active legal capacity was understood narrowly, primarily as the capacity to make declarations of intent.[6] Alexander Wolter clearly distinguished this category from the broader concept of *Handlungsfähigkeit* in ZGB Art. 12.[7] For this reason, the amendment made by the General Provisions of the Civil Law Act 1950, which adopted the concept of active legal capacity which is still in force today (GPCL Art. 48 *et seq.*), was of a technical rather than substantive nature.

Also nowadays, active legal capacity in the strict sense of the word, as a statutory concept (CC Art. 11 *et seq.*), is to be interpreted narrowly as concerning the ability to perform legal actions (thus making declarations of will). There are no grounds for applying the Polish regulation on capacity to perform legal acts directly to other acts (in particular: notices, expressions of affection or declarations of knowledge).[8] One may also have basic doubts about attempts to construct, in the Polish legal system, a general category of active legal capacities, the scope and conditions of which would be determined on the basis of active legal capacity regulations. The notion of 'active legal capacities', therefore, has descriptive rather than normative force in Polish private law today. It is used to synthesise the capacity to perform various acts of significance, legal actions included, in the sphere of private law and private law relations.

The possibility of taking action and making declarations other than legal actions (meaning manifestations of knowledge and feelings, notifications, etc.) should be analysed *a casu ad casum,* and the basic criterion of their legal significance should be that of employing sufficient discernment.[9] With regard to certain declarations – which are not declarations of intent – the Polish legislator explicitly defines the subjective premises of legal significance. For example, with regard to forgiveness (CC Art. 899, 930.2 and 1010.2), it is indicated that it is effective when it has been made precisely 'with sufficient discernment'. In the case of acknowledgement of paternity, pursuant to Family and Guardianship Code (FGC) Art. 77.1, the declaration necessary for its assertion may be made by a person who is at least 16 years of age, and there are no grounds for total incapacitation (FGC Art. 77.1). However, legal capacity affects the possibility of making such a declaration effectively.

5 A. Wolter, Zdolność osób fizycznych do działań prawnych, *Przegląd Notarialny* 2/1947, p. 25.

6 A. Wolter, Zdolność osób fizycznych do działań prawnych, *Przegląd Notarialny* 2/1947, p. 25; F. Zoll, A. Szpunar, *Prawo cywilne w zarysie. Tom I. Część ogólna,* Księgarnia Powszechna, Kraków 1948, p. 110.

7 A. Wolter, Zdolność osób fizycznych do działań prawnych, *Przegląd Notarialny* 2/1947, p. 25.

8 K. Mularski, *Czynności podobne do czynności prawnych,* Wolters Kluwer Polska Sp. z o.o., Warsaw, 2011, VIII, 1.2., p. 218–225; R. Trzaskowski in: *Kodeks cywilny. Komentarz. Tom I. Część ogólna, cz. 2 (art. 56 – 125),* ed. J. Gudowski, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2021, p. 439. It should be noted, however, that a view has recently been expressed in the literature about the appropriate application of legal capacity to these declarations by virtue of the reference in Article 65.1 of the Civil Code. Thus: P. Księżak in: *Kodeks cywilny. Komentarz,* ed. K. Osajda, vol. ed. W. Borysiak, Wydawnictwo C.H. Beck, Legalis, 2022, commentary to Article 11, n. 7 *et seq.*; A. Herbet in: *Zobowiązania. Przepisy ogólne i powiązane przepisy Księgi I KC. Tom I. Komentarz,* ed. P. Machnikowski, Wydawnictwo C.H. Beck, Legalis, 2022, commentary to Article 14, n. 16.

9 K. Mularski, *Czynności podobne do czynności prawnych,* Wolters Kluwer Polska Sp. z o.o., Warsaw, 2011, VIII, 2.3, p. 234–239.

Indeed, pursuant to FGC Art. 77.2, a person without full legal capacity may only make the necessary declaration of acknowledgement of paternity before the guardianship court.

Polish legal literature also uses the term 'capacity' to specify that it refers to the ability to induce a specific civil law event or to become a party to a legal relationship as a result of such an event,[10] such as 'capacity to inherit',[11] 'capacity to testify', 'capacity to marry'[12] or 'capacity to consent to a medical procedure'.[13] Such formulations are shorthand for the various substantive legal premises for the effectiveness of certain events. The use of the term 'capacity' or 'incapacity' occurs in very different contexts and the flagged situations cannot be analysed together. For example, 'capacity to inherit' is a statutory concept (CC Art. 972 and 981[5]) and is a manifestation of (passive) legal capacity.[14] 'Testamentary capacity', i.e. the ability to make and revoke a will to the possession of full active legal capacity (CC Art. 944.1), is simply a manifestation of active legal capacity.[15] 'Incapacity to give informed consent' is also a statutory concept (Art. 32.2 and 34.3 of the Physicians and Dentists Act of December 5, 1996 (PDA),[16] while Article 17.2 of the Patients' Rights and Patients' Rights Ombudsman Act of November 6, 2008 (PPA),[17] is of a factual nature and is examined *ad casum*.[18] In the literature, however, views can be found on the construction of broader the concept of 'capacity to give informed consent to a medical procedure', which depend in particular on the age of majority.[19]

The issue of tort capacity, understood as the characteristics of a person, the existence of which determines the possibility of qualifying one's behaviour as a tort (within the meaning of the Civil Code) giving rise to liability *ex delicto*,[20] should be considered separately. The premises of such capacity consist of reaching the appropriate age (13). It is questionable whether such capacity also consists of the mental state at the time the tortious act was committed (CC Art. 425).[21]

In summary, in Polish law the category of active legal capacity must be understood, firstly, separately from passive legal capacity, which is quite obvious from the perspective of the continental private law tradition, but no longer so obvious from the perspective of *common law* systems and, secondly, narrowly – as the capacity to make independent

10 See A. Klein, Zdolność prawna, zdolność do czynności prawnych i inne zdolności a klasyfikacja zdarzeń prawnych, *Studia Cywilistyczne* 1969, vol. XIII-XIV, pp. 163 *et seq.*

11 E. Skowrońska-Bocian, *Prawo spadkowe,* Wydawnictwo C.H. Beck, Warsaw, 2022, p. 40 *et seq.*

12 See M. Domański, *Względne zakazy małżeńskie,* Wolters Kluwer Polska SA, Warsaw, 2013, p. 44 *et seq.* and the literature cited therein, as well as a critique of the concept of 'capacity to marry'.

13 P. Sobolewski in: *System Prawa Medycznego. Tom I. Instytucje Prawa Medycznego. Tom 1,* ed. M. Safjan, Wydawnictwo C.H. Beck, Warsaw, 2018, p. 396.

14 J. S. Piątowski, A. Kawałko, H. Witczak in: *System Prawa Prywatnego. Tom 10. Prawo spadkowe*, ed. B. Kordasiewicz, Wydawnictwo C.H. Beck, Warsaw, 2015, p. 164.

15 E. Skowrońska-Bocian, *Prawo spadkowe,* Wydawnictwo C.H. Beck, Warsaw, 2022, p. 78.

16 Journal of Laws 2023, item 1516.

17 Journal of Laws 2023, item 1545.

18 See B. Janiszewska in: *System Prawa Medycznego. Tom II. Część 1. Regulacja prawna czynności medycznych,* eds: M. Boratyńska, P. Konieczniak, Wolters Kluwer Polska SA, Warsaw, 2019, p. 489.

19 P. Sobolewski in: *System Prawa Medycznego. Tom I. Instytucje Prawa Medycznego. Tom 1,* ed. M. Safjan, Wydawnictwo C.H. Beck, Warsaw, 2018, p. 396.

20 P. Machnikowski, O zdolności deliktowej*, Acta Iuris Wratislaviensis* No 3048, PRAWOCCCIV, Wrocław 2008, p. 112.

21 P. Machnikowski, O zdolności deliktowej*, Acta Iuris Wratislaviensis* No 3048, PRAWOCCCIV, Wrocław 2008, p. 116.

declarations of will and not just any declarations or undertaking broader categories of actions constituting civil law events.

In Polish law, and more commonly in doctrine, there are specific 'capacities' relating to the premises for the occurrence of various legal events in both private and public law. However, it is not possible to subject them to a common analysis leading to the formulation of relevant general conclusions due to the fundamental structural differences separating them. As indicated, private law uses the concept of active legal capacities to collectively describe the capacity for various legal actions of significance in the sphere of private law. However, this concept is descriptive and not normative.

Legal capacity as a legal category

It is extremely important to note that active legal capacity is a strictly normative category in Polish law.[22] It is determined by a person attaining 13 years of age (CC Art. 12) or coming of age (CC Art. 10 and 11) or by incapacitation (partial or total) and the appointment of an interim counsel in the course of incapacitation proceedings (Civil Procedure Code [CPC] Art. 549.1). The state of disability, including intellectual disability, mental disorder or mental illness, does not directly affect the scope of legal capacity. Indeed, Polish law does not recognise the concept of natural incapacity.[23] Such a solution is provided, for example, in BGB § 104, under which an incapacitated person is one who's mental functions are in a state of pathological disorder that preclude the free expression of will, provided that this state is not temporary.

A person of full legal capacity (CC Art. 11), is one who is over 18 years of age (CC Art. 10.1) or who has entered into a marriage as a minor (CC Art. 10.2), without losing his/her majority if the marriage is annulled by divorce or terminated by the death of the spouse.[24] Pursuant to FGC Art. 10.1, a person under the age of 18 may not enter into marriage. However, the guardianship court may allow a woman who has reached the age of 16 to do so. This solution is usually justified by the situation of mothers who have not reached the age of 18 and for this reason do not have parental authority over their child. Full legal capacity is necessary for underage mothers to have and exercise parental authority over their child (FGC Art. 94.1).[25] It should be noted, however, that currently, full legal capacity through marriage is an exceptional solution in Poland. Whereas there were 3,501 marriages contracted by women under the age of 18 in 1995, in 2022 there were only 108.[26] The demographic changes that have taken place in Poland over the last thirty

22 A. Herbet in: *Zobowiązania. Przepisy ogólne i powiązane przepisy Księgi I KC. Tom I. Komentarz,* ed. P. Machnikowski, Legalis 2022, commentary to Article 14, n. 16.

23 This position is generally accepted today in the Polish civil law doctrine. B. Lewaszkiewicz-Petrykowska emphasised that "the view qualifying a lack of awareness or freedom as a lack of actual capacity – M. D./B. L.] no one defends it anymore", B. Lewaszkiewicz-Petrykowska in: *Kodeks cywilny. Komentarz. Część ogólna*, eds: P. Księżak, M. Pyziak-Szafnicka, Wolters Kluwer Polska SA, LEX, 2014, commentary to Article 82, n. 4; M. Gutowski, in: *Kodeks cywilny. Tom I. Komentarz. Art. 1–352,* ed. M. Gutowski, Wydawnictwo C.H. Beck, Warsaw, 2021, commentary to Article 11, p. 146, Nb. 6; A. Herbet, in: *Zobowiązania. Tom I. Przepisy ogólne i powiązane przepisy Księgi I KC. Komentarz,* ed. P. Machnikowski, Wydawnictwo C.H. Beck, Warsaw, 2022, commentary to Article 14, p. 36, Nb 24.

24 See M. Watrakiewicz, Wiek a zdolność do czynności prawnych*, Kwartalnik Prawa Prywatnego* 3/2003, p. 512.

25 See M. Domański, *Względne zakazy małżeńskie,* Wolters Kluwer Polska SA, Warsaw, 2013, p. 127 *et seq.*

26 Data from GUS's Statistics Poland, CSO Demographic Yearbooks.

years (the so-called second demographic transition)[27] have made marriages contracted by underage women and their coming of age in this way a rarity.

A minor who has reached the age of 13 and a person who is partially incapacitated (CC Art. 15) have limited capacity. Persons who are not incapacitated as yet, but who are put under the care of interim counsellors in the course of incapacitation proceedings (CPC Art. 549.1), also have such status. Persons with limited legal capacity may independently perform actions by which they do not incur obligations or dispose of their rights (CC Art. 17). In order to perform legal transactions by which one assumes obligations or disposes of one's rights, one generally needs the consent of a legal representative. Such a representative may be a parent exercising parental authority (FGC Art. 98.1) or a guardian (FGC Art. 155), an interim counsellor or, in the case of a partially incapacitated person, a curator (CC Art. 16.2 and FGC Art. 181.1).

With regard to actions by which a person with limited legal capacity incurs an obligation or disposes of one's rights, there are exceptions when the consent of the legal representative is not needed. Among the legal actions that a person with limited legal capacity may take by independent action regardless of the reason for which his or her active legal capacity is limited are contracts of minor importance commonly concluded in the course of everyday life (CC Art. 20) and actions disposing of one's own earnings (CC Art. 21). In addition, a person with limited legal capacity acquires full capacity with respect to such legal acts, as their legal representative may designate for their free discretionary use.[28] It should be noted that the powers of the legal representative of a person with reduced capacity usually do not extend solely to giving consent to perform legal acts. In the case of a parent exercising parental authority as well as a guardian, they may, as statutory representatives, perform legal acts on behalf of persons with limited legal capacity. In these cases, the legislator has made provision for parallel representation. Legal acts can be performed both by oneself with the consent of one's legal representative or by that person's legal representative with direct effect for that person.[29]

The situation of a curator for a partially incapacitated person is more complicated. Pursuant to FGC Art. 181.1, he/she is appointed to represent and manage the property only if the guardianship court so decides. If the court, in the order appointing a curator does not grant him/her the competence to represent and manage the property, he/she cannot perform legal acts on behalf of the ward. It should be emphasised that, in practice, in the vast minority of cases, the courts confer such powers on the curator.[30] A question mark

27 See M. Domański, *Względne zakazy małżeńskie,* Warsaw 2013, p. 371 *et seq.*

28 The solutions indicated are complemented by the regulations of the Family and Guardianship Code on administering a child's property by its parents. See FGC Art. 101, according to which parents are obliged to exercise with due diligence the management of the property of a child under their parental authority. The management exercised by the parents shall not extend to the child's earnings or to objects given to the child for free use. Parents may not, without the authorisation of the guardianship court, carry out acts exceeding the scope of ordinary management or consent to such acts being carried out by the child.

29 However, it is important to bear in mind the limitations of both the parent and the guardian of the minor (FGC Art. 156) when carrying out actions exceeding the scope of ordinary management of the child's property, as well as giving consent to the child to carry out such actions (FGC Art. 101.3).

30 In a study conducted by D. Olczak-Dąbrowska, unlimited power of representation and management was entrusted by the courts in 23% of the examined cases and limited in 17% (D. Olczak-Dąbrowska, Wybrane rodzaje kurateli w praktyce sądowej, *Prawo w Działaniu*, vol. 17/2014, p. 131). Similar results were revealed in a study by M. Jankowska. The power of representation was granted in 37% of the cases examined and the power of administration of assets in 35% (these were mostly the same cases). See M. Janowska, *Kuratela nad*

hangs over the scope of a curator's powers if the court has not appointed him/her to represent and manage the ward's assets.[31]

In Polish law, there is also a category of persons who lack legal capacity. It includes minors under the age of 13 and persons who are completely incapacitated (FGC Art. 12). A statutory representative acts on their behalf, who may be a parent exercising parental authority (FGC Art. 98.1) or a guardian (FGC Art. 175 in conjunction with Art. 155).

However, the lack of legal capacity does not completely exclude such persons from participating in legal transactions. Pursuant to CC Art. 14.2, they may conclude contracts commonly relating to minor day-to-day matters. Such contracts become valid upon execution. The indicated regulation also contains a mechanism to protect against abuse. A contract concluded by a person who lacks legal capacity does not become valid by virtue of execution if it is grossly disadvantageous for that person.

A consequence of the fact that capacity is a strictly legal and not a factual category is that if a person is of age and has not been incapacitated (nor has a temporary counsellor been appointed), that person has full capacity regardless of health or disability. Pursuant to CC Art. 82, decisions or declarations of will made by persons who, for any reason, were in a state that precluded conscious or free choice of action are invalid. The scope of application of this standard includes both pathological (disease) and non-pathological states (resulting, for example, from extreme exhaustion). The scope will also include situations where declarations of will are made by persons suffering from mental or intellectual disabilities. However, this regulation does not have the character of circumscribing the scope of active legal capacity, but being a defective declaration of will, it allows such a declaration to be considered invalid *post facto* if made in a disabling condition. The primary function of such a solution is to protect the autonomy of the person making the declaration.[32]

In summary, it should be stated that the Polish legal system is characterised by the normativity of the category of legal capacity, which is only indirectly related to the mental and intellectual state of an individual. In addition, it is gradable and applies uniformly to groups by age (under 13, over 13 up to the age of majority, adults) and by incapacitation (partial and total).

Incapacitation

Incapacitation is a major factor affecting the scope of legal capacity of adults in Polish law. Both the institution of incapacitation and its name (meaning 'deprivation of one's own will' in Polish) were known in Poland's legal systems before the consolidation of civil law. Title XI of Book One of the Civil Code of the Kingdom of Poland of 1825 (Art. 489 *et seq.*) reads 'on the deprivation and limitation of one's own will'. These solutions constituted a transposition of Title XI (§ II) of Book One of the Napoleonic Code.[33] The

osobą ubezwłasnowolnioną częściowo. Raport z badana aktowego, IWS Report, Warsaw 2018, p. 39 (available at: https://iws.gov.pl/wp-content/uploads/2019/04/IWS_Jankowska-M._Kuratela-nad-osob%C4%85-ubezw%C5%82asnowolnion%C4%85-cz%C4%99%C5%9Bciowo.pdf).

31 See G. Matusik in: *Kodeks rodzinny i opiekuńczy. Komentarz,* ed. K. Osajda, vol. ed. M. Domański, J. Słyk, Wydawnictwo C.H. Beck, Legalis, 2022, commentary to Article 181, n. 18 *et seq.*

32 See P. Machnikowski in: *Zobowiązania. Przepisy ogólne i powiązane przepisy Księgi I KC. Tom I. Komentarz,* ed. P. Machnikowski, Wydawnictwo C.H. Beck, Legalis, 2022, commentary to Article 82, n. 6 *et seq.*

33 H. Konic, *Prawo osobowe. Wykład porównawczy na tle prawodawstw obowiązujących w Polsce w zestawieniu z kodeksem szwajcarskim. Część trzecia,* Księgarnia F. Hoesicka, Warsaw, 1929, p. 357.

institution of incapacitation was also known to the German Civil Code (§ 6 in the original wording – *entmündigung* translated as 'niedoletność', literally meaning 'underageism',[34] and in the Polish official translation of 1923 as 'ubezwłasnowolnienie' meaning 'deprivation of one's own will'[35]). In the southern parts, subject to Austrian law, the Ordinance on Incapacitation (*Entmündigungsordnung*) – Kaiserliche Verordnung vom 28 Juni 1916 über die Entmündingung, RGBl. Nr. 207 held sway.

These regulations became the basis for the development of solutions adopted in the Personal Law Decree and the decree of August 29, 1945, regulating procedural issues on incapacitation.[36] The regulatory model adopted in these normative acts was then applied with modifications in the Act of July 18, 1950, General Provisions of Civil Law[37] and finally in the Civil Code and the Civil Procedure Code.

As regards structural foundations, the solutions currently in force do not differ significantly from those adopted directly in the course of the unification of civil law. Referring to the Austrian (§ 1 and 2 of the 1916 Ordinance), French (Articles 489, 497 of the Civil Code of the Kingdom of Poland of 1825) and Swiss solutions,[38] two degrees of incapacitation were adopted: total and partial.

According to PLD Art. 5.1, a court could totally incapacitate a person who had reached the age of seven. This was, of course, related to the accepted caesura of acquiring limited legal capacity (PLD Art. 3.2). The basis for total incapacitation could only be mental illness or mental retardation but no longer other mental disorders.[39] A mere 'diagnostic label' from the beginning of the Polish regulations on incapacitation was an insufficient premise for its adjudication. These specified disorders were supposed to induce a state in which the person was incapable of managing his/her own affairs. As H. Konic emphasised when analysing Swiss solutions (a position later recognised as valid on the grounds of PLD by W. Witkowski): 'mental illness by itself is not a reason for interdiction. It may be transitory, e.g. consisting in an acute attack of melancholia which disappears within a few weeks. There may also be a state of harmless monomania, none of which will be reason for establishing guardianship'. Complete incapacitation will only apply when 'mental illness entails permanent incapacity, or when the incapacity is so severe that circumstances require official intervention'.[40]

In the case of partial incapacitation, which could be imposed on an adult, the basis could be not only mental illness or mental retardation (PLD Art. 6.1), but also prodigality, compulsive drunkenness or drug addiction (PLD Art. 6.2). In the case of mental illness or mental retardation, partial incapacitation could be applied if the degree of impaired capacity was not so severe as to justify total incapacitation. Prodigality justified partial

34 § 6 BGB – German Civil Code in force since 1 January 1900, transl. W. Zieliński, Bytom 1900, p. 2. The same concept was used in this translation of BGB § 114 and § 115.

35 *Kodeks cywilny obowiązujący na ziemiach zachodnich Rzeczypospolitej Polskiej (Polish official translation),* Warszawa Poznań 1923, p. 2, § 6.

36 Journal of Laws 1945, no. 40, item 225.

37 Journal of Laws 1950, no. 34, item 311.

38 H. Konic, *Prawo osobowe. Wykład porównawczy na tle prawodawstw obowiązujących w Polsce w zestawieniu z kodeksem szwajcarskim. Część trzecia,* Księgarnia F. Hoesicka, Warsaw, 1929, p. 426 *et seq.*

39 W. Witkowski, *Ubezwłasnowolnienie (Prawo materialne i formalne),* Demokratyczny Przegląd Prawniczy 1–2/1947, p. 24.

40 H. Konic, *Prawo osobowe. Wykład porównawczy na tle prawodawstw obowiązujących w Polsce w zestawieniu z kodeksem szwajcarskim. Część trzecia,* Księgarnia F. Hoesicka, Warsaw, 1929, p. 422; W. Witkowski, Ubezwłasnowolnienie (Prawo materialne i formalne), *Demokratyczny Przegląd Prawniczy* 1–2/1947, p. 23.

incapacitation only if it caused the person to put himself or his family at risk of privation (PLD Art. 6.2.1). Drunkenness or drug addiction justified partial incapacitation when it exposed one or one's family to danger of privation, put one in danger of need of assistance in running one's own affairs, or endangered the safety of others.

The indicated legislative solutions concerning incapacitation have been slightly modified in the GPCL. Apart from raising the age for acquiring limited legal capacity from seven to thirteen, the premises for full incapacitation (GPCL Art. 9.1) remained unchanged. It could still only be based on mental illness or mental retardation. The range of situations where partial incapacitation was possible was extended. In the case of prodigality, drunkenness or drug addiction, the effects they were supposed to cause were no longer specified.[41]

An important element influencing the shape of the institution of incapacitation was the adoption, already in the Supreme Court's case law of the 1950s, of the concept of its purpose. As emphasised in the reasoning of its judgment of April 12, 1954:

> not in every case of mental illness or mental retardation must incapacitation be underpinned by ruling. In particular, incapacitation will be necessary if there is a need to deal with the personal affairs of an ill person e.g. one requiring medical treatment. Moreover, when the patient's property interests require the patient to be incapacitated.[42]

A similar position was taken in its ruling of November 12, 1956.[43] Despite the apparent extension of the possibility of a ruling on incapacitation, the Supreme Court, by means of a precedent-setting interpretation of the provisions of the GPCL, reinforced the protective function regarding persons with mental disorders. Incapacitation had to be justified from the perspective of protecting the property or non-property interests of the affected person.[44] But the purpose of incapacitation, meaning that it could only be imposed to protect the property or non-property interests of the person it was to affect, was not reserved explicitly in the law being considered a necessary premise for the possible interference in the scope of an individual's active legal capacity.

Minor modifications of incapacitation have been made in the Civil Code. Firstly, the terminology was slightly modified: 'psychological underdevelopment' was replaced by 'mental retardation' (CC Art. 13.1 and 16.1). Secondly, prodigality was deleted as a basis for partial incapacitation.[45] Thirdly, the *medical* grounds for partial and total incapacita-

41 As emphasised in the Supreme Court ruling of 14 November 1951, C 402/51, State and Law 12/1951, p. 971, 'partial incapacitation is justified in any case of persistent alcohol abuse and not only in flagrant cases where compulsive drunkenness has led, to total incapacity for work and normal life and inability to direct one's own conduct'.

42 Supreme Court Ruling of 12 March 1954, II C 784/53, Legalis.

43 Supreme Court Ruling of 12 November 1956, 3 CR 440/56, OSN 4/1957, item 115, "the state of mental illness, wasting away, etc. of the person concerned is not sufficient in itself to make such a decision, but it is also necessary to establish that the incapacitation is expedient. Such a decision is not expedient when the person concerned has no major assets which he could recklessly dispose of to the detriment of himself and his family, and moreover handles his ordinary affairs in a way that is not abnormal".

44 It should be noted that such a view has not been accepted in the literature without resistance. See S. Wójcik, Glosa do orzeczenia Sądu Najwyższego z 12 listopada 1956 r., 3 CR 440/56, *Państwo i Prawo* 8–9/1958, p. 276; A. Wolter, *Prawo cywilne. Zarys części ogólnej,* Warsaw 1963, p. 139.

45 However, as the Supreme Court stated in its decision of 5 February 1965, I CR 399/64, OSNC 1/1966, item 5, "riotous lifestyle and squandering of assets may, in the light of Article 16 § 1 of the Civil Code, constitute grounds for partial incapacitation if a mental disorder manifests itself in this way".

tion have been harmonised. Fourthly, a general *psychological* rationale for partial incapacitation was identified, that being '[a] need for assistance in managing affairs' in the absence of a justification for full incapacitation.

Although in substantive law the institution of neither total nor partial incapacitation has been subject to legislative changes since the Civil Code came into force, it is not as if its interpretation has not been subject to modification.

The interpretation of the premises adopted in practice was increasingly strict. As emphasised in a Supreme Court ruling representative of this trend of May 17, 2013,

> it is a well-established view in doctrine and jurisprudence that the existence of mental illness or any other cause indicated in this provision [CC Art. 13 – M.D./B.L.] is not a sufficient premise for the declaration of total incapacitation. These reasons must still be causally linked to the inability of the person under consideration to control his or her own, broadly understood, behaviour. The term 'incapacity' should be understood as the lack of conscious contact with the environment and the inability to intellectually assess one's situation, one's behaviour and its ensuing consequences.[46]

Despite the absence of an express stipulation in the provisions of the Civil Code that incapacitation may only be used to protect the interests of a person of restricted active legal capacity, the interpretation that incapacitation is an expedient institution has been consistently extended and consolidated.[47] As the Supreme Court emphasised in its ruling of December 29, 1983:

> incapacitation is an institution established in the exclusive interest of ill persons who, for reasons set out in CC Art. 13.1, are unable to control their own conduct or, for reasons

46 Supreme Court Order of 17 May 2013, I CSK 122/13, Legalis.

47 This is an almost universally approved view in the Polish doctrine of private law: M. Balwicka-Szczyrba, A. Sylwestrzak, Instytucja ubezwłasnowolnienia w perspektywie unormowań Konstytucji RP oraz Konwencji ONZ o prawach osób niepełnosprawnych, *Gdańskie Studia Prawnicze* 2018, vol. XL, p. 163; M. Balwicka-Szczyrba, A. Sylwestrzak, in: *Kodeks cywilny. Komentarz,* eds: M. Balwicka-Szczyrba, A. Sylwestrzak, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2022, commentary to Article 13, pp. 44–45, Nb 4; H. Dąbrowski, in: *Kodeks cywilny. Komentarz. Tom 1,* ed. J. Pietrzykowski, Wydawnictwo Prawnicze, Warsaw, 1972, commentary to Article 13, pp. 79–82; S. Dmowski, in: S. Dmowski, S. Rudnicki, *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna,* LexisNexis Polska Sp. z o.o., Warsaw, 2011, commentary to Article 13, pp. 85–87, Nb 6–11; M. Gutowski, M. Gutowski, in: *Kodeks cywilny. Tom I. Komentarz. Art. 1–352,* ed. M. Gutowski, Wydawnictwo C.H. Beck, Warsaw, 2021, commentary to Article 13, pp. 153–154, Nb 5; A. Herbet, in: *Zobowiązania. Tom I. Przepisy ogólne i powiązane przepisy Księgi I KC. Komentarz,* ed. P. Machnikowski, Wydawnictwo C.H. Beck, Warsaw, 2022, commentary to Article 14, pp. 31–32, Nb 20; S. Kalus, in: *Kodeks cywilny. Komentarz. Tom I. Część ogólna (art. 1–125),* eds: M. Habdas, M. Fras, Wolters Kluwer Polska SA, Warsaw, 2018, commentary to Article 13, pp. 74–75, Nb 3; P. Księżak, in: *Komentarze Prawa Prywatnego. Tom I. Kodeks cywilny. Komentarz. Część ogólna. Przepisy wprowadzające KC. Prawo o notariacie (art. 79–95 i 96–99),* ed. K. Osajda, Wydawnictwo C.H. Beck, Warsaw, 2017, commentary to Article 13, pp. 135–136, Nb 17–20; M. Pasieka-Kuzara, Bliski koniec instytucji ubezwłasnowolnienia, *Transformacje Prawa Prywatnego* 2021, no. 2, p. 90, footnote 37; M. Pazdan, in: *Kodeks cywilny. Tom I. Komentarz. Art. 1–44910,* ed. K. Pietrzykowski, Wydawnictwo C.H. Beck, Warsaw, 2020, commentary to Article 13, p. 97, Nb 8–9; K. Piasecki, in: *Kodeks cywilny z komentarzem. Tom I,* ed. J. Winiarz, Wydawnictwo Prawnicze, Warsaw, 1989, commentary to Article 13, p. 28, Nb 5; M. Pilich, in: *Kodeks cywilny. Komentarz. Tom I. Część ogólna. Cz. 1 (art. 1–554*), ed. J. Gudowski, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2021, commentary to Article 13, pp. 272–273, Nb 8; M. Pyziak-Szafnicka, Ubezwłasnowolnienie jako środek ochrony osób dotkniętych chorobami otępiennymi i chorobą Alzheimera – aktualna regulacja i projektowane zmiany, *Studia*

> set out in CC Art. 16.1, need assistance to manage their daily affairs. The institution of incapacitation does not serve the welfare of the applicant for incapacitation and the family of the applicant.[48,49]

The purpose of incapacitation should be interpreted as a response to a real and concrete need for assistance. This need must be assessed exclusively from the vantage point of the person to be incapacitated. As the Supreme Court emphasised in its decision of September 6, 2017,

> despite the existence of grounds . . . , the court may dismiss the request for incapacitation if the patient's life situation is stabilised, he or she has sufficient factual care, and there is no need to take any action requiring the establishment of legal guardianship, and if the incapacitation decision could lead to the disruption – against the interests of the patient – of a factual situation that is favourably regulated for him or her . . . This approach is due to the perception of the institution of incapacitation as being exclusively aimed at protecting the interests of the sick person. . . . Thus, the interests of the person submitting the application for incapacitation or his or her family should be of no account in regard of the incapacitation decision.

The subsidiarity of incapacitation, in particular total incapacitation, was also emphasised with the ruling that

> as a consequence, the application of this institution should always be imposed with due regard for the dignity of the human individual and the necessity to secure the protection of his or her interests. Total incapacitation should only be imposed when the protection of an individual's interests cannot be adequately ensured by other normative protective institutions.[50]

To sum up, despite its archaic timbre and the fact that the content of the regulations is out of sync with contemporary psychiatric nosology, as emphasised in the literature,[51]

Prawno-Ekonomiczne 2019, vol. CXI, pp. 66–68; M. Serwach, in: *Kodeks cywilny. Część ogólna. Komentarz,* eds: M. Pyziak-Szafnicka, P. Księżak, Wolters Kluwer SA, Warsaw, 2014, commentary to Article 13, pp. 201–204, Nb 11–15; T. Sokołowski, in *Kodeks cywilny. Komentarz Lex. Tom I. Część ogólna,* ed. A. Kidyba, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2012, commentary to Article 13, p. 80, Nb 2 and 3; R. Strugała, in: *Kodeks cywilny. Komentarz,* eds: E. Gniewek, P. Machnikowski, Wydawnictwo C.H. Beck, Warsaw, 2021, commentary to Article 13, p. 40, Nb 2.

48 Supreme Court Order of 29 December 1983, I CR 377/83, Legalis.

49 Similarly in the orders of 26 January 2012, III CSK 169/11, 18 December 2019, IV CSK 157/19,

50 Supreme Court Ordeer of 6 September 2017, I CSK 331/17, Legalis.

51 See M. Balwicka-Szczyrba, A. Sylwestrzak, Instytucja ubezwłasnowolnienia w perspektywie unormowań Konstytucji RP oraz Konwencji ONZ o prawach osób niepełnosprawnych*, Gdańskie Studia Prawnicze* 2018, vol. XL, pp. 160–161; M. Balwicka-Szczyrba, A. Sylwestrzak, in *Kodeks cywilny. Komentarz,* eds: M. Balwicka-Szczyrba, A. Sylwestrzak, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2022, commentary to Article 13, p. 44, Nb 3; J. Gudowski, Ubezwłasnowolnienie – relikt normatywny czy przejaw prawnego obskurantyzmu? in: *Ius et Ratio. Jubilee Book dedicated to Professor Elżbieta Skowrońska-Bocian,* eds: W. Borysiak, J. Wierciński, A. Gołaszewska, M. Olechowski, p. 132; T. Pajor, Ochrona osób niepełnosprawnych a ubezwłasnolwolnienie, in: *Studium nad potrzebą ratyfikacji przez RP Konwencji o prawach osób niepełnosprawnych,* ed. K. Kurowski, Wydawnictwo Kurza Stopka J. Tyluś Malak, Łódź, 2010, pp. 85–86; M. Pasieka-Kuzara, Bliski koniec instytucji ubezwłasnowolnienia*, Transformacje Prawa Prywatnego* 2021, no. 2, p. 87; M. Zima-Parjaszewska,

incapacitation in the Polish legal domain cannot be regarded as an institution aimed at abasing or stigmatising anyone. Despite various specific doubts, as well as the deficiencies of the solutions in force, one cannot fail to notice that the jurisprudential practice has unequivocally given the institution a protective character, aiming to secure, as far as possible, the personal and property interests of the person affected.[52] The application of the Civil Code on incapacitation leaves no room for pursuing the interests of other persons (family, relatives or others), which still had a normative basis in the 1945 Personal Law Decree.

System-wide nature of active legal capacity

In the Polish legal system, the limitation or lack of active legal capacity (sometimes the status of an incapacitated person) interferes far more deeply with the legal situation than simply by depriving or limiting active legal capacity in the private law sphere.[53]

From a private law perspective, it should be emphasised that a person without full active legal capacity cannot make or revoke a will (CC Art. 944.1). A fully incapacitated person cannot enter into marriage (FGC Art. 11.1). The incapacitation (total or partial) of a spouse gives rise to a system of compulsory separation of property (FGC Art. 53.1). A person who does not have full legal capacity does not have the right to parenthood (FGC Art. 94.1), nor can he/she adopt a child (FGC Art. 114^1.1) or be a guardian (FGC Art. 148.1).

Active legal capacity is closely linked to active procedural capacity – the ability to independently perform procedural acts in civil proceedings. Pursuant to CPC Art. 65.1, the rule is that active procedural capacity is vested in natural persons with full active legal capacity, so persons lacking this capacity cannot perform procedural acts themselves. Incapacitation proceedings themselves are the exception. Even a person incapacitated in earlier proceedings, pursuant to CPC Art. 559.3, may successfully apply for the reversal or modification of the incapacitation ruling.

Persons with limited active legal capacity have active procedural capacity in matters arising from legal acts which they can perform independently (CPC Art. 65.2). The scope of legal acts that may be performed by persons with limited active legal capacity independently has been outlined. Moreover, specific provisions grant persons with limited active legal capacity active procedural capacity in certain types of proceedings. For example, pursuant to CPC Art. $453,^1$ in cases establishing or denying the parentage of a child and for determining the ineffectiveness of an acknowledgement of paternity, the mother and father of a child also have active procedural capacity when they are limited in active legal capacity

Artykuł 12 Konwencji ONZ o prawach osób z niepełnosprawnościami a ubezwłasnowolnienie w Polsce, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka,* ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, p. 130; M. Zima-Parjaszewska, Artykuł 12 Konwencji ONZ o prawach osób z niepełnosprawnościami a ubezwłasnowolnienie w Polsce, *Studia Prawnicze* 2013, no. 2, p. 82.

52 Cf. T. Pajor, Ochrona osób niepełnosprawnych a ubezwłasnowolnienie, in: *Studium nad potrzebą ratyfikacji przez RP Konwencji o prawach osób niepełnosprawnych,* ed. K. Kurowski, Wydawnictwo Kurza Stopka J. Tyluś Malak, Łódź, 2010, p. 84; M. Pyziak-Szafnicka, Ubezwłasnowolnienie jako środek ochrony osób dotkniętych chorobami otępiennymi i chorobą Alzheimera – aktualna regulacja i projektowane zmiany, *Studia Prawno-Ekonomiczne* 2019, vol. CXI, pp. 66–68.

53 Cf. L. Kociucki, Niektóre problemy nowelizacji polskiego prawa o ubezwłasnowolnieniu, *Studia Prawnicze* 2013, no. 2, pp. 116–119; M. Tomaszewska, Ubezwłasnowolnienie zagrożeniem prawa do wolności? in: *Idea wolności w ujęciu historycznym i prawnym. Wybrane zagadnienia,* eds: E. Kozierska, P. Sadowski, A. Szymański, Wydawnictwo Adam Marszałek, Toruń, 2010, pp. 522–523.

if they are at least 16 years old, and pursuant to CPC Art. 573.1, a person under parental authority, guardianship or curatorship has the capacity to take action in proceedings concerning his or her person, unless he or she has no legal capacity.[54]

Minority status and incapacitation have significant impact on the possibility to consent to the provision of healthcare. For a minor patient, the consent of the patient's statutory representative is necessary (PDA Art. 32.2 and 34.3). In the case of patients who have reached the age of sixteen, their consent is also required (PDA Art. 32.5 and 34.4). Similarly, in the case of patients who are completely incapacitated, the consent of the statutory representative must be obtained (PDA Art. 32.4 and 34.4). As regards examinations that do not pose an increased risk to the patient, if the totally incapacitated person is able to express an opinion on his/her examination with discernment, his/her consent is also required (PDA Art. 32.4). With regard to other services, the totally incapacitated person may object (which may be overridden by a decision of the guardianship court: PDA Art. 32.6 and 34.6). A partially incapacitated patient may independently consent to an examination or to the provision of a service that does not pose an increased risk to him/her, provided that he/she is capable of giving informed consent (PDA Art. 32.2). In the case of procedures posing an increased risk, the consent is given by the legal representative, and the patient may alternatively express his/her objection (PDA Art. 34.6).[55]

Apart from the cited examples, a huge number of public law regulations apply to the category of active legal capacity. By way of example, it should only be pointed out that pursuant to Art. 29.1.4 of the Detective Services Act,[56] a person may apply for a detective's licence if he/she has full active legal capacity. Under Art. 65.2 of the Advocates Law,[57] a person who has full active legal capacity may be entered on the roll of advocates. A similar regulation can be found in Art. 24.1.4 of the Legal Advisers Act.[58] The following must also have full active legal capacity: a member of a university council (Art. 20.1.1 of the Law on Higher Education and Science[59]), a person wishing to obtain the right to practice as a pharmacist (Pharmacist Law Art. 13.1.2[60]), a person wishing to join the prison service (Prison Service Law Art. 29.1[61]) or a laboratory diagnostician (Laboratory Medicine Law Art. 11.1.9[62]). The number of references to active legal capacity in various acts, being difficult to establish and identify, is one of the reasons for the fundamental problems with changes in the institution of incapacitation and changing the normative basis for shaping the active legal capacity of natural persons.

In the Polish legal system, active legal capacity is one of the central characteristics of natural persons that is applicable in both civil and public law. It is a normative qualification, depending not only on the fulfilment of preliminarily defined statutory premises, but also on the occurrence of a number of civil law events. With regard to adults, the institution of

54 For various aspects of procedural capacity, see R. Obrębski, Zarys istoty zdolności procesowej w postępowaniu cywilnym, *Polski Proces Cywilny* 1/2017, *passim*, in particular p. 23 *et seq.*

55 For a detailed discussion of the various 'configurations' of medical consents see B. Janiszewska, *Zgoda na udzielenie świadczenia zdrowotnego. Ujęcie wewnątrzsystemowe,* Wydawnictwo C.H. Beck, Warsaw, 2013, p. 458 *et seq.*

56 Detective Services Act of 6 July 2001, Journal of Laws 2020, item 129.

57 Advocates Law Act of 26 May 1982, Journal of Laws 2023, item 1184.

58 Legal Advisers Act of 6 July 1982, Journal of Laws 2022, item 1166.

59 Higher Education and Science Law of 20 July 2018, Journal of Laws 2023, item 742.

60 Pharmacist Act of 10 December 2020, Journal of Laws 2022, item 1873.

61 Prison Service Act of 9 April 2010, Journal of Laws 2023, item 1683.

62 Laboratory Medicine Act of 15 September 2022, Journal of Laws 2022, item 2280.

incapacitation (total and partial) is of fundamental importance from the perspective of their active legal capacity. It determines active legal capacity in the strict sense of the word, the ability to perform various functions, to participate in legal transactions in the broad sense, and to participate in social and political life. This institution constitutes an interdisciplinary axis that determines the status of an individual in both private and public law. Despite the gradual proliferation of more flexible criteria conditioning the ability to perform certain acts, for example, with sufficient discernment, there are still very many instances in which the possibility of acquiring a right in a variety of legal situations in both private and public law is dependent on the formal criterion of having full active legal capacity.

33 Polish contemporary regulation of active legal capacity in the light of standards established in Article 12 of the UN Convention on the Rights of Persons with Disabilities

These reflections on contemporary Polish regulations on active legal capacity flowing from CRPD Article 12 standards, as analysed in this chapter, have been divided into four parts. The first of these generally presents the most important substantive and procedural aspects of active legal capacity and its limitations, while the three remaining parts offer in-depth analyses of three institutions designed to support persons with disabilities participating in civil law transactions: curatorship for partially incapacitated persons, curatorship for persons with disabilities and plenary guardianship for fully incapacitated persons.

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a. Introductory remarks

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1. Preliminary issues

Poland ratified the Convention on the Rights of Persons with Disabilities (CRPD) on September 6, 2012, and it passed it into law on October 25, 2012.[1] Neither during work on its ratification nor after its entry into force were changes made to private law to bring domestic law solutions into line with the CRPD standards, in particular its Article 12.[2]

In the Polish legal system, active legal capacity (understood narrowly as a legal category determining the ability to effectively make declarations of will) is determined by age (Civil Code [CC] Art. 10–12 and Art. 15), marriage to a narrower extent (CC Art. 10.2) and incapacitation (CC Art. 13 and 16) or the appointment of a temporary counsellor in the course of incapacitation proceedings (Civil Procedure Code [CPC] Art. 549.1). The issue of age and coming of age by marriage is not relevant from the perspective of the CRPD. The central issue that raises most doubts is incapacitation.[3]

1 Journal of Laws 2012, item 1169.

2 Cf. J. Gudowski, Ubezwłasnowolnienie – relikt normatywny czy przejaw prawnego obskurantyzmu*?*, in: *Ius et ratio. Księga jubileuszowa dedykowana Profesor Elżbiecie Skowrońskiej-Bocian,* eds: W. Borysiak, J. Wierciński, A. Gołaszewska, M. Olechowski, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2022, pp. 126–141; M. Szeroczyńska, Mozolna droga ku likwidacji instytucji ubezwłasnowolnienia, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka,* ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, pp. 164–189.

3 M. Balwicka-Szczyrba, A. Sylwestrzak, Instytucja ubezwłasnowolnienia w perspektywie unormowań Konstytucji RP oraz Konwencji ONZ o prawach osób niepełnosprawnych*, Gdańskie Studia Prawnicze* 2018, vol. XL, *passim*; J. Gudowski, Ubezwłasnowolnienie – relikt normatywny czy przejaw prawnego obskurantyzmu*?*, in: *Ius et ratio. Księga jubileuszowa dedykowana Profesor Elżbiecie Skowrońskiej-Bocian,* eds: W. Borysiak, J. Wierciński, A. Gołaszewska, M. Olechowski, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2022, *passim*; A. Herbet, in: *Zobowiązania. Tom I. Przepisy ogólne i powiązane przepisy Księgi I KC. Komentarz,* ed. P. Machnikowski, Wydawnictwo C.H. Beck, Warsaw, 2022, commentary to Article 14, pp. 18–20, Nb 2–4 and pp. 25–26, Nb 11; L. Kociucki, Niektóre problemy nowelizacji polskiego prawa o ubezwłasnowolnieniu*, Studia Prawnicze* 2013, no. 2, *passim*; P. Księżak, in: *Komentarze Prawa Prywatnego. Tom I. Kodeks cywilny. Komentarz. Część ogólna. Przepisy wprowadzające KC. Prawo o notariacie (art. 79–95 i 96–99),* ed. K. Osajda, Wydawnictwo C.H. Beck, Warsaw, 2017, commentary to Article 13, pp. 132–133, Nb 7–8; I. Markiewicz, J. Heitzman, A. Pilszyk, Ubezwłasnowolnienie – instytucja wciąż potrzebna*?, Psychiatria* 2014, no. 4, *passim*; M. Pasieka-Kuzara, Bliski koniec instytucji ubezwłasnowolnienia*, Transformacje Prawa Prywatnego* 2021, no. 2, p. 95; M. Pazdan, in: *Kodeks cywilny. Tom I. Komentarz. Art. 1–44910,* ed. K. Pietrzykowski, Wydawnictwo C.H. Beck, Warsaw, 2020, commentary to Article 13, p. 98, Nb 15; I. Radlińska, Ochrona podmiotowości prawnej osób niepełnosprawnych intelektualnie w stopniu umiarkowanym w prawie polskim*, Pomeranian Journal of Life Sciences* 2017, no. 1, *passim*; R. Strugała, in: *Kodeks cywilny. Komentarz,* eds: E. Gniewek, P. Machnikowski, Wydawnictwo C.H. Beck, Warsaw, 2021, commentary to Article 13, p. 41, Nb 6; M. Szeroczyńska, Mozolna droga ku likwidacji

Since the consolidation of civil law in Poland after World War II, incapacitation has played a fundamental role in regulations helping people with mental or intellectual disabilities to act in legal transactions. As presented in this book's earlier chapters, it exists in the form of partial incapacitation (CC Art. 16) and total incapacitation (CC Art. 13). A curatorship is established for a partially incapacitated person (CC Art. 16.2) and a guardianship for a totally incapacitated person, unless, as a minor, he or she remains under parental authority (Family and Guardianship Code [FGC] Art. 13.2). In acquiring the scope of 'measures related to the exercise of legal capacity' in the understanding of CRPD Article 12.4,[4] the institution of curator for a person with disabilities (FGC Art. 183) should also be recognised. The institutions of curatorship for a person with disabilities, in the context of the requirements under the CRPD, will be discussed in further, separate sections of this study. The reflections below have the sole aim of presenting incapacitation as an institution, the application of which requires the appointment of a guardian or curator depending on whether the person in question is totally or partially incapacitated. Thus, further parts of this chapter are devoted to guardianship and curatorship.

It is also important to flag the existence of different specific solutions in Polish law. For example, according to Mental Health Act (MHA) Art. 44 § 1,[5] for a person held in a psychiatric hospital, the guardianship court establishes a curator at the request of a person needing assistance in dealing with all of his/her affairs or affairs of a certain type during his/her stay in the hospital. Pursuant to CPC Art. 556.2, if the court has failed to serve court letters or summon the subject of the application for incapacitation to a hearing, it shall appoint a curator for him or her (unless he or she has a statutory legal representative who is not the applicant). However, these institutions are not of a general nature but are strictly related to specific situations or proceedings, such as a term in a psychiatric hospital. For this reason, although they are important and interesting, they will not be analysed in detail in this book.

2. Model for the interpretation of CRPD Article 12

The results of the analysis of the existing solutions in Poland with regard to active legal capacity and its limitations, depend on the initial assumption made with regard to the interpretation of CRPD Article 12; pursuant to its paragraph 2, states should recognise

instytucji ubezwłasnowolnienia, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka,* ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, *passim*; M. Tomaszewska, Ubezwłasnowolnienie zagrożeniem prawa do wolności? in: *Idea wolności w ujęciu historycznym i prawnym. Wybrane zagadnienia,* eds: E. Kozierska, P. Sadowski, A. Szymański, Wydawnictwo Adam Marszałek, Toruń, 2010, *passim*; M. Wilejczyk, *Zagadnienia etyczne części ogólnej prawa cywilnego,* Wydawnictwo C.H. Beck, Warsaw, 2014, pp. 153–161; K. Zaradkiewicz, Ubezwłasnowolnienie – perspektywa konstytucyjna a instytucja prawa cywilnego, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka,* ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, *passim*; M. Zima-Parjaszewska, Artykuł 12 Konwencji ONZ o prawach osób z niepełnosprawnościami a ubezwłasnowolnienie w Polsce, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka,* ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, *passim*.

4 At present, there is no doubt that the notion of legal capacity on the basis of CRPD Article 12 includes both passive capacity (to be the subject of rights and obligations) and active capacity (the ability to participate in legal transactions by one's own actions).

5 Journal of Laws 2022, item 2123.

that persons with disabilities have active legal capacity, on an equal basis with others, in all aspects of life. At the same time, states must take appropriate measures to ensure that persons with disabilities have access to the support they may need in exercising their legal capacities (paragraph 3). The criteria to be met by 'measures related to the exercise of active legal capacity' are described in paragraph 4.

The position of the Committee for the Rights of Persons with Disabilities, and of some representatives of the doctrine of human rights, that the content of CRPD Article 12 prejudges the prohibition of any substitute solutions in national systems, i.e. assuming that it is possible to appoint a representative (guardian, curator, assistant, etc.) who, without the consent of the person affected by disability, could perform legal acts on that person's behalf.[6] With such a despotic exegesis of CRPD Article 12, assuming inflexibly that everyone with disabilities, regardless of their state of health, must have full active legal capacity to perform all legal acts, and that this active legal capacity cannot be limited (e.g. by the appointment of a representative), one would have to conclude that both total and partial incapacitation fundamentally contravene CRPD Article 12. This follows from the consequences of incapacitation regardless of its kind. Pursuant to CRPD Article 12, totally incapacitated persons do not have active legal capacity. The statutory representative, who is either a parent (FGC Art. 98 and Art. 108) or a guardian (FGC Art. 155), acts for these persons. Totally incapacitated persons, with the exception of contracts concluded in negligible day-to-day matters (CC Art. 14.2), cannot make independent legal transactions and are equated with minors under the age of 13.

The consequences of partial incapacitation are not as far-reaching as those of total incapacitation, but they also impose limitations on the ability to perform legal acts and independent legal transactions. Partially incapacitated persons may only carry out acts on their own if they neither assume obligations nor dispose of their right.[7] An appointed curator may be authorised to manage the property and represent a partially incapacitated person (FGC Art. 181.1). Such a curator acquires the power to perform legal acts with direct effect for the incapacitated person. Both total and partial incapacitation can be imposed by court ruling against the will of the affected person.

The UN Committee on the Rights of Persons with Disabilities found the Polish institution of incapacitation to be incompatible with the CRPD as would arise from its recommendations upon analysing Poland's implementation report as submitted pursuant to CRPD Article 35.[8] The wholesale rejection of the institution of incapacitation actually closes the discussion on the specific solutions currently in force in Poland and undermines the purpose of analysing particular aspects of these solutions from the Convention's perspective.

6 Cf. I. Radlińska, Ochrona podmiotowości prawnej osób niepełnosprawnych intelektualnie w stopniu umiarkowanym w prawie polskim, *Pomeranian Journal of Life Sciences* 2017, no. 1, pp. 74–76; M. Szeroczyńska, Mozolna droga ku likwidacji instytucji ubezwłasnowolnienia, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka,* ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, pp. 171 and 186–187; M. Zima-Parjaszewska, Artykuł 12 Konwencji ONZ o prawach osób z niepełnosprawnościami a ubezwłasnowolnienie w Polsce, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka,* ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, pp. 145–151.

7 With the exception of a few other categories: the disposal of earnings, objects given by the legal representative for free use or contracts commonly concluded in minor matters of daily life.

8 See *Concluding observations on the initial report of Poland,* CRPD/C/POL/CO/1, 29 October 2018.

However, the view of the UN Committee on the Rights of Persons with Disabilities, together with those of some representatives of human rights doctrine, is not the only one. It has been flagged in the subject literature that, in exceptional circumstances, it is permissible to employ substitutive measures while maintaining the standards arising from CRPD Article 12.4.[9] This would mean that CRPD Articles 12.3 and 12.4 would have to be treated as *lex specialis* in relation to CRPD Article 12.2.

It should be noted that this interpretation of CRPD Article 12 was adopted by Poland when ratifying the Convention. Indeed, it is only by making this assumption that one can explain the interpretative declaratory statement made by Poland when ratifying the CRPD,[10] that it considers incapacitation to meet the standards of CRPD Article 12.2. The legal comparative research presented in this study on 25 legal systems in force in 24 CRPD signatory states reveals that substitution mechanisms are allowed in most of the 25 legal systems under scrutiny. This observation applies both to legal systems in which amendments to private law corresponding to CRPD Article 12 have not yet been introduced and to those in which such amendments have already come into force. The interpretative practices of states parties to the implementation of CRPD Article 12 should not be ignored. This is particularly so when addressing the question of either the absolute inadmissibility or the exceptional admissibility only in justified cases of the use of the substitutive model of performing legal transactions on behalf of persons with disabilities. The following considerations assume acceptance of this position.

3. Incapacitation and CRPD Article 12 – substantive legal aspects

Pursuant to CRPD Article 12.4, 'measures relating to the exercise of legal capacity' should respect the rights, will and preferences of persons with disabilities; be free of conflicts of interest and undue influence; be proportionate and tailored to the circumstances of the individual person; be applied for the shortest possible time; and be regularly reviewed by competent, independent and objective authorities or judicial bodies.

From the perspective of material legal solutions, the fundamental problem with the institution of incapacitation is proportionality and its adaptability to the situation of a specific person. As already indicated, there are currently only two types of incapacitation in the Polish legal system. Their application causes consequences strictly described by legal

9 M. Domański, Konwencja ONZ o prawach osób niepełnosprawnych w interpretacji Komitetu do spraw praw osób niepełnosprawnych a podstawowe instytucje prawa cywilnego, *Prawo w Działaniu* 2019, no. 40, p. 152; T. Pajor, Ochrona osób niepełnosprawnych a ubezwłasnowolnienie, in: *Studium nad potrzebą ratyfikacji przez RP Konwencji o prawach osób niepełnosprawnych,* ed. K. Kurowski, Wydawnictwo Kurza Stopka J. Tyluś Malak, Łódź, 2010, p. 84; M. Pyziak-Szafnicka, Ubezwłasnowolnienie jako środek ochrony osób dotkniętych chorobami otępiennymi i chorobą Alzheimera – aktualna regulacja i projektowane zmiany, *Studia Prawno-Ekonomiczne* 2019, vol. CXI, pp. 70–71 and 76; M. Wilejczyk, *Zagadnienia etyczne części ogólnej prawa cywilnego,* Wydawnictwo C.H. Beck, Warsaw, 2014, pp. 158–159; K. Zaradkiewicz, Ubezwłasnowolnienie – perspektywa konstytucyjna a instytucja prawa cywilnego, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka,* ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, p. 205.

10 The Republic of Poland declares that it interprets Article 12 of the Convention in such a way as to permit the use of incapacitation, in the circumstances and in the manner prescribed by national law, as a measure referred to in Article 12(4) in a situation where, as a result of mental illness, mental retardation or other mental disorder, a person is incapable of directing his or her own behaviour.

norms. The courts are not competent to modify them in any way. This applies not only to consequences concerning the lack or limitation of active legal capacity but also to further consequences (exclusion of the possibility of marriage by a totally incapacitated person [FGC Art. 11] or the lack of possibility to perform certain functions or practice certain professions). All consequences related to the loss of full active legal capacity follow automatically. Even if a court were to consider that certain restrictions in law are not necessary in specific factual situations, it cannot change them. On the one hand, such a solution ensures certainty in legal transactions and makes the situation of incapacitated persons clear, also from the vantage point of their counterparties. On the other hand, however, it leads to a certain standardisation of the status of persons with different needs and life situations.

The lack of intermediate solutions between both types of incapacitation in the Polish legal system should also be regarded as problematic, as should be the lack of even less intrusive solutions regarding active legal capacity (for example, that only the most serious legal actions, having far-reaching personal or financial consequences, would necessitate obtaining the consent of a representative or a court). The lack of solutions based on parallel representation apart from ordinary powers of attorney in the Polish legal system, which to a limited extent can be used to realise and secure the interests of persons with disabilities, should also be noted. They do not result in a limitation of active legal capacity and, at the same time, make it possible to perform certain activities on their behalf in situations when such persons cannot perform them on their own. Given the high degree of inflexibility of the institutions in force in Polish law, it is difficult to put into practice the assumption of subsidiarity of 'measures related to the exercise of legal capacity'.

The second problematic issue is the question of the time limitation of the mechanisms used. Both total and partial incapacitation are of undefined duration by court ruling. There is no possibility for the institution of incapacitation to be applied for a fixed period of time. In practice, there are situations where an open-ended term court ruling may be justified. For example, intellectual disability is sometimes a stable condition that is not responsive to treatment. Conducting court proceedings every few years – involving the need for a person with disability to undergo medical and psychological examinations, appear in court and be heard when it is known in advance that the condition has not changed – may even be seen as unnecessarily traumatic for the persons with disabilities. In many cases, however, it is difficult to determine the future course of the condition and the effectiveness of the therapies employed. In such cases, the protection measures applied should be temporarily limited. The open-ended duration of incapacitation does not mean that it is definitive, permanent and irrevocable regardless of changes in the condition of the person in question. The opposite is true. In Polish law, judicial incapacitation by court ruling may be reversed at any time (CPC Art. 559) and this may be done either *ex officio* (CPC Art. 559.1) or at the request of the incapacitated person (CPC Art. 559.3), if the factual premises which determined its application abate or change.

Related to this issue is the problem of the Convention's requirement of 'regular review by a judicial authority' of the solutions applied. This only takes place in the event of an application for its modification or reversal. A sure-fire substitute for such an ongoing review of the justifiability and effectiveness of the applied solutions is a court's ongoing supervision of the incapacitated person's guardianship and curatorship (FGC Art. 165 *et seq.* in conjunction with FGC Art. 175 and 178.2). If the guardianship court deems further incapacitation to be justified, it should notify the competent court, which may initiate *ex officio* proceedings to lift or modify the incapacitation order.

4. Procedural aspects

The issue of incapacitation proceedings is regulated by CPC Art. 544–560.[1] Insofar as the substantive provisions have not been subject to change since the Civil Code came into effect on January 1, 1965, the procedural regulations have undergone significant modifications by the Act of May 9, 2007.[11] Pursuant to CRPD Article 12.4, 'measures related to the exercise of legal capacity' should respect the rights, will and preferences of the person with disabilities. The decision on incapacitation itself may also be made against the will of the person affected. It should be noted, however, that that person himself/herself has ample opportunity, guaranteed by law, to state his/her case.

Proceedings for incapacitation may be initiated only upon request (CPC Art. 545) and not *ex officio*. The cluster of those with the right to file applications for incapacitation is quite limited and includes spouses, direct line relatives, siblings or legal representatives of the incapacitated person to be, with the caveat that relatives cannot file applications regarding persons who have legal representatives (CPC Art. 545.1 and 545.2). In the jurisprudence of the Supreme Court, under the strong influence of the CRPD regulation, the view has been adopted that such an application may also be filed by the person himself.[12] Moreover, a request for incapacitation may also be submitted by the public prosecutor or the ombudsman.[13]

The person subject to the application is, by law, a participant in the proceedings for incapacitation with all attendant rights (CPC Art. 546.11).[14] An application for the incapacitation of a person with mental or intellectual disability must be supported by a medical certificate issued by a psychiatrist (regarding the mental state) or a psychologist (regarding the degree of intellectual disability). It is imperative for the person affected by the application to be heard immediately upon commencement of proceedings (CPC Art. 547.1). The necessity of making every effort to give the person subject to incapacitation proceedings a fair hearing also applies to cases where agreement with that person is impossible (CPC Art. 547.3).

A person to be incapacitated must first be examined by an expert psychiatrist or neurologist, as well as by a psychologist (CPC Art. 553.1) whose opinions concern not only the state of health but also the extent of the patient's capacity to manage his or her own proceedings and affairs. This procedure should also lead to the establishment of the position, preferences and various aspects of the situation of the person concerned. It should be noted that even without a request from the person affected by the proceedings, the court may appoint an *ex officio* lawyer for him/her. This comes into play when, due to their state of health, persons with disabilities cannot make such requests themselves and courts find the participation of professional attorneys necessary (CPC Art. 560).

11 Act amending the Act – Code of Civil Procedure and certain other acts, Journal of Laws 2007, no. 121, item 831, which entered into force on 7 October 2007, which was enacted following the judgment of the Constitutional Tribunal of 7 March 2007, K 28/05, Legalis. Cf. M. Szeroczyńska, Mozolna droga ku likwidacji instytucji ubezwłasnowolnienia, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka*, ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, pp. 168–169.

12 See Resolution of the Supreme Court of 28 September 2016, III CZP 38/16, Legalis.

13 See, for example, J. Gudowski in: *Kodeks postępowania cywilnego. Komentarz. Tom IV. Postępowanie rozpoznawcze. Postępowanie zabezpieczające*, ed. T. Ereciński, Wolters Kluwer SA, LEX, 2016, commentary to Article 545, n. 9.

14 See K. Lubiński, *Postępowanie o ubezwłasnowolnienie,* Wydawnictwo Prawnicze, Warsaw, 1979, pp. 68 *et seq.*

In proceedings for incapacitation and for its reversal, a person with disabilities has active procedural capacity and, therefore, regardless of the position of the appointed representative, may independently appeal against a court ruling (CPC Art. 560.1). What is exceptionally important, the formal requirements for a validly lodged appeal (CPC Art. 560.2) do not apply to appeals filed by such persons. This provision is understood as a basis for preventing the rejection of appeals filed by persons subject to applications for incapacitation, for formal or fiscal deficiencies.[15]

In ensuring the absence of conflicts of interest and impartiality, incapacitation is not simply adjudicated exclusively by ordinary courts (where judges have all systemic guarantees of impartiality and independence) but by district courts (and thus courts of higher instance, where, by definition, more experienced and more senior judges adjudicate) and by panels of three judges, which is exceptional in civil proceedings (CPC Art. 544). The decision on incapacitation (CPC Art. 518) may be taken to the Court of Appeal (CPC Art. 367.2 in conjunction with CPC Art. 13.2).[16] An appeal in cassation against an incapacitation ruling can also be lodged under general rules, with the Supreme Court (CPC Art. 519^1.1).

As mentioned earlier, the validity of a judicial incapacitation by court ruling is, of itself, of indeterminate duration. However, it may be reversed at any time. An incapacitation ruling can be reversed *ex officio* (CPC Art. 559.1) or by request (including that of the incapacitated person himself – CPC Art. 559.3). Incapacitated persons may at any time file, without the consent or even knowledge of their legal representatives, motions to reverse or modify their judicial incapacitation pronouncements. Courts may not refuse to initiate proceedings in such cases, and persons with disabilities filing such requests are not obliged to pay court fees (Art. 96.1.9a of the Act on Court Costs in Civil Cases).[17] There is no explicit basis in the CPC to exclude the application of the provisions on formal requirements for pleadings to motions to revoke or amend rulings on incapacitation filed by incapacitated persons. However, the doctrine of procedural law postulates the introduction of a provision explicitly excluding the application of the provisions of the CPC on formal requirements for pleadings to motions for the reversal or modification of incapacitation rulings filed by incapacitated persons.[18]

Analysing the provisions of proceedings in incapacitation cases from the CRPD standards angle, some shortcomings should be noted. Firstly, according to CPC Art. 554^1.1, the evidentiary proceedings in these cases should primarily establish: the state of health and the personal, professional and financial situation of the person subject to the application for incapacitation, the sort of affairs that need to be managed by this person and the way in which his/her life needs are catered for. It should be considered that, plainly put, greater emphasis should be placed on identifying the wishes and preferences of the person affected

15 Cf. J. Jagieła, Ochrona praw osoby, której dotyczy wniosek o ubezwłasnowolnienie, i ubezwłasnowolnionej w sprawach o ubezwłasnowolnienie i o uchylenie albo zmianę ubezwłasnowolnienia (Zagadnienia wybrane), in: *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana Profesorowi Adamowi Zielińskiemu,* ed. M. Boratyńska, Wolters Kluwer SA, Warsaw, 2016, pp. 931–932.

16 This, as indicated above, can also be brought by the person affected by the decision.

17 Act of 28 July 2005 on court costs in civil cases, Journal of Laws 2022, item 1125.

18 Cf. J. Jagieła, Ochrona praw osoby, której dotyczy wniosek o ubezwłasnowolnienie, i ubezwłasnowolnionej w sprawach o ubezwłasnowolnienie i o uchylenie albo zmianę ubezwłasnowolnienia (Zagadnienia wybrane), in: *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana Profesorowi Adamowi Zielińskiemu,* ed. M. Boratyńska, Wolters Kluwer SA, Warsaw, 2016, pp. 932–933.

by the proceedings. It would be desirable to postulate that such elements should also be compulsorily addressed by the courts. These issues will carry more weight in the course of proceedings for the appointment of a guardian or curator for an incapacitated person, but the attitude of the person with disabilities to the incapacitation proceedings and their goals should also be of direct concern to the adjudicator.

Pursuant to CPC Art. 557, in its incapacitation decision, the court specifies whether the incapacitation is to be total or partial and its underlying reason. Insofar as the resolution on the type of incapacitation in the operative part of the order is obvious since it determines the nature and extent of its consequences, the inclusion of the reason for its decision in the operative part raises serious doubts. Admittedly, it is recognised in both literature and judicature that it is not a matter of seeking endorsement for court findings by reference to specific diagnoses of specialist clinical units, but that of establishing statutory grounds, *viz.* 'mental illness', 'mental retardation' or 'other mental disorders', for their rulings.[19] However, such designations are not only questionable in the light of the changes taking place in psychiatric nosology, they unnecessarily stigmatise those to whom the rulings apply, and, in short, they are simply superfluous.

5. Summary

It should be strongly reiterated that a detailed analysis of the compatibility of various aspects of the regulation of limitations to active legal capacity in Polish law with the CRPD inherent in the institution of incapacitation is only possible if the admissibility on the basis of CRPD Article 12 of substitute solutions is recognised.[20]

Given this initial assumption, it may be taken that Polish regulations on incapacitation proceedings are in greater compliance with the Convention's assumptions than the substantive legal regulations. The basic problem related to the application of the substantive legal regulation on incapacitation is its low degree of flexibility hindering the realisation of the subsidiarity of measures related to the substitutive exercise of active legal capacity. The creation of intermediate solutions, notably without unnecessarily limiting the active legal capacity of persons with disabilities, should be vigorously postulated. Moreover, it would be advantageous to allow courts to adapt their detailed solutions to the personal will, preferences and financial situation of the persons affected by them. The law should only set out the framework within which the court would seek the most appropriate solutions guided by criteria in line with CRPD Article 12.

The indeterminate concept of incapacitation is also an issue to be given sharper definition. Detailed solutions in this regard require analyses and discussion taking into account, first and foremost, the real needs of persons with disabilities in different situations and in different states of health. It should be cautiously postulated, however, that the principle should be the application of the analysed measures for a fixed period of time, the expiry of which would induce their cyclical review and verification by the court.

19 See Order of the Supreme Court of 16 April 2010, IV CSK 470/09. In the literature, for example: A. Górski in: *Kodeks postępowania cywilnego. Komentarz. Tom III. Art. 506–729,* ed. T. Wisniewski, Wolters Kluwer Polska Sp. z o.o., LEX, 2021, commentary to Article 557, nb. 1.

20 Deeming the use of the substitutive model of legal transactions on behalf of persons with disabilities is completely unacceptable under any condition renders detailed analyses of this model of legal transactions and the extent to which it can be applied pointless.

The issue of the institution's designation should not be overlooked either. The term 'incapacitation' (deprivation of one's own will), with its roots striking deep into the 19th century (e.g. Art. 489 *et seq.* of the Civil Code of the Kingdom of Poland of 1825), is considered stigmatising by many representatives of the doctrine, but above all by people with disabilities. Semantically, in its Polish meaning, for non-lawyers, it is associated with punishment or a punitive measure rather than an institution whose purpose is to protect and support persons with disabilities. For this reason, a change of designation should be postulated and, on this platform, solutions of a neutral character should also be introduced.[21]

The procedural solutions concerning the application of 'measures relating to the exercise of legal capacity' must be aligned with the substantive legal solutions which they embody. It should be emphasised that the Polish model consisting in the adjudication of measures by an independent court, in civil (non-procedural) proceedings, seems to be optimal and corresponding to the standards arising from the CRPD.

Other mechanisms, such as narrowing down the categories of those authorised to apply for legal protection measures on behalf of persons with disabilities and producing detailed definitions of participants of incapacitation proceedings by operation of law (whose non-participation in the proceedings may lead to their invalidation: CPC Art. 379.5 in conjunction with CPC Art. 13.2),[22] including recognition of the person to whom the application relates as a participant by operation of law, should also be considered optimal and guarantee that the rights of the person with disabilities are respected. Guarantees in the area of evidentiary proceedings should also be assessed positively, *viz.* the necessity both to carry out an extensive procedure, including the submission of opinions by medical and psychological experts, and to give the person affected by the application a hearing. The solution providing for the possibility of refraining from serving court letters or summoning the person concerned to a hearing 'if the court deems it inappropriate in view of that person's state of health, as determined by expert opinions' may raise some qualms. Such a solution should be an absolute exception, reserved for situations where service, due to the state of health, is simply impossible or would be detrimental to the person concerned.

Solutions facilitating the possibility to appeal a court ruling on incapacitation or to file a request for its reversal by the very persons who have been incapacitated themselves, should definitely be considered as compliant with the CRPD. Solutions exempting them from court fees or limiting the formal requirements for such procedural actions should be considered correct.

21 Cf. P. Machnikowski, Instytucja opieki nad pełnoletnim w pracach Komisji Kodyfikacyjnej Prawa Cywilnego w latach 2012–2015, *Państwo i Prawo* 2019, no. 4, p. 135.

22 See Order of the Supreme Court of 19 November 2015, IV CSK 379/15, Legalis.

b. Curatorship for a person incapacitated partially in the light of Article 12 of the CRPD

Anna Sylwestrzak

I. Introduction

The institution of a legal incapacitation, enshrined in Polish law,[1] was based on the pursuit of securing the interests of persons whose mental capacity deviates from the standard to the extent that they are not fully capable of participating in legal transactions without the risk of suffering damage. In the older civil-law literature, as well as in case-law literature, the costs of such protection, consisting in losing full capacity for legal acts, was justified with benefits that compensate for these conditions and consist of providing a person with mental disorders with support.[2] It was reserved that incapacitation should have been the final measure, and the court was not obliged to adjudicate such a measure even if all premises thereof would have been met, yet it would not have been advisable from the point of view of the interest of the person who was to be incapacitated.[3] Despite the aforementioned reservations, the research on the judicial practice has disclosed a series of abuses in the application of incapacitation by courts, especially the marginal treatment of the best interests of the legally incapacitated person.[4] Over the course of time, the gradual maturity of the society, accompanied by the evolution of the legal system towards improving respect for human dignity, autonomy and personal interests, manifested among others, by Poland's ratification of the UN Convention on the Rights of Persons with Disabilities on September 6, 2012 (hereinafter CRPD), resulted in growing criticism of the institution of incapacitation as increasingly inadequate when faced with the expectations of

1 See: Decree of 29.08.1945 Personal Law, Journal of Laws of 1945, No. 40, item 223 and Decree of 29.08.1945 on incapacitation procedure, Journal of Laws of 1945, No. 40, item 225.

2 More: A. Sylwestrzak, Gloss to the Decision of the Supreme Court of 16.04.2010, IV CSK 470/09, *Gdańskie Studia Prawnicze. Przegląd Orzecznictwa*, 2010, Nos. 3–4, pp. 63–70 and judicial decisions quoted therein.

3 More: M. Tomaszewska, *Charakter prawny decyzji o ubezwłasnowolnieniu w sądowym stosowaniu prawa (Legal Character of a Decision on Incapacitation in Judicial Application of the Law)*, Wydawnictwo Adam Marszałek, Toruń 2008, p. 60 and next. See also: Decision of the Supreme Court of 14.02.1974, I CR 8/74, OSN, 1975, No. 1, item 12 and Decision on the Supreme Court of 11.08.1971, II CR 295/71, LEX, No. 6976.

4 A. Firkowska-Mankiewicz, J. Parczewski, M. Szeroczyńska, Praktyka ubezwłasnowolniania osób z niepełnosprawnością intelektualną w polskich sądach – raport z badań (The Practice of Incapacitation of Persons with Mental Disabilities in Polish Courts – Report on the Research), *Człowiek-Niepełnosprawność-Społeczeństwo*, 2005, No. 2, p. 87; I. Kleniewska, Postępowanie w sprawach o ubezwłasnowolnienie w praktyce sądowej (Proceedings in Incapacitation Cases in Judicial Practice), *Prawo w działaniu*, 2006, No. 1, pp. 119–134.

modern society.[5] Currently, ever-greater numbers of proposals to replace it with supported decision-making are being filed.[6]

In Polish law, the institution of curatorship constitutes the basic instrument of support and protection for a partially incapacitated person,[7] with regard to whom being covered with curatorship constitutes one of the basic consequences of incapacitation. The subject of this study will be the analysis of the institution of curatorship in terms of fulfilling standards resulting from Article 12 of the CRPD. The assessment constitutes a fragment of a broader subject matter, namely, the relation of the entire institution of partial incapacitation with regard to the CRPD's standards. The scope of research will cover substantive and procedural regulations concerning the institution of curatorship established on the basis of Article 16, paragraph 2 of the Civil Code.

II. Template for the assessment of Polish legal provisions on partial incapacitation

Pursuant to Article 1 of the CRPD persons with disabilities mean persons with long-term incapacity, among others: mental and intellectual. Thus, a partially incapacitated person, as a person experiencing mental disorders, especially in the form of a mental illness, mental deficiency, alcohol addiction or drug addiction (Article 16 of the Civil Code), meets the criteria for classification of persons with disabilities pursuant to the CRPD and is covered with protection provided therein.

The CRPD stipulates a series of standards aimed at eliminating discrimination of persons with disabilities, their social inclusion[8] and providing them with conditions to exercise their rights on equal terms with other persons, which is demanded by the inherent dignity and value of each person. Article 12 of the CRPD stipulates the necessity of recognising persons with disabilities as subjects of law and, in consequence, requires equality in terms of legal capacity of persons with disabilities in all aspects of life. Therefore, disability may

5 More: P. Machnikowski, Pełnomocnictwo opiekuńcze w pracach Komisji Kodyfikacyjnej Prawa Cywilnego w latach 2012–2015 (Guardianship Power of Attorney in Work of the Civil Law Codification Commission in the Years 2012–2015), *Rejent*, 2016, No. 5, p. 50; J. Greguła, Przedstawicielstwo opiekuńcze – projekt nowej instytucji w prawie rodzinnym (Guardianship Representation – Draft of a New Institution in Family Law), *Krakowski Przegląd Notarialny*, 2016, No. 2, p. 17.

6 Among others: U. Ernst, Ubezwłasnowolnienie (Incapacitation), *Transformacje Prawa Prywatnego*, 2010, No. 4, p. 31; J. Kamiński, Instytucja ubezwłasnowolnienia (The Institution of Incapacitation) [in:] *Polska droga do Konwencji o prawach osób niepełnosprawnych ONZ (Polish Path on the Convention on the Rights of Persons with Disabilities)*, A. Waszkielewicz (ed.), Fundacja Instytut Rozwoju Regionalnego Krakow, 2008, p. 104, M. Szeroczyńska, Mozolna droga ku likwidacji instytucji ubezwłasnowolnienia (Arduous Path to the Abolishment of the Institution of Incapacitation) (in:) *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka (Rights of Persons with Intellectual or Mental Disability in the Light of International Human Rights Instruments)*, D. Pudzianowska (ed.), Wolters Kluwer SA, Warsaw, 2014, p. 164 and M. Wilejczyk, *Zagadnienia etyczne części ogólnej prawa cywilnego (Ethical Issues of the General Part of Civil Law)*, Wydawnictwo C.H. Beck, Warsaw, 2014, pp. 157–158;

7 In 2012, a curator was appointed for a partially incapacitated person in 763 cases, and in 2013 – in 742 cases. See: D. Olczak-Dąbrowska, Wybrane rodzaje kurateli w praktyce sądowej (Selected Types of Deputyship in Judicial Practice), *Prawo w działaniu. Sprawy cywilne*, 2014, no. 17, p. 91.

8 As in: J. Sandorski, A. Zbaraszewska, Standardy ochrony osób starszych i niepełnosprawnych w orzecznictwie międzynarodowym (Standards of Protection of the Elderly and Persons with Disabilities in International Jurisdiction), *Gdańskie Studia Prawnicze*, 2019, no. 2, p. 164.

require establishment of support necessary in exercising legal capacity. Another standard concerns characteristics of measures related to exercising legal capacity: these measures should respect the rights, will and preferences of a person, remain free of conflict of interests and illegal pressures, be characterised with proportionality and adjustment to the legal situation of a given person and, finally, be applied for the shortest possible period of time and be subject to regular review by competent, independent and impartial authorities or a judicial authority.

Upon ratification of the CRPD, Poland submitted an interpretative declaration to Article 12 of this Convention, the essence of which consists in allowing the use of incapacity in compliance with the Polish law 'in a situation when, as a result of a mental illness, mental deficiency or other types of mental disorders, this person is not capable of being in control of their actions'.[9] However, this reservation refers only to a situation when 'a person is not capable of being in control of their actions', and in Polish law, this condition constitutes a premise for full, not partial, incapacitation, the premise for the latter constituting the need for providing a person experiencing mental disorders with assistance in conducting their affairs. Therefore, the contents of the reservation do not constitute an obstacle to the assessment of the compliance of the institution of curatorship for a partially incapacitated person with standards of Article 12 of the CRPD.

II. Appointment of a curator

1. Procedure for incapacitation vs procedure for appointment of a curator

In Polish law, the judicial regulation of a legal situation of an incapacitated person is divided into two stages comprising two separate procedures before different authorities. The incapacitation is adjudicated by the regional court, which cannot, however, appoint a curator for an incapacitated person due to the fact that this case belongs to the jurisdiction of a guardianship court. The guardianship court, however, comprises the family and minors division (exceptionally, the civil division) of the district court. Upon the decision on partial incapacitation becoming final, the regional court, pursuant to Article 558, paragraph 1, of the Code of Civil Procedure, adjudicates *ex officio* sending an extract of the final decision to the guardianship court for the purposes of appointing a curator. This two-stage construction poses a threat to the interests of an incapacitated person since the consequences of incapacitation, namely, the loss of full capacity for legal acts, take

9 On doubts regarding effectiveness of the reservation: M. Domański, Ubezwłasnowolnienie w prawie polskim a wybrane standardy międzynarodowej ochrony praw człowieka (Incapacity in the Polish Law Vs Selected International Human Rights Standards), *Prawo w Działaniu*, 2014, no. 17, p. 41; S. Gurbai, Ograniczanie czy respektowanie zdolności do czynności prawnych osób dorosłych z niepełnosprawnościami? (Limiting or Respecting the Capacity of Adults with Disabilities to Enter into Legal Transactions?) [in:] *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka (The Rights of Persons with Intellectual or Mental Disability in the Light of International Human Rights Instruments)*, D. Pudzianowska (ed.), Wolters Kluwer SA, Warsaw, 2014, p. 71; M. Zima-Parjaszewska, Artykuł 12 Konwencji ONZ o prawach osób z niepełnosprawnościami a ubezwłasnowolnienie w Polsce (Article 12 of the UN Convention on the Rights of Persons with Disabilities vs Incapacity in Poland) [in:] *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka (The Rights of Persons with Intellectual or Mental Disability in the Light of International Human Rights Instruments)*, D. Pudzianowska (ed.), Wolters Kluwer SA, Warsaw, 2014, p. 148.

effect upon the finalisation of the decision on partial incapacitation, whereas the curator is appointed later. This creates a risk of an even longer period of time when the incapacitated person is deprived of assistance[10] and thus cannot fully participate in legal transactions while waiting for the resolution of the guardianship court, which fact has already become the subject of doctrinal criticism.[11] The remedy for such risk may consist in the regional court appointing a temporary advisor, whose status is analogous to a curator for a partially incapacitated person (Article 549 of the Civil Procedure Code); however, in contrast to the latter, it is a temporary institution since the decision on appointment thereof becomes invalid upon appointment of a curator by the guardianship court (Article 550, paragraph 1, point 2 of the Code of Civil Procedure). The institution of a temporary advisor may, therefore, be applied for the purposes of, among others, filling a gap in the representation of an incapacitated person which arises in the period preceding resolution of the case by the guardianship court. Appointment of a temporary advisor is not, however, obligatory in each case: a premise comprises recognising a need for such an appointment by the regional court for the purposes of protection of personal or financial interests of a person who is the subject of the procedure (Article 548, paragraph 1, of the Code of Civil Procedure). The court makes this assessment on the basis of the all circumstances of the case occurring at the time of resolution, also forecasting the future – until the resolution by the guardianship court – which, due to a longer period of time that may pass until this moment, cannot prevent the occurrence of situations unforeseen by the court, in which, however, assistance of a temporary advisor, proves to be necessary in contrast to the previous forecasts. In practice, occurrence of an impasse is indicated by recent interventions of the commissioner for human rights.[12] Therefore, it should be postulated that in the case of keeping the institution of incapacity, **obligatory appointment of a temporary advisor should be introduced** into Polish law by the regional court, or an extension of the jurisdiction of regional court with appointment of a curator for a partially incapacitated person, which, as indicated in the doctrine, would be justified if the legal grounds for establishment of curatorship were provided not under Article 16, paragraph 2, of the Civil Code, but under Article 181 of the Family and Guardianship Code.[13]

10 In the light of examinations of the records conducted by M. Jankowska, this period of time on average amounted to 65 calendar days until institution of a procedure before guardianship court, while the duration of a procedure before guardianship court was on average up to 3 months, which additionally prolongs the period of remaining 'unassisted'. M. Jankowska, *Kuratela nad osobą ubezwłasnowolnioną częściowo (Curatorship over Partially Incapacitated Person)*, Instytut Wymiaru Sprawiedliwości, Warsaw, 2018, pp. 14–15. Whereas the commissioner for human rights noted in his practice situations when a decision on incapacitation issued by the regional court and a resolution of the guardianship court are separated by months and even years, during which a given person is deprived of any protection, see letter of the Commissioner for Human Rights of 16.01.2019 to the Constitutional Tribunal no. IV.7024.23.2018, https://bip.brpo.gov.pl/pl/content/RPO-do-trybunalu-ubezwlasnowolnienie-calkowite-niekonstytucyjne. The research conducted by D. Olczak-Dąbrowska clarified that the most frequent reason for lengthiness of a procedure consists in the difficulties in finding a candidate for a curator. D. Olczak-Dąbrowska, Wybrane . . . *(Selected . . .)*, p. 133.

11 See: M. Pasieka-Kuzara, Bliski koniec instytucji ubezwłasnowolnienia? (Is the End of the Institution of Incapacitation Near?), *Transformacje Prawa Prywatnego*, 2021, no. 2, p. 91.

12 See letter of the Commissioner for Human Rights quoted in annotation no. 9.

13 G. Matusik (in:) *Kodeks rodzinny i opiekuńczy. Komentarz (Family and Guardianship Code. Commentary)*, K. Osajda (ed.), Wydawnictwo C.H. Beck, Warsaw, 2017, p. 1788.

2. Procedure for appointment of a curator for a partially incapacitated person before the guardianship court

Upon receiving a copy of the regional court's decision on partial incapacitation, the guardianship court having jurisdiction over the residence of the incapacitated person[14] initiates, usually *ex officio*, a procedure for appointment of a curator for an incapacitated person (Article 506 and Article 570 of the Code of Civil Procedure), which, however, does not exclude initiating such a procedure on request.[15] The case is examined in non-litigious proceedings. Despite the fact that the same criteria determine the territorial jurisdiction of the regional court adjudicating incapacity, as well as the jurisdiction of the guardianship court, the risk of prolonging the proceedings due to the time of communication between courts is not excluded since it may happen that courts situated in different locations adjudge (e.g. Regional Court in Gdańsk, and District Court – Family and Minors Division in Sopot).

Further reservations are raised by the scope of the capacity for acts in court proceedings of a partially incapacitated person in the period before appointment of a curator. The general regulation of Article 65 of the Code of Civil Procedure provides a person with limited capacity for legal acts, with capacity to be a party in court proceedings in cases resulting from legal acts, which such a person can enter into independently, whereas, in the event of other transactions, representation of a statutory representative is necessary (Article 66 of the Code of Civil Procedure), which is missing in the analysed case and which may result in an impasse dooming such a person to passively wait for appointment of a curator. Moreover, in the event of a procedural situation of the incapacitated person in the case for appointment of a curator, it should be noticed that the scope of their capacity to be a party in a given case does not unambiguously result from Article 573 of the Code of Civil Procedure, which provides the person with limited capacity for legal acts, remaining under parental authority, guardianship or curatorship, with capacity for acts in the proceedings concerning such a person. The partially incapacitated person is not, in fact, covered by curatorship and thus does not exhaust the hypothesis formulated in the quoted provision of the norm. The advisability of granting this capacity to be a party in a case for appointment of a curator should not, however, raise any doubts. This issue has been reported in the literature as well as in the case law, where it is consistently proposed to adopt the interpretation allowing for application of Article 573 of the Code of Civil Procedure towards persons with regard to whom curatorship has not yet been appointed.[16] Nevertheless, the research on court records conducted in 2018 indicated that partially incapacitated persons were participants in proceedings for appointment of a curator in approximately only half of the cases,[17] which should be considered worrisome. The interests of the incapacitated person can be protected on the basis of Article 573 of the Code of Civil Procedure by omitting the result of the linguistic interpretation for the benefit of the application of an

14 In the case of a lack of a place of permanent residence, a place of temporary residence and, alternatively, the district court for the capital city of Warsaw – Article 569 par. 1 of the Code of Civil Procedure, is conclusive.

15 See: P. Rylski, *Uczestnik postępowania nieprocesowego. Zagadnienia konstrukcyjne (Participant in Non-litigious Proceedings. Constructional Issues)*, Wolters Kluwer Polska SA, Warsaw 2017, pp. 213–214.

16 Justification to the Supreme Court's judicial decision of 11.01.1957, II CR 1014/56, OSPiKA, 1958, no. 6, item 147; among others: A. Góra-Błaszczykowska, *Komentarz do art. 573 k.p.c. (Commentary to Article 573 of the Code of Civil Procedure)* (in:) *Kodeks postępowania cywilnego. T. III. Art. 506–729 (Code of Civil Procedure. Vol. III Articles 506–729)*, Wydawnictwo C.H. Beck, Warsaw, 2021, Lex/el, thesis 1.

17 M. Jankowska, *Kuratela . . . (Deputyship . . .)*, p. 19.

a fortiori (*a maiori ad minus*) inference in the form of the following reasoning: if the act grants the capacity to be a party in a given case to a person with a statutory representative (and therefore, is in a 'better' situation than the incapacitated person before the appointment of a curator), the more so such capacity should be granted to a partially incapacitated person, who does not yet have a curator and thus cannot be represented by them. Nonetheless, in the long term, amendment of Article 573 of the Code of Civil Procedure should be formulated in terms of taking into account rights of persons with limited capacity for legal acts who do not have a representative, especially considering the courts' common practice of **omitting the inclusion** of partially incapacitated persons in proceedings.

In compliance with Article 514, paragraph 1, of the Code of Civil Procedure, in proceedings for appointment of a curator for a partially incapacitated person, there is often no need to fix a date for a trial, yet despite there being no need to fix a date for a trial, a court cannot hear participants at a court sitting or demand written statements from them before settlement of the case. Therefore, binding procedural provisions do not provide for the obligation to hear a partially incapacitated person for whom a curator is to be appointed. This contrasts with the procedure of appointing a temporary advisor, in which a regional court is obliged to hear the person whom the motion for incapacitation concerns (Article 548, paragraph 2, of the Code of Civil Procedure). Given the standards under Article 12 of the CRPD, and especially the need to respect the will and preferences of an incapacitated person, it has to be stated that the current legal status does not fully implement these standards, leaving the guardianship court with quite a wide range of discretion with regard to the possible hearing of an incapacitated person. However, it should be expected that the hearing is conducted obligatorily as in the case of appointing a temporary advisor.

In order to present the more comprehensive characteristics of the role of a guardianship court in shaping the legal situation of a partially incapacitated person, it should be noticed that this court does not examine the legitimacy of appointing a curator since such necessity results from the previous incapacitation of the person for whom such a curator is to be appointed. Assessment that the curator's assistance is necessary for a person experiencing mental disorders has already been made by the regional court, and the district court is vested only with oversight of the scope of the competences of the person who will perform this function and the appointment of such person and the further supervision over execution of the curatorship.

3. Appointment of a curator

The provisions of the Family and Guardianship Code indicate the criteria for appointment of a curator in both a negative manner – in the form of obstacles excluding the capacity of a person to be a curator (Article 148 of the Family and Guardianship Code in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code), as well as in a positive manner – by regulating priority among persons taken into consideration by the court while appointing a curator. Namely, priority is given to a spouse and in the case of a lack thereof – to the father or mother of the incapacitated person (Article 176 in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code); next, to a relative or family member of the incapacitated person or their parents (Article 149, paragraph 2, in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code); and finally, to a person indicated by a relevant organisational unit of social aid (Article 149, paragraph 3, in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code). The primary criterion in selecting a curator is, however, the best interests of a

person for whom the curator is to be appointed, which may permit omitting a person who has priority pursuant to the act.[18] In order to learn about the possibility of exercising curatorship, the manner of exercising thereof and the living conditions of the person whom the proceedings concern, the guardianship court, pursuant to Article 570[1a] in conjunction with Article 605 of the Code of Civil Procedure, can adjudicate conducting an inquiry at the domicile by a court-appointed curator. Furthermore, a proper practice would be for the guardianship court to request sending by the regional court the case files in which the incapacitation was adjudicated since case files can provide information about the circumstances of the case crucial for examination in the guardianship case.

The will of the person for whom a curator is to be appointed constitutes one of the elements that should be taken into consideration by the court amongst all of the circumstances comprising the best interests of the person. It should be noted here that a legal regulation that would explicitly impose such an obligation on the court is missing. This situation should be criticised since partial incapacitation concerns an adult who shows a certain level of independence as regards the management of their own affairs and thus, their opinion regarding a candidate for a curator should be of great importance for settlement. In practice, courts often omit determining the preferences of a partially incapacitated person regarding the selection of a curator, and research on court records indicated that the proposition of such a person is taken into consideration only in a small percentage of cases.[19] In particular, the objection of a partially incapacitated person against a specific candidate for a curator should be most thoroughly examined by the court. The objection of a partially incapacitated person against a selection of a specific person for a curator makes a bad forecast for the future cooperation of the curator and the ward. This situation is not compliant with the standard of Article 12, paragraph 4, of the CRPD, according to which the will and preferences of an incapacitated person should be respected. It should therefore be proposed that in case of further maintenance of an institution of incapacitation in the Polish law, provisions regarding selection of a curator are amended in order to emphasise the necessity to respect the opinion of a person for whom a curator is appointed.

A curator for a partially incapacitated person is appointed by a decision issued by a guardianship court, which can be appealed. A cassation is not allowed in this case (Article 519,[1] paragraph 2 of the Code of Civil Procedure). A person appointed as a curator by the guardianship court is obliged to immediately take over curatorship, unless, due to important reasons, they are discharged from this obligation by the court (Articles 152–153 of the Family and Guardianship Code in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code). The curator can submit a motion for such discharge within a week from the service of the decision (Article 592 of the Code of Civil Procedure in conjunction with Article 605 of the Code of Civil Procedure). An important reason justifying discharge from curatorship is an imprecise concept, understood as an occurrence

18 S. Kalus (in:) *Kodeks rodzinny i opiekuńczy. Komentarz (Family and Guardianship Code. Commentary)*, K. Piasecki (ed.), Wydawnictwo Prawnicze LexisNexis, Warsaw, 2011, p. 1024.

19 Research conducted by M. Jankowska indicated that only in 57% of cases efforts were made to learn the preferences of a person for whom the curator was to be appointed, and only in 10% of cases their proposition was taken into account, *Kuratela . . . (Deputyship . . .)*, pp. 22 and 29. However, research conducted by D. Olczak-Dąbrowska showed that an incapacitated person did not have an impact on selecting a curator in 40% of cases, *Wybrane . . . (Selected . . .)*, p. 133.

of events that prevent or significantly hinder taking over and exercising curatorship by the appointed curator.[20] The objection of a ward against selection of a curator, especially if combined with a refusal to cooperate with them and the situation did not promise a prompt improvement, should be considered as an exhausting premise for the court releasing the curator from exercising the curatorship. Nonetheless, such situations could be prevented in the majority of the cases if the preferences of the incapacitated person were taken into consideration at the stage of appointment of a curator.

While taking over the curatorship, the curator takes an oath according to the text specified in Article 590 in conjunction with Article 605 of the Code of Civil Procedure, after which the guardianship court issues a certificate (Article 591, paragraph 1, in conjunction with Article 605 of the Code of Civil Procedure), which specifies the scope of their rights (Article 604 of the Code of Civil Procedure). It is worded to specify the scope of the curator's competences in the certificate.[21]

III. The scope of the curator's competences

1. Competences of a curator who has not been given by the court the right to represent a ward and to manage their assets

The basis for determining the scope of competences of a curator of a partially incapacitated person is provided for in Article 181 of the Family and Guardianship Code, in compliance with which the curator is appointed to represent this person and manage their assets only when decided by the guardianship court. In the light of this regulation, appointment of a curator with a narrower scope of competence is a rule since this narrower scope is automatically related to the appointment of a curator, whereas extending their competences requires additional settlement.[22] Such an understanding is reflected in practice since, as results from research on court records, a curator with a 'basic', that is, a narrower scope of competences is most often appointed.[23] Such a curator cannot represent the ward or manage their assets, which should be understood as a curator not having competences to perform activities on behalf of a ward. Thus, the function of this type of curatorship is emphasised, which consists in assigning the partially incapacitated person and not replacing them in managing their affairs.[24] However, doubts concern granting the curator with competences to perform control activities consisting in expressing consent/confirmation or refusing consent/confirmation with regard to activities of the ward which, in compliance with Articles 17–19 of the Civil Code, require consent/confirmation of a statutory representative to be valid. The linguistic interpretation leads to the conclusion that the curator does not have such competence; however, this would cause the occurrence of a

20 On the grounds of the institution of guardianship J. Sadomski, Komentarz do art. 169 k.r.o. (Commentary to Article 169 of the Family and Guardianship Code) (in:) *Kodeks rodzinny i opiekuńczy. Komentarz (Family and Guardianship Code. Commentary)*, J. Wierciński (ed.), LexisNexis, Warsaw, 2014, thesis 3.

21 G. Matusik (in:) *Kodeks . . . (Family and Guardianship Code . . .)*, p. 1794.

22 J. Ignatowicz (in:) *Kodeks rodzinny i opiekuńczy. Komentarz (Family and Guardianship Code. Commentary)*, K. Pietrzykowski (ed.), Wydawnictwo C.H. Beck, Warsaw, 2003, p. 1120.

23 M. Jankowska, *Kuratela . . . (Deputyship . . .)*, p. 39.

24 H. Dolecki (in:) *Kodeks rodzinny i opiekuńczy. Komentarz (Family and Guardianship Code. Commentary)*, Wolters Kluwer Polska, Warsaw, 2013, p. 991.

broad category of activities which cannot be performed by the curator or the ward, who in consequence would be significantly excluded from transactions. Two groups of opinions can be differentiated with regard to the issue.

The opinion based on the literal sense of Article 181 of the Family and Guardianship Code assumes that a curator with basic competences only has a status of an advisor responsible before a guardianship court, and thus, if necessary, to perform an activity included in the category of a statutory representation, the curator should request a power of attorney from the guardianship court.[25]

Nevertheless, supporters of granting the curator with competences to perform activities referred to in Articles 17–19 of the Civil Code have prevalence, although they differ in presented arguments.[26] Functional aspects and especially striving for the protection of interests of the ward support this majority direction. Therefore, it should be considered that a curator with a basic scope of competences, despite not having a status of a statutory representative[27] (this concept is, however, disputed), has competences in terms of the control activities pursuant to Articles 17–19 of the Civil Code, which are established *ex lege*, since they are closely related to the essence of this type of curatorship. A lack of the curator's judicial authorisation to manage assets of the ward does not exclude these competences since giving consent to the performance of activities by the ward does not constitute a manifestation of asset management. This activity comprises, in fact, management performed by the ward, whereas the curator acts only as a third party, whose consent, despite being necessary, does not constitute an element of the activity performed by the ward.[28]

The lack of the curator's authorisation to manage assets of the ward results in the curator with a basic scope of competences not being authorised on the grounds of Article 22 of the Civil Code to give assets to the ward for use at their own discretion, as this type of activity is included in the scope of activities within management of assets of the ward.[29]

The lack of the curator's authorisation to manage assets of the ward does not mean a complete discharge of the curator from financial affairs of the ward. Management of the

25 K. Korzan, Glosa do postanowienia SN z dn. 8.09.1970 r., II CZ 115/70 (Gloss to the Supreme Court's Decision of 8.09.1970, II CZ 115/70), *Państwo i Prawo*, 1972, no. 11, p. 165.

26 In judicial decisions – Supreme Court's decision of 30.09.1977, III CRN 132/77, OSN, 1978, no. 11, item 204 and Supreme Court's decision of 8.09.1970, II CZ 115/70, OSN, 1971, no. 6, item 104. In the doctrine, among others, H. Mądrzak, Glosa do post. SN z dn. 8.09.1970 r., II CZ 115/70 (Gloss to the Supreme Court's Decision of 8.09.1970, II CZ 115/70), *Nowe Prawo*, 1973, no. 5, p. 794; P. Ochałek, Glosa do postanowienia SN z dn. 30.09.1977 r., III CRN 132/77 (Gloss to the Supreme Court's Decision of 30.09.1977, III CRN 132/77), *Nowe Prawo*, 1981, no. 3, p. 161; T. Smyczyński (in:) *System Prawa Prywatnego (Private Law System)*, vol. 12, T. Smyczyński (ed.), Warsaw, 2003, p. 827; J. Strzebińczyk (in:) *Kodeks cywilny. Komentarz do art. 1–534 (Civil Code. Commentary to Articles 1–534)*, E. Gniewek (ed.), C.H. Beck, Warsaw, 2004, p. 73.

27 In the doctrine, the conception granting the curator with a 'passive' representative status is also presented, as: G. Matusik (in:) *Kodeks . . . (Family and Guardianship Code . . .)*, pp. 1792–1793.

28 With reference to the nature of consent see: B. Lewaszkiewicz-Petrykowska, Problem wad oświadczeń woli w czynności prawnej dokonanej przez przedstawiciela (The Issue of a Defect in a Declaration of Will In a Legal Transaction Entered into by the Representative) (in:) *Studia z Prawa cywilnego. Księga pamiątkowa dla uczczenia pamięci prof. A. Szpunara (Studies in Civil Law. Commemorative Book to Honour the Memory of Professor A. Szpunar)*, A. Rembieliński (ed.), Państwowe Wydawnictwo Naukowe, Warsaw-Łódź, 1983, p. 25. More – A. Sylwestrzak, Charakter prawny i kompetencje kuratora osoby ubezwłasnowolnionej częściowo (The Legal Nature and Competences of a Deputy of a Partially Incapacitated Person), *Przegląd Sądowy*, 2011, no. 5, pp. 45–57.

29 T. Sokołowski (in:) *Kodeks cywilny. Komentarz, t. I. Część ogólna (Civil Code. Commentary, vol. I. General Part)*, A. Kidyba (ed.), Wolters Kluwer Polska sp. z o.o., Warsaw, 2009, p. 104.

assets should be differentiated from the broader concept of care over property,[30] within which the curator should have knowledge of the financial affairs of the ward in order to properly advise them in the independent performance of activities. The curator can also take practical actions such as assistance in household accounting, drawing up a list of expenses, etc., and in the event of discovering a threat to the financial interests of the ward, the curator should submit a motion to the guardianship court for intervention. The curator could, for example, request limiting the independence of the ward in managing their earnings (Article 21 of the Civil Code), if the ward makes financially unreasonable decisions that put him or her at a risk of falling into numerous debts.

Apart from the aforementioned authorisation, a curator with a basic scope of competences has the right to care over the ward, which takes on a form of help given especially in the area of health and household issues.[31] In this scope, a curator can not only give advice and necessary information but also directly perform activities in this scope, e.g. accompany the ward in performance of activities by referring them in the right direction (assistance in reaching a relevant institution, bringing to a specific place, help in editing letters, etc.), act as a messenger, help in the running of the household and personal matters and so forth (making a list of necessary purchases, helping in self-service activities, etc.).[32]

The assessment of competences of the curator, who has not been entrusted with representation and management of assets of the ward by the court, is partially positive in terms of compliance with standards under Article 12 of the CRPD. A significant area of independence of the ward, undisturbed by the concurrent competence of the curator to replace the former in legal transactions, whose role is focused on providing assistance with the independent activity of the ward, should be approved. This constitutes a manifestation of respecting the rights, will and preferences of a person subject to curatorship. The court's power to adjust the scope of the curator's competences to the needs of the ward is also beneficial, which corresponds to the requirement under Article 12 of the CRPD consisting in the scope of the curator's competences to be individually shaped with regard to the needs and flexibly adjusted to the situation of the authorised person. However, it should be emphasised that the flexibility of shaping the curator's competences by the guardianship court is not full since it has been limited at its base, pursuant to the act, with effects of the incapacitation and the resultant necessity of the curator's activity in specific areas,[33] which cannot be omitted. Assessment of this subject matter in terms of Article 12 of the CRPD would require a broader analysis since it concerns effects of incapacitation in terms of the capacity to enter into legal transactions; this subject matter exceeds the scope of this chapter. It should be emphasised that in the area of control over correctness of acts in law creating liabilities and concerning disposal of assets (Articles 17–19 of the Civil Code), the curator may become a factor blocking performance of an activity, against the will and preferences of the ward, who would like to perform the activity, whereas no mechanism has been provided for the ward allowing them to overcome a lack of consent of the curator,

30 As: S. Kalus (in:) *Kodeks . . . (Code . . .)*, p. 883.

31 See: Supreme Court's decision of 14.05.1973, I CR 207/73, LEX on. 7255. Guardianship in personal matters of the ward is discussed by M. Serwach in: *Kodeks cywilny. Komentarz (Civil Code. Commentary)*, M. Pyziak-Szafnicka (ed.), Wolters Kluwer Polska sp. z o.o., Warsaw, 2009, p. 201, as well as J. Strzebińczyk in: *Kodeks cywilny. Komentarz do art. 1–534 (Civil Code. Commentary to Articles 1–534)*, vol. I, E. Gniewek (ed.), Wydawnictwo C.H. Beck, Warsaw, 2004, p. 69.

32 More on ways to help a person with disability: D. Olczak-Dąbrowska, *Wybrane . . . (Selected . . .)*, p. 107.

33 The court could not, e.g., refuse granting the curator with the right to give consent to activities performed by the ward, referred to in Articles 17–19 of the Civil Code.

e.g. in the form of a possibility to apply to the court for a permit to execute an activity protested against by the curator. In this scope, standards specified in Article 12 of the CRPD have not been met. In the event of further maintenance of incapacitation in Polish law, it should be suggested to introduce such a mechanism, established, perhaps, based on a model provided for in Article 39 of the Family and Guardianship Code.

In order to present the full characteristics of a situation of the ward, it should be noticed that they could benefit from the curator's assistance also in cases in which they are vested with full competence for independent actions (e.g. in terms of managing their earnings), by granting power of attorney to the curator.[34] This subject matter has not been regulated in a particular manner; thus, the provisions of the Civil Code on power of attorney apply herein. The existence of the possibility of a curator acting as a plenipotentiary should be approved of, as one of the admissible manners of providing the ward with assistance. The risk of abuse would perhaps make it worthwhile to consider more specific regulation of this issue. Although the possibility of granting a power of attorney for a particular activity does not raise any reservations, a doubt arises with regard to the possible granting of a specific power of attorney or a general power of attorney – namely, whether this does not lead to undesirable, excessive withdrawal of the ward from their own affairs and therefore infringe the proportionality requirement stipulated in Article 12 of the CRPD.

2. Competences of a curator who has been appointed by the court to represent the ward and to manage their assets

The curator's rights to represent the ward and manage their assets can be vested in the curator only in the event of granting them by a guardianship court in a decision appointing a curator or in a later decision extending the original scope of their competences. It is also admissible to create indirect situations, in which the curator obtains only a partial extension of their competences (*a maiori ad minus*).[35] In such a case, it should be proposed to precisely describe in the contents of the decision the type of activities to which the curator is authorised in order to eliminate any uncertainties in this area. As has been aptly stated in the doctrine, a court could also grant to the curator a power of attorney to represent the ward only in a specific case, with regard to which such a need arises.[36]

All activities that can be performed by a curator with 'extended' competences (in the broadest admissible scope of the curatorship) can be divided into several categories: (1) legal acts entered into by the curator on behalf of the ward within the vested right to representation, as well as the management of assets; (2) consent/refusal to give consent to acts performed independently by the ward (Articles 17–19 of the Civil Code); (3) giving the ward assets for use at their own discretion pursuant to Article 22 of the Civil Code, within the right to manage the assets of the ward; (4) procedural acts undertaken within the representation of the ward; (5) acts undertaken before the guardianship court with

34 See: Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna (Civil Law – General Part)*, Wydawnictwo C.H. Beck, Warsaw, 2011, p. 329.

35 The research on court records disclosed such practice in 17% of cases – e.g., D. Olczak-Dąbrowska, Wybrane . . . *(Selected . . .)*, p. 131. Also see: H. Dolecki (in:) *Kodeks rodzinny i opiekuńczy. Komentarz (Family and Guardianship Court. Commentary)*, Wolters Kluwer Polska, Warsaw, 2013, p. 992; J. Ignatowicz (in:) *Kodeks rodzinny i opiekuńczy. Komentarz (Family and Guardianship Court. Commentary)*, J. Pietrzykowski (ed.), Warsaw, 1990, p. 628.

36 D. Olczak-Dąbrowska, *Wybrane . . . (Selected . . .)*, p. 125.

regard to the judicial supervision over the execution of curatorship;[37] (6) practical activities. Activities enumerated in points 2, 5 and 6 fall within the curator's competences in each case, whereas activities enumerated in points 1, 3 and 4 require a judicial authorisation.

With regard to the competences consisting in a curator acting on behalf of a ward (enumerated earlier, in points 1 and 4), the existence of a concurrent competence of the curator can be observed, which may infringe the autonomy of the represented ward by omission of their will since the activity can be effectively performed against the will of the ward and even without their knowledge. The only authority supervising the correctness of an activity in this sphere is the guardianship court (see notes in point IV and V). Granting the curator broader competences to some extent 'prematurely' in a situation when an incapacitated person is able to participate in legal transactions in a controlled manner should therefore be considered inadmissible in the light of a standard of ensuring respect for the rights, will and preferences of an incapacitated person pursuant to Article 12, paragraph 4, of the CRPD. Furthermore, vesting the curator with the right to give the ward specific assets for use at their own discretion, as a result of which the curator has the possibility of extending the sphere of independence of the ward in terms of ordinary management thereof should be assessed positively. With regard to a ward, who is an adult, exercising this right by the curator should be reinforced in comparison with an analogous situation between a parent and a child, by imposing on the curator the obligation of such entrustment, if the circumstances imply that the ward does not need assistance in ordinary management of specific items. The essence of curatorship in the light of standards pursuant to Article 12 of the CRPD consists in providing assistance when needed and not withdrawing the ward from the possibility of managing their affairs independently. Therefore, it would be justified to consider introducing relevant legal regulations in this scope. In consequence, the authority shaping the scope of the partially incapacitated person's autonomy would also be, apart from the regional court adjudicating incapacitation and guardianship court settling the scope of the curator's competences, the curator, who, as a person with an ongoing and direct contact with the ward, should *ad casum* use this instrument. Criticism of the curator's right in terms of controlling activities performed by the ward pursuant to Articles 17–19 of the Civil Code has been discussed in the previous point, and they remain valid here.

IV. Exercising curatorship

The curator is obligated to due diligence in the performance of activities while taking into account the best interests of the ward (Article 154 in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code). In the case law concerning the institution of guardianship, it has been underlined that assessment of the best interests of the ward should be versatile,[38] which remains valid in the case of curatorship, however, with a consideration of characteristics thereof. Since we deal with an adult in need of assistance, the elements comprising their best interests should not only include care for current existence and proper treatment but also emphasise care for maintenance and development of their independence as well as respect for their opinion, which should aim at prevention of

37 E.g., applying for a permit to perform more important activities concerning the person or assets of the ward (Article 156 in conjunction with Article 178 par. 2 of the Family and Guardianship Code).

38 Supreme Court's decision of 6.01.1975, III CRN 440/74, LexPolonica no. 322085.

social exclusion and recurring helplessness.[39] Due to the fact that by cascading reference to exercising curatorship, provisions on parental authority apply in the scope not regulated by guardianship provisions (Article 155, paragraph 2, of the Family and Guardianship Code), it is legitimate to apply Article 95 of the Family and Guardianship Code, respectively. Nonetheless, the element of upbringing and obedience irrelevant in the situation of a partially incapacitated person should be discharged, whereas the obligation to respect the dignity and rights of a ward, expressed in paragraph 1, should be taken into account. Furthermore, a properly modified paragraph 4 shall apply, on the grounds of which, before making important decisions concerning the ward, the curator should listen to the former, if the mental development, health condition and level of maturity allows and takes into consideration, as far as possible, their reasonable wishes. It should be noted that the level of satisfaction by the thus-defined norm of the requirements specified in Article 12 of the CRPD is moderate. The curator is, admittedly, obliged to consult their actions with the ward, which is desirable, yet this obligation is weakened by restriction to more important decisions. In the case of curatorship, it would be legitimate to consult with the ward, in principle, all activities in the sphere of their autonomy, and even if not particular, small actions, then at least the general direction thereof. Furthermore, it seems that the curator should be obliged to inform the ward of performed activities, even small ones, in the scope depending on the capacity of a ward to understand such reports. Meanwhile, such an obligation is not explicitly established in the provisions of the Family and Guardianship Code. Admittedly, one can attempt to derive such duty from the obligation of the curator's due diligence in performance of activities, reinforced by the best interest clause of the ward. However, this basis is not unequivocal and does not sufficiently secure the ward's interest in the current discernment of their own legal situation. It does not correspond with the standard specified in Article 12 of the CRPD of respecting the will and preferences of a person covered with curatorship, who should be able to learn about their affairs in order to express their will and preferences defect-free.

All activities of a curator undertaken in the course of curatorship can be, on the grounds of Article 156 of the Family and Guardianship Code in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code, divided into activities undertaken independently and activities performed under a permit of the guardianship court, upon request of a curator (Article 593 of the Code of Civil Procedure in conjunction with Article 605 of the Code of Civil Procedure). The criterion for this division – the level of importance of the affair (only 'more important' cases require a permit) – is blurred and discretionary. Given the diversity of situations in practice, this ensures flexibility and validity, however, at a cost of provoking uncertainty. In the doctrine it is recommended that in the event of any doubts whether a case belongs to the catalogue of cases requiring a permit, the curator should apply for it to the court before undertaking an activity.[40] The verification of whether the curator does not make decisions in more important affairs of the ward freely and without permit issued by the court, lies within the tasks of the court in the course of

39 About the priority of the right of a ward to make decisions concerning their own life – A. Moszyńska, *Komentarz do art. 181 k.r.o. (Commentary to Article 181 of the Family and Guardianship Code)* (in:) *Kodeks rodzinny i opiekuńczy. Komentarz (Family and Guardianship Code. Commentary)*, M. Habdas, M. Fras (eds.), Wolters Kluwer Polska SA, Warsaw, 2021, Lex/el, thesis 10.

40 H. Haak, A. Haak-Trzuskawska, *Opieka i kuratela. Komentarz do art. 145–184 k.r.o. oraz związanych z nimi regulacji k.p.c. (Guardianship and Deputyship. Commentary to Articles 145–184 of the Family and Guardianship Code and Related Regulations of the Code of Civil Procedure)*, Warsaw, 2017, p. 93.

supervision over exercising curatorship. Taking into account the standards from Article 12 of the CRPD, it should be postulated – as regards the interpretation of a 'more important' case – that such a case should be considered in a situation of a conflict between the curator and the ward. Respecting the will and preferences of the ward requires their opinion to have an actual impact on their own situation and not to be easily overcome by the curator acting on their behalf. The situation of a ward should be definitely differentiated from the situation of a child under 18 years old towards whom parents are vested with the attribute of upbringing and directing along with the correspondent obedience of a child, whereas the ward does not remain under parental authority and, thus, all activities in their legal sphere that are against their will are less empowered.

Article 159 of the Family and Guardianship Code in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code enumerates categories of affairs in which a curator cannot represent a ward,[41] and if necessary, to manage them, the court appoints to this end another curator (Article 99 of the Family and Guardianship Code in conjunction with Article 155, paragraph 2, and Article 178, paragraph 2, of the Family and Guardianship Code). This solution is aimed at eliminating a situation in which impartiality of the representative is questionable as in the event the activity would be performed by the representative with 'themselves' or in the event the interests of their family members are at stake. This solution corresponds to the elimination of the conflict of interests and illegal pressures required in Article 12 of the CRPD and should be assessed positively.

The measure provided for in Article 160 of the Family and Guardianship Code in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code (taking an inventory of assets) is aimed at determining the assets of the ward for the purposes of effective control thereof. As such, this does not raise any doubts with regard to the legitimacy of its application. However, the measure provided for in Article 161, paragraph 1, of the Family and Guardianship Code in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code (obligation to submit specific assets to a court deposit[42]) should be perceived in essence as a manifestation of interference in the sphere of competences not only of the curator, but also the ward, who, pursuant to such a decision, loses independence in managing such assets, since collecting them requires a permit of the guardianship court. This measure should be applied towards a ward, who is a major, with great caution. However, application of Article 161, paragraph 2, of the Family and Guardianship Code – in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code towards a ward, which stipulates that cash which is not necessary to satisfy justified needs should be placed in a banking institution and which should be collectible by a representative only upon the guardianship court's permit – should be properly modified. It should be taken into consideration that the ward with a limited capacity to enter into legal transactions has full competence to manage their earnings, which can be excluded/limited by the guardianship court only for important reasons (Article 21 of the Civil Code). Therefore, the absolute obligation of the guardian to deposit cash in a banking institution does not arise as a result of curatorship in the event of cash generated from earnings of the ward.

41 These are legal transactions between persons remaining under curatorship of the same curator and legal transactions between one of such persons and a guardian, or their spouse, descendants, ascendants or siblings, unless the transaction consists in gratuitous gain to the benefit of the ward.

42 These are valuables, securities and other documents.

The curator is liable towards the ward in terms of indemnity for undue performance of curatorship, whereas a relevant claim submitted by the ward expires upon a lapse of three years after the termination of curatorship or discharge of the curator (Article 164 of the Family and Guardianship Code in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code). This time period can be approved in the light of standards pursuant to Article 12 of the CRPD since it starts running only upon termination of the curatorship, and thus, it can be kept by the ward at their own discretion, without the risk of illegal pressure from the curator. By the way, it is also worth mentioning the analogous intention of the regulation regarding suspension of the limitation of claims in Article 121, point 2) of the Civil Code with regard to claims that are vested in persons without full capacity to enter into legal transactions against the curator throughout the duration of the curatorship. This provision is supplemented by Article 164 of the Family and Guardianship Code, resulting in the fact that only actual termination of curatorship causes the renewed running of the limitation period.[43]

V. Supervision over curatorship

Supervision over curatorship regulated in Articles 165–168 of the Family and Guardianship Code in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code is performed by the guardianship court in an ongoing manner, in the form of diversified tools of varied level of intensity: guidelines, orders, requests for explanation and presentation of documents, reviewing the curator's reports regarding the ward and bills concerning the management of their assets, ordering correction or supplementation as well as settlements regarding approval thereof and, finally, issuance of relevant orders necessary to obviate effects of undue performance of curatorship and prevention thereof for the future.

Deputy's report concerning the ward should include data on their health condition and living conditions, whereas on the grounds of the institution of guardianship, it is proposed for the guardianship court in the course of supervision to hear the ward, provided that their mental development and health condition allows it, in order to verify reports and assess the level of performing duties by the guardian.[44] This proposal should also be referenced to the supervision over executing curatorship since there is always a risk of unreliability of the curator in drawing up reports, which may be left undetected, if the analysis is limited to the review of the report only.[45]

The frequency of submitting reports and account of management is determined by the guardianship; they are submitted at least once a year – in practice, usually twice a year,[46] in an oral or written form (Article 595 of the Code of Civil Procedure). Thus, the requirement resulting from Article 12, paragraph 4, of the CRPD is met, consisting in measures related

43 The curator can, even after termination of the curatorship, manage urgent affairs related to the management of assets of a ward (Article 171 of the Family and Guardianship Code in conjunction with Article 178 par. 2 of the Family and Guardianship Code). See: P. Zakrzewski (in:) *Komentarz do art. 164 k.r.o. (Commentary to Article 164 of the Family and Guardianship Code)* (in:) *Kodeks . . . (Code . . .)*, Lex/el., 2021, thesis 4.

44 On the grounds of guardianship: H. Dolecki (in:) *Kodeks rodzinny i opiekuńczy. Komentarz (Family and Guardianship Code. Commentary)*, H. Dolecki, T. Sokołowski (eds.), Wolters Kluwer Polska, Warsaw, 2013, p. 976.

45 In practice, cases have been indicated in which deputies abused their competences to the detriment of the ward, which was not reflected in the contents of the reports – e.g. D. Olczak-Dąbrowska, *Wybrane . . . (Selected . . .)*, p. 134.

46 I. Kleniewska, Praktyka sądowa w zakresie ustanawiania i nadzorowania opieki dla osoby ubezwłasnowolnionej całkowicie (Judicial Practice in the Scope of Appointment and Supervision of Guardianship for a Completely Incapacitated Person), *Prawo w Działaniu*, 2008, no. 4, p. 118.

to exercising the legal capacity being 'subject to regular review by relevant independent and impartial authorities or a judicial body'. Due to the fact, that the curator has to submit periodical reports on regular basis, the guardianship court can intervene in the event the curator exercises curatorship improperly or if circumstances imply that the scope of the curator's competences, initially specified by the guardianship court, does not meet the needs of a ward and requires changing (extending or limiting on the grounds of Article 181, paragraph 1, of the Family and Guardianship Code). If the guardianship court, in the course of supervision over exercising curatorship, recognises that the mental state of the ward has improved to the extent justifying revocation of incapacitation and no authorised person submitted such a motion, the guardianship should notify the prosecutor (Article 59 of the Code of Civil Procedure). By the way, it should be underlined that a regional court can also revoke incapacitation *ex officio*, if it recognises that reasons therefore have ceased (Article 559, paragraph 1, of the Code of Civil Procedure). It should be noticed that supervision exercised by the guardianship court directly oriented on verification of the curator's activities can also indirectly serve as verification of the legitimacy of further maintenance of incapacity. Nevertheless, full implementation of standards under Article 12 of the CRPD would require establishing an additional verification tool directly oriented on the legitimacy of application of the institution of incapacitation. It should take on a form of an obligatory periodical assessment in this subject matter performed by the regional court or the guardianship court on the occasion of exercising supervision over performance of curatorship – in the latter case, with the obligation to notify the regional court of the need for revocation of the incapacitation. The legislator's intervention should be advanced in this direction *de lege ferenda*.

VI. Discharge of a curator

Deputyship over a partially incapacitated person terminates by the law in the event of a revocation of the incapacitation (Article 181, paragraph 2, of the Family and Guardianship Code) or changing the partial incapacitation into complete incapacitation or as a result of the court's decision on discharge of a curator. Discharge can occur due to important reasons upon the request of a curator, and *ex officio* – due to an obstacle in exercising curatorship or due to the curator's negligence in performance of curatorship violating the interests of the ward in the course of performing curatorship (Article 169 of the Family and Guardianship Code in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code). Then the curator's discharge results in the appointment of a new curator. In order to prevent a situation in which a partially incapacitated person is deprived of support between discharge of the curator and appointment of a new one, the hitherto curator is obliged to continue running urgent affairs related to guardianship, unless the guardianship court decides otherwise. Thus, the continuity of care of a ward is kept, which corresponds with standards under Article 12 of the CRPD.

The attitude of the ward and especially their lack of acceptance of activities performed by the curator manifesting in a permanent conflict may exhaust the premise of an important reason for discharging the curator.[47] However, authorisation of the ward to act in the case for discharging the curator raises certain doubts. With regard to minors with limited capacity to enter into legal transactions there is a dispute whether they are vested with the

47 In practice, occurrence of such a reason for discharging the curator was noted in the research on court records – see: M. Jankowska, *Kuratela . . . (Deputyship . . .)*, p. 65.

capacity to act in the proceedings for deprivation or limitation of parental authority on the basis of Article 573, paragraph 1, of the Code of Civil Procedure.[48] However, a position worth supporting has been expressed in the doctrine, stating that a partially incapacitated person can submit a motion for changing a curator.[49] Initiative of the ward may constitute, in fact, an important signal that curatorship exercised by a specific person is not compliant with the best interests of the ward, and thus, the court should determine whether there actually are reasons for changing the curator.

As an effect of discharge, the curator is obliged to submit a final account on management of assets (Article 172 of the Family and Guardianship Code), which concerns only the curator who has been vested with competence to manage assets. On the grounds of Article 596 of the Code of Civil Procedure, it is problematic who the guardian court is obliged to summon to participate in revision of such an account since in the light of this provision, in the event the case concerns the assets of a person who does not have a full capacity to enter into legal transactions, the court summons a statutory representative of this person. As results from previous deliberations regarding competences of a curator, a curator does not always have the status of a statutory representative (unless performance of control in terms of the activities under Articles 17–19 of the Civil Code is classified as an indication of representation). Perhaps a reasonable solution in this situation would be to summon to participate in the review of the final account of both the curator who is not a statutory representative of the ward as well as the ward themselves.

It should be underlined that the guardianship court is not empowered to terminate the institution of curatorship until the regional court revokes the incapacitation. Until the partial incapacitation remains valid, it is necessary for the incapacitated person to have a curator, the appointment of which is vested with the guardianship court. However, the authorisation to submit a motion for revocation of the incapacity is vested with the incapacitated person (Article 559, paragraph 3, of the Code of Civil Procedure), as a result of which it can bring the curatorship to an end by revoking the incapacitation. Settlement of the regional court concerning further maintenance of incapacitation is, however, based on the assessment of fulfilment of premises for incapacitation (Article 16 of the Civil Code), among which the will of the partially incapacitated person in only one of the factors that can influence the assessment of advisability of application of this institution. Therefore, the ward does not have a possibility to simply 'resign' from assistance and their will in this scope does not have to be respected. It remains in contrast to the standards of Article 12 of the CRPD as an indication of substitute support, in which intervention against the will of a person with disability is applied.[50]

To conclude deliberations on the discharge of a curator, it should be stated that assessment of provisions of the Family and Guardianship Code and the Code of Civil Procedure concerning the discharge of a curator in terms of compliance with standards of the CRPD

48 No authorisation has been supported by, among others, P. Pruś, *Komentarz do art. 573 k.p.c. (Commentary to Article 573 of the Code of Civil Procedure)* (in:) *Kodeks postępowania cywilnego. Komentarz (Code of Civil Procedure. Commentary), vol. II*, M. Manowska (ed.), Lex/el. 2020, thesis 2, whereas, J. Bodio is in favour of authorisation – *Komentarz do art. 573 k.p.c. (Commentary to Article 573 of the Code of Civil Procedure)* (in:) *Kodeks postępowania cywilnego. Komentarz do art. 1–729 (Code of Civil Procedure. Commentary to Articles 1–729), vol. I*, A. Jakubecki (ed.), Lex/el, 2017, thesis 1.

49 M. Jankowska, *Kuratela . . . (Deputyship . . .)*, p. 66.

50 See: analysis of provisions on incapacitation in the light of Article 12 of the CRPD conducted by M. Domański, *Ubezwłasnowolnienie . . . (Incapacitation . . .)*, pp. 41–45.

is positive, on the condition of its proper interpretation taking into consideration those standards and, especially, ensuring the ward with authorisation to participate in the case for discharge of a curator, whereas the assessment of the lack of a binding impact of the ward on revoking incapacity with curatorship, in effect of which they can remain under curatorship against their own will, is negative.

VII. Conclusions

In the summary of the conducted analysis, it should be stated that the institution of curatorship for a partially incapacitated person only to a certain extent corresponds with the standards stipulated in Article 12 of the CRPD for measures related to exercising legal capacity by persons with disabilities. The following should be assessed positively, among others:

- the possibility of a relatively flexible determination of competences of a curator pursuant to Article 181 of the Family and Guardianship Code, with a consideration of the needs of the ward;
- a lack of parallel competence of the curator to represent the ward as a basic model of the scope of curatorship pursuant to Article 181 of the Family and Guardianship Code;
- the possibility of extending the scope of competences of the ward by giving them specific assets for use at their own discretion pursuant to Article 22 of the Civil Code (this possibility, however, occurs only in the case of extended competences of the curator with management of property of the ward);
- the curator's possibility to act as a plenipotentiary of the ward;
- exclusion of the curator's competence when it does not guarantee impartiality (Article 159 of the Family and Guardianship Code);
- periodic verification of functioning of the curatorship with reports submitted by the curator.

However, among elements that do not meet standards stipulated in Article 12 of the CRPD, the following should be enumerated:

- adjudicating in the case of incapacitation and in the case for appointment of a curator by various authorities, which may result in a longer period of time between validation of the first decision and issuance of the second, during which the incapacitated person is deprived of a curator and, in consequence, of the possibility to fully participate in legal transactions;
- a lack of the guardianship court's obligation to hear the partially incapacitated person for whom the curator is to be appointed, as well as a lack of the obligation to take into consideration the will and preference of such a person with regard to the selection of a curator;
- not emphasised enough the curator's obligation to listen to the ward, as well as the existing risk of omitting their will and preferences in execution of curatorship, especially in the case of extending competences of the ward with representation and assets management of the ward;
- a lack of the curator's obligation to inform the ward on an ongoing basis on performed activities;
- a lack of a mechanism allowing the ward to overcome a lack of a curator's consent to perform activities pursuant to Articles 17–19 of the Civil Code; and
- a lack of a mechanism periodically verifying the legitimacy of maintaining curatorship and incapacitation. The mechanism of the guardianship court's supervision over execution of curatorship is insufficient in this matter.

c. Curatorship of a person with disabilities in the light of Article 12 of the CRPD

Małgorzata Balwicka-Szczyrba

1. Introduction

In compliance with the binding standards of human rights, every human is equal before the law, and the state and the legal system thereof should be the ultimate guardian for persons who cannot take care of their rights and interests on their own.[1] In the area of protective mechanisms, an important role is played by legal tools for supporting specific individuals, also including institutions of the so-called guardianship law – guardianship and curatorship. They are of a common nature in the meaning that they are established for each person in need of care, assistance or support, in compliance with legally defined principles.

The social importance of the subject matter analysed herein and referring to one such tool – the institution of curatorship for a person with disability – should be emphasised. Approximately 4.5 million of persons with disabilities[2] live in Poland, and it has been observed that the statutory appointment of a curator for this group of persons in Poland has been showing an upward trend.[3] The existence of appropriate legal solutions coherent with international standards is the absolute basis for due protection and support of those persons.

It should be underlined in the introduction that in compliance with the modern approach to disability, legal regulations concerning persons with disabilities should not be of a discriminatory nature, and in cases where this is necessary due to the situation or characteristics of a given person, these regulations should be of a supportive and equalising nature. The modern protection model is, in fact, based on the assumption that these persons should be perceived by the legal system not as an object of medical activities or care, but as the equal subjects of rights.[4] In consequence, relevant legal solutions should be varied and adjusted to various forms of disability, depending on the needs of this group of persons. In this context, the attention of legislators and law enforcers should be focused on equalising opportunities for persons with disabilities so that they can participate in civil law transactions to the fullest extent possible. Relevant legal measures should not, however, influence the privilege of this group of persons' position in civil law transactions at

1 In the common law system, this concept is defined as *parens patriae*. See more: R. Dinerstein, E. G. Grewal, J. Martinis, Emerging international trends and practices in guardianship law for people with disabilities, *ILSA Journal of International & Comparative Law* 2016, vol. 22, p. 436.

2 In compliance with data from the press conference of the Office of the Commissioner for Human Rights of 21.01.2016. The material is available on the website of the Commissioner for Human Rights (https://bip.brpo.gov.pl/).

3 See: research conducted by D. Olczak-Dąbrowska, Wybrane rodzaje kurateli w praktyce sądowej (Selected Types of Curatorship in Judicial Practice), *Prawo w działaniu. Sprawy cywilne* 2014, no. 17, p. 102.

4 See, among others: M. Domański, Ubezwłasnowolnienie w prawie polskim a wybrane aspekty międzynarodowej ochrony praw człowieka (Incapacitation in the Polish Law vs Selected Aspects of the International Human Rights Protection), *Prawo w działaniu. Sprawy cywilne* 2014, no. 17, p. 10 and literature referred therein.

the expense of others but should consist in balancing the interests of all participants so that the position of the weaker party is properly reinforced so as to restore balance between the parties unsettled due to health issues. It is recommended to introduce tools based on the so-called supported decision-making model.[5]

The subject of this chapter is the institution of curatorship for a person with disability, which is regulated in Article 183 of the Family and Guardianship Code.[6] This institution will be subject to analysis in the context of meeting standards specified in Article 12 of the Convention on the Rights of Persons with Disabilities (hereinafter also referred to as the CRPD). Our considerations will, in the first part, concern terminological and systemic issues and, in the second, substantive and procedural aspects of appointment of a curator for a person with disability.

In the introduction, a thesis should be also put forward that institution of curatorship for a person with disability in its current form to a significant extent implements the guarantees under Article 12 of the aforementioned Convention. There are, however, areas, which will be specified herein, with regard to which taking legislative action would be worth considering, aimed at improving coherence with Poland's obligations under the Convention. Article 183 of the Polish Family and Guardianship Code (the FGC) and Article 600 of the Polish Civil Procedure Code (the CPC) will have been amended since February 15, 2024 as a result of the Act of July 28, 2023 on amendment of the Family and Guardianship Code and some other acts. As a consequence Article 183 of the FGC and Article 600 of the CPC will have fulfilled many of the demands set out hereinafter. This chapter depicts not only the current state of things as of the date of publication thereof, but also shows which demands for improvement have been taken into consideration while amending Article 183 of the FGC and Article 600 of the CPC and which remain still relevant. Many considerations and remarks concerning the current shape of Article 183 of the FGC will have remained relevant also after the amendment of this provision of the FGC will have come in force.

2. Standards resulting from Article 12 of the Convention on the Rights of Persons with Disabilities

The CRPD[7] is considered to be 'the best known tool in the world for protection of rights of persons with disabilities'.[8] It has been observed that it has introduced a new model of

5 As, among others: M. Domański, Ubezwłasnowolnienie . . . (Incapacitation . . .), p. 11; M. Balwicka-Szczyrba, A. Sylwestrzak, Instytucja ubezwłasnowolnienia w perspektywie unormowań Konstytucji RP oraz konwencji o prawach osób niepełnosprawnych (The Institution of Incapacitation in the Context of Regulations of the Constitution of the Republic of Poland and the Convention on the Rights of Persons with Disabilities), *Gdańskie Studia Prawnicze* 2018, volume XL, p. 166; U. Ernst, Ubezwłasnowolnienie (Incapacitation), *Transformacje Prawa Prywatnego* 2010, no. 4, p. 31.

6 Article 183 of the Family and Guardianship Code stipulates that a curator is appointed for a person with disability, if this person needs assistance in managing all affairs or with regard to affairs of a specific type, or to deal with a specific case. Please note that the Article 183 of the FGC will have been amended as a result of the Act of July 28, 2023 on amendment of the FGC and some other acts, Journal of Laws 2023, item 1606. This amendment will have come into force on February 15, 2024. As a result of this amendment the nature of the curatorship for a person with disability and the scope thereof are flexible. The nature (representative or supportive) and the scope of the curatorship for a person with disability is to be adequate for the needs of the person for whom it is established. This is to be decided by the court taking into account all the relevant circumstances on a case by case basis. The court is obliged to hear the person with disability before any decision on curatorship is taken, unless communication with this person is impossible. The person with disability may determine a candidate who can be a curator.

7 The Convention was drawn up in New York on 13.12.2006, signed by Poland on 30.03.2007 and ratified on 6.09.2012, Journal of Laws of 25.10.2012, item 1169.

8 E.g. R. Dinerstein, E. G. Grewal, J. Martinis, Emerging international . . ., p. 439.

understanding disability based on human rights. It is a social model established on systemic factors and equality aspects, and not on medical perception.[9] The aim of the Convention, in compliance with Article 1, has become to support, protect and ensure full and equal exercise of all human rights and fundamental freedoms by all persons with disabilities, as well as to support respect for their inherent dignity.

Article 12 of the CRPD referring to equality before the law, introduces specific standards of protection of persons with disabilities and guarantees of implementation thereof. These standards and guarantees should be reflected in legal regulations adopted within a given state party. It should be underlined that the Committee on the Rights of Persons with Disabilities, appointed in compliance with Article 34 of the CRPD, in a Comment to Article 12 of the CRPD, recognised the right to equal treatment as generally binding; therefore, it is not possible to limit this right. Equality and non-discrimination are recognised therein as a cornerstone in the guarantee of protection.[10]

The first standard resulting from Article 12 of the CRPD is the right of persons with disabilities to recognition of as persons before the law.

The second is the guarantee of legal capacity on an equal basis with others in all aspects of life. Here, it should be explained that the term 'legal capacity' used in Article 12, paragraph 2, of the CRPD has been translated into Polish improperly, i.e. literally as *zdolność prawna*. It is rightly argued that this phrase, taking into consideration the full contents of Article 12 of the CRPD, refers not only to the level of static capacity but also the dynamic level.[11] Therefore, the idea of the Convention would be better reflected by the term *zdolność w sferze prawa*, covering both the legal capacity and the capacity for legal acts.[12]

The third standard resulting from Article 12 of the CRPD is the obligation of states parties to take appropriate measures to provide persons with disabilities with access to the support they may require in exercising their legal capacity. Here, it should be underlined that the tools of support provided for in the national law for persons with disabilities grant priority to the will and preferences of the person with disability.

Fourth, in compliance with paragraph 4 of Article 12 of the CRPD, states parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person are free of conflict of interest and

9 See: F. Beaupert, L. Steele and P. Gooding, Introduction to Disability, Rights and Law Reform in Australia: Pushing Beyond Legal Futures, *Law in context* 2017, vol. 35, no. 2, pp. 1–2.

10 Committee on the Rights of Persons with Disabilities, General comment No. 6, 2018, on equality and non-discrimination, available on the website, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en

11 M. Balwicka-Szczyrba, A. Sylwestrzak, Instytucja ubezwłasnowolnienia . . . (The Institution of Incapacitation . . .), p. 152.

12 See more: M. Balwicka-Szczyrba, A. Sylwestrzak, Instytucja ubezwłasnowolnienia . . . (The Institution of Incapacitation . . .), p. 152; M. Domański, Ubezwłasnowolnienie. . .. (Incapacitation . . .), p. 33; A. Błaszczak, Zastrzeżenia i oświadczenia interpretacyjne Polski do Konwencji o prawach osób z niepełnosprawnościami (Poland's Reservations and Interpretative Declarations to the Convention on the Rights of Persons with Disabilities) [in:] *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka (The Rights of Persons with Intellectual or Mental Disabilities in the Light of International Human Rights Instruments)*, D. Pudzianowska (ed.), Wolters Kluwer SA, Warsaw, 2014, p. 35; S. Gurbai, Ograniczanie czy respektowanie zdolności do czynności prawnych osób dorosłych z niepełnosprawnościami? (Limiting or Respecting the Capacity to Enter into Legal Transactions of Adults with Disabilities) [in:] *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka*, *(The Rights of Persons with Intellectual or Mental Disabilities in the Light of International Human Rights Instruments)*, D. Pudzianowska (ed.), Wolters Kluwer SA, Warsaw, 2014, pp. 68–69.

undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests. Therefore, it should be assumed that thus understood measures should be based on tools of a supporting nature, according to the supported decision-making model.[13] The reality of assistance and adjustment to the situation of a given person while respecting their autonomy should constitute a priority of supported decision-making.

Fifth, states parties shall take all appropriate and effective measures to ensure the equal rights of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and they shall ensure that persons with disabilities are not arbitrarily deprived of their property.

3. Disability – definition issues

The legislator's approach to the term 'disability' is at least twofold. There are legislative acts, in which the legislator refers to this concept yet does not define it. Regulations, including a legal definition, narrowing the scope of the discussed concept to the elements indicated in the contents thereof, can be also encountered. An example of the first approach is provided by provisions of the Family and Guardianship Code, in particular Article 112^6 of the Family and Guardianship Code, concerning foster care over a child with disability, or Article 135, paragraph 2, of the Family and Guardianship Code, stipulating the manner of fulfilling the obligation of maintenance towards a person with disability. The issue of using the term 'disability', without at least exemplary enumeration of components thereof, is also found in Article 183 of the Family and Guardianship Code, regulating the institution of a curator. In this regard the state of things will have remained unchanged also when the amendment of Article 183 of the FGC and Article 600 of the CPC will have come into force since February 15, 2024.

Furthermore, there are legislative acts in which the legislator explicitly defines the concept of 'disability'. In the Charter of Rights for Persons with Disabilities adopted by the resolution of the Sejm of the Republic of Poland of August 1, 1997 – Charter of Rights for Persons with Disabilities,[14] persons with disabilities are defined as persons whose physical, mental or intellectual capacity permanently or temporarily hinders, limits or prevents them from living everyday life, learning, working and fulfilling social roles. As an example of a regulation of a statutory importance, the Act of August 27, 1997,[15] on vocational and social rehabilitation and employment of persons with disabilities should be indicated, which defines disability in Article 2, point 10, as person's permanent or temporary incapacity to fulfil social roles due to the permanent or long-term impairment of the body, especially causing incapacity for work.

While referring to the aforementioned concepts of the legislator, it seems that introduction in certain legislative acts of the concept of 'disability' without a detailed definition thereof is an intended legislative measure. Moving on to the grounds of Article 183 of the Family and Guardianship Code, this procedure seems beneficial. The legislator does not, in fact, narrow this term to specific features/characteristics of a given person, allowing a wide depiction thereof with a consideration of guidelines resulting from both the principles of the Polish legal system and international standards. This approach is coherent

13 See: M. Domański, Ubezwłasnowolnienie . . . (Incapacitation . . .), p. 11.
14 M.P. *(Official Gazette of the Republic of Poland)* No. 50, item 475.
15 Journal of Laws of 2020, item 426, as amended.

with the CRPD, which introduces a broad understanding of 'disability' by including in the group of persons with disabilities persons with long-term physical but also mental and intellectual, as well as sensory impairment, which may, in conjunction with various barriers, hinder their full and effective participation in social life, in compliance with the principle of equality with other persons. The position that the broad definition of 'disability' provided for in the Convention can be applied in the absence of a statutory definition in the Family and Guardianship Code, should be supported.[16] It is concurrent with a definition from the Polish Dictionary PWN, describing a person with disability as a person who does not reach full physical or mental capacity.[17]

An attempt at defining disability can also be found in judicial case law. Here, apart from the aforementioned physical and mental aspect of this concept, attention is also drawn to the social dimension of disability. For instance, in the light of the Supreme Court's judgment of August 20, 2003,[18] disability means not only an impairment of the body but also hindrance, limitation or incapacity of fulfilling social roles as an element of participating in social life. However, in the judgment of the Voivodeship Administrative Court in Warsaw of November 29, 2006, it is indicated that disability refers to a physical, mental or intellectual condition permanently or temporarily hindering, limiting or preventing from fulfilment of social roles and, in particular, capacity to perform work. Moreover, it is underlined that disability is a broader concept than handicap, which can be derived from the social dimension of effects of disability.

On the grounds of terminological considerations, it is worth underlining that the Polish legislator initially did not use the term 'a person with disability' but 'a handicapped person'. The institution of a curator for a handicapped person (since such was the name of the predecessor of the current institution of a curator for a person with disability) was regulated as early as under the decree on Guardianship Law of May 14, 1946.[19] Article 57, paragraph 1, thereof indicated that for handicapped persons, in particular blind, deaf and mute persons, a curator is appointed upon their request, if they need assistance to manage their affairs or affairs of a specific type. Therefore, Article 57, paragraph 1 of the decree provided for an open catalogue of handicap, the occurrence of which could constitute the basis for appointment of a curator, emphasising disabilities related to vision, hearing and speech impairments. Thus, the legislator applied a mixed regulatory model – an exemplary catalogue oriented on a certain group of features. Despite the fact that the Family Code of 1950 did not introduce the institution of curatorship for a handicapped person, it was included in the Family and Guardianship Code of 1964. This act, in its initial wording, still did not use the concept of a person with disability, but a handicapped person. Only after many years, that is, on October 7, 2007,[20] this concept was replaced with the term 'a person with disability'. As indicated in the justification to the amendment bill,[21] the phrase 'a handicapped person' was recognised as pejorative due to the growing commonness of

16 As: A. Sylwestrzak, Konwencja o prawach osób niepełnosprawnych a unormowania kodeksu rodzinnego i opiekuńczego (Convention on the Rights of Persons with Disabilities vs Regulations of the Family and Guardianship Code). *Acta Iuris Stetinensis. Kodeks rodzinny po wielkich nowelizacjach (Family Code After Great Amendments)*, Szczecin 2014, p. 621.

17 Polish Dictionary PWN, available on the website: https://sjp.pwn.pl/slowniki/niepe%C5%82nosprawno%C5%9B%C4%87.html.

18 Judgement of the Supreme Court of 20.08.2003, II UK 386/02, LEX no. 107174.

19 Journal of Laws of 1946, No. 20, item 130.

20 Act of 9.05.2007 on amendment of the Act – Code of Civil Procedure and certain other acts, Journal of Laws No. 121, item 831.

21 Justification of the bill of 09.05.2007 on amending the Act – Code of Civil Procedure and certain other acts.

use of the objectivised phrase 'a person with disability'. It was aptly noticed that a lack of a proper and not negatively characterised name for the institution could discourage persons with disabilities to submit motions for appointment of a curator.

As part of the considerations related to the used terminology, the valid judgment that the phrase 'a person with disability' is a more accurate concept than 'a disabled person' in the light of the modern approach presented herein should be emphasised.[22] Even the title of the Convention itself refers to 'persons with disabilities'. Therefore, terminological changes in concepts used by the Polish legislator should be introduced in this spirit, treating disability in the aspect of features of a given person, and not in the subjective scope.[23] Placing emphasis on underlying features and not on the person is of a much less stigmatising nature and safeguards the respect for the dignity of a given person, guaranteed in Article 12 of the CRPD, to a broader extent. This comment should refer to the institution of curatorship for a person with disabilities under Article 183 of the Family and Guardianship Code, discussed herein. *De lege ferenda,* the curator referenced therein should receive a name referring to disability as a feature, while noticing the broad scope of possible 'disabilities', it is worth emphasising in the name its physical or mental dimension. In consequence, a curator under Article 183 of the Family and Guardianship Code would be named: a curator for a person with physical or mental disability and the institution-curatorship for a person with physical or mental disability. This demand will have remained relevant also when the amendment of Article 183 of the FGC will have come into force (February 15, 2024).

4. Curator for a person with disabilities and other measures of legal protection of interests of persons with disabilities in legal transactions

Curatorship constitutes a form of limited and partial care over a person or property.[24] Curatorship for a person with disability, considering varied forms of curatorship provided for by the law, is classified, similarly as curatorship over a partially legally incapacitated person, as a type of permanent curatorship with a significant scope.[25] The institution of a curator for a person with disability constitutes one of the tools regulated by the Polish legal system to protect this group of persons. In the beginning, it is worth placing this tool in the context of other institutions dedicated to persons with disabilities.

In the science of civil law, a division of regulations was proposed, referring to the situation of persons with disabilities into three groups.[26] The first are the measures aimed at protecting and safeguarding the interests of a person with disability. This group includes, for example, legal tools aimed at equalising the opportunities of persons, actually incapable of using regular measures, to participate in legal transactions (e.g. a substitute signature form – Article 79 of the Civil Code). Second are the measures aimed at protecting the

22 As, among others: M. Balwicka-Szczyrba, A. Sylwestrzak, Instytucja ubezwłasnowolnienia . . . (The Institution of Incapacitation . . .), p. 158; W. Rożdżeński, Wykorzystanie instytucji kurateli dla osoby niepełnosprawnej dla realizowania czynności właściwych pełnomocnictwu zdrowotnemu (The Use of the Institution of Curatorship for a Person with Disability for Performance of Activities Under Healthcare Power of Attorney), *Przegląd Prawa Medycznego*, nos. 1–2/2021, p. 125.

23 Also: M. Balwicka-Szczyrba, A. Sylwestrzak, Instytucja ubezwłasnowolnienia . . . (The Institution of Incapacitation . . .), p. 158.

24 H. Haak, *Opieka i kuratela. Komentarz (Guardianship and Curatorship. Commentary)*, Toruń 2004, p. 267.

25 As: J. Strzebińczyk (in:) *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze (Private Law System. Family and Guardianship Law)*, vol. 12, T. Smyczyński/J. Strzebińczyk eds., Wydawnictwo C.H. Beck, Warsaw 2011, p. 906.

26 A. Sylwestrzak, Kurator dla osoby niepełnosprawnej (A Curator for an Incapacitated Person), *Przegląd Sądowy* 2014, no. 9, p. 17 and examples provided therein.

interests of third parties infringed (threatened) as a result of the disability of one of the participants in legal transactions. Here, an example is provided by regulations introducing liability for damage caused by a person with disability due to their impairment. Third are the measures ensuring the safety of legal transactions by banning the use of specific legal institutions by persons with disabilities due to the incapacity for proper achievement of objectives of this institution – for instance, bans addressed at deaf and mute persons who cannot draw up a nuncupative will (Article 951, paragraph 3, of the Civil Code) or provisions on the incapacity to be a witness while drawing up a will (Article 956 of the Civil Code).[27]

In the range of cases thus specified, referring to persons with disabilities, the institution of curatorship for a person with disability can, in the majority of cases, serve a dual purpose. First of all, this institution is aimed at the protection of rights and interests of persons with disabilities. This institution does, in fact, perform the assistance function. Nonetheless, it can be stated that it also performs, at least in some cases, the function aimed at the protection of interests of third parties, infringed (threatened) as a result of disability of one of the participants in legal transactions. Since the curator should take care of the interests of the ward, they should also take care of the correctness of factual and legal acts in which such a person participates. Duly provided assistance of a curator to a person with disability, including their advisory function, has an impact on the situation of other participants in legal transactions. The institution of curatorship for a person with disability has, therefore, features relevant for the first and second of the aforementioned groups of tools. The multitude of functions of the institution of curatorship for a person with disability and, in particular, its protective dimension towards the ward as well as – in a large number of – third parties duly implement safeguards under Article 12 of the CRPD by ensuring proper participation of persons with disabilities in legal transactions. It is especially required to emphasise that in this understanding, the institution of a curatorship for a person with disability constitutes an instrument based on the so-called supported decision-making, which is compliant with Article 12 of the CRPD, as not limiting the participation of a person with disability in civil law transactions, but supporting them.[28] The amendment of Article 183 of the FGC which will have come into force since February 15, 2024 gives more arguments to support the above views on the curatorship for persons with disabilities.

5. Substantive law aspects of appointing a curator for a person with disability

In the light of Article 183 paragraph 1 of the Family and Guardianship Code, a curator is appointed for a person with disability, if this person needs support in managing their affairs or affairs of a specific type, or to deal with a particular case. Therefore, premises for appointment of a curator include: first, disability; second, the need for assistance, which refers to all cases or cases of a specific type, or to deal with a particular case. These premises must be met jointly. The prerequisites which must be fulfilled in order to establish a curatorship for a person with disabilities will have remained unchanged also when the amendment of Article 183 of the FGC will have come into force (February 15, 2024).

At the beginning of this chapter, the broad understanding of the concept of 'disability' has been presented, also relevant for the interpretation of this term in compliance with Article 183 of the Family and Guardianship Code. It should be added that already in the binding period of regulations referring to a curator for a handicapped person, the narrowing understanding of the concept of 'handicap' came into question in the science of

27 Ibid., 17.

28 Also: D. Olczak-Dąbrowska, Wybrane rodzaje kurateli w praktyce *sądowej* (Selected Types of Curatorship in Judicial Practice), *Prawo w działaniu. Sprawy cywilne* 2014, no. 17, p. 103.

civil law. It was primarily underlined that the concept of handicap (and thus, as should be deducted, also disability) should not be strictly interpreted for humanitarian reasons.[29] Such an approach is coherent with the standards of Article 12 of the CRPD.

However, while defining a person with disability pursuant to Article 183 of the Family and Guardianship Code, authorised to apply for the appointment of a curator, certain personal criteria should be introduced. First of all, it should be indicated that pursuant to Article 183 of the Family and Guardianship Code, a curator can be appointed only for a person who has full capacity for legal acts.[30] In consequence, the institution of a curatorship for a person with disability shall not apply with regard to minors, since these persons do not have full capacity for legal acts and are represented by statutory representatives. *De lege lata,* a curator appointed on the basis of Article 183 of the Family and Guardianship Code is expected to assist the persons with disabilities and not replace them. This element of characteristics of the curatorship for a person with disability will have remained relevant also after the amendment of Article 183 of the FGC will have come into force (February 15, 2024). Regardles of the curator appointed for a person with disability is authorised to represent her or not, the person keeps unlimited active legal capacity for as long as any other grounds for limitation of active legal capacity are not applied. Also, in the case of a person for whom a temporary advisor has been appointed, the appointment of a curator pursuant to Article 183 of the Family and Guardianship Code is unjustified since the person with disability has, in this case, the assistance provided.[31]

With regard to the broad definition of 'disability', curatorship, in compliance with Article 183 of the Family and Guardianship Code, is established due to bodily infirmity as well as due to all conditions of the body that hinder the management of one's own affairs.[32] In judicial case law, such circumstances include especially diseases hindering movement and communication or helplessness caused by old age.[33] It is confirmed by the research conducted by D. Olczak-Dąbrowska indicating that diseases related to ageing, especially Alzheimer's, Parkinson or dementia, occurred in almost half of the cases for appointment of a curator.[34]

Furthermore, it is rightly assumed that disability pursuant to Article 183 of the Family and Guardianship Code does not cover, in principle, mental illness, since the latter constitutes a premise for incapacitation and not appointment of a curator for a person with disability.[35] Only a mild mental illness, which does not justify incapacitation, could become the basis for appointment of a curator for a person with disability.[36] It should be assumed that a person with disability, for whom a curator is to be appointed, is capable of guiding their conduct, as well as making independent decisions about themselves, and therefore, the premises for full or partial incapacitation are not met. In order to also emphasise the mental dimension of possible disability, justifying appointment of a curator, it is worth

29 Especially: A. Józefowicz, Kuratela ustanawiana dla osób ułomnych *(Curatorship Appointed for Handicapped Persons)*, p. 982. See also: W. Ziętek, Kurator dla osoby ułomnej – *de lege ferenda* (A Curator for a Handicapped Person – de lege ferenda), *Rodzina i Prawo* 2007, no. 2, p. 982.

30 See: A. Józefowicz, Kuratela . . . (Curatorship . . .), p. 983; D. Olczak-Dąbrowska, Wybrane rodzaje kurateli . . . (Selected Types of Curatorship . . .), p. 96.

31 As: A. Sylwestrzak, Kurator dla osoby . . . (A Deputy for a Person . . .), p. 21.

32 See, among others: A. Sylwestrzak, Kurator . . . *(A Deputy . . .)*, p. 19.

33 Decision of the Supreme Court of 08.12.2016, III CZP 54/16, LEX no. 2186578.

34 D. Olczak-Dąbrowska, Wybrane rodzaje kurateli . . . (Selected Types of Curatorship), p. 104.

35 See, among others: L. Kociucki, Piecza nad ludźmi starymi. . .. (Care over the Elderly . . .), p. 138; W. Rożdżeński, Wykorzystanie instytucji kurateli . . . (The Use of the Institution of Curatorship . . .), p. 126; D. Olczak-Dąbrowska, Wybrane rodzaje kurateli . . . (Selected Types of Curatorship . . .), p. 96.

36 As, among others: W. Rożdżeński, Wykorzystanie instytucji kurateli . . . (The Use of the Institution of Curatorship . . .), p. 126;

specifying in the contents of Article 183 of the Family and Guardianship Code the premise for application of this institution, which would constitute physical or mental disability.

The second premise under Article 183 of the Family and Guardianship Code is the person with disability needing assistance. The need for assistance refers to all affairs, or affairs of a specific type, or a specific case. In consequence, it is possible to appoint a curator *ad litem*, but in most cases, it will still be of a permanent nature. The concept of 'an affair/a case' can concern a broad category of factual and legal acts, however, only in order to ensure legal protection. It is aptly noticed that safeguarding purely factual care, such as keeping company, remains outside the legal sphere.[37] Cases covered with assistance of a curator can concern both the person and assets of the ward.

In the understanding presented, solutions included in Article 183 of the Family and Guardianship Code are characterised by flexibility due to the possible multidimensional use of this institution for a broader or narrower category of cases, and even for one case. Such a flexible adjustment of the institution to a specific situation of a person with disability is a proper measure, coherent with standards resulting from Article 12 of the CRPD. It allows individual specification of support relevant for the factual and legal situation of a given person and their needs. As a result of the amendment of Article 183 of the FGC which will have come into force since February 15, 2024 the grounds for the above opinion will have become stronger.

6. Procedural aspects of instituting proceedings for appointment of a curator for a person with disability

The procedure to establish a curatorship for a person with disability, as referred to in Article 600 of the Code of Civil Procedure, falls within the scope of curatorship procedures covered by the Code of Civil Procedure. These procedures are of a non-litigious nature and they fall within the jurisdiction of guardianship courts. Specifically, the exclusive competence to hear such cases is vested in the guardianship court having jurisdiction over the domicile of the person or – where none exists – over the person's temporary place of stay. Furthermore, provisions regulate that in the event this basis is also missing, the district court for the capital city of Warsaw is competent (Article 569 of the Code of Civil Procedure). In order to ensure due protection of rights and interests of a person with disability, the act introduces specific solutions. In urgent situations, in case of a lack of competence, the guardianship court issues *ex officio* all necessary rulings, even with regard to persons who are not subject to its territorial jurisdiction, by notifying the guardianship court with territorial jurisdiction (Article 569, paragraph 2, of the Code of Civil Procedure). This flexibility in the scope of court jurisdiction should be approved in the light of standards under Article 12 of the CRPD.

Proceedings for appointment of a curator for a person with disability is instituted, in compliance with Article 600 of the Code of Civil Procedure, in three modes. The first instance is upon a request of a person with disability. The request type of institution of proceedings corresponds to the largest extent with standards under 12 of the CRPD since it fully implements the will and preferences of a person with disability, who requested appointment of a curator.

In the light of Article 7 of the Code of Civil Procedure the motion for institution of proceedings can also be submitted by the public prosecutor. Furthermore, with the consent of this person, appointment of a curator for a person with disability can be effected upon a request of a non-governmental organisation, whose statutory tasks include protection

37 A. Sylwestrzak, Kurator . . . (A Curator . . .), p. 22.

of rights of persons with disabilities, providing assistance to such persons or protection of human rights. However, it should be emphasised that in light of Article 546, paragraph 3, of the Code of Civil Procedure, the indicated non-governmental organisations can join the proceedings at any stage thereof. In such an event, the procedural position of a non-governmental organisation resembles the procedural position of the public prosecutor.[38] In consequence, the final judgment rendered in the action instituted by the non-governmental organisation has the gravity of *res judicata* between the party to the benefit of whom the action has been instituted and the other party.

With reference to Article 12 of the CRPD, the possibility of instituting proceedings by a non-governmental organisation should be assessed positively. Despite the fact that the applicant, in the case of the second mode, is a non-governmental organisation, the assistance offered by this organisation, as well as experience in running this type of case, will constitute relevant support for a person with disability, who might not have relevant legal knowledge to prepare a motion. Due to the fact that the right to bring a case to the court and pursue claims through the agency of associations, organisations and other legal persons has been considered as implementing the principle of equality,[39] it is good that the relevant legislative changes have been introduced in Poland. The science of civil law calls for making it easier for external entities, such as centres of social assistance and district centres of family assistance, to apply for appointment of a curator for a person with disability.[40] These calls should be supported as compliant with Article 12 of the CRPD, yet with a certain modification, i.e. in the scope of the possibility of submitting such a motion by relevant territorial self-government units that are obliged to provide social assistance in compliance with principles specified in Article 16 of the Act of March 12, 2004, on social assistance. Moreover, in this case, proceedings should be instituted with the consent of a person with disability, and these entities should act in compliance with the same principles with which non-governmental organisations must comply.

Thirdly, proceedings for appointment of a curator for a person with disability can be instituted *ex officio*. However, in compliance with Article 600, paragraph 2, of the Code of Civil Procedure, such a possibility exists in the event the condition of a person with disability excludes the possibility of submitting a motion or expressing consent. Furthermore, the court can also appoint *an ex officio* curator in the event referred to in Article 558, paragraph 2, of the Code of Civil Procedure, that is, in the event of a dismissal of a motion for incapacitation. In such a situation, the court notifies the guardianship court of the need to appoint a curator for a person with disability. As a matter of fact, it is legitimate to assume that when a condition of a given person does not qualify as a mental illness, mental retardation or other type of mental disorders justifying incapacitation, and constitutes disability pursuant to Article 183 of the Family and Guardianship Code, a relevant measure of

38 In compliance with Article 62 of the Code of Civil Procedure, provisions regarding a prosecutor instituting an action to the benefit of a given person apply to non-governmental organisations instituting an action to the benefit of natural persons, respectively, with the exception of Article 58, sentence 2, of the Code of Civil Procedure. See more: M. Maciejewska-Szałas, Organizacje pozarządowe i formy ich uczestnictwa w postępowaniu cywilnym (Non-governmental Organisations and Forms of Their Participation in Civil Proceedings), *Gdańskie Studia Prawnicze* 2017, no. 2, p. 133.

39 Committee on the Rights of Persons with Disabilities, General comment No. 6, 2018, equality and non-discrimination, point 31. Available on the website, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en

40 The postulate was also submitted by W. Ziętek, Kurator dla osoby ułomnej – de lege ferenda (A curator for a handicapped person – de lege ferenda), *Rodzina i Prawo*, 2007, no. 2, p. 62.

protecting procedural interests of a person with disability may consist in the adjudicating court undertaking measures aimed at appointing for this person a curator referred to in Article 183 of the Family and Guardianship Code.[41]

With regard to the third mode, it should be indicated that only since 2007 has the possibility existed that a court may also act *ex officio* in order to appoint a curator for a person with disability.[42] The initial wording of procedural provisions allowed only the request-type proceedings. In the context of due protection of rights of a person with disability, the discussed procedural changes should be assessed positively. Postulates for extending the possibility of appointing a curator also under the *ex officio* mode were made in the science of civil law especially with regard to cases where the condition of a given person hinders submitting a motion.[43] Such persons were virtually deprived of the possibility to receive assistance. It should also be emphasised that the narrowing of the premises for court acting *ex officio* only to the aforementioned situation is justified and should be considered an action taken in the best interests of persons with disabilities. Undoubtedly, while instituting a case *ex officio*, the court cannot appoint a curator to give satisfaction to persons other than a person with disability. In this understanding, the third mode of instituting proceedings for appointment of a curator for a person with disability should be considered coherent with Article 12 of the CRPD since it is of a protective nature. This opinion will have been justified more after the amendment of Article 183 of the FGC and Article 600 of the CPC will have come into force (February 15,2024). This is in particular because according to the amended Article 600 of the CPC it is compulsory to hear the person with disability in the course of proceedings for establishing a curatorship. The court may abstain from hearing the person with disability only if impossibility to communicate with them is confirmed by a physician.

7. Other procedural aspects of proceedings for appointment of a curator for a person with disability

While assessing the implementation of standards under Article 12 of the CRPD regarding the course of the proceedings for appointment of a curator under Article 183 of the Family and Guardianship Code and, thus, upon institution thereof, it is worth conducting an analysis of further procedural provisions, as well as related provisions of the Family and Guardianship Code.

First of all, it should be indicated that since in the light of Article 510, paragraph 1, of the Code of Civil Procedure, an interested party in the case is anyone whose rights are concerned by the result of the proceedings, a candidate for a curator should then also participate in the proceedings.[44] Engagement of a candidate for a curator in the proceedings appears to be a proper instrument of controlling the candidate also in terms of the possibilities and predispositions to take over the entrusted role, which is compliant with standards under Article 12 of the CRPD, in the scope of safeguarding relevant assistance and support.

41 See: decision of the Supreme Court of 08.12.2016, III CZP 54/16, LEX no. 2186578.

42 As a result of an amendment of the Code of Civil Procedure by the Act of 09.05.2007 on amendment of the Act – Code of Civil Procedure and certain other acts, Dz.U.2007.121.831.

43 As, among others: A. Józefowicz, Kuratela ustanawiana dla osób ułomnych (Curatorship Appointed for Handicapped Persons), p. 982. See also: W. Ziętek, Kurator dla osoby ułomnej – *de lege ferenda* (A Curator for a Handicapped Person – de lege ferenda), *Rodzina i Prawo* 2007, no. 2, p. 983; E. Marszałkowska-Krześ, *Postępowanie nieprocesowe w sprawach osobowych oraz rodzinnych (Non-litigious Proceedings in Personal or Family Cases)*, Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wrocław 2012, pp. 288–289.

44 Also: D. Olczak-Dąbrowska, Wybrane rodzaje kurateli . . . (Selected Types of Deputyship . . .), p. 101.

Secondly, it should be noticed that, in compliance with Article 514, paragraph 1, of the Code of Civil Procedure, fixing a date for a trial in the case of the appointment of a curator for a person with disability depends on the discretion of the court. Despite not fixing a date for a trial, before deciding on a case, the court can hear participants at a court sitting or request them to submit written statements. In this scope a lack of solutions may raise doubts, in imitation of the regulations concerning proceedings for incapacitation, with regard to the obligation to hear the person (see Article 547, paragraph 1, of the Code of Civil Procedure). However, this instrument would allow determining in more detail the will of a person with disability and the relevant scope of assistance. Nonetheless, this hearing would not have to be conducted in the presence of an expert psychologist and a psychiatrist, as in the case of Article 547, paragraph 1, of the Code of Civil Procedure, in order not to hinder and prolong the proceedings. Therefore, it is worth recommending the inclusion in the Code of Civil Procedure a regulation which would oblige the court to hear a person whom the proceedings concern, with the exception of a situation when such hearing is not possible, in the case of a court acting *ex officio* in compliance with Article 600, paragraph 2, of the Code of Civil Procedure, i.e. when the condition of a given person excludes the possibility of submitting a motion or expressing consent to institute proceedings.

While assessing the course of the proceedings for appointment of a curator for a person with disability, it is aptly emphasised that it is less formalised in the case of proceedings for incapacitation and especially with regard to the lack of the necessity to hear the evidence of the expert's opinion in the scope of the health condition of a person with disability.[45] This solution appears to be beneficial, bearing in mind the necessity to provide the broadest possible simplifications for a person with disability in asserting their rights.

An important subject matter is the issue of legal representation in proceedings for appointment of a curator for a ward. In case law, it is assumed that in the case for appointment of a curator for a person with disability, appointment of a curator for such a person without their request is inadmissible.[46] Such a person can be represented only when, of their own will, they appoint a plenipotentiary or request appointment thereof by the court. It is underlined that apart from two situations specified in Article 560^1 of the Code of Civil Procedure and Article 48, paragraph 1, of the Act on the protection of mental health, the legislation has not provided for a possibility of appointing by the court *ex officio* a barrister or a legal advisor without a relevant motion submitted by the interested party. Therefore, in the Supreme Court's assessment there are no justified grounds for assuming that there is a legal loophole that requires analogous application of one of the aforementioned provisions.[47] *De lege lata* this position should be considered legitimate and coherent with the standards of Article 12 of the CRPD. Priority should be, in fact, granted to the will of a person with disability, who determines whether they wish to be represented by a plenipotentiary or to act independently. Furthermore, upon the consent of this person, appointment of a curator for a person with disability can be effected upon request by a non-governmental organisation whose statutory tasks include protection of rights of persons with disabilities. Thus, in the event that the conduct of proceedings by a person with disability is hindered, they have the possibility to benefit from such assistance, which constitutes another argument for the aptness of the position presented.

45 Noticed by D. Olczak-Dąbrowska, Wybrane rodzaje kurateli . . . (Selected Types of Deputyship . . .), p. 116.
46 Judgement of the Supreme Court of 25.07.2019, III CZP 16/19, LEX no. 2719114.
47 Justification to the judgment of the Supreme Court of 25.07.2019, III CZP 16/19, LEX no. 2719114.

Judicial proceedings in the case for the appointment of a curator for a person with disability ends with issuance of a decision, which can be appealed. In the light of Article 519[1], paragraph 2, of the Code of Civil Procedure, a cassation is not allowed in this case.

With regard to the contents of the decision ending the proceedings, it should be indicated that the scope of rights and obligations of a curator should be specified with regard to the motion submitted by the person with disability. Article 321, paragraph 1, of the Code of Civil Procedure, in conjunction with Article 13, paragraph 2, of the Code of Civil Procedure, indicating that the court cannot adjudicate with regard to the issue that has not been covered by the request or adjudge in excess of the request, applies herein. In consequence, a person with disability will have a crucial impact on cases in which a curator appointed for them is going to act, which constitutes a solution coherent with Article 12 of the CRPD, ensuring consideration of the will and the preferences of a person with disability. In case law, it is underlined that binding the court with the request is, in fact, of an absolute nature and the court cannot adjudge with regard to the issue not covered by the request or adjudge in excess of the request. These means that the contents of the decision both in a positive and negative sense are decided on by the party's request. The court cannot adjudicate something other than what was requested by the applicant (*aliud*), in excesss of what was requested (*super*), or on factual grounds other than the ones indicated by the applicant. Therefore, the ban on adjudicating in excess of the request refers to the request (*petitum*), or its factual grounds (*causa petendi*).[48] Nonetheless, it should be noticed that, if the contents of the request are phrased incorrectly, the court can modify them accordingly, solely in order to give the contents of such a request a juridically proper form.[49] Furthermore, it is worth adding that in the scope of selecting a curator by the adjudicating court, the criteria stipulated in the Family and Guardianship Code for a guardian should be applied, in particular the statutory exclusions (see Articles 148 and 149 in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code). The additional criteria will have been introduced since February 15, 2024 when the amendment of Article 183 of the FGC will have come into force. According to the amended Article 183 paragraph 12 of the FGC only a person, who is of full legal age and whose personal qualifications justify conviction that she will perform her duties duly, can be appointed as a curator for a person with disability. The candidate for a curatorship can be determined by the person with disability for whom the curator is to be appointed.

In the case of *ex officio* adjudication or upon the request of a non-governmental organisation, the issue of taking into account the will and preferences of a person with disability is more complex. In the first case, since the non-governmental organisation acts upon the granting of consent of a person with disability, it should independently strive to determine the will and preferences of such a person. It is worth recommending that the person with disability indicates in the contents of the consent to institute proceedings the identity of the curator and his/her desired scope of rights and obligations. In the event the court acts *ex officio*, the will and preferences of a person with disability should constitute the subject of determining the adjudicating panel, if possible. Otherwise, if it is not possible to determine the will and preferences of an individual, despite making efforts, the criterion of the best interpretation of the individual's will and preferences instead of their best interests should be applied.[50] In such a sense, on the condition of striving for the most comprehensive determination of the will and preferences of a person with disability, coherence of Polish solutions

48 As in justification to the judgment of the Appellate Court in Warsaw of 15.09.2002, I ACa 258/20, LEX no. 3113193.
49 See: judgment of the Appellate Court in Szczecin of 29.12.2020, I ACa 496/20, LEX no. 3150090.
50 See: M. Domański, Ubezwłasnowolnienie . . . (Incapacitation . . .), p. 35 and sources indicated therein.

with safeguards of Article 12 of the CRPD is ensured. However, a lack of procedural provisions directing the introduction of the court's obligation caused that Article 183 of the FGC and Article 600 of the CPC will have been amended since February 15,2024 and as a result it will be included in the Code of Civil Procedure provisions ordering the fullest consideration of the will and preferences of the ward in the course of adjudicating in the proceedings for appointment of a curator for a person with disability. The introduction of such a regulation will additionally reinforce implementation of the Convention standards.

A person appointed to act as a deputy by the guardianship court is obliged to immediately take on their obligations and perform them with due diligence, bearing in mind the best interests of the ward and social welfare (Article 154 of the Family and Guardianship Code in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code).

8. Rights and obligations of a curator for a person with disability

In the light of Article 183 of the Family and Guardianship Code, the scope of rights and obligations of a curator is determined by the guardianship court. They are specified in the certificate issued for the curator in compliance with Article 604 of the Code of Civil Procedure. This certificate performs a confirming function, it does not raise any doubts that the curator must know exactly what their rights and obligations are as appointed by the court.

The indicated regulation under Article 183 of the Family and Guardianship Code rules that the scope of obligations of a curator for a person with disability can be varied (including to a great extent) according to the circumstances of a given case. The guardianship court will assess the scope of required assistance *ad casum*. The Convention itself allows a conclusion that support for persons with disabilities is a broad concept, concerning various types of activities of varied intensity.[51] The concept of a varied assistance mechanism adjusted to individual needs should be supported in the light of standards under Article 12 of the CRPD.

It should be emphasised that the basic competences of a deputy are assistance competences. Article 183 of the Family and Guardianship Code indicates three groups of the so-called assistance cases. The first one, being the broadest, includes all affairs of the ward, with the reservations specified below. The second includes affairs of a specific type. The third one comprises a specific affair. The scope of curatorship is determined by the factual and legal circumstances of the ward with regard to the need for assistance and support. In this scope, it is required to perform an in-depth study of the needs of a person with disability and determine their will as well as the scope of the required protection of their interests. In the science of civil law, it is aptly noticed that the general regulation of Article 183 of the Family and Guardianship Code allows a relatively flexible determination of competences of a curator and furthermore that the scope of these competences should be determined by the court to the fullest possible scope with participation of a ward.[52]

In the literature, the following possible competences of a curator for a person with disability to act are indicated:[53]

- factual acts in the scope of asset management;
- performance of other factual acts, e.g. pension collection;

51 See: R. Dinerstein, E. G. Grewal, J. Martinis, Emerging international trends . . ., p. 447.

52 W. Rożdżeński, Wykorzystanie instytucji kurateli . . . (The Use of the Institution of Deputyship . . .), p. 152.

53 See: L. Kociucki, Piecza nad ludźmi starymi w polskim prawie cywilnym i opiekuńczym na tle porównawczym (Care Over the Elderly in the Polish Civil Law vs Guardianship Law), *Ruch Prawniczy Ekonomiczny i Socjologiczny* 1999, journal 1, p. 140; A. Józefowicz, Kuratela ustanawiana dla osób ułomnych (Deputyship Appointed for Handicapped Persons), p. 982. See also: W. Ziętek, Kurator dla osoby ułomnej . . ., (A Deputy for a Handicapped Person – de lege ferenda), p. 984.

- advice in legal transactions;
- managing all affairs of a person with disability which cannot be dealt with by this person due to their disability;
- messenger activities;
- plenipotentiary activities (only in the event of a ward granting the curator with power of attorney in compliance with general principles and ordering performance of a given legal act).[54]

A largely disputed subject matter consists in whether a curator for a person with disability has the right to represent the ward. The opinion that a curator appointed under Article 183, paragraph 1, of the Family and Guardianship Code is not a statutory representative of such a person should be considered prevailing.[55] According to the minority opinion, however, which is difficult to accept *de lege lata*, curatorship can be connected to the curator's right to represent on the basis of a statutory representation.[56] While considering the former as apt, it should be assumed that the court's decision authorises the deputy to undertake factual act, whereas additionally granting the power of attorney is necessary to perform legal and procedural acts. The case specified in Article 87, paragraph 1, of the Code of Civil Procedure is an exception – if a curator is a family member referred to therein, he or she could be considered to act as a procedural plenipotentiary of the ward.[57] In this aspect, it should be regarded as worrisome that D. Olczak-Dąbrowska's reports state that in 83% of studied cases, the court granted curators the right to represent the ward as in the case of a curator for an incapacitated person.[58] *De lege lata* there are no legal grounds to adjudicate in this scope.

While analysing the aforementioned subject matter, it should be noticed that depriving a curator for a person with disability of the possibility to represent the ward (apart from the circumstances of granting them a power of attorney) significantly narrows their competences. That is why Article 183 of the FGC will have been changed since February 15, 2024 in order to introduce an explicit legal basis for the court to authorize the curator to act on behalf of a person with disability. The authorization of the curator to represent a person with disability does not limit by itself their active legal capacity. The understanding which is justified in the light of so far wording of Article 183 of the FGC raises certain reservations regarding obligations under Article 12, paragraph 4, of the Convention. It stipulates that states parties shall provide the person with disability with all measures that relate to the exercise of legal capacity. It is good that the *de lege ferenda* conclusion expressed in the literature[59] regarding the supplementation of Article 183 of the Family and Guardianship Code in a manner allowing the court to grant the curator with the right to represent the person with disability only when the person with disability applies, therefore, have been taken into conisderation and Article 183 of the FGC will have been amended in this

54 As a result of amendment of Article 183 paragraph 1^1 of the FGC an explicit legal basis for the court to authorize the curator to act on behalf of a person with disability will have been introduced since February 15, 2024. The authorization of the curator to represent a person with disability does not limit by itself her active legal capacity.

55 As among others: L. Kociucki, Piecza nad ludźmi starymi . . . (Care Over the Elderly . . .), p. 140; A. Sylwestrzak, Kurator . . . (Deputy . . .), p. 24. In terms of judicial decisions, see: decision of the Supreme Court of 24.05.1995, III CRN 22/95, LEX no. 4231.

56 See: K. Kruk, Zgoda pokrzywdzonego na przekazanie ścigania karnego (Consent of the Victim to Transfer Prosecution), *Prokuratura i Prawo*, 2002, no. 3, p. 60.

57 As: D. Olczak-Dąbrowska, Wybrane rodzaje kurateli . . . (Selected Types of Deputyship . . .), p. 100.

58 D. Olczak-Dąbrowska, Wybrane rodzaje kurateli . . . (Selected Types of Deputyship . . .), p. 116. The research was conducted in 2011–2013.

59 As, among others: A. Sylwestrzak, (Curator . . .), p. 24.

regard since February 15, 2024. After the amendment will have come into force the way of representing of the person with disability by the curator will have to be compliant with the will and preferences of the ward. Thus, this instrument will be more flexible since the court, depending on the needs of the person with disability expressed with the motion submitted by them, will appoint a curator-assistant, a curator-representative or a curator combining both of these roles. Flexibility of the indicated solution will meet the standards specified in Article 12 of the CRPD.

9. Judicial supervision over a curator for a person with disability

Pursuant to Article 165, paragraph 1, of the Family and Guardianship Code, respectively, applied to the institution of curatorship, a guardianship court supervises the exercise of the curatorship by familiarising oneself on an ongoing basis with the curator's activities and providing them with guidance and instructions. In particular, the court can demand explanations from the curator in all matters included in the scope of the curatorship and presentation of related documents.

The detailed scope of supervision of a curator is specified in the decision on appointment of a curator for a person with disability issued by the adjudicating court. Statements submitted by the curator to the guardianship court constitute a basic supervisory instrument. Since, in unregulated cases, the provisions on guardianship apply, Article 595 of the Code of Civil Procedure also applies. A statement on asset management should be made in writing, unless the court allows a record of a verbal statement. In consequence, a statement in the scope other than that concerning asset management can be submitted orally. In the light of Article 166, paragraph 1, of the Family and Guardianship Code in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code, the curator's reporting obligation should be performed at least once a year on dates indicated by the guardianship court.

Depending on the contents of the decision, a statement on the performance of the curator's obligations should exhaustively report the exercise of rights and performance of obligations of the curator by indicating managed affairs and activities undertaken to the benefit of the person with disability.[60] In the light of properly applied Article 167, paragraph 1, of the Family and Guardianship Code, the guardianship court reviews statements in terms of the subject matter and accounts and, if necessary, orders rectification and supplementation. In the event any irregularities in the curator's activities are noticed, the court can undertake specific measures to the best interests of the ward, by issuing an order (Article 168 of the Family and Guardianship Code in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code). In particular, the guardianship court can, without a request of the person with disability, *ex officio* change the curator while not revoking the curatorship, if the court determines that the curator is guilty of acts and omissions in violation of the interests of a person for whom the curatorship has been established.[61] Undoubtedly, changing the curator constitutes the farthest-reaching instrument resulting from the guardianship court's supervision.

The presented supervisory measures undertaken in the interests of a person with disability should be considered compliant with the safeguards of Article 12 of the CRPD, whose paragraph 4 introduces the obligation to undertake control measures by state institutions. These measures secure the ward's interests and are an expression of the state's care over the correctness of providing support.

60 A. Józefowicz, Kuratela ustanawiana dla osób ułomnych (Curatorship Established for Handicapped Persons), p. 986.

61 Resolution of the Supreme Court of 14.12.1982, III CZP 55/82, LEX no. 163 4500.

10. Revocation/expiry of curatorship for a person with disability

The duration of a curatorship is closely related to its scope and thus to the needs of a person with disability. It is especially influenced by the type of case/cases with regard to which a curator has been appointed. In principle, the court which has appointed the curator will revoke the curatorship when the objective thereof is no longer valid (Article 180, paragraph 1, of the Family and Guardianship Code), which may happen upon a request or *ex officio*. Therefore, if a curatorship for a person with disability has been limited in its scope, including, in particular, to a specific type of cases (which is allowed under Article 183 of the Family and Guardianship Code), implementation thereof justifies revocation of curatorship. Nevertheless, if a curator has been appointed to deal with a particular case, the curatorship expires upon completion thereof (Article 180, paragraph 2, of the Family and Guardianship Code). In this case we deal with expiry of a curatorship *by operation of the law*.

The aforementioned regulations make the curatorship for a person with disability a flexible institution, including in the aspect of their legal personality. Elimination of the basis for establishment thereof is connected with the possibility of revocation thereof or even expiry *by operation of the law*. This solution appears to be compliant with Article 12 of the CRPD, where flexibility of support instruments for persons with disabilities and adjusting them to specific needs are emphasised. The possibility of acting, in the case for revocation of the curatorship, upon the request of a ward, allows them to influence the existence of curatorship, including revocation thereof.

Legal provisions also provide for the possibility of dismissal of the curator. While applying Article 169, paragraph 1, of the Family and Guardianship Code in conjunction with Article 178, paragraph 2, of the Family and Guardianship Code, the guardianship court can do so due to important reasons upon a request of the curator. The case law indicates that appointing a natural person as a curator against their will constitutes an important reason.[62] An important reason can also include other important circumstances preventing them from performance of the entrusted function, including those independent of the curator, e.g. their illness, as well as dependent on the deputy, e.g. a conflict with the ward. Furthermore, the guardianship court will dismiss the curator if, due to factual or legal obstacles, the curator is incapable of providing care or commits acts or negligence that violate interests of the ward (Article 169, paragraph 2, of the Family and Guardianship Code). The protective instrument of the ward is provided for by the properly applied paragraph 3 of this article since, unless the guardianship court decides otherwise, the curator is obliged to continue to manage urgent affairs until a new curator takes over. This regulation, protecting the ward from a situation when they are left without support, should be considered compliant with standards under Article 12 of the CRPD. Therefore, in principle, a ward is not left without protection, and if it is necessary to change the curator, the change proceeds with a preservation of continuity of protection and support.

11. Summary

The institution of a curator for a person with disability under Article 183 of the Family and Guardianship Code constitutes an important and practical support instrument for persons with disabilities. The analysis conducted herein allowed proving the thesis presented in the introduction, consisting in the fact that to a significant extent, this institution, in its current shape, meets the standards under Article 12 of the CRPD. This opinion will have been more justified and grounded in the light of Article 183 of the FGC after its amendment will have

62 Resolution of the Supreme Court of 27.12.2021, III CZP 59/20.

come into force since February 15, 2024. In statutory regulations referring to the discussed institution, pursuits of the broadest possible consideration of the will and preferences of the ward are visible, and the institution itself appears flexible and meets the needs of a person with disability depending on a given situation concerning such a person. In consequence, it should be stated that curatorship provided for in the Family and Guardianship Code for a person with disability duly fits supported decision-making, ensuring support for persons with disabilities, which is of a supporting and not excluding nature. Therefore, it constitutes an instrument for the protection of rights and interests allowing the independent and fullest possible participation of a person with disability in the civil law transactions while granting them relevant assistance and support as well as equalising possibilities.

In the light of the standards resulting from Article 12 of the CRPD, especially the following should be approved of

- the possibility of applying, in the case of a lack of a definition of a person with disability on the grounds of Article 183 of the Family and Guardianship Code, the Convention's broad definition of 'disability';
- an extended catalogue of modes of instituting proceedings, including the possibility of instituting proceedings for the appointment of a curator for a person with disability also upon a request of a non-governmental organisation, with the consent of a person with disability, as well as *ex officio*, however, only in a very limited and justified scope – in cases specified in Article 600, paragraph 2, of the Code of Civil Procedure;
- a flexible scope of curator rights and obligations that are of the nature of an assistance and support and which are, in principle, specified by the applicant, including the flexible scope of assistance cases with regard to which the curator is appointed (all cases/cases of a given type/a specific case);
- the institution of a judicial supervision over a deputy, including the possibility of a broad control performed by the court over the due execution of entrusted obligations;
- flexibility of legal solutions concerning the duration of curatorship depending on the specific case, including the possibility of expiry of the curatorship *ex lege* in a situation when, it has been appointed with regard to a specific case, which has been completed, and in other cases, due to the possibility of acting upon a request of a cared-for person for revocation of the curatorship;
- beneficial procedural solutions of a protective nature towards a person with disability in the proceedings for appointment of a curator, such as flexible regulations in the scope of the territorial jurisdiction of the court, or simplified judicial procedures.

There are, however, areas meriting legislative action to improve the coherence of regulations referring to a curator for a person with disability with standards specified in Article 12 of the Convention. The most important ones have been enumerated.

1. In order to ensure terminological coherence with the CRPD, the person of a curator under Article 183 of the Family and Guardianship Code should receive a name referring to disability as a feature; however, noticing the broad scope of possible 'disability', it is worth emphasising its physical or mental dimension in the name itself. In consequence, a curator under Article 183 of the Family and Guardianship Code would be named: a curator for a person with physical or mental disability and the institution itself – curatorship for a person with physical or mental disability. In the same interpretation that emphasises physical or mental disability as a premise for appointing a curator, the contents of Article 183 of the Family and Guardianship Code should be changed. It will remain relevant also after the amendment of Article 183 of the FGC will have come into force.

2. Doubts are raised as to the lack of implementation of solutions, following the example of regulations concerning incapacitation, on the obligation of hearing the person (see Article 547, paragraph 1, of the Code of Civil Procedure) in the proceedings for appointment of a curator for a person with disability. It will have been changed after the amendment of Article 600 of the CPC will have come into force (February 15, 2024). This instrument will allow verifying or determining in more detail the will of the applicant and relevant scope of assistance. Therefore, it was a good decision to include in the Code of Civil Procedure a regulation which will have obliged the court to hear a person with disability, with the exception of a situation when such hearing is not possible, and especially in the event of a court acting *ex officio* in compliance with Article 600, paragraph 2, of the Code of Civil Procedure, i.e. when the condition of a given person excludes the possibility of submitting a motion or expressing consent to institute proceedings.
3. It was a good decision to introduce a procedural provision that a court adjudicating in proceedings for appointment of a curator for a person with disability should take into consideration their will and preferences to the fullest extent possible.
4. It was a good decision that the legislature has taken into consideration the *de lege ferenda* conclusion expressed in the literature, regarding supplementation of Article 183 of the Family and Guardianship Code in a manner allowing the court to grant the curator with the right to represent the person with disability when the person with disability applies. This amendment will have come into force on February 15, 2024. This the proposed solution will be more flexible since the court, depending on the needs of a person with disability expressed in the motion submitted by them, will appoint a curator-assistant, a deputy-representative or a curator combining both of these roles.

d. Plenary guardianship in the light of the CRPD Article 12 standard

Maciej Domański and Bogusław Lackoroński

1. Preliminary issues

Plenary guardianship of an incapacitated person is very closely related to the institution of incapacitation as such under Polish law. The necessity to distinguish it and analyse it separately is due to the specificity of the adopted solutions, where a declaration of incapacitation is delivered in one proceeding, and the appointment of a guardian for a person already incapacitated in another, completely separate proceeding. Moreover, each of these proceedings is conducted by a different court.[1] An incapacitation ruling is delivered in the first instance by the district court (*sąd okręgowy*), composed of three professional judges, while the establishment of guardianship and the appointment of a guardian is decided in the first instance by the regional/guardianship court (*sąd opiekuńczy*). The establishment of a guardianship and the appointment of a guardian follows the commencement of ongoing supervisory proceedings over the exercise of guardianship. Only a cumulative description of all the stages of court proceedings – from incapacitation, through guardianship proceedings, up to the guardianship supervisory proceedings and, finally, verification proceedings aimed at determining whether the reasons for incapacitation persist – gives a full picture of the construction of the 'measures relating to the exercise of legal capacity' referred to in CRPD Article 12.4.

The inclusion of the guardianship of a wholly incapacitated person in the measures referred to in CRPD Article 12.4 suggests that this institution should also meet the standards set out therein, *viz.* respect for the rights, will and preferences of the person concerned, absence of conflicts of interest and undue influence, proportionate and commensurate with the circumstances of the ward-to-be, to apply for the shortest possible time and be subject to regular review by an independent and objective authority or judicial body.

The validation of the final ruling on incapacitation, i.e. when it comes into effect, which is constitutive in nature (Civil Procedure Code [CPC] Art. 521.1) and closes the first stage of the proceedings. Pursuant to CPC Art. 558.1, the court that has issued an incapacitation ruling must send a copy of the validated incapacitation order *ex officio* to the guardianship court. The guardianship court then initiates guardianship proceedings *ex officio* (CPC Art. 570) thereby,[2] opening the second stage of applying 'measures related to the exercise of legal capacity' by a person who (in principle) is already deprived of legal capacity.

1 S. Kalus, *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Piasecki, Wydawnictwo Prawnicze LexisNexis Sp. z o.o., Warsaw, 2006, commentary to Article 175, p. 919.

2 I am leaving aside the question of whether these proceedings can also be initiated upon request and who, if anybody, would have the authority to do so.

At the outset, it is necessary to flag a significant problem with the assessment of solutions concerning various aspects of care for fully incapacitated persons in the light of the Convention's standards. This is due to the problematic legislative technique adopted by the Polish legislator. Material law regulations, as well as some regulations of a procedural nature, are to be found in the Family and Guardianship Code (FGC). However, the legislator has not regulated the issue of guardianship of an incapacitated person in an autonomous and exhaustive manner. FGC Art. 176 and 177 contain only fragmentary regulations concerning the appointment of a guardian and the termination of the guardianship of a fully incapacitated person. FGC Art. 175 makes general reference to the corresponding applicability of regulations on the guardianship of minors to the guardianship of fully incapacitated persons. The regulation of guardianship of a minor is not comprehensive either. With regard to guardianship, FGC Art. 155.2 refers to the corresponding application of the provisions on parental authority. As a result, the exercise of guardianship over a fully incapacitated person should be applied, by way of 'cascading correspondence', to the regulations on parental authority. The specifics of the appropriate application of the rules implies that some of the regulations referred to are applied without any changes, some with changes and some will find no application whatsoever.[3] The hazy referrals to regulations which may or may not apply and, possibly, how the norms should be reconstructed on the back of such referrals should be modified because this lack of clarity makes the legal position highly problematic.[4] Given the contentiousness of this issue both in legal doctrine and in judicial decisions, determining the transposition of the Convention's standard regarding such a normatively ambiguous institution is open to dispute.

It should be emphasised that from the vantage point of the CRPD standards alone, as built on the principles of autonomy, freedom of choice, independence and non-discrimination of all persons with disabilities (CRPD Article 3), the legislative technique of referrals to provisions on the guardianship of minors, or even parental authority, is questionable. Recognition of the specificity of the situation of adults put under guardianship, of their special needs and the distinctness of their situation from that of children under parental authority or guardianship, should decidedly speak for the adoption of an exhaustive and autonomous regulation of the differences separating guardianship for a fully incapacitated person and for a minor. This does not mean, of course, that there is a need for a complete separation of the regulation of guardianship of a minor and guardianship of a fully incapacitated person. Many issues involving each of the two types of guardianship are sufficiently common to both to make them amenable to common regulation. The idea is that the provisions on guardianship for the totally incapacitated should enable, or perhaps even order courts to take stock of the fact that they are mostly applied to adults with varying degrees of capacity to express their preferences, in particular in personal matters.[5] This should take the form of a statutory order for the guardianship court to consider a candidate nominated by the fully incapacitated person if he or she expresses any preference

3 J. Nowacki, Odpowiednie stosowanie przepisów prawa, *Państwo i Prawo* 3/1964, p. 370 *et seq.* Cf. S. Kalus, in: *Kodeks rodzinny i opiekuńczy. Komentarz,* ed. K. Piasecki, Wydawnictwo Prawnicze LexisNexis Sp. z o.o., Warsaw, 2006, commentary to Article 175, pp. 918–919; J. Sadomski, in: *Kodeks rodzinny i opiekuńczy. Komentarz,* ed. J. Wierciński, LexisNexis Polska Sp. z o.o., Warsaw, 2014, commentary to Article 175, p. 1054, Nb 4.

4 Cf. G. Jędrejek, *Kodeks rodzinny i opiekuńczy. Komentarz,* Wolters Kluwer Polska SA, Warsaw, 2017, commentary to Article 175, pp. 1076–1077, Nb 1 and 2.

5 Cf. S. Kalus, in: *Kodeks rodzinny i opiekuńczy. Komentarz,* ed. K. Piasecki, Wydawnictwo Prawnicze LexisNexis Sp. z o.o., Warsaw, 2006, commentary before Article 175, pp. 917–918.

whatever in this respect.[6] Adequate and detailed regulation in relation to FGC Art. 154 is required for the manner in which the guardianship of a fully incapacitated person is to be exercised. Pursuant to FGC Art. 154, the guardian is obliged to discharge his/her duties with due diligence as required by the welfare of his/her ward and the public interest. The category of due diligence refers to certain objectified patterns of behaviour. The welfare of the person under care is also interpreted more from the objective perspective. These criteria do not refer to the need to take into account the position of the incapacitated person himself. There is not even a norm that would unequivocally order the guardian to establish this position. A regulation to that effect could be subsumed, for example, by a § 2 added to FGC Art. 176.

It would also seem worth considering the introduction of an explicit statutory basis to ensure the active and personal participation of one who is already incapacitated (irrespectively of the participation of his/her legal representative) in all proceedings concerning the modification or reversal of his/her incapacitation,[7] and guardianship proceedings, regardless of on whose initiative these proceedings are initiated. Pursuant to the current legal status, participation by operation of law is expressly granted to those who are subject to incapacitation applications only in incapacitation proceedings (CPC Art. 546.1.1).[8]

2. Establishment and appointment of guardians

From the CRPD perspective, it is a moot point whether the procedure for the appointment of a guardian satisfies the requirement of freedom from conflicts of interest and unlawful pressure. A guardian is appointed by the guardianship court (FGC Art. 145.2 in conjunction with FGC Art. 175). The family court is to act as the guardianship court (CPC Art. 568), i.e. the division of the court that deals with family and guardianship law cases concerning the demoralisation and criminal acts of minors and the treatment of persons addicted to alcohol, narcotics and psychotropic drugs (Art. 21.1 of the Act of August 18, 2011, amending the law on the system of common courts and some other acts).[9] This court is now usually the family and juvenile division of the district court (Common Court System Act Art. 12.1.3).

The establishment of a guardianship by the common court gives it all the systemic guarantees of impartiality and independence. Guardianship proceedings, conducted by a guardianship court, are of a special nature and are to be distinguished from non-contentious proceedings. This is related to the specific function of the court – of providing legal custody and protecting the welfare of the subject of the proceedings. For example, the guardianship court may, to a large extent, act *ex officio* and even go back on its final rulings if the welfare of the person concerned by the proceedings so requires (CPC Art. 577). This constitutes a significant exception to the substantive validity of judgments in civil proceedings.

6 In our view, Article 176 of the Family and Guardianship Code needs to be amended accordingly.

7 The necessity of the participation of an incapacitated person in proceedings concerning the revocation or modification of incapacitation is recognised in the doctrine of civil procedure and in case law. Cf. J. Gudowski, in: *Kodeks postępowania cywilnego. Komentarz. Tom IV. Postępowanie rozpoznawcze. Postępowanie zabezpieczające,* ed. T. Ereciński, Wolters Kluwer SA, Warsaw, 2016, commentary to Article 559, p. 214, Nb 11.

8 Cf. K. Korzan, *Postępowanie nieprocesowe,* Wydawnictwo C.H. Beck, Warsaw, 1997, p. 307, Nb 493; P. Rylski, *Uczestnik postępowania nieprocesowego – zagadnienia konstrukcyjne,* Wolters Kluwer Polska SA, Warsaw, 2017, p. 180; J. Bodio, in: *Kodeks postępowania cywilnego. Tom I. Komentarz do art. 1–729,* ed. A. Jakubecki, Wolters Kluwer Polska SA, Warsaw, 2017, commentary to Article 559, p. 930, Nb 6.

9 Journal of Laws 2011/203/1192.

The requirement to respect the rights, will and preferences of a totally incapacitated person with disabilities is more problematic. Admittedly, as accepted in the literature, such a person is a participant in the proceedings[10] (so, for example, he/she should be notified of the commencement of proceedings or of the date set for a hearing), but firstly, this is not clear from the regulations, which leads to uncertainty in the corresponding court practice[11] and, secondly, fundamental doubts arise as to how an incapacitated person can participate in proceedings, even if he/she is recognised as a participant. If, in the course of incapacitation proceedings an interim counsel (CPC Art. 549) is appointed to represent the subject of the application for incapacitation, he/she may also be the statutory legal representative after the end of the incapacitation proceedings (CPC Art. 550.1.2) and thus also during the proceedings for the establishment of a guardianship and the appointment of a guardian. However, if an interim counsel has not been appointed, the incapacitated person is in a legal void. He/she no longer has legal capacity, which ties in with a lack of procedural capacity (CPC Art. 65.1) while, at the same time, he/she does not yet have a legal representative, as proceedings for such appointment are still pending.

The question of the juridical requirement to know the position of an incapacitated person during proceedings is problematic. In the cases that have been analysed, it is not mandatory to schedule a hearing. If the court treats the incapacitated person as a participant in the proceedings, he/she has a common right to be heard.[12] However, the legislator has not provided, as in some other guardianship proceedings (for example, CPC Articles 561.3 and 576.1), an obligation to hear the ward-to-be. Such a solution should be postulated. *De lege lata*, there is no guarantee that the position and preferences of the incapacitated person will be ascertained at all, let alone taken into account, in proceedings to establish guardianship.

The key issue of the proceedings for the establishment of a guardianship and the appointment of a guardian is the choice of the person who will assume the guardianship. Pursuant to FGC Art. 176, if the welfare of the ward does not prevent it, the guardian of a totally incapacitated person to be appointed, first and foremost, should be his/her spouse or, in the absence of the latter, his/her father or mother. When it comes to choosing a guardian, FGC Art. 149 should also be taken into account, in particular § 3, which should be interpreted to mean that in the absence of a suitable candidate for the position, the court shall request the competent organisational unit of social assistance or a social organisation or an institution where the incapacitated person resides, to appoint a candidate for the guardianship. The regulations specifying the choice of guardian do not anticipate the court even having to consider a candidate nominated by a totally incapacitated person.

The primary criterion for the selection of a guardian remains the welfare of the ward, and the court may not appoint as guardian one who is likely to fail in one's guardianship

10 See S. Kalus, *Opieka nad osobą całkowicie ubezwłasnowolnioną,* Uniwersytet Śląski, Katowice, 1989, p. 106. It is so with regard to the status of a partially incapacitated person in guardianship proceedings: D. Olczak-Dąbrowska, Wybrane rodzaje kurateli w praktyce sądowej, *Prawo w Działaniu* vol. 17/2014, p. 128.

11 In a study by D. Olczak-Dąbrowska, concerning the establishment of curatorships for a partially incapacitated persons, it was said that in 40% of cases such persons were not treated by the courts as participants in the proceedings (D. Olczak-Dąbrowska, Wybrane rodzaje kurateli w praktyce sądowej, *Prawo w Działaniu* vol. 17/2014, p. 133).

12 A. Laskowska-Hulisz in: *System Prawa Procesowego Cywilnego. Tom IV, cz. 1, vol. 2,* eds: T. Ereciński, K. Lubiński, Wolters Kluwer Polska Sp. z o.o., Warsaw, 2021, p. 1424.

duties. The interpretation of these provisions could lead towards an obligation to take into account first the person nominated (preferred) by the incapacitated person. However, such an interpretation is not accepted. A regulation specifying the priority of the appointment as guardian of the person nominated by the incapacitated person or at least the obligation to consider that person's appointment would be most desirable. This is probably one of the leftovers of the inadequate regulation of the distinctiveness of a fully incapacitated person and the guardianship of or parental authority over a minor.

3. Provision of care

The scope of the guardian's duties and powers is strictly determined by full incapacitation and the extent of its resultant limitations. The guardian thus has custody of the person and his/her property (FGC Art. 155 in conjunction with FGC Art. 175). He/she is also his/her statutory legal representative.

Polish guardianship arrangements definitely meet the standard of freedom from conflicts of interest and undue influence and are subject to constant review by independent and objective judicial bodies. Pursuant to FGC Art. 156 (applied correspondingly by way of referral to FGC Art. 175), the guardian should obtain *ex ante* the authorisation of the guardianship court in all more important matters that concern both the ward and his/her property. The prevailing view is that a legal act performed without the court's permission is invalid.[13] The principle of *ex ante* assessment by the court, of all major acts performed by a guardian, is fully enshrined in Polish law.

The Family and Guardianship Code also provides for a number of exclusions to counteract any possibility of representation by a guardian torn by a conflict of interest. Pursuant to FGC Art. 159.1, a guardian cannot represent opposing sides in litigation, if both are under his/her guardianship, or in legal actions between himself/herself and his/her ward, or the ward's spouse, descendants, ascendants or siblings, unless the legal action is of gratuitous benefit for the ward. These rules apply correspondingly to proceedings before courts or other state authorities.

Pursuant to FGC Art. 160.1, immediately upon taking charge of his/her ward, the guardian is obliged to draw up an inventory of the ward's assets and submit it to the court. This provision applies correspondingly if his/her ward subsequently acquires property. Only exceptionally, if the assets involved are negligible, the court may exempt the guardian from this obligation (§ 2). The court may also oblige the guardian to deposit valuables, securities and other documents belonging to the ward with the court. These items may not be taken away without the court's permission (FGC Art. 161.1). A ward's cash, if it is not needed to meet his/her legitimate expenses, should be deposited by his/her guardian in a bank or compatible approved institution. A guardian may only draw cash so deposited with the permission of the court (FGC Art. 161.2). While these regulations may be seen as unduly formalistic, they establish a high standard of protection for the ward against abuse by his/her guardian.

Once a guardianship has been established and a guardian appointed, the guardianship court exercises constant supervision over the execution of the guardianship. This consists of familiarising itself on an ongoing basis with the guardian's activities and giving him/her directions and instructions (FGC Art. 165.1). The court may also require the guardian to

13 See, for example, J. Sadomski in: *Kodeks rodzinny i opiekuńczy. Komentarz,* ed. J. Wierciński, LexisNexis Polska Sp. z o.o., Warsaw, 2014, commentary to Article 156, n. 10.

provide explanations on all matters falling within the guardianship's remit or to produce documents relating to the guardianship (FGC Art.165.2).

Supervision of guardianship is exercised by way of cyclical reports on the ward and the management accounts of their assets, which must be submitted to the court at least once a year (FGC Art. 166.1). Only exceptionally, if income from the assets does not exceed the ward's estimated maintenance costs, the court may exempt the guardian from providing detailed management accounts, but it is still necessary to submit a general report on the management of the ward's assets (FGC Art. 166.2).

As in the case of the selection and appointment of a guardian, against the background of the current regulations, the existence of mechanisms to ensure that the will and preferences of the incapacitated person are respected is problematic. Pursuant to FGC Art. 154, the guardian is obliged to exercise due diligence as required by the welfare of his/her ward and the public interest. The category of due diligence refers to certain objectified patterns of behaviour. Also, the welfare of the ward is interpreted more from an objective perspective. The listed criteria do not refer to the need to take into account the position of the incapacitated person himself/herself. There is even no norm which would unequivocally tell the guardian to establish such a position. Only indirectly can it be considered that, through 'cascading referral' as prescribed by FGC Art. 95.4, regulating the duty of parents wielding parental authority, to hear out the child, should apply, but it should be noted that parents are only obliged to do so 'if the child's mental development, state of health and degree of maturity allows it'. It can be argued that, in light of the wording of this provision, the application of FGC Art. 95.4 to the guardianship of an incapacitated person is excluded due to the state of health of that person. However, even if so, the parents (guardian) are not obliged to take into account the position of their child in any way other than 'as far as possible' and only to the extent of 'reasonable wishes'.

4. Release of the guardian

The guardianship of a totally incapacitated person ceases by operation of law if the incapacitation is revoked or changed to partial incapacitation (FGC Art. 177). The court may also release the guardian. The release can be requested by the guardian himself, and material legal grounds are important reasons (FGC Art. 169.1). In addition, the court will release the guardian if, due to factual or legal obstacles, the guardian is incapable of exercising care or commits acts or negligence that harm the ward's welfare (FGC Art. 169.2). Proceedings then are initiated *ex officio*.

Given the promise that the incapacitated ward's rights, wishes and preferences must be respected, it is a moot point whether that ward can request his/her guardian's dismissal. Of course, that ward can notify the guardianship court of the need for his/her guardian's release (change), but he/she cannot lodge such a request that would be binding on the court. The guardianship court can only initiate such proceedings *ex officio* (CPC Art. 570).[14] Not only can the incapacitated person not file an application on his/her own, but he/she cannot act on his/her own in proceedings to dismiss his/her guardian due to his/

14 Which of course does not mean arbitrary. In each case where the court obtains information justifying the initiation of proceedings it should do so. See, for example, A. Góra-Błaszczykowska in: *Kodeks postępowania cywilnego. Komentarz. Tom III. Art. 506–729*, ed. T. Wisniewski, Wolters Kluwer Polska Sp. z o.o., LEX, 2021, commentary to Article 570, n. 1.

her lack of procedural capacity. It could be postulated that solutions analogous to those in incapacitation proceedings should be transposed into guardianship proceedings: thus, an incapacitated person would be recognised as a participant in given proceedings (*de lege lata* such status can only result from the general CPC Art. 510, pursuant to which, an interested party in a case, i.e. a person who may participate in the proceedings, is anyone whose rights are affected by the outcome of the proceedings) and be granted procedural capacity; this could run further, *viz.* to the introduction of a solution whereby the regulations on formal requirements would not apply to motions for the exemption of guardians or appeals against rulings in this respect, and that applications or appeals cannot be rejected for this reason and, furthermore, that the applications of such persons would be exempt from fees. It should also be possible to appoint attorneys for incapacitated persons *ex officio,* even without their request.

5. Summary

As emphasised, guardianship of an incapacitated person is not a 'stand-alone' institution but is very closely linked to legal incapacitation. For this reason, the assessment of solutions such as 'open-ended duration' and the scope of limitation of legal capacity or of the guardian's duties and powers should be made in the course of analysing the given incapacitated person.

An analysis of the normative solutions concerning the establishment of a guardianship and the appointment of a guardian, the exercise of guardianship and its court supervision, as well as the dismissal or change of the guardian, prompts the conclusion that the Polish regulations meet all standards related to ensuring solutions free of conflicts of interest, unlawful pressures, and subjection to constant court supervision and review. But one may even risk suggesting that these solutions so formalise the exercise of guardianship and impose so many obligations on the guardian, in particular the reporting obligations, that in practice it may make it difficult to find a guardian and to carry out only those activities that realistically, directly concern the ward.

The assessment of the steps taken to ensure that the will and preferences of persons with disabilities are respected is decidedly worse. The system is based on the assumption that an incapacitated person is to be a 'beneficiary' of various activities and treatments carried out for his/her benefit as objectively understood, rather than as their active participant. This approach is revealed, for example, by reference to the application of regulations concerning parental authority. In this respect, the solutions in force in Polish law should be considered incompatible with the CRPD. It should be postulated that – in proceedings related to the establishment and execution of guardianship, the appointment of a guardian and execution of various actions by the guardian – there should be regulations ensuring real participation of incapacitated persons, including the facility of hearing them out and, as far as possible, taking their views into account.

Due to the doubts raised by both legal incapacitation and guardianship for fully incapacitated persons from the point of view of CRPD Article 12, an amendment to the Civil Code and the Family and Guardianship Code was drafted between 2012 and 2015 by the Civil Law Codification Commission. The changes in substantive law were to be accompanied by corresponding changes to the procedural provisions in the Civil Procedure Code. These changes to substantive law were to consist of corresponding modifications of the Civil Code on active legal capacity, the repeal of its provisions on incapacitation, the repeal of the FGC provisions on the guardianship of totally incapacitated persons (FGC Art.

175–177), its provision on a curator of a partially incapacitated person (FGC Art. 181), and the provision on a curator for a person with disabilities (FGC Art. 183). The provisions that were to be repealed were to be replaced by new ones regulating the institution of guardianship of an adult. The guardianship of an adult was to be regulated by the provisions in Title III of the FGC in its Art. 177^{1}–177^{28}.[15] The proposed regulation was to ensure the possibility of selecting the types of care to be proffered to persons with disabilities and the scope of limitations on the active legal capacity of persons with disabilities in a manner adequate to their needs. The draft provided for the possibility of introducing limitations on the active legal capacity of persons with disabilities, the scope of which could be shaped by a court in a manner adapted to the needs of the given person. The draft did not envisage a complete abandonment of the substitute model of performing legal acts by persons with disabilities but would have ensured the possibility of tailoring it to fit the individual situation of a specific person and limiting the possible duration of its application. A time bar on the limitation on the possibility of applying substitute models in performing legal acts by persons with disabilities would induce courts to make regular checks on the validity of the premises for the restrictions in performing such acts. Work on this draft amendment to Polish private and procedural law was not completed due to the wholesale dismissal of the Civil Law Codification Commission, its chairman and deputy chairman included, in 2015.

15 P. Machnikowski, Instytucja opieki nad pełnoletnim w pracach Komisji Kodyfikacyjnej Prawa Cywilnego w latach 2012–2015, *Państwo i Prawo* 2019, no. 4, p. 136.

34 Significance of regulation concerning active legal capacity for protection of persons with disabilities under criminal law

Szymon Pawelec

Concept of a disabled person

Under international law, the Convention on the Rights of Persons with Disabilities, adopted in New York on December 13, 2006, provides a definition of a person with a disability (hereinafter referred to as the CRPD).[1] This act was ratified on July 26, 2012, by the president of the Republic of Poland with the consent of the Sejm expressed in the Law[2] and entered into Polish law on October 25, 2012. At this point it should be emphasised that, in accordance with Article 91(1) of the Constitution of the Republic of Poland of April 2, 1997, 'a ratified international agreement, after its promulgation in the Journal of Laws of the Republic of Poland, shall constitute part of the national law and shall be directly applied, unless its application depends on the enactment of a law'. Pursuant to paragraph 2 of this norm, 'an international agreement ratified with the prior consent expressed in a law takes precedence over a law if that law cannot be reconciled with the agreement'.

In Article 1 of the CRPD, the parties established that its purpose is 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'. According to the second paragraph of this article, 'persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

At the statutory level in Poland, the protection of persons with disabilities is regulated primarily by the Law on Vocational and Social Rehabilitation and Employment of Persons with Disabilities of August 27, 1997.[3] Article 2(10) of this act defines disability as 'a permanent or temporary inability to fulfil social roles due to a permanent or long-term impairment of bodily functions, in particular resulting in inability to work'. In Article 3(1),

Abbreviations:
Dz U Dziennik Ustaw
OSNKW Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa
OSNwSK Orzecznictwo Sądu Najwyższego w Sprawach Karnych
Prok i Praw–wkł Prokuratura i Prawo – wkładka
OSP Orzecznictwo Sądów Polskich

1 Dz U of 2012 item 1169 as amended.
2 Law of 15 June 2012 on the ratification of the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 (Dz U 2012 item 882).
3 Dz U of 2021 item 573.

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the legislator has established three degrees of disability: significant, moderate and light. Obtaining a certificate establishing the degree of disability, in accordance with the procedure provided for in the aforementioned law, constitutes the basis for granting allowances and rights provided for disabled persons in other regulations.

On the grounds of the Criminal Code,[4] the phrase disabled person appears only in one place – namely, in Article 225 § 4. This provision stipulates a type of prohibited act consisting in preventing or hindering an authorised person from performing official acts of supervision and control in organisational units of social assistance or in facilities providing round-the-clock care for disabled, chronically ill or elderly persons.

It should be noted that the wording 'disabled person' in the norm in question does not appear as an independent concept, but is part of another concept, i.e. 'an institution providing round-the-clock care for disabled, chronically ill or elderly persons'. The activity of this type of institution is regulated in the Law of March 12, 2004, on Social Assistance,[5] in Chapter 3 titled 'Business activity in the field of running an institution providing round-the-clock care for disabled, chronically ill or elderly persons' (Articles 67–69).

The mentioned concept has not been defined explicitly by the legislator, but it is possible to reconstruct its most important elements on the basis of the remaining norms of the law. As noted by the Supreme Administrative Court in the justification of the judgment of September 6, 2018, 'the legislator has not introduced a legal definition of an institution providing round-the-clock care to disabled, chronically ill or elderly persons'. This does not mean, however, that constitutive elements for this institution cannot be reconstructed from the totality of the statutory regulation. In the light of the Social Assistance Law (SAL), such an institution is supposed to provide services of a specified type in relation to a defined category of persons. The activities of the institution are intended to cover persons with disabilities, chronically ill or elderly persons (subjective element). On the other hand, the catalogue of services provided round-the-clock is included in Article 68(1) and (3) of the SAL (objective element).[6]

The phrase 'disabled person' used in criminal law, not being an autonomous term, does not refer to the definition of a disabled person contained in the CRPD. Nevertheless, it should be noted that Article 225 § 4 of the Criminal Code reveals the will of the legislator to safeguard the welfare of disabled persons residing in institutions providing round-the-clock care. The literature indicates that the main object of protection in the criminal norm in question is the correctness of control and supervision activities in the care units indicated in the provision while a secondary object is the rights of the persons staying in them.[7]

It should be added here that the provision in question was added to the Criminal Code by the Law of February 12, 2010, amending the Law on Social Assistance and certain other laws[8] and entered into force on March 31, 2010. In the justification of the draft amendment, the drafters emphasised that the purpose of adding this norm was to ensure the correctness and effectiveness of the inspections carried out and to increase the sense of security of inspectors. The need to address threats to the life or health of older and sick people was also pointed out. Even cases, which occur in practice and have been repeatedly reported by provincial inspectors to the Ministry of Labour and Social Policy, have been

4 Law of 6 June 1997 Criminal Code (Dz U of 2020 item 1444 as amended).

5 Dz U of 2020 item 1876 as amended.

6 Judgement of the Supreme Administrative Court of 06.09.2018, I OSK 2446/16 LEX No 2629441.

7 Marek Kulik, *Kodeks karny. Komentarz aktualizowany*, ed. M. Mozgawa, Wolters Kluwer SA, Warsaw, 2021, LEX/el., commentary to Article 225 of the Polish Criminal Code, para 1.

8 Dz U 2010.40.229.

invoked involving dog chasing, locking the entrance gate to the facility, and not allowing entry to all rooms in the facility.[9]

Concept of an incapacitated person

Apart from the case described, the phrase 'disabled person' does not appear in the Criminal Code. In contrast, criminal law uses the concept of an 'incapacitated person'. The term can be found in five places. However, depending on the provision, an incapacitated person is mentioned with relation to (1) age or health condition (Article 53 § 2 of the Criminal Code), (2) mental or physical condition (Articles 210 of the Criminal Code and 211 of the Criminal Code) or (3) age or mental or physical condition (Articles 189 § 2a of the Criminal Code and 207 § 1a of the Criminal Code).

The concept of an 'incapacitated person' does not have a legal definition. As indicated in the doctrine, the essence of incapacity is the inability to decide for oneself about one's fate or to change one's position, stressing that it is a factual circumstance that 'requires individual determination in each case'.[10] Age as a cause of incapacity can affect both the young and the elderly. In turn, health is understood in the doctrine to mean both mental and physical state.[11] The mental condition causing the incapacity may be, for example, mental handicap, retardation or mental illness. On the other hand, incapacity due to physical characteristics can be related to a physical disability or confinement. However, it should be emphasised that the legislator does not provide for a closed catalogue of such circumstances.

At this point, it is important to point out the fundamental differences between the concept of a 'incapacitated person' and the concept of a 'disabled person' within the meaning of the CRPD. Firstly, having the status of a disabled person does not automatically entail the incapacity referred to in criminal law – such a condition, as mentioned, should be established in each case on the basis of the circumstances of the particular case. Secondly, incapacity need not, unlike disability, be long-term. Thirdly, while the concept of a disabled person in the CRPD emphasises impediments to participation in society on the basis of equality with others, the criminal law concept of an incapacitated person (defined at the doctrinal level) centres around the inability to decide for one's own destiny.

It must be said that the concepts in question have an intersecting relationship. Indeed, it is not difficult to imagine that, in a specific factual situation, the incapacity of a particular person is linked to his or her disability (e.g. incapacity resulting from a mental or physical handicap). At the same time, there may be cases where an incapacitated person does not meet the postulates of the definition of a disabled person (e.g. a person who is incapacitated to a certain extent due to containment but not related to a long-term impairment or due to young age and inexperience in life).

All of the provisions of the Criminal Act mentioned at the beginning of this part of the argument are intended to protect incapacitated persons, including persons with disabilities falling within the scope of this concept. However, they have different functions. First of all, it is necessary to point to two provisions found in Chapter XXVI of the Criminal Code titled 'Crimes against the family and guardianship': Articles 210 and 211. Pursuant to Art. 210 §

9 Government draft law on amending the Law on Social Assistance and certain other laws, 6th term of office, Sejm No 2316 (https://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/2316 accessed October 25, 2021.

10 Sławomir Hypś, *Kodeks karny. Komentarz*, eds. A. Grześkowiak, K. Wiak, Wydawnictwo C.H. Beck, Warsaw, 2021, commentary to Article 207 of the Polish Criminal Code, para 32.

11 Magdalena Budyn-Kulik, *Kodeks karny. Komentarz aktualizowany*, ed. M. Mozgawa, Wolters Kluwer SA, Warsaw, 2021, LEX/el., commentary to Article 53 of the Polish Criminal Code, para 15.

1 of the Criminal Code, 'whoever, contrary to the obligation to take care of a minor under 15 years of age or of a person who is incapacitated due to his or her mental or physical condition, abandons that person, shall be subject to the penalty of deprivation of liberty of between 3 months to 5 years'. According to § 2 of this provision, 'if the consequence of the act is the death of the person referred to in § 1, the perpetrator shall be subject to a penalty of deprivation of liberty of between 2 to 12 years'. In turn, according to Art. 211 of the Criminal Code,

> whoever, against the will of a person appointed for care or supervision, abducts or detains a minor under the age of 15 years or a person who is incapacitated due to his or her mental or physical condition, shall be subject to the penalty of deprivation of liberty of between 3 months to 5 years.

Note that the norms in question have been in criminal law since its entry into force on September 1, 1998. Both provisions provide for independent types of criminal acts in which the object of the direct action is a person who is incapable of acting due to his or her mental or physical condition (possibly a minor under 15 years of age). The good protected by Article 210 of the Criminal Code is the interest of the ward against the failure of the person charged with the duty of care. On the other hand, the provision of Article 211 of the Criminal Code, as it is put in the doctrine,

> addresses itself against the arbitrary unilateral making of changes in the relationship of care or supervision established by law or court decision over the person specified in this provision, whereby it is not a question of giving the characteristics of inviolability to someone's right of care or supervision, but of ensuring the proper conditions for the exercise of this right by the person entrusted with the actual exercise of care or supervision.[12]

The concept of an 'incapacitated person' is also used by the legislator within the institution of an aggravated type of a prohibited act, i.e. not when formulating an independent type of crime, where an incapacitated person (possibly a minor under 15 years of age) as the subject of direct action constitutes the nature of the crime but where the incapacity of the victim is made a circumstance aggravating the penalty for a crime characterised in the second degree type. This occurs in two cases, i.e. in Art. 189 § 2a (aggravated type of unlawful deprivation of liberty) and Art. 207 § 1a of the Criminal Code (aggravated type of bullying).

Pursuant to Art. 189 § 1 of the Criminal Code, 'whoever deprives a person of his or her liberty shall be liable to a penalty of deprivation of liberty of between 3 months and 5 years'. Under § 2 of this provision, 'if the deprivation of liberty lasted longer than 7 days, the perpetrator shall be subject to a penalty of deprivation of liberty of between 1 and 10 years'. In turn, § 2a, which is crucial for this argument, stipulates that 'if the deprivation of liberty referred to in § 2 concerns a person who is incapacitated because of his or her age, mental or physical condition, the perpetrator shall be subject to a penalty of deprivation of liberty of between 2 and 12 years'. It should also be mentioned that, according to § 3, 'if the deprivation of liberty referred to in § 1–2a was combined with particular torment, the perpetrator shall be subject to a penalty of deprivation of liberty for a term not shorter than 3 years'.

12 Anna Muszyńska, *Kodeks karny. Część szczególna. Komentarz*, ed. J. Giezek, Wolters Kluwer SA, Warsaw, 2014, commentary to Article 211 of the Polish Criminal Code, para 2.

In turn, according to Art. 207 § 1 of the Criminal Code,

> whoever physically or mentally abuses his or her next of kin or another person in a permanent or transitory relationship of dependence on the perpetrator shall be subject to a penalty of deprivation of liberty of between 3 months and 5 years.

Relevant from the point of view of the institution under discussion is § 1a of this provision, according to which 'whoever physically or mentally abuses a person who is vulnerable due to his or her age, mental or physical condition, shall be subject to a penalty of deprivation of liberty of between 6 months and 8 years'. It may be added that according to § 2, 'if the act specified in § 1 or 1a is combined with the use of particular cruelty, the perpetrator shall be subject to a penalty of deprivation of liberty of between 1 and 10 years'.

The increase in the penalties for the offences of unlawful deprivation of liberty and abuse when committed against an incapacitated person is an indication of the legislator's particular concern for vulnerable people. It should be emphasised that the creation of an aggravated type of offence is significant in criminal law in that it indicates a particularly reprehensible assessment of a particular act and its high social harmfulness.

The third type of institution related to the notion of an incapacitated person can be found in Article 53 § 2 of the Criminal Code. Pursuant to this provision, when imposing the sentence, the court shall take into account, in particular, the motivation and conduct of the perpetrator, especially when the offence was committed against a person who is incapacitated due to age or health reasons, the commission of the offence jointly with a minor, the nature and degree of the breach of duties incumbent on the perpetrator, the nature and degree of the detrimental consequences of the offence, the nature and degree of the personal conduct of the perpetrator, his or her conduct prior to the commission of the offence and his or her conduct after the commission of the offence, in particular any efforts to make good the damage or otherwise restore the public sense of justice, and the victim's conduct.

The factor in the form of committing an offence to the detriment of a person who is incapacitated due to age or health was added to Article 53 § 2 of the Criminal Code as a result of the amendment of March 23, 2017,[13] which entered into force on July 13, 2017. It can be presumed that behind the obligation of the courts to take this functor into account in the assessment of punishment is the conviction of the legislator as to the particular punishability of offences committed against people whose condition indicates their inability to decide for themselves. Undoubtedly, the indication of such circumstances directly in the law reinforces the protection of persons who are incapacitated, including persons whose incapacity is related to disability.

To conclude this part of the deliberations, it is necessary to point out that the concept of an incapacitated person is used in criminal law under three types of institutions: firstly, for the expression of an independent type of criminal act whose distinguishing feature is the incapacity of the object of the criminal activity; secondly, for the establishment of an aggravated type of criminal act, where harming an incapacitated person entails an increased penalty; thirdly, to oblige the court to take into account the fact of the victim's incapacity when awarding the sentence.

13 Law of 23 March 2017 on amending the Law – Criminal Code, the Law on Juvenile Justice Proceedings and the Law – Criminal Procedure Code (Dz U 2017.773).

Protection of disabled persons who have been the victims of a crime of extortion by force, fraud or the exploitation of a business partner

From the point of view of persons with disabilities, and in particular the protection of their property interests, three types of offences are of particular significance – two found in Chapter XXXV of the CC, 'Crimes against property', i.e. Article 282 providing for extortion and Article 286 penalising fraud, and one found in Chapter XXXVI, 'Crimes against business trading and property interests in civil law transactions', i.e. Article 304 § 1 defining the offence of exploitation of a business partner.

Pursuant to Art. 282 of the Criminal Code,

> whoever, in order to gain a material profit, by means of violence, threat of an attempt against life or health, or violent assault on property, leads another person to dispose of his or her own or another person's property, or to cease business activity, shall be subject to the penalty of deprivation of liberty of between one and ten years.

Pursuant to Art. 286 § 1 of the Criminal Code,

> whoever, in order to gain a material profit, leads another person to a disadvantageous disposal of his or her own or another person's property by means of misleading that person, or by exploiting a mistake or incapability to grasp the action taken, shall be subject to the penalty of deprivation of liberty of between 6 months and 8 years.

According to § 3 of this provision, 'in a case of lesser gravity, the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to two years'. On the other hand, according to § 4, fraud committed to the detriment of a next of kin is prosecuted at the request of the victim.

Pursuant to Art. 304 § 1 of the Criminal Code,

> whoever, exploiting the forced position of another natural or legal person, or an organisational unit without legal personality, enters into an agreement with that person, imposing on him or her an obligation to provide a benefit incommensurate with the reciprocal benefit, shall be subject to the penalty of deprivation of liberty for up to three years.

Referring to the regulations quoted earlier, it should first be pointed out that while Article 282 of the Criminal Code does not provide any special protection for disabled persons, Articles 286 and 304 may be, albeit not directly, but indirectly referred to certain categories of disabled persons – in the former one of the ways of committing the offence is exploitation of the victim's incapability to grasp a given act adequately, while in the latter one the circumstance accompanying the realisation of the activity feature is the forced position of the victim.

A problem that needs to be posed additionally in the context of the quoted provisions is the question of the relevance of the legal capacity of disabled persons for the occurrence of the feature of disposal of property (in the case of extortion and fraud) or conclusion of an agreement (in the case of exploitation of a business partner). It needs to be emphasised that in the Polish law, there are institutions – plenary guardianship and partial guardianship, which enable deprivation or limitation of a person's capacity to perform legal acts – whereas the construction of these instruments indicates that they can be applied particularly in the case of persons with mental disabilities.

The question that needs to be answered, therefore, is whether a disabled person who has been placed under plenary or partial guardianship can, within the meaning of the Criminal Code, dispose of property or enter into an agreement. However, before the author proceeds to detailed considerations in the aforementioned scope, he will briefly summarise the regulations concerning plenary or partial guardianship and in particular the effects which the application of these institutions causes in the area of civil law.

According to Article 12 of the Civil Code,[14] 'persons under thirteen years of age and persons who are under plenary guardianship do not have legal capacity'. Pursuant to Art. 13 § 1 of the Civil Code,

> a person over the age of thirteen may be placed under plenary guardianship if he or she, as a result of mental illness, mental retardation or any other mental disorder, in particular drunkenness or drug addiction, is unable to manage his or her affairs.

Pursuant to Art. 14 § 1 of the Civil Code, 'a legal transaction entered into by a person lacking legal capacity shall be null and void'. At the same time, in § 2 of this provision, the legislator stipulated that

> when a person incapable of legal actions has concluded an agreement belonging to contracts commonly concluded in trivial current affairs of everyday life, such an agreement becomes valid as soon as it is executed, unless it entails a gross disadvantage for the incapable person.

Pursuant to Art. 15 of the Civil Code, 'minors over the age of thirteen and persons who are under partial guardianship have a limited legal capacity'. Pursuant to Art. 16 § 1 of the Civil Code,

> a person who is of legal age may be under partial guardianship because of mental illness, mental retardation or other mental disorder, in particular drunkenness or drug addiction, where his or her condition does not justify plenary guardianship but requires assistance to manage the person's affairs.

Under Art. 17 of the Civil Code,

> subject to the exceptions provided for by the Law, the consent of the legal representative shall be required for the validity of a legal transaction by which a person with limited capacity to act assumes an obligation or disposes of his or her right.

Exploitation of incapability to comprehend the intended action

It seems that in the case of an offence under Article 286 of the Criminal Code, persons with disabilities may be particularly affected by the third of the so-called fraudulent acts listed therein, consisting in the exploitation of the victim's incapability to comprehend the

14 Law of 23 April 1964 – Civil Code (Dz U 2020.0.1740).

intended action. In the following, the author will first present the views of doctrine and jurisprudence with regard to the said incapability, in order to then relate the meaning of this expression to the problem of the protection of persons with disabilities.

As a side note, by way of a historical remark, it should be noted that the difference in the manner of committing the crime of fraud discussed here (other fraudulent acts revolve around the concept of mistake) was particularly emphasised in pre-war legislation. In the Criminal Law of 1932,[15] leading another person to a disadvantageous disposition of property by exploiting his or her incapability to comprehend the intended action was a type of criminal act separate from fraud (Art. 266).

Returning to the current state of the law, the legislator has not established a legal definition of incapability to exercise due judgement in relation to the action taken. In the literature, it was aptly put by *J. Lachowski*, who wrote that it is a 'lack of possibility to rationally assess the decisions that the wronged person makes'.[16] It should be noted that for the occurrence of the described offence the reasons for such a state of affairs are not important, in particular it should be emphasised that it does not have to be caused by the perpetrator.

The legislator has not decided to enumerate the manifestations of exploiting the victim's incapability to comprehend the meaning of one's own action, so any exploitation of this incapability will be covered by Article 286 § 1 of the Criminal Code. The following sources of the victim's incapability to comprehend the meaning of his or her own actions can only be mentioned here by way of example: young age, mental handicap, mental retardation, mental illness, insufficient socialisation, immaturity or abuse of alcohol, drugs or other intoxicants. *L. Wilk* also adds such reasons as naivety, superstition, grossly low state of knowledge.[17]

The doctrine emphasises that Article 286 § 1 of the Criminal Code refers both to a state of total exclusion of the ability to recognise the meaning of an act or to direct one's own conduct, as well as a state of impairment of this ability.[18] In the context of disability, the remark made by *T. Oczkowski*, who rightly noted that, as a rule, 'this incapability will concern persons who have no legal capacity or who have this capacity limited, or persons who are under plenary or partial guardianship, including persons who qualify for such a limitation of their rights', is extremely important.[19]

It has been emphasised in the case law of the ordinary courts that the incapability to properly comprehend an act may be caused by a factor of both a permanent and a transient nature. The Court of Appeal in Wrocław, in its judgment of December 18, 2015, stated that

> the incapability to comprehend the meaning of an action does not have to be permanent, it can only be a temporary state. It is essential that the perpetrator seized the moment and brought about, precisely at the time of the state of this incapability, an unfavourable disposition of property.[20]

15 Regulation of the President of the Republic of Poland of 11 July 1932 Criminal Code (Dz U No 60 item 571 as amended).

16 Jerzy Lachowski, *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, Wolters Kluwer SA, Warsaw, 2020, commentary to Article 286 of the Polish Criminal Code, para 3.

17 Leszek Wilk, *Kodeks karny. Część szczególna. Tom II. Komentarz. Art. 222–316*, eds. M. Królikowski, R. Zawłocki, Wydawnictwo C.H. Beck, Warsaw, 2017, commentary to Article 286, para 38.

18 Maciej Szwarczyk, *Kodeks karny. Komentarz*, ed. T. Bojarski, Wolters Kluwer SA, Warsaw, 2016, commentary to Article 286, para 3.

19 Tomasz Oczkowski, *Oszustwo jako przestępstwo majątkowe i gospodarcze*, Zakamycze, Kraków, 2004, p. 60.

20 Judgement of the Court of Appeal in Wrocław of 18.12.2015, II AKa 307/15 LEX No 1993070.

M. Dąbrowska-Kardas and *P. Kardas* aptly point out that

> in order to recognise that the perpetrator took advantage of the incapability of the person disposing of property to comprehend the intended action, it is sufficient if it is established that at the time of disposing of property, the person making the action was not aware of the legal transaction and what legal or economic consequences result or may result from this transaction.[21]

The doctrine stresses that bringing about a disadvantageous disposal of property by exploiting the victim's incapability to comprehend the intended action does not have to involve the use of special means by the perpetrator. In order to ascribe perpetration for the act defined in Article 286 § 1 of the Criminal Code, it is therefore not important whether incitement, promises, assurances, persuasion, etc. were used.[22]

When relating the concept of incapability to reasonably comprehend the intended action to the concept of a disabled person within the meaning of the CRPD, it should be noted that these are not the same concepts. The most significant difference is that the condition of the victim of the crime of fraud refers only to the mental and intellectual aspect and does not concern physical or sensory capacities which fall within the conventional definition of disability. In conclusion, Article 286 of the Criminal Code specifically protects persons with disabilities insofar as their disability is related to their inability to make rational decisions.

Exploitation of a forced position

While in the case of fraud, the element constituting special (albeit indirect and incomplete) protection of persons with disabilities was one of the fraudulent acts (exploitation) referring to the victim's incapability of comprehending the intended action, in the case of exploitation, this protection is expressed in the characteristics of the circumstances accompanying the realisation of the activity feature. At this point we should quote *L. Wilk*, who rightly observes that

> the forced position of the victim should be perceived as a circumstance accompanying the perpetrator's implementation of the activity features, and not as a separate activity feature. Although the term 'exploiting' might suggest its activity feature, a closer analysis makes it possible to state that it constitutes the indicated circumstance of committing the criminal act and an element of the mens rea.[23]

M. Bojarski understands the term 'forced position' as

> such a state of affairs in which the victim is forced to immediately take an obligation on particularly onerous conditions under the threat of even greater damage or immediate

21 Małgorzata Dąbrowska-Kardas, Piotr Kardas, *Kodeks karny. Część szczególna. Tom III. Komentarz do art. 278–363 k.k.* ed. A. Zoll, Wolters Kluwer SA, Warsaw, 2016, commentary to Article 28 of the Polish Criminal Code, para 51.

22 Tomasz Oczkowski, *Oszustwo jako przestępstwo majątkowe i gospodarcze*, Zakamycze, Kraków, 2004, p. 60.

23 Leszek Wilk, *Kodeks karny. Część szczególna. Tom II. Komentarz. Art. 222–316*, eds. M. Królikowski, R. Zawłocki, Wydawnictwo C.H. Beck, Warsaw, 2017, commentary to Article 286 of the Polish Criminal Code, para 36.

> annoyance. It shall not therefore be an exploitation of a forced position to require even an excessive benefit under such circumstances where the debtor assumes an obligation in order to make money from it.[24]

The judicature strongly emphasises the objectivity of the circumstances of the forced position. The Supreme Court, in its judgment of October 31, 1966, still issued on the basis of the Criminal Law of 1932,[25] emphasised that 'a forced position is an objective circumstance belonging to the essence of the offence under Article 268 of the Criminal Code and the reasons for the creation of such a position are indifferent for the existence of this offence'.[26] This theory is still valid – *T. Oczkowski*, commenting on Article 304 of the Criminal Code, states that this provision refers to 'the threat of a significant annoyance, which means that it is an objective circumstance and the subjective feelings of the person concluding an agreement unfavourable to him or her should not be the key criterion here'.[27]

In interpreting the concept of 'forced position', the Supreme Court also strongly emphasises such elements as the extraordinary nature of the situation in which the victim of the crime finds himself or herself and the necessity for him or her to enter into the agreement. The judgment of March 27, 2014, reads as follows:

> The feature of the crime defined in Article 304 of the Criminal Code is not every 'position', i.e. any situation concerning the business partner which the perpetrator exploits by concluding with him or her an agreement imposing on him or her an obligation to provide a benefit disproportionate to the perpetrator's reciprocal benefit, but the 'forced position' of that person, i.e. such a state of his or her affairs – exploited by the perpetrator – which actually determines his or her conclusion of such an agreement as necessary in this situation.[28]

The interpretation presented by the Supreme Court is fully endorsed by common courts. For example, the Court of Appeal in Katowice of August 28, 2014, describes the forced position as follows:

> It must be so far unfavourable that it directly threatens him or her [the victim – the author's note] with great distress (e.g. in the case of an individual, the inability to meet the basic needs of life for himself or herself and family, loss of housing, etc.).

Further on in its reasoning, this court stated:

> The essence of 'forced position' is also the indispensability of obtaining a benefit intended to ameliorate that position and the impossibility of reversing the unfavourable situation by means other than entering into an agreement imposing a disproportionate benefit.[29]

24 Marek Bojarski, *Kodeks karny. Komentarz*, ed. M. Filar, Wolters Kluwer SA, Warsaw, 2016, commentary to Article 304 of the Polish Criminal Code, para 3.

25 Regulation of the President of the Republic of Poland of 11 July 1932 Criminal Code (Dz U No 60 item 571 as amended).

26 Supreme Court of Poland of 31.10.1966 Rw 904/66 OSNKW 1967/1 item 6.

27 Tomasz Oczkowski, *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, Wolters Kluwer SA, Warsaw, 2020, commentary to Article 304 of the Polish Criminal Code, para 2.

28 Judgment of the Supreme Court of 27 March 2014, V KK 332/13, OSNKW 2014 No 11 item 83.

29 Judgement of the Court of Appeal in Katowice of 28.08.2014, II AKa 240/14 LEX No 1509004.

From the point of view of people with disabilities, special attention should be paid to the fact that the provision of Article 304 § 1 of the Criminal Code does not presuppose the economic nature of the forced situation. The situation was different under the Criminal Law of 1932, where in Article 268 the legislator characterised the crime of exploitation as follows:

> Whoever, exploiting the forced position of another person, enters into an agreement with him or her imposing on him or her an obligation to provide a material benefit obviously disproportionate to the reciprocal benefit, shall be punished with imprisonment of up to 5 years or with detention.

M. Bojarski remarks that the state of forced position may be connected with the life or health situation of the victim.[30] In turn, *L. Wilk* argues that the situation of the victim of an offence under Article 304 § 1 of the Criminal Code may be of a personal nature, and factors such as infirmity, inexperience or lack of knowledge of law, although they do not automatically signify a state of forced position, may still be related to it in a specific state of facts.[31] It must therefore be recognised that disability may be a factor which influences or even directly shapes the forced position of the victim of a crime of exploitation, in particular when account is taken of the barriers and impediments which disabled persons face in accessing certain goods and services.

Disposal of property

Both extortion by force criminalised under Article 282 of the Criminal Code and fraud criminalised under Article 286 of the Criminal Code are substantive offences. The existence of the effect specified in these provisions is necessary for the perpetrator to be held criminally liable. The effect feature in both offences consists in the disposal of property by the victim. Except that in the case of fraud, such disposition must be adverse. We should also keep in mind that in the crime of extortion by force, an alternative effect may be the cessation of economic activity by the victim, which, however, due to the limited subject matter of this article, will not be discussed further.

Initially, the author will discuss the essential difference between the crimes under Article 282 and 286 of the Criminal Code, he will present considerations with regard to the understanding of the concept of 'disposal of property' common to both prohibited acts, then he will present the position of doctrine and jurisdiction on the interpretation of 'adverse' additionally characterising the feature of effect in the norm criminalising fraud. He then goes on to consider the meaning of legal capacity in the context of the occurrence of the effect indicated in the regulations in question.

The offence of extortion by force and the offence of fraud are distinguished by the issue of the victim's awareness. In its decision of May 25, 2006, the Supreme Court rightly noted that

> the basic element differentiating both types of offences – from Article 282 of the Criminal Code and Article 286 of the Criminal Code – is the victim's awareness of the

30 Marek Bojarski, *Kodeks karny. Komentarz*, ed. M. Filar, Wolters Kluwer SA, Warsaw, 2016, commentary to Article 304 of the Polish Criminal Code, para 3.

31 Leszek Wilk, *Kodeks karny. Część szczególna. Tom II. Komentarz. Art. 222–316*, eds. M. Królikowski, R. Zawłocki, Wydawnictwo C.H. Beck, Warsaw, 2017, commentary to Article 286 of the Polish Criminal Code, paras 42 and 43.

> disposition of property. In the case of the offence of fraud, he or she is not aware that he or she is making an adverse disposition. In the case of extortion by force, on the other hand, the victim knows that he or she is making an adverse disposition, but his or her psyche has been shaped by the threat in the way desired by the perpetrator.[32]

The notion of disposing of property, as already mentioned, is an element of the feature in both the offence under Article 282 of the Criminal Code and the offence under Article 286 of the Criminal Code. The interpretation of this term will be presented jointly for both norms. At the same time, it should be emphasised once again that in the case of the crime of fraud, the legislator narrowed the feature of the effect to these cases of disposal of property, which are of a disadvantageous nature, which will be discussed in more detail later.

Turning to the interpretation of the term 'regulation', it is first necessary to point out its civil law connotation. Under civil law, a dispositive legal transaction consists in the transfer (disposal or acquisition), encumbrance, restriction or abolition of a subjective right. Against this background, an important problem arises as to the choice of the interpretative direction – namely, whether the interpretation of the notion of disposition used in Article 282 of the Criminal Code and Article 286 of the Criminal Code should be carried out under a strict systemic interpretation or with the application of the method of autonomous interpretation.

The criminal law literature commonly rejects the concept of systemic interpretation consisting in limiting ourselves to the definition postulates of 'regulation' formulated in civil law. Representatives of the doctrine generally assume, guided by the directive of purpose, that the concept in question should be understood autonomously and broadly. It is pointed out that its scope includes legal transactions which are dispositive, binding or dispositive-dispositive, as well as transactions regulated by other (than civil) branches of law, as well as factual transactions, in particular those involving the transfer of possession.[33] *W. Cieślak* even adds authorising legal transactions to such a catalogue.[34]

Also in case law, an autonomous and broad definition of 'disposition of property' is adopted. The Court of Appeal in Kraków, in its ruling of May 22, 1997 (though issued on the grounds of the Criminal Law of 1969,[35] but still up-to-date in terms of substance), stated,

> A disposal of property, as stipulated in Article 211 of the Criminal Code, is also the acceptance of a monetary commitment, the drawing up of an agreement on the waiver of rights or the issuance of an instruction to withdraw money from a bank account.[36]

32 Order of the Supreme Court of 25.05.2006, IV KK 403/05 OSNwSK 2006 No 1 item 1123.

33 Aneta Natalia Preibisz, Niekorzystne rozporządzenie mieniem jako znamię oszustwa (art. 286 § 1 k.k.), *Prokuratura i Prawo*, 2005, vol. 10, p. 63; Tomasz Oczkowski, *Prawo karne – rozporządzenie mieniem jako znamię przestępstwa z art. 286 § 1 k.k.* Gloss to the Judgment of the Supreme Court of 29 August 2012, V KK 419/11, *OSP N*, 2013, vol. 9, p. 85; Małgorzata Dąbrowska-Kardas, Piotr Kardas, *Kodeks karny. Część szczególna. Tom III. Komentarz do art. 278–363 k.k.,* ed. A. Zoll, Wolters Kluwer SA, Warsaw, 2016, commentary to Article 286 of the Polish Criminal Code, para 37; Igor Zgoliński, *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, Wolters Kluwer SA, Warsaw, 2020, commentary to Article 282 of the Polish Criminal Code, para 3; M. Kulik, *Kodeks karny. Komentarz aktualizowany,* ed. M. Mozgawa, Wolters Kluwer SA, Warsaw, 2021, LEX/el., commentary to Article 282 of the Polish Criminal Code.

34 Wojciech Cieślak, Rozporządzenie mieniem jako znamię wymuszenia rozbójniczego (Art. 211 k.k.), *Palestra*, 1995, vol. 11–12, p. 53.

35 Law of 19 April 1969 Criminal Code (Dz U No 13 item 94 as amended).

36 Judgment of the Court of Appeal in Kraków of 22 May 1997, II AKa 79/97 Prok i Pr-wkł No 12 item 21.

Also, the concept of property, which is the subject of the disposition, is understood by the jurisprudence in a broad way. In its decision of June 15, 2007, the Supreme Court characterised them as follows: 'The term "property", contained in the wording of Article 286 § 1 of the Criminal Code, means the totality of property situation, including all rights, both in rem and in bond'.[37]

The disposition of property in the case of fraud must be adverse, which, as indicated by *E. M. Guzik-Makaruk* and *E. W. Pływaczewski* 'may consist in incurring actual damage to property or in accepting property obligations'. These authors also emphasise that 'the occurrence of damage to property is not a necessary condition for accepting that there has been an adverse disposition so conceived'.[38] The Supreme Court, in its judgment of October 29, 2020, indicated that the disposition of Article 286 § 1 also includes 'a disposal causing only the creation or increase of the threat (danger) of the occurrence of such negative consequences, sometimes referred to as "damage-free" fraud'.[39]

The broad and autonomous interpretation of 'regulation' also applies to its formal aspect. The literature assumes that for the existence of extortion by force and fraud, the possible invalidity or ineffectiveness (from the point of view of civil law) of the transaction carried out by the victim is of no importance.[40] This view is also endorsed in case law. For example, the Poznań Court of Appeal, in its judgment of February 9, 2017, states,

> An adverse disposition of property will be the divestment of assets, their encumbrance, the discharge of debts, the assumption of obligations, the unjustified postponement of payment deadlines. It is irrelevant whether these transactions are effective from a civil law point of view.[41]

At this point, it should be stated that a disabled person, even if under partial or plenary guardianship, may be led to a disposal of property within the meaning of Article 282 of the Criminal Code and Article 286 of the Criminal Code, while the effectiveness of such a disposal under civil law is indifferent to the criminal law assessment of the perpetrator's behaviour.

Conclusion of an agreement

The conclusion of an agreement constitutes the activity feature of the crime characterised in Article 304 § 1 of the Criminal Code. There is no wider consideration in the criminal law literature on the interpretation of the term 'conclusion of an agreement'. No autonomous interpretation has developed here, unlike in the case of the term 'disposal of property' described earlier. Therefore, referring to the doctrine of civil law, it should be assumed that an agreement is a consensual declaration of will of at least two parties aimed at the creation, modification or termination of legal effects.

37 Order of the Supreme Court of 15 June 2007, I KZP 13/07, OSNKW 2007 No 7–8 item 56.

38 Ewa Monika Guzik-Makaruk, Emil Walenty Pływaczewski, *Kodeks karny. Komentarz*, ed. M. Filar, Wolters Kluwer SA, Warsaw, 2016, commentary to Article 286 of the Polish Criminal Code, para 6.

39 Judgement of the Supreme Court of 29.10.2020 V CSK 69/19 LEX No 3077079

40 Małgorzata Dąbrowska-Kardas, Piotr Kardas, *Kodeks karny. Część szczególna. Tom III. Komentarz do art. 278–363 k.k.* ed. A. Zoll, Wolters Kluwer SA, Warsaw, 2016, commentary to Article 282 of the Polish Criminal Code; Ewa Monika Guzik-Makaruk, Emil Walenty Pływaczewski, Kodeks *karny. Komentarz*, ed. M. Filar, Wolters Kluwer SA, Warsaw, 2016, commentary to Article 282 of the Polish Criminal Code.

41 Judgement of the Court of Appeal in Poznań of 9.02.2017, II AKa 114/16 LEX No 2402478.

Criminal law scholars unanimously stress the civil law nature of the activity feature of the crime of extortion. In particular, it is emphasised that an agreement covered by the disposition of Article 304 § 1 of the Criminal Code should meet all the formal requirements provided by law. According to *L. Wilk*, in the case of an agreement that is invalid under civil law, i.e. not binding on the parties, it is not possible to speak of a victim and thus of the perpetration of the crime of extortion.[42]

In this context, it should be stated that the civil law consequences of the conclusion of an agreement by a victim who is a disabled person and, at the same time, under partial or plenary guardianship have an impact on the criminal law procedural assessment of the perpetrator's conduct. If such a transaction is invalid, the activity feature of the offence in question will not be met. However, in such a case the possibility of attributing responsibility for the attempt to the perpetrator will not be excluded. As *J. Potulski* aptly points out,

> Conclusion of an agreement, e.g. with a person who is not competent to act on behalf of a legal person, or an agreement which is invalid e.g. as a result of defects in a declaration of intent, may be regarded as a manifestation of an attempt or even an ineffective attempt.[43]

Conclusion

As it has been presented in this chapter, the Polish legislator, on the grounds of the Criminal Code, in principle does not use the notion of disability or a related notion of a disabled person. Instead of this term, the term incapacity is used. Referring to basic indications of linguistic interpretation, it is difficult to consider the two concepts as identical. Instead, they undoubtedly have an intersectional relationship with each other. In many specific factual situations, the incapacity of a person is closely linked to his or her disability. At the same time, however, sensitivity should be maintained to those individual situations, analysed from the narrow perspective of statutory features of the discussed types of prohibited acts, in which an incapacitated person may not fulfil the postulates of the definition of a disabled person. In such a situation, the question remains open as to whether, in order to ensure adequate protection for persons with disabilities on the basis of the Criminal Code, specific legislative changes should be postulated or whether certain *de lege lata* interpretative indications should be contented. The answer to this question is not easy. As outlined in the earlier comments, the provisions of criminal law under review are designed to protect incapacitated persons, including persons with disabilities who fall within the scope of this concept. However, they have different functions but are generally aimed at strengthening the criminal law protection of persons whose situation differs from the circumstances surrounding the possibility of action by a normal participant in legal relations. Bearing in mind the described relation of crossing concepts, the replacement of the notion of incapacity by the notion of disability in the Convention perspective could lead in some cases to a limitation of the subjective scope of criminal law protection, which can hardly be considered a desirable direction of change. In this state of affairs, with all sensitivity to the indications flowing from the postulates regarding the prohibition of synonymous

42 Leszek Wilk, *Kodeks karny. Część szczególna. Tom II. Komentarz. Art. 222–316*, eds. M. Królikowski, R. Zawłocki, Wydawnictwo C.H. Beck, Warsaw, 2017, commentary to Article 304 of the Polish Criminal Code, para 28.

43 Jacek Potulski, *Kodeks karny. Komentarz*, ed. R.A. Stefański, Wydawnictwo C.H. Beck, Warsaw, 2020, commentary to Article 286 of the Polish Civil Code, para 2.

interpretation or the *nullum crimen sine lege certa* rule, which is particularly peculiar to the field of criminal law, it would be justified in such a situation to place the emphasis on the *de lege lata* interpretation postulate. It essentially boils down to exposing the need to interpret the Code's concept of incapacity through the prism of the totality of definitional indications related to disability, noting the close relationship between disability and those limitations that the criminal law legislator considers through the prism of incapacity. In this state of affairs, with some elements of crossing of the scope of concepts, the category of disability should be largely contained in the Code category of incapacity. As a kind of presumption in such a situation, it could be assumed that a person with a disability is at the same time, to some extent, directly or indirectly, an incapacitated person. This presumption should of course be treated as challengeable. Extreme situations should be left outside its framework in which, on the basis of a specific factual situation and the associated criminal law qualification, it would be demonstrated that the disability did not in any way impair the position of the victim of a given crime.

Bibliography

Bojarski, M., *Kodeks karny: Komentarz*, ed. M. Filar, Wolters Kluwer Polska, Warszawa, 2016.

Budyn-Kulik, M., *Kodeks karny: Komentarz aktualizowany*, ed. M. Mozgawa, LEX/el, Wolters Kluwer Polska, Warszawa, 2021.

Cieślak, W., Rozporządzenie mieniem jako znamię wymuszenia rozbójniczego (art. 211 k.k.), *Palestra*, 1995, vol. 11–12.

Dąbrowska-Kardas, M., P. Kardas, *Kodeks karny. Część szczególna. Tom III. Komentarz do art. 278–363 k.k.*, ed. A. Zoll, 3rd ed., Wolters Kluwer Polska, Warszawa, 2016.

Guzik-Makaruk, E. M., E. Pływaczewski, *Kodeks karny. Komentarz*, ed. M. Filar, Wolters Kluwer Polska, Warszawa, 2016.

Hypś, S., *Kodeks karny. Komentarz*, ed. A. Grześkowiak, K. Wiak, Wydawnictwo C.H. Beck, Warszawa, 2021.

Kulik, M., *Kodeks karny. Komentarz aktualizowany*, ed. M. Mozgawa, LEX/el., Wolters Kluwer Polska, Warszawa, 2021.

Lachowski, J., *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, Wolters Kluwer Polska, Warszawa 2020.

Muszyńska, A., *Kodeks karny. Część szczególna. Komentarz*, ed. J. Giezek, Wolters Kluwer Polska, Warszawa, 2014.

Oczkowski, T., *Oszustwo jako przestępstwo majątkowe i gospodarcze*, Zakamycze, Kraków, 2004.

Oczkowski, T., Prawo karne – rozporządzenie mieniem jako znamię przestępstwa z art. 286 § 1 k.k. gloss to the judgment of the supreme court of August 29, 2012, V KK 419/11, *OSP*, 2013, vol. 9.

Oczkowski, T., *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, Wolters Kluwer Polska, Warszawa, 2020.

Potulski, J., *Kodeks karny. Komentarz*, ed. R. A. Stefański, Wydawnictwo C.H. Beck, Warszawa, 2020.

Preibisz, A. N., Niekorzystne rozporządzenie mieniem jako znamię oszustwa (art. 286 § 1 k.k.), *Prokuratura i Prawo*, 2005, vol. 10.

Szwarczyk, M., *Kodeks karny. Komentarz*, ed. T. Bojarski, Wolters Kluwer Polska, Warszawa, 2016.

Wilk, L., *Kodeks karny. Część szczególna. Tom II. Komentarz. Art. 222–316*, ed. M. Królikowski, R. Zawłocki, 2nd ed., Wydawnictwo C.H. Beck, Warszawa, 2017.

Zgoliński, I., *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, Wolters Kluwer Polska, Warszawa, 2020.

35 Transposing CRPD Article 12 standards into the Polish legal system

Maciej Domański and Bogusław Lackoroński

1. Preliminary issues

The Convention on the Rights of Persons with Disabilities (CRPD) was ratified by the President of the Republic of Poland on September 6, 2012, by consent expressed in the Act on the Ratification of the Convention on the Rights of Persons with Disabilities of June 15, 2012, drawn up in New York on December 13, 2006.[1] Pursuant to CRPD Article 45.2, it passed into law in Poland on October 25, 2012.

Further to that, Poland has made an interpretative statement on CRPD Article 12, to the effect that

> *the Republic of Poland declares that it interprets Article 12 of the Convention to permit the use of incapacitation, in the circumstances and in the manner prescribed by national law, as a measure referred to in Article 12(4) when, as a result of mental illness, mental retardation or other mental disorder, a person is unable to direct his or her own proceedings.*

Since the entry into force of the CRPD, apart from the amendment of Article 183 of the Polish Family and Guardianship Code (FGC) there have been no amendments to Polish private law, the purpose or effect of which would be to transpose CRPD Article 12 into Polish law. The implementation of the standard set by this article requires amendments to the Civil Code (CC) where it concerns, in particular, active legal capacity and the premises its possible limitation (CC Art. 13, 15 and 16) and in provisions of the FGC relating in particular to guardianship and curatorship (FGC Art. 145–184).[2] The introduction of changes concerning active legal capacity in substantive private law should be linked to an analysis of whether there is a need for corresponding amendments to procedural law[3] and

1 Journal of Laws 2012, item 882.

2 Please note that Article 183 of the Polish FGC will have been amended as a result of the Act of July 28, 2023 on amendment of the FGC and some other acts, Journal of Laws 2023, item 1606. This amendment comes into force on February 15, 2024. As a result of this amendment the nature of the curatorship for a person with disability and the scope thereof are flexible. The nature and the scope of the curatorship for a person with disability is to be adequate for the needs of the person for whom it is established. This is to be decided by the court taking into account all the relevant circumstances on a case by case basis. The court is obliged to hear the person with disability before any decision on curatorship is taken, unless communication with this person is impossible. The person with disability may determine a candidate who can be a curator.

3 Please note that Article 600 of the Polish Civil Procedure Code on establishing a curator for a person with disabilities will have been amended as a result of the Act of July 28, 2023 on amendment of the FGC and some other acts, Journal of Laws 2023, item 1606. This amendment comes into force on February 15, 2024.

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many other public laws, in particular those pertaining to social welfare, electoral law or making the practice of certain professions conditional on full active legal capacity.

Civil Code provisions on active legal capacity and on incapacitation in particular, have not been amended since the Code's entry into force on January 1, 1965.

The condition precedent for transposing the CRPD into Polish law should be the assumption of the model of its interpretation it is to rest on. The following considerations will be based on the solutions in force in the vast majority of the examined legal systems, assuming that in exceptional situations, after meeting the criteria set out in CRPD Article 12, and that it will be permissible to use substitute institutions, in which curators, guardians, carers or assistants can become representatives with the competence to act on behalf of persons with disabilities whose capacity for independent action may be limited.

This suggests that not all CRPD Article 12 substitution mechanisms, and not in every case, are conceived as the expression and consequence of depriving persons with disabilities of active legal capacity.

This interpretation of CRPD Article 12 turns substitution mechanisms into 'measures related to the exercise of legal capacity' within the meaning of this CRPD provision. The proposed model of interpretation is in line with Poland's understanding of CRPD Article 12, as is evident from the content of its submitted interpretative statement to this CRPD provision and as held in Polish civil law doctrine.[4] As an aside, it should also be noted that the implementation model assuming the total abandonment of substitutive solutions exists only at the level of very general assumptions, or rather ideas, the full implementation of which would lead to results that are in fact contrary to the underlying objectives and values of CRPD Article 12. It should be emphasised that the root and branch abandonment of substitutive mechanisms by persons with disabilities prevents them from performing legal acts when it is objectively impossible to ascertain their will in any respect. As a consequence, the complete elimination of substitutive mechanisms for performing legal acts prevents persons with disabilities from participating in civil legal transactions and deciding on issues related to their personal affairs such as, for example, consenting to various medical procedures. The rejection of substitutive mechanisms for the performance of legal acts by persons with disabilities does not result in their inclusion in civil law relations but in their exclusion. Regulations defining the scope of application of substitutive mechanisms of performing legal acts should, on the one hand, correspond to the objectives of CRPD Article 12 and, on the other hand, harmonise with the private law system, be operative and respond to the needs of persons with disabilities participating in legal transactions.

Incapacitation – a sensitive taxonomical issue

Incapacitation, as the deprivation of the ability to produce legal effects by one's own declaration of will, has a long tradition in Polish private law, and in this respect, it does not

4 M. Domański, Konwencja ONZ o prawach osób niepełnosprawnych w interpretacji Komitetu do spraw praw osób niepełnosprawnych a podstawowe instytucje prawa cywilnego, *Prawo w Działaniu* 2019, no. 40, p. 152; T. Pajor, Ochrona osób niepełnosprawnych a ubezwłasnowolnienie, in: *Studium nad potrzebą ratyfikacji przez RP Konwencji o prawach osób niepełnosprawnych,* ed. K. Kurowski, Wydawnictwo Kurza Stopka J. Tyluś Malak, Łódź, 2010, p. 84; M. Pyziak-Szafnicka, Ubezwłasnowolnienie jako środek ochrony osób dotkniętych chorobami otępiennymi i chorobą Alzheimera – aktualna regulacja i projektowane zmiany, *Studia Prawno-Ekonomiczne* 2019, vol. CXI, pp. 70–71 and 76; M. Wilejczyk, *Zagadnienia etyczne części ogólnej prawa cywilnego,* Wydawnictwo C.H. Beck, Warsaw, 2014, pp. 158–159; K. Zaradkiewicz, Ubezwłasnowolnienie – perspektywa konstytucyjna a instytucja prawa cywilnego, in: *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka,* ed. D. Pudzianowska, Wolters Kluwer SA, Warsaw, 2014, p. 205.

deviate from the traditional solutions extant in the *civil law* legal tradition. This also applies to the name.[5] The issues of naming legal institutions are sometimes highly debatable. This applies in particular to certain names used to denote private law institutions. On the one hand, their use is hallowed by long-standing tradition, with their precisely established meanings and presence throughout the legal system, acting as buzzword-passwords of a sort by means of which the legislator refers collectively to whole groups of legal provisions. For private law specialists, they do not evoke negative connotations due to familiarity with their exact connotations. But the names of institutions, hallowed by long-standing tradition, naturally become archaic. By way of example, one can cite such terms as 'annuity' (*dożywocie*), which now, in the common Polish parlance of today, denotes a life sentence. The archaic nature of the name of a particular institution is in itself nothing negative. Sometimes, however, an archaic word may arouse pejorative connotations some, and such is the case with the word *ubezwłasnowolnienie* used in Polish legalese and jurisprudence to denote deprivation or limitation of active legal capacity. With lawyers specialising in private law, this designation is associated with an institution whose purpose is to assist persons with disabilities and to ensure their independent and guaranteed participation in civil law transactions to the utmost extent possible. For this reason, the term 'incapacitation' does not have a negative ring for private law practitioners in regard of those it applies to. However, communities of persons with disabilities, including their loved ones, have for many years raised objections to the word 'incapacitation' as stigmatising and associated with punishment as used in criminal law. It cannot be ruled out that this is due to the fact that, in the distant past but familiar from *belles lettres*, the deprivation of active legal capacity was automatically associated with capital punishment and could also be used in reference to other types of punishment.[6] Taking into account the point of view and sensitivities of persons with disabilities, two solutions can be proposed regarding the designation 'incapacitation': either a social campaign[7] aimed at eliminating it should be mounted, or at least one aimed at reducing the stigmatising character of this label, or abandoning the word

5 In Articles 489–521 of the Civil Code of the Kingdom of Poland of 1825, the shape of which was the result of the reception of the solutions of the Napoleonic Code in its original form, the notion of 'deprivation and restriction of one's own will' was used to define deprivation and restriction of active legal capacity: J. J. Litauer, *Prawo cywilne obowiązujące na obszarze b. kongresowego Królestwa Polskiego z dodaniem ustaw uzupełniających i związkowych oraz orzecznictwa sądów kasacyjnych,* Księgarnia F. Hoesicka, Warsaw, 1923, pp. 98–105. In the area where the Austrian Civil Code (ABGB) was in force, in the Imperial Decree of 28 June 1916, no. 207 Dpp. on incapacitation (Ordinance on Incapacitation), the concepts of 'total incapacitation' and 'partial incapacitation' were used to define the deprivation and limitation of active legal capacity: *Kodeks cywilny zawierający obowiązującą w okręgach Sądów Apelacyjnych w Krakowie i Lwowie oraz Sądu Okręgowego w Cieszynie ustawę cywilną, ustawy i rozporządzenia dodatkowe, z uwzględnieniem ustawodawstwa polskiego oraz orzecznictwa Sądu Najwyższego*] (translated by W. Dbałowski, J. Przeworski), Księgarnia F. Hoesicka, Warsaw, 1927, pp. 266–284. In § 6, § 114, § 115 of the original German Civil Code (BGB) of 1896, the concepts of 'declaring underage' and 'incapacitation' were used to describe the deprivation and restriction of active legal capacity: W. Zieliński, *Niemiecki Kodeks Cywilny obowiązujący od 1 stycznia 1900,* Katolik Spółka Wydawnicza z o.o., Bytom, 1900, pp. 2 and 21–22.

6 Cf. Art. 500 and partly Art. 501 of the Civil Code of the Kingdom of Poland of 1825, the shape of which was the result of the reception of the solutions of the Napoleonic Code, but which were not applied in practice on Polish soil: J. J. Litauer, *Prawo cywilne obowiązujące na obszarze b. kongresowego Królestwa Polskiego z dodaniem ustaw uzupełniających i związkowych oraz orzecznictwa sądów kasacyjnych,* Księgarnia F. Hoesicka, Warsaw, 1923, p. IV and p. 101.

7 This refers to a social campaign along the lines of the one conducted in Poland to eliminate the stigmatising nature of depression ("Depression. You understand – You help"), https://www.gov.pl/web/zdrowie/depresja-rozumiesz-pomagasz-konferencja-prasowa-inaugurujaca-kampanie, accessed April 12, 2023.

altogether and adopting a designation of neutral character on the back of a social campaign aimed at preventing negative associations and stereotypes from arising in reference to the new name of an institution aimed at including persons with disabilities in society. If the second postulate were to be taken, the use of the terms 'establishment of guardianship' and 'appointment of a guardian' seems worth considering.

Systemic procedural issues regarding support for the legal capacity of adults

Based on the current Polish regulation on measures 'related to the exercise of legal capacity', it should be incontrovertibly postulated that their application, as well as their supervision and control, should be left to the competence of common courts, which should take into account the will, preferences, property and non-property interests of the person with disabilities.[8]

However, it would seem necessary to simplify the procedure in deciding the admissibility of instituting support and its type for a person with disabilities by introducing a single procedure in which a specific type and scope of guardianship with the appointment of a guardian with specifically defined powers. The abolition of separate proceedings for incapacitation (or aimed at applying another, modified measure) would simplify the procedure, reduce the number of proceedings and eliminate the likelihood of a legal void (in terms of representation) arising in the period between the date the decision on incapacitation becomes final and that of when the appointed guardian takes up his/her duties. This was the solution proposed by the Civil Law Codification Commission in the period 2012–2015.

The elimination of the stage of proceedings aimed exclusively at the limitation of legal capacity opens up the question of the functional-procedural specificity of proceedings in which adequate measures could be applied to ensure that persons with disabilities can independently participate in civil legal transactions to the extent commensurate with their capacities. It could be proposed, on the model of the solutions proposed by the Civil Law Codification Commission, that this should take place in guardianship proceedings. Firstly, the family and juvenile divisions of lowest instance courts, closest to the places of residence of the persons concerned, seem to be appropriate due to the specificity of the proceedings aimed as they are at supporting persons with disabilities. This specificity determines the need for specific competences of the adjudicators, including not only legal knowledge, but also psychological knowledge, making it possible, for example, to hear persons with mental or intellectual disabilities. Secondly, there are a number of procedural solutions in guardianship proceedings leading to their deformalisation and facilitating the fulfilment of the guardianship's aims and purposes, in particular by giving courts the broad possibility to act *ex officio*, putting time-bars on the duration of the validity of rulings, and enabling action to be taken in urgent cases also by courts that are inappropriate in regard of local jurisdiction. Thirdly, the teams of probation officers, the auxiliary bodies operating in district courts, have a crucial role to play in personal law proceedings. Their participation should be of moment in proceedings concerning the active legal capacity of persons with disabilities. Family and juvenile divisions are exclusive to district courts, so only at this level can cooperation with probation officers be of ongoing concern.

A solution, correct from the point of view of CRPD Article 12.4, which fits in well with the Polish systemic tradition, relates to the permanent supervision of the instituted guardianship measures by the guardianship courts, to be effected by persons appointed for this purpose

8 Cf. P. Machnikowski, Instytucja opieki nad pełnoletnim w pracach Komisji Kodyfikacyjnej Prawa Cywilnego w latach 2012–2015, *Państwo i Prawo* 2019, no. 4, p. 140.

from the milieu of persons with disabilities or from the court guardianship service. The prospect of demographic changes, in particular the ageing of the population and the expected sharp increase in the number of people who will be enjoying the services of various support institutions,[9] may lead, despite the expansion and necessary reinforcement of the family court judiciary, to the need to seek solutions that reduce the direct burden and involvement of family judges in the day-to-day supervision of the interests of people with disabilities. This pressure could be alleviated by entrusting certain activities (under court supervision or by court order, of course) to probation officers or administrative units responsible for family support.

2. Specific solutions

a. Substantive law solutions

A reflection on the transposition of CRPD Article 12.4 into Polish law suggests that by far the most significant changes should concern material legal solutions. At present, in Polish private law, there is a multiplicity of institutions and measures related to the exercise of active legal capacity by persons with disabilities. It seems that alignment with the CRPD Article 12.4 standard should consist in replacing the various institutions employed in various proceedings regarding full or partial guardianship, by a single institution-guardianship for adults, the final shape of which would be dictated by the court, within the bounds of the law and commensurate with the disability and the ability of the person in question to independently exercise active legal capacity. We believe the regulation of guardianship and curatorship for adults should be inserted into the Family and Guardianship Code, as a separate section of its Title III.[10]

Among the types of guardianship to be established, there should be purely assistance-orientated solutions, where the appointment of a guardian would only aim at providing support in making decisions or carrying out activities, but without giving the guardian the competence of a legal representative. Here, a person with a disability could have the option of whether or not to grant the guardian a power of attorney if, in the ward's opinion, he or she needs the assistance of another person to act as his or her proxy. Such an assistant guardianship would not lead to a limitation of the ward's capacity for legal action independently.

In our opinion, solutions based on parallel representation as is assistant-representative guardianship should also be introduced. Such a solution would result in the guardian obtaining the ability to perform, to a certain extent, acts for the ward, but without limiting that ward's ability to perform these acts.[11]

9 Cf. P. Błędowski, Starzenie się jako problem społeczny. Perspektywy demograficznego starzenia się ludności Polski do roku 2035, in: *PolSenior. Aspekty medyczne, psychologiczne, socjologiczne i ekonomiczne starzenia się ludzi w Polsce*, eds: M. Mossakowska, A. Więcek, P. Błędowski, Termedia Wydawnictwa Medyczne, Poznań, 2012, p. 11–23; T. Błędowski, J. Chudek, T. Grodzicki, M. Gruchała, M. Mossakowska, A. Więcek, T. Zdrojewski, Wyzwania dla polityki zdrowotnej i społecznej. Geneza projektów badawczych PolSenior1 i PolSenior2, in: *Badanie poszczególnych obszarów stanu zdrowia osób starszych, w tym jakości życia związanej ze zdrowiem,* eds: T. Błędowski, T. Grodzicki, M. Mossakowska, T. Zdrojewski, Gdański Uniwersytet Medyczny, Gdańsk, 2021, p. 19–25.

10 P. Machnikowski, Instytucja opieki nad pełnoletnim w pracach Komisji Kodyfikacyjnej Prawa Cywilnego w latach 2012–2015, *Państwo i Prawo* 2019, no. 4, p. 136.

11 Solutions meeting those requirements will have been applied as a result of amendments of Article 183 of the Polish Family and Guardianship Code and Article 600 of the Polish Civil Procedure Code, coming into force on February 15, 2024. However, these amendments concern a curatorship for persons with disabilities only. The new solutions which correspond to CRPD Article 12 standard are not of general character. Thus, the regulations concerning incapacitation remain unchanged. It is difficult to predict whether the amended regulations will replace the incapacitation in practice.

There should also be statutory substitution mechanisms (representative guardianship), which would result in facilitating the execution of certain acts either by the ward only with the consent of his or her guardian or by the guardian acting as the ward's representative. The rationale for the use of substitution mechanisms should be framed in such a way that these mechanisms are used by way of exception in particularly justifiable cases. At the very least, the law should give generic indication of the legal acts that are of particular importance to the property or non-property interests of the ward, which should be taken into account by the court in the process of customising *in concreto* the substitution mechanism to be applied to the ward. Such a solution may both contribute to the harmonisation of jurisprudence in similar cases and to the observance of the principle of equal treatment of persons with disabilities in similar circumstances and allows to adjust the scope of restrictions attendant on the elected substitution mechanism to the needs resulting from specific disabilities.

An issue to be considered is to what extent the model of the solution applied by a court as a 'measures relating to the exercise of legal capacity' should be defined by law and to what extent this definition should be left directly to the discretion of the court. Taking into account the need to find a compromise between certainty of legal transactions and flexibility of the instruments used, an intermediate solution might be recommended. The law should specify the legal effects of different types of guardianship, which a court could modify or supplement its order by defining the catalogue of acts requiring the guardian's participation in a way that deviates from the letter of the law. It should also be determined whether it is permissible for a court to appoint a representative for an adult who has not previously appointed such a representative for himself or herself and who, for factual reasons, is unable to make a declaration of intent (for example, due to being in a coma) to carry out a specific action in a situation where its urgent performance on his or her behalf and in his or her interest is necessary. It is therefore not a question of specifying the duration of permanent care but of appointing an *ad hoc* representative who, in accordance with the court's instructions, could perform specific acts.

The wording of CRPD Article 12.4 makes it unequivocally clear that constraints on the exercise of legal capacity should be imposed for the shortest possible time. It should be desired that temporary guardianship should be enshrined as a non-negotiable principle, and the period for which it is imposed should not exceed five years.[12] At the same time, it seems that where the ward's disability is permanent and gives no hope of improvement (e.g. in the case of intellectual disability), it should be possible, by way of absolute exception, to prescribe guardianship of open-ended duration, especially if requested by the person for whom it is to be established (on the assumption, of course, that it can be reversed or modified at any time either *ex officio* or at the request of the ward in question). The impossibility of establishing guardianship of open-ended duration may expose persons with disabilities which are irremovable within a reasonable timeframe according to the prevailing state of knowledge, to the need to undergo pointless medical examinations in order to check whether their state of health has improved.

The principle of subsidiarity of the right of interference with active legal capacity should be unequivocally stressed in substantive law. Assisted solutions should be employed to the maximum extent possible, and only when they prove unavailing due to the state of health and incontrovertible circumstances, should there be recourse to substitute solutions. The general principle should be to maximise the protection of the active legal capacity of a

12 Cf. P. Machnikowski, Instytucja opieki nad pełnoletnim w pracach Komisji Kodyfikacyjnej Prawa Cywilnego w latach 2012–2015, *Państwo i Prawo* 2019, no. 4, pp. 139–140.

person with disabilities and to maximise that ward's possibility to manage his or her own affairs, or at least to co-determine them.[13]

Legal solutions in the form of different types of guardianship for adults established by the courts should be supplemented by the possibility of granting guardianship powers of attorney, and the most appropriate place for its regulation would be the Civil Code where it deals with powers of attorney.[14] The private law provisions should explicitly provide for the possibility of adults to grant special powers of attorney to other persons with specification of their standard and maximum scope. The effectiveness of a guardianship power of attorney would be conditional on the state of health (intellectual capacity) deteriorating to the extent that it prevents the ward *qua* principal from performing any of the legal acts covered by its scope independently. The basic problem is to regulate the mechanism of the emergence of the possibility to perform legal acts on the basis of a guardianship power of attorney. Firstly, it is possible to adopt a public law mechanism, triggering guardianship powers of attorney by court order, due to the need to perform legal acts on its basis. Such a solution protects against abuse and provides security for the person granting such powers of attorney. However, it leads to the formalisation of an institution which, by definition, should empower a representative of a person with a disability to act on his or her behalf without the involvement of public authorities. Consequently, making the effects of a guardianship power of attorney dependent on a court ruling could result in the institution being little different from the establishment of a guardianship. Secondly, it should be stated that the objectives behind making the effects of a guardianship power of attorney conditional on a court ruling can also be achieved by means of a non-judicial mechanism, e.g. by having a notary determining the effectiveness of the power of attorney on the basis of a medical certificate identifying the existence of symptoms on which the effectiveness of the guardianship power of attorney depended.[15] Providing for the possibility of granting guardianship powers of attorney without court involvement could lead to a reduction of the burden weighing on the courts and to the consistent implementation of a mechanism of a private law nature. However, this solution carries the risk of the institution being used to the disadvantage of the ward. Regardless of the solution adopted, the actions of the guardianship attorney, at least to some extent, should also be subject to the supervision of the guardianship court. For this reason, the legal effects of a power of attorney as they come to light should be linked to the provision of appropriate information to the public authority competent to supervise the guardianship attorney.

An extremely important element of the substantive legal regulation of guardianship for an adult should be the definition of criteria enabling the selection of the right person to act as guardian. The substantive legal regulation should unambiguously emphasise the priority of appointing as guardian the person designated by the person most concerned, i.e. the ward-to-be,[16] the person to be assisted. In the absence of such designation, and where it is not possible to establish the ward-to-be's preference, or where his/her choice of guardian cannot be met

13 Cf. P. Machnikowski, Instytucja opieki nad pełnoletnim w pracach Komisji Kodyfikacyjnej Prawa Cywilnego w latach 2012–2015, *Państwo i Prawo* 2019, no. 4, pp. 138–139.

14 P. Machnikowski, Pełnomocnictwo opiekuńcze w pracach Komisji Kodyfikacyjnej Prawa Cywilnego w latach 2012–2015, *Rejent* 2016, no. 5, p. 52.

15 Such a proposal was included in the draft of the Polish Commission for the Codification of Civil Law. Cf. P. Machnikowski, Pełnomocnictwo opiekuńcze w pracach Komisji Kodyfikacyjnej Prawa Cywilnego w latach 2012–2015, *Rejent* 2016, no. 5, p. 56.

16 Solutions meeting those requirements will have been applied as a result of amendments of Article 183 of the Polish Family and Guardianship Code and Article 600 of the Polish Civil Procedure Code, coming into force on February 15, 2024. However, these amendments concern a curatorship for persons with disabilities only.

(for example, because the nominated person does not meet the criteria for the appointment or is deemed unequal to the task, or himself/herself has a guardian), provision should be made for the appointment of a guardian chosen by a court acting in the interest of the ward.

Likewise, with regard to the exercise of guardianship in both formal (legal) and practical *de facto* actions, a clear rule could be introduced whereby the guardian should be obliged to consult his/her decisions with the ward, to inform him/her of the actions taken, and in principle to take the ward's position into account,[17] unless it threatens to harm or seriously endanger the ward's non-material interests. In the absence of an opportunity for the ward to express a preference, the guardian should act in accordance with the ward's will insofar as it can be determined.

b. Process changes

The changes should also extend to the proceedings themselves for the establishment of a guardianship (or its change or revocation). It is of the essence to find a solution that ensures that the ward-to-be and his/her appointed guardian, may participate by law in proceedings (with all due procedural capacity) for a change or revocation of the guardian himself/herself or of terms of the guardianship as such.

In the current state of the law, participation by operation of law is expressly granted to a person subject to an application for guardianship only in guardianship proceedings (CPC Art. 546.1.1).[18]

A solution curtailing the formal constraints on persons with disabilities to take action in proceedings for the establishment of guardianships and the appointment of guardians, and exempting them from court costs, should be purposefully introduced. It should also be made possible, to a large extent, to use a court-appointed lawyer, whose fees should be covered by public funds. The court should be able to grant such legal aid *ex officio* even without a request from the person affected. Such possibility, according to the current regulations of civil proceedings in guardianship cases, is available in very few categories of cases (CPC Art. 519[1]). The admissibility of a cassation appeal should definitely be introduced in the proposed cases for the establishment of a guardianship and the appointment of a guardian for an adult. This is obvious given the social importance of the planned proceedings, as well as the need to develop and ensure consistency in case law. It should be noted that a cassation appeal is currently available in guardianship cases.

c. Consequences of establishing guardianship

Without doubt, the most difficult issue related to the abolition of guardianship and the introduction of new institutions related to the exercise of legal capacity is the determination of the consequences of the establishment of a guardianship. As stressed many times

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The new solutions which correspond to CRPD Article 12 standard are not of general character. Thus, the regulations concerning incapacitation remain unchanged.

17 Solutions meeting those requirements will have been applied as a result of amendments of Article 183 of the Polish Family and Guardianship Code and Article 600 of the Polish Civil Procedure Code, coming into force on February 15, 2024. However, these amendments concern a curatorship for persons with disabilities only. The new solutions which correspond to CRPD Article 12 standard are not of general character. Thus, the regulations concerning incapacitation remain unchanged.

18 Cf. K. Korzan, *Postępowanie nieprocesowe,* Wydawnictwo C.H. Beck, Warsaw, 1997, p. 307, Nb 493; P. Rylski, *Uczestnik postępowania nieprocesowego – zagadnienia konstrukcyjne,* Wolters Kluwer Polska SA, Warsaw, 2017, p. 180; J. Bodio, in: *Kodeks postępowania cywilnego. Tom I. Komentarz do art. 1–729,* ed. A. Jakubecki, Wolters Kluwer Polska SA, Warsaw, 2017, commentary to Article 559, p. 930, Nb 6.

earlier, incapacitation, apart from limiting or depriving of legal capacity, has far-reaching consequences in the private legal domain (e.g. the prohibition of marriage for a person under full guardianship, the compulsory separation as to property if the person under guardianship is a spouse with joint property, termination of parental authority if the parent of a minor is incapacitated) and in the public law domain (if one is unable to perform various functions or qualify for certain professions).

Given the vast number of references to incapacitation in numerous specific laws, it is not possible for a court to refer to each of them when establishing guardianship and expressly prejudging whether the person for whom the guardianship is being established, for example, is to have the capacity for action in certain professions or not. The only possible solution is to adopt a more universal mechanism. As a preliminary point, it should be emphasised that it is not possible to adopt a solution whereby the establishment of a guardianship, regardless of its type, for example, has no impact on the scope of the parental authority of the ward (which, after all, subsumes the duty and right to represent the child) or the possibility of practising as a lawyer or notary, whose duties, to a fundamental extent, consist in performing material and procedural acts on behalf of the persons they represent.

It should be proposed to distinguish and differentiate between the effects of a purely assisted guardianship (which does not limit the capacity of the person for whom it is established) and of a substitute guardianship.[19] In the first case, the establishment of a guardianship should not, in principle, affect the possibility of exercising any rights or functions that depend on legal capacity, unless there is an exceptional situation, for example, concern for the welfare of a minor. In the case of establishment of a substitute guardianship, however, the opposite solution should be adopted which presupposes that its establishment pulls in train effects such as would, currently, an incapacitation ruling. Consequently, the establishment of a substitute guardianship would generally prevent the exercise of rights and functions that depend on full legal capacity. However, a solution should be put in place that would make it possible, at the request of the ward, for a court to decide that in a particular case certain effects of the guardianship can be excluded and that the ward, for example, can take part in elections or practice a particular profession.

The issue can only be touched upon here, but in the context of the changes concerning the consequences of incapacitation, the regulations on parental authority, for example, should be examined. It seems that even if a parent for whom a guardian (surrogate) has been appointed is unable to perform legal acts on behalf of his/her child, they should not automatically lose the possibility to take custody of the child. The family law system should include more nuanced solutions in this respect, allowing for the development of solutions corresponding to specific factual situations. The current regulation seems too rigid, lying down that a parent either has full legal capacity and full parental authority or, lacking such capacity, has no parental authority at all and loses all its attributes.

Under current Polish law, there is no register of incapacitated persons. Although the decision on incapacitation is constitutive and, as a legal event, may have effects in the legal domain of third parties, the disclosure of the fact of incapacitation actually depends on the

19 The amendments of Article 183 of the Polish Family and Guardianship Code and Article 600 of the Polish Civil Procedure Code, coming into force on February 15, 2024 meet these expectations to a limited extent. These amendments concern a curatorship for persons with disabilities only. The new solutions which correspond to CRPD Article 12 standard are not of general character. The regulations concerning incapacitation remain unchanged.

incapacitated person or their guardian. In view of the forecasted increase in the number of persons requiring support, as well as the planned changes aimed at making guardianship an institution with more heterogeneous consequences, positing the introduction of a public register of persons for whom a substitute guardianship has been established would be very timely. It seems there is no need for mandatory registration of assisted care. Such registration could be optional and made at the request of the person for whom it has been established or at the request of the guardian. This is justified insofar as the introduction of a guardianship power of attorney must also be tied to the creation of a register in which it, or anything giving it effect subsequently, should be entered.[20]

Because of the potential stigmatisation of persons for whom a guardianship has been established, the register (covering guardianship and appointed guardians) should be kept on a classified disclosure basis. It should be accessed primarily by courts, notaries, bailiffs or heads of registry offices.

3. Summary

Almost 11 years have passed since Poland ratified the CRPD. Despite repeated attempts to bring national solutions in line with the Convention's standard, apart from the amendment concerning Article 183 of the Polish Family and Guardianship Code and Article 600 of the Polish Civil Procedure Code which will have come into force on February 15, 2024 none have succeeded. This state of affairs indicates how complicated it is to design and carry out an amendment that touches upon the foundations of civil law, as well as being of inordinate importance in the context of public law.

The impetus for change should be provided not only by the standards set by the CRPD but also by the forecasted increase in the number of adults who will require various types of support due to assorted degrees of disability and the identified shortcomings in its current regulation. In the space of the decade and more since the Convention came into effect, solutions to modernise the system of 'measures related to the exercise of legal capacity' have been developed and implemented in many countries. These models are available and designing optimal regulations is now easier than it was just a few years ago. An overview of these models is provided in the comparative legal section of this book.

In conclusion, it should be emphasised that even the best substantive and procedural solutions cannot function properly or optimally implement support for persons with disabilities if their introduction is not coordinated with the inevitable structural and organisational changes that must come simultaneously. It is necessary to reinforce family courts (in terms of staffing as of anything else), to increase the non-legal competences of their judges and to reinforce and improve the functioning of auxiliary services, viz. those of probation officers and the whole system of family support and social care.

20 Cf. P. Machnikowski, Pełnomocnictwo opiekuńcze w pracach Komisji Kodyfikacyjnej Prawa Cywilnego w latach 2012–2015, *Rejent* 2016, no. 5, pp. 54–55.

Part IV

Active legal capacity – non-legal aspects (psychological, psychiatric and diagnostic aspects)

36 Active legal capacity and its restrictions – psychological aspects

Magdalena Błażek and Agnieszka Wojtecka

1. Epidemiology of personality disorders

The aim of epidemiological studies is to determine the prevalence of particular health problems in a study group over a specific period. According to the World Health Organization (WHO), one in eight people worldwide suffer from mental disorders. There are many different types of mental disorders, including cognitive, psychotic, organic mental, emotional, behavioural regulation or personality disorders.[1] The report 'Health at Glance: Europe 2018' says that approximately 84 million EU citizens (17.3%) have suffered from a mental condition. Mental problems are most prevalent among the Finns, the Dutch and the French (approx. 19% of the population). On the other hand, Poles, Romanians and Bulgarians are affected to a lesser extent (less than 15% of the population). The reason for such a difference may not be the better health condition of the inhabitants of Central or Eastern Europe but rather the underdeveloped health culture related to mental and emotional health problems – i.e. citizens' low level of awareness, inability to notice health problems, the stigmatisation of people with mental health problems and inadequate access to relevant specialists.[2]

Mental disorders are a growing concern. According to the estimates presented by the WHO, mental and behavioural disorders in men in Poland are the second (17%) and in women in Poland the third (14.4%) group of reasons related to YLDs (years lived with disability).[3]

Epidemiological studies of personality disorders classified by individual units are rarely conducted. In 2018, Volkert performed a meta-analysis of 10 studies, including 113,998 subjects. The results indicated that people with any personality disorder account for 9% to 12% of the general population of the Western Europe.[4] In Poland the prevalence of personality disorders is at a similar level. About 9% of the surveyed adults aged 18–65 had at least one personality disorder. The most common personality disorders are

1 World Health Organisation, Mental Disorders, https://www.who.int/news-room/fact-sheets/detail/mental-disorders, accessed October 3, 2022.

2 OECD/EU, Health at a glance: Europe 2018, *State of health in the EU cycle*, 2018, https://health.ec.europa.eu/system/files/2020-02/2018_healthatglance_rep_en_0.pdf.

3 World Health Organization, *Global health estimates 2016: Disease burden by cause, age, sex, by country and by region, 2000–2016*, World Health Organization, Geneva, 2018, https://www.who.int/data/global-health-estimates, accessed October 3, 2022.

4 Jana Volkert et al., 'Prevalence of personality disorders in the general adult population in Western countries: systematic review and meta-analysis.' The British journal of psychiatry: the journal of mental science vol. 213,6 (2018): 709–715. doi:10.1192/bjp.2018.202

DOI: 10.4324/9781003463016-41

obsessive-compulsive (anankastic) (9.6%), narcissistic (7%) and borderline (7%). personality disorders, which may coexist.[5]

Mental disorders generate significant costs for medical healthcare. In European Union countries the total expenditure on mental health problems is estimated at over EUR 600 billion, or over 4% of GDP, including direct healthcare expenses of EUR 190 billion, social security programs of EUR 170 billion, and EUR 240 billion to be covered by the labor market due to sick leave or decline in productivity. The Polish system of psychiatric healthcare does not have sufficient resources and therefore is unable to respond effectively to needs. The prevailing care is provided in a hospital setting, instead of the recommended community care. The National Health Fund (NFZ) expenditure is lower than the level recommended by the EU. In Poland, it amounts to 3.4% of the total funds designated for health services instead of the proposed 5.0%.[6]

2. Characteristics of personality disorders

Introduction

The term personality is understood as a pattern of mental traits, automatically manifested in the psychological sphere of human functioning. In colloquial language, this term is sometimes used interchangeably with the concept of character and temperament yet, they actually have different meanings.

Character is related to the traits acquired in the process of an individual's upbringing. It is associated with the tendency to change behaviour in order to adjust to the standards of a particular social group, such as habits, customs and prevailing behaviour. On the other hand, temperament is connected with innate, hereditary tendencies to display specific behaviour, it is manifested in the dominant mood or emotionality of a given person and their activity. Temperament is the biological ground on which personality develops. In order to better understand the concept of personality disorders one should analyse how this term was coined. The term personality derives from the Latin word *persona*, meaning a theatrical mask used by actors in theatre performances. Persona was used to portray some traits that a particular actor did not possess. Over time, the meaning of the word changed, losing the reference to illusion and adopting the real characteristics of a person. The ultimate meaning of *personality* refers to the hidden psychological characteristics of a person.[7] The classic concept of personality proposed by Sigmund Freud is based on a structural model of the psyche composed of the id, the ego and the superego. The id is composed of innate drives and instincts necessary for survival. The id operates based on the pleasure principle. The superego, which is mainly unconscious, represents ideals, moral principles and internalised social values passed on and instilled by parents/caregivers. In turn, the ego is the conscious part that refers to the perception of oneself. The ego appeals to reality

5 Gawda Barbara, Czubak Katarzyna. Prevalence of Personality Disorders in a General Population Among Men and Women, *Psychological Reports*, vol. 120,3 (2017): 503–519. doi:10.1177/0033294117692807

6 *Sytuacja zdrowia psychicznego w Polsce*, Informacja Sekcji Ochrony Zdrowia Narodowej Rady Rozwoju, 9 luty 2016 r., https://www.prezydent.pl/storage/file/core_files/2021/8/5/eaf12a475889b3f67df0091930ab4309/rekomendacje_dot_zdrowia_psychicznego.pdf, accessed October 7, 2022.

7 MillonTheodore, Davis Roger et al, *Zaburzenia osobowości we współczesnym świecie*, Instytut Psychologii Zdrowia, Polskie Towarzystwo Psychologiczne, Warsaw, 2005, pp. 1–3.

and decides between what the id wants and what the superego is limited by. Personality style is simultaneously a style of coping with reality.[8]

Personality features are present in every person and are fixed manners of thinking, experiencing the environment and building relations with others. Personality disorders are collections of traits that have become rigid and therefore limit how a person functions or cause their suffering.[9] Personality disorders include deeply rooted and fixed patterns of behaviour, manifested by inflexible responses to a variety of individual and social situations. These patterns are characterised by significant or extreme differences in comparison with a culture's typical means of relation building, perception, thought and feeling. Moreover, they are permanent and relate to many scopes of psychological functioning. They are characterised by an early onset of the first symptoms, usually in the second decade of life, and they are holistic – i.e. they affect many different areas of personal, professional and social life. Sometimes they may be the reason that a person with a personality disorder suffers and may hinder their achievement of goals. Such a perception of personality disorders has been adopted in the ICD-10 (Classification of Mental and Behavioural Disorders). In Poland, the ICD-10 is currently the recognised classification tool used in public statistics, in medical records and for health services funded by the taxpayer – i.e. the National Health Fund (NFZ). The criteria for a diagnosis of personality disorders usually include from 6 to 9 points relating to the traits, attitudes or behaviour characteristic of a particular disorder.[10] In February 2022, a version of the ICD-11 classification was approved for use by the member states of the European Union (EU), and it is going to be introduced into the Polish health system. The new classification describes personality disorders as

> characterised by the impairment of self (e.g., identity, self-esteem, self-image accuracy, self-direction) and/or interpersonal personality functioning (e.g., the ability to form and maintain close and mutually satisfying relationships and relations, the ability to understand other people's point of view or to cope with conflicts in relationships) that persist over a longer period of time (e.g., 2 years and more).

Both classifications stress that personality disorders develop during the growing period and have features that are not typical for this particular stage. They appear in childhood, adolescence or finally adulthood. A novelty in the classification of personality disorders in accordance with ICD-11 is the determination of severity (mild, moderate, severe). Moreover, the concept of 'personality disorders and related traits' has been introduced, distinguishing leading personality traits or domains, such as detachment from reality, dissociality, anankastic personality, negative affectivity and borderline pattern.[11]

When describing personality disorders the American *Diagnostic and Statistical Manual of Mental Disorders* (*DSM-5*) classification should be mentioned, which is not officially accepted in the Polish system, but due to its high quality and precision, it is often used as

8 Gabbard Glen, *Psychiatria psychodynamiczna w praktyce klinicznej, Wydawnictwo Uniwersytetu Jagiellońskiego, Wyd. II zgodne z DSM – 5*, Kraków, 2015, pp. 47–49.

9 Morrison James, *DSM-5 bez tajemnic. Praktyczny podręcznik dla klinicystów*, Wydawnictwo Uniwersytetu Jagiellońskiego, Wyd. I, Kraków, 2016, p. 584.

10 *Klasyfikacja zaburzeń psychicznych i zaburzeń zachowania w ICD – 10. Opisy kliniczne i wskazówki diagnostyczne*, Uniwersyteckie Wydawnictwo Medyczne 'Vesalius', Kraków – Warszawa 1998, pp. 169–179.

11 *Badanie stanu psychicznego. Rozpoznania według ICD-11*, eds. Gałecki Piotr, Edra Urban & Partner, Wrocław 2022, p. 193.

an aid in diagnosis and classification of disorders in countries where ICD-10 is applied. It may also be treated as a point of reference for the newly developed ICD-11.[12]

Otherwise stated, personality disorders are abnormal patterns of behaviour, fixed in adult life.

Diagnosis of personality disorders

Diagnosis of personality disorders is fraught with various problems and is often a time-consuming procedure. One of the problems is the difficulty in objectively distinguishing the norm from the pathology, which, on the one hand, makes it possible to overlook personality disorders and, on the other hand, to over-diagnose them. The norm and pathology of a given trait may constitute a certain continuum – i.e. normal behaviour can turn into a personality disorder. For instance, assertiveness turns into aggression or submission turns into masochism. Nevertheless, it is assumed that personality disorders should have three features of pathology. The first is stability of behaviour (lack of flexibility in stressful situations and an inability to look for other solutions when a given approach fails). The second feature is the inability to adapt (recognise the situation, assume different social roles, better adapt to the environment). The third trait is functioning in a vicious circle or continuous repetition of pathological behaviour.[13]

When diagnosing personality disorders, one should follow certain general rules that are helpful to establish a proper diagnosis.

1. Checking the duration of symptoms, whether they have been present since early adulthood. Diagnosis of personality disorders is unlikely before the ages of 16 or 17. The source of data, apart from the patient's history, may also be interviews with third parties (family members, friends, co-workers).
2. Determination whether symptoms affect several areas of life, including work, family, social, personal areas. At times patients do not perceive their behaviour as problematic, therefore difficulties in collecting the history may arise.
3. Verifying whether the patient qualifies for a particular diagnosis.
4. Exclusion of another mental pathology.
5. Evaluation, whether any other personality disorder occurs.
6. Recording all diagnosed personality disorders and other mental disorders.[14]

Additional factors hindering diagnosis as well as the therapy are defence mechanisms. A person with a given personality disorder has a certain defensive profile, so-called defence mechanisms that are used to protect against internal and external sources of various types of pressure, stress or fear. Defence mechanisms are based on various principles. For example, denial is the refusal to accept a painful life condition. Omnipotence is the creation of self-image as having an advantage over others, of being more intelligent and resourceful. Rejection is not allowing forbidden thoughts and desires. Rationalisation is the justification of one's actions in the eyes of oneself and others. Projection is the attribution of

12 Moeller Hans-Jurgen, Możliwości i ograniczenia DSM-5 w polepszeniu klasyfikacji i diagnozy zaburzeń psychicznych, *Psychiatria Polska*, 2018, 52(4), pp. 611–628.

13 MillonTheodore, Davis Roger et al, *Zaburzenia osobowości we współczesnym świecie*, Instytut Psychologii Zdrowia, Polskie Towarzystwo Psychologiczne, Warsaw, 2005, pp. 14–18.

14 Morrison James, *DSM-5 bez tajemnic. Praktyczny podręcznik dla klinicystów*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków, 2016, p. 586.

undesirable characteristics or behaviour towards others. Reaction formation is behaviour that counteracts unacceptable thoughts and impulses.[15]

Characteristics of personality disorders

ICD-10 classifies personality disorders in chapters F60–F69: disorders of adult personality and behaviour. Personality disorders are categorised and divided into the following types:

F60: Specific personality disorders

- F60.0: Paranoid personality disorder
- F60.1: Schizoid personality disorder
- F60.2: Dissocial personality disorder (antisocial)
- F60.3: Emotionally unstable personality disorder
  - F60.30: Emotionally unstable personality disorder Explosive type
  - F60.31: Emotionally unstable personality disorder Borderline type
- F60.4: Histrionic personality disorder
- F60.5: Anankastic personality disorder
- F60.6: Anxious (avoidant) personality disorder
- F60.7: Dependent personality disorder
- F60.8: Other specific personality disorders
  - F60.81: Narcissistic personality
- F60.9: Personality disorder, unspecified (difficulty specifying single most characteristic feature of personality disorder)

F61: Mixed and other personality disorders

- F61.0: Mixed personality disorders
- F61.1: Other personality changes

F62: Enduring personality changes, not attributable to brain damage and disease

- F62.0 Enduring personality change after catastrophic experience
- F62.1 Enduring personality change after psychiatric illness
- F62.8 Other enduring personality changes
- F62.9 Enduring personality change, unspecified

F68: Other disorders of adult personality and behaviour

- F68.0: Elaboration of physical symptoms for psychological reasons
- F68.1: Intentional production or feigning of symptoms or disabilities, either physical or psychological (factitious disorder)
- F68.8: Other specified disorders of adult personality and behaviour

F69: Unspecified disorder of adult personality and behaviour[16]

15 MillonTheodore, Davis Roger et al, *Zaburzenia osobowości we współczesnym świecie*, Instytut Psychologii Zdrowia, Polskie Towarzystwo Psychologiczne, Warsaw, 2005, pp. 33–37.

16 *Classification of Mental and Behavioural Disorders ICD-10. Badawcze kryteria diagnostyczne*, Uniwersyteckie Wydawnictwo Medyczne 'Vesalius', Kraków – Warszawa, 1998, pp. 32–33.

In order to facilitate understanding and remembering these personality disorders, the American classification system DSM-5 suggests organising specific disorders into three groups, referred to as clusters A, B and C.[17] Consequently, the descriptions of personality disorders presented take this division into account, and the ICD-10 classification code is given for each personality disorder.[18]

Cluster A

People with personality disorders in this group are described as withdrawn, suspicious, irrational and cold.

F60.0: Paranoid personality disorder. Typically, the people with this disorder are suspicious and they are quick to take offence. Whereas it is normal that a certain amount of distrust aids survival, in people with paranoid personality distrust and suspicion is a constant pattern of behaviour. They trust few people and often look for additional or hidden meanings in innocent remarks. Undesirable events are often interpreted as deliberate and intentional, directed against them, and they are reluctant to assume the good will of others. They are characterised by a high level of jealousy, which is manifested by questioning the loyalty of their loved ones, including their spouse. They interpret minor misunderstandings or difficulties as evidence of betrayal. In addition, they treat everything very seriously, they lack a sense of humor, and they are unable to laugh, especially at themselves. Patients with this diagnosis readily accuse others of bad intentions and are persistent in their accusations. In social relations they are annoying and provoke irritation and anger in others through constant loyalty tests and searching for hidden motives. The most commonly applied defence mechanism is projection. The patients do not notice or renounce their undesired traits, simultaneously attributing them to others and criticising them bitterly.

F60.1: Schizoid personality disorder. Persons with this disorder are characterised by limited range and expression of emotions and seem to be indifferent both to criticism and to praise. They appear to be unsocial, cold and undisturbed as if they were detached from reality and from themselves. They exhibit deficits with regard to motor expression, and they avoid intimacy. They appear to have little interest in sexual experiences with other people. They retreat from close relationships, although their relatives may be an exception. At times, they become overly attached to animals. They can daydream. In social relations these people blend into the background, do not like to attract attention and are insensitive to applicable social norms and conventions. A defensive mechanism of these patients is intellectualisation – i.e. unemotional, impersonal, cold descriptions of interpersonal experiences. They are mainly focused on formal and objective aspects of interpersonal and emotional situations.

F21: Schizotypal disorder. This disorder is classified in chapters F20–F29, governing schizophrenia, schizotypal disorders and delusional disorders, but manuals for diagnosis of

17 Morrison James, *DSM-5 bez tajemnic. Praktyczny podręcznik dla klinicystów*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków, 2016, pp. 582–584.

18 MillonTheodore, Davis Roger et al, *Zaburzenia osobowości we współczesnym świecie*, Instytut Psychologii Zdrowia, Polskie Towarzystwo Psychologiczne, Warsaw, 2005, pp. 135–607. Morrison James, *DSM-5 bez tajemnic. Praktyczny podręcznik dla klinicystów*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków, 2016, pp. 587–621; *Klasyfikacja zaburzeń psychicznych i zaburzeń zachowania w ICD – 10. Opisy kliniczne i wskazówki diagnostyczne*, Uniwersyteckie Wydawnictwo Medyczne 'Vesalius', Kraków – Warszawa 1998, pp. 171–177 and 186–187.

mental illnesses and disorders categorise it together with other personality disorders listed in chapters F60–F69. People with this personality type are secretive and display a lack of skills in establishing relationships with others, which is why they are perceived as weird or strange, feel discomfort in social situations and do not make friends. They can be suspicious of their surroundings and maintain distance, at times behave strangely and have poor vocabulary. They are characterised by unusual observations or ways of thinking, and they tend to think magically or believe in telepathy. Strange beliefs appear in their mind and the line between reality and fantasy is blurred. People with this disorder are susceptible to the influence of cults. The applied defence mechanism is undoing – i.e. rituals or magical practices that are supposed to help cancel or reverse negative thoughts or behaviour.

Cluster B

People in this group display emotions excessively and strive for the attention of others: their behaviour is of the theatrical type, and their mood is often shallow and unstable. They often get involved in interpersonal conflicts.

F60.2: Dissocial personality disorder (antisocial). The affected people are characterised by difficulty in controlling impulsivity, lack of sensitivity and unscrupulousness. This disorder manifests itself in various ways: these people can be charming and trustworthy and at the same time cheat and manipulate, or they engage in criminal activity, such as fights, thefts, lies, frauds and maltreatment of family members. Although they sometimes declare a sense of guilt, most often it does not seem that they actually feel any remorse. Their way of thinking and behaving in almost every sphere of life is characterised by short-sightedness, carelessness, disregard for other possibilities and disregard for the consequences. Moreover, they do not keep their marital, parental, professional and social obligations. Such people ignore traditional values and moral principles. A regulating mechanism is acting-out, which is based on immediate stress relief. All impulses are rapid and directly externalised in a manner that violates social norms or often arouses disapproval or even repugnance.

F60.3: Emotionally unstable personality disorder. In this disorder the general problem is impulsiveness and the lack of control. Impulsive type F60.30 is characterised by frequent outbursts of violent or threatening behaviour, related to the criticism from others.

F60.31: Borderline type. The borderline type is characterised by emotional instability. People with this type of disorder are characterised by paradoxical behaviour. For instance, they become attached to other people who perceive them as good, sensitive and intelligent and then accuse them of betrayal and lack of interest. They are desperately afraid of being abandoned and isolated, but they respond to these fears with anger and aggression. Their behaviour is often self-destructive as they resort to drugs, casual sex, self-mutilation or suicide attempts. A defence mechanism is the regression to previous developmental stages of the ego functioning, which may be manifested by immature behaviour.

F60.4: Histrionic personality disorder. Patients with this disorder desire to be in the centre of attention and actively seek to draw the attention of others with their looks and behaviour. Their manners of behaviour may be described as theatrical, provocative, impulsive, very emotional and hedonistic. Their interests are concentrated on themselves, and they can be manipulative when they want to receive support. Often they are vain people who like flirting and showing off. They find it difficult to handle frustration well, which often leads to outbursts of anger. Moreover, they are trustful and can be manipulated easily. They have difficulties with analytical thinking, but they are good at competitions, where creative thinking is necessary. The applied defence mechanism is dissociation – for

example, changing the ways of self-presentation and creating more attractive images of oneself. People with this disorder use sexualisation as a way of building relations and influencing others.

F60.81: Narcissistic personality. The patients perceive themselves as special and they want to be admired and they lack empathy. Despite showing a grandiose attitude, they are characterised by a fragile sense of self-esteem and often appear to be thinking about their own worthlessness. They show high sensitivity with regard to their feelings and other people's opinions of them, but they do not care about the feelings of others. They want to have special benefits without offering anything in return: with no remorse, they use others to achieve their goals. They look down on people and expect to be served. They rely on lying to create and strengthen illusions of their successes. They use rationalisation, as a defence mechanism, which gives them psychological comfort by inventing convincing explanations for their hurtful behaviour towards others. They absolve their actions in order to present themselves in the best possible light.

Cluster C

Patients in this group are anxious, tense and overly self-controlled.

F60.5: Anankastic personality disorder. Patients with this personality are characterised by perfectionism, rigidity, stubbornness and the need to exert psychological and interpersonal control. They believe that mistakes or shortcomings lead to the feelings of guilt and cause devaluation of achievements. They devote their time to work, at the same time neglecting themselves or their families. At work, they show excessive attention to detail, and likewise, they force others to follow a similar pattern of behaviour, which consequently limits their prospects for success. They also exaggerate about moral and ethical matters and are attached to conventions and prefer formal contacts with other people. They tend to be thrifty, unwilling to dispose of even useless and low-value items. The regulatory mechanism used in people with this disorder is a reaction formation. They express positive social attitudes while deeply experiencing feelings contrary to these attitudes. They are mature and reasonable in situations when others feel anger or fear.

F60.6: Anxious (avoidant) personality disorder. These are people with low self-esteem, who are distrustful, socially inhibited and sensitive to criticism. They feel worse, uglier and clumsier than others, and as a consequence, they establish relations only after making sure that they will be accepted. They are characterised by fear and excessive sensitivity to other people's opinions. They please others in order to deserve their acceptance. They exaggerate the possibility of failure and often avoid new activities and occupations related to social relations. Their regulatory mechanism is fantasy. They escape into the world of dreams, where they can safely release their aggression and satisfy the need for love. In their imagination, they solve conflicts, are more self-confident and satisfy their needs.

F60.7: Dependent personality disorder. Patients with this disorder need to be looked after by others. Their fear of separation leads to submissive and dependent behaviour, which in turn may lead to exploitation or rejection. They tend to deny their own views and feelings when these do not appeal to others, especially their partner. In extreme cases, they tolerate maltreatment as the cost of avoiding loneliness. It is difficult for them to perform tasks autonomously, but they can work under the direction of a leader. They constantly need advice, support and subordination to a more powerful person. They are gullible and can be easily persuaded. Their regulatory mechanism is introjection. In order to reinforce the conviction of an unbreakable bond, they are very devoted to their partner, renounce their opinions to please them and avoid potential conflicts.

Other categories of personality disorders

F61: Mixed and other personality disorders. This category involves the health problems which are not manifested by any specific pattern of behaviour listed in category F60, which makes them difficult to diagnose.

F62: Enduring personality changes, not attributable to brain damage or brain disease. This category applies to problems arising as a result of existential trauma, e.g. catastrophic stress or severe and prolonged stress, or as a result of a serious mental disease in people who previously were not diagnosed with a personality disorder. This group of diagnoses is applied in case of persistent and distinctive personality changes that did not occur before the traumatic experience and are etiologically related.

F68: Other disorders of adult personality and behaviour. This category is divided into two types. Type F68.0 refers to elaboration of physical symptoms for psychological reasons. A patient suffering due to physical causes may additionally report non-specific complaints in order to attract attention. An additional motivation to complain may be a financial compensation received as a result of injuries or accidents. Type F68.1 concerns intentional production or feigning of symptoms or disabilities, either physical or psychological (factitious disorder), despite the absence of confirmed disorders. This may lead to self-injury in order to simulate pain or other ailments, which, despite negative test results, may entail hospitalisation or surgery.

F69: Unspecified disorder of adult personality and behaviour. This code is used only as a last resort when there is suspicion of personality and behavioural disorders, but there is insufficient information to make a conclusive diagnosis.

3. The relationship between personality disorders and the ability to express will and make decisions

We may encounter important questions when analysing the issue of the relationship between various problems of human psychological functioning resulting from personality disorders and their behaviour with regard to responsibility for their own behaviour and actions.

The first one concerns whether personality disorders, regardless of their nature, limit intellectual, emotional and volitional functionin and thus whether they affect the ability to make decisions and express will. The second one is related to the diversity of the classified disorders (DSM and ICD),[19] whether all personality disorders affect this ability and whether this occurs to the same degree. The third question concerns the area of psychological functioning that is the most abnormally developed and its relation with the ability to express will and make decisions.

Personality would appear to be interesting from the perspective of the topic of this chapter, because as a superior system of regulation and activity integration, it is associated with motivation and determines the decision-making process and related action. This happens regardless of whether a properly shaped or a disturbed personality structure is considered.[20,21] In case of the latter, an additional issue is the scope and impact of the disorder, and thus, both the severity of the disorder as well as the area of psychological

19 MillonTheodore, Davis Roger et al., *Zaburzenia osobowości we współczesnym świecie*, Instytut Psychologii Zdrowia, Polskie Towarzystwo Psychologiczne, Warsaw, 2005, pp. 135–607.

20 Oleś Piotr, *Psychologia człowieka dorosłego: Ciągłość-zmiana-integracja*. Wydaw. Nauk. PWN, 2011, pp. 15–38.

21 Cierpiałkowska Lidia, *Psychopatologia*. Wydawnictwo Naukowe Scholar, Warsaw, 2020, pp. 307–342.

functioning that is particularly affected ought to be discussed. Moreover, the concept of personality is not covered by the legal regulations, because its application would introduce too much psychological conditioning for legal jurisdiction. However, it does include the concept of motivation – a motive that may have led someone to commit a particular act or make a declaration of will. Criminal law clearly states that human actions are influenced both by the people themselves (personality factors) and external conditions, which may to a larger or lesser extent limit the freedom to make decisions regarding a specific action and behaviour, as well as the action itself. In the case of personality disorders, this issue involves both factors and their interrelations are complex. Personality disorder, in itself, regardless of its type, hinders efficient functioning, effective achievement of life goals, psychological adaptation and intellectual control of emotions and reactions.

Personality disorders will occasionally affect the evaluation of a situation, but chronically prompt improper reactions to it, leading to inappropriate, but not always harmful, decisions. Patients diagnosed with a personality disorder regardless of its kind have continual problems with social, emotional and/or cognitive adaptation. Importantly, these problems do not result from trauma but from abnormal conditions in which the individual's personality was shaped. In such a situation, the symptoms of abnormal functioning may already be noticeable at early stages of personal development.[22] According to what is known about human beings, all structural and functional disorders have a limiting effect on the efficiency of volitional processes and, therefore, on making life decisions. As Anna Lisowska[23] of the Department of Substantive Criminal Law of the University of Lodz points out, an incorrectly shaped personality may be the cause of behaviour that deviates from commonly accepted norms. In her study, she refers to one type of disorder – antisocial personality disorder. When transferring this thought to other types of disorders, we may think whether they might, through functional difficulties, influence decisions, making their consequences harmful to the individual who makes them or to other people. This can be exemplified by a dependent personality, when the fear of being rejected by others may lead to irrational decisions and excessive submissiveness towards people who are important to a given person and thus make them susceptible to influences that a person with a normal personality structure would be able to resist. There is a strong resemblance here to a sick person, dependent on others, who due to their independence, cannot freely decide about their own life. As the author points out, the analysis of not only the act, but also its causes, allows for a fair and just judgment.[24]

According to Trzebińska,[25] following a very important idea of Cloninger, personality disorders are permanent and their effects on someone's life and social environment are possibly far-reaching. The author stresses this via the personality model by Epstain,[26] which identifies two information processing systems (affective and cognitive) both of which are

22 MillonTheodore, Davis Roger et al., *Zaburzenia osobowości we współczesnym świecie*, Instytut Psychologii Zdrowia, Polskie Towarzystwo Psychologiczne, Warsaw, 2005, pp. 3–49.

23 Lisowska Anna, Osobowość antyspołeczna jako determinant zachowań niezgodnych z obowiązującymi regulacjami prawnymi, *Ius et Administratio*, 2017, no. 4, pp. 1–16.

24 Lisowska Anna, Osobowość antyspołeczna jako determinant zachowań niezgodnych z obowiązującymi regulacjami prawnymi, *Ius et Administratio*, 2017, no. 4, pp. 1–16.

25 Trzebińska, E. Afektywny model zaburzeń osobowości., (in:) ed. E. Trzebińska, *Szaleństwo bez utraty rozumu. Z badań nad zaburzeniami osobowości* Wydawnictwo SWPS Academica, Warsaw, 2009, pp. 79–101.

26 Epstein, S. Cognitive-experiential self-theory. (in:) *Advanced personality* Springer, Boston, MA, 1998, pp. 211–238.

involved in solving problems, making decisions and generating action plans. Moreover, the affective regulation system, understood as complex emotional processes, plays a special role in this process. Where its operation is disrupted situationally (strong affective states, freedom limitation, etc.) or permanently (mental illnesses and personality disorders), decisions that have legal consequences are made with limited freedom and/or result from tensions that are difficult to regulate, from needs to be fulfilled, etc.

Trzebińska[27] notes that disturbances may occur while the experiential system is developing: underdeveloped affective processing procedures, preventing the formation of complex emotions, inefficiency of the system in the area of integrating positive and negative emotions, and the strengthening of the early developmental pattern of omnipotence in the form of chronic experiencing of one's uniqueness. The author suggests that as a consequence, chaotic, ambivalent and grandiose disorders emerge in areas of emotional functioning. Based on the conducted studies, it was possible to assign individual personality disorders to one of three types of emotional problems. It was assumed that chaotic disorders include ones in which the experiencing of complex emotions is difficult – schizoid, schizotypal, paranoid or borderline personality. A characteristic feature of emotional problems is the inability to experience complex emotions, with a simultaneous tendency to fabricate emotional recollections and experience strong emotions. So it might be said that emotional functioning in this group is poorly controlled. The question arises as to whether the unordered character of emotional experiences may affect decision taking and expression of will. The answer is a resounding yes. People who present disorders from this group may take decisions under the influence of severe tension, stress, experienced emotions, and these decisions may be detrimental to them and/or other people, contrary to common sense and life experience. However, this issue is not so simple, because even very strong emotional states pass, and it is not easy to determine whether a given person was under their influence at the time of their declaration of will. The second issue concerns the scale of effects on cognitive, volitional and decision-making processes that occur in such a situation, and therefore will involve an estimation not only of the intensity but also the modality of the emotions experienced. As a rule, the stronger the emotions, the weaker the intellectual control, and therefore, the evaluation of the intensity of the emotional state may be an indication of the ability to express will and take decisions in the heat of the moment. As the authors highlight, this characteristic of experience leads to hasty and impulsive reactions, regardless of whether these are positive or negative emotional states. A positive emotional state in itself, such as falling in love, may, to a significant extent, limit the ability to reason, use knowledge and draw conclusions. Being left by a loved person will have the same result. Thus, the intensity of experienced emotions seems to be a more important limiting factor. Histrionic or borderline personality disorders are often associated with very strong experiences, and consequently all proceedings should consider the factor of the person's emotional functioning at the time of declaring will or taking decisions.[28]

Regarding ambivalent disorders, studies have shown that the integration of positive and negative emotional experiences is problematic. This issue may have very significant

27 Trzebińska, E. Afektywny model zaburzeń osobowości. (in:) ed. E. Trzebińska, *Szaleństwo bez utraty rozumu. Z badań nad zaburzeniami osobowości*, Wydawnictwo SWPS Academica, Warsaw, 2009, pp. 79–101.

28 Trzebińska, E. Afektywny model zaburzeń osobowości. (in:) ed. E. Trzebińska, *Szaleństwo bez utraty rozumu. Z badań nad zaburzeniami osobowości*, Wydawnictwo SWPS Academica, Warsaw, 2009, pp. 79–101.

consequences for decisions, resulting in changeability and uncertainty, which leads to serious mistakes in decision-making processes. In grandiose disorders, on the other hand, the ability to understand and define emotions is fully preserved, which, together with the belief in one's own uniqueness, may promote irrational decisions. The mentioned three types of emotional reactions also determine the difficulties in relations with the environment.

Considering the basic legal rule of liability for conscious, intentional actions, we can question whether those who have developed disturbances in the process of personality formation leading to disorders, due to the limited scope of awareness of the mechanisms determining behaviour, can make decisions and express their will in a fully conscious manner. It needs to be stressed here that the assumption of the existence of significant limitations in this respect would have crucial consequences. Never, in any situation, is a healthy functioning person fully free to make decisions and express their will. They take into account and are affected by numerous circumstances (consciously), without necessarily being aware of this fact. Structurally and functionally, our personality consists of potentially conscious and unconscious mechanisms.[29]

When discussing the conscious expression of will and decision-making, we usually refer to proceedings regarding the conclusion of various types of contracts, making last wills but also concluding marriage contracts or providing consent to treatment or hospitalisation. These activities have their own specificity, both in the psychological and legal sense. The assessment whether specific legal actions, in the case of people with personality disorders, were influenced by factors that may cast doubt on the ability to express will and on the decision-making process requires not only the evaluation of the current mental state but also retrospective examination of circumstances and situations that may have affected these actions. It must be remembered that the mental structure of a human being is functionally interrelated, which means that disturbances in one area (e.g. strong emotions) will affect others (e.g. cognitive, motivational or volitional functioning). The volitional area is particularly important from the perspective of the ability to consciously express will and make decisions. The efficiency of this system is expressed in ability to form a conscious intention aimed at achieving important goals and to undertake and control actions aimed at these goals.[30] In criminal and civil proceedings, understanding of volitional processes is often treated as the motivational area of human functioning, although these areas are significantly different. Motivation describes an internal state referring to the desire to perform a certain action, while the will includes the element of decision, intention and plan associated with the performance of certain activities. This difference is of significant importance, because only in cases of acts of will can we consider the full impact of psychopathology on actual decisions, expressed in action.[31]

Yet there is still an important issue of impulsive acts, which are difficult to control in normally functioning people, and very difficult or sometimes even impossible to control in people whose functioning is disturbed, like in personality disorders. Impulsive behaviour is connected with strong emotions and can lead to risky behaviour, irrational decisions, acts of aggression and self-aggression or manifest itself in the form of passivity, excessive

29 Oleś Piotr, *Psychologia człowieka dorosłego: Ciągłość-zmiana-integracja*. Wydaw. Nauk. PWN, Warsaw, 2011, pp. 247–287.

30 Kuhl, J., & Beckmann, J. (eds.), *Action Control: From Cognition to Behaviour*. Springer Science & Business Media, 2012.

31 Thunholm, P. Decision-making style: habit, style or both?, *Personality and individual differences*, 2004, *36*(4), pp. 931–944.

submission, a tendency to abandon important needs and isolation from the social world. Both of these situations inhibit the ability to consciously express will and make decisions, which leads to greater vulnerability to transient emotional states and external pressures, and consequently, exposure to exploitation by others. Thus, it might be said that even with a properly functioning intellect and potential ability to assess a given situation, such people may take decisions without using these abilities to their full potential.[32]

Experts who assess whether a person diagnosed with a personality disorder in a given situation had the full capacity to consciously and freely express their will or not must evaluate not only the mental state at the time of making decisive actions or declarations of will, but also refer to the degree of complexity of the problem which these processes concern. This is a very important point of contact of law, psychology and/or psychiatry. As shown by Kocur and Trendak (p. 138), it is impossible to generalise the issue by indicating that a particular mental/psychological problem in every situation will enable or exclude a fully conscious action. According to the authors,

> *This is important because a mental dysfunction of the same nature and course may in some cases be considered as excluding the mental ability to consciously or freely make a declaration of will, and in others it may allow it. This mainly concerns the ability to consciously express will and make decisions: if the degree of complexity of a given problem or case is low, then its proper assessment and conscious choice of a specific action, predicted consequences and evaluation of the effects of this action can be made properly, despite the presence of certain mental dysfunctions. However, if the form and subject matter of a specific legal act (conclusion of a complex agreement, drafting a detailed will, etc.) requires high efficiency and full capacity of all mental functions, then even moderately severe mental disorders may prevent the affected person from making a conscious or free decision and expressing will.*[33]

Considering Polish law, Art. 12 of the Family and Guardianship Code, with regard to the validity of will expression when concluding marriage, the importance is given to limitations such as mental illness and mental retardation (in accordance with psychology and classification definitions – intellectual disability). Some clarification of this issue can be found in Art. 15 [1] of the FGC, which mentions the existence of a state excluding the conscious expression of will. When searching for the intentions of the legislator, it can be assumed that they concern factors that significantly limit intellectual activities and emotional regulation of the personality (being under the effects of strong medications, psychoactive substances, dementia syndromes, etc.) and not stable, chronic psychological problems connected with the abnormal formation of the personality structure. It might be said that the difference between the intrapsychic decision-making process and the decision to take a specific action is analogous to the difference between motivational

32 Foroozandeh, E. Impulsivity and impairment in cognitive functions in criminals. *Forensic Research & Criminology International Journal*, 2017, *5*(1), pp. 62–65.

33 Kocur, J., &Trendak, W. Psychiatryczno-sądowe kryteria oceny zdolności do świadomego albo swobodnego powzięcia decyzji i wyrażenia woli. *Archiwum Medycyny Sądowej*, 2009, (2), pp. 136–140.

(intrapsychic) and volitional processes (expressed in acts of will, behaviour, action). As Kocur and Pobocha note (p. 335),

> *such mental disorders and anomalies as neuroses, abnormal personality, sexual dysfunctions, phobias, obsessive-compulsive disorders, and others, due to their nature, and mainly the clinical findings and the course of progression, usually do not cause such disturbances of mental functions that would lead to exclusion of ability to consciously express will.*[34]

Considering common law, the issue of the ability to express will and make decisions seems to be relatively well-defined, at least as far as marriage is concerned. It looks different in the Code of Canon Law. Canon 1095 indicates three conditions for mental incapacity for marriage: lack of sufficient use of reasoning, significant lack of discernment of essential marital rights and obligations reciprocally given and accepted, reasons of a psychological nature that make it impossible to undertake essential marital obligations. It remains an open question whether one of these is sufficient or whether all three must be met. However, as a rule, the concept of ability to declare will and make decisions is much broader here, and as the practice of adjudicating on the dissolution of marriage shows, this canon is often used as the basis for such proceedings.[35]

4. Summary

Summing up these considerations, it can be concluded that the presence of personality disorders with regard to the ability to express will and make decisions should be treated similarly to other factors limiting such ability, cited by the legislator. Gniewek and Machnikowski, in their commentary on Art. 82 of the Civil Code (Art. 82: a declaration of will made by a person who, for any reason, was in a state excluding a conscious or free decision and expression of will is invalid; this concerns mainly a mental illness, mental retardation or other, even temporary, disorders of mental activity) stress that this provision concerns

> *the consequences of a defect in the declaration of will presented as a mental state commonly defined as a lack of awareness or freedom. This is characterised by a lack of actual ability to take decisions regarding the performance of a legal act or a lack of understanding of its consequences. The application of the rules concerning the method of assigning the value of a declaration of intent to certain behaviour may lead to a situation where legal effects will be linked to the behaviour which, in the light of a reasonable assessment of the addressee exercising due diligence, may be perceived as a declaration of intent, even though it is not the result of the actual intention (see note to articles 60 and 65). This also concerns situations where the behaviour formally considered as a declaration of will is not an expression of real intentions due to the special condition referred to in Art. 82 CC. The commented provision prevents such situations determining that a declaration of will made in a state of lack of awareness or freedom is invalid, and consequently a related legal act is invalid*

34 Kocur, J., &Pobocha, J. Ocena psychicznej zdolności do zawarcia małżeństwa u osób z zaburzeniami psychicznymi. *IusMatrimoniale*, 2011, *22*(16), pp. 333–341.

35 Kocur, J., &Trendak, W. Psychiatryczno-sądowe kryteria oceny zdolności do świadomego albo swobodnego powzięcia decyzji i wyrażenia woli. *Archiwum Medycyny Sądowej*, 2009, (2), pp. 13–140.

too (as to the essence of the sanction of absolute invalidity, see the notes to Art. 58). This conclusion applies to both unilateral acts and contracts. Determination of invalidity of a legal act based on the commented provision is also permissible after the death of the person who made a defective declaration of will (cf. art. SN of 27.4.1979, III CRN 56/79, OSN 1979, No. 12, item 244).[36]

Bearing that in mind, we should focus on lack of awareness and freedom as a factor influencing the expression of will or decision-making. This situation may concern both mentally healthy people, with sound personality and intellectual fitness, as well as sick people with intellectual disabilities and people with an abnormal personality classified as a personality disorder. It is therefore important to determine whether, in a particular situation, a person was in a mental state that enabled them to make decisions and express their will. Clearly, knowing that a given person has a specific diagnosis (mental illness, intellectual disability, personality disorders) automatically raises doubts over the state of consciousness but is not sufficient to conclude that the declaration of will is defective. For this purpose, it is necessary to analyse the mental state, giving particular consideration to the emotional and motivational state and the situation in which such a person was at the time of making the declaration of will.

It would seem necessary to seek the opinion of experts in psychiatry and psychology who would examine the psychological functioning and mental state, but what is of great importance as well, considering motivational mechanisms and using specialist knowledge, is to refer to the impact of the situation and other people on the mental state of a person declaring the will. Viewed from the perspective of the complexity of all human decision-making processes and the multitude of internal and external influences on these decisions, such an integrated, broad approach seems to give a more comprehensive insight into the ability of a particular person in a particular situation to consciously and freely declare the will and make decisions. Moreover, regarding personality disorders, it has been indicated that the numbers of people with personality disorders is much greater than the numbers of people diagnosed with them; therefore, the absence of a diagnosis does not automatically mean the absence of a disorder.

Following Gniewek, Machnikowski[37] and Stanik,[38] it can be stressed that the psychological and psychiatric approach to conscious and free decision-making and declaration of will is expressed by the statement that the aspect of consciousness may be present in the absence of freedom in the sense of situational conditions and, more importantly, the internal state.

Any situation of pressure, force and emotional blackmail are the examples. People with personality disorders, susceptible to external influences, whose well-being is strongly dependent on others, may be in a state of complete consciousness, and yet, due to the disorder, not have the freedom to decide (e.g. fearful or dependent personality). Therefore, the conclusion is that each time the situation of a declaration of will or the making of a decision raises doubts, it should be thoroughly assessed, taking into account the factors that might affect awareness and freedom or the absence of them. The presence of a

36 J. Strzebinczyk, *Kodeks cywilny. Komentarz*, ed. E. Gniewek. Wydawnictwo C.H. Beck, Warsaw 2013, commentary to Article 82 of the Polish Civil Code, pp.225–228.

37 Ibid., 225–228.

38 J. M. Stanik, Teoretyczne i metodologiczne problemy opiniodawstwa psychologicznego w sprawach o ważność oświadczenia woli iw sprawach testamentowych, *Przegląd Psychologiczny*, 2009, vol. 52, no. 3, pp. 243–261.

personality disorder of any kind is a factor suggesting the possibility of limited awareness and freedom, but the diagnosis itself does not constitute proof for such a statement.

Bibliography

Cierpiałkowska, Lidia, *Psychopatologia*, Wydawnictwo Naukowe Scholar, Warsaw, 2020.

Classification of Mental and Behavioural Disorders ICD-10, *Badawcze kryteria diagnostyczne, Uniwersyteckie Wydawnictwo Medyczne 'Vesalius',* Kraków, Warszawa, 1998.

Classification of Mental and Behavioural Disorders ICD-10, *Opisy kliniczne i wskazówki diagnostyczne, Uniwersyteckie Wydawnictwo Medyczne 'Vesalius',* Kraków, Warszawa, 1998.

Epstein, S., Cognitive-experiential self-theory, in: *Advanced personality*, Springer, Boston, MA, 1998, pp. 211–238.

Foroozandeh, E., Impulsivity and impairment in cognitive functions in criminals. *Forensic Research & Criminology International Journal*, 2017, vol. 5, no. 1, pp. 62–65.

Gabbard, G., *Psychiatriapsychodynamiczna w praktyceklinicznej*, Wydawnictwo Uniwersytetu Jagiellońskiego, Wyd. II zgodne z DSM – 5, Kraków, 2015.

Galecki, P., ed., *Badanie stanu psychicznego. Rozpoznania według ICD-11*, Edra Urban & Partner, Wrocław, 2022.

Gawda, Barbara, Katarzyna Czubak, Prevalence of personality disorders in a general population among men and women, *Psychological Reports*, 2017, vol. 120, no. 3, pp. 503–519, https://doi.org/10.1177/0033294117692807.

Gniewek, (ed.), *Kodeks cywilny*, Komentarz, Warszawa, 2013.

Kocur, J., J. Pobocha, Ocena psychicznej zdolności do zawarcia małżeństwa u osób z zaburzeniami psychicznymi, *IusMatrimoniale*, 2011, vol. 22, no. 16, pp. 333–341.

Kocur, J., W. Trendak, Psychologiczne i psychopatologiczne aspekty opiniowania w sprawach o unieważnienie testamentu, *Post Psychiatrii i Neurol*, 2000, vol. 9, supl. 1, pp. 69–71.

Kocur, J., W. Trendak, Psychiatryczno-sądowe kryteria oceny zdolności do świadomego albo swobodnego powzięcia decyzji i wyrażenia woli, *Archiwum Medycyny Sądowej*, 2009, vol. 2.

Kołakowski, S., Opiniowanie w sprawach dotyczących ważności oświadczenia woli, in: *Postępowanie karne i cywilne wobec osób zaburzonych psychicznie. Wybrane zagadnienia z psychiatrii, psychologii i seksuologii sądowej*, ed. J. K. Gierowski, Wydawnictwo Collegium Medicum UJ, Kraków, 1996.

Kuhl, J., J. Beckmann, eds., *Action control: From cognition to behaviour*, Springer Science & Business Media, New York, 2012.

Lisowska, A., Osobowość antyspołeczna jako determinant zachowań niezgodnych z obowiązującymi regulacjami prawnymi, *Ius et Administratio*, 2017, vol. 4, pp. 1–16.

Millon, T. et al., *Zaburzenia osobowości we współczesnym świecie*, Instytut Psychologii Zdrowia, Polskie Towarzystwo Psychologiczne, Warszawa, 2005.

Moeller, Hans-Jurgen, Możliwości i ograniczenia DSM-5 w polepszeniu klasyfikacji i diagnozy zaburzeń psychicznych, *Psychiatria Polska*, 2018, vol. 52, no. 4, pp. 611–628.

Morrison, James, *DSM-5 bez tajemnic. Praktyczny podręcznik dla klinicystów, Wydawnictwo Uniwersytetu Jagiellońskiego*, Wyd. I, Kraków, 2016, https://lubimyczytac.pl/ksiazka/299464/dsm-5-bez-tajemnic-praktyczny-przewodnik-dla-klinicystow.

OECD/EU, Health at a glance: Europe 2018, *State of health in the EU cycle*, 2018, https://health.ec.europa.eu/system/files/2020-02/2018_healthatglance_rep_en_0.pdf.

Oleś, Piotr, *Psychologia człowieka dorosłego: Ciągłość – zmiana – integracja*, Wydaw Nauk, PWN, Warszawa, 2011.

Stanik, J. M., Teoretyczne i metodologiczne problemy opiniodawstwa psychologicznego w sprawach o ważność oświadczenia woli iw sprawach testamentowych, *Przegląd Psychologiczny*, 2009, vol. 52, no. 3, pp. 243–261.

Sytuacja zdrowia psychicznego w Polsce, Informacja Sekcji Ochrony Zdrowia Narodowej Rady Rozwoju, luty 9, 2016, https://www.prezydent.pl/storage/file/core_files/2021/8/5/

eaf12a475889b3f67df0091930ab4309/rekomendacje_dot_zdrowia_psychicznego.pdf, accessed October 7, 2022.

Szymusik, A., ed., *Postępowanie karne i cywilne wobec osób zaburzonych psychicznie*, CM UJ, Kraków, 1996, pp. 220–229.

Thunholm, P., Decision-making style: Habit, style or both? *Personality and Individual Differences*, 2004, vol. 36, no. 4, pp. 931–944.

Trzebińska, E., Afektywny model zaburzeń osobowości, in: *Szaleństwo bez utraty rozumu. Z badań nad zaburzeniami osobowości*, ed. E. Trzebińska, SWPS Academica, Warszawa, 2009, pp. 79–101.

Volkert, Jana et al., Prevalence of personality disorders in the general adult population in Western countries: Systematic review and meta-analysis, *The British Journal of Psychiatry: The Journal of Mental Science*, 2018, vol. 213, no. 6, pp. 709–715, https://doi.org/10.1192/bjp.2018.202

World Health Organisation, *Mental disorders*, https://www.who.int/news-room/fact-sheets/detail/mental-disorders, accessed October 3, 2022.

World Health Organization, *Global health estimates 2016: Disease burden by cause, age, sex, by country and by region, 2000–2016*, World Health Organization, Geneva, 2018, https://www.who.int/data/global-health-estimates, accessed October 3, 2022.

37 Active legal capacity and its restrictions – psychiatric aspects

Paweł Zagożdżon

From the perspective of psychiatry, the subject of legal capacity of a person mainly concerns the description of their mental condition, which shows the scope of their cognitive competences and abilities to understand their situation and manage their behaviour. Forensic psychiatry assumes that the states excluding conscious or independent decision taking and expression of will in practical terms include severe dementia syndromes, dementia with accompanying psychotic symptoms, organic mental disorders, organic psychoses without dementia and mental retardation. The list of mental health disorders that may accompany the development of insanity is not complete and may also include situations related to overdose of psychoactive substances, exacerbation of non-organic psychoses or some types of dissociative disorders.

Definition of a disease and mental health

The greatest challenge in the process of assessing legal capacity from a psychiatric perspective is to determine to what extent the deterioration of mental health may affect the understanding of the consequences of one's actions and the management of one's behaviour. The definitions of what mental health is as well as what a mental disorder or illness are, remain one of the major challenges of philosophy of medicine regarding psychiatry. How dynamic these criteria and variable classifications are is underscored by the fact that the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), the so-called bible of psychiatrists that serves as the manual for the diagnosis of diseases, has been revised for the fifth time. The last revision defines a mental disease in the following way:

> A mental disorder is a syndrome characterised by clinically significant disturbance in an individual's cognition, emotion regulation, or behaviour that reflects a dysfunction in the psychological, biological, or development processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behaviour (e.g. political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.

According to this definition, mental illness is associated with disturbances in individual cognitive abilities, control of emotions or behaviour that may affect functioning in the society, family or professional sphere. Indication of problems related to proper functioning is the most pragmatic method of defining a mental illness. The criterion of harmful

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dysfunction has been proposed by Jerome Wakefield, an American philosopher, in order to avoid defining diseases in a value-laden manner, which was particularly desirable with regard to mental disorders. A harmful dysfunction is a condition in which the body is not able to function according to its original biological scheme. From the biological point of view, this impaired functionality may be reflected in a higher risk of certain diseases and, consequently, a higher risk of death or difficulties in having children. From a social perspective, a dysfunction may simply result in fewer possibilities to fulfil certain social or occupational roles. In a classic paper on what mental illness is, Boors gives three criteria to distinguish a disease (deviation from a medically defined normal condition) from an illness, a condition causing significant suffering. The first criterion is to acknowledge that the condition associated with an illness is undesirable for a sick person. According to the second criterion, an illness necessitates a specific treatment. The third criterion is to recognise a medical condition as a sufficient justification for the behaviour that is commonly regarded as abnormal or punishable. As shown earlier, we are dealing with a certain type of tautology in the context of legal conditions: the behaviour usually considered punishable may result from a mental illness, and a mental illness may cause conflicts with the law.

Assessment of mental state

Considering such relatively broad definitions of mental health disorders, it is necessary to more precisely specify the mechanisms through which decreased efficiency in the processes of decision-making and will expression may occur. These relate to, as it was indicated, the disorders that disturb the mental state in terms of consciousness, orientation, control of emotions and behaviour. In a routine clinical mental health assessment, a psychiatrist examines each of these aspects by conducting a thorough psychiatric examination, which basically involves talking, asking questions and observing the given patient.

Consciousness assessment

The first part of mental state examination is the assessment of consciousness. Consciousness is defined by the presence of the sense of experiencing external sensations and is the most primitive or basic characteristic of a human being, who 'knows that they are alive' and feels that they are 'here and now'. Consciousness is also a certain continuum of this experience, which can be disturbed by disease processes, in which the extreme disorder of consciousness is coma, and intermediate states are various levels of drowsiness. A separate manifestation of qualitative disorders of consciousness is, for example, delirium syndrome or, in a milder form, clouding of consciousness. If a person experiences disturbance of consciousness, it appears obvious that their legal capacity is difficult to determine as a person in such a state may not react to pain stimuli (e.g. pressure on the sternum) or not respond to questions such as 'What is your name?'. The aforementioned organic states of consciousness disorders may be caused by a number of somatic diseases such as stroke, head injury, infections, severe circulatory insufficiency, pneumonia, metabolic disorders related to diabetes, thyroid gland diseases, liver or kidney failure, and finally the disorders in the course of advanced cancer (brain metastases).

Assessment of cognitive abilities

The second element of mental state assessment, important from the perspective of competency, is the assessment of cognitive abilities. The basic answer to the question of the current date

and the current location of a person allows us to obtain a rough assessment of the person's orientation in time and place. A more accurate assessment of memory is performed using standardised diagnostic tests such as the Mini–Mental State Examination (MMSE). Apart from evaluation of orientation in time and space, these tests allow for the assessment of attention concentration, recent memory and numeracy as well as visual-spatial skills and language functions. The clock drawing test, which is often used in the initial diagnosis of dementia, can be used to screen for cognitive disorders. A slightly more accurate and sensitive test in the diagnosis of mild cognitive impairment is the Montreal Cognitive Assessment (MoCA), and the Alzheimer's Disease Symptom Assessment Scale – Cognitive Subscale (ADAS-cog), a much more time-consuming test used in scientific research, is employed to precisely assess cognitive impairment in Alzheimer's disease. Thus, cognitive abilities can be measured and an attempt can be made to determine whether their deterioration, if it occurs, affects decision-making process related to legal consequences. The most commonly applied tool for measuring cognitive impairments in clinical practice is the MMSE, in which a maximum of 30 points can be obtained for 30 correct answers. According to the currently adopted recommendations, 27.0–30.0 points are assumed to be the normal result of the MMSE. A suspected cognitive impairment is classified as mild cognitive impairment (24.0–26.99 points), mild dementia (19.0–23.99 points), moderate (middle-stage) dementia (11.0–18.99 points) or severe dementia (0–10.99 points). This type of ordinal scale in the severity of dementia may quite easily categorise the people with these impairments as incapable of making conscious decisions. This inability is undeniable in case of severe dementia, in which verbal communication may be difficult and a person with severe dementia usually no longer recognises their loved ones, but they still understand basic commands. Moderate dementia includes a specific spectrum of cognitive disorders, in which the condition may become so advanced that it is difficult to plan activities, perform simple memory operations such as counting, and very often the orientation in time and place is disturbed. In scientific studies, in which the assessment of certain phenomena, features or behaviours in the elderly is performed using questionnaires, the analysis usually includes only answers obtained from people without significant cognitive impairment, i.e. with mild dementia at most, which corresponds to 19 points and more in the MMSE. This principle was adopted in the largest Polish epidemiological study concerning the health condition of the elderly, PolSenior2. A slightly different problem that may arise in relation to amnestic disorders, i.e. short-term memory disorders, is a disorder referred to as a confabulation. Confabulations are false memories that arise somehow spontaneously and unintentionally in order to fill memory gaps. From a legal point of view, it may be very difficult to verify the authenticity of the events reported by patients with this disorder in terms of time, place and the people involved.

Assessment of emotional state, perception and thinking process

Other important aspects of mental state analysis are affect, perception and way of thinking. All these elements of the mental state can be significantly altered in the course of diseases where psychotic incidents are more frequent, i.e. in severe forms of depression, in exacerbations of bipolar affective disorder or in schizophrenia and other similar schizophrenic disorders, such as delusional disorder or transient psychotic disorder. Anxiety and arousal may indicate an increased psychomotor drive. Fear and tension accompany exacerbation of many mental health problems, but if they are strongly expressed, they may hinder appropriate assessment of the situation. A blunted or flat affect indicates a kind of autistic separation of the person from others and their inability to experience the emotions expressed by the people in their immediate environment. Often, people suffering from schizophrenia,

among the others, through their impoverished facial expressions, give the impression of living in their inner world, and sometimes even of experiencing perceptual disturbances of hallucinatory nature, mainly auditory ones. People who are in a state of psychosis, i.e. in a state of intensified perception of the surrounding reality, are not able to make rational decisions because they cannot base their judgements on a reliable experience of reality. A person suffering from a psychotic depression may hear a voice telling them to kill themselves or simply convincing them that their lives, or even the lives of their loved ones, are not worth continuing. On the other hand, a person with delusions may be convinced that their loved ones have been substituted by their doubles who are participating in a plot to deprive them of their personal property. In case of schizophrenia, the affected person believes that their thoughts are not theirs, and in the most severe form of this disorder, the patient experiences the so-called delusions of possession and is unable to control their behaviour because they have the impression of being controlled by other, external forces (e.g. demons). As regards manic persons, they have the impression of being able to solve very complex problems and having extraordinary abilities. Then they become involved in situations that, in time, result in serious financial, legal and personal consequences.

Autonomy

In simple terms, the assessment of legal capacity of people with mental disorders comes down to the assessment of their ability to exercise self-determination. In the assessment of autonomy, it is important to determine to what extent there is consistency between the aspirations (intentions) and values of a particular person. Ambivalence in this respect would require verification whether it is not caused by a mental health disorder. An important aspect of this assessment is also determination of the person's ability to react and adjust actions in response to external stimuli. Inconsistency between actions and declarations regarding goals may express the lack of understanding of their situation. The examples of such problematic inconsistency include periods of mania, repetitive behavioural rituals in obsessive-compulsive disorder, persistence in addiction despite knowing it is harmful, or bulimic behaviour, gambling and other disorders of impulse control.

An additional and very important source of information when assessing legal capacity is an interview with the family or the data obtained from healthcare professionals or other service providers. These can be used to verify how a given person performs in the social, family or professional environment and whether the events in which they participated have been accurately reported.

The prevalence of mental disorders affecting consciousness and the freedom to make decisions and express will

For some time, we have been in possession of good quality data regarding the prevalence of mental disorders both in Poland and in Europe. The key Polish EZOP study (Epidemiology of Mental Disorders and Access to Mental Health Care) conducted on a sample of 10,000 respondents aged 18–64 in 2015 showed that every fourth Pole had a mental health problem at some point in their life.

Alcohol abuse

The most common disorder was alcohol abuse, which was found in 11% of respondents during their lifetime and this problem affected men (18.6%) more often than it affected

women (3.3%). Alcohol addiction affected men ten times more often (4.1%) than women (0.4%). International Classification of Diseases (ICD-10) defines dependence as a cluster of physiological, behavioural and cognitive phenomena in which the use of a substance or a class of substances takes on a much higher priority for a given individual than other behaviours that once had greater value. A central descriptive characteristic of the dependence syndrome is the desire (often strong, sometimes overpowering) to take psychoactive drugs (which may or may not have been medically prescribed), alcohol, or tobacco. There may be evidence that return to substance use after a period of abstinence leads to a more rapid reappearance of other features of the syndrome than occurs with nondependent individuals. As shown earlier, addictions may strongly determine the ability to control one's behaviour in a situation of the so-called uncontrollable impulse related to reaching for the substance. In assessing the presence of addictions, it is crucial to obtain information related to the last 12 months. Screening tools such as AUDIT (Alcohol Use Disorder Identification Test) or MAST (Michigan Alcoholism Screening Test) are often used in medical practice. The number of points obtained in the AUDIT questionnaire that is equal to or higher than 8 usually requires conducting an in-depth interview in order to evaluate the addiction more precisely.

Dementia syndromes

In 2018–2019 a screening assessment of the state of cognitive functions was conducted based on the largest Polish study regarding the prevalence of health problems in the elderly population in Poland, PolSenior2, involving a representative group of 6,000 respondents aged 60 and over.

In the entire analysed population, a suspicion of mild cognitive impairment was found in 17%, and dementia in 16% of the respondents. The incidence of both mild and more advanced cognitive impairments, suggestive of dementia, increased with age. Among people aged 60–64, three out of four had MMSE test results within the normal range, among 90-year-olds and older the results were normal in less than a third. The diagnosis of dementia was suggested in a total of 12% of the subjects aged 60–64, in 22.5% of the people aged 80–84 and in 55% of the subjects aged 90 and more. Dementia developing in old age is not a physiological phenomenon, even though cognitive abilities decline to some extent with age. The impairment of memory and orientation progresses to a lesser extent in people with higher education, and thus, it appears important for the scores of the MMSE test to be corrected for age and the level of education.

Consequently, from an epidemiological perspective, it seems that dementia syndromes may account for the largest percentage of problems that arise when the ability to make conscious decisions is impaired. They most often occur in Alzheimer's disease, but their causes can be varied and include the following: degenerative, atherosclerotic vascular lesions, consequences following strokes or head and brain injuries, encephalitis or brain tumors. The third after most important cause of dementia following first-place Alzheimer's disease and second-place vascular dementia is Lewy body dementia, whose specificity is based on the fact that it is relatively often accompanied by symptoms of Parkinson's disease and visual hallucinations. According to the ICD-10, the definition of dementia is as follows: dementia (F00-F03) is a syndrome due to disease of the brain, usually of a chronic or progressive nature, in which there is disturbance of multiple higher cortical functions, including memory, thinking, orientation, comprehension, calculation, learning capacity, language and judgement. Consciousness is not clouded. The impairments of cognitive functions are commonly accompanied, and occasionally preceded, by

deterioration in emotional control, social behaviour or motivation. This syndrome occurs in Alzheimer's disease, cerebrovascular disease and other conditions primarily or secondarily affecting the brain.

Once diagnosed, dementia does not have an established and unalterable course. The rate of dementia progression over time has been relatively well studied. Dementia related to, among the others, Alzheimer's disease may last between 8 and 14 years, gradually developing and entering subsequent stages of memory impairment. In its initial stage, memory impairment makes everyday life difficult, yet it does not prevent independent functioning. Moderate dementia (in MMSE, 11–18 points) is characterised by more severe memory disorders. Often, the patient can recall only the well-established and repeatedly used information; new information is temporary and can rarely be reproduced. The patient becomes unable to recall basic information, such as names, surnames and locations. This results in inability to function independently. The progression of the dementia syndrome in Alzheimer's disease measured by the deterioration of the MMSE score is estimated, based on numerous prospective epidemiological studies and meta-analyses, at about two points per year. This may play a significant role in forensic and psychiatric jurisdiction when assessing the mental state at a given time, when a declaration of will has been recorded, e.g. in a last will. Therefore, having the evidence of dementia syndrome, e.g. a diagnosis of memory disorders with 15 points in the MMSE three years before making a declaration of the last will, the patient's ability to make a conscious decision at the time of signing the will might be undermined, as it could have already taken place in the course of severe dementia, i.e. an MMSE result below 11 points.

Depressive disorder

The prevalence of depressive disorders (the so-called major depression according to the DSM-IV) estimated in the EZOP study was relatively low, approximately 3%. In the older population in the PolSenior2 study, the percentage of people with severe symptoms of depression, i.e. at the level of at least 5 points on the 15-point scale of the GDS (geriatric depression scale) questionnaire was 23%. Depression is a condition that accompanies not only many somatic diseases but also other mental disorders characteristic of the elderly age. It has been identified as a risk factor for Alzheimer's disease, which is of key significance with regard to conscious decision-making and expression of will. Simultaneously, the vascular dementia or the preceding mild cognitive impairment are themselves the risk factors for the development of depression. Severe symptoms of depression may manifest themselves as the so-called psychotic depression.

According to the ICD-10, in typical mild, moderate or severe depressive episodes, the patient suffers from lower mood, energy loss, reduced activity. Experiences of pleasure are diminished, the range of interests and concentration are lowered, and there is often significant fatigue, even after little exertion. Sleep is usually disturbed and the appetite is lower. Self-esteem and self-confidence are almost always decreased and the feelings of guilt and low self-worth appear even in mild depressive states.

Regarding the impact on the ability to control one's own behaviour, it appears important to consider depressive disorders with accompanying psychotic symptoms, i.e. hallucinations, delusions or psychomotor retardation. The subject of hallucinations and delusions in this form of depression may more or less directly affect the ability to make conscious decisions and control one's behaviour. A voice that would tell a person with psychotic depression to kill themselves and their loved ones is a circumstance that would certainly affect the assessment of legal capacity.

Bipolar disorder

In the EZOP study, the episodes of mania or hypomania were reported rarely, i.e. 0.1% and 0.4%, respectively. The ICD-10 defines bipolar disorder as follows:

> A disorder characterised by two or more episodes in which the patient's mood and activity levels are significantly disturbed, this disturbance consisting on some occasions of an elevation of mood and increased energy and activity (hypomania or mania) and on others of a lowering of mood and decreased energy and activity (depression). Repeated episodes of hypomania or mania only are classified as bipolar.

Actions taken during the period of mania may result in legal or financial consequences that often require careful forensic and psychiatric analysis with regard to assessment of the ability to make a conscious decision due to the disease process. In mania, decisions are made somehow 'spontaneously', without sufficient analysis of their legal, moral or economic consequences. The perception of the situation in manic people is excessively optimistic and the increased psychomotor drive leads to actions; e.g. they have strange ideas how to earn money or their creative thinking simply improves.

Schizophrenia

Schizophrenia is an example of a serious mental disease and constitutes a model of psychotic disorders that are persistent or recurrent. It is a relatively rare disorder, as its incidence in the population is estimated at approximately 1%. The ICD-10 defines this disease in the following way:

> The schizophrenic disorders are characterised in general by fundamental and characteristic distortions of thinking and perception, and affects that are inappropriate or blunted. Clear consciousness and intellectual capacity are usually maintained although certain cognitive deficits may evolve in the course of time. The most important psychopathological phenomena include thought echo; thought insertion or withdrawal; thought broadcasting; delusional perception and delusions of control; influence or passivity; hallucinatory voices commenting or discussing the patient in the third person; thought disorders and negative symptoms.

The legal capacity of people suffering from schizophrenia is of course upheld, provided that the symptoms of the disease are in remission. People with schizophrenia whose symptoms are progressing often experience auditory hallucinations, increased anxiety and delusions of persecution; i.e. they have the impression that the circumstances in which they find themselves have been initiated for a specific purpose related to them (e.g. 'the neighbours are eavesdropping on me'). Often, information on how much time has passed since the last hospitalisation can be helpful in the assessment of disease stability in schizophrenic patients. On the other hand, the patient's activity in the period preceding hospitalisation may also be an indication in terms of assessing the ability to manage their own behaviour. In schizophrenia, the level of functioning of the affected person is decreased. These persons are often unable to keep their jobs or start a family. They are more prone to somatic diseases, mainly of cardiovascular nature, and therefore, their risk of death is higher.

Anxiety disorder

The prevalence of anxiety disorders is relatively high compared to other mental health problems. In the mentioned epidemiological EZOP study, panic attacks were found with a frequency of 6.2%, various types of phobias, among the others, social phobia and agoraphobia, with a frequency of 5.1%, and generalised anxiety with a frequency of 1.1%. In anxiety disorders, in the form of a phobia, according to the ICD-10, fear is triggered only or mainly by certain situations that in fact do not pose a threat. Consequently, the patient typically avoids these situations and feels terrified when confronted with them. The patient's fears may focus on single sensations, such as palpitations or the feeling of fainting. These are often associated with fear of death, loss of control over one's own behaviour or mental illness. The very thought of being in a phobic situation usually triggers anticipatory anxiety. Phobic anxiety often coexists with depression. In the so-called 'other anxiety disorders', the main symptom is fear, which is not limited to any specific situation. There may also be depressive and obsessive-compulsive symptoms and even some elements of phobic anxiety, but they are distinctively secondary or less severe. In turn, in dissociative or conversion disorders, which are a type of more severe anxiety, there is a partial or complete loss of normal integration between past memories, sense of identity, sensory impressions and control of body movements. All types of dissociative disorders tend to resolve after a few weeks or months, especially if their onset was associated with a difficult event. They are currently believed to be of psychogenic origin and to be closely related in time to traumatic events, insoluble and intolerable situations or distorted relations with the environment.

What needs to be mentioned here is a frequent disorder that occurs as a result of experiencing large-scale events, such as involvement in a traffic accident, warfare or natural disasters – post-traumatic stress disorder. According to the ICD-10 it is:

> a delayed or protracted response to a stressful event or situation (of either brief or long duration) of an exceptionally threatening or catastrophic nature, which is likely to cause pervasive distress in almost anyone. Predisposing factors, such as personality traits (e.g. compulsive, asthenic) or previous history of neurotic illness, may lower the threshold for the development of the syndrome or aggravate its course, but they are neither necessary nor sufficient to explain its occurrence. Typical symptoms include repetitive reliving the traumatic situation in intrusive recollections (reminiscences) and nightmares They appear as a feeling of 'numbness' and emotional dullness, isolation from other people, lack of reaction to the environment, anhedonia, as well as avoiding activities and situations that could remind them of the trauma.

However, it should be stressed that the conditions of this type, if not related to brain injury, may result in legal incapacity. Lower capacity in this respect may be transient and refer to conditions, such as dissociative amnesia, dissociative fugue or dissociative stupor. In dissociative stupor, there is a profound limitation or a complete lack of voluntary movement and lack of a normal reaction to external stimuli, such as light, noise and touch. There must be clear evidence of psychogenic conditioning of the disorder in the form of recent stressful events or a problematic situation. Yet in dissociative amnesia, the prevailing feature is oblivion whose cause is not an organic mental disorder and usually is associated with important recent events and is too severe to be explained by typical absent-mindedness or fatigue. It typically focuses on traumatic events such as an accident or unexpected bereavement and is usually partial and selective.

Mental retardation

Intellectual disability in children under 16 ranges from 2% to 4%, and among adults from 1% to 2%. According to the ICD-10, mental retardation is defined as follows:

> A condition of arrested or incomplete development of the mind, which is especially characterised by impairment of skills manifested during the developmental period, skills which contribute to the overall level of intelligence, i.e., cognitive, language, motor, and social abilities. Retardation can occur with or without any other mental or physical condition. Degrees of mental retardation are conventionally estimated by standardised intelligence tests.

Intellectual disability is therefore subject to quantitative evaluation and may be manifested in a vast array of the manners of functioning. Usually, the legal capacity of people with intellectual disabilities does not change; if specific competences have not been formed, they will not appear in the future. However, in certain situations cognitive functions may worsen. It is known that people with Down syndrome quite often develop symptoms of Alzheimer's disease as a result of particular types of common genetic and pathophysiological mechanisms. In certain people who are affected with this syndrome, some symptoms of Alzheimer's disease appear already at the age of 19–35 and may affect over 25% of people with Down syndrome.

Summary – psychological mechanisms and decision-making competence in psychiatry

One of the major simplifications in thinking about legal capacity with regard to mental illness is the belief that a serious mental illness and decisional capacity exclude each other. Thus, it appears necessary to perform a more comprehensive assessment of the relationship between mental illness and legal capacity. Of the many mental disorders, there are only a few that thoroughly and significantly affect the ability to control one's behaviour. In most mental disorders, the limitation of legal capacity may be only partial or temporary, e.g. during a period of exacerbated symptoms.

Undoubtedly, the diseases in which such irreversible loss may occur are deep dementia, brain damage in the course of poisoning or oxygen deficiency, conditions following brain injuries, and progressive deterioration of cognitive abilities in certain types of schizophrenia (the so-called simple schizophrenia).

Disorders in which the ability to manage one's behaviour has never developed are primarily mental retardations, genetic defects or autism spectrum disorders.

As it has been mentioned before, the key task of a psychiatrist in evaluating the ability to manage one's behaviour is to assess the autonomy of a person suffering from a mental illness. Autonomous actions are those that are taken only at the initiative of a given person without the influence of others and in a way that is not disturbed by abnormal brain functioning or disturbed psychological mechanisms. Actions taken in this manner, even if they seem morally doubtful, are the decisions of a person who is guided by their own system of values in the pursuit of the assumed goal, i.e. when making a decision in a particular situation the person 'knows what they want'. Even if it seems that the person suffers a loss as a result of their decision or the decision leads to any other evidently unfavourable consequences, it nevertheless is a sovereign decision, provided that it was made with proper consideration.

The harm principle, formulated by Feinberg, acknowledges that freedom of action can be legally limited only when, as a result of unauthorised behaviour, another person is harmed, i.e. when there is a situation that harms the legally protected interest of the affected person. However, this freedom cannot be limited if the person causes their own harm. At this point, it is worth quoting a classic text from the treatise 'On Freedom', by Mill:

> As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding). In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences.

The important issue is whether the person making such a decision possesses the necessary knowledge regarding the consequences of the decision and the ability to understand its interpretation, i.e. whether they are competent in this respect. This topic has been described quite extensively in the context of ethical considerations of granting informed consent to undergo a particular type of treatment and also when participating in a medical experiment. According to one of the most frequently commented proposals, the so-called decision capacity/competence assumes the presence of its four criteria:

1. communicating decisions in a consistent (stable) manner;
2. understanding critical information;
3. being aware of the consequences of the situation; and
4. knowing other alternative treatment methods (medical procedures).

These criteria show the importance of a rational choice of possible actions in a particular situation. The so-called rational choice theory assumes that persons with psychological disorders may not have full capacity to make such judgements. For example, people with delusional disorder will base their judgements on a false view of reality, and addicted people may make cognitive errors resulting from habitual actions. At this point it seems worthwhile to quote the classic case of forensic psychiatry concerning the Scotsman Daniel M'Naghten, who, being convinced that he was the subject of a conspiracy initiated by the Tories, murdered one of the government officials in London in 1843, and in a court trial, he was acquitted because he was found to suffer from a mental illness that was accompanied by delusions. The so-called the M'Naghten rule states that if, at the time of committing a crime, the person was under the effect of a mental illness and was unable to assess the nature and significance of the act, he or she is not responsible for that act. In other words, this principle refers to the inability to distinguish between good and evil. A different type of problem is the lack of control over one's behaviour resulting not from a disease-distorted view of reality but from an irresistible impulse that initiates a specific behavioural pattern in a person with a disorder. One of the proposals of the so-called the irresistible impulse test that occurred when the act was committed assumes that

1. this is a person with a mental illness of significant severity;
2. the impulse directly results from a mental disorder; and
3. there is no evidence that the act was planned in advance.

The second principle can be perceived as a weakening of the will and the lack of ability to manage one's behaviour. A person who hears the voice of God ordering them to kill their child, or experiences a 'possession' by the force that directs their body at time of reaching for a tool to kill their mother, does not do it deliberately. Someone who is addicted to gambling will sense an irresistible impulse associated with the reward mechanism when they start betting, which in the addicted person is so strong that it cannot be resisted. In the Polish Penal Code, the following paragraph defines these two principles as follows: 'No crime is committed if, due to mental illness, mental retardation or other disturbance of mental activities, a given person at the time of the act could not recognise its implications or control their conduct' (Article 31 § 1 of the Penal Code).

Currently in psychiatry the understanding of decisive processes occurring in brain is mainly based on cognitive psychology and traditional psychopathology. An opportunity to expand the knowledge in this area is seen in the advances in neuroscience, and the term 'neurolaw' is used in the context of law in English literature.

Disorders of neurodevelopmental processes show the importance of properly formed neural connections (networks and circuits) in the brain for decision-making and cognitive competences. Disorders of the so-called spectrum of autism are an example of the lack of maturity of such connections and the effects they have on the legal capacity of the affected persons. However, there has still not been such a breakthrough, for example, in the advances of neuroimaging to apply functional magnetic resonance imaging of the brain for the assessment of decision-making competences or the presence of mental illness. However, justification for and certain cognitive benefits of irrational beliefs that help people function better in mental crisis are searched for within the area of philosophy of psychology. At times, the role of confabulation and highly developed delusions is emphasised for building the image of reality in the mind of a person experiencing a crisis or trauma in order to overcome difficulties in proper functioning in social relations. In such a case, irrational beliefs or a non-objective description of a situation does not necessarily indicate the presence of a serious mental illness. This significant revaluation of understanding of a mental illness should be considered in the assessment of the legal capacity of people with mental disorders. Similarly, the actions of psychiatrists from the so-called critical psychiatry movement stress the importance of psychosocial factors (unemployment, lack of social support, trauma related to sexual violence) as an element of the vulnerability-stress model in understanding of the mechanisms of a mental illness. A mental illness is often perceived more and more as a result of the lack of a privileged social position or unfavourable social relationships in which psychiatry becomes a tool of power and biopolitics. Therefore, the appropriate application of regulations in relation to the assessment of legal actions becomes an opportunity for a change that could help improve the situation of people affected by a mental crisis or disability.

Bibliography

Ainslie, G., *Palpating the elephant: Current theories of addiction in light of hyperbolic delay discounting*, Oxford University Press, Oxford, 2017.

American Psychiatric Publishing, *Diagnostic and statistical manual of mental disorders (DSM-5)*, Booksmith Publishing LLC, Arlington, VA, 2021.

Becker, R. F., The evolution of insanity standards, *Journal of Police and Criminal Psychology*, 2003, vol. 18, p. 41.

Błędowski, P. et al., *PolSenior2. Badanie poszczególnych obszarów stanu zdrowia osób starszych, w tym jakości życia związanej ze zdrowiem*, Gdański Uniwersytet Medyczny, 2021, https://polsenior2.gumed.edu.pl/attachment/attachment/82370/Polsenior_2.pdf.

Boorse, C., On the distinction between disease and illness, *Philosophy & Public Affairs*, 1975, p. 49.
Bortolotti, L., *The epistemic innocence of irrational beliefs*, Oxford University Press, Oxford, 2020.
Cano, S. J. et al., The ADAS-cog in Alzheimer's disease clinical trials: Psychometric evaluation of the sum and its parts, *Journal of Neurology, Neurosurgery & Psychiatry*, 2010, vol. 81, p. 1363.
Cohen, B. M., *Psychiatric hegemony: A Marxist theory of mental illness*, Springer, New York, 2016.
Cooper, R., *Classifying madness*, vol. 86, Springer, New York, 2005.
Demazeux, S., P. Singy, *The DSM-5 in perspective: Philosophical reflections on the psychiatric Babel*, vol. 10, Springer, New York, 2015.
Feinberg, J., *The moral limits of the criminal law. Vol. 3: Harm to self*, Oxford University Press, Oxford, 1989.
Fischer, J. M., M. Ravizza, *Responsibility and control: A theory of moral responsibility*, Cambridge University Press, Cambridge, 1998.
Folstein, M. F., S. E. Folstein, P. R. McHugh, "Mini-mental state": A practical method for grading the cognitive state of patients for the clinician, *Journal of Psychiatric Research*, 1975, vol. 12, p. 189.
Han, L. et al., Tracking cognitive decline in Alzheimer's disease using the mini-mental state examination: A meta-analysis, *International Psychogeriatrics*, 2000, vol. 12, p. 231.
Kiejna, A. et al., The prevalence of common mental disorders in the population of adult poles by sex and age structure – an EZOP Poland study, *Psychiatria Polska*, 2015, vol. 49, p. 15.
Lafleur, D., C. Mole, H. Onclin, *Understanding mental disorders: A philosophical approach to the medicine of the mind*, Routledge, London, 2019.
Magierska, J. et al., Clinical application of the Polish adaptation of the Montreal cognitive assessment (MoCA) test in screening for cognitive impairment, *Neurologia i neurochirurgia polska*, 2012, vol. 46, p. 130.
Meynen, G., *Legal insanity: Explorations in psychiatry, law, and ethics*, Springer, New York, 2016.
Meynen, G., G. Widdershoven, Competence in health care: An abilities-based versus a pathology-based approach, *Clinical Ethics*, 2012, vol. 7, p. 39.
Mill, J. S., *O wolności*, Wild, 1864.
Oyebode, F., *Sims' symptoms in the mind: Textbook of descriptive psychopathology, Femi Oyebode*, Expert consult, 5th ed., Saunders, Elsevier, 2015, https://indianmentalhealth.com/pdf/2015/vol2-issue1/Book_Reveiw.pdf.
Przybysz, J., *Psychiatria sądowa. Opiniowanie w procesie karnym. Podręcznik dla lekarzy i prawników*, Fundacja Tumult, Toruń, 2003.
Pużyński, S., J. Wciórka, *Międzynarodowa Statystyczna Klasyfikacja Chorób i Problemów Zdrowotnych. Rewizja dziesiąta. Klasyfikacja zaburzeń psychicznych i zaburzeń zachowania w ICD-10. Badawcze kryteria diagnostyczne*, Vesalius, Kraków, Warszawa, 1998.
Rapley, M., J. Moncrieff, J. Dillon, *De-medicalizing misery: Psychiatry, psychology and the human condition*, Springer, New York, 2011.
Sobów, T., I. Kłoszewska, Diagnostyka i leczenie otępień, *Rekomendacje zespołu ekspertów Polskiego Towarzystwa Alzheimerowskiego Medisfera*, Otwock, 2012, p. 82.
Tiihonen, J. et al., 11-year follow-up of mortality in patients with schizophrenia: A population-based cohort study (FIN11 study), *Lancet*, 2009, vol. 374, p. 620.
Wakefield, J. C., The concept of mental disorder: On the boundary between biological facts and social values, *American Psychologist*, 1992, vol. 47, p. 373.
Waszkiewicz, N., A. Szulc, Diagnoza nadużywania alkoholu, *Przegl Lek*, 2009, vol. 66.
Wierucki, Ł. et al., Health status and its socio-economic covariates in the older population in Poland–the assumptions and methods of the nationwide, cross-sectional PolSenior2 survey, *Archives of Medical Science*, 2020, vol. 18.
Zawiła-Niedźwiecki, J., O pojęciu kompetencji w podejmowaniu decyzji terapeutycznych, *Etyka*, 2015, vol. 51, p. 67.

38 Active legal capacity and its restrictions – diagnostic aspects

Jarosław Rychlik

Introduction

This chapter presents selected issues relevant from the perspective of psychological diagnosis conducted to assess the capacity to perform legal transactions. The first part of the chapter presents general issues of diagnosis in the methodological context, indicating key areas, relevant from the perspective of conducting diagnostics related to the assessment of the capacity to perform acts in law. The subsequent sections address the role of both non-standardised and standardised methods in diagnostics aimed at assessing the capacity to perform acts in law. In terms of non-standardised methods, interview and observation methods were highlighted. As for standardised methods, exemplary diagnostic tools were presented along with their characteristics including their essential psychometric properties related to the issues of relevance and reliability. This chapter introduces selected tools from the field of diagnostics: neuropsychological, general cognitive performance and personality. As part of the standardised methods analysis in each chapter, a comparison was made between the tools presented with regard to their usability in relation to the assessment of the capacity to perform acts in law. The final part of this chapter addresses the issue of integration of diagnostic data in relation to the possible parallelism of the research findings obtained in the fields of neuropsychology, cognition and personality.

1. Introductory remarks on psychological diagnosis – aspects of the assessment of the capacity to perform acts in law

The issue of capacity to perform acts in law and its potential limitations, due to its reference to issues such as the ability to make rational decisions or to act, presents a significant challenge for psychological assessment. It is worth noting that the area of diagnosis includes (1) the process of identifying and determining the nature of a disease or disorder on the basis of its manifestations and symptoms through the application of assessment techniques (e.g. tests) and other available data; (2) the classification of persons based on the category of disease, disorder, irregularity or set of dysfunctional characteristics; and (3) the decisions or statements that are derived from the said process or the classification used.[1] In order to properly implement the activities, the matter of what function diagnosis serves in the context of the research process aimed at understanding an individual is important. The parallelism between the diagnostic process and scientific cognition should be mentioned here. Therefore,

1 Source: dictionary.apa.org/diagnosis.

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it should be emphasised that the diagnostic process includes descriptive, exploratory and predictive aspects.[2] In a diagnostic context, the descriptive function refers to establishing the factual circumstances or the state of affairs; e.g. it involves establishing the intellectual level of the individual. The exploratory function is based on the identification of the underlying reason for the factual circumstances, e.g. the reasons for the decline of the intellectual capacity. The predictive function, on the other hand, relates to what is likely to happen as a result – what the consequences of the identified state of affairs will be, e.g. what decisions and behaviours are likely to occur as a result of the individual's decreased intellectual capacity. Furthermore, as part of the diagnostic function, the corrective aspect is important from the perspective of the issues discussed in this chapter, which relate to the possible remedial measures, i.e. what should or could be done to achieve the required state, e.g. in the area of improving intellectual capacity. It should be made clear that this aspect of the diagnostic function also refers to the role of science, which, within the theoretical models, indicates the possibility of reality modelling – to eliminate certain states of affairs, to limit their relevance or to indicate measures that will trigger their occurrence (e.g. in the case of intellectual shortcomings, identifying the best measures to improve one's cognitive functioning).

As part of the issue of performing legal transactions in relation to the issue of diagnostic capacity, a highly relevant matter is the paradigmatic orientation of the diagnostician. This issue is related to the problem of psychology in terms of the integration of knowledge and diversity of psychological approaches. This problem of the evolution of psychology as a science affects the way in which psychological assessment is conducted and, consequently, the final result of the diagnosis in terms of determining the character of disorder. It should be noted that the issue of paradigmatic diversity translates into the area of diversity of methods, techniques and tools that can be employed in the field of psychological diagnosis. Furthermore, the diagnostician's paradigmatic orientation translates into the selection of the diagnostic tools and the meaning and value the diagnostician attributes to the resulting samples of behaviour. The issue of this diversity is conditioned by several factors. The first factor is the progress in the field of psychological knowledge, which is related to the emergence of the main branches of psychology in the form of introspection, depth psychology, behaviourism, *Gestalt* and phenomenological and cognitive approaches. Each of these branches adopts a somewhat different vision of a person and thus asks a different research question – also on the level of diagnostic process. Furthermore, this theoretical diversity also overlaps with the issue of the gradual specialisation of psychology and expansion of its sub-fields, which focus on very specific areas of human functioning, which is reflected in the area of diversity of directions and objectives of the diagnostic process. Regarding the issue of diagnosing an individual for possible mental health disorders, clinical features and deficits relevant to the assessment of their potential for the capacity to perform acts in law, it is important to highlight three key areas (disciplines) of psychology that relate to the main areas of the human functioning, the consideration of which allows the diagnostic process to be comprehensively completed. In order to conduct such a diagnostic of an individual, it is appropriate to refer to theories specialising in the issues of

1. the functioning of the central nervous system and identification of the possible organic characteristics of the brain by looking at the degree of completion of tasks involving cognitive functions (e.g. **attention, short-term memory, thinking**);

2 W. J. Paluchowski, *Psychological diagnosis: Process, tools, standards*, Polish Scientific Publishers PWN, Warsaw, 2007.

2. recognising general intellectual capacity and its more specific aspects (e.g. **thinking [including abstract thinking], general knowledge**);
3. personality in the sense of key features in the regulation of an individual's behaviour and the possible **presence of clinical features**.

2. The dilemma of methods employed in psychological diagnosis – between standardised and non-standardised methods

Despite the fact that to a large extent the categorisation of key areas for the assessment of the capacity to perform acts in law described earlier determines the direction and manner in which the diagnostic is to be conducted, further doubts can be detected, as to the manner in which the diagnostic is to be conducted, such as in the context of the choice of methods and techniques to be employed in order to obtain behavioural samples of the tested person's functioning in the three mentioned areas.

One of the questions that emerges concerns the issue of the extent to which standardised and non-standardised methods are employed and the importance of the results derived from the use of these methods for the overall assessment of an individual's functioning. It should be mentioned that the division presented is one of the basic divisions as regards the diagnostic methods employed. Non-standardised methods include interview and observation, and their utilisation is often related to the fact that they facilitate a general overview of the human functioning and allow for the collection of information that can help to identify problem areas and set the direction of the further diagnostic process. Their use is not based on a precisely defined method of execution, nor does it impose a restrictive interpretation method. Therefore, the interpretation may depend on the paradigm to which the diagnostician is attached. The value of these methods in the context of the assessment of capacity to perform acts in law is related to the fact that they offer the opportunity to clarify the general diagnostic problem towards more detailed research questions. Meanwhile, standardised methods are various types of tests and questionnaires that contain instructions on how to carry out the study and how to interpret the behavioural samples collected. Furthermore, it is important to remember that in many cases the use of standardised methods is associated with the fact that the diagnostician has already formulated and specified precise questions related to the research problem, e.g. as to the factors that are most likely to represent possible limitations to the tested person's capacity to perform legal transactions.

A psychologist confronted with a predicament with respect to the formulation of an assessment as to the functioning of an individual in terms of the capacity to perform acts in law appears to have a relatively precisely defined research problem. It is also worth noting that the formulated **research problem** on the issue of assessing the capacity to perform acts in law constitutes, to a certain extent, an **open question**. It is open in the sense that it requires an understanding of a broad spectrum of the tested person's behaviour at different levels and in different contexts. Therefore, it appears that, similarly to research aimed at diagnosing other aspects of human functioning,[3] non-standardised methods should also play an important role in research aimed at assessing the capacity to perform acts in law to allow for a comprehensive understanding of the diagnosed person and the identification of

3 J. Sommers-Flanagan, Z. Waganesh, M. Hood, *The encyclopedia of clinical psychology*, 2015, www.researchgate.net/publication/319336218_Clinical_Interview; https://doi.org/10.1002/978111862539 2.wbecp117.

key problem areas, which will consequently promote the correct selection of standardised methods at a later stage of diagnostics. As we contemplate the use of standardised methods, it is important to recognise their value in the context of obtaining precise and reliable answers to questions and hypotheses that arise from exploring the general determinants of the diagnosed person's psychosocial functioning on the basis of non-standardised methods. Their value is related to the fact that, among other things, they reduce the dependency of the results' interpretation on the tested person's personality traits. However, the findings formulated based on these methods usually concern a narrow scope of an individual's functioning.[4]

To summarise the issue of diagnostic dilemmas as to the choice between non-standardised and standardised methods, it is necessary to indicate their common properties. These methods are based on collecting behavioural samples, which constitute the foundation for making more general conclusions that allow for the characterisation of respondents in terms of certain psychological traits, deficits or the presence of mental disorders, as well as the prediction of possible changes in the functioning of the tested persons What is different in these methods is the process of collecting behavioural samples as well as their level of systematisation in terms of interpretation. Non-standardised methods lack uniform standards on their application, which is why they are referred to as 'non-standardised'. Conversely, as regards standardised methods, there are specific rules for their application and interpretation and, moreover, the scope of inference is limited to precisely identified areas of the functioning of an individual.

3. Non-standardised methods in the assessment of the capacity to perform acts in law

Regarding the issue of the application of non-standardised methods in psychological assessment, it should be mentioned that interview and observation are the most commonly used methods. An interview is a conversation conducted to obtain a specific type of information. At the same time, it is a research procedure that initiates professional contact with the patient (Stemplewska-Żakowicz, 2009; Sęk, 2001).[5] It should be used to collect information relevant to the assessment, resulting in the interpretation that allows the identification of the mechanisms governing the tested person's behaviour and the level of functioning in different areas. As for the method of observation, it should be highlighted that it involves the conscious and deliberate collection of data related to the tested person's behaviour, which provide a premise for inferring the psychological traits. It is also stressed that an important element of observation is its regularity and the fact that it avoids subjectivity in the interpretation of collected data (Sęk, 2001).

The role of interview and observation in a diagnosis related to the assessment of the capacity to perform acts in law appears to be important as both methods permit the collection of general data on the tested person's cognitive, individual and social functioning, which leads to the clarification of the initially outlined, general research questions. The role of information collected as a result of the application of these methods seems particularly important because, notwithstanding the existence of hypotheses formulated prior to the initiation of the research process, further relevant questions and hypotheses

4 L. Cierpiałkowska, H. Sęk, *Psychologia kliniczna*, PWN, Warsaw, 2016.
5 K. Stemplewska-Żakowicz. *Psychological diagnosis*, GWP, Gdańsk, 2009, pp. 62–89.

may emerge as a result of their application, resulting in the in-depth diagnostics in specific areas, which may be important in the context of formulating a definitive assessment of the capacity to perform acts in law and identifying factors that may support the researcher in this respect, despite the existing limitations.

There are a number of other non-standardised methods besides the observation and interview. Due to the specific nature of this study, the construct analysis should be mentioned, which can be a behavioural sample that provides a premise for inferring intellectual capacity in the verbal area but also provides a premise for inferring emotional and personality functioning. However, caution should be exercised when analysing this type of research data due to the risks of over-interpretation or subjective interpretation. As part of the construct analysis, the psychologist may, for example, analyse samples of the tested person's handwriting in order to get a general idea of the area of the tested person's verbal intelligence.

4. Standardised methods – psychometric aspects relevant in the context of the assessment of the capacity to perform acts in law

Regarding standardised methods, it should be noted that these are psychological tools, tests, estimate scales, questionnaires and surveys, which are based on a very standardised way of using them in the diagnostic process. Standardisation is based on elimination or significant reduction of the dependence of test results on the impact of factors that do not constitute the aim of the diagnostic measurement (Hornowska, 2001) (e.g. situational factors in circumstances where the aim of the measurement is not to assess reactivity to specific circumstances but to establish the presence of some predisposition, e.g. neuroticism). The standardisation of a tool can also be understood in a broader sense – as a set of methodological and psychometric activities related to the development of a diagnostic tool (Brzezinski, Hornowska, 2000). The tool, based on a specific standardisation, is equipped with precise instructions and a key to allow unambiguous evaluation of behavioural samples (e.g. answers to questions or the extent of responses to tasks) and unambiguous ways of interpreting the results. When discussing standardised methods, it is important to highlight the problem of their objectivity (which is another key feature of test-oriented tools). Objectivity is achieved if there are no discrepancies in the interpretation of samples taken from the same person and analysed by different diagnosticians. Objectivity is based on the development of unambiguous rules of interpretation, which is related to the issue of translating raw results into score on a specific standardised scale (such as ten, stanine or tetron scales). The issue of standardisation and objectivisation of diagnostic methods is related to another important issue of test-oriented methods – namely, normalisation. It constitutes a statistical operation based on identifying the relationship between the results obtained using a given tool (e.g. a test or survey) and the average results in a specific population (Hornowska, 2001). The issue of normalisation is related to giving meaning to results defined in the context of results in a normalisation sample, which should be representative, thus allowing for the approximation of how the respondent ranks in the population in terms of a specific trait (Hornowska, 2001). This issue is related to the measurement error, an important matter for psychological assessment, which should also be taken into account during the implementation of the study. Normalisation, therefore, allows for the final interpretation of the results in the context of how an individual develops a given trait in relation to the levels of that trait determined for the normalisation sample (Hornowska, 2001).

Achieving the mentioned properties of diagnostic tools is largely based on the use of the procedures of psychometrics, which addresses the issue of psychological testing (Brzezinski, Hornowska 2000). Another particularly important aspect of psychometrics is to establish procedures for the correct development and validation of tests and diagnostic tools. Psychometrics posit that in addition to the mentioned properties of questionnaires, the issues of reliability and relevance are very important in terms of their measurement characteristics (psychometric goodness) (Brzezinski, Hornowska, 2000; Hornowska, 2001).

Regarding the issue of reliability, it should be clarified that it refers to the accuracy of measurement of a given trait with a particular psychology tool. Figuratively speaking, we can say that reliability answers the question of how well a specific test (questionnaire scale) measures a psychological property. Reliability is understood both as internal consistency and stability over time (Brzezinski, Hornowska, 2000; Hornowska, 2001). Verification of the questionnaire's internal consistency is based on the split-half method. This method involves comparing the results of two parallel halves of the same test completed by the same participants (Brzezinski, Hornowska, 2000; Hornowska, 2001). It provides a way to determine the homogeneity of questionnaire positions, i.e. the extent to which a questionnaire measures a homogeneous psychological trait. The reliability aspect related to stability is based on the test-retest technique; i.e. establishing relationships between repeated measurements with the same test (in the same group of test takers). Reliability understood as stability is particularly important when validating tools that refer to theories that imply the constancy of the measured psychological property (which is particularly relevant in the development of questionnaires testing personality traits and types of temperament). Furthermore, there is a technique of comparing alternative forms of the same test. Usually, to determine the level of reliability, the Kuder-Richardson coefficient (for a test consisting of dichotomous questions, e.g. yes or no) or Cronbach's *alpha* (for questionnaires using a multiple-choice questions ranging from 1 [definitely no] to 5 [definitely yes]) has to be calculated. In addition, the Spearman-Brown coefficient is also used to determine reliability understood as stability (Brzezinski, Hornowska, Zakrzewska, 2005).

The problem of validity involves verification whether a psychological test measures the characteristic or trait it was developed to measure. Validity is reflected in the accuracy of the operationalisation of the measured variable, i.e. whether, in order to determine the level of a particular psychological characteristic, the questionnaire collects behavioural samples appropriate for estimating that particular characteristic (Brzezinski, Hornowska 2000; Hornowska, 2001). There are many types of relevance. The literature also mentions face validity, which is about whether a test looks like it is supposed to measure a particular characteristic or trait. It can be concluded that this is the most superficial aspect of validity and it is not sufficient for a psychological test to be described as meeting the requirements of psychometric goodness (Hornowska, 2001). A very important aspect of the validity of diagnostic tools is their criterial validity, which consists in confirming the relationship of the results of a given questionnaire to specific external criteria (e.g. the validity of a questionnaire measuring social competence will be confirmed by correlating its results with the observation of behaviour indicating good interpersonal interactions, and for the intelligence scale by correlating it with school performance). Psychometrics also indicates convergent and discriminant validity. Investigating this type of validity is based on the multitrait-multimethod analysis (Brzezinski, 2019; Hornowska, 2001). It involves determining the relationship between a tool to investigate a particular characteristic and the results of tools examining constructs of similar and different nature. Validation of the convergent and discriminant validity in a test designed to measure shyness, for instance,

can be based on correlation with the results of tests to measure social anxiety and introversion (convergent validity validation) and with tools to measure intelligence and temporal orientation (discriminant validity). Confirmation of the presence of correlations indicating convergent validity and discriminant validity confirms the presence of theoretical validity. However, this aspect of validity for inventories measuring psychological properties that include more specific mental properties (so-called factors) also requires confirmation of validity in terms of structural validity, i.e. that certain items of inventory show closer correlations with each other than with the other test items included in the inventory. In order to illustrate this kind of validity, it is important to mention the C. Ryff's *psychological well-being scale* (adapted by Karaś, Cieciuch, 2017). This scale measures global well-being; however, it assumes that global well-being is based on six more specific aspects of adaptation. Confirmation of the structural validity of this questionnaire is provided by factorial analyses, indicating stronger correlations of test items designed to examine specific aspects of well-being.

4.1. Neuropsychological diagnosis in the assessment of the capacity to perform acts in law

Neuropsychological diagnosis constitutes one of the key diagnostic areas in a situation where research is aimed at a comprehensive clinical diagnosis of the patient's mental structures. It should be noted that a number of psychological difficulties may be connected with neurological disorder and indicate a deterioration in the area of CNS structure, i.e. organic brain syndrome (Carson, Bucher, Mineca, 2003). Three following methods for diagnosing organic brain damage are presented to provide an overview of the problems related to neuropsychological diagnosis based on standardised methods: the Wisconsin card-sorting test (WCST), by R. K. Heaton and associates (2008); Brickenkamp's D2 attention test (2012); and the brain injury diagnosis test (BID) by S. Weidlich and G. Lamberti (1996). Each of these tests allows the determination of the possible presence of organic characteristics in the central nervous system (CNS) based on the testing of executive and perceptual functions. It should be also noted that it is currently assumed that in justified cases, in the case of a neuropsychological diagnosis, suggesting lesions in the area of the central nervous system, diagnostic imaging, e.g. via PET scan or TK scan, is carried out to provide more in-depth diagnosis (Kądzielawa, 2001). However, it seems appropriate to employ the aforementioned psychological tools in order to obtain information justifying the possible need for an in-depth diagnosis in the neuropsychological area (Carson, Bucher, Mineca, 2003).

a. The Wisconsin card-sorting test (WCST)[6]

One of the well-regarded tools for diagnosing neuropsychological aspects is the Wisconsin card-sorting test (WCST) by R. Heaton and associates (2008). The test was originally developed to assess abstract reasoning and the ability to modify cognitive strategies. It can be seen as a measure of executive function involving the ability to develop and maintain an appropriate problem-solving strategy in response to changing situational conditions. It is primarily used as a tool to measure abstract reasoning in the general adult population.

6 Presented information on the Wisconsin card-sorting test (WSCT) is based on the textbook for this test – R. K. Heaton, G. J, Chelune, J. L. Talley, G. Kay, G. Curtiss, *The Wisconsin card sorting test – modified and extended*, Psychological Test Laboratory, Warsaw, 2008.

Table 38.1 Reliability analysis coefficients (based on generalisability coefficient)

Categories of errors measured	*Total number of errors*	*Perseverative responses*	*Perseverative errors*	*Total perseverative errors*
Generalisability coefficient	0.71	0.53	0.52	0.72

According to some researchers, it is used as a clinical neuropsychological tool (Bulter, Retzlaff, Vanderploeg 1991; after Heaton et al., 2008). This test is popular with clinicians due to its sensitivity in detecting frontal lobe disorders (Drewe 1974, Milner 1963; after Heaton et al., 2008).

The test includes 4 reference cards and 128 answer cards, which represent figures that have different shapes. This test involves placing all the reference sheets in front of the participant and handing them part of the answer cards. The participants are instructed that they must match each of the answer cards with the reference cards. The rules for matching cards change each time the participant correctly matches a particular card to the reference card. The participant is asked to continually identify the changing rules of how the cards should be matched. The participant is informed every time the cards are mismatched. The current rule of how the cards should be matched should never be disclosed to the participant.

Validation of the test was based on a group of 899 healthy individuals, resulting from a combination of six separate samples. The first sample group consisted of 453 teenagers and children, the second sample group consisted of 49 students, the third sample group consisted of 150 healthy adults, the fourth sample group consisted of 50 people (who only participated in the standardisation study), the fifth sample group consisted of 124 pilots and the sixth sample group consisted of 76 adults. Measurement accuracy was determined based on generalisability theory, which is applied as an alternative to the stability coefficient (Cronbach et al., 1972; after Heaton et al., 2008). A group of 46 children and teenagers were surveyed twice with WCST (M = 13.09) establishing generalisability coefficient values. The results of the analysis are presented in Table 38.1.

The generalisability coefficient values obtained indicate good and relatively correct test properties in terms of stability over time. As for the validity of the WCST, it has been confirmed in studies on clinical groups consisting of persons suffering from focal and diffuse brain injuries (Drewe, 1974; Milner 1963; Robinson et al., 1970; after Heaton et al., 2008). Furthermore, validity was verified by demonstrating the existence of correlation of the test results with physiological indicators in the form of regional cerebral blood flow in the prefrontal cortex area, thus confirming the validity of using the test to diagnose the presence of organic changes in these areas of the central nervous system (Robert Heaton et al., 2008).

b. Rolf Brickenkamp's D2 test of attention[7]

As regards the issue of neuropsychological diagnostics, the Rolf Brickenkamp D2 test of attention (2012) should be presented. The test is used to measure the level of attention and ability to focus on perceptual stimuli. The test is considered to meet the conditions

7 Information on the D2 test is presented based on the textbook – R. Brickenkamp, *The D2 test – handbook*, ERDA Publishing House, Warsaw, 2012.

of standardisation. Furthermore, the handbook for this test indicates that it is a tool with objective properties and high reliability and validity. However, it is worth taking a closer look at the characteristics of this test as well as the methods used to validate it. It is a test of general skills related to attention concerning the selection of elements present in the field of perception. An important strength of the test is its independence of other cognitive aspects, e.g. concerning general knowledge. The test is also independent of learned arithmetic skills. It allows to diagnose the speed of processing perceptual material, the accuracy (lack of omissions) and persistence, i.e. the absence of a decline in the ability to correctly process perceptual material as a result of fatigue due to continuous concentration of attention. So far it was primarily used to test drivers. In addition, it was used to screen workers hired in the mining industry. Its use was, however, most often linked to the demands of clinical psychology. The test is primarily used to measure concentration of attention; however, according to some researchers, it can also be used to measure divisibility of attention (in which case, additional diagnostic tool designed to measure the extent to which attention is split between tasks should be used). The tool has been developed in versions for children and adults.

During this test, the participant is tasked with detecting the letter 'D' in a sequence of characters next to which there are markings with short lines. The difficulty of the task is related to the fact that the 'D' letters are written in lines with the 'P' letters. When calculating the results, the speed of perception and the number of errors made in the detection of the letter 'D' marked with two lines are taken into account.

The test's reliability was verified by the split-half and test-retest methods. In both cases, the Kuder-Richardson coefficient was used, producing high half reliability rtt > 0.90 for all types of attention indicators (for detection speed, accuracy and concentration level) (Buttner, 1968, Esner, 1987; after Brickenkamp, 2012). These results demonstrate high test reliability in measuring the mentioned properties of attention. Stability over time has also been confirmed by the test-retest method by obtaining reliability indices (rtt) in the range between 0.71 and 0.89 (Buttner 1968, Esner, 1987; after Brickenkamp, 2012). In contrast, lower stability over time indices were obtained in the group of children with conduct disorders, something that should be explained either by mental deterioration or by factors resulting from the effective psychological support, which improved their general functioning and was reflected in the area of primary cognitive functions. In the group of children with conduct disorders, the K-R reliability index ranged from 0.86 to 0.37 (Brickenkamp, 2012).

Regarding the relevance aspect of the D2 test, a comparison was made between pupils having low and high school activity in terms of their test scores. It was found that pupils, classified based on teachers' observations in the active group, obtained higher scores in the D2 test (in terms of stimuli selection speed and overall attentional resources and ability to focus) than pupils classified in the passive group. In contrast, no differences were noted between the groups in terms of accuracy of task completion in the D2 test. Furthermore, the results of the D2 test were compared between groups of pupils characterised by low and high persistence. Pupils classified as persistent made fewer mistakes as compared to pupils who lacked persistence. In terms of comparison of these groups by how fast they identified stimuli, no statistically significant differences were found (Brickenkamp, 2012).

These results are in line with expectations and prove the test's validity, as the alacrity criterion varies in terms of task completion rate in the D2 test, and the persistence criterion varies in terms of task completion accuracy.

Moreover, it is important to highlight a number of other studies that confirm the validity of the D2 test, demonstrating that the results of this test:

- positively correlate with attention measured by Duker and Lienert KLT-L (A) test – high correlation coefficient values (0.71) were observed (after Brickenkamp, 2012);
- negatively correlate with tests measuring the completion time of perceptual tasks by persons with neurological deficits (Hamster, 1978; after Brickenkamp, 2012);
- differentiate between those who repeatedly fail their driving test and those with good driving skills (Brickenkamp, 1962; after Brickenkamp, 2012);
- differentiate between drivers who cause car accidents and those who drive safely (Brickenkamp, 1962; after Brickenkamp, 2012);
- differentiate between athletes playing sports that require high levels of attention and athletes playing sports that do not require high efficiency in this area (Brickenkamp, 2012).

Furthermore, it was found that athletic trainings requiring attention and focus result in improved performance in the D2 test (Scheler 1986; after Brickenkamp, 2012). As regards the relevance of this tool in the clinical applications, the results of a study by Esner (1987) are worth mentioning, which confirmed that school-age children with conduct disorders score lower on the D2 test as compared to children without such disorders. It was confirmed that older adults (changes in CNS may occur as a result of ageing) scored worse on the test as compared to younger adults.

The D2 test has standardisation for adults based on a group of 3,000 people. Another standardisation has been developed for children and youth in the following age groups: 9–10 years, 11–12 years, 13–14 years, 15–16 years, 17–18 years, 19–20 years. The distribution of all D2 test indices was confirmed to be consistent with the Gaussian curve (in all groups). The test interpretation is based on percentage ranks and a quarterly division (Brickenkamp, 2012), which allows for easy ranking of the participants in terms of their test performance level and facilitates interpretation in the context of clinical diagnosis.

c. Brain injury diagnosis (BID) test[8]

The primary goal of the BID test is to assess memory disorders during memorisation of figurative material. This test has limitations: persons age under 10 and over 70 are excluded, as are those identified as possessing subpar intelligence. It is important to note that the number of misinterpretations of perceptual material increases in the group of children under the age of 10 and persons over the age of 60 (Weidlich, 1969; after Weidlich, Lamberti,1996).

In the first edition, the test consisted of 15 tasks (learning and reproducing information) (Weidlich, 1972). Subsequently, the test was reduced to 10 tasks, and further development produced a final version of the test of 6 tasks, in which the tested person had to learn and reproduce information (Lamberti, 1976) (after Weidlich, Lamberti, 1996). The tested person's task is to depict nine figures in the drawings and then reproduce them using wooden elements (sticks).

8 Information on the BID test was presented based on the textbook by G. Weidlich, G. Lamberti, *BID – Brain injury diagnosis*, 1996.

As regards the reliability of BID test, it should be rated as satisfactory. The correlation coefficients of the repeated test on healthy participants were r = 0.68 with n = 680 (in the Weidlich study of 1969) and rtt = 0.83 (Wolfram study of 1989) (after Weidlich, Lamberti, 1996). In Lamberti's (1992) test-retest method, a correlation of rtt = 0.92 (n = 107) was found between the results, indicating high reliability understood as stability over time.

It is worth noting that BID test maintains considerable stability over time. The Weidlich (1969) study applied a one-year time interval between test and retest resulting in a correlation of r = 0.68 among healthy participants. Weidlich proposed a scheme of assessment, taking into account qualitative and quantitative variables. Wolfram (1989) indicated a significant retest effect in a group of 68 healthy participants, who were retested after a period of three to four months. The reliability coefficient calculated by means of the measure correlation stood at r = 0.56. After making adjustments, the consistency coefficient of the test reached a value of r = 0.83, which should be considered high.

Lamberti (1992) calculated a test-retest reliability coefficient for a group of 45 patients suffering from brain damage. The study was first conducted in its original version, followed by a parallel version one week later. A correlation coefficient of r = 0.92 was established for the entire test, which indicates the stability of BID results over time in participants with CNS lesions and demonstrates the clinical relevance of the tool.

Studies on relevance, despite different assumptions and objectives, highlight the excellent diagnostic value of the BID on many clinical groups. Therefore, the validity of the BID compared to other methods is significantly higher (Wolfram, 1989; after Weidlich, Lamberti, 1996). At this point, the Weidlich (1972) study on a group of 60 patients with brain damage should be mentioned (only patients over the age of 18 with brain damage were eligible for the study). The control group, similar in age, gender and education (healthy participants), was matched to this group. Statistically significant differences were identified between the groups. Comparisons were also made between patients suffering from endogenous schizophrenia and congenital retardation. As part of these comparative studies, statistically significant differences between groups were found, which should be considered as an indicator of criterial validity. It should be pointed out that persons with different disease qualifications in terms of their clinical situation scored differently on the test. It was further found that the test is able to differentiate between psychiatric patients and persons with neurological conditions.

The test measures cognitive functions including attention, form and shape perception, immediate memory, ability to reproduce information, and motor skill. There are no time restrictions in the test procedure and it is strictly standardised in terms of instructions provided to the participant and the diagnostician's behaviour. The qualitative assessment in the BID consists of identifying the following mistakes: perseverations, rotations, inversions, fabrications.

A practical advantage of the BID test is that it comes in two parallel versions, allowing to retest cognitive functioning in a short time interval without the risk of biasing the second test's indicators by a learning factor.

d. Summary – neuropsychological evaluation tests: Wisconsin card-sorting test, the D2 test, the BID test

Considering the psychometric indices of the presented neuropsychological evaluation tests, their usefulness in identifying psychological problems resulting from CNS deterioration should be mentioned. The most comprehensive psychometric studies have been

conducted on the D2 test and the WCST. These tests can be described as slightly better designed in a psychometric sense than the BID test. It should be also noted that each of these tests refers to a neuropsychological diagnosis based on a different range of cognitive functions. Therefore, depending on the hypothesis formulated as part of the clinical diagnosis, the diagnostician will individually decide on the type of test. If a psychologist, on the basis of the information obtained from the interview, observation or the analysis of documentation, collects information on the **mental deterioration**, the use of the **WSCT** is considered appropriate. The use of **the D2 test** is considered adequate if **attention and concentration deficits** are suspected. The use of the BID test, on the other hand, in spite of its somewhat lower psychometric reliability as compared to the other tests, seems adequate in conditions where the clinician extracts information on **short-term memory impairment**. Furthermore, one should not exclude the possibility of using multiple tests simultaneously to gain a more in-depth diagnosis of the tested person's neuropsychological functioning both in the area of the most important cognitive functions, such as attention or short-term memory, and the higher cognitive functions such as abstract thinking. A possible decision whether to use one test or multiple tests should be supported by a rationale related to the questions – problems asked in a given diagnostic process. In a situation where the diagnostic aim would be mainly to determine the test participant's capacity to perform acts in law and make formal and legal decisions, it can be presumed that *the Wisconsin card-sorting test* should be used, as it involves the thinking, abstracting and reasoning processes – and these cognitive processes appear to be particularly relevant in terms of decision-making that requires analysing implications of planned legal actions and determining their purpose.

4.2. Diagnosis of intellectual capacity and its role in the assessment of the capacity to perform acts in law

The neuropsychological tools described help us to approximate the level of non-verbal basic cognitive functions, but they alone cannot address more global aspects of intelligence, understood in a broader context as the ability to tackle similar problem situations. Two tools for intellectual capacity diagnosis are presented in this section: *Raven's progressive matrices test (SPM)*, focused around non-verbal intellectual performance, which measures intellect in terms of cognitive performance independent of experience, and the *WAIS-R (PL)* revised intelligence scale – renormalised version, which measures intelligence quotient as a global indicator of intellectual performance (composed of numerous specific cognitive functions).

a. Raven's progressive matrices (SPM) – standard version[9]

Raven's progressive matrices test was inspired by Spearman's theory of intelligence addressing the issue of educational capabilities. Spearman's concept also distinguishes, besides educational capabilities, reproductive capabilities as components of the general intelligence component called 'g'. The purpose of the test is to measure non-verbal

9 Information on the *Raven's Progressive Matrices* is presented in accordance with the textbook created for this tool: A. Jaworowska, T. Szustrowa, *The Raven's progressive matrices test textbook: Standard version (1956). Polish standardisation of 1989*, PTP Psychological Testing Centre, Warsaw, 1991.

reasoning. Behavioural samples collected in the progressive matrices test relate to the abstract thinking ability based on noticing relationships between the figures presented in the test. It is important to note that the test results should not be interpreted in terms of general intellectual capacity. In fact, it is more relevant to interpret the results in terms of a general abstract thinking ability within non-verbal concepts (based on the non-verbal material).

The material presented to the participant includes five series of twelve tasks. Each task involves matching one out of several fragments to a fitting pattern (matrix). The method of matching elements to the pattern varies from series to series, which are arranged in ascending order of difficulty. The participant, having read the instructions, should work alone and write down numbers of the figures they have matched to the pattern on the appropriate answer sheet. Such a procedure seems relevant in order to limit the diagnostician-participant interaction to fulfil standardisation conditions. There is no point to impose time constraints – the test qualifies as a so-called power (rather than speed) test. As regards the usefulness of this test, it should be indicated that the area of differentiation of participants primarily includes those with average intelligence, and its use seems appropriate for a relatively **quick diagnosis to exclude** the occurrence of **mental impairment** or more severe **intellectual shortcomings**. However, a disadvantage of the test is that it does not accurately distinguish between above-average intelligence and within the area of impairment. Possible low test scores may give the diagnostician a rationale for further examination to determine whether the decrease in intellectual capacity is related to educational neglect or mental impairment. The advantage of the test is that it can quickly determine whether the participant's cognitive functioning is within normal range.

Raven's progressive matrices test is characterised by highly accurate psychometric properties. A detailed analysis of the tool's reliability was conducted in its adaptation. The internal conformity coefficient based on the Spearman-Brown formula (split-half method) was also calculated. It is worth noting that this coefficient ranges from rtt = 0.77 to rtt = 0.94. These values indicate good to very good psychometric properties in terms of reliability. The test scores particularly well in terms of reliability when it is used on people over the age of 7. In contrast, the testing of younger people involves a greater degree of measurement error, in which case caution must be exercised when interpreting results. A reliability analysis was also conducted by using the test-retest procedure. The absolute stability coefficient reached values ranging from rtt = 0.72 to rtt = 0.80. A verification of the SPM's relevance was also conducted by correlating its results with the Wechsler's test scores. The test results in the 16-year-old group revealed correlations on the following score scales: *arranging pictures* (r = 0.50), *block patterns* (r = 0.65), *puzzles* (r = 0.54), *dictionary* (r = 0.50), *similarities* (r = 0.50), *arithmetic* (r = 0.50). The test is standardised, however, only for the age group of 6 to 16 years, although the textbook indicates that it can be used to test adults as well. Standardisation has been developed for 20 age groups. The standards were developed on a basis of centile and T-score scales, facilitating easy interpretation of results. In the context of the test's application in clinical practice, it is important to mention that the test does not have sufficient discriminatory properties in the area of sub-average intelligence, so it can be used to verify **whether the participant exhibits a possible slight intellectual deficit** or whether they rank within or above normal range. Conversely, in the event of poor results, the diagnostician should consider whether it is necessary to conduct another test to determine the presence of a possible mental impairment.

b. Wechsler adult intelligence scale (WAIS-R/PL) revised-standardised version[10] (J. Brzeziński, M. Gaul, E. Hornowska, A. Jaworowska, A. Machowski, M. Zakrzewska, 2011)

The WAIS-R (PL) test was developed in 1981 and represents a continuation of earlier iterations of 1939 and 1955. The previous 1996 Polish version of the WAIS-R (PL) was revised and standardised in 2011. The scale refers to the concept of intelligence and deviant intelligence quotient. WAIS-R (PL) refers to the concept of general intelligence. It is assumed that intelligence comes in many forms and is determined by many factors. It is not a matter of specific skills but rather a general competence or general capability that allows a person to understand the world and function in it without trouble. Intelligence involves taking conscious actions, thinking rationally and effectively managing your own environment. It manifests itself in both verbal and non-verbal functions. General intelligence can be indirectly measured through the assessment of ability. Qualitatively different aspects of intelligence are revealed in the individual scales of the WAIS-R (PL). It is worth noting that intelligence is not just the sum of different cognitive functions, it is also important how different aspects of intelligence are connected. Therefore, it appears that it is not only the quantitative aspect of intelligence that is important when talking about intelligence but also the qualitative aspect in a structural sense. Wechsler posited that the concept of intelligence goes beyond the 'g' factor referred to in Spearman's concept. In the light of the Cattel-Horn-Carroll theory, it can be assumed that the *verbal scale* of the Wechsler test offers a measure of crystallised intelligence, while the *non-verbal scale* refers to fluid intelligence. An important assumption of Wechsler's concept is that intelligence as a whole also includes those factors that do not fit into the concept of cognitive ability. For it is assumed that it is a function of personality and it incorporates features that relate to more than just the cognitive ability (Brzezinski et al., 2011).

The scale refers to the concept of intelligence quotient (IQ). The current version of WAIS-R (PL), developed in 2011 by Brzeziński and associates, is based on a procedure for determining intelligence by converting each raw score into a calculated score specific to a given age group to which the participant belongs. Cumulative scores are then converted into IQ for the verbal scale, non-verbal scale and full scale (in each age group, IQ values share the same mean (M = 100) and standard deviation (SD = 15). This procedure facilitates direct comparison between the results of individual participants and people from different age groups.

The current version of the WAIS-R (PL) test is based, like the previous version, on eleven tests. Six tests relate to the verbal scale – as part of these tests, the participant verbalises the test tasks performed. Five tests are based on *execution* alone – they are qualified by the *wordless scale* (the participant performs tasks on supporting material, e.g. arranging blocks or sorting out pictures). Both scales can be applied jointly or independently as required for diagnosis. It is possible to measure general intelligence quotient using the *full scale*.

The verbal scale includes tests such as news, repeating numbers, vocabulary, arithmetic, reasoning and similarities. In the area of the non-verbal scale, the following tests are

10 Information on the WAIS-R Scale (PL) was presented according to the test textbook: J. Brzeziński, M. Gaul, E. Hornowska, A. Jaworowska, A. Machowski, M. Zakrzewska, *D. Wechler's Intelligence Scale for adults: Revised-renormalised version WAIS-R (EN) textbook,* PTP Psychological Testing Centre, Warsaw, 2011.

distinguished: missing pictures, arranging pictures, blocks, puzzles and numerical symbols. The material for WAIS-R (PL) includes a textbook, record sheets, and a set of aids for non-verbal tests. Depending on the test, the participant's task is to answer questions on a range of topics, identify errors in the pictures presented, repeat memorised digit strings (forwards and backwards), arrange pictures to tell stories, define concepts, reproduce geometric patterns, solve arithmetic tasks, assemble pieces of puzzles, answer questions about social situations, encode digit symbols and identify similarities between concepts. All instructions are very precise and the attending psychologist is provided with precise statements to address to the participant (e.g. to keep them motivated and to offer assistance, which is also strictly defined by instructions). There are clear time limits set for speed tests, and the order in which individual tests are conducted is pre-determined.

The WAIS-R (PL) scale, revised in 2011, was reviewed for reliability for each of the standardisation groups. Reliability coefficient was calculated for each of ten different age groups.

For news, vocabulary, arithmetic, understanding, similarities, missing pictures, arranging pictures, blocks and puzzles, reliability was calculated on the basis of the split-half method (using the Spearman-Brown coefficient, which is based on the correlation of two test parts). The repeated measures method was used for the following tests: numerical symbols and repeating numbers, given that these tests are based on the speed of cognitive processes. Absolute stability was calculated for these tests. Table 38.1 presents the reliability coefficients for the specific tests within the verbal scale, and Table 38.2 for the tests of the non-verbal scale. Conversely, Table 38.3 illustrates the reliability values for the verbal, non-verbal and full scales.

Analysis of the presented values indicates high and very high psychometric properties of this test in terms of a measurement accuracy (especially in the area of the verbal scale tests).

In the area of the non-verbal scale, reliability is good and very good. A holistic approach can be adopted, showing that the individual scales are characterised by considerable psychometric accuracy, making it possible to conduct precise intellectual capacity assessments.

Table 38.2 Reliability for tests in the verbal scale

Verbal scale tests	*News*	*Repeating numbers*	*Vocabulary*	*Arithmetic*	*Reasoning*	*Similarities*
Value range for the reliability coefficient	0.89 to 0.94	0.68 to 0.86	0.91 to 0.95	0.87 to 0.93	0.77 to 0.84	0.83 to 0.90

Source: *WAIS-R (PL)* textbook

Table 38.3 Reliability for tests in the non-verbal scale

Non-verbal scale tests	*Missing pictures*	*Arranging pictures*	*Blocks*	*Puzzles*	*Numerical symbols*
Value range for the reliability coefficient	0.79 to 0.89	0.57 to 0.71	0.78 to 0.90	0.52 to 0.69	0.74 to 0.94

Source: *WAIS-R (PL)* textbook

WAIS-R (PL) was also very thoroughly revised for relevance in 2011. To verify relevance, an analysis of the relationship of the individual test scores of this scale with the results of *Raven's progressive matrices test* was performed. Table 38.5 presents the results of these analyses.

It is worth noting that tests requiring executive cognitive operations (as part of the non-verbal scale) produce higher correlations with Raven's progressive matrices test as compared to the verbal scale tests. These results indicate the theoretical validity of the distribution of tests within the verbal and non-verbal scales. The validation conducted by the authors also took into account the broader context of relevance verification, as the relationships of IQ measured by WAIS-R (PL) with cognitive performance tested with the following tests were

Table 38.4 Reliability of the featured scales: verbal, non-verbal and full

WAIS-R (PL) scales	*Verbal scale*	*Non-verbal scale*	*Full scale*
Value range for the reliability coefficient	0.86 to 0.90	0.79 to 0.84	0.88 to 0.91

Source: *WAIS-R (PL)* textbook

Table 38.5 Correlations of the verbal scale tests with *Raven's progressive matrices test*

Verbal scale tests	*News*	*Repeating numbers*	*Vocabulary*	*Arithmetic*	*Reasoning*	*Similarities*
Correlations with the Raven's progressive matrices test	0.28 to 0.58	0.33 to 0.47	0.31 to 0.44	0.33 to 0.65	0.28 to 0.54	0.34 to 0.53

Source: *WAIS-R (PL)* textbook

Table 38.6 Correlations of the non-verbal scale tests with Raven's progressive matrices test

Non-verbal scale tests	*Missing pictures*	*Arranging pictures*	*Blocks*	*Puzzles*	*Numerical symbols*
Correlations with Raven's progressive matrices test	0.49 to 0.61	0.40 to 0.50	0.46 to 0.70	0.36 to 0.50	0.54 to 0.94

Source: WAIS-R (PL) textbook

Table 38.7 Correlations of the verbal, non-verbal and full scales with Raven's progressive matrices test

WAIS-R (PL) tests	*Verbal scale*	*Non-verbal scale*	*Full scale*
Correlations with Raven's progressive matrices test	0.38 to 0.61	0.57 to 0.70	0.47 to 0.68

Source: *WAIS-R (PL)* textbook

found: test of attention and perception (Ciechanowicz, Stańczyk, 2006), the RFFT figural fluency test by Łojek and Stanczyk (2004), the California verbal learning test (CVLT) by D. Dlis, J. H. Kramer, E. Kaplan and B. A. Ober (adapted by Łojek, Stańczyk, 2006) and tools that do not examine any aspects of cognitive functioning, e.g. the Endler and Parker CISS questionnaire scales adapted by Strelau, Jaworowska, Wrześniewski and Szczepanik (2005), which is used to measure styles of managing stress. Low correlations of WAIS-R (PL) tests with stress management styles test (task-based, emotional and evasive) confirm the aspect of differential accuracy of this scale (Brzezinski et al., 2011).

Overall, the high theoretical relevance of WAIS-R (PL) should be derived from the results obtained – its design is based on the recording of relevant behavioural samples that allow the inference about the overall intellectual potential of the participants.

Another extremely valuable aspect of WAIS-R (PL) is the ability to establish the relationship of intellectual potential within individual tests. This offers the opportunity to conduct a qualitative profile analysis of the relationship between various abilities. This analysis extends beyond the aspect of identifying intellectual performance and becomes part of the diagnosis towards the presence of clinical features making the patients more prone to some specific mental illnesses (e.g. psychotic disorders).

The latest version of WAIS-R (PL) was based on a wider range of standardisation groups than the previous version. The test includes the following age groups: 16–17 years, 18–19 years, 20–24 years, 25–34 years, 35–44 years, 45–54 years, 55–64 years, 65–69 years, 70–74 years and 75–79 years. About 200 people were tested for each age group. The application of standardisation of the WAIS-R (PL) involved converting the raw results into the standard scales. Before the results were calculated from raw to standardised, procedures were performed to refine the empirical distribution to make it compliant with the Gaussian curve. This transformation guaranteed a normal distribution within the calculated results.

This standardisation offers **the opportunity to interpret** the results in terms of **the intelligence quotient** (as a global factor integrating the different aspects of cognitive functioning). There is also a possibility to identify the individual aspects of cognitive performance based on the converted results. This procedure simplifies the interpretation of results in the context of clinical and therapeutic applications since it makes it easy to refer to the identification of possible **intellectual deficits and to recognise levels of mental impairment.**

c. Cognitive performance tests – a comparison Raven's progressive matrices (SPM) and WAIS-R

When summarising tests in the area of intellectual performance diagnostics, it should be noted that Raven's progressive matrices test is a general diagnostic tool, focused on cognitive aspects unrelated to experience gained (performance in the area of non-verbal intelligence). WAIS-R (PL) has better developed psychometric and, consequently, diagnostic properties. It certainly allows for a more precise interpretation of the results, which is important for planned therapy or to determine the participant's performance in various contexts of functioning, including those involving the capacity to perform legal transactions. SPM provides the opportunity to make a fast diagnosis and **exclude the possibility of mental impairment**. WAIS-R (PL) provides the opportunity to precisely identify the intellectual level – it is better to differentiate between the participants. SPM, on the other hand, correctly differentiates between the participants with average intelligence – it lacks the psychometric qualities to differentiate more accurately between levels of mental impairment. Therefore, in a situation where it is necessary to conduct an in-depth intellectual performance diagnostic, it is more appropriate to resort to the WAIS-R (PL).

4.3. Personality diagnosis – for identification of key clinical features relevant to the assessment of the capacity to perform acts in law

Two types of questionnaires can be distinguished as part of the personality diagnostics. One type is based on referring to the assumptions of a particular psychological theory, and another type that makes no such reference, since it is based on the empirical identification of behavioural samples related to certain psychological characteristics or traits (e.g. nosological). As for tests that refer to the first of these traditions, *the Eysenck personality questionnaire* (*EPQ-R*), adapted by P. Brzozowski and R. Drwal (1995), and the *NEO-FFI personality inventory* by P. T. Costa and R. R. McCrae, adapted by J. Strelau, P. Szczepanik and M. Śliwińska (1998), were presented. As for the test that refer to the latter tradition, *the Minnesota Multiphasic Personality Inventory* (*MMPI® 2*), adapted by U. Brzezińska, M. Koć-Januchta i J. Stańczyk (2012), was presented.

a. The Eysenck personality questionnaire EPQ-R[11]

The EPQ-R questionnaire in its current revised version was published in 1985. It was created by S. B. G. Eysenck, H. J. Eysenck and P. Barrett. The questionnaire is based on H. J. Eysenck's theory of personality. Eysenck believed that personality is a relatively permanent organisation of character, temperament, intellect and physical properties that determine specific ways of environmental adaptation (Eysenck, 1970). He identified four levels of personality organisation:

1. theoretic constructions level (L1);
2. the level of phenomena that can be observed in general psychology experiments (L2);
3. level of habits in behaviour (L3) – this area includes primordial and more general traits (neuroticism, extra-introversion, psychoticism), while assuming that general traits include primordial traits;
4. the level of attitudes or habits of thoughts (L4).

L1 involves phenomena that are unavailable for direct observation. The other three levels are directly observable. L1 and L2 phenomena are determined by factors of a biological and constitutional nature. L3 phenomena occur when constitutional and environmental factors interact. L4 phenomena are connected with phenomena from the three lower levels. In 1970, Eysenck forewent with the fourth level, establishing a new, simplified personality model. According to Eysenck (1970), genotype together with environment determines the development of phenotypic traits of a living organism, including anatomical and physiological characteristics of the nervous system. The nervous system, together with the environment, determines the development of basic personality traits and behaviour. These traits include neuroticism, extra-introversion. psychoticism and intelligence. It can be concluded that genetic factors affect behaviour, however, not directly, but together with the environment (after Brzozowski, Drwal, 1995).

According to Eysenck (1970), personal differences in extra-introversion are associated with the reticular activation system (*ARAS*) activity. ARAS triggers higher levels of cortical

11 Information on the *EPQ-R* test was presented based on the textbook by P. Brzozowski, R. Drwal, *The Eysenck personality questionnaire: Polish adaptation of the EPQ-R. Textbook,* PTP Psychological Testing Centre, Warsaw, 1995.

arousal in introverts compared to extroverts. This arousal is a response to external stimulation. Extroverts, in turn, experience higher cortical inhibition. Introverts, due to their constantly elevated levels of cortical arousal, are more prone to conditioning processes (they learn faster than extroverts in terms of responses to punishments and rewards).

The second scale measures *neuroticism*. According to Eysenck, individual differences in neuroticism are determined by the visceral brain (i.e. the limbic system and hypothalamus) as well as the autonomic nervous system. Automatic cortical arousal is triggered by emotional stimulation of these structures. As a result, during questionnaire research, participants achieve slightly negative correlations between the neuroticism scale and the extraversion scale.

As for *psychoticism*, its underlying cause is not clear, as it is difficult to find information on its anatomical and physiological conditions in the relevant literature. A. C. Heath and N. G. Martin proved in their research that there are no genetic determinants of psychoticism. However, further study revealed that psychoticism can be hereditary – more so than extraversion and neuroticism (after Brzozowski, Drwal, 1995).

In 1994, Eysenck brought up a number of arguments for the strong influence of biological factors on the three aspects of personality described earlier. The following is a brief overview of each of the scales that measure the level of three individual, biologically conditioned traits, as well as *the lie scale*.

As for the functional level relevant to the extroversion-introversion aspect, it is assumed that an extrovert is sociable and has a wide social circle. An extrovert's actions are driven by emotions; they need external stimulants and their behaviour is strongly influenced by the here and now. They are engaged in practical activities and avoid becoming stagnant. They are not discouraged by setbacks and are optimistic about their future. They prefer an active lifestyle. Introverts, on the other hand, are reserved and value their own company and peace and quiet. They have few friends and choose them with caution. They live an organised lifestyle and are driven by reason. They are diligent and have the reputation of people who can be relied upon. In line with the issue of the intensity of occurrence of traits in the population with regard to the issue of normal distribution, it is assumed that the majority of people are ambivert, displaying partly extrovertic and partly introvertic features. However, in his work, Eysenck focused little on the functioning of ambiverts (after Brzozowski, Drwal, 1995).

Two opposite sides are distinguished within neuroticism in the form of emotional balance on one side and being neurotic on the other side. As for the functioning of neurotics, it has been found that these people have low resistance to stress, suffer from unspecified somatic disorders and complain of constant troubles. They are sensitive, anxious and prone to mood swings and mental breakdowns. They also often complain of depressive states or suffer from depression. The neuroticism scale is a continuum from the norm to pathology (after Brzozowski, Drwal, 1995).

In the area of psychoticism, it is believed to represent a continuum from the norm to pathology (Eysenck, 1970). Psychoticism is defined as a tendency towards psychosis, mostly schizophrenia and bipolar affective disorder. Those who obtained high scores in the test are cold, impersonal and unable to feel compassion. They display distrust and a sense of unhappiness. They have persecutory delusions, sometimes play at the expense of others and display limited (higher) emotionality. Elevated scores on this scale are obtained by inmates, schizophrenics, alcoholics, drug addicts and children displaying antisocial behaviour (Eysenck and Eysenck, 1976; after Brzozowski, Drwal, 1995).

The last of the scales is the deception scale. It measures the need for social approval or the tendency to present themselves in a positive way.

The EPQ-R consists of 100 questions within each of the four scales (the questions on the participant's inventory sheet are not arranged in order, instead they are presented in a different alternating order). The *neuroticism scale* in made up of 24 questions, the *extroversion scale* is made up of 23 questions, the *psychoticism scale* is made up of 32 questions and the *lie scale* is made up of 21 questions. The EPQ-R is a paper-and-pencil test. The questionnaire test can be conducted both individually and collectively. The test time is not limited. In most cases, participants take approximately 2,025 minutes to complete the questionnaire. Participants who read the instructions and filled in the questionnaire complete the test by circling one of the two possible answers (yes or no). If the respondent cannot decide on any of the given answers because, for example, neither of them corresponds fully to their belief, they should choose the one they think is closer to the truth (Brzozowski, Drwal, 1995).

The EPQ-R uses zero-one scoring, which is why the total score on a given scale cannot be greater than the number of questions. The raw scores for each of the scales are entered into an answer sheet, where the converted scores are determined based on the standardisation developed. This procedure facilitates an easy interpretation of how the person tested in terms of a given trait performs in comparison to the standardisation group. The questionnaire is intended to be used on adults and youth from the age of 16. The test does not impose any serious limitations as to the participants' education (Brzozowski, Drwal, 1995).

The reliability of the EPQ-R was estimated in two ways: by calculating absolute stability (test-retest method) and based on internal consistency for individual scales. Stability was estimated for pupils only. A group of 124 girls and boys were tested twice with the EPQ-R. The stability of the EPQ-R scales is absolutely correct. The *psychoticism scale* proves to be less reliable as compared to the other scales. An exceptionally high level of stability was obtained with the *extroversion-introversion scale* (Brzozowski, Drwal, 1995).

Cronbach's *alpha* coefficients were used as the basis for assessing the internal consistency of the EPQ-R scales. The psychoticism scale has the lowest reliability, with a value above 0.70 (in the student group only). In the group of relatives through consanguinity and affinity of psychiatric patients, an *alpha* index = 0.45 was obtained (Brzozowski, Drwal, 1995).

The standards were developed on the basis of the results of 1,414 people tested between 1989 and 1992. The test subjects were divided into three standardisation groups: adults, students and pupils.

The EPQ-R questionnaire in its full version can be used for research and individual diagnosis in clinical psychology, education and organisational and occupational psychology.

b. Costa and McCrae's NEO-FFI personality inventory[12]

The theoretical model by Costa and McCrae remains in opposition to the Eysenck's *PEN* theory, as it increases the number of personality superfactors from three to five. It replicates factors such as extraversion and neuroticism; however, it posits the division of into agreeableness and diligence. Furthermore, it introduces an additional aspect of personality in the form of openness to experience.

12 Information on the NEO-FFI test is presented based on the textbook – B. Zawadzki, J. Strelau, P. Szczepanik, M. Śliwińska, *Costa and McCrae's NEO-FFI personality inventory. Polish adaptation. Textbook,* PTP Psychological Testing Centre, Warsaw, 1998.

Neuroticism refers to the aspect with emotional adaptability on one end of a spectrum and emotional imbalance on the other end. Neurotic individuals are characterised by a susceptibility to experiencing negative emotions, such as anger, dissatisfaction, guilt and vulnerability to psychological stress. In contrast, people that have low neuroticism are emotionally stable, calm and able to cope with stress in a constructive manner. Neuroticism includes six components, such as anxiety, aggressive hostility, depressiveness, impulsivity, hypersensitivity and excessive self-criticism. The authors believe that this trait is an aspect of normal personality. Therefore, it is possible that although a person displays a high intensity of this trait, he or she is free of mental disorders. In this approach, neuroticism differs from the approach of Eysenck (1970), who treats this trait as a property differentiating a healthy personality from a sick one, that is to say, one prone to neurosis (after Zawadzki, Strelau, Szczepanik, Śliwińska, 1998).

Extroversion is the aspect that characterises the quantity and quality of social interactions, the level of activity and the ability to experience positive emotions. It includes six components: sociability, cordiality, assertiveness, activity, sensation-seeking and emotionality in the context of positive emotions (after Zawadzki, Strelau, Szczepanik, Śliwińska, 1998).

Openness to experience describes an individual's tendency to search for and positively evaluate life experiences, cognitive curiosity and tolerance to novelty. It includes six components: imagination, aesthetics, affectivity, action, ideas and values (after Zawadzki, Strelau, Szczepanik, Śliwińska, 1998).

Agreeableness is an aspect that describes negative versus positive attitudes towards people, experienced feelings, thoughts and actions. At the cognitive level, this trait manifests itself as trust or distrust. On the emotional level, in turn, it manifests as sensitivity or indifference to the affairs of others. At the behavioural level it manifests as a cooperative versus oppositional attitude. Persons who are not very agreeable are egocentric and show a competitive rather than cooperative attitude. People who are highly agreeable are sympathetic towards other people and inclined to help them. Agreeableness includes components such as trust, straightforwardness, altruism, acquiescence, modesty and a tendency to self-pity (after Zawadzki, Strelau, Szczepanik, Śliwińska, 1998).

Diligence measures the degree to which a person is organised, persistent and motivated in intentional activities – e.g. it describes attitude towards work. Individuals with high levels of diligence are self-motivated and display persistence to achieve their goals. High levels of this trait are associated with non-constructive tendencies – such as perfectionism, workaholism and a compulsive tendency to keep things tidy and organised. A low level of *diligence* does not imply a lack of moral principles but a lower motivation for social achievements. The components of *diligence* are competence, a tendency to keep things tidy and organised, dutifulness, striving for successes, self-discipline and prudence.

The *NEO-FFI* is an inventory that provides information on five basic aspects of personality. It includes 60 items, the completion of which involves participants spending approximately 1,015 minutes with the tool.

The reliability of measurement with the NEO-FFI scales was assessed using Cronbach's *alpha* coefficient. The highest reliability coefficients were obtained for the following scales: diligence (*alpha* = 0.82), neuroticism (*alpha* = 0.80) and extroversion (*alpha* = 0.77). The lowest Cronbach's *alpha* coefficients were obtained for the following scales: openness (*alpha* = 0.68) and agreeableness (*alpha* = 0.68). The reliability coefficient measured for the scales of the Polish version of the NEO-FFI are slightly lower than in the original version (especially for the openness and neuroticism scales). Still, the values obtained are psychometrically correct (Zawadzki, Strelau, Szczepanik, Śliwińska, 1998).

c. MMPI®-2 – Minnesota Multiphasic Personality Inventory[13]

For many years, the MMPI questionnaire has been the most widely used questionnaire among all questionnaire-based personality testing methods. The MMPI test was developed by psychologist Starke R. Hathaway and neuropsychiatrist J. Charnley McKinley. The inventory was first published in 1943 as a result of many years of work conducted at the University of Minnesota Clinic Complex. The first version of the MMPI inventory contained a basic set of 550 items, each being a descriptive statement about a specific feelings or behaviour, and the participant's task was to indicate whether or not they agreed with the statement. In the 1980s, efforts were made to prepare a revised, standardised version for the US population. The tool has been adapted to different geographical backgrounds to ensure that the MMPI-2 results can be used and compared internationally. Nowadays, the MMPI-2 is the most widely used personality test in the world and the second most widely used of all tests after the WAIS-R. It contains 567 items, each one being some statement about a participant to which they should respond whether it is true or false (Brzezińska, Koć-Januchta, Stańczyk, 2012).

The standardised, most recent Polish version of the MMPI-2 questionnaire includes two main categories of scales: control and clinical scales. As regards control scales, the following categories of scales were distinguished: inconsistency of non-convergent responses, inconsistency of convergent responses, rare responses, rare responses for the follow-up part of the test, rare responses concerning psychopathological symptoms, exaggeration of symptoms, the lie scale, and corrective and positive self-presentation.

The aforementioned control scales are used to assess the tested person's attitude towards the diagnostic process. The following scales are of particular importance: *the lie scale* and the *positive self-presentation scale* shedding light on the problem of hiding possible symptoms of disorders. Interpretation of these scales helps to determine how the tested person reacted to the research procedure and, in particular, whether they adopted an attitude that could influence the results obtained in the area of clinical scales.

In terms of the aforementioned clinical scales that can be directly applied in the assessment of the occurrence of disorders, the following scales are of particular importance: hypochondriasis, depression, hysteria, psychopathic deviation, masculinity/femininity, paranoia, psychasthenia, schizophrenia, hypomania and social introversion.

A valuable aspect of the MMPI-2 inventory is also the wide range of subscales (among other things): discouragement, lack of positive emotional, persecutory thoughts, dysfunctional negative emotions, uncommon experiences, hypomaniacal agitation, generalised anxiety, fears, compulsivity, depression and bizarre thinking. These subscales provide an additional spectrum of interpretation shedding light on the nature of possible psychopathology with implications for the extent of disadaptational forms of functioning.

The inventory is designed to diagnose adults between 18 and 69 years of age with at least an elementary school education. Testing can be done on an individual or group basis. There is no time limit to how long the test will take. Due to the large number of items, it is permitted to respond in two sessions (the items 1 to 370 in the first session, the next session for the remaining items).

In order to verify reliability, both the method based on verification of the internal consistency of the individual inventory scales and the repeated measurements method were

13 Information on the *MMPI* Test was presented based in the textbook – N. J. Butcher, J. R. Graham, Y. S. Ben-Porath, A. Tellegen, Grant Dahlstro, *Minnesota multiphasic personality inventory R – 2 adapted by U. Brzezińska, M. Koć-Januchta, J. Stańczyk*, PTP Psychological Testing Centre, Warsaw.

used. In terms of internal consistency, Cronbach's *alpha* values ranging from *alpha* = 0.69 to *alpha* = 0.90 were obtained for content scales, for additional scales values ranging from *alpha* = 0.32 to *alpha* = 0.91, for personality psychopathology values from *alpha* = 0.63 to *alpha* = 0.86, and for clinical scales values from *alpha* = 0.66 to *alpha* = 0.90. These results indicate very good and correct psychometric properties in terms of the internal consistency of the scales – indicating the potential for precise measurement. Correct psychometric properties were also confirmed in terms of internal stability tested by the test-retest method on a group of 49 women and 49 men with at least a 14-day interval between both tests.

The inventory's relevance was verified based on the multitrait-multimethod procedure by establishing relationships between individual scales and tests, such as ACL, KPD, EPQ-R, and IVE. Furthermore, criterial validity was assessed by including the following clinical groups in the study: inmates, alcohol and drug addicts, unemployed persons and patients diagnosed with neurosis, depression and/or schizophrenia.

The normalisation study was carried out on a group of people between 18 and 69. The selection of the normalisation sample involved age, gender, education and place of residence (aiming to be representative in terms of all these variables in the sample). A total of 1,220 respondents participated in the normalisation study (the final normalisation sample included 1,174 people 588 women and 586 men).

The basic version of inventory use is based on the so-called paper-and-pencil variant. The elements of the inventory, as required by standardisation, include textbook, answer key, notebooks containing test questions for the participants, answer sheets, sheets for recording results and identifying profiles. It should be mentioned that, besides the paper-and-pencil version of the MMPI-2, an e-test is also available on the *Epsilon* platform. The platform also allows results from the paper-and-pencil version to be uploaded and calculated – making it easier to interpret the results and eliminate the possibility of mistakes related to the process of decoding and counting.

The MMPI-2 is mainly used in clinical diagnosis in relation to the nosological classification for the diagnosis of personality and mental disorders (hypochondriasis, depression, anxiety disorders, schizophrenia, paranoia and others). The inventory is also used for non-clinical applications (candidate screening, college admissions, military service).

d. Comparison of tests the diagnosis of personality and mental disorders – significance of nosological features in taking legal and formal actions

The personality tests presented are characterised by correct properties in terms of psychometric goodness. The EPQ-R questionnaire refers to trait theory, taking into account constitutional and biological factors. The theory distinguishes three personality traits. The NEO-FFI inventory relies on distinguishing features according to their identification at the linguistic and semantical level. The questionnaire's authors believe that five personality factors should be distinguished, as they are sufficient for a complete personality description at a linguistic level (after Jarmuż, 1998). The MMPI-2 questionnaire distinguishes as many as ten clinical scales, referring to the nosological classification. Therefore, in case of the need to assess the capacity to take certain legal actions and decisions, it seems to incorporate the widest range of criteria relevant to the assessment of a person's capacity to handle such problematic situations. Scores on the schizophrenia, paranoia and hypomania scales seem particularly relevant for assessing the aforementioned matters. High scores on these scales are associated with direct limitations in the person's capacity to adequately understand reality, themselves, and the test.

High scores on the *schizophrenia* scale are associated with disruptions in the processes of thinking, abstract thinking, reasoning and perceiving reality. It is worth noting that the

development of a disorder like schizophrenia can, over time, adversely affect the ability to understand reality and lead to decrease of intellectual capacity. Symptoms of schizophrenia are associated with the presence of delusions (e.g. being under the influence of certain external forces – hallucinations that lead to an urge to perform certain actions may occur). Patients diagnosed with schizophrenia may experience interruptions in their thinking processes. An important destabilising factor in the functioning of people diagnosed with schizophrenia is also the disruption of volitional activity.

The problem of severity of paranoid symptoms (e.g. delusional disorder) is also relevant in the assessment of one's ability to perform legally binding actions. Paranoid symptoms are associated with persecutory delusions, which are sometimes linked to the so-called stigmatising behaviour, which certainly limits the ability to perform rational legal actions.

The problem of the occurrence of manic episodes (e.g. in the course of bipolar affective disorder) may be an important argument for limiting a person's ability to address legal and formal situations in an appropriate way. The occurrence of a manic episode hinders constructive self-determination, as pathological mood elevation impairs the ability to rationally process information. It is important to note that psychotic symptoms associated with, e.g., inflated self-esteem and grandiosity may manifest during the course of a manic episode. The difficulty in rational processing of information is related to the occurrence of the so-called flight of ideas during a manic episode.[14]

4.4. The role of integrating diagnostic data for assessing the capacity to perform acts in law in the context of exemplary disorders

The Nationwide Psychological Diagnosis Section of the Polish Psychologists' Association in § 4.1 of the Guidelines for Psychological Assessment specifies, 'The psychologist integrates the quantitative and qualitative data collected in the study to answer the diagnostic question'. This provision is reflected in the phases of diagnostic procedure, which include stages indicating the need to proceed from preliminary data, through the formulation of the diagnostic problem and determination of hypotheses, to their verification and arrival at a final diagnosis. If many methods are used as part of the diagnostic process, it is necessary to connect results and interpret them in relation to the previously formulated hypotheses. It is possible that at this stage contradictions between the results from the different research tools used may arise. In such a situation, it is necessary to refer to more in-depth diagnostic process and formulate another hypothesis in an attempt to verify it in the subsequent stage of the diagnostic process. It is important, however, to ensure that the diagnostic process does not include actions that affect the well-being of the diagnosed person or produce undesirable economic consequences (Sęk, 2001). As part of the diagnostic canons, it is assumed that the test result should include the following:

- collection of general information about the diagnosed person;
- information on the diagnosed person's current behaviour and situation;
- data related to the diagnosed person's course of life and medical history, as well as data on previous diagnoses and treatment and therapeutic processes;
- information about the diagnosed person's environment (study, work, family);

14 The nature of schizophrenia, delusional disorder and bipolar affective disorder is presented based on the *ICD-10 Classification of Mental and Behavioural Disorders. Clinical descriptions and diagnostic guidelines,* Publishing House 'Vesalius' Institute of Psychiatry and Neurology, Kraków, Warsaw, 2000.

- test results and conclusions from the diagnosis process;
- description of a disorder and hypothetical explanations of the underlying mechanisms, as well as aetiology, pathogenesis and characteristics of personal and environmental resources; and
- general conclusions and recommendations for further actions, e.g. in terms of support and assistance.

In the context of assessing the capacity to perform legal transactions, the psychologist should take into account a number of circumstances that may limit the ability to rationally and accurately identify the meaning and aim of such a legal transaction. Several potential disorders that may limit such capacity should be taken into account. Regarding the issues presented at the beginning of this chapter, the assessment of the diagnosed person's ability to identify the meaning of legal transactions performed can be limited in the area of neuropsychological and cognitive functioning and also in the area of personality in case of significant severity of pathological personality traits related to the nosological criteria. It should also be taken into account that there are often similarities found between diagnostic results concerning the distinguished aspects of diagnosis. Given the large number of disorders affecting the diagnosed person's ability to understand the meaning of the legal transactions performed, the following table presents only three selected mental disorders in relation to the results obtained through neuropsychological and cognitive processes diagnostics and in the area of personality.

Table 38.8 Exemplary research results for neuropsychological, intelligence and personality aspects for three selected diagnostic units

Disorder	*Neuropsychological diagnostics*	*Diagnostics of cognitive processes*	*Diagnostics in the area of personality*
Schizophrenia	Depending on phase of the development of the disorder, deviations from the norm may be present, e.g. perseverations, distortions, and delusions.	The presence of a specific intelligence profile (WAIS test), e.g. a significant decrease in tasks involving the so-called *reasoning* scale.[15] The issue of central nervous system developmental disorders as factors announcing the onset of the disease process is postulated. Higher IQ scores have been found to reduce the risk of disease[16] and the role of decreased intellectual performance as a factor that increases the risk of schizophrenia and other psychotic disorders. In it also postulated that there is a direct link between cognitive performance decline and the development of false beliefs and perceptions.[17]	Elevated scores on the schizophrenia scale (MMPI test), which can often also be accompanied by elevated results on the paranoia scale.

15 N. Michel, J. Goldberg, R. Heinrich, A. Miles, A. Narmeen, S. McDermid Vaz, WAIS-IV profile of cognition in schizophrenia, *Assessment*, 2013, vol. 20, https://doi.org/10.1177/1073191113478153.

16 Source: Schizophrenia and the intelligence quotient – Psychiatry.co.uk.

17 A. David, A. Malmberg, L. Brandt, P. Allebeck, G. Lewid, IQ and risk for schizophrenia: A population-based cohort study, *PsychMed*, 1997, vol. 27, no. 6, pp. 1311–1323, https://doi.org/10.1017/s0033291797005680.

Disorder	*Neuropsychological diagnostics*	*Diagnostics of cognitive processes*	*Diagnostics in the area of personality*
Mild intellectual disability	There are significant measurable differences in many neurocognitive areas between people of average intelligence and those with reduced intellectual potential.[18] Individuals with lower intellectual potential take more time to perceive reality and do it in narrower range; therefore, distortions and false beliefs appear.	There are many dimensions of mild intellectual disability. It can be linked to educational neglect. Poor abstract thinking as compared to reasoning based on unambivalent material. Weak divisibility of attention. Such persons are, in many situations, unable to concentrate. Memory processes are also disrupted due to limited memory capacity. Those suffering from mild intellectual disability often struggle to memorise things and create logical connections. Results on WAIS scales are often reduced, especially those related to abstract material: reasoning, defining concepts, arithmetic, general knowledge.	It is known that correlations between measures of cognitive ability and personality traits are low. Our data based on the popular 'big five personality traits' model shows that the highest correlations (up to r = 0.30) tend to occur for openness to experience. Some recent developments in the study of intelligence (e.g. emotional intelligence, complex problem solving and economic games) indicate that this relationship may grow stronger in the future.[19]
Autism	No significant differences in attention, memory and learning.[20]	Complex information processing deficiencies – people with autism have been found to perform worse than control group on measures of abstraction, including cognitive flexibility, verbal reasoning, complex memory and complex language understanding.	Autism spectrum disorder (ASD) is associated with widespread difficulties in social interactions, communication and behavioural flexibility. Because of this, individuals with ASD are believed to exhibit a number of unique personality traits. However, there has been surprisingly little research on these issues.[21]

18 G. Palmer, Neuropsychological profiles of persons with mental retardation and dementia, *Research in Developmental Disabilities*, 2006, vol. 27, no. 3, pp. 299–308, https://doi.org/10.1016/j.ridd.2005.05.001, Source: Neuropsychological profiles of persons with mental retardation and dementia – ScienceDirect

19 L. Strakov, Low correlations between intelligence and big five personality traits: Need to broaden the domain of personality, *Journal of intelligence*, 2018, https://doi.org/10.3390/jintelligence6020026.

20 N. Minshew, G. Goldstein, L. Muenz, J. Payton, Neuropsychological functioning in non-mentally retarded autistic individuals, *Journal of Clinical and Experimental Neuropsychology*, 1992, https://doi.org/10.1080/01688639208402860.

21 R. Schriber, R. Robins, M. Solomon, Personality and self-insight in individuals with autism spectrum disorder, Published in final form as: *JPSP*, 2014 (2015), vol. 106, no. 1, pp. 112–130, https://doi.org/10.1037/a0034950.

The comments presented indicate that, where multiple diagnoses are made, relationships can be identified between testing results in the field of neuropsychology, cognitive performance and personality. In other words, sometimes when a certain scope of results occurs within one diagnostic plane, a certain scope of results is anticipated in another diagnostic plane. The observation is particularly understandable given the health psychology agenda, which favours a holistic view of the individual as a biopsychosocial whole. Therefore, the analysis of the research results should take into account the existence of similarities between the results of the different areas, and in the absence of such similarities, hypotheses explaining the specific nature of the disorder, which gives rise to deficits in certain areas without leading to deficits in others, should be formulated. The presence of such non-parallel results indicates the need for more in-depth diagnostics (e.g. cases of specific brain damage in adults, which not necessarily result in serious consequences in other areas of functioning).

5. Summary

The issue of how to assess the capacity to perform acts in law poses a significant challenge for psychological diagnostics as regards the extent of such capacity for persons suffering from mental disorders that may affect the rational assessment of legal transactions and the identification of their underlying purposes. Despite the complexity of the issues, it should be noticed that psychology, based on the methodological canons and theoretical paradigms produced, as well as the research apparatus, methods and diagnostic techniques, seeks to overcome these challenges. It should be mentioned that, as in other areas of diagnostics that are carried out due to important social demand, also in the area of the assessment of the capacity to perform acts in law, it is important to indicate the need to consider three areas of the patient's functioning, which will allow the diagnostician to formulate conclusions in this area. These areas should include aspects of neuropsychological functioning, cognitive functioning and pathological severity of dysfunctional personality traits. Within each of these planes, there is a chance that potential impediments may arise, which will limit the tested person's ability to perform rational legal transactions and correctly identify the purpose of such transactions. Psychology has developed a variety of research methods and techniques to identify these dysfunctions and determine their severity. As part of the diagnostic process involving the assessment of the capacity to perform acts in law, it seems reasonable to rely on both standardised and non-standardised methods. Within non-standardised methods, the value of observation and interview should be highlighted. These methods facilitate a general yet holistic overview of potential problem areas and an insight into the psychosocial resources of the tested person. Employing these methods also allows the diagnostician to gain an insight into the tested person's perspective of their own situation, including problem areas and resources. It should also be emphasised that it is unlikely that the process of assessing and deciding on the patient's capacity to perform acts in law, in circumstances where such capacity is doubtful, can be done solely through the use of non-standardised methods. If the diagnostician has reliable reasons to question the patient's capacity for these types of actions, the standardised methods should be employed, selected depending on the initially reported problem and potential difficulties in performing these actions. In this regard, the psychologist can resort to standardised methods from the aforementioned areas of diagnostics: covering the range of diagnostics of neuropsychological functioning, cognitive functioning and the area of personality. The tools identified in the paper are characterised by correct and superior qualities in terms

of degree of psychometric standards implementation. Each of the tools presented in the paper has been verified in terms of reliability and relevance and is standardised to facilitate precise interpretation of the research results. The psychologist enjoys a certain degree of autonomy in the selection of tools used in the diagnostic process, but this autonomy appears limited in relation to the requirements of the research process. In this context, it is particularly important for the research activities undertaken by the diagnostician not to undermine methodological correctness and ethical principles. The psychologist must therefore resort to the tools that are as reliable and relevant as possible in order to answer the diagnostic question formulated. Should bigger concerns arise as to the aspects limiting the capacity to perform acts in law, the psychologist can and should conduct a holistic diagnosis, covering all the mentioned levels of functioning. This can often be necessary to gain a holistic understanding of the patient's functioning. In fact, such diagnostics will allow a better recognition of the patient's strengths and weaknesses (resources and capabilities) within each area of functioning. Therefore, even if deficits are detected, it will be possible to formulate precise commendations in terms of conditions which would, at least to some extent, allow the patient to perform such actions. Such diagnostics offers the opportunity to identify forms of support or therapy, or to set periods of remission that would at least partly eliminate the need for identified limitations. Due to the permanent nature of some disorders (irreversibility of pathological processes) and their severity, or the severity of the illness-related symptoms, it will sometimes be impossible, at least in the field of psychology, to identify factors that eliminate the need to limit the capacity to perform legal transactions without assistance.

Reference list

Stemplewska-Żakowicz, K., Paluchowski, W. J., *Podstawy diagnozy psychologicznej*, in: J. Strelau, D. Doliński (eds.). Psychologia. Podręcznik akademicki. Vol. 2. GWP, Gdańsk, 2011, (pp. 23–63, 86–91).

Paluchowski W. J., *Diagnoza psychologiczna. Podejście ilościowe i jakościowe, Seria: Wykłady z Psychologii*, vol. 7, Scholar Publishing House, Warsaw 2006, (selected chapters).

Stemplewska-Żakowicz K., *Diagnoza psychologiczna. Diagnozowanie jako kompetencja profesjonalna, GWP*, Gdańsk 2013, vol. 1, 2, 4.

Hornowska E., Urbański M. (ed.), W. J. Paluchowski. *Diagnozowanie diagnozy*, Scientific Publishing House of the Faculty of Social Sciences, Adam Mickiewicz University, Poznań, 2017 (vol. 1).

Paluchowski W. J., *Diagnoza psychologiczna. Proces – narzędzia – standardy*, Scientific Publishing House Łośgraf, Warsaw, 2012.

Concluding remarks

Maciej Domański and Bogusław Lackoroński

The studies that make up this book confirm the thesis that the issue of the active legal capacity of natural persons is of system-wide significance that goes far beyond private law regardless of its host legal environment. Active legal capacity, the possibility and manner of exercising it, its scope and the possibility of limiting it are all subject to private law regulation, but in all legal systems their importance extends to public law as well. Active legal capacity and its scope determine the possibility of making legal transactions of significance as well as the possibility of incurring legal liability. Since it all depends on one's capacity to control one's own behaviour and its consequences, it is difficult to identify an area of law in which this category would be irrelevant. Hence, there is such great interest in CRPD Article 12 in the legal literature, and it is surely no coincidence that the first commentary prepared by the UN Committee on the Rights of Persons with Disabilities was precisely concerned with this CRPD provision.

An analysis of the legal discourse on the Convention and its redirectional impact on approaches to the active legal capacity of individuals lays bare the existence of some tension between human rights concerns and the perspective of national legal systems, in particular in private law. An isolated analysis made only from one of these perspectives does not lend itself to a comprehensive treatment of the issue at stake, nor would it produce sound proposals for solutions responding to the complex needs of persons with disabilities.

The system-wide nature of active legal capacity, the wide range of contexts and the complexity of the linkages in which references to active legal capacity appear in various places in different legal systems makes its adequate description extremely elusive. This does not mean that no attempt should be made to do so; on the contrary, precisely because of the difficulties involved, representatives of the doctrine propagators should make every effort to ensure that neither the legislative nor the judicial authorities are left without in-depth reflection on the issue. In-depth scholarly reflection on active legal capacity, its scope and its possible limitations should entail recognition of the complexity and multifaceted nature of these issues. There are no simple and obvious solutions in the field of active legal capacity. Any proposal for change must be supported by reflection and careful anticipation of the consequences of its introduction at as many – preferably all – levels and in as many – preferably all – legal contexts as possible.

A general reflection on the implementation of CRPD Article 12 suggests that the entry into force of the CRPD has had significant impact on changing perceptions of the issue of active legal capacity of persons with disabilities, as well as changes in private law in this regard. The regulation of the active legal capacity of persons with disabilities has evolved with the evolution of private law since ancient times. The entry into force of the CRPD

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has had a very significant impact on the direction and dynamics of changes concerning the active legal capacity of persons with disabilities. These changes constitute the next stage in the evolution of active legal capacity and its corresponding regulation. The issue of autonomy of persons with disabilities highlighted by the CRPD, their active participation in the legal system and the perception of active legal capacity (in addition to passive capacity) as a right of the individual[1] has urged a change in the approach of lawyers. In the private law tradition (in science and practice), incapacitation, including total incapacitation (or similar measures) and their use as a means of protecting persons with disabilities, was, until relatively recently, free of controversy. These days, there is virtually no room for such views in the academic discourse on active legal capacity. The discussion is not so much about the need to modify the regulation of active legal capacity and related institutions as it is about the manner of introducing and the scale of changes regarding the permissibility and scope of possible interference with the active legal capacity of persons with disabilities.

The change in legal science and practice regarding the scope of limiting the active legal capacity of persons with disabilities has entailed a corresponding evolution in the approach to such persons at the legislative level. The extent and manner in which changes are made in national legal systems varies widely. Changes in legal status do not always find corresponding expression in the content of legal provisions. Sometimes, these changes are merely reinterpretations of existing legislation. For this reason, it is often extremely difficult to assess the fulfilment of the requirements under CRPD Article 12. The difficulty arises not only from the complexity of the active legal capacity issue in the context of national legal systems but also from the way the standard in CRPD Article 12 is framed, the implementation of which is the goal and task for national legal systems. For this reason, it is not uncommon to assess whether or not the modifications introduced in a given national legal system are sufficient or free of doubt. The direction of changes in national law is essentially set by CRPD Article 12 with emphasis now put on the autonomy of persons with disabilities and a reciprocal shift away from a medical model of disability to a social model. Due to the fundamental nature of the changes needed to implement the standard under CRPD Article 12, this is not always a one-step process, exhausting itself in the introduction of one-off changes to the national legal system. This review highlights the differences between and the different stages of CRPD Article 12's transposition into the legal systems of its signatory states. There are some national legal systems where the modification of the regulation on active legal capacity has been either non-existent or only symbolic.

The legal systems examined differ considerably, not only in their specific solutions to active capacity but also in their interpretations of the CRPD and the standards derived thereby. This book's research findings show that, irrespective of the legal tradition (*common law* or *civil law*) and the broader cultural context, the regulations on active legal capacity still mostly give grounds, albeit to a narrower extent, for the application of substitute models for legal acts performed by persons with disabilities.

Despite the general trend, reinforced by the content of CRPD Article 12(4), leading to a reduction in the range of substitutive mechanisms in performing legal acts by persons with disabilities, and the introduction of alternative institutions, reinforcing judicial supervision and control of the adopted solutions, it still does not seem possible to completely

1 Without prejudging whether it is in the nature of a private law personal right or of an object of protection in the international human rights protection system.

abandon the substitutive model if persons with disabilities cannot express their will or even their preferences by way of legal acts. Firstly, this is due to the design of legal systems (since the earliest times), in which the autonomy of the will and the capacity for self-determination are the foundations of the most essential legal actions, as well as of various types of legal liability. No one has proposed an alternative, and for example, a return to solutions based on objective responsibility detached from guilt and the ability to control one's own behaviour and its effects seems unacceptable and socially unjustified. Secondly, the necessity for this arises from the state of medical science. Despite enormous progress, for instance, in psychiatry or psychotherapy, which has made it possible to limit the use of substitutive solutions, there are still cases where there are no known therapies or rehabilitation methods that would make it possible to restore the full ability of persons with disabilities to participate consciously and independently in determining their actions.

The basic aim of this study was to outline an optimal model for the transposition of CRPD Article 12 into national law. As a result of the research that went into this book, it must be conceded that a one-size-fits-all model for the transposition of CRPD Article 12 into national laws does not exist and, it seems, cannot exist. This is due to the very deep divergences between the traditions shaping the national legal systems in the various CRPD signatory states have evolved. From a comparative point of view, it is a veritable patchwork of institutions to assist and enable persons with disabilities to participate in legal processes. In order to assess whether any changes to a given national legal system should be devised, it is necessary to take into account all its complexity and the interconnectedness of the various institutions directly and indirectly linked to active legal capacity. Devising one institution and proposing its adaptation to the Convention standards, to the exclusion of other parallel solutions, entails a high degree of risk of introducing changes that will not actually serve the interests of persons with disabilities or the objectives of CRPD Article 12.

The need to approach change holistically and take the whole context into account yields one more conclusion. This context should not be limited to the legal environment alone but should also include the broader social reality. Elements such as functioning social structures, the nature of social ties or even the demographic structure of a particular society should be taken into account when modifying legal systems. In systems where there are strong family groups, neighbourly communities, etc., the optimal solution may be their reinforcement, by creating a more formalised character with instruments or institutions that currently exist within non-legal social relations. In countries where such strong social groups and ties do not exist, but where well-functioning public institutions do exist, the optimal solution might sooner be to use such institutions to create support systems for people with disabilities. It is also important to recognise the serious problem in societies in the northern hemisphere, in particular of their rapid ageing. Considering that health problems and disabilities are much more common among the elderly than in other age groups and that, according to demographic forecasts, in a few decades there will be several people of retirement age for every active person, it will not be feasible to create a system in which each person with a disability has several assistants (carers) to support him or her in performing various legal actions, even under the unrealistic assumption of unlimited financial resources. In our opinion, the importance of the role of representatives of medical sciences, and psychiatry in particular, in the process of shaping national legal regulations requires special emphasis. At the very least, expert knowledge in this area is necessary to shape legal regulations in a way that is adequate to the current diagnostic possibilities and applied nosological units. It also seems that knowledge of psychiatry and psychology should be employed when deciding on the palette and shape of institutions needed or

necessary for persons with particular types of disability to exercise their active legal capacity in a way that does not increase the risk of abuse.

The experience of countries whose legal systems were submitted to scrutiny also shows that there are no simple show-stopping solutions in implementing CRPD Article 12. Typically, the road to change is made up of stages, attempts to develop optimal solutions, meandering as it does through assorted phases and stages. The process is staggered over time and occurs in different countries at variable pace determined by local circumstances. The complexity of transposing CRPD Article 12 and its crucial concerns into national laws should prompt great caution and prudence in drafting and implementing the changes. Awareness of the difficulties in transposing CRPD Article 12 into national legal systems should serve a warning at the commencement of preparatory work for those wishing to endorse this Convention.

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