

**Mental Disability Law: the recognition of legal capacity and the replacement of
substituted decision-making**

Approaches taken by the Council of Europe, England and Wales and Hungary

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Abstract

The radical nature of the change that the United Nations Convention on the Rights of Persons with Disabilities (CRPD) has introduced in how inclusion, equality and the universality of human rights is perceived is reflected in the radical change that Article 12 of the Convention has introduced in relation to the recognition of legal capacity of all. Article 12 of the CRPD obliges states to recognize the right of persons with disabilities to exercise their legal capacity through making autonomous decisions and to provide assistance to this if support is required.

The main focus of this thesis is the realization of the international standards in relation to the recognition of legal capacity and supported decision-making in different domestic legal setting. The main argument of the thesis is that international demands for a reform in the field of legal capacity law should be taken seriously: states are required to acknowledge universal legal capacity and to replace substituted forms of decision-making mechanism with adequate supported decision making procedures.

The findings of the research suggest that domestic implementations fell short of the requirements of the CRPD. Legal systems relying on mechanisms of substituted decision-making in the form of traditional guardianship systems are *prima facie* contrary to the aspirations of Article 12 even if its last resort nature and the proportionality of the limitations on legal capacity are emphasized. Systems relying on the best interest approach can also be prone to criticism due to the flaws of the best interest criterion and the lack of meaningful supports in decision-making.

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“Let us make a Convention for a world where we can all grow and develop with mutual support.

IMAGINE A CONVENTION FOR ALL.”¹

Introduction

‘Remarkable and forward looking’², ‘ground-breaking’³ and ‘landmark’⁴ treaty are just a few of the attributes that have been given to the Convention on the Rights of Persons with Disabilities (hereafter ‘CRPD’).⁵ Gerard Quinn claimed that the CRPD “is the single most exciting development to take place in the disability field for many decades.”⁶ The huge attention that has been given to the adoption of the CRPD can partly be explained by the dramatic change what the CRPD has introduced to the various aspects of how disability and disability law is perceived.

A considerable amount of literature has been published on the emergence of the need for a disability specific convention, on the intensive, but highly inclusive nature of the debates during the drafting process or on the possible implications of its adoption.⁷ It has been well shown how the failure of the general human rights system to secure the enjoyment of basic human rights to persons with disabilities has led to the need for a disability-specific

¹ International Disability Caucus, Nothing about Us without Us, International Disability Caucus Special Edition, January 31, 2006, available at <http://www.ideanet.org/content.cfm?ID=595D77> last accessed 28 March 2014

² The UN Secretary-General, Secretary-General’s Message on the Adoption of the Convention of the Rights of Persons with Disabilities, delivered by Mr. Mark Malloch Brown, Deputy Secretary General, 13 December 2006, SG/SM/10797, HR/4911, L/T/4400 available at <http://www.un.org/News/Press/docs//2006/sgsm10797.doc.htm>, last accessed 28 March 2014.

³ Office of the High Commissioner for Human Rights, ‘Arbour welcomes entry into force of “ground-breaking” convention on disabilities’, 4 April 2008, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8399&LangID=E> last accessed 28 March 2014.

⁴ United Nations Enabled, Landmark Convention on the Rights of Persons with Disabilities to be Adopted on 13 December, 6 December 2006, <http://www.un.org/disabilities/convention/news061206.shtm>

⁵ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, 13 December 2006.

⁶ Gerard Quinn, ‘A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities’, in Gerard Quinn and Lisa Waddington (eds), *European Yearbook of Disability Law*, volume 1 (Intersentia, 2009) 90.

⁷ Gerard Quinn and Theresia Degener, ‘Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability’, HR/PUB/02/1, United Nations, Geneva, 2002, Amita Dhanda, ‘Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future’ (2006) 34 *Syracuse Journal of International Law and Commerce* 429.

convention.⁸ It has been also pointed out by the literature that – instead of creating new rights – the CRPD was adopted with the aim of explaining how the existing human rights are to be applied in a disability-sensitive way.⁹

The adoption of the CRPD brought about a paradigm shift in multiple ways: it has induced a shift from the medical model of disability to a social, but also a rights-based model of disability.¹⁰ Persons with disabilities are no longer seen as recipients of charity or ‘objects’ to be managed, but as “subjects with equal rights under the law.”¹¹ Thus, most importantly the shift to the human rights-based framework entailed the acknowledgement that “persons with disabilities enjoy legal capacity on an equal basis with others.”¹² The call for a shift from the practice of blanket denial of legal capacity of persons with disabilities towards the recognition and support of the exercise of legal capacity is one of the main virtues of the CRPD. The right to equal recognition before the law is not a right in itself, but it serves as a prerequisite for the enjoyment of several other basic rights.¹³ It is little wonder that Article 12 of the CRPD had been frequently named as the core provision of the convention.¹⁴

Article 12 of the CRPD spells out two fundamental postulates. Firstly, states have to acknowledge that persons with disabilities have the right to make their own decisions.

⁸ Department of Economic & Social Affairs, Office of United Nations High Commissioner for Human Rights, & Inter-Parliamentary Union, *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, page 4; Oddný Mjöll Arnardóttir and Gerard Quinn, Introduction, in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, vol 100 (Martinus Nijhoff Publishers, 2009) XVII, Dhanda (n 7) 448.

⁹ *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities*, Ibid, page 5, 12, and 20; Oddný Mjöll Arnardóttir and Gerard Quinn, Introduction, Ibid, XVII., Anna Lawson, ‘A Catalyst for Cohesion?’ in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), Ibid.

¹⁰ Oddný Mjöll Arnardóttir and Gerard Quinn, Introduction, Ibid, XVIII.

¹¹ Oddný Mjöll Arnardóttir and Gerard Quinn, Introduction, Ibid, XVII.

¹² CRPD, Article 12 (2).

¹³ *From exclusion to equality: realizing the rights of persons with disabilities*, page 24.

¹⁴ Anna Lawson, ‘*The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*’ (2006) 34 *Syracuse Journal of International Law and Commerce* 563, 596. Lucy Series, ‘Legal capacity and participation in litigation: recent developments in the European Court of Human Rights’, publication pre-print of a chapter in Gerard Quinn and Lisa Waddington (eds), *European Yearbook of Disability Law*, volume 5 (Intersentia, 2014), 1.

Secondly, states have to provide effective means of assistance in case there is a need for help to make decisions.¹⁵ Moreover, the CRPD clearly indicates that instruments of supported decision-making should be designed to replace systems of substituted decision-making, and consequently, if it is necessary, it urges a legislative reform on the national level.¹⁶

As with any other international human rights treaty, the effective implementation of Article 12 of the CRPD is a key issue. The CRPD entered into force on the 3rd of May in 2008 and questions concerning its implementation inevitably arise. The aim of this thesis is to analyze the realization of the standards of Article 12 of the CRPD, looking at the legal system of two European countries, and the evolving jurisprudence of the European Court of Human Rights. It is crucial to see how the standards work in practice and what are the obstacles in the transformation of the vision of Article 12 from promise to action. The thesis addresses the question that to what extent were the countries successful in taking measures to achieve an effective system of support and assistance in the decision making of persons with disabilities along with the lowest degree of legal capacity deprivation.

The three jurisdictions chosen to analyse the realization of the aspirations of Article 12 are the regional system of the Council of Europe and the domestic legal system of Hungary and England and Wales.¹⁷ The regional jurisprudence of the Court is highly influential, since states are obliged to implement the judgments.¹⁸ Similarly, the standards of the Council of Europe proved to be influential as well.¹⁹ However, when the international and the regional standards are divergent regarding key issues - as in the case of the CRPD and the ECHR -, the effective implementation of these standards could be more difficult. Hungary

¹⁵ CRPD, Article 12 (2) and (3).

¹⁶ See among others CRPD Committee (2012c), Concluding Observations on Hungary, CRPD/C/HUN/CO/1, 27 September 2012.

¹⁷ Hungary ratified the CRPD on the 20th of June in 2007 and the UK ratified it on the 8th of June in 2009.

¹⁸ As we will see in the following, regarding the principles and the requirements set out in connection with claims brought under Article 6 of the Convention, Hungary is quite compliant.

¹⁹ As we will see later, for example the amendment of 2001 to the Civil Code of 1959 was justified by the Recommendation in the ministerial argument to the amendment.

has repeatedly been the target of the criticism of the CRPD Committee²⁰ due to the dominance of a substituted decision-making forms. Hungary is a good subject of analyses, since the adoption of the new Fundamental Law and the two civil law reforms offered a good opportunity to rethink the domestic regulations and to design a legal system in line with the international standards. However, as it will be outlined below, the recodification can be seen as a missed opportunity. As to the third jurisdiction, England and Wales, the Mental Capacity Act 2005 is regarded to be a CRPD friendly piece of legislation, with an empowering ethos and many progressive rules indicating a different approach from the one taken by traditional guardianship systems. At the same time, there are growing concerns about the successful implementation of the Act and its compliance with the provisions of the CRPD, as it will be analysed below.

It has to be noted that there is no universal design advocated by Article 12, every state is allowed to design mechanisms suitable to its specific legal system. But whatever framework the state develops it cannot be far short of the requirements of Article 12. Although the required legislative and institutional amendments are clear cut, domestic reforms are making their way tardily. The exposure of the weak points of implementation or the complete failure of implementation will consequently indicate the fields where state parties have the obligation and duty to act or improve.

As to the terminology used throughout this thesis, with regard to the fact that there is no agreement on a preferred terminology used in connection to persons whose legal capacity can be affected by domestic regulations, I would prefer to use the language of the CRPD, since this thesis sets the CRPD as a standard for compliance and comparison. The CRPD is of the opinion that disability is an evolving medical and societal concept, thus it does not try to

²⁰ See the Concluding observations on the initial periodic report of Hungary mentioned above and Communication No. 4/2011 of the CRPD Committee, adopted at its tenth session (2-13 September 2013).

give a fix definition of disability. Similarly it only gives a non-exhaustive definition of person with disabilities enabling the wide application of the convention. The focus or application of the Convention is wide, the phrase ‘persons with disabilities’ non-exhaustively refers to/includes persons “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.”²¹

In the first chapter I will introduce the standards set out by Article 12 of the Convention. These standards will be the constant reference points during the country analyses. The second chapter outlines the approaches taken by the Council of Europe concerning legal capacity as it is reflected in the documents adopted by the organs of the Council of Europe and in the jurisprudence of the ECtHR. Points of compliance and points of divergence with the CRPD will be highlighted. The third chapter will look at the process of the recodification of the Civil Code in Hungary and the dubious results Hungary have achieved in moving towards a system based on the preservation of legal capacity and on a supported decision-making mechanism. The fourth chapter will focus on the approach taken by the Mental Capacity Act 2005. The seemingly compliant provisions of the Act with the CRPD will be pointed out, as well as the obvious deficiencies in the light of Article 12 of the CRPD.

²¹ CRPD, Article 1.

1. Setting standards: The requirements of Article 12 of the CRPD

In this first chapter I will briefly outline the main provisions of Article 12 of the CRPD and consequently I will set the standards for the comparison of the domestic legal systems. As we have already mentioned above, the CRPD is based on the social model of disability. This means that the factor hindering the person's full participation in the society is not his or her health condition as such, but the existing social, environmental or cultural barriers.²² These are the real disabling elements that are to be eliminated and the denial of the recognition of legal capacity of persons with disabilities is one of the most serious legal barriers. The legal system not only hinders persons with disabilities from being in charge of making decisions about their own lives, but it also fails to adapt to their various assistance needs in decision-making.²³ The three main requirements of Article 12 logically flow from the above mentioned systemic problems.

First, Article 12 (1) of the CRPD states that every individual must be recognized as feasible holders of rights and bearers of duties. Second, Article 12 (2) adds a prime element to the principle of equal recognition before the law. It requires states to acknowledge the capacity to act, the right to exercise the rights on an equal basis with others. This provision rebuts the wide-spread assumption that a person who might need assistance in decision-making is at the same time unable to autonomously reach a decision.²⁴ Consequently it rebuts the practice of identifying the lack of mental capacity – or limited mental ability – with the lack of legal capacity.²⁵ As the Committee on the Rights of persons with Disabilities (hereafter CRPD Committee) put it, the existence of any kind of mental, sensory or

²² State parties to the CRPD recognized “that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.” CRPD, Preamble (e).

²³ Lucy Series, (n 14) 26.

²⁴ Soumitra Pathare and Laura S Shields, ‘Supported Decision-Making for Persons with Mental Illness: A Review’ (2012) 34 Public Health Reviews 1, 2.

²⁵ By mental capacity I refer to the person's decision-making ability, while legal capacity refers to the fact that the legal system recognizes the legal force of the person's decision.

intellectual impairment cannot be the only reason for legal incapacitation.²⁶ Such a practice can lead to disability based discrimination what is aimed to be eliminated by the whole spirit of the Convention.²⁷

Thirdly, Article 12 (3) demands states to provide access to the support that persons with disabilities may need in order to exercise their rights and to make their own decisions. It is debated whether the language of Article 12 allows for the imposition of any form of substituted decision-making, the text of Article 12 is not unequivocally clear on this point.²⁸ However, the CRPD Committee has a clear stand on this issue: it repeatedly urged states to replace the default systems of substitute decision-making with supported decision-making mechanisms. The CRPD Committee emphasized that this process requires the abolition of the former and the development of the latter: “the development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention.”²⁹ The state’s role is multiple and crucial in protecting and fulfilling the rights of disabled persons and in facilitating the exercise of their legal capacity.³⁰

In addition to this, Article 12 (4) sets out the safeguards aimed at preventing the exploitation and abuse of disabled persons in the exercise of their legal capacity. The

²⁶ CRPD Committee, Draft General Comment on Article 12: Equal recognition before the law, CRPD/C/11/4, 25 November 2013, 3. The European Court of Human Rights also expressed its rejection of this approach in *Shtukaturov v. Russia*: „However, in the Court’s opinion the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation.” *Shtukaturov v. Russia*, Application no. 44009/05, 27 March 2008.

²⁷ CRPD Committee, Draft General Comment on Article 12: Equal recognition before the law, 4.

²⁸ Dhanda (n 7) 461., Oliver Lewis, ‘Advancing Legal Capacity Jurisprudence’ [2011] E.H.R.L.R. 700, 705.

²⁹ CRPD Committee, Draft General Comment on Article 12: Equal recognition before the law, 6.

³⁰ As the CRPD Committee has pointed out several times, state parties have to diminish the guardianship system, review laws and develop policies to further supported decision making, to guarantee the right to vote, to marry, to work, to choose the place of residence and to provide access to justice to every individual. State parties are also expected to organize trainings and consultations involving every stakeholder and actor of the society with the purpose of advancing the recognition of legal capacity. See among others the CRPD Committee’s concluding observations on the Hungarian report (paragraph 26) and on the Spanish report (paragraph 34). UN, CRPD Committee (2012c), Concluding Observations on Hungary, CRPD/C/HUN/CO/1, 27 September 2012, UN, CRPD Committee (2011a), Concluding Observations on Spain, CRPD/C/ESP/CO/1, 23 September 2011.

standards of proportionality, individual tailoring, an impartial and regular review of any measure affecting legal capacity and the predominance of the will of the disabled person have to apply to all measures related to the exercise of legal capacity. Article 12 (5) aims to restore the individual's control over his or her property and financial affairs. Financial motivations behind initiating the guardianship procedures are common, thus this provision indirectly contributes to the derogation of the guardianship system.

What is really important to emphasize is that the call of the CRPD for the abolishment of the substituted decision-making systems does not mean that there is no obligation to protect the interest and well-being of the person who at a point of time lacks capacity to make a decision or to assist him or her in decision-making.³¹ The CRPD only challenges the ways in which this support had been provided and urges moves towards a different mechanism. Towards a mechanism where the wishes and the preferences of the individual are respected, where the individual is actually empowered to consider, articulate and communicate these wishes. The main purpose of this thesis is to analyse how domestic legal systems respond to these challenges and how do they deal with their obligations, but before this, the standards of the Council of Europe will also be discussed.

³¹ Peter Bartlett, *Mental Disability and the European Convention on Human Rights* (Martinus Nijhoff 2007) 155.

2. Divergent standards: the Council of Europe on legal capacity

As it has been outlined in the Introduction, the second chapter will explore the standards of the Council of Europe. When appropriate, it will be contrasted with the standards of Article 12 of the CRPD to reveal how it positions itself *vis-à-vis* the CRPD. First, the relevant documents adopted by the Committee of Ministers will be analysed. In the second part of the chapter, it will be shown how the question of legal capacity has been addressed by the jurisprudence of the ECtHR and to what extent did the Court call into question the domestic practices of imposing limitations on the legal capacity of persons with disabilities.

2.1. Advancing incapacitation on the level of principles

As a starting point, it has to be noted that at the time of the drafting of the European Convention of Human Rights, there was no special attention paid to the human rights of disabled people and the text of the Convention made no reference to disability rights, let alone legal capacity. The only aspect through which the Convention reached to persons with mental health issues was the restriction on the right to liberty.³² Although the Convention does not contain specific provisions with regard to persons with disabilities,³³ over the years, the core problematic issues of guardianship affected particular provisions of the Convention.³⁴ Disabled applicants brought complaints before the Court under several provisions of the Convention claiming that his or her fundamental human right had been violated.³⁵

³² David Thór Björgvinsson, ‘The Protection of the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights’, in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, vol v. 100 (Martinus Nijhoff Publishers, 2009) 143.

³³ Loukēs G Loukaidēs, *The European Convention on Human Rights: Collected Essays*, vol v. 70 (Martinus Nijhoff Publishers, 2007) 95.; David Thór Björgvinsson, *The Protection of the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights*, (n 32) 143.

³⁴ David Thór Björgvinsson, *Ibid.* 144.

³⁵ The provisions of the Convention was invoked referring to the right of liberty and security , the right to fair trial , the right to an effective remedy , the right to private and family life , the right to marry, the right to vote.

The Committee of Ministers of the Council of Europe – in adopting Recommendation No. R. (99) 4 on principles concerning the legal protection of incapable adults in 1999 (hereafter ‘Recommendation’) –³⁶ was aware of the large scale of different regulations concerning legal capacity that can be found in the member states.³⁷ Nevertheless, the Committee of Ministers tried to impel the member states to implement the principles set out in the Recommendation with the aim of bringing domestic regulations closer, albeit, without prescribing the specific measures to be taken in order to reach the realization of these principles.³⁸ At the same time, in contrast to the CRPD, this decision – however influential it can be – lacks any obligatory nature and leaves a considerable leeway to the member states in the implementation.³⁹ These factors undoubtedly lessen the pressure on the member states to take action in accordance with the principles of the Recommendation.

As to the approach taken in the Recommendation, one of the key elements is the acknowledgement that different possible degrees of incapacity and different situations may call for different and, more importantly, suitable legal responses.⁴⁰ As a consequence of this, state governments are expected to “recognize that different degrees of incapacity may exist and that incapacity may vary from time to time.”⁴¹ This reflects a sensible perception of mental disability and resonates with the CRPD’s take on the concept of disability. The

³⁶ Given the fact that the Committee of Ministers is the primary governing and decision-making body of the Council of Europe and it is composed of the Foreign Ministers of the member states it is important to know what position does the Committee of Ministers generally take on the question of legal capacity and disability.

³⁷ „Recognizing, however, that wide disparities in the legislation of member states in this area still exist;” Preamble of Recommendation No. R. (99) 4.

³⁸ Mary Keyes, in *Legal Capacity Law Reform in Europe*, claims that the Recommendation contains detailed guidance for member states on the way of reforming domestic legislation. However, since the Recommendation accepts the use of restrictive measures on legal capacity, it can only set up the principles aiming to govern the establishment of such measures. Some of the principles - like the maximum preservation of legal capacity, necessity and proportionality or the paramountcy of the interests and welfare of the person concerned - are undoubtedly essential - and the Recommendation plays a vital role in setting these principles at least as European standards -, but the formulation of these principles frequently grants a wide margin of appreciation for the member state governments. The notion of necessity is quite a subjective criterion and the frequent use of phrases like “so far as possible” or “whenever possible” weakens the guiding strength of the principles.

³⁹ “[The Committee of Ministers] recommends the governments of member states to take or reinforce, (...) all measures they consider necessary with a view to the implementation of the following principles”. Recommendation No. R. (99) 4, Preamble, last paragraph.

⁴⁰ Recommendation No. R. (99) 4, Principle 2, s 1.

⁴¹ Recommendation No. R. (99) 4, Principle 3, para 1.

Recommendation does not try to define the notion of disability,⁴² but focuses on the process of the decision-making. The Recommendation concerns adults who are deemed to be incapable of reaching autonomous personal or financial decisions or understanding and expressing them.⁴³ It is important to point out that as it is explained in the Explanatory Memorandum to the Recommendation, the autonomy and authenticity of a particular decision has to be judged “in the light of a person’s character, values and life history.”⁴⁴ The Recommendation sees the decision-making of individuals through the lens of the functional approach.⁴⁵ As a consequence of this, the Recommendation presupposes that in the lack of a cognitive and coherent course of decision-making, the person concerned might need certain measures of protection in order to protect his or her interest, signaling that paternalistic attitudes do not easily fade away. The Recommendation explicitly mentions representation or assistance as possible forms of protection and prefers the less formal protection measures, such as assistance provided by family members or by others.⁴⁶ These provisions can be seen to be in line with the informal support based on the approach of the CRPD.

However, the most crucial point is the potential effect of the establishment of a measure of protection on the legal capacity of the person concerned. According to the Recommendation, a restriction of legal capacity is permissible, even though only if it seems to be “necessary for the protection of the person concerned.”⁴⁷ The stressed presumption of full

⁴² When defining the scope of application of the principles the Recommendation traces back the incapability of decision-making to an impairment or insufficiency of the personal faculties. Principles, Part I, para 1. „The incapacity may be due to a mental disability, a disease or a similar reason.” Principles, Part I, para 2.

⁴³ The principles are applicable to persons who “are incapable of making, in an autonomous way, decision concerning any or all of their personal or economic affairs, or understanding, expressing or acting upon such decisions, and who consequently cannot protect their interests.” Principles, Part I, para 1.

⁴⁴ Explanatory Memorandum to Recommendation No. R. (99) 4, para 19.

⁴⁵ Lewis (n 28) 702.

⁴⁶ Recommendation No. R. (99) 4, Principle 5, para 2.

The Recommendation acknowledges in Principle 19 that there are certain personal aspect of life from where representation should be excluded, but leaves the determination of such aspect to the member states. The Explanatory Memorandum to the Recommendation mentions the act of „voting, marrying and recognizing or adopting a child.” Bartlett, *Mental Disability and the European Convention on Human Rights* (n 31) 159., Explanatory Memorandum, para 67.

⁴⁷ Recommendation No. R. (99) 4, Principle 3, para 1.

legal capacity of Article 12 (1) of the CRPD clearly departs from the approach taken by the Committee of Ministers. Although the Recommendation allows restrictions of legal capacity, it has a nuanced view on the permissibility of such serious measures: member states should also provide for measures leaving legal capacity intact⁴⁸ or for measures being limited to specific cases not requiring the appointment of any representative.⁴⁹ The possibility of joint decision-making and of appointing an optional number of representatives should also exist.⁵⁰ Looking back to the Recommendation from the post-CRPD era, one of the most progressive provisions is the recognition of decisions taken by persons having legal capacity providing for a possible subsequent loss of capacity.⁵¹ The Recommendation also rules out the automatic complete deprivation of legal capacity. Proportionality and individual tailoring to the needs of the person are key principles in assessing the necessity of any measure of protection.

The Recommendation follows the human rights approach in naming the respect for human rights of all and for human dignity as governing principles and it advocates the inclusion and involvement of disabled persons in decision-making even in the absence of legal capacity.⁵² This is reflected in the specific principles as well: according to the Recommendation, the full, free and informed consent of the adult should be a prerequisite for the establishment of any measure, the incapable adult should have a say in decision-making and in choosing assistance or representation.

The Committee of Ministers placed a considerable emphasis on procedural safeguards similar to the ones articulated in the CRPD: measures should respect the wishes, feelings and welfare of the person concerned, should be based on individual assessment and tailored to the

⁴⁸ Recommendation No. R. (99) 4, Principle 2, para 4.

⁴⁹ Recommendation No. R. (99) 4, Principle 2, para 5.

⁵⁰ Recommendation No. R. (99) 4, Principle 2, para 6.

⁵¹ Recommendation No. R. (99) 4, Principle 2, para 7.

⁵² The person concerned should be in the center of the whole decision-making: if technically he would not direct the whole decision-making process, it still should be driven by his or her past and present wishes, values and preferences.

individual circumstances, should apply for a limited period of time and be subject to periodical reviews. Very importantly, any change in the circumstances or in the individual's condition should trigger a review.

Two remarks have to be made in assessing the relevance of the Recommendation. First, it often serves as a reference point in the judgments of the ECtHR.⁵³ This is of huge importance, since due to the soft law nature of the document, member states are not obliged to implement the principles into the domestic law. Still, in an indirect way – through deciding in specific cases -, the Court can measure the domestic legal regulations against these principles and may find a violation of the Convention's rights.⁵⁴ In this sense the Recommendation backs up the Convention's provisions and enriches them with additional substantial content. This is due to the second remark: as the Court has pointed out several times, the Recommendation reflects the existence of some kind of "common European standard in this area."⁵⁵ In *Stanev v. Bulgaria* the Court gave a picture about how and to what extent it does consider the existence of an European consensus in a particular area of regulation. A comparative analysis of domestic legal systems can lead to the conclusion of the existence of an emerging trend on the European level.⁵⁶ The Court stated that in the interpretation of Article 6 (1) of the Convention, it has to consider this trend emerging in national legislation

⁵³ Mary Keys, 'Legal Capacity Law Reform in Europe: An Urgent Challenge', in Gerard Quinn and Lisa Waddington (eds), *European Yearbook of Disability Law*, volume 1 (Intersentia, 2009) 68., Bartlett, *Mental Disability and the European Convention on Human Rights* (n 31) 175.

⁵⁴ The ECtHR noted in *Shtukaturov v Russia* that the Russian legislation was in conflict with the principles of the Recommendation - it "did not provide for a "tailor-made response"" – and as a consequence of this the restriction on the applicant's right guaranteed by Article 8 could not be regarded to be strictly necessary. *Shtukaturov v Russia*, Application no. 44009/05, 27 March 2008, para 95.

⁵⁵ Mary Keys, (n 53), 69. As the ECtHR put it in *Shtukaturov*: „Although these principles have no force of law for this Court, they may define a common European standard in this area.” *Shtukaturov v Russia*, para 95.

⁵⁶ After conducting a comparison of twenty legal systems on the direct access to court with regards to the restoration of legal capacity, the Court observed that there is „a trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity.” *Stanev v Bulgaria*, Application no. 36760/06, 17 January 2012, para 243.

and the relevant international instruments – such as the CRPD and the Committee of Ministers Recommendation.⁵⁷

Recent documents, like the Committee of Ministers Recommendation⁵⁸ on principles concerning continuing powers of attorney⁵⁹ and advance directives⁶⁰ for incapacity clearly reflect the evolving standards determined by the CRPD. With the promotion of measures like lasting powers of attorney and advanced directives the Council of Europe support the CRPD's efforts to advance supported decision-making procedures. Similarly, the Council of Europe Disability Action Plan 2006-2015⁶¹ had been also influenced by the particular sections of Article 12 of the CRPD. The Action Plan reaffirms the principle of equal recognition before law,⁶² the state's obligation to provide tailor-made support to exercise legal capacity⁶³ and to guarantee the exercise of property rights and the possibility to manage one's financial affairs.⁶⁴

The Council of Europe and the ECHR jurisprudence moves in a different dimension from the CRPD universe. We have seen what the position of the Council of Europe is on the level of principles. Now we will look at the principles in action.

⁵⁷ *Stanev v Bulgaria*, paras 244-245.

⁵⁸ Recommendation CM/Rec(2009)11 of the Committee of Ministers to member states on principles concerning continuing powers of attorney and advance directives for incapacity.

⁵⁹ "A 'continuing power of attorney' is a mandate given by a capable adult with the purpose that it shall remain in force, or enter into force, in the event of the granter's incapacity." Recommendation CM/Rec(2009)11, Principle 2, para 1.

⁶⁰ "'Advance directives' are instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity." Recommendation CM/Rec(2009)11, Principle 2, para 3.

⁶¹ Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: Improving the quality of life of people with disabilities in Europe 2006 – 2015, Recommendation Rec(2006)5.

⁶² "People with disabilities have the right to recognition everywhere as persons before the law. When assistance is needed to exercise that legal capacity, member states must ensure that this is appropriately safeguarded by law." Action Plan, 3.12.1 para 1.

⁶³ Member states are required to "provide appropriate assistance to those people who experience difficulty in exercising their legal capacity and ensure that it is commensurate with the required level of support;" Action Plan, 3.12.3, VI.

⁶⁴ States are also expected to "take effective measures to ensure the equal right of persons with disabilities to own and inherit property, providing legal protection to manage their assets on an equal basis to others." Action Plan, 3.12.3, VIII.

2.2. Challenging the guardianship system on a case-by-case basis

Since the Convention and consequently other Council of Europe instruments do not rule out the restriction on legal capacity or full incapacitation *per se*, the Court follows this approach. It focuses on the nature and way of the incapacitation instead of disqualifying incapacitation *per se*. The Court refrains from articulating general principles, it does not seem to want to take a stand on the issue, instead looks at the particularities of every specific case and judges on the application of legal incapacitation in the specific context. The Court elaborates the Convention's requirements on a case-by-case basis.

2.2.1. Substantial requirements: complaints under Article 8 of the Convention

Many legal capacity related cases decided by the Court – just as the Recommendation itself – were issued before the adoption of the CRPD. Many claim that people with disabilities – especially with mental impairments – have been invisible not only in the society, but in the Convention system as well.⁶⁵ This seems to be slightly changed with strategic litigation and the recent developments in the jurisprudence.

In *Botta v Italy*⁶⁶ the Court elaborated its understanding of the layers of private life and of the protection provided by Article 8 of the Convention.⁶⁷ If private life has to be protected against interference hindering personal development and engagement in social activities, the institutionalised forms of substitute decision-making can constitute a very serious interference

⁶⁵ Lucy Series, (n 14) 3; Bartlett, *Mental Disability and the European Convention on Human Rights* (n 31) 1.

⁶⁶ *Botta v Italy*, Application no. 153/1996/772/973, 24 February 1998.

⁶⁷ “Private life, in the Court’s view, includes a person’s physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.” *Botta*, para 32. In *Pretty v. the United Kingdom* the Court reaffirmed this broad understanding of the term private life, referring to several earlier cases, *inter alia* to *X and Y v. the Netherlands*, Application no. 8978/80, 26 March 1985, para 22 and *Mikulić v. Croatia*, Application no. 53176/99, 7 February 2002, para 53. In *Shtukaturov v. Russia* the Court cites *Brüggemann and Scheuten v. Germany* when it states that “Article 8 “secure[s] to the individual a sphere within which he can freely pursue the development and fulfilment of his personality” (see *Brüggemann and Scheuten v. Germany*, no. 6959/75, Commission’s report of 12 July 1977, Decisions and Reports 10, p. 115, § 55.” *Shtukaturov*, para 83.

with private life.⁶⁸ The Court's decision in *Shtukaturov v Russia* confirms this point: the domestic first instance court's judgement of incapacitation "deprived the applicant of his capacity to act independently in almost all areas of life: he was no longer able to sell or buy any property on his own, to work, to travel, to choose his place of residence, to join associations, to marry, and so on. Even his liberty could henceforth have been limited without his consent and without any judicial supervision."⁶⁹ It is very difficult to imagine a meaningful life worth of an adult human being without the dignity and responsibility of deciding on these issues. This case touched upon several problematic features of the legal incapacitation processes and the guardianship systems. The decision reflects on three things: the Court's position on the restriction of legal capacity, on the reasons and justifications of incapacitation and on the possible way outs from the status of deprived legal capacity.

As to the first point, it has to be noted that in the Court's assessment the consequences of the applicant's deprivation of legal capacity amounted to a very serious interference with the applicant's private life and "as a result of his incapacitation, the applicant became fully dependent on his official guardian in almost all areas of his life."⁷⁰ Despite the seriousness of the interference the Court did not rule out incapacitation *per se*, but rather followed its standard three-part test.⁷¹ In *Kruskovic v. Croatia* the Court stated that the deprivation of legal capacity, even if it intrudes to the area of private and family life, is "not in principle in contradiction with the requirements of Article 8."⁷² Interestingly, despite the applicant's

⁶⁸ Oliver Lewis very accurately demonstrates how incapacitation can pervade every aspect of life when it „denies the person the right to privacy in virtually every arena of his or her life; it gives third parties access to the person's private papers and medical history; it places severe restrictions on the person's ability to enter into social activities and relationships and almost certainly negates any possibility of his or her developing intimate or sexual relationships." Lewis (n 28) 709.

⁶⁹ *Shtukaturov*, para 83.

⁷⁰ *Ibid*, para 90.

⁷¹ The Court looked at whether the interference of the applicant's right to respect for his private life was prescribed by law, pursued a legitimate aim under Article 8 (2) and whether it "was 'necessary in a democratic society' in the sense that it was proportionate to the aims sought." *Ibid*, para 85.

⁷² *Kruskovic v. Croatia*, Application no. 46185/08, 21 June 2011, para 30, European Union Agency for Fundamental Rights, (n19) 22.

complaint in *Shtukaturov*, the Court refused to examine the lawfulness or the legitimate aim of the interference, since it stated “that the decision to incapacitate the applicant was in any event disproportionate to the legitimate aim invoked by the Government.”⁷³

In examining the reasons behind the incapacitation procedure, the Court has expressed its concerns about the flawed assessment of the applicant’s capabilities and the insufficient justification of the measure. According to the Court

the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation. By analogy with the cases concerning deprivation of liberty, in order to justify full incapacitation the mental disorder must be “of a kind or degree” warranting such a measure (see, *mutatis mutandis*, *Winterwerp*, cited above, § 39).⁷⁴

The decision of the domestic court fell short of this requirement, since the medical report on which the incapacitation decision was based did not show or analyse the alleged inability of the applicant to make and understand certain type of decisions. The Court pointed to the key rationale behind its concerns in this regard: the “incidence of the applicant’s illness is unclear, as are the possible consequences of the applicant’s illness for his social life, health, pecuniary interests, and so on.”⁷⁵ The Court’s judgement reflects the nuanced view of disability and consequently calls for a ‘tailor-made response’ to the different levels of incapacity as required by the Recommendation, already mentioned above. Each decision having legal consequences should necessitate a separate assessment of functional capacity.⁷⁶

This functional approach was vividly given expression in *X v. Croatia* where the Court rejected the practice according to which the deprivation of the legal capacity should be automatically linked to the deprivation of the capacity to act in relation to other rights and

⁷³ *Shtukaturov*, para 86. In *Sykora v the Czech Republic* the Court stated the same. *Sykora v the Czech Republic*, Application no. 23419/07, 22 November 2012, para 104.

⁷⁴ *Shtukaturov*, para 94.

⁷⁵ *Ibid*, para 93.

⁷⁶ *Mary Keys*, (n 53), 76.

issues in life - in this case to the applicant's parental rights.⁷⁷ In *Alajos Kiss v Hungary*⁷⁸ the Court found that regulations – even constitutional ones – on the automatic loss of the voting rights as a consequence of full or partial restrictions on legal capacity resulted in a disproportionate interference. The disenfranchisement was not based on an individual assessment of one's abilities, but was generally prescribed by the Hungarian Constitution.

The last main theme in relation to the guardianship issue is the possibilities of challenging the deprivation of legal capacity. In *Shtukurov v Russia* the Court took into serious consideration the fact that the full deprivation of legal capacity was ordered “for an indefinite period”⁷⁹ and only could be challenged by his guardian who herself initiated the incapacitation. In *Stanev v Bulgaria* the Court emphasized the fundamental feature of the right to have a standing to initiate the restoration of legal capacity, since the interconnectedness of the restrictions on legal capacity and the exercise of other human rights.⁸⁰ In the case of Mr. Stanev the deprivation of his legal capacity resulted in such a serious measure as the deprivation of his liberty.⁸¹ In *Berková v. Slovakia* the applicant could not apply for the restoration of her legal capacity for an excessive period of three years and this prohibition was held to be an unnecessary and disproportionate interference with her rights under Article 8.⁸² Having regard to the serious interference with the rights under Article 8 caused by full deprivation of legal capacity, the Court strongly advised the national authorities to frequently

⁷⁷ Due to the fact that the applicant was deprived of her legal capacity she was – although without any official divestment of her parental rights - automatically excluded from the adopting procedure of her child who was taken into state care. There was no assessment of the relationship between the child and his mother or of the way the applicant was taking care of her child. *X v Croatia*, Application no. 11223/04, 17 July 2008.

⁷⁸ *Alajos Kiss v Hungary*, Application no. 38832/06, 20 May 2010.

⁷⁹ “Full incapacitation was applied for an indefinite period and could not, as the applicant's case shows, be challenged other than through the guardian, who herself opposed any attempts to discontinue the measure.” *Shtukurov*, para 90.

⁸⁰ “In particular, the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty. (...) The Court therefore considers that this right is one of the fundamental procedural rights for the protection of those who have been partially deprived of legal capacity.” *Stanev*, para 241.

⁸¹ „It seems clear to the Court that if the applicant had not been deprived of legal capacity on account of his mental disorder, he would not have been deprived of his liberty.” *Stanev*, para 154

⁸² *Berková v Slovakia*, Application no. 67149/01, 24 March 2009, paras 175-176.

reassess the justifications for the deprivation of legal capacity, especially if the person concerned requests so.⁸³ In several cases the Court also affirmed the importance of the possibility of a direct access to seek the restoration of legal capacity from a procedural point of view, based on Article 6 of the Convention.⁸⁴ Litigation based on Article 6 reveals several grounds based on which the deficiencies of an incapacitation procedure can be claimed. There are many ways in which people with disabilities can be deterred from effectively taking part in legal proceedings. Apart from the most obvious way of explicitly banning access to court, the lack of any legal aid or a representative's failure to respect and to convey the will of the person being represented can also seriously curb effective litigation.

2.2.2. Procedural requirements: complaints under Article 6 of the Convention

Alleging the violation of fair trial rights and principles might offer an easier way to get a grip on incapacitation procedures – for lawyers and judges alike. As to the applicability of Article 6 (1) of the Convention, legal incapacitation can be decisive for the determination of several civil rights and obligations of disabled people. As the Court noted in *Matter v. Slovakia*, the deprivation or the restoration of legal capacity determines whether the person concerned “is entitled, through his own acts, to acquire rights and undertake obligations set out, inter alia, in the Civil Code.”⁸⁵ Since, according to the Court's jurisprudence, the procedural safeguards under Article 5 (1) and (4) are broadly similar to those under Article 6 (1) of the Convention, in assessing whether proceedings affecting legal capacity were fair, the Court will take into consideration its case-law under Article 5 (1) (e) and Article 5 (4) of the Convention.⁸⁶ Similarly to the cases on deprivation of liberty, in cases involving mentally

⁸³ *Matter v Slovakia*, Application no. 31534/96, 5 July 1999, para 68

⁸⁴ *Stanev v Bulgaria*, para 245; *Salontaji-Drobnjak v Serbia*, Application no. 36500/05, 13 October 2009, para 134.

⁸⁵ *Matter v Slovakia*, para 51.

⁸⁶ See *inter alia* *Shtukurov v Russia*, para 66; *Stanev v Bulgaria*, para 232; *D. D. v Lithuania*, Application no. 13469/06, 14 February 2012, para 116.

disabled persons the Court grants a certain margin of appreciation to the domestic courts,⁸⁷ but the very essence of the applicant's right to a fair trial under Article 6 of the Convention must remain intact.⁸⁸ The Court will consider all the relevant circumstances of the case when evaluating the compatibility of the particular measure with the fairness principle.⁸⁹

The first prerequisite of participation is the right to be informed of the proceeding. Without proper notification, the applicant is deprived of the possibility to exercise other procedural rights. In *Shtukaturv* the fact that the applicant had not been notified about the incapacitation procedure barred him from being present and being heard during the proceedings – or at least being represented through a representative.⁹⁰ Additionally, the fact that he had only learnt about the decision after it had come into force deprived him of the possibility to file an appeal against it.⁹¹ Similarly, presence is a prerequisite for an adversarial proceeding, since it enables the parties to the proceeding to challenge evidence and to assist in establishing the facts.⁹² Claiming that the applicant's personal presence would not be “purposeful”, the domestic court in *Salontaji-Drobnjak v. Serbia* relied on a presumption which lacked any medical evidence and this contributed to the find of violation of Article 6. Likewise in *Lashin v. Russia* the Court also rejected the governmental justification based on the claim that the applicant's appearance before the court would be prejudicial to the applicant's health.⁹³

⁸⁷ In this regard, the Court accepts that special procedural rules might be set up with the aim to „secure the proper administration of justice” or „the protection of the health of the person concerned”. *Shtukaturv*, para 68.

⁸⁸ *Shtukaturv v Russia*, para 68; *Stanev v Bulgaria*, para 230; *X and Y v Croatia*, Application no. 5193/09, 3 November 2011, para 79.

⁸⁹ “In assessing whether or not a particular measure, such as exclusion of the applicant from a hearing, was necessary, the Court will take into account all relevant factors (such as the nature and complexity of the issue before the domestic courts, what was at stake for the applicant, whether his appearance in person represented any threat to others or to himself, and so on).” *Shtukaturv v Russia*, para 68.

⁹⁰ *Ibid*, para 69.

⁹¹ See also *X and Y v Croatia*, para 66; *Sykora v the Czech Republic*, para 109; *Berková v Slovakia*, para 141.

⁹² “Turning to the present case, the Court firstly notes that the applicant had been excluded from the final hearing and had therefore been unable to personally challenge the experts' report recommending the partial deprivation of his legal capacity.” *Salontaji-Drobnjak v Serbia*, para 127.

⁹³ *Lashin v Russia*, Application no. 33117/02, 22 January 2013, para 82.

As the Court has phrased in *Shtukaturov*, personal presence can serve different goals: it enables litigants to present their case, but also enables them to make contact with the judge.⁹⁴ Personal presence and the possibility of posing questions to the applicant allow the judge to form a “personal opinion about the applicant’s mental capacity”,⁹⁵ instead of simply relying on the medical report presented by the medical expert. The active role of the judge in the capacity assessment is especially important when the medical report cannot be regarded as up-to-date⁹⁶ or when the exclusive reliance on only one medical opinion can lead to arbitrariness.⁹⁷ As the Court noted:

(...) at the end of the day, it is the judge and not a physician, albeit a psychiatrist, who is to assess all relevant facts concerning the person in question and his or her personal circumstances. It is the function of the judge conducting the proceedings to decide whether such an extreme measure is necessary or whether a less stringent measure might suffice. When such an important interest for an individual’s private life is at stake a judge has to balance carefully all relevant factors in order to assess the proportionality of the measure to be taken. The necessary procedural safeguards require that any risk of arbitrariness in that respect is reduced to a minimum.⁹⁸

The Court does not deny the function of the medical evidence in the incapacitation procedure, but sets strict requirements for it. In *Sykora v the Czech Republic* the Court elaborates the requirements: any “limitation of legal capacity must be based on sufficiently reliable and conclusive evidence. An expert medical report should explain what kind of actions the applicant is unable to understand or control and what the consequences of his illness are for his social life, health, pecuniary interests, and so on.”⁹⁹ Therefore the Court reasoned along the functional approach when it linked the substantial and the procedural requirements of any incapacitation: the degree of the applicant’s incapacity must be analyzed

⁹⁴ “The Court notes that the applicant played a double role in the proceedings: he was an interested party, and, at the same time, the main object of the court’s examination.” *Shtukaturov v. Russia*, para 72.

⁹⁵ *Ibid.*

⁹⁶ Bartlett, *Mental Disability and the European Convention on Human Rights* (n 31) 164.; European Union Agency for Fundamental Rights, *Legal capacity of persons with intellectual disabilities and persons with mental health problems*, Luxembourg, Publication Office, 2013, 21.

⁹⁷ In *H.F. v. Slovakia* the domestic court failed to consult a second psychiatric expert. *Ibid.*

In *Shtukaturov v. Russia* the judge decided solely on the grounds of documentary evidence. *Shtukaturov v. Russia*, para 73.

⁹⁸ *X and Y v Croatia*, para 85.

⁹⁹ *Sykora v the Czech Republic*, para 103.

in a thorough medical report serving as one of the evidences in a fair procedure. The length of the judicial questioning or the medical examination of the applicant can indicate the judges' and the experts' failure to properly address the degree of incapacity of the applicant and its consequences in certain aspects of life.¹⁰⁰

The effectiveness of the exercise of the right to access to court can be enhanced by proper legal aid and representation.¹⁰¹ The complex and “professional” aspects – involving medical expertise – of the incapacitation procedure and the seriousness of the impact of the procedure on the applicant's life may call for an effective legal representation protecting and representing the interest of the person concerned. In *Salontaji-Drobnjak v. Serbia* the Court emphasized that the mere fact that the applicant had been provided with legal representation is not enough, the person being represented must be enabled to consult and instruct the representative on the case.¹⁰² The case of *DD v. Lithuania* concerned the problematic issue of conflict of interests. The Court held that if there is a conflict between the person with disabilities and his or her guardian, and if this “conflict potential has a major impact on the person's legal situation” the person should be heard in person or through representation.¹⁰³ Accordingly, having regard to the conflict, the applicant has to be provided an own lawyer who is different from the one representing the guardian.¹⁰⁴

Similarly, the role of the guardian ad litem also carries the same inherent possibility of conflicting interests. In the case of *M.S. v Croatia* the Court found it problematic that the Croatian legal system did not contain regulations in case of a “conflict of wishes between a guardian and the person placed under guardianship.”¹⁰⁵ Since the domestic social welfare center initiated the incapacitation proceeding and for the purposes of representation during

¹⁰⁰ See *X and Y v. Croatia*, para 87; *Shtukurov v. Russia*, para 91.

¹⁰¹ *Lucy Series*, (n14) 17.

¹⁰² *Salontaji-Drobnjak v. Serbia*, para 127.

¹⁰³ *DD v. Lithuania*, para 118.

¹⁰⁴ *Ibid*, para 12.

¹⁰⁵ *M. S. v Croatia*, Application no. 36337/10, 25 April 2013, para 80.

these proceeding the employee of the center itself was appointed, it was not in the interest of the guardian ad litem to oppose the proceeding, challenge the evidence or act in the interest of the applicant in any other way.”¹⁰⁶ Keeping in mind Article 12 (3) of the CRPD, the system of litigation guardians cannot be regarded as an adequate form of legal assistance. The general practice of entrusting a litigation guardian with the protection of the interest of the “persons who, on account of their mental disabilities are not fully capable of acting for themselves”¹⁰⁷ is very different from the one the CRPD wishes to advance. Instead of the patronizing practice of acting on behalf – although in the supposed interest – of the person concerned, emphasis should be placed on assistance in forming and conveying the wishes of the person and in enabling the litigant to participate in conducting litigation.

Conclusion

Stanev v. Bulgaria and *Shtukaturov v. Russia* were leading cases and they allowed the Court to spell out some very important standards capable of serving as a starting point for an evolving jurisprudence on legal incapacitation. Although the guardianship system has not been questioned in its entire foundation, the Court gradually becomes aware of the serious consequences and the inherent dangers of limitations of legal capacity. Consequently the Court has not yet called for the replacement of substitute decision makers – or even for reforming their roles. However, with its decisions focusing on procedural rights, the Court tried to bring the incapacitation procedures and the appointment of guardians within the realm of the rule of law.¹⁰⁸

¹⁰⁶ The Court also took into consideration the fact that the national law did not “provide for obligatory representation of the person concerned by an independent lawyer, despite the very serious nature of the issues concerned and the possible consequences of such proceedings.” *MS v. Croatia*, para 104.

¹⁰⁷ *Winterwerp v. The Netherlands*, para, 60; *Stanev v. Bulgaria*, para 170, *DD v. Lithuania*, para 118, *Sykora v. The Czech Republic*, para 82.

¹⁰⁸ *Lucy Series*, (n14) page 26.

3. Promises and old practices: Hungary

With the system of plenary and partial guardianships Hungary used to be a clear example of non-compliance with Article 12 of the CRPD. The Civil Code of 2009 carried some elements of the sign of a paradigm shift, but the Civil Code of 2013 does not follow the path marked by the Civil Code of 2009. The third chapter will examine Hungary's struggle with the implementation of the CRPD standards in relation to the assessment of legal capacity and to the supported and substituted decision-making mechanisms.

3.1. The general legislative framework

Until the 15th of March 2014 the two main sources of the domestic legal framework regulating legal capacity and guardianship were the Act IV of 1959 on the Civil Code (hereafter the 'Civil Code of 1959')¹⁰⁹ and the Act III of 1952 on the Code of Civil Procedure.¹¹⁰ The Parliament adopted a new Civil Code on the 11th of February 2012 which entered into force on the 15th of March 2014.¹¹¹ It has to be noted that the Government drafted and proposed a new Civil Code in 2009, however, the Act CXX of 2009 on the Civil Code (hereafter 'the Civil Code of 2009') did not become operative due to the decision of the Constitutional Court of Hungary.¹¹² It can be argued that historically Hungarian civil law provided a legal framework only for the full or partial restriction of legal capacity and substitute decision-

¹⁰⁹ Available in Hungarian at http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1300005.TV

¹¹⁰ Available in Hungarian at http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=95200003.TV

¹¹¹ Act V of 2013 on the Civil Code. In the meanwhile, the constitutional framework has also changed: the Act XX of 1949 on the Constitution of the Republic of Hungary has been replaced by the Fundamental Law of Hungary which entered into force on the 1st of January 2012. Additionally, the 149/1997 (IX.10.) Governmental Decree on Guardianship Authorities and Child Protection and Guardianship Procedures contains relevant information regarding the guardianship proceedings, the institution of supported decision-making and on the advance directives. The Act CL of 2004 on the General Provisions of the Public Administrative Procedures and Services provides the rules of the public administrative procedures.

¹¹² 51st Constitutional Court Resolution of 2010 (28th April). The Constitutional Court found the passed Bill in violation of the constitutional principle of legal certainty due to the alleged short period of preparation for the entry into force of the first two books of the Civil Code of 2009.

making.¹¹³ For a long time the institution of guardianship was the only legal instrument the law offered as a solution to people who had difficulties in the course of decision-making. There were no alternatives to instruments limiting legal capacity. The exclusivity of the guardianship system was first challenged by the Civil Code of 2009 with the introduction of the instruments of supported decision-making and advance directive. As already mentioned above, the Civil Code of 2009 did not enter into force and consequently a new recodification process began what resulted in the adoption of the Civil Code of 2013. This new Civil Code also contains the alternative measure of supported decision-making and advance legal statement, however with modified conditions which are less favourable to the international standards, especially to the CRPD.

The unambiguous postulate of the CRPD is the restoration of the legal capacity of persons with disabilities with the purpose of granting every individual the freedom and responsibility to make sovereign decisions. This purpose calls for developing supported decision-making mechanisms respecting individual autonomy. The Government submitted its first report in October 2010 to the CRD Committee and the Committee adopted its concluding observations on Hungary in September 2012.¹¹⁴ The Committee welcomed the introduction of the supported decision-making mechanism, but it also expressed its concerns regarding the continuance of the guardianship system. These concerns are especially legitimate considering the widespread use of guardianship proceedings. According to the statistical data provided by the National Office for the Judiciary on the placements under full or partial guardianship, as of 2013 August 61,259 people were placed under guardianship. Out of this more than 60,000 people 34,174 were under excluding and 24,442 were under restricting guardianship. There

¹¹³ István Hoffman and Gyorgy Konczi, 'Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code' (2010) 33 *Loy. LA Int'l & Comp. L. Rev.* 143, 153–155.

¹¹⁴ UN, CRPD Committee (2012c), Concluding Observations on Hungary, CRPD/C/HUN/CO/1, 27 September 2012, para 25

was no data available regarding 2,643 people.¹¹⁵ The CRPD Committee requested Hungary to submit written information on the measures adopted in order to diminish guardianship and develop supported decision-making mechanisms within 12 month.¹¹⁶

In the following, instruments of assistance in decision-making, planning for the time of anticipated incapacity and making decisions on behalf of a person provided by the civil codes will be further analysed through the lens of the CRPD. Differences between the approaches taken by the old and new Civil Code will be outlined, as well as the progressive provisions of the non-operative Civil Code of 2009. However, the crucial preliminary question is that under which conditions are these instruments of facilitating or restricting the exercise of legal capacity applicable. The next chapter aims to focus on the questions of mental capacity, legal capacity and the capacity to act.

3.2. Mental capacity and legal capacity

As a preliminary remark it has to be noted that the Hungarian civil law differentiates between legal capacity and the capacity to act. Legal capacity allows the person to be holder of rights and bearer of obligations. Capacity to act allows the person to exercise rights and assume obligations and it means that the legal force of his or her acts and decisions is acknowledged – for instance the person can make valid contracts or legal statements.¹¹⁷ Similarly to the Constitution, the Fundamental Law also stipulates that every person has legal capacity.¹¹⁸ Consequently, according to the old Civil Law, every person has legal capacity from the

¹¹⁵ For the statistical data see Appendix 1 of the Information provided under the follow-up procedure to the concluding observations of the Committee by Hungary, Response by Hungary to selected recommendations of the Committee on the Rights of Persons with Disabilities following the examination of the Initial Report of Hungary on 20-21 September 2012. http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/FollowUp.aspx?Treaty=CRPD&Lang=en last accessed 28 March 2014

¹¹⁶ CRPD Committee, Concluding observations on Hungary, para 56.

¹¹⁷ Civil Code of 1959, article 8 (1) and article 11 (2). Civil Code of 2013, article 2:1 and 2:8. In English see the Information provided under the follow-up procedure to the concluding observations of the Committee by Hungary, footnote 1.

¹¹⁸ Constitution, section 56, Fundamental Law of Hungary, section XV.

moment of birth till the moment of death.¹¹⁹ Legal capacity cannot be restricted or renounced.¹²⁰ The Civil Code of 2009 and the Civil Code of 2013 contain the same provision,¹²¹ so it can be stated that in respect of Article 12 (1) of the CRPD, the legislation complies with the Convention.

Under the civil codes the capacity to act can be restricted, although the basis for such a restriction differs. The Civil Code of 1959 stated that everyone had full capacity if his or her capacity was not limited or abrogated by law.¹²² The Civil Code of 2013 slightly rephrases this definition: every person has the capacity to act unless it is restricted by the Civil Code itself or by a guardianship order of the court restricting legal capacity.¹²³ In practice, nothing has changed in relation to restricting the capacity to act: it is for the court to find the diminishment or the lack of capacity and to place the person under partial or full guardianship. Under the Civil Code of 1959 a placement under partial guardianship was applicable if the court concluded that the adult's ability to conduct his or her own affairs was permanently or recurrently diminished to a large extent due to his or her mental state, intellectual disability or pathological addiction.¹²⁴ If the person's mental ability to conduct her or his affairs was permanently and completely diminished due to his or her mental state or intellectual disability, he or she could be placed under full guardianship.¹²⁵

The criteria of the Civil Code to establish the diminishment or the complete lack of legal capacity contains two elements: it requires the existence of a "certain medical condition"¹²⁶ and the person's inability to manage his or her affairs.¹²⁷ The new Civil Code

¹¹⁹ Civil Code of 1959, article 8 and 9.

¹²⁰ Civil Code of 2013, article 2:1.

¹²¹ Ibid, article 2:1, 2:2 and 2:4.

¹²² Civil Code of 1959, article 11 (1).

¹²³ Civil Code of 2013, article 2:8 (1).

¹²⁴ Civil Code of 1959, article 14 (4).

¹²⁵ Ibid, article 15 (4).

¹²⁶ European Union Agency for Fundamental Rights, European Union Agency for Fundamental Rights, (n 96) 32.

altered the statutory criteria of the imposition of any legal capacity restriction in two aspects. First, it replaced the expressions of mental state, intellectual disability or pathological addiction with the umbrella term of mental disorder referring to all kind of “psychological disorders”¹²⁸ as the ministerial argument to the Bill puts it.¹²⁹ Secondly, the Civil Code of 2013 supplements the criteria with a new element. A deficiency in the mental capacity of the person alone is not enough for justifying the imposition of any restrictive measure. The restriction has to be further justified by the personal, family and societal circumstances of the person concerned.¹³⁰ If the person needs help in managing his or her affairs, it has to be considered whether his or her environment and family can sufficiently assist him or her in the decision-making. Thus, there would be no need for any kind of ‘institutional’ assistance, let alone any interference with the person’s capacity to act. According to the ministerial argumentation another important principle is that the sole fact that the person’s legal capacity has been restricted in relation to a certain group of affairs does not justify the imposition of any limitation of legal capacity in relation to another group of affairs. This aims to prevent the consideration of factors based on prejudicial assumptions and to limit the restriction to the strictly necessary group of affairs. Consequently, mental capacity is decision-specific.

However, the current regulation maintains the established link between the existence of a mental disorder and legal capacity. Keeping in mind that the CRPD considers legal capacity to be a universal attribute, it is questionable whether the general practice of the states in decoupling mental capacity to legal capacity is in line with the CRPD.¹³¹

¹²⁷ Ibid.

¹²⁸ The Information provided under the follow-up procedure to the concluding observations of the Committee by Hungary, (n 115) 3.

¹²⁹ See in English, *ibid.*

¹³⁰ Civil Code of 2013, article 2:19 (2).

¹³¹ Most recently Eilionoir Flynn has criticized this practice apropos of the Assisted Decision-Making (Capacity) Bill 2013 of Ireland. She claimed that this practice „represents a deficits-based approach firmly tied to the medical model of disability” and that the „Convention does not provide for mental capacity to be used as a proxy for legal capacity – i.e. for people who are perceived to have poor decision-making skills to be denied the

In the determination of a person's legal capacity the court has to obtain the expert opinion of a psychiatrist, since the incapacity assessment is generally based on a medical report.¹³² The law gives no guidance on the course of the medical examination or what does this medical opinion have to contain.¹³³ A more complex assessment – including an additional environmental study and documents about the financial affairs of the person concerned – is only required by the Code of Civil Procedure when the procedure is initiated by the guardianship authority.¹³⁴ The Civil Code of 2013 – with requiring the judge to take into consideration the individual circumstances and the family and social relations of the person concerned – compels the court to undertake a more thorough assessment in determining the necessity of any interference with the legal capacity of the individual. The judge is also authorized to order additional evidence if it is necessary.¹³⁵ Undoubtedly, the personal presence of the person during the capacity assessment can enable the judge to form an opinion about the person's abilities. The Code of Civil Procedure states that the adult has to be heard in-person unless there are exceptional circumstances, such as when no one knows his or her whereabouts or when his or her personal presence is unavoidably hindered.¹³⁶

If it has been established by the court that the person in question does not have the ability to manage his or her affairs on his or her own, one question follows, namely that what are the alternatives offered by the Civil Code to the independent and autonomous decision-making.

opportunity to make legally binding decisions.” <http://humanrights.ie/mental-health-law-and-disability-law/assisted-decision-making-capacity-bill-2013-finally-published/> accessed 28 March 2014

¹³² Code of Civil Procedure, article 310 (2).

¹³³ The court has the discretionary power to order the assessment of the person to be conducted in a medical institution for a maximum period of 30 days if it seems that a longer period of examination is required or if the person repeatedly fails to appear for the medical examination. Code of Civil Procedure, article 310 (2).

¹³⁴ Code of Civil Procedure, article 307 (2). The environmental study should contain information about the lifestyle and care of the person concerned, the contact information of doctors, medical and social institutions, information on the person's financial and social circumstances and any other information what might be relevant to the case. 149/1997 (IX. 10.) Governmental Decree, article 9(3).

¹³⁵ Code of Civil Procedure, article 310 (1).

¹³⁶ Ibid, article 309 (3).

3.3. Supported vs. substituted decision-making

The Civil Code of 1959 only provided for mechanisms of substituted decision-making in the form of partial or plenary guardianship. Although it never entered into force, the Civil Code of 2009 represented a remarkable step in reforming the legal system. With the abolition of the plenary and the general partial guardianship and the introduction of the instrument of supported decision-making and advance directive, the law seemed to move towards an approach which complies better with the CRPD. In the Initial Report submitted by Hungary under article 35 of the Convention, the Government gave account of the Civil Code of 1959, however, it also mentioned the preparatory works on the compilation of a new Civil Code.¹³⁷

After the consideration of the information provided by the Hungarian government delegation in September 2012 the CRPD Committee urged the Government to “use effectively the current review process of its Civil Code and related laws to take immediate steps to derogate guardianship in order to move from substitute decision-making to supported decision-making which respects the person’s autonomy, will and preferences and is in full conformity with article 12 of the Convention.”¹³⁸ The Committee also requested Hungary to “submit within 12 month information in writing on the measures adopted in order to meet the recommendations set out in paragraph 26.”¹³⁹ In its response, the Government outlined the changing rules of the guardianship system and the provisions concerning supported decision-making and advance legal statements.¹⁴⁰

¹³⁷ Initial reports submitted by States parties under article 35 of the Convention, Hungary, 14 October 2010, CRPD/C/HUN/1, para 78.

¹³⁸ CRPD Committee, Concluding observations on Hungary, para 26.

¹³⁹ Ibid, para 56.

¹⁴⁰ The Information provided under the follow-up procedure to the concluding observations of the Committee by Hungary, (n 115).

The first noteworthy measure introduced by the new Civil Code is the instrument of supported decision-making.¹⁴¹ However promising the introduction of this measure looks like, it cannot serve as a viable alternative to substituted decision-making, since it does not replace, but only compliments the guardianship system. According to the new provisions, the guardianship authority – with the aim of avoiding any restriction on legal capacity – can appoint a supporter on the request of a person who is in need of support due to his or her slightly diminished ability to manage his or her affairs or to make decisions. Moreover, if a court – assessing the mental capacity of the person – reaches the conclusion that a placement under guardianship would not be necessary, it can also initiate the appointment of a supporter. The introduction of this measure is undoubtedly a positive step forward, but it does not achieve the aim of universal support. As it has been pointed out by Gombos Gábor, the Hungarian Civil Liberties Union and the Mental Disability Advocacy Center, this measure classifies people: only those can be supported whose capacity is slightly diminished and who are in need of support.¹⁴² Thus, the availability of supported decision-making is made dependent upon the severity of the mental disability. This is contrary to the aim of Article 12 to provide support for everybody who is in need of assistance and to the Convention itself which prohibits any form of discrimination based on the ground of disability.

The institution itself pursues the aim promoted by the CRPD: it seeks to provide assistance in decision-making to people – in general or in relation to specified issues – without restricting the supported person's capacity to act.¹⁴³ The function of the supporter is to be present, provide information and give advice to the supported person at all stages of any

¹⁴¹ The specific details of the instrument have been elaborated in the Act CLV of 2013 on supported decision-making.

¹⁴² Gábor Gombos, Társaság a Szabadságjogokért, Mental Disability Advocacy Center, Vélemény a támogatott döntéshozatalról szóló törvénytervezetről és a kapcsolódó törvénymódosítások első szövegváltozatáról (Opinion on the Bill on supported decision-making), 15 August 2013, page 2.

¹⁴³ Act CLV of 2013, article 1.2.

administrative, civil or criminal procedure or whenever the person makes legal statements.¹⁴⁴ The person of the supporter plays a key role in providing an effective assistance what meets the support needs of the individual. The relationship between the supported person and the supporter should be one of confidence and trust. The supporter is appointed after the hearing of the supported person and the potential supporter – ideally nominated by the supported person – and the supported person’s consent is required.¹⁴⁵ The number of supporters is limited to two persons, but the Government did not justify this unreasonable limitation. For persons with no trusted ones around the legislator provided the appointment of a professional supporter.¹⁴⁶ Although in this case the essential element – namely trust - is missing from the relationship, the person is still supported by someone who can only assist in the decision-making, but cannot take it over. However, the fact that the supporter is appointed by the guardianship authority brings the institution closer to the guardianship system.¹⁴⁷ In contrary to this, under the Civil Code of 2009 it was the authority of the court to appoint the supporter, but the appointment was based on the formal or informal agreement between the supporter and the supported person.¹⁴⁸ The Court basically only acknowledged and legalized this relationship.¹⁴⁹

The second innovative instrument introduced by the Civil Code of 2013 is the possibility of making advance legal statements.¹⁵⁰ The advance legal statement is linked to a probable future restriction of legal capacity and the activities of a potential guardian. The person – at the time when he or she still enjoys full mental capacity – can determine who he or she wants as a guardian (or who he or she does not want) in case of a future full or partial

¹⁴⁴ Act CLV of 2013, article 4 (1).

¹⁴⁵ Ibid, article 3 (2).

¹⁴⁶ Ibid, article 7.

¹⁴⁷ Gombos Gábor, Társaság a Szabadságjogokért, Mental Disability Advocacy Center, (n 142), 3.

¹⁴⁸ Civil Code of 2009, article 2:19 (4)

¹⁴⁹ Hungarian Disability Caucus, 'Disability rights or Disabling rights?' CRPD Alternative Report, August 2010, page 85.

¹⁵⁰ Civil Code of 2013, article 2:39.

limitation on his or her capacity to act and also the way his or her guardian should act in relation to his or her personal and financial affairs.¹⁵¹ The advance directive becomes operative when the court decides to place the person under guardianship, unless this measure would go obviously against the person's interest or if the would-be supporter refuses to fulfil his or her role or if he or she is excluded from performing this role.¹⁵² The guardianship authority in the course of the appointment procedure is bound by the content of the advance legal statement and consequently the will of the person concerned what is a positive rule in light of the CRPD.¹⁵³

In sum, supported decision-making is a mechanism which provides assistance, but does not interfere with the capacity to act, and thus it satisfies the key command of Article 12 (2) of the CRPD. The instrument of advance legal statement is meant for the time when the person's capacity to act might be restricted, however it tries to ensure that in these situations the will of the person shall prevail as it is set out in Article 12 (4) of the CRPD. But what happens when supported decision-making is deemed to be insufficient for the protection of the person and his or her capacity to act becomes restricted? Does the safeguards of Article 12 (4) of the CRPD provided? The next chapter will focus on these issues.

3.4. Forms of substituted decision-making and their safeguards

As to Article 12 (2) and (3) of the Convention, the most striking divergence from the Convention is the dominance of the various forms of substituted decision-making under the new Civil Code – despite the introduction of the above mentioned support-focused instruments. It has to be noted that the new Civil Code is a step forward from the exclusivity

¹⁵¹ Civil Code of 2013, article 2:39 (1)-(2).

¹⁵² Ibid, article 2:40 (1).

¹⁵³ Ibid, article 2:40 (3).

of substituted decision-making – although it is a step back from the reform attempt of the Civil Code of 2009, as we will see below.

The old Civil Code only provided for mechanisms of substituted decision-making. It acknowledged two degrees of legal capacity limitation - the full and the partial deprivation of legal capacity – and as a protective measure guardians were appointed to act on behalf of the person concerned.¹⁵⁴ In 2001 a third type of capacity limitation was introduced: the court could impose a restriction of capacity only in relation to certain types of issues. In relation to issues that are not affected by the restriction the person retained his or her capacity to act. This more individualized measure certainly strengthened the principle of necessity and proportionality,¹⁵⁵ although it has been argued that in reality it had not been well-implemented, since courts rarely imposed this form of capacity restriction.¹⁵⁶

Keeping in mind the above mentioned the reforms brought along by the Civil Code of 2009 seemed to be ‘revolutionary’: it abolished plenary guardianship and partial guardianship with general limitations. The only form of legal capacity restriction had to be limited to certain type of cases.¹⁵⁷ The Civil Code of 2009 did not enter into force and the Civil Code of 2013 did not radically transform the system established by the old Civil Code. It preserved both the full and the partial guardianship systems – although it abolished guardianship with general limitation. In addition to this, the new Civil Code undoubtedly tries to emphasize the *ultimate ratio* nature of full guardianship and substitute decision-making as such. Moreover,

¹⁵⁴ In the case of plenary guardianship the person’s right to make decisions was stripped from him or her in an all pervasive way: the court-appointed guardian was authorized to decide and act. If the court restricted the person’s legal capacity in a general way, the person placed under guardianship could only act with the consent or subsequent approval of the guardian.

¹⁵⁵ Hoffman and Konczi (n 113) 165. Istvan Hoffman refers to the ministerial explanation to the Bill according to which the amendment was introduced to achieve compliance with the Council of Europe Recommendation R(99) 4 of 1999.

¹⁵⁶ „It should be noted that the change in approach took place only at the level of civil law. Courts rarely make use of the institution of partially diminished active legal capacity.” Ibid 175., Hungarian Disability Caucus, ‘Disability rights or Disabling rights?’ 82 and 85.

¹⁵⁷ Civil Code of 2009, article 2:23 (1)-(2).

several principles are aimed to foster this attitude, most importantly the principle of necessity and proportionality.

The attitude that the principle of necessity and proportionality should be applicable to every measure related to legal capacity tries to find the balance between respecting the individual's autonomy and protecting him or her from harm. As a starting point, no restriction of legal capacity is acceptable when other measures – that do not affect legal capacity – would be sufficient in protecting the rights of the person concerned.¹⁵⁸ Similarly, full limitation of legal capacity is acceptable if partial limitation would not be enough to achieve the protection of the person's rights.¹⁵⁹ This principle is also reflected in the statutory criteria of restricting capacity: when assessing the necessity of placing a person under guardianship, the judge has to consider whether the person's social network – his or her family and friends – is able to provide sufficient assistance in managing his or her affairs.¹⁶⁰ This resonates with the idea that the first and foremost circle of support should be composed of the ones the person knows and loves. Consequently, informal support – what does not affect the capacity to act – should be the primary measure of assistance and protection.

The Hungarian Government claimed that the purpose of the institution of partial guardianship is giving “targeted assistance.”¹⁶¹ This measure would provide targeted solutions to the individual needs after considering the individual circumstances, for example the living conditions of the individual.¹⁶² However, even if it is labelled as individual assistance, it remains a joint decision-making, since the person has to seek the approval of the guardian in relation to issues specified by the court.¹⁶³ The court has to justify the necessity of the

¹⁵⁸ Civil Code of 2013, article 2:19 (4) and 2:21 (3).

¹⁵⁹ Ibid, article 2:21 (3)

¹⁶⁰ Ibid, article 2:19 (2) and 2:21 (2).

¹⁶¹ The Information provided under the follow-up procedure to the concluding observations of the Committee by Hungary, 3.

¹⁶² Ibid.

¹⁶³ New Civil Code, article 2:20 (1).

limitation when it specifies the affected issues.¹⁶⁴ In contrary to the Civil Code of 1959 it does not contain an exemplifying list on the group of affairs in relation to which the capacity to act can be restricted. As the Government puts it, this makes “it possible for the judicial practice to better adapt to individual circumstances.”¹⁶⁵

As one of the major drawbacks of the recodification, the instrument of full limitation on legal capacity remained part of the system. The ministerial argument claimed that not only the name of the measure has been changed – from guardianship excluding legal capacity to guardianship fully limiting the capacity to act – its applicability has been restricted. According to the Government’s report plenary guardianship “may only be ordered exceptionally, if the person concerned is unable to make a legal statement even jointly with his or her guardian and if it is absolutely necessary that somebody acts on his or her behalf.”¹⁶⁶ But apart from the above mentioned principle of necessity and proportionality, the law gives no further guidance on the imposition of this measure. It is the ministerial argument that states that it should be used as a measure of *ultima ratio* after very careful judicial consideration of the circumstances of the case.

It is worth mentioning here how the Civil Code of 2009 intended to handle the cases when somebody had to act on behalf of the person. As it has been already pointed out, it only allowed limitations of legal capacity in relation to specified measures by the court. If the communication between the guardian and the person placed under guardianship was so severely hindered that it could not be facilitated even by an expert, and consequently, the guardian was not in the position to approve or consent to the legal acts of the person, a court – in a separate legal procedure – could authorize the guardian to act alone on behalf of the

¹⁶⁴ The Information provided under the follow-up procedure to the concluding observations of the Committee by Hungary, (n 117), 3.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid, 4.

person concerned.¹⁶⁷ The other possibility for the independent act of the guardian was when the person authorized the guardian to act on behalf of him or her in permanent or recurrent matters.¹⁶⁸ Consequently there were really limited and detailed cases by the law when the guardian could be authorized to act alone – in cases of real last resort or when that was the explicit will of the person concerned. Compared to this, the new Civil Code does not seem to have a clear idea on how to restrict the applicability of the full limitation of the capacity to act to the lowest possible level.

Regarding the safeguards of Article 12 (4), apart from individual tailoring and proportionality, there are few positive changes introduced by the Civil Code of 1959. First, compared to the old code, the new Civil Code does not allow any exception from the obligation of the court to undertake a periodic review of the placement under full or partial guardianship. This does not preclude the opportunity to initiate the termination or the modification of the conditions of the guardianship measure whenever it seems to be necessary, due to the change in circumstances, for example.¹⁶⁹ However, the only effective safeguard ensuring the primacy of the will of the person placed under guardianship is the creation of an advance legal statement. In case of plenary guardianship the sole requirement is that before the guardian acts he has to listen to the person's opinion and request and has to take them into account - as far as it is possible.¹⁷⁰ Apart from this, the guardian's decision can be based on the assumed best interest of the person, in the lack of an advance statement. If the person made an advance statement on how the guardian should act in connection to his personal and financial affairs, the guardian has to observe these instructions.¹⁷¹ Disregarding the content of the document shall result in the removal of the guardian by the guardianship

¹⁶⁷ Civil Code of 2009, article 2:25 (b).

¹⁶⁸ Ibid, article 2:25 (a).

¹⁶⁹ Ibid, article 2:30 (4).

¹⁷⁰ Ibid, article 2:22 (3).

¹⁷¹ Ibid, article 2:34 (4).

authority what is quite a serious sanction.¹⁷² As to the rules of conflict of interest, the new Civil Code specifies the ones who are excluded from the possibility of being appointed: whose appointment would be contrary to the interest of the person concerned or against whose appointment the person objects – in the advance legal statement or in any other way.¹⁷³ The guardian can also be removed only if he or she acts in a way what harms or jeopardize the interest of the person placed under guardianship.¹⁷⁴ As to Article 12 (5) of the CRPD, full or partial guardianship affecting financial matters - due to the substituted or joint way of decision-making – can preclude retaining control over financial matters, since the whole aim of the guardianship system is to protect the personal and financial interest of the individual from harmful decisions.

Conclusion

It can be argued that due to the Civil Code's failure to recognize the full legal capacity of disabled persons, the Civil Code is in violation of Article 12 of the CRPD. Maintaining the instrument of fully limiting guardianship – the remainder of the traditional paternalistic approach – is contrary to the CRPD Committee's explicit call to abolish substituted forms of decision-making. However, an instrument of facilitating the exercise of legal capacity to act has been introduced, but the legislator's vision of the supported decision-making is different from the one advocated by the CRPD. Besides, as the CRPD Committee emphasized, the introduction of supported decision-making does not compensate the failure to abolish the guardianship system. Moreover, the primacy of the principles of individual tailoring and proportionality are present on the level of aspirations, but it is yet to see how they will be adopted in practice. Furthermore, the Civil Code contains no reference to the principle according to which the person's will, preferences and beliefs are to govern all decisions.

¹⁷² Ibid, article 2:33 (2) (b).

¹⁷³ Ibid, article 2:31 (2).

¹⁷⁴ Ibid, article 2:33 (2) (c).

4. Empowerment and its deficits: England and Wales

As the House of Lords Select Committee gave a summary of the general opinion about the MCA 2005, it was regarded to be “‘progressive’, ‘positive’, a ‘wonderful piece of legislation’ and ‘a force for good.’”¹⁷⁵ However, the overall assessment of the Act provided by the Committee suggested that despite the fact that the MCA 2005 is widely supported, its implementation has failed in several aspects.¹⁷⁶ This chapter will analyse how successful the implementation of the CRPD was. The analyses will follow the structure set out in the previous chapter: the research focused on the principles of decision-making, on the capacity assessment and on the supported and substituted decision-making procedures.

4.1. The general legislative framework and the principles of decision-making

In England and Wales the major pieces of legislation setting out the legal framework concerning situations when a person may lack the mental capacity to make a certain decision are the Mental Capacity Act 2005 (hereafter ‘the MCA’) and the two Codes of Practice supplementing the MCA and the deprivation of liberty safeguards and serving as a guidance for the interpretation and the implementation of the Act.¹⁷⁷ The Mental Health Act 2007 introduced amendments to the MCA in response to the concerns raised in the ECtHR judgment of *HL v. UK* concerning the deprivation of liberty of incapable persons.¹⁷⁸ In 2013 the House of Lords set up a Select Committee to conduct a post-legislative scrutiny of the MCA and to examine evidence on the Act. The Select Committee has published its report on

¹⁷⁵ Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: post-legislative scrutiny*, 13 March 2014, para 40, available at: <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/13902.htm> last accessed 28 March 2014

¹⁷⁶ *Ibid.*, chapter 1, para 12 and chapter 3, para 103.

¹⁷⁷ Department of Constitutional Affairs, *Mental Capacity Act 2005 Code of Practice* (London:TSO, 2005). Besides the MCA and the two Codes of Practice two statutory instruments bear relevance, one on the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations and one on the Court of Protection Rules.

¹⁷⁸ Peter Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (2nd edn, Oxford University Press, 2008) 43., Paul, LLB. Bowen, *Blackstone’s Guide to the Mental Health Act 2007* (Oxford University Press, 2007) 16.

the 13th of March in 2014 in which it expressed its concerns about the deficits of the implementation of the Act, however the report also addressed several conceptual issues as it will be outlined in the following.

From the perspective of Article 12 of the CRPD one of the main purposes of the MCA 2005 is to provide for alternative decision-making processes for the event of the incapability of a person to make a particular decision of minor or vital importance. However, certain decisions are excluded from the scope of the MCA 2005: decisions related to family relations, treatment matters under the MHA 1983 and voting rights specified in sections 27-29 of the MCA 2005.¹⁷⁹ In these personal matters nobody can give consent on behalf of the person who is perceived to lack capacity. However, when substituted decision-making is allowed, the scope of this mechanism is wide: the decision-maker can manage financial and property, decide in welfare questions or consent to medical treatment.

As to the question that who can make the decision on behalf of the person with mental disabilities, the MCA creates several mechanisms. The MCA established the Court of Protection with the jurisdiction to hear cases in connection to mental capacity, best interests and other related matters under the MCA. The Court of Protection has the power to appoint so-called deputies who are authorized to make decisions on behalf of a person lacking capacity relating to a certain property, health or welfare matters. The Act also aims to assist people to make plans for a time when they may be unable to make decisions. People have the opportunity to create a Lasting Powers of Attorney (hereafter: LPA) and an Advance decision on refusing treatment. These instruments of planning for the time of anticipated incapacity and making decisions on behalf of a person will be analysed from the point of view of the

¹⁷⁹ MCA 2005, ss 27-29. According to section 27 a decision consenting to marriage or civil partnership, to have sexual relationship, to a divorce based on two years' separation or to the dissolution of the civil partnership cannot be made. Section 28 is concerned with the decisions which are cannot be made under detention and treatment according to the MHA 1983: giving treatment for mental disorder or consenting to such a treatment. Bartlett, *Blackstone's Guide to the Mental Capacity Act 2005* (n 178).

CRPD in the subsequent chapters. However, the starting point for every decision concerning the capacity of a person is the requirement to be in line with the general principles underpinning the provisions of the MCA 2005. Whoever makes the decisions on behalf of the individual, the five principles set out in the MCA 2005 are applicable to every decision. These principles – if they are consistently observed – can materially contribute to the protection of the autonomy of the individual.

According to the first principle of the MCA 2005, there is a presumption in favour of a person's capacity: "a person must be assumed to have capacity unless it is established that he lacks capacity."¹⁸⁰ This presumption of legal capacity for all corresponds with the requirement of Article 12 of the CRPD. As the Joint Committee on the Draft Mental Incapacity Bill ('Joint Committee') has put it, the incorporation of this presumption reflected "the positive nature of the Bill's purpose and will."¹⁸¹ As to the practical operation of the presumption of capacity, Peter Bartlett notes that it is a strong presumption and it needs strong evidence to rebut it.¹⁸² However, as it will be discussed below, a declaration of incapacity can still be made using the statutory two step test of assessing capacity if the person is unable to make a particular decision. This measure clearly goes against the promotion of autonomy. In addition to this, the Select Committee concluded that the application of this assumption was not successful. Evidence showed that the principle was used to support non-intervention by service providers.¹⁸³ This attitude does not only prevent undue interference in decision-making, but it does also preclude the assessment whether any kind of support is needed in it.

The second principle is of utmost importance. It formulates a general obligation of providing assistance. A person can only be treated as someone who is incapable to make a

¹⁸⁰ MCA 2005, s 1(2).

¹⁸¹ Gordon R Ashton and Penny Letts, *Court of Protection Practice 2013* (Jordans, 2013) 97.

¹⁸² Bartlett, *Blackstone's Guide to the Mental Capacity Act 2005* (n 178) 33. 48.

¹⁸³ Select Committee on the Mental Capacity Act 2005, para 56.

decision if any assistance in the process of the decision-making has failed.¹⁸⁴ The significance and the practical application of this principle will be outlined later in connection to supported decision-making.

Thirdly, the Act expressly rejects the outcome approach: it emphasizes that the mere fact that the decision is deemed to be unwise does not question the decision-making ability.¹⁸⁵ This principle takes into account the real nature of decision-making and the risk we take with every decision. However, the Select Committee noted in its final report that they were told that “the paternalistic, medical model of care is still dominant”¹⁸⁶ in health care and that decisions are still often made “based on the staff’s perception.”¹⁸⁷

Furthermore, as the fourth principle, if the person’s lack of capacity is established, every act and decision made under the MCA 2005 on behalf of an incapable person has to be made in ‘the best interest’ of that person. A valid and applicable advance decision constitutes an exception: it has to be observed even if it does not seem to be in the best interest of the person.¹⁸⁸ These decisions were taken - with the purpose of planning for any future lack of capacity - by the person when there was no doubt about his or her mental capacity and whatever was the decision, it has to be respected. The best interest criteria will be further analysed later in this chapter in relation to the decision-making mechanisms.

According to the last principle, before the act is done or the decision is made, regard must be had to whether the purpose for which it is needed can also be effectively achieved in a way that is less restrictive of the person’s rights and freedom of action. Requiring the

¹⁸⁴ “A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.” MCA 2005, s 1(3).

¹⁸⁵ MCA 2005, s 1(4).

¹⁸⁶ Select Committee on the Mental Capacity Act 2005, para 89.

¹⁸⁷ Ibid.

¹⁸⁸ Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (n 178) 53.

consideration of the least restrictive alternative aims to preserve personal autonomy as far as possible, and this approach fits to the approach of the CRPD.

4.2. Mental capacity and legal capacity: the capacity assessment under the MCA

For the applicability of the MCA it has to be established that the person concerned lacks mental capacity. According to the MCA a person lacks capacity if he or she at a certain point of time is unable to make a particular decision due to “an impairment of, or a disturbance in the functioning of, the mind or brain.”¹⁸⁹ This definition comprises two criteria: in order to establish that a person lacks capacity for the purposes of the Act it has to be proved that there is an existing mental disability or disorder¹⁹⁰ and that this disturbance or impairment of the brain has the effect that the person concerned is unable to make a specific decision in question. In assessing the ability to make a decision several considerations has to be taken into account. It has to be examined whether the person is able to understand the relevant information about the decision,¹⁹¹ to retain the relevant information in mind, to weight the information during the decision-making and to communicate the decision by talking, using sign language or other means.¹⁹² What matters is the ability to understand the given information and the consequences of the possible choices. The definition of the lack of capacity and the statutory test of assessing capacity are proved to be contentious issues. In line with the functional approach, the MCA further states that it is irrelevant whether this impairment or disturbance is temporary or permanent. Thus, the MCA is following the

¹⁸⁹ MCA 2005, s 2(2).

¹⁹⁰ In section 4.12 the Code of Practice of the MCA 2005 gives an exemplificatory list of impairments or disturbances in the functioning of the mind: conditions of some form of mental illness, dementia, learning disabilities or long-term effects of brain damage.

¹⁹¹ According to section 4.16 of the Code of Practice relevant informations are the nature of the decision, the reasons for the decision-making and the possible consequences of the decision-making or of the failure to make a decision.

¹⁹² MCA 2005, s 3(1). The statutory definition is based on the functional approach: the person’s legal capacity is linked to his or her mental capacity. With the use of the functional test what assessed is the decision-making procedure itself: how well the information - on which the decision should be based - is understood, how is it evaluated and how is the final decision communicated.

mainstream international approach that incapacity in decision-making is time and decision-specific - since the outcome of the functional test can vary from time to time and from decision to decision.¹⁹³ Besides, lacking capacity to reach a decision relating to one specific matter does not affect the authority to decide in other matters in relation to which the capacity of the person has not been questioned.

However this highly cognitive and rational test does not apply to everybody on an equal basis. The definition requires the presence of some form of mental disability and this diagnostic threshold was introduced with the aim to avoid the “overuse of the statute.”¹⁹⁴ Peter Bartlett rightly points out that this approach moves back towards the medical model of disability what the CRPD desperately intended to leave behind.¹⁹⁵ Moreover, there are claims that establishing legal incapacity based on the existence of a mental impairment leads to discrimination on the ground of disability. However, I share Peter Bartlett’s view’s that with the continuous application of the functional test without considering

disability explicitly (as when, for example, he or she considers ‘ability to make a decision’ rather than psychosis, diagnosis, or limited intellectual ability) this will not address the problem if the criteria differently affect disabled people – it merely moves the problem from direct to indirect discrimination.¹⁹⁶

Furthermore as it has been noted above, there are certain situations – the most illustrative example is a person in coma – when the person concerned is clearly unable to make any recognizable decision due to a mental condition which cannot be disregarded.

Section 2 (3) aims to exclude that considerations based on prejudices and labels play part in the capacity assessment. Age, appearance or any assumption based on a certain – odd or

¹⁹³ Ashton and Letts (n 181) 105.

¹⁹⁴ Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (n 178) 49. Peter Barlett invokes the Law Commission’s report on Mental Incapacity and the Explanatory Notes to the Mental Capacity Act for explaining the underlying reasons behind the insertion of this threshold. Law Commission, *Mental Incapacity (LawCom 231)* (London: Queen’s Printer, 1995), para 3.8, Department of Health, *Explanatory Notes to the Mental Capacity Act* (London: Queen’s Printer, 2005), para 22.

¹⁹⁵ Peter Bartlett, ‘The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law’ (2012) 75 *The Modern Law Review* 752, 762.

¹⁹⁶ *Ibid* 763.

unusual – condition or behaviour cannot affect the declaration of the lack of capacity.¹⁹⁷ However, the evidence presented to the Select Committee revealed serious problems in connection to the capacity assessment undertaken by health and social care professionals: there is tendency of making assumptions about the lack of capacity based on impairment or failing to conduct assessments at all. Evidence and research suggested that the establishment of the lack of capacity was based on the existence of a mental illness, age or appearance and that blanket assumptions were based “upon diagnosis or an unwise decision.”¹⁹⁸ The generally poor quality of the assessments was also criticized, most importantly the fact that the capacity assessment was not decision-specific.¹⁹⁹ Moreover, the assessor had often no link to the assessed person and it hindered real communication and understanding, let alone support.

The responsibility to undertake the capacity assessment rests with the decision-maker who is intended to make the particular decision in question on behalf of the person. As a safeguard, the person who wishes to challenge the finding of the capacity assessment – reasonably after raising this or her concerns to the decision-maker – can ask the Court of Protection to rule on the question of incapacity.²⁰⁰

4.3. Supported vs. substituted decision-making

Whenever it is established that the person lacks the capacity to make a particular decision the next question is that how the decision-making will look like. The CRPD clearly requires the development of supported decision-making schemes. The crucial question here is whether the Act provides for sufficient support to facilitate the disabled persons’ autonomous decision-making or it only authorizes paternalistic forms of substitute decision-making. In the UK Initial Report on the Convention on the Rights of Persons with Disabilities submitted to

¹⁹⁷ MCA 2005, s 2 (3).

¹⁹⁸ Select Committee on the Mental Capacity Act 2005, paras 57.

¹⁹⁹ Ibid, para 66.

²⁰⁰ MCA 2005, s 15(1)(a).

the CRPD Committee the Government claimed that the legal framework established by the MCA 2005 pursues the aim to „empower and protect people, including disabled people, who lack the mental capacity to make their own decisions.”²⁰¹ The Government also states that adults „have a right to be supported to make as many decisions for themselves as possible and that any decisions made on their behalf are in their best interest.”²⁰² This very well reflects the MCA’s ambivalent approach towards support: people have the right to be supported, but only to a reasonable extent and beyond that other people are authorized to decide in the best interest of the person concerned. In the following these two divergent instruments will be discussed: instruments of support and of paternalistic best interest decisions.

The second principle of the MCA states that a “person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.”²⁰³ According to the Code of Practice the aim of this principle is to avoid automatic labelling as lacking capacity and to avoid unnecessary interventions in a person’s private life. The Code of Practice gives a useful guidance on how people can be enabled to take part in the decision-making to the biggest extent possible.²⁰⁴ As a general rule support has to be tailor-made to the personal circumstances and to the type of the decision in question.²⁰⁵ Section 3 (2) states 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).”²⁰⁶ The form of support has to meet the needs of the individual. Support should be provided by using the appropriate form of communication reflecting the need of the person and by providing all the relevant information for the decision-making in an accessible way. The

²⁰¹ UK, Initial reports submitted by States parties under article 35 of the Convention, United Kingdom of Great Britain and Northern Ireland, 24 November 2011, CRPD/C/GBR/1, para 105.

²⁰² Ibid.

²⁰³ MCA 2005, s 1(3).

²⁰⁴ Code of Practice, ch 3.

²⁰⁵ Code of Practice, para 2.7

²⁰⁶ MCA 2005, s 3(2).

prudent selection of the place and timing of the assistance, as well as the involvement of people having a relationship of trust with the person concerned can enhance the effectivity of the support.²⁰⁷

It can be argued that the guidelines of assistance are quite attentive to the particular needs of the individual. However progressive the MCA and the Code of Practice seem to be in this respect, this obligation of assistance is relative under the Act - in contrast to the CRPD's requirement of support as the sole form of participation in an individual's decision making. If all practical steps were taken to help to reach a decision, but this assistance proves to be unsuccessful, the person can be treated as lacking capacity and as in need for acting on behalf of him or her. Moreover, the indefinite meaning of the word practicable can be subject to judicial interpretation and it is not sure where does the obligation of help end and when is further assistance judged not to fall under the category of practicable. Besides the above mentioned a third problem has been articulated during the post-legislative scrutiny of the Act. Evidence suggested that support rarely takes place in practice.²⁰⁸ This might be due to the limited resources of supported decision-making and the lack of education and training.²⁰⁹

The establishment of the Independent Mental Capacity Advocate (hereafter: IMCA) service was also praised by the public as a form of advocacy and support protecting the rights of the people lacking capacity when specifically important decisions are made under the Act.²¹⁰ Section 35 of the Act requires that an IMCA has to be appointed when a serious decision - about a long-term placement in a hospital or care home or about a serious medical treatment - is about to be made in relation to a person who lacks capacity to make a decision

²⁰⁷ Code of Practice, 3.2.

²⁰⁸ Select Committee on the Mental Capacity Act 2005, para 79.

²⁰⁹ Ibid, para 82. The importance of the resources was emphasized by Mind as the following: "to assess, engage and empower a person who may lack capacity can be resource intensive. It may require help from speech therapists or occupational therapists or for more time to be devoted to that person by the care staff or clinical team supporting them." Ibid, para 81.

²¹⁰ Ibid, para 165

and has no one to represent him or her or to be consulted. The function of the IMCA is to help the person to “participate as fully as possible in any relevant decision”,²¹¹ to obtain information to find out the person’s wishes and feelings, to assist decision-makers to work out the person’s best interest and to challenge decisions which does not appear to be in the best interests of the person.²¹² The IMCA also has to consider any alternative options or to request a second medical opinion in case of medical treatment decisions.²¹³ The Select Committee suggested that given the important role they play in supporting people with mental disabilities the scope of the service should be extended and they should be involved earlier in the decision-making process. The House of Lords Committee also urged for the further professionalization and training of the service.²¹⁴

However, this is all the support the MCA intends to provide for persons lacking capacity. If support fails, a court, a deputy or anybody providing care or treatment for the person can make a decision on behalf of the person concerned. I would also mention the creation of a Lasting Power of Attorney here, since its aim is to advance autonomy, but it still remains close to forms of substitute decision-making. Regardless of the specificities of these measures, in effect, these legal mechanisms the MCA contains are still based on a substitute decision-making model. What is common about the forms of substitute decision-making is that it has to be made in the best interest of the person lacking capacity. Section 4 of the MCA 2005 sets out the grounds on what every decision taken on behalf of a person has to be based. The single criterion of the best interest of the person has to govern all decision-making processes. The legislator obliges the decision-maker to take into consideration every relevant piece of information and it sets out the relevant steps to be taken in determining a person’s

²¹¹ MCA 2005, s 36 (2) (a).

²¹² MCA 2005, s 36 (2) (3).

²¹³ Ibid.

²¹⁴ Select Committee on the Mental Capacity Act 2005, para 175 and 177.

best interest. This so-called ‘best interests checklist’²¹⁵ requires decision-makers to take into consideration three clusters of interest: to protect the person’s position and to consider the past and the present wishes, feelings and values of the person.²¹⁶ Considering the likeliness of regaining capacity allows the decision-maker to design his actions according to a plan for a certain time-frame, but it also facilitates the exercise of legal capacity from the moment of regaining capacity.²¹⁷ This is a very important factor, since this can guarantee that the decision-maker only interferes with the person’s autonomous decision-making as long as it is strictly necessary.

The decision-maker – as far as it is practicable – has to take into account the past and present wishes, feelings, values and beliefs of the person. This includes all the factors that would contribute to the decision-making process and all the factors that the person would probably consider.²¹⁸ According to Section 4 (7) of the MCA the decision-maker has to consult with others named by the person or engaged in caring for that person or any donee of an LPA created by the person or deputy appointed by the court in order to gain information about the subjective elements determining the best interest.²¹⁹ This undoubtedly contributes to the expression and realization of the will and preferences of the person concerned what is the main purpose of Article 12 of the Convention. Taking into account the disabled person’s present wishes allows for his or her considerable involvement in the decision-making. However, what the CRPD promotes is the full involvement, regardless of the degree of support needed. As a second major divergence, the person’s wishes and feelings are just one consideration among other relevant factors according to the MCA. The relevance of an incapacitated person’s own wishes in the best interest test was articulated in the case of *ITW v*

²¹⁵ Gordon R Ashton, Penny Letts and Laurence Oates, *Mental Capacity: Law and Practice* (2nd edn, Jordans, 2012) 123.

²¹⁶ Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (n 178) 53.

²¹⁷ *Ibid.*

²¹⁸ MCA 2005, s 4(6).

²¹⁹ MCA 2005, s 4(7).

Z [2009] EWHC 2525 (Fam).²²⁰ The person's wishes and feelings was said to be a significant factor and according to Mr. Justice Munby the weight to be attached to it are always case-specific and fact-specific.²²¹ However, as Peter Bartlett noted "the express inclusion of factors unrelated to the views and preferences of the individual is in marked contrast with the approach of the CRPD. The CRPD approach may allow other factors to be considered when the will or preferences of the person with disability cannot in practice be ascertained, but these will be in only rare cases, and much less frequently than envisaged by the MCA. If the ethos of Article 12 is to be implemented, it would seem that legislative amendment will be required in this respect."²²²

If not a legislative amendment, at least a coherent judicial practice - placing more emphasis on the subjective elements of the best interest test - should ensure the better compliance of the Act with Article 12 of the CRPD. In relation to the recent judgment in *Aintree University Hospital Foundation Trust v James* the Select Committee²²³ – relying on Kirsty Keywood's opinion – concluded that the right and preferences of the person should be "the starting point for any kind of determination of what is best for an individual"²²⁴ and that diminishing the relevance of the objective criteria would achieve a better compliance with Article 12 of the CRPD.²²⁵ Furthermore this "would ensure that genuinely substituted

²²⁰ *ITW v Z* [2009] EWHC 2525 (Fam).

²²¹ This weight will be influenced by the degree of the person's incapacity, "the strength and consistency of the views being expressed" by the person concerned and the possible impact on the person of the "knowledge that her wishes and feelings are not being given effect to", "the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in her best interests." *Ibid* [15].

²²² Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (n 197) 766.

²²³ *Aintree University Hospitals NHS Foundation Trust v David James* (2013) UKSC 67, (2013) MHLO 95

²²⁴ Select Committee on the Mental Capacity Act 2005, para 99.

²²⁵ *Ibid*.

decision-making was limited to a very small number of people who had no way to communicate their wishes.”²²⁶

4.4. Deciding on behalf of the person and its safeguards

Since the MCA does not rule out substitute decision-making, the legislation is still not in compliance with the CRPD itself or with the CRPD Committee’s interpretation of Article 12, according to which there is no room for substituted decision-making and states are compelled to design such a legal regime where persons in need of support are granted with assistance. In the following I will analyse the forms of substitute-decision making regulated by the Act from the point of view of the CRPD.

The instrument of the advance decision to refuse a specified treatment can be regarded as one of the most CRPD compatible measures allowed by the MCA. It allows making a decision to refuse a specified future treatment what might be necessary to be carried out or continued at a time when the person might lack capacity to consent to it.²²⁷ An advance decisions can only be made by a person at a time when he or she still has capacity and it cannot be altered or withdrawn after the person loses his or her mental capacity.²²⁸ An advance directive can apply to the beginning or to the continuation of the treatment and it can specify the treatment itself, as well as the circumstances.²²⁹ It prevails over any possible consent given by other decision-makers: a donee of an LPA – except the case when after making an advance decision the person grants authority to give or refuse consent in connection to the same treatment –, a deputy appointed by the court or anybody acting under

²²⁶ Ibid.

²²⁷ MCA 2005, s 24(1).

²²⁸ MCA 2005, ss 24 (1) and (3).

²²⁹ Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (n 178) 78. Since a valid and applicable advance decision is regarded as a refusal of consent to a treatment, it is relevant in connection to treatments where consent is necessary. Ibid 80. Bartlett mentions enforced treatment under the MHA as treatments where the advance decision cannot be operative.

section 5 of the MCA.²³⁰ Similarly, the Court of Protection can only make declarations in connection to the existence, validity and applicability of the advance decision, but it cannot change or overrule it.²³¹ These are safeguards to ensure that the will of the person concerned prevails. However, it has to be noted, that according to section 25 (2) (c) of the MCA, an advance decision is invalid if the person clearly acts in an inconsistent manner with the advance decision. Furthermore an advance refusal is inapplicable in case of significant and relevant – although not anticipated – changes of the circumstances which would affect the decision.²³² These provisions can potentially erode the prevalence of the expressed wishes of the person – even if their rationale is not to tie the person to a prior decision by all means – and their consideration in the specific cases makes the advance decision’s validity and applicability dubious. Moreover, looking at this mechanism from the point of view of the CRPD, it can be problematic that only one kind of decision can be made, namely the refusal of a treatment. Its scope does not cover other health care matters, not to mention decisions taken in other areas of life.

As one of the most progressive provisions of the Act, section 9 allows people to plan for the future lack of capacity by choosing a person to be part of the decision-making process and by specifying the extent of this involvement. The person who wishes to plan for a time when he might not be able to make a decision has the option of making a Lasting Power of Attorney or of assigning somebody to be consulted when defining the best interest of the person concerned.²³³ An LPA can be created for managing property and affairs or personal welfare issues and for making all or particular decisions related to these matters.²³⁴ This

²³⁰ Ibid 80.

²³¹ MCA 2005, s 26(4).

²³² MCA 2005, s 25 (4) (c).

²³³ The usage and application of one of the mechanisms does not preclude the parallel application of the other. However, inevitably, the content of these documents can be in conflict and it makes harder for the decision-maker or the judge to determine the actual will and best interest of the person. Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (n 178) 12.

²³⁴ MCA 2005, s 9 (1).

instrument is rigid in a way that it has to be made on a specific form and it need to be registered with the Office of the Public Guardian, but flexible in a way that it allows the person to assign different people to make different decisions reflecting his or her own needs.²³⁵ The person has the power to appoint several individuals to act jointly or severally. The donee's decision-making authority is restricted by the requirement of considering the best interest of the person and by any type of restrictions specified in the LPA.²³⁶ However, this provision raises the question of a possible conflict between the person's wishes and his or her assumed best interest. The Ac clearly allows a person to make a decision in choosing a donee, but it does not really allow for the person to make substantive decisions.²³⁷ In effect the decision-maker authorized by the LPA is a substitute decision-maker, although the person creating the LPA has the opportunity to name a person who he or she trusts. As to the safeguards of this measure, the Court of Protection can revoke or refuse registration if it was made under undue influence or by fraud or the donee does not behave in the best interest of the person.²³⁸

According to the Law Commissions report the Court of Protection was intended take the role of a decision-maker only as a last resort.²³⁹ The court has various powers set out in the MCA which are mostly supervisory in nature. It has a general supervisory role in deciding whether the person concerned has a capacity concerning a specific decision and in whether the acts done in relation to the person were lawful or were made in the person's best interest.²⁴⁰ As noted above, it has the power to rule on the validity and applicability of an advance decision. According to section 22 and 23 of the MCA the Court has jurisdiction in relation to the creation and the validity of an LPA and it can also "determine any question as

²³⁵ Bartlett, *Blackstone's Guide to the Mental Capacity Act 2005* (n 178) 15.

²³⁶ MCA 2005, s 9 (4).

²³⁷ Bartlett, *Blackstone's Guide to the Mental Capacity Act 2005* (n 178) 69.

²³⁸ MCA 2005, s 22 (3).

²³⁹ Bartlett, *Blackstone's Guide to the Mental Capacity Act 2005* (n 178) 74.

²⁴⁰ MCA 2005, s 15.

to the meaning and effect”²⁴¹ of an LPA. Under section 16 of the MCA the court also has decision-making power in relation to personal welfare or property and affairs matters.²⁴² When the court decides it has to take into consideration the basic principles and the best interest of the person. The Codes of Practice sets out a list of very serious healthcare and treatment decisions in which the court shall decide on the lawfulness of the proposed act.²⁴³ The court can also appoint deputies to make a specific decision on behalf of the person when the person lacks capacity, however a decision by the court is preferable to the appointment of a deputy.²⁴⁴ They can be appointed for property and affairs or for health and welfare matters.

There are two important restrictions in relation to the powers of the deputies. First, the deputy’s power should be as limited in scope and in duration as possible and secondly, a deputy cannot make a decision if he is aware of the fact – or if he reasonably believes – that the person concerned has the capacity in relation to that matter. This aims to restrict the deputy’s decision making power to the lowest level and to limit the autonomy of the person only to the necessary extent. However, this still falls short of the requirement of the maximum preservation of the autonomy of the person inherent in Article 12 of the CRPD. As to the safeguards against the abusive exercise of the power granted to the deputies, the deputies have to submit periodic reports to the Public Guardian who can investigate complaints submitted against the actions of the deputy.²⁴⁵

The least formal mechanism regulated by the MCA 2005 is the act which provides care or treatment to a person with disability. If the act is carried out in connection with care and treatment which is in the best interest of the person and the decision-maker was not

²⁴¹ MCA 2005, s 23 (1).

²⁴² MCA 2005, s 16 (1) and (2). According Section 17 and 18 of the MCA these include decisions on where to live, with whom to contact, giving or refusing consent to treatment, manage property, discharging debts, carrying out contracts etc.

²⁴³ Section 8.18 of the Code of Practice. These include for example decisions about the withholding or withdrawal of artificial nutrition or hydration in a vegetative state.

²⁴⁴ MCA 2005, s 16 (2) (b) and s 16 (4) (a).

²⁴⁵ Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (n 178) 76.

negligent, the MCA 2005 provides protection from liability for these acts.²⁴⁶ Consequently, the Act does not confer decision-making authority as such on a specific person, it just acknowledges acts performed in connection with necessary treatment and every-day care. The scope of actions enjoying this protection is wide. The Code of Practice gives an exemplifying list of the personal care, healthcare and treatment matters covered by the Act.²⁴⁷ In these cases necessary caring and treatment acts provided by family members and carers can take place without any formal authorization. However, the MCA does not specify the relationship between the person concerned and the ones providing the care or treatment, although the wide scope of actions covered by the general defence presupposes a wide group of people getting involved in these kinds of decisions. In relation to these decisions the requirement of trust and personal relationship should further the compliance with the purposes of the CRPD. The requirement to assess the lack of capacity – to take reasonable steps to establish the lack of capacity with a reasonable belief – and the requirement to act in the best interest of the person is equally applicable in connection with these acts and decisions of care and treatment.²⁴⁸ As to its relation to other forms of decision-making, the general defence does not authorize the carer to act contrary to an advance decision, to a decision of a donee of an LPA or of a deputy appointed by the court.²⁴⁹

It is quite telling that the Government in the UK Initial Report named the Court of Protection and the Office of the Public Guardian as safeguards and stressed the latter's supervisory role in relation to the deputies and its investigatory role in relation to the allegations of their misconduct.²⁵⁰ However, according to Article 12(4) of the CRPD, measures relating to the exercise of legal capacity should “apply for the shortest time

²⁴⁶ MCA 2005, s 5 (1)-(2).

²⁴⁷ These actions range from helping with dressing, washing, eating, communication, mobility or shopping to carrying out medical examinations, giving medication or providing nursing care or emergency care. Code of Practice, para 6.5.

²⁴⁸ MCA 2005, s 5 (1).

²⁴⁹ Bartlett, *Blackstone's Guide to the Mental Capacity Act 2005* (n 178) 64.

²⁵⁰ UK Initial Report on the Convention on the Rights of Persons with Disabilities, para 106 and 109.

possible” and they should “be subject to regular review by a competent, independent and impartial authority or judicial body.” As the MDAC has pointed it out in its submission to the Select Committee, the MCA did not set up an independent body performing this review function. As it has been discussed above, the Court of Protection was established to decide in capacity and best interest issues only as a last resort.²⁵¹

Conclusion

The MCA 2005 spells out several principles that suit the requirements of the CRPD, namely the presumption of capacity, the rejection of the outcome approach, the rejection of relying on prejudiced assumptions during the capacity assessment or the requirement to provide support with special regard to different means of communication. However, the problems raised in connection to the capacity assessment and the best interest approach indicates that a more CRPD-compliant interpretation and application of the Act might be required. It has been pointed out that judges should give more weight to the person’s views and personal preferences compared to the objective best interest of the person.²⁵² Furthermore, there should be more reliance on supported decision-making – instead on best interest decisions.²⁵³

²⁵¹ MDAC, Submissions to the House of Lords Select Committee on the Mental Capacity Act 2005 on behalf of the Mental Disability Advocacy Center.

<http://www.mdac.info/en/news/mdac-asks-uk-house-lords-amend-legal-capacity-law>

²⁵² Ibid.

²⁵³ Select Committee on the Mental Capacity Act 2005, para 83.

Conclusion

The main aim of this paper was to analyse how domestic legal systems handle the concept of legal capacity and what are the measures they offer to person's believed to lack the mental capacity to decide on their own. The purpose was to show that to what extent states did engage in the implementation of the requirements set out by Article 12 of the CRPD. The thesis also analysed the level of engagement of the Council of Europe and the ECtHR with the international trend set by the CRPD in recognizing universal legal capacity or at least in eroding substituted decision-making systems.

In relation to the reform dynamics in Europe, it has to be noted that although the CRPD has been cited before the Court several times, the Court – when looking for consensus – still focuses on the common patterns of the domestic legal systems and not on international documents. Up until now, the standards are still divergent, as it has been shown in the second chapter. However, since the Convention is a living instrument, theoretically there is a chance that – through the adaption to the needs of the persons with disabilities – the case law further evolves and substantially deals with the problems rising in connection with legal capacity. There are signs of change on the level of principles as well. As Oddný Mjöll Arnardóttir and Gerard Quinn pointed it out, the Committee of Ministers was considering “whether to draft a new European convention on legal capacity issues in part because of Article 12 of the CRPD.”²⁵⁴

In relation to Hungary and England and Wales, it has been shown that none of the countries fully comply with the postulates of Article 12 of the CRPD. The research suggests that these two domestic legal systems are not really empowering. Instead of enabling persons with disabilities to make their own decisions, they provide a legal framework for the operation

²⁵⁴ Introduction, Oddný Mjöll Arnardóttir and Gerard Quinn, *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, vol v. 100 (Martinus Nijhoff Publishers, 2009), XVI.

of incapacitation procedures and substituted decision-making mechanisms. The main concern of these models is to design a system with safeguards where people are not ‘wrongfully’ stripped from their legal capacity.²⁵⁵ However, according to the CRPD, legal capacity should be universal and there should be no legal barriers hindering disabled person’s inclusion in the society. As the CRPD Committee pointed out “there has been a general failure 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.”²⁵⁶ States are clearly expected to abandon paternalistic models and to stop justifying protective measures constituting an interference with the person’s autonomy.

It is undoubtedly difficult to strike a fair balance between empowerment and protection. The paradigm shift that the CRPD advances is undeniably a radical one, it requires the radical change of the mindset and consequently of the legal regulations. Such a change requires determination and creativity. Determination, because relying on the old, well-established systems is convenient and creativity, because the CRPD gives little guidance on how to put into practice its standards. But states have to take serious efforts to try and design solutions in compliance with the CRPD in order to fulfil their primary obligation to create a society “where we can all grow and develop with mutual support.”²⁵⁷

²⁵⁵ Dhanda (n 7) 460.

²⁵⁶ CRPD Committee, Draft General comment, (n 26), 2.

²⁵⁷ International Disability Caucus, Nothing about Us without Us (n 1).

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