

SUFFICIENCY OF LAW, DEFICIENCY OF RIGHTS

The Legal Capacity to Act as a Universal Standard of Being Human
The International Perspectives and the Bulgarian Legal Reform



International legal workshop
Sofia, 29 - 30 April 2015

COLLECTION OF MATERIALS

SUFFICIENCY OF LAW, DEFICIENCY OF RIGHTS

The Legal Capacity to Act
as a Universal Standard of Being Human

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The story on the last page is a compilation of actual facts and events from the life of people, reached by the pilot projects of the "Next Step" Program.

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A Few Words Instead of an Introduction to the Legal Workshop

It is difficult for us to make an introduction to the present legal workshop because it is difficult to tell how big our expectations are for the results that it is expected to deliver. In 2013¹ we had organized the first international legal workshop in Bulgaria that was dedicated to the standards of article 12 from the UN Convention of the Rights of Persons with Disabilities, the legal capacity to act concept, the court practices, the problems, the related decisions of the Court at Strasburg and so on. The workshop in 2013 played an important role in some events that had occurred afterwards and make the change happening: a court judgement issued by the Sofia City Court that was based on article 12 and that refused to put a person under guardianship because the standards of the Convention will not be fulfilled, two legal articles², a claim, submitted by the National Ombudsman before the Constitutional Court for annulment of the texts in the Law on Persons and Family, new cases where putting someone under guardianship was refused, court expertise that were based on article 12, a movie of the National Television about guardianship and many, many other important events, and still – the most important one – the preparation of entirely new draft law for physical persons and support measures that aims to change an almost 70 year old guardianship framework in Bulgaria. All of these gave us the hope to think that the Bulgarian legal community could be a leader of opinion and provide solutions that will contribute not only to the national development, but will be quoted as an example of *good practices* in foreign literature.



It is difficult for us to make this introduction also because of the Next Step Program³ and because it is almost impossible in a couple of sentences to describe the personal stories, the changes that happened for every single participant in the Program, the hundreds of pages of researches, the hours of discussing and wondering whether it could go worse and what in fact will be the better answer. With time, the task of our team of lawyers grew up: at first it was mainly to provide legal consultations on specific personal cases, but later on it turned out to be - to invent new legal institutes and to find a way not to simply apply the existing ones but at least to do this in the sole interest of the person and after taking into consideration his/her own will and preferences. Of course with the time passing by this task had become highly difficult and loading with expectations on behalf of the people that we will come up with a better solution. And this is why the published draft law is a hope for a change, not only for the people who had participated in the Program, but also for those who have similar problems.

It is difficult to for us to make this introduction also because it is difficult to present the Bulgarian context, especially to foreigners – starting with questions like “What is the difference between a dwarf and a child?”⁴, going further with the complicated political changes in the recent years that of course reflected the decisiveness for reforms in different spheres, the case of the bank crash that influenced seriously the

¹ 16-17 October 2013, Sofia, Bulgaria, <http://goo.gl/cI9klO>
² “The new formula of the legal capacity to act”, Legal Thought magazine, 1, 2014, p. 77; authors: Nadya Shabani, Pavleta Alexieva, Marieta Dimitrova, Aneta Genova, Velina Todorova; “Issues of the Legal Capacity to Act”, Jubilee collection dedicated to the 80th anniversary of prof. Vasil Mrachkov, author: prof. Tsanka Tsankova.
³ The Next Step Program is a partner initiative of the Bulgarian Center for Not-for-Profit Law, the Bulgarian Association of People with Intellectual Disabilities, the Global Initiative in Psychiatry – Sofia and the National Organization of Mental Health Service Users. The purpose of the program is to pilot new support measures to help people with intellectual disabilities and psychosocial problems to exercise their basic human rights according to their own will and preferences without being put under guardianship.
⁴ This question was mentioned on one of the seminars for judges that we had organized and it is still used by some judges to determine whether to start a procedure for guardianship or not.

civil turnover and the budget of the whole country that was most probably caused by people with full legal capacity to act, and finally – emphasizing on the strong leadership of some people, involved in the process of decision-making and who made explicit steps towards the change.

This is why, we will simply say WELCOME!

We hope that this legal workshop is going to make a change in your professional practice, to provoke you to see the issues of the human rights of people with disabilities beyond the well-established stereotypes of guardianship thinking and the existing attitudes.

We are convinced that you will hear interesting thesis and approaches, as the best among them are included in the present booklet.

And we believe that when you leave on 30 April “the supported decision making” will be equally significant term for you just as the well-known “legal capacity to act”.

The team of the Bulgarian Center for Not-for-Profit Law

We use the opportunity to thank to our partners – Ministry of Justice and the Institute for Legal Studies, for their leadership on the topic, as well as to Michael Bach from the Institute for Research and Development on Inclusion and Society, Canada and the team of the Human Rights Initiative of the Open Society Foundations, who didn't get tired to believe in the potential of the Bulgarian contribution to the process of applying the standards of the Convention.

THE CALLING OF THE INSTITUTION of the Ombudsman is to be a mediator, balancer, intermediary in disputes of people with the administration when their rights are violated or threatened. I emphasize this in order to clarify that the Ombudsman does not normally react emotionally and all actions taken by him, are very well thought out and considered in terms of human rights and legal stability. In 2014, however, due to the exhaustion of all possible instruments which can make the state fulfil its obligations under the Convention on the Rights of Persons with Disabilities, I made my most emotional, even extravagant request to the Constitutional Court, requesting the cancellation of the texts in the Persons and Family Act related to guardianship. I undertook this extreme act knowing that the request will most likely be rejected. My goal was, however, to shock the executive and the legislative powers and to force them urgently and adequately to harmonise the regulation of the legal capacity to act of people with intellectual disabilities in such a way as to stop the daily violation of the rights of those Bulgarian citizens.



As expected the Constitutional Court rejected my request, arguing that pronouncing these texts unconstitutional would result in significant gap in the legislation. My goal, however, was achieved with the reasoning of that decision - the court stressed the need for serious legislative changes in the application of art. 12 of the Convention on the Rights of Persons with Disabilities and the executive authorities began to discuss new rules for the legal capacity to act.

Now there is already light in the tunnel - the Ministry of Justice made a very belated but important step by drafting and publishing for public comment a draft bill of the Individuals and Support Measures Act. The statutory act will introduce a new approach in the exercise of rights of people with intellectual disabilities and mental health problems, by replacing the regimes of placing under guardianship with a system of measures for support and protection adequate to the modern day which will ensure the exercise of fundamental human rights of people with disabilities, according to their preferences and wishes.

Very serious work has been done by the experts participating in the work group for drafting the bill, but without being sceptical, I must stress that the biggest challenge is yet to come. And it is not related only to the passing of the bill by the National Assembly, where there will be probably many debates, the doctrine will resist stubbornly, but most likely reason will prevail.

The challenge is the prejudice of Bulgarians towards people with mental disabilities and now it is the commitment of the institutions, NGOs, experts and the media to work through debate and persuasion to change the mentality and attitudes of many people in the country. The international legal seminar on “the legal ability to act as the universal standard for human sufficiency. International perspectives and the Bulgarian legal reform” has the ability to initiate, to outline the boundaries of the route through which the Bulgarian society has to go to transform its attitudes towards people with intellectual disabilities from guardianship to support!

Konstantin Penchev
Ombudsman of Republic of Bulgaria

A handwritten signature in blue ink, belonging to Konstantin Penchev. The signature is stylized and fluid, written over the printed name and title.

THE GUARDIANSHIP in the Bulgarian law means restriction, prohibition of legal capacity to act of an adult person that is insane or with imbecility and who is incapable of taking care of his/her own affairs and interests. This legal framework, established with the Persons and Family Act, adopted 1949 that has not been changed up to now, is extremely outdated and not consistent with the international standards of human rights. It contradicts to the international legal instruments that have been ratified by the Republic of Bulgaria and that within the meaning of article 5, paragraph 4 from the Constitution – are part of the national legislation.



On 23.02.1999 the Committee of Ministers of the Council of Europe (of which Bulgaria has been a member since 07.05.1992) adopts a Recommendation № R (99) 4 on principles concerning the legal protection of incapable adults, that recommends to the governments of the member-states to provide in their legislations and practices all necessary measures that will guarantee the principles of the recommendation, among which is also the “maximum preservation of capacity” (principle 3), meaning that the legislation whenever possible should acknowledge that there are different levels of incapability and that the incapability changes over time. Respectively, the protective measures should not directly lead to automatic and full incapacitation. The restriction of the legal status however shall be possible in cases where the person needs protection. In fact a protective measure shall not automatically deprive the person of the right to vote or to make a will or to express his/her agreement or disagreement for each intervention to his/her health or to take any other decisions of personal matter at any time when his/her abilities allow him/her to exercise these rights. Whenever possible the adult persons shall be able to conclude valid legal deals of everyday life. When a representation is needed in a certain area the person shall have the opportunity to perform actions in that area with the consent of his/her representative.

On 27.09.2007 Bulgaria had signed the UN Convention from 2006 for the Rights of Persons with Disabilities (UNCRPD) and the National Assembly on 26.01.2012 adopted a law (prom. SG issue 37/2012) for its ratification that put in force the Convention for Republic of Bulgaria from 21.04.2012r. In 2009 the European Union as an organization ratifies the UNCRPD (decision of the Council 2010/48/EC from 26.11.2009) and from 22.01.2011 the Convention is in force for the EU. In fact this is the first Convention that the EU joins as an union which besides all emphasizes the extreme importance of the principles provided in this international document that have been adopted by the whole European community. The Convention acknowledges that the equality, dignity, autonomy, independence, access and inclusion in the community are the basis towards ensuring the uniform and universal standards for the people with disabilities.

The Convention not just promotes the human rights of people with disabilities, but also radically changes the classical legal theories and legislations that regulate the legal status and the legal capacity to act of physical persons. Article 12 from the Convention acknowledges the legal status and legal capacity to act of people with disabilities (psychosocial, intellectual and physical impairments) on an equal basis with others in all spheres of life meaning that people with disabilities are equal subjects before the law. They not just have rights, but also shall be able to exercise them through personal actions. The intervention of the state in restricting these rights shall be highly limited and shall include only the provision of support measures and safeguards that ensure the choice of the person according to his/her own will and preferences. The Convention acknowledges that people with disabilities have the right to possess and inherit property, the right to manage their own financial matters and the right to equal access to bank loans, mortgages and other forms of financial credits, as well as protection in cases

where their property have been arbitrarily taken away. Because it acknowledges basic human rights, the article 12 from the Convention becomes directly applicable from the date of its ratification. This understanding is explicitly pointed out in paragraph 26 of the General Comment on article 12, issued by the UN Committee on the Rights of Persons with Disabilities in April 2014. Further on in article 13 the access to justice of people with disabilities is guaranteed, article 23 – the right to marry and create a family, the right to be parents, article 29 – the right to vote and to be elected, and so on.

This short and inexhaustive review of the rights that have been guaranteed, undoubtedly points out that the institute of guardianship under the Bulgarian law is in contradiction to the principles of the UN Convention, because the people in Bulgaria who are put under guardianship – partial or full, and who had been deprived partially or entirely from their legal capacity to act, do not have the right to vote, the right to create family and to marry, to be parents and to exercise parental rights, do not have the right to inherit, the right to choose where to live, the right to association. The deprivation of these rights is limitless and there is no national mechanism for periodic review of the state of those under guardianship. Almost three years the Bulgarian society faces unprecedented situation of contradictory national legislation with regard to the legal capacity to act of the Bulgarian citizens. On the one hand the UNCRPD and the principles of the European Convention on the human rights and basic freedoms as legal norms of higher rang have supremacy that is provided by the Constitution of the Republic of Bulgaria. On the other hand, the Persons and Family Act continues to be in force and is the reason to have a lot of civil cases of adult people to be put under guardianship. My deep belief is that article 5 from the Persons and Family Act is in contradiction to the UN Convention and shall not be applied. Unfortunately however there are no national legal mechanisms to be adopted by the Bulgarian legislator that consist of support measures and safeguards which the state and in particular the court shall provide to people with disabilities in Bulgaria. This white spot in the legislation was admitted also by the Constitutional court that rejected the claim of the Ombudsman for proclamation of the text of article 5 from the Persons and Family Act as unconstitutional.

Before being appointed as a deputy minister of justice, I as a judge had also reviewed guardianship cases of adult people. I was in the position to directly apply the principles of the UNCRPD and the European Convention on the Human Rights, for which there are no particular national measures for application. I was extremely worried of the fact that I as a judge cannot provide full protection of people with psychosocial and intellectual disabilities. However according to article 27 from the Vienna Convention on the Law of Treaties, ratified by Republic of Bulgaria and in force since 21.05.1987, SG issue 87/10.11.1987, the lack of internal legal framework could not be used as an excuse by the state for failing to fulfill its obligations under the international conventions. For breaching the duty to provide mechanisms for exercise of basic human rights by incapacitated people, Bulgaria has been found guilty by the European court on human rights twice – the case Stanev vs Bulgaria (2012) and the case Stankov vs Bulgaria (2015).

For me it was a great honor to participate in an unique process of creating a new modern framework of the status for people with disabilities that is in line with article 12 from the UNCRPD. The cross-institutional expert group within the Ministry of Justice prepared a draft law on physical persons and support measures. Its public discussion is the next step, as well as the popularization of its principles and support measures. I am aware of the fact that it will be difficult to overcome the paradigm, but it is time for the Bulgarian society to pay the attention to the vulnerable groups and to become engaged with the specific and individual care and protection of each fellow citizen who is suffering from psychosocial or intellectual impairments. People with intellectual disabilities and mental disorders are part of our society and they should have guarantees that they can exercise their basic human rights, autonomously or with support, on an equal basis with others.

Verginia Micheva-Ruseva
Deputy minister of justice

ORGANIZERS

The Ministry of Justice of Republic of Bulgaria

Almost three years ago, immediately after the ratification on 26 January 2012 of the UN Convention on the Rights of Persons with Disabilities by the National Assembly of the Republic of Bulgaria, the Ministry of Justice set up a inter-departmental work group with the task of drafting proposals for changes in the regulations which have to comply with the standards of art. 12 of the Convention. Members of the work group included representatives of those ministries and agencies of the state administration involved in the problem, the deputy-Ombudsman of the Republic of Bulgaria, the judiciary, the doctrine and non-governmental organizations working in this field. The purpose of the work group was to harmonise Bulgarian legislation with the criteria and standards of the UN Convention and with the requirement of recognizing and ensuring – not only equal opportunities for personal participation of people with disabilities in all spheres of life but the provision of the necessary support by planning legislative changes in the short and long term.

Initially a Concept for changes in national legislation related to the standards of art. 12 of the UN Convention on the Rights of Persons with Disabilities was drafted which was approved with a minutes of Decision № 43 of the Council of Ministers on 14 November 2012. It presents a new approach to ensuring the equal enjoyment of basic human rights of people with disabilities. The Concept, approved by the government, did not foresee the establishment of new human rights but specified the measures to be taken by our country to effectively guarantee the human rights which have already been recognized internationally.

Bulgaria was obliged to take urgent action in relation to the judgement in the case “Stanev vs. Bulgaria” delivered on 17 January 2012 by the European Court of Human Rights, which clearly highlighted the inconsistency of Bulgarian legislation with the European Convention for Human Rights and Fundamental Freedoms concerning the institution of guardianship and the ensuing restrictions on the legal capacity to act of persons and the need for the adoption of common measures by Bulgaria to end such violations in the future. The decision of the ECHR clearly stresses that placement in an institution of people with mental disabilities is illegal as is done without the person's consent in violation of the basic human rights such as the right to personal freedom and security, access to court and in the absence of effective legal remedies. The judgement also contains a lot of criticism of the Bulgarian legislation with regard to the fact that it does not provide for periodic review of the status of people under guardianship, regardless of the type of guardianship, but in practice it is imposed as a lifetime measure.

The approved concept has proposed for the first time the new idea to Bulgarian legislation regarding the legal capacity to act of natural persons – the so-called “supported decision-making”. It clearly emphasizes, in accordance with the Convention, that any person, regardless of the type of disability, has the opportunity to form a will, to make choices and decide to do or refrain from doing specific legal actions in order to exercise their rights and fulfil their commitments. It is necessary this possibility or potential to be evaluate on a case by case basis and not on the basis of common criteria, as it is laid down in Bulgarian legislation now.

The Constitutional Court with Decision № 12 of 17 July 2014 on the motion of the Ombudsman for declaring as unconstitutionality the provisions of the Persons and the Family Act, stresses that urgent measures are necessary to change the legislation on the independent exercise of rights of people with disabilities, because “the current legal framework does not take into account the requirements of the Convention on the Rights of Persons with Disabilities” and “the protection of the rights of these people

is a matter within the competence of the National Assembly, as a legislative body which should pass the appropriate legislation on the regime of legal incapacity to act”.

On November 6 2014, the draft bill on the Individuals and Support Measures Act, together with detailed reasons was published for preliminary discussion on the Ministry of Justice's website. The bill provides the precondition for possessing legal capacity to act to be age only - the age of 18 years, introducing the institute of support in carrying out legal actions by an adult with disabilities, support in his/her decision-making, but not for him/her and safeguards in a situation of risk. The published project is being improved and to date has been consulted with the members of the working group; sending for coordination with the ministers pursuant to art. 32, para. 1 of the Rules of the Council of Ministers and its administration is pending.

Bulgarian Center for Not-for-Profit Law Foundation (BCNL)

BCNL is a public-benefit foundation founded in July 2001. Our mission is to provide support for drafting and implementation of legislation and policies aiming to advance civil society, civil participation and good governance in Bulgaria. BCNL is an affiliate of the International Center for Not-for-Profit Law (ICNL), based in Washington DC, the USA and is a founder and partner of the European Center for Not-for-Profit Law (ECNL) seated in Budapest, Hungary.

During the last 10 years we have been involved in the adoption of the NGO law in Bulgaria and its amendments, tax incentives for public benefit organizations and their donors, and have been pushing for the reforming the Social Assistance Act and its Implementing Regulations that have created a mechanism for contracting out public social services to NGOs. Two of our most important initiatives recently are the preparation of a Government Strategy for Support to Civil Society Organizations and the draft Law on Volunteerism.

BCNL was among the main leaders in Bulgaria for the ratification of UNCPRD and participated in the preparation of the Concept for amending the national legislation concerning the legal capacity in compliance with article 12 and UNCPRD standards (adopted by Council of Ministers in November 2012). BCNL was one of the members of the working group within the Ministry of Justice that prepared the draft Law on Physical Persons and Support Measures.

Institute for Legal studies, Bulgarian Academy of Sciences

The Institute for legal studies, established in 1947 as a public entity, part of the Bulgarian Academy of Sciences, which is an independent research institution, funded by the state budget. The institute is the only unit of the Academy, dealing with fundamental and applied research in the field of law. It also provides legal expertise and consultancy to the Parliament, Government and the Supreme Court of Cassation.

The Institute is a place for training of more than 30 doctoral students, the scholars from the Institute teach in many Law faculties in the country. The Institute comprises for departments (International Law, Civil Law, Criminal Law and Public Law) and issues one of the top legal magazines: Pravna Missal (Legal Thought).

OFFICIAL GUESTS

Mr. Hristo Ivanov, Minister of justice of Republic of Bulgaria

Христо Иванов е магистър по право от Софийския университет „Свети Климент Охридски„. Hristo Ivanov has an LLM degree from the Sofia University “St. Kliment Ohridski”. He had a specialization from the Fulbright/Hubert Humphrey Fellowship Program, Washington College of Law, in Washington, the USA in the area of law on national security and the procedures for court appointments in the USA. From 1996 to 2002 he works as a project coordinator in the area of the legislative and judicial reforms led by the American Bar Association - Rule of Law Initiative. From 2002 to 2006 he is an independent consultant on projects of international institutions, programs for international technical support and private customers, related to assessment of the legislation and promotion of the rule of law.

From 2006 till 2014 Mr. Ivanov is a Program director at the Bulgarian Institute for Legal Initiatives where he manages projects in the area of judicial reform, prevention of corruption and promotion of the rule of law.

From 6 August till 7 November 2014 Mr. Ivanov is a deputy prime minister and minister of justice in the ex officio cabinet of Prof. Georgi Bliznashki. On 7 November 2014 he was appointed as a minister of justice in the cabinet of Boyko Borisov.

Mr. Konstantin Penchev, Ombudsman of Republic of Bulgaria

Mr. Konstantin Penchev has an LLM degree from the Sofia University “St. Kliment Ohridski” in 1976. He had a specialization in the area of protection of the competition from France in 1991. He started his judicial career as a fellowship judge in 1977 at the Sofia City Court, after which he had served as a junior judge and was appointed for a Chairperson of the District Court at Svoje. From 1984 till 1986 Mr. Penchev works as an expert at the “Contracts and Law” Department within the Ministry of Foreign Affairs. In 1986 he renews his judicial career as a judge at the Sofia Regional Court and a deputy chairperson of the same. From 1994 till 2004 Mr. Penchev worked as an attorney – at – law at the Sofia Bar Association.

In 2001 Konstantin Penchev was elected a Member of Parliament in the 39th National Assembly. He had participated in the work of the Parliament Commission on economy and the Commission of legal matters. He was also a chairperson of the Temporary commission for elaboration of the Regulation for the structure and activity of the administration of the National Assembly as well as a member of the Temporary commission for preparation of proposals for amendments in the Constitution. Mr. Penchev was also a member of the permanent delegation of the National Assembly at the Parliament Assemblée of Council of Europe. He was also a chairperson of the Group of Friendship with Lebanon.

From 2004 till 2010 Mr. Penchev was elected for a chairperson of the Administrative Supreme Court and from 2010 he was appointed as a national ombudsman of Republic of Bulgaria.

RAPPORTEURS

Dr. Michael Bach, Institute for Research and Development on Inclusion and Society, Canada

Michael Bach is the Executive Vice-President of the Canadian Association for Community Living (CACL), a national advocacy organization to advance the human rights and inclusion of people with intellectual disabilities and their families. CACL is a federation of over 400 local associations for community living, and 13 provincial/territorial associations.

For a number of years, Dr. Michael Bach was Director of Research and Vice President at The Roeher Institute, a national institute for research on disability, public policy and human rights. Michael has undertaken research and development on disability and human rights both nationally and internationally (Central and South America, the Caribbean, European Community, India) on a wide range of public policy issues - funding for disability-related supports, labor force inclusion, literacy and education, children's and family issues, shifting to an individualized funding model for supports, guidelines for inclusive programs and services. He has completed numerous professional reports and research studies and published articles, chapters, and books in the area of disability and public policy. He has spoken at conferences nationally and internationally on wide-ranging issues in the field.

Michael Bach holds a Ph.D. in Sociology and Equity Studies from the Ontario Institute for Studies in Education, of the University of Toronto. He is board member of Mental Health Advocacy Center (MDAC).

Dr. Valentin Aichele, German Institute for Human Rights, Head of the independent monitoring body of the UNCRPD in the Federal Republic of Germany

Dr. Valentin Aichele, LL.M. (University of Adelaide) is with the German Institute for Human Rights since 2005. He is an expert in the field of economic, social and cultural human rights. Since May 2009, Valentin Aichele is Head of the independent monitoring body to the UN Convention on the Rights of Persons with Disabilities.

Ms. Maja Groff, Senior Legal Officer at the Permanent Bureau of the Hague Conference on Private International Law

Maja Groff is a Senior Legal Officer at the Permanent Bureau, and has worked with the Hague Conference since 2008.

Ms Groff's primary responsibilities focus on Hague Conventions which address the cross-border protection of vulnerable adults (the Hague 2000 Convention) and the cross-border recovery of family maintenance (the Hague 2007 Convention), the International Hague Network of Judges, Information Technology solutions to support Hague children's Conventions, and work on potential new Conventions or international co-operation mechanisms in the areas of the recognition and enforcement of foreign civil protection orders and the facilitation of access to foreign law. She conducts liaison work with professional bodies and other international organizations and has played a key role in the co-ordination of international conferences and experts groups.

Ms Groff has worked in private practice in general corporate law and finance in New York City, with pro bono involvement in asylum, constitutional and family law. She holds two law degrees, a Bachelor in Civil Law and a Bachelor in Common Law from McGill University (with Great Distinction), as well as degrees from Harvard University (A.B., magna cum laude, with Honors) and Oxford University (M.Sc., with Distinction). She has studied at Sciences Po, Paris (Master de Droit Économique), completed advanced professional training in international humanitarian law, and has studied and worked in international criminal law. Ms Groff has extensive experience in multicultural settings and has completed training and fieldwork in international development. She has participated in a number of United Nations negotiations for various governmental and non-governmental actors.

Ms Groff is a member of the New York Bar, and has served as a member of the International Law and United Nations Committees of the New York City Bar Association.

Ms Groff has authored a number of Permanent Bureau Preliminary Documents, notably on access to foreign law, operational issues under the 1980 Child Abduction Convention and the cross-border recognition and enforcement of civil protection orders. She is the international law correspondent for the Canadian practitioner publication *Wilson on Children and the Law* (Lexis Nexis), and has lectured on private international law topics and Hague Conventions, public international law, human rights, and access to justice matters at various international venues. She is the doctoral session coordinator for the Hague Academy of International Law, Private International Law program (2011 to 2013). She has won a range of scholarships and research grants for academic achievement throughout her academic career.

Ms Groff is a member of the Executive Committee of the Harvard Club of the Netherlands, and has contributed to various civic and charitable causes, including those assisting at risk children and youth, and addressing corporate social responsibility.

Dr. Maria Mammeri – Latzel, Judge at District Court Kpenick, the Federal Republic of Germany

Dr. Maria Mammeri-Latzel has an LL.M. degree from the Free University in Berlin from 1986 and after that she had studied in Geneva, Switzerland. In 1993 she was elected for a judge from the Senate of Berlin. She had worked as a judge on a rotation principle in the Landgericht Berlin, District Court Köpenick (Civil law) and in the District Court Tiergarten (Criminal law). From 1996 till now she is a district judge in Köpenick specialized in the area of guardianship and civil law cases. In 2002 she had completed a PhD dissertation at the Free University of Berlin on the practice of law in divorce cases during the Third Reich. From 2004 till now she conducts trainings in the area of Mediation and engagement in court-based mediations in civil law cases.

Dr. Eilíonóir Flynn, Centre for Disability Law and Policy, NUI Galway University, Ireland

Dr. Eilíonóir Flynn is Deputy Director of the Centre for Disability Law and Policy and Senior Lecturer with the School of Law. In her current role as Senior Research Fellow, Eilíonóir represents the CDLP on a number of EU-funded research projects in the fields of access to justice, EU implementation of the UN Convention on the Rights of Persons with Disabilities, active citizenship and disability (DISCIT), and legal capacity reform (PERSON). She is one of the editors of the *European Yearbook of Disability Law*.

At a national level she is also actively engaged in processes of legal capacity reform, and co-ordinates a working group of civil society organizations on this issue, as well as a group of organizations supporting the emergence of a National Platform of Self Advocates with Intellectual Disability. Internationally, she has supported the Secretariat of the UN Committee on the Rights of Persons with Disabilities, and in particular the working group which prepared a draft General Comment on Article 12 (legal capacity). She is also actively engaged with the UN Open-Ended Working Group on Ageing which aims to strengthen the international human rights of older persons.

Mr. Yotam Tolub, Bizhut, Israel

Attorney Yotam Tolub is an Israeli disability rights lawyer specializing in legal capacity and the right to autonomy. He has been working at Bizchut – the Israel Human Rights Center for People with Disabilities for the last five years as a legal counsel. He handles litigation, promoting legislation, raising awareness and writing on the issue.

Yotam is an expert in the field of the right to legal capacity for people with disabilities as well as in developing alternatives to guardianship in accordance with the UN Convention on the Rights of Persons with Disabilities. He has represented in Israeli courts people with intellectual and psychosocial disability under legal guardianship claiming their independence.

He is currently leading an Israeli pilot of supported decision making due to start in 2014.

Dr. Atanas Slavov, council to the minister of justice of Republic of Bulgaria

Atanas Slavov holds Ph.D. in Constitutional law and LL.M. both from Sofia University “St. Kliment Ohridsky”, Bulgaria. Dr. Slavov lectures at Sofia University (Public Administration Department and European Studies Department). He is completing a doctoral degree on democratic consolidation in South East Europe at the University of Glasgow. His research interests and publications are focused on constitutional law and theory, direct democracy and citizens’ participation, political theology. He has professional experience as a legal consultant in the civic sector as well as with the Council of Legislation Directorate with the Ministry of Justice.

Since August 2014 Slavov has been appointed an advisor to the cabinet of the Minister of Justice.

FACILITATORS

Mrs. Verginia Micheva - Ruseva, Deputy Minister of Justice

Ms Verginia Micheva-Ruseva graduated from Sofia University, Bulgaria with a Magister in Law in 1995 and she passed the Bulgarian State Examination for judicial posts in December, 1995. She also completed various legal courses, including human rights law courses for which she was awarded certificates. She has served as a judge during her entire seventeen year professional career. She commenced her judicial career as a junior judge, she subsequently served as a Municipal Court judge for eight years and she was then appointed as a District Court judge by the High Judicial Council at her home town Razgrad. In September 2008 she was appointed to serve as a civil judge at District Court level with the EULEX Mission in Kosovo. Additionally, while in the mission she was appointed as a substitute member of the EULEX Human Rights Review Panel by the EULEX Head of Mission in July 2011 and in January 2012 – as a member of the Panel. In

October 2012 she resumed her duties as a judge in Bulgaria and was seconded to work as a civil judge in Sofia City Court. Now she is dealing with second instance family cases as well as first instance international child abduction cases, recognition of foreign judicial decisions, adoptions, court cases related to establishment of origin, and guardianship cases.

In November 2014 Mrs. Micheva-Ruseva was appointed a deputy minister of justice at the cabinet of Mr. Boyko Borisov.

Dr. Velina Todorova, Institute for Legal Studies within the Bulgarian Academy of Science

Dr. Velina Todorova is a lawyer, associate professor in Civil and Family Law both at the University of Plovdiv and the Institute for Legal Studies – Bulgarian Academy of Sciences. She has been working extensively in various fields of the legal reforms concerning the rights of vulnerable groups such as children and women, family and social protection legislation. She was a leading expert in drafting of Child Protection Act and its subsequent revisions. She has provided expertise not only nationally but internationally including for the Council of Europe, European Parliament and the Council on European Family Law. As a former Deputy Minister of Justice she contributed to the start of the legal reform in regard with the legal capacity for people with disabilities.

Mrs. Nadia Shabani, Program Director, BCNL

Nadia Shabani is Program Director at the Bulgarian Center for Not-for-Profit Law (BCNL). She has worked in the organization since its establishment in 2001 until 2009, and came back to BCNL in 2012. Within BCNL she works on issues such as establishment of NGOs, public-private partnerships, good governance and social contracting. She provides assistance to public officials on central and local level, lawyers, professional groups, parental organizations and social service providers for developing policies, strategic documents, drafting legislation changes and impact assessments in social area.

In 2009, Nadia became the chair of the National Agency for Child Protection in Bulgaria, responsible for the enforcement of children rights and coordination of all government policies in the area. As the head of this agency she was in charge of the coordination of all measures and programs in the plan for the deinstitutionalization of children in Bulgaria, accepted in 2010 and funded by the EU (100,000,000 euro for the first 4 years).

Nadia has an M.A. degree from the Law Faculty in Sofia University and specialization in International Law and international organizations.

Mrs. Marieta Dimitrova, Legal consultant, BCNL

Marieta Dimitrova is called to the Sofia bar in 1990. She is a Legal consultant at the Bulgarian Center for Not-for-Profit Law (BCNL) since its establishment and has more than 10 years of experience in implementing projects, related to civil society development, social area and challenges for persons with disabilities.

Marieta has been a legal consultant to the Parliament Commission on Labor and Social Policy in the 41 National Assembly. She works on the issues of the UNCPRD since 2008.

Attorney Aneta Genova, Mental Disability Advocacy Center, Hungary

Mrs. Aneta Genova (Micheva) is an attorney-at-law in the area of protection of human rights, as well as a legal consultant for Bulgaria at the Mental Disability Advocacy Center, Hungary. Since 2005 she works actively in the area of protection of human rights of people with mental problems (psychosocial issues and intellectual disabilities). Mrs. Genova was one of the attorneys in the case Stanev vs. Bulgaria and Stankov vs. Bulgaria, where the European Court of Human Rights judged Bulgaria for violation of human rights of people under guardianship. She had worked at the Bulgarian Helsinki Committee until 2012, she had served as a judge from 1998. Mrs. Genova had studied clinical social work in the New Bulgarian University. In the present moment Mrs. Genova is studying a PhD in Law at the Institute for Legal Studies within the Bulgarian Academy of Science.

AIMS OF THE INTERNATIONAL LEGAL WORKSHOP

We are assigned with the task to make a revolutionary reform so that we will be able to guarantee the equality before the law for all Bulgarian citizens. We have to change our common understanding about the legal capacity to act of people with disabilities. Similar processes are often a topic of discussions in Ireland, Canada, Israel, Germany; countries with different history, economic development and state of civil society awareness. Despite their differences, all of these countries share one common new doctrine towards the change – the debate about the protection and the guarantees of human rights of people with disabilities is not dominated by nostalgia feelings for legal constructions from 2000 years ago, but just on the contrary – the leading point is the modern understanding of the human being as an unique piece of art that has the right to build an own life according to individual thinking, values, desires and preferences.

The purpose of the legal workshop is to create space for discussing the ongoing legal reform of the guardianship system in Bulgaria that is based on the requirement for application of the standards of article 12 from the UN Convention on the Rights of Persons with Disabilities (the Convention). The event will accumulate expert knowledge and comparable information related to the topic on national and international level. A special focus of the debate will be the draft law on Physical Persons and Support Measures, prepared by a working group within the Ministry of Justice in the period January – March 2015. The legal workshop will provide the opportunity for Bulgarian and foreign participants to share views, arguments and comments on the draft legal texts as well as on their impact over the judicial practice and legal theory in the area of legal capacity to act.

During the conference the participants will have the opportunity to discuss:

- The theoretical concept of the legal capacity to act for people with disabilities according to article 12 from the Convention;
- The court practice in Bulgaria and Germany in applying the existing legal framework of guardianship within the context of the Convention;
- The draft Law on Physical Persons and Support Measures, published by the Ministry of Justice for open discussion as well as other similar reforms and initiatives in Canada, Ireland and Israel.

“The existing legal framework does not take into consideration the requirements of the Convention on the Rights of Persons with Disabilities (published in SG 37/2012) so that the restrictions for these people to be proportionate to their condition, to be applied for a limited period of time and to be reviewed periodically by an independent body”

From the decision №12/17.07.2014 of the Constitutional Court of Republic of Bulgaria under Constitutional case №10/2014

AGENDA

WEDNESDAY, 29 APRIL 2015

14.00 – 14.30	Registration and coffee
14.30 – 15.00	Ms. Verginia Micheva – Ruseva, Deputy Minister of Justice, <i>Ministry of Justice of Republic of Bulgaria</i> Ms. Velina Todorova, associate professor <i>Institute for legal studies, Bulgarian Academy of Science</i> Ms. Nadia Shabani, Program Director <i>Bulgarian Center for Not-for-Profit Law</i>
15.00 – 16.30	Plenary Session: The new theoretical understandings of the legal capacity to act <i>Moderator: Ms. Velina Todorova</i> Rapporteurs: Dr. Michael Bach, Institute for Research and Development on Inclusion and Society, Canada <i>Shifting the Paradigm – the standards of article 12 form the UNCRPD</i> Dr. Valentin Aichele, German Institute of Human Rights, Head of the independent monitoring body of the UNCRPD <i>The application of the UNCRPD in Germany</i>
16.30 – 17:00	Daily wrap-up session and closing of the first day Dr. Aneta Genova, <i>Mental Disability Advocacy Center, Hungary</i>

THURSDAY, 30 APRIL 2015

9:00 – 10:30	Plenary sessions: Judicial practices in applying existing legislation on guardianship within the context of UNCRPD <i>Moderator: Verginia Micheva - Ruseva</i> Rapporteurs: Dr. Maria Mammeri-Latzel, Judge at District Court Köpenick, the Federal Republic of Germany <i>German law on legal capacity to act and the judicial practice</i> Ms. Maja Groff, Senior Legal Officer at the Permanent Bureau of the Hague Conference on Private International Law <i>Applicable international legal standards and the UNCRPD</i>
10:30 – 11:00	Coffee break
11:00 – 12:30	Plenary sessions: The draft Law on Physical Persons and Support Measures <i>Moderator: Mrs. Marieta Dimitrova, Legal consultant, BCNL</i> Rapporteurs: Dr. Eilionoir Flynn, Center for Disability Law and Policy, Ireland <i>The example of Ireland: the Bill on Assisted Decision Making</i> Yotam Tolub, Bizhut, Israel <i>The example of Israel: the legal capacity to act and the financial issue</i> Dr. Atanas Slavov, member of the working group within the Ministry of Justice and counselor to the Minister of Justice <i>The Draft Law on Physical Persons and Measures of Support</i>
12.30 – 13:00	Daily wrap-up session Nadia Shabani, Program Director, BCNL
13:00 – 13:30	Closing session: Future steps Mr. Hristo Ivanov, Minister of Justice Mr. Konstantin Penchev, National Ombudsman of Republic of Bulgaria
13:30 – 14:30	Cocktail

NATURAL PERSONS AND SUPPORT MEASURES ACT

Chapter One

GENERAL PROVISIONS

Subject

Art. 1. This Law shall regulate the acquisition of legal status¹ and the exercise of legal capacity² by natural persons, and the terms and conditions for receiving support in decision-making in relation to performing specific legal actions.

Legal status

Art. 2. Any natural person acquires, as from his/her birth, the capacity to hold rights and obligations.

Legal capacity

Art. 3. Upon turning 18 years of age, any person shall become an adult and shall be fully capable to acquire rights and assume obligations on his/her own behalf, through his/her own actions.

Minors

Art. 4. (1) Any person who has not turned 14 years of age shall be a minor.

(2) Minors can enter, without being supported by another person, into contracts of small value that are usual for their age provided that they meet their obligation as of the time of or right after entering into the transaction.

(3) In any other cases, any legal actions on behalf of minors shall be carried out by their legal representatives.

Under age persons

Art. 5. (1) Any person aged 14 till turning 18 years of age shall be under age.

(2) Underage persons can enter on their own into ordinary small transactions for meeting their needs and can dispose of the proceeds of their labor.

(3) Underage persons can also enter on their own into transactions resulting in rights for them, without any ensuing obligations.

¹ The term legal status (for the purpose of the translation of the law) is used in the meaning of a capacity to acquire rights and hold obligations.

² The term legal capacity (for the purpose of the translation of the law) is used in the meaning of a capacity to exercise rights and obligations with personal actions.

(4) In any other cases, underage persons shall carry out legal actions with the consent of their parents or guardians.

Time limit for giving consent

Art. 6. (1) The person who has entered into a transaction with an underage person may request that the parent, respectively the guardian, approve that transaction by allowing a two-month time limit therefor.

(2) Where consent has not been given within the above time limit, the transaction shall be considered unapproved.

Persons with disabilities

Art. 7. (1) Any person, irrespective of the type of their disability, shall be entitled to appropriate support for the purpose of independently exercising his/her rights.

(2) The state authorities and organizations, the local authorities, and the public services providers shall be obliged to take the necessary actions to ensure reasonable accommodations and access for persons with disabilities.

(3) The state authorities and organizations, the local authorities, and the public services providers shall also ensure that persons with intellectual disabilities, mental health problems or dementia have the possibility to understand the content of their rights and obligations, and shall ensure appropriate persons who will consult and assist them.

Supported decision-making body

Art. 8. (1) The supported decision-making body shall be the mayor of the municipality. The mayor may delegate this function to a person from the municipal administration by virtue of a written order.

(2) The supported decision-making body by the person's permanent address shall:

1. enter the support measure determined and the time limit thereof into the register of the population;
2. create and keep a register of the facilitators of procedures for determining protective measures in a risk situation;
3. create and keep a register of the providers of the social service "supported decision-making";
4. create and keep a register of the organizations which provide training of the facilitators of the procedure for determining protective measures, and collect data about the training programs.

(3) The supported decision-making body may request that support measures are determined under the procedure of Art. 15 of the Law.

(4) The supported decision-making body shall appoint the facilitator of the procedure for determining protective measures in a risk situation, and shall replace that person in the event of existence of any of the circumstances under Art. 29, para 2. Where a conflict of interest, as well as other circumstances making impossible the delivery of their duties are established, the supported decision-making body shall dismiss the facilitator of the procedure for determining protective measures in a risk situation.

(5) Prior to the entry into force of this Law, the supported decision-making body shall create an archive with the records of the persons placed under guardianship.

Chapter Two

SUPPORT MEASURES

Provision of support measures

Art. 9. (1) The measures under this chapter can be provided to an adult person who, as a result of an intellectual disability, mental disorder or dementia has serious difficulties in understanding the essence of his/her decisions and the consequences thereof when carrying out specific legal actions.

(2) Serious difficulties within the meaning of paragraph 1 shall be the cases where the person:

1. does not understand the information and facts on which the decision about performing the specific legal action is based or
2. does not assess the essence and importance of the individual potential decisions or
3. does not relate the information to the assessment of the consequences in the process of making the relevant decision.

(3) Serious difficulties within the meaning of paragraph 1 shall not be the case where the person is unable to independently express his/her will and preferences in the usual way, if that person uses explanations appropriate to his/her state, including via non-verbal communication forms, visual presentation, etc.

(4) The need for support shall be determined depending on the person's ability to perform specific legal actions related to the management and disposition of property rights and cash, concluding deals, making decisions about medical treatment and participation in administrative and court procedures.

(5) The support provided for the performance of specific legal actions under paragraph 4 shall be the determination of support measures under this Law.

Exercise of personal rights

Art. 10. (1) Entering into a marriage, requests for the annulment of a marriage, making a will, right to association, giving consent to medical care in cases other than emergencies, and the exercise of reproductive rights shall be actions taken independently after the person has been appropriately consulted on the types of rights and the consequences from the exercise thereof.

(2) The supported decision-making measures for the purpose of exercising the rights under paragraph 1 shall be invalid.

(3) Where the person enters into a marriage, he/she shall be provided with appropriate consultations provided for in Art. 7 of the Family Code.

(4) Where consent to medical care or the exercise of reproductive rights is given, the person must be provided with appropriate consultations, in conformity with his/her ability to communicate, by a medical expert designated by an order of the head of the healthcare establishment.

Principles in terms of determining support measures

Art. 11. (1) Support measures shall be determined by the court following the procedure laid down in Art. 15 subject to the principles of the necessity of each measure, respect for the person's wishes, preferences and values, proportionality, timeliness and flexibility, prevention of conflict of interests and

undue influence, and exhaustiveness.

(2) Each measure shall be applied only where the conditions set out in Art. 9, paragraphs 1-3 of this Law are met.

(3) The support measures shall be relevant to the case and the state of the person. Measures shall be determined only for the purpose of the specific legal actions under Art. 9, paragraph 4 for the performance of which the person needs support.

(4) Each measure shall have a time limit and shall be determined for a period not exceeding two years. Reviewing the measure and replacing it with another measure can be requested at any point.

(5) One month prior to the expiry of the time limit of the support measure, the court that determined the measure shall request information about the person's state from the relevant parties, and shall initiate a case for a new hearing.

(6) Support measures shall be based on the person's personal choice and shall conform to his/her wishes and preferences.

(7) The determining of support measures shall not substitute the will of the supported person with the will of the supporting person.

(8) The choice of the supporting person shall be based on the analysis and the evidence for the existence of a trusty relationship between the supported person and the supporting person.

(9) In determining the support measure the court shall follow the sequence of the measures listed in Art. 13 by examining the person's abilities. The court can determine different support measures in respect of the same persons in a reasoned decision.

Essence and purpose of support measures

Art. 12. (1) Support measures shall be a form of assistance provided to the person with a view to facilitating the personal exercise of his/her rights and shall aim at:

1. clarifying the meaning of the legal action and the consequences therefrom;
2. facilitate the communication of the person with the other parties involved in the legal action in respect of which support is provided;
3. assist the person in expressing his/her wishes and preferences in a manner comprehensible to the others;
4. render other assistance depending on the specifics of the case.

Types of support measures

Art. 13. (1) The court shall determine one or several of the following support measures:

1. Refer the person to a Social Assistance Directorate designated by the court for using a community-based social service that will help improve the person's skills;
2. Identify an individual who has a trusty relationship with the person in need of support, and the specific legal actions for which the person needs support;
3. Identify an individual who has a trusty relationship with the person in need of support and who will express the consent in decision-making in relation to the legal actions laid down in the court judgment;
4. Impose restrictions on the disposal of property above a certain value threshold at the request of the person in need of support;

5. Approve the preliminary declaration under Art. 19 made by the person in need of support.

(2) The court shall notify ex officio the supported decision-making body with jurisdiction over the permanent address of the person with a view to registering the support measure determined.

(3) In case the measure under paragraph 1 cannot be determined, the court shall institute the proceedings set out in Chapter Four.

Trusty relationship

Art. 14. (1) A relationship between the two persons – the supporting person and the supported person – shall be trusty where the following preconditions are met:

1. The supporting person and the supported person are aware of the relationship;
2. The relationship between the supporting person and the supported person is of an objectively lasting nature;
3. The supporting person has the ability to convey the decision, the wishes and preferences of the supported person;
4. The supporting person is ready and has the ability to act in the interest of the supported person, by taking into account the wishes and preferences thereof.

(2) The trusty relationship excludes any relations of undue influence, violence, abuse or manipulation of the supported person by the supporting person.

Request for determination of support measures

Art. 15. (1) Determination of support measures can be requested by means of a claim lodged to the district court exercising jurisdiction over the current address of the person under Art. 9 by the person's first-degree relatives, brother or sister, spouse, by a friend with whom a trusty relationship has been established, by the prosecutor or the supported decision-making body. Where the person does not have a current address or this address cannot be found, the application shall be lodged to the district court exercising jurisdiction over the person's permanent address.

(2) The claim shall set forth the preferred support measures, the specific legal actions in respect of which the determination is requested, and the relevant aim pursued.

(3) In any case, in the hearing of the case the claimant may approach the court with a motion to grant injunction to secure the claim, if the claimant submits evidence to prove that in the absence thereof the interests of the person in respect of whom support measures are requested shall not be protected. Injunction securing the claim is admissible under the terms and following the procedure laid down in Chapter Thirty-Four of the Civil Code of Procedure.

Chapter Three

SUPPORTED DECISION-MAKING

Definition

Art. 16. (1) Supported decision-making shall be a support measure under Art. 13 whereby a supporting person designated following the procedure laid down in Art. 13 shall provide, under the conditions

of a trusty relationship, provides support to a supported person in order for the latter to express his/her wishes and preferences in making decisions in relation to performing specific legal actions.

(2) Supported decision-making shall always be based on the personal choice of the person.

(3) The court shall always check if the supported person has received sufficient explanations about the meaning of and the consequences from the measures, and about the possible less restrictive and more friendly alternatives, if any potential conflicts of interest have been prevented, and if the will of the supported person has been unduly influenced.

Court judgment on supported decision-making

Art. 17. (1) The relationship between a supported person and a supporting person shall emerge by virtue of a court judgment under Art. 13, items 2, 3, 4, and 5.

(2) The person may have different supporting persons for different legal actions.

Contract on supported decision-making

Art. 18. (1) By virtue of the contract on supported decision-making a person (a supporting person) is obliged *ex gratia*, on the basis of a trusty relationship with another person (a supported person) to assist that particular person in independently carrying out the legal actions under Art. 9, paragraph 4, with due respect for the wishes and preferences of the supported person.

(2) The contract on supported decision-making shall be concluded on the grounds of an effective judgment determining a support measure under Art. 13, paragraph 1, item 2.

(3) The supported person may conclude a contract with different supporting persons in respect of whom a trusty relationship has been established, in relation to carrying out separate legal actions. The supported person shall not have more than one supporting person for the same legal action.

(4) The contract may be concluded for not more than 2-year period. The supported person has the right to terminate the contract with the supporting person at any point in time. The termination shall be subject to approval by the court.

(5) The contract on supported decision-making shall not be contrary to the law and good ethics.

(6) The contract shall be in force with respect to the parties thereto as from the date of delivery of the court judgment, and with respect to the third parties as from the date of entry thereof into the register of the population.

(7) In the event of several support contracts, the valid one shall be the contract with the latest entry into the register of the population.

(8) The supported person shall perform legal actions independently only if the contract under Art. 18 does not include another measure under Art. 13.

(9) The supported person shall be obliged to inform the supporting person about his/her intentions to make specific decisions and/or perform a legal action that is part of the subject matter of the contract.

(10) The supporting person shall be obliged to provide assistance to the supported person by explaining to him/her in an accessible manner the information needed to make the relevant decision and/or by facilitating his/her contact and/or communication with a specialist.

(11) The supporting person shall be obliged to assist the supported person in receiving any information, consultations and/or documents needed to make the relevant decision in an accessible format.

(12) The supporting person shall be obliged to assist the supported person in making and expressing his/her decision concerning the specific legal actions on the basis of his/her wishes and preferences.

(13) The supporting person shall be obliged to ensure the correct and precise implementation of the decisions made by the supported person.

(14) The supporting person shall be obliged to not disclose the facts and information known to him/her as a result of delivering the contractual obligations, and to store the information and documents received in relation to these obligations.

(15) The supporting person shall deliver the activities under the contract in person. Any third person may request that the support be also documented or confirmed by means of the signature of the supporting person, which will certify the fact that the contract under Art. 18 has been concluded under the conditions of supported decision-making. This signature shall not replace the signature of the supported person required for concluding the contract. By laying down his/her signature, the supporting person shall not express his/her wishes and preferences, but shall only document the circumstance that he/she has taken due care of providing support to the supported person.

(16) In the event of a risk of harm to the interests of the supported person, and of termination of the trusty relationship, the supporting person shall be obliged to approach the court with a request for terminating the support measure and replacing it with another one.

(17) The contract on supported decision-making shall be terminated:

1. with the expiry of the term over which it was been concluded;
2. under the conditions of Art. 23, paragraph 2;
3. in case the trusty relationship between the parties collapses, as established through the court;
4. in case the need for support for the independent exercise of rights, in respect of which the measure was determined through the court, ceases to exist;
5. by means of a unilateral statement by the supported person who is entitled to terminate the contract at any point in time;
6. in the event of an emerging objective impossibility, established through the court, for either of the parties to meet their contractual obligations.

(18) The supporting person shall be entitled to terminate the contract with the supported person in the event of a failure of the latter to meet his/her notification obligation under Art. 18, paragraph 9.

(19) In any cases of termination of the contract, the supporting person shall be obliged to declare the contract terminated before the supported decision-making body, which shall also be noted in the register of the population.

(20) In case the supported person needs other forms of support, the supported decision-making body may approach the court with a request for determining another support measure.

Preliminary declaration

Art. 19. (1) Any adult person shall have the right to a preliminary expression of his/her will on the need for the court to designate one or more persons that will support him/her in case he/she reaches a state of being unable to form or express his/her wishes and preferences.

(2) The preliminary declaration shall be made in writing with a notarial certification of the signature and the content.

(3) The declaration under paragraph 2 shall indicate adult natural persons who will provide support, and, if the declarant wishes so, may also contain:

1. the legal actions which a representative designated by the declarant will carry out on his/her behalf;

2. the specific legal actions in respect of which the declarant will be supported by a person designated out of the group of supporting persons, if these persons are more than one;
3. the legal actions in respect of which the declarant shall in no case be supported by a specific person;
4. the preconditions for the declaration to become effective or to cease to be effective;
5. the restrictive measures which the declarant defines as admissible to be taken, and the legal actions in respect of which they will be applied;
6. a time limit for the measures under item 5;
7. the specific circumstances resulting in changing the supporting persons;
8. instructions regarding what the declarant wishes shall not happen to his/her rights or personality after getting into the state under Art. 9;
9. any other matters relevant to the exercise of the specific legal rights.

(4) The notary performing the certification of the preliminary declaration under paragraph 2 shall send it to the supported decision-making body with jurisdiction over the person's permanent address within 3 days. The supported decision-making body shall enter the declaration under paragraph 2 into the register of the population.

(5) The preliminary declaration enters into force from the date of its approval by the court under the procedure of article 13, paragraph 1, item 5. It may be withdrawn or changed by means of a new declaration under paragraph 2 in a court procedure laid down in this Law. The changes shall be effective as from the day on which they are entered into the register of the population.

(6) The preliminary declaration shall be binding for the court in terms of the determination of the support measures. The court shall be obliged to take into consideration the declaration, unless the implementation thereof is impossible. The latter situation shall be explicitly noted in the court judgment, the court being obliged to always accommodate, to the maximum extent possible, the will expressed by the declarant.

(7) A preliminary declaration that has come into effect shall not preclude the possibility for the person under Art. 9, paragraph 1 to enter on his/her own into ordinary minor transactions for the purpose of meeting his/her current needs and dispose of his/her labor proceeds.

Co-decision-making

Art. 20. (1) Co-decision-making shall be a support measure under Art. 13, paragraph 1, item 3 regarding the independent exercise of rights whereby the supported person shall choose a person who shall assist him/her in making decisions or carrying out legal actions in the areas chosen by the supported person or in the achievement of certain goals.

(2) Within the application of this measure, the decision shall be made and the relevant legal action shall be performed jointly by the supported person and the supporting person.

(3) At the request of either the supporting person or the supported person, the court may determine the conditions under which the measure shall apply, and the prerequisites for the termination thereof.

Court procedure

Art. 21. (1) In determining the measures under this chapter, the court shall examine whether a trusty relationship exists between the relevant persons, and whether the conditions for the application of support measures are met.

(2) Within any proceedings for determining support measures the court shall examine and establish the existence of a trusty relationship. The court shall hear the supported person and the person in respect of whom it is alleged to have a trusty relationship with the supported person. The court shall gather evidence under the terms and following the procedure laid down in the Civil Code or Procedure.

(3) The decision regarding the existence of a trusty relationship is part of the judgment determining a support measure, and shall be a motivated one.

(4) The court may also gather additional evidence under the terms and the procedure laid down in the Civil Code of Procedure.

(5) The court shall deliver a judgment whereby it recognizes as established the fact that the person in respect of whom support has been requested and the person to provide that support are in a trusty relationship, recognizes the relevant persons as being, respectively, supporting and supported, determines a time limit within which the support measure shall be applied and the specific legal actions in respect of which the measure is determined.

(6) The judgment shall be subject to immediate enforcement, but it can be appealed under the terms and the procedure laid down in the Civil Code of Procedure before the appeal court within 14 days from the notification thereof to the parties. The appeal shall not suspend the enforcement, unless the appeal court rules otherwise till the delivery of the final judgment. The judgment of the appeal court shall be final.

(7) All the measure approved by the court shall come into effect for the parties as from the date of the delivery of the judgment, and for all third parties as from the date of the entry thereof into the register of the population.

Third parties

Art. 22. (1) The support measures entered into the register of the population shall be binding for any third party, and for all public services providers and representatives of state authorities and organizations and the local authorities.

(2) Each person shall ensure that the delivery of the support is possible by providing:

- a) written materials, oral clarifications, and others allowing the supported person to understand all the aspects of the specific legal action;
- b) enough time for the supported person and the supporting person to discuss between themselves the meaning and relevance of the specific legal action and the consequences thereof.

(3) The person who has denied to observe paragraph 2 shall be liable for compensation for undue damages under the terms of in Art. 40 and subsequent articles of the Obligations and Contracts Act.

(4) The determination of support measures shall not terminate the powers of attorney issued by the supported person in a general procedure, unless the judgment rules otherwise.

Person who are not eligible to act as supporting persons

Art. 23. (1) A person shall not be eligible to act as a supporting person if:

1. the person has been convicted with a final judgment for an intentional general crime against the personality;
2. the person is a party to pending court procedures in which the supported person is also involved;
3. in respect of that person a protection order has been issued under the Domestic Violence Protection Act.

(2) The support measures shall be ceased if, after the determination thereof, the circumstances under paragraph 1 occur in respect of the supporting person.

(3) The cessation shall not apply to the decisions and legal actions performed by the supported person with the help of the supporting person prior to the occurrence of the circumstances that have resulted in ceasing the support measures.

Liability

Art. 24. The supporting person shall owe compensation to the supported person for damages and/or lost earnings that have occurred for reasons of his/her actions resulting from willful neglect of his/her obligations under the contract or the law.

Chapter Four

PROCEDURE FOR DETERMINATION OF IMMEDIATE PROTECTIVE MEASURES IN A RISK SITUATION

Definition

Art. 25. The determination of protective measures in a risk situation is a special procedure for decision-making, that is applied on the grounds under Art. 26, in relation to one or several of the following areas:

1. choosing the residence of the person in need of support;
2. actions for the disposition of immovables, movables through a formal transaction, bank deposits or securities in possession of the person in need of protection;
3. choosing medical treatment, other than the healthcare provided in emergency situations or in the cases under Art. 155 of the Health Act, for the person in need of support.

Grounds

Art. 26. (1) The procedure for determining protective measures in a risk situation shall be admissible in cases of a serious and immediate risk to the life, health, and property of the person under Art. 9, paragraphs 1 and 2, and where:

1. all other possibilities for determining support measures have been exhausted or
2. there is a serious contradiction between him/her and the supporting person, which makes the effective delivery of the support impossible, where an urgent decision has to be made or
3. there is a serious contradiction between him/her and the co-decision-maker, where an urgent decision has to be made.

Court actions

Art. 27. (1) The procedure for determining protective measures in a risk situation shall be immediately instituted by a ruling of the court under the terms and the procedure laid down in Chapter 28 of the Civil Code of Procedure.

(2) The court ruling for instituting the procedure shall:

- a) indicate the issues to be solved;
- b) determine the time limit of the measure which shall not exceed 6 months;
- c) oblige the supported decision-making body to designate a person who will conduct the procedure for determining protective measures, and shall set a deadline for the submission of the initial and subsequent reports on the progress of the case.

(3) The determination of protective measures in a risk situation may also be commenced within a procedure for determining support measures, where the determination of such support measures has failed.

(4) The opening of this procedure shall terminate the effect of any other support measures. No support measures shall be determined within the duration of this procedure.

Obligations of the person conducting the procedure

Art. 28. (1) The person conducting the procedure shall have the following obligations:

1. set up an individual council;
2. make special efforts to find relatives or close acquaintances of the person;
3. organize the activity of the individual council;
4. monitor whether the members of the council provide the best interpretation of the person's wishes and preferences in view of the specific circumstances and context;
5. submit reports on the progress of the case to the court that has ruled the measure;
6. request immediate shifting to another measure in the event of arising reasons for such a change.

(2) The interpretation of the wishes and preferences shall take into consideration the following binding criteria:

1. the interpretation shall not be based only on the person's external behavior and state;
2. all the relevant circumstances have been taken into account;
3. all the necessary efforts have been made in order for the person to be able to make his/her own decision;
4. the circumstances related to the supporting treatment have been specifically discussed;
5. the person's past and present wishes, feelings, beliefs, and values have been taken into account;
6. the perspectives of the person's relatives or close acquaintances have been discussed and taken into account.

Rights of the person conducting the procedure in determining protective measures in a risk situation

Art. 29. The person conducting the procedure shall be entitled to:

1. receive remuneration from the supported decision-making body;
2. request from the supported decision-making body that he/she be replaced in the event of emergence or establishment of a conflict of interest, illness or another reason making the delivery of his/her obligations impossible.

Individual council

Art. 30. (1) An individual council shall be set up for the person in respect of whom the procedure under Art. 25 is conducted.

(2) The members of the council shall be the person himself/herself, if possible, a relative/a close acquaintance or relatives/close acquaintances with whom the person has a trusty relationship, as well as representatives of the supported decision-making body and the Social Assistance Directorate, the medical doctor treating the person, the social services provider working with the person, in case the person uses such services.

(3) Members of the council may also be human rights non-profit legal entities and other individuals who are familiar with the person's state, his/her ability to make decisions, and his/her real wishes and preferences.

(4) The supported decision-making body shall convene a meeting of the individual council within one week from the date of the court ruling under Art. 27, paragraph 1.

(5) The individual council shall make the best interpretation of the person's wishes and preferences by applying the criteria set out in Art. 28, paragraph 2 in view of the specific circumstances and by taking into account the available information regarding previous expressions of the person's will and his/her life story and values.

Decisions of the individual council

Art. 31. (1) The individual council may make the following decisions:

1. supportive decisions, which do not have legal implications and relate to the provision of the support the person needs;
2. restrictive decisions for the person, which have legal implications, including the restriction of a specific right of the person in respect of whom the measure is determined;
3. decisions on the disposition of the person's property in the event of an obvious need to ensure immediate protection of the person's life, health and property against direct harm.

(2) The individual council shall submit to the court a report on the decisions made with a detailed presentation of all the reasons for applying the criteria set out in Art. 28, paragraph 2. The report shall be submitted not later than 1 month from the date of the court ruling under Art. 27, paragraph 1.

(3) The decisions of the individual council under Art. 31, paragraph 1 shall be made within the time limit determined by the court. The court shall issue a judgment within one month, which shall be notified to the parties and shall be immediately enforced.

(4) The decisions under paragraph 1, items 2 and 3 shall be entered into the register of the population.

(5) The decisions made under paragraph 1 shall be subject to judicial review and can be appealed by the persons under Art. 15 before the appeal court under the terms and procedure laid down in the Civil Code of Procedure.

Chapter Five

DECLARATION OF ABSENCE

Appointment of a representative

Art. 32. (1) Where a person is absent or no information is available regarding the person, the regional court, based on a petition by the interested parties or at the prosecutor's request, shall appoint a person who shall represent him/her, shall perform any management actions, and shall take any other measures needed for the protection of the interests of the person concerned.

(2) The representative shall be chosen and appointed with priority amongst the relatives or close acquaintances of the absent person.

(3) Where the absent person has a legal representative, no other representative shall be appointed.

(4) Where the absent person has an assignee, a representative shall be appointed only for those matters that the assignee is not empowered to deal with.

(5) The rules set forth in this provision shall apply with regard to persons who have, due any reason whatsoever, fallen into a state of coma. The assignee's powers shall arise at the point of the appointment thereof and shall cease their effect at the point when the state of coma ceases to exist. The provisions of Articles 32-43 shall not apply with regard to persons who have fallen into a state of coma.

Declaring a person absent

Art. 33. Where the person is absent for over one year, the court, at the request of the interested parties, shall declare that person as absent.

Entry into possession

Art. 34. (1) The persons who are heirs to the person declared absent as of the material time of the last notice about that person shall be entitled to request from the court temporary entry into possession of his/her property.

(2) As from the day of entry into possession the powers of attorney and the representation, if any, shall cease their effect.

Actions in terms of property

Art. 35. (1) The persons granted entry into possession shall be entitled to manage the property of the absent person, to represent him/her at court and other institutions, and to use the proceeds of his/her property.

(2) Such persons shall not be entitled to alienation of, mortgage and liens on the property or any other actions of disposition, except for cases of need or obvious benefit to the absent person, and any such actions shall be subject to permission issued by the regional court.

Temporary rights

Art. 36. (1) The heirs and the persons who have rights conditional on the death of the absent person may request temporary exercise of these rights.

(2) The execution of the obligations with respect to the absent person which are extinguished upon his/her death, such as alimony, etc., shall be suspended.

Reimbursement

Art. 37. (1) Where the absent person turns out to be alive, the persons who entered into possession of his/her property, shall be obliged to reimburse only the income raised after the invitation to reconstitute the property.

(2) The ruling on the declaration of absence shall be declared null.

Last notice and declaration of death

Art. 38. (1) After five years have elapsed from the day of the last notice about the absent person, the court, at the request of the prosecutor or any interested party, shall declare the person's death.

(2) The declaration of death may also be done in the absence of a declaration of the person's absence.

Declaration of death in warfare

Art. 39. Where a person has disappeared in warfare or another event resulting in grounds to presume that he/she is dead, death may be declared if two years have elapsed after the warfare or the event ceased.

The time of death

Art. 40. (1) The court shall determine the day, and, if possible, the time of the presumed death.

(2) In absence of data proving otherwise, the moment of death shall be the day to which the last notice relates.

Legal consequences

Art. 41. The death declared by the court ruling shall give rise to the same legal consequences as the ones ensuing from the person's real death.

Restitution

Art. 42. (1) Where the person declared dead turns out to be alive, he/she is entitled to request:

a) the restitution of the property available, the property alienated gratuitously, any proceeds from the property alienated onerously, and the sums due by third persons for fees charged on the alienations executed;

b) the restitution of the property alienated onerously, if, at the time of acquisition, the purchaser was aware of the fact that the person declared dead was alive;

c) the execution of the obligations under Art. 35, paragraph 2 as from the day of the invitation.

(2) A marriage terminated shall not be restored.

The exact date of death

Art. 43. Where after the decision about the presumed death, the exact date of the person's real death is established through the court, his/her heirs, as from that date, shall be entitled to exercise their rights under Art. 42, paragraph 1, letters (a) and (b).

ADDITIONAL PROVISIONS

§ 1. “*Supported person*”, within the meaning of this Law, shall be an adult person in respect of whom the conditions set out in Art. 9, paragraphs 1 and 2 exist, and the determination of support measures is requested;

§ 2. “*Supporting person*”, within the meaning of this Law, shall be an adult person who has been designated by the supported person and has a trusty relationship with the supported person, who provides assistance and support in making decisions in relation to performing specific legal actions in conformity with the wishes and preferences of the supported person.

TRANSITIONAL AND FINAL PROVISIONS

§ 4. The Persons and Family Act (prom., SG, issue 182 of 1949, amended issue 193 of 1949, issue 12 of 1951, issue 12 and 92 of 1952, issue 15, 16 and 89 of 1953, issue 90 of 1955, issue 90 of 1956, issue 50 of 1961, issue 23 of 1968, issue 36 of 1979, issue 41 of 1985, issue 46 of 1989, issue 20 of 1990, issue 15 of 1994, issue 67 of 1999, issue 81 of 2000, issue 120 of 2002) **shall be repealed.**

§ 5. The Family Code (prom., SG, issue 47 of 2009, amended issue 74 and issue 82 of 2009, issue 98 and 100 of 2010, issue 82 of 2012, issue 68 of 2013) shall be amended, as follows:

1. Art. 7 shall be amended, as follows:

a) The main text of paragraph 1 shall be amended to read: “Shall not have the right to enter into marriage a person who is in bondage to another marriage”, and items 1, 2 and 3 shall be deleted;

b) Paragraphs 3 and 4 shall be created and shall read:

“(3) Any person who meets the conditions set out in Art. 9 of the Natural Persons and Support Measures Act and wishes to enter into marriage must:

1. receive, in an appropriate manner, information about any potential consequences from his/her wishes. The same information must also be received by the partner with whom the person is to enter into marriage.

2. receive, in an appropriate manner, information about the legal essence and consequences from the civil marriage, including the relations between the spouses, the dissolution of the marriage, and parental rights and obligations. The same information must also be received by the partner with whom the person is to enter into marriage.

3. receive, where needed, support by an interpreter at the conclusion of the marriage.

(4) The provision of information and support shall be ensured by the supported decision-making body.”

2. Art. 9, paragraph 1 shall be amended as follows:

a) The main text shall be amended to read:

“(1) Each of the persons entering into marriage, shall submit to the civil status official a declaration, certifying that there are no obstacles to the conclusion of the marriage under Art. 7.”

b) Items 2 and 3 shall be deleted.

3. In Art. 18, paragraph 2 the words “or under restricted guardianship” shall be deleted.

4. In Art. 84, paragraph 3 the words “deprived of parental rights or placed under full guardianship” shall be replaced with “or deprived of parental rights”.

5. In Art. 89, paragraph 4 the words “or placed under guardianship” shall be deleted.

6. Art. 90, paragraph 2 shall be amended, as follows:

a) In item 2 the words “placed under restricted guardianship” shall be deleted.

b) Item 3 shall be deleted.

7. Art. 153 shall be amended, as follows:

a) In paragraph 1, in the first sentence the words “placed under full guardianship” shall be deleted, and the second sentence shall be deleted.

b) In Art. 2 the second sentence shall be deleted.

8. In Art. 155, paragraph 3 the second sentence shall be deleted.

9. In Art. 156, paragraph 3 the words “or placed under full guardianship” shall be deleted.

10. In Art. 160, paragraph 1 the words “or placed under full guardianship” shall be deleted.

11. In Art. 164 paragraph 3 shall be deleted.

12. In Art. 172 the text of paragraph 1 shall become the main text, and paragraph 2 shall be deleted.

13. Art. 173 shall be amended, as follows:

a) Paragraph 2 shall be deleted.

b) In paragraph 3 the words “and 2” shall be deleted.

c) Paragraph 4 shall be deleted.

§ 6. The Civil Code of Procedure (prom. SG, issue 59 of 2007, amended issue 50 of 2008, amended by Judgment No 3 of the Constitutional Court of RB - issue 63 of 2008; issue 69 and 109 of 2008, issue 12, 19, 42; Judgment No 4 of the Constitutional Court of RB - issue 47 and 82 of 2009, issue 13, 100, Judgment No 15 of the Constitutional Court of RB - issue 5 of 2011; issue 45, 49 and 99 of 2012, issue 15 and issue 66 of 2013, issue 53 of 2014) shall be amended, as follows:

Art. 28 shall be amended, as follows:

a) In paragraph 2 the words “and those under partial guardianship” shall be deleted.

b) In paragraph 4 the words “and those under full guardianship” shall be deleted.

c) Paragraphs 5 and 6 shall be created and shall read

“(5) The persons in respect of whom support measures have been determined under the terms and following the procedure laid down in the Natural Persons and Support Measures Act or have been placed under guardianship under the terms and following the procedure laid down in the Persons and Family Code (repealed) shall perform court procedural actions in person.

(6) Legal non-profit persons acting for the public benefit shall have the right to step into a pending procedure as an interested party for the purpose of defending the person’s rights and interests under Art. 5”.

2. In Art. 106 in the heading and in the main text the words “placed under full guardianship” shall be deleted.

3. In Art. 177, in paragraph 2 in the first sentence the words “or placed under full guardianship”, and in the second sentence the words “place under partial guardianship” shall be deleted.

4. A new Chapter Twenty-eight shall be created:

Chapter Twenty-eights

“DETERMINATION OF SUPPORT MEASURES”

Art. 336 (1) Determination of support measures can be requested by means of a claim lodged to the district court exercising jurisdiction over the current address of the person by the person himself/herself, by the person’s first-degree relative, brother or sister, spouse, by a friend with whom a trusty relationship has been established, by the prosecutor or the supported decision-making body.

(2) In determining support measures the court shall be obliged to examine the measures under the Natural Persons and Support Measures Act in an exhaustive manner and in their order by assessing the possibility for an initial determination of less intensive measures.

(3) Where the person has been placed in a healthcare establishment, the court shall request data about his/her state.

(4) The claim under Art. 1 shall indicate the preferred support measures, and for what specific legal actions and for what purpose the determination thereof is requested.

Art. 337 The court shall hear the person in respect of whom the determination of a support measure is requested. Where the person is in a healthcare establishment or his/her health state does not allow him/her to attend in person the court hearing, the court shall be obliged to gather direct impressions of that person through personal contact, including a visit outside the court building.

Art. 338 (1) The court shall pronounce on the claim after hearing the person, his/her relatives and close acquaintances, and the persons under Art. 337, paragraph 4. Where this proves insufficient, the court shall proceed to gather other evidence.

(2) If needed, the court shall appoint an expert assessment and/or opinion by the provider of a social service for people with disabilities. The expert assessment and the opinion shall examine the person’s ability to understand the essence and the consequences from his/her decisions within the meaning of Art. 9, paragraph 2 of the Natural Persons and Support Measures Act.

(3) A court judgment must not be based only on a psychiatric expert examination or only on the medical perspective in discussing the case.

(4) After the judgment determining support measures becomes effective, the court shall notify it to the relevant supported decision-making body.

(5) No court fee shall be charged on the hearing of the case for determining a support measure, and the costs for expert assessments and opinions shall be paid from the state budget. If the claim is dismissed, the claimant shall pay the amount of the court fee, and the expenditures incurred within the procedure, including the expenditures made at the expense of the respondent. This rule shall not apply if the person himself/herself has request the determination of support measures for himself/herself.

Art. 338a The court procedure for determining a support measure shall observe the following principles:

1. Confidentiality shall be observed by hearing the case in camera, and publishing the judgments only after the data identifying the parties to the case have been deleted;
2. Appropriate conditions and environment for the person with disabilities shall be ensured;

3. The court shall act in an exhaustive and active manner;

4. Specialization shall be observed by ensuring that the case is heard by a judge who has been properly trained;

5. Respect shall be shown for the feelings and emotions of the person with disabilities and his/her way of communicating.

Art. 339 (1) It shall not be possible to deliver a judgment in absentia on the claim for determining a support measure.

(2) In its judgment the court shall determine a time limit within which the measures will be applied, which shall not exceed 2 years.

(3) In the final hearing of the case the court shall announce the date on which it will pronounce its judgment and from which the appeal time limit will run.

(4) The court shall deliver its judgment not later than two weeks from the final hearing of the case.

§7 The Social Assistance Act (prom. SG issue56 of 19 May 1998, amended SG issue45 of 30 April 2002, amended SG issue120 of 29 December 2002, amended SG issue18 of 28 February 2006, amended SG issue30 of 11 April 2006, amended SG issue105 of 22 December 2006, amended SG issue52 of 29 June 2007, amended SG issue 59 of 20 July 2007, amended SG issue58 of 27 June 2008, amended SG issue14 of 20 February 2009, amended SG issue 41 of 2 June 2009, amended SG issue74 of 15 September 2009, amended SG issue15 of 23 February 2010, amended SG issue 9 of 28 January 2011, amended SG issue 51 of 5 July 2011, amended SG issue32 of 24 April 2012, amended SG issue15 of 15 February 2013, amended SG issue 66 of 26 July 2013, amended SG issue98 of 28 November 2014r.) shall be amended to read:

1. Art.16 shall be amended, as follows:

a) paragraph 2 shall be amended to read:

(2) Social services shall be provided on the basis of an individual assessment of the needs and in conformity with the wishes and preferences of the person. Persons shall not be placed in specialized institutions and/or residential services against their will and preferences.

b) a new paragraph 3 shall be created and shall read:

(3) The referral of persons to the use of social services shall be done by the Social Assistance Directorates; the jurisdiction of the relevant Social Assistance Directorate shall not be determined by the existence of the person’s current address, it suffices that the Directorate is approached by means of a written application to that end by the person himself/herself or the body that is assigned such functions by the law.

c) a new paragraph 4 shall be created and shall read:

(4) The placement of a person in a social service – a residential one or a specialized institution – shall be done through the court. Till the court delivers its judgment, the Social Assistance Directorate shall proceed with temporary placement under an administrative procedure.

d) a new paragraph 5 shall be created and shall read:

(5) The acts issued by the head of the Social Assistance Directorate shall be subject to an appeal under the terms and following the procedure laid down in the Administrative Code of Procedure.

2. A new article 16a shall be created:

Placement through the court

Art. 16a. (1) The claims for placement in a social service – a residential one or a specialized institution – shall be within the jurisdiction of the regional court by the person's current address.

(2) In the proceedings under Art. 16a the court shall be entitled to collect evidence ex officio.

(3) The court shall immediately hear the claim in an open session with the participation of the bodies or persons lodging the claim, and with the participation of the person.

(4) The court shall pronounce on the claim within one month with a judgment which shall be notified to the parties and shall have immediate effect.

(5) The judgment under paragraph 4 must indicate the time limit for the placement.

(6) The judgment shall be subject to an appeal before the district court within a seven-day term. In the event of an appeal or an objection lodged, the court shall appoint the hearing of the case within a maximum term of seven days. The district court shall deliver a final judgment.

(7) The court may change the measure determined at the person's request, where such change is in the person's interest.

§ 16 In the Contracts and Obligations Act (prom. SG issue 275 of 1950, amended SG issue 69 of 1951, SG issue 92 of 1952, SG issue 85 of 1963, SG issue 27 of 1973, SG issue 16 of 1977, SG issue 28 of 1982, SG issue 30 of 1990, SG issue 12 and 56 of 1993, SG issue 83 and 104 of 1996, amended SG issue 83 and 103 of 1999, SG issue 34 of 2000, SG issue 19 of 2003, SG issue 42 and 43 of 2005, SG issue 36 of 2006, SG issue 59 and 92 of 2007, SG issue 50 of 2008) the following amendments are made:

1. In article 14 the words „or falling into a state that could be a reason to be put under guardianship“ shall be deleted
2. Article 27 is amended as follows:
“Article 27 Voidable are the contracts that are concluded by persons with measures, determined under the Physical Persons and Support Measures Act, if the contract requirements are not followed as well as the contracts that are concluded as a result of a mistake, fraud, intimidation or extremity“
3. Article 31 shall be deleted.
4. In article 41, par.1 the words “placed under full guardianship” shall be deleted.
5. In article 287 the words “placed under full guardianship” shall be deleted.
6. In article 291 the words “placed under full guardianship” shall be deleted

§ 55. (1) As from the date of entry into force of this Law any judgments regarding the placement of persons aged over 18 under guardianship shall cease to be effective from that date onward by virtue of the Law.

(2) The then effective guardianship and custodianship bodies shall be renamed into Supported Decision-making Bodies which shall be obliged, within 6 months from the entry into force of the Law to put in place a record of all the documents pertinent to the persons placed under guardianship.

(3) In case with respect to a person who was under guardianship till the entry into force of this Law the circumstances under Art. 9., paragraph 1 exist, and the need to take support measures or protective

measures under Chapter Four is established, the persons under Art. 15, paragraph 1 of this Law shall be obliged, in observance of the rules laid down in this Law, to take actions for ensuring the measures.

(4) In terms of the cases for placement under guardianship instituted by the entry into force of this Law, the court shall determine a time limit within which the parties shall bring their claims in line with the provisions of this Law. If the instructions are not fulfilled by the deadline, the procedure shall be terminated.

(5) Where a case is pending before a second-instance court or the Supreme Court of Cassation, the court shall terminate it and shall, thereafter, refer the case to the first-instance court for carrying out the procedural actions laid down in paragraph 4.

§ 56. The enforcement and application of this Law shall be monitored by an inter-agency group set up by the Minister of Justice. The group shall consist of representatives of the Ministry of Justice, the Ministry of Labor and Social Policy, the Ministry of Health, and the National Association of Municipalities. The working rules of the inter-agency group shall be regulated by an Order issued by the Minister of Justice. A report on the findings and results from the monitoring shall be drafted by the inter-agency group and submitted to the Council of Ministers five years after the entry into force of the Law.

§ 57. The Law shall be effective as from the date of its publication in the State Gazette.

Committee on the Rights of Persons with Disabilities

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General comment No. 1 (2014)

Article 12: Equal recognition before the law

I. Introduction

1. Equality before the law is a basic general principle of human rights protection and is indispensable for the exercise of other human rights. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights specifically guarantee the right to equality before the law. Article 12 of the Convention on the Rights of Persons with Disabilities further describes the content of this civil right and focuses on the areas in which people with disabilities have traditionally been denied the right. Article 12 does not set out additional rights for people with disabilities; it simply describes the specific elements that States parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

2. Given the importance of this article, the Committee facilitated interactive forums for discussions on legal capacity. From the very useful exchange on the provisions of article 12 by experts, States parties, disabled persons' organizations, non-governmental organizations, treaty monitoring bodies, national human rights institutions and United Nations agencies, the Committee found it imperative to provide further guidance in a general comment.

3. On the basis of the initial reports of various States parties that it has reviewed so far, the Committee observes that there is a general misunderstanding of the exact scope of the obligations of States parties under article 12 of the Convention. Indeed, 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. The aim of the present general comment is to explore the general obligations deriving from the various components of article 12.

4. The present general comment reflects an interpretation of article 12 which is premised on the general principles of the Convention, as outlined in article 3, namely, respect for the inherent dignity, individual autonomy — including the freedom to make one's own choices —, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; and respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

5. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities each specify that the right to equal recognition before the law is operative "everywhere". In other words, there are no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited. This is reinforced by article 4, paragraph 2, of

the International Covenant on Civil and Political Rights, which allows no derogation from this right, even in times of public emergency. Although an equivalent prohibition on derogation from the right to equal recognition before the law is not specified in the Convention on the Rights of Persons with Disabilities, the provision in the International Covenant covers such protection by virtue of article 4, paragraph 4, of the Convention, which establishes that the provisions of the Convention on the Rights of Persons with Disabilities do not derogate from existing international law.

6. The right to equality before the law is also reflected in other core international and regional human rights treaties. Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women guarantees women's equality before the law and requires the recognition of women's legal capacity on an equal basis with men, including with regard to concluding contracts, administering property and exercising their rights in the justice system. Article 3 of the African Charter on Human and Peoples' Rights provides for the right of every person to be equal before the law and to enjoy equal protection of the law. Article 3 of the American Convention on Human Rights enshrines the right to juridical personality and the right of every person to recognition as a person before the law.

7. States parties must holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others. Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.

8. Article 12 of the Convention affirms that all persons with disabilities have full legal capacity. Legal capacity has been prejudicially denied to many groups throughout history, including women (particularly upon marriage) and ethnic minorities. However, persons with disabilities remain the group whose legal capacity is most commonly denied in legal systems worldwide. The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights. It acquires a special significance for persons with disabilities when they have to make fundamental decisions regarding their health, education and work. The denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty.

9. All persons with disabilities, including those with physical, mental, intellectual or sensory impairments, can be affected by denial of legal capacity and substitute decision-making. However, persons with cognitive or psychosocial disabilities have been, and still are, disproportionately affected by substitute decision-making regimes and denial of legal capacity. The Committee reaffirms that a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12. All practices that in purpose or effect violate article 12 must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.

10. This general comment focuses primarily on the normative content of article 12 and the State obligations that emerge therefrom. The Committee will continue to carry out work in this area so as to provide further in-depth guidance on the rights and obligations deriving from article 12 in future concluding observations, general comments and other documents.

II. Normative content of article 12

Article 12, paragraph 1

11. Article 12, paragraph 1, reaffirms the right of persons with disabilities to be recognized as persons before the law. This guarantees that every human being is respected as a person possessing legal personality, which is a prerequisite for the recognition of a person's legal capacity.

Article 12, paragraph 2

12. Article 12, paragraph 2, recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all areas of life. Legal capacity includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships. The right to recognition as a legal agent is provided for in article 12, paragraph 5, of the Convention, which outlines the duty of States parties to "take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and ... ensure that persons with disabilities are not arbitrarily deprived of their property".

13. Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. Legal instruments such as the Universal Declaration of Human Rights (art. 6), the International Covenant on Civil and Political Rights (art. 16) and the Convention on the Elimination of All Forms of Discrimination Against Women (art. 15) do not specify the distinction between mental and legal capacity. Article 12 of the Convention on the Rights of Persons with Disabilities, however, makes it clear that "unsoundness of mind" and other discriminatory labels are not legitimate reasons for the denial of legal capacity (both legal standing and legal agency). Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.

14. Legal capacity is an inherent right accorded to all people, including persons with disabilities. As noted above, it consists of two strands. The first is legal standing to hold rights and to be recognized as a legal person before the law. This may include, for example, having a birth certificate, seeking medical assistance, registering to be on the electoral role or applying for a passport. The second is legal agency to act on those rights and to have those actions recognized by the law. It is this component that is frequently denied or diminished for persons with disabilities. For example, laws may allow persons with disabilities to own property, but may not always respect the actions taken by them in terms of buying and selling property. Legal capacity means that all people, including persons with disabilities, have legal standing and legal agency simply by virtue of being human. Therefore, both strands of legal capacity must be recognized for the right to legal capacity to be fulfilled; they cannot be separated. The concept of mental capacity is highly controversial in and of itself. Mental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity.

15. In most of the State party reports that the Committee has examined so far, the concepts of mental and legal capacity have been conflated so that where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed. This is decided simply on the basis of the diagnosis of an impairment (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person's decision-making skills are considered to be deficient (functional approach). The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.

Article 12, paragraph 3

16. Article 12, paragraph 3, recognizes that States parties have an obligation to provide persons with disabilities with access to support in the exercise of their legal capacity. States parties must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect.

17. Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making. Article 12, paragraph 3, does not specify what form the support should take. "Support" is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication. Support to persons with disabilities in the exercise of their legal capacity might include measures relating to universal design and accessibility – for example, requiring private and public actors, such as banks and financial institutions, to provide information in an understandable format or to provide professional sign language interpretation – in order to enable persons with disabilities to perform the legal acts required to open a bank account, conclude contracts or conduct other social transactions. Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences. For many persons with disabilities, the ability to plan in advance is an important form of support, whereby they can state their will and preferences which should be followed at a time when they may not be in a position to communicate their wishes to others. All persons with disabilities have the right to engage in advance planning and should be given the opportunity to do so on an equal basis with others. States parties can provide various forms of advance planning mechanisms to accommodate various preferences, but all the options should be non-discriminatory. Support should be provided to a person, where desired, to complete an advance planning process. The point at which an advance directive enters into force (and ceases to have effect) should be decided by the person and included in the text of the directive; it should not be based on an assessment that the person lacks mental capacity.

18. The type and intensity of support to be provided will vary significantly from one person to another owing to the diversity of persons with disabilities. This is in accordance with article 3 (d), which sets out “respect for difference and acceptance of persons with disabilities as part of human diversity and humanity” as a general principle of the Convention. At all times, including in crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected.

19. Some persons with disabilities only seek recognition of their right to legal capacity on an equal basis with others, as provided for in article 12, paragraph 2, of the Convention, and may not wish to exercise their right to support, as provided for in article 12, paragraph 3.

Article 12, paragraph 4

1. Article 12, paragraph 4, outlines the safeguards that must be present in a system of support in the exercise of legal capacity. Article 12, paragraph 4, must be read in conjunction with the rest of article 12 and the whole Convention. It requires States parties to create appropriate and effective safeguards for the exercise of legal capacity. The primary purpose of these safeguards must be to ensure the respect of the person’s rights, will and preferences. In order to accomplish this, the safeguards must provide protection from abuse on an equal basis with others.

2. Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the “best interpretation of will and preferences” must replace the “best interests” determinations. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The “best interests” principle is not a safeguard which complies with article 12 in relation to adults. The “will and preferences” paradigm must replace the “best interests” paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.

3. All people risk being subject to “undue influence”, yet this may be exacerbated for those who rely on the support of others to make decisions. Undue influence is characterized as occurring, where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation. Safeguards for the exercise of legal capacity must include protection against undue influence; however, the protection must respect the rights, will and preferences of the person, including the right to take risks and make mistakes.

Article 12, paragraph 5

23. Article 12, paragraph 5, requires States parties to take measures, including legislative, administrative, judicial and other practical measures, to ensure the rights of persons with disabilities with respect to financial and economic affairs, on an equal basis with others. Access to finance and property has traditionally been denied to persons with disabilities based on the medical model of disability. That approach of denying persons with disabilities legal capacity for financial matters must be replaced with support to exercise legal capacity, in accordance with article 12, paragraph 3. In the same way as gender may not be used as the basis for discrimination in the areas of finance and property,¹ neither may disability.

III. Obligations of States parties

1. States parties have an obligation to respect, protect and fulfil the right of all persons with disabilities to equal recognition before the law. In this regard, States parties should refrain from any action that deprives persons with disabilities of the right to equal recognition before the law. States

¹ See the Convention on the Elimination of All Forms of Discrimination against Women, art. 13 (b).

parties should take action to prevent non-State actors and private persons from interfering with the ability of persons with disabilities to realize and enjoy their human rights, including the right to legal capacity. One of the aims of support in the exercise of legal capacity is to build the confidence and skills of persons with disabilities so that they can exercise their legal capacity with less support in the future, if they so wish. States parties have an obligation to provide training for persons receiving support so that they can decide when less support is needed or when they no longer require support in the exercise of their legal capacity.

2. In order to fully recognize “universal legal capacity”, whereby all persons, regardless of disability or decision-making skills, inherently possess legal capacity, States parties must abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect.²

3. In its concluding observations on States parties’ initial reports, in relation to article 12, the Committee on the Rights of Persons with Disabilities has repeatedly stated that States parties must “review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person’s autonomy, will and preferences”.

4. Substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where (i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences.

5. States parties’ obligation to replace substitute decision-making regimes by supported decision-making requires both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives. 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.

6. A supported decision-making regime comprises various support options which give primacy to a person’s will and preferences and respect human rights norms. It should provide protection for all rights, including those related to autonomy (right to legal capacity, right to equal recognition before the law, right to choose where to live, etc.) and rights related to freedom from abuse and ill-treatment (right to life, right to physical integrity, etc.). Furthermore, systems of supported decision-making should not over-regulate the lives of persons with disabilities. While supported decision-making regimes can take many forms, they should all incorporate certain key provisions to ensure compliance with article 12 of the Convention, including the following:

(a) Supported decision-making must be available to all. A person’s level of support needs, especially where these are high, should not be a barrier to obtaining support in decision-making;

(b) All forms of support in the exercise of legal capacity, including more intensive forms of support, must be based on the will and preference of the person, not on what is perceived as being in his or her objective best interests;

(c) A person’s mode of communication must not be a barrier to obtaining support in decision-making, even where this communication is non-conventional, or understood by very few people;

(d) Legal recognition of the support person(s) formally chosen by a person must be available and

² See the Convention on the Rights of Persons with Disabilities, art. 2, in conjunction with art. 5.

accessible, and States have an obligation to facilitate the creation of support, particularly for people who are isolated and may not have access to naturally occurring support in the community. This must include a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge the action of a support person if they believe that the support person is not acting in accordance with the will and preferences of the person concerned;

(e) In order to comply with the requirement, set out in article 12, paragraph 3, of the Convention, for States parties to take measures to “provide access” to the support required, States parties must ensure that support is available at nominal or no cost to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of legal capacity;

(f) Support in decision-making must not be used as justification for limiting other fundamental rights of persons with disabilities, especially the right to vote, the right to marry, or establish a civil partnership, and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty;

(g) The person must have the right to refuse support and terminate or change the support relationship at any time;

(h) Safeguards must be set up for all processes relating to legal capacity and support in exercising legal capacity. The goal of safeguards is to ensure that the person’s will and preferences are respected.

(i) The provision of support to exercise legal capacity should not hinge on mental capacity assessments; new, non-discriminatory indicators of support needs are required in the provision of support to exercise legal capacity.

30. The right to equality before the law has long been recognized as a civil and political right, with roots in the International Covenant on Civil and Political Rights. Civil and political rights attach at the moment of ratification and States parties are required to take steps to immediately realize those rights. As such, the rights provided for in article 12 apply at the moment of ratification and are subject to immediate realization. The State obligation, provided for in article 12, paragraph 3, to provide access to support in the exercise of legal capacity is an obligation for the fulfilment of the civil and political right to equal recognition before the law. “Progressive realization” (art. 4, para. 2) does not apply to the provisions of article 12. Upon ratifying the Convention, States parties must immediately begin taking steps towards the realization of the rights provided for in article 12. Those steps must be deliberate, well-planned and include consultation with and meaningful participation of people with disabilities and their organizations.

IV. Relationship with other provisions of the Convention

Recognition of legal capacity is inextricably linked to the enjoyment of many other human rights provided for in the Convention on the Rights of Persons with Disabilities, including, but not limited to, the right to access justice (art. 13); the right to be free from involuntary detention in a mental health facility and not to be forced to undergo mental health treatment (art. 14); the right to respect for one’s physical and mental integrity (art. 17); the right to liberty of movement and nationality (art. 18); the right to choose where and with whom to live (art. 19); the right to freedom of expression (art. 21); the right to marry and found a family (art. 23); the right to consent to medical treatment (art. 25); and the right to vote and stand for election (art. 29). Without recognition of the person as a person before the law, the ability to assert, exercise and enforce those rights, and many other rights provided for in the Convention, is significantly compromised.

Article 5: Equality and non-discrimination

1. To achieve equal recognition before the law, legal capacity must not be denied discriminatorily. Article 5 of the Convention guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability. Discrimination on the basis of disability is defined in article 2 of the Convention as “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms”. Denial of legal capacity having the purpose or effect of interfering with the right of persons with disabilities to equal recognition before the law is a violation of articles 5 and 12 of the Convention. States have the ability to restrict the legal capacity of a person based on certain circumstances, such as bankruptcy or criminal conviction. However, the right to equal recognition before the law and freedom from discrimination requires that when the State denies legal capacity, it must be on the same basis for all persons. Denial of legal capacity must not be based on a personal trait such as gender, race, or disability, or have the purpose or effect of treating the person differently.

2. Freedom from discrimination in the recognition of legal capacity restores autonomy and respects the human dignity of the person in accordance with the principles enshrined in article 3 (a) of the Convention. Freedom to make one’s own choices most often requires legal capacity. Independence and autonomy include the power to have one’s decisions legally respected. The need for support and reasonable accommodation in making decisions shall not be used to question a person’s legal capacity. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity (art. 3 (d)) is incompatible with granting legal capacity on an assimilationist basis.

3. Non-discrimination includes the right to reasonable accommodation in the exercise of legal capacity (art. 5, para. 3). Reasonable accommodation is defined in article 2 of the Convention as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”. The right to reasonable accommodation in the exercise of legal capacity is separate from, and complementary to, the right to support in the exercise of legal capacity. States parties are required to make any necessary modifications or adjustments to allow persons with disabilities to exercise their legal capacity, unless it is a disproportionate or undue burden. Such modifications or adjustments may include, but are not limited to, access to essential buildings such as courts, banks, social benefit offices and voting venues; accessible information regarding decisions which have legal effect; and personal assistance. The right to support in the exercise of legal capacity shall not be limited by the claim of disproportionate or undue burden. The State has an absolute obligation to provide access to support in the exercise of legal capacity.

Article 6: Women with disabilities

35. Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women provides for women’s legal capacity on an equal basis with men, thereby acknowledging that recognition of legal capacity is integral to equal recognition before the law: “States parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals” (para. 2). This provision applies to all women, including women with disabilities. The Convention on the Rights of Persons with Disabilities recognizes that women with disabilities may be subject to multiple and intersectional forms of discrimination based on gender and disability. For example, women with disabilities are subjected to high rates of forced sterilization, and are often denied control of their reproductive health and decision-

making, the assumption being that they are not capable of consenting to sex. Certain jurisdictions also have higher rates of imposing substitute decision-makers on women than on men. Therefore, it is particularly important to reaffirm that the legal capacity of women with disabilities should be recognized on an equal basis with others.

Article 7: Children with disabilities

36. While article 12 of the Convention protects equality before the law for all persons, regardless of age, article 7 of the Convention recognizes the developing capacities of children and requires that “in all actions concerning children with disabilities, the best interests of the child ... be a primary consideration” (para. 2) and that “their views [be] given due weight in accordance with their age and maturity” (para. 3). To comply with article 12, States parties must examine their laws to ensure that the will and preferences of children with disabilities are respected on an equal basis with other children.

Article 9: Accessibility

37. The rights provided for in article 12 are closely tied to State obligations relating to accessibility (art. 9) because the right to equal recognition before the law is necessary to enable persons with disabilities to live independently and participate fully in all aspects of life. Article 9 requires the identification and elimination of barriers to facilities or services open or provided to the public. Lack of accessibility to information and communication and inaccessible services may constitute barriers to the realization of legal capacity for some persons with disabilities, in practice. Therefore, States parties must make all procedures for the exercise of legal capacity, and all information and communication pertaining to it, fully accessible. States parties must review their laws and practices to ensure that the right to legal capacity and accessibility are being realized.

Article 13: Access to justice

1. States parties have an obligation to ensure that persons with disabilities have access to justice on an equal basis with others. The recognition of the right to legal capacity is essential for access to justice in many respects. In order to seek enforcement of their rights and obligations on an equal basis with others, persons with disabilities must be recognized as persons before the law with equal standing in courts and tribunals. States parties must also ensure that persons with disabilities have access to legal representation on an equal basis with others. This has been identified as a problem in many jurisdictions and must be remedied, including by ensuring that persons who experience interference with their right to legal capacity have the opportunity to challenge such interference — on their own behalf or with legal representation – and to defend their rights in court. Persons with disabilities have often been excluded from key roles in the justice system as lawyers, judges, witnesses or members of a jury.

2. Police officers, social workers and other first responders must be trained to recognize persons with disabilities as full persons before the law and to give the same weight to complaints and statements from persons with disabilities as they would to non-disabled persons. This entails training and awareness-raising in these important professions. Persons with disabilities must also be granted legal capacity to testify on an equal basis with others. Article 12 of the Convention guarantees support in the exercise of legal capacity, including the capacity to testify in judicial, administrative and other legal proceedings. Such support could take various forms, including recognition of diverse communication methods, allowing video testimony in certain situations, procedural accommodation, the provision of professional sign language interpretation and other assistive methods. The judiciary must also be trained and made

aware of their obligation to respect the legal capacity of persons with disabilities, including legal agency and standing.

Articles 14 and 25: Liberty, security and consent

1. Respecting the right to legal capacity of persons with disabilities on an equal basis with others includes respecting the right of persons with disabilities to liberty and security of the person. The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention. States parties must refrain from such practices and establish a mechanism to review cases whereby persons with disabilities have been placed in a residential setting without their specific consent.

2. The right to enjoyment of the highest attainable standard of health (art. 25) includes the right to health care on the basis of free and informed consent. States parties have an obligation to require all health and medical professionals (including psychiatric professionals) to obtain the free and informed consent of persons with disabilities prior to any treatment. In conjunction with the right to legal capacity on an equal basis with others, States parties have an obligation not to permit substitute decision-makers to provide consent on behalf of persons with disabilities. All health and medical personnel should ensure appropriate consultation that directly engages the person with disabilities. They should also ensure, to the best of their ability, that assistants or support persons do not substitute or have undue influence over the decisions of persons with disabilities.

Articles 15, 16 and 17: Respect for personal integrity and freedom from torture, violence, exploitation and abuse

42. As has been stated by the Committee in several concluding observations, forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law and an infringement of the rights to personal integrity (art. 17); freedom from torture (art. 15); and freedom from violence, exploitation and abuse (art. 16). This practice denies the legal capacity of a person to choose medical treatment and is therefore a violation of article 12 of the Convention. States parties must, instead, respect the legal capacity of persons with disabilities to make decisions at all times, including in crisis situations; must ensure that accurate and accessible information is provided about service options and that non-medical approaches are made available; and must provide access to independent support. States parties have an obligation to provide access to support for decisions regarding psychiatric and other medical treatment. Forced treatment is a particular problem for persons with psychosocial, intellectual and other cognitive disabilities. States parties must abolish policies and legislative provisions that allow or perpetrate forced treatment, as it is an ongoing violation found in mental health laws across the globe, despite empirical evidence indicating its lack of effectiveness and the views of people using mental health systems who have experienced deep pain and trauma as a result of forced treatment. The Committee recommends that States parties ensure that decisions relating to a person's physical or mental integrity can only be taken with the free and informed consent of the person concerned.

Article 18: Nationality

43. Persons with disabilities have the right to a name and registration of their birth as part of the right to recognition everywhere as a person before the law (art. 18, para. 2). States parties must take

the necessary measures to ensure that children with disabilities are registered at birth. This right is provided for in the Convention on the Rights of the Child (art. 7); however, children with disabilities are disproportionately likely not to be registered as compared with other children. This not only denies them citizenship, but often also denies them access to health care and education, and can even lead to their death. Since there is no official record of their existence, their death may occur with relative impunity.

Article 19: Living independently and being included in the community

44. To fully realize the rights provided for in article 12, it is imperative that persons with disabilities have opportunities to develop and express their will and preferences, in order to exercise their legal capacity on an equal basis with others. This means that persons with disabilities must have the opportunity to live independently in the community and to make choices and to have control over their everyday lives, on an equal basis with others, as provided for in article 19.

45. Interpreting article 12, paragraph 3, in the light of the right to live in the community (art. 19) means that support in the exercise of legal capacity should be provided through a community-based approach. States parties must recognize that communities are assets and partners in the process of learning what types of support are needed in the exercise of legal capacity, including raising awareness about different support options. States parties must recognize the social networks and naturally occurring community support (including friends, family and schools) of persons with disabilities as key to supported decision-making. This is consistent with the Convention's emphasis on the full inclusion and participation of persons with disabilities in the community.

46. The segregation of persons with disabilities in institutions continues to be a pervasive and insidious problem that violates a number of the rights guaranteed under the Convention. The problem is exacerbated by the widespread denial of legal capacity to persons with disabilities, which allows others to consent to their placement in institutional settings. The directors of institutions are also commonly vested with the legal capacity of the persons residing therein. This places all power and control over the person in the hands of the institution. In order to comply with the Convention and respect the human rights of persons with disabilities, deinstitutionalization must be achieved and legal capacity must be restored to all persons with disabilities, who must be able to choose where and with whom to live (art. 19). A person's choice of where and with whom to live should not affect his or her right to access support in the exercise of his or her legal capacity.

Article 22: Privacy

47. Substitute decision-making regimes, in addition to being incompatible with article 12 of the Convention, also potentially violate the right to privacy of persons with disabilities, as substitute decision-makers usually gain access to a wide range of personal and other information regarding the person. In establishing supported decision-making systems, States parties must ensure that those providing support in the exercise of legal capacity fully respect the right to privacy of persons with disabilities.

Article 29: Political participation

1. Denial or restriction of legal capacity has been used to deny political participation, especially the right to vote, to certain persons with disabilities. In order to fully realize the equal recognition of legal capacity in all aspects of life, it is important to recognize the legal capacity of persons with disabilities in public and political life (art. 29). This means that a person's decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote, the right to stand for election and the right to serve as a member of a jury.

2. States parties have an obligation to protect and promote the right of persons with disabilities to access the support of their choice in voting by secret ballot, and to participate in all elections and referendums without discrimination. The Committee further recommends that States parties guarantee the right of persons with disabilities to stand for election, to hold office effectively and to perform all public functions at all levels of government, with reasonable accommodation and support, where desired, in the exercise of their legal capacity.

V. Implementation at the national level

50. In the light of the normative content and obligations outlined above, States parties should take the following steps to ensure the full implementation of article 12 of the Convention on the Rights of Persons with Disabilities:

(a) Recognize persons with disabilities as persons before the law, having legal personality and legal capacity in all aspects of life, on an equal basis with others. This requires the abolition of substitute decision-making regimes and mechanisms that deny legal capacity and which discriminate in purpose or effect against persons with disabilities. It is recommended that States parties create statutory language protecting the right to legal capacity on an equal basis for all;

(b) Establish, recognize and provide persons with disabilities with access to a broad range of support in the exercise of their legal capacity. Safeguards for such support must be premised on respect for the rights, will and preferences of persons with disabilities. The support should meet the criteria set out in paragraph 29 above on the obligations of States parties to comply with article 12, paragraph 3, of the Convention;

(c) Closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations, in the development and implementation of legislation, policies and other decision-making processes that give effect to article 12.

51. The Committee encourages States parties to undertake or devote resources to the research and development of best practices respecting the right to equal recognition of the legal capacity of persons with disabilities and support in the exercise of legal capacity.

52. States parties are encouraged to develop effective mechanisms to combat both formal and informal substitute decision-making. To this end, the Committee urges States parties to ensure that persons with disabilities have the opportunity to make meaningful choices in their lives and develop their personalities, to support the exercise of their legal capacity. This includes, but is not limited to, opportunities to build social networks; opportunities to work and earn a living on an equal basis with others; multiple choices for place of residence in the community; and inclusion in education at all levels.

SUMMARY
on
THE JUDGEMENT OF IV CHAMBER OF THE EUROPEAN COURT OF HUMAN RIGHTS IN CASE BROUGHT BY APPLICATION Nº 25820/07, SUBMITTED BY STEFAN NIKOLOV STANKOV AGAINST THE REPUBLIC OF BULGARIA

The hearing was held on 17 March 2015, Strasbourg

This summary is intended to give general information on the judgment in the case "Stefan Stankov vs. Bulgaria" before the European Court of Human Rights. This judgement is related to the application of the provisions of the United Nations Convention on the Rights of Persons with Disabilities, ratified and entered into force in the Republic of Bulgaria. The judgement shows that the ratification of the UN Convention on the Rights of Persons with Disabilities by the Bulgarian state has not yet brought its domestic legislation in accordance with the requirements of the Convention.

THE FACTS (1999 – 2012)

The applicant Stefan Stankov, born in 1958 in Popovo, suffers from a mental disorder which requires medical treatment and hospitalization in a psychiatric hospital. After his father's death he remained to live with his mother. A Public Prosecutor, at the request of his mother, applied to the District Court in Targoviste with a request to place Stankov under full guardianship. The District Court delivered a judgement but it put Stankov under partial guardianship. According to the court's reasoning Stankov suffers from schizophrenia, leading to a change in personality and this mental health problem gets the applicant in a state which makes him unable to take care of his own affairs and interests. But it also noted that there had been periods of remission and that the state of Stankov is not so severe as to require placing him under full guardianship. The district judge, after taking into account the forensic psychiatric experts' opinion and hearing Stankov, stated that it is in his interest to be placed under partial guardianship. His mother was appointed as his custodian.

In 1999, after an appeal signed by Stankov's mother, who did not have the capacity to be his legal representative (author's note: *the mother had been appointed a custodian and therefore she did not have the right to sign alone documents for placement on behalf of and in the name of the person. In this sense, the custodian is not a "legal representative" with powers similar to that of a guardian.*), he was forcibly placed in the social care home for adults with mental disorders in the village of Dragash voyvoda, district of Pleven. A contract for placement in a social care home, concluded on 14 August 2002 between the applicant's mother and the home in Dragash voyvoda, was presented on the case. On the same day the director of the home requested the permission of the social services to place Stankov, so that he was granted social allowance and signed the application stating himself as the legitimate representative of Stankov. The social questionnaire, attached to the application of the director, stated that Stankov was a sociable person and could cope independently in everyday life, that there was no information available about the possibility of his close relatives taking care of him and that he had no connection with them. The

questionnaire concluded that "it is necessary for him to continue to benefit from the services in Dragash voyvoda".

The director of the home informed Stankov's mother with a letter of 20 September 2002 about the possible limitation on the reception capacity of the social care home and invited her to come and discuss opportunities for the reintegration of her son in a family environment. Stankov's mother failing to answer tacitly refused to take him out of the home.

On 26 September, 2002 Stankov was transferred to the social care home for adults with mental deficiency in the village of Rusokastro, district of Burgas.

Stankov's mother authorized with a notarized power of attorney a social worker from the home in Rusokastro with her custodial powers to dispose of his disability pension in order to meet his costs for food, clothing or other current needs, and to represent him to third parties.

After the transfer of the applicant the director of the home in Rusokastro submitted a proposal to the guardianship and custody authority for constitution of a Board of Trustees for Stankov. This authority appointed again the applicant's mother as his custodian with a decision of 18 November 2002.

On 3 August 2006 the applicant Stankov sent to the director of the home in Rusokastro a written appeal to be move to another building. His wish was to be closer to his family and his native home and he believed that the care provided in home did not meet his needs.

On 17 March 2008 the director of the home in Rusokastro was named the new custodian of Stankov with decision of the guardianship and custody authority. When the management of the home was changed a new decision of the authority of 1 September 2009 appointed the new director of the home as the custodian of the applicant.

- **Assessment of the social competence of the applicant during his stay in the home in Rusokastro and conclusions of the psychiatric report drawn up at the request of Stankov's lawyer**

On 26 November 2005 on the initiative of Stankov's lawyer he was examined by a psychiatrist who prepared a report. It states that the applicant is a calm person, communicates easily, understands well the subject of the analysis and is responsive. The doctor finds that it is possible to assume that Stankov suffers from schizophrenia whose last episode dates back to more than 10 years. On the one hand, it was clear that the applicant had unstable behaviour in the past. On the other hand, as stated in the judgment of 21 May 1999 and in other medical certificates, this condition had not been constant, but sporadic and with long periods of remission. The psychiatrist stated that during the examination Stankov undoubtedly was in a state of remission, which allowed him to take care of himself in an independent way despite the diagnosis. He added that the applicant posed no danger to others.

On 27 November 2006 a social worker from home in Rusokastro sent a letter to the applicant's brother-in-law to take care of Stankov in a family environment. The letter states that social allowance will be granted to him in this respect – in providing assistance with a personal assistant or social worker or home help.

On 19 September, 2007 a special commission was formed to carry out an appraisal of the situation of each of the residents in the home in Rusokastro, to draw up a list of twelve people who can benefit from the service "Sheltered Housing". Among the names was that of Stefan Stankov.

In 2011 a similar commission was formed again. The Commission with a decision dated 13 January 2011 drew up a list of 33 people, including the applicant, for whom it was necessary to identify appropriate measures for rehabilitation and return to a family environment, promoting the improvement of their personal contacts.

On 20 February 2012 an employee from the home sent a letter to Stankov's mother asking her to take care of her son in a family environment, but judging by the files on the case it seems no response to this letter was received.

- **The applicant's attempts to obtain release from custody (partial guardianship)**

On 29 June, 2006 Stankov through his lawyer filed a request with the District Prosecutor's Office to appeal to the District Court to restore his legal capacity to act on the grounds that his health allows him to take care of his own interests. On 09 August 2006, the prosecutor denied the request to bring an action for annulment of the guardianship. He particularly stressed that under the applicable law Stankov should first turn to his custodian and only if he/she refused to initiate the procedure, he could request the assistance of the prosecution. The prosecutor noted that the psychiatric assessment of 26 November 2005 was not prepared in accordance with the legal procedure and therefore could not serve as evidence in the proceedings for annulment of the guardianship. Finally, the prosecutor stated that the request should not be addressed to him and furthermore it was not based on valid evidence.

RELEVANT DOMESTIC LAW AND PRACTICE

Applicable domestic law, involving: a) the legal status of a person under partial guardianship and his/her representation before the courts; b) the procedure for placement under partial guardianship; c) review of the measures taken by the custodian and possibility of replacement; d) the procedure for restoration of legal capacity to act; e) the validity of contracts signed by representatives of persons with disability; f) the place of residence of legally incapacitated persons; g) the placement of legally incapacitated persons in social care homes for adults with mental disorders; h) the appointment of an ad hoc representative in the event of a conflict of interests; i) the arrest by the police under the Ministry of the Interior Act 2006 was discussed in detail in the judgment "Stankov vs. Bulgaria" [GC] (no 36760/06, §§ 42-61, et 68-69, 17 janvier 2012). In terms of item "h)" it should be noted that the national courts have heard a claim for change from full guardianship into partial with an ad hoc representative (court decision of 05.05.2011 on civil case № 2110/2010, SCC), and claim for determination of the place of residence of persons placed under full guardianship (court decision of 31.08.2012 on civil case № 459/2012, District Court-Varna),

The rules of the national law applicable in the matter of State liability for unlawful damage (ibidem, § 62-67) are also summarized in the same case...

RELEVANT INTERNATIONAL INSTRUMENTS

The relevant provisions of the Convention on the Rights of Persons with Disabilities (CRPD), adopted by the UN General Assembly on 13 December 2006. (Resolution A/RES/61/106) and ratified by Bulgaria on 26 January 2012 and Recommendation No R (99) 4 of the Committee of Ministers of the Council of Europe on the principles concerning the legal protection of adults deprived

Furthermore, in a document of 15 May 2003 entitled "Où sont les hommes de Dragash voyvoda?" (author's note "Where are the men of Dragash voyvoda?"), Amnesty International noted that because of the closing of Dragash voyvoda fifteen men with schizophrenia were transferred into the home in Rusokastro which is actually a centre where people with deficiency in their intellectual development, accompanied in some cases, with physical or sensory disabilities are placed. According to Amnesty International, the authorities have made this transfer without taking into account the specific needs of the people suffering from various diseases and therefore did not ensure the physical safety and psychological well-being of individuals through customized care.

of rights (adopted on 23 February, 1999), and the relevant parts of the reports from the visits of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in Bulgaria, were also summarized in "Stanev" judgment, §§ 72 -87.

THE LAW

- **Alleged violation of Art. 5, § 1 of the Convention**

The European Court of Human Rights noted that contrary to the requirements of the domestic law, Stankov was not invited to express his opinion regarding his placement in Dragash voyvoda and his transfer to the home in Rusokastro. However, he was not informed about the length of his stay in Dragash voyvoda. **...The Court has already opined that the fact that a person lacks legal capacity does not necessarily mean that he/she is unable to comprehend his/her situation. (Chtoukatourov c. Russie, no 44009/05, § 108, CEDH 2008, and Stanev, § 130).** In this particular case the national law places considerable weight on the will of the person concerned who, according to the court, completely understood his situation. The Court also acknowledged that even if Stankov had not explicitly expressed his objections to the placement; he demonstrated this through his attempted escapes from Dragash voyvoda.

As in "Stanev" the Court concluded that given the involvement of the responsible authorities in the placement of Stankov and in view of the regime for leaving the home, the duration of the measure and the absence of explicit consent of the applicant **the present case could be regarded as deprivation of liberty within the meaning of Article 5(1).**

- **Alleged violation of Art. 5, § 4 of the Convention**

In finding a violation of Art. 5, § 4 the Court referred to its judgement in "Stanev" where it has found that the applicable Bulgarian law did not afford the applicant an accessible judicial remedy capable of giving rise to a direct review of the lawfulness of his placement in a social care home for people with mental health problems (Stanev, § 177).

The court found that in fact Bulgarian courts were not involved in the placement of Stankov at any time and in any form and that the national law does not provide a mechanism for automatic and periodic judicial oversight of placement of people in social care homes for people with mental disorders. Furthermore - as the placement of the applicant is not viewed as a deprivation of liberty in Bulgarian law there is no provision for any domestic legal remedies by which to challenge its lawfulness in terms of deprivation of liberty (Stanev, § 172). In addition, the remedies against acts of guardianship and custody authorities stipulated in the Family Code and by which the Government went were deemed inadequate in the context of art. 5, paragraph 4 of the Convention (Stanev, §§ 174-177).

On the grounds of the above reasons the Court recognized, as in Stanev, that the provisions of Art. 5, paragraph 4 of the Convention were violated

- **Alleged violation of Art. 5, § 5 of the Convention**

The Court considered the theoretical possibility, given by the amendments to Art. 2 of the State Responsibility for Damage Act, the applicant, for whom a violation of Art. 5, paragraph 1 and paragraph 4 of the Convention was acknowledged, to claim damages before the national courts. However, the Court was not convinced that these amendments might meet the demands of the claim for compensation within the meaning of Art. 5, paragraph 5. In fact, it appeared that national courts constantly accepted that the amendments relating to the liability provisions of the state provide a substantive right to compensation

and are not retroactive (Goranova-Karaeneva, § 62 First Sofia Commodities EOOD et Paragh, § 320.). Therefore, for the Court it seemed unlikely that the national courts would award compensation for events that occurred in the period between 1999 and 2012.).

In his appeal Stankov alleged violation of Art. 6 of the Convention due to the fact that Bulgarian law does not provide for bringing an action for recovery of the legal capacity to act. The relevant parts of the provision of Art. 6 read as follows:

„In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Thus, the applicant challenged access to judicial review of his legal status, which allegation is the basis of his claim under Art. 6, paragraph 1. According to it Bulgarian legislation does not meet the requirements of that provision.

● The Court's assessment

The applicable principles of court proceedings are presented in the “Stanev” judgment. The Court reached the following conclusions on it which apply to the present case:

237. *With regard to the Supreme Court's 1980 decision (...), the Court observes that, although the fourth sentence of paragraph 10 of the decision, read in isolation, might give the impression that a person under partial guardianship has direct access to a court, the Supreme Court explains further on that, where the guardian of a partially incapacitated person and the guardianship authority refuse to institute proceedings for restoration of legal capacity, the person concerned may request the public prosecutor to do so. In the Court's view, the need to seek the intervention of the public prosecutor is scarcely reconcilable with direct access to court for persons under partial guardianship in so far as the decision to intervene is left to the prosecutor's discretion. It follows that the Supreme Court's 1980 decision cannot be said to have clearly affirmed the existence of such access in Bulgarian law.*

...

240. *The Court would emphasise that, as far as access to court is concerned, **domestic law makes no distinction between those who are entirely deprived of legal capacity and those who, like the applicant, are only partially incapacitated.** Moreover, domestic legislation does not provide for any possibility of automatic periodic review of whether the grounds for placing a person under guardianship remain valid. Lastly, in the applicant's case the measure in question was not limited in time.*

241. *Admittedly, the right of access to the courts is not absolute and requires by its very nature that the State should enjoy a certain margin of appreciation in regulating the sphere under examination (Ashingdane, cited above, § 57). In addition, the Court acknowledges that restrictions on a person's procedural rights, even where the person has been only partially deprived of legal capacity, may be justified for the person's own protection, the protection of the interests of others and the proper administration of justice. However, the importance of exercising these rights will vary according to the purpose of the action which the person concerned intends to bring before the courts. **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** (see also Shtukaturrov, cited above, § 71). **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. It follows that such persons should in principle enjoy direct access to the courts in this sphere.***

242. *The Court considers that it would not be incompatible with Article 6 for national legislation to provide for certain restrictions on access to court in this sphere, with the sole aim of ensuring that the courts are not overburdened with excessive and manifestly ill-founded applications. **Nevertheless, it seems clear that this problem may be solved by other, less restrictive means than automatic denial of direct access, for example by limiting the frequency with which applications may be made or introducing a system for prior examination of their admissibility on the basis of the file.***

243. *The Court further observes that **eighteen of the twenty national legal systems studied in this context provide for direct access to the courts for any partially incapacitated persons wishing to have their status reviewed. In seventeen States such access is open even to those declared fully incapable (see paragraphs 88-90).** This indicates that there is now a trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity.*

244. *The Court is also obliged to note the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible. It refers in this connection to the **United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities and to Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults, which recommend that adequate procedural safeguards be put in place to protect legally incapacitated persons to the greatest extent possible, to ensure periodic reviews of their status and to make appropriate remedies available (see paragraphs 72-73).***

245. *In the light of the foregoing, in particular the trends emerging in national legislation and the relevant international instruments, the Court considers that Article 6 § 1 of the Convention must be interpreted as guaranteeing in principle that anyone who has been declared partially incapable, as is the applicant's case, has direct access to a court to seek restoration of his or her legal capacity..*

246. *In the instant case the Court has observed that direct access of this kind is not guaranteed with a sufficient degree of certainty by the relevant Bulgarian legislation. **That finding is sufficient for it to conclude that there has been a violation of Article 6 § 1 of the Convention in respect of the applicant.***

The Court sees no significant differences between the facts of “Stanev” and the case brought by Stefan Stankov. **Applicable law, being the same as that in “Stanev” and as far as the Bulgarian state did not prove that the domestic courts examined the applications submitted by persons under partial guardianship to restore their capacity, the Court can only declare that the legal framework in Bulgaria does not sufficiently guarantee enough safeguards for direct access to the court.**

The Court reiterates that it has already given recommendations to the respondent State to envisage the necessary general measures to ensure effective direct access to court of persons under partial guardianship. (“Stanev”, § 258). If the Bulgarian state indicates that reform in this direction is under development, it is clear that to date the current state of law and practice has remained unchanged. The Court therefore cannot resume the recommendations already made.

FOR THESE REASONS, THE COURT

Ruling on an equitable basis holds that the respondent State is to pay the applicant within three months from the date on which the judgement becomes final in accordance with Article 44, paragraph 2 of the Convention the following amounts to be converted into Bulgarian leva at the rate applicable at the date of settlement:

- EUR 15,000 (fifteen thousand Euros) in respect of non-pecuniary damage plus any tax that may be chargeable;
- EUR 6 000 (six thousand Euros) plus any additional taxes owed by the applicant in respect of costs and expenses payable directly into the bank account of Mental Disability Advocacy Centre;

Author's Note. The judgment of the Court on the case of Stankov against Bulgaria was signed with the dissenting opinions of Judges Kalaydjieva and Wojtyczek.

JUDICIAL DECISION

04 November 2013

IN THE NAME OF THE PEOPLE

Sofia District Court, Civil Division, V matrimonial panel, in its open session dated 04 of October in year two thousand and thirteen in the body of:

Judge: XXXXXXXXX

with clerk Iovka Panaiotova, in the presence of the prosecuting magistrate Stanislav Stoikov from Sofia District Prosecutor's office after hearing civil case # 16532 as per the record for 2012, reported by judge Micheva-Ruseva before passing its decision has taken into consideration the following

The plaintiffs xxxxxxxxxxxxxxxx and xxxxxxxxxxxxxxxx, both from the city of Sofia, lodged a claim against xxxxxxxxxxxxxxxx from the city of Sofia on the grounds of art. 5 of the People and Family Act in relation to art.336, para. 1 of the Civil and Procedural Code for putting him under guardianship.

The plaintiffs allege that the defendant is their son, who for many years suffered from mental illness and was repeatedly placed for psychiatric treatment. He receives disability pension that he spends on unnecessary items such as expensive mobile phones and then refuses to pay for them in instalments. He beat his mother and stabbed his father. The plaintiffs plead the defendant to be placed under guardianship and they to be appointed for his guardians.

The defendant received a copy of the claim with the annexes herewith in the statutory one month's notice and did not file a counterclaim.

The representative of the Sofia District Prosecutor's Office expresses the opinion that the claim is justifiable and thinks that the defendant should be placed under guardianship.

The court after deliberating the legal argument of both parties and the presented written evidence and testimonies and considering them jointly and severally pursuant to the provisions of art. 235 para. 2 of the Civil and Procedural Code has established the following to be evident in legal contemplation and in fact:

The Plaintiffs are the parents of the defendant. Upon hearing the defendant, pursuant to the provisions of art. 337 para 1 of the Civil and Procedural Code, it has been established that he is aware of time and place, talks readily, knows about his disease, but his critical ability is reduced with respect to it. He has told the court that he makes music which he records in a recording studio, has appeared on TV, and has filmed a TV clip which has been aired on television and that he speaks several languages, and that he has performed together with folk singers. He has told about his visit to the U.S. where he met the daughter of President Bill Clinton, won MTV awards. He has stated that he receives a pension and knows its amount. He has explained on what he spends his money. He admits that he has signed contracts with Mtel and Globul for mobile telephone services and for purchase of phones. He has paid monthly instalments to mobile operators and owes large sums. He admits that he has assaulted his parents, but allegedly in self-defence. He admits that he has stabbed his father with a knife and demonstrated some self-criticism and regret.

The plaintiff, the father of the defendant, has explained to the court that now his son is very well and takes his medication. However he has concluded contracts with Mtel, Vivakom, and Globul and purchased

phones which he has not paid yet. The plaintiff has had to pay his son's default payments. When the defendant receives his pension he goes to the recording studio to record songs. There people flatter him that he sings very well and take his pension. It happened so that the plaintiff was away and when he came home he found the defendant in helpless state. He was lying lifeless because of alcohol abuse. He had to be hospitalized. According to the plaintiff, the defendant becomes dangerous when he does not take his medication. The plaintiff controls the intake of medication of the defendant. Once the defendant refused to be given an injection, quarrelled with his mother and then hit her which is why he had been placed in Kurilovo then in Karlukovo. The plaintiff explains that the reason to lodge the claim for guardianship is to stop the defendant from entering into unfavourable contracts. He states that two years ago ProCredit Bank called his wife to tell her that the defendant was inquiring about a loan.

The Court accepted as competently prepared and uncontested by the parties the conclusion of the appointed forensic expert's report prepared by the expert Dr. Konova. After a personal examination of the defendant and after considering the medical records submitted in the case the expert has found that the defendant, 46 years old, suffers from paranoid schizophrenia. The illness dates back to 1986 with change in behaviour and paranoid-hallucinatory symptoms. The defendant has been repeatedly hospitalized in various psychiatric hospitals due to psychotically motivated behaviour and serious bursts of aggression. In 1999 he stabbed his father with a knife and was placed for compulsory treatment. In 2010 he was admitted twice in a psychiatric hospital and his last hospitalization was in State Psychiatric Hospital Karlukovo on the strength of a court decision. The expert has found that the defendant has an alcohol abuse and drinks every day. He spends his pension for a few days by handing out money to other people who flatter him that he sings very well, or by buying unnecessary items. He becomes confrontational when he is not given money or is contradicted. The expert states that the disease of the defendant is characterized by fundamental and typical disturbances in the mental and the emotional and volitional spheres. The disturbances concern the most basic functions and delusions and hallucinations are developed. The thought process is vague, incomplete and impenetrable. The mood is erratic and inadequate. The disease is characterised by a disorder in the emotional and volitional spheres and the thought process. The motivational ability and the ability to consider the moral, ethical and legal implications of actions is disturbed. The expert has found that the defendant lacks real awareness of mental illness and critical behaviour. There are severe thought disturbances, self-reference interpretations and absurd megalomaniac delusions. Despite treatment, the disease has become continuous and a change of personality has appeared. The disease symptoms persist; there is social disadaptation and a high risk of abuse with him and his property

In view of the stated facts the Court makes the following legal conclusions:

Indeed, **art. 5 of the Persons and Family Act** states that minors and adults who, because of dementia or mental illness cannot take care of their affairs are placed under guardianship and become incapacitated. Adults with such sufferings whose condition is less severe and does not require placement under guardianship are placed under partial guardianship. The legal capacity is the reason for lodging a claim for placing a person under guardianship and the justification for such a claim is the existence of a mental disease or dementia and the inability of the person suffering from such a disease or dementia to take care of their affairs (such is the Ordinance of the Session of the Supreme Court № 5/79). Chapter 28 of the Civil and Procedural Code contains procedural rules pursuant to which the court proceedings are conducted.

These provisions of the domestic law, however, are contrary to those of international law instruments ratified by the Republic of Bulgaria and by virtue of art. 5 para 4 of the Constitution of the Republic of Bulgaria are part of our domestic law.

On 27.09.2007 Bulgaria signed the **UN Convention of 2006 on the Rights of Persons with Disabilities**, and with an act passed by the National Assembly on 26.01.2012 the Republic of Bulgaria ratified the Convention and it has been into force for the Republic of Bulgaria since 21.04.2012 (promulgated in State Gazette issue 37/2012). Apart from that, for the sake of completeness, it should be noted that in 2009 the European Union, as an organization, ratified the UN Convention of 2006 on the Rights of Persons with Disabilities (Council Decision 2010/48/EU of 26.11.2009) and of 22.01.2011 the convention is in force in the EU. In fact, this is the first convention to which the EU joined as a union, which among other things points to the critical importance of the principles introduced by this international document which are fully accepted by the whole European community. The Convention is an important tool to promote the human rights of people with disabilities. It develops and specifies the obligations of the acceding countries and sets out the agreed international legal standards for the rights of people with disabilities. The Convention acknowledges that equality, dignity, autonomy, independence, access to and inclusion in the community are the foundation which ensures uniform global standards for people with disabilities. The Convention not only promotes the human rights of people with disabilities but also radically changes the traditional legal theories and laws relating to the capacity to have rights and the legal capacity of natural persons. Article 1 of the Convention defines that people with disabilities are *"those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others"*. Art. 12 of the Convention acknowledges that persons with disabilities enjoy legal capacity and capacity to have rights on an equal basis with others in all aspects of life i.e. persons with disabilities are equal legal persons. They not only have rights but also must be able to exercise them through personal actions. State intervention in restricting these rights is very limited only to the provision of support measures which ensure the personal choice of the person in accordance with his/her wishes and preferences. The Convention recognizes that people with disabilities have the right to own and inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and to protection in case of arbitrary deprivation of their property. Art 13 guarantees access to justice of persons with disability, art 23 - the right to marry, have family and children, art. 29 – to vote and to be elected, etc. This is only a brief and not an exhaustive review of the guaranteed rights, which undoubtedly indicates that the institute of guardianship under Bulgarian law is contrary to the principles of the UN Convention since persons placed under full or partial guardianship in Bulgaria who have wholly or partially lost their legal capacity are not entitled to vote, to have a family, get married and become parents and to exercise parental rights. They do not have the right to make will, the right to choose where to live, the right to association. Deprivation of these rights is unlimited and there is no internal mechanism to revisit periodically the condition of persons under guardianship.

The European Convention on Human Rights and Fundamental Freedoms (ECHR), to which Bulgaria joined in 1992 (ratified with an act passed by the National Assembly on 31.07.1992 - SG, issue 66 of 1992 in force in the Republic of Bulgaria since 09.07.1992) is also part of our domestic law. In a series of decisions, the **European Court** of Human Rights ruled in relation to perceived violations of specific rights of persons under guardianship - the right to direct access to the Court - the case *Stanev against Bulgaria*, the case *Salontaji-Drobnjak v. Serbia* (decision of 13.01.2010), *Shtukurov v. Russia* (application № 44009/05, decision of 27.03.2008), the right to vote under art. 3 of Protocol 1 to the Convention – the case *Alajes Kiss v. Hungary* (decision of 20.08.2010). Placing a person under guardianship is considered by the Strasbourg Court as violation of the right to privacy under Article 8 of the ECHR – such as *Shtukurov v. Russia*, *Salontaji-Drobnjak v. Serbia*

On 23.02.1999 the **Committee of Ministers of the Council of Europe** (in which the Republic of Bulgaria is a member since 07.05.1992) adopted *Recommendation № R (99) 4 on the principles concerning*

legal protection of incapable adults which recommends that member states adopt in their legislation and practices all necessary steps to implement the principles of the recommendation among which “preservation of maximum legal capacity” (principle 3) i.e. laws should, as far as possible, recognize that there are different degrees of incapacity and incapacity may vary from time to time. Accordingly, the protection measures should not have as an automatic consequence the full withdrawal of legal capacity. Limitation of legal capacity, however, should be possible in cases where it is necessary to protect an individual. More specifically a measure of protection cannot automatically deprive a person of the right to vote or to make a will, or to express agreement or disagreement for each intervention with regard to his/her health, or make other decisions of a personal character at any time when his/her abilities allow him/her to perform these rights. When possible every adult should be able to perform valid legal transactions of everyday nature. Where representation is necessary in a certain area the person should be able to perform specific actions in that particular area with the consent of a representative.

Faced with conflicting domestic law, this panel finds that it should apply the rules of a higher rank, which have precedence, provided by the Constitution of the Republic of Bulgaria, namely the UN Convention on the Rights of Persons with Disability and the principles of the ECHR. **Article 5 of the Persons and Family Act is in conflict with these standards and should not be applied.** *Unfortunately there are no domestic legal mechanisms, adopted by the Bulgarian legislation, which will set out concrete measures for protection and support which the state, and in particular, the court should provide to the people with disabilities in Bulgaria. The court is in a position to directly apply principles and standards for which there are no specific implementing measures thus putting at risk the full protection of the defendant.*

Upholding the claim will result in the full or partial deprivation of the defendant of his legal personality (legal capacity and capacity to have rights). Since this is not permissible under art. 12 of the UN Convention, the claim for placement of the defendant under guardianship must be dismissed. After hearing the defendant and his father, the plaintiff, and after accepting the conclusion of the forensic psychiatrist, the court finds that the defendant as a person who suffers from mental illness and needs protection and support measures. Although he can do daily small transactions to meet current needs while carrying out property deals the defendant should be supported by another person in order to protect his property interests and in order to eliminate the risks of manipulation and abuse of his rights and interests. It was established that due to the psychiatric condition he can be manipulated by unscrupulous third parties. At present the defendant undergoes voluntary treatment and therefore a measure of support in this respect should not be determined. The measures determined by the court can be changed if the needs of the defendant for support and protection change. Furthermore it should be remembered that the general protection under art. 26 and art. 27 of the Contracts and Obligations Act is applicable in respect to the transactions carried out by the defendant if there are reasons for this.

On the grounds of the aforesaid the Court

DOES HEREBY DECIDE

TO DISSMIS the claim of xxxxxxxxxxxxxxxx and xxxxxxxxxxxxxxxx, both from the city of Sofia, against xxxxxxxxxxxxxxxx from the city of Sofia on the grounds of art. 5 of the People and Family Act in relation to art. 336 para. 1 of the Civil and Procedural Code for putting him under guardianship.

FINDS that xxxxxxxxxxxxxxxx is a person who can take care of his own affairs and interests, provided he receive assistance and support from his parents xxxxxxxxxxxxxxxx and xxxxxxxxxxxxxxxx in the disposal of his property.

AUTHORIZES xxxxxxxxxxxxxxxx and xxxxxxxxxxxxxxxx, both from the city of Sofia to accompany and

support their son xxxxxxxxxxxxxxxx in making financial decisions by:

1. *Supporting* their son xxxxxxxxxxxxxxxx *in collecting and providing* information from any person or organization which *information is needed for decision making* which xxxxxxxxxxxxxxxx wants to do;
2. *Supporting* their son xxxxxxxxxxxxxxxx *in understanding the information* which refers to the decision that he needs to take, as well as to everything concerning the decision;
3. *Supporting* their son xxxxxxxxxxxxxxxx *in expressing his decision* to third parties;
4. *Supporting* their son xxxxxxxxxxxxxxxx *in carrying out his decisions.*

Any disposal with the property of xxxxxxxxxxxxxxxx should be authorized by the court pursuant to art. 130 paragraph 3 of the Family Code.

THE DECISION may be appealed before the Court of Appeal – city of Sofia and protested within 2 weeks’ time from the receipt of copy of it by the parties.

Judge:

The Bulgarian discussion on guardianship between the judgment of the Constitutional Court and the Draft Law on Natural Persons and Support Measures

INTRODUCTION

The Ministry of Justice has submitted a Draft Law on Natural Persons and Support Measures (DLNPSM) for a public discussion. This is a step in meeting the commitment to amend the Bulgarian legislation¹ which was assumed three years ago.

The topic has undoubtedly been included on the Bulgarian legislative agenda not as a result of its autonomous development but due to binding commitments under the international human rights law, in particular the Convention on the Rights of Persons with Disabilities (the Convention, CRPD) adopted the by UN General Assembly some 20 years ago. It is well known that this international treaty has not recognized any new human rights and freedoms. What it has offered is a new understanding of the exercise of these rights and freedoms *by everybody*, as well as safeguards therefor². This implies a shift in the perspective of the legal status of persons with disabilities: from compassion and charity to a human rights-based approach, from paternalism to empowering and treating these persons as active subject of their rights³. The contribution of the Convention on this matter is focused in its article 12 in relation to its principles of *respect for inherent dignity and individual autonomy, including the freedom to make one’s own choice, and independence and non-discrimination* (Art. 3, items (a) and (b)).

Having ratified CRPD, Bulgaria must meet its obligations to ensure that its domestic legislation is in line with the Convention⁴. This is an extremely serious challenge, as it requires a radical change: abolishing an established instrument of Bulgarian law that was fully legitimate till recently – guardianship. An opportunity to make gradual changes in the guardianship regime has been missed, namely the opportunity to apply *Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults, 23.02.1999. Step-by-step actions could also contribute to a cultural change in the Bulgarian society, defined by the drafters of the Convention as “a change in the paradigm” of the way psychosocial problems and intellectual disabilities are perceived and treated, and to an academic debate on the topic which is not the case at*



Velina Todorova*

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1 See Concept on changes in the national legislation in relation to the application of the standards laid down in Art. 12 of the UN Convention on the Rights of Persons with Disabilities by adopting legislative measures aimed at support for persons with disabilities and the independent exercise of their rights, respect for their individual characteristics and protection of their interests. Adopted by the Council of Ministers on 14 November 2012 by Protocol 43/14.11.2012 of the Council of Ministers at: http://pris.government.bg/prin/document_view.aspx?DocumentID=8RMxcMeAentEcHr/4hQgUw==

2 The European Union also ratified the Convention in 20119 (Council decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with disabilities); furthermore, over the last several years the European Union has clearly incorporated the main standards set out in the Convention in its political and legal instruments.

3 See Human rights Commissioner Office, CommDH/IssuePaper (2012) 2 Strasbourg, 20/02/2012 “Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities”.

4 Bulgaria signed the 2006 UN Convention on the Rights of Persons with Disabilities on 29 September 2007 and ratified it by virtue of a law passed by the National Assembly on 26 January 2012; thus the Convention has been effective for the Republic of Bulgaria since 21 April 2012. This is the first UN Convention ratified by the European Union it its capacity of an organization (Council Decision 2010/EU of 26 November 2009). The Convention is in force for all EU Member States. This fact indicates the paramount significance of the principles set out in the international treaty which have been adopted by the whole European Community) (a statement made by the Supreme Court of Cassation, case No 10/2014). As regards the obligations of the State Parties, see Art. 4, items (a) and (b) of CRPD.

present¹. The adoption of CRPD in 2006 did not arouse any doctrinal excitement or legislative initiative, either².

Prior to the Government Concept (2012), the framework of the debate in Bulgaria was set till recently by the decision made by the Bulgarian court to apply the international law due to an established contradiction with the domestic legal order (grounds: Art. 5 (4) of the Constitution³, Constitutional Case No 10/2014, initiated at the request of the Ombudsman of the Republic of Bulgaria, for establishing the unconstitutional nature of Art. 5 (1) of the Persons and Family Act (PFA) in the section “and lose their legal capacity”, and Art. 5 (3) of the same law, as well as the two judgments of ECtHR which establish violations of the rights of persons with disabilities committed by Bulgaria⁴). We expect that the Draft Law on Natural Persons and Support Measures submitted by the Ministry of Justice will be yet another occasion for discussions. The new law proposes the abolition of guardianship/legal incapacity and the substitution of this legal regime with support measures tailored to the individual state of the natural person and ensuring independent autonomy in the exercise of rights. The transition is from the utilitarian tradition of benefit and harm to the liberal tradition of respect for freedoms and rights⁵. This transition requires that the ethical and philosophical arguments already presented⁶ should be supplemented with the position of the Bulgarian academic legal community.

The purpose of this article is to present and comment on the institutional position with respect to guardianship/legal incapacity and, thus, contribute to the discussion on the arguments. The subject of our analysis are the opinions expressed in Constitutional Case No 10 of 2014⁷. The analysis concerns two positions identified in these opinions that are compared to the philosophy of DLNPSM and the principles of CRPD, including its article 12. One of the two positions stays within the remit of utilitarianism and defends the thesis according to which the Bulgarian legal framework protects the interests of persons with disabilities and of the society, it is in line with CRPD and the Constitution, and does not need any changes⁸. As for the liberal position, it comes up with arguments to prove that this legal regime is in contradiction with the rights of persons with disabilities, does not conform to the underlying principles of the Constitution regarding equality before the law, the protection of the rights and dignity of the individual, and non-discrimination, which is why a change is needed⁹. Finally, the Draft Law on Natural

1 The reasoning to the proposal for a Resolution of the European Parliament of 18 December 2008 with recommendations to the Commission on cross-border implications of the legal protection of adults (2008/2123(INI) points out that the reform of custodianship and guardianship for adults was carried out in Germany in 1992, Spain in 20013, Italy in 2004, the United Kingdom in 2007, France in 2009. According to the European Judicial Network the reform was implemented in Estonia in 2010, Romania in 2009; Austria and Slovenia are drafting new legislation. Ireland passed a new Assisted Decision-making (Capacity) Bill in 2013, even though it has not yet ratified the UN Convention. Israel passed a new law in 2010, and the courts are reexamining the cases of individuals placed under guardianship.

2 See Report – Analysis of the Legislation, Policies and Practices: Guardianship and Human Rights in Bulgaria. 2007, published in the Bulgarian language by the Medical Disabilities Advocacy Center, Budapest, Hungary. In 2012 the Bulgarian Center for Not-for-Profit Law (BCNL), together with the Bulgarian Association for Persons with Intellectual Disabilities, and the Global Initiative on Psychiatry-Bulgaria started an advocacy campaign for legislative changes in the guardianship regime and the piloting of models for supported decision-making (<http://equalrights.bcnl.org/>). In the same year the Ministry of Justice, with the support of BCNL and an expert group, developed a Concept on Legislative Changes (see note 1) endorsed by the Council of Ministers. This document and the requirements set out in Art. 12 of CRPD were on the discussion agenda of an international legal workshop organized by the Ministry of Justice, BCNL, and the Ombudsman in 2012.

3 See Judgment of the Sofia City Court (judge Verginia Mincheva) of 4 November 2013, civil division, V family panel, civil case No 16532 in the 2012 inventory whose reasoning reads: “...the instrument of guardianship in the Bulgarian law is contrary to the principles set out in the UN Convention, as the persons placed under full or partial guardianship in Bulgaria, being persons who have fully or partially lost their legal capacity, do not have the right to vote, the right to marry and have a family, reproductive rights, parental rights, the right to make a will, the right to choose their residence, the right to association. The deprivation of these rights is termless, and there is no internal mechanism for regular examination of the state of the person under guardianship...”

4 See the judgment in the case Stanev v Bulgaria issued on 17 January 2012 on application 36760/06 at: <http://www.justice.government.bg/47/233/>, and the judgment in the case Stefan Stankov v Bulgaria issued on 17 March 2015 on application 25820/07.

5 See more in: Hristova, St., Making Ethical Decision in Restricting Patient Autonomy. V. Kaneva, Autonomy and Bioethics, Second Part, 2011 (Христова, Ст. Вземане на етични решения при ограничена автономия на пациента. В: Кънева, В. (съставител). Автономия и биоетика. Втора част. С., 2011 г.: 119-120.).

6 See more on the topic: Jotov, St. “My Days are in Your Hands”, Sociological problems, Special Edition. (Йотов, Ст. „Дните ми са в твоите ръце“. Социологически проблеми, Специален брой, 2012, 123-143). See by the same author: Autonomy and dignity (Автономия и достойнство), and Kaneva, V., The Principle of the Autonomy and Bioethics, In: Autonomy and Bioethics, Second part (Кънева, В. Принципът на автономията в биоетиката. В: Автономия и биоетика. Втора част). Also: studies in Autonomy and Bioethics, First part, 2011 (Автономия и биоетика. Първа част. С., 2011 г.), etc.

7 See: Request by the Ombudsman of the Republic of Bulgaria to establish, on the grounds of Art. 150 (3) of the Constitution, the unconstitutionality of Art. 5 (1) in respect of the words “and lose their legal capacity”, and Art. 5 (3) of the Persons and Family Act whereby citizen’s rights are violated; Judgment No 12 of 17 July 2014 in Constitutional Case No 10/2014 and opinions of stakeholder institutions on the website of the Constitutional Court.

8 See the Positions of SCC, the Prosecutor General, the Council of Minister, the Ministry of Health.

9 See the Positions of the civil society organizations – BCNL, Bulgarian Lawyers for Human Rights (BLHR), the Bulgarian Helsinki Committee (BHC), the Bulgarian Association for Psychiatry, the Civil Association Alzheimer-Bulgaria (position on the Draft Law). To some extent, the position of the Ministry of Labor and Social Policy is also close to this one.

Persons and Support Measures is presented in a nutshell.

Regrettably, the restricted competence of the Ombudsman to make referrals to the Constitutional Court – only with requests for establishing the unconstitutional nature of a law whereby rights and freedoms of citizens are violated (Art. 150 (3) of the basic law) – raises some limits for those who have expressed opinions. The provision of Art. 12 of CRPD is not, in formal terms, a matter to be examined by the Constitutional Court and, respectively by those who have expressed opinions. A fact to be highlighted is that this formal ground has been amply used by the Supreme Court of Cassation (SCC) and the Council of Ministers. Article 12 is the key text of the Convention which requires a reform in the guardianship regime and is the real argument for contesting the domestic legislation. Even the position in the opinion of the Council of Ministers (2014) is strangely divergent. The opinion refers to the Government Concept of 2012 on changes in the national legislation in relation to Art. 12. In parallel, however, it holds that such changes are not needed. The opinions that are crucial for the reform show reluctance to embark upon a discussion on the substance which is needed due to both CRPD and ECtHR. Hence, the discussion is upcoming.

(IN)EQUALITY BEFORE THE LAW

The Bulgarian debate on the equality of people with disabilities before the law has gained momentum with the fact that the constitutionality of the regime of legal incapacity has been challenged by the Ombudsman. It is well known that the Constitution guarantees that the citizens are equal before the law (Art. 6 (2), the 1st sentence). The philosophy of the constitutional law-maker is that “all persons are born free and equal in dignity and rights” (Art. 6 (1)), and the state shall guarantee the “... dignity and rights of the individual (Art. 4 (2)). The texts of these provisions imply that people with disabilities also enjoy the safeguards in terms of equality before the law and protection of their rights. Discrimination on the basis of one’s personal situation is prohibited (Art. 6 (2), the 2nd sentence of the basic law). By means of the above provisions the Bulgarian Constitution is in line with international law that has explicitly recognized equality before the law as an underlying principle in safeguarding human rights¹. The abolition of guardianship can be expected to bring about a higher level of alignment of the Constitution with the standards, as the grounds for limiting the legal capacity of persons with disabilities in the basic law (Art. 42 (1) and Art. 65 (1)) will also be abolished.

Equal recognition before the law and the protection of people with disabilities against discrimination are specifically laid down in the provisions of the latest international treaty on human rights, CRPD (Art. 5 and Art. 12). In order to highlight the significance of this right and of the safeguards to be put in place for the purpose of its effective exercise, Article 12 of CRPD refers to:

“...further describes the content of this civil right and focuses on the areas in which people with disabilities have traditionally been denied the right. Article 12 does not set out additional rights for people with disabilities; it simply describes the specific elements that States parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.” (General comment: 1)

Article 12 of CRPD constitutes, undoubtedly, development in terms of equality before the law. This development is the result of quantitative accumulation since 1948 (when the Universal Declaration on Human Rights marks the beginning of the evolution of the international human rights law), the practice and knowledge acquired in this field, and the legitimate expectations of people with disabilities in terms of the respect for their rights.

¹ Equality before the law is a fundamental principle in guaranteeing human rights recognized in the Universal Declaration on Human Rights and the Covenant on Civil and Political Rights. See also the Preamble, CRPD, item 4, General Comment No 1: Article 12: Equal Recognition before the Law, UN Committee on the Rights of Persons with Disabilities, 19 May 2014 (CPRD/C/GC/1): 1.

Against the background of this dynamic development, the historical arguments in the Bulgarian context aimed at defending the inviolability of the legal framework (PFA) are inexplicable: while dating back to the early 20th century (1907), this law is still effective, the case law is not contradictory, and an explicit public need to revise it has not been expressed¹. It is needless to point out that the international human rights law (IHRL) is a dynamic area. Its development started after the Second World War; hence, as of 1907 neither the Bulgarian law-maker, nor the international community and doctrine shared these ideas at a level equal to the extent of their subsequent evolution in relation to clear historical, ethical and legal considerations. Today, in the democratic society, we could hardly deny that IHRL sets the imperative background against which we position and assess the Bulgarian human rights legislation. IHRL does, to a large extent, determine the material legitimacy of the Bulgarian human rights legislation. The latter should understand well enough and follow the dynamics of IHRL.

Article 12 of CRPD reveals a turnaround to the underlying civilistic construction of legal capacity in the search for legal arguments for (in)equality before the law:

“...affirms that all persons with disabilities have full legal capacity. ... persons with disabilities remain the group whose legal capacity is most commonly denied in legal systems worldwide. The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others.” (General comment: 8)

The viewpoint is that the unity between the legal status and the legal capacity recognized to adults should not be disrupted, as it is only in their unity that these legal entitlements can ensure the real, effective, not just formal, equality in rights². This is the perspective for the analysis and assessment of the safeguards for equality before the law for people with psychosocial problems and intellectual disabilities introduced by the “ordinary legislator” in Bulgaria. The reason is that one of the principles of the rule of law requires that the legislation should reflect and develop the principles and rights enshrined in the Constitution³. The Constitution, on the other hand, in conformity with the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights sets forth an *irrefutable presumption of freedom and equality of individuals as from their birth*, which generates requirements for the whole legal and political system to ensure guarantees in the relevant legal regimes⁴.

And the opposite assumption: pursuant to Art. 5 (1) of PFA adult natural persons who, due to imbecility or a mental disorder, are unable to take care of their own affairs shall be placed under guardianship and shall lose their legal capacity. In their legally relevant actions, individuals without legal capacity shall be substituted by a guardian or shall act with guardian support (depending on the type of guardianship).

This regulation is not only acceptable but also defensible according to the majority of the opinions in Constitutional Case (CC) 10/2014. It is argued that legal incapacity does not affect the person’s quality to act as a “legal subject”: the person is such only on the grounds of the legal status recognized (Art. 1 of PFA). The status of legal incapacity is general in personal law. It covers both underage and adult persons placed under guardianship⁵. The regulation for similar cases is identical, which meets the constitutional principle of equality before the law⁶. Legal incapacity is not *ex lege* a quality of the legal subject but a

¹ This thesis is defended in the Position of the Council of Ministers on Constitutional Case 10/2014. See also Ts. Tsankova, “Issues of the Legal Capacity to Act”, Jubilee collection dedicated to the 80th anniversary of prof. Vasil Mrachkov (Цанкова, Ц. Въпроси на дееспособността. В: Юбилеен сборник, посветен на 80-годишнината на проф. д.ю.н. Васил Мръчков, ИК „Труд и право“, София), 2014г.: 205.

² On the unity between legal status and legal capacity, see The new paradigm of legal personality: Article 12 of the UN Convention on the Rights of Persons with Disabilities, Nadya Shabani, Pavleta Alexieva, Marieta Dimitrova, Aneta Genova, Velina Todorova, Legal Thought, 2014 (Шабани, Н., П. Алексиева, М. Димитрова, А. Генова, В. Тодорова Новата парадигма на правосубектността: член 12 от Конвенцията на ООН за правата на хората с увреждания. Правна мисъл, 2014, кн. 1:80-88).

³ See Position of the Center for Not-for-Profit Law on Constitutional Case 10/2014.

⁴ Idem.

⁵ Tsankova, Ts. - Issues of the Legal Capacity to Act (Цанкова, Ц. Въпроси на дееспособността): 206.

⁶ Position of SCC, p.8, position of the Council of Ministers, p. 5.

consequence from a judgment issued in court proceedings with all the pertinent procedural safeguards to protect the individual’s interests and rights¹. SCC even draws a conclusion that needs no comment: *“The regime challenged concerns the civil legal capacity of natural persons. This means that it is not relevant to the rights of the personality...”*.

It is further argued that what partial guardianship secures is support for the person to exercise their right, hence the regime is not inconsistent with the protection of human dignity. An assisting person who is *a natural person with legal capacity is ensured, which allows the person concerned to act on an equal basis with others; thus, all persons are guaranteed equal participation in legal life*. The conclusion is that guardianship is a mechanism not only for the exercise of rights but also for protection against discrimination, and, respectively, for the protection of the dignity of people with disabilities².

The opposite thesis has also been developed, which, however, uses arguments leading to the same conclusion. According to the Council of Ministers, people with disabilities **are not equal** before the law, as their protection requires so. These persons are compensated by means of a privileged status enshrined in the Constitution which provides for their special protection (Art. 47 (4) and Art. 51 (3))³.

An understanding, though limited, of guardianship as a *serious infringement on the person’s legal status* can be found in the judgment of the Constitutional Court: (guardianship) *“...is a quality state related to the person’s legal status which results in the impossibility for the relevant person to acquire rights and assume obligations through their own actions.”*⁴. A particularly clear interpretation transpires from the dissenting opinion of judge Georgi Angelov in Constitutional Case No 10/2014: *“Article 6 (2) of the Constitution ... does not allow either declaring the disabled as persons without legal incapacity, which is the case with the challenged section of Art. 5 (1) of PFA, or substituting them in the exercise of their rights with another person, as stipulated in the challenged Art. 5 (3) of PFA.... The rights of these persons cannot be limited on the grounds of their personal situation. This relates to both their legal status (the capacity to hold rights and obligations – Art. 1 of PFA) and their legal capacity (the capacity to acquire, through their own actions, rights and to assume obligations – Art. 2 of PFA).”*

This interpretation expressed in the dissenting opinion should be supported. It is in conformity with both the Constitution and CRPD. Equality before the law is not compatible with limiting the possibility for rights to be exercised in person, even to a lesser extent can such limitation be justified with the need to provide protection. Equality means only the possibility for each person to exercise their rights in accordance with their personal wishes and preferences (within the limits defined in Art. 57 (2) of the Constitution). In other words, the substituted decision-making of the person with disabilities should be replaced with supported decision-making – exercising one’s rights in person by using all legal safeguards for the protection of the rights:

“...Article 12, paragraph 2, recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all areas of life. Legal capacity includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles the person to **full protection of his or her rights by the legal system**. Legal capacity to act under the law recognizes the person as an agent who can perform acts with legal effect.”⁵

In line with this rationale and contrary to the shared position of the institutions expressed before the Constitutional Court, the Bulgarian regime of legal incapacity should be assessed as being contrary to the

Constitution, and, hence, abolished. The purpose would not be a simple replacement of the established legal terminology and notions with new ones but the adoption of a new concept which will do away with the very consequences of guardianship for adults: equalizing adults and children and excluding the former from personal participation in legal life. It is not a matter, either, of substituting the presumption of legal capacity with a refutable presumption of legal incapacity¹. The presumption of legal capacity will become irrefutable if the persons who have difficulties in exercising their rights use the support measures laid down in DLNPSM.

It is not only the regime itself but also the language of the law that have been assessed in other positions as damaging the person’s dignity: *“... We cannot but also share the findings in the Ombudsman’s request that the so-called “medical” criteria applied for placement under guardianship, i.e. “imbecility” and “mental disease”, are a serious anachronism, and attributing, by way of a judicial act and by virtue of the law, such personal characteristics to an individual, given the contemporary achievements of medical science, can be qualified in no other way but as damaging the personal dignity of the person affected.”*²

GUARDIANSHIP AND SELF-DETERMINATION

The recognition of the autonomous independence of people with disabilities is emphasized not only in CRPD (a basic principle – Art. 3: *respect for inherent dignity, individual autonomy...*) but also in the Charter of the Fundamental Rights of the European Union. Pursuant to Article 26 of the Charter *“The Union recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence...”*. The purpose is ensuring guarantees for the protection of the rights of these persons, incl. by limiting the state’s interference in the exercise of the rights.

Interference in the autonomous independence by means of imposing restrictions thereon implies direct deprivation of rights, which is not that visible. While legal incapacity, as a personal status, is generally regulated through the referring norm of Art. 5 (30 of PFA (equalization with the child’s status), the consequences in terms of limiting rights are regulated throughout the Bulgarian legislation (in over 50 laws regulating various public relations). As pointed out by the UN Committee on the Rights of Persons with Disabilities:

“...Legal capacity is indispensable for the exercise of economic, social and cultural rights. It acquires a special significance for persons with disabilities when they have to make fundamental decisions regarding their health, education and work. (The denial of legal capacity to persons with disabilities has, in many cases, led to the deprivation of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty.)” (General comment: 8)

While the exercise of the property rights of the person under guardianship through a custodian (guardian) is possible, and this seems to be the main purpose of the regime – ensuring that the family/relatives and the public (civil turnover) feel at their ease –, the substitution or legal assistance for the exercise of personal rights is impossible³. This is why a direct consequence of legal incapacity is depriving the person under guardianship of rights which are to a large extent either equally important or more important than property rights for the person’s life. It is not a must for the person to receive a bank credit, to dispose of substantial immovables or cash, while any human being is a member of a family, wishes to

¹ Idem.
² See Position of SCC, idem in: Ts. Tsankova: 210-211.
³ The reasons to Judgment 14 of the Constitutional Court of 1992 in Constitutional Case No 14 of 1992 are also cited: privileges are also guarantees against the abuse of the rights of persons who are unable to take care of their own affairs.
⁴ Judgment No 12 17 July 2014 in Constitutional Case 10/2014.
⁵ General comment, paragraph 3.

¹ Ts. Tsankova: idem: 205-206.
² Position of Bulgarian Lawyers for Human Rights (BLHR). Although SCC and COM have commented this section in the Ombudsman’s request, they have not identified such an issue.
³ Thus, according to the Prosecutor General: “It (legal incapacity, author’s note) ensures the protection of his/her property, legal representation in court and administrative procedures, social, pension, health, financial and many other social services – to the direct benefit of the person represented.”

have a family, to make decisions on where to live and how to spend their money.

This aspect of legal incapacity, which confirms that the person under guardianship is deprived of rights, and is, therefore, an unequal citizen has gained increasing awareness and recognition in the Bulgarian context. As pointed out in a judgment of the Sofia City Court of 4 November 2013, civil division, V family panel, in civil case 16532 in the 2012 inventory: “...those placed under full or partial guardianship, having entirely or partially lost their legal capacity, do not have the right to vote, the right to marry and have a family, reproductive rights, parental rights, the right to make a will, the right to choose their residence, the right to association. The deprivation of these rights is termless, and there is no internal mechanism for regular review of the state of the person under guardianship.” Hence, the conclusion that the guardianship regime under the Bulgarian law is contrary to the principles of CRPD.

Taking an analogous position, the Constitutional Court broadens the range of rights protected by the Constitution, of which, however, the person under guardianship is deprived: “...of the right to submit a claim to the court for the revocation of guardianship ... of the right to protect their honor and dignity, in case they feel offended, by lodging a complaint about offense or slander before the court (Art. 161 of CC), do not have a legally recognized right to lodge an application for protection against domestic violence (based on an argument in Art. 8 of the Protection against Domestic Violence Act), are deprived of the right to keep their own identity documents (Art. 8, item 3 of the Bulgarian Identity Documents Act)”¹. It is a different matter whether the Constitutional Court holds the belief that this issue can be solved through a detailed regulation of the legal regime of adults’ legal incapacity. This development and the re-regulation of the general status of guardianship based on the following consideration: “...the limitations for such persons should be proportionate to their state, should be applied over the shortest term possible, and should be subject to regular revision by an independent body” will align legislation with CRPD.

At present, the Constitutional Court proposes that the regime of legal incapacity, as a regime restricting the rights, should have a narrow interpretation and application. The only way to apply this recommendation is subject to the condition that it influences the internal conviction of the court approached with an application for placement under guardianship. The risk to be assumed by the court is the direct application of CRPD, which will reaffirm the priority of the international law to which the national one has proved contrary. This view is held in the above judgment of SCC in civil case No 16532 in the 2012 inventory: “...Regrettably, there is a lack of national legal instruments adopted by the Bulgarian legislator for determining specific protection measures and support measures to be ensured by the state, in particular by the court, for persons with disabilities in Bulgaria. **The court is in a situation where it has to directly apply principles and norms in the absence of a specific measure for the application thereof, which puts the court at risk of not providing full protection for the respondent.**” The restrictive application of the regime of legal incapacity is impossible where the matter at stake are the concrete consequences from this regime for the remaining legislation.

Viewed in this perspective, guardianship constitutes a radical interference in the private life of a part of the citizens, which is protected by the Constitution (Art. 32 (1))². Furthermore, there is inadmissible interference in a number of rights protected by ECHR: the right to access to justice and a fair trial (Art. 6), protection against inhuman and degrading treatment (Art. 3), the right to the protection of private and family life (Art. 8). This is why the judgment issued by the Grand Chamber of the European Court of Human Rights (ECtHR) in the case *Stanev v Bulgaria* (Judgment of 17 January 2012 on complaint 36760/06)³ holds that placement under guardianship obstructs the access to justice⁴ and the redress for inhuman

and degrading conditions in the event of accommodation in an institution, and makes the protection against such placement impossible¹. The same judgment explicitly emphasized the growing importance that the international instruments for the protection of persons with mental disorders attach to the provision of maximum legal autonomy to such persons². Analogous conclusions are drawn by the Court of Justice of the European Union in the case *Stankov v Bulgaria* (Judgment of 17 March 2015 on complaint 25820/07). The Court rules that the placement of Mr. Stankov under guardianship has resulted in violation of his right to freedom and safety (Art. 5 of ECHR), of the prohibition of inhuman and degrading treatment (Art. 3), and of the right to access to justice (Art. 6)³.

The conclusion is that the Bulgarian legal framework (Art. 5 of PFA) results in the deprivation of autonomy of an adult person. Another consequence is inequality before the law in comparison to persons with legal capacity. This regulation is legitimized by means of the protection principle: the person does not have the capacity to make decisions, his/her autonomy has to be limited in order to protect him/her against the harm he/she can inflict on himself/herself and the others. This principle is denied in the international human rights standards. The inconsistency with the international but also with the European standards deprives, to a large extent, the national legislation of its legitimacy.

PROTECTION OF INTERESTS OR RIGHTS

While the infringement upon legal capacity is recognized, the thesis claiming that this is a form of protection, moreover, the only one, seems unshakable. Interference in autonomy is regarded as an acceptable and proportionate restrictive measure, as it is aimed at ensuring the protection of the person’s interests. The absurdity of the text “protection through restriction” is highlighted in the Ombudsman’s request: “...It is inadmissible for this protection to be expressed in deprivation of legal capacity or its considerable restriction on the basis of general and outdated criteria such as imbecility and mental disease⁴, without taking into consideration the specifics of the various impairments and states, and the degree of disability. Protection should be provided by means of appropriate tools that will assist and support these persons in making decisions and in independently performing legal actions, and not by means of various degrees of deprivation of legal capacity resulting in a situation where the decisions related to their everyday life are made by someone else.” The thesis is clear: protection cannot be ensured through deprivation of rights but through additional empowerment of the vulnerable person by providing support for independent actions.

It is just the opposite position that is expressed in the Judgment of CC in case No 12/17.07.2014: “With regard to persons with mental disabilities the special **protection includes also preventing** these persons from performing legal action whereby they may damage their own interests. An important element of this protection is the regime of guardianship...insofar as due to the nature of their state there is no other more efficient means to protect their interests.” Being consistent in its understanding in terms of the narrow interpretation of legal incapacity, the Constitutional Court proposes that “it should be understood as a state whose sole purpose is to prevent any legal actions that might damage the interests of the person under guardianship or third persons or the public.” This implies welcoming protection via restriction of the freedom of personal actions, via prevention against damaging actions and proposing, in exchange, protection of the interests. In support of this position the arguments adduced relate to the protection regime for children, in particular special protection regulated in the Child Protection Act which also provides a detailed lists of the risks in respect of which protection is envisaged⁵.

¹ Paragraphs 217-221 of the Judgment.

² Paragraphs 244 of the Judgment.

³ See Press release of the Court: ECHR 085 (2015), 17.03.2015.

⁴ Unlike the neutral position of SCC regarding the obsolete terminology used in Art. 5 (1) of PFA, BLHR point out: “We cannot but also share the findings in the Ombudsman’s request that the so-called “medical” criteria applied for the placement under guardianship, i.e. “imbecility” and “mental disease” are a serious anachronism, and attributing, by way of a judicial act and by virtue of the law, such personal characteristics to an individual, given the contemporary achievements of medical science, shall be qualified in no other way but as damaging the personal dignity of the person affected”

⁵ Addressing the correlation between the concepts *защита* and *закупна* (translator’s NB: both translate as “protection”) is outside the scope of this article.

The scope of protection

The thesis about the protective function of guardianship has been largely developed in the majority of the institutional positions. Its derivative is the utilitarian position according to which the goals of this regime justify its sustainability. It protects the interests of persons with psychosocial problems and intellectual disabilities, of the persons with whom they enter into legal relationships, and of the public by protecting the civil turnover. Arguments in support of the above have also been sought in CRPD whose purpose, according to the authors of this position, is *protection* and *support* for the interests of persons with psychosocial problems and intellectual disabilities. Therefore, the abolition of guardianship might have socially unfair results by clashing “the social dimension with the legal one”¹. We are aware (probably) that the social dimension consists in the inability of persons with mental and intellectual impairments to perform a “reasonable action”, which makes pointless our efforts to recognized equal legal capacity for them. There is even a more extreme opinion along this line, whose starting point is the linguistic interpretation of Art. 1, § 2 of CRPD:

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

The conclusion drawn is that CRPD uses the qualification “long-term” for the impairment as a criterion to identify the persons who will avail themselves of its protection: *“The impairment should be long-term and a consequence of some kind of insufficiency which allows these people the ability to interact with the surrounding environment but impedes their full and efficient participation in the society on an equal basis with others.”* Hence, the conclusion: *“...For some people the impairment, in addition to being long-term, is of such a nature that it does not allow any possibility for participation, due to which these persons do not have rights suitable to be protected by the Convention”².*

The literal interpretation of this result from the interpretation by the supreme instance of cassation suggests that the persons in respect of whom the provision of Art. 5 (1) of PFA would require placement under full guardianship will not be covered by the scope of CRPD. Thus, full guardianship remains outside the debate. It ensures that the social dimension conforms to the legal one. The conclusion to be drawn is that consistency has been achieved between the aims of the Convention and the aims of Art. 5 of PFA – i.e. protection of and support for the interests of persons with mental impairments. Therefore, the regime laid down in PFA is a valid regulator, which implies that changes in the legislation are not needed.

The conclusions made by SCC, however, pose a certain risk: carrying on with the reasons expressed by the supreme instance of cassation will take us to an even more bizarre conclusion: persons with serious mental and intellectual impairments do not belong to *homo sapiens*, and, given this, we should treat them accordingly. This, to put it mildly, is the original interpretation made by the Bulgarian supreme instance of cassation in reading the Convention. SCC excludes the variability of the social dimension, it excludes heterogeneity as a feature of human nature, and, instead, opts for an approach that would hardly ensure protection but is, for sure, convenient and tailored to serve the interests of third parties – caretakers, banks, medical specialists, and in some cases – the family and relatives/friends of persons with disabilities³. What is overlooked is the fact that the security of third persons and of the turnover is ensured by means of the general regime of invalidity of contracts laid down in the Obligations and Contracts Act⁴.

1 The thesis is expressed in the Position of SCC. See Ts. Tsankova: idem: 207.

2 Prof. Tsankova defends the opposite position, idem: 210.

3 Evidence of this are the frequent cases of institutionalization of those under guardianship. A conclusion supported by the judgment of ECtHR. See the same in: Legal Capacity in Europe. A Call to Action to Governments and to the EU. Mental Disability Advocacy Center, Budapest, 2013: 9. The same is expressed in the position of the BLHR and the Civil Association Alzheimer-Bulgaria on the occasion of the discussions on DLNPSM held on 10 March 2015.

4 See the judgment above of SCC and the position of BLHR.

The subject of protection

The Supreme Court of Cassation considers as worthy of protection those persons whose suffering, even though long-term, is not that serious; hence, they are placed under partial guardianship: *“This group of persons meet the imperative provision of Art. Of CRPD. The international treaty applies with respect to them”*, reassures us SCC. As to how the treaty is applied, this is a different matter, according to the court. A minor omission by the court is, at first sight, the fact that the court does not read and interpret Art. 1, § 2 of CRPD in conjunction with its § 1 which is unambiguously imperative:

“The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”

Furthermore, it is obvious that what it is all about is not the protection of the interests but of the rights of these persons. Needless to emphasize that CRPD does not provide for distinguishing individuals on the basis of the severity of their disability, impairment or inability to interact with the world. On the contrary, the interpretation of the Convention closest to its philosophy is that where:

“...a person’s disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.” (General comment: 15)

The opinions maintain the popular position according to which the aim of the Convention is the protection of persons who are vulnerable due to their disability, which is why PFA’s regulation regarding partial guardianship is consistent with it. The institutions declare without any hesitation that persons with disabilities need **protection** as they are unable to take care of their affairs on their own; guardianship should be maintained, being a form of state protection for these persons; as the dignity of these persons is protected by placing them under guardianship, changes are not needed¹. This is why, guardianship is a useful mechanism and should not be changed². The opinion of the Prosecutor General offers an outright reproduction of the understanding in terms of the incapacity of persons with disabilities, which justifies depriving them of their legal capacity – an approach rejected by the UN Committee on the Rights of Persons with Disabilities³. It is further held that the deprivation of legal capacity constitutes a real protection of persons with mental or intellectual impairments. Guardianship is not just a restriction but also a measure to support the individual and a safeguard to protect their interests – a tool ensuring “calm and protected participation in the private legal life”⁴. According to SCC, this approach is consistent with the principles set out in Art. 3 of CRPD and meets the obligations set out in its Art. 4.

The opposite thesis is defended in the dissenting opinion in Constitutional Case 10/2014: *“...The risks of potential inability of these persons to understand or manage their actions in relation to disposition or lack of exercise of their rights or assuming obligations (“take care of their own affairs” pursuant to Art. 5 (1) of PFA) are relevant, in most cases, to the **persons concerned**. As for third persons, these are exceptions (for example, parental rights). These risks should be regulated by the legislator on general grounds and on an equal basis with respect to everybody (see for example Art. 26 (2), prop. 2, Articles 28, 29, 31, 33 of the Obligations and*

1 An opinion supported by key structures within the legal community/judiciary: SCC, the Prosecutor General, the Union of Lawyers in Bulgaria, and by representatives of the executive involved in this topic – Ministry of Health and the Bulgarian Medical Association (BMA).

2 See the positions on Constitutional Case 10/14 of the Council of Ministers, the Supreme Court of Cassation, the Prosecutor General, BMA. The Council of Ministers has come up with a position that is entirely contrary to the Concept on changes in the national legislation related to the application of the standards of Article 12 of the UN Convention on the Rights of Persons with Disabilities by taking legislative support measures for persons with disabilities aimed at the efficient and independent exercise of their rights, respect for their individual characteristics, and protection of their interests, approved by Decision of 14.11.2012 of the Council of Ministers.

3 The understanding that it is only the rational individual that has rights has been convincingly refuted with the argument that it is discriminatory and based on the fiction that we have the tools to assess the processes going on in the human conscience and brain. General comment: 15.

4 See Ts. Tsankova: Idem: 212.

Contracts Act; Art. 131 (2) and Art. 132 (1), item 1 of the Family Code, etc.).”

The position of the Prosecutor General which makes due referral to Art. 12 also prompts an appeal for taking legislative actions: *“The state has not so far provided other alternatives for protecting and assisting persons with disabilities in the exercise of their own legal capacity – an obligation that the state has under Art. 12 of the UN Convention on the Rights of Persons with Disabilities.”* The purpose of the protection to be ensured by the state, pursuant to the Convention, is:

“The primary purpose of these safeguards must be to ensure the respect of the person’s rights, will and preferences. In order to accomplish this, the safeguards must provide protection from abuse on an equal basis with others.”
(General comment: 20)

The protection provided to persons with disabilities by the now effective regime has a different philosophy. It does not define the rights and equality before the law of these persons as problems, and provides them with care (Art. 164 (3) and Art. 168 (2) of the Family Code) and protection of their interests as identified by another person. In addition to the criticism passed, this regime is often deficient in safeguarding protection, as it is conducive to abuse of the person’s interests. Thus, according to BLHR: *“...the review of the case law in guardianship proceedings reveals in the prevailing majority of the cases that the legal interest and the reasons of the plaintiffs in such proceedings are determined by property relations with the persons whose placement under guardianship is claimed, and, in particular, by concerns regarding potential “unreasonable” disposition of the property by the person. Hence, while the placement of the person under full guardianship and depriving him/her of legal capacity might achieve certain goals in the interest of protecting the property rights of the person under guardianship, it implies an absolute restriction of any other rights in respect of which the person affected might be able to make decisions on his/her own, such as for example making decisions about his/her residence or medical treatment or education.”*

Interests are protected through the rights that the natural person is entitled to. This is the role played by law – ensuring that specific interests are protected by empowering the persons concerned with tools to protect these interests. And the opposite – empowering other persons for the purpose of protecting others’ interests is not a valid safeguard for an adult legal subject. This approach is applicable to under-age persons whose situation presumes the need for protection. Such persons are children. Beyond any doubt, guardianship and custodianship have been designed to resemble family relations, and their purpose is that the interests of persons deprived of legal capacity are taken care of¹. Interests depend on the judgment made by the parent/guardian (custodian). Adult legal subjects, by way of presumption, have legal capacity and can act autonomously depending on their preferences and wishes. Replicating the care construct based on another person’s assessment of the interests of the person under guardianship reproduces the dependence on and the subordination to another person’s will. The goal pursued by CRPD is changing this situation:

“Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the “best interpretation of will and preferences” must replace the “best interests” determinations. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The “best interests” principle is not a safeguard which complies with article 12 in relation to adults. The “will and preferences” paradigm must replace the “best interests” paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.” (General comment: 21)

¹ Jotov, St., “My Days are in Your Hands” (Йотов, Ст. Дните ми са в твоите ръце): 125.

PROTECTION THROUGH SELF-DETERMINATION

The opinions already expressed do not, for the most part, fall outside the paradigm of protection. The discussion on the legal nature of guardianship as affecting the person’s status (and the legal implications therefrom – the general deprivation of legal capacity) in terms of rights is transformed into a justification of the need to protect the person’s interest as judged appropriate by another person. This is understandable. The concern in terms of abuse of the rights and interests of vulnerable persons is also understandable, the state’s commitment to ensure protection for such persons is explicit (Art. 51 (3) of the Constitution)¹. We also take into consideration the cautious attitude toward the rather liberal approach to persons with psychosocial problems and intellectual disabilities, where such an approach might pose risks to others. However, ensuring care is no longer the only paradigm applicable to vulnerable persons. Even care in itself should be subject to variations taking into account the various states of vulnerable persons.

The Draft Law on Natural Persons and Support Measures (DLNPSM/DL) is the platform for the debate on the alternative to “care” by means of guardianship. The draft law proposes the abolition of legal incapacity, the latter being a restriction contrary to human dignity and disproportionate to the objective of guaranteeing the person’s rights and interests. Instead, the mechanism introduced is empowerment aimed at the independent exercise of rights in combination with appropriate support measures depending on the person’s state (Art. 7 (1) and Art. 9 (5), and Art. 12)². The starting point is the irrefutable presumption of legal capacity enshrined in ECHR which is based on the equality of everybody before the law. An expression of continuity is the understanding that the support for the exercise of rights by vulnerable persons should be provided with the involvement of the court in its capacity of “a competent, independent and impartial authority or judicial body” (art. 12 (4) of CRPD). An assessment by the court is also needed in order to establish the serious difficulties the person has (art. 9 (2)) in confirming the fiduciary relationship (Art. 14), to determine the support measure relevant to the state and needs (specific legal actions) (Chapter Three of DL), the control over the efficiency of that measure and its potential substitution with another one (Art. 11 (5)). In addition to the procedural rules set out in DLNPSM, §6 of its Final and Transitional Provisions proposes the relevant amendments to the Civil Code of Procedure (CCP).

Support Measures in cases of serious difficulties

The support measures are defined in DL as a form of providing assistance to the person in order to facilitate the personal exercise of their rights: 1) clarifying the meaning of the legal action and the consequences thereof; 2) facilitating the communication of the person with the other parties involved in the legal action in respect of which support is provided; 3) assisting the person in expressing their wishes and preferences in a manner comprehensible to the others; 4) rendering other assistance depending on the specifics of the case (Art. 12). The purpose in identifying the wishes and preferences of the person in such a way as to ensure that their rights are exercised depending on these wishes and preferences, and not based on the assessment of their interests made by someone else.

The persons who are entitled to support are defined in Art. 9 (1). The criterion is that the person should have difficulties in understanding the information and the facts on which the decision about performing the specific legal action is based (Art. 9 (1)). The provision limits the serious difficulties to three alternatives: intellectual disability, mental disorder or dementia. What is meant is a long-term state of the person (intellectual disability), a progressing disease (dementia) or a mental disorder (which could

¹ We cannot but agree that the new legislative solutions should establish *de facto* a situation of equality of all subjects before the law, including in the field of economic and social rights. See Tzankova, Tz. Idem: 221.

² We shall use henceforth the proposals for legislative changes made by BCNL, and the justification behind DLNPSM “The “New Formula” of legal capacity – an opportunity for everybody to exercise their rights, an opinion on the paradigm changed in line with Art. 12 of CRPD” (www.bcnl.org/bg/articles).

be a long-term disease or an episode)¹. These states are such that they cause serious difficulties in understanding the essence of the decisions made in relation to the specific legal actions and the consequences thereof (Art. 9 (2)).

What is of paramount relevance to understanding the new procedure for determining support measures and their implementation in each individual case is the so-called testing (assessment) of the serious difficulties the person concerned may have. The decision-making process consists of four elements: understanding, assessing, relating, and communicating. The purpose of this assessment is identifying the stage in decision-making at which a deficit emerges in order to make up for this deficit in a way allowing the person to independently exercise their rights. The test assesses the person's ability to:

1. understand the information and facts on which the decision about performing the specific legal action is based or
2. assess the essence and importance of the individual potential decisions or
3. relate the information to the assessment of the consequences in the process of making the relevant decision. (Art. 9 (2)).

It is the deficit and not the abilities that are assessed on the basis of the irrefutable presumption of legal capacity of adult persons. This is why, while this test cannot serve as grounds for restricting any rights, it is the basis for providing the right to receive support tailored to the relevant individual.

In parallel, the draft law focuses in particular on the following risk: if the person has only communication problems (without these being serious difficulties within the meaning of Art. 9 (2)), this should not impact their real abilities to exercise their rights independently. It is explicitly stipulated that similar communication difficulties shall be grounds for determining support measures (Art. 9 (3)). They serve as grounds to ensure reasonable facilities for the person with disability, which reasonable facilities shall ensure that the person is able to understand the others and is adequately understood by the others, without the disability impeding in any way the independent exercise of the rights. It is stipulated that all persons with disabilities are entitled to such reasonable facilities (Art. 7 (2 and 3))². These reasonable facilities are due prior to support measures, and support measures are not made use of in respect of persons with mental health problems and intellectual disabilities, either, if the measures for reasonable facilities are sufficient to overcome the communication deficit.

Specific legal actions

The provision of Art. 9 (4) sets out yet another criterion aimed at limiting the application of support measures. It is an objective one – depending on the type of actions with legal relevance. Support measures can be determined only in relation to specific legal actions: the management and disposition of property rights and cash, concluding transactions, making decisions about medical treatment and participation in administrative and court procedures. It is obvious that three types of actions are relevant: first and foremost, transactions with property rights and obligations, procedural actions and decisions, and decisions concerning treatment that are the only ones within the person's private remit³. DLNPSM defines them as specific legal actions with a view to emphasizing that support measures do not in any way concern the person's legal capacity and are limited only to specific legal actions. This highlights the particular relevance of the provision of Art. 9 – it is key in terms of determining the limits within which support measures are to be provided in the exercise of rights. A combination is made between the subject-related criterion (subjective) and the legal actions-related criterion (objective).

The exercise of non-property rights falls outside the scope of support (Art. 10). These rights pertain to the personality and its identity, and to unique experiences – private life, freedom of consciousness, religion, participation, which is why they are at the discretion of the rights holder. Such rights are, for example, the *right to marry and have a family, reproductive rights, the right to association, voting rights*. The rights listed are not only fundamental ones but are so personal that they can in no way be confined within any assumption regarding the assessment of/measure for their exercise with support. This does not preclude social services for supporting individuals who have declared their need of support in the delivery of these rights; however, this will be social support and not support for decision-making. Furthermore, DLNPSM stipulates that the person shall be provided with special counselling on the type of rights and the consequences from their exercise in relation to entering into a marriage, requests for the annulment of a marriage, making a will, association, giving consent to medical care in cases other than emergencies, and reproductive rights (Art. 10). Special attention should be paid to the provisions regarding consultations in relation to emergency health care and to medical interventions concerning the person's reproductive behavior.

The principles of the new legal framework

DLNPSM offers a careful regulation of the principles to be observed by the bodies involved in determining support measures and the control over them (Art. 11). The list of principles includes: *the necessity of each measure, respect for the person's wishes, preferences and values, proportionality, timeliness and flexibility, prevention of conflict of interests, undue influence, and exhaustiveness*¹. The principle of necessity means that a support measure shall be applied only where the conditions set out in Art. 9 (1-3) are simultaneously met: a mental state (1) resulting from a disease, trauma or intellectual disabilities or psychosocial problems, and (2) as a result of which the person has serious difficulties. The existence of the above cumulative preconditions implies the emergence of a *specific right to support* in exercising the rights, while the person does not lose their legal capacity. This principle guarantees minimum interference in the persons' legal capacity: only insofar as a real need to exercise rights exists.

The principle of **respect for the person's wishes, preferences, and values** is fundamental in the new philosophy of the regulation. It replaces the principle of protecting the adult's interests with the principle of protecting their rights. **In relation to any support measure** the first action that must always be performed is examining the wishes and preferences of the person with disabilities (Art. 11, Articles 6 and 7, Art. 16, Art. 21 (1), item 4, Art. 30 (5)), including in cases of exceptions – where the decision is made by another person (for example, the *procedure for determining protective measures in a risk situation*). The impossibility to independently express one's wishes and preferences in the ordinary manner does not serve as grounds for disrespecting them; the opportunity to communicate these wishes and preferences shall be ensured. This should and can be achieved through the relevant specialist and/or relatives/friends who can assist in understanding the wish/wishes of the person with disabilities. The respect for the person's will is also guaranteed by their inalienable right to initiate a procedure for ruling, changing or terminating a measure (Art. 15 (1)).

The principle of **proportionality** means that the measure shall be relevant to the case and the state of the person, and shall be imposed with the scope needed (only for the specific legal actions for which the person needs support). As for any other legal actions, the person shall be deemed to act entirely on their own. The principle guarantees proportionality of the interference in the person's legal capacity – only within the limits of conformity to the law: in order to ensure support for the independent exercise of rights (Art. 11 (3)).

¹ See a Report by Association Alzheimer-Bulgaria and a Report on the national policies and practices in Bulgaria: Ensuring adequate health and social services for persons with dementia – obstacles and opportunities.

² See General comment No 2: Article 9: UN Committee on the Rights of Persons with Disabilities, 22.05.2014 (CPRD/C/GC/2).

³ DLNPSM does not regulate the assumptions of forced and compulsory medical treatment under the Health Act.

¹ The principles for determining a measure have been developed on the basis of the standards laid down in Art. 12, item 4 of CRPD.

An important principle is also the **time limit**. All measures shall have a time limit (Art. 11 (4 and 5), Art. 18 (4)). Each measure shall have a time limit depending on the person's need of support and this time limit shall not exceed two years. Revision of the measure is also envisaged – it can be done till one month before the expiry of the measure in order to assess whether it is still needed or another one should be applied. This is also a manifestation of the principle of **flexibility of measures** which is closely related to the **time limit**. The measure has to be consistent with the dynamics of the person's state, and, if the need be, can be replaced. A mechanism guaranteeing the principle of flexibility is also laid down via the obligation for the court to review the measure.

The principle of **preventing conflicts of interest and undue influence** is ensured by means of the eligibility rules to be applied in respect of supporting persons (Art. 23), and the requirement for a fiduciary relationship between the supported person and the supporting one (Art. 11 (8)).

The principle of **exhaustiveness** of the measures means that a support measure shall be determined in accordance with the persons' abilities, as they have been examined, by following the order from the least restrictive measure to the more intensive ones; in terms of application, the measures under Chapter Three have priority over the measures under Chapter Four (Art. 13). Exhaustiveness also means that more than one measure shall be determined for the person concerned if their state requires so and subject to the reasons in the court judgment (Art. 11 (9)). In addition, the court judgment shall not be based only on a psychiatric expert examination or on medical considerations regarding the disability (Art. 338 (3) of CCP).

Fiduciary relationship

The new set of tools for the personal exercise of rights is based on the concept of the fiduciary relationship as a tool for the person with disabilities to express their wishes and preferences (Art. 14). The fiduciary relationship, as suggested by its name, is a relationship between two or more persons based on mutual confidence and understanding. The draft law makes the existence of the fiduciary relationship conditional on four prerequisites (Art. 14 (1)) whose cumulative existence shall be established by the court in its adjudication on determining support measures (Art. 21 (1-3)). The first one is the voluntary nature of the relationship, the consent by both parties to the existence thereof. While the consent can be expressed in different forms depending on the type and degree of the disability of the person in need of protection, it has to be comprehensible and the court should be able to establish it. The consent shall be conclusive, i.e. implied in an obvious manner in the behavior of both parties. For example, a person with serious intellectual disabilities may express preference for a specific person out of those taking care of him/her, and this has to be visible in their everyday relations. This mutual nature of trust, however, must be manifested under circumstances excluding manipulation or violence. The assessment shall be complex and based on multiple sources.

An important precondition for the existence of a fiduciary relationship is its objectively long-term nature. The long-term feature serves as a guarantee to prove the emerging confidence between the two persons. While it is difficult to establish the exact point in time when a relationship becomes fiduciary, what is known for sure is that confidence does not arise right at the point of two persons meeting. The existence of a fiduciary relationship is a circumstance in respect of which the court shall gather evidence from various sources. The long-term nature in the relations can be proved by the court by means of testimony and/or explanations provided in this respect by both parties.

The third precondition is the ability of the supporting person to convey the wishes and preferences of the supported person. There has to be **communication** in a fiduciary relationship – the parties thereto should be able to understand what each of them is saying. The relevant factors are the court's personal

impressions and observations regarding the communication between the parties (supporting person – supported person), and testimony ascertaining that communication is possible. For example, reverting to the case with the persons with intellectual disabilities, it is possible that the person with whom he/she has a special relationship responds to his/her signals in a way provoking a reaction of gratification. This is absolutely feasible even in serious cases and can be established by means of an expert examination which the court accepts as valid evidence for the existence of communication.

The fourth precondition is the readiness and the ability of the supporting person to act in the interest of the supported person by taking into account their wishes and preferences. While readiness has a future perspective, verifying actions in a retroactive perspective is not excluded if the fiduciary relationship in the past had some aspects of supported decision-making. Readiness can only be declared. While readiness cannot be objectively examined before the relationship of supported decision-making unfolds, it has to be observed and controlled in case the support is formalized (Art. 11 (4)).

In order to safeguard the rights and interests of the supported person, the court has to be convinced that the fiduciary relationship excludes any relations of undue influence, violence, abuse or manipulation of the supported person by the supporting one (Art. 14 (2)). This means that the court needs expertise in detecting signs of emotional abuse, mental or physical violence¹. Any evidence is admissible (Art. 21 (2)).

Types of measures

The possible support measures are listed in Art. 13. Except for Art. 13 (1), items 1 and 4 – where there is no specific legal action by a third person – the measures are regulated with details in Chapter Three of DL which is drafted on the basis of the “supported decision-making” concept (replacing the “substituted decision-making” such as guardianship). The underlying idea behind this concept is that the person's wishes and preferences are always taken into consideration. The measures and the order of their listing follow the logic of proportionate interference in the personal exercise of rights (autonomy) depending on the person's state. Each measure shall be entered into the population register under the terms and procedure of the Civil Registration Act. Intervention shall not be needed if the person has difficulties only in social communication; in such cases the court can refer him/her to the Social Assistance Directorate for using a community-based social service which will contribute to improving his/her abilities. Relevant amendments to the Social Assistance Act are proposed with a view to introducing such a service (§ 7 of FTP). Intervention shall not be needed, either, if the court imposes restrictions on the disposition of property above a certain value threshold at the request of the person in need of support (Art. 13 (1), item 4). The restriction shall be imposed by the court and shall be entered into the relevant register.

Supported decision-making includes a number of measures based on a fiduciary relationship between the supporting person and the supported one whereby the personal exercise of rights and the respect for this exercise by all third parties is ensured (Art. 16 in conjunction with Art. 13 (1), items 2, 3 and 5). The measures shall be determined for specific areas and/or actions within the meaning of Art. 9 (4) of DL, if difficulties in respect of them exist, and shall be bound by a certain time limit. These areas relate mostly to the exercise of property rights, concluding transactions, the personal choice of residence, the choice of medical treatment, and participation in court and administrative procedures. As supported decision-making is both a measure of support and a measure limiting legal capacity, it is based on a court judgment. The legal fact giving rise to the right to interfere in another person's legal sphere is the court judgment whereby the existence of a fiduciary relationship/s is confirmed between the supported one and the supporting person who may be more than one person (Art. 17 (1) in conjunction with Art. 13 (1), item 2 and Art. 18 (3)). The court judgment creates the legal relationship between the supporting

¹ Including the requirement for a specific training.

person and the supported one (Art. 18 (6)). The court judgment designates the supporting person(s) and the legal actions in respect of which the measure is determined. Designating the supporting person and choosing a specific person to act as such depends on the preferences of the supported person.

Supported decision-making covers three types of measures whose purpose is ensuring the necessary support for the independent exercise of rights (performing legal actions and/or inactions) with a view to giving rise to certain legal consequences based on the wishes and preferences of the supported person: provisional measures (provisional dispositions and long-term powers of attorney), a supported decision-making contract (concluded as a result of special court proceedings under Art. 21), and co-decision-making.

The **approval of a preliminary declaration** by the person in need of protection (Art. 19 in conjunction with Art. 13 (1), item 5) is the least intensive interference which presupposes enhanced safeguards for the freedom of the expression of will and its effectiveness in the future. The preliminary declaration is regulated as an expression of will with deferred action – as of the time when the person reaches a state of being unable to form or express their wishes and preferences (Art. 19 (1)). The regulation covers the form, the content, the court procedure for ceasing the effect of or changing the declaration.

The **supported decision-making contract** is concluded on the grounds of a court judgment, the supported person being able to conclude a contract with one or more persons with whom a fiduciary relationship has been confirmed by the court (Art. 18 (3)) in relation to support for different legal actions. The contract lays down the rights and obligation of the parties thereto. The contract is the legal fact giving rise to the obligation for third parties to accept the legal actions of the supported person under the conditions of supported decision-making (Art. 20). The contract shall be registered in the population register under the terms and conditions of the Civil Registration Act. As of the time of registration the contract shall be opposable to third parties (Art. 18 (6)).

A measure with more intensive support is **co-decision-making** (Art. 20). It differs considerably from the above measure. Under supported decision-making the supported person carries out the specific legal actions on their own, while under co-decision-making the decision is made and the specific actions with legal consequences are carried out jointly by the supported person and the supporting one (Art. 20 (2)). The determination of this measure is also conditional on confirming the fiduciary relationship (Art. 13 (1), item 3). Due to the higher degree of limiting the independence of action, additional safeguards against disproportionate interference in legal capacity are provided for. The choice of the supporting person is assigned to the supported person who also chooses the areas for co-decision-making or the objectives for whose achievement co-decision-making is needed. The supported person is provided with the opportunity to approach the court with a claim for additional conditions in terms of the effectiveness and the termination of the measure.

Where the application of none of the support measures listed is possible, the draft law regulates a special procedure for determining protective measures in a risk situation under Chapter Four (Art. 13 (3) in conjunction with Art. 26). This procedure combining a special court procedure and an administrative one is, by its nature, a protective measure which guarantees that the person who is in a serious crisis will not be left without the possibility for support and will not suffer irreversible losses in personal and financial terms. In personal terms, the protection regulated concerns health care in emergency cases, as well as matters such as the person's place of residence (under the conditions of an urgent solution and a serious and immediate risk to life, health, and property – Art. 26 (1)). The financial aspect relates to the disposition of considerable amounts of cash and belongings and/or immovable property. This procedure is the measure needed to take the person out of the situation of a serious crisis unharmed and help him/her restore the fiduciary relationship and/or build up new ones, to help him/her continue being an inte-

gral part of society irrespective of the crisis episode and the risks inherent to such an episode.

In parallel, the procedure provides a response to numerous concerns in relation to specific difficult life situations where the fiduciary relationship collapses, the provisional expression of will is withdrawn. The procedure also guarantees the rights of third persons.

With respect to persons who have fallen into a state of comma, the provisions regarding the appointment of a representative in the event of declaration of absence under Chapter Five are applied.

CONCLUSION

The Natural Persons and Support Measures Act requires that the focus of the Bulgarian discussion on Art. 12 of CRPD should move away from the territory of utilitarianism where the paternalistic approach to adult persons is well accommodated. Actions need to be taken to ensure autonomy for persons with psychosocial problems and intellectual disabilities not only for the purpose of consistency with the global treaty but also in view of the fact that we owe them equality in terms of the legal status and legal capacity. The empowerment of these persons within the limits of preventing any harm to them and the others by means of the compensatory mechanisms laid down in the draft law will be a serious step forward in taking them out of anonymity and introducing them into real life – their own life and the life of the society whose members they are.

Intro-version¹

From Guardianship to Freedom

“Now I am going to think if I want to enroll in a second greening course. If I feel like it, I’ll do it.” I.K

1. METHODOLOGICAL INTRODUCTION

An integral part of this pilot project was the action research which ran in parallel with all other activities. The *action research* method has been specifically designed for the purpose of studying social and cultural changes within organizations and communities. This method requires that the participants are actively involved in the changes during the research process, and that the researchers themselves are committed to the transformation project by means of consultations or another supporting role. Hence, the research field is transformed into an action field, and the remit of the researcher’s role is broadened beyond the strict abidance by methodological procedures. The researcher steps out of the limits of acting as a neutral observer who studies the social world from the perspective of privileged knowledge in order to take over the role of a social actor committed to the process of change from the perspective of clearly articulated values shared with the other actors, and in order to acquire new knowledge, together with them, in the course of that process.



Haralan Alexandrov*

The main approach in this research was the critical self-reflection on first-hand experience alongside the efforts to bring about changes through a variety of roles within the project: the users (persons with psychosocial problems or intellectual disabilities), their parents and relatives and friends, supporting professionals (social workers and facilitators), lawyers, the managers of the organizations involved in the project, civil society activists, etc. The participants performing such a variety of roles, in parallel with their specific contribution to the project, also assumed the role of researchers studying their own participation. The insight into this variety of experience helped us gain awareness of the dynamics of individual involvement in the process of social and cultural change and its limitations.

2. THE PARTICIPANTS’ VOICE

This research will provide explanations about the conscious change occurring in the individuals’ perception, its real manifestations in the form of difficulties experienced, future expectations regarding changes and solutions of problems, sustainability of the endeavor initiated. In terms of the research sub-

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¹ This research has been carried out by a team led by Dr. Haralan Alexandrov, main researcher. Assistant researchers are: Nadia Shabani (Program Director, Bulgarian Center for Not-for-Profit Law) and Ivan Georgiev (legal consultant, Bulgarian Center for Not-for-Profit Law), and all the members of the team that developed the pilot supported decision-making programs.

ject, we identified several main groups: parents and relatives/friends, professional in the social and legal areas (social workers, psychologists, and practicing lawyers), as well as the beneficiaries themselves of this innovative concept of legal capacity – persons with intellectual disabilities and/or autistic problems, and persons with psychosocial problems¹.

Hurrying slowly

In quantitative terms, what happened (the pilot program) has different dimensions for those involved: for some it implies a minimum change, for others it can be assessed as an unexpected progress in their perception and, subsequently, as a potential progress in the public perception. It often happened that parents expressed the following view: “Even before the start-up of the project our children would often share their wishes with friends and relatives; however, nobody took them serious. Now these young people can feel that they do matter, that others care about their opinion, and thus they themselves wish that the networks (of supporting persons) would gather. They have become more responsible with respect to their obligations – they are observing their employment schedule without the need to be reminded of it.”

The supported persons themselves experienced the change via its direct manifestation – the pilot projects transformed them from being the subject of obligations, as perceived by the others, into being the authors of their own legal actions – from withdrawing money from an ATM (as they do not have the legal right to withdraw money at the bank) to regarding their health state as their won obligation, and the access to a medical doctor as a right exercised. Legal treatment is expressed in an explicit manner: “having a disability is not a prerequisite for making wrong or correct decision”. According to this group, in order for the change to occur, it is the very element of incidental consultation, which in practical terms is lack of consultation, that should be abolished, as it embodies the obsolete concepts regarding the substituted will in the exercise of rights. According to the social workers the change can be measured in the correlation “I have rights – I assume obligations”: “What matters for me is that I am seeing the change not only in terms of “empowerment” but also in terms of “my responsibilities”.

“The users expect from us to abolish guardianship, they expect legal protection measures, they expect justice. I think that we have disappointed them in this respect, that we have been disappointed. While I am well aware that before the measures have been introduced we can change nothing in legal terms, and being in this situation of awaiting the development together with our users makes us sometimes feel exhausted and sad, and contributes to professional burn-out.” (social worker)

“On a personal note, I “have deleted” most of the expression I would use in speaking about psychosocial problems, about impairments, as a whole. It’s a strange feeling that I have of investing more in strengthening the relations that are important for me (network). I am thinking of the people surrounding me as a supporting network, which puts them in a position of being more valuable and better valued. I think that those who are close to me perceive this as a positive change.” (user)

The negative practices of persons with intellectual disabilities not being familiar with their rights, and being, thus, unable to feel the change are confirmed by the fact that these persons were often unaware of their legal status: *“In the past I had never thought about what being under guardianship implies for me, about what could change, while now I am aware that things can be different.”* V.D. While building up prestige runs through a number of stages, the indicator whereby you can tell it has grown is the increasing number of people who seek the opinion of the supported person, which is proved by the responses received – the persons concerned have become aware that the words they utter are a precondition for a number of consequences which in the past were just things happening in their life.

¹ For the purpose of this analysis the research target group of beneficiaries will be referred to by means of the following distinctive and distinguishing concepts: “persons with intellectual disabilities”, “persons with intellectual disabilities and/or autistic problems”, “persons with psychosocial problems”, “people involved in the pilot program”, “users”.

The unequal game of equality and inequality

Guardianship, as an embodiment of the legal environment, is not a solution but a tool to deprive of the right to make a choice concerning one's own life and to control it. In this case, the totalitarian system that had developed discriminatory attitudes hidden behind the mask of state social welfare for over fifty years, long before guardianship took away from the users their right to make a choice concerning their own life and to control it, had deprived these users of their rights by institutionalizing them. After spending many years in an institution, these persons do not have the inherent feeling of the right to a personal choice regarding everyday matters such as choosing one's clothes, shoes, meals schedule and sleep hours. Hence, what about their choice in terms of more important life issues – where and with whom they will live, how they will manage their personal belongings and finances, who will provide their medical treatment, do they wish to study or to work? These are all issues that were never on the agenda for solutions. The solutions, of course, insofar as there were solutions, were decisions made by others, irrespective of the will and wishes of the persons with intellectual disabilities and/or psychosocial problems. *“A change is needed in relation to the discrepancy between legislation and reality.” “Persons with intellectual disabilities should be assigned more responsibilities, which will make them think, become more self-sufficient, depending on their abilities.”*

Everybody in the surrounding environment «are helping» in a manner that disables, damages those who have psychosocial problems; thus, such persons find themselves being the undoubtedly weaker party in need of permanent support. At some point this status quo translates into a well-learned and convenient position which crushes the striving to develop and be self-sufficient, and even the trust in one's own capacity. A contributor to this model is also the legal instrument of guardianship – ranging from the good intentions to ensure «help and protection» to the full annihilation of any individuality and will.

“It will be nice if the others know what is difficult for me.” I.K., aged 26

“Other people should know what difficulties I experience, I should tell them about my difficulties, and they should help me cope with them.” S.G., aged 28

“People should change their attitude toward us... For example, some time ago elections took place, I myself and another woman went to the polls and there, however, we were pushed away and were told that we didn't have the right to vote.” V.D., aged 53

There should be more opportunities for us – for example, now I have lost my job, because the company where I worked for my labor therapy had lay-offs, and as I didn't have an employment contract, I was the first one to be laid off.” V.D., aged 53

“The idea that we all must be able and must have very good abilities, as a whole the stereotype in Bulgaria according to which if you are not a “clever guy with higher education”, you are, by and large, good for nothing.”

Knowledge which challenges perceptions and prejudices

The viewpoint of the **parents** regarding the development and passage of new legislation in the area of legal capacity of natural persons can be assessed as positive, with two distinct lines of reasoning: even if the new law does not yield the best possible solution, it will undoubtedly be the best solution to regulate public relations, and its implementation will most probably bring about amendments to other laws. In other words, this is an emerging change which does not set a time frame for its evolution but a specific goal – an improved legal environment ensuring the practical exercise of the rights of disadvantaged persons by means of safeguards for their equal treatment, and will, in parallel, free them from the effect of the current legislation which, while being protective, causes damages and exposes these persons to risks. While the draft law has been recognized as an instrument of positive changes, there are some potential threats – the excessive expectations for the law to provide a new framework for the public mindset, per-

ceptions, ethics, and relations, aims, which goes beyond the inherent function of the law – regulating the public relations which it will inevitably reflect. What cannot be achieved by way of wish, shall not be achieved by way of law, either.

«If we assume that the draft law is passed and nothing else changes, this law might even prove harmful. As this law will result in opening a large empty space, it is crucial for that space to be filled in with the rights things. In my understanding, this law is a kind of a charter of planning at the highest level, which, once adopted, does require developing numerous other constructs that are now missing, each of them resulting in its own subsystems – in the areas legislation, services, informal support, and to the greatest extent: in terms of the attitude of the society to those of its members with psychosocial problems, as well as in many other areas of life».

The best of hopes goes to judges – those who ensure the administration of justice and are close to people (and are definitely more competent than the social services). *“Initially I had the most serious concerns with judges and prosecutors; however, after a few talks with representatives of the judiciary I am now aware that what they want is a law with a logical philosophy, clear provisions, and a good regulation providing the tools for the implementation of the law.”* (social worker).

Accelerators of the elementary particles of change

According to the participants in the research, a distinct accelerator of the process of change would be the new law which will stimulate the most relevant catalyst – the public at large. Another important aspect is the way forward to the change – the stories about the application of supported decision-making, and the court proceedings initiated.

It is understandable that the catalysts with the most powerful impact are the mass media, in particular the Bulgarian National Television (BNT), which encourage the public debate on this topic and shape the public opinion: *“After the film¹ was broadcast by BNT, I received calls from friends telling me that they had at last understood what I had been talking about.”* An important aspect of the process of change was the transition from the feeling about a “special community of a closed type” of lawyers and social workers as the only ones who understand the new formula of legal capacity to the missionary approach – the more participants you attract and share your knowledge with them, the stronger will the feeling be about having “yet another person on the right side”.

For some of the participants in the research strong catalysts are the change in values and referring to these persons not as “they” but as “we” – “if we impose restriction on some people – it is us doing it” or “this may happen to anybody”, involving the unique legal argument: it is not a matter of a new kind of social support but of rights which we owe to some people without being entitled to deprive them of these rights.

Authorship of change?

The personal contribution to implementing change from the perspective of **parents and relatives/friends** is most often understood as finding avenues whereby more information and increasingly reliable information about the new formula of legal capacity can reach the public. This would transform the “care-taking” network for beneficiaries into a supportive one.

“I am conducting a lawsuit to have the guardianship lifted, and I can thus set an example to others.” V.D.

“I attended workshops in Varna and Sofia in order to tell about myself and the project, so that other people could also be helped, similar to myself.” N.

¹ “Under Guardianship”, author Maria Cherneva, director Borislava Dimova, camera Atanas Atanasov, NBT, Award for the Best Documentary in the category “Judiciary Reform” at the 2014 Bulgarian Europe festival.

Who raises the emerging change and responsibility?

The empowerment of persons with intellectual disabilities and/or psychosocial problems allows them to be citizens with equal rights. “The pilot projects have proved that people, whether they are “normal” or with psychosocial problems or with intellectual disabilities, they all share similar values, dreams and expectations – they want to have a job, to create a family and to be relatively self-sufficient, to have the right to do things they like.”

“Yes, in order to help other people who are like me.” V.D.

“It should continue, so that we and others like us could be helped.” N.

3. CONCLUSIONS AND PROSPECTS

This chapter draws the main conclusions and lessons learnt from the research, and from the project as a whole, and presents them in a theoretical perspective chosen by us. We have chosen to analyze the experience of our team in the categories of social constructivism, as in our view this paradigm provides some valid explanations that will encourage and stimulate the agents of change to carry on with their efforts.

The internal transformation

The assessments, ideas and proposals shared in relation to the piloting of the supported decision-making service do point to the fact that the project is assessed as a success which, however, is not sustainable and final. Both the users of the new services, their family and friends and the professionals providing the services have embraced this project as a possibility for a considerable and positive change in their life and professional circumstances. The users and their families share that they did not feel just supported, but rather empowered and encouraged to take their life in their own hands. Thus, they restored their self-respect and dared to dream of a more meaningful and dignified existence. It is the respect for their status of self-sufficient human beings that allowed the users to look into the world and themselves with growing curiosity, and to begin asking themselves questions about their own rights, social involvement and development opportunities. On the other hand, this newly acquired freedom, self-consciousness and self-reflection made it possible for them to become aware of their enhanced self-confidence and independence in terms of both the way they perceive themselves and the way they relate to the environment. The above gives us grounds to argue that the project has unlocked a process of personal transformation via changes in the relations with the surrounding environment.

The big issue at the end of the project is how and to what extent the transformation processes it has unleashed can continue their evolution beyond the protected territory which the project has created and has successfully defended against the pressure of the dominant culture. This issue has been raised, in a way or another, by all the participants in their different roles, and the outlook is not particularly optimistic. A bitter lesson from the project learnt by many participants is that the process of empowerment is confronted with limitations and resistance that seem impossible to overcome. The resistance against change has both external causes – obsolete legislation and institutional frameworks – and internal ones – prejudiced views and beliefs, and irrational but persisting fears and fantasies. The internal and external aspects of the status quo have proved to be interdependent: the legal framework depriving of powers is based on stereotype beliefs and prejudices, which, in their turn, are replicated by referring to conservative laws and institutional practices. This self-nourishing amalgam of beliefs, practices and norms can be defined as the culture of common sense with the meaning of this concept as defined by Clifford Geertz (Geertz, 1983).

The culture of common sense

The anthropologist Clifford Geertz develops the idea about **common sense** as a mentality basis for the dominant cultural norm and a major resource of resistance against cultural change. An inherent feature of common sense is the incidental and unsystematic attitude toward the facts in our reality: common sense registers some facts, leaves others unnoticed, and focuses on yet others on the basis of purely ad-hoc signs. The culture of common sense relies on the reassurance that the meaning of things lies on the surface: self-evident, univocal, and accessible; the efforts put into studying the deeper strata are useless and unhealthy. By means of a number of mechanisms for social regulation – mocking, devaluation, denial – the dominant culture punishes and marginalizes any attempts at self-reflection and identifying problems in terms of the well-established truths about the world.

Common sense comments without interpreting; it explains without understanding; it preaches without verifying. This makes common sense simultaneously conservative (based on stable beliefs regarding the nature of things) and opportunistic – it refers to unverified statements and convenient principles in order to argument a predetermined position. In order to meet the immediate conjectural need for a plausible explanation, common sense makes indiscriminate use of whatever comes handy: it is more than willing to fall back on beliefs and myths; it makes a compilation of bits of incompatible theories, and feels at its ease in substituting facts.

What makes common sense almighty is its convenient nature – it is a tool to explain any action in an acceptable manner, to provide an excuse for any failure. The price we pay for this convenience is the voluntary refusal of knowledge and development. The prerequisite for development lies in challenging and disproving beliefs about reality which people profess by virtue of belonging to a particular community. The uncritical adherence to common sense strips individuals, groups and organizations of their ability to indulge in self-study and find explanations other than the “ready-made” ones in culture.

It becomes clear that the culture of common sense hides the social nature of the existing relations of exclusion, deprivation of rights, and marginalization by vesting them with the status of natural features, of a steady and unshakable objectiveness. Regrettably, the findings from the research suggest that the culture of common sense is the indisputable and unfaltering master of the minds of most Bulgarian citizens, including the legal community.

The social construction of the world

The postmodern paradigm in cultural studies helps demystify the process of naturalizing relations of injustice created by means of social constructs. This school defines culture as a dynamic phenomenon, a product of the interaction between individuals and their environment, which is impacted by historical incidents but follows specific models (cultural patterns) that can be both adaptive and maladaptive. These patterns are adopted by the members of the community via social interaction and become manifest via stable cultural practices, explanatory models and behavioral repertoires, while they often stay hidden for their carriers. The task of the critical researcher of culture, whether an anthropologist or an assisting professional, is to make these cultural models explicit and accessible to the conscience of the community members, thus empowering the latter to commit to change.

A concept standing out among postmodern concepts is **constructivism** – it analyzes culture as a “symbol universe” which people create and maintain through their social interactions and practices, thus

being often misled to perceive cultural artefacts as natural facts. The text “Social Construction of Reality” by Peter Berger and Thomas Luckmann (Berger and Luckmann, 1991), which has acquired classical relevance, studies the cognitive and social mechanisms of *objectivation* and *reification* whereby the social and cultural reality is being transformed from human creation into nature, in an external, objective reality which we find in the world and which seems irrelevant to our participation: *“It will be clear from our previous discussion of objectivation that, as soon as an objective social world is established the possibility of reification is never far away. The objectivity of the social world means that it confronts man as something outside of himself. The decisive question is whether he still retains the awareness that, however objectivated, the social world was made by men - and, therefore, can be remade by them. In other words, reification can be described as an extreme step in the process of objectivation, whereby the objectivated world loses its comprehensibility as a human enterprise and becomes fixated as a non-humanizable, inert facticity. Typically, the real relationship between man and society as objective reality his world is reversed in consciousness. Man, the producer of a world, is apprehended as its product, and human activity as an epiphenomenon of non-human processes. Human beings are no longer understood as world-producing but as being, in their turn, products of the ‘nature of things’. It must be emphasized that reification is a modality of consciousness, more precisely, a modality of man’s objectification of the human world. Even while apprehending the world in reified terms, man continues to produce it. That is, man is capable paradoxically of producing a reality that denies him.”*

Cultural change

In this context cultural change means reordering elements of this “symbol universe” or a picture of the world trustfully accepted which individuals maintain and through which they achieve a shared experience of reality. As the institutions, roles and social practices in which individuals are involved and through which they live their life have a meaning in this particular “symbol universe”, on the one hand, they find themselves in this universe, and, on the other hand, they are committed to the supertask of maintaining, legitimizing and reproducing it. The paradox of change lies in the fact that it inevitably unfolds in the established picture of the world with its deeply rooted institutions, behavior and practices, while bringing new elements into that picture. Thus, the processes of change, on the one hand, destroy the symbol universe, and, on the other hand, have to maintain it, as human reality can exist only in this universe. Hence, the established picture of the world turns into the area of meaning where cultural change takes place, while restricting and opposing change and offering itself as a resource.

In other words, cultural and social change emerges in the area of meaning and, subsequently, unfolds in reality. Meaning is a phenomenon of man’s unique ability to experience the world and get an insight into it, i.e. relating the mind to reality in the efforts made to understand, explain and manage this reality. This operation is performed by the thinking mind over and over again, always in relation to a specific occasion, here and now. We manage to achieve a certain control over reality only by making continuous efforts to understand it and construct explanatory versions in our minds, while reality is always slipping away and is refuting these versions, thus making us invent new ones. The refusal or the impossibility to think of reality in a critical manner results in the failure of this operation to generate thought and in the loss of control over circumstances. What happens is what Berger and Luckmann call “reification” of the human world – it turns into something alien, inhuman, often meaningless and hostile. Alienation and objectification of the social world transform human beings – its inhabitants and authors – into its victims. Reality starts slipping away from the individual conscience, the extreme of that process being its collapse and final loss in the chaos and fragmentation of psychotic experiences.

4. CONCLUSION

This project has allowed the participants to learn a lot about Bulgarian culture and the way it functions with respect to vulnerable individuals and groups. Last but not least, the project has become a field for testing the *action research* method in the Bulgarian context and including professional from various areas in the community of practitioner researchers committed to social and cultural change. The methodological contribution of the project consists in raising in a systematic way a number of issues ensuing from the dual and potentially contradictory role of the research actor who has opted to apply the research action method: how does he validate the knowledge achieved by way of active interaction with the area subject of research; how does he combine the research and the activist agendas of his participation, and how does he manage tensions and potential conflicts between the two agendas; what are the limits of the application of these methods in the local context, and how does their application change the communities involved in the process. In respect of these issues and others of a complex nature – both epistemological and methodological, as well as political and ethical – it is difficult to provide a universal response. The experience of the relatively few researchers applying these approaches in Bulgaria suggests that similar questions can receive answers only in the context of the specific and unique human interaction emerging in the researcher’s genuine commitment to the research area.

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NEW ASPECTS IN THE LABOR LEGAL STATUS OF PERSONS WITH DISABILITIES RELATED TO THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The right to employment is a fundamental social right which is enjoyed by each and every citizen. It is enshrined in paragraphs 1 and 2 of Art. 48 of the Constitution of the Republic of Bulgaria (CRB) which set out an obligation for the state to ensure conditions for the exercise of this right, in particular by persons with physical and mental disabilities. The recognition of this right at the national level constitutes a follow-up development in the context of the rich international legal framework regulating the right to employment as both a universal¹ and a specific one in respect of persons with disabilities. This right is part of the large group of social, economic, and cultural rights set out in Art. 23, item 1 of the Universal Declaration on Human Rights (UDHR), Art. 6 of the International Covenant of Economic, Social and Cultural Rights (ICESCR), in items II and III of the 1944 Declaration of Philadelphia of the International Labor Organization (ILO), Art. 1 of the European Social Charter. In late 2010 the European Commission adopted a European Strategy for People with Disabilities 2010-2014², having ratified³, as a Community, the UN Convention on the Rights of Persons with Disabilities (CRPD)⁴ a year earlier, on 26 November 2009.

The main purpose of the strategic documents regarding the status of people with disabilities, adopted by the European Union (EU), is identifying and taking measures at both the EU and national levels for abolishing any obstacles to the equal treatment of such persons, and for attaining the goal – Europe without Barriers – to include them in public life and the labor market and provide them with equal opportunities and economic security in line with the progressive goals defined by ILO back in 1944. The strategic actions set forth aim at ensuring the equal exercise of the right to employment for persons with disabilities as the way forward to their full-pledged involvement in the society and in the European economy. With a view to achieving this, the European Commission has included employment in its strategy among the eight key areas where urgent measure are needed due to the fact that the national legislations contain numerous obstacles, which prevent people with disabilities from freely exercising their right to employment. A general gap has been established at the EU level in respect of the insufficient inclusion of people with disabilities in the economic and social life, this deficit being identified as one of the reasons for limiting the scope of improvement in terms of the well-being and the quality of life of all European citizens. In the context of the above findings, the ratification of the UN Convention on the Rights of Persons with Disabilities by the EU can be considered a timely and justified action. The Convention sets out, by way of principle, some new legal concepts regarding important aspects of the status of people with disabilities, in particular of those with long-term mental and intellectual impairments.⁵



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1 Read more: Read more: Mrachkov, V., International Labour Law, (Мръчков, В. Международно трудово право, С.: Сибир), 2000, 87–90, 128–132.

2 Accessible at: ec.europa.eu/news/justice/101115_bg.htm

3 Accessible at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2010.023.01.0035.01.ENG].

4 Read more about the difficulties and challenges ensuing for the EU law from the ratification of CRPD: **Jarlath Clifford**, The UN Disability Convention and its Impact on European Equality Law. Equal Rights Review, Vol. 6, 2011, 11-25, accessible at: [<http://www.escri-net.org/node/365001>].

5 This term is used in EU documents in parallel with others to refer to persons suffering from mental, intellectual and other types of mental impairments or disorders. The general term to be used henceforth is persons with mental or intellectual impairments. Read more about the concepts: Zinovieva D., N. Gevrenova, Legal framework for people with mental health disabilities (Зинovieва, Д., Н. Гевренова, Правен режим относно лицата с психически увреждания. С.: Сиела), 2012, 16-17, and the references therein.

The EU strategy defines as unworkable the situation which does not ensure the legal opportunity for these persons to be involved in public life on an equal footing with others. Hence, the recognition before the law of people with disabilities – Art. 12 of CRPD – as persons with a legal status and legal capacity on an equal footing with others can be defined as a feasible measure for attaining the goals set by the EU institutions and the national legislations. Ensuring unrestricted opportunities for the participation of people with disabilities in public life, including the effective exercise of their right to employment and the entitlement to secure their subsistence through their labor, is laid down as a major goal in the Strategy.

Before proceeding with the review of the challenges before the Bulgarian legislation ensuing from the Convention, a couple of preliminary remarks need to be made. This paper does not pursue a review of the legal status of persons with disabilities that have required their placement under full or partial guardianship pursuant to Art. 5 of the Persons and Family Act (PFA); it is focused on the labor legal status of these individuals, as guardianship limits or precludes directly and in advance their labor legal capacity. Secondly, the paper is not aimed, either, at an analysis of guardianship or the necessary changes in the civil legislation which need to be introduced in relation to the Convention ratification. By means of a review of the current situation of people with disabilities placed under guardianship in terms of their labor legal status the paper pursues to both prove the urgent need for amendments to the legislation regulating their labor legal capacity and propose measures in full conformity with the Convention requirements.

Bulgaria has ratified the Convention by means of a law. While the Convention was effective from 21 April 2012 till March 2015 and still is, no real measures whatsoever have been taken to ensure development in line with the new requirements set forth in the Convention. At present the Bulgarian legislation still provides for people placed under guardianship the obligation to bear with the full or partial restriction of their participation in the public, political and economic life. Some of the law-makers and enforcement experts argue that there is no contradiction whatsoever between the norms laid down in the Convention and the Bulgaria legislation. The practice brings to light absurd opinions according to which, even where a contradiction is established, the Convention norms are not binding or even if they were binding, they do not have direct effect – therefore, unless national measures have been put in place, these international norms are not subject to direct application by the Bulgarian authorities. The inert attitude of the Bulgarian legislative power could also be identified as a reason for inaction in spite of the ratification of the Convention and the ensuing obligations, and in spite of the judgment of the European Court of Human Rights¹ against Bulgaria in the Stanev v. Bulgaria case on the grounds of contradiction between the domestic legislation and the Convention.

It is obvious that pursuant to Art. 5, paragraph 4 of CRP the norms of the Convention have direct application under the circumstances of contradiction with the domestic legislation.² It should be established whether such a contradiction exists. The idea about ensuring equal opportunities for the participation of people with disabilities in the civil, political, economic, social and cultural spheres of public life, which can be deduced from the preamble and the objectives laid down in Art. 1 of the Convention – promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and ensure full and effective participation in the society on an equal basis with others – is not extrinsic to the Bulgarian Constitution. The Convention requires the abolition of any forms of unequal treatment of persons with disabilities, without excluding those under guardianship and providing them with equal legal opportunities for participation in all areas of public life, including employment, which ensues from their civil legal status. Article 12 of the Convention raises this specific issue, paragraph 1 thereof obliging the States Parties to reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. In the national legislation, however, Art. 5 in

1 And other pending court proceedings against Bulgaria. The *Stanev v. Bulgaria* judgment is available at: <http://www.justice.government.bg/47/233/>

2 This is explicitly highlighted in the reasons to Judgment 12 of 2014 of the Constitutional Court.

conjunction with Art. 3, paragraph 2 and Art. 4, paragraph 2 of PFA provides for limited legal capacity for those under full or partial guardianship. This implies an obvious contradiction, as paragraph 1 of Art. 12 of CRPD stipulates that persons with disabilities that have resulted in their placement under guardianship shall be treated on an equal basis with others. The now effective legislation does not conform, either, to paragraphs 2 and 3 of Art. 12 of CRPD stipulating that States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. The Bulgarian legislation concerning persons under guardianship has exactly the opposite regulation: it defines persons under full guardianship as having no legal capacity and as being unable to independently exercise any of their rights, including the right to employment. Persons under partial guardianship need to be supported by the guardian in the exercise of their rights; this provision also covers entering into, modifying and terminating an employment relationship, in addition to imposing other limitations.

The practice and the case law do not seem to allow for any doubts as to the existence of such a contradiction between the international legal norms and the domestic legislation. The reasoned judgment No 12 of 17 July 2014 of the Constitutional Court (CC), issued on the basis of an inquiry by the Ombudsman, holds that the lack of detailed regulation of the legal regime of adults without legal capacity results not only in limiting the rights whose exercise implies risks in terms of the interests of those without legal capacity, third parties or the public, but also in the deprivation of an unjustifiably broad range of rights, including of a constitutional order, whose exercise requires legal actions. The constitutional judges recognize that the effective legal framework does take into account the Convention requirements regarding the proportionality of the restriction imposed on persons under guardianship. As for the case law of the regional courts, the scrutiny of the issue whether the effective legislation regarding the placement under guardianship is contrary to the Convention norms has resulted in various conclusions in examining claims for placement under guardianship.¹

The variety of solutions in the practice of determining the civil legal capacity of persons with mental or intellectual impairments, and the lack of legislative initiatives so far makes it difficult to reach a clear concept in terms of amendments to the civil legislation. The Bulgarian labor legislation stipulates that all citizens who have turned 16 years of age shall have the right to employment (Art. 301, paragraph 1 of the Labor Code (LC))² and does not raise any seeming obstacles to the possibility for people with disabilities to conclude, implement and terminate an employment relationship. Moreover, the legislation provides for special protection, such as the concept of reduced work capacity in Section III of LC (Articles 314-320), the Ordinance on the Special Placement of Disabled People, etc.³ The restrictions applied with respect to the labor legal capacity of persons under guardianship ensue from their civil legal status. It is this legal status that precludes the possibility for such persons to have a job under an employment contract and

the possibility for persons under partial guardianship to conclude, modify and terminate their employment relationship. The Bulgarian legislation lacks a separate legal instrument regulating labor legal capacity; instead, it uses the general concept of civil legal capacity. Any limitations in respect of civil legal capacity automatically result in limitations in respect of labor legal capacity. The definition of labor legal capacity – the capacity of natural persons recognized by law to acquire and exercise rights and to assume and meet obligations related to renting workforce for being used by another person, the employer, is only a scientific achievement.

In terms of measures to be taken in the application of the Convention, this paper proposes, firstly, introducing a separate concept of legal capacity in the labor legislation, which will not require changes in the civil legislation. Such a measure would allow persons under guardianship to hold labor rights and obligations and to freely exercise their right to employment. Secondly, the labor legislation should regulate the possibility for persons under guardianship to work by providing for the employer’s discretion in assessing whether the person under full or partial guardianship is suitable for the relevant job and has sufficient capacity to deliver on this job. Such an assessment does not differ from the regular assessment of the qualities of any applicant for a certain job. This assessment process is regulated in the Bulgarian legislation and does not pose specific difficulties. The quality features of the workforce are determined and laid down in the pre-contractual relationship prior to the conclusion of an employment relationship. The legalization of this assessment in the course of implementing the employment relationship is the conclusion of an employment contract and the possibility for the termination thereof under the provisions of Art. 71, paragraph 1 of LC on the basis of an examination of the person’s factual ability to deliver on their professional duties; the possibility to terminate the employment relationship under the provision of Art. 5, paragraph 1, item 5 of LC on the basis of an established lack of qualities, which prevents the employee from efficiently performing their duties. Therefore, I consider that the full provision of the right to employment is applicable in respect of persons with mental and intellectual impairments, the signing of an employment contract with such persons being subject to an assessment of their factual ability to perform the relevant job, which can be carried out by means of the now effective mechanisms.

Thirdly, the drafting of the above regulation requires that the specific characteristics of people with mental and intellectual impairments are taken into account by regulating supported decision-making in relation to entering into, modifying and terminating an employment relationship. The regulation of employment possibilities will enable the individuals concerned to participate in public life and to be self-sufficient in terms of their subsistence. Moreover, by ratifying the Convention, the state has pledged to ensure this participation, including by means of technical assistance, professional counselling and training, etc. (such measures for the exercise of the universal right to employment being set out in ICESCR).

What changes would ensue from the introduction of a separate legal concept of labor legal capacity? The implication would be separate grounds for the right to employment which can be exercised by persons with mental and intellectual disabilities without any restrictions. Thus, the persons under full guardianship, while this regime is effective, will acquire labor legal capacity, which they do not have at present, while those under partial guardianship will not need the guardian’s interference in relation to entering into, modifying and terminating an employment relationship, ensuring legal defense, etc. Scientific research has established an explanation of the now effective legal provisions – labor legal capacity derives from civil legal capacity – in the specific subject matter of the employment relationship: workforce that is manifested only via the personality. Labor presupposes specific individual actions that cannot be performed through the mediation of a representative.¹ Scientific research defines performing a job not as a simple range of basic labor-related actions, but also as a manifestation of a person’s will and conscientious activity, and ability to express their wishes and opinion, to meet legal obligations and

¹ Judgment 1980-2014-SCC (Sofia City Court) establishes a contradiction with the Convention and refuses the placement under guardianship. Judgment 7376-2013-SCC establishes a contradiction which serves as grounds to refuse placement under full guardianship, and the judges proceed further to rule the exercise of temporary measures for providing support to the persons concerned, which do not have a legal basis in the legislation. On the grounds of the contradiction established, Judgment 40277-2013-SCC dismisses the claim for placement under full guardianship as inadmissible. Some regional courts, while recognizing the contradiction between the effective regime of full guardianship and the Convention norms, rule full or partial guardianship (Judgment 150-2014-Varna Regional Court; Judgment 151-2014-Varna Regional Court). In other case, in spite of the contradiction established, given the lack of regulation and with a view to protecting the person’s interests full guardianship is ruled. (Judgment 07-2014 – Plovdiv Regional Court; Judgment 119-2014-Plovdiv Regional Court; Judgment 149-2014-Plovdiv Regional Court). In its judgment 124-2014 the Sofia Regional Court rules the opposite – it places the person under full guardianship on the grounds that the guardianship is in conformity with the measures laid down in paragraph 3 of Art. 12 of (the same is hold for Judgment 120-2014-Sofia Regional Court; Judgment 65-2014-Sofia Regional Court).

² The Bulgarian legislation stipulates that each child shall be entitled, by way of exception, to take part in artistic performances under special rules – a mandatory preliminary medical screening and conclusion therefrom – subject to the issuance of permission by the Labor Inspectorate for each individual case, under alleviated conditions and if the work is in full conformity with the child’s physical, intellectual and ethical development. See Articles 301 – 305 of LC, Ordinance No 6 of 2006 regarding the terms and procedure for issuing work permits to persons under the age of 18, the Ordinance regarding the Employment of Persons aged under 15 (H115).

³ Read more about the special protection for persons with disabilities: N. Gevrenova, D. Zoniveva Special protection for employees with limited working capacity (Гевренова, Н. в: Зонивева, Д., Н. Гевренова, Цит. съч., 91-144; Гевренова, Н. Специална закрила на работниците и служителите с намалена работоспособност. С.: Сиби), 2013.

¹ This is the reason why the concepts labor legal capacity and legal capacity are not distinguished.

exercise subjective rights, which requires intellectual and physical maturity.¹ Such is the reasoning behind the inability of a person placed under full guardianship to participate in public life by entering into, implementing and terminating an employment relationship, even if such a person has the real capacity to work. This viewpoint can be challenged by means of logical arguments. It has persisted for over half a century. Meanwhile our contemporary society has been through progressive changes allowing to a much higher extent the inclusion of persons, even with serious mental and intellectual impairments, in the labor market. Reality also disproves this viewpoint. Work functions during a relatively short period of time, with reduced working hours, related to light physical operations that do not require special judgment, accumulated expertise and do not imply specific risks that persons under full guardianship are unaware of would allow the involvement of such persons in employment under various programs and projects. Practice has shown that the successful participation of such persons in creative processes, in light work activities is possible, which, however, falls outside the scope of labor legislation and even constitutes a violation thereof, as such persons are deprived of the right to employment. This approach in the legislation is in direct contradiction with Art. 12 of CRPD. Another argument in support of providing labor legal capacity for all persons under guardianship concerns the very nature of labor as an everyday activity which involves actions of various degrees of complexity. We can assume that labor consists of all kinds of actions, including light and less demanding ones that do not require specific expert knowledge and skills. The opponents of this assumption define labor, in a rather incomprehensible manner, as being the equivalent of the legal action and the irreversibility of a disposition transaction with immovable property, which gives them grounds to consider that excluding persons with mental and intellectual impairments placed under full guardianship from employment is justified. There are, of course, cases where the impairment does not allow any work activity whatsoever, which makes employment impossible. Such critical cases, however, do not justify the deprivation of employment for all persons placed under full guardianship pursuant to the Bulgarian legislation. This approach is not in line with either the objectives and provisions of the Convention on the Rights of Persons with Disabilities or the postulates in the international and national legal instruments prohibiting all forms of discrimination.

The next step following the regulation of labor legal capacity and the provision thereof for all individuals is introducing measures to facilitate inclusion in the work process depending on the person's health state. They are needed as a mechanism for the practical implementation of the Convention in order to ensure that the individuals with mental and intellectual impairments placed under guardianship have an equal labor legal status with the other citizens. With regard to those placed under partial guardianship, I believe that the applicable *de lege ferenda* and sufficient measure is ensuring the exercise of the labor legal capacity introduced. Such persons should have full access to their right to employment by being able, without the guardian's interference, to conclude, modify and terminate their employment relationship and to use remedies in defense of their labor rights.

There could be more considerations against the provision of full labor legal capacity to those placed under full guardianship, as such a change might be substantial for the persons concerned. The shift will be from the deprivation of any right to employment to the possibility – if they express the will, and such will can unconditionally be established, to act on their own and within the remit of their abilities – to perform labor obligations and exercise their subjective labor rights without the participation of a representative. As indicated, the assessment as to which cases would allow that work to be performed by persons with more serious mental or intellectual impairments is a practical issue. An employment relationship concluded by a person who is unable to carry out even basic physical actions in implementing the subject matter of that relationship shall be invalid due to an impossible subject matter (based on the arguments set forth in Art. 26, paragraph 2 of the Obligations and Contracts Act), such situations being

irrelevant in practical terms. An applicable legislative solution aimed at the protection of the interests of such persons would be referral to the mechanisms of the effective employment regulations and procedure. With respect to persons with mental or intellectual impairments, grounds for their placement under full guardianship following the now effective procedure can be established by applying mandatory guardianship support as a transitional mechanism in the course of implementation and in the event of termination of the employment relationship, similar to the approach to young interns under Art. 233a et al. of LC. Thus, the guardian will help the person concerned and will assist in making decisions that are difficult for him/her and are relevant to his/her job. An approach applicable to the need to adapt the working conditions to the specific characteristics of workers and employees is the use of the well-known regime of special placement of disable persons, reduced working hours, a contract for sheltered employment, etc. In addition, an option might be the introduction of transitional rules for ensuring protection of the personality and interests of people with disabilities, protection against risks to their health and life ensuing from the job, and for preventing the possibility for any abuse by the party that is more powerful in traditional terms – the employer. Such a mechanism can be introduced at the point of hiring the employee by means of a mandatory submission in advance of a copy of the employment contract signed, of any amendments thereto, and of the job description for the purpose of entering these documents into a special register at the Labor Inspectorate. This would be a deterrent for employers in terms of potential abuse of power and attempts to include unfavorable conditions in the employment contract. By reviewing the employment contract the inspectors can assess whether the relevant job – working conditions, employment obligations – is suitable and feasible for the person concerned taking into consideration his/her impairment; whether the clauses are in conformity with the effective legislation, etc. In the event of violations established, the inspectors may proceed to issue binding prescriptions. The registration of employment contracts concluded with persons with mental and intellectual impairments who need additional support shall not limit their labor legal capacity, but will provide a higher level of safeguards for ensuring fair working conditions, health and safety at work for such individuals. In the course of implementation of the employment relationship, the persons with mental and intellectual impairments and all other workers and employees are entitled to receive support from the control bodies in relation to the observance of the applicable legislation. The general control competences under Art. 399 of LC provide for the Labor Inspectorate to monitor whether people with disabilities exercise their labor rights on an equal basis with others, the provision of just and favorable conditions of work, including equal opportunities and equal remuneration for work of equal value, healthy and safe working conditions, opportunities to exercise their labor and trade union rights on an equal basis with others, and the provision of reasonable facilities in the workplace required in letters b, c and f of Art. 27 of CRPD. For the purpose of safeguarding equal rights for people with disabilities, the general anti-discrimination mechanisms laid down in the Protection against Discrimination Act (PADA) can be used, including protection against discriminatory treatment in entering into the employment relationship, the exercise of the rights therein, as well as the termination thereof (Articles 12-28 of PADA). In the event of doubts about a violation, any person can submit an alert to the control bodies. Where violations are established, the relevant administrative measure shall apply, while where guilt is established, administrative sanctions shall be imposed on the employer perpetrating the violation. A tool for preventing employers from abusing of the situation of people with mental or intellectual impairments in the exercise of their labor rights is the enhanced administrative control by the Labor Inspectorate, and the introduction of higher amounts of the fines and material sanctions for officials and employers who commit violations or allow violations of the labor legislation, taking advantage of the unequal situation of persons with mental or intellectual impairments.

Certain categories of persons will not be able to benefit from the labor legal capacity provided due to the specifics of their impairment if the latter does not allow the *de facto* implementation of labor func-

¹ Read more in: Mrachkov, V., Labour Law (Мръчков, В. Трудово право. VII изд., С.: Сиби), 2010, 175-177, and the reference publications cited.

tions. In order to use the labor legal capacity provided, the person concerned should be able to express their will – a requirement ensuing from the very essence of the right to employment, the voluntary nature thereof, and the absolute prohibition of forced labor.¹ Where it is not possible to establish, as stipulated in the civil legislation, the explicit will of the person to work under an employment relationship, such a person will not be able to exercise their labor legal capacity.

The termination of the employment relationship does not require taking additional legislative measures, either, as, if the reasons for termination involve a subjective judgment by the employer, the mechanism of preliminary protection against dismissal under Art. 333, paragraph 1, item 3 of LC shall apply, as well as the requirement for the preliminary provision of a medical conclusion regarding the impact of the dismissal on the health state of the person, and a permission for the dismissal issued by the Labor Inspectorate which assesses the reasons prior to making a pronouncement.² As it has been proposed, this preliminary scrutiny of both the implications from the dismissal in terms of the person's health state and the lawfulness of the dismissal are sufficient; hence, there is no need for the guardian's interference in relation to the termination of employment relationships of persons who are placed under partial guardianship. With respect to persons with mental and intellectual impairments that require their placement under full guardianship, support by the guardian or another supporting person could be applied in relation to the termination of the employment relationship, where the person concerned has declared their wish or consent to quit.

In addition to the material legal provisions, the complete framework for ensuring the legal labor situation of persons with mental and intellectual impairments includes remedies for the protection of their rights. Paragraph 1 of Art. 13 of CRPD stipulates that the state shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. Paragraph 2 of Art. 28 of the Civil Code of Procedure (CCP) stipulates that underage persons and those under partial guardianship shall conduct legal procedural actions in person but with the consent of their parents or guardians, while paragraph 3 of Art. 28 of CCP stipulates that underage persons have the procedural legal capacity to conduct legal proceedings related to disputes over employment relationships. In view of implementing the commitments assumed in ratifying the Convention, it is admissible that, *de lege ferenda*, similar to the approach in respect of underage persons, the persons who are now placed under partial guardianship be also provided with the right to conduct in person proceedings related to disputes over employment relationships, which will allow their direct access to justice in protecting labor rights. In respect of workers and employees whose disabilities serve as grounds, under the effective regulation, for their placement under full guardianship, measures could be introduced to provide support in conducting legal procedural actions.

The Bulgarian legislator is faced with the ever more complicated task to ensure, in addition to legislative measures, the real application of these measures, the definition of obligations, and the regular oversight over implementation. In view of the fact that over the first two years after the ratification of the Convention Bulgaria has not taken any legislative measures to deliver the commitments assumed, the achievement of the Convention objectives, including by ensuring access to the labor market for persons placed under full guardianship, seems an unattainable target. The proposals regarding changes in the labor legislation presented in this paper aim to facilitate, at least to some extent, this process.

1 The prohibition has been set out in numerous international legal instruments, for example Articles 4 and 23 of UDHR, Art. 6, paragraph 1 of ICECCR, Art. 8, paragraph 3 of ICSCR, Conventions No 29 and 105 of ILO, Art. 4, paragraphs 2 and 3 of ECHR, as well as in the national legislation: Art. 48, paragraph 4 of CRP, Art. 1, paragraph 3 of LC.

2 Read more in: N. Gevrenova Special Protection for Employees with Limited Working Capacity (Гевренова, Н. Специална закрила на работниците и служителите с намалена работоспособност.) References cited, 218-278; V. Mrachkov Labour Law (Мръчков, В. Трудово право) References cited, 628-634.

The new paradigm of legal personality: Article 12 of the UN Convention on the Rights of Persons with Disabilities

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INTRODUCTION: THE CONTEXT

After the adoption of the **UN Convention on the Rights of Persons with Disabilities**² the classical understanding of the capacity to have rights and the legal capacity to act of natural persons is challenged to change so as to provide guarantees for independent exercise of rights of all persons, regardless of their disability and how it affects their mental or functional capacity. The challenge is huge. It requires a change in the theory and its principles and the creation of functioning and adequate “new legal statuses” to replace the existing ones. This means to change the paradigmatic approach of law towards people with disabilities – not as objects of care, but as active subjects of their rights; from the charity approach to an approach based on rights, from paternalism to empowerment³. This is the focus of the Convention which does not define new rights but offers a new understanding of their exercise by everyone as well as guarantees for this contained in Article 12⁴.

Bulgaria ratified the Convention on the Rights of Persons with Disabilities (CRPD) in 2012⁵. From that moment on the domestic law has been in conflict with Art. 12 of the CRPD, which has precedence provided by the Constitution.

With this text we aim to open the discussion concerning not *if the paradigm should be changed but:*

- how to change the system of restriction of legal capacity to act and full guardianship by which the will and the personal involvement of the person are replaced, and perhaps displaced by another person's will?
- how the law can ensure the personal exercise of rights by everyone regardless of their intellectual capacity or mental development?
- what kind of support the person needs so that the exercise of rights is ensured in reality?⁶

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2 Cf. the text of the Convention at: <http://equalrights.bcnl.org/uploadfiles/documents/convention.pdf>

3 Human rights Commissioner Office, Comm DH/Issue Paper (2012)2 Strasbourg, 20 February 2012, paper “Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities”.

4 Article 12 Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

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

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

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

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

5 Ratified with an act passed by the 41th National Assembly on January 26, 2012, SG. 12 of 2012, effective April 21, 2012. The European Union has ratified as a union this international legal instrument (the Convention) in 2009 for the first time. (Council decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with disabilities).

6 Cf. Decision of 04.11.2013, on the civil case № 16 532/2012 according to the record of Sofia Municipal Court, available at: <http://challengingthelaw.com/wp-content/uploads/2013/11/Reshenie-K-za-pravata-na-horata-s-uvrejdania.pdf>

- when will these changes happen in time considering that the Concept on Changes in the National Legislation Relating to the Implementation of the Standards of Article 12 of the Convention on the Rights of Persons with Disabilities has been adopted¹?

THE CURRENT CONCEPT OF LEGAL CAPACITY TO ACT

Legal capacity to act and capacity to have rights are legal constructs. Through them man as a natural, biological being is perceived as a legal person and this is done (through laws, objective law) by assigning the legal quality of legal personality, which is a unity of legal capacity to act and the capacity to have rights².

The concept of legal personality which justifies the empowering of people to participate in the legal relations and social life is relatively new. It is known that historically each person was recognized legal personality only after the disintegration of feudalism and the rise of capitalism (and only for the purposes of civic and market relations), which subsequently helped in the development of the whole structure of human rights and their legal protection³.

Bulgarian civil law defines the capacity to have rights as both an opportunity (general and abstract) of a person to be the holder of rights and obligations and as a quality of the legal personality. From the perspective of the person the capacity to have rights is his/her legal quality and from the perspective of objective law - it is defined as legal personality – i.e. the quality of the person to be a legal person⁴. More contemporary authors examine the legal capacity to have rights as the capability of the person to be the holder of rights and obligations as well. There is no uncertainty, however, that the capacity to have rights manifests this connection of the individual to the objective law which makes a person, regardless of his/her will or his/her health status, holder of rights and obligations set out in the legislation.

The functions of the capacity to have rights are not only to ensure the participation of the individual in the legal relations (in the civic and legal sense) but also to ensure its inclusion in the overall socio-political life with guarantees of equality before the law. This follows from the interpretation of Article 1 of the Persons and Family Act (PFA) which stipulates that “Any person from the moment of birth acquires the ability to be the holder of rights and obligations”. The important conclusions from this text are that the capacity to have rights is acquired in the presence of only one prerequisite - the birth of a person, no matter his/her physical condition or development and that the capacity to have rights guarantees equality of people before the law, i.e. in the legally regulated relationship, as each person is qualified. Thus, the capacity to have rights can be defined as a tool for “hominization”/ humanization of man, as it serves for its inclusion in the society as an equal⁵. And equality before the law is one of the fundamental values of democratic society proclaimed by the European and international law and adopted by all democratic countries⁶.

It is evident from Article 1 of PFA that the capacity to have rights is acquired ex lege, with the birth of the subject and regardless of his/her physical, physiological or mental status – i.e. if one is a human being born alive, one is qualified to be a holder of rights and obligations⁷. Capacity to have rights, by its very

nature, cannot be restricted or withdrawn¹. The opposite would mean banning the person from public relations and would be contrary to the value of human rights and the principle of equality. Objective law is the only legitimate limitation of the capacity to have rights².

The exercise of the legal capacity to have rights, however, is problematic from the standpoint of human functioning and the consequences of this functioning. According to the classical doctrine the possibility for people to enjoy the gained rights, freedoms and legal obligations independently - in their own name and for their own account depends on their capacity to act. In the civil law theory, the legal capacity to act is defined as the ability to perform legal actions³, or as the capability to perform legitimate legal actions⁴.

The legal capacity to have rights and the legal capacity to act are related and mutually conditioned. The legal capacity to have rights is the framework within which the capacity of individuals to act as legal persons unfolds – the persons exercise only the rights that they have within their legal capacity to have rights. In other words the legal capacity to have rights is a prerequisite for the legal capacity to act, but the capacity to have rights can exist without the legal capacity to act, i.e. it is possible to have a legal person without the ability for this person to exercise the rights whose holder he/she is. How is this understanding legitimized since it has already seemed absurd in the light of the developments in international law?

It is known that the time of acquisition of the legal capacity to have rights and the legal capacity to act do not coincide. A person acquires the legal capacity to have rights at birth, but other prerequisites are needed for the acquisition of the legal capacity to act: mature legal will and consciousness⁵. They are necessary, according to the theory, because only a person who understands his/her actions, their consequences and legal stipulations and who can control his/her behaviour can exercise his/her rights and assume obligations. That belief or assumption underlies the current paradigm of the legal capacity to act – that only the “reasonable and rational”⁶ person is an autonomous legal person. It may be argued that this is the average man who acts in the usual, conventional way. Persons who do not meet this standard are simply removed from the social relations and decisions are taken on their behalf by proxies – a guardian or a custodian.

The criterion used in the Bulgarian Persons and Family Act to determine if the required psychophysical and intellectual maturity⁷ is reached for the legal capacity of individuals to act is an abstract (formal) and this is their age (at the present moment - 18 years old)⁸. The conclusion is that the current statutory law is based on the understanding that the human being is essentially learning and gaining social experience that helps him/her to act wisely, using the accumulated experience.

Maturity and reasonableness of conduct are a prerequisite for retaining the legal capacity to act once it is obtained by coming of age. The existence of mental disability or mental illness which are supposed to affect the intellectual and volitional capacity of a person to exercise his/her rights may justify intervention in the legal capacity to act through its restriction (Art. 5 PFA) and placing the person under restriction of legal capacity - full or limited. A disability, affecting the intellectual potential of the person is always a prerequisite for doubt as to how a person “can” act reasonably.

¹ Adopted by the Council of Ministers on 14/11/2012 with minutes 43/14.11.2012 of the Council of Ministers http://pris.government.bg/prin/document_view.aspx?DocumentID=8RMxcMeAentEcHr/4hQgUw

² Bulgarian civil law theory, regards legal personality both as “legal quality” and as a primary subjective right, which is a prerequisite for the acquisition of specific subjective rights and responsibilities. Furthermore there are different views on the content of legal personality - whether it is a set of legal capacity to act and legal capacity to have rights or is the same as legal capacity to have rights. Cf. Tadzher, V. Civil Law of People's Republic of Bulgaria. General Part, Section II. S., 1973, p. 17-18. M. Pavlova, supports the opposite opinions. Pavlova, M. Civil Law. General Part. Volume one. S., 1995, p. 214.

³ Cf. Vasilev, L. Civil Law of the People's Republic of Bulgaria. General Part. S., 1956., p. 148 – 150. Tadzher, V. Op. cit., p. 25 and Pavlova, M. op. cit., pp. 215-216.

⁴ Vasilev, L. op. cit., pp. 146-147.

⁵ Quinn, G. Concept paper: Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD. HPOD Conference, Harvard Law School, 20 February, 2010, available at: www.nuigalway.ie/cdlp p. 5.

⁶ Under Article 20 of the Charter of Fundamental Rights of the European Union: all people are equal before the law.

⁷ Cf. also Tadzher, C. op. cit., p. 22-23 and Pavlova, M. op. cit., p. 216.

¹ Theory also holds that the capacity to have rights regarding certain personal rights (the right to work, marriage, participation in elections) that are exercised only by the holder of these rights arises not from birth but from a later time after a certain age. Cf. Tashev R. General Theory of Law. S., 2004, pp. 300-301. The capacity to have rights with regard to certain property rights of children is also limited according to M. Pavlova. Cf. Pavlova, op. cit., p. 222-223.

² This refers to the punishments under Art. 37 of the Penal Code, which reflect temporarily and partially on the capacity of the person to have rights.

³ Cf. Tadzher, C. op. cit., p. 38-39

⁴ Pavlova, M. op. cit., pp. 231-232.

⁵ Cf. Tadzher, C. op. cit., pp. 38-39.

⁶ Such as: Tadzher, C. op. cit., p. 38. Pavlova, M. op. cit., str.230, Tashev, R. op. cit., p. 302.

⁷ Cf. Pavlova, M. op. cit., pp. 232-233.

⁸ Thus, according to the Persons and Family Act: “Any person from the moment of birth, acquires the ability to be the holder of rights and duties” (article 1) and “At the age of 18 individuals become of age and are fully capable to acquire rights and undertake obligations with their actions” (article 2)

In short, under the current law, the capacity to have rights as an abstract possibility to have rights and obligations acquired by the mere coming into existence of the legal person can be defined as the *static* element of the legal personality. The legal capacity to act, however, is determined by additional conditions – the achievement of that intellectual and volitional state that allows the understanding and managing of one’s behaviour (cognitive/intellectual maturity and the ability to express one’s will). These conditions are achieved, i.e. depend on certain factors (coming of age, presence of disease or disability, which make autonomous behaviour possible), so that legal capacity to act can be defined as a *dynamic* element of the legal personality.

Although it is claimed that the legal capacity to act is important primarily for the purpose of performing legal actions by the person¹, in reality its social meaning cannot be denied. In fact, the capacity to act determines the overall autonomous life of the individual in all spheres of life, as the access to many (virtually all) of them is *de facto* through exercise of rights and the legal capacity to act proves to be the key to them². For instance, a person who is put under guardianship is not able to decide where and with whom to live, how to manage his own money and to spend them for, to decide issues related to his/her health, to conclude contracts³.

LEGAL CAPACITY TO ACT AS THE KEY TO ANY HUMAN RIGHT

Historically, the regulations on the capacity to act of adult individuals are developed to provide protection. The protective function unfolds on three levels: for the person with a disability, for the third parties and for society⁴. In the first place the regulations on the capacity to act protect the individuals from themselves, suggesting that it prevents them from actions whose meaning and significance they do not understand due to lack of “legal maturity”. Protection is achieved by the possibility of restricting or divesting of the capacity to act of the person. This means divesting of the right to make decisions for himself/herself and granting this right to another person (especially in divesting of legal capacity)⁵, depending on the assessment of the extent of the disability.

Protected are not only the interests of third parties who enter into legal relations with the legally incapacitated but also the legal relations as a whole which is perceived to be “in the public interest”⁶. Protection is achieved through the institute of invalidity of transactions executed by the legally incapacitated - article 26, paragraph 2, article 27 and article. 34 of the Obligations and Contracts Act.

The capacity to act as an opportunity to exercise one’s rights through personal actions is in fact the legal means, the key through which the capacity to have rights and any right are asserted. Due to this its restriction as the result and consequences for the person leads to diminishing of his/her legal status. As mentioned above, within the existing paradigm only the “reasonable and rational” person is an empowered and autonomous person. Thus restricting the legal capacity is not only a protection but a deprivation of rights considering the impossibility of their personal enjoyment: the content of the legal capacity to act is provided to other individuals to be enjoyed. Going further we can say that the restriction of the legal capacity to act and placing somebody under guardianship leads to subjugation to another’s will, puts the person in subordination which undoubtedly restricts the personal freedom/autonomy and

is in reality inequality before the law. A “proxy/substitute” is appointed to the person in the legal relations such as the guardian and to a lesser extent - the custodian¹.

The described paradox of “protection through incapacitation” is well illustrated by the Australian professor of law at the University of Sydney, Terry Carney: *“The ideology of freedom turns out to be linked to a set of actions designed to restrict the freedom of certain individuals by appointing substitutes/proxies (guardians, custodians). Guardianship laws use the modern rhetoric of human rights, autonomy, support of individuals’ independence and citizens’ participation in social life. Still, the forms of guardianship and custody lead basically to depriving people with intellectual disabilities of rights, conferring to another person the decision-making concerning their lives and sometimes forced institutionalization. The strange paradox to use coercive (restrictive) measures to ensure one’s rights raises the question of possible successful interventions in this Alice in Wonderland world”*.

Considering the serious consequences for the person the Persons and Family Act introduced two conditions for restriction of the legal capacity to act: medical and social². In its version from 1949 the PFA stipulated a medical condition/criterion - the existence of “imbecility, mental illness or physical disability”³. The physical disability was obliterated with the amendment of the act in 1953⁴. There is no hesitation in the theory and practice that the limitation of legal capacity is premised on the cumulative reality of both conditions. Leading, however, is the medical condition - the existence of “imbecility” or “mental illness”. The proceedings for placing under restricted legal capacity start if the persons with a legitimate interest have a medical diagnosis. The latter is leading in the revocation of restricted legal capacity⁵. The conclusion is that the law has adopted the so-called status approach: the medical status of the person is a reason to intervene in his/her legal status. The status approach is combined with the functional and the resultant approaches - interference with legal capacity to act is made also after judging the ability of the person to take care of his/her affairs (his/her skills for decision-making are perceived as insufficient or he/she makes decisions that can have negative consequences) and determining the cause-consequence relation between the disability and the lack or reduced ability to “take care of someone’s matters”.

The incorrect mixing of medical and legal characteristics of a person can be critically rationalized in several aspects. One possible critical reading of the current regulations uses the arguments of value analysis - reducing the legal status of individuals cannot be justified by medical diagnosis or the widely accepted expectation about human behaviour. In all these approaches the disability of the person and/or his/her ability to make decisions are accepted as a legitimate basis for the reduction of his/her legal status and rejection of the possibility to fully exercise his/her rights. But once we agree that the legal capacity to have rights is the tool for inclusion by empowering a person in life, and the capacity to act provides namely a personal action, we can say that the deprivation of the legal capacity to act results in the denial of the human in the human being. To put it in another way - the automatic recognition of the legal personality of the person precisely because he/she is in the capacity of a particular biological species – a human being makes impermissible the separation of the legal capacity to act from the adult person.

1 Cf. Pavlova, M. op. cit., p 233.

2 A distinction should be made between the capacity to act and the ability to commit tort (the ability of legal persons to bear the punitive consequences of legal responsibility). The ability to commit tort is that condition which turns a person into the subject of offense. The legislator adds additional condition as a prerequisite for the ability to commit tort, namely sanity. At the time of the offense the person should be sane in order to commit a tort. Sanity means that the person realises the nature and the meaning of the act and is able to account for his/her actions. Sanity is not a legal category, it is proved by a court medical report and is assessed in every individual case. Tashev, R. op. cit., p 303-4 and Pavlova, M. op. cit., p 233-4.

3 Very often on practice it turns out that even people who are put under partial guardianship cannot conclude minor deals, that are common for their everyday life.

4 Such as Tadzher, C. op. cit., pp. 38-39 and 46-47.

5 In this respect also: Quinn, G. ‘Liberation, Cloaking Devices and the Law. Or a Personal Reflection on the Law and Theology of Article 12 of the UN CRPD’ www.nuigalway.ie/cdlp - paper read at the international law seminar, 16-17 October 2012 Sofia, organized by BCNL and Institute for Legal Studies – Bulgarian Academy of Science.

6 As stated at that historical moment: “Attaching legal action only to mature will create confidence and security in society.” Tadzher, C. op. cit., p. 39.

1 The dependence of the persons under restriction on the will of others has been commented in theory. Cf. Pavlova, M. op. cit., p. 243. On the other hand based on the facts of the case Stanev v. Bulgaria, it should be noted that for persons with restriction of the legal capacity in the modern civic relations and social reality, the effect of restricting their capacity to act and the appointment of a custodian are the same as the degree of restriction of freedom and autonomy of those in full deprivation of legal capacity with appointed guardian.

2 According to Art. 5 of the Persons and Family Act: “Juveniles and adults who, because of dementia or mental illness cannot care for their affairs shall be placed under full restriction of legal capacity and become incapacitated. (2) Adults with such suffering, whose condition is not so severe to be placed under full restriction of legal capacity, shall be placed under partial restriction of legal capacity.

3 Even the very terms, used by the PFA, are obsolete and today they sound archaic and inadequate. For comparison, The Persons Act annulled with the PFA required only the presence of dementia - Article 100.

4 The outdated concepts „imbecility and mental illness” have remained and today should be replaced by the mandatory terms of the International Classification of Diseases, Tenth Revision (ICD - 10) - mild, moderate, severe and profound mental retardation, and mental disorder respectively. Adopted by the World Health Organization and binding on the state parties The adopted non-discriminatory terms are intellectual disability and mental disorder.

5 Thus, “recovery” is grounds for revocation of restricted legal capacity. Cf. item 10 of the grounds of Decree № 5/1979, of 13.II.1980 of the plenary session of the Supreme Court of the People’s Republic of Bulgaria. Published in Records of the Rulings and Interpretations of the Supreme Court of the People’s Republic of Bulgaria on civil cases, 1953-1994 S., 1995, p.13 - 19..

This analysis reveals the discriminatory effect of the interference in the legal capacity to act, which in turn allows the extension of criticism in this direction as well. To a very high extent the unequal treatment of people with disabilities follows stereotyped and stigmatizing understandings. The historically established stigma related to people with intellectual disabilities and medical disorders on practise eliminates the analysis of the cause-consequence relation between disability and the quality of decisions taken by the person for him/herself. The stigma replaces the analysis: it gives a final answer to any “different” from the commonly accepted decision, taken by a person with disability and puts the label “motivated by the illness” or even it finds it equal to a lack of a decision. It is again the stigma that eliminates the analysis of the quality and the significance of the decisions, taken by a person with disability, from the point of his/her unique situation and replaces this so needed understanding of the individual with a simple, shallow, common, usually not supported by any proofs, understanding for what is good for “everybody”.

Another plane of criticism of the system is the lack of variability in interfering with the legal capacity to act. The legislation has no rules on how to take into consideration the degree of disability, the dynamics and individual specificity of the diseases and disabilities in different individuals. As a result only two degrees of “lack of ability” of a person to take care of himself/herself are perceived, justifying both forms of guardianship. Thus structured the institution of guardianship reflects the medical model of disability and the understanding of the norm in medicine and respectively of the atypical divergence from the norm necessarily described as an illness. Speaking in general about disabilities or illnesses hides features that are present in various types of physical, sensory and cognitive disabilities, which differently affect individuals and their ability or inability to perform certain activities in relation to others and the world¹.

INTERNATIONAL STANDARDS

The concept of legal capacity to have rights, the legal capacity to act and the possibilities for its limitation is reflected in the Persons and Family Act, adopted in 1949 and the relevant provisions has remained unchanged to date. Of course, Bulgaria is not an isolated case². The legislation in other European countries which in the past were influenced by the understandings and the concept of the classical legal doctrine on legal capacity to act and the possibilities of limiting it was similar or has been changed very recently³.

In the context of the changes in the rights of people with disabilities and the establishment of a social approach to different kinds of disabilities, it is clear that this doctrine no longer meets the value paradigm, which is based on all the international law on human rights, but also on the objective social needs. The question is if the modern policies in this area have long been based on inclusion, the removal of barriers to this social group, what is the legal response to this trend? In response to this issue, international law offers new standards for the legal regulation of the legal capacity to act⁴. In its completed and condensed form these standards are embodied in the text of Article 12 of the UN Convention on the Rights of Persons with Disabilities and can be summarized as follows: legal personality is the quality of each individual and must be understood as inseparable unity between *legal capacity* - *capacity to act*. The state parties to the Convention shall ensure that persons with disabilities, including people with intellectual disabilities the opportunity to acquire rights and incur obligations through personal actions and to exercise them. Appropriate measures should be undertaken to ensure the access for people with disabilities to the support they need to realize their legal capacity to act.

1 Cf. Kaneva, B. Disability and Dignified life: Issues of care and justice. In: Limits of bioethics. S., 2013

2 Who gets to decide? Right to legal capacity for persons with intellectual disabilities and psychosocial disabilities. Issue Paper commissioned and published by the Commissioner for Human Rights, CommDH/Issue Paper (2012)2. Accessible on: <https://wcd.coe.int/ViewDoc.jsp?id=1908555>

3 Cf. Report of the Committee on Legal Affairs of the European Parliament with recommendations to the Commission on the legal protection of adults: cross-border implications (2008/2123 (INI)), page 8

4 Cf. Recommendation Nº R (99) 4 on the principles concerning the legal protection of incapable adults (adopted 23.02.1999. Committee of Ministers of the Council of Europe).

The text of Art. 12 is important not only for changes in the regulation of the legal status of people with disabilities but it is essential for the effective exercise of other rights provided in the Convention: the right to live independently in the community, access to the labour market, the right to control their own financial and other property rights and interests. As stated in the General Comment (draft) on art. 12 of the CRPD of the Committee on the Rights of Persons with Disabilities to the United Nations, any instrument on human rights accepted by the United Nations proclaims unconditional equality of people with disabilities before the law which means equal rights and capacity to act. Only now, however, the attained new knowledge and philosophy of the rights of people with disabilities and their empowerment let go further due to which the institute of legal capacity to act should be changed in the existing law.

HIGHLIGHTS OF THE PARADIGM SHIFT

Bulgarian legal doctrine still does not question the concept of the legal capacity to act, despite the criticism of its regulation¹. The arguments for legal discussion are contained in the research studies of the humanities in Bulgaria and abroad², as well as in the studies that motivate the development of international law³ or are caused by it. In our opinion, the doctrinal silence in our country is awkward to say the least, if only on the formal grounds of conflict between the international and domestic legal regulations; a hypothesis provided and authorized by the Constitution.

Article 12 of The Convention recognizes the legal capacity to act and the capacity to have rights of persons with disabilities on an equal basis with others in all aspects of life, i.e. every person, in spite of having a disability or a mental disorder has the right to exercise his/her rights *personally*. The Convention emphasise the indivisibility of the capacity to have rights and the legal capacity to act as an element of the legal personality unlike the previously existing laws and established practices that separate them. In the context of Article 12 of the Convention it can be concluded that in practice the following three components are essential for every right: 1) the legal personality is a blend of a static element (the legal capacity to have rights) and a dynamic element (the legal capacity to act), 2) respect and regard for the right on the part of others, 3) the commitment of the state to ensure the exercising of rights through personal actions.

Key to the paradigm shift in the law proposed by the Convention on the Rights of Persons with Disabilities in force in the Republic of Bulgaria since 21.04.2012 is the rejection of medical determinism and the promotion of social understanding of disabilities. While the medical approach considers the disability or illness as a “problem” of the individual, the social understanding of disability seeks to identify the *systemic barriers* to people with disabilities, the negative attitudes, and other factors that lead to their social exclusion and engages the community in the removal of these barriers and guarantees the rights of all citizens. This means that people with disabilities should no longer be seen as “objects of care” and as people deviating from medical norms, but as “subjects” who should be ensured, on an equal basis with others, the right to exercise their rights and to participate in the life of society. While some physical barriers to participation for people with disabilities have successfully been overcome (transport, education, etc.) the legal ones remain untouchable.

1 For example, the European Court of Human Rights makes a critical analysis of Bulgarian legislation on legal capacity to act and justifies its non-conformity with articles 3, 5, 6, 13 and 8 (in dissenting opinions) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in its judgment on the case Stanev v. Bulgaria, available at <https://mjs.bg/47/233/>. Cf. more - Analysis of the Conformity of Bulgarian Legislation with the CRPD, available at : http://www.equalrights.bcnl.org/uploadfiles/documents/bg_review_uncrpd_final.pdf; “ Application of Article 12 and Article 33 of the CRPD (comparative legal analysis) available at: http://www.equalrights.bcnl.org/uploadfiles/documents/comparative_study_uncrpd_final.pdf; publications of the European Union Agency for Fundamental Rights: Legal capacity of persons with intellectual disabilities and persons with mental health problems (July 2013), The legal protection of persons with mental health problems under non-discrimination law (October 2011) and others. available at : <http://fra.europa.eu> .

2 A good example is the cited work by B. Kaneva. Cf. also: Kaneva, B. (Editor) Problems of Autonomy in Bioethics. Edition of the Faculty of Philosophy. S., 2011 Bach, M. (2009). The right to legal capacity under the UN Convention on the Rights of Persons with Disabilities: Key concepts and directions from law reform. Toronto: Institute for Research and Development on Inclusion and Society (IRIS). quoted writings of one of the inspired interpreters of the CRPD J. Quinn, Kerzner, L. (2011) Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision making: A Canadian Perspective.

3 Here we consider not only the UN Convention on the Rights of Persons with Disabilities. It is preceded by the acts of the Council of Europe, dating from the turn of the century and calling for a new approach to the legal capacity to act of persons with disabilities. For example, Recommendation Nº R (99) 4 of the Committee of Ministers of the Council of Europe on the principles of legal protection of incapable adults (adopted on 23 February 1999)

Which are these systemic barriers in the law, which we should overcome?

The First - is the understanding that legal capacity to act can be acquired only by the reasonable person. From ancient times philosophers have reflected on whether rationality is what really makes us humans. Without going deeper into the philosophical discourse, we can highlight the explanations for humanization of rationality, or what is essentially the same - for the dominance of reasonableness in determining the autonomous person today. One of them is the needs of third parties, especially in trade, which needs stability, predictability and trust¹. This is what “cements” our commitment to rationality as a test for humanity². The state also has an interest in rationality, which guarantees preservation of personal property as a prevention from becoming dependent on social funds³. Irrational behaviour, however, is also inherent in man, a smoker’s behaviour can be defined as such; even the business does not always behave rationally (the crisis of Lehman Brothers for example⁴). Therefore, when respecting rationality we should not renounce irrationality also inherent to human behaviour and leading us in some of the decisions we make.

In this context we should consider the proposal not to confuse the legal capacity to act with the mental capacity of a person. The capacity to act is a legal quality while mental abilities relate to the cognitive sphere of man, including the skills of the person to make rationally justified decisions. People have different skills of decision-making. They were formed under the influence of multiple factors: environment, social and other circumstances. These natural or acquired traits of people - disability, disease, and senile impairment can not be grounds for restricting the legal capacity to act, i.e. depriving them of the right to make decisions for themselves⁵. Put in another way - the legal status of persons should not depend on their medical or functional status. The paradigm shift requires moving from the concept of skills to that of rights⁶.

The second barrier is expressed in the problematizing of the risk of wrong decisions and their consequences for the person with a disability. We assume that people with disabilities are not able to form and express their will at least not in the usual way and therefore cannot take care of their affairs. This explains their need for protection and care, which is satisfied by a “substitution” decision making in the interest of the person under restricted legal capacity⁷.

The current regulation outlines a huge discrepancy between the toleration of the wrong decisions and wrong choices of people without disabilities on the one hand and the imposition of extremely high criteria to the process of decision making of people with disabilities. We allow the majority to make their mistakes without legal intervention but along with that we do not agree to treat the minority in the same way (people with intellectual impairments and mental health problems) by allowing them to make the same mistakes and we overexpose the protective role of the law⁸.

The denial of personal autonomy cannot be justified for the purpose of protecting and shielding the persons with intellectual disabilities or mental health problems from bad decisions and choices. Everyone can make wrong decisions, regardless of their physical or mental status, especially when dealing with questions that require a special competence. And the possibility to make a mistake or make improper or simply unwise decision should not be a reason for restricting the rights of people with disabilities or mental health problems as it should not be a reason to restrict the rights of people without disabilities or diseases. For example voters often vote for the wrong politicians. Let us hope that the inadequacy

of this choice will not make anyone call for large groups of people to be divested of the right to vote because they vote for and support the coming to power of the “bad” parties. Not everyone makes the right decision in commercial transactions, not everyone feels competent but for more serious decisions everyone is free to make a mistake or to seek support, professional advice, etc. However for people with disabilities, who are with restriction of the legal capacity, this possibility, in practice, is denied. Article 12 does not permit such discrimination, but instead requires the states to regulate measures of support for independent exercise of rights¹.

The third barrier, as a consequence of the aforementioned, is the understanding that the independent exercise of rights by people with disabilities is impossible. However, if the equal legal status, the autonomy and empowerment are seen as values, the reaction of the legislator should be directed *to the development of support mechanisms namely for independent exercise of rights of all people, including those with disabilities*, so that they make decisions according to their choice, will and preferences and to exercise their rights through personal action (the concept of supported decision-making). This is the way to realize the freedom of all² and in this in practice consists the paradigm shift in the legislation.

The personal exercise of rights enables individuals to build and manage their world as they connect the legal opportunity (the right) with self-expression - the action resulting from the personal understanding, feeling and desire. The objectively possible (the capacity to have rights) is connected with the subjective realization which reveals areas of free choice and provides protection against third party intervention in the process of decision-making.

The Convention not only requires the state parties to recognize the equal legal personality of persons with disabilities and of those without disabilities (art. 12, para. 2). It goes even further - the Convention obliges state parties to take appropriate measures to provide persons with disabilities with access to the support they need for independent exercise of their rights. This is the uniqueness of article 12: it not only recognizes the right of independent exercise of rights by people with disabilities (regardless of the presence of disease, the degree of the cognitive potential, etc.), thus limiting the intervention of the state and third parties in the process of decision making, but also creates opportunities for positive choice by the people with disabilities with the introduction of supported decision-making - a tool to ensure personal choice, taking into account (respecting) the desire and the will of the individual. It is important to be marked that part of the concept for supported decision making are the safeguards (enough and effective) for exercise of the right of personal choice so that the people with disabilities will be protected against misuse and manipulation³.

The essence of the paradigm shift of article 12 is precisely in this - to stop the practice of substitution of decision-making “instead of” the persons with disabilities or illness and in their interest and to ensure the process of decision making and the exercise of rights, which is accomplished with the participation of the individuals, taking into account their will and preferences. The exercise of rights not through personal actions, except in the case of authorization, always leads to or implies *substitution* of the will of the people (example: full guardianship and custody) and making decisions about the life of the holder of rights by other people. Article 12 paragraph 3 of the Convention in conjunction with Article 12 paragraph 1 and 2 obliges the state parties to provide the necessary support for the exercise of the rights of people with disabilities through personal actions.

Perhaps sceptics would argue that there is a group of people with disabilities for whom due to institutionalization or the degree of disability the formation of will is impossible (e.g. persons with severe

1 Theory suggests that “... the capacity to act is a prerequisite for the validity of a legal transaction ...”. Cf. Vassilev, L. op. cit., p 158.

2 Quinn, G.. Concept paper: Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD, pp. 9 - 10.

3 ibidem.

4 ibidem.

5 Cf. section 12 of the Draft General Comment on Article 12 of the CRPD of the Committee on the Rights of Persons with Disabilities to the United Nations adopted on the tenth session, 2-13 .09.2013.

6 Cf. Bach, M. Securing Self-Determination: Building the Agenda in Canada. 1998, available at: www.tash.org

7 Cf. articles 156, 164, 165 of the Family Code.

8 Quinn, G. Concept paper: Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD, pp. 8-10.

1 Cf. item 13 of the General Comment on article 12 of the CRPD of the Committee on the Rights of Persons with Disabilities to the United Nations adopted the tenth session, 2-13 .09.2013

2 ibidem.

3 Very often the general protection mechanisms against misuse, fraud, using the vulnerable situation of another person will be enough also for people with mental disorder or intellectual disabilities. Only in some of the cases, related to the new measures for personal exercise of rights through supported decision making, will be needed additional safeguards to guarantee that the person expresses his own will and preferences, without manipulations.

mental retardation) and/or that will cannot be revealed, “caught” to be interpreted. Therefore, these individuals require 100% substitution of will. Embracing this idea could easily lead to regulatory measures that practically mask substitution in decision-making. The proper response is not to make exemptions that allow decision making “for people” instead of “them” but to regulate additional activities to provide support for independent enjoyment of rights aimed at deciphering their preferences or creating a social environment that facilitate the creation of a will and preferences¹.

CONCLUSION

In conclusion, we would like to emphasize that the contemporary achievements in the field of human rights are primarily result of a valuable and philosophical change. The law, during its development in different periods, has been acquainted with the limitation of legal capacity based on gender, certain social status or physical disability. At those moments the legal regulation has been reflecting the society’s maturity and system of moral values. Now, the eventual change of paradigms (in accordance with Art. 12 CRPD) puts before us the human and valuable challenge to take people with intellectual disabilities and mental disorders as equal before law as everybody else, which is why they shall exercise their rights by personal actions and take decisions of their own lives as the “reasonable persons” are doing. In essence, this is one more step towards recognition and respect to the difference, different life experience and choice. Also it is another chance to recognize the right of this difference to be respected and taken as an equivalent part of our society, to accept the fact that everybody is equal before the law. If it can be perceived as a social value, the law will find out and give an adequate response that will end the following paradox – to guarantee rights by restricting them.

The Example of Ireland: Assisted Decision-Making (Capacity) Bill 2013

Overview

The Assisted Decision-Making (Capacity) Bill 2013 proposes a modern statutory framework to support decision-making by adults who have difficulty in making decisions without help. It will repeal the Marriage of Lunatics Act 1811 and cause the Lunacy Regulation (Ireland) Act 1871 to cease to have effect.

The Bill provides for the replacement of the adult Wards of Court system by a less intrusive system. This system offers a continuum of options to support people in maximising their decision-making capability.

GUIDING PRINCIPLES

The Bill sets out guiding principles that are intended to safeguard the autonomy and dignity of the person with impaired capacity. They apply to each and every intervention, including by the court, that is made under the proposed legislation.

- there is a presumption of decision-making capacity unless the contrary is shown.
- no intervention will take place unless it is necessary.
- a person will be treated as unable to make a decision only where all practicable steps to help that person to make a decision have been unsuccessful.
- any act done or decision made under the Bill must be done or made in a way which is least restrictive of a person’s rights and freedoms.
- any act done or decision made under the Bill in support or on behalf of a person with impaired capacity must give effect to the person’s will and preferences.

Capacity Assessment

The Bill proposes to change the law from the current all or nothing status approach to a flexible functional definition, whereby capacity is assessed only in relation to the matter in question and only at the time in question. If a person is found to lack decision-making capacity in one matter, this will not necessarily mean that s/he also lacks capacity in another matter. The Bill recognises that capacity can fluctuate in certain cases.

The Circuit Court will have jurisdiction for assessing the person’s decision-making capacity. It can use expert reports to assist it in assessing the person’s capacity and in deciding what type of capacity declarations that it should make. There are two types of declaration that the court may make: firstly, that a person lacks capacity to make a decision unless s/he has a co-decision-maker to assist him or her; and secondly, that a person lacks capacity to make a decision even if s/he has a co-decision-maker to assist him or her.

¹ Cited article.

DECISION-MAKING SUPPORT OPTIONS

The Bill proposes three types of decision-making support options to respond to the range of support needs that people may have in relation to decision-making capacity.

- **Assisted decision-making:** a person may appoint a decision-making assistant – typically a family member or carer – through a formal decision-making assistance agreement to support him or her to access information or to understand and to make and express decisions. Decision-making responsibility remains with the person. The Minister will make Regulations to specify the content of decision-making assistance agreements.

- **Co-decision-making:** a person can appoint a trusted family member or friend as a co-decision-maker to make decisions jointly with him or her under a co-decision-making agreement approved by the Circuit Court. A co-decision-maker will help to access and explain information relevant to a decision. The co-decision-maker will also help the person to make and express a decision. A co-decision-maker cannot oppose a decision made by the person where it is reasonable and will not cause harm to another person. The co-decision-maker will be supervised by the Office of the Public Guardian.

- **Decision-making representative:** For the small minority of people who are not able to make decisions even with help, the Bill provides for the Circuit Court to appoint a decision-making representative. A decision-making representative will make decisions on behalf of the person but must abide by the guiding principles and must reflect the person's will and preferences where possible. The functions of decision-making representatives will be as limited in scope and duration as is reasonably practicable. The decision-making representative will be supervised by the Office of the Public Guardian.

ENDURING POWERS OF ATTORNEY

Under the Powers of Attorney Act 1996, a person can create an enduring power of attorney appointing an attorney to make decisions on his or her behalf in relation to financial and business affairs and personal care. The Bill will expand these powers to include health care matters. It will require attorneys to abide by the guiding principles. The Bill will require attorneys to be subject to supervision by the Office of the Public Guardian which will also have the role of registering enduring powers of attorney.

INFORMAL DECISION-MAKING

The Bill, recognising that informal assistance takes place on a daily basis, provides protection from liability for informal decision-makers in relation to personal welfare and healthcare decisions made on behalf of a person with impaired capacity where such decisions are necessary and no formal decision-making arrangements are in place. Informal decision-makers are bound by the guiding principles.

OFFICE OF PUBLIC GUARDIAN

An Office of Public Guardian (OPG) will be set up within the Courts Service to replace the Wards of Court Office to manage capacity-related matters for adults. The OPG will supervise and handle complaints against decision-making assistants as well as against the co-decision makers, decision-making representatives and attorneys of enduring powers appointed by the court. It will also prepare codes of practice for specific groups and will promote awareness of the legislation among the general public.

CURRENT WARDS OF COURT

Each ward will be reviewed in accordance with the new system. A ward who is found to have capacity will be discharged from wardship. A ward who continues to have capacity needs will be offered the support option most appropriate to his or her needs.

ROLE OF COURTS

The Bill provides that the Circuit Court will have jurisdiction on most issues arising under this legislation. The specialist judges provided for in the Personal Insolvency Act 2012 will undertake this work.

The High Court will continue to have jurisdiction in relation to enduring powers of attorney and matters relating to non-therapeutic sterilisation, withdrawal of artificial life-sustaining treatment and organ donation.

The Example of Israel: Alternatives to Guardianship in Financial Affairs

author: BIZCHUT

*This chapter will discuss alternatives to guardianship in financial affairs.
The alternatives in each area are based on several understandings:*

Concern about harm is genuine: Concern about harm and the need to develop protections must be seriously taken into account: first, because the concern is based on incidents that have actually occurred; second, because it is one of the primary reasons for appointing a guardian; and third, because people with disabilities may also be concerned about possible harm.

Existing universal solutions: People with disabilities are not the only ones who have to cope with concerns about financial harm. Concern for adolescents, people in debt, people living in poverty, wealthy parents wishing to transfer property to their adult children and many others have led to the development of various means of intervention or prevention of harm in the financial sphere. These solutions are universal in that they are not meant solely for people with disabilities. Universal solutions that apply to the population at large are not only clearly preferable in considering alternatives but they are consistent with the CRPD which promotes “universal design” as a general obligation (Article 2 and 4(1)(f)).

Heterogeneity of the field: The term “financial affairs” covers a wide variety of financial activities which differ one from another in their character, scope and in how they are governed legally. These various activities must be studied and understood in order to set appropriate professional standards for alternatives to guardianship.

Third party service providers are significant players: Third parties are a significant player in the financial field. Usually these are commercial entities with no particular knowledge regarding the rights of people with disabilities. The banker, the grocer, and the customer service representative are primary players in many financial interactions. Any proposed alternative must take into account the need to educate these providers and increase their awareness.

As stated, our goal is to present alternatives to guardianship that protect the person in financial affairs. We have chosen to focus on three primary components within the broader field of financial affairs:

1. INTRODUCTION

People’s bank accounts are a central crossroads through which their money flows. Their income and property – salary, government benefits, and investments – are usually found in their bank accounts, be they ordinary checking accounts or special accounts. Such accounts are essential in everyone’s life. Owning one makes it possible to arrange for preauthorized direct debit payments, take out a loan, and use a credit card and checkbook. However, in countries where people with disabilities are extremely poor and receive no state financial support, they do not necessarily have a bank account.



Often, the appointment of a guardian is directly related to concerns about harm in the banking sphere. These concerns include wasteful spending of savings, falling into debt, overcharging credit cards, or adding bank account signatories who may exploit the authority given to them. Concerns about all of these scenarios often leads to the appointment of a guardian. The more assets people with disabilities have, the more interested their family and friends are in examining their ability to manage their affairs independently and whether or not a guardian should be appointed. This means that sometimes, people with disabilities whose income has grown (due to winning a lawsuit, gaining an inheritance, receiving a government benefits, or earning a salary) may suddenly find themselves under guardianship on the grounds that their money must be protected.

2. GUARDIANSHIP’S IMPACT ON BANKING ISSUES

Different countries have different procedures affecting the relations between banks and customers under guardianship. In Israel, a person who has been appointed guardian must inform the bank of the appointment. The customer’s bank account is then converted into a special account, and any transactions must hereafter be authorized by the guardian. Even when a guardian authorizes the person to conduct certain transactions independently, banks do not always respect this authorization. They often prefer to be particularly cautious and demand the signature of the guardian for all transactions, thus fully restricting the person under guardianship. The bank is expected not to open an independent bank account for a person under guardianship, although it is easy to circumvent this prohibition in cases where the bank does not have access to the national database listing the names of people under guardianship.

The internal regulations of one of Israel’s major banks exemplify the enormous power guardians have in managing the bank accounts of individuals under guardianship, including denial of all the powers individuals previously enjoyed. From the moment a guardian is appointed for a customer, the bank adds the guardian to all the channels of direct information (such as the bank’s website), provides him/her with a bank card for accessing information and withdrawing cash, and allows him/her to order checkbooks, deposit checks and arrange for preauthorized direct debit payments from the account. The bank will not approve the addition of an authorized signatory nor will it honor checks which had been signed by the customer before the guardian was appointed or approve cash transactions made by the customer unless these transactions are first authorized by a court order. In sum, the appointment of a guardian severely undermines the person’s financial rights in the banking context.

3. LEGAL OBLIGATIONS IN THE BANKING SPHERE

In order to propose alternatives to guardianship in this area, it is important to understand the legal issues that banks face today when interacting with customers with disabilities. From a legal perspective, the bank has three obligations that pull in different directions.

- First of all, there is the **obligation to honor customers’ autonomy** to conduct whatever transaction they wish regarding their account. The bank holds customers’ money, invests it, at times advises the customers, at times loans them money, but it can never restrict the management of money belonging to them without legal authorization to do so.
- At the same time, the bank has an **obligation to make its services accessible**, as part of the prohibition against discrimination. Just as it is obvious that people who use wheelchairs must not be prevented from flying alone and that the airline has an obligation to make flights accessible to them, it should also be obvious that the banks must make their services accessible to people

with disabilities as well as provide accommodation in particular cases. The obligation to ensure accessibility includes both physical accessibility and accessibility to the bank's services. This matter is handled inadequately in many countries, pointing at the need to draft international standards for accessible bank services. Examples include having a specially trained tellers and bank consultants in the branches to provide customers with an accessible service, as well as brochures on the various banking services made accessible to people with various disabilities.

- On the other hand, the bank has a **duty of care**. This is a term from tort law, meaning, in brief, that as an expert in the field, the bank has an obligation to protect its customers from harm. If the bank does not take sufficiently cautious measures, it may be charged with negligence and ordered to pay damages to its customers.

The tension between the bank's obligation to honor the customer's wishes and make its services accessible and its obligation to fulfill the duty of care is strongest when customers want to make a transaction with a high level of risk and it seems clear that they do not fully understand the consequences. On the one hand, the bank must honor the customers' wishes and execute the transaction. On the other hand, society expects and the law requires that the bank refrain from making a transaction which would cause its customers harm.

Several legal advisers for banks told us that in the face of this tension, the duty of care prevails. Civil suits and court rulings place increased liability on banks. Since the legal discourse plays such a dominant role in banking, many people with disabilities are confronted with the bank's refusal to fulfill their wishes. Thus, for example, the bank requires that customers who either have or are perceived as having intellectual disabilities appoint guardians before they are permitted to have a bank account. Many banks recommend that family members of people with intellectual or psychosocial disabilities be appointed guardians when their family member reaches the age of 18. People who hold power of attorney for their elderly parents facing Alzheimer's disease are required by the bank to be appointed as their parents' guardians in order to keep the account active. All the bank representatives we interviewed discussed the banks' difficulties in working with clients with disabilities. They stated their clear preference that someone else be responsible for their financial transactions—in other words, a guardian.

In sum, most of the banks today do not know how to integrate the obligations of Article 12 of the Convention into their work. It seems that change on this issue must be made through primary legislation or at least through the country's banking regulator. Nevertheless, there are a number of measures that can help protect customers from financial harm without requiring the appointment of a guardian. These measures are already in daily use by banks and for the most part do not require special adjustments.

4. RESTRICTIONS IN BANKING

There are three types of restrictions which are applied to bank accounts today that are important to note in a discussion about alternatives to guardianship:

- A. Internal restriction** – A restriction customers impose on themselves for their own reasons. For example, they can determine that earnings will be deposited into a long-term investment plan. If they withdraw the funds before the plan's expiration date, they must pay special fees. Couples may also restrict themselves by requiring that both parties sign a bank form permitting transactions above a certain sum.
- B. External restriction** – A restriction on the customer imposed by an entity external to the bank. This type of restriction applies to all the person's bank accounts at all of his/her banks. For example, individuals who are unable to pay their debts may find themselves under a writ of execution. If

they do not meet the demands of standard debt repayment, the writ of execution may declare them "debtors of limited means." The goal of this declaration is to prevent these individuals from accumulating new debt. To accomplish this, the writ imposes various restrictions including a ban on holding credit cards and checkbooks, a stay of exit order, restrictions on the account and cancellation of credit for the account previously extended by the bank. A court or an agency implementing writs of execution may place a lien on the assets of individuals who owe money to others: the lien may be placed on their savings or checking accounts, salaries, assets, etc. From the moment the lien is in place, the bank restricts the account activity according to the terms of the lien.

- C. Bank restrictions** – The bank can decide to restrict a customer, subject to regulatory procedures. Generally, the restriction will be on the credit limit and whether the customer may obtain a bank issued credit card or checkbook. The restriction is based on a means test, the customer's financial history and information from credit card companies and other banks.

Regulations regarding such restrictions vary from country to country and bank to bank. It is important to study and understand them in order to know whether they also fulfill the need to protect people with disabilities from harm without having to resort to the draconian tool of guardianship.

In this chapter we will see how these existing restrictions can serve as alternatives to guardianship. All the alternatives introduced in the chapter can be self-imposed ones or externally applied by a court. In chapter 3.A we will address the fine line between restriction and coercion and the ethical dilemma that these alternatives evoke.

In addition to these restrictions, there is also a possibility to appoint a guardian over a certain account. If, for example, the person has a significant amount of money, it is possible to appoint a limited guardianship solely over the bank account holding that amount, thereby protecting these funds, while an account holding a smaller amount can continue to be managed by the person. However this report aspires to propose alternatives to guardianship and therefore the following pages will be dedicated to alternative measures regarding banking that do not involve the appointment of a guardian.

5. ALTERNATIVES TO GUARDIANSHIP IN BANKING

Since alternatives in this area they vary from bank to bank, and often from branch to branch within the same bank, the alternatives will be presented in general terms only. The list presented here is meant to serve as the basis for a deeper examination leading to clear and systematic regulation.

Adding a partner to the bank account

Often, individuals themselves, or those around them, worry that they will make poor decisions in managing their bank accounts. In such cases, it is enough to provide assistance, advice and guidance without interfering in the management of the account. However, in cases where individuals are aware that they need restrictions or greater intervention, they can add a trusted person as a partner to their accounts.

Example: Miriam is thinking of appointing herself as guardian over her son, David. David is 17.5 years old. Based on her experience, Miriam thinks her son might go into debt if he owns an independent account once he turns 18. Miriam and David may discuss opening a joint account in which Miriam will act as a silent partner only to make sure that David does not take large loans or go into debt.

This decision can be crucial. From a legal perspective, a partner in an account becomes owner of half the money in the account, and may be liable for any debt incurred in the account. However, there are arrangements whereby adding a partner to an existing account does not grant the partner ownership of funds, but only authority to conduct transactions in the account. Upon becoming a partner in the account, the trusted person acquires a number of tools to assist in financial management. These include assistance in managing the account and the relationship with the bank, monitoring bank account activity and requiring that certain financial transactions have both signatures. Frequent use is made of this tool today by people with advanced Alzheimer's. In these situations, a son or daughter is usually made a partner to the account and assists in managing or manages it for the parent.

In sum, although this alternative is available today, as long as it includes transferring ownership of half the property to the partner, it is a problematic one. If the partnership does not include rights to the money in the account but does include authority to manage and supervise it, it may be a more proportionate alternative in appropriate cases.

Advantages and disadvantages:

-  The procedure is simple and familiar to the banks.
-  It grants a great deal of power to another person and could open the door to exploitation or undue influence. For example, the partner could empty the bank account or transfer large sums from it to his/her personal account. Furthermore, legally, the partner could become owner of half of the amount in the account.

Special combination of signatures

According to this measure, bank transactions are made conditional on a given combination of signatures. For example, in business accounts it is possible to stipulate that the signatures of both the company's CEO and its accountant are required to approve a transaction above a certain amount (these kinds of conditions are also called "internal controls"). In the same manner, it is possible to define a special combination of signatures for a personal account. The person whose signature is required is not a partner to the account, but his/her signature is still necessary to conduct certain transactions. For example, a requirement can be made that all transactions above a certain amount require an additional signature.

This measure is different in substance from appointing a guardian. Whereas guardians are authorized to conduct any transaction they think is right in a bank account without the approval of the owner of the account, authorized signatories do not have the authority to make any decision by themselves and their signature alone is not sufficient to approve the transaction. Furthermore, while a guardian is the one who makes decisions, here the signature of the account owner is required for every transaction, in addition to that of the authorized signatory.

There are two ways to appoint an authorized signatory. One is by going directly to the bank; the other is by a court order. When the appointment is made by going directly to the bank, without the court's intervention, the owner of the account preserves the right to cancel the requirement of the additional signature, thereby recovering full control of decisions at his or her discretion. That power often completely undermines this alternative if its goal is to prevent people from making rash or poor decisions, even when they are convinced that the decision is correct and should not need anyone else's approval. When the requirement for an authorized signatory is imposed by court order, the court alone

may cancel it and restore full control of the money to the person. Appendix B provides examples from Israeli court rulings that employed this measure.

In sum, this tool is a mechanism of co-decision-making, situated somewhere along the continuum between substituted decision-making by a guardian, and supported decision-making. A person's independence to make decisions regarding his/her assets is restricted, but the power is not fully delegated to another. In extreme cases in which individuals believe they need restrictions, this is the most proportionate restrictive tool we know. Nevertheless, it gives a great deal of power and influence to other people and therefore involves limitations on the person's autonomy and freedom.

Advantages and disadvantages:

-  The authorized signatory is not a partner in the account and therefore cannot independently make transactions and/or claim ownership over half the funds in the account.
-  The tool is restrictive, most certainly when it is court-ordered. In addition, many banks claim that due to their computerized systems, they will have trouble enforcing the requirement of a special combination of signatures.

Restrictions on withdrawals

One of the primary concerns about harm in the banking sphere is that people might withdraw funds from the account irresponsibly. This can result in bank debts, the eradication of savings and inability to pay bills. There are several ways to restrict cash withdrawals. One of them is to limit the daily amount a customer can withdraw from the account. In banking systems where it is possible to withdraw the maximum daily amount from multiple ATMs (also known as ABMs or cash machines) before the computer system blocks further withdrawals, this measure will not be as effective for people who withdraw cash at the machine rather than in person at the branch.

It is also possible to require that all cash withdrawals by the customer be made through a bank teller, and provide the teller with instructions through notes in the bank's computer system. The notes can be tailored according to the individual circumstances. They may refer to the amount of money the customer may withdraw, the requirement to obtain the authorization of a third party for a withdrawal above a certain amount of money, or a requirement to inform another person about the withdrawal. Today, there are guardians who employ this method to grant people under their responsibility a certain amount of independence in managing their finances.

Advantages and disadvantages:

-  As long as such individuals do not have an ATM card, this is an effective tool to prevent them from emptying their bank accounts or rashly spending their monthly salaries or benefits.
-  Banks are reluctant to impose additional duties on their tellers and increase their responsibility towards customers. Therefore, not all banks will agree to this type of restriction. Furthermore, any restriction on a bank account is dependent upon the good will of the customer. The moment the customer changes his/her mind, the restriction must be canceled, unless it was imposed by court order.

Additional restrictions on an account

Other than cash, there are three ways to withdraw funds from an account: by check, credit card, or preauthorized direct debit payments. It is possible to restrict the owner of an account in the use of all three of these means. Thus, for example, the bank can restrict the person's right to hold a checkbook (this is the default measure for debtors with limited means). Similarly, the bank can restrict credit card use, a measure we will discuss more extensively:

Several types of cards are issued by banks for use in financial dealings. These include a card that can only be used to receive information about the account; one that allows the holder to withdraw cash from an ATM; a debit card used as a payment method, subject to funds being available in the account; and a credit card that is a charge card. There are credit cards provided by the bank that are directly linked to the customer's bank account and non-bank credit cards, which can be paid by preauthorized direct debit from the bank account.

Various restrictions in the use of these cards can also provide effective protection from harm. For example, in banking systems that allow overdrafts, such as Israel's system, a "positive balance ATM card" would allow cash to be withdrawn only when there are funds in the account. Likewise, it is possible to restrict the daily withdrawal amount. In fact, it is possible to deny the use of a credit card altogether. A more proportional measure is to use a prepaid credit card. In this case, a certain amount of money is credited to the card by advance payment. In a prepaid credit card, expenditures are limited while card holders have full independence in how they spend the money.

In sum, it is possible to block or restrict the various pipelines by which funds leave a bank account. Like the alternative of restricting cash withdrawals, this option also raises the basic questions: who imposes the restrictions and who can cancel them?

Advantages and disadvantages:

-  Restricting withdrawals is an effective way to prevent uncontrolled spending.
-  The restrictions are specific to cards and in most cases will have to be one of a combination of measures.

Investment

Individuals holding large sums of money can invest them in a long-term plan, thereby restricting their freedom to use the funds. At the same time, they can keep smaller amounts of money in their regular accounts. Often this is a preferred solution because it preserves the person's dignity, while providing financial security and preventing court proceedings. However, making a long term investment should factor in other considerations such as the effect on the value of the estate compared to other investment avenues.

Advantages and disadvantages:

-  This is a restriction that people place on themselves using a universally employed measure. It has the added advantage of potentially producing future revenue in the form of interest on the investment.
-  As long as the money is closed in the account, it cannot be used. Therefore, this alternative is appropriate for investment funds and not for those required for daily needs.

Notarized power of attorney

A notarized power of attorney makes it possible to grant a trusted person authority to conduct transactions in an account in accordance with the terms detailed in the power of attorney. This allows the trusted person to help track the account, conduct transactions on behalf of the account holder and implement the latter's decisions. Note the distinction between a specific, or notarized power of attorney which is the alternative discussed here and in which the person maintains legal capacity to make decisions, including to cancel the power of attorney; and a lasting power of attorney, in which the person to whom power is given acts in the other person's stead, leaving the latter with limited powers.

The question of people's capacity to sign a power of attorney may arise regarding this alternative. It should be noted that creating a power of attorney does not require the signatory to have a deep understanding of all of the areas falling under the authority of the recipient of the power of attorney, just as signing a power of attorney for a lawyer to submit a lawsuit does not require a person to be aware of all the details involved in the legal process and the lawsuit. Nevertheless, the signatory must have a minimal level of understanding of both the power of attorney and the areas it covers. In the case of people with significant intellectual disabilities, therefore, it may be difficult to make use of this tool.

In sum, a notarized power of attorney is another legal means of appointing a figure that provides support in financial affairs. The appointee can help people with disabilities clarify information and carry out decisions. The power of attorney can include restrictions on the powers of appointees, thus preventing them from exploiting the situation.

Advantages and disadvantages:

-  This alternative provides support that does not restrict the person with a disability in any way. Furthermore, it is in widespread use and familiar in the banking sphere.
-  The power of attorney affords great power to the appointee, who can make transactions in the person's bank account. In the absence of a trusted person, the device loses some of its appeal.

Trust fund

A regular bank account can be turned into a trust fund managed by a trustee for a beneficiary. (For further discussion of trusts in the real estate context see the second alternative in Chapter 2.A.2 above.)

We know a successful example in Israel of a non-profit organization¹ which provides trusteeship services to people with disabilities. The service usually consists of a depositor (parent or property owner) and a beneficiary (the person with a disability). The organization provides services on a contractual basis, which includes management of the person's bank account and use of the funds in accordance with the consensual provisions of the contract. Because the organization is not-for-profit, the trusteeship services are provided at no cost. As long as the service is provided by reliable professionals or other trusted individuals at low cost, it is likely to effectively serve people who need assistance in managing their bank accounts.²

¹ See website: <http://www.neemanim.org.il/page.aspx?id=89&sid=14>

Advantages and disadvantages:



This solution is specific and flexible and does not require the involvement of the court.



If the property is registered in the name of the trustee, the trust fund can reduce the person's right to control the property. Furthermore, the solution is expensive because it requires payment of a fee to an attorney to draw up the agreement and, in many cases, monthly payments to the manager of the trust fund (unless there is an entity – such as a non-profit organization – which provides the service at no cost).

To summarize, a trust fund is a common and universal legal tool that can accommodate various programs and operational mechanisms. Because it is flexible, it is also neutral: poor use of it could lead to the loss of rights, whereas sensible use may achieve an appropriate balance between the authority of the trustee and the independence of the beneficiary.

Informal trusteeship for income support and social benefits

In many countries an 'informal trusteeship' exists through which a limited form of substituted decision-making is created for the receipt of government income support. That is, in order to ensure that the person's rent and essential bills are paid, an individual is appointed to receive the government funds and manage it for the person. This vehicle was created to avoid the need for full guardianship but also to protect against potential harm.³

Advantages and disadvantages:



This solution is specific and does not limit the person's capacity.



The solution distances a person from managing what is often his/her most important source of income. Furthermore, it is often used disproportionately even when the person is capable of managing his/her affairs with support.

6. SUMMARY: BANKING

Bank accounts are the nerve center of people's financial life. Their financial being depends upon their bank accounts, and everything connected to these accounts. Therefore, denial of the right to manage their accounts severely undermines their right to make decisions and manage their assets as they see fit. The list of alternatives included in this chapter may help find solutions to fit the particular needs of each individual. People who need support and guidance can get them by signing a notarized power of attorney or appointing a trustee; people who need to limit their financial activity may have to make use of restrictions on holding a credit card or checkbook or add an authorized signatory to their bank account. Although not all the measures listed here are currently recognized by the banks, we believe that by adopting one or more of them, we can find solutions to every concern about harm in this area. Appointing a guardian for in order to protect from financial harm in the area of banking is excessive and therefore unacceptable.

² For a summary regarding the use of trusts for people with disabilities see Canadian report: <http://www.lco-cdo.org/rdsp-discussion-paper.pdf>, pg. 70-76.

³ In October 2013, The Law Commission of Ontario, released a report which addressed alternatives to guardianship in the context of the Canadian Registered Disability Savings Plan (RDSP). See pg. 76-82 that address informal trusteeships in Canada, Australia and U.S.A: <http://www.lco-cdo.org/rdsp-discussion-paper.pdf>.

Individual cases and example court rulings

Case 1

A woman with an intellectual disability was appointed a guardian by her brother because of the way she handled money. Among other things, she lost much of her savings on gambling. The woman complained bitterly about the guardian, an external body that provides guardianship services for a fee. She turned for help to Bizchut, which took the matter to court and presented an alternative plan. The court accepted the plan, whose main points are detailed herein. The guardianship was cancelled and the woman regained her legal capacity and autonomy in most areas of life. She received an accountant’s support in decisions over property, for a fee. Some restrictions were imposed on her bank account and on her ability to sell assets she would own in future. One year after the ruling was handed down, the woman has more freedom of action, decides for herself how to spend her money and, at her own initiative, has also begun saving money for various goals she wants to achieve.

Case 2

An army veteran suffering from a head injury sustained in war, who receives a large government stipend, repeatedly plunged into debt. The debts were caused, among other factors, by pressure from people close to him to pay for their expenses. As a result, the possibility of appointing his sister as his guardian was considered. The man turned to Bizchut, which led to an alternative plan being presented to the court. The plan included a requirement for the sister to co-sign any withdrawal over a certain amount each month. The plan, which was approved by the court, provided a solution for the debts he had been accumulating and obviated the need for a guardian.

Case 3

This is the most significant ruling ever handed down in Israel regarding alternatives to guardianship. The case involves a woman with a psycho-social disability who, during periods of manic attacks, spent large sums of money. In response to a request by the woman’s family, the family court decided to appoint a guardian for her. The woman appealed the decision. The appellate instance accepted the appeal and ruled that appointing a guardian should be avoided as long as it is possible to find alternative measures such as restricting the account or registering a caveat on the asset.

Case 4

This case involves a woman with a disability who was due to receive a large sum of money in damages. Consequently, a procedure was launched to appoint a guardian for her on the grounds that she was incapable of managing her own property and there was concern that members of her family would exploit her. The court instructed that the guardian be removed and the damages awarded to the woman deposited in two separate accounts. One account was to be closed for a long period and accessed only with the court’s permission, and another, open account, was to be used by the woman for her daily needs.

Case 1:

In the Haifa Family Court

In the matter of:

Guardianship Case 50389/02/13

The Attorney General
Represented by his legal counsel, Advocates E. Sagi and/or S. Aloni-Zrachia and/or R. Hess-Bachar and/or M. Kaplan and/or R. Houlie-Esawi and/or R. Salman Srur and/or N. Nasseraldeen Nashef
Of the Legal Adviser’s Office, Ministry of Welfare and Social Services
5 Hassan Shoukry Street, Haifa, tel: 04-8619126/7/8; fax: 04-8619193

The Petitioner

VERSUS

1. Respondent 1
I.D. no. []

Represented by her legal counsel, Advocate Yotam Tolub of „Bizchut” – The Israel Human Rights Center for People with Disabilities
at fax no. 02-6521219

2. The Fund for Treatment of Wards of the State
of 41 Hechalutz Street, Haifa
at fax no. 8671958

3. Respondent 3
I.D. no. []
Represented by his legal counsel Advocate Hershkovitz
at fax no. 077-5444804

4. Respondent 4
I.D. no. []
Of []

The Respondents

Abbreviated Judgment

In the proceeding being conducted before me and in all matters relating to the motion of Respondent 1 (I.D. no. []) (hereinafter, „Respondent 1”) to cancel the guardianship, I hereby order as follows:

1. After having heard the parties and being convinced that Respondent 1 is able to take care of and handle her affairs, while obtaining assistance and support on her property affairs from the accountant, Mr. Yehuda Lavie, and after having reviewed the social worker's report on procedure, on June 2, 2013 I decided to cancel the appointment of the guardian – the Fund for Treatment of Wards of the State – as guardian over Respondent 1's person and property and to allow Respondent 1 to conduct her personal affairs independently and to conduct her property affairs with the assistance and support of Mr. Yehuda Lavie.
2. I approve the financial plan submitted to the court file on behalf of Respondent 1 and the list of needs and expenses set forth therein.
3. I authorize Mr. Yehuda Lavie (CPA) I.D. no. _____ to accompany and support Respondent 1 in making financial decisions. In this context, and only in this context, his functions and powers shall be as follows:
 - A. To assist Respondent 1 in collecting and obtaining from any person or entity any information required for the purpose of making any decision she wishes to make.
 - B. To assist Respondent 1 in understanding the information which concerns a decision she needs to make, and all that this entails.
 - C. To assist Respondent 1 in presenting her decisions before any person or entity or presenting them on her behalf, according to her decision.
 - D. To assist Respondent 1 in implementing her decisions.
 - E. To represent her before any entity or body where necessary.
4. In carrying out his function and in light of Respondent 1's consent, Mr. Lavie may receive any relevant information or document in connection with Respondent 1's financial affairs from any public, private or governmental entity.
5. Likewise, I order as follows:
 - A. All Respondent 1's monies shall be managed in the account opened for her at Bank Leumi, branch _____, account no. _____.
 - B. A caveat shall be recorded in the aforesaid account that Respondent 1 may independently withdraw from her account each week a sum not exceeding NIS 300.
 - C. It shall be recorded in the aforesaid account that no credit shall be granted in the account and that any transaction over NIS 300 requires Mr. Lavie's approval.
 - D. Checkbooks and credit cards shall not be provided for this account.
 - E. Mr. Yehuda Lavie shall organize and establish these rules in the Respondent 1's bank records.
6. Respondent 1 shall submit to the court file by means of her legal counsel a document confirming that the above caveats were recorded in the bank account.
7. Likewise, I order that any arrangement between Respondent 1 and her brothers concerning the distribution of the estate shall be subject to the approval of the court.
8. Upon arrangement of registration of Respondent 1's rights over the apartments in the estate, whose details are as follows:
 - 1) Parcel 101, _____.
 - 2) Parcel 10, _____.
 - 3) Parcel 22 _____.

Caveats shall be registered at the Land Registration Office by Mr. Yehuda Lavie on the undertaking to refrain from conducting any transaction, within the meaning of Section 126 of the Land Law, 5729-1969. Deletion of the caveats shall be carried out only under a court order. Respecting the apartments which are not registered at the Land Registration Office, the equivalent transactions shall be performed according to the place of registration.

9. Respondent 1 shall submit to the court file by means of her legal counsel a document confirming that the caveats were registered as set forth above proximate in time to performance of registration of the caveats.
10. Any change or cancellation of the provisions of this abbreviated judgment shall be carried out only by court order.

Handed down today, August 22, 2013
16 Ellul, 5773

(-)
[stamp – Esperanza Alon, Judge
Esperanza Alon, Judge (1)
[circular stamp – Haifa Family Court
[Emblem of the State of Israel]
18]

Case 2:

Guardianship Case 18541-05-12 In the Petach Tikva Family Court

[_____]
Represented by his legal counsel, Advocate Yotam
Tolub Whose address for the purpose of service of process is:
Bizchut, POB 34510, Jerusalem, 91000
Telephone: 02-6521308; fax: 02-6521219

Petitioner

V E R S U S

1. [_____]
2 . The Custodian General of the Tel Aviv District
3. Ministry of Social Affairs and Social Services, Tel Aviv
22 Jerusalem Boulevard, Jaffa, 68022
Telephone: 03-5138200; fax: 03-5138222

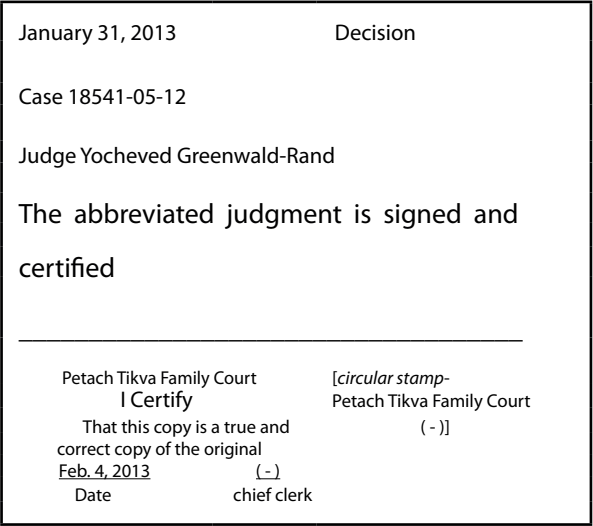
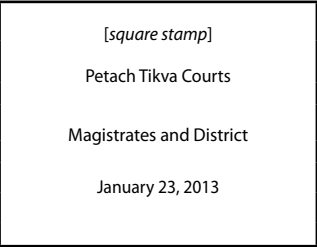
Respondent

Abbreviated Judgment

After the hearing of December 17, 2012 in this motion, it is held as follows:

- Any transaction in the account of the Petitioner, Mr. [_____] in favor of a third party will require the signature of his sister, Ms. [_____].
- Any withdrawal of funds from the Petitioner’s account of over NIS1,000 a month will require the signature of his sister, Ms. [_____].
- Deletion of these restrictions will be carried out only by court order.
- The abbreviated judgment shall be brought to the attention of the branch of the bank at which his account is being managed.

Handed down today: January 21, 2013



Case 3:

Family Appeal (Jerusalem) 815/05 Plonit v. Attorney General

The Law Courts
Jerusalem District Court
Before: The Hon. Judge Yosef Shapira
Family Appeal 815/05
Nov. 30, 2005

In the matter of: **Plonit**
Represented by her legal counsel, Adv. A. Schindler

VERSUS **The Appellant**

The Attorney General
Represented by her legal counsel, the Ministry of
Social Welfare, Adv. A. Ishai

The Respondent

Judgment

Before me is an appeal on the judgment of the Family Court in Jerusalem (the Hon. Deputy President **P. Marcus**) in Family Case 5070/05 in which a guardian was appointed over the Appellant’s property.

Background

1. The Appellant is a 69-year old woman described as suffering from bipolar affective disorder. In manic episodes she behaves with impaired judgment and restlessness and in depressive episodes she is indifferent, apathetic and disinterested in her surroundings.

The Petitioner has six children and an additional son committed suicide while serving in the IDF. Two of the Petitioner’s sons live with her at home while one of them is a ward of court and „Generations Fund“ is his guardian. According to the court of first instance, we are dealing with a conflicted family which has been known to the Family Court for over three and a half years.

The Ministry of Labor and Social Welfare, by means of the Attorney General (hereinafter, the „Ministry of Social Welfare“ or the „Respondent“) filed a motion for the appointment of a guardian for the Appellant’s property.

Presented before the Court were two opinions, the one which was filed on behalf of the Ministry of Social Welfare determined that a guardian should be appointed for the Appellant, in light of the complex relationship between the family members, and the second which was filed on behalf of the Appellant, determined that there was no need for such an appointment and that we were dealing with a woman whose functioning and judgment were generally functional. According to the second opinion, the Appellant’s condition does not justify denying those freedoms incidental to the appointment of a guardian.

The Appellant's Arguments

2. The Appellant opposes the appointment of a guardian, as she has opposed since the commencement of the proceeding and contends that her condition does not justify such a significant violation of her freedom, dignity and sensitivities. Furthermore, the Appellant contends that she goes and gets the treatments and therapies needed and fully cooperates with the treatment providers, so that it is even possible to almost completely prevent the periods when the disease intensifies and there is a problem with her judgment.

The Appellant also contends that the appointment of a guardian will seriously harm her relationship with her children, a relationship which despite its complexity is important to her and to them and in which she invests greatly.

A further contention which the Appellant raised is that the court of first instance did not consider determining alternative measures instead of the appointment of a guardian, measures which could have reduced the damage to her. This was despite the fact that this route had been proposed in the opinion filed by the Appellant herself.

The Appellant contends with respect to the opinions which were presented before the court that since these are contradictory opinions which were filed by both parties, the court should have appointed an expert on its behalf before taking such an extreme measure.

To conclude, the Appellant contends that if it is determined that a guardian should be appointed for her, as the court of first instance determined, then a guardian suited to the specific circumstances should be appointed and not the Fund for Treatment of Wards of the State which, according to her, prevents a relationship between a ward of court and the members of his family.

The Respondent's Arguments

3. The Respondent's contentions were specified in his response to the motion for a stay of performance which was filed by the Appellant, and were also heard in the hearing which took place on November 22, 2005.

According to the Respondent, it was determined in the medical certificate which was filed with the court of first instance that a guardian should be appointed for the property in the present case. Furthermore, in light of pressures and influences which could be exerted by any of the members of the family if a guardian was appointed, the court of first instance was correct when it decided that an external guardian would be appointed for her. In light of this, the decision of the court of first instance should remain in effect.

The Respondent contends regarding the relationship between the opinions, that the medical certificate is from the psychiatrist who has been treating the Appellant since 1998, while on the other hand, the opinion filed by the Appellant is an opinion from a psychiatrist who has not known the Appellant for very long.

Likewise, the Respondent contends that contrary to what the Appellant herself says, who contended that she functions fully and independently, her son's guardian reported that the house is not clean.

Deliberation

Appointment of Guardian

4. The court of first instance did not specify on which section it relied in its decision to appoint a guardian for the Appellant. As a general rule, a guardian may be appointed under sections 28, 33 and 68(a) of the Capacity and Guardianship Law, 5722-1962 (hereinafter, the „Law“).

Section 28 provides:

„Upon the death of one parent, the guardianship of the minor shall vest in the surviving parent; however, the Court may, in addition to that parent, appoint a guardian for the minor either generally or in respect of matters to be specified by the Court. The same shall apply where one of the parents has been declared legally incompetent or is incapable of carrying out his duties under this chapter or the Court has determined, in an argued decision, that the parent has refrained, without reasonable cause, from carrying out all or part of his aforesaid duties or has been deprived by the Court of his guardianship of the minor or where one of the parents is not known or is not married to the other parent and has not recognized the minor as his child.“

This section is part of chapter two of the Law, which deals with the relationship between parents and their minor children and which is concerned with the appointment of an additional guardian in the place of the natural parent of the child, in the circumstances specified in the section. In the present case we are dealing with the case of a ward of court and not a minor, thus this section should not be regarded as a possible source under which the guardian was appointed.

Section 33(a) of the Law enumerates a list of alternatives in which a guardian is appointed by the court. The sole alternative among those provided in the section, which could possibly apply to the present case is alternative (4), which provides as follows:

„(a) The Court may appoint a guardian –

...

(4) For any other person who permanently or temporarily, is unable to look after all or any of his affairs, there being no person authorized and willing to do so on his behalf;“

The Supreme Court held that an appointment under this section is designed for the purpose of managing the affairs of a ward of court and that an examination should be made of whether a factual basis was laid before the court from which it follows that this is a person who is unable to look after his affairs and there is nobody else willing to do so (see, Civil Appeal 445/81 **Elizabeth (Malin) Seabrook v. Salcia Zucker and 2 Others**, 37(3) PD 440; Civil Appeal 1233/94 **Dr. Deborah Cohen v. Attorney General**, *Takdin Elyon* (4)95, 217 (hereinafter, the “Deborah Cohen Judgment”); LCA 3232/04 **Ploni v. Plonim**, *Takdin Elyon* (2)2005, 1685).

The third source for appointment of a guardian is section 68(a) of the Law, which deals with the determination of protective measures and grants the court a general power for this purpose:

„(a) The Court may, at any time, on application of the Attorney

General or his representative or of an interested party or of its own motion, take temporary or permanent measures which seem to it appropriate for protecting the interests of a minor, a legally incompetent person, or a ward either by appointing a temporary guardian or a guardian *ad litem* or otherwise. The Court may also do so on application of the minor, the legally incompetent person or the ward himself.”

This section grants the court general power, which may be exercised in any manner, whose purpose is to protect a legally incompetent person, a minor or ward of court (see, Miscellaneous Civil Motion (Jerusalem) 1237/98 **Plonit v. Almonit et al**, *Takdin Mishpacha* (1)99, 46). Among the options available to the court is also the option of appointing a guardian.

The Relationship Between the Sections

5. The Appellant was not declared a ward prior to the handing down of the judgment of the court of first instance and it seems that calling her a ward in the body of the judgment derived in consequence of the appointment of a guardian under section 33. In light of this, it is highly doubtful if it is possible to appoint a guardian under section 68 before the declaration of the Appellant as a ward of court.

Notwithstanding this, if it is said that it is possible to appoint a guardian in the present case also under section 68(a), it is necessary to examine whether or not this appointment is contingent on the fulfillment of the conditions in section 33.

In the case of a guardian appointed under the provisions of section 28 of the Law, it is determined that section 68(a) provides a response also where the conditions determined in the specific section have not been fulfilled (see, LCA (Haifa) 759/00 **Plonit et al v. Ploni et al**, *Takdin Mechozi* (4)2000, 112). On the other hand, where the relationship between section 68(a) and section 33 is examined, the provisions of section 33 may actually prevail. Section 33 sets forth the cases in which a guardian will be appointed and also incorporates appointment under section 28.

Since this is an appointment under law, this list should be regarded as a closed list and hence the alternative of appointment of a guardian under section 68(a) should be subordinate to the fulfillment of one of the alternatives stipulated in section 33.

6. As a general rule, the dilemma which the court faces when considering a violation of basic rights which is likely to arise upon the appointment of a guardian and protection of the financial interests of an elderly person is not simple. In the aforesaid Deborah Cohen Judgment, it was stated as follows:

„When exercising authority, the normative starting point is that it is a basic right of any person – including any elderly person – to protect his dignity, his privacy, his property and his personal autonomy. These rights which have always been central pillars in our system of law, are currently protected in the Basic Law: Human Dignity and Liberty” (*supra*, page 218).

Before the Court decides on the appointment of a guardian it must examine whether there is no other route which could satisfy the purpose of protection of the affairs of the ward of court without this appointment. If any route is found, the Court must refrain as far as possible from appointing a guardian.

Moreover, even if the Court sees fit to act to appoint a guardian, it must examine whether it is actually possible to appoint a person close to the ward and not a person or entity alien to him, who is anonymous as far as he is concerned and he is not interested in being subordinate to him (see, the Deborah Cohen Judgment, *supra*, at page 220). And *a fortiori* where the ward is a person whose judgment is not impaired and he is able to express an opinion on the matter.

From the General to the Particular

7. It is undisputed that in the Appellant’s life there are periods when her illness temporarily intensifies and in these periods her judgment is likely to be impaired and she is likely to be taken advantage of by any of her family members. At these times she requires protection. This situation satisfies the first two conditions in alternative

(4) of section 33.

However, it must be asked whether there is not indeed anyone that may be authorized to handle the Appellant’s affairs and is also willing to do so. It should be added to this that in the present case this is not a woman with many assets but a woman who owns a residential apartment, half of an additional apartment and NIS 80,000, with over half of this amount being in her son’s possession for her benefit. Furthermore, her monthly income is somewhere around NIS 13,000 a month. It seems from all the evidence that there is someone willing to handle her affairs and her son Meir has already been operating in this manner and is in possession of half her money, with her consent.

Likewise, the Appellant expressed herself before me and I was impressed that this was a woman of unimpaired judgment, aware of the fact that there are times when her ability to judge is impaired and that she is interested at these times in being helped to avoid the performance of transactions with her assets.

Since there is someone willing to handle the Appellant’s affairs, the conditions for appointment of a guardian under section 33(a)(4) are not satisfied. Furthermore, even if the conditions had been satisfied, the appointment of a guardian to permanently take control of the Appellant’s assets is not a desirable solution balancing between her constitutional rights and the desire to protect her assets at the times when she requires this protection.

Even preference of a threatening son over any other is a common phenomenon, and still this does not justify the appointment of a guardian for every aging person. In the present case this is not someone with many assets, as set forth above, and therefore the appointment of a guardian for the Appellant is not proportionate. However, cancelation of the appointment will be subject to restrictions approved also by the Appellant.

Result

8. In light of the above, I accept the appeal and order the cancelation of the appointment of the guardian.

In order to protect the Appellant’s assets I order that within 10 days of the date of receipt of the abbreviated judgment, Advocate Schindler shall register cautionary notes on her apartment and on her rights in half of the additional apartment, with the abbreviated judgment constituting an „undertaking to refrain from performing a transaction” within the meaning of section 126 of the Land Law, 5729-1969. Deletion of the cautionary note shall be carried out only by an order of the court. If the apartments are not registered at the Land Registry Office, then equivalent transactions shall be performed according to

the place of registration.

In order to protect the Appellant’s money, I order the following:

1. Any transaction in the account in favor of any third party will require the signature of an additional authorized signatory who shall be added to her account, at her election, subject to that stated in section 2 below.
2. Any withdrawal of monies from her account in excess of NIS 6,000 a month shall require the signature of an additional authorized signatory.

The abbreviated judgment shall be brought to the attention of all the Appellant’s children and to the branch of the bank at which her account is managed.

There is no order for costs.

The bond shall be returned to the depositor.

Handed down today, 28 Heshvan, 5766 (November 30, 2005) in the absence of the parties.

The court office shall send a copy of the judgment to the legal counsel of the parties.

May be published without identifying particulars.

Yosef Shapira 54678313-815/05

Yosef Shapira – Judge

Case 4:

Tiberias Family Court
Before the Hon. Deputy President Ethy Bouhadana

_____ *et al*

_____ *et al*

Haifa and Northern District
September 2, 2012

...

The parties, as well as all those persons present: it is agreed as follows:

1. That Ms. _____ no longer requires a guardian for the person and/or property, and the appointment of the Fund for Treatment of Wards of the State shall be canceled immediately.
The Fund for Treatment of Wards of the State shall be requested to file a final report to the Custodian General with a copy to Advocate _____. It is clarified that the report is audited by the Custodian General.
After the filing of the report, the balance available to the credit of Ms. _____ will be directly transferred by the Fund to Ms. _____’s account.
2. Notwithstanding that stated in section 1 and to ensure that the compensation for the damage to be received by Ms. _____ is indeed invested in order to guarantee her daily living as well as her future, Advocate _____ is authorized to act in the following manner:
 - A. The compensation monies to be received shall be invested generally in three plans, the first long-term, the second short-term and the third to provide for ongoing needs.
 - B. Advocate _____ shall submit a list to the Court within 7 days on the needs of _____ and alongside these needs, all sources to provide such needs, including the national insurance benefit. Within this same period, Advocate _____ shall file together with the list of needs, bank proposals for investment of the monies.
 - C. It is agreed that the monies to be invested in the short-term plan shall not be wholly or partly withdrawn except with the leave of the Court in a motion to be filed, and a suitable note to be recorded in the account.
 - D. A proposal as set forth in sections B and C shall be sent directly to Advocate _____ who will properly explain it to Ms. _____, and within two days of the date of receipt thereof shall file his position with the Court.
 - E. It is agreed that Advocate _____ is barred from transferring the compensation monies to Ms. _____ or to anyone on her behalf until the investments have been entered as a judgment. However, to enable _____’s needs to be covered from the compensation monies until conclusion of the process, Advocate _____ shall be authorized to transfer to an account in Ms. _____’s name only, the sum of NIS 50,000 only.
 - F. The Court is requested to enter the investment proposal and the manner of financing Ms. _____’s ongoing needs as a judgment.
3. It is requested to enter these consents as a decision.

DECISION

The consents of the parties are entered as a decision.

In light of the consents to cancel the order appointing the Fund for Treatment of Wards of the State as guardian over the property of Ms. [] and these consents are based also on a medical opinion, I order the cancelation of the order given on March 4, 2010.

Advocate [] is barred from transferring the compensation monies awarded to Ms. [] until a judgment is entered on the manner of their investment, except for a sum of NIS 50,000 which Advocate [] is authorized to transfer into an account in Ms. []’s name only, for the purpose of covering her needs, including a caregiver.

A copy of this decision shall be sent to the Fund for Treatment of Wards of the State and to the Custodian General in Haifa.

The file shall be brought for my review on September 13, 2012.

Handed down and notified today, 15 Ellul, 5772, September 2, 2012 in the presence of those persons present.

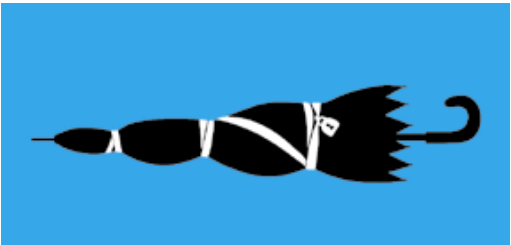
(-)

Ethy Bouhadana, Deputy President

Three court cases for repealing of guardianship which are actually system repealing cases¹

One guardianship less

By the end of March 2015 the guardianship of a 22-year-old girl was repealed by the judgment of the District Court – Dobrich. She is an example for the “good job” done by the System – abandoned by her parents at her childbirth due to some diseases she had and as a consequence of doctors’ advices. Since then the state started to provide public social “care” to her. And instead of a child with a home and parents she became a child with a number of homes – all for children with mental disabilities. When she became at legal age – in order to insure a higher security for her – the System deprived her of rights, placing her under full guardianship and authorized her with the lifelong right to enjoy a life hidden behind various institutions and prohibitions. But She did not give up – she graduated from high school; she acquired the profession of hairdresser and with the time took a stand against the System, in order to refute it completely. She decisively fought the prohibition to exercise her right to employment – she decided to break the medical criteria that were the ground to be put under guardianship. Legal proceedings for abolishment of the guardianship were initiated. But actually these proceedings were a fight against the System. And the Person who faced the System finally succeeded to defeat it using the tested weapons of the System itself – forensic psychiatric examination, sessions in order to bring the System to the following conclusion: “From the perspective of her development, the guardianship is a restriction that hinders her from the access to the labour market, to education and qualification, development of autonomy / ... / The imposed measure actually puts her at risk. /.../ Following these, this provision of Art. 5 of Persons and Family Act contradicts to the Art. 12 of the Convention on the Rights of Persons with Disabilities and this contradiction should be resolved in favor of the Convention...” And now – one more life is “judged” in favor of the Person and *versus* the System that usually has many fake, but widely considered as “human”, names – Social, Health, Judicial and so on.



¹ The present cases are part of the “Next Step” Program implemented by the Bulgarian Center for Not-for-profit Law Foundation, Bulgarian Association of People with Intellectual Disabilities, Global Initiative in the Psychiatry – Sofia and National Organization of Mental Health Services Consumers. The leading characters are participants in the pilot projects within the country for Supported Decision-Making.

Case N^o with subject: the joint life of the Person V. and the System

In 2001 by the judgment of the District Court M.V. was placed under guardianship in view of the fact that under a tacit order of the Social Ministry at that time people living in institutions were obliged to be placed under restrictive regime of their legal capacity. It was like that: one judge visits institutions and meets all the people accommodated there and decides to place 20-30 of them under guardianship. In such a way the protection measure of the guardianship becomes a means of restriction without taking into account what actually the person desires and what kind of opportunities are available in order to achieve them. And step by step the Person V. loses the right to exercise her own abilities as well as slowly and constantly she becomes the Object V. – an object behind which stand the beautiful fictions about the “individual approach”, “social protection”, “persons with physical and mental disabilities are under the special protection of the state and society”, etc.

And You ask: “Why the Object V.”? Just because at the time of the interdiction of Person V. her potential to cope and to develop was not examined, but only the medical diagnosis “*other specified imbecility*” had been taken into account. In 2001 when a person was placed under guardianship traditionally the medical model was exactly applied. The diagnosis, the expert statement of the psychiatrist was always determining for the court judgment. The personal impression of the court on the abilities of the person (who is about to be put under guardianship) remains for “personal use”. During the period in which V. was placed under guardianship she was living in a social institution in the city of Lom. Actually just as a subject she was moved by the System in the city of Lom without taking into account her desire where she wanted to live. V. did not have any social contacts outside of the institution (except with her grandmother). She didn’t know how much money she had, what was the amount of her pension and she hadn’t even access to her own money, nor any information about what “placing under guardianship”, “human rights”, “choice” meant.

In November 2005 with the help of the Regional Association for People with Mental Disabilities Support /RAPMDS/ – the city of V. Person V. leaves the institution but remains in the System. In the beginning she was accommodated in a sheltered home for women and after that, at her own request she moved to another sheltered home in the same city. In the she, sheltered home V. was supported by labor therapists, social workers and psychologist. She had a private room and finally – an independent life.

In the period since V. has left the institution until today she had taken part in several programs for rehabilitation and for this period she had achieved significant progress. Currently V. is able to go shopping independently as she asks for advises when she considers it necessary. She orientates very well in the city and also she is able to move alone (without any companion and without any prohibitions). In the day care center that visits V. receives support to develop her skills in reading, writing, calculating, etc. With the help of a scheme for integrated employment she has started part-time work (as a form of labor therapy) in a cleaning company, as the System doesn’t allow her to conclude contracts. According to the “labor therapist” V. is fully granting her labor force and efficiently carries out her duties. And, of course, receives a salary for this.

Since V. has left the institution so far there has been a big progress towards building communication skills with others, forming appropriate behavior and lasting relationships, making choices, expressing opinions. She is very well adapted to the life. Despite the prohibitions of the System and although she had lost more than 40 years of independent life taken by the System, she finally lives her own life. Despite all V. demonstrates a sense of humor.

At present V. is sufficiently independent and able to take decisions where and with whom to live, what to do with her money and how to plan her activities. She has built relationships of trust with the staff members in the services (and also with the other consumers). When she has difficulties to make

decision or she just wants to share a problem she relies on their support and advices. In terms of her personal development, placing her under guardianship is a measure of restriction that hinders her access to the labor market, increasing her education and qualification, development of her independence.

The measure called “placement under guardianship” puts V. at risk. At the moment she has a guardian who supports her, fully complies with her decisions and preferences, supports her aspiration for independence and de facto she doesn’t have to exercise the guardianship obligations under the Family Code. However, nothing can guarantee V. that in case of change of her guardian she will be able to build again the same complex of relationships of trust, that her aspirations will be respected and she would not be deprived from her liberty and participation in the community life, as it was until 2005. However, V. has a support system built in the community which fully compensates those deficits that she has - not so much because of her disability but because of the prolonged institutionalization, lasting memories of the joint life in the homes of the System.

But since 2012 many changes have set in the social and political life. Those changes generally make unacceptable one person with disabilities to be deprived of his/her legal capacity to act. In 2012 the Convention on the Rights of Persons with Disabilities (CRPD) was ratified by Bulgaria and pursuant to Art. 5 para. 4 of the Constitution of the Republic of Bulgaria the CRPD is part of the national law of the country having precedence over those provisions of the national law that contradict it. Nevertheless the state doesn’t recognize the legal capacity of people with disabilities to act in violation of Art. 12 of the CRPD. Therefore, the provision of the Art. 12 of the CRPD precludes the possibility one person to be placed under guardianship, and even if he/she has already been placed, this measure appears to be inconsistent with Art. 12 of the CRPD and its existence can’t be tolerated. All this actually motivates V. to request the abolition of her guardianship. But according to the current Civil Procedure Code the proceedings for abolishment of the guardianship is the same as placing a person under guardianship and it can be only initiated by a statement of action by the guardian, but not by the person under guardianship. But V. is happy to have her guardian who has addressed the court with the request to abolish the guardianship. Essentially, the fact that the action is well-founded is based on the following arguments: the condition for placement under guardianship and the reasons to undertake this measure were provided in Art. 5 of the Persons and Family Act (PFA). The placement under guardianship is related with the existence of mental illness or intellectual disability leading to the complete or partial inability of the person with disability to deal with his/her works. It is obvious by the foregoing facts that V. manages to do her works in a way that satisfies her. Moreover there is a network of social relationships (professional and personal) which are likely to provide V. with all the necessary support to overcome those difficulties she meets in everyday life.

Therefore, at the present moment there are no prerequisites provided in Art. 5 of the Persons and Family Act which can determine the guardianship of V. in accordance with the national legislation. There are no more prerequisites but the factors of the System that still exist defend the guardianship as the most valuable institute for deprivation of rights.

Pursuant to Article 12 of the CRPD persons with disabilities shall be ensured to fully exercise their rights themselves; their legal capacity to act shall be respected on an equal basis with others. Thus, it should be assumed that there are no grounds for V. to be still deprived of her legal capacity to act, as she is implicitly deprived of liberty due to her disability and stay in an institution. If there are difficulties related to the fact that she has spent years of her life in an institution or other difficulties, such as each person undergoes in his/her own life, so for these difficulties she is receiving adequate support and has made significant progress. There is a support network of kith and kin, friends and professionals and this network ensures fully that V. will deal with her affairs in the most appropriate way that suits her interests, wishes and aspirations without her disability being obstacle therefor. And the court, therefore,

had to abolish the guardianship of V. However, the prosecution and the municipality as parties in the case expressed the opinion that V. could take care of her daily needs, but with vicarious support. For this reason they maintain that V. shall be put under partial guardianship. Witnesses in the case, guardian and a social worker from the sheltered home where V. is living consider that V. is able to take care independently for herself, she makes appropriate and sufficient care for her appearance, health and financial affairs. The psychiatric expert examination confirms the statements of the witnesses and reaffirms that V.'s mental disorder is not a mental illness but it is a consequence of the experienced years of living in an institution - all sorts of homes of the System. Actually the expert witness practically states that the medical criterion under Article 5 of Persons and Family Act is not applicable in this case.

The court takes into account all the described facts, but puts emphasis on the way V. "takes the right decisions on how to resolve common domestic problems," but "her condition does not allow to make complex, abstract decisions and understand their meaning" - this is exactly the strongest reason for the court to enact "placement under partial guardianship". The partial guardianship, as a measure, does not lead to any specific protection, but on behalf of that, leads to very clear and specific restrictions in almost the same extent as the full guardianship. But in order to come to this judgement the court surely lacked alternative measures as opposed to the fully and partial guardianship. Measures, which can crush the System and return lots of people back to life.

Life as a hostage of an expert examination

N. has brought her guardianship since 2001. The background of her placement under this measure is identical to V.'s. The measure "guardianship" has the same level of impropriety.

N. had also lived and overcome on her way several institutions of the type "home for ..." children of the System. Scarcely in 2004 with the help provided by the Regional Association for Support of Persons with Mental Disabilities / RASPM / - the city of V., N. was accommodated in a sheltered home for women with intellectual disabilities. Shortly thereafter, due to the scheme for integrated employment to the Association, N. began working in a sewing workshop. She had also worked part-time in a cleaning company. Her employment was determined as a form of labor therapy simply because of the circumstance that she was placed under guardianship. But if N. didn't fall under "protected" hits of the law - to be deprived of the right to employment, then her employer would have concluded a labor contract with her. Her labor rights would have been protected. Now she is about to start a work in the cafeteria but still - as a form of labor therapy.

For the placement of N. under guardianship, just like V.'s case, again only the medical criterion has been taken into consideration. The most decisive point for the court judgement has always been the diagnosis, the expert opinion of a psychiatrist.

The life in an institution had affected N. in a way that she became more antisocial and suspicious to strangers. Although it is difficult for her to make contacts with strangers, once she builds a relationship of trust with someone, she becomes a pleasant companion, willing to share, to give and receive support. Although N. did not understand the meaning of the measure "placing under guardianship" while she was in an institution, just because she was listed in the general scheme of imprisonment and isolation from the community during all the years of life in the community, N. realized the meaning of the restriction and the diverse ways in which the measure negatively affected her life.

N. still receives support by her friends, the staff of the sheltered home where she is living, and also takes part in programs providing social support. At present, the social work is primarily aimed at

upgrading already acquired skills. This process includes developing skills for the allocation of her own monthly funds and preparation of a budget, control over her emotions and encouraging the integration into new activities.

Currently N. is independent. She is independent to the extent that she wishes to receive support from her guardian to initiate a lawsuit in order to abolish the guardianship. N. is well aware of the possible outcome of the trial - maybe it is time for her to "break up" with the guardianship, but even if that does not happen, N. is ready to continue her life in the name of the possible ways to exercise her rights.

After exposure of these facts before the court, the judge followed the well-established model of the case law and appointed a judicial-psychiatric examination. The examination was prepared by three experts. The leading expert who has known N. for years and took participation in the committee for evaluation of her labor ability /the well-known Labor Experts Medical Commission / stated the following reasons and conclusion: the expert confirms the diagnosis of "mild mental retardation" and concluded that the diagnosis "limits the ability of the person to understand the significance and the sense of her actions and that she is unable to handle more complex situation and to make decisions in order to protect her rights and interests" - that statement distinctly contradicts to the all mentioned above. The examination describes in details the testimony of the witnesses in the case and the words of N. from the interrogation related to the case and from the interview with the experts. Generally, the doctors draw the conclusion that persons with mild and moderate mental retardation have reasonable reflections on basic life issues. But abstract thinking is not sufficiently developed.

"That is why their estimation in more complex situations is wrong", / but who says that we, who are not placed under guardianship, always make the "right" choice? /. It is stated again the general conclusion that "such persons can usually perform non-specialized activity and to provide themselves material funds" /does life presuppose course requires special knowledge and training so the life can be really lived? / So the examination concludes that "deficits of N. are of such extent and type that limit her ability to understand the meaning and significance of her actions and to provide self-care for herself," that is why the medical experts accept that she is with "partial capacity to act" - qualification that only the court is entitled to do.

After the preparation of the examination a judgement is about to be pronounced. Until then the right to exercise rights provided by the Convention on the Rights of Persons with Disabilities is suspended. But life can not bear delay just because the lack of legal constructions, right?!

Study of the effects and economic benefits of supported decision-making*

"De Pasarel Bulgaria" Foundation
Bulgarian Centre for Not-for-profit Law (BCNL)

SUMMARY

This document is a summary of the results from a *Study of the Effects and Economic Benefits of Supported Decision-making*, developed jointly by the „De Pasarel Bulgaria“ Foundation and Bulgarian Centre for Not-for-profit Law (BCNL) within the project „Art. 12 - The Next Step“ (2012-2014), part of the Next Step Program. The overall objective of the program is to collect and summarize the results of the practical implementation of measures of supported decision-making (SDM) in the country by using them as a basis for building a new legal model to replace the system of guardianship. At the heart of the program are the standards of Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD), under which people with disabilities should be able to exercise their rights in person, according to their will and preferences, while ensuring adequate support, based on trust. The program also includes two pilot projects: „Paradigms Shift in the Context of Article 12 of CPRD. Searching for solutions for people with mental health problems“, implemented by the Global Initiative in Psychiatry - Sofia (GIP - Sofia) in partnership with the National Organization of Mental Health Services Consumers (NOMHSC) (carried out in Sofia and Blagoevgrad) and „To Empower People with Intellectual Disabilities“, implemented by the Bulgarian Association of People with Intellectual Disabilities (BAPID) (carried out in Sofia by Autism Association and in Vidin by the Regional Society for Support of Persons with Mental Disabilities). More than 40 persons with intellectual disabilities and mental health problems who are under guardianship or in high risk of being placed under guardianship were included in the program.

The *Study of the Effects and Economic Benefits of SDM* was done on the basis of the results achieved particularly through the two pilot projects which within 12 months piloted the measures for supported decision-making among its clients - people with mental health problems and intellectual disabilities - in Sofia, Blagoevgrad and Vidin. For the purposes of the study a research was conducted in 2013 among the clients - participants in the pilot project activities, the results of which form the basis of summaries and conclusions presented in this document regarding the benefits and the costs to the society from the implementation of the SDM mechanisms.

The analysis was prepared with the methodological support of the international experts Michael Bach, Institute for Research and Development on Inclusion and Society (IRIS), Canada and Freddie Wools, „De Pasarel - Netherlands“ foundation.



Objectives

The analysis has the following main objectives:

- to define the areas in which SDM leads to benefits or costs to the society and thus to outline the areas that should be thoroughly examined in the future when SDM mechanisms are not in the pilot phase but are widely accepted and applied as an alternative to guardianship¹ in implementing the CRPD in Bulgaria;
- to highlight the non-financial benefits - the effect of SDM on people with disabilities and society as a whole as the main argument for the advantages of SDM compared to the guardianship, as a legal status, leading to restriction or deprivation of the opportunity to personally exercise human rights and in this regard - respective restriction or deprivation of the people with disabilities of the opportunity to participate in the public life;
- to create as far as possible at this initial stage, an overview of the actual financial costs/benefits of the implementation of SDM and thus answer the question whether the benefits to society outweigh the costs of SDM;
- to support one of the main conclusions of the whole „Next step in Bulgaria“ program that the institutional type of care and the accompanying widespread practice of guardianship is entirely contrary to the CRPD and that people with disabilities can be active and able-bodied citizens only if they live in the community.

Analytical framework

The expected outcome is “Quality of life, equality before the law, independent living and social inclusion of people with mental health and intellectual disabilities in accordance with Art. 12 and Art. 19 of the CRPD”. This is the starting point on which the analytical framework and the overall concept of the analysis are built. With regard to this expected result the SDM mechanisms (as a new, pilot intervention) are compared with the system of guardianship (as an existing practice/intervention). All conclusions about SDM are drawn in comparison with the existing practice of guardianship and institutional care by addressing the question: Has SDM achieved the expected result - “Quality of life, equality before the law, independent living and social inclusion” (in greater degree than the system of guardianship) and what are the associated benefits and costs to society?

For this reason, two main types of benefits/costs, namely “non-financial” and “financial” are identified in the analytical framework of the study.

Non-financial benefits to society which are analysed are:

- Quality of life of people with mental health problems and intellectual disabilities
- Equality before the law in accordance with Art. 12 of the CRPD
- Independent living in accordance with Art. 19 of the CRPD
- Social inclusion in accordance with Art. 19 of the CRPD



* You can find the full article on www.bcnl.org, section Articles

¹ The pilot projects cover cases of adult people who are either under full guardianship or who are under partial guardianship without distinguishing between the two regimes.

Financial costs and benefits to society are analyzed in terms of:

- The cost of the intervention – the necessary costs of implementing the SDM mechanisms compared to the cost of implementing the existing practice of guardianship;
- Use of social services – the economic result of the needed change in the type and the scope of support provided within the system of social care and services as a result of the effects of SDM on the level of autonomy (supported autonomy) of people with mental health problems and intellectual disabilities;
- Use of health services – the economic result of reducing the usability of health services (in particular stays in psychiatric hospitals and consultations with a psychiatrist) as a result of the effects of SDM on the level of autonomy of people with mental health problems and intellectual disabilities;
- Increase in employment – the economic result of the increase in employment as a result of the effects of SDM on the level of autonomy, self-determination and social inclusion of people with mental health problems and intellectual disabilities.



Methodology and Tools

The survey methodology was developed based on the analytical framework taking into account the limitations imposed by the small scale and the short time period of piloting the SDM mechanisms. The survey included 53 people with mental health problems and intellectual disabilities in Sofia, Blagoevgrad and Vidin as follows:

- 36 people (16 with intellectual disabilities and 20 with mental health problems) participants in the pilot projects BAPID and GIP-Sofia who are included in the pilot projects and participated in the approbation of SDM measures;
- 6 people (with intellectual disabilities) who are under guardianship and live in the community;
- 11 people (6 with intellectual disabilities and 5 with mental health problems) who are under guardianship and live in an institution.

All the participants in the study had interviews with filling in structured questionnaires 1/Measuring the Quality of life and 2/Assessment of the degree of autonomy and personal prospects. For the purpose of reporting and analyzing the change for the participants in the pilot projects (36 persons) interviews with filling in questionnaires were made at the beginning of the project (without SDM) and after a period of six months, during which time they received SDM.

The tools used were as follows:

- For the analysis of the non-financial benefits 1/Personal outcome scale – (POS) for quality of life applicable to people with intellectual disabilities and 2/ A version of the questionnaire of the World Health Organization Quality of Life of People with Mental Health Problems (WHOQoL), approved for Bulgaria, were used;
- For the analysis of the financial costs and benefits, the information about the level of autonomy, the needs for support and the personal prospects of the users was collected through a questionnaire specially developed for the purposes of the analysis.

The conclusions as to the costs and benefits of SDM were based on comparing the results of the survey on the following principles:

- comparing the results at both times of measurement – 1/before SDM/under guardianship and 2/ with SDM (for participants in the pilot projects);
- comparing the results of the participants in the pilot projects of the second measurement (with SDM) with the results of people under guardianship, without SDM, living in institutions.

Limitations

This analysis is the first attempt in Bulgaria to review the financial and non-financial benefits and costs of SDM mechanisms compared to the system of guardianship. The small number of persons who were covered by the pilot projects and participated in the approbation of SDM measures and the short period (6 months) for the survey, point to the ambition of the analysis. It is to serve as a source of information for the areas of the study, to highlight the non-financial benefits as the leading ones and to identify notable trends at this stage rather than to claim maximum accuracy and completeness of the data and calculations.

The limitation of the analysis stems from the very definition of the expected result for which it is difficult to predict the time frame necessary for the realization of the non-financial benefits – “quality of life, equality before the law, independent living and social inclusion of people with mental health problems and intellectual disabilities in accordance with Art. 12 and Art. 19 of the CRPD”. The method of extrapolation was applied for some of the calculations particularly as regards the long term forecasts.

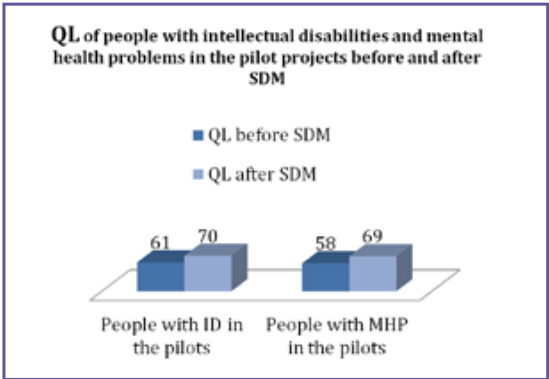
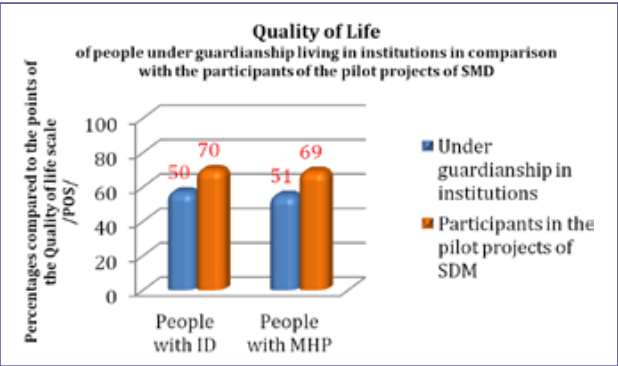
Hard to access and scarce statistical information was an additional difficulty. Some of the calculations are based on ballpark values and assessments but this, according to the study team, does not affect the overall credibility of the presented trends and general conclusions.

Survey Results – non-financial benefits of SDM

Quality of life

The study was based on a conceptual framework for quality of life, developed by Schalock, Bonham and Verdugo (2008), which consists of 3 factors (autonomy, social inclusion, well-being), divided into eight domains (personal development, self-determination, interpersonal relations, social inclusion, rights, emotional well-being, physical well-being, material well-being), which are characterized by indicators measured from objective and subjective point of view. The survey results show the following trends:

- For the short period of piloting the SDM mechanisms all study participants, without exception, reported an improvement in the overall indicator of quality of life. The increase is an average of 10% for both groups of surveyed people (people with mental health problems and people with intellectual disabilities).
- The quality of life is directly dependent on the place of living - the comparison of the participants in the pilot project with the residents living in institutions /under guardianship/ clearly shows that the quality of life of this group is significantly lower compared to that of the people living in the community - with an average of 9% before the SDM piloting and with 19% in comparison with the results after the application of the SDM mechanisms.
- The greatest improvement (by an average of 12%) for all participants in the pilot project is registered in the areas of Personal development, Self-determination and Interpersonal relations.
- The comparison of the two groups of consumers shows that the total average level of quality of life is higher for people with intellectual disabilities (61% at 58% for people with mental health problems), but the people with mental health problems achieve greater improvement in quality of life within the pilot projects (by 11% at 9% improvement in people with intellectual disabilities).
- The lowest results for both groups were reported in the areas Physical Well-being and Material Well-being. These are the areas in which the effect of the SDM should be monitored over a longer period of time.



2. Equality before the law in accordance with Art. 12

Compliance with Art. 12 of the CRPD is undoubtedly a non-financial benefit of the SDM mechanisms compared to the system of guardianship. The arguments for this are on fundamental level and are based on the so-called “paradigm shift” in terms of legal capacity to act and the personal exercise of rights that the Convention introduces. Article 12 affirms that the mechanisms of substitution of will have to be cancelled and that an alternative mechanism of SDM should be provided. The Convention recognizes that people with disabilities should have the opportunity and the conditions to exercise their rights according to their will and preferences as everyone else in all areas of life and requires the state parties to ensure access for people with disabilities to the help they need in this connection.

Supported decision-making is a way to meet the requirement of Art. 12 for equality before the law. Unlike guardianship, SDM mechanisms recognize the personality of people with mental health problems and intellectual disabilities and oppose the deprivation of opportunities to „enjoy“ their primordial rights and freedoms, according to their will and preferences.

3. Independent living in accordance with Art. 19 of the CRPD

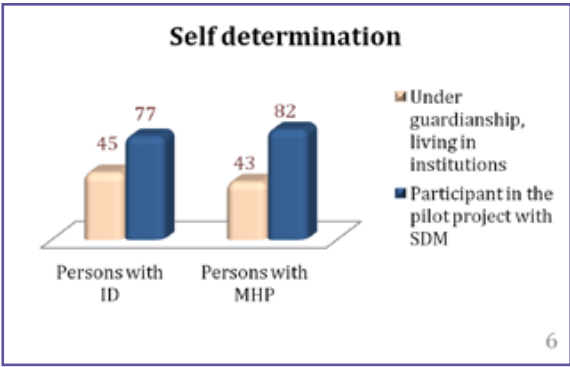
Independent living for people with mental health problems and intellectual disabilities is a non-financial benefit of SDM. The survey results show that for the participants in the pilot projects SDM actually contributes to them making their own choices about how to live their lives in accordance with their individual preferences and values. Independent living is freedom of choice, self-determination and opportunities for personal development. Independent Living opposes being obliged to live one’s life as others want you to live it, which is precisely what the system of guardianship does.

During the study the change in the „Independent Living“ was measured on the basis of the results in the domains „Self-determination“ and „Personal Development“, according to Schalock’s framework.

3.1. Self-Determination

Self-determination is the extent to which the behaviour of the individual is self-motivated. It is a combination of attitudes and abilities that lead people to setting goals for themselves and making them take initiatives to achieve these goals. Supported decision-making empowers people and makes them more self-determined, as shown by the results:

- There is a perceptive increase in the level of self-determination as a result of the SDM mechanisms for both target groups. The average level of improvement, registered for the duration of the pilot project is relatively high - 12%.
- The highest result in both groups was achieved for questions 8, 9, and 10: Q8. To what extent does the person make a free choice when it comes to making decisions? Q9. To what extent does the person make decisions on his/her own initiative (for things that he/she has not been explicitly asked by others to make a decision)? Q10. To what extent are the decisions of the person taken seriously (no matter what the decision is)?
- Self-determination is the most sensitive area with respect to the comparison made between people



living in institutions, placed under guardianship and those living in the community included in the pilot projects. Here the biggest difference recorded for the entire survey is noticed - 32% difference in the group of persons with intellectual disabilities and 39% for people with mental health problems. This proves that the self-determination of people in institutions is exceptionally low. The limiting environment in specialized institutions and the restrictive daily routine deprives people of their right to make choices even for the smallest things in life. People in institutions have no control over their lives and what is worse, institutional lifestyle robs them to such an extent that they even lose motivation to change that.

3.2. Personal Development

Personal development is another area where there is a significant increase in the results due to SDM mechanisms. This means that supported decision-making gives people the opportunity to acquire new skills and makes them realize the importance of their abilities. In this study, along with “Self-determination”, “Personal Development” plays the most significant role in shaping the overall results for quality of life.

Both groups demonstrated positive growth in their personal development within the project for SDM and especially in the application of newly acquired knowledge and skills and proactive attitudes of behaviour. The average level of improvement in this area, registered for the period of the pilot project, is 10.5% (14% for people with intellectual disabilities and 7% for people with mental health problems).

Although a little change is registered in this domain for people with mental health problems (7%), their baseline was significantly higher compared to the group of intellectual disabilities (74% at 64% of people with Intellectual Disabilities).

The measurements in this particular domain stand out with a significant change with regard to the following groups of questions: Q3 To what extent has the person mastered and applied new skills and/or knowledge for the last 6 months? Q4 To what extent does the person use his/her skills (e.g. in work, school, home) and has the opportunity to express himself/herself in the community?

The study reported much lower results in the domain „personal development“ for people living in institutions (50% for people with intellectual disabilities and 58% for people with mental health problems while those results for people living in the community are 78% and 81% respectively). This once again proves that the institutional care type and the system of guardianship not only limit human rights, but also deprive people of the opportunity to grow and experience the joy of their personal development and realization of their potential.

Social inclusion in accordance with Art. 19 of the CRPD

Supported decision-making is a necessary and logical step in creating an inclusive society that guarantees human rights and participation of people with disabilities in all aspects of social life. In Bulgarian society, social exclusion and discrimination are a fact for both study groups. The principles of SDM are in accordance with the social model of disability which addresses social exclusion as a problem that is rooted entirely in the society and not in the individual with a disability. The focus is on the lack of participation in social life, which follows not from the free will of the person but is a consequence of the restrictions that society puts in front of him/her.

The study recognizes that SDM leads to social inclusion of people with disabilities in accordance with Art. 19 of the CRPD which is evidenced by the results in these two domains - „Interpersonal relations“ and „Social inclusion“. Various forms of SDM improve interpersonal relations and give people with disabilities the opportunity to participate actively in the social life as full citizens.

4.1. Interpersonal Relations

People with intellectual disabilities and mental health problems have a huge need for social interaction, like everyone else. In practice, however, it is hard for them to build and maintain relationships. They struggle with low self-esteem, which is the result of failures. SDM mechanisms empower people with intellectual disabilities and mental health problems. As a result of SDM they increase their confidence and improve their interpersonal relations. They build stronger ties with family members, relatives and friends and experience greater emotional security. Thus, they make more easily and with less fear the new social contacts and expand their personal network (natural support). The emotional stress of the families is also decreased as a result of SDM. The survey results indicate that:

The average level of improvement in this domain, registered for the period of the pilot project, is 11% (12% for people with intellectual disabilities and 10% for people with mental health problems). The questions which registered the highest results are associated with the joint participation of friends and family in social activities and receiving support from others [Q14, Q18].

Quite naturally people under guardianship in institutions have the lowest results (43% of people with intellectual disabilities and 48% of people with mental health problems of those surveyed). In addition it should be noted that the questions in the survey did not take into account the fact that their personal contacts are restricted most often to their relations with other consumers, accommodated in a specialized institution and placed under guardianship. The survey team believes that if this fact is correctly recorded, the result of the people in institutions for this domain will be even lower.

4.2. Social inclusion

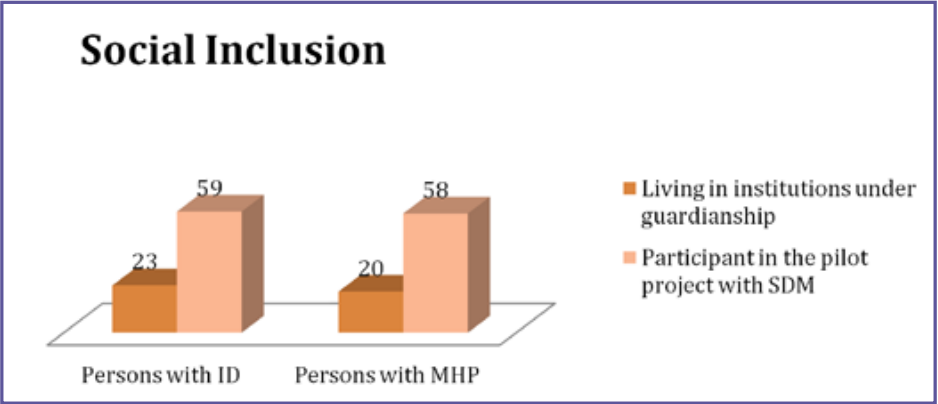
The inclusion of people with mental health problems and intellectual disabilities in all spheres of social life was significantly improved as a result of the SDM mechanisms. All participants in the pilot project stated that thanks to the SDM they participate in community activities more often and more freely.

The improvement in the degree of social inclusion of people with intellectual disabilities is by 11%, and for those with mental health problems by 8%, the average being 9.5% for both groups.

This is most clearly demonstrated by the following questions from this domain: Q21: How often is the person involved in activities/events in the neighbourhood and/or uses different public amenities that are available in the area where he/she lives? and Q24: How often does the person participate in recreational activities, go shopping for fun, eat in a restaurant, use public transport, take part in sporting events, etc.?

The results in the „social participation“ domain of respondents living in institutions under guardianship are the lowest in the entire study - an average of 22%, with an average 50% of people in the community. Even these results are expected to be lower because to some of the questions such as „do you know your neighbours by name and do you receive help from them sometimes?“ people from institutions answered thinking about other consumers in the institution, not people in the community.

- Limited opportunities for people in institutions reflect most on their social inclusion and form their full social exclusion.



Study results – financial costs and benefits of SDM

Conclusion on non-financial benefits of supported decision making

Based on the presented results of the analysis, we can conclude that despite the short period of piloting the SDM mechanisms in Bulgaria all aspects of the expected result, defined in the analytical framework, are a fact. As a result of the supported decision-making in comparison with the system of guardianship the society receives non-financial BENEFITS in terms of “Improved quality of life, equality before the law (Article 12), independent living and social inclusion (Article 19)”.

Cost of the intervention

The analysis provides data about the necessary costs of implementation of the SDM mechanisms compared to the cost of implementation of the existing practice of guardianship.

The study estimates the number of persons to whom the SDM mechanisms are applicable in Bulgaria as follows: 35 thousand people with varying degrees of intellectual disabilities ¹ and 87 thousand people with varying degrees of mental health problems² . The total estimated number of beneficiaries is 122 thousand people for whom the various SDM mechanisms are applicable in varying degrees and with varying frequency/intensity.

	Number of People in Bulgaria	% people who need mechanisms for SDM	Number of potential consumers of SDM
With Intellectual disabilities			
• mild	22 939	60%	13 763
• moderate	16 056	90%	14 450
• severe and profound	6 882	100%	6 882
Total of Intellectual disabilities:			35 095
With mental health problems			
• Severe Mental Disorders	103 987	80%	83 190
• General Mental Disorders	1 456 408	0,3%	4 369
Total of Mental Health Problems:			87 559

TOTAL: 122 654

Approximate number of potential consumers of the various mechanisms of SDM

Mechanisms of SDMP	% potential customer of SDM in groups	Number of consumers
Self-help groups	70% of the people with mental health problems	61 291
Access to specialized professional support	30% of the people with intellectual disabilities 40% of the people with mental health problems	45 552
Professional mentor	70% of the people with mental health problems 20% of the people with intellectual disabilities	68 310
Anti-crisis plan	80% of the people with mental health problems 10% of the people with intellectual disabilities	45 587
Support network	90% of the people with intellectual disabilities 20% of the people with mental health problems	85 822
Crisis facilitation	5% of all people with mental health problems and intellectual disabilities	6 132

The study poses the question whether SDM is associated with fewer costs to society compared with guardianship (per person/per year) and seeks the answers by comparing the costs of the two interventions. It is acknowledged that the cost of SDM decreases progressively over time and therefore a calculation for a 10-year period is made and, based on it the result, is presented on an annual basis as follows:

- the cost to society for a person placed under guardianship per year is 208 levs, while those for SDM - 699 levs making guardianship with 491 levs per person/per year more economically advantageous intervention. In the calculation for both interventions an attempt is made to be exhaustive in terms of the type of costs, taking into account various factors - legal costs, administrative, communication costs, costs associated with training, monitoring, etc. The costs of the state in respect to the loss of lawsuits before the European Court such as the case Stanev 2012 are included in the costs of guardianship.

Use of social services

The analysis explores the economic result of a needed change in the type and the scope of support provided by the social services as a result of the effects of SDM on the level of autonomy (supported autonomy) of people with mental health problems and intellectual disabilities.

The domains “Accommodation and support for independent living” and “Day Care and advisory services” were studied. Fundamental for the analysis is the right of every person to live in the community and therefore all predictions are made in view of the full replacement of the institutional care type with community services.

The main conclusions are drawn based on a comparison of the “current situation” and the “desired situation with SDM” in those domains. The survey made conclusions on the skills for autonomy, the needs for support and the prospects of the studied groups (before and after SDM) and the necessary diversification of support from social services so they meet the utmost needs of the individual – “the right amount of support - no more, no less”.

1 According to the statistical tool for number of people with Intellectual Disabilities - De Pasarel 2011 and a forecast based on international experience, the SDM mechanisms are designed for 60% of the people with mild intellectual disabilities, 90% of the people with moderate and 100% of people with severe and profound intellectual disabilities.

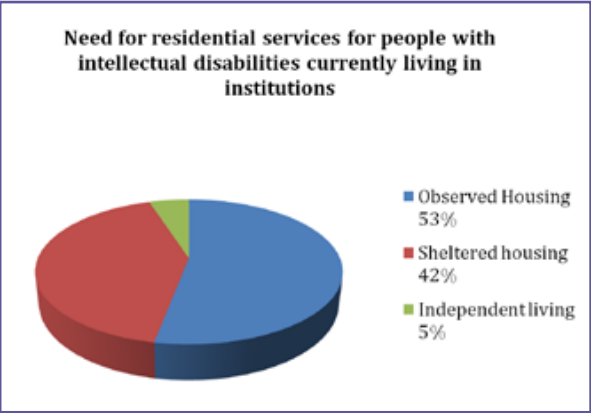
2 According to the official statistics of the World Health Organization and the forecasts based on international experience, the SDM mechanisms are designed for 80% of the people with severe mental disorders and 0.3% of the people who at some point in their lives suffer from a general mental disorder.

2.1. Accomodation and support for independent life

The need for accommodation and support for independent living¹

People from specialized institutions

- people with intellectual disabilities who are currently living in specialized institutions have the following need for accommodation services in the community: 42% need support in Sheltered housing with 24 - hour support, 53% need Observed Housing with lesser intensity of support, 5% can live independently with hourly support at home.
- people with mental health problems who are currently living in specialized institutions: 44% need to use Sheltered Housing in the community, 33% Observed Housing and 23% can cope alone with hourly ambulatory support.



The conclusion is that more than a half of both studied groups (57% of people with intellectual disabilities and 56% of people with mental health problems) who are currently living in institutions do not need intensive 24-hour support. The reason these people have been placed in institutions is the lack of adequate alternatives in the community (SH OH) leading to two main negative effects: reducing the level of skills of those people for autonomy and self-determination and a corresponding deterioration, instead of improvement of their condition; 2/ increase in the cost to the society for 24-hour intensive care, which is not only unnecessary but even extremely harmful to people.

For the majority of people in both groups (53% of people with intellectual disabilities and 33% of people with mental health problems) the most appropriate form of support is Observed Housing which is with lesser intensity of support compared to the Sheltered Housing.

The comparison between the two groups showed that people with mental health problems are more prepared for support for accommodation with a lower intensity. At the same time, because of their instability, caused by the mental illness, they need more intensive and more suitable for their particular needs mechanisms for SDM. This applies most to people with mental health problems who have lived long in an institutional environment.

People who use the service «Sheltered Housing» in the community

The study proved that even in the services in the community the support that is given to people with intellectual disabilities and mental health problems is not adjusted to their individual needs. Most often consumers who, with the appropriate mechanisms of SDM and professional social work, can cope with

a lighter type of care are accommodated in sheltered housing with 24-hour support. This excessive care has negative effects on both the quality of life of the people and, from a purely economic point of view, is much more expensive for society. The public pays the same high price both for light and «severe» cases. In the study of the level of autonomy and the prospects of users accommodated in SH and considering the introduction of SDM mechanisms for them the following conclusions were drawn:

- for people with intellectual disabilities: 36% of them actually need 24-hour support in Sheltered Housing. These are people with severe and profound degree of disability and those with multiple disabilities. Fifty five percent, however, are able to cope with a lower intensity of support in Observed Housing – these are 30% of people with moderate disability and those with mild disability. Nine percent could cope with adequate hourly support at home.
- for people with mental health problems: 33% of those currently accommodated in sheltered housing are genuinely in need of this service. These are consumers with severe mental disorders and serious behavioural problems. Forty six percent of them are able to cope in Observed Housing and 21% can cope with independent living in the community with hourly ambulatory support with appropriate mechanisms for SDM, accompanying services and professional case management.

Over 60% of both groups (64% of people with intellectual disabilities and 67% of people with mental health problems) who currently use the service Sheltered Housing with implementation of adequate mechanisms for supported decision-making can in the future cope with a light intensity of support. Again, for more than 50% of the entire group «the right amount of support» is available in the service Observed Housing which is currently the most underdeveloped in Bulgaria and the capacity of Observed Housing in the country is 105 places.

Necessary capacity for accommodation services in the community

As regards the “Accommodation and support for independent living” the main conclusion considering the above-mentioned findings and the official statistics for the number of people using accommodation services is that with the closure of specialized institutions the total capacity of accommodation services in the community should be, as follows:

- 1621 places in Sheltered Housing with 24-hour support (an increase from the current capacity of 560 places)
- 2187 places in Observed Housing (an increase from the current capacity of 2083 places)
- 530 hourly care services at home.

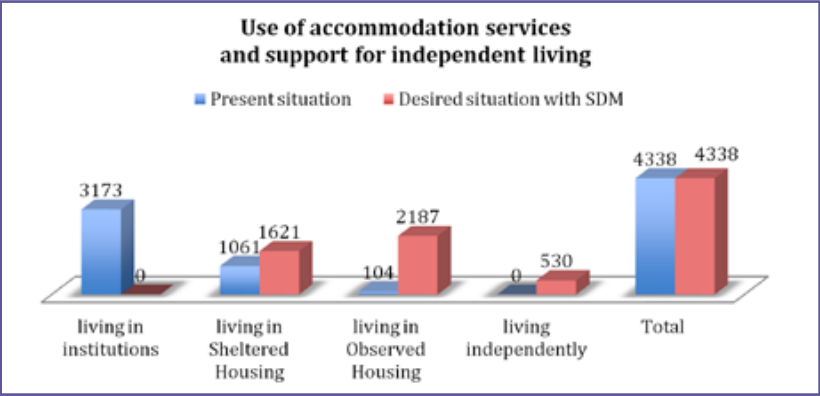
Economic effect of the change of the usability of accommodation services

The described «desired situation» regarding the necessary capacity would lead to a reduction in maintenance costs, proving once again that institutional care is not only inefficient, but also significantly more expensive.

On the basis of the current uniform financial standards for social services, the calculations show that the replacement of resident services in the community and the parallel diversification of support according to the individual needs would lead to a reduction in maintenance costs by 5 million and 600 thousand levs annually nationwide. Which means that by realizing the “desired situation - the de-

¹ Conclusions are drawn based on the Analysis of the management, effectiveness and efficiency of social services in Bulgaria, developed by De Pasarel 2012 Foundation and evaluation within this study (of the group of consumers at the Home for Adults with Mental Retardation, village of Podgumer, Sofia) on the level of autonomy and the prospects considering assistance in the future situation through SDM mechanisms.

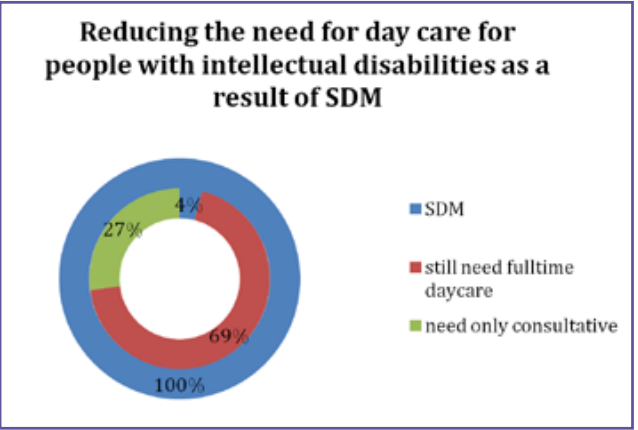
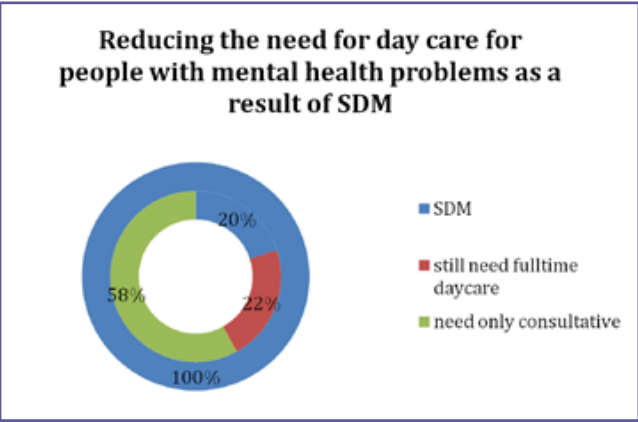
institutionalization of care and the introduction of mechanisms for SDM” a person with an intellectual disability or mental health problem using residential service will cost to society **1295 levs less**. Spanning the entire group of people who need accommodation services in the community (not just those currently accommodated but including those in the waiting lists) the society could realize savings of 49 million levs annually in the «desired situation.



2.2. Day care and advisory services

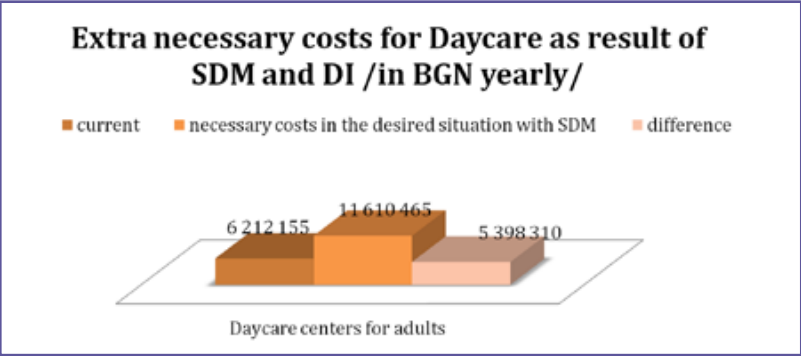
As regards the “**Day Care and advisory services**” the basic processes that occur to achieve the “desired situation with SDM” are:

- increasing the capacity of Day Care and advisory services for people who are de-institutionalized;
- reducing the usability/intensity of support in Day Care and advisory services for people who have acquired greater autonomy as a result of SDM.

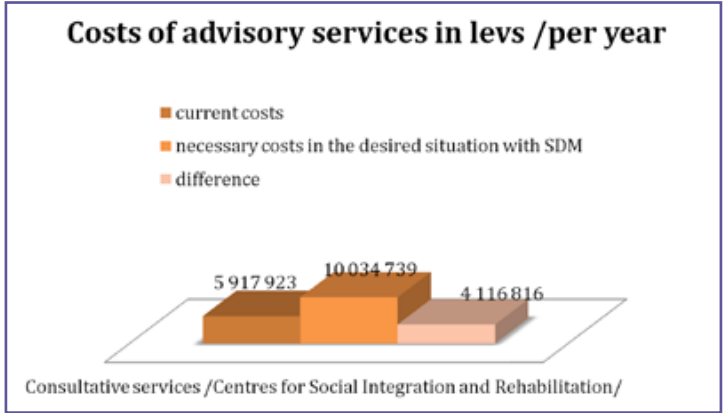


The results of the study envisage the following approximate values:

- Increasing the capacity of Day-care centres by 922 places which will lead to 5 million and 400 thousand levs annual increase in costs;



- Increasing the capacity of advisory services by 1 584 places, which will lead to 4 million and 117 thousand levs annual increase in costs;



- The total increase in the capacity for day care and advisory services is by 2506 places (Day Care from 1061 to 1983 places in “desired situation” and advisory services: from 2277 to 3861 places), leading to an overall increase in costs to society by 9 million 151 thousand levs annually.

The general conclusion of the calculations is that the increase in the target group from 3338 to 5844 people increases the cost to society per person/per year with only 70 levs. On average (based on the uniform financial standards for day care and advisory services and the number of consumers) the cost per person in the current situation is 3633, while in the “desired situation” it is 3703 levs.

Conclusion regarding the use of social services

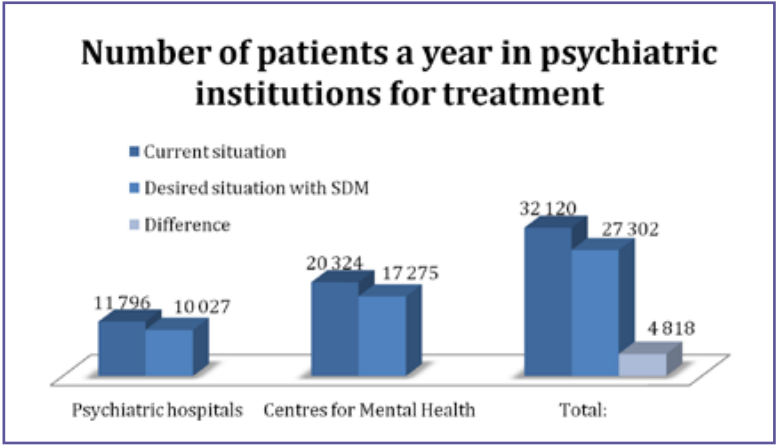
Summarized the results of the use of social services (accommodation services and support for independent living and Day Care and advisory services) suggest that the desired situation with deinstitutionalization and SDM (compared to the current situation) is more cost-effective for society by 1 225 levs per year for each person with intellectual disability or mental health problem served by the system of social services.

1. Use of health services

The analysis explores the economic result of reducing the usability of health services (in particular stays in psychiatric hospitals and consultations with psychiatrist) as a result of the effects of SDM on the level of autonomy and self-determination of people with mental health problems and intellectual disabilities.

Lack of supportive environment outside the psychiatric hospital is in most cases the reason people with mental health problems stay for long periods in a psychiatric institution for treatment. In many cases, the lack of housing is also a factor for psychiatric hospitals to be used as a shelter. On the other hand, the lack of support and lack of individualized approach in the social services in the community often leads to the psychiatrist to taking the role of a social worker, person leading the case or a mentor, as consumers turn to him/her in most of the cases with a social problem and not for a matter directly related to the psychiatric treatment. The analysis examines the role of SDM in reducing the use of these expensive medical services. The data from the pilot projects show a clear tendency to reduce the frequency and length of stay in psychiatric hospitals and consultations with psychiatrists as a result of the introduction of SDM mechanisms – self-help groups, support network and professional mentor.

With regard to treatment in psychiatric hospitals the calculation is made on the basis of 15% reduction in the number of patients and a 30% reduction in the average length of stay.



In the “desired situation with SDM” the annual cost per consumer would be 872 levs, while now it is 1275 levs ¹. The financial benefit (savings) is 382 levs annually. Nationally this would result in savings of 16 million levs annually. In terms of «consultations with psychiatrist» the calculation is made based on a 20% reduction (from 11 consultations to an annual average of 9) or 60 levs average reduction in the cost to society per consumer/per year.

The total financial benefit (savings for society) from reducing the usability of psychiatric care is estimated at 442 levs per consumer/per year.

Increase in employment

The analysis explores the economic result of the increase in employment as a result of SDM due to its effects on the level of autonomy, self-determination and social inclusion. By denying the legal capacity to

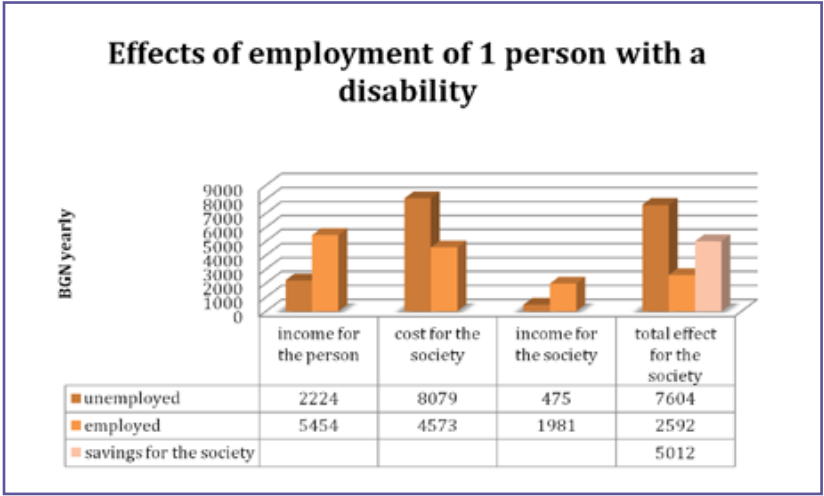
act to people with disabilities deprives them of their right to work and in fact excludes them from the labour market. The potential of people with disabilities to offer benefits to society is highly underestimated. This is not only unfair and contrary to the CRPD, but also leads to many negative economic consequences for both the disabled person and his/her family and for society as well.

Work is crucial for people with mental health problems and intellectual disabilities, as they are particularly susceptible to the negative effects of the lack of meaningful activities and the related loss of structure, purpose and identity. Once socially excluded due to disability, the lack of opportunities to work and to be useful limits further their social functioning intensifies the feeling of uncertainty resulting in a loss of motivation and apathy.

SDM works toward overcoming social exclusion by expanding their social network, enhancing the credibility, confidence and motivation and by providing ongoing support to build skills for autonomy and self-determination. These effects of SDM improve employment opportunities for people with disabilities and could lead to significant economic benefits.

Without being exhaustive and comprehensiveness, the analysis provides an overview of the potential benefits for the disabled person and society of taking up work.

An example is examined of a person with an intellectual disability (90% disability), who when unemployed has an average annual income of 2,224 levs, and the cost to society for this person is 7604 levs annually (including disability pension, integration allowances, heating allowance and use of Day Care). When that person is employed at the minimum wage (370 levs) his/her average annual income is 5454 levs, and the cost to society – 2592 levs annually (revenues for state social security, reduction of social benefits tied to income, replacement for Day Care with advisory services in the community).



The results of the study in terms of the prospects of the participants in the pilot projects and their abilities show that over 85% of the people are able to work with adequate mechanisms for SDM (in various forms – full-time, part-time, combination of work and day care, supported employment, etc.).

The main conclusion is that among the non-financial benefits related to health and well-being, the employment of a person with a disability is associated with an annual increase of his/her income of 3230 levs (over 59%) and an annual cost reduction to the society of 5012 levs (savings of more than 65%).

¹ National Centre for Health Information and Analysis.

Regardless of the indisputable evidence that SDM is economically viable intervention both for people with disabilities and for the society, this fact should serve only as a secondary, additional argument in the political decision-making regarding the need to introduce mechanisms for SDM. The non-financial benefits, those that cannot be expressed in money, have in the case of SDM much more weight. Quality of life, respect for human rights, independent living and social inclusion of people with mental health problems and intellectual disabilities are social benefits which should be leading with regard to the decision to change the system of guardianship. They have no monetary value because they are priceless.

Conclusion on the financial costs and benefits of supported decision making

The calculations made in the analysis outlined in approximate values of economic efficiency of mechanisms for SDM per user/ per year as follows:

1. Cost of the intervention	financial cost	- 491 BGN
2. Use of social services		
2.1. Residential	financial benefit	1 225 BGN
2.2. Day care and advisory	financial cost	-70 BGN
3. Use of health services	financial benefit	442 BGN
4. Increase in employment	financial benefit	5 012 BGN
TOTAL	Financial BENEFIT to society from SDM:	6 118 BGN

Providing opportunities and environment for people with intellectual disabilities and mental health problems to exercise their rights

What, where and how¹

GUIDELINES FOR POLICY CHANGES

SUMMARY

This research was conducted by a team of the Bulgarian Centre for Not-for-Profit Law (BCNL)² within the **Next Step Program**, implemented in partnership with BAPID, Global Initiative in Psychiatry GIP and the National Organization of Mental Health Services Consumers (NOMHSC) in Bulgaria. The research presents the position of the authors on the reform in sectoral policies which is needed to ensure the measures approved in the program and the results achieved by it for specific people as opportunities for all persons with mental health problems or intellectual disabilities living in Bulgaria. The proposals following from the analysis are based on the experience of the authors as part of the team of BCNL dealing with advocacy in the last 13 years as well as part of the team of the Next Step programme. The guidelines for policy changes are part of the research potential of the programme including a position on the change in the legal environment: "The New formula for the legal capacity to act - opportunities for everyone to exercise their rights". Opinion on the revised Article 12 of the CRPD paradigm, analysis of the effect and the economic benefits, analysis of the changing attitudes through action, a Guide to the exercise of rights права .

The Next step program is a partnership initiative of the Bulgarian Centre for Not-for-Profit Law, the Bulgarian Association of People with Intellectual Disabilities, Global Initiative on Psychiatry – Sofia and the National Organization of Mental Health Services Consumers. The aim of the program is to test new support measures through which people with intellectual disabilities or mental health problems will be able to exercise their basic human rights, according to their wishes and preferences without being placed under guardianship. The program is the mechanism through which the response is sought to the challenges which Article 12 of the UN Convention on the Rights of Persons with Disabilities, poses to Bulgaria.

Supporting points of the Research The specific reason for the preparation of this research is the challenge which Bulgarian institutions and society face in adopting the standards of the UN Convention on the Rights of Persons with Disabilities (CRPD). The Convention presents the latest developments in the field of human rights. Its innovation is expressed in the text of Art. 12. According to the text of the legal provision the legal possibility for people with disabilities to exercise their human rights (legal capacity to act) cannot be restricted. It cannot be the subject of a substitute decision-making (guardianship provides such systems) and should be provided in a way that ensures the personal exercise of rights according to the wishes and preferences of the particular person at that moment. For this purpose, the Convention requires the introduction of supported decision making - a system of support measures whose purpose and effect is to guarantee equality before the law for all in the exercise of human rights.

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² The authors of the analysis are: Nadya Shabani, (Program Director of the Bulgarian Centre for Non Profit Law), Pavleta Alexieva, (Program Director of the Bulgarian Centre for Non Profit Law) and Marieta Dimitrova, (Legal Advisor to the Bulgarian Centre for Non Profit Law)

The standards of the Convention are the result of values and philosophical change. At different periods of its development the law also knew the limitation of the capacity to act based on gender, given social status or the presence of physical disability. This legal regulation reflected the maturity and the moral values of the society at those moments. The possible paradigm shift now (according to Article 12 of CRPD) faces us with a purely humane and value challenge to acknowledge that people with intellectual disabilities and mental disorders are equal before the law like everyone else – they should exercise their rights through personal actions and make decisions about their lives. In essence, this is another step towards the acknowledgment and respect for diversity, different life experiences and choices, the recognition that the right of this difference should be respected and accepted as equal part of our society. If this is seen as a public good, the law will find and give an adequate answer to end the paradox of securing rights by limiting them.

This analysis draws on the most important conclusions of the approbation of the support measures within the Next Step program, namely:

- The reversal of guardianship as a legal status of people with intellectual disabilities and mental health problems will not be enough to achieve the standards of the Convention. It is necessary to introduce a new type of measures in the form of social interventions in the social policy, legislation and practice of social care provision. Measures aimed at building skills in social service consumers to make decisions with legal consequences and ultimately to enhance their social experience in the exercise of their human rights. It would not be appropriate to rely on the current profile and capacity of the existing services without accounting for the specificities of these interventions.

Social interventions in the process of SDM which have proved their effectiveness in implementing the Next Step program and are related to the facilitation of the supporting network and the identification of significant for the person's supporters should be defined as a new type of social service. Funding should be provided for this social service, but not within the single financial standard, by adding it to the existing types of social services for people with disabilities. It is necessary to quantify this type of service independently as an activity and function of support. As far as the social activities related to SDM are new to the Bulgarian reality and should reflect and meet the standards stipulated in Article 12 of the CRPD it is very important for this kind of services to develop standards of quality and to train the providers of these service.

- The introduction of new support measures for the exercise of rights according to the wishes and preferences of the people requires the provision of the so-called "reasonable accommodations" in a number of sectoral policies and regulations. They are the mechanism to ensure the effect of the new support measures.
- The introduction of the standards of the Convention will require the provision of safeguards. These safeguards should not be allowed to slip along the plane of restrictions to people with disabilities in order to protect their "best interest" in a specific area but to develop in the direction of best communication and interpretation of their will and preferences.

Prerequisites

To achieve the aim of the reforms several important preliminary conditions should be accounted for in implementing the changes in sectoral policies with a view of introducing the standards of Article 12 of the Convention in the Bulgarian law.

Above all, it should be borne in mind that the UN Convention, and especially the standards it sets, determines the **"making" of laws** before a particular group of public relations that need regulation have occurred. The Convention is a vision that, it can be said, has not existed fully and completely before its adoption. The excuse that we are not ready or that others have to do it first are not suitable and justifiable. The challenge remains to figure it out in a way that is adequate for the Bulgarian context. This was the motivation for creating the "Next Step" programme - to "experiment" in the local context, showing here and now, in Bulgaria in 2014 that results are possible.

Next, as the Convention itself begins - values should change before changing the law. For this to happen in a meaningful way all who are important have to be included (the people with disabilities, their friends and relatives, the social services providers, civic advocacy organizations, organizations for protection of human rights, the media, etc.) and thus to distinguish the **agents of change**.

The experience of the program shows that these two groups are the most active in achieving social change: 1) the relatives and friends of people with intellectual disabilities (the parents often perceive the SDM as a real opportunity for social inclusion and empowerment of their children as full citizens and entities in the community and 2) the lawyers, especially these two subgroups - defence lawyers of human rights and judges – in their capacity of "deciding" on human lives and the ability to judge people in the fairest manner . Unfortunately, the barriers of society are too big to "understand" the people with intellectual disabilities when they speak in the first person, and the stigma is the strongest for people with mental health problems, (that is why for the latter SDM is often the best defence against the "over-protection" and tackling with people in mental crisis)

Another no less important prerequisite for achieving a successful reform is **overcoming the deficits in the systems of education, health and social care**. The purpose of these sectoral policies is to provide minimum conditions and build skills for independent living for each person. With regard to people with intellectual disabilities and mental health problems these sectoral policies do not achieve this goal.

In order to achieve the end result of SDM (personal exercise of rights according to the will and preferences of the people) it is necessary: 1) these three systems to work holistically and complementary i.e. to provide opportunities for integrated delivery of health, social and educational services by the individual categories of providers and 2) - to create conditions, including reasonable accommodations in the form not only of physical access but also of trained professionals in their respective fields to support access to the general education system, the public health and social care system while respecting the wishes and preferences of people with intellectual disabilities and mental health problems.

Providing the necessary support for the exercise of the rights by everyone, including people with disabilities, means above all that the desires, preferences and emotions of the person are valued, irrespective of the medical diagnosis and/or the communication difficulties. In this sense, it is impossible to believe that the measures for SDM can be combined with institutional care therefore another prerequisite is the **de-institutionalization**.

The first and most important intervention that should be taken is to involve the people placed in social institutions in the community life including, if necessary, accommodation in residential services in the community which focus on social inclusion and human development. The opposite is also impossible - to have de-institutionalisation without provision of SDM. In fact, then it would only be a transfer, without a true “rejection of the institution” as a model.

The reform, which the standards of the Convention require, needs a **new understanding of the functions of the state**. Together with the *protective function* (originating from the constitutional requirement to protect all persons who are at risk) and the *function of ensuring the rights and independent resolution of disputes* a new understanding of the *function of the state of ensuring the exercise of legal capacity to act* should be implied. This function stems from the obligation of the state to ensure the identity and uniqueness of each person, and the obligation of the state to cooperate in the exercise of rights. This, in turn, includes the obligation to ensure to everyone (regardless of the situation and the condition he/she is) a process in which his/her will would be leading in making decisions that affect the exercise of his/her rights.

This function should be reflected in the new legislation in:

- the regulation of legal proceedings which set out the measures for support in view of the standards and the safeguards laid down in the Convention and the legislation;
- the institutional and financial provision of the measures for SDM;
- the development of the authority of SDM;

Undoubtedly a prerequisite for achieving the desired social change is also the change in the values, attitudes and even beliefs of the public. SDM and the change that CRPD requires is extremely challenging.

The provision of Article 12 destroys the myth that only a reasonable subject can exercise rights – it is a real test of whether we perceive ourselves as actually equal before the law along with all other people (including people with intellectual disabilities or mental health problems), whether we accept that all people have equal rights not only “on paper” but have the right to exercise them, enjoy them and draw benefits as well as make mistakes

Finally, an essential prerequisite for the reform is the **understanding of disability through the prism of human rights**. Divestment of the legal capacity to act actually puts artificial barriers to a certain group of people to try to enjoy certain benefits at all, an attempt to seize the opportunity to address important questions about themselves because another person is authorized to determine on their behalf if, what, when and how¹. Ultimately, however, the restriction of the legal capacity to act is not only a protection but in practice a divestment of rights (because if we think - what are our rights for if we cannot exercise them according to our will and preferences and in this line of thinking - it is well worth noting, that for the personal exercise of rights the contemporary doctrine admits in actual fact that the defining quality is “a person” and not “legally valid will”).

¹ At present, the institute of restriction of the legal capacity to act is governed by the Persons and Family Act and the Civil Procedural Code and full and partial guardianship – in the Family Code and the Civil Procedural Code. The last two codes though changed relatively recently - in 2007 and 2009 respectively, do not offer new solutions to the problems associated with the exercise of rights of people with disabilities. In practice the rules concerning restriction of legal capacity to act are replicated in their previous, ineffective form.

In the context of the changes in the rights of people with disabilities and the establishment of a social approach to different kinds of disabilities, it has become clear that this doctrine no longer meets the value paradigm, which is based on all the international laws on human rights, but also on the objective social needs. The question is if the modern policies in this area have long been based on inclusion, the removal of barriers to this social group what is the legal response to this trend.

Highlights of Policies Analysis

● Intervention, imposed from outside vs. support based on trust

The basis of the personal exercise of rights of people with intellectual disabilities and people with mental health problems should be primarily the support desired and recognized by the person himself/herself, while the intervention imposed from outside must be the exception only when there is an imminent risk of serious harm to the life, health or property of the person.

It is crucial to emphasize that the concept of action for vulnerable groups is not based on decision making in view of their “best interest” but in view of that their will and personal choice are always respected. This requires even to take into account the possibility of people with disabilities to take wrong decisions - like everyone else.

● Scope of the new legal regulations

New legislative texts should regulate public relations which relate to the exercise of rights by persons who are at least 18 years old. It is necessary to describe the prerequisites for the acquisition of the legal capacity to act (a certain age only) and the system of support measures (supported decision-making) which are aimed at individuals in order to be able to exercise their rights. Also the social system and policy need to ensure well working, individually oriented and effective mechanisms to assess, implement, and maintain social interventions and to look for their result.

In other words the SDM should be both a set of measures which determine the legal status of the person, but at the same time (reciprocally) – they should be organized as measures for social interventions in order to provide sustainable change in the environment in which the person lives and for overcoming the difficulties he/she encountered as a result of his/her contact with it.

● The Convention redefines disability by focusing on its social dimension

The preamble to the Convention defines explicitly “disability” as “an evolving concept” which is not the result of human disease but of the interaction with the environmental barriers that hinders their full and “effective participation in society on an equal basis with others”. Bulgarian legislation currently does not reflect the values on which human rights are built, but rather treats disability as unchangeable phenomenon and aims to “*protect the environment*” from its potential/possible distortion, and not vice versa - to “*distort*” the environment to empower the individual and thus - to protect him/her from civil legislative and social destruction (in the sense of - discrimination/exclusion/poverty/deprivation of liberty/violation of privacy, etc.).

In this context, the changes in the different sectoral policies must reflect this new understanding of disability and thus the problems encountered by people with disabilities in the exercise of these rights can be resolved in an efficient manner. This means to make changes not only in the terminology but also in the measures and mechanisms that will be implemented which have to be directed not so much to “protecting the public relations” from the individual but to the modification of the environment to the individual’s needs.

- **Need to change the terminology in laws and policies**

All statutory acts must harmonize the terms so that they are in line with the latest trends and terms in the humanities (especially in medicine and social sciences). For instance the approach of the legislator is inconsistent since the terms used in the Integration of People with Disabilities Act (considered vital in terms of regulation of the guidelines for change in the sectoral policies for people with disabilities) are “people with intellectual disabilities” and “persons with mental disorders”(Article 44) and in other regulations these terms are not appropriately implemented.

- **Exclusion of the direct link between the disability and the exercise of the so-called personal rights.**

Of particular importance in understanding the new paradigm of rights of people with disabilities is to conceptualize a new way of exercising personal rights. They are related to the personality and its identity and unique experiences – the private life, the freedom of conscience, religion and association and therefore depend on the discretion of their holder. These include *the right to marriage and family, reproductive rights, freedom of testation, freedom of association, the right to vote.*

To ensure equality in the exercise of these rights the social services which help people, who have expressed a need for support, to exercise these rights should be developed, but this will be social support and not support for decision making. There should be different safeguards for each one of them - especially the right to marriage and freedom of testation, as the risk of their abuse is high.

- **Guidelines for policy change**

Applying the standards of Article 12 of the Convention, aimed at creating personal guarantees for personal, full and effective exercise of rights should trigger changes in many different sectoral policies. The purpose of these changes should be:

- to provide the person access to the very exercise of rights; *and*
- to give guarantees that the concrete measures and procedures adhere to the principle that a person makes decisions according to his/her personal wishes and preferences, that there are safeguards not only against abuse, manipulation and violence, but also against “substitution” in decision-making.

The sectoral policies in which changes should be made can be summarized through the specific rights:

- the right to choose with whom and where to live or to determine one’s place of residence;
- the right to dispose of one’s property and funds;
- the right to select and organize one’s treatment;
- the right to work;
- personal relationships.

- **Determining the place of residence**

Accommodation in residential services

The use of social services in specialized institutions and residential services in the community and accommodation there respectively should be made solely and only on account of the will and preferences of the people with intellectual disabilities and mental health problems. This should be guaranteed both in the court proceedings and in the administrative proceedings on the institutionalization. Placement in a residential service should be regulated as a last resort and must be implemented based on the decision of the court and the person may appeal the placement.

The placement should always be temporary in accordance with the law, and it should be stipulated expressly that the period of placement should not exceed 2 years and that there should be a mandatory review of the case and periodic evaluation/expert appraisal of the person.

Legal aid

The lawyers appointed as public defenders of people with intellectual disabilities or mental health problems should be trained in the standards of the CRPD and the new paradigm so that they are able to provide adequate legal protection of their principals.

Housing

It is necessary to develop strategies and policies for social housing at municipal level, including for development of supported living and creation of social services such as temporary or monitored housing for persons with disabilities. It is also necessary to provide quick and effective working measures to prevent acts arbitrarily restricting access of individuals to their own real estate, combined with support measures ensuring their autonomy and ability to manage their lives.

Process of evaluation of the needs and efficient provision of service

The currently existing system of evaluation of the needs of persons applying for the use of social services (including institutionalization) under Article 40 of the Rules for Implementation of the Social Assistance Act (RISAA) is formal and does not reflect the objective need for support. A mechanism for evaluation of the individual abilities of each person should be provided.

Access to services

Any person with a disability should be given access to social services to improve his/her functioning and to support him/her in the development of his/her skills. The social services should be varied giving different opportunities so that an individual approach can actually be implemented according to the specific level of functioning and capabilities of the person identified through a comprehensive and independent evaluation and self-evaluation.

Informed choice

The Social Assistance Act (SAA) should ensure that the person with a disability has a free and informed choice of social services, including the right of refusal without this automatically leading to the risk of institutionalization.

Choice and organization of treatment

Persons with intellectual disability/or mental health problems should have guaranteed access to hospital and out-patient care. For this purpose a system of services, working on prevention and mental health issues, should be seriously develop and this can be the topic of a separate analysis. With regard to the issues related to informed consent to treatment it is necessary to provide support measures that take into account the wishes and preferences of individuals.

Employment

Currently, persons with intellectual disabilities or mental health problems are excluded entirely from the labour market. It is necessary to change completely the employment policies by focusing on the measures for creating reasonable accommodations for people with disabilities when signing a contract of employment (presentation of the text in an easy to read form and other relevant information), providing reasonable accommodations in the workplace for people with disabilities, including people with intellectual disabilities and mental health problems.

It is also necessary to take steps for the development of secure and supported employment for people with disabilities and social entrepreneurship.

Management of property, finance, private funds

The protection of people with disabilities from arbitrary deprivation of their property should be ensured, a significant change of the policies and legal framework on the activities and the provision of reasonable accommodations for people with disabilities by the notaries, banks and credit institutions, land registry and other entities operating in this area should be provided. It is necessary to improve and develop the professionalism of the legal profession (notaries, lawyers, judges), experts from the banking sector and other professionals working with people with disabilities through programs and training, and to familiarize them with the standards of Article 12 of the CRPD. Mechanisms should be developed through social services as part of social work to promote the resources and skills of people with disabilities to manage their property and finances according to their preferences.

● **Personal relationships**

Given that the traditional family ties of individuals with mental health problems often break down because of the specifics of the diseases, people remain in complete isolation and for people with intellectual disabilities these ties are confined to the circle of the biological family because of the stigma, the policies and legislation associated with the provision of social services should be oriented to support the socialization of individuals and to establishing personal connections and relationships with others outside the service personnel which they use or the circle of family and friends.

● **Structural Reform**

In order to achieve the desired change, it is necessary to place a new focus on the responsibilities and powers of social institutions, local authorities (the mayor), the court and to anticipate the interconnection between the efforts of each institution on every particular case.

Hello! My name is Faith – the girl with the scars

Hello! My name is Faith. I do not remember my family name. But if I could choose a new one, it would have been Faith Filipova (in translation from Greek – “the faith that loves horses”).

My first scar came with my birth – it was made by the doctor who helped me to be born. Later on I was marked by the pediatrician to whom I was taken by my mom any time I started to choke and cough. During the very first visit to the pediatrician's cabinet, d-r Mulekov noticed that there is something wrong with me – I was intellectually retarded. He was obliged to tell the unhappy news to my mom. I was diagnosed – instead of a person with name I became “a person with intellectual deficiency”. And since then the real trouble began.

My father had a hard time overcoming the shame to have a child that was an “idiot”. This was how everybody called me since I was seven years old. I used more interjections than it is normal for a child at my age. Rarely my mom took me for a walk because she was afraid that somebody will start talking to her; will ask about me and she will meet only eyes full of pity, shot as fireworks at her or at me. Only my grandma Nusha had the courage to embrace me with her unconditional love. She always knew when and what I craved for – she could see in my eyes the desires I had. She was also proud to tell the neighbors what a good girl I was in fact.

One day I had the crazy idea to get out of home alone. I was 9. My everyday regime and the gloomy atmosphere in our small apartment, had suffocated me. I was craving to breathe the fresh air on the street, to play with the kids from the neighborhood, to jump and play with a ball like them. My father, who was just coming back from work, saw me to stay bending in front of the entrance of the block, surrounded by other kids who mocked at me throwing pebbles at me, got mad and cursing at me, pulled me out of the swamp of the children's ridicules. Later, he beat me because he was angry and I did not dare to get out of bed for a pretty long time. I did not want the scars on my body to be seen.

When I heard the school bell for the first time, I was already 19 years old. If I was born “normal”, now I would have been graduating from the high school. But when the crash had happened I had not started even second grade.

Daddy, mommy, grandma, my little brother and I were travelling to the only high school in my hometown to celebrate Goshko's first day at school. A truck came upon us and caused a chain crash. Only my daddy who was driving the car had survived and for his utmost disappointment – I was also alive. It took him very long time to forgive me.

At the age of 21 I fell in love. It happened one afternoon when my father was sleeping after his night shift and I decided to use this opportunity. I quietly got out of home. I was walking around and I did not understand why I was attracting all the looks of people on the street. I did not hurt anybody, but yet it was only the faces of disgust that were turning after me. I decided to have a break and sit on a bench in the park. Soon after that, a young man sat next to me and asked me how old was I. I knew that I was 21 but at that moment I remembered the cake that daddy had bought for my birthday some days ago. I counted 26 candles. Somebody had wrongly calculated my age.

We secretly continued meeting with my beloved in the park. Once he asked me to draw something for him on a white paper. After that he wanted to see my picture on my ID card. My grandma had told me to carry it always, on a sting around my neck. I gave it to him. After that day I have never seen him again. When my daddy found out that I had mortgaged my inherited property, he had almost beaten me to death. When I put myself together again, for the first time in my life I heard the word “guardianship”. It turned out that I was “married” to it and nobody wished to get know what was my real will. They made me stand in front of a judge, instead of in front of the mayor who performs the marriage ceremony. The first question that I was asked was if I knew how to count. Of course I could – grandma Nusha had taught me of that. I could also calculate numbers, I knew poems by heart. I read books, but slower. The



judge asked me many times about simple things from my life but I did not dare to say a word. I was quiet. I knew the consequences – daddy would be angry and would get drunk again. After that I would have get new bruises, new scars.

The next scar (I had stopped counting them) appeared from the phrase of two words “full guardianship”. And here I am - being for whole 15 years in the Home for adults with intellectual disabilities, in the village of Rusokastro. Surrounded by people who are 40 years older than I am; lost in the monotony of the strictly planned days, I have the feeling that I am losing my senses. My life also started to lose its meaning. The only friends that I had at the Home were the flowers in my room. Only with them I was able to share that I was shivering at night, how humiliating for me was to wear the old clothes of the old women who used to live there, to bathe once in three weeks and to feel the smell of my dirty hair. I could not understand why the care-givers from the personnel were constantly yelling at us. The fact that they could not understand what we were saying was not our fault. I did not trust anybody except Aunt Dora. She had a big heart and reminded me of my grandma – they both treated me as a human being with dignity who has not only physical, but also spiritual needs.

Today, at age of 45, I already feel old. I was abandoned not by my mind, but by my father. My life at the institution was marked by several unsuccessful attempts to escape. Nobody believed me that I could cope with my life on my own – that I can buy a pie and in the same way I can deal with family issues. I became a hostage of a piece of paper holding the title “Medical Expertise”. And that word from the past had always held me back. My freedom was put under guardianship ...

Goodbye! My name was Faith – the girl with the scars. And this was another day when the horses of salvation did not come ...

**Goodbye! My name was Faith – the girl with the
scars. And this was another day when the horses
of salvation did not come...**

The present text is a compilation of true facts and events that are part of the lives of people and from their personal stories. All of them were part of the pilot projects from the Next Step Program