

EQUAL RECOGNITION BY THE LAW OF PERSONS WITH INTELLECTUAL DISABILITIES / MENTAL HEALTH PROBLEMS - GENERAL FRAMEWORK AND CHANGE NEEDS IN ROMANIA

In 2010, Romania ratified the UN Convention on the Rights of Persons with Disabilities. This Convention completely changes the paradigm describing a human rights approach to disability. Once ratified, Romania has undertaken implementation of this Convention.

In this paper we will briefly discuss how national regulations ensure equal recognition before the law of persons with disabilities under Article 12 of the Convention. We will also refer to the necessary changes to support services in decision making, an indispensable mechanism for exercising the right to equal recognition before the law and the right to independent and community living of persons with disabilities.

According to the Convention:

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.¹

¹ Law 221/2010 on the ratification of the Convention on the Rights of Persons with Disabilities adopted at New York by the United Nations General Assembly on 13 December 2006, opened for signature on 30 March 2007 and signed by Romania on 26 September 2007.

In 2014, the UN Committee on the Rights of Persons with Disabilities, which monitors the implementation of the Convention, adopted General Comment no. 1 explaining in detail what this article means in the specific case of people with disabilities and what are the obligations of states to ensure this right that is essential to the exercise of all other rights.

We summarize some of the critical commentary² ideas for this analysis:

- Addressing disability based on the human rights model involves changing from the paradigm of the superseded decision to that of the supported decision; substituted decisions include arrangements such as: total guardianship; court bans, partial guardianship;
- The status of a person as a person with a disability or the existence of an impairment (including a physical or sensory impairment) should never be grounds for denying his or her legal capacity or any of the other rights provided for in Article 12, and states must abolish all practices that have this purpose or effect to ensure that people with disabilities, on an equal basis with others, are restored to their full legal capacity; actual or perceived mental capacity deficiencies should not be used as a justification for denying legal capacity;
- Legal capacity includes the ability to have rights and duties (usability) and to exercise these rights and duties (exercise capacity) - all people, including people with disabilities, have the ability to use and exercise simply because they are human beings. The two aspects of legal capacity cannot be separated;
- Mental capacity is a very overlapping concept of legal capacity, although mental capacity is not, as often presented, an objective scientific phenomenon that occurs naturally but it is dependent on social and political contexts as are the disciplines, professions and practices that often play a dominant role in determining mental capacity; support for the exercise of legal capacity should not be dependent on mental capacity assessments - new, non-discriminatory indicators are needed to determine the need for support;
- Discriminatory approach for people with disabilities through which they are deprived by legal capacity: status approach - there is a disability diagnosis, result-based approach - the person concerned takes a decision considered to have negative consequences, the functional approach - the decisional abilities of a person are considered to be deficient. All these approaches apply disproportionately to people with disabilities, and assume that they can accurately determine how the human mind works, and when the person does not pass the test, he is denied a fundamental right, that of equal recognition before the law;
- States have the obligation to provide persons with disabilities with access to support in the exercise of their legal capacity in accessing the necessary support to make decisions with legal effects;
- Support in the exercise of legal capacity must respect the rights, wishes and preferences (s.n.) of persons with disabilities and in no case, be a substitute decision;

² Committee on the Rights of Persons with Disability, *General comment No. 1 (2014), Article 12: Equal recognition before the law*, CRPD/C/GC/1, 19 May 2014, disponibil la: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en

The Romanian legislation does not comply with the Convention from the point of view of observance of Article 12. The Romanian Civil Code establishes the deprivation of the exercise capacity of the one who the Code calls "the judicial banned", the decision being substituted for them. Moreover, the Civil Code, although recently adopted (2009), after Romania's signing of the Convention (2007) and entered into force (2011) after the ratification by Romania of the Convention (2010), unveils a philosophy not only discriminatory, by the terminology used - offensive terms, specific to another age, such as "alienation" or "mental debility", being used. Although an approach of major importance for the Romanian society - the amendment of the Civil Code after about a century and a half - the prospect of fundamental rights promoted by the United Nations, of which Romania otherwise belongs, does not appear to have penetrated the legal culture of the Romanian legislator.

Thus, according to the New Civil Code:

Article 43: Lack of exercise capacity³

(1) Except as provided by law, they shall not have the capacity to exercise:

b) the judicial ban.

(2) For those who do not have the capacity to exercise the legal acts are concluded, on their behalf, by their legal representatives, under the conditions stipulated by the law. (...)

(3) However, the person lacking the capacity to exercise may himself conclude the specific acts prescribed by the law, the preservation acts, as well as the low-value provisions, of a current nature, which are executed at the moment of their conclusion. (...)

Article 164 Conditions⁴

A person who does not have the necessary knowledge to take care of his interests because of alienation or mental debility will be placed under a court order.

The law implementing the Civil Code explains what is meant by "alienation" or "mental debility":

Article 211⁵

For the purposes of the Civil Code, as well as the civil law in force, the term mental alienation or mental debilitation refers to a mental illness or a mental disability that determines the person's psychic incompetence to act critically and predictively on the social and legal consequences that can arise from the exercise of civil rights and obligations.

The deprivation of legal capacity is therefore based on a mental capacity approach that violates Article 12 of the Convention. Moreover, in an eloquent manner for lack of minimum information on mental health / intellectual disability issues on the one hand and on the

³ Civil Code, Art. 43, alin. (1), lit. b).

⁴ Civil Code, Art. 43, alin. (2) și (3).

⁵ Legea 71/2011

discriminatory view of disability, which is seen as a disease, on the other hand, we learn from the Romanian civil legislator that the guardian of the person under the ban is invariably obliged to act "to speed up his healing". This premise of the law describes a vision of Romanian society, a vision otherwise formalized by law, typical of those societies that see disability as an unfortunate accident. Such societies denied the fact that disability is an intrinsic part of the diversity of human nature and that people with disabilities must be respected just like others. The vision of such companies invariably leads to discrimination and abuse of people with disabilities.

Article 174 - Tutor's Obligations

(1) The tutor is obliged to care for the person who has been subjected to a judicial interdiction, to hurry his healing and to improve his living conditions. For this purpose, the income and, if need be, all the goods of the person under the judicial ban will be used.

(2) The guardianship court, taking the advice of the family council and consulting a specialist physician, shall decide, taking into account the circumstances, if the person placed under court interdiction is taken care of at his home or in a sanitary institution.

(3) When the person placed under a court order is married, his husband will be heard.

So, once put under interdiction, crucial decisions about the person are automatically taken by others, including the freedom of movement of the person. Furthermore, the prohibition procedure, regulated by the Code of Civil Procedure in a strictly medical key for determining mental capacity, raises serious problems from the perspective of protecting the person against potential abuse, beyond the fact that the prohibition in itself violates the Convention. Thus, the person against whom a ban is required has very few opportunities to challenge the procedures and measures taken. Furthermore, she can be admitted for 6 weeks in order to determine the need for banning.

Article 938: Prior measures

(1) Upon the receipt of the application, the president of the court shall order to communicate to the person under interdiction copies of the request and of the attached documents. The same communication will be delivered to the prosecutor when the request has not been made by the prosecutor.

(2) The prosecutor, directly or through the police bodies, shall carry out the necessary investigations, take the opinion of a commission of specialized doctors, and if the person whose legal interdiction is requested finds himself hospitalized in a sanitary unit, he will also take his opinion.

(3) If necessary, the president shall also appoint a curator under the conditions provided by the Civil Code. The appointment of the curator is mandatory in order to be represented in court by a person whose enforcement is required if his state of health hinders his personal presentation.

Article 939: Provisional admission

If, according to the opinion of the commission of specialists and, where appropriate, of the sanitary unit as provided in art. 938 para. (2), it is necessary to observe for a longer time the mental state of the one whose judicial interdiction is requested, and the observation cannot be done otherwise, the court, also requesting the prosecutor's conclusions, will be able to order the temporary hospitalization, for a maximum of 6 weeks, in a specialized health facility.

Art. 940: The Judgment

(1) Upon the receipt of the documents as provided in art. 938, the time limit for adjudicating the application will be fixed, with the parties' citation.

(2) At the trial, the court is obliged to hear the person whose interdiction is required, and also ask questions to determine his / her mental state. If a person whose court order is requested is unable to appear in court, he will be heard where he is.

(3) Judgment shall be made with the participation of the prosecutor.

The admission of a person to determine her mental capacity so as to be able later to deprive him/her of the exercise capacity theoretically in her interest, even as a measure of last resort, is an excessive measure, disproportionate to the aim pursued and which leads to restricting the freedom of the person from our point of view in an abusive way.

Also, the fact that a committee of doctors is in doubt whether a person has the necessary judgment to take care of his interests and needs, longer observation of the person should take place, even in the logic of banning on the basis of the determination of the mental capacity, that could lead to the finding that the person has discernment in certain situations (since there is doubt) and possibly does not have in others. Instead, the procedure is based on a binary vision of the whole or nothing, which allows total deprivation of legal capacity based, most likely, on limited situations in which physicians determine that the person has no discernment.

Thus, including the legislative model that allows for prohibition, the measure taken in the Romanian legislation is an excessive one, totally restricting the legal capacity where there are already indications in the law that a limited restriction could be applied at most. In essence, however, it is clear that this concept of "mental capacity" is, as the UN Committee on the Rights of Persons with Disabilities states, an inadequate concept to be used in the field of legal capacity of individuals, neither objective nor scientific; no one that naturally can be established.

The Civil Code also provides for the establishment of a curator as a protective measure in cases related to old age, illness or physical infirmity⁶. The institution of curator does not imply the lack of legal capacity, and it functions as a mandate, although it is also envisaged that the situation can be established without the consent of the represented one, if such consent

⁶ Codul civil, Art. 178-186.

cannot be given⁷. The way in which the institution of curator is regulated, unlike the interdiction, again shows that the legal philosophy that determines the lives of these people discriminates against persons with intellectual disabilities / mental health problems, including the current criteria of the Romanian legislation based on the determination of mental capacity. From this perspective of the affected mental capacity, an elderly person may be in a situation where there is a person with intellectual disabilities / mental health problems, only that in the case of the latter one the interdiction is established and the deprivation of legal capacity, and not the curator. Obviously, the solution is that none of these categories should be deprived by legal capacity and possibly the institution of curator could be expanded and modified to mean a clear restriction on the application and focusing on the person's decision, on increased safeguards against abuse, and on decision support.

The UN Committee on the Rights of Persons with Disabilities states in Commentary No. 1 that States have a duty to examine all their legislation in a holistic way to ensure that people with disabilities are not restricted in their legal capacity in an unequal manner to others. We believe that the Romanian State, in order to implement the Convention, has the obligation to review all legislation to ensure that the presence of disability is no longer a reason for restricting legal capacity. This must be accompanied by the establishment of the necessary procedural safeguards, especially in the provision of services of any kind, to ensure that the necessary steps have been taken to determine the desires and preferences of the people - that is, there is no decision taken in their place.

THE SUPPORT IN MAKING DECISIONS

For the exercise of legal capacity, people with disabilities may find themselves in need of support in making their decisions. It is important to understand that each of us is using support when making decisions - we consult with friends, we look for information, etc. Changing the paradigm in making the decision from substituted decision (when others make the decision) to supported the decision (when, with if necessary, the person makes the decision, or when the decision is based on the best interpretation of the person's wishes and preferences) is based on the change of perception about the person with disabilities. The fact that a person has a disability does not mean that he no longer has personal desires and preferences. To respect the right to choose the person with disabilities means, like any other person, to respect his human freedom and dignity.

The UN Committee for Persons with Disabilities states on the support for the exercise of legal capacity the following:

“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

⁷ Codul civil, Art. 182, alin. (2).

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.⁸

Concretely, support can mean the help that a person with disabilities receives from friends or family / other close persons in making different decisions. More specifically, support people help the person to understand the information, evaluate it, make informed decisions and communicate it (e.g. by creating lists of pluses and minuses with the person in need of support, role-plays / simulations for helping the person understand choices, the presence of support people at important meetings to take notes, and helping the person to remember and discuss the options he / she has, etc.). The presence of several support people in the support circle also provides a mechanism against abuse⁹. This support mechanism can be formalized by a decision-making support agreement whereby the person chooses the support person and the areas in which he or she wants to benefit from their support and may also give them decision-making power; or co-decision in certain situations¹⁰. Other means of support include the adaptation of information or the use of special or simplified languages, including less conventional languages, but with which the person can express his will. Support is also the allocation of sufficient time when the person needs more time to make a decision as well as support arrangements in making the decision by which the person can decide what will happen to it in certain potential future situations.

In Romania, the person can decide in advance who to represent him legally in case of interdiction¹¹, but it is hard to believe that in a Romanian context and without support, the persons who are in a situation of being banned even exert this right to decide in advance. This decision would also be irrelevant from the perspective of complying with the Convention because of the end result, namely the way in which interdiction means the total deprivation of

⁸ Committee on the Rights of Persons with Disability, General comment No. 1 (2014), Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, alin. 17, disponibil la: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en

⁹ American Civil Liberties Union, FAQs about supported decision making, disponibil la: <https://www.aclu.org/other/faqs-about-supported-decision-making>.

¹⁰ Vezi model de acord la American Civil Liberties Union, *ACLU Supported Decision-making Agreement*, disponibil la: <https://www.aclu.org/other/aclu-supported-decision-making-agreement>.

¹¹ Codul civil, Art. 166.

legal capacity with all its consequences, deprivation based on a determination of mental capacity.

The American Civil Liberties Union, one of the oldest and most important US human rights organizations, has developed a decision-support library¹². This includes a model of competence / capacity determination from the point of view of the need for decision support. This is a human rights model, which recognizes that individuals can have the capacity to make decisions in certain situations but not in others, and that this capacity cannot be evaluated on the binary model in the sense of everything or nothing. It is also not a model based on the medical assessment of mental capacity, but on concrete abilities in the everyday life of the people in question.¹³

As stated, the Romanian state must change the way in which tutelage is regulated. But, beyond the interdiction, because of prejudices, including those who are not under interdiction but who have intellectual disabilities / mental health problems are often considered as incapable of making decisions, and expect someone else to make decisions for them, including in terms of accessing fundamental rights, such as the right to health. Compliance with the Convention also involves a change in mentality in Romania, which must also be assumed and sustained by important changes in the social, educational, medical or legal professions. To stop seeing people with intellectual disabilities as children or people with mental health problems as "dangerous madmen" to be restricted and controlled, and to put in place the situation where the person with disabilities, with his wishes and preferences, is at the heart of the decision, means:

- an assumed commitment to combat prejudice at the societal level,
- the adoption of working methods and tools to encourage the person with disabilities to exercise his / her decision-making capacity,
- allocating a long time in the economy of providing all services to support people with disabilities who need support to understand the information and make a decision, understanding the consequences and even taking risks according to their own desires,
- training social workers, psychologists, doctors, lawyers, educators in this respect
- changing mentality and the approach in universities and professional associations is also essential in this endeavor.

Social services delivery, services' standards for people with disabilities, and the efficiency of supervision, monitoring and control from the perspective of fundamental rights, how social workers know and have the resources to work with the community to build community support for people with disabilities are other areas where change is needed to ensure the right to support in decision-making and the right to independent living and community inclusion under the Convention.

¹² American Civil Liberties Union, *Supported decision-making resource library*, <https://www.aclu.org/other/supported-decision-making-resource-library>

¹³ American Civil Liberties Union, *Beyond the binary: Using a supported decision-making lens in evaluating competence*,: <https://www.aclu.org/other/beyond-binary-using-supported-decision-making-lens-evaluating-competence>.

We believe it is necessary to adopt a standard of deinstitutionalization service covering both the pre-de-institutionalization period and thereafter, in order to ensure that all institutionalized persons have the option of leaving the institutions within a reasonable time, that they are prepared in this sense and that community services do not repeat the model of institutionalization only at a smaller scale.

Another model that complies with the Article 12 Convention is found in Australia, Victoria, where a government agency has published a guide on support for decision making by people with disabilities addressed to service providers, social workers and supporters¹⁴. As a model of public acceptance of the need for change to comply with the Convention, we quote from the introduction to this guide:

"Freedom to make decisions that affect our lives is a fundamental right that we should each enjoy.

The decisions and choices we make are a reflection of who we are as individuals. They allow us to express our views, personalities, desires and goals, and reflect what we think is important in life. Through these choices and decisions, we can follow the lifestyles we want.

(...)

Where people are denied the right to make decisions or are restricted by others in the types of decisions they can take, their human rights are potentially neglected.

We all make decisions based on the best information available to us. This includes tips and support from friends, partners, family members and other significant people in our lives, as well as past experiences.

People with disabilities are no different in this respect. However, some people may need some extra assistance to be able to make and express the election. Such assistance may include access to communication aids or translators, information in different formats, longer time, or different decision-making environments.

(...)

This guide recognizes and supports a human rights-based approach to services for people with disabilities. It was developed as part of the reorientation by the Victorian Government of disability-related services to self-directed approaches and to make it easier for people with disabilities to have individual lifestyles.

This reorientation changes the roles of service users and vendors. Rather than service recipients, people become active participants in planning and obtaining the types of support that they believe would be most suited to their needs and goals.

¹⁴ State Government Victoria, Department of Human Services, Disability Services, *Supporting decision-making. A guide to supporting people with a disability to make their own decisions*, January 2012
<https://providers.dhhs.vic.gov.au/sites/dhhsproviders/files/2017-07/Supporting-decision-making-quick-reference-guide.pdf>

While service providers retain responsibility for service quality and results, their role is rather empowering; providing advice and support to help people with disabilities exercise as much choice and control as possible on their lives. "

The guide provides and explains seven principles in decision making for people with disabilities:

1. Everyone has the right to make decisions on issues that affect them.
2. The ability to make decisions must be owned.
3. Every effort must be made to help people make decisions.
4. Capacity is specific to each decision.
5. People have the right to learn from experience.
6. People have the right to change their minds.
7. People have the right to make decisions with which others may not agree.

We believe that this guide, and other existing models we have just mentioned here, must be taken into account by all relevant decision makers and actors in order to re-orient services practices for people with disabilities.

CONCLUSIONS

In order for Romania to become a country where the intrinsic dignity of the human being is truly recognized and respected, a profound change of paradigm is needed; and as regards the way in which they are perceived, dealt with in practice, but also in legislation, when it comes to persons with intellectual disabilities / mental health problems. Romania has a legal obligation to make this change, an obligation stemming from the Convention on the Rights of Persons with Disabilities whom our country has ratified. Therefore, if Romania is able to present itself as a state of the rule of law, then it must respect the law, and the authorities with relevant attributions to take the necessary changes. Also, if we want the Romanian democracy to have substance, then we must all, as a society, have another approach also regarding the persons with disabilities.

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