SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 1-19

A BRIEF GLIMPSE UPON THE "PARADIGM SHIFT" REGARDING PERSONS WITH DISABILITIES - TALES OF CONSISTENCY

D. STOYANOV

Received 20.09.2024; accepted 20.10.2024
First online publication:26.10.2024
https://doi.org/10.55516/ijlso.v4i1.191

Dimitar STOYANOV
Ph.D., Senior Assistant Professor in Civil Law,
Faculty of Law, Sofia University "St. Kliment Ohridski", Bulgaria
e-mail: dimitarstoyanov2011@gmail.com ; dimituris@uni-sofia.bg
ORCID ID: https://orcid.org/0000-0001-9080-8641

Abstract

The article provides a detailed analysis of the paradigm shift introduced by the UN Convention on the Rights of Persons with Disabilities (CRPD). The CRPD, adopted in 2006, is recognized as a significant human rights treaty that reaffirms the universal concept of human dignity, applying it to all individuals, including those with mental disabilities. The convention emphasizes the need for legal frameworks to evolve, ensuring that persons with disabilities enjoy legal capacity on an equal basis with others. The historical context leading up to the CRPD is outlined, noting that earlier UN declarations and principles laid the groundwork by gradually recognizing rights of persons with disabilities. This development can be divided into three stages: the initial recognition of legal personality, the establishment of principles for mental health care, and finally, the CRPD's comprehensive approach to legal capacity.

A key focus of the article is the controversy surrounding Article 12 of the CRPD, which grants persons with disabilities the right to legal capacity in all aspects of life. This provision challenges traditional systems of guardianship and substitute decision-making, which have historically been used to manage the affairs of individuals with mental disabilities. The article discusses the debates and misunderstandings among national legislators regarding the implementation of this "paradigm shift," particularly the move from substitute to supported decision-making.

Overall, the article argues that the CRPD represents a culmination of decades of evolving legal principles aimed at ensuring equality and dignity for persons with disabilities. The author emphasizes the need for national laws to align with this

new approach, ensuring that legal capacity is universally recognized, regardless of an individual's mental or physical condition.

Key words: *The UN Convention on the Rights of Persons with Disabilities; paradigm shift; equal recognition before the law; persons with disabilities.*

INTRODUCTION

The United Nations Convention on the Rights of Persons with Disabilities (CRPD), adopted by the UN General Assembly in 2006 and in force since 2008[1], is widely regarded as the first human rights treaty adopted in the 21st century (*Watson, Anderson, Wilson, Anderson, 2022, p. 2806*) and an esteemed representative of "core" human right treaties (*de Búrca, 2015, p. 295*). It resolutely reaffirms human dignity as a universal concept and as an unalienable right, applicable to all persons regardless of their individual features. Divided into seven chapters and containing exactly fifty articles, it is evident that the Convention strives to provide an extensive set of rules on the subject. Its creators recall the necessity to set higher standards in the legal protection of persons with disabilities - a task that cannot be achieved without the timely intervention of national legislators who should provide adequate legal means to achieve this humane result.

Moreover, by the explicit recognition of disability as an "*evolving concept*" in Recital (e) of the Preamble, the drafters bring about an entirely new legal approach regarding persons with disabilities, referred to by many scholars as a "*paradigm shift*" (*Rimmermann, 2017, p. 30 et seq.*). It consists of providing these persons with an unhindered possibility to enjoy legal capacity on an equal basis with others in all aspects of life (art. 12, para. 2 CRPD), thus imposing a legal obligation on State parties to amend their national legislation in accordance with the Convention rules. The drafters define "*persons with disabilities*" in a very broad manner, thus stretching the concept of equal legal capacity embodied in art. 12 to individuals with physical and mental disabilities alike (art. 1, para. 2 CRPD).

However, the Convention brought about heated doctrinal discussions within many State parties. The main issue is whether pre-existing rules on guardianship and substitute decision-making procedures regarding persons with mental disabilities throughout different national legislations stand at variance with the new approach, adopted by the drafters, and, should there be a logical collision,

This study is financed by the European Union-Next Generation EU, through the National Recovery and Resilience Plan of the Republic of Bulgaria, project SUMMIT BG-RRP-2.004-0008-C01". The present paper is part of a collaborative research project. All opinions, views and legislative interpretations expressed herein, are my own.

[1] Drafted on 13 December 2006; Signed on 30 March 2007; In force since 3 May 2008.

how to resolve it. That is why, the present article is a humble attempt to assess conflicting views on the relation between guardianship and the provisions of CRPD in order to establish what necessary measures should be undertaken by the respective legislator to ensure conformity of national rules on persons with disabilities with the "*paradigm shift*", introduced by the CRPD.

I. THE CRPD AND ITS BACKGROUND

Some critics claim that this new type of legal approach to persons with disabilities might be considered unexpected and hasty by some national legislators and that it even may lead to "*adverse consequences*" (*Scholten/ Gather, 2018, p. 226*).

To my view, there might be some margin for discussion. UN's concern for equal treatment of persons with disabilities spans over a period of several decades[2]. Nowadays, it seems to be accepted (*Series, L., Nilsson, A., 2018, p. 342*) that the first specific expression of this concern lies in the *UN Declaration on the Rights of Mentally Retarded Persons (1971)*[3]. Some of the more important reasons to adopt this declaration are the "*necessity of assisting mentally retarded persons to develop their abilities in various fields of activities*" and the promotion "*of their integration as far as possible in normal life*", as it is laid down in the Preamble. The drafters deal with basic human rights of persons with disabilities (*Schoenfeld, 1974, p. 31*), such as the mere possibility to bear human rights (Paragraph 1); access to medical care and education suited to the person's individual needs (Paragraph 2); the right to live with one's family (Paragraph 4) etc. In this regard, it is particularly worthy to point out that the right to a qualified guardian when this is required to protect the person's well-being and interests is explicitly laid down within the system of human rights (Paragraph 5). The drafters aim to provide a substantially higher level of protection of the legal interests of the person, by providing in Paragraph 7 that whenever such persons are unable, because of the severity of their condition, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure within national legislations used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities. It would seem that, at this early stage, the UN renders the appointment of guardians and substitute decision-making an

[2] A thorough presentation of UN's acts on persons with disabilities can be found in Rimmerman, **A**. Disability and Community Living Policies, op.cit., p. 31 – 34.

[3] Adopted on 20 December 1975 by UN General Assembly Resolution 2856; Full text available at - https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-rights-mentally-retarded-persons (last visited 22.07.2024).

expression of legal protection of one's interests and does not consider it detrimental to the person with disabilities.

In just four years to follow, the UN adopted the *Declaration on the Rights of Disabled Persons (1975)*[4]. While it does not present a radical turning point, the 1975 Declaration contains the first eloquent expression that "disability" is a wide concept that refers to persons with physical ***and*** mental disabilities equally and simultaneously - a concept subsequently adopted in art. 1 CPRD as well. It simply refers to the previous declaration regarding the possibility to appoint a guardian (paragraph 7 UN Declaration'1975). Even at this early stage, the drafters admit that, in connection to the enjoyment of civil and political rights by the person with mental disability a "*possible limitation or suppression of those rights for mentally disabled persons*" is sometimes justified, provided that the additional requirements are met in national legislations, such as the involvement of medically competent specialists, the existence of a periodic review and the right to appeal to a higher authority.

It is worth to recollect that, as a rule, UN Declarations are non-binding instruments and do not create direct legal obligations for State parties or other actors. At the same time, in their Preambles both UN declarations contain the unfortunate finding that "*certain countries, at their present stage of development, can devote only limited efforts to this end*". Perhaps particular socio-economic circumstances in the second half of the XX century throughout carious national legislations are the very reason why such a non-binding form is chosen on the first place. It may be that the drafters consider it unwise to impose an entirely new legally binding regime regarding persons with disabilities on State parties, since such an approach might actually produce detrimental consequences.

The non-binding intervention of the UN in the subject of rights of persons with disabilities remains a trend throughout the 1980s. Instead of introducing legally binding supranational acts, the United Nations prefers to raise worldwide awareness of these persons' rights. An expression of this policy is a UN proclamation from December 1982, whereby the decade from 1983 until 1992 is pronounced "***United Nations Decade of Disabled Persons***". Moreover, a major outcome in the same 1982 - declared by the UN as the *International Year of Disabled Persons* - is the formulation of the *World Programme of Action concerning Disabled Persons*, adopted by the General Assembly on 3 December 1982, by its resolution 37/52 [5]. These initiatives are accompanied by the preparation of the first worldwide reports about conditions of people with mental disabilities. Legal scholars point out that rapporteurs "*found widespread human*

[4] Adopted on 09 December 1975 by General Assembly Resolution 3447; Full text available at - https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-rights-disabled-persons (last visited 22.07.2024).

[5] Full text available at - https://www.un.org/development/desa/disabilities/resources/world-programme-of-action-concerning-disabled-persons.html#text (last accessed on 27.07.2024).

rights abuses and a generally "gloomy picture" of the conditions of mentally disabled people", resulting in the call for the establishment of a permanent international body to supervise respect for the rights of people with disabilities (*Rosenthal, E., Rubenstein, L., 1993, p. 257 et seq*.). Despite the subsequent lack of initiative on the establishment of such a body, the UN remains persistent to promote rights of persons with disabilities.

On 17 December 1991, the UN General Assembly adopts *The Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*[6]. These twenty-five principles define fundamental freedoms and basic rights of persons with disabilities and are intended to serve as "*a guide to Governments, specialized agencies and regional and international organizations, helping them facilitate investigation into problems affecting the application of fundamental freedoms and basic human rights for persons with mental illness*" [7]. Contemporaries boast the *1991 Principles* and point out that they articulate principles of human rights in mental health treatments and prohibit or restrict obsolete medical practices (*Zifcak, 1996, pp. 1-10*).

It is fair to point out that even these Principles do not depart from the substitute decision-making process. On the contrary, as early as Principle 1, the drafters explicitly provide that" *Any decision that, by reason of his or her mental illness, a person lacks legal capacity, and any decision that, in consequence of such incapacity, a personal representative shall be appointed, shall be made only after a fair hearing by an independent and impartial tribunal established by domestic law.* " [8] Moreover, it is worth mentioning that this is not the first instance when the to use the notion of "*legal capacity*", mentioned in Principle 1. It has already been introduced within UN legislation in art. 15 of the 1979 *UN Convention on the Elimination of All Forms of Discrimination against Women*[9]. It

[6] Full text available at - https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-protection-persons-mental-illness-and-improvement (last accessed on 24.07.2024).

[7] Cf History of United Nations and Persons with Disabilities – United Nations Decade of Disabled Persons: 1983 – 1992. https://www.un.org/development/desa/disabilities/history-of-united-nations-and-persons-with-disabilities-united-nations-decade-of-disabled-persons-1983-1992.html (last accessed on 20.07.2024).

[8] It should be noted that the adoption of the Principles does not mark the end of UN's initiatives on the subject. On the contrary, on 16 December 1992, the General Assembly appealed to Governments to observe 3 December of each year as International Day of Disabled Persons. The Assembly further summarized the goals of the United Nations regarding disability and asked the Secretary-General to move from consciousness-raising to action, placing the Organization in a catalytic leadership role, which would place disability issues on the agendas of future world conferences.

[9] Cf. Adopted on 18 December 1979 by the UN General Assembly, full text available at https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women (last accessed on 16.02.2024). The provision of art. 15 is, as follows: "*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.*"

is evident that the drafters have attributed to the notion of "legal capacity" one and the same meaning in both conventions – the legal ability to act on one's behalf autonomously.

Therefore, it is easy to percept the 21st-century CRPD as a logical continuation of these processes, as is evident from recitals from the preamble. More specifically, Recital (10) recognizes the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support. As early as Recital 11, drafters of the CRPD express their concern that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,

Given this brief historical overview, one can deduce that the adoption of the CRPD is not a spontaneous and unexpected whim, but the result of a targeted policy which, in our opinion, can be divided into three stages of legal development.

The first stage, spanning from 1971 to 1991, is aimed at affirming that people with disabilities should be recognized as full-fledged subjects of law at all, i.e. not to be deprived or limited in their *legal personality* solely due to the presence of a mental disability.

The adoption of 1991 Principles can be regarded as the backbone of the second stage. The Principles are intended to guarantee that persons with disabilities will enjoy the same basic rights concerning various health aspects, such as right of access to specialized medical services and the prohibition of aggressive treatment (Principle 11). At this second stage, there is no question of reconsidering the placement under guardianship at all. On the contrary, as early as Principle 1, para. 6 it is stated that "*any decision that, by reason of his or her mental illness, a person lacks legal capacity, and any decision that, in consequence of such incapacity, a personal representative shall be appointed, shall be made only after a fair hearing by an independent and impartial tribunal established by domestic law*". As it is evident, the drafters' aim is to identify good practices and basic principles in the legal treatment of people with disabilities and, ultimately, to establish an exemplary model of legal framework to be adopted by national legislations regarding medical care provided to people with disabilities.

In this sense, the adoption of the CRPD in 2006 can be regarded as the third stage in the development of the legal framework in relation to people with disabilities. At this stage, the drafters irrefutably presume that the desired advanced level of legal protection of people with disabilities has been already achieved worldwide. The drafters assume that national legislators have already unanimously recognized full legal personality of people with disabilities and that these people are not subjected to humiliating and damaging treatment. As it can be deduced, the past five decades provide a solid foundation upon which the CRPD can introduce a new paradigm on the legal capacity of people with disabilities.

Therefore, the adoption of the CRPD can by no means be regarded as hasty or inconsiderate, but should be considered as an expression of a consistent legislative policy lasting for half a century.

II. THE CRPD AND CONTROVERSIES SURROUNDING THE "UNIVERSAL LEGAL CAPACITY"

The drafting process of the CRPD encompasses a period of four years. The provisions were negotiated over eight sessions of the Ad Hoc Drafting Committee (*Series, Nilsson, 2018, p. 343*). Despite the swift resolution of the matter, there were many controversies. For instance, some national legislations, among which Russia and China, ostensibly willing to clarify the notion of 'legal capacity', proposed to include a footnote defining its meaning. However, their true proposal was to limit the scope of legal capacity solely to "the capacity to hold and bear rights", i.e. to legal personality and thus to exclude the "capacity to act". This purported "clarification" was resolutely dismissed by the Drafting Committee, since it compromised the very idea of the intended "paradigm shift". However, the biggest controverse was manifested in connection with art. 12 CRPD. A small number of national legislations submitted interpretative declarations when ratifying the CRPD stating that they understand article 12 to permit substitute decision-making[10].

Despite these controversies, the drafters of the CRPD brought about a paradigm shift by recognizing legal capacity as the *centre of all individual freedoms (Škorić, 2020, p. 32)*. Moreover, it is worth pointing out that the final text of the CPRD does not mention substitute decision-making whatsoever. On the contrary, it is evident that the creators' intention is to bring about a "paradigm shift" in the legal status of people with disabilities by providing a universal legal capacity not depending on the presence or lack of mental and psychical disabilities.

Article 12 CRPD lays down the most prominent principle of "equality before the law". In order to reveal the true legislative incentive, this article is to be construed together with art. 6 of the *Universal Declaration of Human Rights 1948* (*Everyone has the right to be recognized before the law*) and art. 16 of the *International Covenant on Civil and Political Rights* (*Everyone shall have the right to recognition everywhere as a person before the law*.). The provision of art. 12 CRPD can therefore be regarded as a continuation of these fundamental rules, aimed specifically at people with disabilities.

The aforementioned article consists of five paragraphs, who should rather be interpreted systematically. Some scholars are inclined to view art. 12 CRPD as

[10] Among them are Australia, Canada, the Netherlands, Poland, Estonia, Norway, Egypt and Singapore.

containing a "*defense right*" vis-à-vis invasions of one's legal personality and the right to call for support when necessary (*Nachtstatt, 2019, p. 15 – 16*).

Paragraph 1 enacts rules on legal personality of people with disabilities. The drafters state that the mere ability to be recognized as a person is a necessary pre-requisite for individual autonomy. This provision actually contains a non-discrimination rule, providing that all persons, irrespective of any disability, enjoy the same legal recognition of their personality (*Series, Nilsson, 2018, p. 348*).

Pursuant to *Paragraph 2,* States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Perhaps this provision has stirred the highest number of discussions among contracting States. It is worth to remind that art. 12, para. 2 CRPD is the reason for the previously discussed reservations. Some critics of the "paradigm shift" claim that there is no uniform meaning of "legal capacity" and that this purported obscurity makes it hard for national legislators to bring their provisions in accordance with the Convention. Others tend to deny the existence of a new approach regarding people with disabilities and their legal capacity whatsoever and claim there is no need for any amendments within national legislations (*Scholten, Gather, 2018, p. 229*).

In order to reveal the true meaning of Paragraph 2, one must recollect that the long-standing tradition in many national legislations regarding people with mental disabilities is to appoint a specific person – guardian/administrator/proxy, who will act on behalf of that person with respect to both his or her personal and financial matters. Throughout the last two centuries, many national legislations have provided that every human being should have full mental capacity in order to enjoy legal capacity, i.e. the possibility to act by one's own volition and to cause legal consequences. Should it be established that the mental abilities of a person are impaired or missing, the person is deemed incapable of making autonomous decisions on their own. Therefore, the appointed legal representative makes all relevant decisions and the person with disabilities is deprived of their own legal capacity with the objective criteria "*best interest of the person*", rather than giving advantage to the personal will and preferences of this person. This "functional" approach considers mental capacity to be a necessary prerequisite for legal capacity (*on the correlation between mental capacity and legal capacity cf. Arstein-Kerslake, Flynn, 2016, p. 474 et seq*). In case of a lacking mental capacity, the person is regarded as lacking certain psychological features which brings about the appointment of a guardian - a system is also known as "substitute decision-making"[11].

[11] The most comprehensive summary of the substitute decision-making system can be found, to our view, in Para. 27, General Comment No. 1 - Article 12 : Equal recognition before the law (Adopted 11 April 2014), prepared by the Committee on the Rights of Person with Disabilities - https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-1-article-12-equal-recognition-1 (visited on 28.207.2024).

This very system is challenged by the drafters of the CRPD. Therefore, it is of little surprise that the first General Comment on the Convention, adopted at the Eleventh Session of the United Nations General Committee on the Rights of Persons with Disabilities (March 31st – April 11th 2014) is solely devoted to art. 12 CRPD[12]. The reason to put an emphasis upon art. 12 CRPD in particular can be explained, to our view, by the UN Committee's observation that there is a "*general misunderstanding*" of the exact scope of the obligation of States parties under article 12 of the Convention. This misunderstanding the members of the UN Committee discover in the unwillingness of some national legislators to grasp that "*the human rights-based model of disability implies a shift from the substitute decision-making to one that is based on supported decision-making*".

Being prepared by a body of the UN itself, the 2014 General Comment is actually the most authentic construction of art. 12 CRPD. It contains the resolute position that art. 12, para. 2 recognizes that persons with disabilities enjoy legal capacity on an equal basis with other persons in all areas of life. In order to completely eradicate any possible attempts to misinterpret the notion of "legal capacity", the drafters unequivocally provide that legal capacity comprises both the ability to hold rights and duties (legal standing), and the ability to exercise these rights and duties (legal agency)[13] in an autonomous manner. On the other hand, "mental capacity" is precepted as the individual decision-making skills of a person, which naturally vary from one person to another. The substitute decision-making system presupposes an impaired mental capacity should inevitably result in depriving the person of their legal capacity.

The drafters' aim is to reconsider mental capacity as a necessary prerequisite of legal capacity. As it is pointed out, no legal instrument on the topic, i.e. the provisions of art. 6 of the Universal Declaration of Human Rights, art. 16 of the International Covenant on Civil and Political Rights, as well as art. 15 of the Convention on the Elimination of All Forms of Discrimination provides a distinction between mental capacity and legal capacity. In the light of these preceding rules, art. 12 CRPD cannot possibly provide that *"an unsound mind" and other discriminatory labels can be considered as a legitimate reason for the denial of legal capacity (both legal standing and legal capacity)*[14]. The Committee points out that deficits in mental capacity should not be used to restrict or revoke legal capacity of persons with disabilities and, thus, ultimately overthrows the substitute decision-making system[15].

---

[12] Cf. https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-1-article-12-equal-recognition-1 (visited on 17.02.2024). Henceforth it will be referred to as General Comment.

[13] Cf. General Comment, p. 3, para. 13.

[14] Ibid., p. 3, para. 13.

[15] Ibid, p. 3, para. 13 and 14.

Therefore, it can be of no surprise that the members of the UN Committee consider legal capacity as an "*inherent right accorded to all people*"[16], comprised of both legal standing and legal agency, the latter meaning the abstract ability to act autonomously and to have these actions recognized by law with regard to third parties. Thus, legal capacity would mean that all people, including persons with disabilities, have both legal standing and legal agency simply by virtue of being humans. Therefore, these two phenomena cannot be separated in the manner, presupposed by the functional approach, without discriminating against people with disabilities.

Paragraph 3 seems to be the logical continuation of the preceding two provisions. It recognizes that *States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity*. As far as people with disabilities are concerned, art. 12, para. 1 recognizes their legal personality, whereas para. 2 – their legal capacity. The next step is to make sure that the "paradigm shift" towards supported decision-making is not just wishful thinking, but an actual State party obligation. Some scholars point out that art. 12, para. 3 forms the foundation of the support paradigm and calls for a State party obligation to provide support for the exercise of legal capacity (*Series, Nilsson, 2018, p. 363 – 364*).

Paragraphs 4 and 5 provide obligations for State Parties. The former urges State Parties to provide legislative safeguards to prevent abuse while persons with disabilities exercise their legal capacity and sets out primary requirements, whereas the latter - 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 shall ensure that persons with disabilities are not arbitrarily deprived of their property

In order to facilitate national legislators, the General Comment has attempted to clarify the notion "support". By providing support throughout the decision-making process, State parties refrain from denying persons with disabilities their legal capacity. On the contrary, they enable these persons to make valid legal decisions[17]. Within the meaning of art. 12, "support" is defined as a broad term that encompasses both informal and formal support arrangements of varying types and intensity, such as peer support, advocacy and assistance in the recognition of diverse, non-conventional methods of communication, especially for those people who use non-verbal forms of communication to express their will and preferences. Moreover, the UN Committee calls for the adoption of a statutory requirement aimed at private and public actors, such as banks and the like, to provide information in an understandable manner or to

[16] Ibid, p. 3 – 4, para. 14.
[17] Cf. General Comment, p. 4, para. 16.

provide other form of assistance, so that people with disabilities "*can perform the legal acts required to open a bank account, conclude contracts or conduct other social transactions*"[18].

The drafters of the General Comment № 1 explicitly provide that "*in order to 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*".[19] In order to achieve this result, the Committee proposes a two-step process, consisting of the abolition of the substitute decision-making regime and the development of supported decision-making alternatives (para. 28). The main idea of the new regime is to comprise various support options that give primacy to one's own wills and preferences. Their exact content, form and procedures will be determined by the national legislators in a manner which is most expedient and in harmony with national legal and social traditions. However, in para. 29, (a) – (i), the Committee has set out some "*key provisions to ensure compliance with article 12 of the Convention*" with regard to these various forms of support. Among them worth pointing out is the requirement that all forms of support are based on the wills and preferences of the person and not on what is believed to be in his or her objective interest (para. 29, (b) of the General Comment).

This approach by the UN Committee is criticized by some as being one-sided and not willing to deal with the "hard cases", where the person has an extensive cognitive impairment and their will cannot be discerned. It is argued whether such a situation requiring "100 per cent support" "*necessarily shades towards substitute decision-making*" and that supported decision-making in this particular instance is actually almost identical to an optimally operating guardianship, i.e. substitute decision-making (about this discussion cf. *Alston, 2017, p. 38*).

In my humble opinion, the viewpoint of the UN Committee can be easily explained, when one recollects the purpose of the CRPD to promote legal capacity on an equal basis. The aim of the Committee is to set the principal position that persons with disabilities are autonomous and, instead of being deprived of their legal capacity, should be supported throughout the exercise of their rights in the most suited manner. Should the drafters allow retaining some form of substitute decision-making model as an exception (e.g. for the "hard cases"), this shall inevitably lead to unequal treatment of persons with disabilities. A set of questions arise, among which the issue who will determine whether the individual case is a "hard" or an "easy" one. Another problem is the criterion upon which such an assessment will be made. This assessment is, however, an expression of the functional approach, which is resolutely turned down by the UN Committee as

[18] Cf. General Comment, p. 4- 5, para. 17.
[19] Cf. General Comment, p. 6, para. 25.

being discriminatory. Thus, by not allowing any exceptions with regard to "hard cases", the members of the UN Committee stand true to the preset aim of providing legal capacity on an equal basis.

Moreover, it can be argued whether the approach is really one-sided. Regarding art. 12, para. 4, the General Comment № 1 (2014) explicitly provides in its paragraph (18) that "*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 ... At all times, including in crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected*". Moreover, para. 29, (b) of the General Comment is particularly aimed at the "hard cases", by providing that "*all forms of support ..., including more intensive forms of support, must be based on the wills and preferences of the person ...*". Therefore, to our view, the aforementioned criticism seems to be somewhat unjustified.

III. THE CRPD AND ITS IMPACT

3.1. Supporters of substituted decision-making often refer to the circumstance that the European Court of Human Rights (ECtHR) never denied this approach in its established case law (*Stavert, 2020, p. 5* – "*However, as already mentioned, as the current legal framework in Scotland currently gives precedence to ECHR rights and ECHR jurisprudence continues to favor the emphasis on defining limits for intervention approach*."). There are numerous recent examples of case law where ECtHR discussed respective national provisions on deprivation of legal capacity and found no violation of human rights in their mere existence[20]. It should be recalled, however, that the ECtHR "*rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights"*[21]. No mention of a universal legal capacity or intended "*paradigm shift*" are expressed within its provisions. Therefore, it might ostensibly seem that the ECtHR seems reluctant to acknowledge that persons with mental disabilities are being deprived of their legal capacity under the "functional approach".

At the same time, one should recollect the long-standing position of the Council of Europe regarding persons with disabilities, and their numerous instruments, some of which even predate the CRPD. As early as 1999, the Committee of Ministers of the Council of Europe adopted the "*Principles*

[20] Among them cf. *D.D. v. Lithuania* 13469/06 – Judgment from 14 February 2012 – "*Under the Court's practice, persons of unsound mind who were compulsorily confined in a psychiatric institution should in principle be entitled to take proceedings – attended by sufficient procedural safeguards – at reasonable intervals before the court to challenge the lawfulness of their continued detention*."; *A.-M.V. v. Finland – Judgment from 23 March 2017*.

[21] Cf. https://www.coe.int/en/web/tbilisi/europeancourtofhumanrights (last visited on 13.08.2024)

concerning the legal protection of incapable adults"[22]. However, particular interest lies in the 2004 *Recommendation No. REC (2004) 10 of the Committee of Ministers to member States concerning the protection of the human rights and dignity of persons with mental disorder*[23]. The provision of its article 4, paras. 1 and 2 provide that *persons with mental disorder should be entitled to exercise all their civil and political rights* and that *any restrictions to the exercise of those rights should be in conformity with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and should not be based on the mere fact that a person has a mental disorder*. This provision may be interpreted as a timid attempt to overcome the idea that legal capacity presupposes mental capacity. In other words, the Committee affirms that not every person suffering from a mental illness should *prima facie* be deprived of their legal capacity for this sole reason. The Explanatory Memorandum renders such an interpretation appropriate. Pursuant to its para. 47, "*Restrictions on these rights should be an exception rather than the norm. Given the importance of these rights, any restrictions on them must be prescribed by law. Such rights may be restricted for various reasons, for example under criminal law or laws relating to child protection, but the second paragraph emphasizes that restrictions should be in conformity with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and should not be based on the mere fact that a person has a mental disorder.*"

The recommendation to assess every case individually does not by itself mean that the Committee seemed inclined to fully depart from the substitute decision-making system at this point. Such a policy shift did however occur. The Council of Europe Disability Strategy 2017-2023[24] is eloquent evidence of the substantial impact, brought about by the adoption of the CRPD. This otherwise non-binding instrument sets forth to recognize equal recognition before the law regarding persons with disabilities as one of the priority areas. Regarding the exact content of the notion, the drafters refer directly to art. 12 CRPD, thus providing that legal capacity is comprised by the capacity to hold rights and duties and the capacity to act on them simultaneously.

In Recital 62, the drafters assume that "*legal capacity continues to be denied to a part of the population on the basis of disability, particularly intellectual or psychosocial disability. Substituted decision-making, including full*

[22] Full text available here - https://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec(99)4E.pdf (last visited on 13.08.2024)

[23] Full text available here - https://rm.coe.int/rec-2004-10-em-e/168066c7e1 - (last visited on 13.08.2024)

[24] Full text available here - https://www.coe.int/en/web/disability/strategy-2017-2023 - (last visited on 13.08.2024)

guardianship regimes where persons are stripped of their personhood in the eyes of the law and of the society, still prevail in many member States."

Taking into consideration these negative traits of substituted decision-making, in Recital 63 the drafters call for Member States "*to replace substituted decision-making with systems of supported decision-making. Possible limitations on decision-making should be considered on an individual basis, be proportional and be restricted to the extent to which it is absolutely necessary. Limitations should not take place when less interfering means are sufficient in light of the situation, and accessible and effective legal safeguards must be provided to ensure that such measures are not abused.*"

Therefore, it is of no surprise that quite recently, in 2023, the Council of Europe invoked Member States to adjust their national legislations on persons with disabilities with the paradigm shift, brought about by art. 12 CRPD[25]. Whether this call will lead to a change in ECtHR case law on the deprivation of legal capacity via a national court judgement as well, remains to be seen in the following years.

3.2. In order to assess the consequences of adopting the CRPD into national legislations, it may be prudent to assess its impact. To my view, a major complication in the process of duly implementing the provisions of CRPD into various national legislations it that the drafters did not re-classify substituted decision-making as an obsolete legal institute. The resolute denial of the deprivation of legal capacity due to a mental illness is adopted in para. 9 of the General Comment № 1 (2014)[26]. This view is, however, not expressed within the provisions of the UN Convention and can be regarded, at most, as the authentic construction of its provisions.

These national legislations can be divided into two main groups, based on the lack or presence of a reservation clause regarding art. 12 CRPD.

3.1. As it has already been pointed out, Australia is among the national legislations who ratified the Convention with a reservation concerning art. 12, thereby declaring its reluctance to abandon the substitute decision-making system already incorporated into its domestic law. However, this position is actually not as rigid as it seems at first glance. Perhaps it was the resolute and authoritative General Comment on art. 12 that ushered the Australian Law Reform Commission to set forth the National Decision-Making Principles[27]. Published on 18.09.2014,

---

[25] https://www.coe.int/bg/web/commissioner/-/a-paradigm-shift-is-needed-towards-a-human-rights-approach-to-mental-health-care

[26] "*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.*"

[27] Cf. https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/3-national-decision-making-principles-2/national-decision-making-principles-2/ (last accessed on 21.02.2024)

The National Decision-Making Principles provide a conceptual overlay, consistent with the CRPD, for a Commonwealth decision-making model that encourages supported decision-making.

The National Decision-Making Principles consist of four central ideas to serve as a guiding point in a future law reform of the legal capacity of persons with disabilities, whereby every principle is accompanied by a potential set of rules. First of all, all adults have an equal right to make decisions that affect their lives and to have those decisions respected. According to the second principle, persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives. Moreover, a person's will and preferences must direct decisions that affect their lives. Finally, legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

As it is evident, these four main ideas (or Principles) are an embodiment of the paradigm shift adopted by the CRPD and is aimed at the recognition of people with disabilities as persons before the law and their right to make choices for themselves. Indeed, the principles call for a preference of the individual autonomy, irrespective of existing mental disabilities.

However, within the view of the Australian lawyers, this shift is not that radical. Regarding *Principle 3 - Will, preferences and rights*, the Australian Law Reform Commission developed a model law reform that actually does not fully depart from the substitute decision-making approach. Pursuant to Recommendation 3-3, containing Will, Preferences and Rights Guidelines[28], the drafters have attempted to strike a balanced approach by affirming supported decision-making as the main rule. It is applicable as the default rule, whereas representative decision-making is being considered "*a last-case scenario*" in the "*hard cases*" - what should happen when the current will and preferences of a person cannot be determined. The focus should be on what the person's will and preferences would likely be. In the absence of a means to determine this, a new default standard is advocated—expressed not in terms of 'best interests', but in terms of human rights.

The influence of the National Decision-Making Principles can be found in one of the most recent legislative amendments on persons with disabilities, namely the Guardianship and Administration Act (GAA), in force since 01.03.2020 in the Australian State of Victoria. Scholars point out that this act embeds elements of Article 12 CRPD and understandings of supported decision-

[28]Cf. https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/3-national-decision-making-principles-2/will-preferences-and-rights-2/ (last accessed on 21.02.2024)

making into legal reform particularly in relation to persons with severe cognitive disability (*Watson, Anderson, Wilson, Anderson, 2022, p. 2812)*. The main idea, set out in art. 8 of the Act, is that a person with a disability who requires support to make decisions should be provided with practicable and appropriate support to enable the person, as far as practicable in the circumstances, to make and participate in decisions affecting the person to express the person's will and preferences and to develop the person's decision-making capacity. The will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person. Moreover, a general "restriction clause" in provided in the manner that powers, functions and duties under this Act should be exercised, carried out and performed in a way which is the least restrictive of the ability of a person with a disability to decide and act as is possible in the circumstances (cf. art. 8, para. 3 GAA).

Although the institute of substitute decision-making is retained in the newly enacted GAA, its scope of application is quite limited. In order to abstain from depriving the person with disability of their legal capacity, the drafters have provided that guardians can be appointed in relation to personal matters, whereas administrators are restricted to financial matters[29]. This approach appears to be a dramatic shift towards individual autonomy and supported decision-making, especially in the light of the circumstance that the already repealed Guardianship and Administration Act from 1986 provided that the guardian has powers and duties over the represented person as if they were a parent and the represented person was their child (cf. art. 24, para. 1 of the repealed Act)[30].

3.2. A much more resolute approach has been adopted by national legislations who ratified the CRPD without any reservation clauses regarding its art. 12. Above all, it is worthy to point out that pursuant to art. 1 of the *Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities*, the UN Convention on the Rights of Persons with Disabilities was approved on behalf of the European Community, currently known as the European Union, without a reservation clause on art. 12 CRPD[31]. This would mean that every national legislation belonging to the European Union should

[29] Pursuant to art. 3, para. 1 of the Act, *"personal matter"* refers to any matter relating to the person's personal or lifestyle affairs, such as where and with whom the person lives, daily living issues such as diet and dress, as well as medical treatment decisions. The same provision art. 3, para. 1 of the Act contains many more legal definitions, incl. "*financial matter*" - any matter relating to the person's financial or property affairs and includes any legal matter that relates to the financial or property affairs of the person.

[30] A comparison between the repealed and the newly enacted Guardianship and Administration Acts can be found here - https://www.judicialcollege.vic.edu.au/resources/fact-sheet-guardianship-and-administration-act-vic (last accessed on 22.02.2024).

[31] Cf. Official Journal L 23, 27.1.2010, p. 35–36 - https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010D0048 (last accessed on 22.07.2024).

inevitably bring its rules on persons with disabilities in conformity with the provisions of the CRPD. Such legislative amendments have been introduced with the "*Erwachsenenschutz-Gesetz*"[32] in Austria in 2018, in Germany in 2023 (*Weber-Käßer, 2023, p. 538 et seq*)[33], and, outside the EU, in Chile in 2021 (M*odels of Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD), 2024, p. 116)* in order to ensure full conformity with the provisions of CRPD.

It is worthy to point out that some national legislations signed the supranational act without reservation, but are yet to ensure conformity of their domestic law with the "paradigm shift" of art. 12 CRPD. Among them is France. Even today, despite the ratification of CRPD, the provision of art. 494-1 of the French Civil Code explicitly provides the opportunity to deprive persons of their legal capacity because of a mental disability[34]. This collision between domestic law and supervening international provisions did not remain unnoticed, though, In 2021, the Committee on the Rights of Persons with Disabilities expressed criticism over this lack of legislative activity and pointed out that French civil law still lacks a supported decision-making mechanism (*Models of Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD), 2024, p. 205 – 206*).

CONCLUSION

The CRPD adopts a resolute approach towards persons with disabilities. Introducing the "paradigm shift" and the concept of universal legal capacity is aimed at reaffirming these persons as actual participants in socio-economic affairs. However, there may still be room for debate whether a full adoption of its

[32] This act introduced a legislative amendment to numerous provisions of the Austrian Civil Code, inter alia § 242, para. 1 ABGB, where the legislator provided that legal capacity cannot be limited via appointing an agent – „*Die Handlungsfähigkeit einer vertretenen Person wird durch eine Vorsorgevollmacht oder eine Erwachsenenvertretung nicht eingeschränkt*." – full text available - https://www.parlament.gv.at/dokument/XXV/I/1461/fname_607999.pdf

[33] The article discusses the new revision of § 1814 BGB, which enables persons with disabilities to be supported while making decisions. It should be pointed out that Germany abolished the guardianship system in the early 1990s.

[34] The authentic text of art. 494-1 of the French Civil Code is, as follows: "*Lorsqu'une personne est dans l'impossibilité de pourvoir seule à ses intérêts en raison d'une altération, médicalement constatée soit de ses facultés mentales, soit de ses facultés corporelles de nature à empêcher l'expression de sa volonté, le juge des tutelles peut habiliter une ou plusieurs personnes choisies parmi ses ascendants ou descendants, frères et sœurs ou, à moins que la communauté de vie ait cessé entre eux, le conjoint, le partenaire auquel elle est liée par un pacte civil de solidarité ou le concubin à la représenter, à l'assister dans les conditions prévues à l'article 467 ou à passer un ou des actes en son nom dans les conditions et selon les modalités prévues à la présente section et à celles du titre XIII du livre III qui ne lui sont pas contraires, afin d'assurer la sauvegarde de ses intérêts*".

provisions into the respective domestic legal system has been actually carried out in all UN Member States.

BIBLIOGRAFIE

1. Alston, B., Towards Supported Decision-Making: Article 12 of the Convention on the Rights of Persons with Disabilities and the Guardianship Law Reform – Law in Context, Vol 35, No 2 (2017): Disability, Rights and Law Reform in Australia - DOI: 10.26826/law-in-context.v35i2.10 ;
2. Arstein-Kerslake, A., Flynn, E. The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A roadmap for equality before the law, The International Journal of Human Rights, vol. 20, Issue 4, 2016 - https://doi.org/10.1080/13642987.2015.1107052 ;
3. de Búrca, G. Experimentalism and the limits of uploading: the EU and the UN Disability Convention - Extending Experimentalist Governance? The European Union and Transnational Regulation - Jonathan Zeitlin (ed.), Oxford University Press, 2015 - https://doi.org/10.1093/acprof:oso/9780198724506.001.0001 ;
4. Domański, M. Lackoroński, B. (eds.) *Models of Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities. Private and Criminal Law Aspects., Routledge, 2024.*
5. Nachtstatt, E. Die rechtliche Handlungsfähigkeit im Erwachsenenschutz,Linde Verlag, Wien, 2019;
6. Rimmerman, **A.** Disability and Community Living Policies, Cambridge University Press, 2017;
7. Rosenthal, E., Rubenstein, L. International Human Rights under the "Principles for the Persons with Mental Illness" Advocacy Protection of persons with mental illness. - International Journal of Law and Psychiatry. Special Issue: International Human Rights and the Problem of Extra-Clinical Harm, Volume 16, Issues 3–4, (Summer–Autumn 1993) – https://doi.org/10.1016/0160-2527(93)90001-U ;
8. Schoenfeld, B. Human rights for the mentally retarded: Their recognition by the providers of service. - Human Rights, Fall 1974, Vol. 4, No. 1 (Fall 1974) ;
9. Scholten, M., Gather, J. Adverse consequences of article 12 of the UN Convention on the Rights of Persons with Disabilities for persons with mental disabilities and an alternative way forward. - Journal of Medical Ethics, 2018, vol. 44 - https://doi.org/10.1136/medethics-2017-104414 ;
10. Series, L., Nilsson, A. Article 12 CRPD: Equal Recognition before the Law - In: The UN Convention on the Rights of Persons with Disabilities - A Commentary, Oxford University Press, 2018;
11. Stavert, J. Supported Decision-Making and Paradigm Shifts: Word Play or Real Change? – In: Frontiers in Psychiatry; Volume 11/2020, https://doi.org/10.3389/fpsyt.2020.571005

12. Škorić, M. The Twenty-first century – the beginning of a new era in the protection of human rights of persons with mental health disabilities - Pravni vjestnik, vol. 36, issue 1, 2020 - https://doi.org/10.25234/pv/9320 ;
13. Watson, J., Anderson, E., Wilson, E., Anderson, K**.** The impact of the United Nations Convention on the Rights of Persons with Disabilities on Victorian guardianship practice. - Disability and Rehabilitation, 2022, vol. 44, no. 12 - DOI: 10.1080/09638288.2020.1836680
14. Weber-Käßer, S. Die Reform des Betreuungsrechts. – Anwaltsblatt, 10/2023;
15. Zifcak, S. The United Nations Principle for the Protection of People with Mental Illness: Applications and Limitations - Psychiatry, Psychology and Law, Vol. 3, Issue 1 (April 1996) - https://doi.org/10.1080/13218719609524870 .