



The Bulgarian Center for Not-for-Profit Law (BCNL) was founded in July 2001 and is incorporated as a public-benefit foundation in the Central Register at the Ministry of Justice. BCNL's mission is to provide support for the drafting and implementation of legislation and policies aiming to advance civil society, civil participation and good governance in Bulgaria.

New „formula“ for capacity to act - opportunity for everyone to exercise their rights

Statement on the paradigm shift of article 12 of CRPD

„The total institution“: Should a person reside in such a system, it encompasses his or her whole being. It undercuts the resident's individuality. It disregards his or her dignity. It subjects the individual to a regimented pattern of life that has little or nothing to do with the person's own desires or inclinations. And it is inescapable.

Characteristics of Total Institutions

Erving Goffman

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INTRODUCTION

After the adoption of the **UN Convention on the Rights of Persons with Disabilities** 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 (some operating for more than 2000 years). This means to change the paradigmatic approach of law to 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 empowerment¹. 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 12².

The proposed new understanding of personality and the opportunity to exercise its rights autonomously is much more inclusive in art. 12 of the Convention than the idea of the "reasonable person." It acknowledges the realities of making a decision for each person and emphasizes the support rather than the retraction of the legal possibility for individuals to make choices. As Dr. Michael Bach³ said: "*... the question no longer is whether a person has a mental capacity to exercise his/her abilities, the question is what kind of support is required to enable the person to exercise his/her rights?*"

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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 Human rights Commissioner Office, CommDH/IssuePaper (2012)2 Strasbourg, 20 February 2012 "who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities".

² The European Community ratified as a union the Convention in 2009 (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); in addition, in recent years the European Union clearly has laid down the basic criteria of the Convention in its political and statutory acts (The European Disability Strategy 2010-2020).

³ For the past twenty-five years Michael Bach has undertaken research and development on law, policies and programs in Canada and internationally on ways to advance the full inclusion and human rights of persons with disabilities, IRIS – Institute for research and development on Inclusion and Society.

In **Bulgaria**, people with disabilities, particularly those with mental health problems and intellectual disabilities, are presumed to have no capacity to act, based only on their diagnosis. Therefore they are easily deprived of their legal capacity. Despite the skills and abilities they have they are facing social exclusion, their human rights are seriously violated, and they are subjected to violence and abuse, both in the community and in the institutions. And it is not only the result of the inability of the guardianship system adequately to meet their needs, which frequently becomes an instrument of abuse by the people closest to them, but to system beliefs, policies and measures for exclusion, "hiding", misunderstanding and rejection inherited from the past.

In practice, people with restriction of the legal capacity cannot make their own decisions according to Bulgarian legislation. It prevents them from exercising their most important human rights, including the right to marry, to vote, to work, to take legal action and to claim their rights in the legally instituted way. Access to justice is generally impossible. Exercise of the right of ownership is virtually impossible. There is no respect for the private and family life of the person. In many cases, people with mental health problems and intellectual disabilities who are with restriction of the legal capacity, are forced (by their relatives or the care system which does not give them a choice) to live in institutions outside the community for the rest of their lives⁴. In institutions their right to a life free from torture and humiliation is denied. They are subjected to a regime which dehumanizes them, causing the loss of the abilities they acquired in their life. Very often the damage caused by the institution is worse than the disease or the difficulty itself. In its report on Bulgaria, published on 28.02.2008⁵, the European Committee on Prevention of Torture (CPT) specifically emphasizes the fact that in institutions, people with mental disorders are subjected to humiliating and inhuman conditions. In its report on Bulgaria, published on 15.03.2012⁶, CPT reiterates that institutionalization is *de facto* an imprisonment. Furthermore CPT highlighted in this report the conflict of interest between those with restricted legal capacity and their guardians when the latter are also the directors of the institutions where the people are placed. In the judgment in the case of *Stanev v. Bulgaria*, the Grand Chamber of the European Court of Human Rights⁷ (ECHR), states that the guardianship impedes access to justice⁸, makes impossible the seeking of compensation for the inhuman and degrading conditions in case of placement in an institution, makes impossible the protection against placement in such institutions⁹. The judgement in the case of *Stanev v. Bulgaria*, ECHR explicitly stresses that "growing importance which the international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible"¹⁰.

At present, the restriction of the legal capacity is governed by the Persons and Family Act and the Civil Procedural Code and full guardianship and partial guardianship (custody) – by 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 problems related to the legal capacity of natural persons. Practically the rules concerning guardianship are replicated in their previous, ineffective form.

The current legislation does not provide the people with mental health problems and intellectual disabilities with mechanisms which can guarantee them a real opportunity to exercise

⁴ Of nearly 7 500 people with restriction of the legal capacity in 2012, 3 500 are placed for „care“ in specialized institutions.

⁵ The report was drafted on a visit by the delegation of CPT in 2006 <http://www.cpt.coe.int/documents/bgr/2008-11-inf-eng.pdf>.

⁶ The report was drafted on a visit by the delegation of CPT in Bulgaria in the period 18 – 29.10.2010 <http://www.cpt.coe.int/documents/bgr/2012-09-inf-eng.pdf>.

⁷ The Judgement was enacted on 17.01.2012 on application 36760/06 <http://www.justice.government.bg/47/233/>

⁸ Paragraphs 241-247 of Judgement of 17. 01. 2012 on application 36760/06.

⁹ Paragraphs 217-221 of Judgement of 17. 01. 2012 on application 36760/06.

¹⁰ Paragraph 244 of Judgement of 17. 01. 2012 on application 36760/06.

their individual freedom and to be treated as equal before the law and as such is a potential cause of many (successful) cases before the ECHR.

Bulgaria ratified the Convention on the Rights of Persons with Disabilities (CRPD) in 2012¹¹. From that moment on the domestic law has been in conflict with Art. 12 of the CRPD, which has precedence provided by the Constitution. We believe that for us, the Bulgarians, the issue is not how many cases will there be against Bulgaria in Strasbourg, but rather that a serious discussion is needed on how to change the legal framework so that not only to declare that we "meet" the standards of the Convention, but to create real conditions for this most vulnerable group of people with disabilities - those with mental health problems and intellectual disabilities to be able to be equal, be able to decide where and with whom to live, to manage their money, to choose their treatment, to decide how to use their free time, etc. Naturally, this change in the law will not compensate the deficits in an inefficient system of healthcare, education and social support. However, it is certainly a milestone for the paradigm shift and for the understanding of people with disabilities in general. For the rest of us it will be a test of the degree of sincerity in our belief in the equality of all before the law and of our willingness to accept it.

This statement¹² presents the ideas of a group of lawyers who work on the subject and aims to open the discussion concerning **not if the paradigm should be changed** but:

- how to change the system of restriction of legal capacity 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 reality¹³?
- when in time will these changes happen considering that Conception of 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 ratified¹⁴.

The principal ideas developed in this text are based on the positions stipulated in the Conception of changes in the national legislation relating to application of the standards of Article 12 of the Convention for the Rights of Persons with Disabilities¹⁵.

¹¹ 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).

¹² This statement was prepared by the following team of lawyers: Nadya Shabani (Program Director of the Bulgarian Centre for Non Profit Law) Pavleta Alexieva (Program Director of the Bulgarian Centre for Non Profit Law) Marieta Dimitrova (lawyer, Legal Advisor to the Bulgarian Centre for Non Profit Law) Aneta Genova (lawyer, legal consultant to the Mental Disability Advocacy Centre), Velina Todorova (PhD Associate Professor of civil and family law).

¹³ 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>

¹⁴ 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==

¹⁵ 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==

❖ 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 rights. 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 (although in the ideology of natural law, the capacity to have rights, is in general an inherent quality of man) that historically the capacity to have rights of any person was not recognized until the age 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 protection.

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 personality¹⁶. 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) 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 equal¹⁷. 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 countries¹⁸.

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 qualified¹⁹. Capacity to have rights, by its very nature, cannot be restricted or withdrawn²⁰. The opposite would mean banning the person from

¹⁶ Vasilev, L. op. cit., p 146-147.

¹⁷ Quinn, G. Concept paper: Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD. HPOD Conference, Harvard Law School, 20 February, 2010, достъпен на: www.nuigalway.ie/cdlp - стр. 5.

¹⁸ Under Article 20 of the Charter of Fundamental Rights of the European Union: all men are equal before the law.

¹⁹ Cf. and Tadzher, V. op. cit., pp. 22-23 and Pavlova, M. op. cit., p 216.

²⁰ Theory also holds that the capacity to have rights regarding certain personal rights (right to work, marriage, participation in elections) that are exercised only by the holder of these rights arises not from birth but from a

public relations and would be contrary to the value of human rights and the principle of equality²¹. Objective law is the only legitimate limitation of the capacity to have rights.

The exercise of 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 actions, or in general as the capability to perform legal actions²² or the capability to perform legitimate legal actions²³.

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.

As was mentioned above, according to the present day doctrine, 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 consciousness²⁴. 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"²⁵ 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 shall 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 maturity²⁶ is reached for the legal capacity of individuals to act is an abstract (formal) and this is their coming of certain age (at the present moment - 18 years)²⁷. 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

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.

²¹ 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.

²² Cf. Tadzher, V. op. cit., p 38-39.

²³ Pavlova, M. op. cit., p 231-232.

²⁴ Cf. Tadzher, V. op. cit., p 38-39.

²⁵ So: Tadzher, V. op. cit., p 38. Pavlova, M. op. cit., str.230, Tashev, R. op. cit., p 302.

²⁶ Cf. Pavlova, M. op. cit., p 232-233.

²⁷ 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)

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.

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 this 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 person²⁸ 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 exercising rights and the legal capacity to act proves the key to them²⁹. In practice, when one has restriction of legal capacity one cannot decide where and with whom to live, how to manage ones money and what to spend it on, to deal with issues related to one's health, to make deals³⁰

❖ 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 society. In the first place the regulations on the capacity to act protect the individuals from themselves, suggesting that it prevents them from an action 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)³¹, depending on the assessment of the extent of the disability.

Protected are not only the interests of third parties who enter into legal relations³² with the legally incapacitated and but also the legal relations as a whole which is perceived to be "in

²⁸ Cf. Pavlova, M. op. cit., p 233.

²⁹ 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.

³⁰ Very often in practice, it appears that even those placed under partial restriction of legal capacity cannot conduct small transactions.

³¹ 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 the international law seminar, 16-17 October 2012 Sofia, organized by BCNL and Institute for Legal Studies – Bulgarian Academy of Science.

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the public interest". Additionally 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 result and consequences for the person leads to diminishing of his/her legal status. As mentioned above, within the existing paradigm empowered and autonomous person is only the "reasonable and rational" 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 the restriction of legal capacity 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 custodian³³.

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 social³⁴. In its version from 1949 the PFA stipulated a medical condition/criterion - the existence of "imbecility, mental illness or physical disability"³⁵. The physical disability was obliterated with the amendment of the act in 1953³⁶. 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

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. Kolev, T. General Theory of Law. C.,

³³ 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.

³⁴ 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.

³⁵ Even the very terms, used by the PFA, are obsolete and today they sound archaic and inadequate. For comparison, Persons Act by PFA required only the presence of dementia - Article 100

³⁶ The outdated concepts "dementia and mental illness" remained and today they 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 parties. The adopted non-discriminatory terms are an intellectual impairment and mental disorder.

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 capacity³⁷. 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 capability 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 the establishment of a causative link between the impairment and the absence or reduced ability to "care for his/her affairs".

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 can not 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. 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.

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 to allow taking 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 putting under restricted legal capacity. Thus structured the institution of restricted legal capacity 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 world³⁸.

Historically, the stigma connected to intellectual disabilities and mental disorders practically excludes the analysis of the causative relationship between the disability and the quality of the decisions that the person must make for himself/herself. The stigma replaces analysis: it provides a ready answer for each decision, which is different from the conventional, taken by a disabled person by putting the label of "disease motivated" or even by equating it to a lack of decision. Again the stigma excludes the analysis of the quality and the importance of the decisions made by people with disability in terms of their unique human situation by replacing this so necessary understanding of the individual with a superficial widespread, often unsupported by any evidence, understanding of what is good "for everyone".

³⁷ 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.

³⁸ Cf. Kaneva, B. Disability and Dignified life: Issues of care and justice. In: Limits of bioethics. S., 2013

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. Of course, Bulgaria is not an isolated case. 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 it³⁹ was similar or has been changed very recently.

In response to this issue, international law offers new standards for the legal regulation of the legal capacity to act⁴⁰. 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 (simultaneous) legal capacity and capacity to act.

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 regulation⁴¹. The arguments for legal discussion are contained in the

³⁹ 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.

⁴⁰ Cf. Recommendation № 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).

⁴¹ 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 on <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 on), [The legal protection of persons with mental health problems under non-discrimination law](#) (October 2011) and others. available at : <http://fra.europa.eu>.

research studies of the humanities in Bulgaria and abroad⁴², as well as in the studies that motivate the development of international law⁴³ or are caused by it. According to us, our doctrinal silence 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 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 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 with 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" which 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.

What are these systemic barriers in the law, which should be overcome?

The first - is the understanding that only the reasonable person can be legally capable to act. From ancient times philosophers have reflected on whether rationality is what really makes us humans and as stated in the analysis above – we lawyers still endorse this idea more or less. Without going deeper into the philosophical discourse, we can emphasize 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 interest of third parties, especially in trade, which needs stability, predictability and trust⁴⁴. This is what "cements" our

⁴² 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.

⁴³ 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 № 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).

⁴⁴ Theory suggests that "... the capacity to act is a prerequisite for the validity of a legal transaction ...". Cf. Vassilev, L. op. cit., p 158.

commitment to rationality as a test for humanity⁴⁵. The state also has an interest in rationality, which guarantees preservation of personal property as a prevention from becoming dependent on social funds⁴⁶. Irrational behaviour, however, is also inherent in man, smoking behaviour can be defined as such, even the business does not always behave rationally (the crisis Lehman Brothers⁴⁷, for example). 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 themselves⁴⁸. The paradigm shift requires in addition to this to acknowledge that these natural or acquired traits represent a unique personal experience that the individual can only personally integrate into his/her life and can personally decide how to adjust his/her preferences and desires with this experience and it is a right that cannot be taken from him/her. Put in another way - the legal status of individuals should not depend on their medical or functional status. The paradigm shift requires moving from the concept of skills to that of rights⁴⁹.

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 capacity⁵⁰.

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 law⁵¹.

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 to restrict 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

⁴⁵ Quinn, G.. Concept paper: Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD.’ p. 9 - 10.

⁴⁶ Quinn, G.. Concept paper: Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD.’ p. 9 - 10.

⁴⁷ There again.

⁴⁸ 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.

⁴⁹ Cf. Bach, M. Securing Self-Determination: Building the Agenda in Canada. 1998, available at: www.tash.org

⁵⁰ Cf. articles 156, 164, 165 of the Family Code.

⁵¹ Quinn, G. Concept paper: Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD.’, p. 8-10.

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 rights⁵².

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 of 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 all⁵³ 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 support decision making - a tool to ensure personal choice, taking into account (respecting) the desire and the will of the individual.

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 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 making exemptions that allow decision making "for people" instead of "them" but the regulation of 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 preferences.

In conclusion we would like to emphasize that the recent advances in the field of human rights are primarily 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

⁵² 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.

⁵³ There again.

moral values of society at those moments. The possible paradigm shift now (according to Art. 12 of CRPD) faces us with the purely humane and values 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 as does the "reasonable person." 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 an adequate answer to end the paradox of securing rights by limiting them.

➤ **Scope of the new legal regulations**

The new provisions in the law should regulate public relations, which relate to the possibility of exercising rights by persons who are at least 18 years. The prerequisites for the acquisition of the capacity to act (only given age), the impregnability of the presumption of legal capacity to act, and the circumstances under which the new institute of "supported decision making" is incorporated should be described. The law should regulate the "supported decision making" as a set of measures that are aimed at allowing individuals to exercise their rights, the principles governing the new rules, the safeguards and the powers of the authorities involved in the making and implementation of decisions relating to the exercise of the legal capacity to act of persons.

➤ ***Supported decision making***

The essence of the paradigm shift of article 12 is to stop the practice of substitution of decision making "instead of" the persons with 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 regardless of the degree of their disability or the existence of an illness. That is why the only criteria for the exercise of the legal capacity to act should be age.

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. Support measures should respect the rights, the will and preferences of people with disabilities and should never allow substitution in decision making. The obligation to exchange the regimes of substituted decision making with supported decision making requires the **simultaneous** removal of the institutes of substituted decision making and the development of measures of supported decision making (SDM) .

The purpose of the support in each case should be the disclosure of the will or the creation of social conditions where that will can be manifested and interpreted⁵⁴

➤ **The test „I understand the consequence of my actions“ in the light of art. 12 of the Convention on the Rights of Persons with Disabilities**

According to classical theory, the concept of legal capacity to act implies the cumulative existence of the following four elements:

1) Understanding

Understanding is the most basic element of the legal capacity to act⁵⁵. For a person to agree to do or to refuse to do a certain legal action he/she must have an elementary understanding of the facts on which the decision is based. Compliance with this criterion can be very complicated depending on what is meant by the term "understanding the facts". One of the simplest interpretations includes the presence of a minimal understanding and cognitive skills. But different authors are adamant that only this level of mental capacity is not sufficient for making decisions concerning the performance of valid legal actions.

⁵⁴ Personhood and Legal Capacity. Perspectives on Paradigm Shift of art.12 CRPD. Gerard Quinn. Harvard Law School/2010

⁵⁵(Buchanan & Brock 1989)

2) Evaluation

In addition to understanding the facts on which the decision is based, the classic concept of legal capacity to act requires also the ability of the person to evaluate "the nature and importance of the various possible alternatives"⁵⁶ and to integrate this evaluation in the process of making a particular decision. This component of the capacity to act is usually derived from the regulatory requirement which states that the legal person should be able to understand the legal consequences of a given decision. In the Anglo-Saxon legal system the ability of individuals to think and to summarize information, including the ability to draw conclusions, to assess risk and possible consequences is seen as part of the legal capacity to act.

3) Objectification and expression/communication of the choice of the person in relation to others

It is possible that the first two elements of the capacity to act exist, but the legal person is unable to objectify and communicate its inner will and preferences (for example, a person who has experienced a stroke, a person diagnosed with cerebral palsy and others where the intellect is preserved but the person is unable to objectify his/her wishes verbally, in writing, with gestures or otherwise).

4) Ability to form and express an independent will.

The formation, understanding, evaluation and the objectification of a choice/decision as stages in the formation of the will should be performed voluntarily by the person.

Traditionally in the legal systems which allow the restriction of the legal capacity to act and the restriction of the legal capacity, the absence of one of the above elements in the process of decision making is a prerequisite for restriction of the capacity to act and the appointment of a guardian/ custodian. The effect of this is the substitution of the will of the people, particularly in the case of guardianship.

The paradigm shift in the meaning of article 12 of the Convention on the Rights of Persons with Disabilities requires a change in the concept of the legal capacity to act, including the test with 4 items shown above. The capacity to act is not a two-stage concept (I can/I cannot). Each of us has different levels of capability and resources engaged in making certain decisions. People who have no intellectual disabilities, impairments or mental health problems also have different resources, levels of capability and ability to take decisions.

The new paradigm requires recognizing that human rights do not comply with the social and medical determinism. We are all people who in their actions demonstrate a mix of rational and irrational, we are social beings, regardless of our individualism and we all rely on the support of others in decision making and the expression of our legal personality. By rejecting the medical determinism we should assume that if any person is a legal person he/she therefore manifests desires and preferences⁵⁷.

The provisions of Article 12 take into account and are based on this reality. In the context of the new paradigm two new elements become leading for the persons who do not meet the four elements of the classical concept of legal capacity to act:

⁵⁶(Buchanan & Brock, 1989).

⁵⁷ Personhood and Legal Capacity. Perspectives on Paradigm Shift of art.12 CRPD. Gerard Quinn. Harvard Law School/2010

- 1) **The existence of a will / wishes of the person**
- 2) **The existence of at least one (trusted) person who knows the person and can give the best interpretation.**

In the context of the future legislation the first element should be regulated as an irrebuttable presumption. With regard to the second element effective means of detecting the presence of these two elements should be provided as well as of their understanding for the purposes of achieving the most appropriate support for the person with disability. This deliberate effort to detect the presence and content of the above two elements will be called a "two-stage test" for the purposes of this statement.

People with intellectual disabilities or mental health problems are holders of the same rights as other people but because of the presence of a disease they are constantly faced with social, legal and practical barriers that impede their exercise. In this regard the provision of article 12 par. 3 of the Convention focuses on one more condition – it requires the State Parties to the Convention to take appropriate measures to provide access of persons with disabilities to the support they need for independent exercise of their rights. This is actually an obligation to create tools that ensure the personal involvement of individuals by taking into account the two new criteria mentioned above. Also changes in legislation should contain specific provisions that expressly regulate the obligations of any third parties that should make sufficient efforts with due care so that a disabled person will be provided with specific "translation" or other measure by which to ensure that the information is understood by the person and/or has reached those having functions and duties under the measures of SDM⁵⁸.

➤ **The concept of "fiduciary relationship" as a tool for the expression of will⁵⁹**

The new tools for personal exercise of rights which requires the application of the two-stage test is based on the *concept of fiduciary relationship* as a tool for expressing the will of the person with a disability.

The fiduciary relationship, as its name suggests, is a relationship between two or more people based on mutual trust and understanding. It is difficult to give a comprehensive and final definition of a "fiduciary relationship". Instead, it is possible the law to determine criteria characterizing a fiduciary relationship and they are referred to as its minimal content. Such criteria (which follow from the very relationship of trust and understanding) are:

Voluntariness (reciprocity)

Both people recognize each other as people who trust each other.

Firstly, a "fiduciary relationship" to exist there must be **reciprocity**. Both parties must agree that it is present. The consent may be expressed in different *form*, depending on the type and degree of disability of the person in need of support, but it should be explicit. The consent may be concludent – it should be evident from the behaviour of the two people. For example, a person with severe intellectual disabilities can express a preference for a particular individual among the people who take care of him/her and this is evident in their daily interactions. The expression of reciprocity of trust, however, must be expressed in circumstances which preclude manipulation or abuse. The assessment must be wide-ranging and based on multiple sources.

58 Art. 9 of the CRPD.

Exclusion of undue influence

Absence of history of manipulation, abuse and violence.

In the fiduciary relationship there is **no room for manipulation, abuse and violence**. We cannot speak of a fiduciary relationship in cases where there is a history of abuse or violence. The judge should be well prepared to recognize the signs of emotional harassment, mental or physical abuse⁶⁰. All evidence would be admissible to determine such behaviour. The court should be extremely serious about each experience of the person seeking support associated with abuse or violence. Very often the person is not able to determine exactly why he/she is experiencing such feeling. But he/she is the best expert in terms of his/her feelings and his/her sense that he/she was a victim of abuse will prove to be true in many cases at a certain level even if the abuser had the best of intentions.

Ability to interpret the will

The communication between the two people, the stability of the relationship (the relationship has existed for some time and they both have come to know each other to such an extent that their claim for the presence of trust can be taken seriously and not as an expression of hope, frivolity, fantasy or something similar);

The fiduciary relationship has certain **stability**. It is hard to say at what point in time a relationship becomes fiduciary but certainly trust is not established at the moment of encounter between two people. This stability of the relationship can be verified easily by questioning witnesses and/or questions to this effect are included in the conversation with the parties in this regard.

In a fiduciary relationship there must be **communication** – the parties involved in it should be able to understand what each one says. To establish this, the judge will probably have to watch how the two parties communicate and to gather information from their acquaintances that communication is possible. For example, if we return to the case of people with an intellectual disability, it is possible that a person with whom he/she has a special relationship responds to his/her signals in a way that induces a reaction of satisfaction. This is completely reasonable to happen even in severe cases and it would be valid evidence in court for existence of communication.

Readiness to act in the interest of the supported person and to exercise his/her will most accurately

Readiness refers to the future, evaluation of actions in the past is not excluded if the assessed fiduciary relationship had aspects which included the exercise of supported decision making.

Finally, for the purposes of litigation, there must be a **readiness to act in the interest of the supported person and to exercise his/her will most accurately**. This readiness can only be claimed, it cannot be objectively assessed before a relationship of supported decision making has been developed. But it must be systematically monitored in the event that it leads to the formalization of the relationship of support.

⁶⁰ As well as to have received specific training.

There are other elements of a fiduciary relationship, but they are not of such fundamental importance - they need not be listed further but opportunity should be given to judicial panels to collect data in each direction the case prompts. Therefore, litigation and the rules for its proceedings must be so constructed as to ensure a thorough and individualized attention to detail in each case. It is necessary to reach an objective verification of subjective experiences that, in addition, might be impossible to be communicated in a standard manner. Procedural provisions of the new legislation should be such as to avoid formal approach and ensure flexibility and adaptability to the needs of each case.

➤ **Exercise of 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. The personal rights of the individual cannot be restricted in any way as a result of the support measures. 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.*

The mentioned rights are not only fundamental, but so strictly personal that it is not possible to include them in any hypothesis of their evaluation/measurement in order to be exercising by anyone else. Of course, this does not mean that social services which help people who have expressed a need for support to exercise these rights will not be developed, but this will be social support and not support for decision making.

For each one of them there should be different safeguards - especially the right to marriage and freedom of testation, as the risk of their abuse is high. As regards the right to vote there should not be similar special safeguards but rather the common ones which apply to all voters/candidates.

Marriage

The right to marriage of a person with disabilities cannot be restricted in any circumstances. No one shall be subjected to examination or assessment of the capacity to decide to marry.

To achieve this several legislative measures need to be taken, as follows:

- The ban on people with disabilities to marry should be removed; we should reject the barrier to marriage - a disease that justifies guardianship of the person, envisaged in the interest of the person who is presumed to be unable to form and express his/her will and therefore protected him/her from the effects of marriage - if we think what they are - no particular risks for the person are created, but rather a different situation for his/her spouse.
- A standard should be established that allows the participation of an interpreter in the procedures before the civil status officers. This measure is not an element of supported decision making.
- The free access to legal advice on the legal implications of marriage, the settlement of property relations and the conclusion of premarital or prenuptial agreement should be ensured to people with disabilities. These consultations are not within the supported decision making, and would rather have the character of a simple consultation, which may contain an element of social service (finding a suitable consultant, accompanying, supporting communication, etc.).

- Support in exercising their parental rights during pregnancy and childbirth should be ensured to the spouses with disabilities. Supported exercise of parental rights (within the meaning of the concept of "supported decision making") is possible and permissible.

Testation

The right of a person with disability to dispose of his/her property after his death cannot be restricted in any way. The disabled person can bequeath property at his/her discretion, without having to be subjected to prior tests or assessments of his/her capability to express his/her will to bequeath his property.

However, to guarantee that right the disabled person should be guaranteed access to legal advice on the implications of the testament, the forms of testamentary dispositions, the ways to change his/her will.

The current law recognizes the participation of an interpreter or translator in specific cases, but it should be modified in the direction of inclusion of interpreter able to communicate the will of a person with communication problems which go beyond the scope of those stipulated in the current legislation. In the means of communication should be included such specific communication strategies as using special communication cards and others in accordance with the advancement of the science in this particular disability. These measures do not fall within the scope of the measures related to supported decision making.

As a safeguard against the abuse of the free exercise of the freedom of testation a possibility should be introduced for everyone (including non-governmental organizations - NGOs) to declare the testament invalid if it is in favour of a supporter and it is established that it was made as a result of undue influence.

Association

Every person, regardless of his/her disability has the freedom of association without any limitations. The capacity of a person to associate cannot be put to test or assessment under any circumstances.

In order to ensure the exercise of this right people with disabilities should have free access to legal advice on the legal implications of association in any particular case, the manner in which to exercise their rights and obligations as members of an association. The possibility to participate in the work of an association with an interpreter should be expanded. Both measures do not fall within the scope of supported decision making. Freedom to associate, expressed mainly in the right to be able to share with other people common values, to do things together in order to achieve common goals and this to be a formal and recognized by all other people processes should be distinguished from property relations regarding membership or participation in a specific organization which has competent and representative power, for which there may be a procedure for supported decision making.

Right to Vote

The free access to participation in political life cannot be restricted on the basis of disability. The capacity to express will related to the exercise of the right to vote cannot be tested and assessed under any circumstances.

The current electoral law contains rules that enable people with disabilities to participate in politics directly regardless of their disabilities. They may require specific aids or special conditions to exercise their right to vote but that does not mean that someone else will substitute

their will or help them to form one. This principle should be expanded to people with intellectual disabilities and mental disorders by finding the right aids for them in order to exercise their right to vote personally and directly.

➤ Distinctions

Sanity in Criminal Law

Sanity is a category of criminal law. It suggests that the individual, who has committed a crime, understands the nature and the meaning of the act and may be held criminally liable.

People who have come of age may be exempted from criminal liability if they were in a state of "insanity" when they committed the offense. Possible causes of insanity are: intellectual deficit or long-term or short-term disorder of consciousness which has led to an inability to understand the nature and the meaning of the act or to control their actions.

The regulations of the Penal Code concerning insanity do not contain provisions regarding people with restriction of the legal capacity. Guardianship, in itself, is not pointed as grounds for exemption from criminal liability. In addressing the issue of sanity of the person with restriction of the legal capacity who has committed a crime, the court will not cite the guardianship but will investigate thoroughly whether as a result of the disability the person who committed the crime was or was not in the capacity to understand the nature of the offense and/or its socially harmful consequences.

Even placement for compulsory treatment is not related to guardianship. If the judge considers that the person who committed a crime was insane at the time of the offense, the judge may order the person to be admitted for compulsory treatment. This decision has nothing to do with whether the capacity of the person to act is reduced or not.

Placement for compulsory treatment

The placement for compulsory treatment is a medical measure imposed under the People's Health Act for people suffering from a mental disorder when they have an episode of exacerbation of the disease and when due to this exacerbation there is a high risk of committing a crime and of placing in danger the life or the health of themselves or their relatives. The guardianship is not a condition for the treatment to happen or not.

In a legal case for compulsory treatment the judge is not interested whether the person has restriction of the legal capacity but whether he/she is suffering from a mental disorder, whether he/she is in a period of a serious crisis and whether there is a serious risk of harm to him/her and/or other people. An additional issue that the judge must consider is whether the person whose treatment is discussed is in a position to give informed consent for his/her treatment i.e. whether this person understands his/her disease, the need for treatment and the consequences of medical decisions that should be taken in the course of the treatment. This consideration is not affected in any degree by whether the person was with restriction of the legal capacity or not.

From the mentioned above it is clear that the current law in Bulgaria does not connect sanity under criminal law with the legal capacity to act. One could even say that the criminal law uses an approach that is much closer to art. 12 of CRPD compared with civil law governing the legal capacity to act. The same can be said for compulsory treatment. Therefore, when discussing new legislation on legal capacity to act it is appropriate not to include in the scope of the newly drafted legal norms the issues concerning sanity under criminal law and compulsory placement

for treatment according to the procedure under the Health Act because the current legislation does not suggest a direct link between these legal categories.

➤ **“Supported decision making” as a tool for independent exercise of rights (SDM)**

The concept of supported decision making (which replaces the “substituted decision making”) is based on the idea always to taken into account the wishes and preferences of the persons. The institution of measures for supported decision making is based on the irrebuttable presumption of Article 12 of the Convention, that any individual has the recognized capacity to act and is associated with the obligation of the state parties to take appropriate measures to ensure access of people with disabilities to the necessary support for independent exercise of rights. By regulating the SDM the tools for independent exercise of rights are adequately adapted in practice with the purpose of ensuring the personal participation of people with intellectual disabilities and mental health problems.

The supported decision making includes a set of measures based on the trust between the supporter and the supported person by which fiduciary relationship the personal exercise of rights (and respect of this by all third parties) is achieved. The measures are instituted for specific areas and/or actions in case of complications in them and are always instituted for a specified period and the areas are mainly related to the exercise of property rights, conducting commercial transactions, personal choice of a place of living, and choice of treatment and realization of the right to work (not of personal rights). SDM is a broad range of measures /or legal relations/ aiming to provide the necessary support for independent exercise of rights (performance of legal actions and/or inaction) in order certain consequences to arise based on the will and preferences of the supported person. The range includes the following measures:

- preliminary measures (preliminary injunctions and long-term power of attorneys),
- contract for SDM (signed according the will of the parties or as a result of a special judicial procedure),
- joint decision making,
- facilitation (crisis facilitation).

Common to all forms of SDM is the new focus on values, namely that everyone, even those with the highest intensity should be based on and take into account the wishes and preferences of individuals not the criterion the "best" interest of individuals. The guiding principle is that when implementing the measures of SDM there should be exhaustiveness and initially the possibility to apply those with less intensity is considered. The implementation of measures with a higher intensity comes after exhausting the possibilities of applying a lighter measure.

Part of the regulation of the support measure is to ensure the avoidance of conflicts of interest and undue influence between the supported person and the supporter. Normatively should be regulated the measures for SDM, but also the safeguards to protect against conflicts of interest and the exercise of undue influence on the person.

❖ **Principles for determining the support measures for independent exercise of rights**

If we summarize what has been said so far, the following conclusion can be drawn: the general rule that should be introduced is that people exercise their rights independently and therefore take responsibility through personal actions. It is possible, however, that they do not pass the test "I understand the consequences of my actions" in one or more areas or elements of areas directly related to their everyday life and needs where decisions should be made (but not in the area of personal rights). Then it is necessary to introduce appropriate tools for the exercise of rights by regulating the support measures that enable individuals to exercise their rights

individually, according to their will and preferences, regardless of the disabilities they have in order to avoid substitution of their will with that of someone else's. These measures should be completely normatively regulated and must meet the following conditions according to the Convention:

1) Necessity and Sufficiency

The support measures should be implemented if the following conditions are concurrently present: (1) a state of mind caused by a disease, injury or intellectual disability or mental disorder, and (2) as a result of which the person does not pass the test "I understand the consequences of my actions" and therefore experiences lasting difficulties or is unable to exercise rights and assume obligations independently. The presence of the described set of conditions leads to the establishing of a *specific right of support* in the exercise of rights of people with disability, without the latter losing their legal capacity to act.

2) Respect for the wishes, preferences and values of the person

Support measures for dealing with personal matters should imperatively be carried out and implemented in compliance with the will and preferences of the person. Always and necessarily the will and preferences of the person with a disability are considered as the first condition with the exceptions when the decision is taken by another (e.g. in facilitation procedure). The impossibility to express one's will and preferences independently in the usual way is not a prerequisite to disregard them and a possibility for their expression should be provided. This should and can be achieved by appropriate specialists and/or loved ones who can help to understand the wish/ wishes of the disabled person.

3) Proportionality

The measures must correspond to every specific case and the status of the person and should be imposed in such a scope as may be necessary (only for the affected areas). The identification of specific support measures should be only with respect to those activities for whose performance the individual needs support. For all other legal actions it should be accepted that the person is acting completely independently.

4) Duration

All measures are for a limited period of time. The period of time for which they are instituted depends on the objectivised will of the supported person, when the measures are implemented not by a judicial procedure, and on the assessment of the need for support of the person at the time of the institution of the respective measure in the hypothesis when the court is approached. With respect to any measure of SDM implemented as a result of judicial proceedings and instituted for a period longer than three years a mandatory periodic review of the need for them should be regulated (for example, every 3 years)

5) Avoidance of conflict of interest and undue influence

The legislation needs to regulate what person can be a supporter, and to impose an explicit ban on those persons who cannot be supporters in order to avoid conflict of interest⁶¹.

6) Flexibility of measures

⁶¹ For example, German law has introduced such a ban with respect to directors of specialized institutions.

A legal possibility and a regulation of the appropriate mechanism for changing the measures within the initially defined period of time due to changes in the dynamics of the person's status⁶².

7) Participation of the person

The supported person should have the opportunity at any time to start proceedings for implementation, modification or termination of the measure. Their right to participate personally in all related administrative and/or judicial procedures, to express their will, to submit applications, to receive legal assistance and more should be ensured. Such an opportunity should be provided for a range of people close to the person and for the prosecutor or for the professionals who work with the person, including civil organizations whose activities are related to people with disabilities (people with mental health problems and/or intellectual disabilities) and/or protect their rights and interests.

❖ Safeguards

Since SDM will only apply to actions with legal consequences, support measures should be instituted by the court in special proceedings order following their sequence and exhaustion of the possibilities of the previous measure.

General safeguard against :

- a) ungrounded applications for the institution of the measure,
- b) the risk of instituting a measure that is not consistent with the individual needs of the person,
- c) the risk of abuse of the state of the person by the applicant and
- d) guarantee that the use of the procedure is only for the purpose of providing timely support according to the specific needs of the person; the responsibility of the court to perform the following actions for any legal proceeding, no matter for what kind of measure this applies and who is requesting it should be regulated explicitly: - revision of the test "I understand the consequences of my actions" and/or verification of the cumulative presence of the elements of the two-step test.

Special safeguard:

When the choice of selecting a place of living concerns the placing in institution a special decision of the court is needed. Institutionalization is a kind of imprisonment⁶³.

That is why it is necessary to be done only as a last resort after exhausting all other possibilities for life in the community as determined by the court which should investigated the matter. A change of the Social Support Act and art. 40 et seq of the Regulations is needed in accordance with Art. 5 of the ECHR which should stipulate that the placement of persons who are subject to measures of SDM shall be performed after:

- ✓ evaluation and granting of their consent to live in the institution on the basis of the information about this institution ;

⁶² For example: when evaluating the abilities of the person it is found that he/she has difficulties to form independently his/her choices and to make decisions related to property management and/or exercising of parental rights. Accordingly the measure guardianship for a certain period is instituted. During this period the person's status changes and they now develop skills for independent decision making and exercise of rights in areas for which a guardian has been appointed. An opportunity should be provided within the specified period of time to refer to the competent authority for appropriate change of the measure.

⁶³ According to settled case-law of the ECtHR.

- ✓ placement to be made by a court order for a certain period of time by specially trained judges after checking the exhaustion of all services, assisted living in the community and on the basis of the information provided to the court about the institution/institutions where that person will be placed;
- ✓ appeal procedure for placement to which the person to whom the service is supplied has direct access;
- ✓ periodic judicial review of the placement and its duration to which the person to whom the service was rendered has direct access.

❖ **Procedural approaches for conducting a "two-step" test and evaluation of the fiduciary relation**

1) **Hearing of the potential supported person and supporter**

This hearing should be organized under appropriate amicable conditions. It should be simply a conversation in which the judge will be able to understand the actual relationship between the potential supporter and supported person. Prerequisites in conducting the hearing are:

- compliance with the terms of confidentiality and secure environment for the potential supported person and supporter;
- possibility that the hearing is held in camera;
- ensuring confidentiality of the shared information before the judge;

2) **Questioning of the closest people (the people they know well) of the potential supported person and supporter.**

3) **Expert's appraisal but as an additional evidence only** if the first two techniques to verify fiduciary relationship are insufficient.

A process aimed at identifying a *fiduciary relationship* must comply with the following rules:

- 1) **Confidentiality** – exploring the relationship between man seeking support and the prospective supporter under the conditions of special, predisposing atmosphere which creates trust. Keeping secret the shared information should be guaranteed if the circumstances require it or one of the parties requests it.
- 2) **Comprehensiveness and activity of the court.** An opportunity for the court to act on its own initiative and to guide the parties to take certain actions, etc must be provided.
- 3) **Consideration of judicial cases by additionally trained professionals only.**
- 4) **Respect for the feelings and perceptions of people with disabilities**, even if they are not formulated "correctly" in terms of normal communication.

❖ **Supported decision making: measures and procedures**

In the next few paragraphs are presented the specific measures for supported decision making and the procedures for their institution we propose that should be provided in law, taking into account the principles listed above.

1. Contract for supported decision making between the supported person and the supporter in an out of court procedure

Key features and characteristics: formal (written form for validity), bilateral agreement, *Intuit personae*, for definite or indefinite period of time, opposable to third parties after its entered in a special register. Objects of the contract is the fiduciary relationship between the parties, and its legal consequences are expressly regulated by the law

1.1. Entry into force

The factual attributes of the contract include: 1) the conclusion of a written agreement between the supported person and the supporter and 2) the entry of the contract in a special register⁶⁴. Entry of the contract in the register makes it opposable to third parties and has probative value against them i.e. the existence of a registered contract should oblige the third parties to accept the will of the supported person as legally valid *without requiring formal participation of the supporter in the performance of the legal actions*. When the support rendered under the contract relates to the conclusion of commercial transactions for which a qualified form of authorization is needed (e.g. a title deed), the contract should be preliminary approved by the court within the judicial procedure.

1.2. The minimum required content of the contract

The minimum required content of the contract for supported decision making should be provided by law. It should include:

- 1) Identification of a specific area for which the supported decision making will apply (one of the decisions comprehensively stipulated in the law related to: the choice of a place of living, commercial transactions, choice of treatment, exercising parental rights, disposal of property);
- 2) Individualizing features of the parties to the contract;
- 3) The rights and obligations of the parties to the contract;
- 4) The responsibility of the parties for breach of contract;
- 5) Effect of the contract to third parties.
- 6) Procedure for resolving a dispute between the supported person and the supporter - it should be clear that if there is a disagreement between the persons the supporter must be able/need to take certain actions in order to avoid liability.

1.3. Rights and obligations of the supported person

- 1) The right to perform legal actions independently, unless otherwise provided in the contract;
- 2) The obligation to act in good faith;
- 3) The obligation to inform always the supporter about his/her intention to conduct commercial transactions and what they are.

If the supported person fails to perform this obligation this should be deemed as a reason for unilateral termination of the contract by the supporter. Exercising the right to terminate the contract should be subject to the occurrence and timely fulfilment of two obligations on the part of the supporter: 1) to initiate legal proceedings to review the status of the supported person and 2) to apply for entry in the register a notice of termination of the contract. By fulfilling these two obligations the supporter is released from liability for damages after the time of entry of the

⁶⁴ From now on in this document the reference to "the register" shall mean the special register described on page 31.

cancellation in the register but is not relieved of his/her responsibility in relation to the supported person for failed legal actions and foregone benefits. If he/she does not fulfil any of its obligations the supporter should be liable for actual damages and foregone benefits in relation to the supported person.

1.4.Rights and obligations of the supporter

- 1) The obligation to study the true preferences and desires of the supported person;
- 2) The obligation to actively gather information about the relevant decision;
- 3) The obligation to respond to a risk of interest infringement by initiating a procedure for changing the measure;
- 4) The obligation to act in good faith and with due diligence;
- 5) The obligation to initiate the procedure for changing the measure when the fiduciary relationship is broken down. The fulfilment of this obligation relieves the supporter of responsibility;
- 6) The right to terminate the contract unilaterally.

1.5.Responsibility of the parties in breach of contract

The supporter is liable for any damages or foregone benefits (owes compensation) if they are the result of failure to fulfil the obligations under the contract. There will be a relieve from liability of the supporter in the hypothetical case when the supported party has failed to fulfil its obligation to inform (default on the part of the supported person) that he/she intends to enter into commercial transactions and the supporter has begun to terminate the contract after fulfilling his/her two additional obligations in which case, however, the supporter remains responsible for the foregone benefits.

If there is no failure the supporter is relieved from liability i.e. the supporter bears no objective responsibility.

1.6.Effect of the contract to third parties

- The contract becomes effective to third parties at the time of its registration. Third parties who enter into a legal relationship with the supported person have the obligation to perform an official verification in the register where a contract and/or court decision to institute the supported decision making is entered;
- The third parties are required to comply with the contract otherwise - to start litigation proceedings;
- If despite the existence of a contract for supported decision making, the third party refuses to sign a contract with the supported person, but does not initiate litigation proceedings to review the status, the third party is liable for damages or foregone benefits to the support person.

1.7.Termination of the contract

Grounds for the termination of the contract is the following hypothesis: if the supported person takes action that can seriously damage their property interests, despite the support provided by the supporter the supporter should sent a notification letter for entry in the registry that the fiduciary relationship has broken down (he/she does not want to be supporter of that person) while at the same time he/she has the obligation to initiate litigation proceedings in the court for review of the status of the supported person.

1.8.Safeguards

The safeguards (guarantees) which should be regulated: in view of the protection of the rights of the supported person, minimization of the risk of negative consequences for the parties resulting

from a conflict of interest between them and against abuses on the part of the supporter are the following:

- legal regulation of the minimum content of the contract;
- provision of a statutory deadline for implementation of the statutory duties of the supporter and penalty for non-compliance (unless they were not performed due to objective reasons).

2. Litigation Proceedings in relation to the contract for SDM: Individual choice (Person Appoint)

Specifics: This measure of supported decision making should be implemented as first possibility and only when some of the requirements for its application are not met, then to proceed to the next measure Supported choice (Supporter Apply). The measure "independent choice" is instituted on the basis of a court decision that stipulates the conclusion of a contract for supported decision making (see point 1 above) - when there is no prior contract or which "approves" an already concluded contract for supported decision making - where such support shall refer to the performance of legal actions for which special legal form of authorization is provided.

2.1. Scope of litigation

The scope of litigation will be confined to cases where for a person with a disability *the following three cumulative conditions* are present:

- 1) the person does not meet one of the four criteria on which the test "I understand the consequences of my actions" is conducted; evaluation shall be carried out by the court in person or by a court-appointed multidisciplinary team, including a speech specialist/social worker, psychiatrist, psychologist and other specialists if necessary. The team should assess the functionality of the person in different areas according to the standards for the assessment of disease and disability approved by WHO - ICF. Outside these specialists the team must include a person who works or is otherwise closely associated with the disabled person and knows his habits, modes of communication, decision making, as well as the expression of preferences;
- 2) there is a need for decision making and/or for resolution of legal matters falling among the areas expressly and exhaustively listed in the law, including: the choice of a place of living, conclusions of a contract, choice of treatment, exercise of parental rights, disposal of property;
- 3) the support of a trusted person (*supporter*) is necessary for making this particular decision and/or for resolving this particular matter.

2.2. Persons entitled to initiate litigation procedure ("stakeholders")

The following categories of people shall have the right to initiate litigation procedure:

- 2.2.1. The person against whom institution of the support measure is requested. This right will be always exercised personally, regardless of whether another measure of support has been imposed on the person, or there is a contract for supported decision making in a particular area;
- 2.2.2. The spouse, relatives and friends of the person;
- 2.2.3. The persons who provide professional support and care of the person such as a social worker, doctor, etc.;
- 2.2.4. The prosecutor;

2.2.5. The authority on the legal capacity to act following a warning by any third party which has or would have a legal interest (in this case, the third party must prove that it has made *every reasonable effort* and despite it is not certain whether the person is protected from performing legal actions).

2.3.Procedural rights and obligations of the supported person and the supporter

2.3.1. The supported person has:

- 1) The obligation to assist justice. Reluctance to assist the court (for example - does not want to have supporter, but the need for such person is established or cannot indicate a trusted person or the person designated as a trusted person does not wish to be identified as supporter) should be grounds for commencing the next procedure, and the termination of this procedure;
- 2) The right to designate a supporter. If the person for whom the procedure is initiated does not exercise this right or the court establishes during the hearing that the two persons have no fiduciary relationship but at the same time it has established the need for support the court should commence the next procedure;
- 3) The right to legal representation. If the person fails to designate such a person, then the court shall appoint one official (legal aid);

2.3.2. The supporter has:

- 1) The obligation to appear in person before the court and to express his/her opinion orally or in writing;
- 2) The obligation to assist justice. If he/she does not fulfil this obligation, the person designated as a trusted person is excluded from the procedure.

2.4.Hearing the case

The hearing of the case should proceed in the following stages:

2.4.1. Stage 1: Verifying the admissibility of the application by the court

During the verification, the court should:

- verify and establish whether the applicant is a person eligible by the law to initiate litigation procedures (i.e. he/she is in the group of “stakeholders”). When the procedure is initiated by a person falling within groups from 2.2.1. to 2.2.4., the court should establish only the capacity of the person and in the case of a person from group 2.2.5., the court must establish whether there is a legal interest. It is also relevant to the legal regulation of the minimum content of the act with which the procedure is initiated and is filed by a "stakeholder" (i.e. the application). When an applicant is a person from one of the groups from 2.2.1. to 2.2.4., the court should conduct an official inquiry on the basis of information in the records of civil status. When the initiator is a person from group 2.2.5., he/she should present evidence of legal interest at the time of filing of the application in order to save time at the hearing of the case;
- to verify and establish whether the decision/matter for which the procedure is initiated is among those areas which are comprehensively and explicitly stipulated in the law.

2.4.2. Stage 2: Hearing the case in court (court proceedings de facto)

The hearing should be conducted in camera as it concerns matters of a very personal/intimate nature of the parties .

During the hearing, the court should carry out the following actions:

- **Action 1: Expert’s appraisal** of the test „I understand the consequences of my actions”. The test consists of holding a conversation with the person and if the collected information and impressions are not sufficient to form an opinion on the extent to which a person passes the test to carry out an assessment of functioning. The assessment should

be carried out by a multidisciplinary team including speech specialist/social worker, psychiatrist, psychologist and other specialists if necessary. The team should evaluate the functionality of the person in different areas according to the standards for the assessment of disease and the disability approved by WHO - ICF). Outside these specialists the team should include a person who works or is otherwise closely associated with a disabled person and knows his/her habits, modes of communication and decision making, as well as the expression of preferences. The court appoints the experts.

Possible results / findings of the court following Action 1

- 1) The person passes the test and as a result the case should be terminated and the court rules refusal to institute the measure of supported decision making;
 - 2) The person does not pass the test and as a result the court proceeds to Action 2 .
- **Action 2:** the court must identify at least one person (trusted person) who knows the person and can give the best interpretation (explanation) of the will of the person in the specific circumstances and context.

Possible results/findings of the court following Action 2:

- 1) Absence of criterion is established 2) and therefore the court should take actions to implement the next measure for supported decision making (point 3);
 - 2) A presence of both criteria is establish and therefore the court proceeds to Action 3.
- **Action 3:** constituting the supporter (trusted person)
- 1) The person for whom the measure for supported decision making refers should declare in person before the court who is the supporter. This declaration should be done with the personal appearance before the court during the hearing or if the person's condition does not allow it - the court should do what is necessary to obtain this information directly from the person.
 - 2) The supporter thus designated should be summoned by the court to appear in person to be heard;
 - 3) The court must examine the fiduciary relationship between the parties (see page)

Possible results/findings of the court following Action:

- 1) The court establishes that there is no fiduciary relationship i.e. it does not qualify as such (for example the designated for supporter declares that he/she does not want to be a supported) and then that person may designate another person as a supporter (the court verifies any fiduciary relationship, etc.);
 - 2) The court establishes there is a fiduciary relationship and therefore proceeds to Action 4.
- **Action 4:** enactment of the court decision which designates the supporter and stipulates a contract between the supported person and the supporter to be concluded and the contract to be entered in the register.

Hypothesis 1: if there is no prior contract for supported decision making, with the court decision, the court should designate the supporter with regard to the specific matter/decision in respect of which the proceedings were opened i.e. the court should act in its binding competence in relation to the said trusted person in the proceedings. On the basis of this court decision both parties should sign a contract for supported decision making.

Hypothesis 2: if there is prior contract for supported decision making then the court decision:

- 1) Will give strength (validate) the concluded contract in the cases in which support is provided for decision making/conducting commercial transactions for which the law stipulates a special form of authorization (e. g. a title deed);
- 2) Will designate a supporter with regard to the specific matters/decision for which the procedure is initiated and will suspend the action of the contract for supported decision making with the other supporter for the same matter/decision (if there is such contract concluded prior to the court proceedings). In this case, the dispositive section of the court decision should be entered in the register.

- **Effect of the court decision**

The court decision has the force of *res judicata* to the supported person and the supporter he/she designated. After the entry into force of the court decision any subsequent change of the supporter at the will of the supported person must be done in legal form. If the supported person has initiated the procedure and the court decision has granted his/her wishes then the supported person could appeal the decision. If the supported person fails to comply with his/her contractual obligations under the contract for supported decision making concluded on the basis of the court decision, then the supporter has the right unilaterally to terminate it with the ensuing two additional obligations .

The court decision should be entered in the register. The entry acts as a notification to third parties and has evidentiary value concerning the circumstances referred to in the court decision.

2.5.Safeguards

The safeguards that should be regulated in view of the protection of the rights of the supported person by taking into consideration his/her will and preferences, minimization of the risk of unjustified lawsuits and when the purpose of the initiated procedure is only with a view of providing timely support according to the specifically identified needs of the person are the following:

- The right of the person to instigate independently an action for establishing that he/she can cover the 4 elements of the test "I understand the consequences of my actions" and to request elimination of all support measures, regardless of who initiated the court proceedings;
- Review of the eligibility of the application initiating proceedings before the court based on the following two criteria: 1) the eligibility of the applicant and 2) whether the decision / question to which initiate the proceedings refer is among the exhaustively and expressly mentioned in the law areas;

- ❖ **Facilitation (crisis facilitation)**

This measure is imposed when there is an exclusive urgency in particular circumstances. The aim of the measure is to appoint a facilitator and to constituted and individual council to make concrete decisions about a particular person, regarding to his/her will and preferences.

1. Grounds for initiating the procedure for facilitation

The facilitation procedure can be initiated only after all possibilities for instituting the measures for support decision making have been exhausted. Furthermore, in order to proceed with the facilitation *at least one* of the following prerequisites must be present:

- ✓ there is an obvious risk of serious loss of property or an imminent risk of serious or irreversible harm to the person or their relatives ("*Serious advert affects*");

- ✓ when the person expresses a preferences at some point, but these preferences are in great conflict with previous expression of will(with preliminary measures, or SDM);

2. Scope of the procedure for facilitating

The commencing of facilitation procedure should be limited to the need to take decisions solely on the following matters:

- choice of place of living;
- disposal of movable or immovable property over certain value;
- choice of urgent medical treatment.

3. Persons eligible to initiate facilitation procedure:

Anyone can send a request to the authority on the legal capacity to act to initiate this procedure.

4. Characteristics of the procedure for facilitating

The facilitation procedure has the following stages:

4.1. Stage 1: Approaching the authority on the legal capacity to act

After being approached the authority is obliged to collect evidence of the grounds for initiating facilitation procedure (see point 1). If it considers that there is sufficient evidence for the appointment of a facilitator, the authority on the legal capacity to act is required to approach the court to pass a decision on the measure within specific motion proceedings (Stage 2 - first hypothesis)

If the authority refuses to approach the court, any person who has a legal interest may initiate specific motion proceedings before the court to pass a decision on the facilitation measure. The person who approached the court should prove his/her legal interest and the reasons for institution of the measure (Stage 2 - second hypothesis)

4.2. Stage 2: Institution of the facilitation measure by the court

The facilitation procedure cannot be longer than 6 months/year.

4.3. Stage 3: Appointment of facilitator and constitution of individual council

On the basis of the decision of the court the authority on legal capacity to act (an authority at the local municipal council) appoints a person to be a facilitator among those included in a preliminary list (like the experts with the courts). Inclusion on the list is preceded by a selection procedure in which candidates are assessed whether they meet certain criteria stipulated by the law.

5. Characteristics of the position of "facilitator"

5.1. The activity of the facilitator is non-gratuitous and is paid under a civil contract concluded with the municipality in which the competent authority on the legal capacity to act is.

5.2. Obligations of the facilitator:

- ✓ to organize the activities of the individual council and monitor how those involved in the council act in view of/interpret the best wishes of the person in the specific circumstances and within the specific context;
- ✓ to actively gain information that will be important for making the specific decision,
- ✓ verify the presence or absence of conflict of interest/undue influence in relation to the individual members of the council,
- ✓ to approach the court in case the process cannot continue in a way that ensures that the decision is to the best wishes of the person.

- ✓ to monitor to what extent the persons included in the council act in view of/ interpret the best wishes of the person under the specific circumstances and in the specific context complying with the following mandatory criteria :
 - the interpretation is not based only on the external behaviour and condition of the person;
 - all relevant factors are taken into account;
 - all reasonable efforts are made in order the person to make the decision independently;
 - the circumstances to supporting treatment are specifically discussed;
 - past and present wishes and feelings, beliefs and values of the person are taken into account;

6. Individual council

The mayor convenes the council following the procedure mentioned above.

6.1. Composition of the individual council: „mandatorily represented” persons who the person designated in the previous measures as people close to him, social services workers who work directly with the person, the social worker from the Directorate for Social Support in charge of the case) and alternatively represented (the treating physician, the GP, NGOs - advocate).

6.2. Decisions which the Individual Council makes:

6.2.1. supporting decisions: these are decisions that do not have immediate legal consequences and are associated with providing the necessary support for the person. These decisions are not subject to registration;

6.2.2. restrictive decisions : these are decisions which have direct legal effects (e.g. - those that are related to the restriction of a specific right of the individual to whom a certain measure has been instituted)

6.2.3. blocking decisions:

6.2.4. regulatory decisions, but only in the cases prescribed by law, *where the aim is* the immediate protection of the life, the health or property of the person from direct damage,

The decisions under paragraphs 6 . 2.2 . - 6.2.4. are specific they are of temporary nature and are subject to entry in the register. They can be attacked by:

- any person with a legitimate interest, with the exception of professionals (doctors, social worker/s of the person and the like) who sit on the council in a professional capacity,
- the person,
- relatives an friends;
- non-governmental organizations which have representative functions in relation to the person/advocate.

7. The safeguards that should be regulated in view of the protection of the rights of the supported person who is in the process of facilitation by taking into consideration his/her will and preferences, minimization of the risk of unjustified lawsuits and when the purpose of the initiated procedure is only with a view of providing timely support according to the specifically identified needs of the person are the following:

- expressly indicated range of decisions concerning the procedure;
- requirement for cumulatively existence of one of the specific grounds for the initiation of the procedure and the inability to apply another measure;
- wide range of individuals in the individual council including the possibility of including NGO representatives (see arguments below) ;
- the decision on the institution of the measure is made by the court.

❖ **Joint Decision Making.**

This is a specific support measure under which the supported person acts jointly with the supporter and to be legally binding his/her actions it is necessary to objectify both wills. It should be constituted in relation to adults who have difficulty exercising their rights especially in the areas of life connected with management and real estate transaction and financial assets. It is instituted only for areas and activities where the court expressly finds that there is a permanent and severe difficulty for independent enjoyment of rights through personal actions. In all other areas, the person concerned can act completely independently and without any restrictions. In the mentioned in the court decision areas/activities, decisions are made jointly by the person under this measure and supporter person. **An important element is that in this case the wish to institute this measure should be made by the person himself/herself and the supported must be designated by him/her.** It is possible to constitute a *joint decision making* only if the person has expressed his/her will for this to the competent court.

The safeguard that should be regulated under this procedure to ensure maximum protection of the rights of the person are the following:

- Mandatory personal hearing of the person without exception;
- Mandatory comprehensive expertise's appraisal in the composition of which are included: a psychiatrist, psychologist, social worker or a related expert, expert (s) on communication, persons who know the person, the treating physician of the person concerned and/or social worker in a fiduciary relationship with him, etc.;
- Action of the court to determine the nature of the relationship between the person and the person who will support him/her in making decisions. The fiduciary relationship should always be preferred over all other;
- Areas that will be affected;
- Duration of the measure.

❖ **Preliminary Measures**

Preliminary measures are unilateral formal declarations of will which have conditional implications (if a condition occurs resulting in difficulty or inability for the person to make decisions independently and/or to express them'). In their legal nature they are unilateral, bespoke, formal legal contract (in writing with notarized signatures and content that is entered in the register. Such prior declaration of will may be made by any person without a medical diagnosis, intellectual disability or other disability. It may contain different provisions for possible future time when the above condition will occur.

Measures of this kind will be important for initiation of proceedings to institute the measures for supported decision making or custody and will be binding for the court (if they meet the requirements of the law) and all the rest, after passing a decision in which they (or the relevant section complying with the law) are identified as required in the future.

Preliminary measures represent an alternative that provides a legal possibility to respect the will of the people in terms of conditions leading to difficulty or inability for the person to make independent decisions and/or to express them They represent a form of declaration of will that takes effect due to circumstances affecting the ability of autonomous decision making and the exercise of rights through personal actions (e.g. episode of mental illness, progressive dementia, Alzheimer's disease, terminal conditions with impairment of consciousness and other diseases). Preliminary measures are taken by persons who have all the prerequisites to perform legal actions independently through personal actions at the time of implementation of the measure. Preliminary measures can be taken by individuals who need assistance in exercising their legal capacity and therefore are included in the system of supported decision making.

Regardless of their type preliminary measures should contain:

1. guidelines and requirements for the process of decision making;
2. the extent of matters which the third party is empowered to decide;

3. declarations of will concerning what the person would not want to happen to his/her rights or his personality after the occurrence of the moment, which puts into effect the instrument itself;
4. identification of the events that put the instrument into effect and possibilities for its dynamic exclusion and inclusion. The latter is relevant especially for persons with mental disorders who would need the effect of the measure during an episode and would like to exercise their rights independently through personal actions in remission.

Preliminary measures are of two main types: preliminary declarations and long-term power of attorneys and it is possible to create hybrid instruments. Preliminary measures are legal means that allow to take into account the will and preferences of individuals (although there is a substitution in the expression of will). Preliminary declarations and long-term power of attorneys have similar components that need to be regulated and provided in future legislative changes. Also, each of these measures has its own specifics, which should also be taken into account.

The safeguards that should be provided to protect the rights of the supported person are:

- Inapplicability of preliminary measures regarding rights *intuito personae*;
- Inability to change, withdraw or suspend the preliminary measures of a person who is in crisis but who can be reviewed in the "lucid" moments with all the attendant legal consequences in cases where the person only limits his/her autonomy with the preliminary measures;
- Inability to change or withdraw the preliminary measures by the person when a court decision has entered into force in the cases where instructions are given on how to make decisions, the scope of these decisions is determined and the person who will perform them provided that the ability of the person issuing the preliminary measures to act independently is **irreversibly** affected as a result of disease or disability;
- Regulation of the mechanisms for control over the authorized person ;
- Providing mechanisms to engage the will/consent of an authorized person for the implementation of the power of attorney when put in effect (e.g. through legal requirement at the time of entry into force of the power of attorney to enter into a contract for the implementation of the actions referred to therein in which contract the will of the authorized person is objectified) .
- The declaration of will in the preliminary declaration which determines the third party as a supporter within the procedure for SDM should not in itself produce an effect without the corresponding decision of the court which determines the measure "supported decision making " ;
- In the proceedings for the determination of the specific measure of supported decision making the court should take into account the wishes of the person that a certain person will be his/her appointed supported expressed in a prior statement but after reviewing the presence of the legal requirements and prerequisites, the fiduciary relationship and absence of conflict of interest and undue influence;

1. Preliminary declarations

These are unilateral declarations of will which have occurred in practice as documents in which the person gives instructions what action (factual and/or legal) and medical treatment to be taken if he/she happens to be in a terminal or other situation.

Preliminary declarations can be successfully used when a permanent difficulty or inability occurs and the individuals cannot make independent decisions and/or objectify them. It is possible to express will and therefore provide instructions regarding the place of residence for example (whether he/she wants to be placed in a specialized institution), which person to be designated for his/her supporter, what are his/her preferences for undergoing treatment and in general what the person would like to happen in a state of inability to exercise their rights independently through personal actions. Preliminary declarations may also contain guidance on the process of decision making.

2. Long-term power of attorneys

These are the kind of preliminary measure by which the person forms a preliminary personal decision whom to delegate the right to make decisions for him and on his behalf in connection with his affairs, health care, place of living and other important issues in respect of which he/she will experience difficulties in performing them independently through personal actions.

The long-term power of attorney determines the extent of matters and the type of decisions that should be made by the third party and it is possible to specify guidelines and procedures in making these decisions. With long-term power of attorney the person alone designates and authorizes a third party to represent him/her and in his/her name and on his/her behalf to make decisions concerning his/her person and property, upon the occurrence of certain circumstances that affect his/her ability to independently take decisions and effectively to exercise his/her rights through personal actions. The long-term power of attorney requires the following key issues to be addressed:

- the scope of representative power and what rights cannot be included in the scope of the long-term power of attorney;
- the circumstances under which the power of attorney comes into effect and the mechanism by which the long-term authorization will flexibly come into force and be excluded respectively when the ability of the authorizing person to exercise his/her rights independently is restored;
- conditions for withdrawal of long-term power of attorney and the legal consequences;
- the power of attorney under Bulgarian law is an unilateral declaration of will, which is not binding on the authorized. To fulfil its purpose the long-term power of attorney should have guarantees for the person who makes it that the authorized person will actually take care of his/her matters and will represent him/her in the way stipulated in it, in accordance with the given instructions and guidelines.

All preliminary measures specify the circumstances that enter them in force. However, in respect of the long-term power of attorneys, especially in the cases where they are used by people to protect them from their uncontrollable will, in a situation of crisis, the circumstances that put the power of attorney in force should be very precisely regulate as well as those which terminate its operation. These changes in the effect of long-term powers of attorneys should also be entered in the register for which it is necessary to ensure the active involvement of the authorized person/persons.

Long-term powers of attorney reveal in different ways their effect in terms of persons suffering from mental disorders which have big dynamics and in terms of persons whose loss of cognitive abilities develops progressively and unequivocally to full dementia. In people with mental disorders their role is more to protect people from the legal implications of their uncontrollable or compromised will at times of crisis, so that people consciously limit their

autonomy until the critical moment passes. In people with dementia and other similar conditions, the purpose of these power of attorneys is to provide guidance on how to decide on their matters and to be protected from actions they would not want to happen after the occurrence of the circumstance which puts the power of attorney in effect, which is usually irreversible.

❖ Necessary structural and institutional changes

To meet the obligations of States Parties to the Convention it is necessary to meet all requirements for a change of environment, so that all persons without disabilities can exercise their rights effectively and to "enjoy" that. Thus, in view of the anticipated changes in the Bulgarian legal framework it is necessary to develop a system of authorities whose functions in view of the new concept is to ensure adequate and maximum implementation of legal institutions, ensuring that their goals will be achieved.

- **Proposed structure:**

The new structure of authority should provide three key functions:

- 1) **function of protection:** results from the constitutional requirement to protect all persons who are at risk - lack of care, inability to cope alone, the presence of another factor which as a direct consequence will lead to social exclusion.

In view of the Bulgarian context and historical development of the systems of protection these should be functions performed through the powers of social services and their main obligations should be directed at immediate reaction and taking protective measures and directing to measures for support. In this sense, they should be constituted as a party to the above mentioned proceedings, but only as such and will no longer be able to lead the process on behalf of the person. Another obligation should be to provide information (and actively collecting of such) and to participate in the evaluation of the person, referral to services and participation in the common action plan. Anyone who becomes aware that a person is at risk, should be obliged to refer to them.

- 2) **function to ensure the exercise of legal capacity to act** - stems from the state's obligation to ensure the identity and uniqueness of each person, and the obligation of the state to assist in the exercise of rights, which in turn includes the obligation to ensure that to everyone (regardless of the situation and state he/she is) will provide a process by which his/her will would be leading in making decisions concerning the exercise of his/her rights.

This function is implemented in the following ways:

- Litigation procedure, which sets out measures to support the legislation standards and safeguards provided in the Convention;
- Keeping a special register and entering the measures in it;
- Support the organization of the process of facilitation and the monitoring of the measures;

The mayor as the current authority on guardianship and custody should be kept as an authority with specific powers, but under different name – authority on the legal capacity to act . As an authority on the legal capacity the mayor will have the following obligations:

- In cases where it is known that a person cannot exercise his/her rights to organize the necessary procedures;
- To ensure the involvement of all stakeholders;
- To enter/delete circumstances off the register;

- To appoint crisis facilitators and to convene the individual council when facilitation measure is instituted with a court decision;
- To actively gather information and to maintain a specific fund with which to pay the designated facilitators.

Register for recording support measures

The specified support measures are entered in a special register within the National Database "Population" (this could be the personal registration card in the population register within the meaning of Art. 22 et seq of the Civil Registration Act ESGRAON). Not all third parties will have access to the register, but only certain third parties (notaries public , banks, business organizations)..

3) The function of instituting measures providing an independent decision making: this authority must meet the criteria for being impartial, independent controlling authority. In the Bulgarian context, this can only be a judicial authority and in this case the most suitable of the judicial system is the district court, in order to ensure maximum accessibility for persons to participate in the proceedings.

❖ The possibility NGOs to intervene in cases on behalf of the person

In the new legislation on legal capacity to act and supported decision making it should be possible organizations to institute proceedings to determine support measures, to intervene in such proceedings, to request change of certain measures (changing to another measure or termination)

For Bulgarian legislation such an approach is not entirely new: According to Art. 71 para . 2 of the Protection Against Discrimination Act "*trade unions and their branches and legal persons who are non-profit organisations operating in the public interest can make a motion of behalf of the people whose rights have been infringed upon their request. These organizations may join as interested party in pending litigation [...].*"

Obviously, the legislator has expanded the scope of persons entitled to claim the right to intervene in the proceedings already instituted beyond the circle of those directly concerned, based on the understanding that it is a relationship in which the people concerned may be extremely vulnerable and unable (factually or emotionally) to protect their rights

People with mental health problems or intellectual disabilities are often more vulnerable, forced to live in a situation of heavy dependence or are particularly vulnerable because of the nature of the disease or disability. It is also possible they to be unable to articulate their needs clearly enough. It is therefore appropriate in the future legislation the capacity to act and support decision making to adopt an approach that would allow a wide range of interventions from organizations.

Of course, not every organization should have these rights, but only those who are active in supporting people with disabilities. These can and should be non-governmental organizations operating in the public interest, the objects of which include objectives related to protecting the rights of people with mental health problems or intellectual disabilities, social support for people from these groups, provision of social services. The need for their inclusion comes from the fact that very often they are the first to recognize the need for support measures for one person. They are able to track the development of a case, they have a wealth of information for the people of the region in which they operate and often have the resources to support .

❖ Comatose state - the status of absentee

In Bulgarian legislation there is a significant gap regarding persons who are in coma and the issues related to their legal capacity to act. The Coma is a border state between life and death⁶⁵ and can occur in many diseases that lead to primary or secondary damage to brain structures. Consequently, those in coma do not cover the test "I understand the consequences of my actions". To them as a rule are not available the other two elements, namely the existence of a will/desire of the person, the presence of at least one person who knows him/her and can give the best interpretation (explanation) of the will of the person under the specific circumstances and context.

In the presence of such a hypothesis to avoid substitution and to make decisions consistent with the wishes and preferences of individuals with regard to the exercise of their civil rights, the tools of the preliminary measures could be use. Every person has the legal option to prepare preliminary instruction or a long-term power of attorney as appropriate. As has already been noted the preliminary measures represent an alternative that provides a legal possibility to respect the will of the person in terms of the conditions leading to difficulty or impossibility for the person to make decisions for themselves and/or to express them. In this case the coma should be the circumstance that puts into effect the appropriate preventive measure

However, if the person in coma has not prepared in advance such instruction or power of attorney then *litigation proceedings for declaration of the status of absentee* (on the model of in absentia in the Persons and Family Act) should be stipulated. The purpose of this procedure is to designate the person to replace the will of the person in coma in the exercise of his/her rights and decision making until its possible recovery or death.

⁶⁵ Medical and Legal Problems of Death – terms and definition. Dr. Stoyan Stavru