



Incapacitation as a Mean of Protecting the Dignity of the Persons with Disabilities in the view of Convention on the Rights of Persons with Disabilities

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Abstract

The institution of incapacitation is perceived in the context of the assurance of legal support for people who, due to the condition of their health and to other circumstances, require such support. Pursuant to Article 12 of the Convention on the Rights of Persons with Disabilities: States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law (Section 1) and they enjoy legal capacity on an equal basis with others in all aspects of life (Section 2). In this article, I present selected premises of incapacitation as protection of the rights of persons with intellectual disabilities according to the provisions of the Convention and the extent of their exercise in Poland. I reveal that the shape of the institution of incapacitation in Poland remains in contradiction with assumptions of Article 12 of the Convention. I discuss the criteria and the scope of limitations of a total and partial incapacitation. I present an interpretative declaration concerning Article 12 of the Convention made upon ratification. In view of the critical remarks made by the circles supporting persons with intellectual disabilities, the formula applied rarely represents a form of protection adjusted to the needs of such person, whereas it frequently deprives them of their dignity and legal possibilities of deciding autonomously about themselves adequate to their level of development

Keywords total incapacitation, partial incapacitation, intellectual disabilities, Convention on the Rights of Persons with Disabilities

Introduction

The right to respect own dignity is one of the most important rights possessed by every man. Personal dignity is the property of every person. It constitutes the most precious human welfare, which determines his uniqueness, and moreover is the key element of the equality of all people towards each other. Human rights should guarantee everyone to be able to administer himself, not to be used nor appropriated by others, not to be brought to the role of the object, but to always remain an entity. It should be stressed that dignity of the human being has fundamental meaning for the human rights. Dignity is always the overriding point of reference is incomparable with other determinants of law and cannot be changed to other values. Dignified treatment of human means that, in every life situation he/she is the entity that has the freedom of choice, and the law must be respected (Szczipal, 2012).

Incapacitation is a controversial solution. On one hand this legal instrument aims to protect a person who needs constant support with daily living. On the other hand, it causes effects that limit the freedom of actions of the person and therefore put him/her in a situation that violate his/her dignity. Due to its complexity incapacitation should be used as an exceptional measure. By the rule, every person (after reaching certain age) has full legal capacity, acts in his/her own name, and bears all consequences. According to the intention of the legislator, incapacitation is a legal tool created in order to most of all protect, people who are under the guardianship. It can be seen in two dimensions - causes and effects. First dimension includes reasons for guardianship over a person, which are essential for that person's well-being and preserving his/her dignity. The dimension of effects of the incapacitation is two-fold: one by limiting the capacity of acting on his/her own behalf the guarded person becomes protected, and two, third-parties who could suffer as a result of guarded person's actions are also protected. Protection of third parties, that is family, or legal guardians, cannot be a reason for incapacitation, it appears only as a result

of it. Distorting those proportions would lead to situations where incapacitation is not a form of protection but rather a mean of objectification and limiting human dignity.

Incapacitation in the Light of provisions of the Convention on the Rights of Persons with Disabilities

Incapacitation is normally viewed in the context of providing legal support for people who, due to their health or other circumstances, need it. The means of legal protection of people, who have problems with decision-making, should match the needs of an individual, his/her level of disability and his/her situation. According to the intention of the legislator, incapacitation is legal tools used in order to, first and foremost, protect the person who is guarded. The incapacitation should maintain a balance between the need of protection and the scope of limitations - the more help and support a person needs in his/her actions the more control and limitations he/she has (and vice versa). Central point of incapacitation is dignity and well-being of a person, who due to illness, disability, addiction, etc. is not able to function independently in the reality of social, legal, and economic laws that surrounds him/her (Cytowska, 2011).

Convention on the Rights of Persons with Disabilities adopted by the General Assembly of the United Nations on 13 December 2006 and ratified by Poland on 06 September 2012 is based on the principles of protecting dignity, individual autonomy and independence, non-discrimination, and equality of chances (Szczupał, 2012). *Convention on the Rights of Persons with Disabilities* in art. 5 assumes that the Countries acknowledge that *all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law* (point 1) and that *to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided* (point 3). Equality means an opportunity to exercise freedom and human rights. However, disabled persons are often regarded as incompetent for that and their rights and freedoms in private life as well as freedom of decision making are often limited, depending on many cultural, economic, social, and political factors (Dz.U. 2012, item 1169).

According to the Convention a disabled person has the same rights and obligations, as other members of a society, including rights to freedom and safety, right to freedom of movement, freedom of independent life, right to health, education, and employment as well as right to participate in social, cultural, and political life. *Convention* requires Member States to undertake successful actions aimed at improving the quality of life of the disabled persons. It requires re-valuing of social norms and attitudes, in order to respect the human dignity and to fully integrate the disabled persons (Dz.U. 2012, item 1169).

European Disability Strategy (2010-2020): A Renewed Commitment to a Barrier-Free Europe for Disabled Persons — COM(2010) 636 requires Member States to introduce regulations concerning the legal capacity that are in line with the idea included in the art. 122 of the UN Convention according to which: *States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law* (point 1) and *shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life* (point 2). *Legal Capacity* is enjoyed by every person from the moment of birth, it cannot be renounced, limited, or transferred to other person by means of legal action (art. 8 *Polish Civil Code*). *Acting Legal Capacity* is on the other hand, an ability to have rights and obligations due to one's own actions, according to his/her will (Civil Code, Dz. U. 1964 No 16 item. 93 as amended.; Szeroczyńska, 2012).

Art. 12 of the Convention relates to all persons with disabilities, however it has the most importance in relation to those with intellectual or psychical disability:

- point 3 requires Member States to undertake appropriate measures as to secure the disabled persons *provide access* which they may need when exercising their acting legal capacity.
- point 4 states that all measures related with exercising acting legal capacity should include *appropriate and effective safeguards to prevent abuse*.

According to the Convention means of supporting a person with disability should respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, be proportional and tailored to the person's circumstances, apply for the shortest time possible and be subject to regular review by a competent, independent and impartial authority or judicial body. All the safeguards should be proportional to an extent by which they influence the rights and interests of a given person. Art. 12 emphasises the guaranteeing equal rights of persons with disabilities to own and inherit real estates, control personal finances as well as emphasising the assurance that the disabled persons will not be deprived of their property in an arbitrary way (Szczupał, 2012).

Art. 12 of the Convention should be analysed together with their purpose, rules, and provisions of the Convention. The preamble of the Conventions recognizes *inherent dignity and worth and the equal and inalienable rights of all members of the human family* and that *everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, and discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person*. The purpose of the Convention is to: *ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities*. The obligation resulting from art. 12, requires an introduction to the legislation forms of support in exercising by the disabled persons acting legal capacity. Those forms of support should not be based on unlimited in time, legal incapacitation in all aspects of life and leaving the decision-making to his/her legal guardian.

The *Convention* is the most precise attempt to move away from system of proxy in decision making for the disabled persons, including the elimination of incapacitation understood as depriving the acting legal capacity and introducing to the legislation a system based on supported decision-making.

The concept of supported decisions:

- first the person must understand available information on a given subject,
- then he/she must be able to assess the effects of his/her actions,
- based on the information about a situation and its effects a person must be able to make free decision,
- finally he/she must be able to communicate his/her will to other people in a way which is understandable for others.

Support can be given on each of the stages of decision-making and can have different forms, both personal and technical (Szeroczyńska, 2012; Zima - Parjaszewska, 2012). The model of supported decision-making is based on supporting the person, who for some reason, for example due to disability, needs it in different areas of life but at the same time does not lead to leaving the disabled person not deciding no his/her own.

Incapacitation as a Mean of Protecting the Dignity of Persons with Disabilities in Poland

Dimension of Premises

The present shape of legal regulations in Poland concerning legal incapacitation of the disabled persons is dubious in terms of their compliance with the rules of limiting the constitutional rights and freedoms of a human being, expressed in art. 341 para 3. of the Polish Constitution. Current legal regulations concerning legal incapacitation allow for too much interference with private lives of the intellectually disabled persons and deepen their social exclusion and violate their dignity.

Civil Code in Poland includes two types of incapacitation full and partial, which differ with regard to their intensity and effects. "A person who has attained thirteen years of age may be fully incapacitated, if he is incapable of controlling his own behaviour due to mental illness, mental retardation or another kind of mental disorders, in particular alcoholism or drug addiction" (art. 13 § 1 Civil Code). The effect of full incapacitation is the loss of acting legal capacity of the incapacitated person (art. 12, Civil code) and setting a legal guardian (unless he/she stays under parental guardianship) (art. 13 § 1 Civil Code).

Similarly partial incapacitation, imposed only on an adult person, who due to mental illness, mental slowness (retardation), or other mental distortions, especially alcohol or drug addiction, requires help in conducting his/her own matters. Imposing partial incapacitation results in limiting the acting legal capacity of the incapacitated person and setting up a curator for him/her. Grounds for incapacitation are directly correlated with its effects - correct shaping of legal situation of the incapacitated person is directly related with precise analysis of his/her needs (Cytowska, 2011; Zima - Parjaszewska, 2012; Civil Code, Dz. U. 1964 No 16 item 93 as amended).

Limitations

Incapacitation does not serve the purpose of legal protection of the disabled persons - in the area of grounds, judiciary practice, and situation of incapacitated persons in Poland. *Civil Code* while enumerating the medical needs for incapacitation uses negative terms which are unused in medical, pedagogical, and sociological literature for years now. Legislator do not give answers how to understand the most important grounds for incapacitation, i.e. *the inability to direct one's own actions and need in directing those actions*. Judiciary practice despite significant changes in proceedings about incapacitation due to *the Act of 09 May 2007 on change of Civil Procedure and some other Acts* (caused by the Constitutional Tribunal's verdict of 07 March 2007 sign. K28/0542 on request of Polish Ombudsman) violates the interests of the disabled persons. Polish Ombudsman reported irregularities with respect to *exercising guardianship over the incapacitated person*, reporting lack of curators, extensive proceedings for setting the guardians and curators, conflicts and not caring about interest of the incapacitated persons) (Firkowska-Mankiewicz, Parczewski, Szeroczyńska, 2005). The shape of the legal incapacitation in Poland goes against the assumptions of the article 123 of the Convention:

- *incapacitation is not a measure* that provides a support with exercising the acting legal capacity, but rather it leads to depriving of limiting those these capacity. It is based on proxy in decision making not in supporting a person in making a decision on his/her own.
- amendments to the regulations with regard to proceeding about incapacitation are not a safeguard of not overusing legal incapacitation.

- despite the regulations about *the requirement of listening to the opinion of the incapacitated person by his/her guardian before making any decision on important issues*, the will and preferences of the disabled person are not taken into consideration in most important matters such as decision concerning his/her place of residence,
- incapacitation is a measure which is not proportional and most often not matching the situation of a specific person. Moreover it does not take into account the varied needs of persons who require legal support and it extends to almost all parts of life,
- *imposed for indefinite period of time*, while it should be imposed for as short time period as possible,
- the control over how guardianship is exercised is done only by accepting by the Family Division of the Court the reports from exercising the guardianship, which are brought at least once a year,
- incapacitation makes it impossible to exercise - on equal rights as other persons - the right to possess and inherit property and to control one's own finances (Szeroczyńska, 2012; Zima - Parjaszewska, 2012).

The effects of incapacitation lead to legal and social exclusion of the incapacitated persons and violate their dignity. Actions of their legal guardians are not the same as the actions of a person in question. Constitution Tribunal (verdict K/25/05) points that between inspiring to make a specific decision and making that decision on one's own there is, from the point of view of right to freedom, a qualitative difference - first is only "secondary" reflection of that law, while the other is its essence. An incapacitated person slowly loses social skills that he/she gained and post often do not make any attempts to develop other skills. *An incapacitated person is socially stigmatised not only due to for instance his/her disability, but also due to the incapacitation itself.* Incapacitation leads to increasing stigmatisation (Verdict of The Constitution Tribunal of 07 March 2007, sing. K 28/05, OTK ZU 2007 no 7A item 75; Firkowska-Mankiewicz, Parczewski, Szeroczyńska, 2005).

Solutions

Barrier to the changes regarding the issue of legal incapacitation is the position of Poland, which made an interpreting announcement during ratification of the Convention, according to which the Republic of Poland interprets the art. 12 of the Convention in a way that allows for imposing incapacitation in circumstances and in a way described by the national law, as a mean described in art.12 para 43, in a situation where due to mental illness, intellectual disability, or other mental disorder a person is not able to control his/her behaviour. To fully implement art. 12 it is necessary to abolish legal incapacitation and replace it with other forms of legal support which would be harmonious with the supported decision-making model. The closest function included in the Family and Guardianship Code is the one of the curator.

Polish Society of Anti-Discrimination Law undertaken a research project in the years 2010-2012 entitled: "Jeśli nie ubezwłasnowolnienie, to co?" (*If not incapacitation then what?*) which aimed at analysing the practice of using legal incapacitation, including its use in legal procedures, that his the correctness of imposing it and applying the amendment of 2007 to the Civil Procedure Code as well as defining the expectations and needs of the social circles of the intellectually disabled persons and their close family and what norms should future legal regulations conform to in order to provide support for those people in making decisions of legal importance (Kociucki, 2013; Zima - Parjaszewska, 2012).

The effect of the project was creation of the assumptions for the change in legal regulations that promoted abolishing both full and partial legal incapacitation and creating legal assistants whose duties and provisions would match the actual needs of the person for whom an assistant function would be set. It was suggested that among other, accepting this kind of legal solutions with regard to Constitutional Laws and international law, language, Civil Code, Civil Procedure Code, and Social Law (Kleniewska, Szeroczyńska, 2012; Zaradkiewicz, 2014).

There are also assumptions of the Commission of the Civil Law's Codification according to which: incapacitation should be replaced with four forms of support, which will not automatically interfere with the acting legal capacity, namely: assistant guardianship, representative guardianship, co-decision form of support, and full representation.

The Commission of the Civil Law's Codification want art. 82 of the Civil Code to be repealed. It states that statement made by a person who, for any reason, was in a condition that excluded aware decision making or violated the freedom of decision making, is invalid (Kociucki, 2013; Zaradkiewicz, 2014).

Ministry of Justice created *Assumptions for the project of the Act on changing Acts - Civil Code, Civil Procedure Code, Family and Guardian Code, Act on Support for the Family and the System of Care and other Acts*.

Introducing the solutions suggested in the project is connected with:

- the need for change in the regulations about legal incapacitation result from changing social conditions and development of medical and social sciences.
- the need to replace the incapacitation with other legal solutions results from number of international legal acts , including: *the Recommendation of the European Council Committee no. (99)4 on the rules concerning legal protection of the disabled adult persons; recommendations of the Committee of Ministers of the Council of Europe no (2006)5, The UN Convention of 13 December 2006 on Rights of Persons with Disabilities*
- the problem of inappropriate protection of the incapacitated persons noticed by the Constitutional Tribunal (verdict K 28/05)
- the existence of barriers met by the mentally ill persons and persons with intellectual disabilities with regard to getting married (art 11. and art 12 k.r.o.; Kociucki, 2013).

In the *Assumptions for the project of the Act on changing Acts* it was assumed that new regulations will: withdraw from the model in which a person can be deprived of acting legal capacity by court order in an arbitrary, abstract, and often only vaguely connected with actual mental status of the person way. Moreover, the project brings changes with regard to the functions of guardianship and relations between guardianship and acting legal capacity. Guardianship shall be introduced in order to support in managing personal affairs of the disabled person and the scope of duties and competencies of the guardian will depend on the mental state of the guarded person. The project also assumes withdrawal from full incapacitation as an objection for getting married (Kociucki, 2013; Zaradkiewicz, 2014). Creating a clear-defined picture of the rights of the disabled persons in the modern-day world and making the countries and their governments to actually hold up to those rights is a very important step on the way of improving the dignity of the disabled persons.

Conclusion

The legal incapacitation is a legal instrument that can be used to protect the legal rights of the intellectually disabled person (especially if the disability is high) in situations when it is necessary. However, it is overused as a legal measure what results in full incapacitation without taking into consideration the degree of disability of a person and without matching it with the person's needs and skills. Non-compliance with the procedural safeguards violates the dignity and human rights, which in turn causes the legal instrument, created by the legislator in order to protect the rights of the disabled persons, to serve as a tool for discrimination by limiting their dignity and leading to social exclusion. Instead of supporting it leads to losing the acquired social skills. Limiting or depriving of acting legal capacity are an argument for abolishing legal incapacitation whatsoever. According to the Council of Europe's Commissioner for Human Rights it is possible to create a number of alternatives for the disabled persons, that allow for withdrawing from the outdated tool of legal incapacitation and transition towards a new model of law.

Current, elastic solutions concerning supported decision-making are replacing the incapacitation. Therefore, in the light of the Constitutional Tribunal's verdicts, critical voices from the environments supporting the persons with the intellectual disability and mental illnesses, and taking into consideration the shift of the paradigms related with the disabilities - with more emphasis being given to the dignity, self-determination, full social inclusion, and support from the community - the current formula of the incapacitation is rarely matching the actual needs of the person and often deprives the person of dignity and adequate to his/her level of development legal possibilities for autonomous decision-making. It is necessary to promote the approaches realizing the principle of the social integration and respect for the dignity of all men. The society should be the place to experience autonomy, real partnership and equal access for all its members to the full participation in the social life.

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