

PROTECTION OF THE ADULT THROUGH JUDICIAL COUNSELLING AND SPECIAL GUARDIANSHIP. GENERAL CONSIDERATIONS AND ASPECTS OF COMPARATIVE LAW

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Abstract

This paper aims to analyse the implications of „Law no. 140/2022 on some protection measures for people with intellectual and psychosocial disabilities and the amendment and completion of some legal acts” in Romania, by reviewing the aspects pointed out by the CCR in its unconstitutionality dec. no. 601/2020. This paper will also analyse legislative regulations on the protection of the adult in different legal systems.

Keywords: *vulnerable adults, legal capacity, unconstitutionality, disabilities, judicial counselling, special guardianship.*

1. Introduction

The issue of the protection of vulnerable adults is a topic that has been addressed more and more recently at the European and national level, with various measures being proposed to protect the interests of this population category.

In Romania, according to the data provided by NAPRPD within the Ministry of Labor and Social Solidarity, through CGDSACP, on September 30th 2023, the total number of people with disabilities was 909,754 people (more precisely: 98.23% - meaning 893,686 people - are in the care of families and/or live independently «non-institutionalized» and 1.77% - 16,068 people - are in public residential social assistance institutions for adults with disabilities «institutionalised»¹).

Therefore, in the context of an ageing world population, combined with increased international mobility, the need for improved international protection for vulnerable adults through legal regulation and international cooperation has been imposed. Life expectancy in many countries is increasing, and this fact also causes a corresponding increase in cases of diseases related to old age. Given these premises, it is important that at the international level there are accurate and clear legal rules regarding the competent authorities that can adopt the necessary measures to protect the person or property of the vulnerable adult, presenting the rules related to jurisdiction, applicable law and international recognition and application of the measures of protection.

This paper aims to analyse the situation of the protection of people with intellectual and psychosocial disabilities at both national and international level and to examine whether there are currently sufficient instruments to protect this category of population.

Regarding the international regulation of the subject of the protection of vulnerable adults, we recall the 2000 Convention that addresses numerous private international law (PIL) issues regarding, for example, the management/sale of assets belonging to persons suffering from impairments of personal faculties. The 2000 Convention also establishes a cooperation mechanism between the authorities of the member states, but it is important to specify that Romania, unfortunately, is not a party to this convention.

The issue of vulnerable adults is also highlighted in CRPD, an international treaty that recognizes the fundamental rights of persons with disabilities and promotes their full and effective participation in society, addressing a wide range of issues in order to protect and respect the rights of these persons, establishing standards for non-discrimination, accessibility, equal opportunities. Romania is party to this Convention since September 26th 2007, the Convention being ratified through Law no. 221/2010.

In Romania, the civil legislation regarding the protection of persons with disabilities was reformed in 2022 by the entry into force of Law no. 140/2022. Such a reform came in the context of the CCR dec. no. 601/2020, the subject for this exception of unconstitutionality being the provisions of art. 164 para. (1) CC, which referred to placing the protected person under judicial interdiction. Therefore, approximately 2 years after the decision

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¹ Available at <https://anpd.gov.ro/web/transparenta/statistici/>.

of the unconstitutionality decision set out above, the Romanian Parliament adopted Law no. 140/2022 which amended the legislation regarding the measures to protect people with intellectual and psychosocial disabilities.

Law no. 140/2022 tends to unify Romanian civil legislation with the CRPD, but it is far from being perfect or even comprehensive. Although the CRPD was ratified by Romania as early as 2010 (through Law no. 221/2010-November 26th 2010), it was only in 2022 that an attempt was made to build a legislation that would be in agreement with the principles stipulated by the CRPD.

2. General considerations and aspects of comparative law regarding the protection of the adult through judicial counselling and special guardianship

2.1. General provision of CRPD

As we saw and established, CRPD promotes and protects the human rights of persons with disabilities and guarantees that these persons have full and equal access to all aspects of social, economic, cultural and political life.

Thus, the purpose of the CRPD is „to promote, protect and ensure the full and equal exercise of all fundamental human rights and freedoms by all persons with disabilities and to promote respect for their intrinsic dignity.”²

Making a terminological delimitation of the notions of „disability” and „handicap”, we underline that the first term suggests the situation in which a person's cognitive or physical abilities are diminished due to a disease they suffer from, while the term „handicap” refers to the person's impediment to participate in society under normal conditions.

CRPD does not, however, define the concept of disability, instead it only states that persons with disabilities „include those persons who have permanent physical, mental, intellectual or sensory impairments, impairments which, in interaction with various barriers, may limit the full and effective participation of individuals in society, on equal terms with others.”³ Regarding the concept of disability, the Preamble of the CRPD stipulates that disability is an evolving concept and highlights the diversity of people with disabilities and the fact that they face attitudinal and environmental barriers that prevent their participation in society under normal conditions.⁴

In Romania, art. 2 para. (1) from Law no. 448/2006 defines disabled persons as „those persons whose social environment, not adapted to their physical, sensory, mental, mental and/or associated deficiencies, totally prevents or limits their access with equal opportunities to the life of society, requiring protective measures in support integration and social inclusion.”⁵

Based on the CRPD, CRPD Committee was also established, a body of independent experts that monitors the implementation of the Convention by the state parties. All state parties must submit regular reports to the Committee on how the rights are being implemented, and the Committee examines each report and makes general proposals and recommendations on the report, which then is transmitted to the state party concerned.

The general principles of the CRPD are stipulated in art. 3 and envisage:

„a) respecting the inalienable dignity, individual autonomy, including the freedom to make one's own choices and the independence of individuals;

b) non-discrimination;

c) full and effective participation and integration in society;

d) respect for diversity and acceptance of people with disabilities as part of human diversity and humanity;

e) equal opportunities;

f) accessibility;

g) equality between men and women;

² CRPD, art. 1, part I, available at <https://lege5.ro/App/Document/geztqnryg4/conventia-privind-drepturile-persoanelor-cu-dizabilitati-din-26092007?d=2024-03-18>.

³ *Idem*, art. 1 part II.

⁴ *Idem*, Preamble.

⁵ Available at <https://lege5.ro/App/Document/geytinrsgi/legea-nr-448-2006-privind-protectia-si-promovarea-drepturilor-persoanelor-cu-handicap>.

h) respect for the developmental capacities of children with disabilities and respect for the right of children with disabilities to preserve their own identity.”⁶

Also, art. 12 CRPD stipulates the obligations that the state parties have in recognizing the legal capacity of persons with disabilities. Thus, they must take all the necessary measures so that disabled people can enjoy, on equal terms with others, legal assistance in all areas of life.

Likewise, in the exercise of their legal capacity, persons with disabilities must be supported by the states parties which are obliged to take all appropriate measures to ensure their access to the support they may need, so that they are adequately and effectively protected from possible abuses.

Art. 12 CRPD provides that „such protection will guarantee that the measures related to the exercise of legal capacity respect the rights, will and preferences of the person, do not present a conflict of interests and do not have an inappropriate influence, are proportionate and adapted to the person's situation, apply for the shortest possible period and are subject to periodic review by a competent, independent and impartial authority or legal body. Protective measures will be proportionate to the degree to which such measures affect the rights and interests of the person.”⁷

We conclude that CRPD represents an extremely important and much needed international legal instrument that highlights that protecting the human rights of persons with disabilities will contribute to facilitating the development of the society as a whole.

2.2. Decision no. 601/2020 in the CRPD context

On March 27th2021, the CCR issued dec. no. 601/2020, the object of the exception of unconstitutionality being the provisions of art. 164 para. (1) CC, which has the following content: „The person who does not have the necessary discernment to take care of his interests, due to alienation or mental debility, will be placed under judicial prohibition.”⁸ Therefore, the above-mentioned article highlights the hypothesis of placing under a judicial ban the adult who no longer has the necessary discernment to take care of his interests due to alienation or mental weakness.

According to EXD⁹, alienation is a „generic term for any mental illness”. But Law no. 71/2011 defined alienation/mental disability as „a mental illness or a mental handicap that determines the mental incompetence of the person to act critically and predictively regarding the social-legal consequences that may arise from the exercise of civil rights and obligations.”¹⁰ With reference to the definition of mental impairment, CCR emphasises that although from a medical point of view mental impairment represents a mild form of mental deficiency, from a legal point of view it encompasses all its forms, regardless of the person's degree of incapacity.

Thus, in order to be placed under judicial prohibition, it is necessary to have a legally designed medical diagnosis of a mental illness or a mental handicap that determines the lack of discernment necessary to take care of one's own interests.

CCR defines judicial injunction as a „measure to protect the rights and legitimate interests, patrimonial and non-patrimonial, of the natural person, instituted by the court following the evaluation of the possibility of the person to exercise his rights and fulfil his obligations, the conditions for the establishment of this measure being provided strictly and limitingly by the provisions of art. 164 para. (1) CC.”¹¹

Related to the formulated definition, the Court stipulates that placing under a judicial ban establishes a substitute regime, highlighting that the rights and obligations of a person subject to such a measure will be exercised by a legal representative, regardless of the degree of impairment of the judgment of the person in question, in the damage a support regime characterised by a support mechanism for the state to grant depending on the degree of impairment of discernment.

Considering the above, CCR believes that it is necessary to clarify whether such a substitute regime complies with the requirements of art. 50 of the Constitution and art. 12 CRPD.

⁶ CRPD, art. 3, available at <https://lege5.ro/App/Document/geztqnryg4/conventia-privind-drepturile-persoanelor-cu-dizabilitati-din-26092007?d=2024-03-18>.

⁷ *Idem*, art. 12 para. (4).

⁸ Available at <https://lege5.ro/App/Document/gi2tsmbqhe/codul-civil-din-2009>.

⁹ Available at <https://dexonline.ro/definitie/aliena%C8%9Bie>.

¹⁰ See Law no. 71/2011, art. 211.

¹¹ See CCR dec. no. 601/2020, point 29.

Art. 50¹² of the Romanian Constitution provides that disabled people enjoy special protection and the state ensures the implementation of a national policy of equal opportunities, prevention and treatment of disabilities, so that disabled people can effectively participate in the life of the community.

Art. 12 CRPD essentially stipulates that all persons with disabilities have the right to full legal capacity which is indispensable for the exercise of civil, political, economic, social and cultural rights. CRPD emphasises that persons with disabilities enjoy legal capacity under conditions of equality with other persons, in all areas of life. In the light of the above, CRPD provides that the state has the obligation to take all appropriate measures to ensure the access of persons with disabilities to the support they may need in the exercise of legal capacity. The protective measures set out above must be adapted to the particular situation of the person with disabilities, being necessary to be proportional to the degree in which they affect the rights and interests of the person and will be adapted to his situation and will respect the rights, will and preferences of the person. CRPD points out that with regard to the duration for which a protection measure is instituted, it is applied for the shortest possible period, its periodic review by a competent authority being necessary.¹³

Therefore, considering the content of the two articles exposed above, CCR found that „in order to respect the rights of persons with disabilities, any protection measure must be proportional to the degree of capacity, be adapted to the person's life, be available only if other measures cannot provide sufficient protection, to take into account the will of the person, to apply for the shortest period of time and to be reviewed periodically.”¹⁴

In the analysed decision, CCR emphasised that the measure of placing under judicial prohibition must be regulated only as an *ultima ratio*, as it presents an extreme gravity that involves the loss of civil rights as a whole. Such a measure must also be analysed under the aspect of whether other measures have proven ineffective in supporting the civil capacity of the person, and the state must provide all the necessary support to avoid such an extreme measure.

Also, regarding the duration for which the protective measure is instituted, respectively the possibility of its periodic revision, the criticised legal text does not correspond to international standards, according to which a protective measure is applied for the shortest possible period and is subject to periodic revision by a competent authority. CCR highlights that these deadlines must be „fixed, predetermined, easily quantifiable, flexible and without an excessive duration, allowing the periodic review of the measure in an efficient and coherent way”.¹⁵

Therefore, in the light of the above, CCR concluded that the measure of placing under judicial prohibition is not accompanied by sufficient guarantees to ensure respect for fundamental human rights and freedoms, since the measure:

- does not take into account the fact that there may be different degrees of incapacity;
- does not consider the diversity of a person's interests;
- it is not ordered for a fixed period of time and is not subject to periodic review.
- In reality, in order to comply with the requirements of the CRPD, any protective measure must:
 - be proportional to the degree of capacity (when regulating a protective measure, the legislator must take into account that there can be different degrees of incapacity and mental impairment that can vary in time, so that different degrees of disability must be assigned corresponding the degrees of protection);
 - be adapted to the person's life;
 - apply for the shortest period of time and reviewed periodically;
 - take into account the will and preferences of people with disabilities.

Taking into account the above, we can state that the procedure of placing under judicial interdiction flagrantly violates the ECHR and CRPD, and the unconstitutionality of the measure of placing under judicial interdiction was imperative to be pronounced by the CCR.

2.3. Measure for the protection of the adult regulated by Law no. 140/2022

In the context of CCR dec. no. 601/2020 regarding the exception of unconstitutionality of the provisions of art. 164 para. (1) CC, a legislative reform was obviously necessary. After approximately 2 years from the ruling

¹² Available at <https://lege5.ro/App/Document/gq4deojv/constitutia-romaniei-republicata-in-2003>.

¹³ CRPD, art. 12, available at <https://lege5.ro/App/Document/geztanryg4/conventia-privind-drepturile-persoanelor-cu-dizabilitati-din-26092007?d=2024-03-18>.

¹⁴ See CCR dec. no. 601/2020, point 34.

¹⁵ *Idem*, point 40.

on the unconstitutionality of the provisions of art. 164 para. (1) CC by the CCR, the Romanian Parliament adopted Law no. 140/2022 which amended the legislation regarding the measures to protect people with intellectual and psychosocial disabilities.

It should be noted that since the publication of dec. no. 601/2020 in the Official Gazette and until the legislative reform set out above „it was no longer possible to order the measure of placing under prohibition by court decision; consequently, in the respective time interval, all the legal acts should have been concluded by the persons in question themselves, but the acts of disposition and administration thus concluded are struck by relative nullity for lack of discernment.”¹⁶

The measures to protect vulnerable adults provided by Law no. 140/2022 are judicial counselling and special guardianship. Law no. 140/2022 provides for the first time in Romanian legislation and assistance for the conclusion of legal acts, a support measure intended for an adult natural person who has an intellectual or psychosocial disability and who needs help to take care of himself and manage his patrimony, being a measure that does not affect its exercise capacity.

These protective measures must be based on the following principles: necessity, subsidiarity and proportionality and must be gradually established according to the degree of intellectual and psychosocial disability of the person concerned. More precisely, assistance for the conclusion of legal acts is the only measure that can be ordered by the notary public, and legal advice and special guardianship can only be ordered by the court (the guardianship court or the specialised courts/sections/completions for minors and family).

Therefore, judicial counselling and special guardianship are exceptional protective measures, which apply only to natural persons who cannot look after their own interests because they suffer from a deterioration of their mental faculties, and which have the effect of restricting/depriving the natural person of the ability to exercise and establishment of guardianship.

Regarding the length for which protection/support measures can be instituted, according to the Romanian Civil Code, we specify that:

- judicial counselling can be ordered for a period that cannot exceed 3 years;
- special guardianship can be ordered, as a rule, for a period that cannot exceed 5 years, and as an exception the court can order the extension of this measure for a duration that cannot exceed 15 years. Therefore, the measure of special guardianship can have a maximum duration of 20 years;
- assistance for the conclusion of legal documents can be taken for a maximum period of 2 years and can be renewed for a period that cannot exceed 2 years.¹⁷

Therefore, the assistance measure for the conclusion of legal acts is addressed to adults with discernment who have an intellectual or psychosocial disability, being a measure whereby the assistant appointed by the notary public has an intermediary role between the protected person and third parties. It should be emphasised that this assistant does not have a significant role in this support measure because he cannot conclude legal acts on behalf of the vulnerable adult, nor can he approve the acts that the vulnerable adult concludes on his own.

Judicial counselling is a measure of protection that can be taken in the situation where the deterioration of the mental faculties of the protected person is partial, and the said person, due to the state in which he is, must be continuously counselled in order to exercise his rights and freedoms.

The situation is different in the case of special guardianship, as it aims at a total and permanent deterioration of the mental faculties of the protected person, but, as in the case of judicial advice, the protected person must be continuously represented in the exercise of his rights and freedoms.

In the light of the above, we note that a new institution has been introduced in the Romanian civil legislation for the protection of the vulnerable person, namely Assistance for the conclusion of legal acts. From my point of view, this is a complicated, clumsily designed procedure that does not bring important benefits to the protected person. However, the Romanian legislator tried to establish a similar procedure as in the states analysed in this paper, in order to align as much as possible with the principles stipulated by the CRPD, and at the moment it is premature to draw conclusions regarding the usefulness of the assistance support measure for the conclusion of the legal acts, so we will let practice have the last word.

¹⁶ See G. Boroj, C.A. Angheliescu, I. Nicolae, *Fişe de drept civil*, 7th ed., revised and supplemented, Hamangiu Publishing House, Bucharest, 2022, p. 324.

¹⁷ Art. 168 CC, available at <https://lege5.ro/App/Document/gi2tsmbqhe/codul-civil-din-2009>.

2.4. Aspects of comparative law

Legislation from France and Canada represented sources of legislative inspiration for the adoption of Law no. 140/2022. So, in the French legal system, Law no. 308/2007 thoroughly reviewed the legal protection of adults, enshrining a series of important principles in the foundation of legal protection of vulnerable adults, with an emphasis on ensuring the protection of the person, and not only his right to property.¹⁸

Art. 433 French Civil Code provides for the establishment of a temporary medical or judicial protection measure (judicial guarantee) which can be ordered for a limited period either until the disabled person recovers, or until it is necessary to apply a protective measure, in this case guardianship or guardianship.

In the French legal system, the guardianship is a measure of protection of the vulnerable adult by which his capacity to exercise is lifted, and his representation for all civil law acts is instituted for a period of 5 years which can be renewed by the judge for the same period of time. As in our law, the duration of the guardianship cannot exceed 20 years (art. 428 French Civil Code).

Curatorship is provided in the French Civil Code as a judicial measure that aims to protect the vulnerable adult and his assets, being of 3 types: simple (the protected person carries out administrative or conversation acts by himself, his assistance being required by the curator for the acts that engage his present or future patrimony), reinforced (the curator, in addition to the documents provided for in the simple guardianship, also manages the bank account of the protected adult) and individualised (the guardianship in which the documents that the protected adult can conclude, alone or assisted by the curator, are approved by the court).

Therefore, the French legislator carried out a broad legislative reform regarding the regulation of the protection of people with intellectual and psychosocial disabilities, adjusting the regulations to respond to higher standards of protection. In this sense, the emphasis is on the principle; necessity (a protection measure can only be pronounced if the deterioration of the mental faculties is medically confirmed), subsidiarity (the least restrictive measure must be applied) and proportionality (the protective measure must always be checked and adapted to each situation).

In the Spanish legal system, in 2021 the legislation aimed at the protection of people with intellectual and psychosocial disabilities was reformed in accordance with the principles of the CRPD, emphasising the transformation of the social mentality regarding this category of people. And in this legal system, „an incipient form of future protection mandate” is provided.¹⁹ Therefore, „the law replaces the existing stigma and paternalism with measures of support and respect for human rights”, and in the current legislative configuration „disappears the figure of guardianship that led to raising the legal capacity of a person with intellectual disabilities, and guardianship is replaced, mainly, by the application of a voluntary support system or, if that is not possible, by guardianship (guardianship) in fact, guardianship or legal guardian.”²⁰

In Belgium, the legislation that provides for the protection of persons with disabilities has in mind the stimulation of extrajudicial protection mechanisms that are imposed only when necessary and proportionate to the needs of the vulnerable adult (art. 488¹ Belgian Civil Code). So, in the priority Belgian civil legislation are extrajudicial protection measures.

In the Republic of Moldova, in order to protect the person with disabilities, the civil legislation was reformed establishing contractual protection measures, respectively the assistance contract, the future protection mandate and judicial protection measures, respectively provisional protection, curatorship and tutelage (Law no. 66/2017).

In the Italian legal system, there is a form of assistance to the vulnerable adult („amministrazione di sostegno”²¹) by which the adult preserves as much as possible his exercise capacity/autonomy and which is adapted to his particularities. The Italian legal system also provides for the classic means of protection of the vulnerable person, namely guardianship and guardianship (Law no. 6/2004).

¹⁸ See L. Andrei, *Ocotirea majorului – Reforma legislativă realizată prin Legea nr. 140/2022*, (coord.) R. Constantinovici, Solomon Publishing House, Bucharest, 2023, p. 28.

¹⁹ See A. Diaconescu, *Considerații asupra proiectului pentru modificarea și completarea Legii nr. 287/2009 privind Codul civil, a Legii nr. 134/2010 privind Codul de procedură civilă, precum și a altor acte normative în materia protecției persoanelor cu dizabilități*, *Studia Iurisprudentialia* 2/2021, <https://sintact.ro/comentarii-monografii-reviste-si-webinarii/articole/consideratii-asupra-proiectului-pentru-151029036>.

²⁰ See R. Constantinovici (coord.), *Ocotirea majorului – Reforma legislativă realizată prin Legea nr. 140/2022*, Solomon Publishing House, Bucharest, 2023, p. 28.

²¹ Art. 404 Codice Civile (R.D. 16 marzo 1942, n. 262), available at <https://www.brocardi.it/codice-civile/libro-primi/titolo-xii/capolo-404>.html.

We note that the states exposed above have modified their civil legislation to be in agreement with the principles stipulated in the CRPD. The protective measures were established in such a way as to be as flexible as possible, to allow the choice of the most appropriate form depending not only on his medical situation, but also taking into account his patrimonial and personal situation, respectively taking into account the fluctuation of the disease due to the fact that medicine evolves.

Therefore, these states directed their attention towards the establishment of subsidiary and necessary protection measures, which take into account the particular situation and needs of the vulnerable adult, promoting the maximum mention of exercise capacity and the proportionality of the measures with the degree of capacity of the vulnerable person.

3. Conclusions

According to the WHO, in 2020, there were approximately 1 billion people with disabilities in the world who fall into the category of the poor population. People with disabilities are discriminated against and looked down upon and are often denied the chance to work, go to school and participate fully in society. CRPD is a very important international legal instrument because it ensures that persons with disabilities have access to the same rights and opportunities as everyone else, and we must each and every one of us try and implement it. The legal framework is important, but it is important only from how sanctions can be applied to those who do not comply. But in the real world, in the real aspects of the day-by-day activities, whether it is in school, work, social gatherings, stores, cinemas and so on, we must ensure that the persons with disabilities feel safe and feel treated as a normal person is treated.

The Convention emphasises that disability is a human rights issue and is intended to encompass many areas where both physical barriers may arise, such as physical access to buildings, roads and means of transport, access to information through written and electronic communications, as well as social, namely the reduction of discrimination and stigmatisation, by which people with disabilities are often excluded from education, employment and health and other services.

In Romania, Law no. 140/2022 tends to unify Romanian civil legislation with the CRPD, but it is far from being perfect or even comprehensive. Although CRPD was ratified by Romania as early as 2010 (through Law no. 221/2010-November 26th 2010), it was only in 2022 that an attempt was made to build a legislation that would be in agreement with the principles stipulated by the CRPD. Therefore, in the Romanian civil legislation a new institution has been introduced for the protection of the vulnerable person, namely Assistance for the conclusion of legal acts. From my point of view, this is a complicated, clumsily designed procedure that does not bring important benefits to the protected person. However, the Romanian legislator tried to establish a similar procedure as in the states analysed in this paper, in order to align as much as possible with the principles stipulated by the CRPD, and at the moment it is premature to draw conclusions regarding the usefulness of the assistance support measure for the conclusion of the legal acts, so we will let practice have the last word.

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