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LEGAL CAPACITY WITHIN THE CONVENTION ON PERSONS WITH DISABILITIES: A CASE STUDY ON NORWAY

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Abstract

La tesi tratta l'importanza dei diritti umani, in particolar modo il diritto alla capacità legale per le persone con disabilità. La prima parte del manoscritto si concentra sui diritti umani come concetto generale e sul principio di eguaglianza declinato nel suo significato filosofico e giuridico. L'eguaglianza è di fondamentale importanza, anche e soprattutto al momento della stesura degli strumenti di specificazione, come la Convenzione per i diritti umani delle persone con disabilità (CRPD). Viene quindi analizzato questo strumento di hard law, facendo particolare attenzione alla capacità legale conferita alle persone con disabilità che segna il passaggio dal modello di processo decisionale via sostituto al modello di processo decisionale con supporto, e le sue implicazioni. Nell'ultima parte dell'elaborato viene trattato il caso della Norvegia, concentrandosi in particolare sul recepimento e l'implementazione della Convenzione nel sistema legislativo e l'applicazione dello stesso in un caso specifico. Il caso giuridico analizzato riguarda una persona con disabilità psichiche: affetta da schizofrenia. Il suddetto caso è arrivato alla Corte Suprema Norvegese, che ha emanato una sentenza con opinioni dissenzienti che ha così confermato la posizione norvegese, ancora legata a pratiche obsolete, sottolineando la riserva con la quale il Paese ha recepito la Convenzione.

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Introduction

Throughout the years, many terms have been used to describe a person whom, by interacting with others or with the environment, encounters barriers that obstruct their full being: handicapped, disabled, special needs, differently-abled, unfortunate, exceptional and so on. The intrinsic meaning carried by these words is often negative yet offensive. However, disability is a problem concerning all population, indeed most people in their life may develop a disability due to an accident or just because of the old age, either they encounter someone with disability from birth. Consequently disability is a real problem, in spite of this the first legally binding international instrument that protects human rights of persons with disabilities was adopted only in 2006 and entered into force in 2008.

Disability has always been a *taboo topic*: rarely discussed, or discussed with great amount of reticence. What complicates even more the official and unofficial discussions is that each and every culture or religion has a different meaning for disability. Nowadays people in most of the developed countries acknowledge the medical reason behind disabilities may be due to a malformation, a hereditary disease or other scientific reasons. Nonetheless, in the past disability was often viewed as due to God's punishment or simply the will of God, and even nowadays spome believe it is because of the impurity of the woman that carries the baby in the womb, or again a manifestation of an angry ancestor. However, even in countries where the social network thrives for inclusion and where inclusion is a political theme, persons with disabilities are often left out. The result of it is a situation where human rights are not equally recognised to every human being. Therefore, some live a life bursting with obstacles where their voice is not heard. Precisely for this reason it is important to recognise to persons with disabilities their legal capacity, i.e. the ability to make their own actions count on the legal level. Thus, this right is essential since it brings all human beings on the same level (right to equality is being respected) and allows them to take position and possession of the rest of human rights.

There are many and different types of disabilities and the literature argues regarding their number and division. A macro categorisation of disabilities can be summed in roughly four main categories: sensory, physical, intellectual and psy-

chological. This manuscript focuses mainly on the last two categories, intellectual and psychological, i.e. on people that have a disability that is directly connected to their cognitive processes or their emotional, mental or psychiatric disorders. The manuscript is organised in three chapters.

Chapter 1 starts by giving a wide view and definition of human rights, analysing them as a philosophical concept and considering their implications. It goes further in explaining what are the instruments through which human rights are protected and describes the process of codification and specification. Subsequently it goes into details and analyses the UN Convention on the Rights of Persons with Disabilities, its birth process and the main articles that define it, in particular art. 12, legal capacity.

In Chapter 2 the legal capacity with its traits and importance is discussed by declining it in a less technical terminology. First, the connection between autonomy and legal capacity is explained, subsequently the importance that various intellectuals have given to autonomy in literature and what are the most recent trends are examined by analysing relational autonomy.

The last chapter, Chapter 3, is a case study that examines the Norwegian legislation in the matter of human rights, with a focus on legal capacity. First, the implementation of the CRPD in Norway is described by examining some official reports. Then it is delineated the Norwegian law system with special regard to human rights and their protection, to finish with a case that reached the Norwegian Supreme Court and they emanated a dissenting opinion.

Finally, some final considerations are stated in the Conclusions.

Chapter 1

An international instrument for persons with disabilities

1.1 Defining human rights

Human rights are inalienable rights entitled to all individuals because they are human beings. Therefore they are inherent to all humans no matter their nationality, religious believes, sex, colour, ethnicity, sexual orientation, language, social status, health or political affinity. Human rights are not granted by any international or national legal organisation, they are simply recognised, protected and promoted by those institutions. As a result they are claimable by all individuals because they are entitled to them, which means they are part of their existence.

The Universal Declaration of Human Rights, adopted by the United Nation General assembly in 1948, the preamble opens by acknowledging «whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world» (UN General Assembly and others 1948, p. 1). Thus, the Declaration itself recognizes equal rights and dignity already existing and entitled to all individuals, along with them being the basis of freedom justice and peace.

It is hard to find a definition that describes the concept of human rights in its entirety because the notion is multifaceted. Some of the dimensions on which it moves on are ethical, social, political and juridical, and they are all interconnected between each other. Over the time, it has become even more complicated to define the concept, because human rights are dynamic and in continuing evolution, therefore they continue to increase in number and in pretenses. Thus, there is no precise definition, yet we can describe their characteristics: they are universal, inalienable, indivisible and interdependent. Universality refers to the rights which are equally entitled to everyone despite any different characteristics of individuals. They also

are inalienable, i.e. they cannot be restricted if not on the basis of an equal and just process. Human rights are indivisible and interdependent because a person can not enjoy one of those rights at the time without all the rest. They are a whole that can be considered only in their integrity. Due to these characteristics, it is quite evident that human rights have related obligations which arise from the fact that they are claimable. Obligations can be more then the rights themselves, because it is logic that the presumption on which human rights lay on, is that they must be respected, protected and fulfilled. These duties are not just for institutions but are entitled to other people as well, all human beings are entitled of rights and obligations, in order that each and every human right to be fulfilled.

Perhaps one of the most important principle that human rights have as their foundation is the principle of equality. There is a two face medal for equality, whereas one it considers the principle of equality in a philosophical way, the other in a juridical manner. From the philosophical point of view, it is about a moral principle that puts all human beings on the same level, meaning they are all equal, morally and philosophically speaking. On the other side, the juridical principle takes in consideration equality both substantial and formal. This juridical principle has a profound connection with the principle of legality which means that the public powers of a state are subject to the law itself, and each and every deed they make it needs to be in compliance to the law, under penalty of invalidity of the deed. Indeed, all three powers, judicial, legislative and executive, are all subordinated to the law because the law is above any institution or power, due to the rule of law.

The principle of formal equality plays a fundamental role and it concerns mainly the judiciary power because it establishes an impartial imposition of the law, but also an impartial exercise of the legislative power. It is forbidden the emanation of laws that discriminates any legal entity. In other words, the formal equality is about equal subjection of everyone to only one jurisdiction, where each and every single entity is equal in front of the law. The formal equality establishes the basis for the fight against discrimination which is defined as «any distinction exclusion or restriction [...] which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any field» (United Nations (UN) 2006, art. 2 cl.4). The prohibition of discrimination is a way to allow people to enjoy their human rights and at the same time, it is a right on its own, the right to not be discriminated, as article 14 of the European Convention on Human Rights states: «The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin,

association with a national minority, property, birth or other status.» (Council of Europe 1950, art.14) The principle of equality together with the principle of non discrimination doesn't state to treat everyone in the same way, but it does prescribe to treat similar situations equally, and different situations in different ways.

Substantive equality is about equal opportunities. The lawmaker could be required to resort to different treatment in order to maximise equal opportunities for everyone. This can be done throughout affirmative actions for the purpose of compensating for factual inequalities that originate from natural, social facts or from previous injustices. Substantive equality after recognising the inequalities present among individuals, requires to the lawmaker to prevent and protect those who are discriminated by them. The main explanation for these different treatments it lays in the intent to bring a remedy to previous discriminate situations where the victims were big categories of subjects like women, children, people with disabilities, minorities and so on, and to remove obstacles that denies them the right to self development.

The principle of equality could require equal treatment, which does not necessarily mean only that the legislator has to apply the law equally without taking into consideration different situation or different subjects, but it could also require for those different subjects to be considered as so in order to elaborate a specific legal protection. In other words it requires different treatments but at the same time the principle of equality rules out the different treatments that do not aim for a legitimate scope, there must be a reasonable basis for a different treatment. Inequalities are not always unfair, they are only if their effects are unjust. The principle of equality is one of the main principles that crosses the entire system of human rights, therefore it is in the name of this principle that we are facing the proliferation of international Conventions or national law, that have the purpose to protect and guarantee the enjoyment of the human rights to important categories of people.

1.2 Codifying human rights of persons with disabilities

In order for human rights to be recognised, respected, protected and fulfilled they need to be codified by an officially recognised legal authority or institution. It is to be noted, that human rights are dynamic, which means that they are essentially questionable, but at the same time their content is undetermined and uncertain because they keep on evolving. This makes the process of positivisation even harder. Throughout the process of codification or positivisation, it takes shape the law itself that needs to ascertain the protected area of the human rights by determining the

procedures and mechanisms of guarantee and the implementation system. In other words positivisation refers to the transformation of ideals into normative standards, from morality to law, from soft law to hard law, from international law to domestic law. Therefore the law has the hard duty to make human rights enjoyable by all human beings, moreover the law needs to deepen into the human rights by always keeping an open mind in order to embody the core content of the human rights taken into consideration and adopt instruments that sanction officially the human rights.

Notwithstanding, one very important step of codification is the process of specification that has exactly the same logic as codification, but it better specifies circumstances that qualifies the subject of the law. The specification process specifies the subject of the human rights and their specific characteristics. These characteristics are circumstances that are relevant to the enjoyment of human rights and that expose the ultimate beneficiary to a specific violation, and they could include sex, age, religion and others. Identifying as a male, female, an immigrant, a person with disabilities, or a worker, is what determines and underlines some specific characteristics of the human existence that are considered relevant in order to bend the human rights paradigm in a specific way. It is to better understand how human rights must be protected when the subject of the law it's one of a specific situation and characterized in a specific way. The process of specification is an evolution of the human rights paradigm. Since the Universal Declaration of human rights, adopted in 1948, that is a huge milestone in the process of human rights, the process of codification keeps on evolving, and the law adopted and implemented later it identifies the protection of the rights of specific categories that are vulnerable.

A recent convention adopted on 6th of December 2006 and entered into force on the 3rd of May 2008, is the UN Convention on the Rights of Persons with Disabilities. It is an instrument of specification to protect and guarantee the human rights of a vulnerable category, namely people with disabilities. The process of specification and codification was a long and tormented one. Some studies divide the process into 4 stages. (Della Fina, Cera, and Palmisano 2017) The first stage goes from 1945 until 1970, and it is characterised by complete non-recognition of the human rights of people with disabilities as a category worthy of specification. Both the UN Charter of 1945 and the Universal Declaration of Human Rights of 1948 do not mention people with disabilities. They are mentioned only in the Universal Declaration, in article 25, but it refers to disability as a condition or an event. As a result this first decades were mainly characterised by invisibility. From 1970 to 1980, the second phase, persons with disabilities were started to be seen as subjects of rehabilitation. In 1971, the Declaration on the Rights of Mentally Retarded Persons was adopted but it was only a document, of soft law, in which there was some kind of recognition of the

medical model of disability. Granted that, this document recognised “impairment” as a potential barrier to the enjoyment of human rights. In 1975, the Declaration on the Rights of Disabled Persons, a soft law document, stipulated that people with disabilities should be subjects to human rights as well, but under some conditions. Firstly, equal rights as for non-disabled people were granted only to persons with intellectual impairments. On the other hand, in some cases, institutionalisation was considered “indispensable” for some persons with disabilities. This Declaration, likewise the one mentioned earlier, was an intent and a step towards a human rights approach, but the common course of action was still characterised by the medical model. As a matter of fact, prevention of disability is mentioned twice and disability is defined as «any person unable to ensure by himself or herself, wholly or partly the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capacities».(Della Fina, Cera, and Palmisano 2017, pp. 5-6) The second phase ended with the General Assembly that proclaimed 1981 as the International Year of Disabled persons.

The third stage is a much more active one, in which major turning points are reached and it goes from 1980 until 2000. The International Year of Disabled persons had a big result, the World Programme of Action Concerning Disabled Persons was outlined. The Programme of Action was the UN strategy, with three pillars approach, definition, prevention and rehabilitation of disability plus a forth new dimension aiming the equalisation of opportunities. In addition, the document brings into the attention of the United Nations organisations, governments and stakeholders the human rights of disabled persons. Moreover the General Assembly proclaimed the International Decade of Disabled Persons 1983-1992. During this period of time it was adopted the first legally binding human rights treaty that mentioned persons with disabilities, namely ILO Convention 159. This hard law instrument introduced the principle of equality of opportunity in the workplace for persons with disabilities. Moreover there were various studies conducted during that decade that proposed a series of interesting reports and guidelines. One of the most important was conducted by Special Rapporteur Leandro Despouy, it has been responsible for bringing disability on the agenda of several human rights bodies of the United Nations. Although the Decade culminated with the adoption of a soft law instrument, also under influence of the international disability rights movement, called Standard Rules on the Equalization of Opportunities for Persons with Disabilities in 1993. The Rules was a groundbreaking document because of the terminology used, like “independence” or “personal assistance services”. What distinguishes this document of soft law from the others adopted in the past, is the provisions for its monitoring that were conducted until 2014. The Disability Rights Movement also had an important role

in the defining the third phase that brought to the Convention implemented today. Indeed the Movement, composed by actual people with disabilities all around the world, inspired by other social movements, became politicised and started to have an impact, it gained strength and by the end of the last century had become policy advocates.

The fourth and last phase is characterised by the New Millennium, that witnessed persons with disabilities and their organisations becoming agents of human rights.It was finally embraced a human rights-based approach that gave disabled persons equal rights as human beings, therefore recognised in front of the law. The Millennium started with the World Summit on Disability in March 2000 in Beijing where the Declaration on the Rights of People with Disabilities in the new century was adopted. This Declaration, despite being a soft law document, urged for a binding convention and encouraged the disability organisations to fight for it. The next year, in 2001 in September in Durban took place the World Conference against Racism, and the Programme of Action encourage the United Nations General Assembly to elaborate an integral binding document that promotes, protects and recognises the rights and dignity of persons with disabilities.

The road to the adoption and the writing of the Convention on the Rights of Persons with Disabilities was a very contorted one. The first meeting of the Ad Hoc Committee took place in July 2002 and it was open to all member states of the United Nations. The outcome of this first reunion wasn't a successful one. Many countries were reluctant, and the only thing that they agreed on was to meet the following year plus they requested to the Secretary General to improve accessibility of the UN headquarters. It was June 2003, when the second meeting had started and the atmosphere was different from the previous year. The public opinion had turned in favor of a convention that had persons with disabilities as a subject. Therefore the setting was changed and demands from disabled persons' organisations were strongly felt because of one of their slogans "Nothing about us without us". For the first time in the history of United Nations were about to participate to a General Assembly negotiations non-governmental organisations. Usually they were only allowed as observers and not participants. A small working group, composed by states and disabled persons' organisations, started to prepare the draft in January 2004. The main challenge that the Working Group had to face was the two different languages they spoke, one of the lawyers sent by the governments and on the other side the disability movement, persons who were dealing with disabilities on a daily basis. The first reading of the Ad Hoc Committee of the draft the Working Group had outlined was a complete disaster, only from the second reading something had started to move. The key arguments that were subject of many disagreements were legal capacity,

forced intervention and institutionalisation, social, religious and cultural values, inclusion versus segregation, and lastly women and children with disabilities. In order to conclude the negotiations an unorthodox method was adopted since there were endless, overlapping proposed amendments. It consisted of delegations that could still object to amendments that were proposed and if it did the amendment would be dropped unless the delegation that had proposed it could strike a deal with that who had objected. This was a clear sign that the Committee had clear intentions of finishing the convention soon. What was left to discuss in the final meeting, in 2006, was the monitoring. The Committee agreed on a monitoring body and mechanism based on the committee system developed by the other human rights treaties. Moreover a big obstacle that consisted of including the right to petition to individuals to the committee was also overcome by deciding to add this right but with an optional protocol. After the drafting committee had revised it, the Convention on the Rights of Persons with disabilities was adopted on 13th of December 2006, and when it was opened for signatures a few months later it was signed by a total of 81 states on the very first day, another record for an UN treaty. The Convention had a few more "first times" in the history besides the ones already mentioned earlier. It was the first time when so many persons with disabilities were active at all levels, never before so many of them had been so active and influential in international lawmaking. Furthermore the Convention was one of the least politicised and most inclusive human rights debate for some years. The negotiations were not only between member states but it included international disability communities where the member states had to take their demands seriously.

1.3 Legal capacity in the CRPD

As mentioned earlier, one of the subjects that saw the members of the Committee and member states debating with hard interest, was article 12 of the Convention on Human Rights of Persons with Disabilities. The article that carries the title "Equal recognition before the law", it is at the core of many rights in the convention, in addition of being the key that allowed the shift form the medical model to the rights approach of disability. The article aims to establish that persons with disabilities are subjects of the law, likewise all human kind, and to promote supported decision-making instead of substituted. This new model is taking into consideration different degrees of support in order to exercise legal capacity. This is a topic which was very much debated by many delegations, they argued that sometimes persons with disabilities would not be able to exercise their legal capacity. Therefore, they required for the article to consider also the possibility of substituted decision-making,

where another person that has to be appointed legally, would make decisions on behalf of the person with disability. At first, the Working Group inserted in the article the concept of safeguards, but it did not include any specific caption that would give the ability to the states to allow for substitute decision-making. It was also debated the actual meaning of "legal capacity", where China and Russia claimed that the translation in their language concerned only the capacity of holding rights instead of exercising them. The matter was seen as a problem since it meant that states could remove the legal capacity in practice, while maintaining a legal fiction that the right still existed. The final text of the article 12 that was approved by the General Assembly affirms:

> *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.*

This article constitutes the core of the CRPD since it recognizes the legal capacity of persons with disabilities. The acknowledgment is essential in order to have access to other human rights and to protection from any interference with personal integrity. The Committee on the Rights of Persons with Disabilities states in the General Comment on article 12: « the right to equal recognition before the law is operative everywhere [...] there are no circumstances permissible under international

human rights law in which a person may be deprived of the rights to recognition as a person before the law, or in which this right may be limited» (Nations 2013, p.2). Legal capacity is connected to the achievement of other rights e.g. the right to independent living in article 19, or the right to health in article 25, moreover many rights depend directly on it. In other words, Gerard Quinn refers to it, as a legal tool that «... helps to secure notions of personhood ... allows for an expression of the will and in doing so prevents coerced interventions» (Quinn 2010, p. 10)

Article 12 starts in the same way as ICCPR and CEDAW do, by reaffirming the right of recognition before the law. Furthermore the second paragraph claims that the right to enjoy legal capacity shall be secured by the States in all aspects of life, on "an equal basis with others". The third clause of the article recognizes the right to support in exercising the legal capacity, and it is required to the States to provide to the persons with disabilities access to the support, if necessary, in order to allow them to take decisions that carry legal effects. This paragraph uses the term "support", which does not include the deprivation of the right to legal capacity. Moreover the support necessitated may be both formal or informal, and could vary from one person to another due to the diversity of persons with disabilities. Indeed, as paragraph 4 states, there shall be delineated a support system that has the aim to outlaw the substitute decision-making and «create appropriate and effective safeguards for the exercise of legal capacity»(Committee on the Rights of Persons with Disabilities 2014, p.5) that respects the will, rights and preferences of the person. The last paragraph focuses on the financial matters and it is asked to the States to ensure that persons with disabilities are supported in those legal decisions as well.

1.4 Distinction between legal and mental capacity

Carrying a disability, often, brings to the assumption of incapacity,therefore the person's affairs are taken over, and others take decisions in their "best interests". Given the circumstance it is important to differentiate the concept of "legal capacity" from "mental capacity". Legal capacity has a broad meaning that essentially involves «the ability to hold rights and duties (legal standing), as well as the freedom to exercise those rights and duties (legal agency).» (Della Fina, Cera, and Palmisano 2017, p. 269) This definition falls into the broad meaning of equal recognition before the law which happens to be the title of article 12 of CRPD. Being a holder of rights involves the full protection of the rights by the legal system, meanwhile as an actor, a person shall have the power to create, modify and end legal decisions, which must be legally recognised by the law itself.

On the other hand "mental capacity" refers to a more dynamic content. It con-

cerns a group of skills like the cognitive ability, impairments, the capacity of understanding the consequences of ones actions and to communicate their will and preferences. It is a combination of all of these elements that gives a certain level of mental capacity to a person with disabilities. As a result, mental and legal capacity are bounded together. When it comes to assessing a person's legal capacity, firstly it is evaluated their mental capacity. Dhanda Amita in her article Legal capacity in the disability rights convention: stranglehold of the past or lodestar for the future, distinguishes three different methods of assessment of legal capacity: status attribution, functional test and outcome test. According to the first approach every person that has any type of disability being it physical, psychosocial or psychological, are presumed by the law as a lack of legal capacity. The status attribution is undoubtedly a medical approach to disability. The functional test, despite having a remain of the medical approach, takes a step forward, «the person with disability is considered incapable if, by reason of the disability, he or she is unable to perform a specified function.» (Dhanda 2006, p. 431). Therefore the court is called to assess the presence or the absence of the impairment. Differently, in the outcome test, Dhanda claims that, the decision of the incapability is established according to a choice made by the person with disability, i.e. «when a person with disability arrives at a decision that is not socially accepted». (Dhanda 2006, p. 433).

The study of Dhanda, aside from highlighting that the rights approach to persons with disabilities is not fully implemented, attests that persons with disability are not even given the opportunity to make mistakes and learn form them, nor they are given the chance to build skills that are required for decision-making. The EU Agency for Fundamental Rights carried a study on persons that have lost their legal capacity, or had their legal capacity restricted, and it showed that they «shared a sense of powerlessness» (European Union Agency, for Fundamental Rights 2013, p. 7) because they do not hold any legal capacity. The three approaches are clearly falling into a paternalistic practice from the states.

1.5 Substituted and supported decision-making

Losing legal capacity it is always pursuant a legal court decision that delegated the power to others because of the person's disability. Therefore, the person with disability is subjected to guardianship or wardship, which means they are not able to make any decision that carries legal consequences, not towards third parties nor themselves. The partial or total loss of legal capacity has serious repercussions on a person integrity and dignity since they do not have a saying, not even in personal matters like their own health. The whole mechanism is called substituted decision-

making. The guardian has the power to act on behalf of the person with disability, in their best interests, meanwhile the individual has little contribution or none into what decisions are taken on their behalf. The guardian may be a trusted person, a family member, although it is more common for it to be a lawyer or a civil servant, that is to say a person that has nothing to do with the individual that was deprived by their legal capacity. Thereby it brings to another issue, a complete stranger does not posses the necessary information to take decisions on behalf of the person with disabilities if they are not aware of what represents their best interests, not only legally speaking. This is one of the problems that the CRPD attempts to tackle by introducing a new system for decision-making, and that is the supported one. This approach consists in support for the persons with disabilities to exercise their legal capacity, which «would ensure that local factors would play a part and would vary with the personal and societal context.» (Della Fina, Cera, and Palmisano 2017, p. 270) This form of decision-making can be formal or informal, nevertheless shall respect the will, rights and preferences of the person with disability. Support alludes, as well, to non-traditional communication methods in order to allow one to better express their will and preferences.

In the 16th paragraph of the General comment on article 12, the Committee on the Rights of Persons with Disabilities states «at all times, including crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected.» Therefore, if an individual chooses at anytime not to be supported in the exercise of their legal capacity, their decision shall be respected. Support in the decision it has not to be replaced with substituted decision-making since it would violate human rights norms, unless the individual agrees to the substitution.

Alongside with the support decision-making, it is the States duty to create a valid system support in the exercise of the legal capacity by constructing competent safeguards. Their principle objective must be to guarantee the respect of the person's rights, will but also preferences by providing, when necessary, protection from abuse on equal basis with all human beings.

1.6 "On equal basis with others"

Article 12 of CRPD it is to be read together with article 5 of the same convention, and it quotes:

> *1. States Parties recognize 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.*
>
> *2. States Parties shall prohibit all discrimination on the basis of dis-*

ability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

The Committee on the Rights of Persons with Disabilities, in the General comment no. 6 of the CRPD, insists that «equality and non discrimination are among the most fundamental principles and rights of international human rights law ... they are the cornerstones of all human rights.» (Committee on the Rights of Persons with Disabilities 2018, p. 1). As a matter of fact, the two principles are at the core of all human rights treaties. Without these guidelines all the international treaties and conventions would be sterile. Likewise the CRPD by using "on an equal basis with others" throughout the articles, links all the rights to the non-discrimination principle, art 5.

The new approach to disability, i.e. the human rights model, «recognises that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights.» (Committee on the Rights of Persons with Disabilities 2018, p.2)

Having a disability is part of the identity of an individual, hence, the law and the policy maker need to keep it into account, and allow equal opportunities to all human beings. However, the notion of equal opportunities is a general concept that has distinctive developments. On one side there is formal equality, which by treating people the same way in similar situations, aims to take action against direct discrimination. Formal equality establishes an impartial imposition of the law in order to combat prejudices and negative stereotypes. In spite of that it does not keep into consideration the actual differences that exists in reality between individuals. The differences considered in this case are the obstacles that people encounter on a daily basis because of their impairments. On the other hand, substantive equality does keep into account structural differences and indirect discrimination by stating which are the relevant differences in order to better protect and promote the rights of the individuals with disabilities. This form of equality does not treat everyone in the same ways the substantive equality does. On the contrary, it bares in mind the differences and work towards giving everyone the same opportunities despite their disabilities. Formal and substantive equality together try to better safeguard the equality among human beings with disabilities. For example an individual with

a physical deficit, like someone that prior to an incident lost the sensibility in their legs and was forced to a wheelchair, according to the principle of formal equality has to be treated the same way as a person with full function in their body. Therefore both of the individuals are allowed to enter any public building like the town hall, during the opening hours (formal equality). However if the building of the municipality in question has stairs, the person with the physical disability would not be able to enter. Here is where substantive equality takes action by adding that the law has to give equal opportunities to both individuals to enter the building and by requiring all public buildings to facilitate the entrance to persons that have physical impairments.

The Convention on Persons with Disabilities elaborated a new model of equality on which stands the convention itself. To better ensure equality among the society, the CRPD went to the core of every single right by recognising socioeconomic disadvantages, the intersectionality of every human being, the right to participation of individuals as social beings, but also the accommodation dimension, as a matter of human dignity. Minkowitz (2017) calls it "transformative equality" with a slight different view that is present in the General Comment no 1. She refers to it as different «measures to remove the causes of inequality» (Minkowitz 2017, p. 84) and by making a parallel with the Convention on the Elimination of all Forms of Discrimination against Women, she claims it to be a «real transformation of opportunities, institutions and systems so they are no longer grounded in historically determined paradigms of power and life patterns» (Minkowitz 2017, pp. 84-85). Therefore, all the rights recognised in the CRPD, are to be seen, but also interpreted, throughout the principles of equality and non discrimination. Moreover, the convention affirms that their promotion is of immediate realisation for member states and not subject to progressive realisation.

In the Convention on Person with Disabilities there are considered various forms of equality; there is the "equality under the law" and the "equality before the law". The last one is a conventional kind of equality that is contemplated also in others conventions. It concerns the right of each and every human being to be protected by the law. In other words, "equality before the law" refers to substantive equality. Meanwhile, "equality under the law" is one-of-a-kind principle that is to be found only in the CRPD. Being equal under the law by making a reference to article 12 of the same convention, implies the option given to those with disabilities to engage in legal relations, i.e. «the right to use the law for personal benefit» (Committee on the Rights of Persons with Disabilities 2018, p. 3). The two different terms used throughout the CRPD, require for the institutions and public authorities to actively intervene to combat discrimination, therefore to act in conformity with the

convention by protecting and promoting the rights of persons with disabilities. In addition, member states of the convention have the duty to ensure "equal benefit of the law" meaning to allow access for all to the same opportunities by eliminating obstacles, and by safeguarding equal access to the judiciary system to defend their rights. Therefore states have the so called positive obligations to protect individuals with disability also by promulgating legislation that is specifically addressed to those who are discriminated on the basis of their disability.

In the third paragraph of the article there is a unique recognition of a human right, that is the right to reasonable accommodation which considered to be «essential to secure compliance with the principle of non-discrimination.»(Della Fina, Cera, and Palmisano 2017, p. 167). It is one of the duties of the member states to ensure reasonable accommodation and the denial of providing it would result in the violation of a basic human right, therefore it is of immediate application. Cera claims that:

> *The consequence of this explicit intersection of equality and reasonable accommodation in the CRPD is that the right to non-discrimination can only be realized through its application to all human rights.*

Thus, the CRPD gathers that this new right, together with equality and legal capacity, stand at the basis of the recognition of other human rights and their respect. Moreover, if a person with disabilities does not enjoy the right of reasonable accommodation it results difficult, if not impossible for them to enjoy any other human right because at the basis of it stands a discrimination.

To summarise, states members of the Convention on Persons with Disabilities, have specific obligations. Upfront, it is their duty to refrain from discriminating actions or laws that are adopted on the basis of disability. Likewise, it is necessary to abolish or modify all laws, customs and practices that involve discrimination. In addition states have the obligation to take such measurements and to raise awareness about the equal rights of persons with disabilities, and in the same time to ensure that those rights are actionable in courts in order to provide justice for those discriminated. The sanctions need to be proportionate but also effective for the purpose of dissuading others. On the other hand members of the convention also have a passive role. It is fundamental to monitor the implementation of the Convention by involving also organisations of persons with disabilities, by consulting and implicating them in the implementation as well.

It is important to be noted that the prohibition to discriminate it is not referred only to the states and their institutions but it does include also private individuals as well as organisations.

1.7 Equality and legal capacity

Equality has as its premises for the individual to be a subject of the law, which implies to have legal capacity. «Equality before the law must include the enjoyment of legal capacity by all persons with disabilities on an equal basis with others.» (Committee on the Rights of Persons with Disabilities 2018, p. 12). Whenever legal capacity is denied to an individual because of their disability this is an act of discrimination that is outlawed by the Convention on Rights of Persons with Disabilities. Thus, article 5 and article 12 of the convention are essentially connected to each other and to better allow the articles to guarantee the rights for persons with disabilities states members have obligations. One of the most important steps is to reform all internal laws that deny legal capacity on the basis of disability and promote a supported decision-making model. Furthermore the General comment n. 6 asks to the states to ensure resources to the new model of decision-making by also assisting individuals and support them with various services, both formal and informal. In addition states shall create «an accessible, locally available, low-threshold network of high-quality free legal counselling or legal aid, which must respect the will and preferences» (Committee on the Rights of Persons with Disabilities 2018, p. 12) of persons with disabilities. The network has to apply to the convention, therefore the protection and the counselling can not be based on removal of legal capacity. The persons, networks that provide those services are required by the convention to be educated and trained.

1.8 Persons entitled of CRPD

It is important to understand who are the persons with disabilities, and what it means to have a disability. A definition of persons with disabilities it is to be found in the preamble of the CRPD which

> *...recognises that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others .... (United Nations (UN) 2006).*

Furthermore in the first article , second paragraph of the same convention, it gives a specification by adding that

> *Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*

As can be seen the disability, according to the convention, results form the interaction with the external of certain persons. This is a big threshold reached by the convention that outlines the view of the Committee, and of the CRPD itself. The UN Development group goes further into details and adds that states may adopt a more flexible approach, which means that the individuals that are recognised as persons with disabilities may vary depending on «socio-economic contexts and cultural environments.»(United Nations (UN) 2011, p. 16).

In article 3 of the CRPD there are enumerated the eight principles that are of a central importance. First and perhaps most importantly, the respect for human dignity that lies at the core of the human rights, but also for the independence and freedom of persons. Furthermore, we can find non discrimination and respect for difference, that are to be complied both by the states and by the single individuals; accessibility meaning physical access to structures; equality of opportunities; equality among men and women; effective and complete participation and inclusion in society; and last but not as for importance, respect for the evolving capacity of children with disabilities. All of these principles are later taken one by one throughout the convention and better explained the states duties towards them.

The convention recognises also many other rights. Indeed it could be divided into 3 parts. The first part contains the more technical article and it goes from article 1 to the 4th. The central part is the actual core of the CRPD and it is where the rights of persons with disabilities are stated. Some of the rights to be recognised are for example the respect for privacy (art 22), respect for home and the family (art 23) a very debated one, adequate standard of living and social protection (art 28), personal mobility (art 20), living independently and being included in the community (art 19), education (art 24), and many others that are of equal importance as the ones mentioned here. The last part of the convention goes from article 31 until the last one that is 47. This section illustrates the mechanical part of the convention and puts its focus on technical aspects, for example the implementation and monitoring part (art 33), or the institution established by the convention i.e. article 34 Committee on the Rights of Persons with Disabilities, the Report of the Committee (art 39) and so on.

Overall the CRPD gives persons with disabilities recognition as human rights holders, and empowers them to act in order to defend their rights.

The UN Convention on Human Rights of Persons with Disabilities is an instrument of hard law that stands on the social model of disability which was further elaborated into a new approach i.e the human rights model. This new point of view allowed the CRPD to recognise many innovative human rights of persons with disabilities that were never before recognised in others instrument. Furthermore, it has

to be noted that the convention does stand on by itself being the one that recognises human rights to persons with disability, but also includes that other fundamental treaties like UN Charter, the UDHR, the ICESCR and many others apply to persons with disability as well.

Chapter 2

Limits and boundaries of legal capacity

2.1 Autonomy and legal personality

The concept of autonomy is very popular in literature but also significantly used in everyday-life. The etymology of the word comes from the Greek words “autos” meaning “self” and the word “nòmos” which is “law” or “rule”, the freedom to live by self law or rules, where self law refers to the autonomy of choosing for themself. Many political philosophers have wrote about autonomy and gave their definition of it. John Stuart Mill in his book “On liberty” writes about the principles of liberty. He underlines that the first one is the liberty of thought and feelings and he finds intrinsic value in it, i.e. permitting an individual to decide for himself even if he makes unhealthy choices. Furthermore Dworkin «does not use the word “autonomy”, but in discussing the idea of treating people as equals he is arguing for equal respect for the autonomy of citizens» (Dworkin 1988, pag 3) and in doing so he implicitly gives great importance to the autonomy, considering it as a prerequisite of equality. Moreover, prof. Bruce Ackerman when writing about the liberal state and its main pillars, says that «it is not necessary for autonomy to be the only good thing; it suffices for it to be the best thing that there is.»(Ackerman 1980, pag 369).

During the latest years the contemporary feminist ideology has had its saying in the matter of autonomy and it affirms that autonomy has both social and relational dimensions. This school of thought have had a profound impact on the new approaches on legal personality and legal capacity. Lucy Series in her article “Relationships, autonomy and legal capacity: Mental capacity and support paradigms” explains how peoples behaviour, decisions, beliefs, values and identities are influenced and shaped also according to the relationships they have and nourish. The relationships that individuals have at a young age with «parents, teachers and friends,

that provide the necessary support and guidance for the development of autonomy» (Series 2015, pag 81). Oshana Marina in her book "Personal autonomy in society" goes further and explains that an individual does not reach full autonomy until particular social and relational conditions are satisfied. However, she adds that relationships could also be the reasons why individuals are not truly autonomous i.e. they have oppressive relationships.(Oshana 2016).

The school of thought of the contemporary feminist falls under the name of relational autonomy (RA). The literature of RA provides a series of alternatives in which a person can be assisted in taking decisions by considering relationships as enabling autonomy. In particular RA focuses on support in the context of mental capacity assessment which is strictly bounded with legal capacity (as it is explained in 1.4). Mackenzie and Rogers in their article "Autonomy, vulnerability and capacity: A philosophical appraisal of the Mental Capacity Act" describe mental capacity as being by nature «dialogical» (Mackenzie and Rogers 2013) since a dialog is used to asses someone's mental capacity. This approach, called "hermeneutic", has the ability to promote authentic decisions making by seeking in an individual verbal and non-verbal communication their personal narrative, values and beliefs. However Series specifies that according to RA theorists «autonomy is always, for everyone, dependent upon supportive relationships which enable autonomy to develop, and that it is necessary to be given opportunities to make decisions, including mistakes, in order to develop autonomy.» (Series 2015, pag 85)

RA literature deeply analyse the support paradigm that the CRPD proposes. It is highlighted how this paradigm brings up difficult questions as per the ownership of a certain decision. Indeed, Series presents in her article some theories according to which «the supporters should be viewed as a prosthesis for thinking [...] and we should attribute the functioning of the prosthesis to the agent using them»(Series 2015, pag. 86). Moreover, Series explains how prosthesis are individuals with their own minds, thus it is difficult that supported decisions could be to some extent cleansed of the moral frame of the person. Regardless of its flaws the supported paradigm is one of the most preferable and highly consensual, however simultaneously literature has found «instruments that gives advance consent to measures that may conflict with a person's expressed will and preferences in the future»(Series 2015, pag. 86).

The RA literature provided with "self binding directives" and one of them is the Ulysses agreement. The name is after the Greek hero Ulysses who wanted to hear the sirens singing and asked his crew to tie him to the boat and not untie him whatever he might say. Likewise, the Ulysses agreement works: a person decides in advance what treatment, or no treatment, they want at a point in the future when

because the situation might be such for them to change their mind. It is important to notice that Ulysses agreements do not require for a person to be incapable of making decisions in order for it to come into effect. Series affirms that «they can present ethical hazard because they require a person's presently expressed wishes to be overruled» (Series 2015, pag. 86).

Another example of binding directives is the co-decision making agreement which is used in Canada, Ireland and Australia. This agreement establishes that a person nominates through a formal agreement and court authorisation, a co-decision maker. The co-decision maker can help the individual in all decisions or just in some specific cases. This agreement gives the power of veto to both individuals; therefore, these agreements are criticised because they seem very similar to substituted decision making model. However the co-decision making agreements can be very effective for people that fully trust a third party to take action on their behalf and still be involved and informed and most importantly have a saying in the matter.

Facilitated decision making is an approach for people that do not have anyone in their life whom they trust to understand their needs and communication in order to support them in their decisions. This model establishes an external facilitator that takes decisions on individuals behalf only after they have listened and understood the individual' narrative by taking into account their past, set of values and moral frame. Thus, this approach is sensitive also to the individual present expressions despite the fact they are labeled as incompetent. What makes this model different form the substituted decision making is that the third party makes the decisions on the basis of the «best interpretation of the person's will and preferences, rather then their objective best interest» (Series 2015, pag. 86). This approach is all about the facilitator interpretation and accuracy, therefore there is the risk of misunderstandings. Nevertheless, as Series affirms, facilitators do have three moral obligations: «first, to strive for the best interpretation [...], second, to maximise their potential to express what they want more clearly thirldly, having come to the best interpretation of what they want, to convert that into legal effect on their behalf.» (Series 2015, pag. 87)

The models that the RA literature provides are all within the support paradigm approach, thus they aim to protect the autonomy and legal capacity of persons with psychological disabilities. As Series affirms:

> *Without wishing to dismiss the claim that sometimes other are able to identify situations where we are not ourselves, it is not immediately obvious that a claim to know a person's true will and preferences better than they do is a preferable basis for coercive intervention, or is any less prone to subjective and arbitrary interpretation, than mental incapacity and best interests, or even risk.*

On the other hand Stefan reminds us in her article "Silencing the different voice: Competence, feminist theory and law" that capacity is «a value judgment arising from an individual's conversation or communication with individuals in positions of power»(Stefan 1992, pag. 47) where failure of communication are associated only to the most fragile part of the dialog. Keeping this in mind it makes even harder for persons with disabilities to even try to express themselves because they are discouraged from the beginning.

2.2 Mental capacity assessment

At the basis of the legal capacity lays the fundamental concept of mental capacity and its assessment. Mental capacity is about individuals that have the intellectual ability to make discerning and considerate decisions. Owen et al. suggest that «it is seen simply as a necessary condition for the valid exercise of self-determination.» (Owen et al. 2009, pag. 90).

The assessment of mental capacity is fundamental in the process of legal capacity which depends on the person's action and on the consequences of those actions, by determining how much that person have power on their life. «The concept of capacity is therefore crucial to the law of consent and the courts have to devise criteria according to which they can establish the presence or absence of capacity in cases where the initial presumption is challenged.» (Owen et al. 2009, pag 90).

There is no universal criteria for the assessment of mental capacity and legal capacity, however most legal jurisdictions base their system on medical tests. In their article "Mental capacity and decisional autonomy: an interdisciplinary challenge" Owen et al. analysed some cases, mostly in US and UK, to research what test was used to asses capacity. The two preferred criteria that had emerged from their studies are very similar between them. The first system was theorised by Grisso and Applebaum in 1998: the capacity is assessed in relation to treatment decisions. The test used consists in four steps that tests: 1) the ability to express a choice about treatment, 2) the ability to understand information relevant to the treatment decision, 3) the ability to appreciate the significance of that treatment information for one's own situation, 4) the ability to reason with relevant information so as to engage in a logical process of weighing treatment options. As Owen et al. notice «is designed as a descriptive definition written to inform clinical practice, rather than as an authoritative statement of law, it provides a useful background against which to consider the position as it is evolving» (Owen et al. 2009, pag. 91). This approach is mostly used in the United States of America, meanwhile according the Owen et al. studies in the United Kingdom the approach is slightly different. In the UK there

is indeed an official document called “Mental Capacity Act” (MCA) that in section 3 paragraph 1 affirms:

> *[A person] is unable to make a decision for himself if he is unable:*
>
> *(a)to understand the information relevant to the decision,*
>
> *(b)to retain that information,*
>
> *(c)to use or weigh that information as part of the process of making the decision,*
>
> *or*
>
> *(d)to communicate his decision.*

This model was built on the common law and the Courts still refer to the existing case law when applying the law, therefore «any discussion of the definition of capacity in English law requires reference to both common law and the MCA.» (Owen et al. 2009, pag 91).

Comparing the two approaches there are some similarities. Both methods give great importance to being able to express a choice or to communicate a decision and to the comprehension of the relevant information. Owen et al. summarise the two similarities in the cognitive terms of attention, memory and language. The individual, in order to be considered responsible of their actions, has to be able to at least grasp the information needed to understand their own situation. However, the difference in the two models is to be found in the last point: the US approach requires the ability to reason meanwhile the second method avoids using the verb “reason” and instead says “weigh” or “use”. «The absence of rationality in the decision-making process cannot alone amount to incapacity. Neither can the irrationality of the outcome»(Owen et al. 2009, pag 92). A perfectly competent individual should be able to decide for themself, it is their right to do so and the right keeps existing despite of the fact that the consequences of the choice may be rational or irrational. On the other hand Owen et al. affirms that the law assessing capacity has to be very precise because if it is permissive it might protect decisions that are not taken autonomously, or on the contrary if it is too severe some decisions that are undoubtedly autonomous might be disregarded.

In order to asses an individual mental capacity the Court shall focus on the person’ ability to understand and to weigh the information they need to take decisions. The reasons why an individual takes decisions do not need to be, as Freedman says, “recognisable” since this criteria puts its focus on the reasoning process by going beyond the ability to grasp information and falls into the individual reasoning according to their moral frame. Indeed «the decision-making lacks capacity because it is based on a misperception of reality, not simply because it is an irrational decision

- the distinction between process and outcome can be very fine» (Owen et al. 2009, pag 93).

At the beginning of this section it was highlighted how the jurisdiction on mental capacity bases its assessment on medical tests although the medical premises are rather different from the legal perspective. Indeed, psychiatrists approach autonomy from the "principle of duty of care" (Owen et al. 2009), while the law starts from presumption of capacity. The two approaches have different bases therefore it is considerably difficult to try to move them closer together.

2.3 "Best interest" versus "will and preferences"

Generally, juridical legal capacity evaluation considers mainly substituted decision making and supported decision making. Indeed, when discussing about "best interest" and "will and preferences" they refer to the two different approaches regarding legal capacity. Best interest is related to substituted decision-making where a third party is appointed to take a decision in the best interest of the individual that lacks legal capacity. On the other hand when speaking of "will and preferences" it is implied that the individual still has legal capacity therefor their wishes are respected.

The best interest is decided, regardless of the individual that concerns the situation, by the third party, often without even consulting the person upon which the consequences fall. This approach firstly deprives an individual of their legal capacity and subsequently entitles a third party of this right who will take, from that moment onward, decisions according to which they believe it is the best interest of the person. The third party is called guardian and they are responsible of the individual decisions. There is full and partial guardianship and they differ because in the first case the guardian has full power over all legal matters of the individual. Meanwhile partial guardianship is when the third party has responsibility over determined legal matters, e.g. economic matters, health matters and others. It is common that the guardian appointed is a person outside the personal sphere of the individual whose legal capacity is denied. When the guardian takes decisions the individual' personality, believes and wishes are completely disregarded, because the guardian has an outside point of view and little, if not any, knowledge of the person. The third party is a complete outsider, and as such does not know the individual personally. The decisions taken by the guardian are objective and objectivity does not always suit a person's wishes. When it is about a person' wishes objectivity does not have a place in the view of the fact that it is about their life and because of it they shall have a voice and express their preferences since they are the ones living it. All decisions taken by individuals are the result of many factors both objective and subjective,

and most of the times it all depends on how a person perceives the situation itslef.

De Bhalis and Flynn affirm «all forms of support must be based on the individual's will and preferences as distinct from the 'best interests' model»(Bhailís and Flynn 2017, pag. 12). The General Comment on art 12 of the CRPD agrees adding that in case that it is challenging and hard to determine what are someone's will and preferences, for example difficulties in communication, «a best interpretation of will and preferences»(Nations 2013) shall replace the best interest approach. The "best interest" approach is a highly paternalistic model that denies individuals their right to autonomy. Indeed in the General Comment of 2013 states that the guidelines for the exercise of legal capacity shall «respect the rights, will and interests of the person, including the right to take risks and make mistakes»(Nations 2013).

Chapter 3

Norwegian law system applied by the Supreme Court

3.1 Implementation of the CRPD in Norway

There is the belief that the Nordic countries, the Scandinavian countries, are among those where the quality of life it is at its highest. This can be correct to some extent, however, during the last decade, the Northern countries have regressed on some aspects. For example Denmark have emanated laws that clearly discriminate wide categories of minorities, especially immigrants, while Norway, discriminates to some extent people with disabilities. The government has signed immediately on the 30 March 2007 and ratified the Convention on Human Rights of Persons with Disabilities on the 3rd of June 2013. The ratification came along with a declaration from Norway regarding articles 12, 14 and 25 (*Convention on the Rights of Persons with Disabilities: declarations and reservations* 2016).

> *Article 12*
>
> *Norway recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Norway also recognizes its obligations to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. Furthermore, Norway declares its understanding that the Convention allows for the withdrawal of legal capacity or support in exercising legal capacity, and/or compulsory guardianship, in cases where such measures are necessary, as a last resort and subject to safeguards.*
>
> *Articles 14 and 25*
>
> *Norway recognises that all persons with disabilities enjoy the right to liberty and security of person, and a right to respect for physical and*

mental integrity on an equal basis with others. Furthermore, Norway declares its understanding that the Convention allows for compulsory care or treatment of persons, including measures to treat mental illnesses, when circumstances render treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards.

In 2013, after Norway ratified the CRPD, the Likestillings og diskriminering-sombudet, The Equality and Anti-Discrimination Ombud (LDO) wrote a report namely "CRPD: Right to freedom, personal safety and equal health services for persons with psychosocial disabilities" where they pinpointed the obstacles that Norway was encountering in properly respecting the CRPD, as an «input to the Norwegian authorities» (*CRPD:Rett til frihet, personlig sikkerhet og likeverdige helsetjenester for persone r med psykososiale funksjonsnedsettelse r Innspill til norske myndigheter* 2013, p.i). In the introduction of the document mentioned, the Ombud acknowledges that the «CRPD is therefore based on people with disabilities retaining their legal capacity and receiving the support they need to enable them in making decisions, among other things, related to the choice of health services.»(*CRPD:Rett til frihet, personlig sikkerhet og likeverdige helsetjenester for persone r med psykososiale funksjonsnedsettelse r Innspill til norske myndigheter* 2013, p.3)[1] The Ombud goes on by attesting that the Convention on Persons with Disabilities recognises the autonomy, personal freedom and security on the same level with all, and that it gives it emphasis in order to reach total non-discrimination on the basis of disability. Moreover the LDO attempts to illustrate Norway' reasons for the declarations regarding the CRPD. Norway's legislation, according to the LDO, was not in line with the Convention in view of the fact that it was still allowing compulsory mental care treatment as well as detention in institutions without the consent of the person. Additionally, Norway's law fully legitimated the substituted decision-making. In paragraph 4.1.3 of the report the LDO states: «the Norwegian Guardianship Act of 2010 appears to be problematic in the face of the CRPD, in particular regarding Article 12. In LDO's assessment, a major legislative reform in the field of mental health care must be supplemented by a study of a model for "supported decision making" that is in accordance with CRPD Article 12(...)»(*CRPD:Rett til frihet, personlig sikkerhet og likeverdige helsetjenester for persone r med psykososiale funksjonsnedsettelse r Innspill til norske myndigheter* 2013, p.15).[2] According the Ombud, official stud-

[1] CRPD bygger derfor på at mennesker med nedsatt funksjonsevne skal beholde sin rettslige handleevne og få den støtte de trenger for selv å kunne fatte beslutninger knyttet til blant annet valg av helsetjenester.

[2] Likevel vil LDO fremheve at den nye norske vergemålsloven av 2010 synes å være problematisk holdt opp mot CRPD – særlig artikkel 12. Etter CRPD artikkel 12 skal et system for "supported decision making" tre i stedet for såkalt "subsituted decision making". Etter LDOs vurdering må en

ies revealed that around 20% of all patients admitted for mental health care are by forced decisions. Moreover, according to the same studies, the consequences of the coercive treatment together with coercive admission are of big harm for the patients. On account of that in 2012 the Ministery of Health adopted a three steps strategy: firstly the aim for the mental health treatment to become based on voluntary participation; second, resort to high quality of health services in such a manner that the coercive treatment to be reduced at its minimum; and last if there had to be a use of coercion it had to be registered in a the Norwegian Patient Register. The plan was contemplated for three years, from 2012 to 2015.

LDO in the same report explains that the government declaration of the CRPD was «based on the desire to preserve existing legislation, and in the same time to avoid doubts about weather Norwegian law complies to the CRPD.» [3](*CRPD:Rett til frihet, personlig sikkerhet og likeverdige helsetjenester for persone r med psykososiale funksjonsnedsettelse r Innspill til norske myndigheter* 2013, p.21) In other words, Norway still allowed the deprivation of the legal capacity, the coercive treatment and restrain but «as a last resort»[4]. (*CRPD:Rett til frihet, personlig sikkerhet og likeverdige helsetjenester for persone r med psykososiale funksjonsnedsettelse r Innspill til norske myndigheter* 2013, p.22).

In the last part of the report, the LDO gives their opinion on the declaration by affirming that Norway in its stating gives the impression that the authorities are not willing to align with the principles of the CRPD since they legitimately consider coercion as a tool. The Ombud goes even further by contemplating the possibility whatsoever that the declaration is compatible with the CRPD purposes, since article 12 is considered to be a key article of the Convention. In paragraph seven about conclusions and recommendations, the LDO states that a reform of the filed of Mental Heath urges in order to comply with the principles of self-determination and non-discrimination contained in the CRPD. Furthermore they consider that Norway shall withdraw its declaration of the CRPD.

Three years later, in May 2015, Nils Muiznieks, a commissioner for human rights of the Council of Europe wrote a report after his visit to Norway in January 2015. Muzinieks points out in the summary «the implemantation of the CRPD in Norway falls short of some of its key objectives in promoting the self-determination, legal capacity and effective equality of people with psycho-social and intellectual

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større lovreform på psykisk helsevern-feltet suppleres av en utredning av en modell for "supported decision making" som er i samsvar med CRPD artikkel 12

[3]Norske myndigheter synes å ha tilnærmet seg problemet med mulig motstrid mellom norsk rett og CRPD ut fra et ønske om å bevare eksisterende lovverk, og samtidig unngå tvil om hvorvidt norsk rett er i samsvar med CRPD.

[4]som en siste utvei.

disabilities.» (Muiznieks 2015, p.4). Later on in the report, he goes deeper into details by claiming that Norway's declarations on the CRPD is a «de facto reservation» (Muiznieks 2015, p.7) which was criticised by the Ombud, as mentioned earlier, but also by the National Institution for Human Rights on multiple occasions. The declaration may also be the reason why there were no reforms to the existing legislation regarding treatment and admission to institutes coercion as well as substituted decision-making. Precisely, regarding the last matter, in the report it is mentioned that the Guardianship Act, adopted in 2010, makes amends on equality of persons with disabilities, however it still allows denial of legal capacity without approval from the person. In addition to that, Muzinieks reports [p.8] that when the guardians are not a family member, they do not even know who they are representing because they never encountered each other. On account of that the guardians could not comprehend what is in the "best interest" of whom they represent, but yet they do take decisions on the account of the persons with disabilities. In the "Conclusions and recommendations", the Commissioner suggests that Norway shall work harder towards a most comprehensive legislation, by outlawing coercive treatment of any kind, likewise «to develop new systems for supported decision-making alternatives, based on individual consent.» (Muiznieks 2015, p.4) At the same time the report recognises the effort made by the government throughout the "Norwegian national strategy to reduce the use of coercion in mental health care" and on top of that asks for a deeper intervention on the legislative side as well. It is also brought to attention the use of ECT (electroconvulsive therapy) since the Commissioner «is not convinced that the documented use of ECT in Norway with reference to the "principle of necessity" in the Penal Code is in line with human rights standards, including the provisions of the CRPD.» (Muiznieks 2015, p.14)

In May 2019, the UN Committee on the Rights of Persons with Disabilities published the "Concluding observations on the initial report of Norway". The report is a fundamental document since it gathers together information from all independent national institutions including statistics data, and as a result it is a very complete document that gives a great picture of the country's situation in relation to the Convention on persons with disabilities. Firstly, «the Committee welcomes the progress achieved by the State party in implementing the Convention» (Committee on the Rights of Persons with disabilities 2019, para.2), e.i. the adoption of the Equality and Anti-Discrimination Act (2018), the strategy to prevent hate speech (2016-2020), the National Inclusive Initiative that includes persons with disabilities (2018) and a couple more. However it is also noted that Norway still has a long way to go in order for its legislation to be perfectly in line with the CRPD since the declaration made in 2013 were not withdrew and the State has not yet ratified

the Optional Protocol. Moreover, differently from the others reports mentioned earlier, the Committee recognises a «slow progress in replacing the medical model of disability with the human rights model» (Committee on the Rights of Persons with disabilities 2019, para.5d) but it is believed that the legislation has not reached the purpose of the Convention. With regard to specific rights, the UN Committee draws attention to many rights recognised in the CRPD. Among them there is the fundamental "equality and non discrimination" right contained in article 5 of the CRPD; according to the report «there is a lack of effective legislation and mechanisms to address multiple and intersectional forms of discrimination against persons with disabilities [...]» (Committee on the Rights of Persons with disabilities 2019, para.7a). On top of that, it is considered that the Equality and Anti-Discrimination Ombud does not have enough powers «to grant restitution and compensation» (Committee on the Rights of Persons with disabilities 2019, para.7c).

Another right not respected by the Norwegian law is "equal recognition before the law", article 12 or the CRPD; the government have not replaced the substituted decision-making with the supported decision-making, likewise the guardians appointed are not properly trained to carry out their role. The same article is disregarded also because «County governors lack sufficient knowledge of the human rights model of disability and respect for the full legal capacity (..) and do not systematically carry out supervision of the persons still appointed as guardians.» (Committee on the Rights of Persons with disabilities 2019, para.19b).

The UN Committee reiterated also what both the other reports assessed years earlier, Norway's institutions still practice coercive treatment and admission to mental care (article 15 CRPD) and do not respect their right to living independently and being included in the community (article 19 CRPD).

The UN Concluding observations go deeper and pinpoint many other fields of rights, like education, awareness raising, work and employment, respect for home and the family, and others in which Norway shall make amendments, and concludes by «strongly encourag(ing) the State party to involve civil society organisations, in particular organisations of persons with disabilities, in the preparation of its periodic report.» (Committee on the Rights of Persons with disabilities 2019, para.55).

In accordance with the reports mentioned here it seems relatively clear that, in spite of Norway having ratified the Convention on Human Rights of Persons with Disabilities, not all human rights of this minority group are recognised and respected.

3.2 Human rights and legal capacity in Norway's legislation

The Norwegian Constitution is one of the oldest constitutions still in force. It dates back to 1814, although it was amended multiple times. Despite the fact that it was emanated a long time ago, it contains important democratic principles and it has a solid basis on which the state and its institutions are erected. Moreover the Norwegian Constitution ranks on the highest level of the legislation and it can be amended following a special, long and complex process. The lasts major amendments were made in May 2014, for the bicentenary of the Constitution itself, when the Stortinget [5] reviewed many articles and changed the name of section E from "General provisions" into "Human Rights". «Until the reform of 2014, the Constitution offered only a fragmented protection of human rights.» (Øie and Bull 2019, p.34)

For instance the second article, second clause, states that the «Constitution shall ensure democracy, a state based on the rule of law and human rights». (*The Constitution of the Kingdom of Norway* 2020) This article was indeed modified in 2014 and it is now at the core of the Constitution itself, and the basis on which the recognition of human rights in the Norwegian legislation lies on.

The rights introduced with the reform are civil, political, economic social and cultural ones: the right to a dignified life, free from torture, slavery and any inhuman degrading treatment (article 93), the right to freedom (article 94), the right to fair trail before independent court (article 95), the presumption of innocence until proven guilty (article 96), equality before the law and protection against discrimination (article 98), the right to join associations and the right to peaceful protests (article 101), the right to privacy and personal integrity (article 102), the right of children to be heard and to protection of personal integrity (article 104), the right to freedom of movement (article 106), the right to cultural identity and participation in cultural life (article 107), the right to education (article 109), the right to a satisfactory standard of living and to health care (article 111), the right to a healthy environment (article 112) and introduced the legal provision (article 113).

Analysing the rights in Norway's Constitution in more details, we are not able to find a specific article that recognises legal capacity as a human right, indeed «the Lonning Commission supported the idea of a holistic approach to the interpretation of human rights, but [...] this did non prevent the selection of only central rights to be included in the Constitution.»(Øie and Bull 2019, p.40) Moreover, according to Oie and Bull the choice the Commission made was in the logic of not constraining "the freedom of future generations". Thus, it is recalled in ordinary legislation as

[5] the (Norwegian) Parliament.

well as in many international Conventions ratified by the government. On the other hand the equality before the law is recognised in the Constitution in article 98:

> *All people are equal under the law.*
>
> *No human being must be subject to unfair or disproportionate differential treatment.*

The article states the principle of formal equality according to which all individuals are considered on the same level by the law. Meanwhile, the substantive equality, in the second provision, it is not rather clear. However the Norwegian Supreme Court in the Holship case stated that this article «had to be interpreted only as a directive to the courts and other authorities to apply and enforce human rights at the level at which they have been incorporated into Norwegian law» {HR-2016-2554-P,para.70}. As a matter of fact most of the human rights recognised by the Norwegian legislation are contained in "The Human rights Act: act relating to the strengthening of the status of human rights in Norwegian law".[6] The conventions present in the Act are therefore integrated into the Norwegian legislation and some of the most important are: Convention for the Protection of Human Rights and Fundamental Freedoms, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and Protocols attached to those conventions. As part of the law, these Conventions are respected and the rights that they recognise are recognised by the national legislation as well. Therefore, the Courts apply the Conventions being them on the same level as laws emanated by the Storting.

Legal capacity is recognised in the Norwegian legislation throughout the Conventions ratified, and incorporated by the government. One of the most important articles is to be found in the Covenant on Civil and Political Rights (ICCPR) and is article 16:

> *Everyone shall have the right to recognition everywhere as a person before the law.*

«Pursuant to this provision, the individual is endowed with the 'capacity to be a person before the law', i.e. to be recognised as a potential bearer of legal rights and obligations.»(Office of the United Nations High Commissioner for Human Rights 2005, p.4) Afterwards the same right is reaffirmed, but in a different context. It is in the Convention on Elimination of Discrimination against Women (CEDAW) article 15 paragraph 2, that provides of a definition to legal capacity in relation to a particular group of people, in particular the second provision of the paragraph: «[...]

[6]Menneskerettsloven: Lov om styrking av menneskerettighetenes stilling i norsk rett.

they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.» It is therefore a precise provision that recognises the legal capacity to women and in addition to that it specifies what legal capacity includes.

In spite of the fact that Norway has ratified the Convention on Persons with Disabilities, this was never incorporated in the Norwegian legislation. Indeed when speaking of persons with disabilities' legal capacity, there are to mention the articles mentioned above, i.e. the CRPD together with Norway's declaration, but also the Guardianship Act[7] (Justis- og beredskapsdepartementet 2021). This Act was first emanated in 2010 and last emended in 2021 and it contains important provisions on legal capacity and on those who lost it. It is divided into 13 chapters and 102 articles. The Guardianship Act addresses the right to legal capacity but of those who have lost it totally or partially. Indeed the section that is relevant to this case is mainly the 4th "Guardianship for adults"[8], and it comprehends articles from the 20th to the 24th. Specifically regarding legal capacity, articles 20 and 22 shall be read together for a better understanding of the meaning that the government ascribes to the right. Article 22 "Special conditions for guardianship with deprivation of legal capacity"[9] affirms (my transaltion)

> *A person who is in a condition as mentioned in article 20, first paragraph, may be deprived of their legal capacity in accordance with the rules in the second and third paragraphs.*
>
> *A person may be deprived of legal capacity in financial matters if this is a necessary to prevent him or her from exposing his or her wealth or other financial interests to the risk of being significantly impaired, or he or she is being exploited financially in an improper manner. The deprivation of legal capacity may be limited to certain assets or certain dispositions.*
>
> *A person may be deprived of legal capacity in personal matters in certain areas if there is a significant risk he or she will act in a way that will be significantly likely to harm his or her interests.*[10]

[7] Lov om vergemål.

[8] Vergemål for voksne.

[9] Særskilte vilkår for vergemål med fratakelse av den rettslige handleevnen.

[10] En person som er i en tilstand som nevnt i § 20 første ledd, kan fratas sin rettslige handleevne etter reglene i annet og tredje ledd.

En person kan fratas den rettslige handleevnen i økonomiske forhold hvis dette er nødvendig for å hindre at han eller hun utsetter sin formue eller andre økonomiske interesser for fare for å bli vesentlig forringet, eller han eller hun blir utnyttet økonomisk på en utilbørlig måte. Fratakelsen av den rettslige handleevnen kan begrenses til å gjelde bestemte eiendeler eller bestemte disposisjoner.

En person kan fratas den rettslige handleevnen i personlige forhold på bestemte områder hvis det er betydelig fare for at han eller hun vil handle på en måte som i vesentlig grad vil være egnet til å skade hans eller hennes interesser.

The conditions that are mentioned in article 20 first paragraph are «mental illness, including dementia, mental impediment, substance abuse, severe gambling addiction or or severe health impairment»[11]. Moreover it is of fundamental importance that, according to article 25 of the Guardianship Act, a person can be deprived of their legal capacity fully or partially only by a Court sentence and consequently will be placed under guardianship by the state administrator, or also by the Court that has issued the deprivation of capacity. Another important provision it is to be found in article 20, second paragraph «The person who is place under guardianship must give written consent in the creation of the guardianship [...]unless he or she is unable to understand what a consent entails. Consent is not required if the guardianship includes deprivation of legal capacity.»[12]

The Guardianship Act is central when speaking of legal capacity of persons with disabilities because it is on the basis of these provisions that the Norwegian Courts emanate their sentences. However, as it can be infer from the analysis above, the articles are not in line with the CRPD's objectives. As a matter of fact the Convention establishes that the legal capacity shall not be taken from people on the basis of their impairments, at least not without their consent. Moreover the CRPD encourages the supported decision-making, i.e. a network that shall help persons with disabilities when they require assistance, and does not allow for substituted decision-making. Therefore, Norway legislation, due to the declaration made when ratified the CRPD does not apply to all the provisions and rights contained in the Convention.

Another important Act in this matter is one that Norway has emanated in 2018: the "Equality and Anti-discrimination Act"[13] and last amended in 2021. «The purpose of the Act is to establish a comprehensive law that harmonises all protection against discrimination.»(Independent Living Institute 2019, p.5). According to the first section, first paragraph of the Act the grounds that are covered are considerably broad and they comprehend gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or other significant characteristics of a person. According to a study concluded by the Independent Living Institute in Stockholm on the Nordic countries the Equality and Anti-discrimination Act is «one of the few anti-discrimination laws that expressly covers intersectionality.»(Independent Living Institute 2019, pag 5). However it results clear that the

[11] sinnslidelse, herunder demens, psykisk utviklingshemming, rusmiddelmisbruk, alvorlig spilleavhengighet eller alvorlig svekket helbred.

[12] Den som settes under vergemål, skal skriftlig samtykke i opprettelsen av vergemålet [...] med mindre han eller hun ikke er i stand til å forstå hva et samtykke innebærer. Det kreves ikke samtykke hvis vergemålet omfatter fratakelse av den rettslige handleevnen.

[13] Likestillings- og diskrimineringsloven.

Act does not intervene on the matter of legal capacity and does not prevent in any way the loss of it.

3.3 Defending mechanism of human rights in Norway

When it comes to protection and promotion of human rights, Norway has a very well developed network of institutions, besides having ratified most of the international Conventions. Almost all of these institutions are completely independent and they emanate a report every year stating the worked concluded throughout the year and their view on the country's situation on determined human rights.

The monitoring and supervision of human rights starts from a more practical level i.e. the public administration. The institution responsible is the Civil Ombudsman[14] and it is in control of preventing injustice from being exercised against the individual, and it contributes to the administration respecting and securing human rights since 1980. The area of operation includes the public administration and everyone in its service but also all cases where someone may be subject to public deprivation of freedom (section 4 of the Act on the Storting's ombudsman for control of the administration). The Sivilombudet also deals with individual complaints and investigates maladministration or injustices. Sections 5 and 6 of the Act establishes the independence of the Ombudsman e.i. total independence from the Storting and of the administration. Since 2014 the same institution is in charge of prevention of torture.

Another institution is the one mentioned earlier in this chapter, the Equality and Anti-discrimination Ombud. Its assignment is to promote equality by combating discrimination on grounds that include gender, ethnicity, religion, disability, sexual orientation, gender identity, age, and others. The LDO is entitled to receive individual complaints, examine them and later provide advice to the victims. Other responsibilities of the Ombud are the promotion and monitoring of the Convention on Women (CEDAW), Persons with Disabilities (CRPD) and the one on all forms of Racial Discriminations (ICERD). The LDO is also the second degree appeal of the Equality Tribunal. The Ombud is an independent institution from the Storting as well.

A third institution is the National Institution for Human Rights (NIM)[15]. It is an independent, public body that is organizationally subordinated to the Storting and it has many important mandates. Its main task is to promote human rights but also to protect them according to the Constitution and the Conventions ratified by

[14] Sivilombudet.

[15] Norges institusjon for menneskerettigheter.

the country. NIM also publishes annual reports on specific rights or conventions each year. The National Institution does not have to hand individuals complaints, instead its task is to «provide advice and guidance, so that the state authorities can fulfill their human rights responsibilities in the best possible way»[16] (NIM 2022). In addition to this NIM also provides regular reports to the UN on various human rights.

In 2018 the Act relating to the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal[17] introduced other two important institutions in order to better promote and protect human rights. It is about the Anti-discrimination Ombud and the Anti-discrimination tribunal. They have different tasks and responsibilities. Both institutions have jurisdiction in the same fields that are established by section 1 of the Act and it comprehends working environment, ownership of property units, tenancy, house-buildings cooperatives, housing cooperatives and ship labour. The Ombud has an active role in promoting equality in all sectors of the society on the basis of gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression or age and it also examines individual complaints. The Ombud also takes individual complaints indeed it is a quasi-judicial appeal body and its duty is mainly to provide guidance to victims, it does not assist or represent them in legal proceedings. On the other side the Tribunal «is an independent public administrative agency administratively subordinate to the King and the Ministry.»[18] The Tribunal also examines individual complaints but previous to the Ombud, and it can take administrative decisions and impose coercive fines however this last action is not applied in reality.

All the institutions mentioned above are special bodies that somehow complete and better assure human rights. Nevertheless the Norwegian general jurisdiction consists in a hierarchy structure system where all courts deal with civil, criminal and administrative cases. At the very bottom of the hierarchy we find the Conciliation Board[19] which is the lowest court in civil cases and it's mainly a conciliation body and a court. Right after there are the District Courts[20] which has general jurisdiction also in cases heard by the Conciliation Board. Afterwards at the second grade are to be found the Appeal Courts[21] and they manage the appeals of most civil cases

[16][...] å bidra med fagkunnskap og gi råd og veiledning, slik at statens myndigheter kan ivareta sitt menneskerettslige ansvar best mulig.

[17]Lov om Likestillings- og diskrimineringsombudet og Diskrimineringsnemnda

[18]Nemnda er et uavhengig forvaltningsorgan administrativt underordnet Kongen og departementet.

[19]Forliksrådet.

[20]Tingrett.

[21]Lagmannsrett.

and all criminal ones. The Appeal Courts are only six and they are in Oslo, Hamar, Skien, Bergen, Trondheim and Tromsø which are the most important cities.

The Supreme Court[22] is the last court of appeal and the highest. It is located in Oslo and it has jurisdiction over all the country and on all cases, however the right to appeal to it is very restricted. Some of the objectives of the Supreme Court are to safeguard the Constitution by allowing the law to develop within its framework, ensure uniformity of legal processes, decide in matter of principles and others. It is composed by 20 judges and the plenary session is only required for very important cases, meanwhile normal cases are preside over only by 5 and the ones of medium importance by 11 judges.

Cases of human rights violations fall under the civil cases most of the times or under administrative matters, therefore they may be firstly analysed by the Conciliation Board and after by the District Courts and lastly by the Supreme Court.

3.4 Sentence of the Norwegian Supreme Court on legal capacity

After having analysed the Norwegian judiciary system and the law regarding legal capacity, we are focusing in detail how the Norwegian Supreme Court ruled over a case of a person with disability and her legal capacity.

The sentence of the Supreme Court (SC) that we refer to (NORGES HØYESTERETT 2016) dates back in December 2016 and it sees the Attorney General Erik Bratterud against the guardian and lawyer Dagfinn Tynes. The case concerns a requirement for the deprivation of legal ability to act in economic matters, in particular, weather inherited funds should be covered by the lack of that right.

It is about a women, A, who was born in April 1965 and after several year of forcibly medication and institutionalised, was diagnosed, in October 2013, with paranoid schizophrenia. A's mother used to take care of her and after her death in 2013, A inherited circa NOK 1 million (98.000 euro circa). After a brain attack in September 2014, A was hospitalised and the doctors claimed that she was unable to live independently due to her mental illness as well as because she became dependent on a wheelchair and needed help dressing. She opposed moving to a care home, however she has had been living in an apartment in a care center under the municipal psychiatric service.

Pursuant notification from the psychiatric service where A lived, on 30 October 2014 the County Governor established guardianship pursuant her consent. Later

[22] Høyesterett.

on, in December of the same year, the County Governor met again under recommendation of the Guardian and deprived A of the legal capacity to act in economic matters, therefore the inheritance went under administration of the Guardian. The decision was appealed and brought in front of the District Court which in April 2015 emanated its sentence. The Court partially deprived A of her legal capacity to act in personal areas that were limited to determining her residence and to making decisions on services and benefits, and in addition she was also deprived of her legal capacity to act in economic matters. However this was not to be applied, according to the Court, to the received inheritance.

The County governor, together with the Guardian, appealed the fact that A should be deprived fully of her ability to act in economic matters. Meanwhile A with her attorney appealed, but regarding her psychiatric diagnosis as considered by her incorrect, therefore, according to them, the conditions that deprived her of her legal capacity did not exist.

The Court of Appeal issued its sentence in January 2016 by supporting the sentence of the District Court. It is important to notice that this judgement was a dissenting sentence since two judges were not of the same opinion. Both parts appealed to the Supreme Court. On one side the County Governor appealed the part of the sentence where it said that the deprivation of legal capacity to act in economic matters did not apply to the inheritance, and on the other hand A appealed claiming that she could not be deprived of her legal capacity in personal nor financial matters. Meanwhile in June 2016 A's Guardian resigned and a new Guardian was appointed.

The Supreme Court in its sentence of December 2016 goes deep into analysing how the Appeal Court (AC) argument its decision. The AC claims that in order to deprive a person of her legal capacity to act over funds not needed for ordinary expenses and subsistence there is the need for a more serious condition. Moreover the Court affirmed that the boundary between funds needed for subsistence and other means is very difficult to draw. The principle according to which the AC took the decision is the "minimum medium principle" i.e. deprivation of legal capacity just to prevent her from putting her wealth or other financial interests at risk of being substantially deteriorated. Moreover the AC found that A had significant deviations from normal safeguarding of her personal finances in terms of ongoing social security benefits. However the Supreme Court argued that this discrepancy can be found in financial understanding as a general feature of her condition resulting in not comprehending how to administrate neither her inheritance. The proof is evident since A's inheritance was reduced to about 650,000 NOK. In addition to this, the SC claims that in the event that A is not deprived of her legal capacity in acting in financial matters fully she must be deprived also of her right to start debt, however

the AC did not take this into consideration.

Furthermore the Supreme Court, in its sentence, reflects on article 12 of the UN Convention on the Rights of People with Disabilities. The Court argues that Norway's obligations deriving from article 12 do not change the Guardianship Act ruling that allows for legal capacity to act in economic matters to be fully deprived. The SC makes a reference also to Norway's declaration on that article claiming that the statements made by the Committee on the Rights of Persons with Disabilities cannot be given decisive weight also with regard to article 92 of the Constitution: «The authorities of the State shall respect and ensure human rights as they are expressed in this Constitution and in the treaties concerning human rights that are binding for Norway.»[23]

On the other hand the SC claims that since A consented to guardianship, this gives the guardian and the care center where she lives, the right to cooperate with her on the use of the money. Therefore the cooperation should be sufficient to protect A's wealth and economic interests. In addition the Court, in emanating its sentence, kept into consideration that the funds that were spent were necessary since they were allocated to expenses for a person with disabilities.

When discussing the question of whether A should be fully deprived of her legal capacity in financial matters or just regarding the control of her inheritance, the SC referred to article 22 of the Guardianship Act (mentioned in section 2.2) keeping in mind the minimum medium principle. The Supreme Court ruled that it is compatible with Norway's legislation, more in particular with the Constitution and art 8, second paragraph, of ECHR[24], the full deprivation of legal capacity in financial matters. The SC also brings to attention that article 12 of the CRPD do not change in any way the rule of the Guardianship Act since the Convention is not incorporated into the Norwegian law, therefore art 22 of the Act shall be interpreted in accordance with Norway's obligation under international law.

In the Supreme Court sentence, from clause 49 until 70 included, examines in depth the CRPD influence in the Norwegian legislation. The SC comes to the conclusion that according to art 12 clause 2 of the CRPD and to the definition of person with disabilities, no person with a long-term mental, intellectual disability shall be deprived of their legal capacity. At the same time clause 4 of the same article men-

[23] Statens myndigheter skal respektere og sikre menneskerettighetene slik de er nedfelt i denne grunnlov og i for Norge bindende traktater om menneskerettigheter.

[24] There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.(Council of Europe 1950)

tions "measures" concerning the exercise of legal capacity and that such mechanism shall be proportionate and adapted to the person with disabilities. The Norwegian SC underlines how this clause does not exclude that measures may consist in deprivation of the legal capacity and that the Guardianship Act was emanated before the CRPD was ratified by Norway. However, even after ratification of the Convention Norway issued its statement regarding art 12 without considering the General Comments that clearly ruled out deprivation of legal capacity and the SC considered that the government interpretation leads to limited significance for the Convention, as a result the Guardianship Act must be followed.

The sentence also discusses General Comments of the EEA Agreements and EEA obligations that we are not going to report. However we are going to consider the SC comments regarding ECHR, indeed article 102 of the Constitution[25] is based among other things on art 8 of the ECHR. The Court underlines how the similarities are many and that the Norwegian article shall be interpreted in light of the international law. Although art 102 Const. does not consider legal restriction in private life and in family, art. 8 second clause ECHR is more permissible. As a result art 22 of the Guardianship Act together with the basic clause of the minimum medium principle meets the Convention requirement for legal basis, purpose and proportionality, and the provision is thus compatible with human rights in the Constitution and in the ECHR. This means that the Supreme Court concluded that legal capacity to act in economic matters can be fully denied to a person in need of guardianship.

After the SC cleared its position on denial of legal capacity, it went deeper in analysing if there was the need for complete denial of legal capacity in economic matters or partial. The Court starts by pointing out that art. 22 of the Guardianship Act does not make any differentiation, however it keeps into consideration the risk of significant deterioration of wealth or other economic interests as decisive. According to the Court partial deprivation of legal capacity shall be determined on the basis of an assessment of the risk of significant deterioration associated with the various funds. The SC claims that there must be a significant deviation from normal in order for the legal capacity to be fully denied because as the Ministry emphasises that it is important that the individual's integrity and desire to be respected. Subsequently the SC affirms that the law established a high threshold for fully denial of legal capacity in financial matters of a person under guardianship. Moreover the individual's wishes must be respected but with regard to protection of the person from their own actions especially if influenced by the condition they are in. There-

[25] Everyone has the right to the respect of their privacy and family life, their home and their communication. Search of private homes shall not be made except in criminal cases. The authorities of the state shall ensure the protection of personal integrity.

fore with regard to A's condition, the Supreme Court after hearing the explanation of the Chief Medical Officer where A was living, decided on depriving her fully of the legal capacity to act in economic matters.

This sentence of the Supreme Court, however is a dissenting one, which by definition means that not all judges agreed with the final judgment. Indeed 2 of the 5 judges dissented in almost all arguments. First of all the minority of the judges pointed out how the inheritance was not part of the funds A relied on for her subsistence, and precisely for this reason, she shall have more freedom in disposing of her inheritance and according to her wishes. The two judges in the dissenting opinion claimed that the threshold for full denial of legal capacity may be higher then the one considered by the majority since the Ministry, in the preparatory work of the Guardianship Act affirms that the full deprivation of the legal ability to act shall only be relevant where ordinary guardianship or partial denial is not deemed sufficient. In other words the purpose of partial deprivation of legal capacity was to make it possible to establish individually adapted solutions. Furthermore, they also believe that this provision was established in order to bring the Guardianship Act in accordance with the requirements set out in international conventions. In addition, the minority of the SC interpreted the provisions of art 92 of the Constitution in a more opened manner by arguing that Norwegian law must as far as possible be assumed to be in accordance with treaties that the country ratified. For this reason art. 12 of the CRPD shall be attended and shall allow persons with disabilities like A, to have their legal capacity and shall be given the support they may need to exercise it. The judges also recognise that due to Norway's declaration on the same article, the legislation does consider full denial of legal capacity, however it can be recourse to it as a last resort, therefore A should not be deprived fully of her ability in order to prevent exposing her to the risk of being significantly degraded. Moreover A has not been able to control the inheritance without the guardian's consent. Indeed it becomes clear how she needs advice and guidance, according to the SC minority, and how such dispositions should be made in an appropriate manner since she has by her consent a guardian who is required to give such advice.

The sentence, therefore, dissents in the matter of fully denial of legal capacity for A. The minority believes that she may be deprived of the right to contract debt bot not denied capacity over her inheritance.

Conclusion

Human rights are of fundamental importance in the life of persons since they allow people to develop themselves, both on a personal level and on legal level. On the legal level the basic human rights that are essential for individuals are, among others, equality and legal capacity. Human rights are of basic significance for all persons, in particular for those who are part of the exposed categories. One of the most vulnerable category of subjects is persons with disabilities and the instrument that has endeavoured to protect them is the Convention on persons with disabilities. The CRPD, in art 12, attempts to guarantee the right to equal recognition before the law for persons with disabilities, and entitles the states of the duty to ensure this human right and protect it. People with disabilities have equal dignity and equal rights likewise other persons consequently, they are all entitled with human rights. Persons with disabilities may appear to be more in need of assistance; nevertheless, they have their form of autonomy that may be different from what is commonly assumed. Thus, in substance, their autonomy is built in the same way as everyone else' is: with time, personal relationships and experience. The grasp and internalisation of these concepts required a long time for the states, NGOs and other organisation to fully comprehend them. Only during a second phase they started to discuss over a binding instrument to protect human rights of persons with disabilities. Nonetheless some States who ratified the Convention have struggled to comply to art 12 of the CRPD.

In this manuscript it is shown that Norway has disregarded this article in applying its law, despite having transposed the Convention. The paradigm shift that the CRPD proposes it seems to be dismissed by the Norwegian legislation. As a matter of fact, some persons with disabilities appear to have no legal standing or legal agency, their will and preferences are not taking into account. Thus, it is preferred the substituted decision making instead of the supported decision-making, model suggested and enforced by the CRPD.

At the present moment it is important to focus on correctly implementing it without keeping out main matters that outline the Convention.

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