

Incursion in the Study of New Protection Measures of People with Intellectual or Psychosocial Disabilities

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Abstract

In Romania, people with intellectual or psychosocial disabilities did not have the right to marry, divorce, be parents, adopt children and could not access a bank loan. According to the law, many of these people have been banned by the courts. The current legislative reform in the field emphasizes the degree of autonomy of the protected person, respect for specific needs, will and wishes. Currently, we are witnessing a new, modern legislative approach, in accordance with the needs felt at the social level, as well as in the practice of the courts, in harmony with the international and constitutional requirements in the matter.

Keywords: protection, minor, major, tutelage, counselling, special court, mandate.

JEL Classification: K36, K38

1. Analytical considerations regarding the unconstitutionality of the provisions of art. 164 para. 1 of the Civil Code

The present study aims to capture the opportunity and the ways in which the constitutional legislator declared unconstitutionality of the provisions of art. 164 para. 1 of the Civil Code, as well as the analysis of the guarantees by which a special legal regime for the protection of persons with disabilities was established, with the declared purpose of respecting all their rights and freedoms, in full compliance with the provisions of the *Convention on the Rights of Persons with Disabilities*². Taking into account the fact that by regulating a special legal regime for the protection of persons with disabilities, the premise of respecting all their rights and freedoms is created, the Court holds that, in the conception of the Convention on the Rights of Persons with Disabilities, "the legal capacity of the person is not confused with his mental aptitude, being distinct concepts, and the perceived or real limitations in the mental capacity should not be used as justification of the rejection legal capacity³".

Thus, by Decision no. 601/2020⁴, the Constitutional Court found the unconstitutionality of the provisions of art. 164 para. 1 of the Civil Code⁵, which established that "a person who does not have

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² Adopted in New York by the United Nations General Assembly on December 13, 2006, opened for signature on March 30, 2007 and signed by Romania on September 26, 2007, ratified by Law no. 221/2007, published in the Official Gazette of Romania, Part I, no. 792 of 26 November 2010, as amended; the *Convention on the Rights of Persons with Disabilities* aims to promote, protect and ensure the full and equal exercise of all human rights and fundamental freedoms by all persons with disabilities (Article 1 of the Convention) and aims at respecting inalienable human dignity, individual autonomy, including the freedom to make their own choices and the independence of the person (art. 3 letter a) of the Convention). Article 12 point 2 of the Convention, as interpreted by the Committee on the Rights of Persons with Disabilities through General Comment No. 1/2014, specifies that all persons with disabilities have the right to full legal capacity. Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights. It acquires a special significance for people with disabilities when they have to make fundamental decisions about their health, education and work. Also, art. 12 point 2 of the Convention recognizes that persons with disabilities enjoy legal capacity on equal terms with others, in all areas of life, and legal capacity and mental capacity are distinct concepts. In the light of article 12 point 3 of the Convention, the State has the obligation to take all appropriate measures to ensure the access of persons with disabilities to the support they may need in the exercise of legal capacity. According to article 12 point 4 of the Convention, it is possible to apply protection measures on persons with disabilities, adapted to the particular situation of the person. They will be proportional to the degree to which they affect the rights and interests of the person and will be adapted to his situation and will respect the rights, will and preferences of the person. As regards the length of time for which a precautionary measure is to be established and its periodic review, article 12(4) of the *Convention on the Rights of Persons with Disabilities* regulates that a precautionary measure shall be applied for the shortest possible period and shall be subject to periodic review by a competent authority. The Convention therefore enshrines certain guarantees which must accompany the protection measures put in place with regard to persons with disabilities.

³ Article 12 of the *Convention on the Rights of Persons with Disabilities*.

⁴ Published in the Official Gazette of Romania, Part I, no. 88 of 27 January 2021, accessed on the www.lege5.ro, on 09.11.2022.

⁵ Art. 164 para. (1) of the Civil Code regulates the placing under judicial interdiction of the adult who no longer has the necessary discernment to take care of his interests due to alienation or mental debility, which are defined, according to art. 211 of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, no. 409 of June

the necessary discernment to care for his interests, because of alienation or mental debility, was to be placed under judicial prohibition⁶ (with the consequence that the text of domestic law was repealed). Thus, the person placed under judicial interdiction exercised his rights and obligations through a legal representative, regardless of the degree of impairment of the discernment of the person concerned, to the detriment of a support regime characterized by a "support mechanism that the state should grant according to the degree of impairment of the discernment⁷". In this respect, the Constitutional Court calls into question whether the unconditional option for such a substitute regime complies with the requirements of article 50 of the Constitution⁸ and article 12 of the *Convention on the Rights of Persons with Disabilities*.

In order to ensure the guarantees that must accompany the protection measures, there is also Recommendation no. R (99)4 of the Committee of Ministers of the Council of Europe on principles relating to the legal protection of incapacitated adults, adopted on 23 February 1999. Principles 3 and 6 of Recommendation no 3 and 6. R (99)4 of the Committee of Ministers of the Council of Europe establishes that national legislation should, as far as possible, recognize that there may be varying degrees of incapacity and that incapacity may vary over time, and 'where a protective measure is required, it must be proportionate to the degree of capacity of the data subject and adapted to the individual circumstances and needs of the data subject'. At the same time, principle 14, point 1 of Recommendation no 14. R (99)4 of the Committee of Ministers of the Council of Europe provides for the limited duration of the protection measure and the establishment of its regular review. In order to respect the rights of persons with disabilities, any protection measure must be proportional to the degree of capacity, be adapted to the life of the person, be ordered only if other measures cannot provide sufficient protection, take into account the will of the person, be applied for the shortest period of time and be periodically reviewed⁹.

The Civil Code establishes with absolute values, in the sense that any potential impairment of mental capacity, regardless of its degree, can lead to depriving people of the capacity to exercise. The Court holds the following: "the civil capacity is composed of the capacity of use, defined as the person's ability to have civil rights and obligations" (art. 34 of the Civil Code), and "the capacity to exercise, defined as the person's ability to conclude civil legal acts alone" (art. 37 of the Civil Code). "Any partial/total, permanent/temporary limitation of mental capacity can certainly lead to the loss of exercise capacity and the limitation of civilian capacity, without the possibility that such a situation will be avoided by the necessary support measures. It follows that there is a paradigmatic dissonance between the Convention on the Rights of Persons with Disabilities and the Civil Code on the protection measures to be taken with regard to persons with disabilities, the first being placed in the

10, 2011, as a mental illness or a mental disability that determines the mental incompetence of the person to act critically and predictively regarding the social-legal consequences that may arise from the exercise of civil rights and obligations. In order to be able to order the judicial interdiction, there must be a legally designed medical diagnosis of a mental illness or mental disability that determines the lack of discernment necessary for the care of one's own interests. Although from a medical point of view mental debility is a mild form of mental deficiency, from a legal point of view it encompasses all its forms, regardless of the degree of incapacity of the person.

⁶ The placing under judicial interdiction represented a measure of protection of the legitimate rights and interests, patrimonial and non-patrimonial, of the natural person, ordered by the court as a result of the assessment of the possibility of the person to exercise his rights and to fulfill his obligations, the conditions for the establishment of this measure being strictly and limitative provided by the provisions of art. 164 para. (1) of the Civil Code. Therefore, according to the Civil Code, this represented a protection measure established in the interest of the person, taking into account his/her possibility to fulfill his/her obligations regarding himself/herself and his/her assets (Articles 106 and 104 of the Civil Code).

⁷ See, Decision No. 601/2020 of the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 88 of 27 January 2021.

⁸ Article 50 of the Constitution enshrines the right of persons with disabilities to enjoy special protection, meaning that the state must ensure the implementation of a national policy of equal opportunities, prevention and treatment of disability, in order to ensure the effective participation of persons with disabilities in the life of the community. This constitutional norm imposes on the legislator the positive obligation to regulate adequate measures so that persons with disabilities can exercise their fundamental rights, freedoms and duties, an obligation of support and support to come to their aid (see in this regard Decision no. 138 of March 13, 2019, published in the Official Gazette of Romania, Part I, No. 375 of 14 May 2019, paragraph 60, or Decision no. 681 of 13 November 2014, published in the Official Gazette of Romania, Part I, no. 889 of 8 December 2014, paragraph 21).

⁹ See Eaton J, Carroll A, Scherer N, Daniel L, Njenga M, Sunkel C, Thompson K, Kingston D, Khanom GA, Dryer S., *Accountability for the Rights of People with Psychosocial Disabilities: An Assessment of Country Reports for the Convention on the Rights of Persons with Disabilities*, „Health and Human Rights Journal”, 2021 Jun, 23(1), pp. 175-189.

sphere of support measures and operating with intermediate values, while the second placing itself in a substitution regime and absolute values, refusing intermediate solutions adapted to the particular situation of each person. Given that the deprivation of a person's capacity to exercise and the exercise of a person through a tutelage is a particularly serious consequence of a person's indictment, the Court will consider whether the protection measure regulated by the criticized legal provisions is accompanied by sufficient guarantees, as provided for by the Convention on the Rights of Persons with Disabilities, guarantees ensuring the exercise of their legal capacity and, consequently, respect for the dignity of the person"¹⁰.

The Court notes that from the way the measure of judicial interdiction is regulated by art. 164 para. (1) of the Civil Code, it does not follow that it concerns the total lack of discernment of the person in relation to the multitude of interests he can manifest in the different areas of life.

However, although the person concerned may manifest a conscious will in a certain field, by placing him under judicial interdiction he loses his capacity to exercise. Although the Convention on the Rights of Persons with Disabilities establishes that a protection measure is established taking into account the existence of varying degrees of capacity, the Romanian legislation provides for restricted exercise capacity only in respect of a minor aged between 14 and 18 years (articles 38 and 41 of the Civil Code), not the restricted exercise capacity of the major who, as a result of the judicial interdiction, he will be totally deprived of it, the legal acts being concluded, on his behalf, by a legal representative (art. 43 para. (2) of the Civil Code).

The Court holds that "the effects produced by the restriction of a person's capacity to exercise more than necessary may position him, under the aspect of freedom of action in areas where he manifests a conscious will, in a situation of inequality towards other persons who are not under a measure of protection, being free to exercise their rights and to assert their freedoms with consequences for the principle of equality. Therefore, given that there are varying degrees of disability, and a person may have to a greater or lesser extent the impaired, but not entirely abolished, discernment, until a measure restricting the person's capacity to exercise is ordered, consideration should be given to instituting alternative and less restrictive measures than judicial interdiction. Consequently, in the absence of these alternative measures, it is for the legislator to identify and regulate mechanisms capable of providing the necessary support in making decisions based on the will and preference of these persons." Consequently, as it has assumed by ratifying the Convention on the Rights of Persons with Disabilities, the legislator must provide support in the exercise of legal capacity, by developing mechanisms based on the premise of respecting the rights, will and preferences of persons with disabilities, and, only to the extent that the support thus provided proves to be ineffective, to regulate protection measures adapted to the particular situation of persons. Thus, a protective measure such as judicial interdiction must be regulated only as a last ratio, as it has an extreme gravity which implies the loss of civil rights as a whole and which must be carefully considered each time, including as to whether other measures have proved ineffective in supporting the civil capacity of the person. Therefore, the state must not give up its positive obligation resulting from the provisions of Article 50 of the Constitution and must provide all the necessary support to avoid such an extreme measure.

The Court notes that neither from the point of view of the duration for which the protection measure is established, nor from the aspect of its periodical revision, the criticized legal provision does not correspond to the international standards, according to which a protection measure is applied for the shortest possible period and is subject to periodical review by a competent authority. Thus, the interdiction and, implicitly, the tutelage lasts until the cessation of the causes that caused them (art. 177 para. 1 of the Civil Code). The aforementioned legal provision represents a guarantee of substantial law, but in order for this guarantee not to be an illusory one, the legislator must regulate its ordering for certain periods of time in order to make it possible to assess the cessation of the causes that led to the imposition of the measure. These time limits must be fixed, predetermined, easily

¹⁰ In the opinion of lawyer Constantin Cojocariu, expressed in the motivation of the exception of unconstitutionality. See www.lege5.ro, accessed on 17 November. 2022.

quantifiable, flexible and without excessive duration, allowing the measure to be reviewed periodically in an effective and coherent manner.

The Court notes that these criteria are also regulated in the laws of other countries, such as France, where the duration for which the measure is established is expressly established, as well as the conditions under which it may be renewed or extended, respectively the imposition of the measure may not exceed 5 years or, as the case may be, 10 years, renewed for the same period or for a period not exceeding 20 years (article 440 (3) of the French Civil Code) and Switzerland, where the measure must be lifted as soon as possible and re-examined at regular intervals (article 383 of the Swiss Civil Code).

The Court finds that the obligation of the court to communicate the decision of interdiction to the competent health service has been regulated, in order for it to establish on the one placed under judicial interdiction, according to the law, a permanent supervision (art. 941 para. 1 letter b) of the Code of Civil Procedure). Therefore, a person can be placed under judicial protection for an indefinite period of time, and the permanent supervision of the health service does not necessarily imply a periodic reassessment of the person's capacity, this not being unequivocally reflected in the national regulations. However, given that there is a possibility that the mental deficiency may vary over time, the placing under judicial interdiction for an indefinite period and without a periodic reassessment of the person's capacity affects the rights and interests of persons who, during certain periods, can become aware of and coordinate their actions. Therefore, the measure of protection of the mentally impaired person must be individualized in relation to the degree of incapacity.

In its case-law, the European Court of Human Rights has held, in essence, that a measure having the effect of total incapacity must be proportionate to the degree of capacity of the person concerned and adapted to his individual circumstances and needs, the mental disorder must be "of the type or degree" justifying such a measure, interference with a person's right to respect for his or her private life constitutes a violation of article 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, unless it was 'provided for by law', pursued a legitimate objective and was a measure 'necessary in a democratic society'¹¹. The case-law of the European Court of Human Rights has established that "the deprivation, even partial, of legal capacity should be a measure of last resort, applied only if the national authorities, after carrying out a careful analysis of the possible alternatives, have come to the conclusion that no other measure, less restrictive, would serve the purpose or when another measure, less restrictive, it was not tried without success¹²."

In this context, the Court holds that the protection measure consisting in the placing under judicial interdiction, which has as a consequence the deprivation of the person concerned of the capacity to exercise and the institution of tutelage, is not accompanied by the above-mentioned guarantees. In their absence, "the deprivation of the capacity to exercise the person leads to the impairment of one of the supreme values of the Romanian people, namely the human dignity provided by art. 1 para. 3 of the Constitution, which, within the meaning of the jurisprudence of the constitutional court, represents the source of the fundamental rights and freedoms, as well as of the guarantees associated with them¹³". At the same time, "the free development of the human personality, which is closely related to human dignity, is also affected, both in terms of its active side - expressed in the form of freedom of action - and of its passive side - expressed in the form of respect for the personal sphere of the individual and the requirements underlying it¹⁴."

By virtue of these arguments, it follows that everyone must have the freedom to act in order to develop his personality, the State, by virtue of its social character, having the obligation to regulate a normative framework that ensures the respect due to the person, the free expression of the personality of the citizens, of the fundamental rights, of the equality of opportunity, having as a result

¹¹ See, to that effect, judgment of 31 May 2016 in *A.N. v. Lithuania*, paragraph 123, judgment of 27 June 2006 in *Shtukaturov v. Russia*, § 94.

¹² Judgment of 18 September 2014 in *Ivinovi v. Croatia*, paragraph 44.

¹³ See, to that effect, Decision No. 1.109 of 8 September 2009, published in the Official Gazette of Romania, Part I, no. 678 of 9 October 2009.

¹⁴ See Decision No. 465 of 18 July 2019, published in the Official Gazette of Romania, Part I, no. 645 of 5 August 2019, paragraphs 31, 44, 45.

the respect for human dignity. In fact, art. 1, first sentence of the Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights", which "highlights the equality component of human dignity, which constitutes the basis of the principle of equality¹⁵".

In conclusion, the Court holds that the measure of judicial interdiction regulated by art. 164 para. 1 of the Civil Code is not accompanied by sufficient guarantees to ensure the respect for human rights and fundamental freedoms. It is taken into account that there may be varying degrees of incapacity and diversity of a person's interests, and the old regulation of the Civil Code regulated the judicial prohibition that was ordered for an indefinite period of time and was not subject to any periodic review. As has been pointed out in the specialized literature¹⁶, "any protection measure must be proportional to the degree of capacity, be adapted to the life of the person, be applied for the shortest period of time, be periodically reviewed and take into account the will and preferences of people with disabilities. Also, when regulating a protective measure, the legislator must take into account that there may be varying degrees of incapacity and mental deficiency may vary over time. The lack of psychic capacity or discernment can take different forms, for example, total/partial or reversible/irreversible, a situation that requires the establishment of protection measures appropriate to reality and which, however, are not found in the regulation of the measure of judicial interdiction. Therefore, the different degrees of disability must be attached to appropriate degrees of protection, the legislator in regulating legal measures having to identify proportionate solutions. An incapacity must not lead to the loss of the exercise of all civil rights, but must be considered in each individual case."

Therefore, the Court holds that in the absence of the establishment of guarantees to accompany the measure of protection of the judicial interdiction, the constitutional provisions of art. 1 para. 3 of article 16 para. 1 and of article 50, as interpreted in accordance with article 20 para. 1, and in the light of article 12 of the Convention on the Rights of Persons with Disabilities.

In the social life, it seems that from the date of finding the unconstitutionality of art. 164 para. 1 of the Civil Code and until now, the regulatory vacuum has been felt strongly among persons with physical disabilities and mental incapacity and, in particular, among the legal representatives (caregivers) who did not have the legal authority to admit those without protection in a hospital, in a sanatorium, in a care center for the elderly or could not defend the incapable from their own harmful decisions taken under the influence of malicious persons.

The tutelage courts noticed with applications for interdiction have tried to resort to interim measures or procedural loopholes, trying to find solutions to unblock this situation of deregulation, the victims of which were the very victims of which the law presumes to be deprived of protection.

By virtue of fulfilling the obligation to comply with the tasks stipulated in the Convention on the Rights of Persons with Disabilities, the National Authority for the Rights of Persons with Disabilities, Children and Adoptions¹⁷ was designated. Thus, based on the proposals and recommendations made by the Committee for the Rights of Persons with Disabilities, a body of independent experts that monitors the implementation of the Convention by the States Parties, the National Authority for the Rights of Persons with Disabilities, Children and Adoptions may make proposals for regulation in this field, leaving it to the Parliament or, as the case may be, the Government to adopt a regulation in accordance with the Constitution and the *Convention on the Rights of people with disabilities*.

¹⁵ See Decision No. 465 of 18 July 2019, cited above, paragraph 33.

¹⁶ See, Marieta Safta, *The Constitutional Court of Romania (CCR): selection of case law (January-June 2021)*, in "Revista de drept constitutional" nr. 1/2021, p. 76.

¹⁷ According to art. 3 para. 1 letter c) of Government Decision no. 1.002/2019 on the organization and functioning of the National Authority for the Rights of Persons with Disabilities, Children and Adoptions, published in the Official Gazette of Romania, Part I, no. 12 of January 9, 2020 - Specialized body of the central public administration, with legal personality, subordinated to the Ministry of Labor and Social Solidarity, which has a regulatory function and ensures the elaboration of the necessary normative framework in order to harmonize the legislation in its own fields of competence with the provisions of the international treaties and conventions Romania is a party to and the fulfillment of the obligations arising from the capacity of Member State of the European Union.

2. New legislative reform in the field of measures to protect the individual by means of civil law

Starting from the need for a paradigm shift in the field, in order to align the national legislation with the requirements imposed by the *Convention on the Rights of Persons with Disabilities*, adopted in New York by the General Assembly of the United Nations on December 13, 2006, was adopted Law no. 140/2022 on some protection measures for people with intellectual and psychosocial disabilities and amending and supplementing some normative acts¹⁸.

The stated goal was to combat social exclusion and discrimination, to encourage the active participation, under equal conditions, of these categories of persons in civil life, as well as to reintegrate them in the socio-economic plan, with beneficial effects including on their health status.

The law amending the Civil Code aimed to remedy the deficiencies found by the Constitutional Court and to align the national regulation with the requirements of the *Convention on the Rights of Persons with Disabilities*.

Thus, as a result of the amendment of the provisions of art. 164 of the Civil Code, at present, the protection of the major takes place by instituting the measure of judicial counseling or special tutelage, or of the trusteeship or of another measure provided by law. Minors with limited exercise capacity may also benefit from special tutelage. However, “where the tutelage court considers that the protection of the person can be achieved by establishing the trusteeship or by putting him under judicial advice, this measure may be ordered one year before the date of his 18th birthday and shall begin to take effect from that date¹⁹”.

Both special tutelage and judicial counseling are measures to protect people with mental or cognitive disabilities (with abolished or diminished discernment), while the trusteeship seeks to protect the person with physical infirmities, but capable from a mental point of view.

By intellectual disability is meant, significantly reduced ability to understand new or complex information and to learn and apply new skills. The person with intellectual disability has a reduced ability to cope independently.

Psychosocial disability concerns the situation of people who have received a mental health diagnosis and who have experienced negative social factors, including stigmatization, discrimination and exclusion.

2.1. Assistance of the major in the conclusion of legal acts

Assistance for the conclusion of legal acts is a support measure, which does not affect the exercise capacity of the protected person and which is to be carried out on the basis of an authentic act, based on the freely expressed will of the person with disabilities before the notary public. Thus, “the major who, due to an intellectual or psychosocial disability, needs support to take care of his person, to manage his/her patrimony and to exercise, in general, his/her civil rights and freedoms may request the notary public to appoint an assistant, under the terms of the Law on notaries public and notarial activity no. no 36/1995, republished, as amended, for a maximum duration of 2 years²⁰. The assistant must act as an intermediary, with prudence, diligence, honesty and loyalty in order to achieve the best interests of the major. In the exercise of assistance, the person designated as assistant shall not conclude on behalf of the major legal acts, nor shall he approve the acts which he concludes himself. In order to be an assistant, it is necessary to meet the legal conditions laid down in article 113 (a) to (d) of the Civil Code, for the tutelage.

The task of the assistant is free of charge and will be closely supervised by the Tutelage Authority, in order to carry out in good faith the obligations incumbent on the assistant, which is

¹⁸ Published in the Official Gazette of Romania, Part I, no. 500 of 20 May 2022, in force from 18 August 2022. Bringing important changes in the field of civil capacity of individuals, as it was regulated in the Civil Code, including on the protection measures that can be instituted towards persons with intellectual and psychosocial disabilities.

¹⁹ Art. 164 para. 6 Civil Code.

²⁰ Art. 1 of Law nr. 140/2022.

entitled to verify the annual reports drawn up by the designated assistant, in this respect. If the assistant's activity is detrimental to the protected major, any interested person may lodge a complaint with the tutelage court, which decides as a matter of urgency, with the summoning of the parties, with the hearing of the major, by an enforceable order.

2.2. Judicial counseling

A person may benefit from judicial counseling if the deterioration of his mental faculties is partial and it is necessary to be continuously advised in the exercise of his rights and freedoms, not sufficient protection of the person protected by the institution of assistance at the conclusion of legal acts. It should be pointed out that the measure only follows the legal dimension of the life of the person in a situation of diminution of cognitive capacity, which it helps to understand and analyze critically the meaning of the acts he concludes. The measure of judicial counseling can be ordered only if the psychiatric expertise committee considers that the person, although conscious and lucid, presents a partial/temporary/intermittent deterioration of the mental faculties, likely to affect his discernment, there being a risk that the legal acts he concludes will not be fully assumed. The measure is intended both to protect the person concerned from the risk of wasting his assets under the harmful influence of persons directly interested in profiting from him, but also to protect third parties, since the law provides that acts concluded by persons lacking the capacity to exercise or with limited legal capacity are voidable, even without proof of damage.

The duration of judicial counseling may not exceed 3 years. By the decision establishing the judicial counseling, the tutelage court establishes, depending on the degree of autonomy of the protected person and his specific needs, the categories of acts for which it is necessary to approve his acts. The court may order that the protection measure concern even only one category of acts. The ordering of the protection measure is without prejudice to the ability of the protected person to conclude legal acts for which the court has established that the consent of his protector is not necessary.

In practice, protection through legal advice is ensured by the appointment of a tutelage or by the public notary seized for the authentication of the acts concluded by the protected persons, for which the authentic form is mandatory (precisely as a warning of the importance of the act). However, by instituting the measure, the court establishes that certain categories of acts cannot be validly concluded without the legal advice of the party.

The reassessment of the protection measure is made at the request of the protector/representative of the protected person, at least 6 months before the expiry of the term for which it was ordered, by the tutelage court, as well as whenever there are data or circumstances that justify the reassessment of the measure.²¹

2.3. Special tutelage

Special tutelage may be ordered against a person, if the deterioration of his mental faculties is total and, as the case may be, permanent and it is necessary to be represented continuously, in the exercise of his rights and freedoms. The establishment of special tutelage can be done only if adequate protection of the protected person cannot be ensured by the establishment of assistance for the conclusion of legal acts or judicial counsel. The tutelage thus appointed by the court becomes the legal representative of the incapable, who takes care not only of the person, the state of health and his assets, but who is the only one who can conclude legal acts in the name and on behalf of the protected person.²²

The duration of special tutelage cannot exceed 5 years. However, if the deterioration of the

²¹ Sépulchre, M. and Lindqvist, R., 2016. *Enhancing active citizenship for persons with psychosocial disabilities*. „Scandinavian Journal of Disability Research”, 18(4), p. 316-327, <https://doi.org/10.1080/15017419.2015.1105288>.

²² See Schmid, M., Goldbeck, L., Nuetzel, J., Fegert J M., *Prevalence of mental disorders among adolescents in German youth welfare institutions*, „Child Adolesc Psychiatry Ment Health”, 2008 Jan 28; 2(1):2, p. 7, <https://doi.org/10.1186/1753-2000-2-2>.

mental faculties of the protected person is permanent, the court may order the extension of the special tutelage measure for a longer duration, which may not exceed 15 years.

With regard to the person who may be appointed as tutelage, the law takes into account, as a matter of priority, close persons such as the spouse, the parent, a relative or a blueberry, a friend or a person who lives with the protected person, if the latter has close and stable links with the protected person, able to perform this task, taking into account, as the case may be, the bonds of affection, the personal relations, the material conditions, the moral guarantees presented by the one called to be appointed tutelage, as well as the proximity of the domiciles or residences. When appointing the tutelage, the court takes into account the option expressed by the protected person, his usual relations, the interest shown in his/her person, but also the possible recommendations made by the persons close to him/her, as well as the lack of contrary interests with the protected person.

Minors with limited exercise capacity may also benefit from special tutelage.

However, where the tutelage court considers that the protection of the person can be achieved by establishing the trusteeship or by putting him under judicial advice, this measure may be ordered one year before the date of his 18th birthday and shall take effect from that date²³. In case of necessity and until the resolution of the application for the establishment of judicial counseling or special tutelage, the tutelage court may appoint a special curator for the care and representation of the person whose protection has been requested, as well as for the administration of his assets.

The protection measure ordered by the tutelage court takes effect from the date when the court decision became final, but, for opposability vis-à-vis third parties with regard to the lack of capacity to exercise protection, the publicity formalities provided for by the Code of Civil Procedure must be completed, unless the third has known the imposition of the protection measure in another way.

The minor who, at the time of the establishment of the special tutelage, was under the protection of his parents, remains under this protection until the date when he becomes of age, without being appointed a tutelage.

2.4. Protection mandate

With a novelty character, the law amending the Civil Code introduces the notion of a protection mandate, i.e. a unilateral act or convention, concluded in authentic form, by which a person with full capacity to exercise can no longer take care of his person or manage his assets.

The mandate of protection may also be given by the major who benefits from judicial counseling, with the consent of the legal tutelage and with the authorization of the tutelage court.

The mandate may include the wishes expressed by the principal with regard to his care and living conditions after the incapacity has occurred. The mandate also shows the person appointed by the principal, to whom the trustee must be held accountable, as well as the frequency of fulfillment of this obligation, which may not be more than 3 years. If the principal has not appointed such a person, he or she shall be appointed by the tutelage court upon acceptance of the mandate.

Therefore, any person who has full legal capacity may appoint the person to be appointed as tutelage to take care of the person and his or her property, should he or she be placed under judicial advice or special tutelage. By the decision by which the protection measure was taken, the tutelage court appoints the person who will exercise the function of tutelage from the date of the final decision, as well as the duration of the measure.

By the decision establishing special tutelage, the court determines, depending on the degree of autonomy of the protected person and his specific needs, the categories of acts for which his representation is required. The court may order that the protection measure concern even only one category of acts. The court may also order that the protection measure shall relate only to the person of the person being protected or only to his or her property. The ordering of the protection measure is without prejudice to the ability of the protected person to conclude legal acts for which the court has established that it is not necessary to approve the protector or, as the case may be, to represent

²³ Art. 164 para. 6 Civil Code, as amended by Law no. 140/2022.

him (e.g. acts of preservation or acts of small disposition, of a current nature and which are executed on the spot). In his turn, the tutelage may conclude certain disposition acts (e.g. those having as their object the exit of assets of significant value from the patrimony of the protected one) only with the prior authorization of the tutelage court, precisely in order to prevent tutelage from becoming a legal means for the squandering of the incapable's wealth.

The law confers the right of the tutelage to represent the protected person even at the conclusion of strictly personal acts, such as marriage, divorce, the exercise of parental rights, actions relating to parentage or adoption. Thus, the marriage of the person placed under legal advice or tutelage can take place only with the prior written notification of the tutelage, who can oppose the marriage, in the latter case, the tutelage court being the one that will decide on the merits of the opposition. For obvious reasons, related to the state of powerlessness of the one placed under a measure of protection, but also to the influence that the tutelage has on the protected one and who can exercise manipulations of capture and suggestion, the law stops the marriages between the tutelage and the protected one.²⁴

Also, the person placed under tutelage may conclude or modify a marriage contract only with the consent of the tutelage and with the authorization of the tutelage court. At the request of the tutelage, the spouse receiving legal counsel or special tutelage, the court may decide on the separation of property, where this is in the interests of the protected person.

It follows from the interpretation "*per a contrario*" of the provision that divorce by mutual consent cannot be granted if one of the spouses benefits from judicial counsel or special tutelage, it follows that in that situation divorce is nevertheless permitted at the request of one of the spouses, for good reasons or relating to the state of health of one of the spouses and which make it impossible to continue the marriage. In these situations, the spouse placed under tutelage will be represented in the divorce process by his/her tutelage, unless this capacity is held by the other spouse himself/herself, in which case the special authorization of the tutelage court will be sought.

As a rule, the parent placed under special tutelage does not exercise parental authority over his minor child, but retains the right to watch over the child's upbringing and upbringing, as well as the right to consent to his or her adoption, unless he or she was unable to manifest his or her will due to lack of discernment.

We note an incoherence of the legislator who, on the one hand, seems not to allow the consent to adoption expressed by the tutelage, but only personally by the parent placed under tutelage, provided that he has discernment, and, on the other hand, the special tutelage is a measure of protection of the very one whose mental faculties are completely and irreversibly damaged.

Regarding the dwelling of the person placed under special tutelage, I have captured several other inconsistencies of the legislator:

- on the one hand, the law amending the Civil Code provides that the tutelage court decides whether the protected person will be cared for at his home, in a social service or in another institution (for example, in a nursing home), and the change of the place of care is made with the authorization of the tutelage court, at the request of the protected person, of the tutelage, of the social service or of the care institution;

- on the other hand, article 92 para. 4 the Civil Code establishes that the domicile of the person benefiting from special tutelage is with the legal representative, unless for the latter, the tutelage court orders otherwise.

Therefore, the rule is that the protected person lives with the tutelage, at his home, only in this way being possible the direct care and supervision of the one incapable of managing himself and, only by exception, by placing or institutionalizing him in specialized centers.

At the same time, although the text of the law establishes that the incomes and, if necessary, all the assets of the protected person will be able to be used for the care of the protected person, the legislator introduced a substantial limitation and provided that, when the care of the protected person

²⁴ See for specific aspects Oleksandr Shevchuk, Viktor Shevchuk, Ihor Kompaniiets, Serhii Lukashevych, Olena Tkachova, *Features of ensuring the rights of drug addicts for rehabilitation in Ukraine and the European Union: comparative legal aspect*, in „Juridical Tribune - Tribuna Juridica”, Volume 12, Issue 2, June 2022, pp. 263-281.

is not done at his home, he and the furniture are kept at his disposal.

The power of administration in respect of these assets allows only the conclusion of lease agreements, which automatically terminate, by way of derogation from other legal provisions, upon the return of the protected person to his home. If it becomes necessary and it is in the interest of the person protected to dispose of the furniture or the rights in respect of his/her dwelling, the document is subject to the authorization of the tutelage court. When the one protected is married, his husband will also be heard.

The protection measure may be terminated by the death of the protected person, at the expiry of the period for which they were instituted (unless it was extended), by replacing or lifting it (if the causes that led to its adoption have ceased or changed).

Given the duration predetermined by law (3 years and 5 years respectively), the protection measures will be periodically subject to review by the tutelage courts.

3. Mechanisms for protecting and guaranteeing the interests of persons with intellectual and psychosocial disabilities²⁵

The new normative act introduces a series of guarantees for the benefit of persons with disabilities, as follows:

- the establishment of a gradual system for the establishment of protection measures;
- limited periods of time for which protection measures can be ordered and extended;
- laying down rules on the periodic reassessment of the system of care.

3.1. In the matter of non-patrimonial relations

Marriage – art. 276 of the Civil Code. The person under judicial counseling or special tutelage may marry, with the establishment, correlatively, of a preventive control, by obliging the future spouse who is under a protection regime to inform the tutelage under whose protection he is, about the intention to celebrate the marriage, the latter being able to formulate opposition to marriage under the law. In this situation, the civil status officer who receives the declaration of marriage will refer the matter to the tutelage court. The obligation to inform the legal tutelage also subsists in the event of the conclusion or modification of a marriage contract by the protected major, who will also have to obtain the authorization of the tutelage court in this regard.

The marriage concluded between the tutelage and the person under his/her protection is voidable.

However, cancelability can only be invoked by the person under protection.

Dissolution of marriage by divorce – art. 375 para. 3 and art. 429 para. 3 Civil Code. Divorce by mutual consent may not be granted if one of the spouses is granted judicial advice or special tutelage. "If the spouse benefits from special tutelage, the action may be initiated by the tutelage, and in the absence of a curator appointed by the court."

Parental authority – art. 503 para. 1 and art. 507 para. 1-2 Civil Code. In the case of the parent placed under judicial council, the tutelage court may decide that the exercise of parental authority over the child's property shall be exercised exclusively by the other parent.

Where the person protected by judicial counseling exercises parental authority alone, the tutelage court may decide, with due regard for the best interests of the child, on the institution of tutelage over the child.

If a special tutelage has been established over one of the minor's parents, the other parent

²⁵ According to the official statistical data provided by the Superior Council of Magistracy (SCM), in the period 2011-2020, 46,000 cases were solved with interdiction decisions, and currently, there are approximately 4,500 cases pending before the courts with the same object. Additionally, from the data collected with the support of the General Directorates of Social Assistance and Child Protection (DGASPC) during 2021, approximately 3,000 children with a certificate of classification in the degree of severe disability will turn 18 years old, which will probably lead to a consistent number of cases in court, through which a protection measure will be requested.

exercises parental authority alone with regard to the assets of the protected minor, the other parent retaining only the right to watch over the upbringing and education of the child.

Adoption – art. 507 para. 2 Civil Code. Unlike the old rule according to which, in the case of the protected person, the consent to the adoption of his child was given by the tutelage, by the new amendment to the Civil Code, the parent placed under special tutelage may consent to the adoption of his child, in so far as he/she can validly express his/her will.

3.2. In the matter of patrimonial relations

Art. 1205 para. 1-3 Civil Code. "The contract concluded by a person who, at the time of its conclusion, was, if only temporarily, in a state that made it impossible for him to realize the consequences of his deed is voidable."

Art. 1263 para. 3-4 Civil Code. The protector of a person receiving judicial advice may, on his behalf and in his interest, request the annulment of the contract made without his consent or confirm the contract when such consent was sufficient for its valid conclusion. The same rule applies to acts concluded by the protected person, without the opinion of the family council or the authorization of the tutelage court.

3.3. In the field of civil liability

Art. 1366 para. 1-3 Civil Code. The person receiving judicial council is liable for the damage caused, unless he proves that he was indiscriminate at the time of the offence. The person who benefits from the special tutelage is not liable for the damage caused, unless his discernment is proved at the time of committing the deed.

Art. 1372 Civil Code. The protector of a person receiving legal counsel or special tutelage is liable for the damage caused to another by the latter persons.

4. Conclusions

Following the study undertaken in the field of the new protection measures introduced by the legislator, as a result of the constitutional approach taken on the basis of Decision no. 601/2020 of the Constitutional Court, the question arises, if not, the new law, does not introduce more vulnerabilities than guarantees compared to the provisions of the Civil Code declared unconstitutional?

We manifest the following reservations and fears related to some omissions, ambiguities, exaggerations in the approach of the legislator, with the tendency to modernize the legislation for people with mental or psychosocial disability, as follows:

- Any psychiatrist or psychologist can confirm that an indiscriminate person cannot be aware of their own needs. All the more so, the need for assistance or for the "administration of its own assets" and, still less, that of "exercising its civil rights and freedoms" !?!

- How will a person suffering from severe or accentuated mental disability, without discernment, without self-control, without temporo-spatial orientation, "who needs support to take care of his person"²⁶ manage to ask for the support of a notary public and to go to a notary's office!?! What kind of decisions can the indiscriminate major make, in the conception of para. 2 of art. 1 of Law. 140/2022? How can the protected, indiscriminate person become aware that the assistant is taking advantage by abusing her trust? Is this one of the additional guarantees for respecting the rights of the person with a mental disability?

- How could "the major who, due to an intellectual or psychosocial disability, needs support to care for his person"²⁷ "complain to the tutelage court" against the protector on whose aid he

²⁶ Article 1 para. 1 of Law no. 140/2022.

²⁷ Article 5 para. 3 of Law nr. 140/2022.

depends? With the support of the assistant? And, if he no longer has living relatives, and if the neighbors are not interested in his fate, who will support him to file a complaint against the assistant in the tutelage court?

- In the content of art. 1 para. 1 of the Civil Code it is expressly provided that "the assistant is authorized to act as an intermediary between the major receiving assistance and the third persons, being presumed to be acting with the consent of the major". We ask ourselves, justified, we say, what are the guarantees that the person with severe intellectual disability, extremely vulnerable especially in legal terms, by the nature of this type of disability, will not be "taken" to a notary to be "assisted" in bad faith, in the administration of his patrimony?!!! Does this provision offer more guarantee and is more protective than the unconstitutional art. 164 of the Civil Code, on the basis of which the legal value of the "signature" of such a person who is unable to become aware of the needs and consequences of his deeds was voidable? How could the "presumption" that the indiscriminate major has consciously given his consent, guarantee the respect for the fundamental rights of the person with disabilities" as recommended in the motivation of the Constitutional Court Decision no. 601 /2020?!

- What is the legal liability and civil sanctions imposed on the assistant who does not "act with caution, diligence, honesty and loyalty"?

- With regard to the expenses related to the assistance, we propose to supplement art. 4 para. 3 of Law no. 140/2022, as follows: "under the condition that the assistant does not take advantage of the lack of discernment of the one he assists by requesting him the exaggerated value of the expenses related to the assistance".

- With regard to the provisions of art. 174 para. 3 - 4 of Law no. 140/2022 that allow the "protector" to be cared for in a social service or another institution, and the tutelage (thus also the appointed one) can "manage" his home having the right to rent it, but not the obligation for the income thus earned to use them for the "protected" one. These regulations could motivate the interest in the care of the "care" not to be done at his home, but in an institution.

- Art. 41 para. 1 of Law no. 140/2022, on the restricted exercise capacity regulates as a novelty, the measure of putting under judicial advice. I note, however, that no article or paragraph mentions who carries out, where and how, the judicial advice of persons with limited legal capacity. In the case of special tutelage, however, there are the necessary regulations for the exercise of this protection measure.

- In art. 106, paragraph 2 of Law no. 140/2022, the protection of the majority by instituting the measure of judicial counseling or special tutelage or trusteeship was added and the wording "or of another measure provided by law". In the absence of specifying another measure provided for by law, an ambiguity is created that may subsequently generate "loopholes" of interpretation and unwanted consequences for the protected person. We wonder whether it would not have been more appropriate for parents to legally represent their adult descendants with severe psychosocial disabilities and mental ages of minors, as an alternative far preferable to the measure of establishing special tutelage.

- The duration of 15 years for which the special tutelage may be ordered is unjustified (art. 168 para. 3 of Law no. 140/2022), since, at the expiry of the measure, the protector will be considered to have discernment, which does not correspond to reality, and this situation does not represent any legal guarantee of fundamental rights. In this respect, could account be taken of the Constitutional Court's reasoning regarding the regular reassessment of the residual incurable disability, with a view to extending, with well-founded reasons, the special tutelage every five years, in five years? In this situation, people with intellectual and psychosocial disabilities would no longer have to go through all the humiliating and traumatic medical-bureaucratic procedures each time, and where necessary, the measure of protection would be adapted to the irreversible nature of the disability and the person would no longer be deprived of protection after the expiry of the 15-year limit.

According to the 'Transitional and Final Provisions' of Chapter IV of the new legislative act, 'the courts, of their own motion or upon request, shall re-examine all the prohibition measures and shall order either their replacement by special tutelage or judicial advice, or their lifting, if they find that the circumstances have changed. Pending the final settlement of the review procedures, those

prohibited under the previous regulation shall be deemed to be de jure under special tutelage²⁸. Consequently, the designation of tutelages shall last until the possible replacement/lifting of the measure in the review procedure.

Bibliography

1. Decision no. 601/2020 of the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 88 of 27 January 2021.
2. Eaton J, Carroll A, Scherer N, Daniel L, Njenga M, Sunkel C, Thompson K, Kingston D, Khanom GA, Dryer S., *Accountability for the Rights of People with Psychosocial Disabilities: An Assessment of Country Reports for the Convention on the Rights of Persons with Disabilities*, „Health and Human Rights Journal”, 2021 Jun, 23(1), pp. 175-189.
3. Law no. 140/2022 on certain protection measures for people with intellectual and psychosocial disabilities and amending and supplementing certain normative acts, published in the Official Gazette of Romania, Part I, no. 500 of May 20, 2022, in force from August 18, 2022.
4. Marieta Safta, „The Constitutional Court of Romania (CCR): selection of case law (January-June 2021)”, in *Revista de drept constitutional* no. 1/2021, pp. 75-94.
5. Oleksandr Shevchuk, Viktor Shevchuk, Ihor Kompaniits, Serhii Lukashevych, Olena Tkachova, *Features of ensuring the rights of drug addicts for rehabilitation in Ukraine and the European Union: comparative legal aspect*, in „Juridical Tribune - Tribuna Juridica”, Volume 12, Issue 2, June 2022, pp. 263-281.
6. Romanian Civil Code.
7. Schmid, M., Goldbeck, L., Nuetzel, J., Fegert J M., *Prevalence of mental disorders among adolescents in German youth welfare institutions*, „Child Adolesc Psychiatry Ment Health”, 2008 Jan 28; 2(1):2, <https://doi.org/10.1186/1753-2000-2-2>.
8. Sépulchre, M. and Lindqvist, R., 2016. *Enhancing active citizenship for persons with psychosocial disabilities*. „Scandinavian Journal of Disability Research”, 18(4), p. 316-327, <https://doi.org/10.1080/15017419.2015.1105288>.
9. *The Convention on the Rights of Persons with Disabilities*, adopted in New York by the General Assembly of the United Nations on December 13, 2006, ratified by Law no. 221/2007, published in the Official Gazette of Romania, Part I, no. 792 of November 26, 2010, as amended.

²⁸Art. 20 para. 1-6 of Law no. 140/2022. The re-examination of all the decisions ordering the measure of interdiction will be made within 3 years from the entry into force of Law no. 140/2022. The adjudication of the applications for interdiction pending before the courts at the time of entry into force of the law is resumed, regardless of the procedural stage in which they are located. If the applications are on appeal, the decisions of the first instance are automatically abolished and the files are sent ex officio, by administrative means, to the first court.