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## **LEGAL PROTECTION FOR PEOPLE WITH MENTAL DISORDERS**

**ABSTRACT**

The way in which the legal subjectivity of persons with disabilities is understood, which is particularly true for persons with mental disorders, is evolving in the context of the legal institution of incapacitation. First of all, a shift from a substitute decision-making model to a supported decision-making model is suggested. The former involves depriving such persons of their legal (procedural) capacity and placing them under the care or guardianship of others. The latter is to provide them with the appropriate means to access the support they will need in exercising their legal (procedural) capacity. Hence, the legal institution of incapacitation should eventually be abolished and replaced with a new legal instrument of support, which is to be directly based on supportive guardians, representative guardians and legal assistants.

**KEYWORDS:** *person with a disability, person with a mental disorder, incapacitation, legal (procedural) capacity*

The proper protection of the rights of people with mental disorders is obviously possible only within a democratic state of law. This is particularly true in view of the various experiences that have befallen people with mental disorders, both in the past century and nowadays, when we analyse their respect in all those countries where it has not had the chance to function properly (Kmiecik, 2017, 163-460). For example, attention should be paid to the sterilisation and euthanasia of mentally-disturbed people in the Third German Republic, which stemmed from theories of mental degeneration, social Darwinism and racial hygiene (Kmiecik, 2017, 189). Today, most experts estimate that the total number of people killed during the 'Euthanasia' campaign reached 160,000 in Germany alone, and in German-occupied areas, it ranged from 250,000 to as many as 300,000 (Schott, Tölle, 2006, 177-178). In contrast, there was the politicisation of psychiatry in the Union of Soviet Socialist Republics, which consisted mainly of placing people with views different from the official ones in psychiatric institutions to undergo forced treatment (Propopienko, 1997, 16.). A special role in the system of 'pacification psychiatry' was played at the time by the former Moscow Scientific and Research Institute of Forensic Psychiatry named after V. P. Sergei, which was established on the basis of the central police reception room for people with mental disorders in 1923 (Kmiecik, 2017, 250). Finally, the use of psychiatry during the 'Cold War' period as a tool of the secret services by the United States of America should

also be mentioned (Kmiecik, 2017, 270). Above all, it was intended to achieve four psychiatric goals: to find the so-called truth serum; to program a person's mind to perform an undesirable act; to alter a person's personality combined with memory erasure; to develop more effective torture techniques; and to develop techniques for enduring torture (Kmiecik, 2017, 270).

However, the democratic legal state is not always able to prevent the abuses, often very drastic, that have been and are still being committed against people with mental disorders in the majesty of the law, although it creates the best conditions for the systemic protection of their rights (Kmiecik, 2017, 9). A telling confirmation of this is the way in which the legal subjectivity of persons with mental disorders is understood in the context of the legal institution of incapacitation. The assumption formulated in the Convention on the Rights of Persons with Disabilities that persons with disabilities have the right to be recognised as subjects of the law should be taken as a starting point (The Convention on the Rights of Persons, 2006, Article 12 (1)). Thereby, persons with disabilities have been placed on an equal legal footing with 'non-disabled' persons, which naturally excludes any discrimination against them. Thus, the legal subjectivity of persons with disabilities is not fundamentally different from that of 'non-disabled' persons. Among persons with disabilities, a narrower category of persons with mental disorders can be distinguished today. Although we do not have a legal definition of persons with mental disorders, a legal catalogue of them has been identified in reporting terms. In fact, the following are considered to be persons with mental disorders: mentally ill (with psychotic disorders); mentally retarded; with other mental disorders, which according to the current state of medical knowledge are classified as mental disorders and require health services or other forms of assistance and care, necessary for those persons to live in a family or social environment (The Law on Mental Health Protection, 1994, Article 3 (1)). Accordingly, it may now be established that the legal subjectivity of persons with mental disorders is essentially the same as the legal subjectivity of 'non-disabled' persons.

The catalogue of people with mental disorders includes terms that are essentially medical in nature, specifically: 'mental illness', *mental handicap*, and *other mental disorders*. These medical terms have eventually acquired the character of legal terms but they are, unfortunately, devoid of legal definitions.

Hence, they must be established on the basis of the current state of medical knowledge, and it proves indispensable to acquire non-legal knowledge about them (Dąbrowski, Kubicki, 1999, 15). However, it is difficult to accept this state of affairs because of the numerous risks it entails in the process of applying the law (Płużyński, 2007, 306). First of all, it must be stated that 'mental illness' is a vague term and, therefore, the way it is defined is often questionable. Most commonly, 'mental illness' is understood as a mental disorder of various origins in which there is a loss of the ability to assess reality realistically (Gierowski, Paprzycki, 2012, 156). Indeed, 'mental illness' is a chronic psychotic process of the endogenous and organic or somatogenic type (Bilikiewicz, 1992, 771). With regard to the term 'mental retardation', it is also used inconsistently, although it usually refers to a condition characterised by significantly lower-than-average general intellectual performance in the development process, associated with disturbances in one or more areas, such as puberty, learning and social adaptation (Korzeniowski, Pużyński, 1972, 132 et seq.). Finally, 'other mental disorders' assumes terminology to mean neurotic disorders, personality disorders and other non-psychotic mental disorders with homonymous symptoms and states associated with intoxication and with dependence on narcotics, psychotropic substances and substitutes (Duda, 2012, 77 and the literature cited therein). Short-lived organic, somatogenic or reactive mental disorders, therefore, belong to 'other disturbances of mental functions' (Ludwiczak, 2015, 21).

From the point of view of the legal institution of incapacitation, it is first necessary to stipulate that only its civil understanding comes into play here, so that its constitutional understanding, created only for electoral purposes, must be explicitly rejected (Zaradkiewicz, 2014, 190-213). It may still be considered, although no legal definition has been created, that it boils down to total or partial incapacitation by a court decision. A distinction is traditionally made into plenary and partial guardianship. As a result, a person who has reached the age of thirteen may be placed under plenary guardianship if, due to their mental illness, mental retardation or other mental disorder, in particular drunkenness or drug addiction, they are unable to direct their own actions (The Civil Code, 1964, Article 13 §1). At the same time, guardianship shall be established for totally incapacitated persons unless they are still

under parental authority (The Civil Code, 1964, Article 13 §2). Furthermore, an adult may be partially incapacitated by reason of mental illness, mental retardation or other mental disorder, in particular drunkenness or drug addiction, if the person's condition does not justify total incapacitation but they need assistance to manage their affairs (The Civil Code, 1964, Article 16 §1). In any case, guardianship shall be established for a partially incapacitated person (The Civil Code, 1964, Article 16 §2). In view of this, guardianship is not only the revocation or limitation of the legal (procedural) capacity in the field of property law but also – or perhaps above all – the extension of legal custody over the guardian (Wolter, 1958, 276). This implies the conclusion that incapacitation should not only be theoretically, but also practically, freed from the preponderance of judicial-legal elements and brought to the forefront elements of a personal-legal nature (Wolter, 1958, 276).

Consequently, a mental disorder is always a substantive ground for guardianship (Ludwiczak, 2015, 18). For both plenary and partial guardianship, there is a psychiatric component which indicates, as grounds for guardianship, the presence of mental illness, mental retardation or other mental disorder (Ludwiczak, 2015, 18). In doing so, mental disorders should particularly include drunkenness and drug addiction. From this perspective, a lack of terminological clarity is now becoming apparent, which concerns not only the terminological relationships within the legal system but also the necessary terminological references outside it. Above all, there is nowadays the need to move away from the term 'mental illness', or the broader term 'mental disorder', to the less stigmatising term 'mental disability' (Pudzianowska, 2014, 23). Furthermore, we are dealing with the term 'mental retardation', which is outdated by the language of modern psychiatry, rather than using the correct term 'mental retardation' (Ludwiczak, 2015, 21). In turn, the term 'mental retardation' is being replaced by the less stigmatising term 'intellectual disability', which denotes a lower-than-average level of intellectual functioning (Zima-Parjaszewska, 2014, 130). Therefore, the term 'mental disability' should, at the same time, be distinguished from the term 'intellectual disability' (Zima-Parjaszewska, 2014, 130). Finally, it is still necessary to note the perception changes in medical science and psychology of the terms 'drunkenness' and 'drug addiction' (Zima-Parjaszewska, 2014, 130). Scientific literature already

uses the term 'alcohol disease', while international classifications have started to use the term 'alcohol dependence syndrome' and, in relation to drug addiction, 'dependence on drugs' (Zima-Parjaszewska, 2014, 130).

If we analyse the legal subjectivity of persons with disabilities, the scope of which also includes the legal subjectivity of persons with mental disorders, we must, first of all, refer to their legally-regulated capacity. Obviously, capacity is a unified institution under the law, although a distinction is traditionally made into legal (judicial) capacity and legal (procedural) capacity. Capacity itself implies the existence of minimum qualifications, which must always be possessed by a legal subject who realises the relevant capacities in the legal system (Hart, 1998, 48). Accordingly, we further recognise that legal (judicial) capacity is the ability of a subject to have certain powers and duties in law (The Civil Code, 1964, Article 8 §1). Legal capacity (procedural capacity) means the ability of a subject to express his or her will with certain powers and duties under the law (The Civil Code, 1964, article 11, article 12). Meanwhile, the Convention on the Rights of Persons with Disabilities focuses exclusively on 'legal capacity' (The Convention on the Rights of Persons, 2006, Article 12 (2-4)). First and foremost, it should be understood as the capacity to take legal action, as it determines the general ability to act in the sphere of law (Kociucki, 2006, 364, 369). Unfortunately, the term 'legal capacity' has been inaccurately translated here from the English original (Błaszczak, 2014, 30-31). It is certainly backed up by a concept that should be considered as primary and forming the basis for further determinations, while it turns out to be more relevant for practice, since legal capacity is usually defined by legal (procedural) capacity (Heldrich, Steiner, 1995, 2-13). In that case, legal capacity usually expresses legal (judicial) capacity and legal (procedural) capacity together (Gurbai, 2014, 68). Thus, the Convention on the Rights of Persons with Disabilities does not so much confer legal (judicial) capacity on all its addressees, but rather grants them equal legal (procedural) capacity with others (Błaszczak, 2014, 31).

In view of the above, it should now be recalled that the (judicial) legal capacity of persons with disabilities has never been questioned, which also applies to persons with mental disorders. The problem of legal (procedural) capacity of persons with disabilities has become apparent for a long time, which mainly concerns persons with mental disorders, especially when it comes to applying

the legal institution of guardianship to them. Particular reference should be made to the fact that the practice of the legal institution of guardianship has been repeatedly subjected to criticism, which has different grounds, i.e., philosophical, axiological and praxeological. In the philosophical aspect, it is pointed out that the mental diversity of people cannot stand in the way of just equality, meaning that people with mental disorders cannot, at the same time, be subject to just inequality (Tokarczyk, 2005, 215-217).

From an axiological perspective, it is argued that people with mental disorders are subjected to evident stigmatisation, thus there is a serious violation of human rights (Pudzianowska, 2014, 16). However, a praxeological reference points to numerous pathologies in this area, including the following: the interests of people with mental disorders are not safeguarded, but only the interests of those normally around them; the burden of coping with difficulties in functioning is on people with mental disorders, their families and their next of kin; public authorities are relieved of the obligation to seek to ensure the highest possible level of functioning of people with mental disorders, as these functions are handed over to legal guardians or curators; people with mental disorders are excluded from the mainstream of society; and people with mental disorders are affected by various types of property abuse (Zima-Parjaszewska, 2014, 135).

In this respect, there is a clear evolution, which is expressed in the shift from a substitute decision-making model to a supported decision-making model, as postulated nowadays (Zima-Parjaszewska, 2012, 16 et seq.). The surrogate decision-making model involves deprivation of legal (procedural) capacity and placement under the care or guardianship of others. The model of supported decision-making, in turn, is to provide access by appropriate means to the support that will be needed when exercising legal (procedural) capacity. Considering the above, the legal institution of incapacitation must ultimately be abolished and replaced with a completely new legal instrument of support, although a very arduous path will likely lead to this (Szeroczyńska, 2014, 164 et seq.). As a result, it is a matter of a paradigm shift in the approach to persons with disabilities, and this is particularly true for persons with mental disorders, which is to grant them legal (procedural) capacity. What is needed, therefore, is a paradigm shift that will force a shift away from depriving these people of their legal (procedural) capacity to ensuring that they have access

to support in exercising their legal (procedural) capacity. Of course, this will force the use of entirely new measures to ensure access to such support. Measures related to the exercise of legal (procedural) capacity should be appropriate, effective, proportionate and adapted to the circumstances of each person with a disability, including a person with a mental disorder (Błaszczak, 2014, 34). Furthermore, these measures should be applied as soon as possible and be subject to regular review by an independent and impartial authority or judicial body (Błaszczak, 2014, 34).

Within the framework of the supported decision-making model, the creation of a statutory basis is being called for these days, which will introduce measures of direct access to support for people with disabilities, this is of particular importance for people with mental disorders, and for their support guardians, representative guardians and legal assistants (Draft Law on Amendments to the Law – the Civil Code, 2024). A supportive curator will be appointed for those requiring a lighter form of support, while a representative curator will be appointed for those requiring a more intensive form of support. The role of the supporting curator will be to support an adult in managing all matters or to provide *ad hoc* assistance in dealing with specific matters. However, the person in need of support will retain full decision-making autonomy over their affairs. In the case of a representative guardian, in matters arising in connection with any acts that the guardian may perform on behalf of a specific person, the person in need of support will have no procedural capacity. In these situations, such persons will lose their decision-making autonomy entirely, in favour of their representing guardians. However, the grant of the right of representation will be limited to a specific type of case or action, so the supported persons will be able to independently conclude contracts in minor everyday matters or legal actions involving the incurring of an obligation or the disposition of property of a value up to a certain amount. Finally, the legal assistant will provide support to the designated person in the exercise of their legal capacity in managing the affairs of the person commissioning the legal assistant, as specified in the contract. Importantly, guardians of both types will be appointed by the court, while the legal assistant will already act on the basis of a legal assistance contract concluded between the legal assistant accepting the duties of the legal assistant and the person commissioning the assistant.



## REFERENCES

- Bilikiewicz, T. (1992). *Psychiatry*, PZWL Publishers, Warsaw, 771.
- Błaszczak, A. (2014). Poland's reservations and interpretative statements to the Convention on the Rights of Persons with Disabilities, (in:) Pudzianowska, D. (ed.), *Rights of persons with intellectual or mental disabilities in light of international human rights instruments*, LEX a Wolters Kluwer Business, Warsaw, 30–31, 34.
- Dąbrowski, S., Kubicki, L. (1999). *Law on Mental Health Protection. A review of major issues*, 15. Institute of Psychiatry and Neurology, Warsaw.
- Duda, J. (2012). *A Commentary to the Law on Mental Health Protection*, LexisNexis, Warsaw, 77 and the literature cited therein.
- Gierowski, J. K., Paprzycki, L. K. (2012). Safeguards, in: Paprzycki L. K.(ed.), *The System of Criminal Law*, vol. 7, C.H. Beck, Warsaw, 156.
- Gurbai, S. (2014). Limiting or Respecting the Legal Capacity of Adults with Disabilities, (in:) Pudzianowska, D. (ed.), *Rights of persons with intellectual or mental disabilities in light of international human rights instruments*, LEX a Wolters Kluwer Business, Warsaw, 68.
- Hart, H. L. A. (1998). *The Concept of Law*, PWN Law Publishers, Warsaw, 48.
- Heldrich, A. Steiner, A. (1995). Legal Personality, (in:) *International Encyclopaedia of Comparative Law*, vol. IV, Persons and Family, Tübingen, ch. 2, 2–13.
- Kmieciak, Z. R. (2017). *The fate of the madman and the fool in the state and society*, Wolters Kluwer, Warsaw, 9, 163–430 and the literature cited therein.
- Kociucki, L. (2006). The concept of legal capacity of natural persons – structural issues, (in:) Czaplinski, W. (ed.), *Law in the 21st Century. A memorial book of the 50th anniversary of the Institute of Legal Sciences of the Polish Academy of Sciences*, SCHOLAR Scientific Publishing House, Warsaw, 364, 369.
- Korzeniowski, L. Pużyński, S. (eds.) (1972). *The Encyclopaedic Dictionary of Psychiatry*. PZWL Publishers, Warsaw, 132 et seq.
- Ludwiczak, L. (2015). *Guardianship in the Polish legal system*, LexisNexis, Warsaw, 18, 21.
- Pluzinski, S. (2007). *Mental illness – problems with the definition and place in diagnosis and legal regulations*, No. 3, 306. *Psychiatria Polska*.
- Propopienko, A. S. (1997). *Biezumnaya psichiatriya. Sevretnye materials about primenienii v SSSR psichiatrii v karatielnykh cel*, 16. Sovershenno sekretno, Moscow.
- Pudzianowska, D. (2014). Introduction, (in:) Pudzianowska, D. (ed.), *Rights of persons with intellectual or mental disabilities in light of international human rights instruments*, LEX a Wolters Kluwer Business, 16, 23.
- Schott, H., Tölle, R. (2006). *Geschichte der Psychiatrie. Krankheitslehren, Irrwege, Behandlungsformen*, C.H. Beck, Munich, 177-178.
- Szeroczyńska, M. (2014). The laborious road to the abolition of the institution of incapacitation, (in:) Pudzianowska, D. (ed.), *Rights of persons with intellectual or*

- mental disabilities in light of international human rights instruments*, LEX a Wolters Kluwer Business, Warsaw, 164 et seq.
- Tokarczyk, R. (2005). *Philosophy of law*, Maria Curie-Skłodowska University Publishing House, Lublin, 215–217.
- Wolter, A. (1958). *Directions of changes in Polish family law*, vol. 8–9, p. 276. State and Law.
- Zaradkiewicz, K. (2014). Guardianship – a constitutional perspective vs. a civil law institution, (in:) D. Pudzianowska (ed.), *Rights of persons with intellectual or mental disabilities in light of international human rights instruments*, LEX a Wolters Kluwer Business, Warsaw, 190–213.
- Zima-Parjaszewska, M. (2012). Equality of persons with disabilities before the law – the legal situation of incapacitated persons, (in:) Błaszczak, B. (ed.), *Key challenges after Poland's ratification of the UN Convention on the Rights of Persons with Disabilities*, Bulletin of the Ombudsman 2012, No. 10, 16 et seq.
- Zima-Parjaszewska, M. (2014). Article 12 of the UN Convention on the Rights of Persons with Disabilities and incapacitation in Poland, (in:) Pudzianowska, D. (ed.), *Rights of persons with intellectual or mental disabilities in light of international human rights instruments*, LEX a Wolters Kluwer Business, Warsaw, 130.
- Zima-Parjaszewska, M. (2014). Article 12 of the UN Convention on the Rights of Persons with Disabilities and incapacitation in Poland, (in:) Pudzianowska, D. (ed.), *Rights of persons with intellectual or mental disabilities in light of international human rights instruments*, LEX a Wolters Kluwer Business, Warsaw, 135.

### **LEGAL ACTS**

- Draft Law on Amendments to the Law – the Civil Code and Certain Other Laws, number UD80, [www.gov.pl/web/prime/minister/project-legislation-about-amending-the-code-of-civil-law-and-some-other-legislation](http://www.gov.pl/web/prime/minister/project-legislation-about-amending-the-code-of-civil-law-and-some-other-legislation) 4 (accessed:14.07.2024).
- The Convention on the Rights of Persons with Disabilities, drawn up in New York on 13 December 2006 (Journal of Laws of 2012, item 1169).
- The Law on Mental Health Protection of 19 August 1994 (Journal of Laws of 2022, item 2123, as amended).
- The Act of 23 April 1964 – the Civil Code (Journal of Laws 2023, item 1610).