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a doktori értekezés szerzőjének aláírása

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6 A doktori értekezés benyújtásával egyidejűleg be kell nyújtani a mű kiadásáról szóló kiadói szerződést.
Reconstructing personhood:
legal capacity of persons with disabilities

János Fiala-Butora

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of the Requirements for the Degree
of Doctor of Juridical Science
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VI. CONCLUSION ............................................................................................................. 250
I. Introduction
This dissertation inquires into what it means to be a person before the law. An assumption of our legal system is that all subjects entering legal transactions are capable of rational decision-making to pursue their interests. For two millennia, persons with intellectual and psychosocial disabilities have been considered to fail to meet this criterion. They have been denied the right to make their own decisions, and the law authorized other persons, their guardians, to make decisions on their behalf. From subjects, they were reduced to objects of the law, unable to enter into legal transactions on their own.

This legally recognized incapacity stigmatizes persons with disabilities and results in violations of their autonomy in many areas of their lives. It also leads to their exclusion from conceptions of equal citizenship. A long philosophic tradition from Immanuel Kant through John Rawls to Peter Singer failed to include persons with severe disabilities into theories of justice and equal moral personhood. Considered unable to achieve the cognitive functioning required from human beings, persons with disabilities were described as having a moral status below that of some

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2 See, for example, Act no. IV of 1959 on the Civil Code of Republic of Hungary, § 15/A.(1), declaring null the legal transactions of incapacitated persons, and § 17(2), declaring null the legal transactions of persons with lack of capacity.
3 The terminology of disability is clarified below in Chapter 1 Part E.
4 Guardianship has existed at least since Roman times, see Ildikó Basa, *Gondnokság a római jogban* [Guardianship in Roman Law], 47 Állam- és Jogtudomány 407, 443 (2006).
8 Peter Singer, *supra* note 6, at 567.
animals; their rights could be violated, they could even be killed with impunity.\(^9\) Other philosophers, such as Martha Nussbaum,\(^{10}\) Eva Kittay\(^{11}\) and Anita Silvers,\(^{12}\) tried to include persons with severe disabilities in a theory of justice, but could not overcome the obstacle presented by their perceived inability to make their own decisions. In these theories, persons with disabilities might deserve protection for other reasons, but they are not fully autonomous beings, their status is not equal to their fellow citizens. The lack of legal capacity of persons with severe disabilities remains a central obstacle to justifying their moral personhood.\(^{13}\) As noted by Gerard Quinn, a long-standing advocate for disability rights, this is not simply a question of contract or legal status, it goes to the heart of whom we recognize as equal human beings.\(^{14}\)

Law is not the only cause of prejudices and stigma relating to the lack of rationality and cognitive skills of persons with disabilities, but greatly contributes to it. A legal system recognizing their abilities and validating them as autonomous decision-makers would treat them as equal citizens, subjects, not objects of the law. To achieve this change of status is the aim of this dissertation.

**A. The existing landscape of legal capacity law**


\(^{11}\) Kittay, *supra* note 9, 606.

\(^{12}\) Anita Silvers and Leslie Pickering Francis, *Thinking About the Good: Reconfiguring Liberal Metaphysics (or not) for People with Cognitive Disabilities*, 40 Metaphilosophy Nos. 3–4, 475, 475 (July 2009).

\(^{13}\) See the critique of Martha Nussbaum in János Fiala-Butora et al., *supra* note 5, at 71.

\(^{14}\) Quinn, *supra* note 1.
Historically, persons with disabilities could not be accepted as autonomous subjects because they indeed make decisions differently than non-disabled individuals. Because law could not incorporate their way of exercising their legal capacity, placing them under guardianship was accepted as a necessary intervention.\(^{15}\) In order to protect their interests, guardians were appointed to make decisions on their behalf. No alternatives were developed to replace this system of substituted decision-making until the end of the 20\(^{th}\) century.\(^{16}\) Reforms concentrated on improving guardianship by tailoring it to individual needs and introducing effective safeguards, but they did not question guardianship as such.\(^{17}\)

Not only did guardianship undermine the position of persons with disabilities as full members of society, but also generated frequent abuses.\(^{18}\) It led to the social exclusion of persons with disabilities sanctioned by law, to their “civil death”,\(^{19}\) and persons subject to it as the “legally disappeared”.\(^{20}\) Currently, the Council of Europe’s Commissioner for Human Rights considers it one of the most important and most invisible human rights issues.\(^{21}\) A system more respectful of disabled persons’ autonomy is therefore not only crucial for philosophical theories of


\(^{17}\) *Id*, at 48.


\(^{21}\) Mental Disability Advocacy Center (MDAC), Legal Capacity in Europe, 1 (October 2013).
personhood; it also has grave practical implications for the everyday lives of millions of persons with disabilities around the world.

Historically, similar restrictions on legal capacity have existed for other groups, such as women, racial and religious minorities, and children. Gradually, the limitations on women’s and other minorities’ legal capacity have been lifted, and now they are universally recognized as scientifically unfounded. Persons with disabilities, together with children, are still waiting for their liberation. They are still suffering from attitudes portraying them as incapable of managing their affairs, which are currently backed up by medical and psychological evidence. They have still not achieved full citizenship; guardianship and exclusion from decision-making are still the norm for them, and autonomous status the exception.

**B. Recent challenges to guardianship**


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22 See Chapter 2 Part B *infra* for the historical development.
which in its article 12 requires state parties to “recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”. This is considered by many to be the most important provision of the CRPD, but also the most controversial one. It introduces a paradigm shift in understanding legal capacity, moving from the current paradigm of substituted decision-making to a new one based on support. It is, however, unclear what the new paradigm ought to look like, and what its contours are. Does it apply to everybody, including persons with the most severe disabilities? So far there is no satisfactory answer to the question what “equal basis” for legal capacity means in the case of persons with disabilities. To propose such an answer is the primary aim of this dissertation.

C. Academic positions

The CRPD challenges the prejudice that persons with disabilities are incapable of rational decision-making, and it requires that they be supported to make their own decisions instead of being incapacitated. It, however, does not explain how supported decision-making should be understood, how it operates in practice, and how persons with the most severe disabilities can benefit from it. These questions are currently being developed in the academic literature.

27 CRPD, supra note 26, Article 12 (2).
Some authors consider it unclear how support works in practice, and suggest that more research and experiments need to be conducted before it can replace guardianship. They also doubt that persons with severe disabilities can be incorporated into a support framework. According to them, persons with severe disabilities cannot make decisions even with the highest degree of support and are therefore in need of guardianship. Thus, they are outside the CRPD’s mandate of equal recognition of legal capacity. Other authors claim that an exception read into the CRPD is not compatible with its text and undermines the Convention. Therefore persons with even the most severe disabilities must be supported to make decisions, their legal capacity cannot be restricted. They have developed an ideal vision of supported decision-making, which should be made available to all persons with disabilities without exceptions.

This dissertation shows that the existing proposals of supported decision-making are describing ideal models which go beyond law’s ability to influence behavior. A more fruitful legal analysis should concentrate on the functions of guardianship laws, and how these functions could be fulfilled by laws based on support. This approach leads to a more modest but also more realistic

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29 Nina A. Kohn et al., supra note 15, at 1114.
31 Carney, supra note 30, at 7.
33 A particularly well-known example is developed in Michael Bach and Lana Kerzner, A New Paradigm for Protecting Autonomy and the Right to Legal Capacity, Paper prepared for the Law Commission of Ontario (October 2010).
understanding of how law can enable rather than hinder the exercise of legal capacity. Its aim is not to propose a law which enacts the ideal version of supported decision-making, but a law which achieves the goals of the ideal version.

D. The structure of this dissertation

Chapter 2 of this dissertation will describe how guardianship operates, and why it is considered currently one of the most important human rights violations in the world. A number of abuses related to guardianship have been documented by academic research, reports of human rights organizations, and the work of international human rights tribunals that underlie the need for reform. To understand how guardianship has failed to protect persons with disabilities, it is necessary to separate abuses that are a result of the system’s malfunctioning from shortcomings that are inherent in guardianship. To achieve this, the chapter will analyze the psychological foundations of legal capacity limitations.

Chapter 3 will analyze the theoretical writings on supported decision-making to establish its basic features, and compare it with the existing legislation recognizing supported decision-making in Canada, Sweden, and Germany. Supported decision-making has been proposed by the Convention on the Rights of Person with Disabilities as an alternative that could replace guardianship and supposedly fulfill the goal of fully respecting the autonomy of persons with disabilities. However, it is unclear what supported decision-making exactly means, and how it works in practice. It has been so far mainly described by disability advocates, quite likely

34 Gerard Quinn, Concept Paper: 'Personhood and Legal Capacity – Perspectives on the Paradigm Shift of Art. 12 CRPD' 3 (20 February 2010).
overstating its potential. This chapter will compare supported decision-making to the ideal version of guardianship described in Chapter 2, in order to establish their advantages and disadvantages. The aim will be to describe the trade-offs present in replacing guardianship with supported decision-making, and exploring ways to mitigate them. The main question is whether it is possible to design safeguards that could ensure that supported decision-making can take on the functions of guardianship, including maintaining legal certainty and protection from abuse.

Chapter 4 will assess how support might be relevant to persons with high support needs. Any framework is as good as its ability to deal with its exceptions. Persons with the most profound disabilities, who might completely lack decision-making abilities in some or all areas, therefore represent a challenge for the concept of supported decision-making. They might not be able to make decisions even with full support, therefore supposedly they will always be dependent on some form of substitute decision-making. Chapter 4 will propose a solution to incorporate the decisions taken on behalf of persons with the highest support needs into the supported decision-making framework. If this proposal is successful, even persons with the most severe disabilities could achieve full legal personhood in the framework suggested by this dissertation, an attribute which they have been denied so far.

Chapter 5 returns to the starting point, and will apply the results of the analyses of the previous chapters to interpret Article 12 of the CRPD. There are largely two conflicting positions in the literature concerning the meaning of Article 12 and the obligations following from it, neither of which are convincing. Because, as it will be shown, these attempts cannot fully resolve the issue at hand, this chapter will offer a different analysis, applying a structure based on the different
aspects of international human rights norms. The dissertation will provide a novel approach to addressing the implementation of the CRPD using the framework of Evolutionary Implementation.

E. Note on terminology

This dissertation is concerned with persons who have decision-making difficulties. This primarily involves groups such as persons with intellectual disabilities (mental retardation, cognitive disabilities, developmental disabilities), autism, psycho-social disabilities (mental illness), and some of their important sub-categories, such as persons suffering from dementia and substance abuse problems and other addictions, and persons in persistent vegetative states (coma). Although an umbrella-term, “mental disability” has been suggested and used by some to cover all these groups,\(^\text{35}\) this is both outdated and misleading, as in other contexts it is used to refer to persons with psycho-social, or persons with intellectual disabilities, which are just a subset of the overall category. Therefore instead of coining a new umbrella term, this dissertation will use “persons with disabilities” throughout to refer to all the above categories of persons with decision-making difficulties. In practice, persons with sensory impairments,\(^\text{36}\) communication difficulties,\(^\text{37}\) cerebral palsy and other types of mobility impairments may be all placed under

\(^{35}\) This is reflected in the names of two important international organizations working in the area of disability rights: Mental Disability Advocacy Center (MDAC), and Mental Disability Rights International (MDRI).

\(^{36}\) Amita Dhanda, \textit{supra} note 18, at 431.

\(^{37}\) See, for example, descriptions of Civil Codes in Mexican States which provide for incapacitation of deaf persons and persons with physical disabilities in: Rehabilitation International, Legal Capacity and Guardianship of Persons with Disabilities in Mexico, Seminar on Legal Capacity and Access to Justice, 11 and 25 (Mexico 2010); also, see István Hoffman & György Kőnczei, \textit{Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities}...
guardianship,\textsuperscript{38} despite the absence of a rational connection between its legal basis and their condition. They are nevertheless not typically primary objects of guardianship legislation.

The above groups are very different and diverse in many of their characteristics, but from the perspective of guardianship they are treated surprisingly similarly: in many countries, the same legal regime is applicable to them.\textsuperscript{39} The dissertation will note important differences where they matter. For the most part, the examples provided come from the realm of persons with intellectual disability.

\textit{Disabilities in Light of the Convention on the Rights of Persons with Disabilities}, 33 Loy.LA Int'l & Comp. L. Rev. 147, 150 (2010); also Mental Disability Advocacy Center (MDAC), \textit{supra} note 21, at 79.

\textsuperscript{38} Quinn, \textit{supra} note 20, at 7.

\textsuperscript{39} Typically, the same guardianship legislation applies to persons with psychosocial disabilities as well as persons with intellectual disabilities; see, for example, Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 14(4) and 15(4).
II. Guardianship and the dark side of protecting the vulnerable
This chapter explains in detail how persons with disabilities lose their status as autonomous members of society due to the operation of legal capacity laws. This dissertation uses the term legal capacity laws to include all legislation regulating decision-making on behalf of persons with disabilities, laws that permit or prohibit persons to make legally valid decisions based on their actual or perceived (in)ability to make these decisions. Those recognized as capable can make decisions on their own; for those found to be incapable, law has various alternative mechanisms to allow substitute decision-makers to make decisions on their behalf.

The idea that some persons with disabilities are incapable managing their affairs and that therefore it is society’s duty to protect them by intervening in their decision-making goes back to at least ancient Roman times. It has been accepted and practiced as a natural reaction to the situation of persons with some types of disabilities since then, as an indispensable element of life and law. This dissertation challenges two thousand years of wisdom by describing the flawed foundations of substituted decision-making.

In order to understand the problematic features of guardianship, this chapter will describe how guardianship has become a human rights concern, and what problems it leads to in practice. Some of the human rights violations connected to guardianship are caused by faulty application and defective procedures; these will be separated from those of its features that cannot be overcome by improved procedures, those problems that are inherent in guardianship. The aim of

this chapter is to uncover guardianship’s core features and the assumptions behind it, in order to understand the functions guardianship fulfills. The next chapter will explore how the same functions can be fulfilled through alternative means, and the strengths and weaknesses of different approaches will be compared.

A. What is legal capacity?

To analyze the human rights implications of “legal capacity” and “guardianship,” these terms must be clarified. Both concepts can be found in all legal systems of the world in various forms, but they lack a universal definition.

For the purposes of this dissertation, legal capacity is defined as the right of individuals to be recognized as subjects of rights and obligations before the law, and the ability to acquire rights and obligations by their own actions. These two components of legal capacity are sometimes referred to as capacity to have rights and capacity to act. In some jurisdictions, typically in common law countries, they are expressed in one legal institution; in others they are constituted separately, causing a great deal of confusion in translations. All persons are born with the capacity to have rights, which is recognized and cannot be taken away under modern law, at

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43 The translation of “legal capacity” to Arabic, Chinese and Russian led to controversies already during the CRPD’s drafting process, because it could have changed its meaning; see Anna Lawson, The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?, 34 Syracuse J. Int’l L. & Com. 596 (2007); Hungarian law, for example, differentiates between capacity to have rights, capacity to act, procedural capacity (capacity to participate in legal proceedings), and delictual capacity (capacity to bear the consequences of breaking the law by one’s actions).
least as far as the western world is concerned.\textsuperscript{44} The capacity to act, on the other hand, is subject to limitations in all countries around the world. This dissertation is concerned with this second component only, and it will use legal capacity in this sense.

Legal capacity is typically limited by reasons of age, in the case of minors, and the person’s inability to make decisions alone on account of some impairment. Limitations can take many forms and many names such as guardianship, conservatorship, tutelage, custodianship, trusteeship, administratorship, and others. But the central feature is always the transfer of the adult’s ability to acquire rights and obligations by her own actions to another person, the guardian. The incapacitated adult’s actions thus lose their legal relevance; they are not binding, because only the guardian is entitled to act on her behalf.

This dissertation will use the umbrella term guardianship to refer to these types of interventions, which are the main example of substitute decision-making. Their common feature is that once they are imposed on the disabled person, she loses her ability to make legally valid decisions, and this decision-making power is transferred to another person. The scope of the measure can be general, affecting all decisions, which is often called plenary guardianship. On the other hand, partial guardianship can be limited to only certain decisions or certain types of decisions, such as management of real property, family matters, medical decisions and others.

Besides guardianship, other mechanisms limiting the decision-making ability of persons with disabilities in specific areas also exist. Mental health laws contain provisions on overriding the

\textsuperscript{44} The CRPD Committee has so far not found a situation involving the deprivation of capacity to have rights.
objections of persons who are refusing treatment;\textsuperscript{45} laws on adoption can have specific provisions for not taking into account the disabled person’s opinions in the process;\textsuperscript{46} electoral laws can decide whether disability can be a basis for disenfranchisement;\textsuperscript{47} banking regulations can forbid persons with various impairments to operate a bank account without an assistant,\textsuperscript{48} etc. All these provisions can have an impact on a person’s legal capacity. Whether decision-making in a particular area is governed by general guardianship laws or specific sectorial provisions varies among jurisdictions, but all these regulations can have an impact on a person’s legal capacity. This dissertation is mainly concerned with general guardianship laws, but will also explain how its finding can be applied to laws regulating specific areas.

\textbf{B. A historical excursion}

The notion that some persons are unable to protect their interests, and therefore others have to make decisions on their behalf, is as old as law itself. In Ancient Rome, The Law of Twelve Tables prescribed that “fools” (persons with mental illness)\textsuperscript{49} should be appointed guardians (curators) to manage their property and thus protect the financial interests of their family and


heirs.\textsuperscript{50} In the middle ages, the reception of Roman law in the European continent resulted in the adoption of guardianship as a general framework for managing all decisions of the disabled person.\textsuperscript{51} In England, the King’s Parens Patriae powers justified appointing guardians to noblemen with mental illness or intellectual disability to manage their estate and arrange for care of the person\textsuperscript{52} since the 13\textsuperscript{th} century.\textsuperscript{53} The sovereign’s power over persons with disability was absolute, relating to both their body and property.\textsuperscript{54}

Guardianship has survived to the 21\textsuperscript{st} century, but not without changes. As Blankman describes, in Western Europe, inflexible plenary guardianship systems have been phased out since the 1960’s, and have been replaced with more limited forms of guardianship tailored to the disabled person’s needs.\textsuperscript{55} Also, the intervention’s purpose shifted from protecting the adult’s property for the sake of her heirs, to protecting the adult’s interests themselves, including not only financial, but also healthcare and social care matters.\textsuperscript{56} Alternatives to guardianship have also been developed, such as enduring powers of attorney, allowing patients to decide on their medical treatment in the event of their incapacity.\textsuperscript{57} These alternatives, however, have not undermined the

\textsuperscript{50}Johns, \textit{supra} note 38, at 10.


\textsuperscript{52}Leslie Salzman, \textit{Guardianship for persons with mental illness – a legal and appropriate alternative?}, 4 St. Louis U. J. Health L. & Pol'y 279, 286 (2010-2011).


\textsuperscript{54}Rees, \textit{supra} note 43, at 73.

\textsuperscript{55}Blankman, \textit{supra} note 12, at 47.

\textsuperscript{56}Id.

\textsuperscript{57}Carney, \textit{supra} note 51, at 1.
position of guardianship: it remains the prevalent model of intervention even in the most progressive jurisdictions.58

The situation is even worse in the countries of post-communist Central and Eastern Europe, which were behind the Iron Curtain and thus did not participate in the reform movement of the 1960’s. They rely heavily on outdated plenary guardianship,59 which in many states is the only form of legal response to the needs of persons with disabilities who have difficulties making their own decisions.60

Persons with disabilities were not the only ones suffering from restrictions of their legal capacity. Women were in a similar situation – medieval law contained various restrictions on their legal capacity, which depended on their personal status. Married women, for example, could not own or dispose with property, only their husbands could do it on their behalf.61 Similar legal limitations existed for racial minorities,62 and of course children.

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58 See Marcia Rioux, Joan Gilmour & Natalia Angel, Negotiating capacity: legally constructed entitlement and protection, in: Bernadette McSherry & Ian Freckelton (eds.), Coercive care: rights, law and policy 51, 71 (Milton Park, Abingdon, Oxon, England: Routledge, 2013), describing the situation in Canada, considered to be one of the most progressive countries in the area of legal capacity regulation.
59 Mental Disability Advocacy Center (MDAC), Legal Capacity in Europe, 20 (October 2013).
60 See, for example, Shtukaturov v. Russia, no. 44009/05 (Eur. Ct. Hum. Rts., March 27, 2008).
62 See Eric Foner, Forever Free xxii (2005), for the description of “negro incapacity” in US history; see Helen T. Catterall (ed.), Judicial Cases Concerning Slavery and the Negro 247 (Washington, 1926), for the description US law made between the delictual capacity and legal capacity of slaves. Slaves were able to commit crimes, but were incapable of concluding civil transactions – by criminal law they were considered persons, but contract law considered them things, not persons; see also Michael Bach, Securing Self-Determination: Building the Agenda in Canada, TASH Newsletter (1998); Michael Bach, The Right to Legal Capacity under the UN Convention on the Rights of Persons with Disabilities: Key Concepts and Directions for Law Reform, 7; UN Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) – Article 12: Equal recognition before the law, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/1, § 8 (19 May 2014).
Gradually, the limitations on women’s legal capacity have been lifted, and now are universally recognized as scientifically unfounded. The same development took place with regard to racial and religious minorities. Legal capacity laws no longer restrict somebody’s decision-making ability just because she is a woman, or a member of a disfavored minority, at least as far as the western world is concerned.

Persons with disabilities, together with children, are still waiting for the same kind of liberation to take place. They have still not achieved full citizenship. They are still suffering from age-old attitudes portraying them as incapable of managing their affairs. These are currently accepted and justified by medical and psychological evidence showing that they lack the ability to make fully autonomous decisions. Contrary to other historically oppressed groups, for persons with disabilities guardianship and exclusion from decision-making is still the norm, and autonomous

65 The situation of some racial minorities, such as the Roma, might constitute an exception. In some European states, the unwillingness of authorities to register births and issue identity documents to Roma results in denial of personhood and the loss of civil rights. For the description of this problem in Italy, see Aoife Nolan, ‘Aggravated Violations’, Roma Housing Rights and Forced Expulsions in Italy: Recent Development under the European Social Charter Collective Complaints System, 11 HUM. RTS. L. REV. 343, 355 (2011).
66 The situation might be different in some countries, where the rights of women are considerably curtailed in many areas of life. See Hassan M. Fattah, Kuwait Grants Political Rights to Its Women, N.Y. TIMES, May 17, 2005, at A9, about the recent granting of the right to vote to women in Kuwait.
68 Rioux et al., supra note 24, at 53; Stein & Silvers, supra note 62, at 129.
status the exception. Their objectively existing decision-making difficulties are often still addressed by law the same way as they were in medieval times.

C. Legal capacity as a human right

Regardless of its variations across jurisdictions, the core of guardianship is always the same and is always problematic: it transfers the adult’s decision-making power over her own affairs to the guardian. The person is thus reduced from a subject to an object of law, her will and actions become legally irrelevant. Depending on the scope and type of the guardianship order, the guardian enjoys control over all or some of her affairs, and may be authorized to decide where the adult lives, with whom she associates, what medical procedures she undergoes, what happens to her property and so on. Not surprisingly, guardianship, especially in its plenary form, is referred to as “civil death”, and persons subject to it as the “legally disappeared”.

Guardianship is no doubt a problematic institution, because it constitutes a serious intrusion with personal autonomy. The concern for the rights of the person placed under guardianship was already recognized in Ancient Roman Law, and it gradually replaced the protection of the person’s family’s property interests as the only consideration followed by incapacitation. It is therefore surprising that guardianship has only recently been recognized as a human rights

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71 Basa, supra note 47, at 411.
issue. This part will describe existing human rights law relating to legal capacity, and how current norms are relevant to considering the main question of this dissertation, whether guardianship is an acceptable method of exercising legal capacity by persons with disabilities “on an equal basis with others.”

At the United Nations level, the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to recognition as a person before the law, but this protects only the capacity to have rights, not the capacity to act. Guardianship has therefore remained permissible under the ICCPR. Newer instruments, such as the Convention on the Elimination of Discrimination Against Women (CEDAW) signed in 1973, and the Convention on the Rights of the Child (CRC) signed in 1990, contain provisions guaranteeing the capacity to act. There is very little jurisprudence and discussion of guardianship issues under these instruments relevant for the topic of this article.

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72 See below in this part.
74 As explained by the commentary to the ICPR by Manfred Nowak, “limitations on the capacity to act… do not represent a violation of Art. 16”, see Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 283 (Strasbourg: N.P. Engel, 1993). The Human Rights Committee have recently expanded the scope of Article 16 in enforced disappearance cases, holding that “intentional removal of a person from the protection of the law constitutes a denial of the right to recognition everywhere as a person before the law” – see Chhedulal Tharu and others v. Nepal, Human Rights Committee, No. 2038/2011, CCPR/C/114/D/2038/2011, July 3, 2015. These developments have not resulted in changes in the Committee’s views regarding guardianship.
76 On the relevance of CEDAW during the CRPD negotiation process see Dhanda, supra note 46, at 442. On the relevance of ICCPR, see European Union Agency for Fundamental Rights, Legal capacity of persons with intellectual disabilities and persons with mental health problems 16 (February 2013).
Guardianship became an important human rights issue recently through the activities of the Council of Europe, and its flagship body, the European Court of Human Rights. Although the European Convention on Human Rights, adopted in 1950, contains no reference to a right to legal capacity, it has been gradually recognized by the case law of the European Court. The first case to deal with the subject was Winterwerp v. the Netherlands in 1979, where the Court had to consider whether the European Convention’s fair trial guarantees are at all available to the restriction of legal capacity. The Netherlands government argued that legal capacity is a matter of status, not of rights and obligations. The European Court rejected this line of reasoning, and held that procedural guarantees do apply to placement under guardianship. It did not, however, question the fact of incapacitation as such. The legitimacy of placing disabled persons under guardianship was also accepted in other cases following Winterwerp, such as Egger v. Austria and Bock v. Germany. Despite its widespread nature in Western Europe, the restriction of legal capacity had not been addressed as a human rights issue by the European Court.

This state of affairs changed only after the post-communist countries of Central and Eastern Europe ratified the European Convention. Although guardianship in those countries was formally often similar to that in the west, it has been applied in a very abusive way with significant procedural flaws which lead to a number of applications challenging certain aspects of it.

78 Id., §73.
81 For the flaws of guardianship systems in Central Eastern Europe, see the reports of the Mental Disability Advocacy Center (MDAC) on several countries of the region: Guardianship and Human Rights in Serbia (2006), Guardianship and Human Rights in Bulgaria (2007), Guardianship and Human Rights in the Czech Republic (2007), Guardianship and Human Rights in Georgia (2007), Guardianship and
Another significant development was the adoption of the Council of Europe’s Committee of Ministers’ Recommendation R(99)4 on the legal protection of incapable adults, which proscribed detailed rules and principles for guardianship.\(^{82}\) Although not a binding instrument, the European Court did take its standards into account when interpreting the European Convention, providing it an almost-binding status.\(^{83}\)

*Matter v. Slovakia* was the first case which considered that the restriction of legal capacity as such could be a problem under the European Convention.\(^{84}\) The European Court held that incapacitation is a serious interference with the right to respect for private life under Article 8 of the European Convention, although it did not find a violation in that specific case.\(^{85}\) That came in *Shtukaturov v. Russia*,\(^ {86}\) where the European Court decided that plenary guardianship applied to the applicant violated his right to private life. Guardianship also led to violations in cases such as *X. v. Croatia*,\(^ {87}\) *Salontaji-Drobnjak v. Serbia*\(^ {88}\) and *Alajos Kiss v. Hungary*.\(^ {89}\) Procedural aspects of guardianship were criticized in *H.F. v. Slovakia*\(^ {90}\) and *Berková v. Slovakia*.\(^ {91}\)

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\(^{82}\) Council of Europe Committee of Ministers, Recommendation R(99)4 on the legal protection of incapable adults (February 23, 1999).

\(^{83}\) See, for example, in *Shtukaturov v. Russia*, supra note 58, §95.


\(^{85}\) Id., § 68.

\(^{86}\) *Shtukaturov v. Russia*, supra note 58.


The European Court has not recognized the central importance of legal capacity for the autonomy of persons with disabilities. In fact, it has not yet recognized a right to personal autonomy as such. The closest it came to this was in *Pretty v. the United Kingdom*. The Court will, however, have plenty of opportunities to do so in the near future, as there are a number of cases concerning guardianship pending before it.

In the case-law of the European Court, the right to legal capacity is concerned with three types of violations. The first relate to violations of procedural rights. The second involves situations where guardianship results in violations of fundamental rights. The third group is concerned with guardianship itself.

1. Violations of procedural rights

In many countries, the incapacitation procedure is not accompanied by the necessary safeguards. As a result, persons whose capacity is in question are often not heard by the courts and have no opportunity to submit evidence or appoint a representative. In some states, it is even possible to place persons under guardianship without them being aware of it, since the law allows courts not

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93 The author is currently representing 6 persons contesting certain aspects of their incapacitation before the European Court of Human Rights.
to notify them about the proceedings, not to hear them during it and not to deliver the decision to them. In others, persons under guardianship have no right to request the review of their incapacitation. The type and quality of evidence used in incapacitation proceedings were also criticized by the European Court. If medical assessments are too general or outdated, or they are prepared without the psychiatrist actually examining the person, the guardianship order based on them loses its validity. These and other problems can lead to a violation of their right to a fair trial under Article 6 of the European Court, as has already occurred in many cases.

2. Violations of other substantive rights

The second group involves situations where the victim cannot exercise a fundamental right because of the limitation of his or her legal capacity. In other words, in this category, the European Court does not contest placement under guardianship itself, it only questions some effects guardianship has for the enjoyment of a wide range of human rights. For example, if a person under guardianship cannot marry, either because her guardian does not consent to it or because it is simply prohibited by law, this can constitute a violation of the right to marry under Article 12 of the European Convention. If she cannot join an association, this can lead to the violation of her rights under Article 11 of the European Convention. If she cannot vote, it can

96 See Sýkora v. the Czech Republic, supra note 93, for a particularly blatant example of disregard for procedural fairness.
98 H.F. v. Slovakia, supra note 88; Sýkora v. the Czech Republic, supra note 93, § 111.
99 Sýkora v. the Czech Republic, supra note 93.
100 Sýkora v. the Czech Republic, supra note 93; H.F. v. Slovakia, supra note 88; Shtukaturov v. Russia, supra note 58.
101 See, for example, Hungarian Act no. IV of 1952 on the Family, Marriage and Guardianship, 9. § (1).
lead to the violation of the right to vote, as found by the European Court in *Alajos Kiss v. Hungary*.

If she is hospitalized against her will but with the consent of her guardian, as happened to the applicant in *Shtukaturov v. Russia*, it can lead to the violation of the right to liberty. If incapacitation precludes the person from being involved in the proceedings concerning the adoption of their own child, it can lead to the violation of her right to family life as happened in *X. v. Croatia*.

It is not difficult to come up with hypothetical scenarios that would likely engage every single article of the European Convention, and where guardianship would be the central reason for the violation. Even freedom from torture is not immune to its power: some guardians have a right to consent to procedures such as surgical castration, electroconvulsive therapy (ECT), psychosurgery (lobotomy), and the use of “cage beds” and other restraints.

If the person objects to these procedures, but her guardian consents to them, she is considered to be a voluntary patient under guardianship laws, since consent is obtained from the legally authorized person. Therefore, a court review of the medical procedure or other legal safeguards are not available for the person under guardianship.

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102 *Kiss v. Hungary*, *supra* note 87.
103 *Shtukaturov v. Russia*, *supra* note 58.
104 *X. v. Croatia*, *supra* note 85.
107 See, e.g., Mental Disability Advocacy Center (MDAC), *Cage Beds: Inhuman and Degrading Treatment in Four EU Accession Countries* 18–19 (2003) (discussing the wide variation in restraints used among institutions studied).
108 *Sýkora v. the Czech Republic*, *supra* note 93, § 80 and § 84.
109 *Sýkora v. the Czech Republic*, *supra* note 93.
domestic legal fiction of consent matters little: these interventions constitute an arbitrary application of severely intrusive measures on a patient who clearly objects.\textsuperscript{110}

3. Guardianship as such

The third type of violations is concerned with the essence of guardianship: a general limitation of the person’s ability to make decisions. The European Court held in 2006 that this constitutes a serious interference with the person’s right to private life under Article 8 of the European Convention.\textsuperscript{111} In 2008, in Shtukaturov v. Russia, it found a violation of that right because of the deprivation of the applicant’s legal capacity.\textsuperscript{112} The mere placement under guardianship, if unjustified, can constitute a human rights violation even if the scope of the guardianship order does not affect other protected rights.

Shtukaturov v. Russia is currently the leading case in the area of plenary guardianship. The decision is often praised for its firm stance against plenary guardianship. The European Court declared that the applicant’s total incapacitation was not compatible with his right to private life even though the domestic courts had no other, less restrictive, options under domestic law. Article 8 of the European Convention therefore requires an answer proportionate to the individual circumstances of each person, and where less restrictive alternatives do not exist, they must be created through legislative reform.

\textsuperscript{110} See the unambiguous wording in Shtukaturov v. Russia, supra note 58, § 108.
\textsuperscript{111} Matter v. Slovakia, supra note 82, § 68.
\textsuperscript{112} Shtukaturov v. Russia, supra note 58.
A fourth category of potential problems should be mentioned, which has not been directly considered by the European Court, and does not fit neatly in any of the above categories. Many guardianship systems do not provide safeguards to the person under guardianship to challenge their guardian’s decisions.\footnote{Salzman, supra note 50, at 287.} This can lead to abuse and arbitrary decisions by guardians, especially if the law provides only very vague indications on what the guardian should base its decisions.\footnote{See, for example, Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 20/C.} There is no reason why the person herself should be unable to initiate a court proceeding to contest her guardian’s decisions. Since the matter will be resolved by a court, there is no reason for not allowing the person to participate in the proceeding, and by extension, initiating the proceeding.

The above description shows that legal capacity is of central importance for persons with disabilities. It is key to their self-determination and independence, and it is also a precondition for the effective enjoyment of all other human rights. Vice versa, its restriction is a breeding ground for violations of the full list of rights protected by the European Convention. Its prevalence makes it, in the opinion of the Council of Europe’s Commissioner for Human Rights, one of the most important and most invisible human rights violations today.\footnote{Mental Disability Advocacy Center (MDAC), supra note 57, at 1.} The reform of guardianship is therefore one of the main goals of the international disability rights movement as it symbolizes the paternalistic approach to disabled peoples’ autonomy and curtailment of their independence.\footnote{Inclusion Europe, Key Elements of a System of Supported Decision-Making: Position Paper of Inclusion Europe (Brussels, Inclusion Europe, 2008); International Disability Alliance (IDA) CRPD Forum, Principles for Implementation of CRPD Article 12, Submitted for the Day of General Discussion on “Article 12 of the CRPD – The right to equal recognition before the law” at the UN,}
4. Implications for the Conventions on the Rights of Persons with Disabilities (CRPD)

The CRPD has been frequently declared not to create new human rights, but only adapt and specify existing general human rights norms to the situation of persons with disabilities.117 When interpreting the obligations it creates, existing human rights law serves as a useful starting point.118 Therefore to analyze the right to equal recognition as a person before the law in Article 12 of the CRPD, the existing international case-law on guardianship has to be taken into account.

The description of the European Court’s jurisprudence shows that limitations of legal capacity can lead to many types of serious violations of human rights. However, not all of these are an inherent feature of guardianship, they do not make guardianship problematic as such.

From the perspective of this dissertation’s topic, the procedural problems are incidental to the substantive issues. They can be solved relatively easily – at least, it does not require too much theorizing to recognize that rules excluding persons with disabilities from their own legal

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capacity proceedings should have no place in modern guardianship laws. They seem to be a remnant of old prejudices that serve no useful purpose apart from the appearance of efficiency.

The concerned person should always be notified of the proceedings, and should always be heard by the judge directly, even if she cannot attend the trial for medical reasons. The fact that decisions about incapacitation are not delivered to the person and she therefore cannot make use of her right to appeal\textsuperscript{119} can be dealt with similarly: such limitations of procedural rights should not be allowed, because there is nothing to be gained by them. If a person is unable to understand the decision, she will not read it, but suffers no harm from receiving it. That is not a legitimate concern for authorizing non-delivery.

The lack of effective representation by court-appointed attorneys is a more complicated issue, but neither specific to this area, nor an unsolvable one. For a start, attorneys should be appointed in a reasonable time before the court hearing, and required to meet at least once with their client before the hearing to learn about her position. A training of attorneys in disability-related issues would be also beneficial. Legal representation provided should be of a certain quality, which means that representatives should be sufficiently trained in matters of legal capacity, sufficiently remunerated and have enough time between their appointment and the hearing to consult their clients and prepare their defense. All these problems can and should be remedied, but that does not change guardianship’s substantive features. The substantive issues – when and how it is applied, and for what purpose – remain the same.

\textsuperscript{119} Sýkora v. the Czech Republic, supra note 93.
Similarly, a lot of the restrictions automatically connected to guardianship can be easily removed by legal reform. There is no reason why a person under guardianship should have to automatically lose her right to vote, the right to marry, the right to join associations, the right to refuse medical treatment and other fundamental rights. If any restrictions should apply in these areas, they should not be automatic but related to the person’s ability to make decisions in the specific area and proportional to the potential harm society is trying to prevent, if any at all.

If the matter of restriction of a specific right of the person under guardianship is decided in a court procedure, the person should never be excluded just because she is under guardianship. Excluding her from proceedings concerning divorce, adoption, abortion, other medical procedures and similar issues is not warranted, because nothing is to be gained by it. If the person is unable to participate meaningfully in the proceedings, no harm is done by attempting to include her. On the other hand, if she is excluded on the basis of her guardianship status, the court is risking the exclusion of individuals who would be able to make their wishes known. However minor their involvement is, it can only be of benefit to the proceeding. Relying on their guardians exclusively has no benefits: there is nothing the guardian could do on their behalf which it could not do if the person herself was involved as well.

An analysis of the right to vote, for example, suggests that disenfranchisement should never take place because of the lack of voting capacity, not even in a separate court procedure concerned specifically with this matter.\textsuperscript{120} A similar closer look on any of these areas would be very useful and uncover what aim exactly is pursued by prohibiting persons under guardianship from

\textsuperscript{120} Fiala-Butora et al., \textit{supra} note 45.
marrying, being eligible for civil servant positions, joining associations, and under what conditions, if at all, can these be justified.

It is possible to modify guardianship in a way that would lead to fewer automatic limitations of other fundamental rights, and retain its core features at the same time. Such a system would still be guardianship if it restricts the person’s ability to make legally valid decisions and appoints a substitute decision-maker to make these decisions, as this is the sine qua non feature of guardianship.

This is not to suggest that the above problems are unworthy of attention. Quite the contrary, they highlight real and serious problems that cause human suffering and make guardianship an intolerable abuse of the most vulnerable. These issues should be emphasized in the political debate or advocacy campaigns because they build momentum for change. Nevertheless, they can be remedied relatively easily, because the cure is known. They, however, do not touch on the substantive issues, the inherent problematic features of guardianship. This dissertation is therefore not concerned with procedural matters and violations of other fundamental rights which all deserve a specific analysis, but are incidental to the issue of legal capacity limitations discussed here. The further analysis will concentrate on the inherent features of guardianship, which cannot be overcome by legal reform without discarding the whole system.

**D. Inherent features of guardianship**

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121 For example by simply changing the domestic procedural rules so that also persons under guardianship would be eligible for a court review of the application of ECT, involuntary hospitalization, etc.
Putting aside the above-identified abuses connected to guardianship, the inherent feature of all legal capacity limitations is transferring a person’s decision-making powers to her guardian. This is a serious interference with the person’s autonomy: she loses the right to make decisions about her own life. This part will analyze the aims and assumptions behind this intervention in order to understand why guardianship is used. Building on this analysis, the next chapter will assess by what other means could the same goals be achieved, and under what conditions and from what perspective are these preferable to guardianship.

1. **Is the aim of substitute decision-making ever legitimate?**

Why would law ever allow the limitation of somebody’s legal capacity? One might accept that there are certain individuals in a society, whether defined as disabled or not, who can find themselves in a situation where they are unable to make competent decisions. Since they cannot take care of their interests, society is concerned about their safety and well-being, life and health, therefore it assists them in various ways. Legal capacity laws are part of this framework of care. They protect vulnerable persons from two types of evils, from their own decisions that are potentially harmful for them, and from the failure to make important decisions necessary for their well-being.

Protection from abuse is an example of the first situation: a person can be tricked into transactions that are harmful for her, such as selling her property below its value. Arranging for care and treatment, managing property (investing funds, applying for social benefits, maintaining
and letting real property, paying bills) are examples of latter, they are transactions necessary to secure well-being which some persons are unable to make.

All these are valid concerns, and should not be taken lightly. The welfare state has been created to take care of vulnerable individuals, and most people would feel uncomfortable if society abandoned the most vulnerable. Indeed, in terms of human rights law, protecting the rights of persons with decreased capacity is a state’s positive duty, failure of which can result in violation of fundamental rights. In Vaudelle v. France\textsuperscript{122} and X. and Y. v. the Netherlands,\textsuperscript{123} the European Court criticized the respondent governments for not adequately protecting the legal interests of disabled persons. It therefore seems that caring about the well-being of vulnerable persons is a legitimate state concern, and sometimes indeed a duty. This, however, does not justify all interventions taken for this purpose – it remains to be seen whether appropriate means are used to achieve it.

2. The assumptions behind guardianship

Notwithstanding the intervention’s legitimate goal, the state uses guardianship only to protect the interests of persons with disabilities, only their legal capacity gets questioned, which raises the obvious challenge of discrimination.\textsuperscript{124} Singling out persons with disabilities for the intervention can only be justified if it can be shown that they are the only ones having diminished capacity.

This brings us to the major assumption underlying guardianship, that the person to whom it is applied is unable to make competent decisions. It is obvious that if the assumption turns out to be incorrect in a particular case, guardianship is unjustified. If an individual is able to make competent decisions, these should be followed, rather than her autonomy violated and her decisions overruled. Guardianship can be justified only if it is applied to a person who is indeed incompetent to make her own decisions.

This leads us to the conclusion that the legitimacy of guardianship depends on the quality of the fit between the affected persons’ actual decision-making ability and the legal intervention. The more over-inclusive guardianship is, the more persons it restricts unjustly, and conversely, the more under-inclusive it is, the more vulnerable persons it fails to protect. This is the first criteria this chapter shall examine, and the next chapter will use it to evaluate alternative approaches.

A typical application of guardianship looks like the following: a person is identified by others to lack capacity to protect his interests. An authorized person, who can be a family member or a public official, initiates a court procedure for placement under guardianship. The person’s legal capacity is assessed during the proceedings by medical experts, and the court decides to limit her legal capacity in areas where she is found to lack capacity. A guardian is then appointed to make decisions on her behalf in these areas.

The described system of legal capacity restrictions is not the only way to protect incompetent individuals. Instead, each decision of the incapable person could be reviewed on an ad hoc basis: every time she makes a decision, and her caretaker thinks the decision harm’s the person’s
interests, the caretaker could ask a court for the decision to be set aside and replaced with a different one if the person is shown to have been incapable of making that specific decision. Similarly, if the person fails to make a decision, the caretaker could ask the court for a specific decision to be made if it is necessary for the disabled person and she failed to make it because she lacked capacity.

There are at least two good reasons why in most situations law does not rely on such an ad hoc review of decisions: first, it is very time-consuming to turn to the courts with every single decision; and second, it undermines legal certainty if all transactions of a person with disability are open to doubt until a court approves them. This could hinder potential partners from engaging in transactions with persons with disabilities, which in general is not in the latter’s interest.

Guardianship facilitates legal certainty. By limiting a person’s legal capacity, a court certifies to other parties that the person’s legal transactions will be null and void,¹²⁵ and by appointing a guardian it certifies him to make legally valid decisions on behalf of the person without the need for individual court approvals. Guardianship thus provides a convenient and effective solution to making decisions for incompetent individuals. Provided, of course, that it is used properly.

Guardianship requires the court to predict which decisions the person will be unable to make in the future. This is difficult for two reasons: capacity can fluctuate, therefore a person can be

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¹²⁵ The law and the guardianship order defines the scope of transactions which will be invalid.
unable to make a decision at some point and able to make it another time;¹²⁶ and capacity assessments are the most reliable if they are most specific to particular decisions.¹²⁷ It is easier to assess whether the person is unable to comprehend a specific financial transaction, than to make a general statement about the person’s ability to make financial transactions. Depending on the particular circumstances, there may be easier and more difficult problems to solve for the person within the general category.

No prediction is perfect except the one concerning persons in coma,¹²⁸ but perhaps absolute accuracy is not necessary. If the prediction expressed in the guardianship order is reasonably close to the person’s real circumstances, there is less cause for concern – guardianship is reasonably related to the person’s ability and needs.

The correlation between presumption and reality is crucial for the legitimacy of guardianship. There could be small or large divergences between persons’ actual ability to make decisions and their legal capacity determined by the courts. Guardianship does not involve an ad hoc consideration of the person’s ability to make a particular decision at a particular time. It is a restriction imposed in advance, which applies to decisions made in the future. In essence it is a prediction that the person will lack capacity to decide certain matters in the future.

### 3. Bases for legal capacity restrictions


¹²⁷ Id.

¹²⁸ That is, with regard to their capacity to make decisions: they are incapable making any kind of decision. That, however, does not automatically mean that all decisions need to be made to protect their interests.
The fit between the guardianship order and the person’s actual capacity is crucial for evaluating the legitimacy of guardianship. This part will consider the psychological methods on which legal capacity limitations are based. Amita Dhanda lists three limitation methods, the status, outcome and functional approaches. The following analysis uses her typology as a starting point, but adds two additional approaches, the quasi-status approach and the quasi-functional approach.

3.1 The status approach

The status approach is the oldest, and considered the most outdated. It involves depriving a person’s legal capacity purely on the basis of her disability. Examples would include a prohibition on opening a bank account for blind persons, or placement under guardianship purely on the basis of intellectual disability. The latter example is probably historic, and would nowadays be considered prejudiced. It is now widely accepted that the abilities of persons with intellectual disabilities wary, and it is hard to imagine a law which would base legal capacity limitations merely on the existence of disability.

3.2 The Quasi-Status approach

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129 Dhanda, supra note 46, at 431; the same typology was adopted by the Committee on the Rights of Persons with Disabilities: General comment No. 1 (2014) – Article 12: Equal recognition before the law, supra note 60, §15.
130 Dhanda, supra note 46, at 431.
131 Id.
Dhanda considers plenary guardianship as an example of a hybrid between the status approach and the functional approach.\(^{132}\) Plenary guardianship is not, at least formally, based purely on disability.\(^{133}\) It is usually conditioned on other criteria, such as the inability to make decisions because of one’s disability,\(^{134}\) which brings these restrictions to the realm of the functional approach, at least formally.

In practice, however, it seems that in many jurisdictions the application of the additional functional criteria is a mere formality, and the most important or sole factor determining placement under guardianship is the person’s disability. In Hungary, for example, one in-depth study of nearly 300 guardianship decisions found that courts and guardianship authorities “find the existence of a disability very often sufficient in itself for placement under guardianship.”\(^{135}\) Statistics and human rights report show that the situation in other Central European countries is similar,\(^{136}\) and to some degree can be true for any jurisdiction where guardianship proceedings are characterized by the prevalence of formal procedures and superficial inquiries.\(^{137}\) It seems appropriate to create a separate category in this dissertation for these cases, the quasi-status approach – formally based on functional criteria, but in practice determined purely by the existence of disability.


\(^{133}\) That is, in the jurisdictions I am aware of; nor does Dhanda or other authors mention them.

\(^{134}\) An example for many: Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 15(4).


\(^{136}\) Mental Disability Advocacy Center (MDAC), *supra* note 57, at 24.

\(^{137}\) If the application of guardianship provisions was deficient, any system could be considered a “quasi-status” approach. Even the most carefully designed functional approach would be useless if in practice it reflected nothing but a bias of its operators against persons with disabilities. The guardianship systems of post-communist countries, where the existence of a disability is an accurate prediction of incapacitation in the proceedings, are good examples. I am grateful to my colleague Maroš Matiaško for raising this point.
3.3 The Outcome Approach

The outcome approach is not based merely on disability, but on the outcome of the decisions the person with disability makes.\textsuperscript{138} If her caretakers or other decision-makers, such as the court deciding on her legal capacity, consider that her decisions are harmful to herself or otherwise not in her interest, her legal capacity is denied. If her decisions are in conformity with others’ views on what is the “right” decision, her legal capacity remains intact. An example would include a person offered psychiatric treatment, which if she accepted, her consent would be considered valid, but if she refused, it would be considered a sign of incapacity, and she would be given the treatment involuntarily.\textsuperscript{139} Similarly, if a person agreed to be placed to a care home, she would be moved there with her consent; however, if she refused to give her consent, she would be incapacitated and moved with the consent of her guardian.\textsuperscript{140}

While the outcome approach seems outdated, there is no shortage of specific examples of its use. For example, the legal incapacitation proceedings against one of the richest persons in France, Liliane Betancourt, are motivated by the outcome approach. The proceedings were initiated by her heirs because of her habit of indulging her assistant with lavish gift, which was also the stated justification of her incompetence.\textsuperscript{141} An interesting widespread use of the outcome

\begin{footnotes}
\footnote{138}{Dhanda, supra note 46, at 431.}
\footnote{140}{For an example, see Stanev v. Bulgaria, supra note 93.}
\end{footnotes}
approach in England was revealed by the European Court of Human Rights’ decision in *H.L. v. the United Kingdom*. The applicant with intellectual disability was “informally placed” in a psychiatric hospital – because he did not try to leave, no involuntary placement procedure was initiated, but the government made clear that had he tried to leave, the hospital would have applied for a court order to commit him. Mr. H.L. and patients in similar situation are thus considered capable when agreeing with their doctors, and considered incapable if they express disagreement with the offered course of treatment.

Dhanda rejects the legitimacy of the outcome approach on the basis that it merely ensures conformity with social expectations, regardless of their actual benefit to the person or his actual capacity. Appelbaum, on the other hand, defends the outcome approach on effectiveness grounds: it would be inefficient to inquire in detail to the capacity of a person who in any case agrees to the socially accepted course of action. Even if she was found incompetent, and placed under guardianship, the resulting decision of the guardian would be the same as the person herself agreed to at the beginning, therefore time and costs can be saved by simply accepting her decision. An incapacity procedure should be initiated only in cases where there is actual disagreement between the person and her caretaker, the eventual guardian or a doctor suggesting a certain course of treatment.


143 *Id.*, § 83.
144 Dhanda, *supra* note 46, at 433.
In my view both opinions are correct, but they are addressing different issues. Applebaum’s argument relates to the initiation of incapacity proceedings. It indeed seems to be more economical to accept the person’s opinion as valid if she is in agreement with the prospective substituted decision. In certain contexts, such as medical treatment, the outcome approach can be a useful tool to speed up decision-making. Dhanda’s argument, on the other hand, is concerned with the substantive standard of capacity. If incapacity proceedings are commenced, and the person’s disagreement with the eventual guardian is the basis for finding her incompetent, the result is very problematic. There can be good reasons why the person disagrees with the socially acceptable outcome, why she rejects a course of treatment or a particular handling of her property. Reasonable people can disagree about what her best interests are in a particular, difficult situation. This in itself does not equal incompetence, and if it results in incapacitation, it should be rejected.

The above would lead to the conclusion that the outcome approach can be useful for deciding when to initiate the incapacitation proceedings, but not for determining its outcome. However, in practice, this differentiation is problematic. The fact that incapacity proceedings were initiated against somebody can prejudge the final result. The actors of the procedure, judges and medical experts, are already assessing the person’s condition with the notion in mind that another actor already considered her incompetent.\(^\text{146}\) This spill-over of the outcome approach from initiation to substantive decision should not be accepted. Because it is hard to notice, it is also hard to police, therefore it delegitimizes even the narrowest use of the outcome approach the way Applebaum suggested.

\(^\text{146}\) For a good example, see the government’s argumentation in Sýkora v. the Czech Republic, supra note 93, § 59.
3.4 The functional approach

The functional approach is based on the actual capacity, the psychological ability of the person to make the specific decision in question. It is based on a psychological assessment of the person’s capacity to perform the given task. It can be legally expressed by a single term, such as the ability to make competent decisions,\textsuperscript{147} or broken down to its elements, such as in the United Kingdom’s Mental Capacity Act, where inability to make a decision is defined as inability:

(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 the decision (whether by talking, using sign language or any other means).\textsuperscript{148}

The functional approach is used every time incapacitation to a specific decision requires the evaluation of a person’s ability to make that specific decision. In \textit{Kiss v. Hungary}, for example, the European Court held that disenfranchisement of all persons under guardianship is a disproportionate measure, because this group is made up by persons of varying capacities with regard to voting.\textsuperscript{149} The obvious reading suggests that disenfranchisement can be based on an individual assessment of a person’s capacity to vote, which is an example of the functional

\textsuperscript{147} An example for many: \textit{belátási képesség} in the Hungarian Civil Code, Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 15(4).


\textsuperscript{149} \textit{Kiss v. Hungary}, supra note 87, § 44.
Similarly, in X. v. Croatia, the European Court criticized the applicant’s exclusion from her child’s adoption proceedings on the basis of her general incapacitation. For such a serious measure, an assessment of X.’s capacity to participate in the adoption proceedings would have been necessary. In Salontaji-Drobnjak v. Serbia, the Court found a violation because the applicant was not allowed to initiate court proceedings because of his general incapacitation, without an assessment of his actual capacity to participate in court proceedings. All these are examples where the functional approach was required by the European Court as a measure more tailored to the individual’s circumstances, one which makes any interference with her legal capacity more proportionate.

### 3.5 Quasi-functional approach

The functional approach could be equated with partial guardianship, but the matter is more complicated. As explained above, partial guardianship is not based on a person’s ability to make a specific decision, but on a prediction of the person’s ability to make that particular decision in the future. The relationship between partial guardianship and the functional approach is a matter of degree. The closer in time placement under partial guardianship is to any decision the person is not allowed to make due to his incapacitation, the closer the fit between the restriction and the functional approach. Similarly, the more specific the incapacitation order is

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150 Another possible reading suggests that disenfranchisement should never be permitted, not even in the case of proven incapacity to vote. See Fiala-Butora et al., supra note 45.
151 X. v. Croatia, supra note 85, §§ 51-53.
152 Salontaji-Drobnjak v. Serbia, supra note 86.
153 Dhanda, supra note 46, at 432.
about the types of decisions the person cannot make, the closer partial guardianship is to the functional approach.

To make this clear with an example: imagine a person having trouble with managing her house during her treatment for manic depression. She is unable to let it out or sell it, she is not paying the utility bills, and a psychological assessment finds her incapable of performing these tasks. A court then places her under partial guardianship. If the guardianship order relates to managing her house, it is closely related to her functional inabilities. On the other hand, if the order relates to “management of property”,\textsuperscript{154} it is a too broad a category. It incapacitates her also in the area of buying clothes, notwithstanding that her inability to manage her house is not the best predictor of whether she can buy clothes. The assessment serving as the basis of incapacitation was not focused on her ability to buy clothes.

Similarly, if she is prevented from buying clothes only two weeks after the court order, it is easier to argue that the results of the assessment are likely still valid. On the other hand, if she still cannot buy clothes or pay her utility bills ten years after the assessment, there is much less certainty about the relationship between her legal capacity and her functional ability. Her condition might have changed significantly in the meanwhile.

Also, if she was unable to give consent to a specific medical procedure, that is not the best predictor of whether she will be able to give consent to a different medical procedure two weeks

\textsuperscript{154} This was one of the listed grounds of placement under partial guardianship in Hungary, which was therefore utilized heavily by the courts. See Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 14 (6) 2.
later when her health situation might have stabilized. If she is placed under guardianship with regard to “healthcare decisions” on the first occasion, she might be unjustly deprived of the right to decide on her treatment later.

Based on the above, the functional approach should refer only to incapacitation based on an ad hoc assessment of the person’s ability to make the actual specific decision the incapacitation is related to. Partial guardianship does not belong to this category. It is based on a prediction of this ability in the future, which can never be perfect. Because functional capacity is defined with regard to a specific action at the given time, there is always a possibility of a divergence between the person’s actual capacity and her legal capacity as determined by the guardianship order some time earlier and with some level of generality. This is not caused by faulty application – even the most carefully applied guardianship system suffers from this principal problem. Therefore partial guardianship will be considered to be based on a quasi-functional approach in this dissertation.

The difference between the functional and quasi-functional approach is a matter of degree. The closer the guardianship order is to its future effects, and the more specific it is to decisions based on the person’s functional abilities, the closer it is to a functional approach. A guardianship order of short duration or reviewed in short intervals, and covering only a specific decision, is very close to the functional approach.

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155 If its application was deficient, any system could be considered a “quasi-status” approach. Even the most carefully designed functional approach would be useless if in practice it reflected nothing but a bias of its operators against persons with disabilities. The guardianship systems of post-communist countries, where the existence of a disability is an accurate prediction of incapacitation in the proceedings, are good examples. I am grateful to my colleague Maroš Matiaško for raising this point.
4. Evaluation of the different approaches to guardianship

The above analysis allows ranking the different approaches to guardianship based on their relationship to the person’s actual functional ability to make decisions. On one end of this scale is the status-based approach, followed by the quasi-status approach (plenary guardianship), the quasi-functional approach (partial guardianship), with the functional approach on the other end. The outcome approach is omitted, because it should not be used as a substantive test for assessing capacity, only to signalize a need for capacity assessments, as explained above.

The more closely related an approach is to the person’s functional ability, the less restrictive it is. The functional approach is restricting a person only with regard to decisions she is unable to perform. The status approach might be based on no actual relationship between the person’s abilities and her legal capacity. Plenary and partial guardianships are in between, and are not representing discrete points on this scale but are spread on it. Depending on the duration of the order or the frequency of review in the case of both types, and on the narrowness and specificity of the order in the case of partial guardianship, they can predict more or less accurately the person’s functional ability in a given area.

It might be tempting to conclude that the less restrictive an approach is, the better it is. Indeed, the history of guardianship shows a clear tendency to move towards more individually-tailored approaches. This is reflected in domestic law and international law as well, including the Council of Europe’s Recommendation R(99), and the European Court’s jurisprudence described above.
However, such a conclusion would be premature. It would suggest that all countries should be using only the functional approach, which is not the case. In fact, some countries use solely the quasi-status approach, and all the rest uses the quasi-functional approach besides the functional approach. Prejudice and reliance on outdated concepts might partly explain this phenomenon, but the picture is more complicated.

Restrictiveness is apparently not the only value determining the appropriateness of a given approach, or the usefulness of a particular type of guardianship. More restrictive approaches have some advantages as well. They should not be overlooked when searching for alternatives to guardianship. Newer forms of more individually-tailored guardianships are often referred to as less restrictive alternatives, which already includes a value judgment about them being preferable to plenary guardianship. While this might be generally correct and definitely true on the specific axis of restrictiveness, it clouds the issue that there are other qualities of incapacitation that have to be considered, and that only a complex evaluation could show which methods are performing better overall, or with regard to specific values. The other values followed by different incapacitation approaches have to be uncovered in order to outline alternative solutions. These are costs, legal certainty, protection from abuse, and ease of administration and oversight.

### 4.1 Costs

156 That is, countries where only plenary guardianship and partial guardianship with general limitation is available, such as in Russia, Bulgaria, and Lithuania. See Guardianship and Human Rights in Russia, supra note 79; Guardianship and Human Rights in Bulgaria, supra note 79; Guardianship and Human Rights in Lithuania, supra note 79.

157 Mental Disability Advocacy Center (MDAC), supra note 57, at 20; Keys, supra note 92, at 86; Salzman, supra note 50, at 294.
The functional approach requires determinations of legal capacity in a court or administrative proceeding every time a person makes a decision to which his capacity is questioned. This requires a decision-maker, an assessment of abilities, and the representation of legal interests pro and contra. To decide on somebody’s legal capacity on a weekly or monthly basis can be therefore very costly.

Compared to that, the first three approaches incur costs depending on how frequently they are reviewed. A guardianship order of indefinite duration is the cheapest, because it requires only one procedure, to issue it. A less restrictive guardianship order which is reviewed on a regular basis is more costly.

Concerning the quality of assessments, the status approach is probably the cheapest, as it requires showing merely the existence of a disability. The other three less restrictive approaches require some assessment of abilities, with psychological, psychiatric or other expert involvement. The more detailed and the more versatile the assessment, the more reliably it establishes the person’s real abilities, but other than that it is hard to generalize any cost differences between the three approaches in this regard.

In general, the status approach is the cheapest, followed by the quasi-status and the quasi-functional approaches, internally differentiated by the frequency of reviews, and the functional approach is the most costly.
### 4.2 Legal certainty

It is important that parties entering into legal transactions with persons with disabilities can be certain that their agreements are definite, legally binding. Some decisions of a person lacking capacity can be automatically null and void, others are voidable by court intervention or other methods.\(^\text{158}\) Legal certainty is not only an important abstract feature of the legal system, it also has a direct implication on the well-being of persons with disabilities. The less certain contracts concluded with persons with disabilities appear, the less likely other parties will be to enter into transactions with them, affecting many areas from ordinary property transactions and healthcare decisions to the ability to invest and do business.

The status approach seems to promote legal certainty the most. Other parties have to be aware only of the restrictions attached to certain disabilities. Plenary guardianship is also easy to understand from this perspective. All the person’s transactions are handled by her guardian. Any contract agreed to by the guardian will be valid, any contract not agreed to by the guardian (with small exceptions)\(^\text{159}\) will be void.

Partial guardianship is more problematic. It requires a value judgment by the contracting party, and often by the person under guardianship, on whether the specific transaction the parties are contemplating is covered by the guardianship order. The broader and more general the

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\(^\text{158}\) Nullity is sometimes called absolute voidness, while voidability can be called relative voidness; see Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 15/A. § (1) for nullity, and §§ 234-239 for invalidity.

\(^\text{159}\) The law can provide exceptions from this general approach, notably allowing the person to buy goods of everyday need; see for example Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 15/A. § (2).
guardianship order, the easier such a determination is. Therefore the less restrictive (the narrower) the order, the more complications can arise with regard to legal certainty.

The functional approach is the most difficult in this regard. Every transaction is valid, but is voidable if the person’s legal capacity is put in doubt and an assessment is ordered. Therefore parties have the least legal certainty about the validity of their contracts. They can be challenged even by a third party, who, for example, is concerned about the abuse and well-being of the disabled person and initiated a capacity assessment to contest the specific contract.\textsuperscript{160} Uncertainty can be avoided only by asking for an assessment and a court approval of the contract proactively at the time of signing it, which would make contracting with persons with disabilities cumbersome, time-consuming and costly. It follows that from the perspective of legal certainty, the more restrictive the approach the better.

\textbf{4.3 Protection from abuse}

One of the main reasons why guardianship exists is to protect persons with disability from harm caused by their decisions. Harm is hard to predict, therefore the intervention protects persons from all incompetent decisions, whether harmful or beneficial. The golden rule of guardianship in this regard is that it is easier to prevent harm than to remedy it once it happened.

\textsuperscript{160} A long list of family members, the guardianship authority, and the public prosecutor can initiate capacity assessments in Hungary; see Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 14 (2).
From this perspective, the broader the incapacitation, the more protection it provides from self-inflicted harm, because it excludes persons from a broader set of decisions. Plenary guardianship is the most protective measure, since it prevents the person from entering any kind of transactions; all are done by the guardian. Partial guardianship is narrower, therefore it protects the person in fewer areas, with regard to a narrower set of decisions. The functional approach is the least protective: it does not provide any prior protection, only for ex-post voidability of select transactions. It thus seems that the less restrictive the approach, the less protection it provides.

Court decisions\textsuperscript{161} and human rights reports,\textsuperscript{162} however, show that not only other parties can be the sources of abuse, but the guardian can as well. From this angle, plenary guardianship provides the least protection, as it is the most open to abuse. A plenary guardian can take decisions on behalf of the person in any areas of the latter’s life. Partial guardianship is less abusive in this respect, as the guardian’s competencies are more limited. The functional approach provides the most protection, as there is no guardian involved; all claims of incapacity are decided by a court or administrative procedure.

Concerning protection from abuse, the picture is thus mixed. The more restrictive an approach, the more protection it provides against abuse by others, and the less protection against abuse by the guardian or other designated substitute decision-maker.

\textsuperscript{161} Shtukaturov v. Russia, supra note 58; Stanev v. Bulgaria, supra note 93; Sýkora v. the Czech Republic, supra note 93.

\textsuperscript{162} Judit Dallos, \textit{A gyámügyi előadó szemével} [From the viewpoint of a Guardianship Authority employee], in: Hungarian Civil Liberties Union (TASZ), Ki a kompetens? [Who is competent?] 18 (2001); Mental Disability Advocacy Center (MDAC), Guardianship and Human Rights in Hungary 73 (2007).
4.4 Ease of administration and oversight

This category is related to costs, but is not identical with it. Substituted decision-making requires an infrastructure, bodies involved in administering and supervising it. Incapacitation procedures have to be initiated, medical experts need to assess the person’s capacity, and suitable guardians have to be found and appointed by the courts. Guardians need to be trained and supervised, which can include reviewing yearly reports or resolving complaints against them. Running a guardianship system is a challenge to the country’s bureaucracy, and requires significant investments to administrative capacities.

Three points can be raised regarding the administrative costs of each incapacitation approach. First, fragmentation makes running the system more difficult. Therefore, from the bureaucracy’s perspective, concentrating different competencies in one person is preferable. From this viewpoint, plenary guardianship is an ideal solution: one guardian is responsible for all decisions, he is the only one who needs to be supervised. If the person was under partial guardianship, some of her decisions would be made by a guardian, others could be reviewed under an ad hoc voidability procedure, which makes administration of the person’s interests more complicated. This was raised as one of the main reasons for the preference of plenary guardianship by guardianship authorities in Hungary.163

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163 Statement of L.B., a professional public guardian of the Budapest IV. District Guardianship Authority, at the conference organized by the Mental Disability Advocacy Center on Guardianship and Human Rights in Hungary, June 8, 2007, Budapest.
Second, the administrative costs are dependent on the context. If a medical decision needs to be made, the person is likely in a hospital, where an ad hoc assessment of her capacity is likely not very difficult or costly. It seems administratively more convenient to use the hospital’s resources and only ensure procedural safeguards of using the functional approach for an ad hoc decision on medical procedures, rather than trying to intervene with an incapacitation proceeding and using a guardian as a substitute decision-maker, who might not be present or generally not be of much help regarding the incapacitated person’s choices. Yet the latter is not uncommon.\textsuperscript{164} Similarly, if a person lives in a care home, she is already under close supervision. Using the guardianship authorities as a supervisory authority for all her interests does not seem to be efficient. In those cases, a partial guardianship affecting only issues outside of the care home, coupled with an effective complaint mechanism for problems relating to life in the care home, seems to be the most effective solution.\textsuperscript{165}

Third, while administrative difficulties are a valid concern, it is worrying if they become the major or only concern. The correlation between institutionalization and incapacitation is well-known in Central European countries:\textsuperscript{166} placement under guardianship makes possible or immediately follows placement into institutional care.\textsuperscript{167} Similar correlations between

\begin{itemize}
\item \textsuperscript{164} Sýkora v. the Czech Republic, supra note 93.
\item \textsuperscript{165} For a discussion of effective complaint mechanisms see János Fiala-Butora, Disabling Torture: the Obligation to Investigate Ill-Treatment of Persons with Disabilities, 45 Col. Hum. Rts. L. Rev. 214 (2013).
\item \textsuperscript{166} János Fiala-Butora, The Right to Independent Living and its Limits, in: Michael Ashley Stein & Malcom Langford (eds.), Disability Social Rights (forthcoming 2016); Hungarian Civil Liberties Union (TASZ), Ki a kompetens? [Who is competent?], 18 (2001).
\item \textsuperscript{167} Id., at 59; In Slovakia, 93 % of residents of social care institutions were under plenary guardianship according to the Ministry of Social Affairs, see Ministerstvo práce, sociálnych vecí a rodiny Slovenskej republiky [Ministry of Labor, Social Affairs and Family of the Slovak Republic], Národný akčný plán prechodu z inštitucionálnej na komunitnú starostlivosť v systéme sociálnych služieb na roky 2011 –
\end{itemize}
placements under guardianship and institutionalization were shown in Australia as well, where institutional caregivers initiate incapacitations in order to transfer responsibility for residents’ financial matters to their guardians.\textsuperscript{168}

An in-depth study from Hungary demonstrated a causal relationship between investments in administrative capacities and increases in plenary guardianship.\textsuperscript{169} An investment in capacities in certain regions was shown to lead to increases in newly ordered plenary guardianships in those regions.\textsuperscript{170} Once guardians are hired and trained, and institutions to house persons with disabilities built, persons need to be placed under guardianship to occupy the empty capacities.

4.5 Evaluation of the above approaches

The above analysis showed why the functional approach, the least restrictive incapacitation approach, is not the sole approach used around the world. Restrictiveness is not the only value determining the choice of an intervention. Generally, the more restrictive an approach, the less costly it is, the more it promotes legal certainty, the less it protects from abuses by guardians and the more from abuses by others.


\textsuperscript{169} Tamás Verdes & Marcell Tóth, A per tárgya [The Lawsuit’s Object] (2008).

\textsuperscript{170} Tamás Verdes & Marcell Tóth, A gondnoksági rendszer társadalmi funkcióiról [About the Guardianship System’s Societal Functions] (2008).
The choice of a specific measure therefore depends on how high priority is given to a certain value. The most appropriate guardianship system for a given jurisdiction based on the above criteria is likely to be a mix utilizing all measures, or all three except the status approach. A functional approach can be most appropriate in situations where capacity determinations are the easiest to administer: for example with regard to medical decisions in hospitals, where the assessments can be done on the spot, or with regard to decisions which are very infrequent or require a court approval by default. The latter category can include disposing with property of large value (for example, selling or buying a house), or moving into a social care home – these are unlikely to take place very often in a person’s life, and are of a serious nature where abuse is particularly likely and have serious consequences, therefore a court review on every occasion is likely to be worth the cost.

Plenary guardianship can be the most appropriate for persons whose condition is very severe. If they are unlikely to develop skills required for decision-making, it seems acceptable to incapacitate them with regard to all decisions without automatic reviews. While this can prove to be overly restrictive on particular occasions, mandating regular reviews or narrowing orders only to areas where the person is specifically shown to be incompetent can be overly costly.

Partial guardianship can seem as the most useful default approach for all other persons and for all other decisions. It is flexible in scope and in duration, therefore it can be tailored to the individual circumstances of each individual. The more protection the person needs, the more restrictive the order will be.
The above assessment is based on the assumption that the various goals pursued by incapacitation are equally worthy and a legislator is free to choose among them. That might not be true in practice. For example, the more cases highlight abuse by guardians as opposed to abuse by other parties, the more compelling the obligation to prevent that specific abuse becomes. Also, international human rights law’s development towards less restrictive alternatives can be interpreted as a reorganization of the values behind incapacitation. The more emphasis is placed on less restrictiveness, the less acceptable reliance on other values become. Plenary guardianship might have been defended on cost grounds thirty years ago, but in light of current human rights norms it is much less likely to be accepted if shown to be over-inclusive.\textsuperscript{171}

Also, while reliance on certain values might justify choosing between incapacitation methods in the abstract, it is a different question whether the chosen measure is in fact pursuing the selected values in practice. Plenary guardianship might promote legal certainty if used well. However, a lot of uncertainty can be introduced in the system if persons placed under guardianship do not even know about their incapacitation because they were excluded from the proceeding and the decision was not delivered to them.\textsuperscript{172} Legal transactions made by them between the time of incapacitation and the time they found out about it would not be valid under the law, but often indissoluble in practice,\textsuperscript{173} which raises a lot of questions about these transactions’ legal status, the parties’ responsibility for the state of affairs, and compensation. Similarly, plenary guardianship might be less costly in theory, but if in practice it is overused, the system’s overall costs might be higher than of its seemingly more expensive alternatives. Similar examples could

\begin{footnotes}
\item[171] Shtukaturov v. Russia, supra note 58.
\item[172] Sýkora v. the Czech Republic, supra note 93.
\item[173] For example because some of the goods and services exchanged could not be returned after they were consumed.
\end{footnotes}
be raised with any value listed above. From a policy point of view, the choice between alternatives should not be oriented at values they pursue in theory, but values they are actually able to pursue in the given jurisdictional-societal context.

5. Conclusion

This chapter provided a typology of human rights violations connected to legal capacity restrictions. It is important to separate problems connected to faulty applications of guardianship from issues which are inherent in guardianship. These are often conflated in the legal literature, but they require different solutions. Concentrating on the core features of guardianship, which cannot be overcome without discarding the whole system, allowed the analysis to uncover the functions guardianship serves.

The chapter also described the different approaches to incapacitation and what they are based on. It is important to emphasize at this point that the above is not a normative proposal of how incapacitation should be used. It is only a description of the assumptions behind its use in general, which are important to understand if guardianship is to be compared with its alternatives. This assessment cannot be limited to restrictiveness alone. Only by fully understanding the functions guardianship plays in law can it be assessed how other approaches can fulfill those functions.
III. The alternative: supported decision-making as a legal institution
The previous chapter showed how guardianship had become a serious human rights concern at the end of the last century. As criticism of abuses related to guardianship grew, a clear tendency arose in international law to prefer less restrictive versions of guardianship. Plenary guardianship is becoming untenable from an international law perspective, and is being replaced gradually or entirely by partial guardianship in several countries.\footnote{For a review of the situation in Western Europe, see Kees Blankman, \textit{Guardianship Models in the Netherlands and Western Europe}, 20 International Journal of Law and Psychiatry 47 (1997); for Canada, see: Robert M. Gordon, \textit{The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making}, 23 International Journal of Law and Psychiatry No. 1, 61 (2000); for Australia, see Terry Carney, \textit{Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?}, 4 Laws 37 (2015); for Japan, see: Makoto Arai and Akira Homma, \textit{Guardianship for adults in Japan: Legal reforms and advances in practice}, 24 Australasian Journal on Ageing, S19 (Supplement June 2005); For reforms in Central Europe, see: Mental Disability Advocacy Center (MDAC), Legal Capacity in Europe, 1 (October 2013); for an overview of the situation in the US, see: Leslie Salzman, \textit{Guardianship for persons with mental illness – a legal and appropriate alternative?}, 4 St. Louis U. J. Health L. & Pol'y 279 (2010-2011).} Other alternatives, such as enduring powers of attorney, have also become popular and are being introduced in more and more jurisdictions.\footnote{Terry Carney, \textit{Guardianship, Citizenship, & Theorizing Substitute-decisionmaking Law}, Sydney Law School Research Paper No. 12/25, 2 (April 7, 2012); Israel Doron, \textit{Elder Guardianship Kaleidoscope – a Comparative Perspective}, 16 International Journal of Law, Policy and the Family 368 (2002).}

These developments, however, have not aimed at eliminating guardianship, but at improving it. While the various newly introduced legal institutions differ in their restrictiveness, safeguards, and how narrowly they are tailored to individual needs, they do not challenge guardianship as such: they are all methods of substituting the disabled person’s decision with another person’s decision. For that reason, they seem unsatisfactory to many disability rights advocates, for whom overcoming guardianship has become the international disability rights movement’s top priority.
at the beginning of the 21st century. Advocates argue that all forms of substituted decision-making, regardless of how closely tailored to the person’s abilities and circumstances, unjustly restrict disabled persons’ autonomy. Therefore even the least restrictive form of guardianship prevents persons with disabilities from exercising their legal capacity on an equal basis with non-disabled individuals.

To substantiate their claims, advocates offer an alternative to guardianship that is not based on substituted decisions. They claim that persons with disabilities are able to make decisions with support. They thus propose that supported decision-making replaces, to a large extent or fully, guardianship and other methods based on substituted decisions.

This chapter will analyze whether and how supported decision-making allows persons with disabilities to exercise their legal capacity on an equal basis with others. It would be easy to conclude, as many in fact do, that supported decision-making is less restrictive than guardianship and is therefore preferable to it. However, the previous part showed that restrictiveness is not the only measure of a legal institution’s effectiveness. Guardianship fulfills other important functions besides safeguarding disabled persons’ autonomy, for example

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179 Id.
180 Minkowitz, supra note 176, at 408-09; Dhanda, supra note 176, at 445.
protecting disabled persons from abuse by others. Therefore only an in-depth analysis of how these functions can be performed by supported decision-making can show how effective supported decision-making is overall compared to guardianship.

The aim of this chapter is not simply to argue which legal institution is better. Rather, it explores the trade-offs between pursuing various goals of legal capacity laws. If persons with disabilities were making decisions the same way non-disabled persons are, they would not be in need of separate legal capacity laws. Incapacitation would constitute the only obstacle to exercising their legal capacity, and abolishing guardianship laws would allow them to exercise their legal capacity on an equal basis with others. That in itself, however, could do them more harm than good, because it would also deprive them of the protective functions of guardianship. Many persons with disabilities do indeed differ from the general population with regard to making decisions. Guardianship is not the only way to meet their specific needs, but it is important to be aware of what those needs are.

Personal autonomy, the legal certainty of transactions and protection from harmful decisions often conflict with each other. This chapter explores these conflicts, and shows how they can be resolved in a supported decision-making framework. It does not advocate for a specific solution, because that depends on the particular social circumstances of each jurisdiction. Rather, it explains the advantages and disadvantages of various legislative designs of legal capacity laws, and the principles underlying them. It shows that it is possible to resolve the underlying conflicts between the various aims of legal capacity law in a way that respects the autonomy of persons with disabilities more than guardianship does, while also offering them comparable, and in some
ways more effective, protection. Supported decision-making is thus an appropriate theoretical framework for realigning the various goals of legal capacity laws, and should be preferred as a legal intervention to safeguard the needs of most persons with disabilities. Whether and under what conditions it should be preferred for all persons with disabilities, including persons with high support needs, will be assessed in the next chapter.

The first part of this chapter explores what supported decision-making is. It looks at the historical origins of supported decision-making and its appearance in international and domestic legal sources. It shows that there is a discrepancy between how supported decision-making is described in the literature and the legal sources on which this description is apparently based. Supported decision-making should be understood as a theoretical model rather than an existing legal institution. This part describes the main features of this model from the literature, which will serve as an ideal model for the analysis.

The second part explores the psychological foundations of the ideal model of supported decision-making. Various claims about the superiority of supported decision-making have been made in the literature. Because for the purposes of this dissertation it is not an existing legal institution, these claims cannot be verified empirically. Rather, this part analyzes whether these claims can be substantiated on the basis of the existing scientific knowledge about legal capacity. It assesses the psychological assumptions behind the theoretical model of legal capacity, and describes whether as a conceptual matter these lead to any advantages compared to guardianship.

The third part narrows the focus of the inquiry by limiting the ideal model of supported decision-making to one which can serve as a basis for legal regulation. As this part shows, various forms of support can be derived from the theoretical model described above, and supported decision-making as a term is used to describe all of them.\textsuperscript{183} While they are all valuable, and can be used to secure the autonomy of persons with disabilities in various ways, not all can be understood as a legal institution. Guardianship fulfills certain functions; only an institution able to perform any of its necessary functions can serve as its alternative. This part explains how these functions define the content of supported decision-making as a legal institution.

The fourth part analyzes how the functions of guardianship can be fulfilled by supported decision-making as a legal institution. The differences between the ideal and the legal model of supported decision-making become important here: not all goals of the former can be achieved by law. This part will explore the various options for regulating the role of the supporters and overriding various forms of harmful decisions, and what these options mean for fulfilling contradictory principles of legal certainty and protection from abuse. These conflicting goals are treated differently by various forms of guardianship, and supported decision-making also offers multiple ways of addressing them. Instead of choosing the best solution, the aim is rather to understand the trade-offs of each choice.

The fifth part compares the strengths and weaknesses of guardianship and supported decision-making. While supported decision-making has some distinct advantages, as a legal institution it is unable to meet all the expectations created by its ideal model. Nevertheless, overall it outperforms guardianship for most persons with disabilities. It is a flexible institution, which means that its various protective functions can be strengthened at the expense of decreasing the autonomy of persons with disabilities. This flexibility makes it an effective alternative to guardianship for most jurisdictions: it can also accommodate situations where concern about abuse is high and protection is prioritized over autonomy. It is usually securing a higher level of autonomy for the same level of protection than guardianship, although these two institutions perform differently with regard to protection from different kinds of harm.

A. What is Supported Decision-Making?

Supported decision-making is an elusive concept. Although the term is widely used, it has so far not been authoritatively defined in international law. Various authors offered their own definitions in the legal literature, usually by contrasting it to guardianship.\(^{184}\) This part explores the origins of the concept, and the relationship between the theoretical model of supported decision-making and the legal sources from which this model is apparently derived from.

In the narrowest sense, supported decision-making can be understood as a form of assistance to the disabled person which does not involve the transfer of legal decision-making power from the disabled person to the person assisting him.\textsuperscript{185} The core feature is the support provided to exercise legal capacity: according to one definition, supported decision-making is “the process whereby a vulnerable person is enabled to make and communicate decisions with respect to personal care or his or her property and in which advice, support or assistance is provided to the vulnerable person by members of his or her support network”\textsuperscript{186}

A large variety of legal institutions can fit this vague description, therefore it is common to talk about supported decision-making models in the plural.\textsuperscript{187} Some forms of supported decision-making are purely informal, others are official, recognized by the legal system; in the latter case, the supporting relationship can be established by a private contract, or by court appointment.\textsuperscript{188} Many authors emphasize the voluntary nature of supported decision-making – a disabled person chooses her own supporter, they cannot be appointed against the supported person’s will.\textsuperscript{189} Supporters can be drawn from family, friends, peer support groups (for example, in the case of users of mental health services), personal assistance, and community support networks.\textsuperscript{190}

\textsuperscript{185} Carney (2012), \textit{supra} note 173, at 3.
\textsuperscript{186} \textit{The Vulnerable Persons Living With a Mental Disability Act} (Man.), § 6, cited in Gordon, \textit{supra} note 172, at 68.
\textsuperscript{187} Dinerstein, \textit{supra} note 182, at 4.
\textsuperscript{188} Salzman, \textit{supra} note 172, at 307.
\textsuperscript{189} Salzman, \textit{supra} note 172, at 306.
\textsuperscript{190} Dinerstein, \textit{supra} note 182, at 4.
Supported decision-making involves the supported person in expressing her wishes, and gives these wishes legal effect.\textsuperscript{191} It is based on recognizing the disabled person’s autonomy and the right to make decisions on an equal basis with others.\textsuperscript{192} The supporter only helps the person to express her decisions through facilitating communication and understanding,\textsuperscript{193} but the decision is made by the person with the disability herself, which then must be accepted by third parties.\textsuperscript{194}

As mentioned above, these characteristics of supported decision-making have been developed in the legal literature. They are normative descriptions of how the institution should function, they are not based on empirical observations about how supporting relationships operate in real life.\textsuperscript{195} The following part will therefore look at the developments of the concept in international and domestic law, to analyze whether any clarity about the content of supported decision-making can be deduced from the legal sources.

1. The emergence of supported decision-making in international law

Supported decision-making first appeared on the international arena during the negotiations of the Convention on the Rights of Persons with Disabilities.\textsuperscript{196} Disability advocates proposed it as

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{191} Salzman, Salzman, \textit{supra} note 172, at 306.
\item\textsuperscript{192} Michael Bach, Securing Self-Determination: Building the Agenda in Canada, TASH Newsletter, 3 (June/July 1998), cited in: Dinerstein, \textit{supra} note 182, at 5.
\item\textsuperscript{193} Michael Bach 1998, \textit{supra} note 190, at 5.
\item\textsuperscript{195} Kohn et al., \textit{supra} note 180, at 1128.
\item\textsuperscript{196} Dinerstein, \textit{supra} note 182, at 7.
\end{itemize}
\end{footnotesize}
a solution that could replace guardianship and other forms of substituted decisions.\textsuperscript{197} It was heavily debated during the negotiations, and “support” to decisions also appears in the final text of Article 12(3).\textsuperscript{198}

The idea that equality of persons with disabilities requires supported decision-making is very new in international law, and had little precedent before the CRPD. The Council of Europe’s Recommendation R(99)4 on the legal protection of incapable adults, adopted in 1999, does not mention it.\textsuperscript{199} Nor do the earlier soft instruments of the United Nations, such as the Mental Illness Principles\textsuperscript{200} or the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.\textsuperscript{201} The concept is to date entirely missing from the case-law of the European Court of Human Rights,\textsuperscript{202} the Inter-American Court of Human Rights\textsuperscript{203} or the UN Human Rights


\textsuperscript{198} About the negotiations in general, see Dhanda, supra note 176.

\textsuperscript{199} Council of Europe Committee of Ministers, Recommendation R(99)4 on the legal protection of incapable adults (February 23, 1999).

\textsuperscript{200} Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, UN General Assembly Resolution A/RES/46/119, 17 December 1991.


\textsuperscript{203} No case dealing with guardianship and legal capacity has been decided by the Inter-American Court of Human Rights to date.
Committee.\textsuperscript{204} The international norms of the 20\textsuperscript{th} century are fully anchored in the paradigm of substituted decision-making. The only reference to supported decision-making in international law predating the adoption of the CRPD was the Montreal Declaration in Intellectual Disabilities from 2004, a non-binding document issued during the CRPD negotiation process.\textsuperscript{205} The emergence of supported decision-making on the international level can thus clearly be connected to the CRPD, and the participation of disability advocates during the negotiations.\textsuperscript{206}

While the CRPD is not explicit about banning all forms of substituted decisions,\textsuperscript{207} it without doubt obliges states to introduce supported decision-making to their legal order.\textsuperscript{208} The CRPD Committee has criticized States Parties frequently for relying on guardianship, and recommended that they shift to providing support instead.\textsuperscript{209} However, the CRPD does not define the term; in its General Comment No. 1 on Article 12 of the CRPD, the Committee reiterated that support “is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity”.\textsuperscript{210} Some States Parties to the CRPD considered that guardianship itself constitutes

\textsuperscript{204} No communication challenging guardianship and legal capacity has been decided by the Human Rights Committee to date.


\textsuperscript{206} Sundram, \textit{supra} note 195, at 15.

\textsuperscript{207} The CRPD’s text will be analyzed more in detail in Chapter 5, \textit{supra}.

\textsuperscript{208} Even skeptical views as to the scope of this obligation accept that the obligation exists; see Carney (2012), \textit{supra} note 173, at 8.

\textsuperscript{209} See, for example, the Committee’s recommendations to Australia (Concluding observations on the initial report of Australia, CRPD/C/AUS/CO/1, 21 October 2013, \S 25), Argentina (Concluding observations on the initial report of Argentina, CRPD/C/ARG/CO/1, 8 October 2012, \S 20), Hungary (Concluding observations on the initial periodic report of Hungary, CRPD/C/HUN/CO/1, 22 October 2012, \S 26), and Spain (Concluding observations of the Committee on the Rights of Persons with Disabilities – Spain, CRPD/C/ESP/CO/1, \S 34).

\textsuperscript{210} UN Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) – Article 12: Equal recognition before the law, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/1, \S 17 (19 May 2014).
support within the meaning of Article 12. This interpretation was rejected by the Committee in the Rights of Persons with Disabilities, but the Committee did not offer an alternative positive definition of support.

2. Supported decision-making in domestic laws

If supported decision-making had not had a precedent in earlier international instruments, its origins must be found elsewhere. The countries often referred to as having had supported decision-making in their laws at the time of drafting the CRPD are Canada, Sweden and Germany, therefore it seems a sensible suggestion that disability advocates arguing for supported decision-making during the CRPD negotiations were relying on these countries for inspiration. Indeed, the advocacy documents of disabled people’s organizations refer to Canada as an (and often the only) example where supported decision-making exists and according to

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211 See, for example, the country report of Spain: Committee on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: Spain, supra note 207, par. 53.


213 Mental Disability Advocacy Center (MDAC), supra note 172, at 26, referring to Canada (British Columbia).
Sundram it was the Canadian Association for Community Living’s representative who first introduced the concept during the negotiations.²¹⁴

The only legal journal article predating the CRPD negotiations describing supported decision-making is Robert Gordon’s seminal “Emergence of supported decision-making in Canada”.²¹⁵ According to Gordon, supported decision-making appeared in Canada through the advocacy of disability advocates, first articulated in the Canadian Association for Community Living’s 1992 report on alternatives to guardianship.²¹⁶ The idea was based on earlier experiences of Scandinavian countries, particularly Sweden.²¹⁷ The Swedish model of normalization of the lives of persons with disabilities was studied and spread in Canada through the work of Wolf Wolfensberger,²¹⁸ and picked up by Canadians advocating for guardianship reform. It led to the creation of a new legal institution, different from the Swedish original.

Supported decision-making appeared in Canadian law in three main ways according to Gordon: as a court-ordered alternative to guardianship; as a legislatively defined alternative to guardianship; and as undefined alternative to guardianship.²¹⁹ One of the leading cases from the early period was re: Koch, in which the court refused to place the applicant under guardianship on the basis that if she is able to manage her affairs with support, she should not lose her legal

²¹⁴ Sundram, supra note 195, at 15.
²¹⁵ Gordon, supra note 172, at 65.
²¹⁶ Canadian Association for Community Living (CACL), Report of the Task Force on Alternatives to Guardianship (1992), cited in Gordon, supra note 172, at 65.
²¹⁷ Gordon, supra note 172, at 63.
²¹⁹ Gordon, supra note 172, at 65.
capacity. At the time of the CRPD negotiations, several provinces had adopted legislation recognizing supported decision-making, such as the Representation Agreement Act in British Columbia, the Vulnerable Persons Living with a Mental Disability Act in Manitoba, the Dependent Adults Act in Saskatchewan, and the Substitute Decision Making Act in Ontario.

From these models, the British Columbian was the most commonly cited by advocates as an example of a support model adopted by the CRPD. However, the Canadian example differs from the description of supported decision-making offered above in important respects. According to the Representation Agreement Act, a person with disability can authorize another person to act on his behalf. The decisions are thus legally expressed by the representative, who is under a duty to consult with the represented person “to the extent reasonable”, and to execute her wishes “if it is reasonable to do so”. The legal powers of the representative are thus not very different from that of guardians, who are often also under a similar duty to consult the represented person to establish her wishes. Also, while the represented person does not lose her legal capacity, and is thus able to enter into transactions on her own, in some situations if she

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220 Rioux et al., supra note 192, at 70.
223 Representation Agreement Act, [RSBC 1996] CHAPTER 405, § 7(1).
224 Representation Agreement Act, [RSBC 1996] CHAPTER 405, § 16(2).
225 Provisions mandating consultation formally exist also in legislations where they are widely disregarded in practice; see, for example, the Hungarian Civil Code, Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 20/C, which unconditionally requires the guardian to consult the represented person; in practice, this provision is widely ignored by guardians, as reported in: Mental Disability Advocacy Center (MDAC), Guardianship and Human Rights in Hungary 73 (2007).
fails to consult with her representative, her contracts can be declared void on this ground. 226

These described features make the British Columbian system very similar to a limited form of guardianship.

Similar conclusions can be reached by examining the other two countries besides Canada that had also experimented with alternatives to guardianship before the adoption of the CRPD. Sweden adopted a new legal institution arguably based on support already in 1972, and so did Germany in 1991. 227 Although neither is named supported decision-making, they can be seen as a predecessor of the concept, and disability advocates frequently refer to them as such. 228

The Swedish system consists of two institutions, administratorship and God Man (Good Man or Mentor). 229 The former is based on a court-appointed administrator to manage the disabled person’s property, which are the classic features of guardianship. 230 While some claim that administratorship is different than guardianship because it does not lead to the represented person’s disenfranchisement, 231 surely this difference in itself does not make it a different legal institution. The Good Man, on the other hand, is based on appointing a mentor of the person’s choosing, who is supposed to consult the represented person and execute his wishes. This obligation, however, is not absolute. The mentor can make independent decisions on behalf of

226 Gordon, supra note 172, at 65.
227 Herr, supra note 210, at 429.
228 For Sweden, see Devi et al., supra note 195, at 255; Hoffman and Könczei argue that supported decision-making was adopted in Hungary from German law, see: Hoffman & Könczei, supra note 210, at 168; Keys, supra note 210, at 61.
229 Chapter 11 “Om god man och forvaltare” of the Swedish Foraldrabalk 1949:381; Keys, supra note 210, at 61.
230 Herr, supra note 210, at 435-36.
231 Id.
the person in certain circumstances, which makes this institution similar to substitute decision-making. Mentors acting in restrictive ways are not only a theoretical possibility – one author notes that complaints about mentors’ actions had risen by 2007 compared to earlier periods.

The German Betreuung system is similar to the Swedish Good Man. Since 1992, formal judgments on incapacity are not needed for a representative’s appointment. Instead, the court can appoint a Betreuer to the person with disability, who is assisting her in making her decisions. However, the Betreuer can make decisions on behalf of the person if it is necessary. Also, while the represented person can make decisions alone, without the support of the Betreuer, her decisions can be declared void by the courts. The courts can also impose restrictions on her ability to make some types of decisions, called Einwilligungsvorbehalt (Reservation of consent), which is very similar to partial guardianship – in the affected areas, the Betreuer alone will make all decisions.

3. Comparison with the ideal model of supported decision-making

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233 Andrew Byrnes et al., From Exclusion to Equality: Realizing the Rights of Persons with Disabilities, 89-90 (United Nations 2007).
234 Grunewald, supra note 59, at 3.
235 Herr, supra note 210, at 435.
The overview of the three models which served as a reference for adopting supported decision-making in the CRPD shows that as a legal matter, they are different from the descriptions put forward in the literature – none of them conforms to the ideal model described by scholars and advocates. They have features which bring them close to guardianship, or can be also described as co-decision-making procedures.\textsuperscript{239} Of course, this is not to suggest that these legal institutions function the same way in practice as guardianship elsewhere – indeed, advocates relying on the experiences of these three countries during the CRPD negotiation process considered that there are important differences between them and guardianship.\textsuperscript{240} From the available descriptions they seem to be working very efficiently, and are more respectful of disabled person’s autonomy than traditional guardianship systems.\textsuperscript{241} Rather, the above analysis only shows that differences between guardianship and the legal capacity systems of the three countries are not caused merely by the laws. There is a difference between how supported decision-making is described in theory, and the way it is codified in British Columbia, Germany, and Sweden. If these countries were the inspiration for the introduction of supported decision-making into the CRPD and later in other countries, the sources of examples were rather the idealized descriptions of how these models operate in practice, rather than the respective laws.\textsuperscript{242}

\textsuperscript{239} For a discussion of co-decision-making procedures in Canada, see Lara Kerzner, Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective, Prepared for In From the Margins: New Foundations for Personhood and Legal Capacity in the 21st century (April 2011).

\textsuperscript{240} Devi et al. at 249–255.

\textsuperscript{241} Herr, for example, notes how the proportions in Sweden have changed since the adoption of the God Man, see Herr, supra note 210, at 435.

\textsuperscript{242} For example, advocates have frequently relied on the Swedish, German and Canadian experience of supported decision-making in the course of legal reform in Hungary, Czech Republic, Slovakia, and Croatia. For Hungary, see: Guardianship reform coalition of 15 Hungarian organisations, A gondnoksági rendszer módosításának javasolt alapelvei [Proposed principles for the guardianship system’s reform], 3 (June 22, 2007); for the Czech Republic, see: Liga lidských práv, Zásady pro poskytování asistence při rozhodování osobám s duševní poruchou [Principles for providing support to persons with mental disabilities], 5 (2007); for Slovakia, see: Združenie na pomoc ľuďom s mentálnym
Since the adoption of the CRPD, a number of countries have revised its guardianship legislation, and adopted less restrictive alternatives to guardianship. Some of these attempts seem to be much closer to the theoretical definition of supported decision-making, in that they do not transfer any decision-making powers to the supporter, for example in Hungary and the Czech Republic. Guardianship is retained for situations when the supported person cannot make a decision and it needs to be made on her behalf. Similar legislations are proposed in Ireland and Australia. A new legislation proposed in Costa Rica, the Law on Personal Autonomy, apparently plans to abolish incapacitations altogether, and replaces them with support services only. These newer proposals are influenced by the CRPD and theoretical writings on supported decision-making, and are apparently going further in securing disabled persons’ autonomy than the three original models pre-dating the CRPD. The evaluation of these laws, however, is not the aim of this dissertation.

The above analysis shows that supported decision-making as a legal institution does not originate in the three models that served as an example during the CRPD negotiation process. Since there

postihnitím (ZPMP), Osnova návrhu reformy opatrovnictva v Slovenskej republike [Outline of the proposal for guardianship reform in the Slovak Republic], 3 (2011); for Croatia, see: Disability Rights Center, Proposal for implementing Article 12 of the Convention on the Rights of Persons with Disabilities in Croatia, 24 (February 9, 2013).


244 Mental Disability Advocacy Center (MDAC), supra note 172, at 20.

245 For example, the Hungarian Civil Code of 2009 (Act No. CXX of 2009), § 2:22; the Czech Civil Code of 2012 (Act no. 89/2012 Col. 1.), § 55.

246 Mental Disability Advocacy Center (MDAC), supra note 172, at 20.


248 Report on the National Conference on Access to Justice and Legal Capacity: Strategies for Implementing the CRPD, held in Costa Rica, 2 (May 18-20, 2010); Minkowitz, supra note 175, at 162.
is no other real-life example the advocacy documents refer to, supported decision-making as described in the literature must originate in this literature itself. It is a theoretical model, which aims to prescribe normatively how the systems should operate.

This theoretical model of supported decision-making should serve as the basis for future analysis. There are in fact more theoretical models described in the literature, but they share some important features:

1. The disabled person’s decisions are accepted as valid by third parties;
2. The relationship between the supporter and the supported person is based on trust; the supporter is chosen by the supporter, he cannot be appointed against the supported person’s will;
3. The role of the supporter is only to facilitate the supported person’s decision-making; the supporter cannot overturn the disabled person’s decisions.

These core features will constitute the ideal model of supported decision-making for the purposes of this dissertation, to be later contrasted with a legal model. A fourth feature also appears in the literature, namely that support is available to all persons with disabilities, including those with the most severe disabilities. That claim is not universally shared, therefore it will not be part of the analysis of this chapter. Its implications will be explored in Chapter 4.

250 Dhanda, supra note 176, at 445.
251 For a range of opinions, see Carney (2012), supra note 173, at 4.
B. The psychological assumptions behind supported decision-making

Since supported decision-making is a theoretical model, there is very little evidence about how it would work in real life. Therefore, several of the claims on which it is based cannot be backed up by empirical evidence. That, however, does not mean that these claims cannot be verified by different methods. The following part will analyze whether the most important assumptions behind supported decision-making as a theoretical model can be supported by the newest developments in psychology and the science of capacity assessments.

1. Interdependent decision-making

Supported decision-making rests on a simple idea: although persons with disabilities can have difficulties in making decisions alone, they are able to perform much better if they are supported. This is common sense, but its implications for legal capacity are radical. Guardianship laws have failed to incorporate this basic idea, they are built on a false dichotomy ignoring it. The following part will develop these implications and will assess whether they are supported by the scientific basis of capacity assessments.


253 Rioux et al., supra note 192, at 71.
Guardianship laws are based on a dichotomy of disabled and non-disabled individuals. Non-disabled persons are always considered capable individual decision-makers – their legal capacity and their psychological ability to make decisions cannot be questioned under the law. Persons with disability, on the other hand, have legal capacity only if they possess the necessary psychological ability required by guardianship laws. There is a cut-off point in the assessment of abilities, below which a person will be considered incompetent, and will lose the right to make legally valid decisions. Instead, another person will make that decision on her behalf.

According to the advocates for supported decision-making, persons with and without disabilities are not that different with regard to making decisions. Many decisions a person makes in her life are not independent, but inter-dependent – that is, they are made through the interaction with the person’s environment. Support is an integral part of that environment. All persons utilize support, even persons without disabilities. The more complicated the decision, the higher the stakes, or the more limited the person’s knowledge about or experience in the given area, the more likely she is to seek advice from others. An average person might not need help with her weekly shopping or deciding whether to open a new credit account. She, however, might have difficulties in choosing computers or cars, and could require substantial advice from sales representatives or trusted persons. With complicated financial decisions, such as investing a large

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254 See, for example, the Hungarian Civil Code, Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 14(4), which makes clear that guardianship can apply only to persons with psychosocial and intellectual disability; for a similar conclusion of the UK Mental Capacity Act, see Wayne Martin, Sabine Michalowsky, Timo Jütten & Matthew Burch, Achieving CRPD Compliance, Is the Mental Capacity Act of England and Wales Compatible with the UN CRPD? If not, what next?, An Essex Autonomy Project Position Paper (September 22, 2014).

255 Salzman, supra note 172, at 286.

256 Gordon, supra note 172, at 65.

257 Id.

258 Dhanda, supra note 176, at 445.
sum of money, or deciding whether to sell her house and move to a nursing home, she might turn to professional advisors and involve her family in the decision-making process. These are examples of support which do not result in questioning her legal capacity. The law presumes that she can decide what support to utilize, and is ultimately making the decision herself and is taking responsibility for it.

Persons with disabilities utilize support in a similar way. The difference is the type of tasks they need support for: while an ordinary person might need help when buying a car, but not for her daily shopping, a person with an intellectual disability might need it for both tasks. If her disability is severe and her skills very limited, she might need support with even more basic decisions, such as what to wear and what to eat. Nevertheless, the claim is that the nature of the support remains similar across all areas both for persons with and without disabilities.

Law reacts very differently to the decision-making difficulties of persons with disabilities. If they cannot make a decision alone, another person (i.e. a guardian) is appointed to make it on their behalf. While non-disabled persons in need of support are considered fully capable, disabled individuals are legally incapacitated for the same reason. Law thus treats similar situations very differently, unjustly discriminating against persons with disabilities. Instead, it should

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259 Similar examples are raised in Gordon, supra note 172, at 65.
260 Id.
261 Id.
incorporate the higher level of support they need to the concept of autonomous decisions.\textsuperscript{263} It should not lead to the loss of their legal capacity, but to the recognition of decisions of the supported person as autonomous ones.

2. The psychological basis of supported decision-making

Supported decision-making challenges the binary concept of legal capacity laws, according to which somebody is either competent or not competent to make a certain decision.\textsuperscript{264} Instead, it proposes that persons with disabilities are able to make decisions with support, and in this respect they are not different from the general population.\textsuperscript{265} This claim does not seem to rest on a fully developed psychological theory of how persons with disabilities utilize support. The psychological literature concerning disability concentrates on the question of incapacity, not on support.\textsuperscript{266} It is thus hard to do justice to the claim that all forms of supports are similar, that there are no qualitative differences between supporting a person with disability on daily hygiene and advising a non-disabled person on selling his property. However, the existing psychological literature on capacity assessments upholds some arguments in favor of supported decision-making.

\textsuperscript{263} Dhanda, supra note 176, at 445.
\textsuperscript{265} Gordon, supra note 172, at 65.
\textsuperscript{266} Kathleen Cranley Glass, Refining definitions and devising instruments: Two decades of assessing mental competence. 20 International Journal of Law and Psychiatry (No. 1) 5 (1997).
Capacity assessment has recently emerged as a distinct field of research. Its origins lie in the studies on the capacity of psychiatric patients to consent to treatment lead by Paul Appelbaum in the early 1980’s. The development of standardized instruments to measure capacity in various areas such as voting, consent to treatment, competency to stand trial, or managing finances, are an important contribution to this body of research. These instruments are much more reliable indicators of capacity than diagnosis or clinical judgment, which was the primary method of assessments earlier and still is in many parts of the world. As Grisso explains, earlier methods often lead to the phenomenon known as ‘diagnostic testimony’, where the person’s capacity is presumed on the basis of the general characteristics of her particular diagnosis – if she is found to be schizophrenic, the clinician would consider on that basis alone that she is, for example, incompetent to stand for trial.

The Macarthur studies conducted by Appelbaum and Grisso are one of the most well-known and most authoritative studies on capacity assessments. Grisso provides a comprehensive summary of them and the most developed, state of the art capacity assessment tools in his *Evaluating Competencies Forensic Assessments and Instruments Perspectives*. Reading the descriptions of tools most relevant for guardianship (competence to decide on property matters and care of the person) with a critical eye, it seems that capacity assessments do not seem to incorporate some important issues: the importance of abstract thinking for assessments, the existence of other

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271 Grisso, *supra* note 267, at 12.
272 Id.
dimensions of intelligence, the notion of support, and the relationship between legal and clinical incompetence. These will be addressed in turn.

2.1 Abstract thinking and context

Capacity assessments are based on abstract thinking. They are conducted in the forms of interviews: the disabled person has to explain how she does certain things, how she makes certain decisions. The assessment is essentially a set of questions, which she needs to answers.\(^{273}\)

However, there is a difference between being able to do certain things, and being able to explain in the abstract how one does them. Many people, who are able to do the latter, cannot do the former. As explained by Buchanan and Brock, a lot depends on the context in which capacity is exercised: a person may be able to make a decision about treatment if she is asked about it in her home by her relatives whom she trusts, and may be found incompetent to perform the same task in a hospital responding to the doctor, if the place and the person are unfamiliar to her.\(^{274}\)

Guardianship proceedings provide many examples of persons who were able to cook, shop, clean themselves, etc., but fail to explain to the doctor or in the courtroom how they do these things.\(^{275}\)

The latter requires a higher standard of competence.

2.2 Logical/linguistic intelligence

\(^{273}\) For an overview of assessment tools, see Grisso, supra note 267.


\(^{275}\) This observation is based on my practice as an attorney in guardianship proceedings. I have been representing clients in guardianship proceedings since 2004.
Howard Gardner’s theory of multiple intelligences provides another insight into the deficiencies of assessment tools.\textsuperscript{276} Gardner argues that intelligence is not one-dimensional, it cannot be measured on a single axis. Rather, persons use a variety of skills or “intelligences” to solve problems, to make decisions. He originally listed 7 such intelligences,\textsuperscript{277} later expanding the list.\textsuperscript{278} A person’s abilities can vary: he can have a very high logical intelligence, low musical intelligence, and average spatial intelligence, or the other way round. Western culture emphasizes logical and linguistic intelligences to the detriment of others.\textsuperscript{279} The IQ tests used for assessing children almost exclusively measure logical and linguistic skills, and therefore provide a very twisted understanding of “intelligence”.\textsuperscript{280}

Capacity assessments also measure logical and linguistic intelligence to the detriment of other forms of decision-making skills.\textsuperscript{281} These are the areas in which persons with some types of disabilities by definition have lower skills. This, however, only means that they will do poorly on the assessment, not that they have a lower comprehensive “intelligence” in the Gardnerian sense. They might use other skills to perform tasks that the average person would approach rationally.

\textsuperscript{276} Howard Gardner, Frames of Mind. The Theory of Multiple Intelligences (Basic Books New York 10th edn. 1993).
\textsuperscript{278} These are: Naturalist, Spiritual, Existential, Moral intelligences; see in: Howard Gardner, Intelligences Reframed Multiple Intelligences for the 21st Century (Basic Books New York 1999).
\textsuperscript{279} Amita Dhanda, Legal Capacity in the CRPD, 35 (2007, unpublished manuscript, on file with author).
\textsuperscript{281} Gábor Kelemen, A fogyatékosság jelensége a pszichiátriában [The phenomenon of disability in psychiatry], in: Péter Zászkaliczky & Tamás Verdes (eds.): Tágabb értelemben vett gyógypedagógia [Widely constructed special education], 12 (2004).
Gardner did not apply his theory to persons with disabilities, therefore it will be a task for future researchers to show how exactly persons with disabilities can utilize other intelligences to solve tasks. One example can be the use of interpersonal skills. One of the reasons for incapacitating persons with disabilities is that they are thought to be susceptible to abuse by others. Interpersonal skills are one of Gardner’s intelligences. There is no reason why a person with low linguistic and logical skills could not be a good judge of character, who could tell better than most if somebody wants to trick her or harm her in a different way. Perhaps a particular person with a disability has very low interpersonal skills, and is in greater danger of abuse than others. That, however, cannot be established by assessments concentrating only on her logical and linguistic intelligence, as capacity assessments currently do.

2.3 No support

Capacity assessments are based on a binary conception of competence/incompetence. Everybody ends up in one of these two categories. Of course there are persons in the gray zone in between the two, who cannot be assigned with sufficient precision to any. They are, however, not a qualitatively different category, it is just unsure to which of the two categories they

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282 Moye & Marson, supra note 262, at P8.
283 Kelemen, supra note 279, at 8.
284 Moye & Marson, supra note 262, at P3.
belong.\textsuperscript{285} Therefore, everybody is tested on whether they can make decisions alone.\textsuperscript{286} For decisions made with help, points are subtracted.\textsuperscript{287}

According to the theory of interdependent decision-making, however, that is not correct.\textsuperscript{288} Persons who can make decisions with support are not qualitatively different than those who do not need help. The dichotomy of competence was also challenged in the psychological literature. Kapp argues that the dichotomy rests on the dubious proposition that for every decision there is one decision-maker: either the person with a disability or a substitute decision-maker.\textsuperscript{289} However, many decisions can be made with the informal input of family and friends.\textsuperscript{290} If decisions are indeed shared in this way, according to Kapp further studies will need to develop tools about how to take this support into account in assessing capacity.\textsuperscript{291}

\textbf{2.4 Legal and clinical incompetence}

Grisso emphasizes the difference between a clinical and judicial finding of incompetence.\textsuperscript{292} The legal response is not determined by the clinical assessment itself. Whether a person needs to be

\begin{footnotes}
\textsuperscript{286} Kapp, \textit{supra} note 260, at P12.
\textsuperscript{287} Grisso, \textit{supra} note 267, at 335.
\textsuperscript{288} Gordon, \textit{supra} note 172, at 65.
\textsuperscript{289} Kapp, \textit{supra} note 260, at P12.
\textsuperscript{290} \textit{Id.}
\textsuperscript{291} \textit{Id.}, at P13.
\textsuperscript{292} Grisso, \textit{supra} note 267, at 310; see also Moye & Marson, \textit{supra} note 262, at P18-P19.
\end{footnotes}
incapacitated is a different question from whether she is psychologically incompetent. However, the clinical and legal findings seem to be circular.\textsuperscript{293} If the clinical assessment fails to recognize the value of support in making decisions, the law follows suit by assigning people into one of the two categories, competent and incompetent. Since only these two legal categories exist, the clinical assessments are concerned only with them.

This circularity can be changed if the law introduced a new category. Indeed, this proposal seems to be well-founded based on the findings above. Capacity assessments are not recognizing the full skillset of persons with disabilities, they are penalizing them for the support they make use of, and are expecting them to meet a higher threshold than necessary to perform a certain task. In this respect they are treated unfairly compared to non-disabled persons, who do not have to undergo a similar assessment.

Of course, there might be legitimate reasons for this differential treatment. Even though some non-disabled persons might also have difficulties in meeting the capacity assessment standard, there is no denying that persons with disabilities in general are more likely to need protection and intervention.\textsuperscript{294} The threshold of capacity might be scientifically arbitrary if one accepts the validity of support, but it can reflect an important social convention: inability to shop alone for groceries might signal a concern for capacity, the way inability to buy a car alone does not. The conclusion of the above analysis is not that capacity assessments are unreasonable, but rather that

\textsuperscript{293} Kapp, \textit{supra} note 260, at P13.
\textsuperscript{294} Martin et al., \textit{supra} note 252, at 20.
they are deficient in a certain way. A different legal response to the need of support, different from the current incapacitation, is therefore worth exploring.

Psychological studies of how persons with disabilities can make decisions with and without support are few. More research in this area could be very beneficial for the development of our understanding of supported decision-making, as has been noted by others. However, a change in legal capacity laws is not conditioned on such research; the existing knowledge seems to be sufficient for considering and exploring alternatives. Indeed, as the circularity between the legal and clinical understanding of incapacity highlights, the emergence of supported decision-making as a legal category would most likely lead to more studies into how persons with disabilities utilize support. Deferring the establishment of supported decision-making as a legal category would hinder the conduct of empirical analysis about its use in practice.

C. The forms of supported decision-making

Having established that existing capacity assessments and legal capacity laws fail to incorporate the support persons with disabilities receive to make their decisions, this part will explain what forms supported decision-making can take. Various forms of support can be derived from the theoretical model described above, and supported decision-making as a term is used to describe all of them. This analysis is necessary to limit the inquiry into supports that can serve as the basis for legal regulation.

295 Kohn et al., supra note 180, at 1114.
In order to explore what the content of a law based on supported decision-making would be, one has to understand how support works in practice, and how exactly the role of a supporter is different from that of the guardian. The literature reveals that supported decision-making can be understood in different ways: as the ordinary way of making decisions, as a principle of legal capacity laws, and as an alternative to guardianship.

1. Supported decision-making as the ordinary way of making decisions

In the widest sense, supported decision-making is the ordinary way of how persons with and without disabilities make decisions. It is not a new invention, persons have been utilizing support since the dawn of times.\textsuperscript{297} Persons with disabilities rely on informal support networks of their family, friends, caregivers and other trusted persons.\textsuperscript{298} Currently this support is not recognized or regulated by law, neither in the case of disabled nor in the case of non-disabled persons.

This wide understanding of supported decision-making highlights its organic development: it is not an artificial construct, but a natural order of things. It is, however, too vague for legislative purposes. It is difficult to imagine what recognizing this support would mean, how it could replace guardianship. Informal, unregulated support nevertheless can have a role in the legal framework of supported decision-making: in certain cases courts can take natural support

\textsuperscript{297} Gordon, \textit{supra} note 172, at 65.
\textsuperscript{298} Kapp, \textit{supra} note 260, at P12.
networks indirectly into account when deciding about the necessity of placing a person under guardianship.\textsuperscript{299}

\section*{2. Supported decision-making as a principle}

Supported decision-making can also be understood as a principle relevant for all types of decision-making processes, including substituted decision-making: to the extent possible, one should help the disabled person to formulate her own wishes, and use these wishes as a starting point for making decisions. If this principle was incorporated into guardianship laws, the guardian would have to establish first what the represented person’s decision would be, before making his own. He is free to depart from the disabled person’s decisions, but perhaps not without cause. This is the model adopted recently by the English Mental Capacity Act,\textsuperscript{300} and the earlier German and Swedish legal capacity laws described above.\textsuperscript{301}

A guardianship system that incorporated the support principle would be an improvement, but still be far from supported decision-making as ordinary understood. The idea that the guardian’s decisions should be somehow constrained, and he should consult the represented person is not new in guardianship laws.\textsuperscript{302} Notwithstanding the communication between the guardian and the represented person, the decision is nevertheless ultimately made by the guardian, who formally expresses it (for example by signing the contract) and also takes responsibility for it. In the case

\begin{footnotesize}
\begin{enumerate}
\item[(\textsuperscript{299})] Gordon, \textit{supra} note 172, at 65.
\item[(\textsuperscript{300})] Martin et al., \textit{supra} note 252, at 27.
\item[(\textsuperscript{301})] See Part A.2 \textit{supra}.
\item[(\textsuperscript{302})] See, for example, the Hungarian Civil Code, Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 20/C.
\end{enumerate}
\end{footnotesize}
of disagreement between the guardian and the represented person it is therefore common for the guardian’s will to prevail, which is antithetic to the idea of supported decision-making.\textsuperscript{303}

Also, as a practical matter, it is difficult to turn this principle into a legal obligation. It is often no doubt advantageous for the guardian to know what the represented person’s wishes are. However, in the case he is not interested, or when he already made up his mind, communication between them is a meaningless exercise, if it happens at all. Central European countries provide widespread examples of public guardians who make decisions on behalf of persons whom they do not meet before, despite that technically being a legal obligation.\textsuperscript{304}

3. Supported decision-making as an alternative to guardianship

To explore how supported decision-making can be thought of as a legal institution, the role of the supporter has to be compared to that of the guardian. If a disabled person is faced with a decision she is unable to make alone, a guardian would make that decision on her behalf. A supporter, on the other hand, would only ensure that the person is able to make the decision. The supporter needs to explain the circumstances, the various options and their consequences, and let the supported person decide. If the supporter does not agree with the decision, he still has to

\textsuperscript{303} In fact it is typical for persons under guardianship not to have any legal remedy against their guardian’s decisions; see Salzman, \textit{supra} note 172, at 297.

\textsuperscript{304} For a good example, see \textit{Sýkora v. the Czech Republic}, No. 23419/07 (Eur. Ct. Hum. Rts., November 22, 2012); the Mental Disability Advocacy Center’s report found two guardians responsible for 350 persons in one Hungarian institution, which makes meaningful communication between the guardians and represented persons impossible: Mental Disability Advocacy Center (MDAC), \textit{supra} note 223, at 73.
respect it. He cannot overrule it, contrary to the guardian, who substitutes the represented person’s decision with his own.

The supporter’s role is therefore to facilitate the decision-making process. The content of this facilitation is not set in law or theory, but we can contrast it with the breakdown of capacity as understood by guardianship laws. To make a competent decision, the person has to satisfy various criteria, broken down into 4 or 5 categories:\textsuperscript{305}

a) She has to understand information relevant to the decision

b) She has to understand what the available alternatives are

c) She has to understand what their consequences are

d) She has to be able to communicate a decision

e) She has to be able to maintain consistency, stick to the decision (that is, answer the same question similarly over time)

The supporter’s role is to help with all these tasks, which could be classified into two main areas. One of them relates to assisting with communication. The supporter needs to ensure that the supported person receives information in a way she understands, and that her decisions are correctly interpreted by the other contracting parties. Persons with disabilities can have difficulties communicating in an ordinary way, they might use methods that are hard to understand to persons unfamiliar with them. Information in the usual formats might be inaccessible for them, they might need pictures or easy-to-read language to process it. In the case of severe communication difficulties, it is hard for an outsider to differentiate between the

\textsuperscript{305} See Chapter 2 supra.
incompetence to make a decision and the inability to communicate it. A supporter can act essentially as a translator, breaking down communication barriers between the disabled person and her environment. This is an important task, which would greatly enhance the exercise of capacity by persons who are incapacitated because others cannot communicate with them. As one of the mottos of the communication theories of persons with severe disabilities states, “you cannot not communicate” – everybody communicates, even if by the change of pace of breathing, it is society’s task to recognize this communication. The supporter can play a major role in making this happen.

Another large part of the supporter’s role relates to ensuring that the disabled person has reasonable alternatives to choose from. That can only happen if the supporter knows what the various options and their consequences are. It is the supporter’s duty to present these to her, in order to avoid or curtail arbitrariness. If a disabled person wants to spend her money on comic books or cinema tickets or something else which others would find unreasonable, a guardian can prevent that by overruling her wishes, or simply by withholding money from her. A supporter would only have to make sure that the supported person understands the consequences: she knows how much money she has, and what she can and cannot afford to buy if she buys, for example, three cinema tickets a week. If the supported person still prefers the cinema over eating a nice meal, it is her choice.

308 A large part of professional guardians’ workload in Hungary consists of approving the spending and allocating money of the persons they represent; see: Mental Disability Advocacy Center (MDAC), supra note 223, at 74.
To make this clear with another, more complicated example: critics of supported decision-making might object that some decisions have complicated financial consequences, which a person with a disability might not be able to comprehend. If she has to choose between living in her house or moving to an institution, she could prefer to live at home even though she might not afford it, or her standard of living might be much lower than in the institution. Therefore if simply asked where she wants to live, she might not give an answer reflecting all the consequences – a guardian might be a better decision-maker, because he would be able to comprehend the issue in its complexity.

The problem with this example is that the disabled person’s decision is separated from its consequences. A role of the supporter is to make sure that the person is choosing between real alternatives and is aware of their implications. If the person simply cannot afford to live at home, this is not an option she can choose, and that is how it should be explained to her. If living at home is more expensive than in the institution, it should be made clear to her what her standard of living in one and the other place would be, so that she can choose from these complex alternatives, not simply from the two places of abode. Or, perhaps, other options should be explored, such as moving to a smaller house in the community with lower costs. The supporter should explore all the possible scenarios, and see them in all their complexity. In that regard, his task is similar to what a guardian would do. However, the supporter then has to boils down all the complexity into a few realistic options, and present them to the supported person in a way she can understand them and be able to choose from them.
Juxtaposing the role of the supporter and the guardian in exercising the disabled person’s legal capacity allows us to identify what supported decision-making as a legal institution should be concerned with. Concentrating on the tasks necessary for making a competent decision, supported decision-making as an object of regulation can be separated from its other forms, which rely on a much wider understanding of the concept.

The above is a description of the supporter’s role in general. It does not answer the question what happens to persons with the most severe disabilities, who fail to indicate a decision. This issue will be analyzed in the next chapter. Nor does it answer the question whether the supported person’s decision can ever be overruled, which will be considered below.

**D. Supported decision-making as a legal institution**

To make sure that persons with disabilities can utilize support for making decisions similarly to non-disabled persons, law has to incorporate that support to a framework of full legal capacity. That is a very different task than simply enacting the ideal model of supported decision-making into law. This part will explain why that is the case, and how supported decision-making can be adopted as a legal institution. To achieve the latter, supported decision-making has to be able to fulfill any necessary functions performed by guardianship laws. These functions serve conflicting aims, which are resolved differently by various forms of guardianship. Supported decision-making can also incorporate multiple ways of addressing these aims. Instead of choosing the best solution, the aim of this part is rather to understand the trade-offs behind each choice.
1. Ideal v. legal forms of supported decision-making

The ideal version of supported decision-making described in part A of this chapter is normative in nature: it explains how support works, how supporters should behave. It has been proposed in that form as a blueprint for legislation on supported decision-making.\(^{309}\) That is surprising, given that it seems to be inappropriate as a source of legal regulation.

If the ideal version would be enacted into law, it would require supporters to facilitate the decision-making of supported persons, and would detail the nature and rules of this support. It would mandate what supporters should take into account, and what they should refrain from. It is difficult to see how this regulation in itself would achieve the required result. Support emanates from an intimate relationship between a person with disability and her supporter(s). If it works well, the law is irrelevant. If, however, the supporter misunderstands his role or openly abuses it, the law is of no help either. There is no outside supervision over the supporting relationship, an outside person cannot intervene in the intimate relationship between supporters and supported, as that would require second-guessing the quality of support and the decision reached by it. Mandating such review would defeat the whole purpose of supported decision-making, as it would require disabled persons to justify their decisions to an outside body for approval. That is not how non-disabled persons make their decisions.

The shortcomings of such an approach can be illustrated by contrasting it with guardianship. Guardians are required to base their decisions on the represented person’s best interests, or some other similar standard.\textsuperscript{310} The claim of disability advocates, amply illustrated in the previous chapter, is that guardians are often failing to meet their obligations. Those who abuse their position are difficult to hold accountable.\textsuperscript{311} Even though it would be possible, it is very difficult to intervene in the relationship between guardians and the person they represent. The fact that law certifies somebody legally incompetent and entrusts the guardian to represent her interests creates a huge imbalance of power between them. This imbalance makes it very difficult, and in many legal systems impossible, for the disabled person to challenge her guardian’s actions. An automatic oversight by an outside body of all decisions would make the system very complicated and costly, with unsure prospects of improving the disabled person’s position at all.

If instead of the best interest standard the guardian would be required to base its decisions on the represented person’s wishes, the situation would not improve. Without oversight, we would still have no way of knowing which guardian is acting according to his duties and which is abusing his position.

The ideal version of supported decision-making suffers from the same problem: it lets malfunctioning supporters off the hook. It has no possibility to separate them from well-functioning supporters, and taking action against the former ones. Perhaps the system would work better in practice than guardianship. Perhaps the proportion of abuses would be much less than currently. That, however, would not be the result of the regulation, but of extra-legal factors.

\textsuperscript{310} Martin et al., \textit{supra} note 252, at 48.
\textsuperscript{311} Salzman, \textit{supra} note 172.
2. The functions of the legal regulation of supported decision-making

To understand how legal regulation can establish a true supporting framework, we cannot simply read the ideal version of supported decision-making as legal blueprint. This part will look into the functions guardianship currently fulfills or should fulfill in the legal order. It will describe how these functions could be achieved by an alternative legal framework based on the ideal version of supported decision-making. The aim is not to propose an ideal legal regulation of supported decision-making, but to explore the possible solutions and their advantages and disadvantages. The next part will then compare the possible solutions with an ideal version of guardianship described earlier, and will evaluate their strengths and weaknesses in light of the values identified previously.

2.1 The guardian’s right to be present and access information

To be able to give support, supporters have to be present at the time of concluding a legal transaction. This does not cause complications in informal settings, such as shopping or at the hairdresser. However, with more formalized transactions, the presence of third parties may ordinarily not be permitted. A bank giving a loan, a reality agent selling a house, or a police officer inquiring about an incident might all raise concerns about a supporter’s presence and his influencing the person with a disability with whom they want to deal directly. Some decisions and transactions also involve sensitive information, to which a supporter might not have access.
A doctor, for example, might refuse to disclose the patient’s medical history to a supporter, which can be crucial to reaching a decision about a course of treatment.

The right of the supporter to be present and his right to access information are important reasons for formalizing supported decision-making.\(^{312}\) By certifying supporters, the law makes clear to other persons what the supporters’ rights and obligations are, and why they are present in discussing transactions to which they are not a party. Certification and informal support are not mutually exclusive. A person can utilize the aid from any number of informal supporters in areas where this is possible, and rely on certified supporters in more formal contexts.

Guardianship fulfills similar important functions of making clear where the guardian can be present and what information he can access. Guardians are appointed by court or administrative proceedings, where the decision and the law clarify the areas in which they represent the disabled person, those in which they act together, and those which remain in the competence of the person herself. A similar appointment procedure can be also used for supporters, with an important modification: if supported decision-making is based on a relationship of trust, no supporter can be appointed without the person’s consent. This means an agreement must be reached before the supporter and the supported person. The role of the appointing body is not to decide who the supporter will be, but simply to certify to the public that a supporter has been validly chosen.

As an effect of the certification the supporter is recognized by law to support the person in various circumstances. This allows him access to situations to which a third-party generally

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\(^{312}\) Gordon, *supra* note 172, at 64.
would not have access. The certification also signals to the other parties of the transaction that they can trust the process, they do not have to be afraid that the supporter’s presence constitutes a defect of the transaction which can lead to its annulment.

The last point about the importance of certification can be best understood by imagining what would happen without certification. If a disabled person in need of support wanted to conclude an agreement, she would need her supporter during the process to advise her and interpret her choice. Even if the other party to the agreement would not be acting malevolently, he would have to be concerned about the contract’s validity. If somebody contested the validity of the transaction, a court would have to conclude that the disabled person did not have capacity to sign it: if she needed the supporter in the first place, she is unlikely to be able to prove that she was could conclude the agreement alone. More importantly, the unofficial supporter had no business influencing the disabled person in this decision-making process, regardless of his motives. The supporter is not a party to the transaction, and bears no responsibility for its content. If he influenced the outcome in a particular way, this could easily serve as a ground for declaring the agreement void.

Reliance on uncertified supporters would undermine the legal certainty of formal agreements, and prevent others from entering into contracts with persons with disabilities. In these situations it serves as a reassurance for the other transacting party if all persons participating in the transaction have a valid legal reason to do so. The fact that the court certified the supporter indicates that he is in a relationship of trust with the person with a disability, and his involvement in the process should not be contested. In transactions where neither the supporter nor the other
party abuse their positions, and both act bona fide in the supported person’s interest, certification should be enough to create a very strong presumption of the contract’s validity.

The appointing process of guardians also allows screening out persons unfit for this role.\textsuperscript{313} A similar function seems permissible for supported decision-making as well.\textsuperscript{314} The certifying body could reject certain candidates, even though they are validly chosen by the supported person. Since supporters’ rights and their possibility to abuse their position are much narrower compared to guardians, an issue discussed more in detail below, supporters should be rejected only on narrow grounds, such as a history of abuse of their position.

It is an interesting question whether certifying bodies should interfere with the quality of the agreement between the supporter and the supported person. Bach and Kerzner propose that the threshold for capacity for this agreement should be very low: any indication of consent should be accepted as valid.\textsuperscript{315} However, should the supporter be certified if the agreement is not confirmed before the certifying body, or if consent is expressed only in a form which only the supporter can interpret? The case of persons with high support needs, relevant to this question, will be discussed in detail in the next chapter. At this point it is sufficient to mention that the Hungarian Civil Code of 2009 did contain an optional but explicit provision for assessment of the capacity to choose one’s supporter.\textsuperscript{316} On the other end of the informality spectrum, supporters in India under the proposed legislation are appointed by a private agreement, which is later certified by

\textsuperscript{313} See, for example, Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 19/C
\textsuperscript{314} Act No. CXX of 2009 on the Civil Code of Hungary, § 2:18 (5).
\textsuperscript{315} Bach and Kerzner, supra note 176, at 48.
\textsuperscript{316} Act No. CXX of 2009 on the Civil Code of Hungary, § 2:18 (1).
an administrative body without contesting or assessing capacity.\textsuperscript{317} Both solutions, and others in between, are thus possible.

\textbf{2.2 The role of supporters}

A guardian makes decisions on behalf of legally incapacitated persons. On the other hand, a supporter only facilitates a supported person’s own decisions. Commentators have raised the concern that the two might sometimes be different in name only.\textsuperscript{318} They warn that support in practice can turn into substitution, which may lead to a new type of paternalism.\textsuperscript{319}

Indeed, the conflation of support and substitution is inevitable if supporters have the right to express the supported person’s decision. The Swedish God Man, the German Betreuer, and the person’s chosen representative in British Columbia can all make legal transactions binding the disabled person.\textsuperscript{320} In principle, they are only communicating and executing her decisions, but an outsider cannot tell whose will the decision represents.

To have legal certainty about the person’s own wishes, she must express them herself. The supporter can help her formulate her decision, but only the supported person will communicate it

\begin{itemize}
\item[\textsuperscript{317}] Minkowitz (2016), supra note 307, at 7.
\item[\textsuperscript{318}] Kohn et al., supra note 180, at 1114.
\item[\textsuperscript{319}] Id., at 1117.
\item[\textsuperscript{320}] See Part A.2 supra.
\end{itemize}
to the other contracting parties. This is the norm adopted in the Hungarian Civil Code of 2009\textsuperscript{321} and the Czech Civil Code of 2012.\textsuperscript{322}

This solution conflicts with the ideal version of supported decision-making in an important way. It only allows using support by persons who are able to communicate a decision in a way which is intelligible to the other contracting parties. If their wishes can only be understood by the supporter, other persons learn about their content only through the supporter’s interpretation. This allows the supporter to substitute his judgment for that of the supported person.

This problem plays out differently for various sub-groups of supported persons. Persons able to communicate a preference, but not in the required form, can be accommodated as other persons with communication difficulties are. For example, if selling a house requires a written contract, but the supported person is unable to write, witnesses can testify with their signature that she indeed expressed consent with the contract. If the supported person is unable to speak, persons experienced in her form of communication can help interpret her wish.

The supporter can play a major role in making the disabled person understood. However, he should not be the only one able to ascertain her wishes. If he is, he has power to substitute his wish for that of the supported person, either consciously, or by projecting his expectations to the person’s communication. From this perspective, the supporter is no different than a guardian. To

\begin{flushright}
\textsuperscript{321} Act No. CXX of 2009 on the Civil Code of Hungary, § 2:19 (2). This act never entered into force, as it was repealed by Act No. V. of 2013 on the Civil Code of Hungary, currently in force. The Civil Code of 2013 regulates the relationship between supporters and supported persons in § 2:38 (3) the same way as the Civil Code of 2009.
\textsuperscript{322} Act No. 89/2012 Col. l. on the Civil Code of the Czech Republic, § 47 (2).
\end{flushright}
recall, the guardian can also respect the represented person’s wishes, and act according to them – indeed, no doubt some guardians sometimes do. What sets them apart from supporters is that guardians have a legal power to overrule the represented person’s decision if they do not like it. If supporters are the only ones able to express what the disabled person’s wish is, they gain a similar power.

Of course, how supporters and guardians act in practice depends on a lot of other factors besides law. Perhaps it is perfectly reasonable for the Swedish legislator to allow the God Man to make transactions on behalf of the person they support, because God Men tend not to abuse their powers. Therefore the implication of the above analysis is simply to highlight a trade-off in enacting supported decision-making. If the law wants to ensure that support does not become substitution, only the supported person herself should be allowed to express her decisions, to make the formal act of consenting to a legal transaction. Persons with communication difficulties can be accommodated, but those who can be understood solely by their supporters are unfortunately left out. On the other hand, if these persons are included in the support framework, the law cannot prevent support turning into substitution. In either case, the legal framework falls short of the aspirations of the ideal version of supported decision-making.

Which solution is preferable in a given jurisdiction depends on a lot of factors. It is probably not possible to advise for any of them in the abstract, and it is certainly not the aim of this dissertation. The next chapter will offer a possible solution to incorporating persons unable to express a wish in the above framework.
2.3 Legal certainty – the decision-making process

Guardianship makes possible for persons with diminished capacity to enter into valid legal transactions. It allows other parties to conclude agreements with the guardian, whose legal capacity is uncontested. In the absence of a guardian, other parties would have to transact with the disabled person instead, which carries a certain risk. The contract thus concluded could be declared null and void, if the person is found not to have had the capacity to enter into it.\(^{323}\) This incapacity defense protects the disabled person from being bound by obligations to which she could not have validly consented due to her lack of capacity at the time of concluding the agreement. The affected person herself can challenge the contract, or others can do that on her behalf. Contracting through a guardian avoids such risks, therefore it strengthens the agreement’s legal certainty. If the guardian is acting within his legal powers, the agreement cannot be contested on the ground of the represented person’s lack of legal capacity.\(^{324}\)

The legal certainty of transactions made with support is more complicated. If supported decision-making aspired for the clarity of guardianship, the law could mandate that the supported person’s decision is only valid if it is co-signed by her supporter.\(^{325}\) That, however, would take away the disabled person’s right to make decisions alone, and would give supporters power to influence her decisions simply by withholding consent if they did not like the outcome. This is the logic of

\(^{323}\) See, for example, Act No. CXX of 2009 on the Civil Code of Hungary, § 2:23 and § 2:29.

\(^{324}\) Needless to say, the agreement also cannot be contested on the ground of the guardian’s lack of legal capacity, as guardians have to be persons of full legal capacity. If the guardian loses his legal capacity, for example due to a sudden psychiatric episode, he loses his position as a guardian as well; see, for example, Act No. CXX of 2009 on the Civil Code of Hungary, § 2:33 (2)c).

\(^{325}\) The Czech Civil Code of 2012, Act no. 89/2012 Col. l. on the Civil Code of the Czech Republic, § 47 (2) mentions this possibility, but it is optional, not mandatory – the contract is valid also without the supporter’s signature.
the German Einwillingunsvorbehalt and British Columbia’s representation agreements, as explained in the previous part of this chapter.\textsuperscript{326} This seems to be too close to the idea of guardianship, contrary to the principles on which supported decision-making is built.

If supporters’ consent to transactions cannot be made mandatory, the person with a disability is running the risk of making a decision which will harm her. It is highly desirable that there is some sort of a safeguard to correct the most serious mistakes, which might severely harm the disabled person’s interests. However, any possibility of overruling the disabled person’s decisions decreases the other party’s legal certainty. As a result, a too widely construed safeguard can be a disservice to persons with disability. If a transaction can be declared void on a large number of grounds, in a procedure initiated by a wide group of persons, it can discourage other parties from contracting with the supported person. Therefore any safeguard mechanism chosen should carefully balance between protecting the disabled person from abuse and protecting legal certainty. Guardianship maximizes both, at the expense of suppressing the person’s own decisions. Supported decision-making should also provide a reasonable protection to these interests, otherwise it cannot be considered an effective alternative to it. Therefore the next part will analyze protection from harmful decisions, the counter-principle to legal certainty, with the aim of finding a possible balance between the interests they are protecting.

2.4 Protection from harmful decisions

\textsuperscript{326} See Part A.2 supra.
Guardianship protects persons with diminished capacity from abuse by other parties. By making decisions on her behalf, the guardian ensures that the person he represents does not enter transactions which are not in her interest. This approach seriously limits the disabled person’s right to make her own decisions. Those can only prevail if the guardian agrees with them. If the guardian does not, he will overrule them.\footnote{Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 15/A. (1).} It is possible that the guardian’s decision will be less advantageous to the person that her own one would be. The aim of guardianship is therefore not to achieve the best outcome for the disabled person. Rather, it safeguards her best interests as perceived by the guardian. That, however, it does very effectively: no legal transaction of the represented person is valid without the guardian’s consent,\footnote{Obviously, the argument relates to areas where the person is declared legally incapable. In areas where her legal incapacity is intact, she can make decisions freely without the consent of the guardian.} and all those he consented to, are. Guardianship therefore rests on the presumption that, on overall, guardians’ decisions are better, lead to less harm, than the disabled persons’ own decisions would be.

Supported decision-making values disabled persons’ autonomy much more than does guardianship. It accepts that persons with diminished capacity would have trouble making decisions alone, and this could lead to their abuse by others. However, it presumes that they are much better in making decisions with support. There seems to be a lot of wisdom in this thought. Indeed, many decisions are of a highly personal nature, which another person simply cannot substitute. With regard to others, reasonable persons may disagree as to what serves a person’s best interests, and there is no reason why the guardian’s preferences should prevail over the represented person’s. After all, everybody makes decisions in her life which could be regarded as not in her interests by outsiders, but law does not intervene in their lives – why should it in the
case of persons with disabilities? Even with regard to decisions that are clearly harmful to the person, there is value in making mistakes, taking responsibility and learning from them. It is part of the natural development of decision-making skills, crucial for everybody. Disabled person should not be exempt from this experience – perhaps they need it even more than their non-disabled peers.

Although the argument for valuing one’s mistakes is powerful, it cannot be denied that some mistakes are more harmful than others. Persons with disabilities can and do fall prey to abuse by others, who take advantage of their diminished capacity and trick them into transactions that can cost them their homes or property. It is hard to consider these events a valuable learning experience. Can supported decision-making protect persons with these types of harmful decisions? To answer this question, the following parts will consider separately harmful decisions benefitting others, decisions not benefitting anybody, and decisions benefitting the supporters.

### 2.4.1 Abuse by others

Guardianship protects efficiently from abuse by others: the malevolent party would have to trick the guardian, a person of full legal capacity, to take advantage of the person with disability. As explained, this has its disadvantages: by trying to protect the person from all possible harm, it denies his autonomy and sacrifices her potential to develop her skills by making mistakes. Overprotection can cause harm as well.

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329 See the concept of “dignity of risk” in, for example, Gordon, *supra* note 172, at 63.
Supported decision-making at first sight seems to be incompatible with safeguards that are based on overruling a person’s wishes. In this ideal understanding of supported decision-making, which is indeed prevalent in the literature, the only safeguard possible is the support itself.\(^{330}\) That should ensure that persons do not enter into disadvantageous transactions. While some inevitably make harmful decisions, their number does not justify a departure from an absolute rule of respect to the disabled person’s expressed wishes. This position therefore rests on the presumption that abuses will not be prevalent, and the harm caused by them will be lower than the advantage of maximizing the autonomy of persons with disabilities.

However, this is not the only possible reading of supported decision-making. Disabled persons are not the only ones to fall victim to exploitation. The law protects all victims of fraud, error, deceit, duress, misguidance, abuse of position by the other party, and other unfortunate situations in various ways.\(^{331}\) These mechanisms could be used to protect supported persons as well.

The Hungarian Civil Code of 2009 provides for an interesting solution to protecting persons with diminished capacity through formally disability-neutral provisions. The wording of the general voidability clause for contracts has been modified to include situations where the contract was entered into by one of the parties with the intention of taking advantage of the other’s personal circumstances.\(^{332}\) This is broad enough to include a person’s lack of experience and adverse financial situation. The law contains a special procedural rule which makes it easier for persons

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\(^{330}\) Minkowitz (2010), supra note 175, at 156.
\(^{331}\) See, for example, Act No. CXX of 2009 on the Civil Code of Hungary, §§ 5:69-5:84 for a long list of incapacity clauses.
\(^{332}\) Act No. CXX of 2009 on the Civil Code of Hungary, §§ 5:78 for a long list of incapacity clauses.
with disabilities to invoke this substantive rule: besides the supported person, any of their supporters can also initiate the court proceedings. The general rule, which applies to everyone, has thus been accommodated to include the interests of persons with disabilities, who were until now not allowed to enter into any contract for fear of exploitation. The clause does not even contain a reference to disability; after all, in addition to fraud, error, abuse of unequal bargaining power, and all the other conditions listed, people with disabilities have no additional interest in having an “incapacity defense”; all they need is protection from these evils.

It is yet to be seen how courts will interpret the provision, and how they will consider disability as a factor in assessing whether fraud or misguidance have taken place. Only that can answer the question which type of abuse can be prevented by this provision, and which cannot. For the purposes of this analysis, a more general point should be noted: incapacity is not the only ground for protection against abuse by others. Somebody profits from such an abuse, and/or it is carried out in an illicit manner, taking advantage of the other person’s weakness. These harms arguably cover most if not all scenarios of abuse of persons due to their diminished capacity. If law can protect against these harms, there is no need for protection based on incapacity.

The Hungarian solution is not the only way that supported decision-making can incorporate a safeguard for declaring transactions void. The Civil Code’s provision is phrased in a disability-neutral way. To strengthen it, disability could be explicitly mentioned as a circumstance which

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333 More specifically, it allows their supporters to apply to the court with a motion to void the contract. This is the only right the supporters have for themselves; all their other powers are related to facilitating the supported person’s actions. See Act No. CXX of 2009 on the Civil Code of Hungary, § 2:20 (3).
can be abused by the other party. If even that was insufficient, the status of a protected person can be explicitly listed as a circumstance.

Besides the substantive ground for voiding transactions, the second variable in the safeguard is the supporter’s role. The Hungarian example allows any supporter to initiate the proceeding for declaring the transaction void. Some might argue that the supporter’s right to initiate the proceeding alone gives him too much power to contest the supported person’s decision. The supporter cannot overrule them himself like a guardian, but he can achieve the same result by turning to the courts. This claim seems to be far-fetched for two reasons. First, it is much more difficult to achieve the same result for a supporter than for a guardian, because court proceedings are long and costly – in any case, more burdensome than simply having the power to overrule the decision as the guardian does. Second, while a guardian can overrule the represented person’s wishes for any reason, the supporter has to convince the court that abuse has taken place. Therefore, supporters are likely to exercise this power much less frequently than guardians. Nevertheless, if it did turn out that they overuse it, the right to initiate the proceeding for voiding the transaction can be limited to the supported person. If a supporter felt the person was abused, it would have to convince him to sign the court petition.

A middle approach can be also imagined, thereby only supporters who were not present at the time of concluding the transaction could initiate the voidability proceeding alone. This would provide more certainty to the other party, as by witnessing the transaction, supporters would forfeit their right to contest it on their own.
The third variable that can influence the effectiveness of the safeguards against abuse is the type of decisions it applies to. For some type of transactions, where the potential harm is particularly severe and its likelihood is high, more stringent criteria could apply. For example, the law could require that contracts disposing of with real property are attended by all the persons’ certified supporters. When investing large sums of money, it could require the supporters and supported persons to consult expert advice, or entrust an expert with managing the supported person’s portfolio. Or, even more intrusively, it could require a court approval for a transaction above a certain value.

The limitations do not have to be expressed in general terms in the law. The court or administrative body certifying supporters can have powers to specify transactions subject to approval. If the supported person happened to own a company, certain decisions such as selling or donating her share can be subject to court approval.

These restrictions would limit the supported person’s freedom to contract, but would also exclude some particularly serious forms of abuse. Rather than arguing for a specific solution, the point here is merely that these possibilities are all available to adopt in a supported decision-making framework. Whether they would be required in a given jurisdiction, depends on what types of abuses could not be deterred by other means.

The above analysis shows that supported decision-making is able to incorporate a range of remedies that will result in overruling a supported person’s decision if it results in her abuse by others. The more disability-specific, or incapacity-specific, the safeguard is, the more types of
abuse it is able to prevent, but also the more likely it is to deter others from contracting with persons with disabilities. The balance to be reached is therefore a careful exercise in light of the social practice in a specific jurisdiction. Since the remedies are also mostly ex-post court reviews in their nature, their efficiency depends on how accessible and fast the court system is, and how it handles the claims of abuse submitted by or on behalf of supported persons. In a well-functioning court system, where judges understand the goals of supported decision-making, it is possible for disability-neutral provisions to achieve an acceptable level of protection. If that does not happen, the protection could be strengthened at the expense of legal certainty. The goal, however, should not be to eliminate the possibility of abuse, because that is not a realistic expectation. Rather, the possibility of harm should be reduced to an acceptable level.

No safeguard is able to provide full protection. Plenary guardianship is probably the most effective in preventing abuse by others, but it achieves that by creating other types of harm. It is available only to persons who give up all their decision-making powers, which is a huge price to pay. Others, not willing to forfeit their autonomy, remain completely unprotected. If they fall victim to exploitation, guardianship applied *ex-post facto* will be of little help to them. Therefore the effectiveness of guardianship’s protective mechanism should be evaluated in light of the narrow group of persons it is able to help.

Supported decision-making seems to achieve a much better balance of protection and autonomy, which makes protection available to a larger group of persons. In any case, the types of remedies under supported decision-making are flexible, they offer various combinations of support and respect the supported person’s autonomy. Jurisdictions are therefore free to apply a solution fit
for their circumstances, and change it when experience suggests otherwise, if developments make certain abuses more or less likely.

### 2.4.2 Abuse by self

Another type of abuse prevented by guardianship is harm caused by the person’s own decisions. This relates to situations where no one in particular takes advantage of the person, she is simply unable to protect her own interests by making inappropriate decisions. Guardianship solves this problem by replacing all her decisions for which he is found to lack capacity with the decisions of her guardian.

Supported decision-making values the person’s own decisions. Its aim is not simply to allow the disabled person any kind of arbitrary decisions, but to help her make decisions that are in her interest. It can be objected that a person with diminished capacity could not decide about complicated decisions. For example, she might have a preference for staying at home, but she cannot appreciate the financial consequences of her choice. Giving her the option of simply choosing between staying at home or moving to an institution can easily lead to an arbitrary answer. That is not how meaningful support should work. The supporters have to appreciate the consequences of certain decisions, and come up with realistic options to choose from. They have to explain the alternatives to the person so that he can choose among those: does she want to stay at home for five more years and lose his money and then move to the institution, or does she want to move now and keep his money? Perhaps other options are possible, such as using only half of her home and accommodate a tenant in the rest, or moving to a smaller apartment.
Support is playing its role if it allows the disabled person to choose from meaningful options, allowing her to appreciate what she is choosing from.

Supported decision-making achieves decisions of better quality also because of its pedagogic qualities. Everybody needs experience and practice to make decisions of good quality. Guardianship deprives disabled persons the opportunity to learn by making their own decisions. It is thus wholly anti-pedagogic: persons subject to substitute decision-making lose even those skills they had had before incapacitation, and their condition deteriorates. When receiving support, however, they develop their skills. Simply by making more and more decisions over time and experiencing their consequences, they become less and less dependent on their supporters. Making mistakes and taking responsibility for them is an important part of this learning process. For example, while initially they might need assistance with all their shopping, over time they can learn how to budget their weekly or monthly income alone. It is a basic axiom of special education that everybody can learn. While not everybody is able to reach the same level, supported decision-making is much better suited to achieve a person’s full potential than guardianship is.

334 Mental Disability Advocacy Center (MDAC), A kizáró gondnokság kérdése az új Ptk.-ban [The question of plenary guardianship in the new Civil Code], March 31, 2008, 1.
335 Salzman, supra note 172, at 291.
336 Ilona Huszár & Elemér Kuncz, Igazságügyi pszichiátria [Forensic Psychiatry], 274 (Medicina, Budapest, 1978).
337 Kohn et al., supra note 180, at 1139.
338 Oktatáskutató és Fejlesztő Intézet [Institute on Researching and Developing Education], A tantárgygondozó szaktanácsadói támogatáshoz kapcsolódó pedagógiai szintleírások – Gyógypedagógus munkakör [Education level descriptions connected to specialized advising support], 16 (2014).
Despite these positive features of supported decision-making, it cannot be denied that some supported persons will engage in behavior that can be considered by others as harmful or otherwise not in their interest. For example, they might waste their money on useless items, leaving their basic needs unmet. This problem can be approached in a number of ways.

First, some transactions of this nature can be declared void using the safeguards described in the previous part. This would typically involve contracts with long-term obligations, such as telephone-, club membership- and other subscriptions. These are not necessarily the result of abuse by the company offering them. Nevertheless, they can be considered to have been signed by mistake, or some of the other ground available for declaring transactions void. The German experience with Betreung suggests that these seem to be the most typical types of self-harming transactions Germans with diminished capacity enter, and they are declared void easily by the German courts.\textsuperscript{339}

Second, one has to realize that self-harm is difficult to deal with even under guardianship. If the person has a habit of irresponsibly wasting money without the approval of her guardian, her transactions are legally invalid. Nevertheless, if she has access to cash or a credit card, her purchases are hard to declare invalid, especially if she has already consumed the goods she has bought. Contracts with long-term obligations mentioned above are easy to declare void if the person lacked legal capacity to sign them, but unreasonable spending of cash is much more difficult to declare void. It either requires the continuous supervision of the represented person by the guardian, or limiting her access to cash by releasing pocket money to her in small

\textsuperscript{339} Communication with the Legal Director of Lebenshilfe, the German Association of Persons with Intellectual Disability, February 27, 2008, on file with author.
installments. Supported decision-making does not seem to be less efficient with regard to the latter option, and can easily outperform guardianship with regard to the first one.

Third, it is hard to measure the size of this problem because harm in this case is hard to define to start with. Small purchases of everyday nature, especially with regard to entertainment, are highly subjective. Subjecting spending of this type to review on the grounds of rational justification seems to be very intrusive. This is not an issue of capacity: many if not most non-disabled persons would have difficulty justifying some of their expenses on rational grounds. Some, suffering from alcoholism or other types of addiction, whether diagnosed as having a substance abuse problem or not, are clearly endangering their well-being. However, only disabled people’s “irresponsible wasting of money” is sanctioned by legal intervention. This does not mean that some types of spending could not be without doubt considered irrational by a vast majority of society. Rather, the problem is that there are no bright rules to separate the vast majority of unacceptable irrational spending from the tolerable ones. Any intervention on this very shaky basis has the potential to be over-inclusive. Indeed, guardianship in practice tends to be characterized by an invasive control over the represented person’s spending, subjecting all his expenses to scrutiny by the guardian. Since this intervention is affecting only persons with disabilities, no control over irresponsible spending seems to be an acceptable, and definitely a possible, alternative. This seems to be a better option than allowing intervening with disabled

340 The author of this dissertation at the age of 13 spent his first ever salary, earned after two weeks of hard construction labor, on a full six-book edition of Winston Churchill’s Second World War. While he still does not regret this decision, he had a very hard time justifying it to his parents, and even harder to his friends at the time.

341 Judit Dallos, A gyámügyi előadó szemével [From the viewpoint of a Guardianship Authority employee], in: Hungarian Civil Liberties Union (TASZ), Ki a kompetens? [Who is competent?] 18 (2001); excessive control over the disabled person’s spending is not unique to guardians. As mentioned above in Part A.2, the Swedish God Men (mentors) were also criticized on similar grounds.
persons’ choices on the basis that their entertainment patterns derail from the expectation of their community or the rational opinion of a court.

In the absence of available studies it is hard to tell how reckless spending behavior in the absence of incapacitation would manifest in the case of persons with diminished capacity. Instead of intervening by supervising their individual transactions, a better approach seems to be ensuring that whatever spending decisions they make, it does not endanger their well-being. Setting up automatic payments for all the person’s regular expenses, and releasing only the rest of the supported person’s income to him as pocket money already puts a prodigal disabled person in a better position than her non-disabled peers would be. This option seems to be perfectly compatible with supported decision-making. The rest depends on how the supported person manages her money. Educating her about budgeting seems to be a preferable solution than making expense decisions on her behalf, therapy and training a more sensible intervention than legal control. Supported decision-making is more suited for this task than guardianship due to its pedagogic qualities, especially if the supporter has closer and more frequent contact with the supported person than a professional guardian would have.

Lastly, for the sake of completeness, another possible intrusive option to help with prodigious spending is physical control over the supported person’s finances. The supporter could be tasked by the court to retain the supported person’s income after her regular expenses were paid, and release the remaining sum to her in small installments which are easier to manage.\(^{342}\) This would give the supporter power over the supported person’s decisions that seems to be going beyond

\(^{342}\) Gordon, supra note 172, at 72.
the understanding of mere support. Nevertheless, in jurisdictions where the danger of reckless spending was identified as substantial, it could be thought of as a last resort. It could be phrased in a disability-neutral way, similarly to the already existing institution of designated recipient, which is used to help persons unable to manage their regular payments regardless of the reasons.

Another example of a disability-neutral approach concerns the protection of persons from abuse and serious deterioration of their condition due to neglect. If the caretakers of a person with a disability die, authorities often proceed with placement under guardianship to ensure they can intervene with social and healthcare services.343 Their concern for well-being is commendable, and indeed, depending on the jurisdiction, a legal or constitutional obligation. People with disabilities are, however, not unique in having these kinds of needs; the growing elderly population is just as much a recipient of similar services. The fact that these kinds of interventions can be performed without unnecessarily restricting the person’s legal capacity is shown by the Adult Protection Legislation adopted in several Canadian provinces.344 Following the example of child protection legislation, they unify the process of providing assistance to adults in need resulting from various social crises. This approach can ensure that the needs of adult and elderly persons can be met without restricting their rights, regardless of whether they do or do not have a disability.

Specific safeguards can also be developed in various areas. Banks can establish a good practice of providing extra counseling to supported persons when applying for loans. Hospitals can develop procedures for the effective involvement of supporters in medical decision-making.

344 Bach and Kerzner, supra note 176, at 135.
Social protection agencies can extend their cooperation to supporters, providing them advice relevant for the decisions of the supported person. These specific safeguards would not limit the autonomy of the disabled person, they would merely ensure that she and her supporters receive the appropriate type and amount of information to avoid particularly harmful outcomes.

2.4.3 Abuse by the supporter

The third type of harm threatening the well-being of the person with disability is abuse by the person entrusted with safeguarding her interests. Guardianship poorly protects represented persons from abuse by the guardians.345 Their relationship is based on the notion that the guardian makes decisions in the person’s interests, because the latter is incompetent to make them. Due to this presumption it is very hard for a person under guardianship to challenge the decisions of her guardian. In some jurisdictions it is technically impossible, since to file a complaint against the guardian, or even to learn the details of her decision (e.g. inquire about how her property is managed), the represented person needs the guardian’s consent. Even where this is not the case, the prospects of filing a complaint against the person who is the one entitled by law to make decisions on her behalf are slim. Guardianship simply makes abuse possible by giving the guardian complete control over a vulnerable person’s decisions either completely or in a given area, with little outside oversight into how he manages his duties. It is impossible to estimate how prevalent this type of abuse is exactly because there would be little outside

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345 See Chapter 2 *supra.*
knowledge about it, but based on the reports and statements of persons with disabilities it has to be considered a serious and widespread problem.  

Compared to guardians, supporters have less power over persons they are aiding. Nevertheless, the supporting relationship also has potential to turn into an abusive one. The supporter can mislead the supported person about a transaction to benefit from it. For example, he might convince her to sell a property below its market value to the supporter’s accomplice, or to donate it to the supporter.

As a best practice rule, with transactions of significant value, more supporters should be involved. If the supporter has any interest in the transaction, he should not act as a facilitator in the process. These are not hard rules, and it is difficult to turn them to a legal requirement. Nevertheless, their breach can indicate need for a review process.

Proposals about supported decision-making usually mention that the supporter should not exert “undue influence” on the supported person. This concept relates to some form of coercion, but is currently not very well defined psychologically, therefore it is of little help in guiding courts. This lack of clarity can be overcome through developing its substance as a legal standard in the future. Nevertheless, the substantive standard is insufficient to prevent abuses if it is not paired with meaningful procedural rules.

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346 Id.
347 Dhanda, supra note 176, at 445.
A possible reaction to abuse in guardianship is the guardian’s dismissal by the body nominating him. A similar procedure can be imagined for supported decision-making as well, thereby the certifying body would dismiss (de-certify) a supporter who has exerted undue influence over the supporter. Since the supported person can end the supporting relationship anytime, this procedure would help persons who are not aware of them being abused, or wish to retain the supporter nevertheless. It would overrule the choice of the person over who her supporter should be. Given that the standard for such overruling would be a proven case of abuse, this seems to be an acceptable intervention with personal autonomy.

Dismissing the supporter only protects from future abuse, not from the harmful consequences of abuse that has already taken place. To effectively take care of the latter, transactions concluded due to abuse have to be declared void. The same procedure used to challenge abuse by the other party, described above, can serve to review abuse by the supporter as well. The substantive bases for nullity can be expanded by “undue influence” and “unfair advantage”, but perhaps it is not even necessary – the existing grounds described above should be able to capture situations when the supporter benefits from the abuse in some way.

A difficult question in the case of this type of abuse relates to procedural rules: who will help the person with disability to apply to the court? A supported person is by definition in need of some assistance, therefore she is very vulnerable to abuse by her supporter. Without the supporter’s help, she might not be able to initiate a court review proceeding alone. If she has other

\[349\] See, for example, the Hungarian Civil Code, Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 19/C.
supporters, they might be able to help her, or can have a right to initiate the review proceeding on their own. If there are no other supporters, or they are complicit in the wrongdoing, they are of little help. If the supported person cannot count on her supporters, her options are very limited. Some may be able to consult persons outside of her regular support circle and act with their help if they suspect they have been abused. This is not easy, as taking an action against one’s closest supporter never is. Also, these types of external advisors or services may not be available for everybody. Nevertheless, even in these circumstances, the supported person is in a better situation than if she was under guardianship: she does not need her supporter’s consent for taking action, the supporter cannot block her activities the way a guardian could.

If the person is unable to act alone without the help of her supporter, this safeguard will be of little use for her. Even in this case, however, she is better protected than if she was under guardianship. A guardian would simply make a harmful decision on her behalf, while a supporter would need to convince her to make it. Persons who are unable to take action against the supporter alone, but who are nevertheless able to withdraw consent from a transaction which they do not like, are therefore better off in supported decision-making.

Those who need to fully rely on their supporters and are unable to detect any possible wrongdoing on his part are unprotected in this framework. This seems to be a problematic proposition, but in fact it is just a realistic one. Disabled persons completely unable to protect their own interests will be unable to protect them against their supporters, and law can do little about it. A supervisory body for supporters, similar to one for guardians, can be established, which could regularly review the transactions made with the help of supporters. However,
Despite the formalism and increased costs this would bring to the system, its effectiveness is highly questionable in light of the experience with similar supervisory mechanisms of guardians. A better oversight approach seems to be one which concentrates on the overall well-being of the person with a disability, as described in the previous part, not on the benefit of individual transactions she concluded.

Persons in the last category are at least no worse off than they would be under guardianship. They are indeed better off due to one reason: if law cannot help persons who are completely unable to protect their own interests, the aim of the legal capacity framework should be to ensure that there are as few such persons as possible. Supported decision-making’s pedagogical qualities serve this aim better than guardianship. The more autonomous and confident the disabled person becomes, the more she understands the decisions she makes and her interests she needs to secure, the less likely she will be abused. Guardianship, which deteriorates her skills, makes her more vulnerable to abuse.

Outside supervisory mechanisms should also take the importance of the pedagogical factor into account. Instead of investing in expensive oversight bodies and structures, they should develop services which would enable the disabled person to access information, advice and legal aid alone. This would unburden supporters, help the disabled person to become more independent, which are important goals in themselves; and in addition, they would make abuse less likely.

2.5 Guardianship infrastructure
Guardianship has existed for more than two millennia in the European continent, and has spread all over the world in the last centuries. Such long establishment allowed countries to develop an extensive infrastructure supporting guardianship. Public and professional guardians with training and oversight, courts, medical experts conducting assessments, social security and other offices utilizing and applying guardianship law make sure that guardianship is working effectively in practice. Infrastructure can be understood even wider, to include the knowledge about guardianship in society. Family members, shops, public administration, potential business partners, social care institutions and other members of society know how guardianship works, and how to transact with a person under guardianship.

The relevance of this infrastructure is not evident from guardianship laws, it can even be considered an extra-legal matter. Nevertheless, it has a very important impact on how guardianship’s legal rules operate. Guardians are scarcer in countries where public guardians are not offered by the state. Supervision is meaningless if supervisory bodies and courts do not have the capacity to review complaints. If there are not enough medical experts available, the use of sophisticated assessment tools is impossible, and incapacitation becomes detached from medical expertise. If the wider public is not aware of the role of guardians, they can be distrustful of them and reject transacting with the represented person. These are all examples of how the entrenchment of guardianship in society influences how rules about autonomy and abuse play out in practice.

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350 Blankman, supra note 172.
To realize its full potential, supported decision-making also has to develop its own infrastructure, mainly in two areas. First, persons and bodies directly involved in administering it need to be trained about how it works. Courts, social security agencies, and supporters themselves need to understand what supported decision-making requires of them. Second, society at large has to be prepared for accepting support and learn how to deal with it in practice. The level of autonomy supported persons achieve depends on these factors just as much as on the legal rules for support or safeguards. Whether they are able to rent property, open a bank account and take a loan, negotiate with public administration, etc., will be influenced by whether the persons they are transacting with are aware of supported decision-making and its rules.

There is no telling what would be the adequate level of infrastructure for supported decision-making, what kind of activities by the state are necessary. The requirements would be no doubt different at the introductory stage, and evolve as supported decision-making becomes more entrenched and available to a larger group of people. Certainly the more help the state can provide to this process the better. For the purposes of this analysis it is only important to highlight that the task is not simply to develop a new infrastructure, but to overcome the harmful consequences of guardianship’s entrenchment.

Currently, deeply held beliefs about the inability of persons with disabilities to manage their affairs constitute an important impediment to realizing their full potential.\footnote{Dhanda, \textit{supra} note 176, at 462.} Non-respect to the decision-making ability of persons with disabilities is now widely embedded in society. Family members, medical and legal professionals, service providers and all kinds of caregivers learn to...
ignore the wishes of persons with disabilities, and make decisions on their behalf in their own best interests. For centuries, these beliefs have manifested themselves in legal institutions which precluded persons with disabilities from making decisions on their own behalf. These laws also had an effect on the beliefs which formed them. Guardianship and other forms of substituted decision-making have existed since Roman times, and shaped societies’ understanding of what people with disabilities are (not) capable of doing. It is not only guardianship laws themselves which are responsible for the image of an incompetent person with disability; the prejudice is certainly older and much more entrenched than that. Law is nevertheless a factor, perhaps an important one, in the way the prejudice currently manifests itself. Guardianship law, often arbitrarily administered, plays a key role in determining who will become the totally incapable, severely disabled person in need of society’s help, and in defining the nature of this help.

If law can play a negative influence on societal attitudes, it arguably should also be able to play a positive one. The task of legal reform is to put in place legal institutions, which instead of promoting the image of incapable persons with disabilities, will do the opposite. Especially in countries which have an established guardianship system, there is an institutional culture embedded in various segments of society which does not consider persons with disabilities

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autonomous.\textsuperscript{356} Social workers, medical professionals, the public administration, guardians, family members acting in the current guardianship regimes are working with persons with disabilities as objects of care, rather than subjects with decision-making abilities.\textsuperscript{357} Simply abolishing guardianship would not change their attitude immediately; quite the contrary, they would be likely to reinvent the repressive institutional culture in a new legal framework as well.

Therefore, besides establishing a new general legal framework, states have to identify those specific obstacles in which this institutional culture manifests itself, and target those practices by directly overruling them. Legal reform cannot be restricted to changing guardianship laws, but has to affect the way banks deal with their clients and offer loans, how doctors are talking to patients, child custody is exercised by parents, public administration handles customers, courts hear witnesses, and many other areas, which currently constitute a direct obstacle to persons with disabilities exercising their legal capacity.

Of course, law cannot in itself change embedded societal structures overnight; that is a much more complex task, requiring a longer period of time and other factors to be present. With the present societal attitudes to the decision-making abilities of persons with disabilities, no law can achieve a paradigm based on supported decision-making. Law rather has the task of establishing the structure, creating the instruments that allow society to gradually accept and incorporate the notion that persons with disabilities make their own decisions. This is a long-term process, with heavy involvement of the state in making supported decision-making an accepted and regular method of how persons with diminished capacity interact with others. It requires heavy

\textsuperscript{356} Dhanda, \textit{supra} note 176, at 431.
\textsuperscript{357} Sýkora \textit{v. the Czech Republic}, \textit{supra} note 302, serves as a clear, and in no way unique, example.
investment in building infrastructure especially in the early stages, when guardianship is the most entrenched and therefore resistance to change most expected.

Ironically, states with an underdeveloped guardianship infrastructure are better off in this regard. They do not have to overcome embedded institutional norms related to guardianship, because these are less likely to exist or are more superficial. In places where disabled persons are primarily supported by their family without any state intervention, supported decision-making might be accepted as a natural and legally less complicated option than guardianship. The fact that a state does not need to overcome guardianship can save a lot of funds which can be used to develop support infrastructure instead.

E. Comparison of guardianship and supported decision-making

The ideal model of supported decision-making is a superior solution to the exercise of legal capacity of persons with decision-making difficulties. Law, however, cannot enact the ideal model; it can only create institutions aspiring to achieve it. The above analysis showed what conflicting principles the design of supported decision-making law has to take into account, and how the conflicts can be resolved. It remains to be seen how the result holds up to comparison with guardianship.

1. Restrictiveness
Guardianship and support differ fundamentally in their approach to the wishes of persons with disabilities. While guardians are legally entitled to substitute their decisions for that of the person’s they are representing, supporters cannot. In practice, it is possible for a good guardian to act indistinguishably from a good supporter. An ordinary guardian, however, will be very different from an ordinary supporter, not to mention bad ones.

The cornerstone of supported decision-making law is the right of the supported person to legally express her decisions, to enter into legal transactions in her own name by her own actions. Notwithstanding how the decision was achieved and whose opinion it reflects, the supported person will remain the ultimate judge of whether she wants to be bound by the decision or not. As a result, guardianship, regardless of its specific form, is always a more restrictive intervention than supported decision-making.

2. Flexibility

A major advantage of supported decision-making compared to guardianship is its flexibility. With guardianship, a court or other body has to decide in advance and in the abstract what decisions the person will be unable to make. The scope of the order can be changed, but this always requires a new decision with the necessary procedural safeguards. The decision is important, because it allocates crucial powers between the guardian and the represented person: it decides in which areas the latter will be considered capable, and in which ones will the guardian act on her behalf. This leads to divergences between the represented person’s real abilities and her legal capacity, as the latter can never be specific enough to capture all the
possible decisions a person will be required to make, especially if the person’s skills develop or change for any other reason. In practice, a great difference in ability and legal capacity can lead to unjustified interferences with autonomy and undermine the guardianship order’s legitimacy.

With supported decision-making, there is no need for such accuracy. Since the respective powers of the actors are not tied to specific areas, and the supporter’s powers are limited in any case, there is no need to determine in advance which decisions of the supported person should be made independently and which require support. A supported person could always make the decision alone if she wants, and can seek assistance only if she is unable to make the decision. The scope of decisions in which she is acting alone depends on her, respectively on her agreement with her supporters. Nobody can support her against her objections. This is a very flexible tool for exploring how much a disabled person is able to do herself. As she is becoming more comfortable with certain tasks, such as daily shopping, or dealing with the post office or public administration, she can become more independent from her supporter. Rearranging the tasks of supporters and support does not require a bureaucratic intervention and approval based on a problematic abstract prediction of abilities in imagined scenarios; it can be made by the persons most knowledgeable about how far the supported person’s abilities have developed: by her and her support circle.

3. The pedagogic-therapeutic effect

The pedagogic-therapeutic effect has been explained a number of times above. Guardianship leads to deterioration of the represented person’s skills. Even if she is consulted in the process, it
is the guardian who makes the decisions, expresses them, and bears responsibility for them. A supported person, on the other hand, even if she was heavily supported and influenced by her supporters, has to grasp the content of the decision, express it, and take responsibility for it. This legal difference itself contributes to developing her skills, not to mention the potentially vastly different outcome of the two legal interventions in this regard.

4. The expressive function

Law serves other functions in society besides directly regulating behavior. The theory about law’s expressive function states that law can create compliance also by changing the social meaning of a particular behavior. By signaling an appropriate form of action, it induces individuals to change their attitude, to internalize the particular normative obligation expressed in the rule, and it also creates a fear of bearing social sanctions for transgressing socially approved norms.

Notwithstanding its actual legal effects, supported-decision-making serves an important expressive function by portraying the person with diminished capacity as legally capable. By expressing this image in law, it signals social approval to the perception of disabled persons as autonomous individuals. In contrast, guardianship certifies that the person is incapable, which carries a powerful message affecting the negative perception of the represented person.

359 Id.
Apart from the above symbolism, specific legal rules also have an important expressive effect. Supported decision-making requires other parties to transact with the disabled person. They have to accept her as their equal before the law, they have to negotiate the contract and conclude it with her. In the case of guardianship, the other parties do not need to communicate with the represented person at all. The contract is negotiated and signed by the guardian on the disabled person’s behalf, who does not have to be present at all. This undermines the image of disabled persons as equals, leading to them becoming invisible for the wider society, turning from subjects of law to objects of care. Simply by fostering more encounters and legal transactions with persons with disability themselves, supported decision-making is an important tool to change opinions about the skills and autonomy of persons with disability.

5. **Ease of transacting**

Supported decision-making can be difficult to use in particular situations. Complicated decisions might be hard to grasp for a person with higher support needs, and take more time and effort than for a non-disabled person. In this situation, transacting with a guardian is easier and faster from the perspective of contracting parties.

Guardianship’s advantage, however, does not apply to all types of decisions. With regard to many ordinary transactions, which the disabled person is able to make alone, guardianship is more cumbersome, because it requires the parties to produce the guardian to legally express the represented person’s decision. Parties transacting with a supported person are in a more
advantageous position, because they can deal directly with her. Overall, it seems that with more complicated decisions, which are less frequent, guardianship facilitates easier deal-making for contracting parties. Supported decision-making is more advantageous with regard to less complicated decisions.

6. Protection from harmful decisions

The previous comparisons apply to all forms of supported decision-making. However, as this chapter has showed, there are different ways that the disabled person can be protected from abuse. Support can be equipped with various safeguards with different ability to avoid specific types of harmful decisions. Some interventions strengthen the protective features of supported decision-making without interfering with disabled persons’ autonomy, as discussed above. Nevertheless, specific safeguards, which protect persons from more types of harm, limit other important principles of supported decision-making, namely respecting the person’s wishes and fostering legal certainty. The choice of safeguards therefore depends on resolving these trade-offs to secure the adequate level of all mentioned functions.

This conflict cannot be resolved in the abstract, because perfect solutions do not exist. If a person’s decision has a potential to harm her, law can only react by respecting her wish and allowing the harm to occur, or by overruling the wish in some way. Any abstract rule chosen will have a negative effect on some persons with regard to at least one of these factors. It is a policy question which harms are dangerous and widespread enough that protecting from them is necessary even at the expense of other important goals. The answer is not static: as supported
decision-making develops, its effectiveness to prevent certain harms will change. Alternative means of responding to these harms might also be developed, such as the mentioned adult protection legislation. In-depth research about the consequences of various stages of development is needed to fine-tune the protective features of supported decision-making to cause the least interference overall with its other goals.

Guardianship in practice is also not universal in its approach to harmful decisions. Nevertheless, with regard to the above principles it can be classified as an extreme intervention in favor of prevention from harm at the expense of respecting the disabled person’s wishes. Protection from all possible and impossible harm, however, can hardly be the most appropriate policy goal of legal capacity law. Besides, the methods of achieving even this aim in isolation from all others are highly dubious. By making the guardian the sole gatekeeper of what transactions the person with disability enters, the latter becomes completely dependent on him, both in legal and factual- psychological sense. This makes abuse by guardians more likely and severe, and also breeds abuse by others. By losing her decision-making skills, the represented person requires permanent protection by the guardian, which many guardians are unable to offer. This limits represented persons’ ability to contract, and leads to complications when they are acting alone. Even though their transactions are invalid, once they consumed the goods or services purchased, it is hard to annul them against bona fide parties who did not know that the person is acting ultra vires. A person with diminished capacity with cash in hand is unlikely to be best protected by guardianship, which is aimed at not developing her skills on how to spend money. Guardianship is thus both a highly overprotective and an under-protective intervention. To paraphrase
Jefferson’s quote about liberty and security, a law which sacrifices the autonomy of persons with disabilities for their protection achieves neither.

As there is no one type of supported decision-making law with regard to prevention of abuses, it is hard to compare it with guardianship in the abstract. The promise of support is that it can increase the decision-making skills of disabled persons to a level where they would be much less likely to be abused. A range of interventions can help achieve this goal, which makes support potentially superior to guardianship even with regard to protecting from abuse. Nevertheless, some procedure of overruling supported persons’ decisions seems to be necessary, at least until the said potential materializes.

The above analysis indicates a possible solution that can secure all relevant principles to a high level. The point of balance would be for supporters to be unable to overrule the supported person’s decisions themselves, but to have a right to challenge those transactions before courts which they suspect are the result of abuse. Courts could declare the transactions void not on the basis of incapacity, but under a disability-neutral standard of abusing the person’s situation.

The protection could be strengthened by expanding the grounds with some specific reference to the person’s disability. This solution would potentially subject the disabled person’s decisions to more scrutiny than it would be the case for a non-disabled person who has no supporter to protect her from harm. The standard of approving the transaction does not necessarily have to be a best interest standard, it can be some form or reasonable justification as to why the supported person wanted to achieve the outcome the transaction serves, e.g. why she wanted to donate her
house and become homeless. Even this is more intrusive than in the case of non-disabled persons, who can act completely irrationally and do not have to justify their actions for fear of getting them overturned by a court. In the case of supported persons, however, the court has to satisfy itself that the transaction is indeed the person’s decision, and she is aware of all the consequences. That is a “reasonable justification” standard – the court does not have to be convinced that the outcome serves the person’s best interests, because her decisions can be based on personal values the court does not share. Nevertheless, there must be some justification showing the person is aware of the consequences and is indeed choosing them. If that would not be the case, the court would also need to approve decisions without a justification, arbitrary decisions, where the person does not actually decide in light of all the consequences because she might not be aware of them.

This threshold of reasonable justification is higher than that required from ordinary non-disabled persons. It burdens at least some persons with disabilities, whose otherwise valid choices might be overturned by a court. It does not place persons with diminished capacity on an equal basis with others in general, but only with those other persons who do not act arbitrarily. However, forfeiting arbitrary decisions seems to be an acceptable price for the possibility of intervention and protection from serious abuse.

By strengthening the protective features to the expense of respecting the disabled person’s decision, supported decision-making’s above-analyzed advantages vis-à-vis guardianship shrink. Nevertheless, any solution carefully selecting the level on which each conflicting principle will be served is likely better than the one-sided approach guardianship law has chosen.
F. Conclusion

The above analysis showed how law can effectively pursue conflicting aims of securing the autonomy of persons with disability. By distributing power between the supporter, the supported person and other parties, legal rules can create a regime of substituted decision-making that adequately respects the wishes of persons with disabilities, protects them from abuse, and secures the legal certainty of transactions. This is what law can do. It cannot create the ideal version of supported decision-making by enacting it; it can only enact a less perfect system the goal of which is to achieve the ideal system in practice.

As to whether the solution described here puts disabled persons on an equal basis with others with regard to exercising their legal capacity, a few additional remarks should be added. “On an equal basis with others” should not be understood as never interfering with decisions. Law does interfere with decisions of also non-disabled persons to protect them from abuse. It is not surprising that it tries to protect persons with disabilities as well. The question is whether it should equalize disabled and non-disabled person’s level of protection, or their level of autonomy, or do both but not be available for all persons with disabilities.

As to the question of maximizing autonomy, law should be understood as only one factor in a complicated network of social relationship which affects persons’ ability to follow their wishes. There is no single non-disabled standard of autonomous decisions, but rather a sliding scale of how autonomous people are in their social network, which differs based on several factors, such
as age, gender, social relations, wealth and income, education, and others. Many people are influenced by their relatives and other close people (partners, friends, colleagues, church members) about making certain decisions. They have varying degree of ability to resist this pressure, formulate their own preference and execute it. The feminist literature provides many examples of how women’s choices are limited by the societal context they are part of.\textsuperscript{361} People make their decisions within the social context they live in, and their social relationships have varying degree of interest in interfering with their choices. The purpose of these interferences, whether control and subjugation or protection, and their form, is different, but few persons make truly autonomous choices in the sense that they would not have to take into account the preferences of other members of their social environment. Every person’s autonomy is relational, and her decisions are interdependent with her social environment, not independent from it.\textsuperscript{362}

The autonomy of persons with disabilities has to be understood against this background. They are subject to the same kind of social pressures, which are often increased for two reasons. Law elevates existing societal concerns by expressly portraying persons with disability as persons who need to be protected from their own bad decisions, as ones who are substantively different from other people for whom autonomy is the legal norm. In addition, it also gives legal power to others to override the disabled person’s wishes by placing them under guardianship.

What happens in many families when children with disability reach adulthood should be seen in this context. As all children in puberty, they try to resist their parents’ control, they try to become more independent. Many parents of any children cannot accept this, and they use various forms

\textsuperscript{361} Catriona McKenzie & Natalie Stoljar, Relational Autonomy (2000).
\textsuperscript{362} Id.
of pressure, from physical violence and economic deprivation to emotional blackmail to keep children under their control. This process goes awry for many children with disability. In general, their parents invested much more effort in raising them compared to other parents, and they are more protective of them. It is easier for them to become overprotective, which means that they can have great difficulty accepting the independence of their children. This is a psychological state many parents cannot cope with, and results in making sure that they are there to help their child always and everywhere. The child struggles, but her choices are resisted by the parent by force of law.

Eliminating guardianship does not make persons with disabilities automatically autonomous. Considering other factors like education, economic dependence, social dependence (lack of friends), and ability to take care of self, they can still be at the bottom of the autonomy scale with a high degree of dependency on others.

The shift from guardianship from supported decision-making should be seen as an intervention in this network of social relationships. It is important that legal capacity law does not exacerbate the problem of dependency as guardianship does, but it should not be expected that it can solve it in itself. Its goal should be to organize and regulate the person’s social relationships in a manner which strengthens her decision-making ability rather than limit it. Its success will depend a lot on seemingly unrelated factors such as whether the supported person has access to education, employment opportunities, and independent housing. The effectiveness of supported decision-making laws itself will be determined not only by the legal rules, but also by whether supporting networks consist of parents only or reflect the changing social environment which corresponds to
the person’s needs; how much support, information and legal aid the supporters and the supported persons receive; and how aware wider society is of the autonomy of persons with disabilities.
IV. The case of persons with high support needs
The previous chapter showed variations in the legal design of supported decision-making with regard to several factors, such as respecting the person’s autonomy, strengthening legal certainty, and protecting the person from abuse. Yet another important factor influences the design of support as a legal institution: the category of persons it is available to. The solutions discussed until now presumed a person with a diminished capacity, who is nevertheless able to express a wish, and make decisions with support. This chapter assesses the situation of persons with very high support needs, who are unable to make certain decisions even with support.

Whether persons with the most severe disability can be incorporated into a support framework is one of the most difficult questions of legal capacity law. It has several implications for the legal regulation of supported decision-making. If these persons can be incorporated into a support model, then support is a truly universal framework capable to completely replace guardianship. If they cannot be incorporated, the retention of some form of substituted decision-making is necessary.

Two positions on this issue emerged in the academic literature. According to advocates of the first position, which will be named the Support Only model in this dissertation, all persons with disabilities are able to make supported decisions, therefore guardianship should be completely eliminated. Proponents of the second position, named the Some Guardianship framework,


argue that some persons with severe disabilities are unable to utilize support, therefore guardianship in a limited form should be retained to make decisions on their behalf. This chapter will begin by describing the two positions in detail, and compare their relative strengths and weaknesses.

The chapter will put forward a third solution, named Substitution Within Support, which overcomes the weaknesses of the two existing positions by accepting that some persons might be unable to make decisions, yet there are different solutions, other than guardianship, to make decisions to protect their interests. The chapter will describe how substituted decisions on behalf of persons with high support needs can be made in a supported decision-making framework, which does not rest on a formal categorization of persons to capable and incapable based on medical assessments. Rather, the type of each specific decision, whether supported or

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substituted, is decided on an ad hoc basis, with important safeguards ensuring that support does not turn into substitution.

The advantages and disadvantages of the three models will be assessed from the perspective of different sub-categories of persons to whom they would apply. The chapter will argue that the Substitution Within Support framework is better than the other two models with regard to most persons with disabilities, and at the same time not worse with regard to others. It achieves the maximum use of support possible, yet it does not fail to protect the interests of persons who fail to make decisions with support.

The third part of the chapter will explore the possibilities of introducing various safeguards in the Substitution Within Support model, which can provide enhanced protection for some persons at the expense of their autonomy. The fourth part will consider an important assumption shared by all the three models described in the chapter: that the goal of legal capacity law is to maximize the use of support. An important limit on all three positions is the ability of states to successfully administer such models in practice. An alternative solution is briefly considered, which rests on introducing some features of supported decision-making to an improved guardianship system.

A. Existing solutions to the exercise of capacity by persons with high support needs
The legal capacity of persons with high support needs is one of the most difficult topics of legal capacity laws and disability rights in general.\footnote{Sheila Wildeman, Protecting Rights and Building Capacities: Challenges to Global Mental Health Policy in Light of the Convention on the Rights of Persons with Disabilities, 41 The Journal of Law, Medicine & Ethics 48 (2013); Janet E. Lord & Michael A. Stein, Contingent participation and coercive care: feminist and communitarian theories of disability and legal capacity, in: Bernadette McSherry & Ian Freckelton (eds.), Coercive care: rights, law and policy 45 (Milton Park, Abingdon, Oxon, England: Routledge, 2013).} No satisfactory solution has been found to it so far. The various academic positions that were put forward can be divided into two basic categories, depending on whether they accept or deny that all persons with severe disabilities can make decisions with support: the Support Only position and the Some Guardianship position. Both have important weaknesses, which affect differently various sub-groups of persons with disabilities. The following part will describe the two positions in detail and assess their advantages and disadvantages.

1. The Support Only framework – the complete abolishment of guardianship

Advocates of the Support Only position argue that all persons with disabilities can make decisions with support.\footnote{Minkowitz, supra note 362, at 408-09.} That is, no person needs substituted decision-making.\footnote{Id.} In this model, persons with high support needs differ from other persons with disabilities only in the degree of support they require.\footnote{Dhand, supra note 362, at 445.} Those with the most severe conditions should receive the highest level of support, which is sometimes described as 100 percent support.\footnote{Id.}
This position is relying on a reading of the CRPD, according to which Article 12 forbids all substituted decision-making.\textsuperscript{371} The state’s duty, therefore, is to provide as much support as a person needs to make legally valid decisions.\textsuperscript{372} The position is popular among NGOs,\textsuperscript{373} but is also adhered to in the academia and by international organizations.\textsuperscript{374} Importantly, the United Nations’ Committee on the Rights of Persons with Disabilities’ General Comment on the right to legal capacity can be said to endorse the Support Only position.\textsuperscript{375}

Whether Article 12 can be interpreted to require the abolition of all guardianship, will be analyzed in detail in Chapter 5 of this dissertation.\textsuperscript{376} The following part will assess the factual assumption of the Support Only position, namely that all persons with high support needs can make decisions with support. This may seem counterintuitive, therefore it is important to consider it more closely.

\textsuperscript{372} UN Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) – Article 12: Equal recognition before the law, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/1, §29 a) (19 May 2014); Dhanda, supra note 362, at 445.
\textsuperscript{374} Minkowitz, supra note 362, at 408-411; Dhanda, supra note 362; Santos Cifuentes and 30 other legal scholars, supra note 362, at 4-5; Office of the United Nations High Commissioner for Human Rights, supra note 362, §§ 43-45; Council of Europe Commissioner for Human Rights, supra note 362, at 14.
\textsuperscript{375} UN Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) – Article 12: Equal recognition before the law, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/1, §8 (19 May 2014).
\textsuperscript{376} See Chapter 5 infra.
It is hard to imagine how certain persons in a persistent vegetative state, or in final stages of dementia, or persons with severe multiple disabilities are able to make decisions.\textsuperscript{377} State of the art capacity assessment tools described in Chapter 3 are all built on the presumption that incapacity exists; that is, at least some persons with severe disabilities are unable to make at least certain decisions.\textsuperscript{378} That presumption is shared, or at least not disputed, by newer psychological approaches, which take support into account.\textsuperscript{379} The Support Only position’s factual claim is thus not supported by the science of psychology.

Advocates of the Support Only position provide some solutions to get around this problem. One of them is to highlight the often underestimated communication abilities of persons with high support needs.\textsuperscript{380} One of the basic principles of communication theory for persons with severe disabilities states “you cannot not communicate” – in other words, all persons with a disability are able to communicate in some ways, as if only by changing the rhythm of their breathing.\textsuperscript{381} The capacity of these persons is often denied because of their environment’s inability to understand their signals.\textsuperscript{382} The solution, therefore, is to improve communication, to better understand these persons’ wishes. Technology has evolved rapidly in the last years also in the area of communication tools and methods for persons with disabilities, therefore it is likely that

\textsuperscript{381} Inclusion Europe, \textit{supra} note 371, § 6.
\textsuperscript{382} \textit{Id.}
many of those who now have difficulty getting themselves understood will communicate more easily in the future.\textsuperscript{383}

This argument, however, seems to conflate communication with the ability to decide. Denial of legal capacity on the basis of communication difficulties is indeed a problem, which undermines the legitimacy of guardianship. Persons with various physical and sensory disabilities around the world have in fact been denied legal capacity due to their communication difficulties.\textsuperscript{384} New communication technologies should be used and taken into account in this regard. Nevertheless, communication is only one of the aspects of legal capacity.\textsuperscript{385} The fact that a person communicates a wish does not automatically imply the capacity to understand alternatives, their implications, and choose from them. Perhaps all persons can communicate, but that does not mean that all can communicate a valid decision with regard to all the questions important for securing their life and well-being.

Another solution is provided by Michael Bach and Lara Kerzner, which is recognizing the inability of some persons to make some types of decisions.\textsuperscript{386} According to Bach and Kerzner, the supporters’ duty is to establish the person’s wish from his personal values, preferences, the environment they were raised in, in other words, from their “life story”.\textsuperscript{387} This approach is based on Paul Ricoeur’s theory of narrative ethics, according to which our identity is defined by

\textsuperscript{383} Inclusion Europe emphasizes the importance of Augmentative and alternative communication (AAC), which can compensate for impairments and severe disorders of speech-language production and/or comprehension – see Inclusion Europe, \textit{supra} note 371, at 5, fn. 5.

\textsuperscript{384} See Chapter 1 \textit{supra}.

\textsuperscript{385} See Chapter 2 \textit{supra}.

\textsuperscript{386} Bach and Kerzner, \textit{supra} note 378, at 24.

\textsuperscript{387} \textit{Id.}, at 65.
how others perceive us.\textsuperscript{388} It is the supporters’ obligation to communicate a coherent identity of the supported person based on the best knowledge of their personal history.\textsuperscript{389}

Bach and Kerzner’s solution goes a long way towards incorporating persons with high support needs to a support framework. Indeed, it goes too far. If the supporters are responsible for establishing the supported persons’ decisions, their role is not materially different from guardians.\textsuperscript{390} It is true that guardians are typically following a best interest standard, which is based on determining what would serve the person’s interests the most in the guardian’s opinion.\textsuperscript{391} Bach and Kerzner’s proposal is different in that the supporter has to determine what the person would want for him- or herself.\textsuperscript{392} Nevertheless, this is also a substituted decision. If that is the only difference between the two approaches, Bach’s solution can be easily incorporated into a guardianship framework, by changing the legal basis of the guardians’ decisions from best interests to substituted judgment. To call a decision supported, it has to be made by the person with disability herself.\textsuperscript{393}

Alternative solutions have also been offered, but not specifically stating how the wishes of persons with the highest support needs should be established.\textsuperscript{394} The idea of providing 100%

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{388} \textit{Id.}
\item \textsuperscript{389} \textit{Id.}
\item \textsuperscript{390} Tina Minkowitz, Legal Capacity – Alternatives to Functional Capacity, in: Gerard Quinn & Charles O’Mahony (eds.), The UN Convention on the Rights of Persons with Disabilities: Comparative, Regional and Thematic Perspectives 9 (forthcoming 2016).
\item \textsuperscript{391} See, for example, Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 20/C.
\item \textsuperscript{392} Bach and Kerzner, \textit{supra} note 378, at 65.
\item \textsuperscript{393} See Chapter 3, part A \textit{supra}.
\end{enumerate}
\end{footnotesize}
support has become popular,\textsuperscript{395} but it is unclear what exactly 100\% support entails in practice, and how it is different from a substituted decision.\textsuperscript{396}

It seems that there is no basis to support the factual claim stated above. There is no evidence currently that all persons could be supported to make all kinds of decisions, therefore it has to be accepted that some persons are unable to make at least some type of decisions in a supported way. This is true even if the CRPD was interpreted to oblige states to provide support to everybody,\textsuperscript{397} or a law was adopted\textsuperscript{398} to require all decisions to be made with support. A normative requirement does not overcome the factual impossibility.

A clarification is in order here. The fact that currently not everybody can be supported does not automatically mean that this will always be the case. New developments in communication technologies and psychology will no doubt expand the communication and decision-making possibilities of persons with disabilities in the future. In fact, their abilities are often underappreciated,\textsuperscript{399} law and society considers them much more hopeless than they are in real life: many of them are considered completely incapable and placed under plenary guardianship, even though in fact they are able to read and write, work, and live independently.\textsuperscript{400} It is not far-

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\textsuperscript{396} Dhanda, \textit{supra} note 362, at 445.
\textsuperscript{397} UN Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) – Article 12: Equal recognition before the law, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/1, §29 a) (19 May 2014).
\textsuperscript{398} Minkowitz (2016), \textit{supra} note 388, at 4.
\textsuperscript{399} Steven Carnaby, People with Profound and Multiple Learning Disabilities: A Review of Research About their Lives, A report commissioned by MENCAP (December 2004).
\textsuperscript{400} Decisions by the European Court of Human Rights provide several examples for this point: see \textit{Sýkora v. the Czech Republic}, No. 23419/07 (Eur. Ct. Hum. Rts., November 22, 2012); \textit{Shtukaturov v. Russia},
\end{flushright}
fetched to argue that if given the opportunity by an appropriate legal and social support framework, persons with disabilities will in general perform better or much better than expected by current arrangements. By this token, it can be argued that with better technology and communication approaches, persons currently thought to be incapable of making decisions will turn out to be able to make them.

If that becomes a reality for all persons, the factual assumptions of the Support Only proposal become true, and it will be appropriate to revisit its implications. However, that is not the case currently, and it seems warranted to be somewhat skeptical to its probability. The development of communication techniques and methods has been impressive, and it should not be ruled out that a new type of brain scanner or similar technology will at some point be able to establish the wishes of even a person in a persistent vegetative state. But substituting cognitive skills seems much less likely. It can be presumed that for a long time, some persons with severe disabilities will exist who will be unable to benefit from ordinary education, and their knowledge and decision-making skills will be very limited. They will be often unable to indicate a preference regarding many of the more complex matters required for existence in a developed society. Based on that, we can infer that some persons will always be unable to make at least some decisions in a supported way.

It follows that unless technology radically develops or other important changes in medicine will take place in the future, some persons will be unable to make at least some types of decisions, even with support. At least if support is understood in a way described in the previous chapter, as

something different than substitution. This undermines the Support Only position, but not entirely. Even though it is based on a factually incorrect assumption, there might be other reasons why its approach might be preferred over the alternatives. For that, however, the counter-position’s disadvantages have to be analyzed first.

2. The Some Guardianship framework – the need to make substituted decisions

Many scholars reject the claim that all persons with disabilities are able to make decisions with support.\textsuperscript{401} Their positions, which comprise the Some Guardianship framework for the purposes of the dissertation, are based on the factual assumption that at least some decisions of at least some persons have to be made in a substituted way. For that reason, they argue, guardianship needs to be preserved and used alongside supported decision-making, at least in exceptional situations.\textsuperscript{402} Guardianship laws should be improved, even renamed, but nevertheless retained.\textsuperscript{403} The protagonists of this view mainly consist of academics and healthcare providers.\textsuperscript{404}

The Some Guardianship approach does not reject the usefulness of supported decision-making.\textsuperscript{405} It merely questions whether it should be the only option available to all.\textsuperscript{406} If persons

\textsuperscript{401} Carney (2012), supra note 363, at 7.
\textsuperscript{402} Id.
\textsuperscript{403} See the discussion of “facilitated decision-making” in: Mental Disability Advocacy Center (MDAC), Legal Capacity in Europe, 28 (October 2013).
\textsuperscript{404} Carney (2012), supra note 363, at 7; Lawson, supra note 363; Keys, supra note 363, at 65; Weller, supra note 363, at 102; Perlin, supra note 363, at 1159; Lewis, supra note 363, at 704; Kohn et al., supra note 363, at 1118; Melvyn Colin Freeman et al., Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities, The Lancet Psychiatry, Vol. 2 No. 9, 844 (September 2015).
\textsuperscript{405} Carney, supra note 363, at 7.
\textsuperscript{406} Id.
with high support needs cannot make use of it, maybe they are better off with guardianship. The position’s conclusion, which all its proponents share, is that guardianship should be available as an exceptional measure for individuals for whom support failed to ensure the exercise of their legal capacity.\textsuperscript{407}

The argument is straightforward, but the position has a major weakness: it is very hard to ensure that guardianship would indeed only be used exceptionally. No convincing solution to this problem has been put forward so far. There is no exact definition for the category of persons who would be unable to benefit from support – and, as shown in the previous chapter, nor do capacity assessment tools for this purpose exist.\textsuperscript{408} Even if such tools were created, which seems possible, it is highly questionable whether the actual practice of applying them in guardianship proceedings would be able to produce the results required by theory.

Defining the exceptional cases is not simply a matter of fine-tuning that could be achieved through individual litigation. Producing inflated numbers of persons unduly restricted in their legal capacity seems to be an inherent feature of guardianship laws. The available statistics show that in countries where plenary guardianship is an option, it is used at alarming rates: of all placements under guardianship, plenary guardianships constituted 57% in Hungary, 59% in Moldova, 82% in the Czech Republic and 89% in Bulgaria and Croatia according to one study.\textsuperscript{409} Commentators note a similar tendency of the overuse of plenary guardianship in the US


\textsuperscript{408} Kapp, \textit{supra} note 377, at 12.

\textsuperscript{409} Mental Disability Advocacy Center (MDAC), \textit{supra} note 401, at 24.
as well.\textsuperscript{410} Indeed, the history of guardianship reforms offers abundant examples of systemic failures of courts to implement basic legislative changes, such as replacing plenary guardianship with partial guardianship. As one commentator noted, “new legislative wine often sours in old (judicial) bottles.”\textsuperscript{411}

The reason why guardianship has become a major human rights issue is that a large number of persons’ legal capacity has been unduly restricted. The causes of this problem are manifold, including a prejudiced view of the ability of persons with some disabilities to make decisions on their own behalf.\textsuperscript{412} This was reflected also in mainstream international law, which was unable to protect persons with disabilities from encroachments on their legal capacity.\textsuperscript{413} The CRPD aims to overcome existing prejudices about the incapacity of persons with disabilities, which was one of the main motives for its adoption.\textsuperscript{414}

There is another, more technical problem with ensuring that exceptional solutions apply only to exceptional cases: law’s ability to define the exception is in this case quite limited. Guardianship

\textsuperscript{410} Leslie Salzman, \textit{Guardianship for persons with mental illness – a legal and appropriate alternative?}, 4 St. Louis U. J. Health L. & Pol'y 279, 286 (2010-2011); Grisso, \textit{supra} note 376, at 317.
\textsuperscript{412} Paul S. Appelbaum, \textit{“I Vote, I Count”: Mental Disability and the Right to Vote}, 51 Psychiatric Services 849, 850 (2000) (“It seems likely that popular attitudes towards the mentally disabled—seeing them as intrinsically irrational and incapable of participating in civil functions—play an important role.”); Jason H. Karlawish & Richard J. Bonnie, \textit{Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Democratic Nations}, 38 McGeorge L. Rev. 879, 884 (2007) (noting that traditional explanations claiming that certain persons should be excluded from voting because their intellectual disabilities are incompatible with making informed and rational choices are increasingly regarded as discriminatory); Dhanda, \textit{supra} note 362, at 462.
\textsuperscript{413} Incapacitation is permitted under all the other international human rights treaties except the CRPD; see Chapter 2 \textit{supra}.
\textsuperscript{414} Michael Ashley Stein, \textit{Disability Human Rights}, 95 Cal. L. Rev. 82, 82 (2007).
essentially requires the prediction of a person’s decision-making ability in a future situation. It is a very individualized exercise, because the abilities of individuals vary depending on many factors, such as education, experience, access to and the nature of support, and others. This makes comparing cases and providing guidelines difficult. No wonder decision-making often turns to the only hard data available, the nature and severity of the disability. This overvalues psychiatric and psychological expertise, and leads to a semi-automatic placement under guardianship of persons with more serious disabilities.

It should be pointed out that assessment tools can never predict capacity with absolute accuracy even in theory. Psychiatric experts agree that evaluations are not exclusively based on objective criteria, but rely on policy and social prejudice as well. They are more reliable in identifying clearly incapable and clearly capable individuals, but there are always persons in the middle, who cannot convincingly be put in either category. As Hurme and Appelbaum argue, there is no objective scientific cut-off point between capable and incapable. How persons in the gray zone will be categorized depends on many subjective factors. Classifications based on advance assessments are thus always bound to produce a certain number of errors. The proportion of

415 See Chapter 2 supra.
416 Mental Disability Advocacy Center (MDAC), A kizáró gondnokság kérdése az új Ptk.-ban [The question of plenary guardianship in the new Civil Code], March 31, 2008, 1.
417 Id.
418 Id.
419 See, e.g., Appelbaum, supra note 410, at 850) (“It seems likely that popular attitudes towards the mentally disabled—seeing them as intrinsically irrational and incapable of participating in civil functions—play an important role.”).
420 Raymond Raad et al., The Capacity to Vote of Persons with Serious Mental Illness, 60 Psychiatric Services 624 (2009).
persons wrongly considered capable compared to persons wrongly considered incapable can be changed by changing the assessment criteria, but none can be completely eliminated.\textsuperscript{423} This means that if guardianship is available, the legal capacity of some persons who are able to make decisions with support will be limited. This takes place even in theory, if the system operates according to the highest professional requirements. Faulty application in practice, which is not a possibility, but a reality in most jurisdictions of the world, only severely exacerbates the problem.

The argument is not that there would be no correlation between the severity of the disability and the ability to make decisions, but rather that it is far from absolute. Also, more importantly, it is difficult for any legal provision to specify in exact terms who is in the category of persons for whom substituted decision-making is acceptable.\textsuperscript{424} Emphasizing the exceptionality of the measure is not enough: in many legal systems it is already emphasized, judges are acting with the mind that they are applying guardianship only when strictly necessary for the benefit of the person under guardianship, yet they produce an inflated number of incapacitations.\textsuperscript{425}

The Some Guardianship position relies on the assumption that it is possible to restrict the use of substituted decision-making to exceptional situations. However, no wording of such a rule has been proposed so far. In the absence of a workable solution, the fear that the exception becomes

\textsuperscript{423} Hurme & Appelbaum, \textit{supra} note 419, at 962.
\textsuperscript{424} \textit{Id.} ("There is no scientifically determinable point on that spectrum at which we can say the person manifests sufficient capacity for the task.").
\textsuperscript{425} Mental Disability Advocacy Center (MDAC), \textit{supra} note 401, at 24.
the rule does not seem to be unfounded. This is exactly the situation currently,\textsuperscript{426} which the introduction of supported decision-making aims to overcome, not conserve.

3. \textbf{Common ground and disagreement between the two positions}

The above two positions share an assumption regarding the relationship between supported decision-making and guardianship: they both consider the former preferable for some categories of individuals. For the Support Only position, this category comprises all persons with disabilities, for Some Guardianship the category is narrower.

What the two positions also share is both the necessity and the inability to address the situation of persons with high support needs. The Support Only position requires that persons with severe disabilities utilize a support framework, but its proponents have so far been unable to explain how this would work in practice.

Basing the position on a factually wrong assumption does not automatically disqualify it as a normative matter. If the abilities of persons with disabilities are constantly undervalued, acting on the normative assumption that their abilities should be always treated as higher than perceived might lead to good results. Perhaps in most of the cases, the outcome will be more appropriate to their actual abilities, and in any case more favorable to them than basing the normative requirements on their perceived abilities.

\textsuperscript{426} Kohn et al., \textit{supra} note 363, at 1117.
Indeed, there is a lot to be said for this approach. Current legal capacity laws are heavily undermining the autonomous status of persons with disabilities by constantly undervaluing their abilities. Given this starting point, requiring states to act on the basis of these persons being more capable than courts think they are makes sense as an advocacy matter, and it might produce good outcomes. Pointing out the factual incorrectness of the assumption is not enough to disqualify this approach.

However, with regard to a small minority of persons for whom the factual assumption is wrong, the normative approach is not in fact beneficial. The Support Only position potentially harms persons with high support needs: if substituted decisions are prohibited, some of their decisions will not be made because these persons will not be accommodated in a support framework. If important decisions are not made, this could lead to serious harm or even death. Therefore, if there is a framework which could prevent these harms, and at the same time not be worse with regard to persons with lower support needs, it should be preferred over the Support Only model.

The Some Guardianship position has a solution for persons with severe disabilities: guardianship. However, it cannot ensure that substituted decisions are utilized only in their case, that they are applied only in exceptional situations of genuine inability to reach a supported decision. This has the potential of harming a large number of persons with disabilities who are able to utilize support, and who will be denied it because they will be subjected to substituted decision-making.

\[427\] \textit{Id.}\]
Both positions have advantages for a different category of persons, and both harm others in different ways. It is impossible to balance the harms in the abstract, and evaluate which position would work better for a specific jurisdiction. The aim of this dissertation is different: to find another solution for the case of persons with high support needs, which would work better than the existing two.

B. The Substitution within Support Proposal – a proposal for a third option

As the previous description shows, both existing positions on the decision-making of persons with high support needs have shortcomings. The Support Only position presumes that all persons, including those with severe disability, can make decisions with support. Their legal status is similar to persons with milder disabilities: what they need is a higher level of support, which can be provided without creating a special category for them.\(^{428}\) This approach is based on an incorrect, or at least unproven, factual assumption: that all persons are able to make decisions with support.\(^ {429}\) If this claim is false, persons with high support needs might be left without legal protection. Many of them will be unable to make important decisions endangering their life and well-being, notwithstanding how much support they receive. It is irrelevant that they might be able to make some decisions. What matters is that they are unable to make at least some which should be made, from the perspective of society’s interest in and its obligation to safeguard the well-being of these persons.

\(^{428}\) Dhanda, supra note 362, at 455.
\(^{429}\) Id.
The Some Guardianship position recognizes that some persons cannot be incorporated in a support framework, and proposes to retain guardianship for them. Persons with high support needs would constitute a separate legal category, for whom supported decision-making is not available, because they are unable to make use of it. To make sure that important decisions regarding their life and well-being will be made, they will be subject to guardianship, even if in a very limited form. By securing their well-being, however, the Some Guardianship approach creates other kinds of problems. Because for the purposes of legal intervention it is difficult to separate the truly “incapable” from those who could utilize support, there will be a significant number of persons who will be assigned to the wrong category. Some might remain without legal protection, because they will not have guardians and will be unable to make use of support. Others will have their legal capacity restricted, even though they might be able to make decisions with support. Judging from existing practice, the latter category will be much more numerous.

The following part will offer a third solution, named Substitution Within Support. It is not based on the factual assumption of the Support Only position, but nevertheless incorporates persons with high support needs in a modified support framework. It creates space for substituted decisions to be made on their behalf within this framework, with the accompanying safeguards.

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431 Bach and Kerzner, supra note 378, at 60.
432 Such as the “facilitated decision-making” category proposed by Bach and Kerzner, which is essentially a form of substituted decision-making very similar to guardianship; see Bach and Kerzner, supra note 378, at 60.
433 Hurme & Appelbaum, supra note 419, at 962.
434 Mental Disability Advocacy Center (MDAC), supra note 401, at 24.
The Substitution Within Support model accepts that sometimes decisions have to be made on behalf of some persons with high support needs. If these decisions were not made, their life and well-being could be put in serious danger. However, substituted decisions do not automatically require a guardianship framework, they can be made in other ways as well. Many negative features of guardianship described in Chapter 2 do not relate to substituted decisions as such. Rather, they are connected to the *ex-ante* categorization of persons based on capacity assessments. To justify the transfer of decision-making power from the disabled person to the guardian, courts need to establish who lacks capacity to make those decisions. This leads to many shortcomings of the system, as explained above.\(^{435}\)

The categorization, however, can be avoided, if the power to make substituted decisions is based on a different source, not on court decisions and capacity assessments. This dissertation argues that disabled persons’ inability to make their wishes known to an outside observer is a more useful basis for determining when a substituted decision should be allowed. In the Substitution Within Support framework, the disabled person can make her own decisions with support if she can communicate these in a form which a third person can understand. If the disabled person cannot communicate her decisions, the supporter is entitled to make supported decisions on her behalf. The supporter should make all effort to establish the person’s wishes and achieve a supported decision if possible, but if all else fails, he can make the decision on behalf of the disabled person.

\(^{435}\) See Chapter 2 *supra*. 
These are the proposal’s main features, which raise additional questions. The *ex-ante* categorization of guardianship serves as an important safeguard. The following parts will describe how the Substitution Within Support framework ensures that substituted decisions are not abused. This position obviously has its own shortcomings as well, therefore it needs to be tested how it resolves specific decision-making scenarios for different categories of persons.

If it can be shown that the Substitution Within Support proposal is better with regard to some categories of persons with disabilities than the existing two approaches, and not worse with regard to others, it should be accepted as superior to them.436 If this cannot be shown, it should be made clear in what respect is one of the existing approaches better. It should not be expected that the proposal developed here is perfect in the sense that it successfully protects all persons with disabilities from all possible types of harm. As it was shown in the previous chapter, this is not possible.437 Every type of intervention emphasizes different values to the detriment of others, and therefore is better suited to avoid certain types of harms. Because law can only create one specific framework, the result will likely be imperfect at least for some categories affected, for whom a different framework might be preferred. Of course, more sub-categories might be created within a framework, but this has its own disadvantages, which should be evaluated together with the other features of that particular solution. Therefore the key is to be clear what type of problems each approach solves and creates. The different approaches’ overall effectiveness might depend a lot on how they are implemented in practice. Deciding for one of them is an exercise evaluating and comparing the type and frequency of harm. Nevertheless, it

437 See Chapter 3 *supra*. 
should become clear what values each of the solutions are promoting vis-à-vis the other approaches.

1. **Who are “persons with high support needs” from a legal perspective?**

The first question to consider is who exactly belongs to the group of persons unable to make decisions even with support. As shown above, this is a contentious point, because some authors deny that such a category even exists.\textsuperscript{438} It is even more difficult to establish its contours. Defining the group is not simply an exercise in deciding on a threshold based on the severity of disability. Persons with the same degree of disability from a medical perspective, expressed in the form of IQ points or other measures, can have very different abilities due to various factors, such as training and education, experience, familiarity with the environment in which the task is carried out, and so on.\textsuperscript{439} More sophisticated psychological tools to assess the person’s ability to utilize support, similar to those developed for capacity assessments, have not been developed yet.\textsuperscript{440} Once supported decision-making will be an established legal institution, and assessments will concentrate on the question of utilizing support, such tools hopefully will be available. That, however, does not help with the current analysis.

The solution lies in specifying the categorization’s purpose. The Some Guardianship position is based on a separate legal category for persons who cannot utilize support – they are the ones who need to be placed under guardianship. In the Substitution Within Support framework, however,

\textsuperscript{438} Dhanda, *supra* note 362, at 445.
\textsuperscript{439} Mental Disability Advocacy Center (MDAC)(2008), *supra* note 414, at 1.
\textsuperscript{440} Kapp, *supra* note 377, at 12.
formally the same intervention – supported decision-making – applies to all types of persons. There is thus no need to decide authoritatively who belongs to which category for the purposes of this legal intervention.

The question becomes relevant in a different way. Persons with high support needs are incorporated into the Support Only proposal by proactive actions of their supporters – they receive 100 percent support,\textsuperscript{441} or the supporters establish their decision based on their personal history using a narrative ethics approach.\textsuperscript{442} That is support only from an idealized normative perspective – this is how supporters should behave in those circumstances. From a legal perspective, however, there is no difference between this type of support and substitution. The decision-making process is a matter only between the supporter and the supported person. An outsider cannot establish whether the ideal criteria were met, because he or she learns about the process only from the supporter. The supporter, however, is also the only one who could breach the ideal criteria, for example by substituting his own wishes for that of the supported person’s.

Therefore, what matters for the purposes of legal regulation is whether the supported person can make her wishes known to an outsider. If she can, the outsider can be sure that the decision is her own, at least in the sense that she does not reject it. She might have been misled or abused by the supporter in various ways, and thus the decision might not in fact reflect her true wishes. For situations like this, the safeguards expressed in the previous chapter apply.\textsuperscript{443} Nevertheless, by expressing the decision, the supported person herself believes the decision to be her own.

\textsuperscript{441} Dhanda, supra note 362, at 445.
\textsuperscript{442} Bach and Kerzner, supra note 378, at 60.
\textsuperscript{443} See Chapter 3 supra.
If the supported person cannot express her decision in a way which is comprehensible to an outsider, she has to rely in this respect on her supporter. From a legal perspective it is irrelevant whether the decision expressed by the supporter was reached with support or by substitution, because only the supporter knows the answer. A third person or an outside supervisory body could review the supporter’s claim only if it knew the person’s personal circumstances better than the supporter, which is very unlikely. Therefore the decision should be respected, unless the supervisory body would review it using a best interest standard, which would be incompatible with supported decision-making.\(^{444}\)

The framework thus creates a cut-off point and separates disabled persons for the purposes of legal regulation to exactly two categories: those who can communicate their decisions on their own will have a right to make decisions with support, and their supporters must not make substituted decisions on their behalf; for those who can be understood only by their supporters, law cannot ensure that their decisions are indeed supported ones.

The latter category of persons, those who are unable to communicate their decision to an outsider, is wider than “persons with high support needs” as usually understood. It includes those who truly cannot utilize support, those whose wishes cannot be understood even by their supporters, and also those who can make supported decisions but can communicate them only in a manner that their supporters can understand. As a practical matter, it is irrelevant for the

\(^{444}\) UN Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) – Article 12: Equal recognition before the law, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/1, §29 b) (19 May 2014); see Chapter 3 Part A supra.
Substitution Within Support Proposal to which of these categories the person belongs, because all these sub-groups share the same legal fate.

Persons unable to express their decisions enter legal transactions through their supporters. It does not matter whether they are simply unable to communicate the specific decision they made, or whether they are unable to make the decision, or merely chose not to make it. Once they fail to communicate a decision, the supporter is entitled to communicate it on their behalf. What matters for the purposes of third parties and external observers is that some decisions of persons who did not communicate a choice need to be made in a substituted way. Only the supporter knows which of the person’s decisions were or can be made with support, and which need to be made by substitution. Because outsiders cannot judge how the decision was in fact made, they have to trust the supporter that he or she made the greatest possible effort in establishing the person’s true wishes.

The supporter is prohibited from communicating or making a decision on behalf of the supported person only if the latter communicates it herself. In this case, the supported person’s will takes precedence over the supporter’s. If the supported person is unable or unwilling to communicate a decision, she does not express dissatisfaction with the decision made by the supporter, the decision will be binding on her as her own. It cannot be overturned on the ground that the disabled person’s wishes were not respected, since those wishes could not be established. That, however, does not preclude overturning them on different grounds, as explained later.
Defining the legal cut-off point at the level of the inability to communicate one’s decision sets the Substitution Within Support proposal apart from the other two frameworks. Contrary to the Support Only position, it expressly recognizes that some persons need some decisions to be made on their behalf in a substituted way. On the other hand, contrary to the Some Guardianship position, it does not single out these persons and decisions for special legal intervention, such as guardianship. Those substituted decisions can be made by their supporters, who are appointed and are acting in a supported decision-making framework.

2. Substitution Within Support in practice

Some examples might be helpful at this point to make clear how in fact the proposal developed in this chapter plays out for different categories of persons. This part will examine how a simple decision, such as withdrawing money from one’s bank account for buying a new bed, will be executed by different individuals under the different proposals. Three individuals will be considered: A, who is able to make this decision with support and communicate it in a way that bank clerks understand; B, who is able to make it with support, but the bank clerk cannot understand her; and C, who is unable to make the decision with support.

A’s situation is seemingly similar under all three proposals, at least in the normative sense: she should be treated the same way regardless of which framework is adopted. She should have a supporter, who would explain the options available: how a new bed might help her sleep better and which types are available for what price. Depending on her needs, the supporter could help her understand the benefits of a more expensive bed, the value of the price difference and what it
equals to, so that she can choose whether she prefers the increased comfort over the equivalent of, for example, 15 music CD’s. Once A has made her decision about what type of bed she needs, she can instruct the bank clerk to withdraw money from her account. The bank clerk has therefore no doubts that this is what she wants.

How A ended up in this situation, however, varies across the three models. In the Support Only and the Substitution Within Support framework, her case would be simple – only supporters are available, therefore she could only have a supporter. Since she is able to express a decision, the supporter is not allowed to articulate a decision on her behalf, and if she did, the bank clerk is bound to follow A’s decision. If the supporter was concerned that A’s expressed decision is in fact harming her interests, he could turn to a court to declare it null and void, as it is generally the case with any supported decision.445

In the Some Guardianship framework, however, where guardianship is possible, a court certifying A’s supporter must have established prior to the scenario that A is indeed capable of making this type of decision with support, that she does not need a guardian for it. That judgment must have been passed some time ago, with unknown precision – it is unlikely that buying a bed was exactly the question the court was considering when deciding on A’s legal capacity. It is possible that if A was found to lack the capacity to make some types of financial decisions, she is under guardianship also with regard to buying a bed or withdrawing money from her account. Therefore there is a likelihood that she would not act with a supporter, but a guardian acts on her behalf. This is an interference with her autonomy which is not justified by her actual skills with

445 See Chapter 3 supra.
regard to the actual task at the given moment. This is the harm A has to suffer under this framework.

B is able to make the decision, but she is unable to communicate it to the bank clerk. In the Substitution Within Support framework, she would make the decision with her supporter, similarly to A above. Her supporter would then communicate it to the bank clerk in B’s presence. Unless the bank clerk can establish that B wants something else, she has to accept the supporter’s interpretation of what B’s decision is. If B is dissatisfied with the decision as expressed by her supporter, she can turn to a court to declare it null and void, for example with the help of another supporter.446

In the Support Only framework, B’s situation is problematic. She could make the decision with the help of her supporter, but she could not communicate it to the bank clerk. The bank clerk could not accept the supporter’s interpretation of what B’s decision is, because the clerk has no way of knowing whether it reflects B’s will or the supporter’s. The latter, substituting the supporter’s will to B’s, is not allowed in this framework, and outsiders are required not to honor substituted decisions. More support would have to be provided to B, until she is able to make her wish known. If that is not possible, she could not withdraw money from her account.

Under the Some Guardianship model, B would have to act through a guardian, since she is unable to communicate the decision herself. This implies all the difficulties of placing B to the appropriate category with a court judgment as explained above with regard to A. If B’s status is

446 See chapter 3 supra.
established correctly, her position is arguably still worse than it would be in a Substitution Within Support framework. There, the decision is still supposed to take place in a substituted way. In the Some Guardianship model, the guardian makes the decision. That is a difference which in practice is not enforceable. Only B and her supporter know how the decision was in fact made, outsiders have no way of interfering with the decision-making process. One would expect supporters to make more effort in establishing B’s wishes than guardians, but nobody can know whether that has indeed been the case, and certainly cannot know this with regard to a specific decision. Only if B is able to object to a supported decision would the situation be different. In the Some Guardianship framework, her objection would be irrelevant – the guardian’s decision would prevail. In the Substitution Within Support framework, however, the bank clerk would have to accept her objections – they take precedence over the decision communicated by the supporter. The supporter is able to communicate a decision on behalf of B only if she is unable to do so.

C is unable to make a decision even with support, and therefore she would have a problem in the Support Only framework. Her supporter cannot make a decision on her behalf, therefore no decision will be made. She would have to receive more support, enough for her to make her decision known to the bank clerk. If that cannot be achieved, she cannot withdraw money from her account and cannot buy a bed.

In the Some Guardianship model, C’s guardian would make and communicate the decision on her behalf. A problem could arise again with the prior judicial establishment of C’s lack of capacity. If she was incorrectly incapacitated with regard to this decision, she would be denied
the opportunity to make her decision in a supported way. On the contrary, if she was unable to make this decision, but was incorrectly assumed by the court to be able to make it, she would have no guardian for this purpose, and would not be able to withdraw money from her account. She would have to go through a new guardianship procedure, and her guardian’s powers would have to be extended, or a new guardian would have to be appointed, to cover this area.

The Substitution Within Support framework would work for C similarly as the Some Guardianship model. Her supporter would have to make and communicate the decision on her behalf. In this case, no court needs to establish in advance whether C is unable to make the decision with support or not. It is her supporter’s duty to make all effort in establishing C’s wishes. However, this cannot be supervised by the bank clerk or an outside body, except if C is able to communicate an objection to her supporter’s decision – in that case, the clerk honors her objection.

The above examples highlight that the main weakness of the Some Guardianship proposal lies in its reliance on prior categorization of persons according to their capacity with regard to various decisions. This is problematic for several reasons. One, it has a great potential for mistakes. As shown above, the practice of guardianship in many jurisdictions is characterized by heavy overuse.\textsuperscript{447} Connected to this, mistakes are not equally distributed, the system leads to over-caution: failure to appoint a guardian for an area is more serious, because it would lead to decisions not being made.\textsuperscript{448} On the contrary, appointment of a guardian in an area where he is not needed would only mean that the decision will be unnecessarily made in a substituted way.

\textsuperscript{447} Mental Disability Advocacy Center (MDAC), \textit{supra} note 401, at 24.
\textsuperscript{448} Hurme & Appelbaum, \textit{supra} note 419, at 962.
Third, capacity assessments are by their nature imprecise: the court has to list a reasonable number of areas in which a person has or lacks capacity. It is impossible to assess the person’s capacity for all possible tasks within these categories. It is very likely that she would in fact be able to do some decisions in the general category, but her legal capacity with regard to them would be restricted. Fourth, the prior judicial establishment of her capacity status is very static. A person’s ability with regard to certain tasks can change over time, can improve or deteriorate, sometimes very fast. The person’s mood in the given moment might determine whether she is able and willing to make the specific decision which is required of her. No prior assessment can capture this fluctuation, which can unnecessarily deny the person the right to make some decisions with support, which she would otherwise be able to make in practice.

The Support Only framework’s shortcomings are quite obvious. If a person’s all decisions have to be made in a supported way, at least some decisions of at least some persons will not be made, even in theory. In practice, the situation can be much worse, depending on what kind of support is available. There nevertheless might be reasons to prefer this framework. Perhaps its proponents believe that the number of people thus harmed is miniscule, and the interests of others in not accepting any form of substitution either in form or substance outweigh them. Perhaps if support was the only option available, society would be forced to find new ways of providing it, and also persons who are currently thought to be unable to benefit from support could be included in the framework. These are empirical claims that have to be spelled out explicitly and evaluated on their own terms. If one has to choose between different types of harm, it is important to know how exactly everybody will be affected.
It can be objected that this analysis excluded from the Support Only model decisions which can only be understood by the supporter, and not the outside world. If those were accepted as legitimate supported decisions, perhaps in the way Bach and Lerzner suggest, the model would work for a larger number of people. That is certainly true, but as explained above, the outside world could never be certain about the value of those decisions. Maybe they were made in a supported way by the disabled person, maybe they are the supporter’s own decisions. Since the Support Only model objects to substituted decisions, the legal system’s duty is to prevent them from taking place. Hence, decisions whose validity could not be ascertained should not be accepted.

3. **Comparison of the three models**

The Substitution Within Support model openly admits that some decisions made by supporters will be substituted ones. Since substitution is allowed, it is possible that some decisions that could be taken in a supported way, will be made in a substituted way. Only those persons who are themselves able to raise an objection against a substituted decision will be protected from this kind of abuse. For them, the model is no worse than the Support Only model, and significantly better than the Some Guardianship model: there is no prior capacity assessment, therefore anybody capable of making a particular decision at a particular moment will be allowed to utilize support, and object if the supporter abuses his position.

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For persons who are unable to communicate a decision to others, the Substitution Within Support model is significantly better than the Support Only model, because it allows for their decisions to be in fact made. It is also no worse than the Some Guardianship framework, because the decisions are made in the same way in both models. In fact, even here Substitution Within Support has an advantage, because it does not rely on prior capacity assessments, and therefore avoids wrongful categorizations.

The Support Only model requires support to be provided also for persons unable to communicate their decisions. This normative requirement does not lead to more support, because it cannot be enforced. If a third person is unable to establish whether the decision was made in a supported or substituted way, the requirement to support cannot be supervised, its violations cannot be sanctioned. The supporter’s exclusive knowledge makes him the best decision-maker over the question whether support is possible or not in a given situation. This decision should be allocated to him, not to an outside reviewer.

If this assumption is correct, requiring support all the time as a normative matter does not seem to lead to good results. As a practical matter, law is unable to enforce the prohibition of substituted decisions against supporters who breach their obligations. Also, if the supporter willingly wishes to meet the obligation in situations in which it is impossible, it will hurt the supported person, because a decision will not be made. It therefore leads to better results, and in any case is more in line with reality, if the supporter has the power to decide whether a substituted decision is required or not.
Basing this decision with the supporter is the strength of the Substitution Within Support proposal compared to the Some Guardianship approach. In that latter approach, the type of decision, supported or substituted, always has to be determined in advance with some level of generality by outsiders. That is highly problematic, as described in Chapter 2.

The Substitution Within Support model connects the enforceability of support to the ability to communicate decisions by the supported person. In the case of the Some Guardianship approach, the standard is much higher: demonstrating legal capacity in the abstract in a court procedure removed from the decision itself. The Substitution Within Support proposal is more beneficial to persons with disabilities in general.

It can be pointed out that capacity assessments also serve an important safeguard function in guardianship: they make sure that the guardian takes over decision-making only in areas where the person is certified not to have capacity. Because this is lacking in the Substitution Within Support model, the supporter could usurp powers even in areas where this is not warranted. This, however, is a mistaken view. The supporter has the power to make substituted decisions only where the person is uncommunicative. In these areas, substituted decisions are a certainty if guardianship were allowed. In other areas, the supporter has no right to make substituted decisions as a legal matter, since third parties are bound to follow the decisions expressed by the supported person. The supporter’s actions are also subject to the safeguards described in the previous chapter.
The Substitution Within Support model requires the supported person’s active objection to prevent the supporter from making an unjustified substituted decision. If the supported person is misled, threatened or otherwise manipulated by the supporter not to state an objection, the latter can make substituted decisions even in areas where he would not have such rights even as a guardian. This situation is not different from the forms of abuse described and dealt with in the previous chapter, and the same type of safeguards would apply. This type of abuse is possible, because no system is able to eliminate it completely. Supporters who have such extensive influence over the supported person are able to manipulate them in other ways as well. The Substitution Within Support model will be unable to protect the person, who, although able, is not objecting, and has no other supporters to help him. Outside control mechanisms to investigate abuse under a social protection or even criminal framework might be a solution, as in the case of non-disabled individuals who find themselves in similar situation. The Substitution Within Support model at least gives such represented persons the right to object to the abuse on the spot when a decision is expressed by the supporter – were they under guardianship, their situation would be even worse, as the guardian could act without them being present, and in any case their objections would have no legal relevance.

As a side issue, it should be pointed out that supported decision-making does not eliminate capacity assessments entirely. They can indeed be very helpful to establish what the person’s skills and abilities are, and what type of support could be more suitable for her. The difference is that these assessments cannot serve as a basis for incapacitation, they do not justify limiting rights.
Guardianship is in one way more convenient than the Substitution Within Support model. The latter’s in-built safeguard is that the supported person must be present when a decision on her behalf is made. If she was not present, the other party could not be certain that she in fact is unable to communicate a decision. Always bringing a person with severe multiple disabilities along can be burdensome for some caretakers, who would prefer to handle some matters on their own. This problem is mitigated by some factors. Persons with high support needs are unlikely to have many legal transactions – even in a guardianship system, their contacts with their guardians are often limited to a monthly visit or even less. Nevertheless, it could indeed present a serious burden in particular cases, for example when the disabled person buys a home on a loan – one decision was made, but several signatures in different places will be required.

This could be taken care in the Substitution Within Support model by simple powers of attorney. These could be issued in the represented person’s home, where witnesses could certify that she did not express an objection to authorizing the represented person. If the state considered that more safeguards are necessary, a state body, such as the local social security office could certify these authorizations. The supporter is practically authorizing himself, because he is expressing the supported person’s wish, therefore the issue to be certified is only that the latter is indeed uncommunicative on the matter. If this practice of powers of attorney was overused, it could lead to abuse. Supporters interested in their own convenience could be denying the opportunity for the disabled person to try to make her own supported decision. In that case, such powers of attorneys could be restricted, abolished or countered in other ways, depending on how much harm do they actually cause and prevent. This is certainly not a necessary element of the model, but it should be mentioned as a possibility.
C. Safeguards

The above analysis showed how the Substitution Within Support proposal ensures that persons with high support needs can be incorporated into a support framework. The following part will assess the various risks following from the proposal, and possible safeguards mitigating the harm they might cause. A specific risk is inherent in the model: the unjust use of substituted decisions. It will be argued that this type of abuse does not warrant an automatic review process. In cases of reviews by request, the review should not be concerned with procedure, that is, how decisions were made, but with substance, whether the disabled person’s needs are being met. Also, some specific situations have to be considered, such as persons without supporters and repetitive financial decisions.

1. Control over unjust substitution – automatic review process

Safeguards in legal capacity laws are protecting persons with disabilities from two types of evil: harm done by the person’s own decisions, and harm done by the failure to make decisions. Safeguards in the previous chapter described for supported decision-making in general are also applicable to persons with high support needs. Therefore this part only needs to consider whether severe disability or the person’s inability to communicate a decision require any modification to these safeguards. The differences are mostly relevant to a third type of harm specific to persons with high support needs: the potential of their decisions being turned into substituted ones.

450 See Chapter 3 supra.
One common argument against support being available to all persons with high support needs is that in many cases this is support in name only. The Substitution Within Support model acknowledges this: indeed, some decisions will have to be made by supporters in a substituted way. This is preferable to alternative models, as explained above. However, are there any possibilities to ensure that the number of substituted decisions is reduced to the necessary minimum, and all decisions which disabled persons can make with support are indeed made that way?

It is possible to establish a general review mechanism of substituted decisions made by supporters. Anytime a supporter resorts to making a substituted decision, he would have to justify before a supervisory body, such as a court or an administrative tribunal, how they came to the conclusion that the decision they are taking is the one the person would have taken for herself. The person’s own wishes could be established in this procedure to the extent possible, and the supporter’s position compared to them. This process would ensure that supporters are taking all effort to communicate with the supported person, and also that their substituted decisions are not arbitrary.

This review process could indeed put some pressure on supporters to take their duties seriously, but does this at a great cost. It requires persons with disabilities and their supporters to justify their personal decisions before a public body, which non-disabled persons are not required to do. Such automatic reviews could perhaps counter some unjustly substituted decisions; they,

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451 Kohn et al., *supra* note 363, at 1114.
however, would no doubt seem intrusive in the case of genuine supported decisions. And since the basis of the proposal developed here is avoiding ex-ante categorizations based on capacity assessments, the procedure would apply to all decisions communicated by the supporter, regardless of their true nature.

The other shortcoming is that this process would make decision-making very cumbersome. Indeed, guardians are also not required to justify each of their individual decisions in a review procedure, although in their case the potential for abuse is higher. Therefore an automatic review process for substituted decisions of supporters seems even less justified.

2. Review of procedure v. review of substance

If the review process is not automatic, it could be initiated on request. The person with disability could initiate it himself, but this is merely a theoretical possibility. A person with high support needs, who was unable to communicate an objection to his supporter’s decision, is very unlikely to initiate a legal proceeding without the supporter’s help. A more typical course of action would be an intervention by another supporter or a concerned third party.

The important issue to consider is the legal basis for such review proceedings. Two options are possible: suspicion that the disabled person’s decisions were not followed by the supporter, and suspicion that the supporter’s decision harms the disabled person. The first can be characterized as a review of procedure: the supporter’s decision is overturned if it was not in line with the person’s wishes which the supporter should have established. The difficulty is, these wishes are
unlikely to be known to third parties, therefore the process might be underutilized and of little practical significance.

The other option can be characterized as a review of substance: a need for intervention arises if the decision made leads to the disabled person’s abuse, such as of her property or personal well-being. A third party is more likely to notice if a person with severe disabilities’ needs are not adequately met or her property is mishandled, and therefore this option is of more practical relevance.

The difference is not merely a theoretical one, but reflects different approaches in the state’s duty towards persons with high support needs. Persons with severe disabilities are by definition dependent on their caretakers. Regardless of whether they are cared for by their families or professional caregivers, their lives are highly intertwined with their support network. Society has an interest in their needs being met, and can provide them with various support services to this end. It also needs to ensure that abuses in this network do not happen, and if they do, they are remedied.

In many current guardianship systems, safeguards concentrate on the person’s (in)ability to make decisions. If the person becomes homeless, is underfed, or is not undergoing treatment for a serious medical condition, the problem is that she is making wrong decisions. To intervene, a guardian is appointed, who will make the right decisions on her behalf: take care of her money, secure her accommodation, and so on. That is, indeed, the only way to help a person who is actively resisting help: if she is living on the street or is refusing medical treatment, denying her
legal capacity is the only way to override her objections in order to help her. This type of intervention is problematic in itself, as it can lead to violations of personal autonomy, as amply demonstrated by decisions of the European Court of Human Rights.\textsuperscript{452}

However, the basis for societal intervention does not have to be the inability to make decisions, it could also be simply the person’s needs not being met. The adult protection legislation, developed in some Canadian provinces in the 1990’s, serves as an example of the latter.\textsuperscript{453} In this framework, it is irrelevant why the person is starving and underfed, whether this stems from her inability to make the right decisions, or is the result of active abuse. If the person’s needs are not met to the extent that it endangers her life or health, that can trigger an intervention by the social protection agencies.\textsuperscript{454} They could, for example, enter her apartment to investigate the situation. They do not necessarily have a right to act against the person’s objections, but they could offer help and act if she is indifferent.

This latter approach seems to be more suited to supervising the decision-making process of and on behalf of persons with high support needs. If the supporter or a third party\textsuperscript{455} is actively abusing his position to harm the person, the general mechanism for declaring the legal transaction void described in the previous chapter applies without modifications. In addition to this safeguard, the situation of persons with high support needs does not call for a more elaborate supervision of how their decisions were made. The state’s duty is to ensure that these decisions


\textsuperscript{453} Bach & Kerzner, \textit{supra} note 378, at 135.

\textsuperscript{454} John Chesterman, \textit{supra} note 405, at 517–524.

\textsuperscript{455} The latter is much less likely in the case of an uncommunicative person with a disability.
are in the interest of their well-being, that they are properly cared for and can utilize all support services available to them. If this is not the case, signs can be spotted by other persons, including neighbors and service providers, who can trigger the intervention. The question to determine is whether the person’s needs are met, not whether she or her supporter made wrong choices, or indeed whether the person has a supporter or should have one. A person endangering her well-being is a cause for concern and intervention, regardless of her status under legal capacity laws.

In other words, it is illusory and unnecessary for a legal mechanism to ensure that a severely disabled person’s decisions were made in a supported way as often as possible. To the extent law intervenes in the relationship between supporters and the supported person, this should be done to ensure that the supported person’s needs are met. Persons with high support needs need a higher level of care, but not necessarily a higher level of supervision of their decision-making processes, as that provides no meaningful protection.

3. **Other ways of making sure that support does not become substitution**

It might be concerning for some that the Substitution Within Support framework does not provide more safeguards to ensure that supporters are making substituted decisions only if necessary. The fact that there are no supervision mechanisms, however, does not mean that supporters will be no different than guardians.

The system’s design, first of all, ensures that to the extent supported persons are able to voice their own will, they will be able to do so and these will be legally relevant. In this regard, this
model is already a huge advantage compared to guardianship. Indeed, it is likely to benefit most persons who are relatively more able to make their wishes known to others.

For persons unable to communicate, however, the status of supporters still matters. Currently, guardians in most countries are acting in a system based on substituted decisions made in the person’s best interest. Non-respect to the decision-making ability of persons with disabilities is part of their institutional culture. Repressive guardianship laws, which are treating the will of persons under guardianship as irrelevant, contribute to this institutional culture.

Supporters are expected by law to act differently, they are required to make all efforts to take the disabled person’s wishes into account. This obligation can be enforced with regard to persons who are able to communicate their wishes. Even if the obligation cannot be enforced with regard to persons who cannot communicate with outsiders, it is reasonable to expect that this system evolves in a different institutional culture of supporters. It should be more likely for them to act by supporting a person and not substituting her wishes, simply because this is what the law requires of them, and this is what members of their profession do.

Obviously, the institutional culture of supporters is shaped by many factors other than law. Their selection, training, support provided by public bodies, workload, public awareness about and appreciation for supported decision-making are all important considerations. How the practice of supporters in a given jurisdiction develops, whether it will be better in this regard than the practice of guardians, is a question for future empirical analysis. However, it can be stated that as a conceptual matter, the legal framework of supported decision-making, as an important factor in
developing institutional culture and communicating social expectations towards all stakeholders, is promoting more supported decisions even for persons unable to communicate. That is true of the Substitution Within Support proposal as well. It remains to be seen how significant this factor is. Nevertheless, in the absence of viable legal safeguards guarding against the overuse of substitution, the extra-legal factors such as institutional culture will have to be taken more seriously in implementing any system of supported decision-making.

4. Decisions subject to special regime

Until now, this dissertation described supported decision-making as a general framework, which would be applied the same way to all types of decisions. The experience with guardianship shows, however, that it can be efficient to establish special regimes for some areas. These might be justified, for example, by the environment these decisions are made in. Medical decisions usually take place in healthcare institutions, where professionals are present to provide advice and are able to assess the person’s capacity. What the role of supporters will be in these situations is a question beyond the scope of this dissertation. It is nevertheless likely that special rules could apply, especially with regard to urgent care and decisions about mental health treatment.

Special regimes might also be called for to protect disabled persons from an increased likelihood or increased extent of harm. A good example is management of large sums of money or other property of high value. Guardianship approaches this issue by making such decisions subject to administrative or court oversight: in Hungary, for example, the represented person’s house
cannot be sold by the guardian unless a court approves the sale. Such an oversight is possible for supported decision-making as well: if the court or body certifying the supporters finds that the supported person owns property with value above a certain threshold, it could require that all substituted decisions made by the supporter with regard to this property would be subject to court or administrative approval. Supported decisions made by the disabled person with regard to the property would still be subject only to the general safeguards. That is, if one of the supporters feels that the person is abused with regard to management of this property, he could initiate proceedings for the abusive transactions to be declared void.

The described solution approaches the question from the perspective of oversight over the decision-making process. Another approach is possible, which would concentrate on the disabled person’s needs. If the state through its social service agencies learns that the person with severe disability has large assets, this is not a reason for immediate intervention in the relationship between the supporter and the supported person. Rather, the agency could offer help to them with managing the property. Investment decisions might be difficult to make also for an ordinary non-disabled person, therefore this service would be no doubt welcome by many. If the help is refused, social services could still be permitted to access information about how the disabled person’s property is managed. The intervention in this case would consist of increased knowledge on the side of state authorities about the disabled person’s situation. That would place them in an ideal position to initiate the court procedure to declare a transaction void if they suspect that abuse is taking place. The general adult protection framework described above can incorporate this type of oversight over property as well.

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456 Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 16 (1)c).
The first solution, based on oversight of property decisions, is more rigid, and automatically applies to all decisions of a certain type. It is more intrusive, it interferes also with relationships where abuse is not an issue. In this respect, it is closer to the guardianship model, and shares some of its shortcomings. Because it requires decisions to be justified, it asks supported decisions to meet a higher standard of rationality than decisions of ordinary non-disabled persons, who are not subject to such oversight. This might lead to a certain automatism, where courts enforce their own preferred vision of safe investment strategies and the like. It is also questionable how effective this mechanism is: guardianship systems provide good examples that the oversight can be bypassed; persons under guardianship sometimes manage to sell even their house without the authorities being aware of the transaction.457 The courts’ role is not to have any active knowledge and oversight about the person’s property, they only approve transactions brought before them. If a transaction comes to light which took effect without approval, it might be automatically void, but it can be hard to restore the ex-ante situation.

The second solution does not result in increased legal powers over financial transactions when they are made. Its added value rests in state authorities having more knowledge about, more active involvement in the disabled person’s dealings. This can be bypassed as well, and the active involvement can also potentially turn into abusive interference.

How effective either solution would be compared to each other and compared to guardianship, what type of harms they would be able to prevent and redress, is hard to predict in the abstract.

This chapter does not argue that one should necessarily be preferred, or even that these special regimes should be part of a supported decision-making framework. It merely states that if they are considered necessary, they can be part of such a framework without compromising its essence.

5. Persons without supporters

The ideal version of supported decision-making relies heavily on natural support networks, consisting of supporters from the disabled person’s family and circle of friends. Obviously, large support networks are a great resource, and they should be utilized as much as possible. But what about persons who are not so fortunate to have any family members or friends? Can they benefit from supported decision-making?

Persons could end up without natural supporters for various reasons. Some are abandoned by their family and grow up in an institution. If they are re-integrated into the community, they can find themselves without social connections. Others lose their support networks when their parents, with whom they had been living, die. Some might have close family members who are not suitable as supporters, for example because they have abused the person they cared for.

Guardianship responds to these situations by appointing a public guardian, a state official not related to the person, with rights and duties matching that of other guardians’. A similar solution can be imagined in supported decision-making as well. The Hungarian Civil Code of 2009, for example, established the position of a “public supporter” or “official supporter”, similar in
powers to a regular supporter, to help persons who are re-integrated from institutional care back to the community.\textsuperscript{458}

The idea of a public supporter is an uneasy compromise. The ideal model of supported decision-making rests on a relationship of trust between supporters and the supported person.\textsuperscript{459} It works best if they know each other well, if the supporters understand the supported person, her wishes, goals, and communication better than other persons. This is not necessarily true in the case of a public official assigned to support the person, with whom they might have never seen each other before. Nevertheless, in the absence of natural supporters, this alternative seems to be preferable to leaving the person without any support at all.

What could make public supporters more acceptable is their active involvement in supporting the disabled person. In Central Europe, public guardians are notorious for their lack of contact with the persons they represent.\textsuperscript{460} This stems from the lack of resources available in the system and the connected high burden put on guardians. In Hungary, for example, until 2010 guardians used to have a legal limit of 30 persons they can represent,\textsuperscript{461} but it was not uncommon for one guardian to be responsible for much more, with one guardian recorded to represent 350 persons!\textsuperscript{462} It is obvious that guardians with huge workloads cannot devote much time to each of the persons they represent.

\textsuperscript{459} Minkowitz (2016), supra note 388, at. 9; See Chapter 3 Part A supra.
\textsuperscript{460} Mental Disability Advocacy Center (MDAC), Guardianship and Human Rights in Hungary, 73 (2007).
\textsuperscript{461} Id.
\textsuperscript{462} Id.
If public supporters followed a similar model, their role would be trivial or even meaningless, given their lower competencies compared to guardians. They could be of meaningful assistance to the person only if they are able to devote a substantial amount of time to her support. The crucial difference compared to public guardians is not their legal powers, but resources available for providing a service worthy of making use of by the supported person.

Where support networks do not exist, they can also be created. Persons with high support needs are likely to be recipients of various social services. Their case manager or social worker is a good candidate for a supporter, as are other persons with whom they get into contact with. Social integration involves developing a circle of friends, colleagues and other acquaintances, which is already the goal towards which social services are working. This is in line with the requirements of supported decision-making as well. The more social contacts, the more access to natural support the disabled person will have.

Public supporters could have a role in creating a natural support network for the person, in order to eventually hand over their competencies to other supporters. This might not work out for everybody, and in that case the public supporter will have to continue to assist the person indefinitely. Nevertheless, to effectively perform its role, no increased competencies compared to other supporters are needed. What makes an important difference compared to other public officials is the amount of time the public supporter can invest in assisting the person. If he has oversight over how the supported person’s life is developing, the existing rights of supporters

should be enough to protect the person from abuse – the only role many public guardians are apparently playing.

The only legal modification relates to the appointment of public supporters. While regular supporters are certified based on the agreement they make with the person they support, this is unlikely to be an effective approach in the case of persons who do not know each other. Perhaps the model used in the case of public guardians can be adapted here: the supported person can refuse the proposed public supporter, in which case another public supporter will have to be appointed. If there is no refusal, consent is presumed.

The idea of public supporters is no doubt a resource-intensive proposal. This role can be joined with other social services already utilized by persons with disabilities, therefore there are ways to reduce costs, but nevertheless it requires substantial public funding compared to natural supporters. This dissertation does not argue that public supporters should be an integral part of all supported decision-making frameworks. It rather makes the point that meaningful support to persons with high support needs without natural support networks will be costly. Societies which value social integration even for these individuals, many of whom have been lingering in institutions for a long time, have to take this into account. Shortcuts in the form of relatively cheap public guardians with increased competencies but little actual oversight over the person and ability to intervene if needed are unlikely to be of much help, and can create many additional problems. Public supporters are not an ideal solution, but are nevertheless better, or less worse, than any alternative.

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464 See, for example, Act no. IV of 1959 on the Civil Code of the Hungarian Republic, § 19 (4).
D. An acceptable alternative solution without supported decision-making

The three positions described in this chapter share one important assumption: they presume that supported decision-making is valuable and leads to good outcomes for some categories of persons with disabilities. This assumption depends to some degree on the state’s ability to implement and administer supported decision-making in a way prescribed in these proposals and the legislation that could adopt them. If the state fails to administer the system properly, supported decision-making might become a very different institution in practice than imagined in theory. Indeed, that is not simply a theoretical objection: guardianship reforms in the world provide ample examples of states failing to implement the simplest of improvements, such as replacing plenary guardianship with partial guardianship. This leads some authors to consider that administrative capacity is a serious obstacle in the case of guardianship reform, and striving for the optimal solution can produce harmful results.\(^\text{465}\) Smaller improvements that states are able to implement in practice can lead to better results.\(^\text{466}\) Therefore, an alternative solution is considered in this part. If supported decision-making turned out to be impossible to implement, what aspects of it could be incorporated into a guardianship framework.

Chapter 2 explained that guardianship has two defining features which distinguish it from supported decision-making: incapacitation, the transfer of decision-making power from the represented person to the guardian, and the inability to challenge the guardian’s decision by the


person under guardianship. The former is indeed impossible to overcome in a guardianship paradigm. The latter, however, is less clear. It is typical of guardianship probably in all countries of the world, but as a normative matter, it does not necessarily have to be. It could be changed by changing the way substituted decisions are made.

The Hungarian Civil Code adopted in 2009, which never entered into force and was repealed in 2010, should serve as an example of a model which in fact tried to change the relationship between the guardian and the represented person.\textsuperscript{467} The law prescribed the basis on which the person’s decision should be made: instead of her best interests, her expressed wishes had primary importance, then her previously expressed wishes, then her personal circumstances which would allow the guardian to establish what decision she would make if she were capable.\textsuperscript{468} The represented person’s best interests came only as the last resort.\textsuperscript{469} The guardian was also required to consult the person before making any decision.\textsuperscript{470} So far, the law is not unusual, indeed similar reforms changing the basis for substituted decisions from best interest to the person’s wishes have been adopted elsewhere.\textsuperscript{471} However, the law gave legal power to these requirements by allowing the guardian to make decisions only with the represented person’s consent. If they both agreed to a decision, it became legally valid without outside intervention.\textsuperscript{472} If any of them declined to give consent, consent could be given by an administrative body, the local Guardianship Authority, whose decisions were subject to court review by the request of any

\begin{footnotes}
\item[467] Act No. CXX of 2009 on the Civil Code of Hungary.
\item[469] Id.
\item[470] Id.
\item[471] See the Swedish, German, and British Columbia models described in Chapter 3, Part A.1 supra.
\end{footnotes}
party. The system thus enabled the guardian to override the person’s wishes if he considered them harmful, but only with administrative approval. It also allowed the disabled person to automatically submit for administrative review any of the guardian’s decisions simply by denying consent. The law also included special measures for emergency decisions which were subject to retrospective approval.

The envisaged system apparently rested on the cooperation between the guardian and the represented person: if they managed to convince each other, a decision they both agreed to was valid without more. If they disagreed, they suffered inconvenience by having to go through a legal proceeding. This system empowers the disabled person compared to a typical guardianship framework. It is, however, very cumbersome, and more easily manageable solutions could be imagined. For example, the guardian would be allowed to make valid decisions on behalf of the disabled person, but the latter would have a right to challenge these in an administrative proceeding. This seemingly slight change makes a huge difference from the perspective of the disabled person: while, in the Hungarian example, they could prevent a decision by simply refusing consent, in the latter framework they would have to initiate a legal proceeding. However informal and easy to access the proceeding would be, it is more demanding than staying silent.

Since the system described did not enter into force, it is not possible to establish what results it would have produced in practice. However, it is not hard to see that it is administratively demanding. It requires a more direct involvement of public authorities in the relationship between the guardian and the disabled person than it is currently the case. It can result in a major

\[\text{Id.}\]

\[\text{Act No. CXX of 2009 on the Civil Code of Hungary, § 2:23 (2).}\]
workload if many decisions are contested. This suggests that no reasonable improvement of the current system can be achieved without building the state’s administrative capacities, including that of public bodies supervising the system and providing assistance to disabled persons. A no cost solution might result in no real improvements.

Supported decision-making can be directly compared to guardianship with review, and the Hungarian form of guardianship as co-decision-making described above. In a supported decision-making framework, it is the supported person whose decisions are automatically valid if she is able to express them. If the supporter disagrees with the decision and is concerned about harm to the person’s interests, he can initiate a court proceeding to annul the decision. The three frameworks thus differ in how they allocate power among the disabled person and her guardian or supporter: in guardianship with review, the guardian is more empowered, and the burden is on the represented person to challenge an unjust or harmful decision by initiating a review proceeding. In the Hungarian example of co-decision-making, both can prevent a decision they do not like by refusing consent and forcing the other one to initiate a review proceeding. In supported decision-making, the burden is on the supporter to turn to the court to challenge a decision he considers harmful.

The effectiveness of these frameworks in practice depends a lot on how accessible, fast, and effective the review process is. Administrative and court capacities need to be developed in all of them. The various forms of guardianship are in fact less administratively burdensome because they create various obstacles to disabled persons making use of the overview procedures. If they are unable to use them, or in fact they do not even exist, such as in most current guardianship
systems, the system is indeed easier to administer. That, however, should not be mistaken with impossibility to effectively administer a new system. It is a conscious choice by the state not to invest in its administrative capacities.

Cost might be a consideration, but it is hard to evaluate its importance in the abstract. It indeed might be possible that if a country cannot afford to run an effective supported decision-making system, it is better off with outdated guardianship which is easier to manage because it disempowers persons with disabilities. Empowering disabled persons, shifting from one model to the other, incurs costs. Refusing to pay the cost is not an attempt to introduce reasonable improvements, it is a denial of equality on financial grounds, and should be understood as such.

E. Conclusion

The Substitution Within Support model developed in this chapter is based on integrating substituted decisions into a support framework. It accepts that substituted decisions are sometimes necessary, but rejects guardianship systems characterized by ex-ante categorizations based on capacity assessments. Rather, it allows for substituted decisions by the supporter if the supported person is not communicating a decision which can be understood by a third party. The cut-off point for allowing substitutions is not a scientific, but a practical matter, and depends on the observations of third parties. It is a high threshold for substituted decisions, and it is set based on law’s ability to enforce the prohibition of substitutions: this is possible only for people who can express their will in a way which somebody other than their supporter understands.
Compared to the current system of guardianship, the Substitution Within Support model mostly benefits persons with high support needs who are able to communicate a supported decision. They will be able to enjoy true support, with all the educational benefits to developing their skills and take an active part in exercising their autonomy.

Those who are unable to be understood by others also benefit. They are present when their transactions are made, they have an opportunity to make supported decisions, or at least to try. Some of their decisions will be substituted, and because this cannot be supervised by outsiders, perhaps more decisions than truly necessary. Nevertheless, they are not automatically excluded from the possibility of utilizing support. It is their default option. More of them will be able to make use of it than if they were under guardianship.

In addition, the model also has an important expressive function. Incapacitation carries a significant stigma. It emphasizes inability, it signalizes to the outside world that the person is in some important way less capable than her fellow non-disabled citizens. It is also a marker of lack of potential for development, besides being the reason for deteriorating skills. Support, however, has a different message. Its ideology emphasizes that the person is making decisions similarly to everybody else, and is no different from others regarding her status. Support in itself of course does not decrease the stigma already attached to disability; but at least it does not add to it, contrary to guardianship.

Persons truly unable to make decisions even with support benefit seemingly little from the model described here. However, they have a better opportunity than under guardianship to make use of
any decision-making skills they have left, or new skills they happen to develop. Also, they, too, are better off with regard to the model’s expressive function. Even if they were unable to make any decisions in practice, their human dignity is not curtailed by an unnecessary stigma of incapacity. That has an important implication for all persons with disabilities, who are this way able to be incorporated into the category of legally capable individuals at least formally, and thus achieve equality with regard to this fundamental marker of being a fully accepted member of society.

The Substitution Within Support model fails to achieve the full equality of persons with high support needs the way envisaged by the Support Only model: some of them will not be able to make decisions with support; substituted decisions will have to be made on their behalf. There does not seem to be a better option. Law is an imperfect tool to overcome all inequalities in all sense of the word. Mandating supported decisions in all cases cannot be enforceable in practice for the reasons explained above, and it might even hurt rather than help persons with high support needs.

Nevertheless, even persons who need substitute decisions, do not have to rely on a guardianship model characterized by ex-ante categorizations based on capacity assessments. The Substitution Within Support framework provides even for them a more advantageous alternative to developing their skills and benefit from support as much as they can, without giving up on the idea of protecting them from abuses. Some will perhaps never be fully equal in their real opportunities to make supported decisions. Nevertheless, the proposal developed here provides
them a meaningful conception of equality within the support framework, closer to being fully 
equal than in any other proposal so far.

The Substitution Within Support proposal provides less protection from harm than guardianship. 
That is a conscious choice, because it emphasizes the autonomy of persons with disabilities over 
protection. Nevertheless, it can be equipped with specific procedural safeguards to protect, for 
example, the disabled person’s property, or to facilitate decision-making in healthcare matters. 
The safeguards can provide various levels of oversight and protection from abuse at the expense 
of decreased levels of autonomy. What particular solution should be chosen in a given 
jurisdiction is a matter of empirical analysis of the types and severity of abuses, and a value 
judgment about which of these should be necessarily countered. This dissertation does not 
prescribe the optimal set of safeguards, merely points out that various levels of protection are 
possible within the model.

The last issue to consider how the Substitution Within Support proposal, which extends 
supported decision-making to persons with high support needs, affects persons with disabilities 
with regular support needs. There is not much to say here. Substitution Within Support opens the 
possibility of substituted decisions if the supported persons do not express a decision. That could, 
potentially, lead to some additional forms of abuse compared to those described in the previous 
chapter. These are, however, not categorically different from those discussed previously, and do 
not require a different form of response. The supported person will always have the possibility to 
express an opinion, which will take precedence over the supporter’s will. In case the supported
person fails to raise an objection and will become a victim of abuse, the regular safeguard declaring the transaction void is available to him and other supporters.

The key feature of the proposal developed here is strengthening the position of the disabled person in decisions concerning her life. The proposal both strengthens her ability to effectively take part in these decisions, and is also dependent on it for best outcomes. It is the most advantageous for any person with typically milder disabilities who is seriously disadvantaged by guardianship, and who could fully utilize a support option. For others, the difference will be not that obvious, but the framework developed here has either clear advantages over guardianship, or in the case of those who could make very little or no actual use of support, such as persons in coma, are at least not worse, and arguably better for its symbolic and expressive effect.

So far this dissertation has established a larger conceptual framework for understanding and comparing guardianship and supported decision-making. It has highlighted the factors by which they could be compared, the questions to be asked, the areas where more research should be done in the future. Chapter 5 will describe how these questions matter for the CRPD, what is the international human rights law framework in which they should be addressed.
V. Legal capacity for all? –

How much the paradigm has shifted in Article 12 of the
Convention on the Rights of Persons with Disabilities
A. Introduction

The previous chapters of this dissertation showed how persons with disabilities can make decisions with support, and how supported decision-making can incorporate substituted decisions for persons with high support needs. This chapter looks at the relationship between the presented substantive proposal and the requirements of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter the “CRPD”). This chapter will analyze whether the framework proposed by this dissertation is in line with the CRPD, and whether it is even required by it.

The CRPD entered into force on May 3, 2008.475 It was welcomed as the dawn of a new era, as a significant step towards recognizing the rights of people with disabilities worldwide.476 From its many innovative provisions, Article 12 has been appraised as one of the most progressive as well as one of the most controversial.477 It states that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of their life.478 Many commentators consider it a paradigm shift in approaching legal capacity, which requires significant changes to existing guardianship systems.479 Some go further, arguing that Article 12 necessitates the abolition of all

478 Article 12(2) of the CRPD, supra note 473.
guardianship schemes based on the limitation of legal capacity and requires the introduction of measures supporting the exercise of legal capacity.480

While there is agreement on the importance of Article 12, it is unclear what exactly it requires from states implementing it. The brief text leaves broad scope for different interpretations. This is not surprising, given that international treaties such as the CRPD tend to be the result of compromises between various stakeholders.481 Rather than providing a blueprint for legislators and a detailed list of obligations that state parties must comply with, Article 12 is more a statement of basic principles that legal reforms will have to follow. Nor has this issue been clarified by the CRPD Committee’s published concluding observations482 and a General Comment on Article 12.483 While the Committee stressed the importance of introducing supported decision-making and it denounced guardianship, it has not given an explicit answer to the question of how should supported decision-making completely replace guardianship, and what should happen to persons who are unable to make decisions with support.


482 See the CRPD Committee’s Concluding Observations on Austria (CRPD/C/AUT/CO/1, 13 September 2013, § 28), Hungary (CRPD/C/HUN/CO/1, 22 October 2012, § 26), Peru (CRPD/C/PER/CO/1, 9 May 2012, § 25), Spain (CRPD/C/ESP/CO/1, 19 October 2011, § 34), China (CRPD/C/CHN/CO/1, 15 October 2012, § 22).

This chapter addresses the disagreement in legal academia over the meaning of Article 12. Two main different approaches to the interpretation of Article 12 have been proposed, named Absolutist Position and Constricted Position for the purposes of this analysis, which are conflicting and do not reflect upon each other. This hinders clarity in understanding the implications and realizing the full potential of the CRPD.

A third approach, based on Evolutionary Implementation, will be proposed in this chapter, which is based on uncovering the assumptions behind the existing approaches and acknowledging their limitations. The contentious issue, the decision-making of persons with high support needs, cannot currently be resolved by simply looking at the text of the CRPD. Its interpretation will evolve over time as Article 12 is gradually implemented by state parties.

Part B of this chapter will provide the background understanding for the current debate by explaining how legal capacity has become a human right and why this question is important. Part C will provide an overview of the academic debate over the interpretation of Article 12 by identifying the two opposing positions and analyzing their shortcomings. Part D will ascertain the obligations following from Article 12 by applying a structure based on the different aspects of international human rights norms. Since, as it will be shown, these attempts cannot fully resolve the issue at hand, Part E will describe the obstacles to full legal capacity, and Part F will provide a novel approach to addressing the decision-making ability of persons with high support needs, using the framework of Evolutionary Implementation.
B. Legal capacity as a human right

Guardianship constitutes a serious intrusion upon personal autonomy, and therefore objections to it exist on both moral and political grounds. This chapter, however, is concerned only with whether and to what extent can legal capacity be understood as a human right protected by international law.

Regardless of its variations across jurisdictions, the core of guardianship is always the same and is always problematic: it transfers the adult’s decision-making power over their own affairs to the guardian. The person is thus reduced from a subject to an object of the law, their will and actions become legally irrelevant in questions affected by the guardianship order. Under plenary guardianship, the guardian’s control over the person is complete, all decisions are made by the guardian. In partial guardianship, the scope of the guardian’s powers is limited, but within the specified areas he exercises authority similarly to a plenary guardian, which can lead to similar violations of the person’s autonomy. The guardian can be authorized to decide where the adult will live, whom they will associate with, what medical procedures they undergo and what happens to their property. Not surprisingly, guardianship is referred to as “civil death”, \(^{484}\) and persons subject to it as the “legally disappeared”\(^ {485}\).

Chapter 2 described in detail how legal capacity has become an internationally protected legal right. After appearing in UN instruments such as the Convention on the Elimination of

\(^{484}\) Lawson, *supra* note 477, at 469.


To recapitulate from Chapter 2, in the decisions of the European Court, legal capacity as an internationally protected human right is concerned with three types of violations. The first relates to the procedure on the limitation of legal capacity. Lack of effective participation in the court procedure, inability to appeal the decision, lack of access to counsel, the type and insufficient quality of expert testimonies are issues the Court has held to constitute a violation of Article 6 of the European Convention, the right to a fair trial.\footnote{Keys, supra note 477; Matter v. Slovakia, no. 31534/96 (Eur. Ct. Hum. Rts., July 5, 1999); H.F. v. Slovakia, no. 54797/00 (Eur. Ct. Hum. Rts., November 8, 2005); Berková v. Slovakia, no. 67149/01 (Eur. Ct. Hum. Rts., March 24, 2009).}

The other group involves situations when the victim cannot exercise a fundamental right because of the limitation of his or her legal capacity. Examples include Kiss v. Hungary, where the applicant was not allowed to vote as a result of his placement under guardianship,\footnote{Kiss v. Hungary, no. 38832/06 (Eur. Ct. Hum. Rts., May 20, 2010)}
Croatia, where the applicant was excluded from the proceedings concerning the adoption of her child;\(^{491}\) and Sýkora \textit{v. the Czech Republic}, where he was hospitalized against his will without any court review of his detention on the basis of the consent of his guardian.\(^{492}\)

The third type of violations goes to the core of what guardianship is about: the limitation of the person’s ability to make decisions in general. The European Court held in 2006 that this constitutes a serious interference with the person’s right to private life under Article 8 of the European Convention.\(^{493}\) In 2008, in Shtukaturov \textit{v. Russia}, it found a violation of that right because of the deprivation of the applicant’s legal capacity.\(^{494}\) The mere placement under guardianship, if unjustified, can constitute a human rights violation regardless of whether it affects other protected rights.

Two conclusions can be drawn from the above discussion for the purposes of this chapter, to analyze the meaning of Article 12 of the CRPD: first, despite its importance, both in terms of the number of persons affected and the severity of the violations, legal capacity of persons with disabilities has been recognized a serious human rights issue only relatively recently. This is entirely consistent with other human rights violations specific to persons with disabilities: as Stein notes, under general human rights instruments, the issues of persons with disabilities were ignored, they did not enjoy actual human rights protection.\(^{495}\) The CRPD aims at overcoming the

\(^{492}\) Sýkora \textit{v. the Czech Republic}, supra note 468.
\(^{494}\) Shtukaturov \textit{v. Russia}, supra note 486.
\(^{495}\) Michael Stein, \textit{Disability Human Rights}, 95 Cal. L. Rev. 75, 82 (2007), noting that persons with disabilities do not receive specific protection under human rights treaties apart from an article of the
invisibility of disability in human rights treaties. Specifically, Article 12 of the CRPD should be seen as a reaction to the ignorance of mainstream human rights standards about legal capacity issues.

The other issue to be noted is what exactly the CRPD is reacting to. The above description of human rights violations constitutes a certain narrative of what guardianship as a human rights violation entails. The typical victim is a relatively capable person, who is unjustly restricted by a court order, and is legally prohibited from making certain decisions when in fact she would functionally be able to make them. The other type of scenario, involving a person clearly unable to make decisions on her own, who is denied the support to make them, is invisible in the international jurisprudence for obvious reasons: these persons would find it particularly hard to seek legal assistance and turn to international bodies. There is no substantive discussion by human rights tribunals of their experience, and the human rights implications and solutions of the problems these are raising.

International bodies are not the only ones shaping narratives, stories of victimization can reach the public through other means as well. However, the lack of attention on these fora to one side of the problem affects the understanding of the issue by other human rights bodies, and the richness of the various solutions and alternatives developed. As the next part will show, the importance of this experience affected the interpretation of the CRPD by all sides of the debate.

Convention on the Rights of the Child, which does not consider children with disabilities equal to non-disabled children.
C. Article 12 of the CRPD and the conflicting views on its meaning

Article 12 of the CRPD aims to overcome the inability of existing human rights instruments to protect persons with disabilities from the violation of their right to legal capacity. Its clause 1 guarantees the “right to recognition everywhere as persons before the law”, or the capacity to have rights, the passive aspect of legal capacity.\footnote{Article 12.1 of the CRPD, \textit{supra} note 473.} This causes little controversy: the denial of legal personhood on the basis of disability would be hard to justify in the current world. The views of the Committee on the Rights of Persons with Disabilities have so far dealt with Article 12.1 only once, with regard to the lack of identity cards in Peru.\footnote{Concluding observations prepared by the Committee on the Rights of Persons with Disabilities with regard to Peru, CRPD/C/PTE/CO/1, 20 April 2012, §§ 22-23.}

Article 12(2), however, is much more ambiguous. It requires States Parties to “recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”.\footnote{Article 12.1 of the CRPD, \textit{supra} note 473.} Its plain reading forbids discrimination on the basis of disability in the exercise of legal capacity, a common practice around the world. It is, however, unclear whether this prohibits all differential treatments, including those based on objective and reasonable criteria, a question addressed below. Guardianship, a measure limiting legal capacity, has been developed precisely to apply only to persons with disabilities.\footnote{Kees Blankman, \textit{Guardianship Models in the Netherlands and Western Europe}, 20 International Journal of Law and Psychiatry 47 (1997).} It is thus hardly compatible with the notion of enjoying legal capacity “on an equal basis with others”, if the prohibition of discrimination excludes all disability-specific differential treatment.

\footnote{Article 12.1 of the CRPD, \textit{supra} note 473.}
Article 12(3) posits what guardianship and other measures limiting legal capacity have to be replaced with. It requires states “to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. Article 12(2) and (3) together mark a paradigm shift in understanding legal capacity: measures of substituted decision-making, such as guardianship, which limit legal capacity, are forbidden, and have to be replaced by solutions based on supported decision-making.

This shift is no doubt a major breakthrough in international law for persons with disabilities. Many of the practices described previously now constitute impermissible human rights violations under Article 12, and the CRPD goes beyond the issues so far considered by the European Court of Human Rights. However, it is not at all clear how far exactly the wording of Article 12 extends. Largely two, conflicting views have emerged in the legal literature about its limits, which differ mainly in the question of how it applies to persons with the most severe disabilities. To some extent they overlap with the two positions on the legal capacity of persons with severe disabilities, Support Only and Some Guardianship, described in the previous chapter. However, because the purpose of the present analysis is different, this chapter will use different names to characterize the conflicting viewpoints on the meaning of Article 12.

1. The Absolutist Position and the Constricted Position

The first position, named Absolutist in this chapter, rests on a literal reading of Article 12 that prohibits any differential treatment on the basis of disability. Its proponents argue that the CRPD

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500 Article 12.3 of the CRPD, supra note 473.
achieved the goal of outlawing all legal capacity limitations.\textsuperscript{501} According to this view, since the wording of Article 12(2) does not provide for exceptions, it applies to all persons with disabilities, not a specific subset of them, such as persons capable enough to make their own decisions. There certainly are individuals who cannot exercise their legal capacity in the traditional sense; they have to be accommodated under Article 12(3). The state, under this reading, is obliged to support the decision-making of persons with even the most severe disability, and is not allowed to resort to measures of substituted decision-making in their case.\textsuperscript{502}

The main protagonists of the Absolutist Position are disability rights advocates who participated in the drafting of the CRPD.\textsuperscript{503} It, however, is also condoned by academics,\textsuperscript{504} and was adopted by the Office of the High Commissioner for Human Rights of the United Nations\textsuperscript{505} and the Council of Europe’s Commissioner for Human Rights,\textsuperscript{506} it thus certainly cannot be considered a marginal one. Importantly, the Committee on the Rights of Persons with Disabilities’ recent

\textsuperscript{501} Minkowitz, \textit{supra} note at 478, at 408-411.
\textsuperscript{502} \textit{Id.}
\textsuperscript{504} Minkowitz, \textit{supra} note 478; Dhanda, \textit{supra} note 479; Santos Cifuentes and 30 other legal scholars, Legal Opinion on Article 12 of the CRPD, 4-5 (June 21, 2008).
General Comment on Article 12 seems to support the Absolutist Position, by formally rejecting all substituted decision-making.\textsuperscript{507}

The other view, named Constricted Position for the purposes of this analysis, takes a narrower reading of the CRPD. It recognizes that Article 12 requires the replacement of substituted decision-making by supported decision-making. However, it denies that this would apply to all decisions of all persons with disabilities.\textsuperscript{508} The proponents of the Constricted Position argue for using substituted decision-making for exceptional situations, at least for some persons, and at least for some decisions.\textsuperscript{509} The remaining guardianship laws should be improved, even renamed, but nevertheless retained.\textsuperscript{510} The protagonists of this view mainly consist of academics.\textsuperscript{511}

A third group of commentators fall in between the two positions in that they do not take sides in this debate. They highlight the difficulty in interpreting Article 12 but they do not formulate a position on whether it permits exceptions.\textsuperscript{512}

\textsuperscript{507} UN Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) – Article 12: Equal recognition before the law, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/1, § 17 (19 May 2014).


\textsuperscript{509} Id.

\textsuperscript{510} See the discussion of “facilitated decision-making” in Mental Disability Advocacy Center (MDAC), Legal Capacity in Europe, 28 (October 2013).


\textsuperscript{512} Robert D. Dinerstein, Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-
2. Strong and weak points

In order to find a common ground among the two positions presented above, we have to understand their strong and weak sides. There are good arguments on both sides, used by persons taking the rights of persons with disabilities seriously. They can be divided to three categories.

2.1 Support to persons with severe disabilities

The Absolutist Position’s weak point is the Constricted Position’s strong one: it is hard to imagine how persons with very high support needs might do without some form of substituted decision-making. It is true that the CRPD requires that all persons with disabilities have access to the support they require to make decisions, but what does this mean in the case of a person with severe intellectual disability whose parents just died and now has to decide whether she wants to live in her home or move to a group home? Or has to make a decision about a non-life saving psychiatric treatment? There is no doubt that persons in these situations have been abused in the past due to faulty guardianship laws. That, however, does not mean that others could not genuinely be in a situation where they simply cannot communicate a decision, even with the highest possible level of support available.

Proponents of the Absolutist Position have so far not developed a comprehensive theory of how legislation based only on supported decision-making would solve these difficult situations. Relying on the CRPD and claiming that it requires supporting everybody is one thing; explaining what obligations for governments exactly follow from this is another. Unless a credible and workable suggestion is proposed, governments are very unlikely to leave all substituted decision-making behind, because it would require them to do the impossible.

The Absolutist Position seems to be concerned mostly with the restrictions of legal capacity, with legal limitations on decision-making ability. However, some persons’ impairment is so severe, that they are unable to make decisions if they are simply left to their own devices, regardless of any legal limitations. Their incapacity is not simply a societal restriction imposed upon them, unlike in the situations dealt with by the European Court considered in the previous part of this chapter. It is a result of the interaction between their impairment and the societal framework. Failing to ensure that important decisions about their care and management of their property are made can be a violation of their rights under Article 12. The proponents of the Absolutist Position, however, have so far not explained how these decisions would be made if not in a substituted way.

2.2 The nature of exceptions

The Constricted Position acknowledges the impossibility of eliminating all substituted decisions, and accepts that they must be retained in some form. However, it fails to show how it could be ensured that in practice they are applied only exceptionally. This is not simply a matter of fine-
tuning that could be achieved through individual litigation. Producing inflated numbers of persons unduly restricted in their legal capacity seems to be an inherent feature of guardianship law. The available statistics show that in countries where plenary guardianship is an option, it is used in alarming rates: of all placements under guardianship, plenary guardianships constituted 57% in Hungary, 59% in Moldova, 82% in the Czech Republic and 89% in Bulgaria and Croatia according to one study. Commentators note a similar tendency of the overuse of plenary guardianship in the US as well.

The reason why guardianship has become a major human rights issue is that a large number of persons’ legal capacity has been unduly restricted. The causes of this problem are manifold, including a prejudiced view of the ability of persons with some disabilities to make decisions on their own behalf. This was reflected also in mainstream international law, which was unable to protect persons with disabilities from encroachments on their legal capacity. The CRPD aims to overcome existing prejudices about the incapacity of persons with disabilities, this was one of the main motives for its adoption.

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513 Mental Disability Advocacy Center (MDAC), supra note 508, at 24.
515 Paul S. Appelbaum, “I Vote, I Count”: Mental Disability and the Right to Vote, 51 Psychiatric Services 849, 850 (2000) (“It seems likely that popular attitudes towards the mentally disabled—seeing them as intrinsically irrational and incapable of participating in civil functions—play an important role.”); Jason H. Karlawish & Richard J. Bonnie, Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Democratic Nations, 38 McGeorge L. Rev. 879, 884 (2007) (noting that traditional explanations claiming that certain persons should be excluded from voting because their intellectual disabilities are incompatible with making informed and rational choices are increasingly regarded as discriminatory); Dhanda, supra note 479, at 462.
Another, more technical problem with ensuring that exceptional solutions apply only to exceptional cases is that law’s ability to define the exception is in this case quite limited. Guardianship essentially requires the prediction of a person’s decision-making ability in a future situation. It is a very individualized exercise, because the abilities of individuals vary depending on many factors, such as education, experience, access to and the nature of support, and others.\textsuperscript{516} This makes comparing cases and providing guidelines difficult. No wonder decision-making often turns to the only hard data available, the nature and severity of the disability. This overvalues psychiatric and psychological expertise, and leads to a semi-automatic placement under guardianship of persons with more serious disabilities.\textsuperscript{517}

The argument here is not to deny a certain correlation between the severity of the disability and the ability to make decisions, but rather that this correlation is far from absolute. Also, more importantly, it is difficult for any legal provision to specify in exact terms who is in the category of persons for whom substituted decision-making is acceptable.\textsuperscript{518} Emphasizing the exceptionality of the measure is not enough: in many legal systems it is already emphasized, judges are acting with the mind that they are applying guardianship only when strictly necessary for the benefit of the person under guardianship, yet they produce an inflated number of incapacitations.\textsuperscript{519}

\textsuperscript{516} Mental Disability Advocacy Center (MDAC), A kizáró gondnokság kérdése az új Ptk.-ban [The question of plenary guardianship in the new Civil Code], March 31, 2008, 1.
\textsuperscript{517} Id.
\textsuperscript{518} Balch Hurme & Paul S. Appelbaum, Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters, 38 McGeorge L. Rev. 931, 962 (2007) (“There is no scientifically determinable point on that spectrum at which we can say the person manifests sufficient capacity for the task.”).
\textsuperscript{519} Mental Disability Advocacy Center (MDAC), supra note 508, at 24.
The Constricted Position relies on the assumption that it is possible to restrict the use of substituted decision-making to exceptional situations. However, no wording of such a rule under the CRPD has been proposed so far. In the absence of a workable solution, the fear that the exception becomes the rule does not seem to be unfounded. This is exactly the situation currently,\textsuperscript{520} which the CRPD aims to overcome, not conserve.

2.3 The CPRD’s text

The Absolutist Position’s strong side is that it is more in line with the CRPD’s text. Indeed, Article 12 does not provide for explicit exceptions to the prohibition of substituted decision-making, which seems to be a main weakness of the Constricted Position. However, this issue is not decisive of the whole debate.

In the history of international law, several seemingly all-inclusive provisions were interpreted to exclude persons with disabilities from the enjoyment of certain rights. The right to vote is a good example.\textsuperscript{521} While the text of human rights treaties contained no specific exclusion on the grounds of disability,\textsuperscript{522} some form of lack of capacity to vote has become an accepted ground for disenfranchisement through interpretation.\textsuperscript{523} The right to liberty, which had no disability-specific exception in the International Covenant on Civil and Political Rights, was later similarly interpreted to permit the detention of persons perceived to be in need of psychiatric treatment.

\textsuperscript{520} Id.
\textsuperscript{522} Id., at 75.
\textsuperscript{523} Id., at 76.
against their will.\textsuperscript{524} While the European Convention on Human Rights expressly permitted the detention of “persons of unsound mind”;\textsuperscript{525} this was later expanded to cover not only persons in need of psychiatric treatment, but also persons dependent on social care.\textsuperscript{526} Even torture has not been immune to an exception on the grounds of disability.\textsuperscript{527} In its famous judgment of \textit{Herczegfalvy v. Austria}, the European Court of Human Rights held that a measure which would otherwise violate Article 3 of the European Convention can be justified if a “medical necessity” exists; that is, if a psychiatrist decides that a person should be strapped to a bed for weeks, it is acceptable.\textsuperscript{528}

This chapter does not argue that Article 12 should be construed to allow limitations of legal capacity for some persons with disabilities or for some decisions. Rather, the point is that this is possible. The text is not explicit enough to prevent this. If the Committee on the Rights of Persons with Disabilities, the main body interpreting the CPRD, wished to depart from an absolute prohibition of differential treatment under Article 12 by formulating exceptions based on reasonable and objective criteria, it can do so.\textsuperscript{529} The recently released General Comment on Article 12 shows that the Committee’s position is still ambiguous: it rejects all forms of

\textsuperscript{524} See UN Human Rights Committee, General comment No. 35 (2014) - Article 9 (Liberty and security of person), CCPR/C/GC/35, December 16, 2014, § 19.


\textsuperscript{529} Theresia Degener, Challenges and Compliance of the UN CRPD, (to be published as a Working Paper of the Academy of European Law), 4 (March 2013).
substituted decision-making and endorses support, but it does not state what follows from this for persons who are unable to make decisions with support.  

In fact, it is inevitable to read some exceptions into the CRPD. Its text seemingly prohibits all discrimination based on disability. If this was understood to preclude all differential treatment based on disability, it would lead to unreasonable results. For example, it would be hard to argue that a person with total loss of vision should be given a driver’s license under the CRPD and allowed to work as a taxi driver. The CRPD’s text does not contain the exception of genuine occupational requirements, known from other texts on disability. Nevertheless, an interpretation insisting on blind taxi drivers would be hard to sustain, because it would be impossible to implement, and therefore considered unreasonable by the States Parties to the CRPD.

If differential treatment on the basis of disability in some instances can be justified, and the CRPD does not specify what could be accepted as a justification, exceptions will have to be construed through interpretation. A starting point can be using analogies from other human rights treaties. In the UN system, the prohibition on discrimination establishes a presumption of equal treatment, which can be overruled by measures based on objective and reasonable criteria.

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531 Article 5 of the CRPD, supra note 473.

following a legitimate aim. A reading which applied these criteria to the CRPD is implausible for one reason: it would justify violations of rights of persons with disabilities that the CRPD was adopted to overcome, not conserve. Differential treatment of persons with disabilities has been subject to scrutiny under existing human rights treaties using objective and reasonable criteria, and these have not been able to overcome the massive violations of disabled people’s rights. According to the official fiction, the CRPD did not create new rights for persons with disabilities, it only specified existing rights for them, because these have been inadequately protected under existing instruments. It follows that the criteria of the existing treaties cannot be used to justify differential treatment on the basis of disability under the CRPD, at least not in the same way, not to produce the same outcomes. Some heightened form of justification is required, but also not an absolute form of equality, as explained above. What exactly is meant by “on an equal basis with others” is therefore not clear from the text.

No doubt there are good reasons for not specifying exceptions to equal treatment in the CRPD’s text. Highlighting them might have invited increased reliance on them by States Parties, subjecting all disability discrimination to individual justifications. Whether this approach is the most effective in preventing abuse will be shown by future practice. This, however, does not mean that there are no exceptions to the prohibition of differential treatment. Once the CRPD Committee will face them, it will have to specify their criteria to curtail them as much as possible.

534 Stein, supra note 493, at 82.
The Committee has so far had a very consistent position which rejected all substitute decision-making measures.\textsuperscript{536} It ordered governments to replace, not to modify their guardianship systems.\textsuperscript{537} Its General Comment on Article 12 formally rejects all forms of substituted decision-making.\textsuperscript{538} This, however, can change as the composition of the Committee changes, and as it will be faced with more difficult issues of countries that did their best to comply with Article 12, but could not. As one member of the Committee noted, the Committee so far did not decide on the question whether there ever is an exception from the prohibition of substituted decision-making.\textsuperscript{539} The question is thus not settled, not by the text of the CRPD.

3. Common ground

What the above two positions share is both the necessity and the inability to address the situation of persons with high support needs. The Absolutist Position requires that persons with severe disabilities utilize a support framework, but its proponents have so far been unable to explain how this works or what obligations follow from it. This approach potentially harms persons with high support needs: if substitute decisions are prohibited, some of their decisions will not be made because these persons will not be accommodated in a support framework.

\textsuperscript{536}See the CRPD Committee’s Concluding Observations on Austria, \textit{supra} note 480, § 28, Hungary, \textit{supra} note 480, § 26), Peru, \textit{supra} note 480, § 25, Spain, \textit{supra} note 480, § 34, China, \textit{supra} note 480, § 22.

\textsuperscript{537}\textit{Id.}

\textsuperscript{538}UN Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) – Article 12: Equal recognition before the law, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/1, § 17 (19 May 2014).

\textsuperscript{539}Degener, \textit{supra} note 527, at 4.
The Constricted position has a solution for them. However, it cannot ensure that substituted decisions are utilized only in their case, that they are applied only in exceptional situations of genuine inability to reach a supported decision. This has the potential of harming a large number of persons with disabilities who are able to utilize supports, and who will be denied support because they will be subjected to substituted decision-making.

The previous chapter provided a possible solution to these seemingly insurmountable problems. The goal of this chapter is to find an interpretation of Article 12 for which answering these questions is not necessary. With that in mind, the next part will take a closer look at the text of the CRPD.

**D. The text of Article 12 – and its implications**

The two positions described above are both concerned with the interpretation of the CRPD; they deduce normative conclusions about legal capacity reform from the text of Article 12. They rely on the traditional canons of interpretation found in the Vienna Convention on the Law of Treaties from 1969 (hereinafter VCLT). This part will undertake a more detailed analysis of the text to ascertain which of these conclusions are justified.

The CRPD is an international treaty, which is fully subject to the rules of interpretation of treaties listed in Section 3 of the VCLT.\(^{540}\) However, these rules do not fully determine the

outcome. They have to be respected, but within the limits set by them the interpreter can choose various methods of interpretation, which lead to different results.\textsuperscript{541} The aim of this part is therefore not to provide the “correct” or preferred interpretation of Article 12, because more results contradicting each other are possible that are fully compliant with the VCLT’s requirements. Rather, it will assess to what extent the text limits our understanding of legal capacity reform, whether any alternatives can be excluded.

In its method, this part will go above the VCLT, and rely on the specific nature of the CRPD as a human rights treaty. Neuman identifies three aspects specific to human rights treaties that create a useful framework for understanding and interpreting them: the consensual, the supra-positive, and the institutional aspect.\textsuperscript{542} These will structure the following analysis.

\section{The consensual aspect}

The consensual aspect reflects the fact that human rights norms are adopted by the mutual agreement of all parties, and can be interpreted through their subsequent mutual agreements and practice.\textsuperscript{543}


\textsuperscript{543} Id., at 1867.
Concerning the text that the parties agreed to, the general rule of treaty interpretation according to Article 31(1) VCLT is to give the treaty’s terms their ordinary meaning in their context and in the light of the treaty’s object and purpose. This does not seem to settle the difficult questions identified above. There is no “ordinary meaning” to how enjoyment of legal capacity “on an equal basis with others” applies to persons with high support needs under Article 12(2) CRPD. The different positions agree that they exercise their capacity differently than others, either with high levels of support or with substitution. Currently all domestic guardianship systems permit substituted decision-making. The CRPD aims to overcome outdated guardianship regimes, but it is not at all certain what it wants to replace them with. However the content of “equal basis for exercising legal capacity” will be defined, it will not be deduced from the ordinary meaning of the term, as that is too ambiguous.

Article 32 of the VCLT lists the preparatory works of the treaty among the supplementary means of interpretation, to be used in the case of ambiguous or obscure meaning. Article 12 has been one of the most controversial issues of the CRPD’s drafting process, referenced a number of times in the travaux. However, the sources do not make it clear what the parties agreed on. Quite the contrary, it seems that leaving the terms of Article 12 ambiguous was a necessary part of the consensus. A number of delegations proposed that the CRPD expressly permits guardianship, while others wished to expressly prohibit it. The compromise was found in a text which does neither.

545 Dhanda, supra note 479.
546 Id.
547 Id.
A specific issue related to the drafting phase is footnote 12, inserted in the draft text of the CRPD in August 2006 by the drafting committee.\textsuperscript{548} It specified that in the Arabic, Chinese and Russian translations of Article 12(2), “legal capacity” should only refer to capacity to have rights, not capacity to exercise rights.\textsuperscript{549} This would have left the question of guardianship and other forms of limitations of active legal capacity outside the scope of the provision. The footnote was eventually deleted after intense debate,\textsuperscript{550} which shows that States Parties were aware that the CRPD will have an impact on their guardianship systems.

The VCLT recognizes the instruments of ratifications by the parties as sources about the context for the purpose of the interpretation of the treaty.\textsuperscript{551} A number of States Parties addressed Article 12 in reservations or interpretative declarations when ratifying the CRPD, with the aim of retaining their domestic laws based on substituted decision-making.\textsuperscript{552} A country making a reservation wishes not be bound by a specific provision.\textsuperscript{553} This seems to suggest that the States Party making the reservation considers Article 12 to forbid substituted decision-making. On the contrary, the interpretative declarations express that the State Parties consider Article 12 not to prohibit substituted decision-making.\textsuperscript{554} The States Parties’ understanding of the provision are

\begin{footnotesize}
\begin{enumerate}
  \item Trömel, \textit{supra} note 501, at 127.
  \item Lawson, \textit{supra} note 477.
  \item \textit{Id.}
  \item Canada, Singapore, Australia, Egypt, Estonia, Kuwait, and Norway; see the list of declarations and reservations at \url{https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&language=en} (last visited February 1, 2014).
  \item See the reservation of Canada and Singapore to Article 12 at \textit{supra} note 550.
  \item See the declarations of Australia, Egypt, Estonia, Kuwait, Norway to Article 12 of the CRPD, and France’s declaration to Article 29 of the CRPD which implies that Article 12 permits limitations of legal capacity at \textit{supra} note 550.
\end{enumerate}
\end{footnotesize}
thus varied, we cannot deduce a common understanding about the legal capacity of persons with high support needs from it.

There is thus no clear consensus concerning the exact meaning of the provision. However, there is some common denominator among the two Positions and the States Parties’ understandings. All share the view that the CRPD protects all persons with disabilities from violations of their right to legal capacity. The aim is to maximize their autonomy and minimize arbitrary interferences with their decision-making. An approach which brings the CRPD the closest to this aim through interpretation and implementation would satisfy all involved.

There is so far no subsequent agreement between the States Parties about the implementation of Article 12. There is, however, a manifest tension between the principles expressed in the CRPD and the practice of domestic states. While the former requires maximizing autonomy, current guardianship regimes blatantly violate it. No States Party to the CRPD currently complies with Article 12. Many are very far from it.

This is not surprising, given that the purpose of human rights treaties generally, and specifically that of the CRPD, is to reform restrictive domestic legislation.\footnote{Neuman, \textit{supra} note 540, at 1866.} However, if the influence between human rights and domestic norms is mutual, this blatant and widespread non-compliance must have some relevance for constructing the meaning of the CRPD. The situation would simply be different if the majority, or at least some States Parties already managed to create a legal capacity regime based solely on supported decision-making.
Since that is not the case, the implementation process has to adapt to this reality. An interpretation which all states of the world would find impossible to implement would no doubt be rejected by them, and would have little impact in changing domestic practices. It could lead to an explicit subsequent understanding rejecting the complete abolishment of guardianship.

2. The suprapositive aspect

The suprapositive aspect relates to the fact that human rights norms derive legitimacy not only from their text, but also from non-legal principles superior to their embodiment in positive law.\textsuperscript{556} These principles can have various sources, and the fact that States Parties agreed to a certain text does not necessarily mean that they also accepted the suprapositive principle on which it rests.\textsuperscript{557} Indeed, State Parties to the CRPD represent various cultures with different religious and moral systems with potentially very different understandings of disability, therefore it can be very contentious to establish a unified understanding of the CRPD’s superior principles.

The text, however, serves as a useful starting point. The preamble stresses the importance of individual ability and independence, including the freedom to make their own choices, for persons with disabilities.\textsuperscript{558} The same is repeated in Article 3(a), among the General Principles, together with full and effective participation and inclusion in society.\textsuperscript{559} Article 1 states that the

\begin{itemize}
  \item \textsuperscript{556} Id., at 1868.
  \item \textsuperscript{557} Id., at 1873.
  \item \textsuperscript{558} Preamble, Article n) of the CRPD, supra note 573.
  \item \textsuperscript{559} Article 3(c) of the CRPD, supra note 573.
\end{itemize}
CRPD’s purpose is the full and equal enjoyment of all human rights by all persons with disabilities.

These provisions signify that the question of decision-making and legal capacity is an important part of the treaty, and that the drafters wanted to overcome the current exclusionary practices. This, however, does not make it clear how they wanted to overcome them. It cannot be taken as an automatic endorsement of the Absolutist Position. The Constricted Position’s main line of reasoning is not that persons with high support needs should not be included in society or that they should not benefit from the right to legal capacity. Rather, the argument is that preventing them from accessing substituted decisions harms them, as they are unable to make all their necessary decisions with support. To prove this claim wrong one would have to show that its factual basis is incorrect, which has not yet taken place, as described in the previous Part. Seen in this light, the Constricted Position fulfills the purpose of the treaty, while the Absolutist Position frustrates it, since it would allow persons with high support needs to enjoy some of their rights only in a way which they are unable to make use of.

The contradictory claims on which the two positions are based cannot be resolved by reliance on the CRPD’s purpose, because they are factual in nature. Arguing for one position based on the purpose leads to circular argumentation. It inherently entails claims about how the purpose should be achieved, which leads to specifying the purpose itself beyond that expressed in the text. Ascertaining the object of a treaty is not a mechanical task, it is itself an interpretative question and an exercise of value judgment, as explained by Letsas. Proponents of the two

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560 Letsas, supra note 539, at 533.
Positions fall to this trap of implying their preferred means into the interpretation of the treaty’s aim.

There is no doubt that as the CRPD’s interpretation develops, and its provisions will become more specific, the understanding of its object and purpose will evolve as well. However, the direction of this evolution in the case of Article 12 is not determined by the current understanding of the treaty’s purpose.

Nevertheless, the suprapositive principles are a very useful source of inspiration for proponents of the abolishment of all substituted decision-making. The dignity of persons with disability, their equality and full participation in society, including the right to make their own decisions, could be recognized as the maxims on which Article 12 rests, and which States Parties accepted by ratification. Although they do not prescribe how Article 12 should be implemented, it is not too difficult to point out how any particular substituted decision-making regime violates the autonomy of at least some persons with disabilities. Reliance on the CRPD’s norms therefore allows the Committee on the Rights of Persons with Disabilities, if it wishes to do so, to push for further reforms until guardianship is completely eliminated.

3. The institutional aspect

The institutional aspect refers to the effectiveness of oversight of compliance with human rights norms by human rights bodies.\textsuperscript{561} In the case of the CRPD, the Committee on the Rights of

\textsuperscript{561} Neuman, \textit{supra} note 540, at 1869.
Persons with Disabilities is the body entrusted with interpreting and enforcing the CRPD. Its powers, resources, authority and the methods of ensuring compliance it chooses will all have an impact on its success in resolving the tensions between the international and domestic norms through the treaty’s implementation.

The Committee can approach the difference in understanding of Article 12 by itself and the States Parties in two basic ways. It either accepts the states’ claims about the impossibility of providing supported decision-making for all, and interprets Article 12 to allow for retaining substitution in exceptional situations. Or, the Committee can convince the states that the specific requirements it formulates under Article 12 are reasonable and possible to implement, and indeed should be implemented. In any case, the Committee cannot simply unilaterally decide how the CRPD should be understood. The States Parties’ opinion on what can be implemented and how matters. Implementation itself is a dialogue, and the Committee needs to be strategic to achieve the result it considers optimal. The periodic reviews, individual communications and general comments are tools in the Committee’s hand to convince the States Parties to follow its opinion.

If the Committee’s views would be unconvincing, the states have several options at their disposal to challenge them. They can over time influence the Committee’s composition to change it to

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562 See, for example, the German and the Danish governments’ position on the Committee’s draft general comment on article 12: German Statement on the Draft General Comment on Article 12 CRPD, Federal Republic of Germany, February 20, 2014; Response from the Government of Denmark with regards to Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law, Ministry of Children, Gender Equality, Integration and Social Affairs, February 20, 2014.

one more receptive to their views. They can pressure the Committee by reaching mutual agreements in the yearly Conference of States Parties about substantive issues relating to the CRPD departing from the Committee’s views. Moreover, they can resort to simple willful non-compliance. It is not unheard of for even better-established bodies, such as the European Court of Human Rights, to change their opinion on substantive matters after a credible threat of non-implementation even from a single member state. It would be hard to imagine that in the face of general non-compliance with certain of its views the CRPD Committee would not seem wise to revise them.

The CRPD Committee has so far not given an explicit answer to the question whether there are any exceptional circumstances permitting substituted decision-making under Article 12. Its published concluding observations and General Comment on Article 12 so far consistently require the abolition of guardianship and introduction of supported decision-making, without specifying what this means for persons with high support needs. The situation will get more complicated once the dialogue enters the difficult areas, when states already undertaking guardianship reform will get reviewed, or individual applicants testing the edges of Article 12 will apply to the Committee.

564 Article 40 of the CRPD, supra note 473.
566 See the CRPD Committee’s Concluding Observations on Austria, supra note 480, § 28, Hungary, supra note 480, § 26), Peru, supra note 480, § 25, Spain, supra note 480, § 34, China, supra note 480, § 22.
The institutional aspect highlights that the Committee needs to choose its position carefully to convince states about the best possible way to implement the CRPD. It needs to formulate rules that are possible to implement by States Parties.\textsuperscript{568} The replacement of substitution with supported decision-making will be a gradual process, with an unclear end, and the process itself can determine which end result remains achievable and which will be off limits. Setting the precise norms detailing the obligations following from Article 12 can therefore be a crucial undertaking in determining how the interpretation of the article will develop.

To achieve the above-mentioned goal of maximizing the autonomy of persons with disabilities, Article 12 has to be interpreted in a way that has the biggest impact on domestic norms. That is likely not the position which is the furthest removed from them. As the national norms change, the meaning of the human rights norm can change as well, therefore in time it can evolve to a more progressive substantive position. However, this evolution takes place on both levels. Setting the end goal as the starting interpretation of the human rights norm and expecting the domestic norms to gradually achieve compliance with it ignores their interdependence, the fact that their influence is two-directional.

4. A new framework for the debate

The above discussion shows that the tension between the Absolutist Position and the Constricted Position cannot be resolved simply by interpreting the CRPD’s text. Both comply with the

\textsuperscript{568} Neuman, \textit{supra} note 540, at 1871.
CRPD according to the traditional canons of interpretations. The text is not explicit enough to exclude one of the positions. Both share the aim of maximizing the decision-making autonomy of persons with disabilities. They differ on how this aim should be achieved and who can be potentially harmed by this result, but the text does not settle this dispute.

The CRPD is, however, not an ordinary legal text. It is a human rights treaty with some specific properties. Analyzing its consensual, suprapositive and institutional aspects shows that the identified aim of maximizing autonomy will clash with Member States’ unwillingness and inability to implement obligations requiring them to provide supported decision-making to all persons with disabilities. What is the best possible outcome for the interpretation of Article 12 and how it can be reached becomes the same question, to be resolved by the Committee on the Rights of Persons with Disabilities in dialogue with states. The next part will propose a solution to both.

E. The social model’s application to the issue of legal capacity

The previous part showed that while the aim of the CRPD is maximizing the autonomy of persons with disabilities, a goal which both the Absolutist Position of the Constricted Position share, the text of Article 12 does not strictly commit to either goal. To find an alternative way of reaching the same goal which does not depend on settling the factual claims inherent in these positions, this chapter first looks more in detail into the obstacles to autonomous decision-making of persons with disabilities and how they could be overcome in general. These findings will then be applied to the institutional context of the CRPD.
1. The social model of legal capacity restrictions

At first sight, the obstacles to autonomous decision-making seem obvious. Guardianship laws prohibit many persons from exercising their legal capacity. Human rights decisions and studies cited in Chapter 2 serve as examples that this is a real concern and a widespread issue. Moreover, some persons cannot make decisions without assistance. Restrictive laws and lack of support are thus the two legal barriers that Article 12 should overcome.

However, the problem can also be defined on a more general level. According to the social model of disability, barriers to full participation of persons with disability in all areas of life are a result of the interaction of the impairment and the social environment.\(^{569}\) Law is only one factor in this interaction, it is part of a larger social context.

2. The social context and its impact on decision-making

An important feature of the current social context which relies on substituted decision-making is the widely held belief that persons with disabilities, more specifically persons with intellectual and psycho-social disability, are in general unable to manage their affairs.\(^{570}\) This prejudice seems to be deeply entrenched in our thinking.\(^{571}\) For centuries, these beliefs have manifested in

\(^{569}\) Adam Samaha, What Good is the Social Model of Disability?, 74 U. Chi. L. Rev. 1251 (2007).

\(^{570}\) Dhanda, supra note 479, at 462.

legal institutions which precluded persons with disabilities from making decisions on their own behalf. These laws also had an effect on the beliefs which formed them. Guardianship and other forms of substituted decision-making have existed since Roman times, and shaped societies’ understanding of what people with disabilities are (not) capable of doing.\textsuperscript{572}

Guardianship laws are not alone responsible for the image of the incompetent person with disability; the prejudice is certainly older and much more entrenched than that.\textsuperscript{573} However, law is a factor, perhaps an important one, in the way the prejudice currently manifests itself. This is evident in the examples which show that the abuses of the guardianship system deprive many otherwise capable people of their legal capacity. They are considered incapable of independent life once they were placed under guardianship, even if they had been able to work and live alone before that.\textsuperscript{574} Once these rights are taken away from them, they gradually lose their skills, and guardianship becomes a self-fulfilling prophecy: those deprived of their legal capacity will often indeed become dependent on various forms of assistance.\textsuperscript{575} Guardianship law, often arbitrarily administered, plays a key role in determining who will become the totally incapable, severely disabled person in need of society’s help, and in defining the assistance received.\textsuperscript{576}

The lack of respect to the decision-making ability of persons with disabilities is not reflected only in law, it is widely embedded in society. Family members, medical and legal professionals,

\begin{footnotesize}
\textsuperscript{572} Ildikó Basa, \textit{Gondnokság a római jogban} [Guardianship in Roman Law], 47 Állam- és Jogtudomány 407, 443 (2006); Blankman, \textit{supra} note 497, 48.
\textsuperscript{573} Fiala-Butora & Stein, \textit{supra} note 569, at 3.
\textsuperscript{574} Sýkora \textit{v. the Czech Republic}, \textit{supra} note 486, serves as a clear, and in no way unique, example.
\textsuperscript{576} \textit{Id}. 
\end{footnotesize}
service providers and caregivers of various kinds learn to ignore the wishes of persons with disabilities, and make decisions on their behalf in their own best interests. This is the social context which frustrates the fulfillment of Article 12, and which has to be overcome if the CRPD is to be fully implemented. To change simply the laws, and leave the surrounding restrictive social environment intact, would still prevent persons with disabilities from exercising their legal capacity.

3. Changing the societal context

If law can play a negative influence on societal attitudes, it arguably should also be able to play a positive one. The task of legal reform is then to put in place legal institutions, which instead of promoting the image of incapable persons with disabilities will do the opposite. Obviously, this can be achieved by replacing laws restricting legal capacity by ones which respect it. That is, however, not so simple. Suddenly abolishing existing guardianship laws and replacing them with support could meet the requirements of Article 12 formally, but not in substance.

Established guardianship systems bring with them an institutional culture embedded in various segments of society which do not consider persons with disabilities autonomous. Social workers, medical professionals, the public administration, guardians, family members acting in the current guardianship regimes are working with persons with disabilities as objects of care, rather than subjects with decision-making abilities. Simply abolishing guardianship would not change these attitudes immediately; quite the contrary, they would result in reinventing the repressive institutional culture in a new legal framework. Renaming “guardianship” into “supported
decision-making”, and changing its criteria so that it formally does not restrict legal capacity, is simply not enough.577

To implement Article 12, besides establishing a new general framework, the specific practices in which this institutional culture manifests itself have to be identified and targeted. Legal reform cannot be restricted to changing guardianship laws, but has to affect the way banks deal with their clients and offer loans, doctors talk to patients, child custody is exercised by parents, public administration deals with customers, courts hear witnesses, and many other areas, which currently constitute direct obstacles to persons with disabilities exercising their legal capacity.

4. International law’s role in the reform process

Law cannot in itself change embedded societal structures overnight. That is a much more complex task, requiring a longer period of time and other factors to be present. Therefore legal reform needs to recognize that its role is different than bringing laws into compliance with the wording of the CRPD. With the present societal attitudes to the decision-making abilities of persons with disabilities, no law can achieve compliance with a paradigm based on supported decision-making. Law rather has to establish the structure, create the instruments that allow society to gradually accept and incorporate the notion that persons with disabilities make their own decisions.

577 For a contrary argument, see Michael Bach and Lana Kerzner, A New Paradigm for Protecting Autonomy and the Right to Legal Capacity, Paper prepared for the Law Commission of Ontario, 182 (October 2010).
In the case of Article 12, this means the recognition that legal reform itself cannot create a situation achieving the aims of the CRPD overnight. It is impossible, because it requires major societal changes concerning how the autonomy of persons with disabilities is approached both on the institutional level (judges, social workers, guardians, etc.) and in the wider society. However, law can play a major role in creating such a favorable institutional culture. Therefore states should adopt laws which strengthen the perception and practice of persons with disabilities as autonomous decision-makers.

This means that Article 12, under this framework, does not require a certain static goal to be reached that would comply with either the Absolutist Position or the Constricted Position, or any similar proposal. Rather, its aim is to create a process which transforms the societal understanding of legal capacity and its legal implications to produce more and more autonomous decisions-making situations over time.

This does not simply mean that states have to undertake other activities besides legislative reform, such as awareness-raising and education, to support the implementation and ensure the success of the reforms. This goes without saying, these obligations are already stressed by other provisions of the CRPD.578 Rather, legislative reform itself has to adapt to the social context, and has to target specific exclusionary practices. Once these are overcome, a new social context has arisen, with new obstacles, which requires a new legal response.

578 See Article 8 of the CRPD on Awareness-raising, supra note 473.
The aim of Article 12 can only be achieved in several stages. The obligations following from Article 12 have to adapt to these circumstances; they also need to change over time to require the maximum level of autonomy possible in the circumstances. Requiring too much too soon can have the opposite effect than intended: it can result not in transforming societal barriers, but recreating them in a new legal and institutional framework.  

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This approach does not give an answer to what the ultimate aim of Article 12 is, how persons with high support needs will make their decisions if the above framework is implemented. On the other hand, it will result in a societal context where the decision-making of persons with disabilities will be more accepted as a norm, and the institutional framework will foster rather than suppress independent decision-making. This context will be more conducive to answering the difficult questions than the current one. If they can be answered, it should be at the end of this process rather than at the beginning.

F. The evolutionary implementation of human rights norms

The previous part explained that implementing Article 12 does not require adopting a certain static interpretation of the obligations following from it. Rather, Article 12 should be understood as a process, with obligations changing over time. This gradual implementation resembles the concept of progressive realization, well known in the area of social and economic rights. This

579 What exactly the process would look like depends on the circumstances of each society. For a specific proposal on legal capacity reform in Croatia using the approach described here see: Disability Rights Center, Proposal for implementing Article 12 of the Convention on the Rights of Persons with Disabilities in Croatia, (February 9, 2013).
part will describe how it could be understood in the area of legal capacity, which is considered a civil-political right, not subject to progressive but immediate realization.  

1. Progressive realization of socio-economic rights

Social and economic rights are traditionally subject to progressive realization. That is, they have to be fulfilled over time. The concept was first expressed in Article 2 of the International Covenant on Economic, Social and Cultural Rights. The CRPD also adopted it in its Article 4, applicable to economic and social rights in the Convention, but without listing which these are.

Social-economic rights are in this important respect different from civil-political rights, which are subject to immediate realization. The traditional explanation is that the former entail positive obligations which are resource-intensive. It takes time to build the necessary infrastructure, and it is costly to improve the services for providing social protection, housing or healthcare. Countries with different levels of economic development cannot reasonably be expected to provide the same level of services. They have to be assessed based on their potential resources, and show gradual development over time.

A number of authors have challenged the traditional dichotomy between socio-economic rights and civil-political rights. They showed that these two sets of rights have more in common than it

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582 Id.
seems. As many have pointed out, socio-economic rights, typically associated with positive rights, also contain negative obligations that should be fulfilled immediately.\textsuperscript{583} Positive obligations subject to progressive realizations can be scrutinized by courts in a meaningful way, and court orders can be implemented using innovative type of remedies.\textsuperscript{584} Although differences remain, they mainly stem from the different starting point of institutionalizing these rights on the international level and their development since then, not from fundamental philosophical differences between socio-economic and civil-political rights.

2. **Questioning the immediate realization of civil-political rights**

The debate about the collapse of the dichotomy typically concentrates on how socio-economic rights are similar to civil-political rights.\textsuperscript{585} This would allow them to become justiciable and generally bring their legal protection to the level of civil-political rights, which is more developed. However, this coin has another side: civil-political rights are also similar to the traditional understanding of economic and social rights. More specifically, they also contain positive obligations that are heavily resource-intensive and can be fulfilled only over time.

Recently, international bodies have developed a number of positive obligations under civil-political rights which require the development of costly infrastructure. The prohibition of torture, which is thought of as a quintessential negative right, requires the provision of adequate prison


conditions. The European Court of Human Rights has recently ordered Russia to improve the quality of its prison system in general – if the government implements the decision, its steps will look very similar to what it has to do with regard to socio-economic rights: invest more and more resources over time. Similarly, the right to life can require protection by police forces against crimes committed by third parties; the right to fair trial can entail good quality pro bono legal assistance provided by the state; the right to family life can include therapy and counseling to parents with disabilities; etc. Examples could be found probably under all articles of the European Convention.

The right to legal capacity under the CRPD also requires positive efforts by the state. The infrastructure to provide support to the decision-making of persons with disabilities has to be developed. In many countries this can be a sensitive issue in the times of financial crises, and it no doubt will require a longer period to develop the necessary services of acceptable quality.

Moreover, reforms to implement Article 12 require time for certain of their aspects to take effect because, as explained above, they can be successful only if societal attitudes towards the autonomy of persons with disabilities change. States can and should take steps to speed up this process, but in no case can they achieve this immediately.

586 Fiala-Butora (2013), supra note 525.
It follows that Article 12 has to be implemented gradually, over a longer period of time. The transformation of social norms is time-consuming, and will therefore result in a prolonged period of not full compliance with the goal of Article 12. The fact that Article 12 is not thought of as a socio-economic right does not affect this conclusion at all. Formally it might be subject to immediate realization, but the above circumstances make clear that insisting on this would be demanding the impossible. On the other hand, admitting the importance of the time-factor can result in clearer rules on what they apply to and how.

Just as any other right, the right to legal capacity includes both negative and positive obligations. The former and some of the latter can be realized immediately. Progressive realization should not mean delaying implementation to an unknown future point. States should come up with a clear plan on how they will fulfill Article 12. Only steps which do require time to take effect should be accepted as not taken immediately.

3. **Institutional design**

The CRPD Committee has to face the above difficulties consciously, and advise states about how it is possible to implement the CRPD. Since implementation will take place in subsequent phases, the content of the states’ obligations must change over time. If the Committee required too much too soon, states would be unable to comply. Abolishing guardianship immediately would result in its re-emergence under a different name and in a different form. Therefore, the CRPD Committee must first put in place a new institutional framework based on the autonomy of persons with disabilities. At the beginning, this framework will likely not cover all persons
with disabilities, therefore it has to coexist with guardianship. The new framework must be implemented until it achieves recognition in all relevant segments of society. Once universal recognition is achieved, the infrastructure should be provided to expand the framework through support services to make it available to all persons with disabilities, so that it can gradually phase guardianship out.

Article 12 is considered a civil right, therefore formally it is not subject to progressive realization. However, the Committee has ample opportunities to require implementation in stages without relying on Article 4 of the CRPD. It can recognize its approach only implicitly, and simply change the obligations flowing from Article 12 over time. It could also rely on the experience of courts deciding economic and social rights and experiment with novel remedies and orders that take the time- and resource-requirements into account and allow progress to be supervised efficiently.\textsuperscript{591}

The Committee can also explicitly acknowledge that time is a major factor in implementing Article 12, and differentiate its approach formally from progressive realization. The essence of the framework described here is the change of obligations over time, therefore it could be formally differentiated from progressive realization. A new approach, Evolutionary Implementation, could be developed by the Committee, which would take into account the time needed to implement certain aspects of civil and political rights under the CRPD, breaking with the idea that they can all be fully realized immediately. A \textit{sui generis} concept would also allow the Committee to depart from existing doctrine relating to the progressive realization of socio-

\textsuperscript{591} Roach, \textit{supra} note 582.
economic rights, and make Evolutionary Implementation a more closely scrutinized and successful concept.

Progressive realization is often disliked by advocates because it leads to unclear standards and poor implementation records. Contrary to the clear rules of civil-political rights, it is hard to tell how much education or rehabilitation has to be provided by a certain country at a certain point in time, which makes the supervision of implementation difficult. However, this is not necessarily the fault of progressive realization: the obligations following from socio-economic rights are generally underdeveloped in international human rights law, because they have traditionally received less attention from international tribunals. When rights subject to progressive realization are closely scrutinized, they can be justiciable by domestic or international tribunals and can result in meaningful standards that countries can be supervised to fulfill.

This is no different for legal capacity: it is a new right, with unclear obligations following from it, which states have difficulty understanding and implementing. Only accepting the true nature of these obligations can ensure that the standards developed under the CRPD will result in maximum possible compliance and will bring us as close as possible to realizing the CRPD’s aim. This might sound frustrating to many who would like to see restrictions on legal capacity end immediately, but unfortunately there are no shortcuts to realize the full potential of the CRPD without changing the social environment – which takes time.

592 Sepúlveda, supra note 579, at 312; Roach, supra note 582.
593 Sepúlveda, supra note 579, at 156.
G. Conclusion

This chapter showed that current approaches are failing to provide a convincing interpretation of Article 12. Neither the Absolutist Position, which excludes all substituted decision-making, nor the Constricted Position, which permits some substituted-decisions for exceptional circumstances, can rely authoritatively on the text of Article 12. They both provide a possible interpretation of it, but they cannot exclude the alternative. Deciding among them would require settling the difficult question of how persons with high support needs could be incorporated under Article 12. No workable solution has been proposed so far to deal with this issue.

This difficulty is partly caused by the development of legal capacity as a human right. In its relatively short history, international jurisprudence concerning this issue has concentrated on questions of relatively capable individuals who were unjustly restricted by guardianship laws. The issue of persons with severe disabilities in need of support has not been at the forefront of international litigation, therefore little attention has been given to their concerns.

The CRPD as a human rights treaty has some specific features that help interpret it. Analyzing the consensual, suprapositive and institutional aspects showed that maximizing the decision-making autonomy of all persons with disabilities is the main objective of Article 12. The existing positions share this goal, but in proposing how to reach it they read specific value judgments into the CRPD which are not supported by its text. Both the Absolutist Position and the Constricted Position, if adopted, would unavoidably create situations that would harm some persons with
disabilities, contrary to the goal of the CRPD. Harming a small group of persons might be inevitable and indeed could turn out to be the best possible result, depending on the gravity and nature of the harm. However, the CRPD’s text does not specify who should be harmed and how; that will have to be decided in the future. Views based on authoritatively resolving this question relying on the CRPD’s aim are based on circular argumentation.

This chapter took a different approach, named Evolutionary Implementation. If the goal of the CRPD is to maximize autonomy, then obligations following from it have to be aimed at overcoming the obstacles to autonomy. These obstacles are only partly legal. To a large extent, they are constituted by the societal context and institutional culture unfavorable to the independence of persons with disabilities. These cannot be changed overnight. Legal reform can help changing societal barriers, but time is needed for the changes to take effect.

This means that the implementation of Article 12 has to give up on the idea of immediate realization, the traditional approach to civil-political rights. As societal and legal norms regarding legal capacity have to gradually adapt to each other, the obligations following from the CRPD have to change over time as well in order to influence this process in the right direction. There are several ways at the CRPD Committee’s disposal of how this could be achieved.

There is understandable resistance among many supporters of disability rights against introducing delays to the implementation of Article 12, fuelled by the negative experience with the unsatisfactory implementation of social and economic rights under other human rights instruments. However, the proposed Evolutionary Implementation framework does not have to
possess the flaws of existing progressive realization frameworks. Recognizing that time is a factor in achieving the aim of Article 12 should allow for expressly regulating what role time plays in the process. This approach could achieve better results than pretending that time is not an issue at all and require states to comply immediately.

Evolutionary implementation does not answer the difficult question of how the decision-making of persons with high support needs can be incorporated under Article 12. It does not need to, because it is not dependent on this answer, contrary to the other analyzed positions. It, however, creates a framework that benefits all persons with disabilities, among them those with severe disabilities, without prematurely committing to a substantive position that would harm a certain sub-group of those whose right to legal capacity is violated. The cases at the margins will have to be tested and answered at some point, and it is possible that a solution satisfying everyone cannot be found. However, societies benefitting from the reforms as outlined in this chapter can provide more satisfactory answers to these difficult questions than the ones we are currently living in. Article 12 shows us how to get there, not necessarily what we are supposed to find there.
VI. Conclusion
Persons with disabilities have suffered a denial of their legal personhood for more than two millennia. Their personal autonomy has been restricted, their human rights violated through placement under guardianship, and theories of justice failed to include them in concepts of equal citizenship and justify their equal moral personhood. This dissertation argued how these problems can be overcome, how persons with disabilities can be integrated into a framework of equal legal capacity.

The Convention on the Rights of Persons with Disabilities requires that all persons with disabilities enjoy legal capacity on an equal basis with others. This has provided an important impetus for the debate, but did not resolve it. Two main positions have emerged in the academic literature on how to understand equality in this domain. One argues that all persons with disabilities are able to exercise their legal capacity with support. Therefore, to emancipate persons with disabilities, they need to be provided support for making their decisions. Incapacitation in all its form should be abolished, and persons with disabilities should be integrated into the framework of full legal capacity. The move from guardianship to supported decision-making is often described as a paradigm shift: the old paradigm, based on incapacitation, is replaced by a new paradigm based on support, where incapacitation has no
place. They are two realms which have no connection with each other. In the paradigm of fully respecting the dignity of persons with disabilities, there is no guardianship.

The other position argues that supporting all persons is not possible, because some will be unable to make decisions even with the highest degree of support. If certain decisions cannot be made on their behalf, and they cannot make them with support, their will suffer serious detriment, or might even die. Therefore, guardianship in some limited form needs to be maintained. It follows that persons with disability cannot be integrated to a framework of full legal capacity. It is factually impossible, therefore for most persons with disabilities it remains a utopian aspiration at best, and a source of serious problems at worst.

This dissertation offered a third approach, one based on supported decision-making, which allows for some substituted decision-making, but rejects formal categories of incapacitation. It described in detail how the new approach promotes the autonomy of persons with disabilities by leading to better results with regard to each sub-category of affected persons than the existing approaches. Persons without need for support, persons able to make decisions with support, and persons with severe disabilities unable to make some decisions even with support are all either better off in the proposed framework, or in some cases at least not worst off than they would be under existing approaches. It only remains to put the proposal into the context of the main question raised by this dissertation: how can persons with disabilities be treated on an equal basis with others with regard to exercising their legal capacity?

In my opinion, existing proposals on supported decision-making that are trying to completely eliminate substituted decisions, are entrenching rather than overcoming the restrictions on the autonomy of persons with disabilities. They are doing that with the laudable goal of harnessing as much support as possible for all persons with disabilities, but the consequences are nevertheless detrimental. They identify legal incapacitation, the removal of a person’s decision-making powers as the source of denial of disabled persons’ autonomy. They want to accommodate disabled persons in the group of legally capable persons through support. However, in the paradigm based on support, persons with disabilities are still subject to and are supposed to comply with the standard of the imagined rational man – to behave as a fully rational being, a legally autonomous subject with full legal capacity, whose competent decisions are not questioned or overruled by the law. To be equal under this standard, persons with disabilities also have to make decisions which are never overruled by others. They receive support to meet this task, but the requirement is still unfair for many. If the rational man remains the standard, persons with disabilities will be unable to achieve the status of an ordinary citizen, they will never be fully equal.

This dissertation rejects the idea that support is able to raise all persons with disabilities to the level of the idealized, fully legally capable rational man – mainly for the reason that he does not exist. Law has always treated personal decisions of legally capable individuals as potentially subject to overruling by the court system in their own interest. Persons with disabilities cannot be equal in the sense that their decisions would never be overruled. Protection of one’s interests, including protection from abuse and self-abuse, are legitimate goals, and should not be thrown out of the window in the name of equality. Rather, the equality of persons with disabilities
requires that paternalistic tools are applied to them on the same basis as they are applied to others. This also means that if they are more likely to be in need of protection they will be subject to mere frequent overruling of their decisions than ordinary citizens, even if not on the formal ground of legal capacity.

The current system of guardianship and incapacitation is without doubt unduly intrusive, and creates more harm than good. It leads to undermining the autonomy of persons with disabilities. They will be better off without it. However, even if fully capable, many persons with disabilities will still be in need of some protection. This dissertation proposes a framework where the legitimate interests of protection from harm can be taken into account, and applied to persons with disabilities on the same basis as to non-disabled individuals. The rationales for overruling their decisions do not have to be related to formal categories of legal capacity established through capacity assessments, but to goals preventing specific harms established on the basis of objective criteria, which are not based on disability.

It was not the goal of this dissertation to prescribe how much protection a specific jurisdiction should offer to any person. Rather, it described how values such as personal autonomy, legal certainty and protection from harm can be balanced in the framework of supported decision-making to achieve a result suitable for particular situations. A range of options is possible from minimal interference and maximum autonomy to allowing substituted decisions for persons unable to communicate a decision even with support. More or less paternalistic systems can be designed using the proposed framework, but each of them will provide persons with disability more autonomy than guardianship.
It is quite possible that in the described framework, decisions of some persons with disabilities will be overruled more frequently than decisions of non-disabled persons. That, however, is not in itself a sign of lack of equality with regard to exercising legal capacity. Those persons with disabilities who are more vulnerable than others because of their lack of education, economic dependence, social dependence (lack of friends and other social contacts), and ability to take care of themselves will more often be subject to interventions aimed at protecting their interests. Legal capacity law can and should treat them equally, but it cannot overcome obstacles undermining their autonomy to pursue their own interests. At best, it can aim at strengthening rather than weakening their decision-making abilities, but it cannot compensate for all social disadvantages.

In a sense, the dissertation is rejecting the idea of the paradigm shift, at least a certain conception of it. The paradigm where all persons are legally capable and their decisions are never overruled cannot be reached for persons with disabilities, because it does not exist for non-disabled persons either. Rather, law should provide several tools to overrule certain decisions to protect individuals with and without disabilities alike on an objective basis from fraud, mistakes, abuse and other types of harm. Different jurisdictions could opt for different levels of protection, therefore the possible solutions should be imagined as a continuum rather than two opposing paradigms. They differ in allocating the burden to challenge decisions, in whether the right to overrule decisions rests with a court or administrative body or an individual, in whether certain decisions need automatic approval or they can be contested retroactively, and in other features, which each represent a specific resolution of balancing the basic values mentioned above.
However, the range of solutions does not include one where no decisions are ever overruled. It also does not include one where the decisions of persons with disabilities are in general overruled with the same frequency as decisions of persons without disabilities. They will not be overruled on the basis of lack of capacity, but until persons with disabilities will differ from the general population in important socio-economic characteristics, they will be in need of more protection than the average individual.

What the dissertation rejects are current formal categories of legal capacity and incapacity. In that sense it is endorsing another conception of the paradigm shift: guardianship and other disability-specific methods of substituted decision-making based on capacity criteria are not part of the range of imagined solutions. Formal incapacitation should be discarded. That, however, is not enough to achieve the exercise of legal capacity by persons with disabilities on an equal basis with others. Nor is providing support sufficient to meet this goal. A system of combining support with protection, described in this dissertation, goes in its practical implications the closest to ensuring that persons with disabilities are indeed treated like anybody else with regard to enjoying their personal autonomy.

Article 12 of the CRPD does not determine a particular vision of equality in exercising legal capacity. As described in Chapter 5, its text is ambiguous enough to allow for differing interpretations. The solution described in this dissertation is in line with Article 12, but so can be others as well. However, since the overall purpose of the CRPD is to protect the dignity and rights of persons with disabilities, a framework which maximizes personal autonomy without sacrificing other important values should be seen as superior to others in interpreting and
applying the CRPD. Since contrary to other proposals this dissertation also incorporates persons with high support needs, it provides a solution which is closest to the ideal envisaged by the CRPD, and it offers the most promising starting point to include persons with disabilities in theories of justice as well.