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# INCAPACITY TO ACT OF NATURAL PERSONS

CONTEMPORARY CHALLENGES

**Stoyan Stavru**



# Incapacity to Act of Natural Persons. Contemporary Challenges

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**This monograph reflects the Bulgarian legislation in force  
and the publicly announced draft bills as at 1 May 2016.**



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The picture on the front cover is part of the exhibition “I Decide=I Exist” by the author Nadezhda Georgieva (Nad). The exhibition was initiated by Bulgarian Center for Not-for-Profit Law, Bulgarian Association for Persons with Intellectual Disabilities, Global Initiative on Psychiatry - Sofia Foundation, and Maria’s World Foundation.

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...the attainment of majority of a man in villages, and also in towns, was not strictly defined and did not play such a role as it now does. A man's capacity to act [deesposobnost]\* did not depend on the number of his years of age but on his position in the zadruga or in the family. Therefore, where certain contracts were respected what was looked at mostly and solely was that: is the person capable, in view of his or her position in the family; does such person has the right to enter into a contract; and if (s)he does enter into it is (s)he able to perform it...

...

... If Petko is married and if he is the only man in the family, may he be even 15 years of age...

...

... If Stoyan is married and if he is not the only man in the family but he has a father or older brothers, or an uncle who manage the property of the family or of the zadruga Stoyan might as well be as old as 40 and still not be considered capable of acting...

...

... Grandma Petkana is 65 years old; she has sons and grandchildren; but she may not enter into any contract for the property of the zadruga or the family, and if she does enter into such contract, it would be invalid...

...

... If Stoyan is deranged he may not enter into any contract whatsoever ...

...

... If the contract deals with an individual's personal obligations, such as hiring, the capacity to act now depends on the number of years ...

Marinov, D. Zhiva Starina [Living Antique] In: Etnograficheskoto (folklorno) spisanie [Ethnographical (Folkloristic) Magazine]. Book Fourth, Ruse: Perets Yos. Alkalay, 1894, a second edition (facsimile reprint) under the title *Balgarsko obichayno pravo* [Bulgarian Customary Law], Sofia: Marin Drinov Publishing House, 1995, pp. 287– 288, responses No. No. 377–378.\*\*

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\* This Bulgarian term is further explained by the author in footnotes 2 and 3 below. Translator's Notes are given as footnotes and are indicated by an asterisk (\*) in the body text. All clarifying insertions given in square brackets are made by the translator. – Translator's Note.

\*\* Cyrillic texts quoted by the author in the footnotes are given in transliteration followed by an English translation of the title in square brackets; see also the Bibliography section. – Translator's Note.

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## List of Abbreviations

SCC	Supreme Court of Cassation
SC	Supreme Court
CvC	Civil College
CD	Civil Division
CPC	Civil Procedure Code
SG	<i>State Gazette</i>
EP	Electronic periodicals
LAA	Lease in Agriculture Act
BIDA	Bulgarian Identity Documents Act
EDESA	Electronic Document and Electronic Signature Act
VMAA	Veterinary Medicine Activity Act
FA	Forests Act
HcA	Health Act
OCA	Obligations and Contracts Act
CPA	Child Protection Act
CA	Cooperatives Act
CPRA	Cadastre and Property Register Act
PsA	Persons Act
HFA	Health Facilities Act
PFA	Persons and Family Act
MPHMA	Medicinal Products in Human Medicine Act
MDA	Medical Devices Act
LSGLAA	Local Self-Government and Local Administration Act
SA	Succession Act
NNAA	Notaries and Notaries' Activity Act
PMA	Privileges and Mortgages Act (repealed)
PtA	Property Act
JA	Judiciary Act
SAA	Social Assistance Act
TOTCA	Transplantation of Organs, Tissues and Cells Act
DNPSMB	Draft Natural Persons and Support Measures Bill
PEAA	Private Enforcement Agents Act
NFPLEA	Not-for-profit Legal Entities Act
CRPD	Convention on the Rights of Persons with Disabilities
CRB	Constitution of the Republic of Bulgaria
CC	Constitutional Court
MAC	Medical Advisory Committee
CrC	Criminal Code
NIJ	National Institute of Justice
OOD	a transliteration of Bulgarian abbreviation for a "limited liability company"
UN	United Nations
S	Sofia
SAC	Sofia Appellate Court
FC	Family Code (promulgated in <i>State Gazette</i> , issue 47 of 23 June 2009, in force from 1 October 2009)
1985FC	Family Code (promulgated in <i>State Gazette</i> , issue 41 of 28 May 1985, in force from 1 July 1985, repealed in <i>State Gazette</i> , issue 47 of 23 June 2009, in force from 1 October 2009)
CA	Commerce Act
TC	Trade College



## I. Is it possible to “privatize” incapacity?

According to **article 12, item 2 of the Convention on the Rights of Persons with Disabilities (CRPD)** the States Parties to CRPD<sup>1</sup> recognize that persons with disabilities enjoy legal capacity<sup>2</sup> on an equal basis with others in all aspects of life.<sup>3</sup> The Convention on the Rights of Persons with Disabilities was ratified by an act adopted by the 41st National Assembly on 26 January 2012 (SG, issue 12 of 10 February 2012), it was promulgated in *State Gazette*, issue 37 of 15 May 2012 and came into force for the Republic of Bulgaria as from 21 April 2012. This convention was the reason for the pronouncement of *Judgment No. 12 of 17 July 2014 of the Constitutional Court (CC) under constitutional case No. 10/2014* which dismissed the Ombudsman’s petition that CC establish the unconstitutionality of article 5, paragraph 1 with respect to the words “and become incapable of acting” and of article 5, paragraph 3 of the Persons and Family Act (promulgated in SG, issue 182/1949, most recently amended and supplemented in SG, issue 120/2002).<sup>4</sup> In the said judgment CC accepted that the

<sup>1</sup> For the legal effect of CRPD see **Waddington, L.** A New Era in Human Rights Protection in the European Community: The Implications the United Nations’ Convention on the Rights of Persons with Disabilities for the European Community. Maastricht, 2007, accessible online at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1026581&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026581&download=yes); delivered for the first time as a paper at “Human Rights of Persons with Disabilities – from Social Policy to Equal Rights” conference held in Reykjavík on 27–28 September 2007. For the importance of the measures taken in individual states for bringing their national legislations in compliance with the requirements of CRPD, see **Lang, R.** The United Nations Convention on the Right and Dignities for Persons with Disability: A Panacea For Ending Disability Discrimination? – *European Journal of Disability Research*, 2009, No. 3, pp. 266–285, as well as **Quinn, G.** Resisting the “Temptation of Elegance”: Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?. – In: Arnardóttir, O., G. Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*. *International Studies in Human Rights*, Vol 100, 2009, p. 216. For the characterization of CRPD as a “transformative international instrument” for changing national legislations, see **Lewis, O.** The Expressive, Educational and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities. – In: McSherry, B., P. Weller (eds.) *Rethinking Rights-Based Mental Health Laws*. Oxford, 2010, p. 97.

<sup>2</sup> The English term “legal capacity” used here should be understood as a unity of the “capacity to have rights [pravosposobnost]” and the “capacity to act [deesposobnost]”, if the concepts of Bulgarian law of persons are to be used. In any case, “legal capacity” includes individual’s capacity to personally and independently exercise his/her rights. For the definition of “legal capacity” as a “construct which enables law to recognise and validate decisions and transactions which a person makes”, see **Lewis, O.** Advancing legal capacity jurisprudence. – *European Human Rights Law Review*, 2011, No. 6, pp. 700–714. The said article defends the thesis of “legal capacity as a right” that must be ensured to everyone. [the term “legal capacity” and the quotes from Lewis’s article are in English in the Bulgarian original – *Translator’s Note*]

<sup>3</sup> For the significance of CRPD, see **Kanter, A.** The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities. – *Syracuse Journal of International Law and Commerce*, 2007, Vol. 34, p. 287. As regards the many juridical questions raised by CRPD in the countries that have ratified it, see **Gooding, P.** Navigating the ‘Flashing Amber Lights’ of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns. – *Human Rights Law Review*, Vol. 15, No. 1, pp. 45–71. By CRPD the capacity to exercise rights is proclaimed as an inalienable right of every person (and not a legally significant condition that can be taken away). As regards a different possible interpretation of the text of article 12 CRPD (e.g. by reducing “legal capacity” to a “capacity to have rights [pravosposobnost]” but not a “capacity to act [deesposobnost]” in the so-called ‘Arab Group’ of State Parties) and the perils this entails, see **Pearl, A.** Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and the Legal Capacity of Disabled People: The Way Forward? – *Leeds Journal of Law and Criminology*, 2013, Vol. 1, No. 1, pp. 1–30. For the “process of negotiating” the text of article 12 CRPD and the need of a clear wording supporting the change to the paradigm of capacity to act as a right of people with disabilities, see also **Dhanda, A.** Legal Capacity in the Disability Right Convention: Stranglehold of the past or lodestar for the future? – *Syracuse Journal of International Law and Commerce*, 2007, No. 34, pp. 429–431.

<sup>4</sup> A catalyst of the process of questioning the regime of interdiction was also the case *Stanev v. Bulgaria* before the European Court of Human Rights (Stanev v. Bulgaria, App. No. 36760/06, Eur. Ct. H.R. (2012)); and as if the judgment under that case attracted, to a greater extent and much more quickly, the attention of foreign rather than Bulgarian authors. See for instance: **Lewis, O.** Stanev v. Bulgaria: On the Pathway to Freedom. – *Human Rights Brief*, 2012, Vol. 19, No. 2, pp. 2–7, as well as **Drew, N., M. Funk, St. Tang, J. Lamichhane, E. Chávez, S. Katontoka, S. Pathare, O. Lewis, L. Gostin, B. Saraceno.** Human rights violations of people with mental and psychosocial disabilities: an unresolved global crisis. – *The Lancet*, 5 November 2011, Vol. 378, No. 9803, pp. 1664–1675. The second case against Bulgaria before the European Court of Human Rights won by a person placed under interdiction is the case *Stankov v. Bulgaria*. The judgment of 17 March 2015 delivered further to application No. 25820/2007 filed by Stefan Stankov states that “the court does not see considerable differences between the circumstances of fact under the *Stanev* case and the case initiated further to Stefan Stankov’s application.” Under both cases the Court finds that placement of applicants who are limited interdicts in a social care institution for people with mental disorders was made without their consent and constitutes an act of their unlawful imprisonment. [see paragraph 172 of the original French text of the Stankov case: “172. La Cour ne voit pas de différences pertinentes dans la présente espèce. Le requérant a été partiellement privé de sa capacité juridique et il voulait demander la révision de son statut. La législation applicable ayant été la même que celle observée dans l’affaire *Stanev*, précitée, et dans la mesure où le Gouvernement ne démontre pas que les tribunaux internes examinent des demandes en rétablissement de la capacité juridique introduites par des personnes privées partiellement de capacité, elle ne peut que constater qu’un tel accès direct à un tribunal n’est pas garanti à un degré

contested provisions of the Persons and Family Act (PFA) “are not contrary to the Constitution”, “however they must be given a narrowing interpretation and interpreted only in a manner that fulfills the constitutional requirement to provide enhanced protection of the rights of people with mental disabilities”. As regards their being contrary to the requirements of CRPD, CC states that “bringing the legislation in compliance with the Convention on the Rights of Persons with Disabilities cannot be attained by the non-application of the provisions in question. The protection of the rights of people with mental disabilities may not be attained by non-application of the said provisions. The protection of the rights of people with mental disabilities is a matter of the competence of the National Assembly, which must pass the relevant legislation on the regime of incapacity to act [*nedeeposobnost*].” The said provisions of PFA were upheld by CC with arguments “in the name of” the interests of incapable persons: “Declaring the contested provisions of PFA unconstitutional will not only not solve any problem related to the rights of incapable persons but *will give rise to substantial gap in the legal regime of such persons* (my italics), will lead to the abolition of the special protections provided to incapable persons by the legislation in pursuance of the Constitution and will render meaningless the concept of full interdiction [*palno zapreshenie*]\*.” And the incapacity to act, according to CC, should be understood as a “condition that must solely ensure that no legal acts that might *harm the interests* of the person placed under interdiction\*\* or of *third parties, or of the general public* shall be allowed (my italics)”.

**The structure** of this chapter will put emphasis on *two arguments* used in the judgment of CC: a) on the argument that if article 5, paragraph 1 PFA (with respect to the words “and become incapable of acting”) and article 5, paragraph 3 of PFA are declared unconstitutional a gap will arise in the legal regime of persons with intellectual disabilities and mental disorders; and b) on the argument that the regime of incapacity to act ensures that no legal actions harming the interests of third parties and of the general public are allowed. I will use the said emphases to present *a different idea* – the one of “privatizing” the incapacity to act understood as difficulties and inability to form and express a will as well as to delimit the three groups of legislative measures, which could be conducive to the attainment of the effect of “privatizing” the incapacity to act, and namely: protection measures (protective measures or measures protecting the interest), support measures (facilitating measures or measures facilitating the expression of will) and obstruction measures (impeding measures or measures making it difficult to express the will)<sup>5,6</sup>. These measures, which should be clearly distinguished from but also combined with the measures of medical coercion, have the potential to be an alternative to the statutory

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suffisant de certitude.” – Translator’s Note]

\* The concept of *interdiction* in civil law roughly corresponds to the concept of *guardianship* in common law – Translator’s Note.

\*\* The term *person placed under interdiction* in civil law roughly corresponds to the concept of *ward* in common law – Translator’s Note.

<sup>5</sup> For the classification of decisions into three groups (autonomous, supported and facilitated) in the light of comparative law and in the context of CRPD, see **Bach, M. L. Kerzner** A New Paradigm for Protecting Autonomy and the Right to Legal Capacity. Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice October 2010 Commissioned by the Law Commission of Ontario, accessible online at: [www.lco-cdo.org/disabilities-commissioned-paper-bach-kerzner.pdf](http://www.lco-cdo.org/disabilities-commissioned-paper-bach-kerzner.pdf)

<sup>6</sup> For a detailed differentiation and an attempt at a classification of the measures stipulated by DNPSMB, see **Stavru, St.** Zakonoproektat za fizicheskite litsa i merkite za podkrepa. Opit za klasifikatsiya na merkite za podkrepa [The Draft Natural Persons and Support Measures Bill. An attempt at a Classification of Support Measures] In: *Sobstvenots i pravo* [Property and Law], 2016, No. 1, pp. 44–53. In the said article the measures proposed in DNPSMB are divided into two groups: assistance measures (which facilitate the formation of the will of the supported person and do not affect its expression) and restriction measures (which require the participation of a third party upon the formation and expression of the will of the supported person). A different criterion has been used for that classification: whether the violation of the measure leads to invalidity of the declaration of will of the supported person. Only if the second ones are not met, this should lead to the invalidity of the legal transactions entered into by the supported person. Support measures in this text include both assistance measures and restriction measures. Protective measures as restriction measures, however, are differentiated here in a separate group: the one of protection measures. The said measures (under both classifications) can also be examined as a form of care for persons who experience difficulties in formation and expression of their will. For the differentiation between the terms of “help” and “care” in philosophical, ethical and legal context see **Stavru, St.** Grizhata i neynite yuridicheski prostranstva [Care and Its Legal Spaces] In: Kaneva, V., St. Stavru (eds.) *Etichni i pravni granitsi na savremennite meditsinski grizhi* [Ethical and Legal Boundaries of Contemporary Medical Care]. S., 2015, pp. 11–35. If the logic applied there is followed to the end a new term, “care measures”, could also be justified. The ethics of care can be linked to the idea of the so-called “therapeutic jurisprudence”, which aims not only at the strict application of the law but also at ensuring a beneficial psychological effect for the participating persons: the preponderance of parties’ psychological satisfaction over the adversarial triumphalism. In this sense see **Brookbanks, W.** Therapeutic Jurisprudence: Conceiving an Ethical Framework. – *Journal of Law and Medicine*, 2001, Vol. 8, No. 3, pp. 328–341. For a conceptual study of therapeutic jurisprudence and its relation to restorative justice see **King, M.** Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice. – *Melbourne University Law Review*, 2008, Vol. 32, pp. 1096–1126. For linking therapeutic jurisprudence with people with intellectual disabilities see **Winick, B.** Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law. – *New York Law School New York Law School Journal of International & Comparative Law*, 2002, No. 21, p. 537, as well as **McManus, P.** A Therapeutic Jurisprudential Approach to Guardianship of Persons with Mild Cognitive Impairment. – *Seton Hall Law Review*, 2006, Vol. 36, p. 591–625.

provisions currently in force in Bulgaria governing adults' incapacity to act, which provide for substitution<sup>7</sup> of the will of the full interdict [*napalno zapreten*] based on *two criteria*: the assessment of his/her "best interest" (the general criterion under article 130, paragraph 1 FC in relation to article 5, paragraph 3 PFA) and the determination of his/her "presumable will" (a special criterion in the hypotheses of article 96, paragraph 4 MPHMA and article 27a, paragraph 4 TOTCA). It is precisely these two arguments, one idea and two criteria mentioned in the preceding sentences that make up the structure of the first part of this chapter of the book (sections 1, 2 and 3).

In the second part of this first chapter (section 4) I will pay special attention to the *two leading theories* in explaining legal personhood as a two-component category which includes the capacity to have rights [*pravosposobnost*] and the capacity to act [*deesposobnost*].<sup>8</sup> Along with interest and will memory will also be included in the analysis of the inability/incapacity (to act) [*ne(dee)sposobnostta*] as a comparison will be made between legal personhood in natural persons and in juridical persons as well as an overview of the possible juridical facts the interdicted persons could be able to do in person under the Bulgarian legislation currently in force.

**The focus** of this study is the legal notion of *full interdiction*, to which the legal conclusions are addressed in all cases where there is no express statement that limited interdiction [*ogranicheno zapreshenie*] is dealt with. The reason for the choice of this approach is the circumstance that limited interdiction in practice leads to the same effect of robbing the person of the possibility to participate on his/her own in legally relevant social interactions for the legal significance of the will of such person is entirely dependent on obtaining curator's assistance by another person, the appointed curator [*popechitel*]\*. Although it is undoubted, in legal terms, that the curator may not express will on behalf of the limited interdict [*ogranicheno zapreten*], if (s)he nevertheless does so and such will is wrongfully respected, there is no adequate legal mechanism by means of which the interdict can contest such act of his/her curator. There is no adequate legal mechanism for protection of the limited interdict also in cases where the curator refuses, without a motive and without any reason whatsoever, to provide curator's assistance for the performance of a legal act desired by the limited interdict. Thus, for instance, after (s)he is placed in a social care home for people with mental disorders, in the presence of initial consent by the limited interdict and of curator's assistance, if subsequently the limited interdict wants to leave the institution where (s)he is placed, (s)he will need the curator's assistance of his/her curator. The limited interdict, however, does not have the opportunity to contest the "curator's omission" of his/her curator and in practice (s)he is forced to conform to curator.<sup>9</sup>

For any contesting of curator's acts, and mostly of curator's omissions the limited interdict needs curator's assistance. A "vicious" circle thus arises: in order to contest a wrongful curator's assistance or a curator's failure to provide such, one

<sup>7</sup> For the criticism against the approach of substitution of the will of persons with intellectual disabilities and mental disorders in the context of CRPD see **Salzman, L.** Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act. – University Of Colorado Law Review, 2010, Vol. 81, p. 161. For the replacement of the tutor by a "legal friend" or a "mentor", who – although (s) he expresses will instead of the person with disabilities – exercises only certain discretion and as a rule takes into consideration the specific preferences and the presumable will of the person with disabilities whom (s)he knows well and of whom (s)he is a close friend, see **Bach, M.** Supported Decision Making under Article 12 of the UN Convention on the Rights of Persons with Disabilities. Questions and Challenges. Notes for Presentation to Conference on Legal Capacity and Supported Decision Making Parents. Committee of Inclusion Ireland. Athlone, Ireland – November 3, 2007, p. 6. For the possibility of appointing a mentor ("good man") in Sweden, whose functions do not limit the capacity to act of the person with disabilities, see **Herr, S.** Self-Determination, Autonomy and Alternatives for Guardianship. – In: Herr, S., L. Gostin, H. Hongju Koh (eds) The Human Rights of Persons with Intellectual Disabilities: Different but Equal. Oxford, 2003, p. 433. In Sweden there is also an Ombudsman for the rights of people with disabilities who functions at a non-governmental organization and whose actions solely assists the people with disabilities in exercising their capacity to act. See Swedish user-run service with Personal Ombud (PO) for psychiatric patients, accessible online at: <http://nagano.dee.cc/swedensde.doc>

<sup>8</sup> For the division of legal capacity into passive (general legal capacity) and active (capacity to act) in the context of CRPD and in view of its consequences for Hungarian legislation see **Hoffman, I., G. Kőnczei** Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code. – Loyola of Los Angeles International and Comparative Law Review, 2010, Vol. 33:143, p. 144, pp. 147–150. See also **Minkowitz, T.** The United Nations Convention on the Rights of Persons with Disabilities and the Right to be free from non-consensual psychiatric interventions. – Syracuse Journal of International Law and Commerce, 2007, Vol. 34, p. 410, where a capacity for rights ("capacity for rights") and a capacity for legal acts ("capacity to act") are differentiated. See also **Bach, M.** The Right to Legal Capacity under the UN Convention on the Rights of Persons with Disabilities: Key Concepts and Directions from Law Reform. Toronto, 2009, pp. 2–6, where a distinction is also made between the concepts of "disability" and "incapacity".

\* The term "curator" [*popechitel*] in Bulgarian civil law corresponds to the term "curator to a limited interdict" under the Civil Code of the US State of Louisiana and roughly corresponds to the term "guardian to a partially incapacitated person" under common law. The same term, "curator" [*popechitel*], also designates the legal guardian of minors aged 14-18. – Translator's Note.

<sup>9</sup> Such are precisely the two cases examined by the European Court of Human Rights under which Bulgaria was sentenced to pay damages for unlawful imprisonment of persons placed under limited interdiction: the case of *Stanev v. Bulgaria* and the case of *Stankov v. Bulgaria*.

needs curator's assistance. But could one expect curator's assistance against an existing curator's omission? This self-supporting vicious circle of curator's omission in practice results in the limited interdict being put in a position analogous to the one of the full interdict. Limited interdiction is interdiction and in this sense the negatives of interdiction are present in it, too. The "limitation" of interdiction in limited interdiction is neither a form of improvement of the regime of interdiction ("ennobled" interdiction), nor a form of retreat from the regime of interdiction ("crippled" interdiction). It is rather a way to mediate the interdiction's effect of taking away of the capacity to act ("concealed" interdiction), which is attained not by means of direct deprivation of legal significance of interdict's will (as in full interdiction) but by the introduction of a need of an additional declaration of will by the part of another person in order that the wishes and preferences expressed by the interdict be recognized as legally relevant. If the full interdict's desires are under the control of the actions (the active will) of the tutor [*nastoynik*]\*, then the desires of the limited interdict under the control of the omissions (the passive will) of the curator.

The control of the legal significance of the authentic will of the full interdict happens by substituting his/her desires by the will of his/her tutor who makes the assessment as to what extent the latter will take such desires into consideration and whether to reproduce them in tutor's own will expressed by him/her on behalf and in the interest of the interdict. The control over the legal significance of the authentic will of the limited interdict is exerted by invalidating his/her desires though the omission of the curator who judges on his/her own to what extent he is willing to support such desires and whether to give them legal relevance and legal consequences. Thus the difference between full and limited interdiction is a quantitative and not a qualitative one. It is in the "mechanism" of control over the authentic will of the interdict: a mechanism of substitution (active control, control by means of acting) in full interdiction and a mechanism of dependence (passive control, control by means of failure to act) in limited interdiction. In both legal "tactics", however, the ultimate effect is interdict's *dependence* on another person – his/her appointed tutor or curator, respectively. The legal significance of interdict's desires in both cases is dependent on the will of the tutor/curator. The difference is only in the manner of establishing, exercising and maintaining such dependence. It is precisely because of the said essential identity of the two forms of interdiction that the arguments below regarding the adequacy of full interdiction as a measure of regulation of the incapacity to act can be respected also with respect to the legal notion of limited interdiction and in this sense they are important for the interdiction as a uniform legal regime.<sup>10</sup>

## 1. The "best interest" criterion

### 1.1. Some peculiarities of statutory provisions in force

Before I begin with the tasks thus announced I would like to make some notes as regards the regime of interdiction and the incapacity to act in adults stemming from it. I will focus on and restrict myself precisely to the cases of incapacity to act of adults by reason of intellectual disability ("feeble-mindedness" under article 5, paragraph 1 PFA) or mental disorder ("mental illness" under article 5, paragraph 1 PFA). The **statutory provisions currently in force is quite laconic**: it is contained in PFA – an act which was promulgated in *State Gazette*, issue 182 of 9 August 1949 and came into force as from 10 September 1949. Although it was envisaged as a concept to the benefit of the interdict, the interdiction is regulated as a *means of protection only for the interdict's interests* (and not his/her will) and as a *proceeding that can be initiated only by third parties* (in view of the protection of their private interest) or by the state (in view of the protection of public interest). Let us begin with the second characteristic.

According to article 336, paragraph 1 of CPC the placement of a person under full or limited interdiction *may be requested* by a statement of claim filed by the spouse, by close relatives, by the prosecutor and by anyone who has legal interest. It is notable that the very person sought to be interdicted is not listed among the persons who may seek interdiction. Most likely, the logic behind this "omission" in the law is that such person could not realize the need of protection of his/her interest for one of the premises for the application of article 5 PFA is that the person must "be unable to take care of his/her affairs". This shift of the initiative into the hands of persons other than the one sought to be interdicted is the first sign that interdiction, although it aims to protect the interest of the person placed under interdiction, through that aim actually serves the interests of other persons, whether private (property-law, succession-law, family-law interests of the spouse, of close relatives and anyone who has legal interest) or public (defended by the prosecutor) interests. Thus, another aim can be found underneath the "officially" stated aim of the interdiction – to "conserve" the interdict's property by preserving it either as community marital property, or as future estate, or as future property within the meaning of article 133 OCA.

Of course, **the criterion of the "best interest"** of the interdict (article 130, paragraph 1 FC in relation to article 5, paragraph 3 PFA) should be exercised not only upon making decisions of property consequences but also upon those of

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\* The term "tutor" [*nastoynik*] in Bulgarian civil law corresponds to the term "curator to a full interdict" under the Civil Code of the US State of Louisiana and roughly corresponds to the term "guardian to a fully incapacitated person" under common law. The same term, "tutor" [*nastoynik*], also designates the legal guardian of minors aged 0-14. – Translator's Note.

<sup>10</sup> Interdiction is not only a monolithic but also a monotonous legal regime. The two forms of interdiction do not represent two autonomous legal regimes of regulation of the incapacity to act competing with one another but are settled as varieties of the same approach to establishing a dependence of interdict's will on the will of another person.

personal nature: the tutor expresses will instead of the interdict (in full interdiction) and the curator provides curator's assistance alongside the interdict (in limited interdiction) only in view of serving the latter's "best interest". If the problem in the interpretation of the "best interest" *in personal relations* is related to its specific contents, *in property relations* such interest can be used as an indirect means of protection of other person whose "protection" is carried out by the introduced criteria of assessment: the best property interest of the owner is the one that would also be the best for his future creditors and future heirs. As a rule the interest of property as a future object of civil-law transactions is the interest in preserving and increasing it.

But this might not be the *authentic will* of the owner of that property. The contents of the right to property also include a power to destroy the thing [*vesht*]. When destroying the thing the owner should not take the interests of his possible future creditors and heirs into consideration. It seems as if this conclusion is undoubted as regards capable natural persons. This is not so, however, in the persons placed under interdiction. In order to exercise such power leading to destruction of their own property they should depend upon another's will – the will of their tutor/curator who is, however, obliged to exercise the tutor's and curator's functions provided to him/her by the law in view of interdict's best interests. They are prohibited from expressing will at the expense of the interdict, which could lead to harming the latter's interests. This prohibition is valid, regardless of what the actual desires and preferences of the interdict are.

Intellectual disability ("feeble-mindedness" under article 5, paragraph 1 PFA) and mental disorder ("mental illness" under article 5, paragraph 2 PFA) are viewed as medical causes for the occurrence of certain deficiencies in realization, interpretation and handling of reality. The legislative regulation proceeds from the presumption that the lack of certain cognitive abilities leads to the impossibility of forming full-fledged will and therefore all desires and preferences of the interdict should be legally disqualified. In order to impose interdiction it is sufficient to establish the lack of the said cognitive abilities – the law neither requires, nor offers any measures to support the person in developing and exercising his/her cognitive abilities. Instead, the law effaces the interdict's will in the future by substituting it for the will of his/her tutor. However, this *surrogate will* is restricted as it relates to someone else – it is not authentic. Therefore, this will is rather a replica of the interdict's best interest. It is a formulation of the best interest of the interdict in the imperative mood. There is no will, long live the Interest. One can find behind such unconditional *primacy of interest over will*, especially in the cases of full interdiction, a capitulation of the law to person's inability to "take care of his/her own affairs". The statutory provisions governing interdiction do not offer actual support (positive provisions) for the persons with mental disorders and intellectual disabilities and only robs (negative provisions) those persons of the possibility to participate on their own in legally relevant interactions. Instead of such "robbing" legislative approach based on the interest of the interdict, it is possible to look for other mechanisms of respecting the will of the person. The subject of examination in this book is precisely those mechanisms and their philosophical and legal argumentation.

## 1.2. Capacity to act as a cognitive ability ("cognability")

The legal regulation of interdiction proceeds from a concept viewing the capacity to act as a cognitive ability (cognability) formally confirmed by the law. In principle, this cognitive ability is expected to be present upon the attainment of certain age (majority), and therefore the civil capacity to act occurs automatically upon the completion of 18 years. However, if it is found that the expectation of the presence of cognitive ability has not materialized despite the attainment of 18 years of age the person is deprived of the capacity to act thus automatically provided to him/her by placing him/her under interdiction. In this pattern of interdiction *the capacity to act functions as cognability*. Cognitive abilities turn out to be decisive for the legal relevance of our will as our desires, which are often emotional and even irrational in nature, remain without significance. Cognitive abilities can be divided into two groups: intellectual abilities – the abilities to realize the specific actual situation, one's own interests and the interests of the others, and volitional abilities – abilities to exercise volitional control of one's own behavior. The two medical criteria under article 5, paragraph 1 PFA in force for one's placement under interdiction are connected precisely to the ascertainment of intellectual inabilities ("feeble-mindedness") or of volitional inabilities ("mental illness"<sup>11</sup>)<sup>12</sup>. In the case of both inabilities, however, the legal significance of person's will is taken away.

In addition to the cognitively conditioned decisions ("subjected" to the will), however, in people's lives there are also emotionally-motivated acts ("subjected" to desires), which are also respected and taken into consideration by the law. **A classification of the declarations of will** of natural persons would be a matter of interest in view of the predominant manner of making the decision on the performance thereof, including in view of the nature of their motivation. Such classification could lead to the differentiation of two types of declarations of will, which could be conditionally designated as: "*cognitive*" transactions, the making of which is related, as a rule, to rational justification by realization and juxtaposition of the positive and the negative consequences of such transactions (in these transactions the person is expected to take his/her best interest into consideration), and "*emotional*" acts, the making of which is, as a rule, related to emotions and feelings of the person and for which the requirements of rationality are not valid (in these acts

<sup>11</sup> Of course, mental disorders ("mental illness") may also result in intellectual inabilities but the volitional component of inability in mental disorders is emphasized compared to the cases of mental deficiency ("feeble-mindedness").

<sup>12</sup> Historically, prodigality has been regulated as a reason for placing a person under interdiction in view of person's volitional inabilities: although the prodigal most often realized the consequences of his/her participation in games of chance (s)he did not manage to effectively control his/her conduct.

the person is not expected to take his/her interests into consideration to the greatest extent). If the so-called “cognitive” transactions take into consideration and are subject to the best interest of the person, then the so-called “emotional” acts are a priority expression of the authentic will of such person. Contracts for a consideration, especially where they are entered into between natural persons having the capacity of traders (sole traders) can be included in the first group. The contracts without return consideration, unilateral legal transactions and legal acts that may be performed only in person can be included in the second group.

Under the Bulgarian legislation currently in force to propose and substantiate such a classification of the declarations of will of natural persons based on the motivation typically expected for their performance and the psychological peculiarities of the will-formation mechanism would be legally irrelevant as the *motives* of the parties have no **significance** for the legal consequences of legal transactions, unless in the cases expressly stipulated by the law (such as, for instance, article 226, paragraph 2 OCA, article 42, letter “б” SA, article 43, paragraph 2 SA<sup>13</sup>), and the concept of *cause* of legal transactions (article 26, paragraph 2, пп. 4 OCA) is under increasing attacks as a concept without actual legal significance<sup>14</sup> (the cause as the typical and immediate purpose for which a legal transaction of certain kind is being entered into could be used as one of the criteria for the differentiation between cognitive and emotional declarations of will).

The said differentiation of the declarations of will of natural persons could be used to look for and contest *the legitimacy of the concept of interdiction*. The taking away of the capacity to act in interdiction has as its legitimate purpose the “protection” of the interdict from legal acts harming his/her interests. The protection of third parties from the irrational and harmful acts of a person is ensured by other legal concepts (Paulian actions, claims seeking the restitution of a reserved portion [of the estate], etc.). The “protection” ensured by interdiction, however, is exhausted by robbing the interdict of the possibility to carry out on his/her own any legal acts. His/her declarations of will are, *ab origine* and comprehensively, invalidated in terms of law as in the judgment of interdiction the court has judged the person’s ability to form a valid will to be compromised. However, a devalidation of the will of the person occurs not only for marked “cognitive” legal transactions but also for all possible “emotional” acts a natural person could undertake. When these “emotional” acts do not take into consideration or even harm the interests of the interdict, they may be carried out neither by the interdict in person, not by his/her lawful representative. The reason for that is that all legal acts after the person is placed under interdiction must be done in the interest of the interdict. If before the interdiction the person was able to cause, by his/her declarations of will, legal consequences, which, when assessed in their totality, harm him/her, then after the interdiction such acts may not be performed in the name and at the expense of such person. If before the interdiction irrationality was an integrated part of the will of that person and the decisions it “produced” were respected by the law as valid acts of freedom, the interdict’s interests and rationality tests predominate after the interdiction. The subjective part of will formation assessed as “compromised” by the court is replaced by the construct of “the best interest” that asserts itself as an objective one.

In the paradigm of interdiction irrational decision is an erroneous decision: a sign of equality has been put between irrationality and error. By leaving aside the question of irrationality as part of person’s freedom (such irrationality is not an error but the exercise of an afforded choice) we can also dispute the legitimacy of interdiction by means of the assertion that a possible error is being prevented (such an error is viewed as a result of the irrationality of the person). It is precisely here that the question concerning the possibility allowed by the law for every human being not only to make his/her irrational decisions (that harm him/her) but also to make errors<sup>15</sup>. “The subjective right to err” is part of my freedom to the same extent as my right to require my seemingly irrational decisions to be respected by the law. Outside the concept of interdiction the law recognizes the possibility of making errors, regardless of the extent to which people learn by their own mistakes. Error is part of our freedom regardless of its cognitive origin and pedagogic effect. Instead of robbing persons of the opportunity to make errors leading to self-harm by depriving them of legally valid will (by placing them under interdiction) the statutory provisions governing the inability/incapacity (to act) could “invest” in different tools that can use the potential of these errors in order to stimulate the development of certain skills in the respective person (by legislative stipulation of various protection measures, support measures and obstruction measures).

<sup>13</sup> It is notable that the motive matters precisely in the contract for donation, which is unanimously defined as a contract without return consideration as well as in the testament as unilateral legal transaction. Both contracts without return consideration and unilateral transactions were listed as emotionally motivated declarations of will of natural persons.

<sup>14</sup> See for example **Mevorah, N., D. Lidzhi, L. Fahri**. Komentar na Zakona za zadalzhniyata i dogovorite. Chl. chl. 1 – 333 [Commentary of the Obligations and Contracts Act. Articles 1-333]. S., 1924, p. 58: “the concept is too vague and abstract and for that reason many authors maintain that it should be thrown away from legal technique: it does not correspond to anything real and is only a source of mistakes and confusion”. Anti-causalists think that “only three necessary but sufficient conditions suffice for the validity of contracts: parties, consent and subject matter. The cause is just an expression devoid of content or, at best, a new manner of expressing one of the above three elements”. See also **Takov, Kr.** Abstraktnite sdelki v svetlinata na ponyatiyata za abstraktnost i kauzalitet [Abstract transactions in light of the concepts of abstractness and causality] in: Sbornik pravni izsledvaniya v pamet na prof. Ivan Apostolov [A Collection of Legal Studies in Memory of Prof. Ivan Apostolov]. S., 2001, pp. 429–431, 437, where the thesis that the lack of cause is not a stand-alone reason for contract’s voidness. For further details of the existing polemics in Bulgarian legal doctrine see **Konov, Tr.** Za abstraktnite sdelki i kauzata na dogovorite V: Podbrani sachineniya [Of Abstract Transactions and the Cause of Contracts In: Selected Writings]. S., 2010, pp. 459–410 (including the footnotes).

<sup>15</sup> It should be noted that only a part of the possible errors are stipulated by the law (article 29 OCA) as reasons for voidability of legal transactions.

Interdiction disqualifies not only the will, either actual or presumable, but also the desires of the person. When exercising his/her power of representation the tutor *is not bound by an obligation to study the presumable will of the interdict* – by the desires and preferences expressed by the latter, although they are formed in the presence of certain intellectual disabilities or mental disorder. Moreover, the tutor is obliged not to take into consideration such desires or preferences if they are contrary to the interests of the interdict. This is precisely one of the principal purposes of interdiction: to have restricted and devaluated all desires of the interdict by which (s)he could harm him/herself or his/her property. The mental abilities [*umstveni sposobnosti*] dropped underneath certain threshold render the expressed will unworthy of the law, which does not respect it not only as an autonomous<sup>16</sup> legal declaration of will but as a legally relevant fact at all: the law does not require that it be taken into consideration or account when decisions are being made in the name and at the expense of the interdict. At best the interdict's desires and preferences remain as a “natural” will, i.e. the will to realize certain physiological needs: water, food, sleep, etc., whose satisfaction is in fact care for the best interest of the person. Such (infrajuridical) “will” is completely absorbed by “the best interest” of the interdict.

As an interim **conclusion** of a kind I could point out that the only means provided by PFA for overcoming certain cognitive disabilities of the person is *the approach of disrespecting and taking away the will (the capacity to act)*. As far as the person is unable to meet the criteria of rational thinking set by medicine and checked by the judge the person loses his/her will. It is “alienated” and “consigned” to be exercised by another person.<sup>17</sup> All interested parties may file a petition to do so, including the prosecutor. This is an obvious violation of the provision of article 12, paragraph 2 CRPD quoted in the beginning, which requires equal access to capacity to act by people with disabilities “on an equal basis with others in all aspects of life”. The capacity to act of people with disabilities who are placed under interdiction is taken away and not recognized by PFA.

The law, however, does not offer support, which could take into consideration the specific intellectual and mental disabilities of the persons who “are unable to take care of their affairs”. The *court* approached according to the procedure stipulated in article 336, paragraph 1 of CPC *does not have an available option to determine specific measures* that could be applied to people with disabilities *in order to help them express their authentic will in a legally valid way*. The will of these persons is not sought as an authentic manifestation of their freedom, it is substituted for another criterion for determining the contents of decisions made on behalf and at the expense of the interdict – his/her “best interest”. Instead of the principle of “rescuing” any possible authentic will by taking measures to adequately form and express it the law is ready to sacrifice the interdict's desires and preferences at the expense of stability and clarity given by the principle of “the best interest”. In this sense Bulgarian legislator has failed to fulfill the commitment under article 12, item 3 CRPD according to which: “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”\*.

### 1.3. Is there a statutory gap in the statutory provisions governing the incapacity to act?

The argument of CC according to which if article 5, paragraph 1 PFA (with respect to the words “and [they] become incapable of acting”) and of article 5, paragraph 3 of PFA are declared unconstitutional **a gap will arise** in the legal regime of persons with intellectual disabilities and mental disorders should be examined in this context. This conclusion becomes quite dubious if it is considered that *currently there is a gap in the law as well* as regards the possibility of taking appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity (*article 12, item 3 CRPD*). Such special measures that take into consideration the specific needs of people with intellectual disabilities and mental disorders in the independent exercise of their rights are not settled in any Bulgarian law in force. This gap will neither arise, nor will it become greater if the effect of article 5 PFA is dropped. And in both cases Bulgaria has not fulfilled her commitment under article 12, item 3 CRPD.

The abolition of full interdiction, however, *could be part of the fulfillment of Bulgaria's commitment* under article 12, *item 2 CRPD*, which obliges the states to recognize the capacity to act of people with the persons with disabilities “on an equal basis with others in all aspects of life”. This requirement of article 12, item 2 CRPD is associated with the attempt to keep and consolidate the will that the persons with intellectual disabilities and mental disorders can authentically express

<sup>16</sup> For the examination of the concept of “autonomy” and putting it in the context of the persons with disabilities see **Bach, M., L. Kerzner** A New Paradigm for Protecting Autonomy and the Right to Legal Capacity. Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice October 2010 Commissioned by the Law Commission of Ontario, p. 38–44, accessible online at: [www.lco-cdo.org/disabilities-commissioned-paper-bach-kerzner.pdf](http://www.lco-cdo.org/disabilities-commissioned-paper-bach-kerzner.pdf)

<sup>17</sup> In this sense the tutorship granted upon one's placement under interdiction is designated as “civil death” of the person. See for example **Lawson A.** The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn? – Syracuse Journal of International Law and Commerce, 2007, Vol 34, No. 2, p. 563–619, as well as **Keys, M.** Legal Capacity Law Reform in Europe: An Urgent Challenge. – In: Quinn, G., L. Waddington (eds) European Yearbook of Disability Law, Antwerp-Oxford-Portland, 2009, Volume 1, p. 60. For the analysis of the comparison between tutorship and civil death in comparative perspective, see more in **Perlin, M.** “Striking for the Guardians and Protectors of the Mind”: The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law. – Penn State Law Review, 2013, Vol. 117, No. 4, p. 1159–1190.

\* The original English text of the Convention is reproduced verbatim in the translation; however, the author quotes the official Bulgarian translation of article 12, item 3 of the Convention that is slightly different: “State Parties shall take appropriate measures to provide persons with disabilities with access to the support they may need for exercising their rights on their own” – Translator's Note.

despite the impact of their disabilities. In their refusal to declare article 5, paragraph 1 PFA (with respect to the words “and [they] become incapable of acting”) and article 5, paragraph 3 of PFA unconstitutional CC did not prevent the Bulgarian legislation from arising a statutory gap as regards the need to support persons with intellectual disabilities and mental disorders (despite the requirement of article 12, item 3 CRPD) – merely because such a gap has been in existence since the time when CRPD came into force for Bulgaria (21 April 2012), but reaffirmed an existing statutory regulation that restricts and even takes away the capacity to act of persons with disabilities (in violation of article 12, item 2 CRPD).

## 2. The “presumable will” criterion

### 2.1. Interdiction for the sake of the interdict

As regards the second argument of CC, which I would like to examine, first I will have to make again some preliminary remarks. Let us proceed from the assertion that I take interdiction as a concept introduced *for the sake of the interdict*, and not for the sake of third parties or for the sake of the state (it should be noted that in cases where people with disabilities, by their conduct, pose danger for third parties, there are special measures of medical coercion aiming to prevent and neutralize such danger).<sup>18</sup> Proceeding from such an assertion let us ask ourselves the following question: what would the interdict want to be decisive in the exercise of his/her rights – his/her authentic will or his/her best interest? This question could also be reworded thus: what is to be respected: the desires or interests of the person? I think that *for the interdict* it is *more important* – and this should be decisive as soon as the interdiction is imposed for the sake of the interdict – not to have his/her interests preserved but to have his/her will respected. Moreover, the respect for the will is a premise for the person to guard the interests he has him/herself identified as his/her own. Another’s will often thrusts another’s interests.

Therefore in the case of interdiction for the sake of the interdict the main “effort” should be directed at taking into consideration and respecting the will of the person with intellectual disabilities or mental disorders. The concerns related to the cognitive disabilities of the person should be taken into consideration by introducing into legislation different *means of support* that could be determined by the courts for each particular case. These means of support do not aim at restricting or substituting the will of the person but at ensuring the help (s)he needs in order to formulate his/her authentic will. Without the application of these corresponding support measures the will of the person, although it is expressed by him/herself in person, would not be authentic. Support measures make equal people with disabilities and people without them. They help them cross the threshold necessary for the participation in certain social interactions that entail legal consequences.

Support measures, however, *should not put the supported person in a harder position*. They do not introduce an irrefutable presumption of actual capacity to act within the meaning of article 31 OCA. As with all capable persons: the presence of a decision under article 130, paragraph 3 FC as a requirement within the meaning of article 27, paragraph 1 OCA excludes voidability under article 27, paragraph 1 OCA (where the contract has been entered into by an incapable person or by his/her representative without observing the requirements established for them) but does not exclude the one under article 31, paragraph 1 OCA (where the contract has been entered into by a capable person who was, at that time, unable to understand or manage his/her conduct). Therefore even if the support measures that are the most appropriate for the particular case are allowed and even if they are applied in full conformity with the requirements for them (understood *de lege ferenda* as possible “requirements” within the meaning of article 27, paragraph 1 OCA), they do not rule out the possibility of the person being, as at the time of performance of the specific act, actually incapable of acting (article 31, paragraph 1 OCA). There is no reason for the “cascading” application of article 27, paragraph 1 OCA and for the exclusion of article 31, paragraph 1 OCA in the case of incapable persons. The support measures provided to them aim at “bringing” them on an equal footing with capable persons in terms of the assessment under article 31, paragraph 1 OCA, which is still used to date on a case-by-case basis.

As we can note, however, none of the points made above is supported by *the Bulgarian legislation in force*: what is decisive is not the will but the interest of the interdict; no tools for the validation (“normalization”) of the will of persons with intellectual disabilities or mental disorders have been provided for; instead of support measures the law stipulates restriction and taking away the possibility of independent exercise of rights. This suggests that Bulgarian legislation approaches interdiction in a way different than the approach to interdiction as a concept for the sake of the interdict.

### 2.2. Interdiction for other purposes

As per the second possible interpretation of interdiction it is a legal concept introduced *for the sake of any would-be successors of the interdict or for the sake of community as a whole*. In such case it is precisely these persons, or the

<sup>18</sup> If we assume that interdiction was not established for the sake of the interdict but for the sake of his/her present and future creditors or for the sake of third parties having certain interest, then we must seriously reconsider the existing legal regulation of the incapacity to act of the persons who have attained majority. Such an assumption would turn interdiction into a concept analogous to “civil death”, which practically effaces the incapable person’s quality of being a legal subject. This would not only be contrary some basic principles of contemporary law, which put person’s privacy and freedom first but also to some fundamental ethical laws such as Kant’s categorical imperative: “Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end.” See: Kant, Immanuel. *Grounding for the Metaphysics of Morals*. Translated by Ellington, James W. (3rd ed.). Hackett, 1993, p. 36.



state c/o the prosecutor, respectively, who will be able to *initiate* the legal proceedings to have the person placed under interdiction. Precisely such is the solution contained in article 336, paragraph 1 of CPC. In such formulation of interdiction the capacity to act of the interdict should be subject to certain restrictions (even deprivations) in order that a criterion claiming to be objective such as the “best interest” criterion should be preserved. The will of the person is invalidated in order that the control of his/her decisions can be assumed and that the objectively defined interests, mostly property interests, can be preserved. The focus shifts from the person of the interdict to his/her property. Such interdiction proceedings are “psychic insolvency” proceedings where a “cognitive receiver [*sindik*]” (tutor) is appointed to manage the property of the insolvent “debtor” in view of his/her “best interest” (and the one of his/her present and future creditors).

As regards the public interest represented by the state it consists in the need of *stability* of each displacement of goods being part of interdict’s property. Such displacement should not “shake” the trust in civil-law transactions even if to that effect any possible contradiction concerning the legally valid will of the interdict will have to be unilaterally effaced. The legally valid will is deemed the one expressed by the tutor, without it being possible to contest or challenge it in any way whatsoever because of the presence of other desires and preferences expressed by the interdict. The empowerment of the tutor is absolute and leads to the tutor being constituted as a rational and foreseeable (he will always protect “the best interest” of the interdict) substitute for the interdict. In this case, in addition to “alienation” one can also speak of “nationalization” of the authentic will of the interdict as the grounds for that are not the private interests of another but the public interest in ensuring the security of civil-law transactions [*grazhdanski oborot*]. In this perspective the will and also the capacity to act related to it are taken away as a personal resource and become a property administered by the state and its institutions in private or in public interest... The court defines your capacity to act on the initiative of someone else.

### 2.3. Incapacity to act as a public resource

The incapacity to act in the context of interdiction is rather a **public resource** than personal inability/incapacity (to act). Interdiction is a tool for effacement of the specific will and its substitution for the abstract criterion of “the best interest”<sup>19</sup> The authenticity of will is substituted by constructing the interest. But can one be free only within the limits of his/her own interest without his/her will being respected? Doesn’t such interpretation turn the interdiction into a *measure for protection against “erroneous” decisions* and into a tool for depersonalization of freedom?<sup>20</sup> Undoubtedly, the interest of the person has its place in the exercise of the rights but the rights are not merely “cognitive” possibilities [*vazmozhnosti*] (“cognitive rights”) and rational realizations of objectively given interests. Their exercise is part of the freedom of personality and that freedom is impossible without respect for the will even when it is formed and expressed under certain difficulties: in fact, it is precisely supporting measures and not protective measure that are needed in this case. Therefore, even when there are doubts over the authenticity of the will, i.e. doubts as to whether the person understands what is happening and what his interests are in the particular situation, his/her desires and preferences should be examined, supported and taken into consideration.

Such a criterion, however, does not exist in the legislation in force and desires and preferences are entirely “absorbed” by “the best interest” criterion. Every hyperbolization of Interest at the expense of will hides in itself a “Trojan horse” of a kind against freedom. The justification of Interest could serve as a cover for getting through many and different objectives that restrict and take away interdict’s freedom. And although “the best interest” criterion has its place, it should not be the sole and exclusive one if we claim that interdiction is for the sake of the interdict. If, however, this concept serves the civil-law transactions, the stability of legal order and the flow of goods, then it follows that we should consider interdiction a *special analogue of condemnation\** in the law of things [*veshtnoto pravo*], as in this case the object of condemnation is not the property but the will of the person, although the formation and expression of such will are impeded, although they cannot be jointed together in a self-defining identity and although the will is “in bulk” of desires and preferences: desires should be viewed as a “weak-er” form of will whose validity is not absolute, and preferences should be viewed as a choice between different desires competing with one another in the particular case. However, is such an analogy with condemnation permissible? And what could be the “preliminary and just compensation” due in this case?

### 2.4. Measures of medical coercion

The discussion of interdiction is one about its purpose. The threat to other people and to the community as a whole from a *possible socially dangerous and harmful conduct of persons with mental disorders* is addressed by other measures – **medical coercive measures** as regulated in the Health Act (articles 155–165 HA). The intervention in the case such measures are applied, however, is specific and is not related to the complete robbing of the person of the possibility to exercise his/her rights on his/her own. The restriction relates to treatment-related decisions, i.e. to the will expressed as an informed consent to treatment or as a refusal to treatment. According to the law the mentally ill persons with

<sup>19</sup> For a detailed analysis of the question of whether and to what extent the concept of tutorship is capable of protecting the person placed under tutorship, see **Wright, J.** Protecting Who From What, and Why, and How?: A Proposal for an Integrated Approach to Adult Protective Proceedings. – The Elder Law Journal, 2004, Vol. 12, pp. 53–118.

\* or *expropriation*; a concept roughly corresponding to *compulsory purchase* in UK law and *eminent domain* in US law – Translator’s Note.

<sup>20</sup> See also **Perlin, M.** “Chimes of Freedom”: International Human Rights and Institutional Mental Disability Law. – 21 New York Law School Journal of International and Comparative Law, 2002, accessible online at: [www.temple.edu/lawschool/phrhcs/conference/chimesoffreedom.pdf](http://www.temple.edu/lawschool/phrhcs/conference/chimesoffreedom.pdf)

ascertained serious disturbance of mental functions (psychosis or severe personality disorder) or with manifested permanent mental injury [*umstvena uvreda*] as a result of mental disease such as persons with moderate, severe or profound mental retardation or vascular and senile dementia, who – due to their disease – might commit a crime, which is a threat to their relatives or for the general public or which seriously threatens their health are subject to compulsory placement and treatment [*zadalzhitelno nastaniavane i lechenie*]\* (article 155 HA). In such cases the procedure is initiated (quite logically) by the prosecutor and – in case of provision of emergency psychiatric aid and temporary placement for treatment (article 153 and article 154 HA) – also by the director of the health facility (article 157 HA). The deciding body is the court, i.e. the District Court having jurisdiction over the person's current address or the health facility, respectively (article 156 HA). The court delivers a judgment as to the need of compulsory placement, determines the health facility, the period of placement, the form of treatment (outpatient or inpatient), as well as the presence or absence of person's ability to express informed consent (article 162, paragraph 2 HA). It is notable that the judgment as regards the need of compulsory placement is not absolutely bound by a judgment as to the presence or absence of person's ability to express informed consent. The court might establish the need of *compulsory placement* without establishing the absence of person's ability to express informed consent, i.e. without the need of *compulsory treatment*. Only in the cases where the court establishes an absence of person's ability to express informed consent the court pronounces compulsory treatment and appoints a person among the close relatives of the patient to express informed consent to the treatment, and in case of conflict of interests or if there are no close relatives the court appoints a representative of the municipal healthcare office or a person determined by the municipal council by the domicile of the health facility who will express informed consent to the treatment of the person (article 162, paragraph 3 HA). The substitution of one's will stipulated for such cases of compulsory placement and treatment is considerably more specific and proportionate compared to the general deprivation of the capacity to act upon person's placement under interdiction (article 5, paragraph 1 PFA).

But even in cases of such "*ad hoc*" deprivation of person's ability to express his/her will the will of the person must be taken into consideration to some extent as concerns the implementation of the treatment imposed by the court. This approach is adopted by the Bulgarian legislator for the expression of will on behalf of the incapable person only in two cases: a) the expression of will to participation in a clinical trial where the informed consent for an incapable adult is given by his/her lawful representative as the consent of the lawful representative must represent *the presumable will* of the participant (article 96, paragraph 4 of Medicinal Products in Human Medicine Act) and b) the expression of informed consent to hematopoietic stem cells being taken from the person where the consent of the parents or tutors of the minor [*maloletnoto litse*] must represent the presumable will of the minor (article 27a, paragraph 4 of Transplantation of Organs, Tissues and Cells Act (TOTCA)). The second case is stipulated only for minors but it could also be transposed with respect to persons placed under full interdiction on the grounds of article 5, paragraph 3 PFA.

Of course, the presumable will differs from the desires and preferences specifically expressed by the person but as a construct it is more flexible and allows to a greater extent for the desires and preferences expressed by the person to be taken into consideration. And yet it remains *a construct that is built on the basis of an autobiographical notion of the personality of the person*. The personal story and the known worldly manifestations of the person are decisive in order to "continue" and "apply" it in the specific situation where an informed consent to treatment must be given or refused. There is an induction of a kind of patient's identity from the biographical information about him/her followed by a deduction and an application of the pattern of patient's personality thus constructed in order to guess what his/her will concerning the treatment would be. The "presumable will" criterion requires that the will that is inscribed to the greatest extent into the biography of the person should be respected. It might differ from the specific desires and preferences expressed by the patient. If in the case of full interdiction the will of the interdict is a captive of his/her "best interest", then in the cases of article 96, paragraph 4 MPHMA and article 27a, paragraph 4 TOTCA the will of the person is subordinated to his/her biographical projection: the elimination of a possible biographical dissonance could prevail over the respect for the desires and preferences specifically expressed by the patient. Thus, the criterion of "presumable will" adopted in medical law (article 96, paragraph 4 MPHMA and article 27a, paragraph 4 TOTCA) is considerably more sensitive to the will of the person if compared to "the best interest" criterion, which is the leading one in interdiction (article 130, paragraph 1 FC in relation to article 5, paragraph 3 PFA), but it again allows for certain dependences of person's actual will on the projections of autobiographical decisions (s)he has made until then.

## 2.5. Presumable will and the questions of post-identity

In terms of comparative law the "*presumable will*" criterion takes into account both the *overall biography of the person* and the documents created and left by him/her especially to that end, which aim to specify what the person's desires are in some possible future situations where the person will not be able to express a valid legal will. Again, it is all about desires and preferences and not about "full-fledged" will as these documents related to possible future situations whose peculiarities may not be taken into consideration beforehand and therefore the person can express only desires and preferences for them but not will. Such documents are *the preliminary instructions for treatment*. In Bulgarian legislation there are no texts allowing for such instruments to be prepared and respected, although they are a logical continuation of the "presumable will" criterion. They take into consideration the person's will to considerably greater extent as the speculation about it is based on desires and preferences expressed precisely to that end by the person him/herself before (s)he falls into the condition which renders him/her unable to form and express will.

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\* a concept similar to *involuntary commitment* – Translator's Note.

Although there is a risk that the desires and preferences thus expressed are “former”, i.e. that the person has changed his/her ideas about how one should proceed in situations of the envisaged kind, they have been still desires and preferences of the person and should be discussed when his/her presumable will is being determined. The presumable will thus established could prevail over the actually expressed desires and preferences of the person, where there is doubt over their authenticity and over the competence of the person as at the time of expressing them. In such case the desires and preferences expressed in the past will “bind” the person in his/her present condition and the decisions made in such condition. However, in case that the person is autonomous and competent the will of his/her “former self” could not prevail over the will of his/her “present self” and be binding upon the latter. Everyone has the right to change their will and each subsequent will “rescinds” the former ones as the strongest will is the person’s “last” will - the one that is the most up-to-date and that is expressed after all other wills.

Another argument against the admissibility and validity of the preliminary instructions for treatment is the so-called “slavery argument”. Under it the person who has expressed his/her will in the preliminary instructions is different from the person with respect to whom they are to be applied.<sup>21</sup> The reason for that is that it is not until the occurrence of certain mental injury [*umstvena uvreda*] or the deepening of a disease as a result of which the patient is unable to form and express authentic will that the preliminary instructions for treatment come into force. This circumstance<sup>22</sup> being a dilatory condition for the coming into force of the preliminary instructions for treatment has as its effect the effacement of patient’s personality that existed until then, whose will was objectified in the preliminary instructions for treatment. What “remains” (we find) in its stead is another human being who also deserves our respect and should not be treated merely as a slave or as property of the personality, which has been “terminated” as a result of the occurred mental injury [*umstvena uvreda*], and which has also “survived” its “termination” through the will objectified in the preliminary instructions for treatment. The most typical case demonstrating the power of the “slavery argument” is the person with Alzheimer’s, whose memory is completely destroyed and whose cognitive processes are almost entirely effaced; however, there has remained a basic perceptual awareness. In contrast to the patients in persistent vegetative state such person can hear and see or, at least, can have auditory and visual perceptions and retain his/her ability to feel pain and physical pleasure. It is precisely for that “other person”, different from the patient before the development of the Alzheimer’s disease, that the question as to what extent (s) he has not been transformed into a slave of the latter and his/her will objectified in the preliminary instructions for treatment is posed. Between the patient before (the addresser of the preliminary instructions for treatment) and the patient after (the addressee of the preliminary instructions for treatment) the deepening of dementia there is no psychological continuity<sup>23</sup>, so it comes to two separate moral subjects as the second one cannot be subordinated and subjugated to the will of the first only because (s)he has “survived” the development of the respective neurological disorder and to a certain extent has been “foreseen” by the first subject.<sup>24</sup>

The slavery argument is based on the assumption that the subject who has “remained” after a neurological injury is another individual. And this is precisely its weakest point. The main counter-argument that restores the moral authority and the binding power of the preliminary instructions for treatment is that the “living being” that remains is not a “person”\* at all and, therefore, not “another person” for a much better reason. Of course, the absence of a “person” does not automatically mean an absence of moral status. For the “living being” that remains after the neurological impairment can feel pain and pleasure, his/her existence restricts the acts we can do with respect to him/her. But because the will of the terminated “person” and the basic sensitive preferences of the “living being” can come to a conflict between one another the authors recognize the interest as a criterion for resolving this dispute. Interest can survive not only the person’s competence but also his/her personality, even the death of his/her body. Therefore, the interests of the person remain even after the person is terminated because of the occurrence of the irreversible neurological impairment. The interest in treating the still living body in which the person used to exist in a certain way is deemed decisive and having priority over the current basic interests of the “living being” that has survived the injury. A body is “dwelled” consecutively by two human beings who can have different interests and the preliminary instructions for treatment

<sup>21</sup> See for example **Buchanan, A., D. Brock** Deciding for Others. The Ethics of Surrogate Decision Making. Cambridge, 2004, pp. 154–172.

<sup>22</sup> The contemplations below presume that a low threshold should be adopted when assessing the presence of psychological continuity of the person in different stages of life, i.e. some truly radical change to the mental state of the person must occur in order that we accept that it has terminated its existence and “in its stead” (“in its body”) a new living being has “arisen” (has “settled down”).

<sup>23</sup> As regards the importance of psychological continuity of the concept of “personality” see **Parfit, D.** Reason and Persons. Oxford, 1986, pp. 204–209. In the same book Parfit also examines the importance of rationality for construction of personality (p. 307).

<sup>24</sup> Such bifurcation and consecutive “substitution” of the *self* for a “later” self could also be shifted to the context of criminal responsibility (whether the one who is punished is the same one who has committed the crime) and the contractual obligations (whether the one from whom we want to fulfill a promise is the same one who has made it). See **Parfit, D.** Later Selves and Moral Principles. – In: Montefiore, A. (ed), Philosophy and Personal Relations. Montreal, 1973, pp. 142–145.

\* The word used in the original is “lichnost” meaning “personality” immediately followed by the author’s own English translation in parentheses (“person”). In Bulgarian the word “litse” could mean both “face” and “person” (individual). Until the end of this chapter 2.5 “person” and “personality” are used interchangeably to translate “lichnost”. – Translator’s Note.

should allow for the collision of these interests. The terminated person has interest in what will happen in the future after it is terminated with the “living being” that has “inherited” it after the termination. This possibility is deemed part of the right to self-determination of the person: everyone should be able to determine the fate of his/her own living body after the termination of his/her psychological personality or, to put it otherwise, to determine the fate of his/her living “heir” who will dwell in his/her body from the termination of the person until the occurrence of the death of that body. The said right is designated as a right of disposal. Although it is part of the content of the right to self-determination it is also defined as quasi-possessory right. It can be overcome in the cases where it is justified to do so in order to avoid certain damage (for example to avoid causing pain to the “living being” that remains after the neurological damage) or in order to attain the legitimate benefit (for example, the application of a newly-found successful treatment that can restore the physical and mental state of the “living being”). In such case actions can be taken, which are favorable to the “living being” (to a certain extent we can also call him/her the “living body”), irrespective of the fact that such actions do not take into consideration, or even are in direct opposition to the preliminary instructions for treatment.

Other sources for the establishment of person’s presumable will are his/her close relatives and friends who knew him/her and who are supposed to know his/her attitudes to certain situations, decisions and values. We could submit that after the person falls into a state in which it is difficult for him/her or in which (s)he is deprived of the ability to form and express will the law *constructs his/her post-identities*, which are usually temporary – for as long as the state of difficulty or inability – which the court fills with content by drawing information from different sources. The information provided by the person’s close friends and relatives could be precisely such a source. The idea of one’s person that is most typical for law is the one according to which the person lives in the relations between people, i.e. to a certain extent it is a social exteriorization and investment in the relationships with other legal subjects (legal persons). Where such an idea of a “shared” personality is adopted post-identity can be easily maintained by “collecting” and by reconstructing the personality via its relations with the persons close to it: the ones in the relationship to whom it has built itself and has existed as a person. In this sense one could read the assertion according to which one lives for as long as those who remember him/her are alive. Our relationships with other people can be viewed as a deposit of a kind of personal components which could be “claimed” back at a certain time in order to construct the post-identity of “depositor”. This is also a manifestation of the serious potential of the so-called *support networks*<sup>25</sup> and “welfare” powers of attorney<sup>26</sup>, which can be used if the approach of *crowd sourcing* the patient’s (post)-identity is adopted. As far as the person is unable to “collect” him/herself into a personality this process could be carried out by the court with the assistance of the close relatives and friends of the person. Even in the case of this approach that is closest to the presumable will, however, one should be careful not to allow the projection and the sum total to prevail over authenticity. This is valid especially for the cases where the person is able to express desires and preferences but they are disqualified by the law by reason of person’s intellectual disabilities or mental disorder. Thus, the presumable will should always take into account both the past and the up-to-date desires and preferences of the person.

## 2.6. Incapacity to act and identity

The legal regime of interdiction could also be examined in the context of philosophical debate about identity. In general, **two approaches to human identity** can be distinguished: I. *Substantial theory* of identity – according to that understanding identity deals with the preservation of certain substantial content over time as such content-substance could be of spiritual (human soul) or material (human body/brain) nature, and II. *Relational theory* of identity – according to that understanding identity deals with human consciousness seen as a mechanism for connection of two different moments from the past and the present (memory<sup>27</sup>, psychological continuity<sup>28</sup>) or for their integration into a meaningful context constructed by the person him/herself as a story of his/her life (narrative<sup>29</sup>). Both the substantial

<sup>25</sup> Horizontal support networks (as an alternative to the vertical relations of “tutor – interdict”) presume the creation and maintenance of a number of diverse connections between the person with intellectual disabilities and the remaining participants in the network as such connections set up the social foundation necessary for the exercise of such person’s legal personhood. See **Bach, M.** Supported Decision Making under Article 12 of the UN Convention on the Rights of Persons with Disabilities. Questions and Challenges. Notes for Presentation to Conference on Legal Capacity and Supported Decision Making Parents. Committee of Inclusion Ireland. Athlone, Ireland – November 3, 2007, p.9, accessible online at: [www.inclusionireland.ie/sites/default/files/documents/prof-m-bach-shared/bach-supporteddecisionmaking-inclusionirelandnov07.doc](http://www.inclusionireland.ie/sites/default/files/documents/prof-m-bach-shared/bach-supporteddecisionmaking-inclusionirelandnov07.doc) The report also points (p. 11) the advantages of support networks, among which: personal commitment and knowledge of the values and opinions of the supported person; voluntary dedication to the commitment to support; diversity of relationships providing an opportunity of a fuller knowledge about the supported person; a greater chance of there being at least one available member of the support network where necessary; a greater chance of there being at least one member of the support network who is not in conflict of interest with the supported person in the particular situation, etc.

<sup>26</sup> For the existence of such “welfare attorneys” in terms of comparative law, see **Stavert, J.** The Exercise of Legal Capacity, Supported Decision-Making and Scotland’s Mental Health and Incapacity Legislation: Working with CRPD Challenges. – Laws 2015, No. 4, p. 305.

<sup>27</sup> See **Locke, John.** An Essay Concerning Human Understanding London, 1690 [pp. 454–456 of Bulgarian translation quoted by the author. – Translator’s Note].

<sup>28</sup> Connectedness understood as sufficient number of psychological connections, overlapping chains of psychological connections. See **Parfit, D.** Reasons and Persons. Oxford. 1984. pp. 205–206.

<sup>29</sup> See for example **Schechtman, M.** The Constitution of the Selves. NY, 1996, p. 94.

and the relational concepts of identity offer us two criteria for the assessment of whether personal identity is present over time: a metaphysical (human soul) and a biological (human body/brain) criterion provided by the substantial theory and a psychological (memory, psychological connections) and a narrative (narrative) criterion provided by the relational theory.<sup>30</sup> If the metaphysical criterion relies on an additional fact existing permanently outside the biological and mental processes that take place in human body for the preservation of identity over time, the psychological criterion (especially in the form of psychological connections) proceeds from reductionist premises. Each of the criteria presumes its preservation (continuity) over time so that it can be a reason for recognition of identity.

Each of the criteria mentioned has *specific application*. Thus for example the biological criterion can be used in justifying identity in the cases where a person falls into a persistent vegetative state as well as in justifying the identity between human embryo and born child; the psychological criterion is taken into consideration in the assessment for the realization of criminal responsibility – if the person who has committed the respective socially dangerous act does not remember and does not realize at all what he has done, then it may turn out that it is pointless to impose punishment for such act. The narrative criterion, in its turn, can be used in the assessment of the presumable will of a person who has left instructions for treatment and there are doubts as to the extent to which such instructions are up-to-date and authentic provided that they were given more than 5 years – they would be up-to-date of no “narrative turn” has occurred during the said period, which renders the instructions meaningless or inadequate in the new living context of the person.

However, as none of the four criteria as aforesaid is *self-sufficient* and each of them gets to questions and controversies that it alone cannot resolve, I have adopted an approach of combining them where the possible proportion and legal weight of each of the four criteria is assessed upon their application in view of the assessment of the identity of a person over time. Due to the religious nature of the metaphysical criterion it has been replaced by what I designate as *interpersonal criterion*<sup>31</sup>, which examines the stability (continuity) of the person and its relations with other persons.

The examination of these criteria **matters** for the issues concerning incapacity to act and interdiction, considering the circumstance that intellectual disabilities and mostly mental disorders are viewed as circumstances that *interrupt the identity* of the person, who is no longer “the same” and therefore the will expressed by him/her is not “his/her” and thus should not be respected by the law. Without getting to the question<sup>32</sup> of whether several personalities (souls, consciousnesses, narratives) can exist in an individual (body) and whether the person who has fallen into a mental disorder is one different from the person that has existed “in the same body” before the mental disorder the interdiction disqualifies the will as a will for the period for which it is imposed that can not only harm interdict’s interests but is also, as if, a will that is not his/hers. This “deficiency” of personality (personal identity) is a possible argument against the recognition of the will of the interdicted person. Thus, this argument should be examined and this requires us to pay some attention to the questions concerning identity and the way it has been approached in the context of interdiction.

The criteria for personal identity can be differentiated into **two new groups**: objective and subjective. *Objective* criteria are the biological and the interpersonal ones, which use external reference in order to justify the existence of the person and its identity over time: the presence of continuing corporeity uninterrupted over time (biological criterion) and the presence of continuing and uninterrupted social interactions (interpersonal criterion). Both criteria, however, rely not on the full preservation of corporeity/sociality but in their fixation by the gaze of the others (community). It is

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<sup>30</sup> For these criteria, although here they are interpreted in a different way, see **Gyoshev, Hr.** Identichnost i normativnost. Izledvane varhu filosofskia reduksionizam na Derek Parfit [Identity and Normativity. A Study of the Philosophical Reductionism of Derek Parfit]. S., 2013, pp. 14–18.

<sup>31</sup> On the one hand, the interpersonal criterion is related to the mutual recognition between individual persons as a premise for the constitution of their identities. See **Calegari, F.** The struggle for recognition: Axel Honneth’s contributions for a moral (and liberal) grammar of social conflicts. – Leviathan. Notes on Political Research. 2013, No. 6, p. 49. On the other hand, the interpersonal criterion “ensures” certain stability of the person as the surviving reflection in the eyes of its relatives and friends who can “attest” its identity through their own interactions with it. For Hegel’s phrase “being oneself in another” and its relation to the three forms of interpersonal recognition: love (Liebe), right (Recht) and solidarity (Solidarität), placed in the theory of interpersonality, see **Honneth, A.** The Struggle for Recognition. The Moral Grammar of Social Conflicts. Cambridge, 1996, pp. 92–130. For the so-called “intersubjective dependency” see also **Fleming, T.** Recognition in the work of Axel Honneth: Implications for Transformative Learning Theory. – In: AlhadeffJones, M., A. Kokkos (eds). Transformative Learning in Time of Crisis: Individual and Collective Challenges: the Proceedings of the International Transformative Learning Conference in Europe [and] 9th International Conference on Transformative Learning, May 28th–29th 2011, Pre-conference May 27th 2011, Post-conference May 30th 2011, Athens, Greece. New York, 2011, pp. 95–100. It is precisely the battle for recognition by others that underlies social development. However, it is also underlying for a “crowdsourcing” of a kind of parts of identity, which remain “in the eyes” (mind) of one’s significant others.

<sup>32</sup> For details about it and for the existing theoretical dispute, see **Gyoshev, Hr.** Identichnost i normativnost. Izledvane varhu filosofskia reduksionizam na Derek Parfit [Identity and Normativity. A Study of the Philosophical Reductionism of Derek Parfit]. S., 2013, pp. 50–53, where he also examines the possibilities of two persons sharing one individual (shared individual) as well as several individuals sharing consecutively one person (shared person). For the possibility of viewing the mental state of a person subsequently in time as a “vitiating later self” of such person – in the context of the scenario of *the 19<sup>th</sup>-century Russian*, see **Parfit, D.** Reasons and Persons. Oxford. 1984. p. 327. This concept could also be transposed with respect to the “self” of the person where the latter falls into a state of mental disorder.

precisely the others who “preserve” the identity of the changing body and social interactions by uniting the changes into personal identity. Although the process is dynamic the person is “stabilized” by the identity over time attributed<sup>33</sup>. to it In this sense the two criteria are individualized as an application of the attributive approach to the definition of personality according to which personality is a quality that has no real existence: personality is an attribution. It is asserted as a fiction<sup>34</sup> and is used as a tool for the attainment of certain socially important results related mostly to providing security and foreseeability of social interactions. It is precisely this process of creation and attribution of a “person” to the otherwise dynamic and constantly changing individual for the purposes of social interactions that is designated as “*im-person-ation*”<sup>\*</sup>.

*Subjective* criteria are the psychological and the narrative ones, which use internal reference in order to justify the existence of the person and its identity over time: the presence of a coherent consciousness uninterrupted over time (psychological criterion) and the presence of a coherent and uninterrupted narrative (narrative criterion).<sup>35</sup> However, neither of the two criteria relies on a full coincidence of consciousness/narrative over time, they rely on its integration of certain subjective processes of the *self*. The personality “self-reserves” the identity by interpreting and arranging the changes to its experiences and in life in general. Although it is a dynamic process personality is “stabilized” by appropriation of what is happening as parts (fragments) of a whole united by memory or by the narrative constructed by the person. In this sense are individualized as an application of the constructivist approach to the definition of personality according to which personality is a creation of its own self, a construct of certain psychological or interpretative subjective processes. It emerges as an authentic outcome of individual’s functioning as an totality of connected psychological and interpretative processes. It is precisely this process of incessant self-constitution, either through memory, or through overlapping psychological connections that is designated as “self-actualization”, which is “registered” by the law as “freedom of the person”.

**Table No. 1: Components of Personality**

<b>Objective components</b>		
<i>Biological criterion</i>	<b>Attributive approach</b>	Hobbes
<i>Interpersonal criterion</i>		
(external reference)	continuity	
	Personal identity is <b>attributed by others (community)</b> although the changes that inevitably occur in the body and in the scope and nature of social interactions (usually they are gradual and have a long course over time)	
	Leading objective: stability by co-unitarization (nationalization) and fixing	
		<b>IMPERSONATION</b>
	Personality “ <i>is attributed</i> ” as a mask (persona, personification, face**) of the subject – it is a social and juridical role that remains fixed despite the emergence of the individual behind and underneath it. Identity is kept outside as fiction (Hume). The legal personhood is precisely such an identity.	
<b>Subjective components</b>		
<i>Psychological criterion</i>	<b>Constructivist approach</b>	Locke
<i>Narrative criterion</i>		
(internal reference)	continuity	

<sup>33</sup> See **Hobbes, T.** Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil. 1651 [p. 172 of Bulgarian translation quoted by the author. – Translator’s Note].

<sup>34</sup> See **Hume, D.** A Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects, 1738-40 [p. 341 of Bulgarian translation quoted by the author. – Translator’s Note].

\* literally “personification” – Translator’s Note.

<sup>35</sup> The two criteria are related as the story (narrative) of oneself is built on the basis of memory (psychological connection) of the respective events. See **Kasabova, A.** Za avtobiografichnata pamet [Of Autobiographical Memory]. S., 2007, pp. 84–85.

\*\* Here the word “litse” meaning “person” in legal context is used in its meaning of “face” – Translator’s Note.

	Personal identity is <b>appropriated/interpreted</b> by ourselves despite ourselves as we connect in our memory and arrange as a story the changes happening to our bodies and lives (usually they are gradual and have a long course over time)	
	Leading objective: authenticity by individualization (privatization) and liberalization	<b>SELF-ACTUALIZATION</b>
	Personality “ <i>is self-actualized</i> ” via memory of past experiences and states of consciousness (Locke), via psychological connections manifested in overlapping series of psychological connectedness (Parfit) or by uniting past, present and future in a narrative sequence (Schechtman). Identity is appropriated inside as a dynamic experience but one connected over time.	

Let us trace out how each of these four criteria seen as a component of the combined reconstruction of personal identity is accounted for in the legal notion of **interdiction**. Interdiction is a juridical instrument of regulating mental and psychological states in which the authenticity of the will expressed by a person is questioned. The presence of certain intellectual disability [*umstveno zatrudnenie*] or mental disorder [*psihichno razstroystvo*] and inability of the person to take care of his/her own affairs (social criterion) results in deprivation of juridical validity of any will such person would express in person after his/her placement under interdiction. This puts interdiction in closest relation to the psychological criterion. One can draw the conclusion that the law treats the will expressed after the person is placed under interdiction as a will that does not belong to the interdict. There is a *juridical interruption of personality understood as a self-constituted totality of processes of psychological nature*. This is so because the desires, intentions, preferences and, in general, all volitional processes of the interdict become completely irrelevant for the law (unless they are “reserved” in the form of “interests”).

At the same time, however, *the law “maintains” the personality as legal personhood* – the interdict is still the same subject of the law and bearer of (ostensibly the same) rights and obligations (s)he used to have before his/her placement under interdiction. The legal personhood of the interdict remains as a “mere mask”<sup>36</sup>, as a (“natural”) person without authenticity, as a “personification” maintained via the will of the tutor (the latter’s will, consciousness and psyche are used by the law to “animate” the legal personhood of the interdict) and ideologically consolidated via the “care for oneself” (the interdict’s own interest and “own affairs” are declared as a “plot” of the will expressed on his/her behalf). Both subjective criteria stated above are substituted and a shift is made to a purely attributive approach. The psychological criterion is utterly devoid of substance: the will of the interdict is not decisive upon the exercise of his/her legal personhood (decisive is only the will of the appointed tutor). The narrative criterion is substituted and compromised: the narrative of the person of his/her own life is substituted for the sole unifying thread of the interest in caring for oneself. However, the interdict continues to have desires and preferences which provide him/her with psychic connectedness (continuity), even if it is assessed as weaker. This psychological connectedness, however, is not respected by interdiction. The interdict continues to have his/her own interpretation of what is happening to him/her, which provides him/her with narrative connectedness (continuity), even if it is assessed as weaker. This narrative connectedness, however, is not respected by interdiction. Interdiction adopts an approach of favorizing the objective components of personal identity – these are the biological and the interpersonal criteria viewed in their greatest staticity. The interdict is reduced to a body with rights, i.e. with interests (a reduction under the biological criterion), represented and interpreted by another capable person – the tutor (a reduction under the interpersonal criterion). A considerable part of the interpersonal criterion remains irrelevant in the legal regime of interdiction as the latter does not respect and does not use the network of relatives and confidants of the interdict as a possible resource when determining his/her will and when exercising his/her capacity to act.

**Table No. 2: Interdiction and personal identity**

<b>Objective components</b>		
<i>Biological criterion</i>	<b>Favorized</b>	
<i>Interpersonal criterion</i>		
(external reference)	reduction	
	The biological criterion (of the objective components) is adopted as the leading and self-sufficient as it has been extended (for physical criterion) at the same time because a requirement of preservation of the “property” continuity (inviolability) has been added to the preservation of corporeal continuity (inviolability).	

<sup>36</sup> For the examination of the persona as a form of “public validity”, “public mask” that “binds the individual to his acts via the role visible for the public” and a comparison of the views of Hobbes and Locke see **Gyoshev, Hr.** *Identichnost i normativnost. Izledvane varhu filosofskia reduktcionizam na Derek Parfit* [Identity and Normativity. A Study of the Philosophical Reductionism of Derek Parfit]. S., 2013, pp. 38–40.

	The interpersonal criterion is reduced to the proximity of the tutor and the latter's knowledge of interdict's personality and life. The invalidation of the will of the interdict hampers, and in some cases, robs the latter of the possibility to maintain his/her hitherto existing social interactions.	
<b>Subjective components</b>		
<i>Psychological criterion</i>	<b>Substitution</b>	
<i>Narrative criterion</i>		
(internal reference)	legal irrelevance	
	The psychological criterion is transferred to another person – to the tutor who carries out by substitution (on the basis of authorization made by the court) the function of continuation of interdict's legal personhood by attributing identity through the assessment for interest.	
	The narrative criterion is not taken into account as the tutor is not obliged to take into consideration the life story and values of the interdict, which may lead to narrative contradictions and inconsistency in the interdict's narrative of his/her own self.	

The dominance of the attributive approach – the attribution of certain personal identity to the interdict via his/her interest expressed and exercised by the tutor appointed to him/her, harms person's authenticity and freedom to self-determination – to actualize his/her personality on his/her own, including by personally offsetting the occurring deficiencies in the subjective components of his/her identity. The interdict is not allowed, at least in the field of law, a survival of personality during the so-called "lucid periods" in his/her mental condition, even if this happens at the expense of his ascribed identity based on the notion of "his/her own interest" and rationality. Interdiction has the **effect of interruption** of psychological and narrative criteria. It leads to a considerable problematization and formalization of the interpersonal criterion – at the expense of a juridical "fetishization" of the biological criterion extended to a physical criterion and including, in addition to the corporeal, a property continuity. Interdiction comes closest to the definition of personality and its legal interpretation: the legal personhood as a fiction imposed from the outside and stabilizing the individual into a point for secure social interaction. However, this leads to a shift of identity into its subjective components by excluding a considerable part of subjective criteria for personal continuity (connectedness). The interdict does not participate in the construction of his/her legal personality. The capacity to act viewed precisely as a tool for personal self-construction and self-actualization is detached from the general legal capacity to have rights [*pravosposobnost*] and is given to another person, the tutor. The personality that is full-fledgedly being realized in law via the simultaneous provision of general legal capacity to have rights [*pravosposobnost*] and capacity to act is reduced to a mere general legal capacity to have rights [*pravosposobnost*], understood as a passive capacity, as a bearing role of something to be defined by another. *The general legal capacity to have rights* [*pravosposobnost*] *deprived of the capacity to act is not just infrapersonality, it is an object expecting to be continued and constructed from the outside.* By separating the capacity to act from the general legal capacity to have rights [*pravosposobnost*] the interdiction enables a *feigning\* of identity by delegation* – the tutor constructs identity on behalf and at the expense of the interdict. Thus in order to ensure juridical continuity (legal personhood, legal personality) it suffices to attribute connectedness (general legal capacity to have rights [*pravosposobnost*]) of certain interests united around individual's bodily and property integrity (care for one's own affairs) and interpreted as per the narrative of rationality (preference for benefit over damage), the only one possible for them.

**An alternative** to interdiction is the legal regime that affords the persons with intellectual [*umstvenni*] disabilities and mental disorders an opportunity to *preserve their personal identity* (continuity, connectedness) also during the periods when they experience difficulties in forming and expressing their authentic will. This means to respect and provide legal ways to attach legal meaning to the psychological, narrative and interpersonal criteria for identity. A system of diverse and flexible support measures can offer precisely such a vindication of the said continuity criteria that are devaluated by the interdiction.

Thus the *psychological criterion* can be taken into account by making a specific assessment of the mental inabilities [*psihicheski nesposobnosti*] of a person and by localizing the legal measures only in the areas where the ascertained inabilities are manifested. The support measures stipulated by the law should refer only to the specific areas of life of that person instead of completely taking away the legal status of that person. The psychological criterion could also be attached legal meaning by respecting the desires and preferences expressed by the person with intellectual disabilities, which does not mean that they should have "the force of law" as regards the matter of what the legally valid will of that person is. Their meaning will be assessed depending on the mental condition of the person (the level of psychological connectedness) and on the results of the application of the remaining criteria for continuity (of the narrative and the

\* the Bulgarian noun used here is borrowed from German "fingieren" meaning "to compose fiction" – Translator's Note.



interpersonal criteria as well as the physical criterion that takes into consideration the personal and property interests of the person).

*The narrative criterion* can be taken into account by exploring the presumable will of the person, which is based on his/her past life and the personal convictions and values declared by him/her. The actually expressed desires and preferences of the person should be assessed in view of their narrative coherence as, however, the presence of certain narrative inconsistency or contradictions should not per se be a reason for a refusal to recognize such desires and preferences. The ultimate assessment should be the result of a complex application of all criteria for continuity as interpreted specifically for each particular case.

*The interpersonal criterion* can be taken into account by requiring that the close relatives of the person should be consulted as regards the question of what his/her presumable will would be. This could be done by including such relatives in a “support network”. The support network will enable the “collection” of external identity references, which, as a result of his/her social interactions, have remained scattered as separate fragments in the personal experiences, memories and impressions of the person’s significant others. These “pieces” of personality “living” in the minds of the significant others could be reintegrated for the sake of the survival of personality in the periods when it is unable to ensure its own mental continuity (connectedness).

### 3. Respect for the authentic will

#### 3.1. Primacy of the will

A different approach could be set against the “best interest” and “presumable will” criteria functioning as constructs for formation and expression of interdict’s will, which are created by another (the court, the tutorship and curatorship body, the tutor). I think that it is precisely this approach that meets to the greatest extent the requirements of article 12, item 2 and item 3 CRPD. It could be designated “respect for the authentic will of the person”. In the general case the participation of the person in legal relations is determined entirely by his/her will. Thus the law requires that the actual common will of the parties be sought upon the interpretation of contracts (article 20, изр. 1 OCA). Although the subjective rights are exercised for the satisfaction of certain interests the latter are not decisive for their observance – the holder of the right may exercise it even when (s)he has not interest in doing so (as far as (s)he does no harm to third parties), may not exercise it at all or may abandon it altogether. *The will determines whether certain interest is to be satisfied, which exactly and how.* Precisely the will is examined in cases of voidability of contracts (articles 27–33 OCA) and nullity due to absence of consent (article 26, paragraph 2, hypothesis 2 OCA). In the world of capacity to act **will has primacy over interest**. This primacy expresses and translates into a legal language the idea of freedom of personality which defines its interests and conduct on its own. It should not be disregarded offhandedly in the cases where the persons suffer from intellectual disabilities or mental disorders that “weaken” their “will” and fragmentize it into “desires” and “preferences”. Desires and preferences of people with disabilities are part of their freedom and although they do not have the coherence and univocality of the will they need to be respected and taken into consideration in a legal order that appreciates and defends human freedom.

However, how could such desires and preferences of the person be taken into consideration? At least two ways to do so could be pointed out:

#### 3.2. Protection measures and support measures. Lasting power of attorney

The first way is by *introducing a requirement for examination and taking into consideration of the desires and preferences*, appearing as “remains” of a kind of the authentic will of the person with intellectual disabilities or mental disorders. In such cases the court and all bodies implementing the judgments of the court as regards the capacity to act of the person, must give the person a hearing, discuss and integrate the person’s desires and preferences upon the exercise of his/her rights. This manner of taking into consideration the desires and preferences of the person could also be embedded into the regime of interdiction currently in force as “the best interest” criterion, if not replaced, should at least be “weakened” in favor of the need of taking into account the desires and preferences expressed by the interdict. As a whole the means that could be employed to examine and take into consideration the desires and preferences of the person can be designated **protection measures** (protective measures). They take the process of will-formation and will-expression away from the person but upon the realization of that process such measures are guided by the desires and preferences of that person. The court, the tutor, the individual council or another body examine, form and express the will of the person but the will of the latter remains the focus and the aim of their efforts.

The second way is by *validating the desires and preferences of the person as his/her authentic will* even in the cases where (s)he experiences intellectual disabilities or mental disorder. In these cases, however, specific and personalized assistance need to be provided to the person so that (s)he can overcome the difficulties (s)he faces when forming and expressing his/her will. Instead of being “nationalized” the will of the person is supported in its own epicenter – it remains a possession and an act of the person who makes the decision. This support could be manifested in different forms of co-participation in the formation and/or expression of the will, such as provision of information, advising, provision of care of professional or emotional nature, joint exercise of rights, representation, exercise of a right to veto certain decisions, etc. It is precisely that diverse category of means and tools of support for the will in its own epicenter that is designated

**support measures** (facilitating measures). They aim at facilitating the person to overcome the cognitive difficulties (s)he experiences, and to enable him/her to be free within the limits of the legal order established by the law.

However, one more way of validation of desires and preferences of a person is possible, which is not dependent on the presence of a medical criterion leading to intellectual disability or mental disorder. It is about different forms of self-binding by *“transferring” a valid will over time and keeping its binding effect*. This self-binding, however, is entirely determined by the desires of the person and not by some inabilities or disabilities of his/hers. Thus, for example a person wishes that for the following two years (s)he should not be able to dispose of his/her immovable properties or that (s) he should do so only jointly with another person named by him/her. This is the idea behind the so-called **“lasting power of attorney”**.<sup>37</sup> The “lasting power of attorney” is intended to protect the rights of people “on the verge of their capacity to act”. It is about persons who experience intellectual disabilities or suffer from mental disorder that could be “used” against them, for example for property fraud by disposition of real rights in immovable property held by them. The “lasting power of attorney” could contain a mandatory instruction that a third party must be notified before the performance of the described legal acts. The notification of the named person (the “attorney” under the “lasting power of attorney”) is a premise for the validity of the transaction entered into by the authorizing person. The “lasting power of attorney” does not create power of representation for “the attorney” but restricts the power of disposition of “the authorizing person”. The failure to notify results in the voidability of the transaction. The legislative assumption of the possibility of public registration of the “lasting power of attorney” in view of the performance of dispositions of immovable properties creates a general obligation for each notary public to check, before the notarization of a transaction to dispose of immovable property, whether there is a “lasting power of attorney” by the name of the grantor of powers. If the search through the public register shows that there is a “lasting power of attorney” in the name of the grantor of powers the notary public will be obliged to notify the persons named therein in the manner stipulated in the “lasting power of attorney”: for example by sending an email, by post to an administrative address as specified, by notary’s invitation, etc. Depending on the specific legal regulation governing the “lasting power of attorney” the manners of notification could be exhaustively specified by the law or included in the freedom of contract. These obligations of the notary public will not be eliminated even in cases where “the authorizing person” does not want the “last authorized person” to be notified. The will to withdraw the “lasting power of attorney” should be registered as per a special procedure and after the court makes an express examination based on specific criteria specified by the law<sup>38</sup> in order that such will can give rise to its legal consequences.

### 3.3. Obstruction measures. Ulysses Agreements

The said legal effect of the “lasting power of attorney” is possible only if it is adopted *de lege ferenda*. In order that such a *restriction “from the past”* should reflect on the *legal validity of the present will* of the person there must be special statutory procedures to have such “will from the past” fixed and declared. Only if the publicity of such will is ensured any third party will thus be enabled to check whether there are registered “self-binding desires” and to take into consideration the restrictions introduced by them in their negotiations with the person. It is precisely the absence of publicity and the absence of statutory provision that questions the possibility for persons under civil law to be able to agree a form of validity of the transactions among them that is graver than the one stipulated by the law (such a possibility is stipulated by the law for the relations between traders – article 293, paragraph 2 CA). The considerations questioning the validity of an instruction contained in the power of attorney, under which it may only be withdrawn if certain form and certain conditions that are stricter than the ones stipulated by the law are fulfilled, are the same: such self-binding of the authorizing person is deemed to be an inadmissible waiver of rights. It is precisely in the context of the prohibition for the person to take away his/her own freedom on his/her own that the legislative provisions prohibiting the preliminary waiver of certain rights (for example preliminary waiver of prescription, of maintenance, etc.) as well as the inadmissibility of other persons’ valid assumption of obligations in relation to our intended actions to harm our own health (body modifications and conscious mutilations) or to take our own lives (euthanasia) should be viewed. However, is it possible to think of permitting certain legal consequences of such “desires from the past”, which, without entirely effacing the expressed will of the person, could be taken into consideration when assessing its validity. The measures ensuring such an effect could be designated **obstruction measures** (impeding measures). It is entirely possible that a person can have an interest in impeding in the future the legal effect of his/her declarations of will by requiring the fulfillment of certain procedures, which take time and which provide an opportunity for reconsideration of the decision. Not only the persons with intellectual disabilities or mental disorders have interest in the existence of such impediments created consciously in advance.

The obstruction measures supplement the support measures in an overall concept of a “privatization” of the incapacity to act understood as a number of different impediments and inabilities experienced by the person upon the independent exercise of the subjective rights granted to him/her by the law. If the support measures purposefully facilitate the expression of and respect for person’s genuine actual will (eliminate actually existing impediments and hindrances to the formation and expression of a valid will), then the obstruction measures consistently hamper the honoring of the

<sup>37</sup> See also **Stavru, St.** Posledno palnomoshtno za vazrastni i sotsialno slabi hora [Last Power of Attorney in Elderly, Poor and Disadvantaged People] In: Challenging the Law, a professional legal website, published on 20 November 2011 and accessible online at: <http://challengingthelaw.com/veshtno-pravo/posledno-palnomoshtno/>

<sup>38</sup> Such criteria could be pointed out for example in the Draft Natural Persons and Support Measures Bill of which I shall speak below.

actual will of the person in view of certain considerations of the person expressed as “desires from the past” (they create legally relevant difficulties for and impediments to the formation and expression of a valid will). In terms of comparative law such contracts to restrict the future decisions of a person are the so-called ***Ulysses Agreements***.<sup>39</sup> The name of these agreements comes from the story of Ulysses and the sirens in which Ulysses tied himself to the mast and told his crew not to untie him until they pass through the sea of sirens no matter how insistently he might want them to do so. By means of a *Ulysses agreement* a person, the one who self-binds himself (Ulysses), accepts the performance and the honoring of the legal consequences of certain actions of his to depend on the will or on different forms of participation of another person – the one who participates in another’s self-binding (Ulysses’s crew). Usually the legal consequences of the failure to perform a Ulysses agreement are related to *the occurrence of certain adverse property consequences for the self-binding person* – for example if I do not observe my schedule for certain kind of exercises or diet I must pay certain cash amount for each breach. In such cases the effect of the Ulysses agreement is limited to the relations between the parties that have entered into it and creates a property counter-motive against certain conduct of the principal [*vazlozhitel*] under the contract that is unwanted by the principal himself.

A more specific type of Ulysses agreement is the one that gives rise to legal consequences also for third parties in their capacity of possible future contractual parties of the principal. In such cases principal’s failure to fulfill the requirements under the Ulysses agreement could lead to invalidity and contestability of the legal acts carried out by him/her. In order the occurrence of such legal effect be possible, however, the Ulysses agreement and the self-bindings therein contained must be accessible to the officials entrusted by the law with functions concerning the preparation of the form required for the validity of certain type of transactions as stipulated by the law. Only in that case one may require that the self-binding measures introduced by the Ulysses agreement be checked in advance and taken into consideration. Such a Ulysses “agreement” requires by necessity the presence of a counter party and may also be objectified as a unilateral declaration of will that is subject to registration and announcement by a state body specified by the law in order to give rise to its specific (binding) legal consequences.

The Ulysses agreement may also be drafted as an *individual action plan* of a person who experiences certain intellectual disabilities or a mental disorder. In such case the agreement comes close by its nature to the preliminary instructions for treatment but it is characterized by much greater degree of specificity and scope of instructions as it also includes a negotiation of a kind between patient and doctor as regards the manner of administration of treatment that is binding upon both parties. All three varieties of the Ulysses agreement are viewed as tools for the exercise of the right to self-determination by means of preliminary specification of certain future conduct perceived by the person as binding upon him/her. The Ulysses agreement anticipates the occurrence of certain circumstances expected by the person, which will render difficult or even prevent the formation and expression of an adequate (authentic), will desired by the person in the situations of his/her future. In this sense it can be viewed as contracting as regards the “dark periods” of the disease in the lucid periods of its course.

#### **3.4. Negotiations as regards inability/incapacity (to act)**

Although the obstruction measures seem of little applicability and devoid of statistically significant use their meaning can be found in ***the idea of “privatization” of the inability/incapacity (to act)*** and granting it “to the will” of the person – the latter should decide how to manage the exercise of his/her general legal capacity to have rights [*pravosposobnost*]: by relying on various support measures or by applying different obstruction measures. This means to allow for negotiations with respect to the “incapacity to act” understood as *negotiating the manner of exercise of the general legal capacity to have rights* [*pravosposobnost*] of the person: either by entering into a (facilitating) contract for supported decision-making<sup>40</sup>, respectively, by registration of a preliminary declaration, which comes into force in case of inability, or by entering into Ulysses (binding) agreements, respectively, by granting the “lasting power of attorney”, which takes effect as soon as signed. In both cases the entry into and the performance of the contracts rely on the bond of trust existing between the parties which puts the question as to what extent such contracts could be ones against return consideration – for example a contract for conveyance of immovable property in consideration of an obligation to support and care (as a variety of the contract for conveyance immovable property in consideration of an obligation for maintenance and care) or only contracts without return consideration should only be allowed (such as the functions of different nature of tutors and curators under the Bulgarian legislation currently in force are without return consideration and are “honorary” in this sense).

Of course, the law should not allow a person to self-deprive him/herself of his/her capacity to act; on the contrary, the state must ensure capacity for each legal subject to exercise independently his/her rights by ensuring his/her capacity to act including by means of public law. The capacity to act is a public resource and its existence for each legal subject is a matter of public interest. But this is not precisely so as regards the incapacity to act. The incapacity to act could be regulated, if not entirely, at least partially (and to a considerable extent at that) as a personal matter: *a person’s*

<sup>39</sup> For more details about the Ulysses agreements and the grounds for admitting them, including the changeability of emotions and the dynamics of personality over time, see ***Elster, J.*** *Ulysses Unbound. Studies in Rationality, Precommitment, and Constraints.* Cambridge, 2000, pp. 1–56.

<sup>40</sup> It should be taken into consideration that in addition to the possibility of negotiating the state owes specific care with respect to the persons with mental disorders and mental retardation, which require her to stimulate and create conditions for the application of the support measures stipulated in her legislation.

*inability to express and form a will is an individual peculiarity*, which requires protection and support by the part of the community, however, without the latter having compulsory tools for intervention. The compulsory restriction of the capacity to act should be resorted to only in cases where none of the support measures stipulated in the law can timely and effectively prevent any threat to life, health and property of the person with disabilities and incapacities from occurring (in such case protection measures based on the best interest of the person and on his/her presumable will should be applied) as well as in the presence of a threat to third parties or the community as a whole, respectively (in such case coercive medical measures should be applied). All these different categories of measures: support measures, protection measures, coercive medical measures ... should be proportionate, i.e. they should take into consideration the special purposes pursued by them and the condition of the person and should at all times be temporary, i.e. they should be applied for as long as they meet the need having caused their application.

This text offers different options and degrees of “privatization” of the incapacity to act and not of the capacity to act.<sup>41</sup> The capacity to act should remain a question of public order, while the incapacity to act could, gradually and to a greater and greater extent, become a personal matter such as pregnancy, exercise of labor, etc. Such “privatization” of the incapacity to act, however, *requires the pursuit of a consistent and conscious state policy as regards the provision of an appropriate set of protection measures (protective measures), support measures (facilitating measures) and even obstruction measures (impeding measures)*. Thanks to the existence of such measures ensured by the flexibility of the legislation in force and by the institutional infrastructure of the state every person will be able to exercise in a more meaningful way one of the highest values of contemporary law – his/her freedom.

#### 4. The legal personhood among interest, will and memory

The theory of interest and the theory of will are usually opposed to each other in the quest for explanation of the legal personhood<sup>42</sup> (who should be the subjects of the law), on the one hand, and, on the other, in defining the subjective rights (what turns a possibility into a subjective right)<sup>43</sup>. Below I will attempt to present and prove my thesis that **the two theories** have different meaning in the context of the division between the general legal capacity to have rights [*pravosposobnost*] (defined as one’s capacity to be a bearer of rights and obligations) and the capacity to act (defined as one’s capacity to exercise rights and obligations in person) as formally individualizable components of legal personhood. The path of planned “proving” of the said thesis will predominantly pass through the practical questions concerning the legal consequences of interdiction and the legal status of persons placed under interdiction.

##### 4.1. Interest, will and memory

**The theory of interest** has a decisive importance for outlining the boundaries of the general legal capacity to have rights [*pravosposobnost*] (as the bearers of rights are specified), where it is decisive to ensure certain welfare (*de minimis* this is the obligation not to harm and *de maximis* – the obligation to realize the potential of a human being). The theory of interest could be used<sup>44</sup> in the substantiation of a wide range of legal subjects such as *inter alia*: minors, unconscious people, conceived infants, dead human beings, and also animals and living creatures. The theory of interest is used in some cases in order to distinguish one’s will, such as the various forms of legal paternalism – peremptory prohibitions that prohibit persons from agreeing or demanding acts that harm their interests. Such are for example the deprivation of the legal effect of one’s consent to undergo medium bodily harm as well as one’s consent to be killed by another. The consent expressed in such cases is not reflected in the set of facts constituting the committed crime: severe bodily harm, medium bodily harm and murder. The “paternalistic” interdiction<sup>45</sup>, whose main, and at times, only aim is to protect the

<sup>41</sup> The idea of privatization of the incapacity to act can also be examined as a supplementation to the idea of universalization of the capacity to act adopted in CRPD. See **Gooding, P.** Navigating the ‘Flashing Amber Lights’ of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns. – Human Rights Law Review, Vol. 15, No. 1, p. 47.

<sup>42</sup> According to the volitional theories legal subject is any bearer of psychological will, and according to the interest theories – all bearers of legally significant interest. Three more theories could be added to that theory of legal subject: dualistic, relational and negative theories. See **Ganev, V.** Uchebnik po obshta teoriya na pravoto. Tom II. Chast parva: pravni subekti [General Theory of Law. A Textbook. Volume II, Part 1: Legal Subjects]. S., 1915, pp. 37–54 as well as **Tashev, R.** Obshta teoriya na pravoto. Osnovni pravni ponyatiya [General Theory of Law. Fundamental Legal Concepts]. S., 2004, p. 277.

<sup>43</sup> According to volitional theories subjective right is an expression of will, while according to the theories of interest it is an interest protected by the law. One could add several more theories to these theories of subjective rights: theories of natural law, of subjective law as freedom, of subjective law as a relationship and negative theories. See **Tashev, R.** Obshta teoriya na pravoto. Osnovni pravni ponyatiya [General Theory of Law. Fundamental Legal Concepts]. S., 2004, p. 219.

<sup>44</sup> For the view of legal personhood as a mere creature of law, which has only those qualities as ascribed to it by the law that has created it, see What We Talk About When We Talk About Persons: the Language of Legal Fiction. – Harvard Law Review, 2001, Vol. 114, No. 6, p. 1753. This is used to explain not only the “absence of coherent theory” of legal subjects (persons) but also the “fundamental disorganization” in the doctrine of legal personhood (p. 1759). For legal personhood viewed as “full personhood” see **Bach, M.** The Right to Legal Capacity under the UN Convention on the Rights of Persons with Disabilities: Key Concepts and Directions from Law Reform. Toronto, 2009, p. 7.

<sup>45</sup> For which, in terms of comparative law, it is stated that most often leads to a deepening of incapacities of the person and, ultimately, to institutionalization. See **Rosenberg, J.** Poverty, Guardianship, and the Vulnerable Elderly: Human Narrative

interests of the person (for example in cases of interdiction for prodigality) can be viewed as an example where the theory of interest “defeats” its opponent, the theory of will. The idea of *protection* is associated with the theory of interest.

**The theory of will** has a decisive importance in the recognition of a capacity to act (upon the identification of the bearer of rights as an agent of rights) where it is decisive to take into consideration the autonomous will expressed by the person (which exists *de minimis* as a desire or an intention, and *de maximis* as freedom of the person). The personal general legal capacity to have rights [*pravosposobnost*] has been touched upon indirectly as well as the personal (professional) competence that relates to the rights that can be exercised only in person (with them the incapacity to act in practice also means general legal incapacity to have rights [*nepravosposobnost*]). The theory of will opposes the recognition of capacity to act in favor of persons who have not yet developed or who have lost their ability to form and express will (minors, unconscious persons, persons with mental diseases) and also the recognition of legal personhood in the absence (at least of a potential for) of will (conceived infants, dead human beings, animals, other living creatures). The theory of will is used in some cases in order to assume the possibility that legal subject can define or redefine his/her interests on his/her own. Liberalism thus recognizes the legal effect of one’s consent to endure harm, a consent that renders the different forms of assistance in self-harm permitted and in conformity with the law. It is precisely via the theory of will that one can seek to legitimate not only the acts of a subject directed against his/her interest (consents to self-harm) but also the ones directed against his/her will (the so-called Ulysses agreements<sup>46</sup>). The idea of *freedom* is associated with the theory of will.

It seems to me that in addition to the interest and the will there is also a third factor of significance for legal personhood; for such factor it could be said that it “gathers”<sup>47</sup> the interest and the will into a relatively coherent unity, which could be designated as “bearer” (in the general legal capacity to have rights [*pravosposobnost*]) and as “agent” (in the capacity to act). This factor is memory.<sup>48</sup> **The importance of memory** could, in my opinion, be demonstrated by a particular example. A person makes a testament in favor of his relative. Subsequently, the testator becomes ill with Alzheimer’s and makes a second testamentary disposition for the same asset of his estate (immovable property) but in favor of another person forgetting that he has already made a testament and forgetting that the person in whose favor he has made the first testament exists. Here we leave aside the questions of whether the legatee has any special “right to be forgotten” by his testator as well as whether the legatee has the right to seek the interdiction of his testator in his capacity of a would-be creditor of testator in case of death. The Alzheimer’s disease is a progressive disease affecting mainly memory that is getting increasingly wide-spread in aging Europe. This is the reason why the question of the significance of memory for legal personhood (mostly for the capacity to act) is one of exceptional importance. In my opinion, two types of memory should be distinguished in the presented hypothesis depending of its subject matter: *the memory for (the existence) of someone else* – i.e. memory which concerns the motives of the testament and which should not reflect on the validity of the testament if the person is able to understand the nature and the meaning of the act being done by him/her<sup>49</sup>, and *the memory for oneself* – i.e. memory which makes it possible to retain the expressed will as a declaration of will and which is one of decisive importance for the legal relevance of the act done.

Through memory we could distinguish in ourselves a “subject-actor(agent)” and a “subject-bearer”.

The legal construct of “*subject-actor (agent)*” includes a unity of will and memory for oneself. The will is legally relevant only if it is autobiographical. Without autobiography the will is also subjectless. The declaration of will made by a person, whereupon such person does not know who (s)he is is legally irrelevant and should not be respected unless it concerns the satisfaction of immediate bodily needs (prevention of pain, satisfaction of thirst and hunger and suchlike). The requirement announced as a subjective right [and stating that] any person should have a name could be seen as a requirement related

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and Statistical Patterns in a Snapshot of Adult Guardianship Cases in New York City. – *Georgetown Journal on Poverty Law and Policy*, 2009, Vol. 16, p. 315. See also **Quinn, G.** A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities. – In: Quinn, G., L. Waddington (eds), *European Yearbook of Disability Law*. Antwerp-Oxford-Portland, 2009, Vol. 1, p. 89, where it is stated that the separation of the persons with intellectual disabilities from the other people is an approach where the person with disabilities are looked at as an eroded and not merely a complicated human existence.

<sup>46</sup> They will be examined below.

<sup>47</sup> The so-called “narrative coherence” stated as an element of legal personhood (personhood) is attained thanks to that “collection” of experience via memory. See **Bach, M.** Supported Decision Making under Article 12 of the UN Convention on the Rights of Persons with Disabilities. Questions and Challenges. Notes for Presentation to Conference on Legal Capacity and Supported Decision Making Parents. Committee of Inclusion Ireland. Athlone, Ireland – November 3, 2007, p. 8, as well as **Bach, M., L. Kerzner** A New Paradigm for Protecting Autonomy and the Right to Legal Capacity. Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice October 2010 Commissioned by the Law Commission of Ontario, p. 63, accessible online at: [www.lco-cdo.org/disabilities-commissioned-paper-bach-kerzner.pdf](http://www.lco-cdo.org/disabilities-commissioned-paper-bach-kerzner.pdf)

<sup>48</sup> For more details about the role of memory in the construction of identity see the next section.

<sup>49</sup> Of course it matters what the reason for forgetting is: normal or pathological. Where the person forgets considerably more than normal for a person of his/her age this could be attached legal meaning as an error that could have the meaning of a reason for the voidability of the respective declaration of will. The assessment, however, must be done for each particular case. Where, however, memory is impaired to a degree where the person forgets his/herself, his/her own identity, this should reflect on his/her capacity to act.

to the memory for oneself. One must identify oneself before expressing one's will. Only a will associated with certain name (and individualizing features of the natural person) may be a subject-actor(agent). Anonymous will is legally impossible. It may not be attributed to someone so that it can be related to the occurrence of certain legal consequences for him/her. The will is legally relevant where it is a will with a name, a will on someone's behalf. Memory of others could retain the general legal capacity to have rights [*pravosposobnost*] of a person having "forgotten its own self" but not his/her capacity to act (the placement of the person with Alzheimer's under interdiction, viewing animals as "passive subjects").

The legal construct of "*subject-bearer (endurer, patient)*" is considerably more modest in its requirements and needs only the recognition of significant interest. However, who determines whether certain interest exists and what is the specific interest of a legal subject [*subekt*]? If we paraphrase a well-known maxim we could say that "the interest is in the eye of beholder". Interest is a secondary return to the subject, usually when the subject himself cannot "return" to himself, nor can he realize a self-reflection. In this sense interest is, as a rule, constructed and speculative within the range of the ultimate boundaries according to which (self)preservation is accepted to be in the interest of the person, and (self)destruction is not. Despite their amorphousness in many cases the interest could be sufficient legitimization for the recognition of legal personhood (the minors, the unconscious persons, persons placed under interdiction) or legal protection (conceived infants, dead people, animals).

#### 4.2. "Disappearance" of the will in juridical persons

Some of the numerous *manifestations* of the opposition between the theory of interest and the theory of will could be found in the examination of the legal essence of juridical persons as well as upon the examination of the legal status of the natural persons placed under interdiction. Below I will attempt to reveal this opposition as a possible interaction and mutual supplementation of the two theories in view of achieving the optimal respect for both of them. The emphasis will be on persons placed under interdiction but before proceeding further, a couple of words on juridical persons.

There are numerous theories of the legal nature of *juridical persons*.

The theories that *stake on interest* discover in juridical persons stand-alone and fully independent subjects of rights. Juridical persons have interests distinct from the interests of the natural persons who have founded them or who manage them. Such a conclusion could be drawn from the examination of juridical person as a organism of a kind (organic theories) or as property subject to certain interest (subjectless theories). A telling example of juridical persons' "own" interests are the foundations, which are juridical persons without members (they do not have a personal substrate), and treasury shares in joint-stock companies (where the joint-stock company owns shares of its equity). In some cases juridical persons are designated "non-living organism" having its own individuality and personal dignity preventing them from becoming a "puppet". The invalidity of an agreement by virtue of which a juridical person agrees to be unconditionally managed as instructed by another juridical person is justified by the inadmissibility of slavery – both among natural persons and juridical persons.

The theories that *stake on will* view juridical persons as a derivative and dependent subject of rights. It is precisely the special mechanisms for formation of the will of juridical persons that make the division between the general legal capacity to have rights [*pravosposobnost*] and the capacity to act inapplicable for them. Juridical persons may not exercise their rights and obligations "in person", "through their own acts". Their will is expressed by another person, i.e. by representatives, whose functions are similar to those of parents and tutor to minors and fully interdicted natural persons. If we insist on applying the division of "general legal capacity to have rights [*pravosposobnost*] – capacity to act" for juridical persons, we should point out that they are incapable of acting. However, at the same time behind every juridical person there is an actual economic (in for-profit juridical persons) or donor's (in not-for-profit juridical persons) will, which is decisive for their existence. In this sense juridical persons should be viewed as a legal construct (fiction theories) creating a secondary legal personhood, which often (for example for purposes of taxation) plays the role of "smoke-screen", "veil" that covers the actual bearers of the will. The law, however, stipulates a number of cases where the veil of the "concealing legal personhood" must be lifted: upon disclosure of tax fraud, when making an assessment of related parties in commerce law, upon deprivation of certain rights after insolvency, etc. In any case what matters is the disclosure of the actual economic subjects, whose will is decisive for the "conduct" of the respective juridical person.

*The importance of memory* could also be found in juridical persons. Their solidity (juridical identity) is ensured firstly on the basis of individualizing features which are different from (but at the same time similar to) those of natural persons: firm (name) in stead of name, date of registration instead of date of birth, domicile instead of address, type instead of sex, etc. and, secondly, by the history of entries recorded in a public register set up especially to that end, which plays the role of an autobiography of a kind of juridical persons: this memory is "external" and public in contrast to memory in natural persons, which is markedly subjective and personal.

As a whole the theories of the essence of juridical persons favor interest to a much greater extent. Most juridical persons, for example the trade companies incorporated by natural persons, could be viewed as an emancipated property interest that has discontinued its connection of possessions with the legal subject, whose will has initially constituted, has thereafter defined and has, ultimately, "freed" the said interest. From personal interest of members\* it has become an interest of the company. Juridical persons personify and supply legal personhood to a special property or non-property interest. Precisely that interest is the reason for the emergence and existence of the juridical person as a stand-alone

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\* i.e. the "shareholders" of limited liability companies or the "partners" of general and limited partnerships – Translator's Note.

and autonomous legal subject. The primacy of interest over will in juridical persons also determines the irrelevance with respect to third parties of the violations committed in the functions of their bodies. Juridical persons are bound with respect to third parties by the declarations of will of their lawful representatives, regardless of the “actual” will of natural persons who are members of juridical person’s bodies competent to make the respective decision. A natural person’s placement under interdiction has the effect of favorizing the interests of such person over his/her will. Interdiction emancipates the interdict’s interest beyond his/her will in a manner that **can be compared to** the “liberation” of the interest upon the incorporation of a juridical person. If, however, the emancipation of the interest from the will upon the incorporation of juridical persons does not lead to the effacement of the will of the preceding bearer of such interest (the members), the emancipation of the interest from the will in the case of natural persons’ placement under interdiction is associated with a deprivation of the capacity to act of such persons (the interdicts). The interdiction, which favorizes the interest, actually transposes an approach used to regulate the legal status of juridical persons into a completely different context, without taking into consideration the circumstance that as far as the said approach is applied in that context it results in the effacement of the legal significance of the will of the natural persons placed under interdiction. The interdiction thus “turns” natural persons into juridical persons.

### 4.3. “Disappearances” of the will in natural persons

When we explore the meaning of interest and will in the exercise of the rights of the legal subjects, we could point out that will has primacy over interest but interest could survive will. In most cases in civil law it is the will and not the interest of the subject that determines the substance of the legal consequences caused by subject’s conduct. This is the reason why legal transactions are the most wide-spread juridical facts in civil law. Legal transactions are the triumph of the will of legal subjects. The interest of contracting parties is present only as a “discovery” of their will. However, at the same time it is quite possible that there are cases where certain interest survives the ability to form and express will. Certain interest (together with the memory for the person in the minds of others) can retain legal personhood (although it transforms it from a legal capacity to act into a general legal capacity to have rights [*pravosposobnost*] without a capacity to act). Among the examples for an **interest surviving the will (and the capacity to act)** is the placement of a natural person under *full interdiction*. The full interdict is a subject without his/her own will but with rights-interests. His/her will is “downgraded” to “desires” that could be positive – to make something: consents, proposals; or negative – to refrain from doing something: oppositions, refusals. The will of the capable persons is a legally empowered desire. In contrast to the will the legal consequences of desires are “filtered” through interest: they are respected if they correspond to the interest of the person in the given case (an assessment as to the extent to which the expressed desires benefit or harm the interdict) and to the memory for the interdict reflected into the minds of others (an assessment as to the extent to which the expressed desires correspond to the presumable will of the interdict). The first assessment – as to the extent to which the expressed desires benefit or harm the interdict – is made in all substitutions of the will of the interdict by his/her tutor or by the court also under the Bulgarian legislation currently in force. The second assessment – as to the extent to which the expressed desires correspond to interdict’s presumable will – is not taken into account in principle in the Bulgarian legislation currently in force (except for the case under article 96, paragraph 4 MPHMA as stated below) – in contrast to the obligation stipulated in article 15, paragraph 1 of the Child Protection Act that the child who has attained the age of 10 must be given a hearing in any administrative and legal proceedings affecting his/her rights. The opportunity to be given a hearing is provided precisely in view of ascertaining the desires of the person (the child), i.e. of his/her presumable will.

It should be pointed out that the Medicinal Products in Human Medicine Act stipulates an obligation to respect the interdict’s unwillingness to participate in a clinical trial of medicinal products. According to article 96, paragraph 4 MPHMA the informed consent to the participation of an incapable adult in a clinical trial is given by his/her lawful representative as the lawful representative’s consent must represent *the presumable will* of the participant. The same requirement is also stipulated in the case of lawful representation of the minors – for their participation in clinical trials of medicinal products (article 97, paragraph 2 MPHMA) and of medical devices (article 38, paragraph 4 MDA) as well as in cases of donation of hematopoietic stem cells and bone marrow (article 27a, paragraph 2 TOTCA). In the Medical Devices Act, however, there is no requirement that the lawful representative of a person placed under full interdiction should express the latter’s presumable will (article 37, paragraph 5 MDA) as is stipulated for the minors (article 38, paragraph 4 MDA). I do not see a reason for such discrimination and therefore I attach the absence of such a rule for the full interdicts to a legislative omission or not quite precise juridical technique. Article 27a, paragraph 2 TOTCA does not stipulate an express possibility for donation of hematopoietic stem cells and bone marrow by persons placed under interdiction and therefore the general ban on donorship contained in article 24, paragraph 6 TOTCA is still valid. TOTCA regulates one more case where the regime for minors (for donation of hematopoietic stem cells and bone marrow under article 27a, paragraphs 2–6 TOTCA) does not apply with respect to the persons placed under interdiction – the prohibition that interdicts may not be donors is viewed as part of their protection against possible abuse as the legislator has judged that the threat of such abuse is greater than the risk of abuse in the case of minor children. It should be noted that the reference under article 5, paragraph 3 PFA is only to the manner of restriction/deprivation in principle of the capacity to act of the persons placed under interdiction (which the very text makes apparent: the reference to article 3, paragraph 2 and article 4, paragraph 2 PFA), and not to the overall regime governing minors and minors aged 14-18\*.

\* In Bulgarian law persons aged 0-14 are called “maloletni” [“minors” in this translation] and persons aged 14-18 are called “nepalnoletni” [“minors aged 14-18” in this translation] - Translator’s Note.

Another case of an interest surviving the will (*and the legal personhood*) is the right to *authorship after the death of the author*, which is also seen as everybody's obligation to respect (remember) the authorship to a work, which has arisen for the person who created it. Defined as "eternal and subjectless right"<sup>50</sup> authorship after the death of the author is a typical case of respected interest (without being turned into a legal subject). An interest preserved as a right without a subject. A right without will but as a memory for the author "reflected" into the minds of others.

Other cases could also be pointed out where *interest anticipates will (as a capacity to act)* in the interaction between the interest and the will in molding different regulations of legal personhood, such as the case of protection of children (manifested in the numerous measures individualized in the Child Protection Act). Among the cases where interest anticipates will (*as a general legal capacity to have rights* [pravosposobnost]) one could point out the protection of the conceived infant (manifested in the introduction of restrictions on the possibility of abortion at the will of the pregnant woman) and of the vertebrates. The basis for animal protection is the principled prohibition on the cruel treatment of animals in view of "their" recognized interest in attaining certain physical and mental welfare. Even if they are unable to express their will they should be protected – if not as legal subjects then at least as an object of protection. A special characteristic of this protection is that it is afforded precisely to the animals and not to their owners. The guiding interests are the ones of the particular animal and not the ones of its owner. This is the reason why the latter may not refuse to apply the said protection and it represents a statutory restriction of a kind of his/her ownership right to the animal (man's ownership right ends where the animal protection starts). The will of the animal in the objectification (declaration) of "its" interests is replaced by the peremptory requirement of the law, but the intensity of that recognition is not sufficient to become a fiction of legal personhood. However, this is just a possible application of the fiction theory – this time not towards juridical persons but towards animals' biological bodies.

#### 4.4. Juridical facts "without" will

Despite the conditionality of each classification the juridical facts, i.e. the facts whose realization is associated with the occurrence of certain juridical consequences by virtue of a legal rule, could be divided in two big groups: lawful [pravomerni] (ones that conform to the requirements of the law) and unlawful [nepravomerni] (ones that do not conform to the requirements of the law). **Unlawful** juridical facts are always volitional acts – their substance also includes the formation of guilt (actor's subjective attitude, which includes an intellectual and a volitional element), and **lawful** juridical facts might be either "volitional" (legal transactions and juridical acts) and juridical facts "without will" (resultative acts and juridical events).<sup>51</sup> Proceeding from this classification of juridical facts depending on whether they include human will in themselves the capacity to act should be expected to be of significance in the realization of the juridical facts, which do not contain in themselves a requirement for the formation and expression of will.

The importance of capacity to act in **unlawful** juridical facts (*violations of the law* [pravonarusheniya]) has led to the differentiation of a third concept, the capacity to be held responsible for delicts\* [deliktosposobnost] as what is examined when this capacity to be held responsible for delicts is being established is precisely the existence of consciousness and will in each particular case. In this sense, the capacity to be held responsible for delicts (a concept of civil law) comes close to sanity [vmenyaemost]\*\* (a concept of criminal law). Traditionally, in both civil and criminal law it is accepted that minors and persons placed under full interdiction (the persons with no capacity to form and express legally valid will) are not capable of being held responsible for delicts and are insane (persons with no capacity to be held criminally responsible) as this is not to be assessed in each particular case. The question of their "substantial" capacity to be held responsible for delicts and sanity during their "formal" incapacity to act might, however, be seriously problematized, especially in the case of persons placed under interdiction in whose disease there might be "lucid periods" enabling them to assess the nature and the legal consequences of the acts done by them in such periods.

The inability of the formally incapable persons to express a legally valid will "downgrades" them from the subject of the crime (perpetrator, agent) to an element of its objective side (setting, background). Thus their "presence" (but not "participation") in the set of facts constituting the crime [prestapent sastav] could pass through the notion of the so-called *indirect [mediated] perpetration* where a person capable of acting and of being held responsible for delicts

<sup>50</sup> See **Markov, E.** Yuridicheskite postapki – narastvashti samneniya sled reformata [Juridical Acts – Increasing Doubts after the Reform] – In: Burgas Free University, Faculty of Law, Collection of Legal Texts, 1995, Year III, Volume III, p. 47, p. 50 where this "right" is explained as an "eternal obligation" "assumed by all legal subjects, existing and future. Thus it continues to exist but not as a correlative of a subjective right but as a legal obligation. It is another question whether this obligation is the same as before the death of the author and whether it is private in nature."

<sup>51</sup> The classification of juridical facts given below is based (with some terminological modifications) on the classification proposed by **Alexiev, S.** Obshta teoriya na pravoto. Kurs v dva toma. Tom II [General Theory of Law. A Course in Two Volumes. Volume II]. S., 1985, pp. 147–154, also analyzed in **Markov, E.** Yuridicheskite postapki – narastvashti samneniya sled reformata [Juridical Acts – Increasing Doubts after the Reform] – In: Burgas Free University, Faculty of Law, Collection of Legal Texts, 1995, Year III, Volume III, pp. 33–43.

\* The concept of *delict* in civil law roughly corresponds to the concept of *tort* in common law, and the concept of *capacity to be held responsible for delicts* roughly corresponds to the concept of *tortability* in common law – Translator's Note.

\*\* In Bulgarian *vmenyaemost* could mean both "culpability" (when used with respect to the perpetrator) and "imputability" (when used with respect to the guilt/crime) – Translator's Note.



commits the crime not in person but “through” (via) an incapable person.<sup>52</sup> The latter becomes a tool for the execution of the performative act of the crime, a vehicle of another’s will – the will of the actual (“juridical”) perpetrator. Indirect perpetration in criminal law is comparable to messengership [*pratenichestvo*]\* (rather than to representation) in civil law. Both legal notions negate an actual (often quite real) agency – the one of messenger in the case of messengership and of the formally incapable person in the case of indirect perpetration by invalidating the presence of one’s own legally relevant (valid) will and turn the acts of the said persons into a “pure” transfer of another’s will. In criminal law the said attitude towards the “lucid periods” (their depersonalization, “obscuring”) could be supported by the “educational” purposes of punishment: minor children should not be re-educated by the penitentiary institutions because they are yet to be educated by their parents, while interdicts need only treatment and not re-education. Thus, the criminal responsibility, which is always (only) personal is dropped at all. In civil law, however, the purposes are “compensatory” (to recover the harms caused) and could be “allocated” not only to the “actual” perpetrator but also to another person named by the law as one bearing responsibility (responsibility for damages caused by third parties). The non-recognition of one’s capacity to be held responsible for delicts means that the indemnification (responsibility) is assumed by another person, i.e. by one’s lawful representative, supervisor, etc. Such decision would not be justified if the immediate (actual) perpetrator was capable of assessing the nature and the meaning of his/her acts and of managing his/her conduct. If this particular condition of the “actual” perpetrator is not taken into account, this would mean not only that he would benefit from his/her ability to engage in unlawful conduct (which, in itself, could be an argument to attach legal meaning to the “lucid periods”) but also that someone else would be charged with another’s “burden” (which poses the question of whether such allocation is just).

The ability to form and express will has different meaning with different kinds of *lawful* juridical facts.

*Legal transactions* are typical juridical facts, whose legal consequences are determined to a great extent by the will expressed by the legal subjects. It is precisely because of the said meaning of the will in such juridical facts that they can be done only by natural persons who are capable of acting.

Other lawful juridical facts, where the will of the persons performing them matters, are *the juridical acts* – although the will of the persons do not determine the content of the legal consequences of juridical acts, its presence is decisive for the occurrence of the legal consequences stipulated by the law. The following examples of such juridical acts could be given: the management of affairs\*\*, acknowledgment of debt (in liberative prescription\*\*\*) or the existence of real right (in acquisitive prescription), return of receipt. The legal consequences stipulated by the law are related to the declaration of the person, regardless of what his/her actual will has been. The return of the receipt for the debt leads to the presumption that the latter has been paid regardless of the reason for such return (article 109 OCA<sup>53</sup>). Finding a treasure is considered a juridical act as well.<sup>54</sup> Although the actual will is not examined what is decisive in order to connect the person’s act with the legal consequences stipulated by the law is the existence of such person’s ability to form and express legally valid will. It is notable that most juridical acts are associated with the occurrence of legal consequences, which are adverse for the actor of the acts, concerning some existing relative subjective rights (receivables).

The third group of lawful juridical facts is designated as *resultative acts*, i.e. ones that contain human conduct but it is completely devoid (in view of its relevance as a juridical fact) both of the will contained therein and of the requirement for the presence of ability to form and express will.<sup>55</sup> In contrast to legal transactions and juridical acts, which are volitional

<sup>52</sup> For more details about indirect perpetration see **Zhabinsky, N.** Posredstvenoto izvarshitelstvo. Chast I. Posredstveniyat ozvarshitel [Indirect Perpetration. Part I. Indirect Perpetrator]. In: GSUYuF [Yearbook of the University of Sofia, Faculty of Law], volume XXXIII, 9, 1937-1938, pp. 1–162. Among “the means, which having been put in motion by the criminal subject produce the external set of facts of the crime as outlined by the law, are stated: ‘the body of a man other than the criminal subject, which body, as the freedom of the will being formed inside it is unconditionally excluded, is moved by the will of the criminal subject’ and also ‘the animated thing, which – for it is endowed with will and for that will is free to move according to its own will but after the latter has been brought in conformity with the will of the criminal subject’ (p. 65).

\* From *nuncio* in Roman law, i.e. one who is sent by another – Translator’s Note.

\*\* i.e. the so-called *negotiorum gestio* in Roman law – Translator’s Note.

\*\*\* The concept of *prescription* in civil law roughly corresponds to the concept of *statute of limitations* in common law. – Translator’s Note.

<sup>53</sup> According to article 109 OCA the obligation is deemed extinguished if the private document for it is in debtor’s possession unless it is proven that it has not been returned to the debtor voluntarily. The question here is whether the interdict can return the private document of debt “voluntarily” within the meaning of article 109 OCA?

<sup>54</sup> For the thesis that treasure can only be found by a person capable of acting, see **Barbar, L.** Rimsko-pravnata osnova na vladenieto i na nyakoi veshtni prava i nedostatatsite y u nas. [Roman-law Foundation of Possession and of Some Real Rights and Its Shortcomings in Bulgarian Law]. S., 1913, p. 19: “finding a treasure requires the existence of will to possess the treasure (*animus possidendi*)”.

<sup>55</sup> In this respect resultative acts come close in a considerable extent to the so-called “relative juridical events” (will is irrelevant for the occurring legal consequences although it exists). See **Markov, E.** Yuridicheskite postapki – narastvashti samneniya sled reformata [Juridical Acts – Increasing Doubts after the Reform] – In: Burgas Free University, Faculty of Law, Collection of Legal Texts, 1995, Year III, Volume III, p. 38. But: a murder committed by an incapable person opens

acts, the resultative acts are associated with the occurrence of legal consequences defined by the law regardless of the existence of any will whatsoever upon their realization. The following have been cited as examples of such resultative acts<sup>56</sup> processing<sup>57</sup>, mixture and union of things as well as creation of works of science, literature or art. These juridical facts produce their legal consequences regardless of the will of the person and also regardless of his/her incapacity to act. If the juridical acts defined as per the aforesaid manner could be “triggered” only by the conduct of a capable natural person, resultative acts could produce their legal consequences even if realized by an incapable person. It is notable that most resultative acts are associated with the occurrence of legal consequences that are favorable for their perpetrator and that are manifested in the acquisition of absolute subjective rights (real rights and copyrights).

The requirement for capacity to act upon the performance of juridical acts as well as the absence of a requirement for capacity to act upon the performance of resultative acts could be viewed as *regimes ensuring protection of the interests of the incapable persons*, this to include also the persons placed under full interdiction. The combination of these two categories of juridical facts – juridical acts and resultative acts – safeguards the incapable persons in their relations with other legal subjects when relative subjective rights arise, are exercised and extinguished and at the same time protects them when it comes to their absolute rights. In this sense the distinction between juridical acts and resultative acts could be also seen as a consequence of the policy for protection of incapable persons pursued by the legislator.<sup>58</sup>

Considering the distinction between lawful juridical facts made above we should point that ***the persons placed under full interdiction*** may carry out validly, i.e. with the legal consequences stipulated by the law, *only resultative acts but not juridical acts*. They may make *legal transactions* which will at best, if an approach of recognizing the “lucid periods” is adopted, be voidable on the grounds of article 27, hypothesis 1 OCA.

Under the statutory provisions currently in force the full interdicts *are deprived of the possibility to form and be perpetrators of juridical facts of mental life*, such as the intent to have a thing as one’s own [animus rem sibi habendi] and the legally relevant knowledge of certain circumstances.<sup>59</sup> If an approach of recognizing the “lucid periods” in the condition of the interdict is adopted it is possible that the interdict’s mental experiences, including the legal meaning of the knowledge of certain facts, be taken into consideration. A distinction should be made between the ability to form a will (volitional ability) and the presence of knowledge (intellectual ability). Although the two abilities are necessary when making a decision to make certain legal transaction they nevertheless could have a different manifestation, independently of each other, including in the context of resultative acts and the juridical acts. Thus, for example, the knowledge of an interdicted buyer under a purchase and sale contract that the grantor of his/her powers is not an owner should make him/her a possessor in bad faith of the property delivered to him/her if such knowledge is proven as actually present understanding of the circumstance that the person with whom his/her tutor enters into the contract is not the owner of the property. The intent to own, however, is not exhausted by knowledge, and in addition

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the estate of the deceased for this legal effect occurs upon his/her death, no matter what the cause of death is, i.e. no matter who has caused it. As a rule the legal consequences do not affect “the perpetrator” of the relative juridical event. This is not so in the case of resultative acts for with them the legal consequences are associated with the act itself: they determine who becomes the owner of the processed thing, of mixed things, who becomes the author of the work. And this concerns the person who performs the resultative act. If a permanent fixtures is affixed to immovable property this is a relative juridical event and not a resultative act because [by affixing it] the fixture becomes property of the owner of the land, irrespective of who does the affixing itself. Thus, authorship could be pointed out as a possible criterion to discern between resultative acts and relative juridical events: if it matters who has performed the act, then the latter would be a resultative act; otherwise, it would be a relative juridical event.

<sup>56</sup> See **Markov, E.** Yuridicheskite postapki – narastvashti samneniya sled reformata [Juridical Acts – Increasing Doubts after the Reform] – In: Burgas Free University, Faculty of Law, Collection of Legal Texts, 1995, Year III, Volume III, p. 37.

<sup>57</sup> In order that the effect of acquiring the thing under article 94, paragraph 1 PtA to the benefit of the person who has performed the processing such person “should not have known that the materials belong to another”. For the copyright to arise the author’s good faith (and capacity to act) is immaterial but in order that the author acquire a real ownership right to the thing in which the respective work (for example a work of art) is objectified (s)he must also have good faith, i.e. (s)he must not to know that the materials used by him/her belong to another/others. It could be assumed that a lack of knowledge under article 94, paragraph 1 PtA would be present in all cases where the person who does the processing is e incapable of acting. The knowledge of the person who does the processing will be relevant under article 94, paragraph 1 PtA, only if (s)he is able to realize the meaning of ownership to materials and of the circumstance that in the particular case the ownership is possessed by a third party. However, one could accept another thesis – of the need that specific assesment should be made in each individual case at the time when the processing is being done regardless of the formal incapacity to act of the processor (a case of negative recognition of the so-called “lucid periods” of the disease). See below.

<sup>58</sup> For the examination as a possible criterion of distinction between juridical acts and resultative актове for the manner of will formation: in the juridical acts a capacity to will is necessary because they require (presume) conscious (despite being legally irrelevant) judgment of the possible legal consequences; in resultative acts no capacity to will is necessary because such acts are done automatically, even mechanically (in processing, mixing, finding a treasure) or regardless of any reasonable judgment (works of science, literature and art), see **Markov, E.** Yuridicheskite postapki – narastvashti samneniya sled reformata [Juridical Acts – Increasing Doubts after the Reform] – In: Burgas Free University, Faculty of Law, Collection of Legal Texts, 1995, Year III, Volume III, p. 39.

<sup>59</sup> It has already been pointed out in the cases of finding a treasure (the same considerations apply as in the case of occupancy) and of processing under article 94, paragraph 1 PtA.

to an intellectual component it also includes a will to treat the thing as one's own (as such will does not become a will to acquire the thing on the basis of possession by prescription, which will is formed and expressed where acquisitive prescription having already ripened is invoked).

Here are some particular examples of the legal consequences of such juridical facts of the mental life of the full interdicts<sup>60</sup>:

- the full interdict may not carry out personal *possession* because the latter also includes a subjective (conscious) component – *animus*, intent to own.<sup>61</sup> The full interdict, however, could take away another's possession or detention [*darzhane*] and in such case (s)he will be the defendant to a possessory action where (s)he will be represented by his/her legal representative. This permission meets the nature of the protection provided by the claims under article 75 and article 76 PtA: it does not depend on violator's ability to form and express a valid legal will. Despite his/her formal incapacity to act the full interdict may exercise violence or hidden acts within the meaning of article 76 PtA.

Because of the entirely factual nature of *actual cohabitation*, however, it should be accepted that one can also be established with respect to the full interdict. The full interdict may actually live in cohabitation with another person (moreover, the marriage contracted by him/her would be voidable and not null). Thus, the legal consequences associated by the law with actual cohabitation should be respected with respect to him/her. If course, in cases where in addition to the realization of actual cohabitation the law also requires a capacity to act for the occurrence of the specific legal consequences, the lack thereof in the full interdict will hamper the realization of these legal consequences. Thus for example the possibility of *making a donation* in favor of a person with whom (s)he lives in cohabitation stipulated in article 26, paragraph 2, item 1 TOTCA is excluded for the interdicts by the peremptory provision of article 24, paragraph 4 TOTCA, which does not allow organs, tissue and cells for transplantation to be taken from a person placed under interdiction.

The possibility under article 130 HA can cause certain hesitation for the full interdict *to participate in a procedure for assisted reproduction* together with the person with whom (s)he lives in cohabitation. Article 130, paragraph 1 HA contains no express requirement as regards the capacity to act of the persons wishing to create offspring. The requirement for obtaining informed consent in their capacity of patients (article 87, paragraph 4 HA), however, presumes that there is a consent by the tutor of the interdicted person. Article 130, paragraph 5, item 1 HA stipulates that taking eggs from a woman (donor) and placing them into the body of another woman (recipient) may be made if the donor is of full age and is not placed under interdiction. Proceeding from that stipulation of the law, *per argumentum a contrario*, it could be asserted that taking eggs from a woman and placing them into the body of the same woman could be done regardless of such woman's capacity to act. However, under the statutory regulation currently in force this conclusion remains disputable as concerns could be set against it as to the extent to which the full interdict is able to assume parental responsibilities with respect to his/her future child. In contrast this question posed in the context of adoption under the hypothesis of article 130 HA there is no born child (as a separate legal subject), whose legal interest could be assessed and opposed to full interdict's "right" to become a parent. The desire to create offspring with another person and especially the sharing of such desire is a juridical fact of one's mental life that presumes the presence of a capacity to act. At the same time this desire is too personal and intimate to be formed and expressed by legal representative of the full interdict. These are also the two grounds under the legislation in force for which the full interdict will be denied the opportunity to use the methods of assisted reproduction even in the cases of autologous donation;

- the full interdict may not engage in *management of affairs* (a juridical act) because (s)he cannot meet the the requirement of article 60, paragraph 1 OCA, i.e. to know that the affairs (s)he undertakes belong to another, as required by the law. According to article 60, paragraph 1 OCA a person who undertakes the management of affairs which (s)he knows that belong to another without authority is obliged to take care of such affairs until the interested person can assume the management. An additional argument against the permissibility of a management of affairs done by the full interdict is his/her inability to carry out the obligations that have been undertaken by or have arisen for him/her in person;

- it is precisely because (s)he cannot carry out his/her obligations in person that the performance made by a full interdict will not have legal consequences in the cases under article 118 OCA. According to article 118 OCA if the debtor *performs his/her obligation after the liberative prescription expires*, (s)he has no right to demand back what has been paid although at the time of payment (s)he did not know that the prescription has expired. Despite the irrelevance of such knowledge, which the full interdict could not form as well – a knowledge that (s)he performs an obligation that has been extinguished by prescription – the full interdict's performance would not be valid. The performance of an obligation that has been extinguished by prescription should be seen, according to the terminology presented above, as a juridical act and not as a resultative act. For the occurrence of the legal consequences of article 118 OCA it does not matter who makes the payment and if (s)he is able to form a will. In this particular case that will might not be aimed at extinguishing a natural obligation but a performance will nevertheless be due – it will extinguish an existing obligation. The legislator does

<sup>60</sup> The listing and analysis have been made on the basis of Bulgarian legislation in force and do not contain in themselves support for the "interdictive" approach adopted by the legislator.

<sup>61</sup> Possession, however, may be exercised by the legal representative (the tutor) of the full interdict. See in this sense Order No. 338 of 6 April 2009 delivered by SCC under civil case No. 4133/2008, IV Civil Division, where the court stated that the intent to have a thing as one's own is assessed in view of the lawful representative. The legal representative also invokes the acquisitive prescription. See *Petkova, Tsv.* Prodobivane po davnost na nedvizhimi imoti [Acquisition by Prescription of Immovable Properties]. S., 2015, p. 296.

not attach legal meaning only to a possible error of the debtor as regards the expiry of the liberative prescription for the receivable that is performed. However, this does not mean that the legislator does not attach legal meaning to debtor's ability to form will at all. The performance of an obligation is a conscious act and it must be such, especially under the hypothesis of article 118 OCA. If, however, as a result of the performance the creditor has received something, the question of whether it has been received groundlessly is posed. As far as the case under article 118 OCA deals with a juridical act requiring the presence of a will (although such will does not determine the content of the legal consequences related to the act), the inability to form such will should take away the effect of performance of what the full interdict has given – it would be a groundless giving and not a performance of a natural obligation. What the full interdict has given to perform his/her obligation that has been extinguished by prescription will be without legal ground and will be liable to be returned.<sup>62</sup> This conclusion is also supported by one of the functions of liberative prescription – to afford an opportunity to the parties (the creditor, by not seeking performance within the prescription, and the debtor, by performing [the obligation] after the expiry of prescription) to take into consideration the ethical and other non-legal aspects of their relations. Such consideration is only possible if one has the ability to form a will. On the other hand, the performance of a natural debt contains in itself a concludent waiver of liberative prescription extinguished in favor of the debtor as such waiver should belong to the acts of disposition for whose performance by persons incapable of acting a restrictive or a special regime should be applied;

- the *performance of a moral duty* by the full interdict is also invalid. According to article 55, paragraph 2 OCA the person who has consciously performed a moral duty may not request reclamation. The requirement of conscious performance could not be applied with respect to the full interdict;
- the full interdict may not *confirm a voidable transaction by the performance* of his/her obligations under it. According to article 35, paragraph 2 OCA the voidable transaction is deemed confirmed if the person, whose will is vitiated, voluntarily performs in full or in part while knowing the ground for voidability. Such knowledge in the full interdict is legally irrelevant;
- the full interdict may not form *knowledge under article 135, paragraph 1 OCA that by the transaction being entered into (s)he harms his/her creditor*. The question of the presence of such knowledge should be assessed with respect to the legal representative. However, for the full interdicts the presumption under article 135, paragraph 2 OCA will apply – as regards transactions entered into by their legal representative;
- the full interdict may not *return "voluntarily" within the meaning of article 109 OCA the private document of debt* to his/her debtor. As the full interdict cannot act "voluntarily" within the meaning of article 109 OCA the presumption that the debt has been extinguished should not be applied with respect to him/her if the private document for such debt is returned to the debtor by the interdicted creditor; on the other hand, the legal effect of the return of that document to the debtor by interdicted creditor's legal representative should take into consideration the nullity of the waiver stipulated in article 130, paragraph 4 FC);
- the full interdict may not form *knowledge under article 78, paragraph 1 PtA that the grantor of his/her powers is not an owner*. Thus, when applying article 78, paragraph 1 PtA the knowledge will be assessed only with respect to his/her legal representative;
- the full interdict may not form *knowledge under article 94, paragraph 1 PtA that the materials processed belong to another*. As processing is a juridical act and is not related to the participation of interdict's legal representative, then the lack of knowledge will drop as a premise for the application of the manner of acquiring the thing under article 94, paragraph 1 PtA: the full interdict who has made a new thing out of another's materials will become the owner of the thing if the value of workmanship exceeds the value of materials.

At first glance, it also seems that the juridical fact described in the hypothesis under article 41, paragraph 2 SA is a juridical act and not a resultative act. According to the said provision the testament made is deemed repealed if *the testator processes or changes the thing bequeathed* so that it loses its former form and intended use. As it is about an act in which the legislator finds (and requires) the presence of a will although it is not the will that determines the occurring legal consequences (juridical act). Therefore, a person who lacks the ability to form such will cannot realize the said juridical fact. However, if we look deeper into the hypothesis of article 41, paragraph 2 SA we can find that it is about an influence on the object of the property law [*veshtnoto pravo*] of which the testator disposes. Similarly to *the destruction of the thing* its processing under article 41, paragraph 2 SA defaces the object of the bequeathed real right and therefore the legacy remains with an impossible object. This effect occurs as an objective result whose consequences do not depend on the presence of will upon destruction [and] processing of the thing bequeathed. Thus, the juridical fact under article 41, paragraph 2 SA should be viewed as a resultative act and not as a juridical act. It will result in the consequences stipulated in article 41, paragraph 2 SA also in the cases where the destruction, the processing has been carried out by a fully interdicted testator. The possibility of restoring the thing bequeathed into its initial form (form and intended use) should be recognized to the benefit the legatee neither before, nor after the opening of succession;

According to article 19, paragraph 1 SA the legacy of a thing is invalid if the testator is not the owner of such thing upon the opening of succession. The reason for testator not being the owner of the thing bequeathed could be the destruction

<sup>62</sup> For the reverse case, i.e. where the incapable person has groundlessly received something, article 58 OCA stipulates that only what has gone to the benefit of the incapable person is liable to be returned. According to article 75, paragraph 2, sentence 3 OCA *the performance to an incapable creditor releases the debtor if it has gone to the benefit of the creditor*.

of the thing (including while it is being used, if the thing is usable) or the transfer thereof to a third party. We have seen that the destruction of the thing bequeathed (article 19, paragraph 1 SA), similarly to its processing (article 41, paragraph 2 SA) leads to the impossibility of the legacy giving rise to its legal effect (resultative acts). *The transfer of the thing bequeathed* (article 41, paragraph 1 SA) presumes that a legal transaction has been made, which – in addition to the legal consequences, intended by the parties – also causes some additional consequences, the ones under article 41, paragraph 1 SA (thus, in this case the legal transaction is at the same time a juridical act: in order that the invalidity of the legacy to occur due to a disposition of the bequeathed real right the act of disposition must contain testator's will). According to article 41, paragraph 1 SA the full or partial alienation of a thing bequeathed revokes the legacy as regards what has been alienated even if the thing is re-acquired by the testator or if the alienation is voided for reasons other than a vice in consent. The predominant opinion in Bulgaria is that the full interdict cannot carry out in person acts of disposition because they are null on the grounds of article 26, paragraph 1, hypothesis 2 OCA. Therefore, (s)he cannot make a revocation under article 41, paragraph 1 SA of the testamentary disposition made by him/her. However, if the idea of respecting the "lucid periods" is adopted and if it is accepted that article 27, hypothesis 1 OCA is special with respect to article 26, paragraph 1, hypothesis 2 OCA, the voiding of the act of disposition done by the full interdict on the grounds of article 27, hypothesis 1 OCA will lead to the elimination of the revocation effect of article 41, paragraph 1 SA because the act would have been done by the incapable person (fully interdicted) testator in person.

- the full interdict may not carry out *an act rendering him/her unworthy of succession* under article 3 SA, because the acts described therein are presumed to be intentional or conscious.

As regards **the persons placed under limited interdiction** the stated facts of mental life (intent, knowledge, etc.) should be *personally* assessed with respect to them. For the occurrence of their legal consequences in each individual case no "curator's assistance" will be needed by the part of their curator – such legal consequences will occur also in cases where the limited interdict's intention/knowledge is not shared by his/her curator. On the other hand, considering the nature of curator's assistance – it does not determine the content of the declaration of will of the limited interdict but just validates it, curator's knowledge of certain circumstance where such knowledge is not shared with the limited interdict should not result in the conclusion that the limited interdict is in bad faith.

#### 4.5. Conclusions concerning the "will – interest" correlation

The following summarizing conclusions could be drawn from the points presented above:

**The theory of interest** could be used to a much greater extent to adduce arguments supporting the *general legal capacity to have rights* [pravosposobnost]. The interest in the so-called "natural persons" is organically related to their corporeity "enabling" them to feel pain and suffering. The *arch-harm*, the *Ur-harm\**, the harm in view of which the concept of interest is formed is precisely the pain: the basic interest of every living creature is not to feel pain (in order to preserve its welfare). In this sense the theory of interest and the general legal capacity to have rights [pravosposobnost] could be associated *with the body, with the corporeity of man and his/her livebirth*.

**The theory of will** could be used to a much greater extent to adduce arguments supporting the *capacity to act*. Will in the so-called natural persons is functionally related to their "personhood", to their existence as (natural) "persons" and not merely as (biological) "bodies". The person makes liquid (decipherable, performable and due) the interests of the body. (The natural) person is a juridically liquid (living biological) body. The necessities of the bodies having legal personhood become juridical gestures by the mimics of the person. However, the mimics of the person are also mimicry of corporeity in which the peculiarities of the body are made undifferentiated by arranging them into classification known to the law (individualizing features of natural persons – sex, age, health condition, etc.). In law there exist special proceedings to liquidate the person. Such "person in liquidation" is produced by the medical procedure of ascertainment of brain death. The procedure of ascertainment of brain death leads to the "termination" of the (natural) person despite the facticity of his/her living (biological) body – the person for whom the brain death has been ascertained is legally dead ("terminated", "liquidated"), although his/her body is biologically (physiologically) alive. After the ascertainment of brain death the corporeity is no longer a purpose by itself, it is a tool, a "depot" for organs needed for the purposes of post-mortem donation and transplantation. A "person in insolvency" is also the newborn underneath certain weight in grams and gestational age in the medical procedure of ascertainment of its viability. If a newborn under the required parameters does not survive more than 3 days after its birth it is deemed an aborted fetus, i.e. it has failed the test of its "personhood" and it is reduced again to "pure" corporeity (or to "biological waste" to put it in legal language). During pregnancy (when the conceived infant lives with a "borrowed body", i.e. it feeds not only biologically but also juridically on pregnant woman's body) the outlines of the person of the conceived differ quite delicately (through various legal restrictions on abortion), without being recognized as legal personhood (although they "point" to it, for example in view of the conceived infant's capacity to inherit). After birth they are checked (measured) and if they do not meet certain physical (!) parameters, such as weight and age, are ultimately defaced in the procedure for viability examination done by experts. It turns out that the (biological) body must be able to live on its own as per certain medical parameters in order to be recognized as (natural) person. This ability to live on its own could also be seen as a physiological basis of the will, which requires autonomy of the subject. Thus, the theory of will and the capacity to act could be associated *with the person, with his/her personhood and viability*.

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\* used here in the sense of "proto" harm – Translator's Note.

In the context of this distinction the placement under interdiction is a situation of *inflation of the person* – a drop of person’s “purchasing power” (as will) at the expense of the interest (identified via corporeity). What is decisive when making decisions by (in the name of) the person placed under interdiction is precisely the interest, the “ability” for which is underlying for his/her general legal capacity to have rights [*pravosposobnost*] and which is closely connected with the corporeity of the subject. A part of corporeity (in the sense I use this word here) is also the property of the person: as property is an objectified value so corporeity is a transcending objectivity. Both are a kind of facticity around which an interest can be “grouped” together and subsequently constituted as a subject. In this sense, the property interest is a “continuation” of the idea of personal interest – the inviolability of property and the “advance guard” of the inviolability of personality. Property transformed into a juridical person has the same ideological root as personality juridically “interned” as natural person. The person placed under full interdiction is reduced to a great extent to his/her *corporeity=interests* (with impermissible but imposing connotations of objectivity). His face “is not worthy”. Although it is identified by the law – his/her person remains a subject of rights – it is paralyzed into a static mask outlined by the interpretations of his/her interests. The movements of the will manifested as mimics of the face are naturalized and devalued to desires and preferences. In my opinion in order that such mimics and the unimaginable richness of the person as the juridical representation of subjectivity are taken into account these “movements of the will” need to be taken into consideration by stipulating specific juridical rules and mechanisms for their ascertainment and consideration. And now it is mostly about the persons placed under full interdiction. Such “respect” could be manifested in the introduction of a mandatory right to opinion for the person placed under full interdiction in the legal, administrative and medical proceedings and procedures affecting his/her interests; in respecting the will expressed during the “lucid periods” of the disease by affording the person an opportunity to “invoke” the primacy<sup>63</sup> of his/her will over the various interpretations of his/her interests “thrust” upon him/her; by attaching legal meaning to the will, where such exists, in cases of both unlawful and lawful juridical facts an element of which is the conduct of the person placed under interdiction. The person placed under interdiction is precisely “a person under interdiction” – a person who, although being recognized as existing is banned, interdicted. This interdict [*zapret*] however is legitimate only as far as there is no will, the main component of the capacity to act. No juridical “facilities” such as the elimination of the burden of proof (as soon as a person is placed under interdiction (s)he can not express a legally valid will) and the legal certainty of civil-law transactions (in all cases the person who enters into a contract with the person placed under interdiction must know that the transaction is invalid) could “calcify” the will of a person to his/her interest, take away his/her capacity to act by “downgrading” it to a general legal capacity to have rights [*pravosposobnost*]. If the contrary is adopted the inflation of the person will lead to deflation of rights and will turn interdiction into a tool for deconstruction of subjects instead of a measure for their protection.

#### 4.6. Four proposals

Considering the aforesaid *four theses for change* to Bulgarian legislation in force could be formulated, which, if applied, would take into consideration the correlation of the theory of interest and the theory of will in the legal regime of the persons placed under interdiction:

- *the capacity to be held responsible for delicts in civil law and sanity in criminal law should be expressly regulated and defined by the law, and, respectively, applied by the court as specific and actual existing states.* They should be possible also in cases of civil incapacity to act (formally) pronounced by the court by reason of person’s placement under full interdiction. The permanent nature of the regime of interdiction should not efface the “lucid periods” in which the person could commit illicit conduct.

The person placed under full interdiction will bear delictual responsibility or the damages caused consciously by him/her. It is notable that in article 47 OCA the term “incapable” [*nesposoben*]\* and not “incapable of acting” [*nedeosposoben*] is used: “The person who is incapable of understanding or of managing his/her actions shall not be responsible for the damages caused by him/her in such condition unless the inability has been caused by him/herself through his/her own fault. The person who is obliged to exercise supervision on the incapable person shall be responsible for the damages caused by such incapable person, unless the former was unable to prevent their occurrence”. The difference in the usage of the two words is not accidental – the term “incapable of acting” is used in OCA (in the sense of a permanent regime of person’s capacity to act, i.e. according to the terminology of PFA, see for example article 27 OCA, article 58 OCA, article 75, paragraph 2, sentence 3 OCA) and is clearly differentiated from “incapable” (a word used in the sense of a specific inability, see article 269 OCA<sup>64</sup>). It is quite possible that in a certain specific moment a(n) (incapable) person placed under full interdiction is able to understand and manage his/her actions [and] these are precisely the so-called “lucid periods” in some mental disorders, which could be a reason for placing a person under interdiction. Even if we assume that such diseases should lead to the person’s placement under limited interdiction, this does not rule out the

<sup>63</sup> For the priority of will as a principle adopted by many international acts, see **Stavert, J.** The Exercise of Legal Capacity, Supported Decision-Making and Scotland’s Mental Health and Incapacity Legislation: Working with CRPD Challenges. – Laws 2015, No. 4, pp. 297–300.

\* as explained below by the author “incapable” here is interchangeable with “unable”, i.e. the term I have used throughout to translate “nesposoben” – Translator’s Note.

<sup>64</sup> “If the contractor (under a workmanship contract – my note) dies or becomes unable to perform the work the contract is terminated unless it has been entered into in view of the person of contractor and if contractor’s heirs agree to continue the performance.” The specific inability of a person to understand and manage his/her actions is also relevant in view of the voidability under article 31 OCA.

possibility that they have led to the pronouncement of full interdiction – the hypothesis examined by us here. In such case the person placed under full interdiction should not be released from delictual responsibility under the excuse that (s)he is “irrefutably” incapable of being held responsible for delicts. His/her incapacity to be held responsible for delicts is “presumed” by the regime of full interdiction but the latter does not rule out completely and absolutely the ability of the person to understand and manage his/her actions. If the opposite is assumed, this would result in responsibility arising for the person who carries out supervision of the full interdict (as a rule, his/her tutor), unless it is assumed that the consciousness of interdict’s actions is not a case in which the tutor was unable to prevent their occurrence. No obligation to control the conduct of the full interdict during his/her “lucid periods” should be stipulated as a burden resting on the the tutor (this would be a serious encroachment upon the freedom of the latter) as such an obligation could be found in tutorship of minor children where the legal representation of the tutor is combined with an obligation for upbringing. Precisely the obligation for upbringing is the difference between the responsibility under article 47, paragraph 2 OCA (for damages caused by incapable person) and the tutor’s responsibility under article 48, paragraph 2 OCA (for damages caused by a minor) – the latter will be realized also in the cases where the minor child was able to understand and manage his/her actions.

The conscious unlawful conduct of persons placed under full interdiction should not go unpunished. The full interdiction should not be an absolute reason for releasing one of criminal responsibility. The ability of the person to understand the nature and the meaning of his/her actions and to manage his/her conduct (sanity) is assessed in each individual case as the “presumption” of insanity introduced by the regime of full interdiction (as well as the general presumption of innocence in criminal law) should not be irrefutable. Whether and how the purposes of punishment with respect to a person placed under full interdiction could be attained is another question; a question concerning the state’s policy on punishments (the system of punishments and the manners of imposing them) and not one concerning insanity;

- *the bad faith (knowledge) of the full interdict in the “lucid periods” must have significance upon the qualification of the legal acts carried out by his/her tutor.* This is undoubtedly so in the cases of the limited interdiction (as already stated curator’s knowledge does not matter if it is not shared because in contrast to the representative curator does not form the content of the will). The reason to demand that the said bad faith of the full interdict should be taken into consideration is the legal principle that no one can obtain beneficial legal consequences from his own immoral conduct/conduct in bad faith\*. Of course (bad)good faith should be assessed as at the time of occurrence of the respective juridical fact as at the same time there should also be a “lucid period” in the disease of the full interdict. The attachment of legal meaning to the lack of knowledge of certain circumstances was made by the law in order to protect the civil-law transactions (for example article 78, paragraph 1 PtA) or to uphold legal certainty (for example article 70 PtA). The attachment of legal meaning to the knowledge of certain circumstances, however, aims not to allow the occurrence of certain undesired outcome – favoring one person at the expense of another (for example article 135, paragraph 1 OCA). Bad faith is a tool for taking the ethical requirements into account upon the realization of civil-law transactions and the legal relationships between the subjects in general and therefore it should also be taken into consideration in the cases of incapacity to act. The incapacity to act should not mean an irrefutable good faith;

- *the legal transactions entered into by full interdicts should be considered voidable under article 27, np. 1 OCA, and not null under article 26, paragraph 2 OCA.* The provision of article 27, hypothesis 1 OCA should have precedence over the provision of article 26, paragraph 2, hypothesis 2 OCA in the case where the transaction has been made in person by a full interdict.<sup>65</sup> As it the contrary statement<sup>66</sup> according to which the transactions made by a minor child or by a person placed under full interdiction are null because of a lack of declaration of will or consent is the dominant one today. The arguments supporting the lack of will within the meaning of article 26, paragraph 2, hypothesis 2 OCA are most often associated with the early age of the child participating in the making of the transaction.<sup>67</sup> Such a statement, however, does not take into account the possibility of the presence of a will consciously formed and expressed by an incapable person during the so-called “lucid periods” of his/her condition. The interdicted persons are not minors (immature and inexperienced), on the contrary – they are most often ones who have attained majority, have certain experience and in many cases their condition is dynamic and in some periods makes it possible that a conscious will can be formed and

\* or “no one can benefit from his own wrong” – Translator’s Note.

<sup>65</sup> This thesis is currently supported only by **Rachev, Φ.** *Grazhdansko pravo spored novite zakoni za grazhdanskata registratsiya, yuridicheskite litsa s nestopanska tsel, politicheskite partii i religioznite obshtnosti* [Civil Law According to the New Laws on Civil Status Registration, not-for-profit legal entities, political parties and religious communities]. S., 2003, p. 220. For the reception, but also the criticism of that decision while OCA (repealed) was in effect see **Dikov, L.** *Kurs po balgarsko grazhdansko pravo. Tom I. Obshta chast* [Course in Bulgarian Civil Law. Volume I. General Part]. S., 1936, p. 164. The criticism was caused by the fact that under the effect of article 10 OCA (repealed), if a formally capable person makes a transaction in a state of madness it will be “absolutely null”. However, the transactions made by the formally incapable person are always “voidable, irrespective of whether they have been made in a lucid period or not”.

<sup>66</sup> See **Tadzhher, V.** *Grazhdansko pravo na NRB. Obshta chast. Dyal II* [Civil Law of the People’s Republic of Bulgaria. General Part. Section II]. S., 2001, pp. 525–526, **Pavlova, M.** *Grazhdansko pravo – obshta chast* [Civil Law – General Part]. S., 2002, p. 537, **Stefanov, G.** *Grazhdansko pravo. Obshta chast. Yuridicheski litsa, sdelki, predstavitelstvo, pogasitelna davnost* [Civil Law. General Part. Juridical Persons, Transactions, Representation, Liberative Prescription]. S., 1995, p. 135, **Dzherov, Al.** *Grazhdansko pravo. Obshta chast* [Civil Law. General Part]. S., 2012, p. 479.

<sup>67</sup> This quite apparent in the example given in **Vasilev, L.** *Grazhdansko pravo. Obshta chast* [Civil Law. General Part]. S., 2000, p. 306 – a transaction entered into by a child of 8 years of age.

expressed. The application of article 27, hypothesis 1 OCA (instead of article 26, paragraph 2, hypothesis 2 OCA) could allow that the “lucid periods” in the condition of limited interdicts be taken into consideration by preserving the effect of the transactions entered into by them. They would not be null under article 26, paragraph 2, hypothesis 2 OCA but merely voidable under article 27, hypothesis 1 OCA. Such transaction will be voidable by the tutor, by the heirs or by the interdict him/herself (in case that his/her interdiction is revoked) but this will depend on these persons’ will and assessment.

Transactions entered into by the full interdict were “voidable” according to the express wording of article 205 of the repealed OCA.<sup>68</sup> Such legislative solution can be found in article 27, hypothesis 1 of OCA currently in force. The provision of article 27, hypothesis 1 OCA was passed simultaneously with article 26, paragraph 2, hypothesis 2 OCA, from which it follows that the legislator took both provisions into consideration by stipulating the softer form of invalidity for the cases where the transactions are entered into by an incapable person. OCA was passed (SG, issue 275 of 22 November 1950, in force as from 1 January 1951), after the coming into force of PFA (SG, issue 182 of 9 August 1949, in force as from 10 September 1949), which stipulates the two regimes of interdiction that are currently still in force: full and limited interdiction.<sup>69</sup> This shows that the provision of article 27, hypothesis 1 OCA is a special one with respect to article 26, paragraph 2, hypothesis 2 OCA and is a manifestation of legislator’s wish to preserve the effect of the declarations of will made by full interdicts by providing a possibility for the would-be vitiation in their will to be attached legal meaning by lodging a claim to have the transaction declared void.<sup>70</sup> This desire of the legislator can be found in article 21, item 3 in relation to article 20 of the Marriage Ordinance-Act of 1945 (repealed), article 17, paragraph 1, item 1 in relation to paragraph 2 FC of 1968 (repealed), article 96, paragraph 1, item 1 FC of 1985 (repealed), which all stipulate voidability and not nullity of the civil marriage entered into by a person placed under full interdiction, as well as in article 46, paragraph 1, item 1 FC which is currently still in force.<sup>71</sup> Similarly, the violation of the requirement of article 13 SA stipulating that the person who makes a testament should not have been placed under full interdiction leads to voiding (article 43, paragraph 1, letter “a” SA) and not to nullity of the testament. The circumstance that the person making an acknowledgment was incapable of acting also leads to voiding (article 67, hypothesis 3 FC), and not to nullity of the acknowledgment. The circumstance that the adopter is not capable of acting also leads to voiding (article 106, paragraph 1, item 1, hypothesis 2 FC in relation to article 78 FC) and not to nullity of adoption. Under the statutory regulation currently in force the person’s actual inability to form and express will, a circumstance which is presumed if there is a formally pronounced interdiction, is also a ground for voidability (article 31, paragraph 1 OCA) and not for nullity of the transaction. As far as the substantive reason: the person’s lack of ability to understand the nature and the consequences of the act being carried out by him/her and to control his/her conduct, is provided by the legislator as a ground for voidability of the legal transaction made by him/her, then it should be expected that the legislator will provide the same legal consequence also in cases where this inability of the person has been formally ascertained by placing him/her under interdiction. It is precisely this expectation that is met by the provision of article 27, hypothesis

<sup>68</sup> See *Mevorah, N., D. Lidzhi, L. Fahri*. Komentar na Zakona za zadalzhniyata i dogovorite. Chl. chl. 1 – 333 [Commentary of the Obligations and Contracts Act. Articles 1-333]. S., 1924, p. 414, where it is stated that the “judgments under lawsuits where the incapable acted alone [will also be voidable]. Such judgments are subject to voiding under article 205 because judgments are but court contracts”. Much more categorical was article 111 PsA (repealed) which declared the acts made by the interdict after the pronouncement of the judgment of interdiction invalid “by operation of law”.

<sup>69</sup> Even before OCA (SG, issue 275 of 22 November 1950, in force as from 1 January 1951) and PFA (SG, issue 182 of 9 August 1949, in force as from 10 September 1949) the transactions entered into by the full interdict were considered voidable. See for example *Apostolov, Iv.* Osnovni nachala na grazhdanskoto pravo. Lektsii na prof. Iv. Apostolov [Fundamental Principles of Civil Law. Lectures delivered by Prof. Iv. Apostolov]. S., 1946, p. 46.

<sup>70</sup> In terms of comparative law there is an interesting judgment of the Italian Court of Cassation in which it is accepted that the obligation that has arisen for the limited interdict is valid and may not be contested if the latter has misled his contractual partner upon the conclusion of the contract as to his limited capacity to act: “his declaration that he is capable of acting is not sufficient; he must have committed such acts and made such covenants as to create in the mind of the other party to the contract reasonable conviction that he is dealing with a capable person”. See *Maksimov, Hr.* Zakon za litsata. Razyasnen s praktikata na Varhovniya kasatsionen sad [Persons Act. Explained by the Case Practice of the Supreme Court of Cassation]. S., 1941, pp. 131–132. At the same time it was accepted that the legal transactions made by the limited interdict without the provision of the due curator’s assistance might be voided only upon curator’s request: “otherwise, the curator’s power and role in general would be illusory should (s)he fail to intervene in cases where it is obvious that the interdict squanders his estate and does not want to stand up for his interests on his own” – Judgment No. 75/1915 of III Civil Division, where references are made both to Italian and to French jurisprudence (p. 149).

<sup>71</sup> For the thesis according to which the marriage contracted by a full interdict is voidable but only “if the person comprehended the nature and the significance of the act” see *Tsankova, Ts.* Vaprosi na deesposobnostta [Questions concerning the capacity to act] In: Yubileen sbornik posveten na 80-godishninata na prof. d.yu.n. Vasil Mrachkov [A Collection on the 80th Anniversary of Prof. Vasil Mrachkov, Doctor of Juridical Science]. S., 2014, p. 214. However, it is stated that “otherwise (i.e. – if the full interdict did not comprehend the nature and the significance of the marriage contracted by him/her – author’s note) the marriage would be null although there is no express regulation”. If, however, the person placed under full interdiction did comprehend the nature and the significance of the marriage contracted by him/her then what is the cause for its voidability? If the concerns are over his/her ability to realize the potential of the legal relationship of marriage this could be taken into consideration by means of another ground for termination of marriage – divorce because of deep and irretrievable breakdown of marriage. The assessment as to the presence of such breakdown of marriage, however, should be a different assessment that is always case-specific.



1 OCA. If such approach is adopted it will not be article 26, paragraph 2, hypothesis 2 OCA that restricts the scope of application of article 27, hypothesis 1 OCA but the other way round: article 27, hypothesis 1 OCA will “detract” from the scope of application of article 26, paragraph 2, hypothesis 2 OCA.;

- *the declarations of will of full interdicts during the lucid periods should be valid*, if not in all cases, at least in the transactions that could be made only in person. *De lege ferenda* the entry into the contract during a “lucid period” could be attached legal meaning also by the counter party by making an objection against the claim for voiding as the burden of proof shall rest on the one who asserts a “lucid period”. To that end (s)he may have secured a “medical certification” of the interdict as at the time of conclusion of the contract.

The adoption of such a differentiated regime of capacity to act would lead to a “capacity to act with lights and darks” – a differentiation of the (in)capacity to act depending on the subject matter of decisions and on the specific ability of the person in the realization of his/her acts. In the case of person’s formal capacity to act his/her will (freedom) has priority and his/her interest (welfare) comes second. In the case of person’s formal incapacity to act the interest of the person will be decisive but the will must be respected in the would-be flashes of will (the “lucid periods” in the condition of the persons with mental disorders). Bulgarian legislation should stipulate legal mechanisms precisely for respecting the will of the person when it is invalidated [*desezirana*] or when it competes with a regime of observance of his/her interests. Full interdiction is a regime under which the will of the person has almost no legal importance. The formal incapacity to act should not efface completely the actually existing will of the person. The principle “First respect the will!” could be supported by introducing a “medical notary” of a kind (witness) with an express qualification to attest the lucid periods by introducing a requirement for a preliminary consultation with the general practitioner or by increasing the criminal law sanction for abuse of trust (article 217 CrC).

However, it should be considered that the proposals made above have been formulated within the paradigm of interdiction as an approach favorizing the interest over the will of the persons with mental disorders and intellectual disabilities, and therefore they are rather ones of **palliative nature**. They could introduce *different dimensions (nuances) of gray* in the black-and-white world of interdiction but they cannot introduce the full range of colors – its introduction offers a new approach of optimal respect for the authentic will of the persons with mental disabilities. Such an approach presumes the presence of a system of diverse and mutually complementing protection measures and support measures. The legislative regulation of precisely such a system of protection and support measures would correspond to the greatest extent to the care owed by the Bulgarian state toward the persons with mental disorders and intellectual disabilities. It is precisely such a system that could replace the paradigm of mutually exclusive “dark” and “lucid” periods by “coloring” them and bringing them together in a community personal lasting – in one personality. Only if such an approach is adopted shall the will of the persons with mental disabilities not only be taken into consideration in the cases where it meets certain “threshold” psychological criteria but shall also be integrated into its dynamics and in its different degrees of intensity, rationality and well-foundedness.

#### **4.7. Special powers of attorney: enduring, lasting and Ulysses (exclusive) powers of attorney**

The so-called **special powers of attorney** (part of the possibilities have been already mentioned above) could be regulated as a part of a possible system of support measures), such as for example:

- the so-called “*enduring*”, “*continuing*” powers of attorney (endure power of attorney, EPAs)\*. These are mostly medical powers of attorney. Their peculiarity is that they come to force immediately but “survive” the inability (the incapacity to act) of the authorizing person. Where such powers of attorney are introduced, in order to achieve a greater guarantee for the interests of the authorizing person a more onerous form may be stipulated for their validity (the signature and contents must always be notarized); registration with a special register (including a register accessible to health facilities); as well as an opportunity for withdrawal of the power of attorney by court proceedings upon the request of every interested person if it is established that the representative acts contrary to the instructions (the will) and the interests of the represented person;

- the so-called “*deferred*”, “*lasting*” powers of attorney (lasting power of attorney, LPAs)\*\*. In practice, these also concern mainly medical powers of attorney. Their peculiarity is that they come to force only after the occurrence of a defined inability of the authorizing person. In addition to the possible legislative provisions specified above there could also be regulated an express (court) procedure for establishment of the stipulated specific inability of the authorizing person as well as a possibility could be stipulated for the interested parties to make objections, including ones stating that the attorney is no longer appropriate, the power of attorney is not adequate to the current status quo, etc. with respect to the changes having occurred in the period between time when the power of attorney is granted and the occurrence of the authorizing person’s inability.

- the so-called *exclusive (Ulysses<sup>72</sup>) powers of attorney*. These are one of the most controversial powers of attorney in view of their possible legal effect. What is typical for them is that they take away (upon the occurrence of a dilatory condition, [i.e.] if the authorizing person gets into a specific physical or mental inability) the ability of the authorizing person to act in person within the scope of the (exclusive) power of representation granted to the attorney. The aim of

\* the words in parentheses are in English in the original – Translator’s Note.

\*\* the words in parentheses are in English in the original – Translator’s Note.

<sup>72</sup> The so-called Ulysses agreements have already been discussed. Ulysses agreements and Ulysses powers of attorney are very much alike in terms of the restrictive effect aimed by them with respect to the manner of formation and expression or and respect for the will of the person in whose favor have been made these agreements/powers of attorney.

such power of attorney is that the authorizing person decide on his/her own to protect him/herself from the “weakness of his/her will” and to delegate its “exercise” to a person (attorney) whom (s)he trusts<sup>73</sup>. In order to achieve such effect the authorizing person wants to exclude the legal relevance of his/her own will, regardless of his/her formal capacity to act or a specific ability after the occurrence of the dilatory condition envisaged in the power of attorney. The authorizing person does not waive his/her right to withdraw the power of attorney (and to remain fully dependent on the will of the “tutor” (s)he has appointed) but his/her aim is to introduce some impediments to delay that: by introducing a special manner of withdrawal of the power of attorney, including by conducting special non-contentious legal proceedings (similarly to the withdrawal of the power of representation of a tutor) or by free withdrawal by the authorizing person but with the opportunity for the attorney to contest the withdrawal because of the exclusivity of attorney’s power of representation desired by the authorizing person. A temporary curator might be appointed for the period of contestation of the attorney’s power of representation. The peremptory requirements for the Ulysses powers of attorney, i.e. they must be always for a fixed term, they must be made in a qualified form in order to be valid and they must be subject to registration with a special register, could be guarantees against possible abuse of the will of the authorizing person.

Ulysses (exclusive) powers of attorney are an example of a mechanism for resolution of a possible “competition of wills” upon the realization of the legal actions of a legal subject. The person desires (expresses will) in a subsequent (future) (specified) moment that his/her should not have legal significance. This desire (“self-appointment” of a tutor, “voluntary tutor”) does not deprive him/her of will but is a manifestation of a second-degree will, a *meta*-will as regards the significance of his/her will in a defined situation and in a defined period of time.

The subject can “*play trumps*” against him/herself in two ways:

- by justifying *his/her right to act against his/her own interests*: everyone can make decisions that harm him/herself as far as (s)he is able to form and express a will and to have freely realized that ability in the particular case, and
- by justifying *his/her right to act against his/her own will*: here come the preliminary instructions for treatment where a past will (as far as it is not a “former” one, i.e. one that is no longer up-to-date and adequate) prevails over the future will (expressed as at the time of occurrence of the need of treatment) as well as the Ulysses powers of attorney in which the past will (expressed in the power of attorney as “invalidating will”) invalidates the legal relevance of a future will (expressed after the occurrence of the dilatory condition specified in the power of attorney).

Part of the argumentation of the “right to act against one’s own will” passes through the idea of self-government and self-constraint. In the latter, the *self* is seen having at least two components and the “long-run” (rational, rule-oriented) *self* is opposed to the “short-run” (impulsive) *self*.<sup>74</sup> “Sending” a juridically valid and a mandatory (to a certain extent – for example in view of putting certain mechanisms that postpone the attachment of legal meaning to the will) will from the past (formulated by the “long-run” *self*) to the future (meant and intended for a would-be “short-run” *self*) via the intermediation of another person (attorney, contracting party) could be viewed as a form of *autopaternalism* where the person wants to preserve certain identity also in periods in which (s)he is under the influence of certain (mental) disease.<sup>75</sup> The said preliminary instructions for treatment, including instruction on termination of treatment or even on the performance of an active euthanasia upon the occurrence of certain conditions, could also be pointed out as possible juridical tools for the attainment of such personal homogeneity (by attaining a desired narrative<sup>76</sup> for oneself), in addition

<sup>73</sup> If a contract is entered into to that end with the authorized person, who assumes an obligation to carry out certain actions on behalf of the authorizing person, without taking into consideration his/her will expressed after the occurrence of the specified dilatory condition such contract is designated as a “Ulysses agreement”.

<sup>74</sup> See for example **Cowen, T.** Self-Constraint versus Self-Liberation. – Ethics Journal, 1991, Vol. 101, p. 360. Paternalism and different measures for achieving financial discipline are cited as examples of such self-restraint. (p. 361). The author explicitly emphasizes that the “two-selves model is a considerable oversimplification” (p. 362) but this model is a good match for the possible legal complications where there is a contradiction in one’s will in two different moments in time. As a rule law stimulates the “rule-oriented *self*”, see **Elster, J.** Weakness of Will and the Free-Rider Problem. – Economics and Philosophy, 1985, No. 1, pp. 234–235.

<sup>75</sup> *Option money* is an agreement that can be incorporated in a contract precisely in view of the possible opposition of the “long-run” *self* to a will expressed by the “short-run” *self* – the latter may back out of the contract but will have to pay the agreed *option money* because of such backout (a cash sum or a thing).

<sup>76</sup> For the narrative approach for determination of the will of persons with disabilities in the context of the application of CRPD see **Bach, M.** The Right to Legal Capacity under the UN Convention on the Rights of Persons with Disabilities: Key Concepts and Directions from Law Reform. Toronto, 2009, pp. 10–11. Two main approaches have been stated to replace the hitherto prevailing dominance of interest: an examination of the specific intention of the person with the help from people who know the person and who could explain the aims and needs behind the respective behavior (we could call it an approach of “gathering” a personality out of the network of its interactions and contacts), and an examination of the specific will of the person as part of his/her life story defined through the values and challenges filling his/her life so far (precisely this approach is designated by the author as “narrative approach”). For intention as a foundation of will and legal personhood, see **Bach, M., L. Kerzner** A New Paradigm for Protecting Autonomy and the Right to Legal Capacity. Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice October 2010 Commissioned by the Law Commission of Ontario, p. 60–63, accessible online at: [www.lco-cdo.org/disabilities-commissioned-paper-bach-kerzner.pdf](http://www.lco-cdo.org/disabilities-commissioned-paper-bach-kerzner.pdf) For the so-called “indicia of personhood”, which should not be necessarily bound to rationality, see **Quinn, G.** Concept paper: Personhood & Legal Capacity Perspectives on the Paradigm Shift of

to “the Ulysses” (exclusive) powers of attorney.

The above thoughts show that there are many possibilities to correlate the will (wills) and the interest (interests) of legal subjects, which are not sufficiently taken into consideration by the Bulgarian legislation. Although it works in favor of the civil law certainty (I would even call it “univocality”) such legislative approach in practice limits the freedom and harms the interests of legal subjects. The increase of the role of one’s freedom and the recognition of the difference of the *other* have changed the point of the best balance of stability (univocality) and freedom (complexity). This “shift” should also be taken into consideration by the Bulgarian legislation.

## 5. Is support (solidarity) possible after memory (narrativity)?

### 5.1. Alzheimer’s disease

In this chapter of the book I would like to examine in more detail the specific manifestation of *memory* and its significance for identity as a basis of the legal personhood in the context of one of today’s most wide-spread diseases, the Alzheimer’s disease. The overview below attests to the *decisive* significance of memory for personal identity as a narrative project but not to the ability to manifest and be participants in processes of solidarity. And precisely solidarity is underlying for the support that should be provided to people with intellectual, also including memory, disabilities. Some specific means of communication and solidarity with such person made through different forms of art are also mentioned.

The *Alzheimer’s* disease is being mentioned more and more as one of the “scourges” of contemporary life<sup>77</sup> supported by medicine in the battle against diseases and old age. Despite the high hopes placed on neurology the Alzheimer’s disease is still defined as “an incurable, degenerative, and terminal disease first described by the German psychiatrist and neuropathologist Alois Alzheimer in 1906 and ultimately named after him”. People with Alzheimer’s are, and for a long time to come will be, part of our world<sup>78</sup> but they are perceived by the others (“the healthy”) in different and contradictory ways<sup>79</sup>. Most often they are viewed as personalities having lost themselves. As people robbed in their memory. People who have forgotten<sup>80</sup> and who cannot tell about themselves and this gradually cease to exist for others, too<sup>81</sup>.

In this chapter I would like to vindicate the man beyond his ability to tell his own story. To attempt to see the person with Alzheimer’s as a person, but from another, irrational and unmodern type. A personality that cannot contain itself in one story. It cannot achieve indivisibility. It cannot become an individual. Without memory it is disjointed to pieces in itself. It does not live in the time that produces memory. It lives “apiece”. Pieces of a “pure” here and now. The brain of the ill cannot piece together a story out of the memories<sup>82</sup>. Even “after memory” the body remembers and reacts but it cannot arrange, connect and explain. The ill looks confused but he is still before us as an intentional body, as a body that

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Article 12 CRPD. HPOD Conference, Harvard Law School, 20 February, 2010, p. 6, accessible online at: [www.nuigalway.ie/cdlp/documents/publications/Harvard%20Legal%20Capacity%20gq%20draft%202.doc](http://www.nuigalway.ie/cdlp/documents/publications/Harvard%20Legal%20Capacity%20gq%20draft%202.doc)

<sup>77</sup> In North America there are more than 6 million people with Alzheimer’s, they are more than 5 million in Europe, and more than 230,000 in Australia. It is estimated that the people living with Alzheimer’s worldwide are more than 50 million. See **Zeisel, J.** *I’m Still Here: A New Philosophy of Alzheimer’s Care*. London, 2009.

<sup>78</sup> See **Whitehouse, P., D. George** *The Myth of Alzheimer’s: What You Aren’t Being Told About Today’s Most Dreaded Diagnosis*. London, 2008, p. 5.

<sup>79</sup> This monograph deals with the initial and middle stages of the Alzheimer’s disease and not with the late stages in which the patient gradually falls in a vegetative state and his/her conduct resembles the one of persons with akinetic mutism. In such cases “[T]he patients initiate fewer and fewer interactions with the physical and human surroundings and respond to fewer and fewer prompts. Their emotions are muted. Their behavior is dominated by an absent, listless, vacant, unfocused, silent look”. See **Damasio, A.** *Self Comes to Mind : Constructing the Conscious Brain*. New York: Pantheon Books, 2010, p. 197 [corresponding to page 263 of Bulgarian translation quoted by the author – Translator’s Note]. The said condition is observed in “those patients who receive good medical and nursing care and who survive the longest”.

<sup>80</sup> Contemporary research shows that the isolation of people with Alzheimer’s and their confinement in isolated spaces leads to deterioration of disease. See **Welberg, L.** *Neurodevelopment: Isolation reduces myelination*. – In: *Nature Reviews Neuroscience*, No. 13, 2012, pp. 738–739.

<sup>81</sup> Of course, there are exceptions such as, for example the Dutch town of Hogewey where all residents are people suffering from Alzheimer’s and dementia. The houses in the town are built in 23 unique styles furnished around the time period when residents’ short-term memories stopped properly functioning (the 1950s, and 1970s). Thus, the people with Alzheimer’s do not experience the conflict between their decreasing memories (the implacable corrosion of the past) and reality (the implacable advance of the future) and can feel “as if they’re home” (see **Planos, J.** *The Dutch Village Where Everyone Has Dementia*. The town of Hogewey, outside Amsterdam, is a *Truman Show*-style nursing home. – *The Atlantic*, 14 November 2014, accessible online at: [www.theatlantic.com/health/archive/2014/11/the-dutch-village-where-everyone-has-dementia/382195/?single\\_page=true](http://www.theatlantic.com/health/archive/2014/11/the-dutch-village-where-everyone-has-dementia/382195/?single_page=true)) by living in a place that makes it possible for them to live in their “narrative reality” (see **Spence, D.** *Narrative Truth And Historical Truth: Meaning And Interpretation In Psychoanalysis*. London, 1982, p. 31).

<sup>82</sup> For a description of brain’s functions of assembling the world out of sense perceptions that enter the brain from different parts of the body, see **Gazzaniga, M.** *The Mind’s Past*. London, 2000, p. 73.

can recognize us, a body that can give us a taste of the same person. Time is scattered but the joy is real. Experiences are deprived of the complexity of time (past-present-future) but are filled with sincerity.

## 5.2. Descartes' error?

The deepening of the disease takes away the memory, hollows out a gap in the narrative that everyone tells about themselves. The ill ceases to share the context of common past, which, as a rule, keep community together. The ill cannot determine himself, he cannot turn back in time and find there his reasons. But he is not a man without roots in time. His body still keeps a part of his essence. The loss of memory does not take away his humanity to an extent rendering the patient into a "mere" body. For the body is never "pure", it is never "freed" of experience although it cannot tell it as a story. Experience can become visible if we approach the anti-art of the disease by new forms of communication art where interaction is not based on the "gathering" of personality in time but on what happens with the body "here and now". Because "Descartes' error" stating that thinking is decisive for human essence is contrary to the categorical experimental rule we all know: being is always before thinking<sup>83</sup>. Before (s)he starts to think (to remember) everyone of us has been a being body. Child is as much human as the man who has lost his memory.

Alzheimer's disease is not part of the "normal" development of human life by age. Old age comes by the advancement of age.<sup>84</sup> **Old age** sets in when *your body catches up with you*. When it starts to catch up with your desire for future, with your striving for freedom and autonomy. When you feel you cannot do what you want. When you start reckoning with the limitations of your body. When you feel like prisoner in your body. In pain the sensation is the same but often there is more hope in pain because the limitation is untimely and temporary – it is expected to fade, to pass, to be overcome and then we can come back into our sensation of incorporeity. The manifestations of the body during the old age are implacable in the irreversibility of its invisibility. Although old age is an age when many real joys can be experienced it is also the age of limitations, of considerations, of the subjugation of desires to the spirit of the possibilities of the body.

**Alzheimer's disease**, although it is most often associated with the aging of the body, is a result of the degenerative processes that occur in human brain. It is much more a disease of a special part of human body, the brain, than of all the others. If in the "normal" old age the body catches up with the brain (today it is often identified with the individual as a personality-intellect), in the Alzheimer's disease the brain (the human) gradually abandons the body. The body (as a corpus) is healthy – there are no medical complaints related to the functioning of the body (outside the brain). What is absent is the brain's functionality and its ability to remember who we are. The body is not manifested as a physical limitation of the flight of ideas, on the contrary, memory as thought is leaving and what remains is our healthy body. What becomes visible is the absence of a clearly declared and self-narrating consciousness with history. There is a *reversion of man to, into a body* (without an autobiography, without memory) rather than one's body catching up with oneself (identity, memory). A body that has forgotten itself as an autobiographical personality so as to remain entirely in its presence as an experience "apiece". But a body that is still a human being<sup>85</sup>. For rationality is as important for humanity as feelings, emotional intelligence and the ability to interact with others. "Doing to" is accepted to be as important as "being with" if we speak of persons with dementia<sup>86</sup>.

## 5.3. Subjectivity as wandering

Alzheimer's disease could be viewed in the context of the **concept of subject** and its relation to the concept of error. Error is a "civil" sin, a transgression of the law, of proper conduct. Christian etymology links error (as a deviation of what is typical) to sin (as a transgression to evil), the quest (praxis) – to service, and subsequently – to duty as well. Thus duty enters the ethics and ethics becomes the little sister of law (the difference between them becomes increasingly indiscernible: they both represent systems of rules). Life must move along the pre-outlined Path of truth. Error is unwanted deviation subject to sanction. Man's aim is to be preserved in Truth. To remain in it. To tell it by his/her own life.

In parallel with that deontological interpretation of error there is also another according to which what we could call one's biography is not the totality of the rules abided by one but the sketch of one's "deviations" (in the sense of "errors"). One of the most ancient words for error is of Greek origin: *hamartia* (ἁμαρτία, -ας, ῆ), and is translated as "to stumble"<sup>87</sup>. In Latin from which the present-day word for "mistake" is derived, "error" means "wandering"/"straying"\*. Subjectivity (personality) is not our static connection with Truth that constitutes us as a Subject (Descartes), but the process of erring, of roaming, of deviating (loafing, rambling, drifting away, going astray, losing, wandering, distracting, digressing) along

<sup>83</sup> See **Damasio, A.** *Descartes' Error: Emotion, Reason, and the Human Brain*. NY, 2005, p. 248.

<sup>84</sup> Old age is not just a biological but also a social phenomenon, which has different contents in different societies and cultures and which will increasingly become part of the agenda of aging European societies. In this sense a special field could be distinguished in philosophy and ethics, which we can call a "philosophy of old age" or "ethics of old age". For a contemporary study of the questions concerning the old age, see **Zlatanova, V.** *Stareene i neravenstva* [Aging and Inequalities]. S., 2015. Books are published, including in Bulgarian, whose genre could be defined as pedagogy of old age. See **Karpf, A.** *How to Age* Macmillan, 2014.

<sup>85</sup> See **Kitwood, T.** *Dementia Reconsidered: the Person Comes First*. Buckingham, 1997, p. 7, 54.

<sup>86</sup> See **Post, S.** *The Moral Challenge of Alzheimer Disease: Ethical Issues from Diagnosis to Dying*. Baltimore, 2000, p. 3.

<sup>87</sup> See **Agamben, G.** *The problem of subjectivity*. Lecture. The European Graduate School, 2009, accessible online at: [www.egs.edu/faculty/giorgio-agamben/videos/the-problem-of-subjectivity/](http://www.egs.edu/faculty/giorgio-agamben/videos/the-problem-of-subjectivity/)

\* the last three words in quotation marks are given in English by the author – Translator's Note.

the streets of life (Foucault). The subject is not something in advance, something given once and for all (substance), which is a constituent of the world but is an incessant constituting (process) by practicing oneself in the world. If the subject were the creator of truth then how could we encounter ethics as practices of creating oneself?

Man is a *being that is never in the right place*<sup>88</sup>. Man is a constantly erring being. Man's ability to err and not man's subjection to truth makes him human. The error as roaming the streets of life is decisive for the uniqueness of our autobiography. The lines of wandering in the world outline subjectivization as a procedural alternative to the idea of the subject. In Foucault the subject has not eroded to an openness to the world (Heidegger) but is identified with his changeability, with his ability to deviate, to get distracted, to go astray along different and unforeseeable lines<sup>89</sup>. Therefore, the symbol of human life is not the orderly tree where all diversions follow a clear algorithm but a rhizome\*, a knotwork of entangled and disarranged roots (Deleuze). It is not knowledge leading us to the truth that is decisive for the subjectivity but the norm-free process of wandering among things that happen to us. The subject as a fixation is an attempt to master the subjectivity as a process. In fact, there is no subject – we find a constantly denying (changing, deviating) subjectivity.

Where there is not a subject to tell the truth (for subjectivity is a process of wandering) then Truth itself could hardly survive. The absence of a truth knowing subject given in advance threatens the very idea of truth by showing its groundless pretension. Wandering without a wanderer (vagrant), roaming without a (compulsory) quest (for Truth). Truth is not a scientific (knowledge) but an ethical problem (interaction). The question concerning the truth could be put in the points of intersection of wandering subjectivities. They exist outside any map given beforehand (the existence of such a map has always been subjective and arbitrary) and their happening builds the social interactions. Philosophy is a way of life<sup>90</sup>, the art of living and not a doctrine, not a system of postulates. Care for oneself, work on oneself – this is essence of life. Ethics is not a code of rules but an imperative to take care of ourselves by turning our lives into a work of art. Ethics is an "ethos", dwelling in lines of deviations and not subjugation to some externally given rules.

As far as the subject is but a normative mask hiding the elusiveness of subjectivity, *human life* turns out to be without an author (subject). It includes in itself different lines of deviations, subjectivizations of contrary directions, united by the "living" body. The author is a legal and social fiction<sup>91</sup>. What is real is only the body, the incarnatedness or, more precisely, the "carnatedness" as "density" (of the drawing of deviations) because the "incarnatedness" presumes someone to be incarnated. Human life is *a work of art without an author*. The subject could only conditionally be isolated from life in an external, author's position. Human life is not a narrative given in advance. It is not a result to exist while the Process is flowing (in fact there are many parallel processes). It is not a trace that leaves behind a ball of processes. The pre-set author of conduct in the world is not the subject but the world and what happens in it recreates and resumes subjectivity as a process.

The world produces the subject as an incessant process of transformation – creating and being created at the same time. The *self* is not connected with the world. *The self is the connection in itself*. "Creation" of subjects brought "outside" (outside the flow of life) happens by means of different "tricks" called "clutches of power" by Foucault. Power creates authors (subjects) to punish and govern them by "grasping" and "bringing" them out from the processes of subjectivity. One of the most power clutches aim at human body – a convenient "handle" that can be used to "catch" and "pull out" a subject subjugated to order. Body is the most obvious topos around which the processes of subjectivity happen. Its molding by power as a "handle", as a "hanger" of a molded subject requires the introduction of a clear "body standard", a convention of the boundaries, parameters and norms of the body. Power must assure itself that each and every body will be capable of being "caught" and that its form will coincide with the fingers of the controlling hand. It must have the expected morphology (overall "human" silhouette), measurable physical parameters (weight, age, sex) and ascertainable conditions (health and defined diseases), which should be recognizable by power and used by it to create a responsible legal subject. In this context "human rights" are mere eyewash, an official excuse for the constitution of a subject to be kept within a system. Thus, self-constitution (the incessant self-actualization) as a process of wandering is interrupted by freezing of the process of subjectivity in a print pre-forged by the law: the Legal subject is born. But the legal subject must "confine" itself within itself relying on its "own" resources. In order to be a stable bulwark of order it must not only be recognized by power but must also ceaselessly remember itself as a preserving account to which certain rights (debts) and obligations (credits) with respect to order are "accumulated". Thus, memory is born.

#### 5.4. Man – a question of memory?

Depending on its nature and on the manner of its formation *memory* is divided into explicit (declarative) and implicit (procedural) memory<sup>92</sup>. Explicit memory is a reflection of certain events which have happened outside the subject – these

<sup>88</sup> See **Agamben, G.** The problem of subjectivity. Lecture. The European Graduate School, 2009, accessible online at: [www.egs.edu/faculty/giorgio-agamben/videos/the-problem-of-subjectivity/](http://www.egs.edu/faculty/giorgio-agamben/videos/the-problem-of-subjectivity/)

<sup>89</sup> See **Agamben, G.** The problem of subjectivity. Lecture. The European Graduate School, 2009, accessible online at: [www.egs.edu/faculty/giorgio-agamben/videos/the-problem-of-subjectivity/](http://www.egs.edu/faculty/giorgio-agamben/videos/the-problem-of-subjectivity/)

\* from Greek "rhizoma" meaning "root", "rootstock" – Translator's Note.

<sup>90</sup> See **Hadot, P., A. Davidson** Philosophy as a Way of Life: Spiritual Exercises from Socrates to Foucault. Oxford, 1995.

<sup>91</sup> See **Foucault, M.** "What is an Author?", trans. Josué V. Harari, in *Aesthetics, Method, and Epistemology*, ed. James D. Faubion. New York: The New Press, 1994, pp. 205–21.

<sup>92</sup> See **Baddeley, A.** What is Autobiographical Memory? – In: M. A. Conway, D. C. Rubin, H. Spinnler and W. A. Wagenaar

are the memories of what has happened with or around him/her (marriage, school graduation, outbreak of war, death of a close relative, etc.). Implicit memory ensures one's participation in the events building his/her explicit memory – these are the habits of the body and its ability to be a subjectivity (the ability to move in space, the ability to regulate the pulse and blood circulation, the ability to react to a sudden danger before realizing it, etc.). Alzheimer's disease destroys *the autobiographical memory as a kind of explicit memory*. The patient cannot meet the requirement for a personality caught in time. By the progression of disease (s)he loses his/her ability to arrange his/her memories chronologically – to keep them as his/her autobiography<sup>93</sup>, which gradually escapes him/her), as at the same time his/her memories gradually fade in intensity and decrease in quantity<sup>94</sup>. The patient loses his/her ability to recognize his/her memories as episodes of the same narrative. Man keeps information about his/her own life in the form of periods of time (episodes, events) and temporal and spatial connections between them – this ability is designated an episodic (explicit) memory<sup>95</sup>.

Although (s)he loses his/her autobiographical (explicit) memory the person with Alzheimer's retains his/her *implicit (procedural) memory* – the habit (corporeal knowledge) for performance of certain acts that has been accumulated by experience (corporeal repetition) and has deposited into the intentionality of the body. The patient can participate in social interaction but the latter is freed of autobiographical context. This will be dealt with in the end of the monograph. Let us now return to explicit memory.

In order to establish what the specific memory "injuries" caused by the Alzheimer's disease are let us examine in more detail the characteristics of explicit memory. Any information stored in the explicit memory has its own situational (spatial-temporal) specifics – it is always arranged in relation to other memories, it has its own place and date, it always emerges in the context of "what happened before" and "what happened after" that. Every *memory* in the explicit memory contains two components: *setting* – the place and time of occurrence of the event, including personal significance of such place and event, and a *focal element* – which is manifested in what is happening in the setting, what stands out against its background<sup>96</sup>. Without the existence of the setting it is impossible to recognize the focal element. The setting in which the event happens is also designated as a context that could be divided into an external setting, i.e. the place and time of occurrence of the event and an internal setting (cognitive environment) – the specific state in which the person was when the event happened<sup>97</sup>. Context is decisive for every memory. Memory may only exist as a part of my past<sup>98</sup>. The setting in which every memory takes place is the self that might not be in the center of the event but is always present in it.

Depending on its context the explicit (declarative) memory could be divided into *episodic* memory, one of personal context (setting), and *semantic*, i.e. decontextualized memory. Semantic memory, depending on its content (focal element), can be knowledge of an autobiographical fact – where there is personal content (it relates to a particular person), or objective knowledge – where there is no personal content (it relates to laws of nature). Episodic memory<sup>99</sup>, in its turn, is divided into autobiographical and narrative memory depending on whether the main fact (focal element) is personal or not.<sup>100</sup> Autobiographical memory is the one with personal context (setting) and personal content (focal element). Narrative memory is the one with personal context (setting) and impersonal content (focal element)<sup>101</sup>.

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(eds.) *Theoretical Perspectives on Autobiographical Memory*. Dordrecht, 1992, pp. 14–15.

<sup>93</sup> Memory is examined by Comte-Sponville in the tradition of St. Augustine and Bergson as a tool for assembling the personal story that gives identity to every man. When answering the question of who we are we usually "have to tell our life": "you will speak of your past, you will tell us your story and this is the only way of telling us who you actually are. (...) I am what I have been, or what has remained of what I have been. I am a 'was.'" Spirit – "this is memory: to tell who I am means to tell my life, to share my memories". See **Comte-Sponville, A. & Ferry, L.** *La Sagesse des Modernes*. Dix questions pour notre temps. Paris, 1998 [p. 46 of Bulgarian translation quoted by the author. – Translator's Note].

<sup>94</sup> See **Fromholt, P., S. Larsen** Autobiographical memory and life-history narratives in aging and dementia (Alzheimer type). – In: M. A. Conway, D. C. Rubin, H. Spinnler and W. A. Wagenaar (eds.) *Theoretical Perspectives on Autobiographical Memory*, Dordrecht, 1992, p. 419.

<sup>95</sup> See **Tulving, E.** Episodic and semantic memory. – In: Tulving, E., W. Donaldson (eds.) *Organization anti memory*. New York, 1972, p. 385, as well as **Larsen, S.** Personal Context in Autobiographical and Narrative Memories. – In: M. A. Conway, D. C. Rubin, H. Spinnler and W. A. Wagenaar (eds.) *Theoretical Perspectives on Autobiographical Memory*, Dordrecht, 1992, p. 53.

<sup>96</sup> See **Tulving, E.** *Elements of Episodic Memory*, Oxford, 1983, pp. 142–143.

<sup>97</sup> See **Larsen, S.** Personal Context in Autobiographical and Narrative Memories. – In: M. A. Conway, D. C. Rubin, H. Spinnler and W. A. Wagenaar (eds.) *Theoretical Perspectives on Autobiographical Memory*, Dordrecht, 1992, p. 55, p. 57.

<sup>98</sup> See **James, W.** *The principles of psychology*. Vol. I. New York, 1890, accessible online at: <https://archive.org/stream/theprinciplesofp01jameuoft#page/650/mode/2up>

<sup>99</sup> Larsen designates episodic memory compared to the semantic memory (which keeps only the event without its personal context) as a "cognitive luxury", which gives considerable behavioral and mental advantages in human evolutionary development.

<sup>100</sup> For the assumption that autobiographical and episodic memory express the same basic memory, see **Kasabova, A.** *Za avtobiografichnata pamet [Of Autobiographical Memory]*. S., 2007, p. 12.

<sup>101</sup> See **Larsen, S.** Personal Context in Autobiographical and Narrative Memories. – In: M. A. Conway, D. C. Rubin, H. Spinnler and W. A. Wagenaar (eds.) *Theoretical Perspectives on Autobiographical Memory*, Dordrecht, 1992, p. 61.

As stated above **the person with Alzheimer's loses his/her explicit memory** in all of its components and varieties by preserving his/her implicit (procedural) memory. (S)he cannot tell his/her own story according to the requirements of a logical narrative but (s)he can live together with people whom (s)he does not recognize as part of his/her own autobiography. This is also the reason for the occurrence of his/her difficulties in a society that respects the episodic and "has forgotten" the implicit memory. The patient loses not only the memories of his/her own autobiography (the so-called "personal past", a contextualized memory with personal content) but also his/her memories of public (historical) events, the events that have "commonly" occurred for all people living in the respective time in history. If in personal (autobiographical) memories – the memories with personal context and personal contents – the so-called "effect of proximity" exists (the patient remembers more recent events better despite the development of the disease) contemporary research establish that such an effect is not observed in public (historical) memories – the memories without personal content. They fade away and are effaced with the same frequency, regardless of their recentness. These data from research show the particularly severe thinning of the horizon of historical events for the person with Alzheimer's<sup>102</sup>.

The person with an "Alzheimer's" type of dementia *cannot self-identify as something whole (gathered)*, as a subject with an autobiography identifying him/herself. The others can do that for him/her but (s)he cannot do it before them. Forgetfulness hampers the constitution of the subject. The subject, who is the catch of memory, cannot be a property of the patient having lost his/her memory. His/her life has ceased to be a part of an arranged wholeness (and one constantly rearranging itself with the consciousness of preservation). The patient cannot be deducted (constructed) from the past as an extract of biographical sense. The patient exists as a wandering "here and now". A divergence that does not pretend to be a subject. A divergence that happens by accident, every day, losing even its nature of deviation as there is no Road ("branch"\*) with respect to which motion could be defined as "de(-)viation".

The person with Alzheimer's is a man without history. An abiographical man. But also a man without future. One having an ahistorical existence<sup>103</sup>. If we use **the system of the self** proposed by Antonio Damasio<sup>104</sup>, which includes a *protoself* (primordial emotions, among which the elementary feeling of being alive; neuronically description of the relatively stable aspects of biological organism), a rudimentary (*core*) self (a "nucleus" of the self manifested in the ability of independent acts; a protoself modified as a result of ascertainment of interaction between the organism and an object-to-be-known) and an *autobiographical self* (a self with biographical knowledge related to the past and anticipated future), we could claim that the person with Alzheimer's has retained his/her *protoself* and his/her rudimentary self. The disease has affected (taken away) the *autobiographical self*, the one Damasio calls "the social and spiritual constituent of identity" – "the persona". What has remained is designated by Damasio as "the material component of identity" – "the self-as-an-object". Damasio admits that apart from the *autobiographical self* the "nucleus" also participates in the construction of the knowing self by lending additional subjective nuances to thinking. On a rudimentary ("core") level the self exists as a "spontaneous assembly of images that emerge one after the other in close time proximity", compared by Damasio to a mere musical duo (played by the organism and the object of perception) or even a chamber music ensemble, "and in both cases managing quite well without a conductor".

The *autobiographical self* is *the conductor* who functions as a "narrative brain device", a conductor who does not exist in advance but emerges in a certain moment after the symphony has begun to play. The true marvel of human consciousness seen as a grand symphonic piece is "that the score and the conductor become reality only as life unfolds. The coordinators are not mystical, sapient homunculi in charge of interpreting anything. And yet the coordinators do help with the assembly of an extraordinary media universe and with the placement of a protagonist in its midst" – the *self* (the "self process") which observes and attests the thought processes that happen<sup>105</sup>.

Interest is the circumstance that the brain death, according to its legal definition, is associated with the ascertainment of a permanent and irreversible termination of the functions of the brain stem (article 9, item 1; article 13, paragraph 1 and paragraph 2; article 14, article 15, article 17, paragraph 2 and Appendix No. 1 to Ordinance No. 14 of 15 April 2004 on the medical criteria and the procedure of ascertainment of death). Brain *stem*<sup>106</sup> is associated with the fundamental

<sup>102</sup> See **Fromholt, P., S. Larsen** Autobiographical memory and life-history narratives in aging and dementia (Alzheimer type). – In: M. A. Conway, D. C. Rubin, H. Spinnler and W. A. Wagenaar (eds.) *Theoretical Perspectives on Autobiographical Memory*, Dordrecht, 1992, p. 420.

\* a play on words in Bulgarian: "divergence" and "verge" (in the sense of "branch") and "deviation" (from Latin "deviation" meaning "off the road") and "road" (from Latin "via" meaning "road") – Translator's Note.

<sup>103</sup> See **Fromholt, P., S. Larsen** Autobiographical memory and life-history narratives in aging and dementia (Alzheimer type). – In: M. A. Conway, D. C. Rubin, H. Spinnler and W. A. Wagenaar (eds.) *Theoretical Perspectives on Autobiographical Memory*, Dordrecht, 1992, p. 419.

<sup>104</sup> See **Damasio, A.** *Self Comes to Mind : Constructing the Conscious Brain*. New York: Pantheon Books, 2010, p. 31, p. 165 *et seq.* [corresponding to p. 35, and pp. 209–210 of Bulgarian translation quoted by the author – Translator's Note].

<sup>105</sup> See **Damasio, A.** *Self Comes to Mind : Constructing the Conscious Brain*. New York: Pantheon Books, 2010, p. 32 [corresponding to p. 37 of Bulgarian translation quoted by the author – Translator's Note].

<sup>106</sup> ... Damasio says that it is "inextricably attached to the body" because the brain's protoself structures are "attached" to the body " [S]pecifically, they are attached to the parts of the body that bombard the brain with their signals, at all times, only to be bombarded back by the brain and, by so doing, creating a resonant loop", the body is "the rock on which the protoself is built". See **Damasio, A.** *Self Comes to Mind : Constructing the Conscious Brain*. New York: Pantheon Books,

ability to experience feelings (a part of the so-called “proto-self”), while the cerebral *cortex* is associated with the ability to think consciously (the atomic *self* and the autobiographical *self* are also associated with that ability)<sup>107</sup>. An attestation for the legal recognition of the role of feelings (our ability to have ones) when defining the human is the circumstance that for the law the cessation of the functions of the brain stem is equivalent of death while the cessation of the functions of cerebral cortex is a form of brain damage experienced by the person and his/her general legal capacity to have rights [*pravosobnost*].

**The problem of death** is an autobiographical one. *The dramatism* of the dying person is in the circumstance that this is the radical end of his/her autobiography. It is not a mere organism, a mere body that is dying. It is not even a moment, a present that is dying (this happens all the time). An autobiography that is significant as a human story ends. This end of a personality requires a transformation and its integration into the memory of the others. Maybe the people without memory, without an autobiography do not fear death in the same way the ones who remember do.

Maybe death is not such a problem for a small child who still does not know him/herself as history<sup>108</sup> as it is for an adult. *The child*, similarly to the person with Alzheimer’s, is a human without history (even if with an origin). In contrast to such person, however, the child still has no history<sup>109</sup> but everybody believes (s)he has a future before him/her. The child is a human with anticipated biography. A human expected to have an autobiography. The child does not have memory not because (s)he forgets but because (s)he has not lived yet. His/her life is not arranged because it has not happened yet. Death can rob the child of a future projected by others (the adults). The child does not remember him/herself as history. (S)he is an impetuous present that attempts to get used to the division of time into past, present and future imposed by his/her parents. As far as the child does not have a history not long enough backwards that can become his/her autobiography the child cannot as well foresee his/her future as a possible continuation of that history. When the child begins to arrange what is happening it him/her in his/her own autobiography thanks to his/her developing long-term memory<sup>110</sup> (s)he starts fearing for his/her own autobiography. The child understands the stake of his/her own life. The mercilessness of death. *As soon as one has an autobiography death can rob him/her of something*. Every past gives rise to a fear of future. By the growth of our autobiography (memories) our connection with the world deepens as does our desire to remain in it so that we can tell about ourselves to the end or even to continue to tell about ourselves infinitely. Death wrests us out of this falling into life, robs us of the object of our devotion. Memory gives us a fill-fledged, nuanced, rich life that is worth while. But it also gives us the embarrassment of its inevitable loss. A loss we all know as soon as we get to know about death. A loss the more painfully awaited for the harder one integrates one’s own death as a meaningful part of one’s autobiography. When you want to live not only enough but as long as possible and even forever, death does not succeed in finding its place in the story one tells about oneself. Thus it turns into an invisible but implacable enemy of the idea of life as an unending story.

The disintegration of autobiography in *the person with Alzheimer’s* and the loss of memory when it does not rob one of his/her present gives him/her life that is not threatened by death. A life that only has the present that does not leave. *A life that becomes autobiographically useless*. Not capable of being embedded into the stories of others. The man, who was father, brother and colleague yesterday, today is unable to discern his reflection in the autobiographies of his friends and relatives. He is unable to share a common past with them. Despite that he can suffer and enjoy thousands of small things, which – despite being devoid of autobiographical meaning – fill up the everyday life of every human being. The one who has lost his/her memory is possessed by the everyday flow of life. (S)he is invisible for autobiography. (S)he cannot conform to its need of a narrative. Only his/her treatment could have some history as an attempt to get back to the body of an interrupted autobiography.

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2010, pp. 37, 34 [of Bulgarian translation quoted by the author – Translator’s Note]. The ability to experience certain feelings is associated, more specifically, with tractus solitarius and parabrachial nucleus as parts of the brain stem (ibid., p. 98, pp. 102–103 [of Bulgarian translation quoted by the author – Translator’s Note]). As evidence supporting his submission Damasio points out that the ability to experience feelings is preserved by hydranencephalitics, i.e. children born with intact brain stem structures but having no cerebral cortex, thalamus and basal ganglia (with no cerebral cortex). Although the ability to experience such feelings is “quite modest” it qualitatively differentiates them from patients in vegetative state. This submission is valid to an even greater extent in people with Alzheimer’s.

107 See **Damasio, A.** *Self Comes to Mind : Constructing the Conscious Brain*. New York: Pantheon Books, 2010, pp. 34, 97–98, 223, 225 [of Bulgarian translation quoted by the author – Translator’s Note].

108 See for example **Faulkner, K.** *Children’s Understanding of Death*. – In: Arm, A., S. Goltzer (eds) *Hospice Care for Children*, New York, 1993, p. 10, where 50 studies of the way children understand death are pointed. It is accepted that children start to distinguish whether something is dead in their third year. However, until their sixth year they rarely think about their own death. See **Faulkner, K.** *Children’s Understanding of Death*. – In: Arm, A., S. Goltzer (eds) *Hospice Care for Children*, New York, 1993, p. 12, as well as **Mahon, M.** *Death in the Lives of Children*. – In: Talwar, V., Harris, P. and M. Schleifer (eds) *Children’s Understanding of Death from biological to religious conceptions*. New York, 2011, p. 63.

109 The earliest memories are believed to date back to the second and fourth year of one’s life. See **Draaisma, D.** *Why Life Speeds Up As You Get Older. How Memory Shapes Our Past*. New York, 2004, p. 15. But when such memories arise they are without a narrative and in this sense are not meaningful in autobiographical terms. Moreover, a great part of them are effaced by the so-called “childhood amnesia”, which affects the memories until the age of 6–7 and which was first brought to attention by Freud.

110 See **Kandel, E.** *In Search of Memory: The Emergence of a New Science of Mind*. New York, 2006, p. 238.



## 5.5. Forgetfulness and art

The gradual loss of memory could be viewed as an *anti-art* of a kind – *an art that defaces and deconstructs its author turning him in a chaos of divergences*. Daily. Not connected. Confused. But genuine. This is an art with no rules. An art against the rules. In this sense it is something more dreadful than art. Anti-art. The ill gradually loses the idea of his/her own past and of him/herself. It gets increasingly difficult to catch the subject. Even by his/herself. Studies show that over the course of disease the patient retains some kind of knowledge of oneself (self-consciousness), painfully realizing his/her own memory inabilities and attempting to set them off by recognizing them and by favorizing his/her recent memories but not by means of fabulization (an arbitrary invention of a context and a story to fill in for the missing memories). These so-called metacognitive abilities are lost in the final stages of disease<sup>111</sup>.

The knowledge that a person will lose his/her memory is perceived by the patient and his/her relatives as a knowledge that (s)he is about to cease to exist as a personality – it is stated that the use of words and understanding remain but the feelings and depth are gone. Actually, the common autobiographical context vanishes – the past of participants in the conversation does not resound in their words, the use of the latter resembles the sound of strings that are not properly tuned up<sup>112</sup>. The patient loses his/her outlines and “catchability” but continues to exist as a sequence of “deviations”, as unforeseeable and constantly changing subjectivity. It is not merely about a personality disorder, a number of mental diseases might be such. The subject has ceased to exist. Deviations are no longer part of the “deviations” of the subject but are acts “here and now” freed of authorship. They are merely what they are. There is no guilt for them. Not only the people with Alzheimer’s may not be charged because there is no subject to be punished but they are also not subject to treatment because there is not “one” to be “corrected” to his/her present autobiography. There are only fragmentary acts, “natural” and changing will, intuitive anticipation, corporeal intentionality. All of these are not “subjects” fit either for punishment, or for treatment. “Subjectivity” as a procedure that cannot be “gathered” into a “subject” turns out to be too plastic and decentralized to justify a categorical reaction of “correcting” – mending by means of punishment or treatment.

This is the reason for the difficult integration of the ill “without memory” in our *society of memory*. The narrative psychology of personality defines memory as a specific psychological medium in which the self is constituted as autobiography<sup>113</sup>. The Western culture has a special “autobiographic sensitivity”, something attested also by the wide circulation of the novel as a literary genre in which we know the other man through the narrative of his story<sup>114</sup>. The *self* is conceptualized through memory<sup>115</sup>. What is decisive of what we are is, firstly what we remember and only in relation to that – what we have forgotten. The loss of memory is an inability to self-constitution, i.e. to form a narrative personality (one capable of telling about its own self). The Alzheimer’s disease is viewed as a disease that can lead to dementia (“feeble-mindedness”) and become the reason for placing a person under interdiction (inability to express a valid legal will on his/her own), and, most likely, to one’s isolation in social care homes (inability to determine independently his/her own living environment). In order to be placed under interdiction, the person with Alzheimer’s should “cover” one juridical criterion in addition to the medical one: his/her condition caused by the forgetfulness must be the reason for his inability “to take care of his/her own affairs” (article 5 of Persons and Family Act). Forgetfulness is a basic process of the brain that enables the existence of memories and their arrangement into an autobiography. But in addition to the “healthy”, therapeutic forgetfulness there is also a forgetfulness, which is viewed as pathological and asocial by the community – this is the forgetfulness that does not allow one to be a subject who takes care of his/her own affairs. In order to be such a subject (s)he must have an identity “supported” by a well-arranged autobiography that enables the distraction of “one’s own – another’s” affairs to be made for him/her. Otherwise, (s)he cannot be the author of his/her own life and (s)he is also eliminated as a co-author of all others in the construction of the common (social) world<sup>116</sup>.

The “interdiction” (banning) offered by the law is the only way of disavowal because in this case neither punishment, nor treatment are possible. If the later two presume a subject they can address the ban (interdiction) is an act of effacement of the subject. In this sense it can also be directed against a disintegrating (diverging) subjectivity, the one we can identify in people with Alzheimer’s<sup>117</sup>. But this is a policy not only of deprivation but also of exclusion. A policy of creating a new form

<sup>111</sup> See **Fromholt, P., S. Larsen** Autobiographical memory and life-history narratives in aging and dementia (Alzheimer type). – In: M. A. Conway, D. C. Rubin, H. Spinnler and W. A. Wagenaar (eds.) *Theoretical Perspectives on Autobiographical Memory*, Dordrecht, 1992, p. 424.

<sup>112</sup> See **Draaisma, D.** *Why Life Speeds Up As You Get Older. How Memory Shapes Our Past*. New York, 2004, p. 236.

<sup>113</sup> See **Fitzgerald, J.** Autobiographical Memory and Conceptualizations of the Self. – In: M. A. Conway, D. C. Rubin, H. Spinnler and W. A. Wagenaar (eds.). *Theoretical Perspectives on Autobiographical Memory*, Dordrecht, 1992, p. 100.

<sup>114</sup> See **Fitzgerald, J.** Autobiographical Memory and Conceptualizations of the Self. – In: M. A. Conway, D. C. Rubin, H. Spinnler and W. A. Wagenaar (eds.). *Theoretical Perspectives on Autobiographical Memory*, Dordrecht, 1992, p. 101.

<sup>115</sup> See **Baddeley, A.** What is Autobiographical Memory? – In: M. A. Conway, D. C. Rubin, H. Spinnler and W. A. Wagenaar (eds.) *Theoretical Perspectives on Autobiographical Memory*. Dordrecht, 1992, p. 16.

<sup>116</sup> The person with Alzheimer’s may not be a co-author with me in our own story (in this case the authorship is always indivisible). Such person may be part of the interior of the plotline but because (s)he does not remember him/her own self (s)he may not “write” that story, knowing its fabula.

<sup>117</sup> In this sense an appeal is made “to see man behind the fog of the disease”, a fog that shakes the borders of personality but does not take away the human essence. See **Zeisel, J.** *I’m Still Here: A New Philosophy of Alzheimer’s Care*. London,

of “bare” life<sup>118</sup>. Everyone who cannot self-identify as a narrative is not part of Us. Noone. Memory (the remembering on one’s self) turns out to be a threshold of a kind for admission to the community of subjects, to the circle of those who can autonomously manage themselves. *The incapacity for explicit memory is a reason to be denied access to the community.*

However, the person with Alzheimer’s is still here<sup>119</sup>. (S)he is part of the world that we share with him/her although we do not share a common history. Even without an access to his/her own explicit memory (s)he can be accessible for us. Today there are more and more methods of communication with people with Alzheimer’s through different forms of art in which the implicit memory is manifested – music, fine art, poetry<sup>120</sup>. Art is also possible without history. Often the intention of the body, the routine of habit is sufficient for art. Art can be irrational and (despite that) a true experience. Human interaction can be such, too. *An interaction that is also possible beyond the explicit memory.* People with Alzheimer’s, who are growing in number every day, send one of the most serious challenges in the aging “Western” societies – the challenge to our ability to be with the otherness, regardless of whether we can identify it as a specific other. Being together without defining who we are. Preserving solidarity even after identity.

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2009, p. 2.

<sup>118</sup> See **Agamben, G.** *Homo Sacer. Sovereign Power and Bare Life*. Translated by Daniel Heller-Roazen. Stanford: Stanford University Press, 1998, p. 8-9 [corresponding to pp 17–18 of Bulgarian translation quoted by the author – Translator’s Note].

<sup>119</sup> See **Zeisel, J.** *I’m Still Here: A New Philosophy of Alzheimer’s Care*. London, 2009.

<sup>120</sup> See **Glazner, G.** (ed.) *Sparkling Memories: The Alzheimer’s Poetry Project Anthology*, 2005.

## II. Possible approaches to the regulation of incapacity (to act) – a regulation of the “dark” or a regulation of the “lucid” periods?

This second chapter of the book aims to examine some specifics and possible changes to the legal regulation of interdiction under the Bulgarian legislation in force. It is provoked by the Draft Natural Persons and Support Measures Bill (DNPSMB)<sup>121</sup> prepared and published in April 2015, by which the PFA<sup>122</sup> in force is repealed and a radically new approach to the capacity to act of the persons with disabilities is proposed. Before justifying and making a change to a legal concept of such importance as the capacity to act let us ask the question: is it possible that there are any unexhausted, “hidden” resources of interdiction as a legal notion and to what extent they can offer some alternative to the current and to the proposed legal regulation?<sup>123</sup>

### 1. Interdiction: a brief overview

#### 1.1. Grounds for placement under interdiction

Let us first examine *the grounds* for placement under interdiction. According to article 5 PFA “minors aged 14-18 and adults who, because of *feeble-mindedness* or *mental illness* (my italics) are unable to take care of their affairs, shall be placed under full interdiction and become incapable of acting”. In order to place a person under interdiction two criteria must be met: one medical – “feeble-mindedness or mental illness” (alternatively), and one legal – the person’s inability to take care of his/her affairs (caused by his/her “feeble-mindedness or mental illness”). “Feeble-mindedness” is defined as an organic inability (mental deficiency) or an inability by reason of illness or old age (dementia) to perform rational processes, and “mental illness” is defined as an impairment of person’s mind (mental disorder) that prevents him/her from realizing and managing his/her actions. “Feeble-mindedness” and “mental illness” are “disorders of mental abilities”, which render “the individual unable to exercise his rights on his own with reason [*razumenie*] and thus exposes him to carry out transactions that are harmful to his property and his personal dignity”<sup>124</sup>.

In Bulgarian law there are clarifications given in Decree No. 5 of 13 February 1980 of the Plenum of SC, which are binding upon the courts. According to item 1 of Decree No. 5/13 February 1980 the subject matter of the claim under

<sup>121</sup> Published, together with the motives, on the website of the Ministry of Justice (<https://mjs.bg/15/>) on 9 April 2015. The bill underwent some amendments and its new version was published on 31 July 2015.

<sup>122</sup> Passed in the end of the first half of the last century (SG, issue 182 of 9 August 1949, in force as from 10 September 1949), under an entirely different state and political system PFA could be listed under the “outdated” laws regulating the juridical status of the persons with mental incapacities [*umstveni nesposobnosti*] and mental diseases [*psihichni zabolyavaniya*]. See **Lee, B.** The U.N. Convention on the Rights of Persons with Disabilities and Its Impact upon Involuntary Civil Commitment of Individuals with Developmental Disabilities, *Columbia Journal of Law and Social Problems*, 2011, No. 44, p. 396 (the exact phrase used by the author is “antiquated dualistic conceptions of guardianship and autonomy”).

<sup>123</sup> as well as an attempt to contribute to the overcoming of the so-called “doctrinal silence” in Bulgaria as regards the questions concerning the placement under interdiction and its conflict with international acts to which the Republic of Bulgaria is a party. For the expression “doctrinal silence” see **Shabani, N., P. Aleksieva, M. Dimitrova, A. Genova, V. Todorova.** Novata paradigma na pravosubektnostta: chl. 12 ot Konventsiyata na OON za pravata na horata s uvrezhdaniya [The New Paradigm of Legal Personhood: article 12 of UN Convention on the Rights of Persons with Disabilities] In: *Pravna misal* [Legal Thought], 2014, No. 1, p. 91, where they state that the persons with disabilities “should not be perceived as an “object of care” and as persons deviating from the medical norms but as “subjects” to whom the right to exercise their rights in person and to participate in the life of the community should be guaranteed” (p. 92). Something I fully subscribe to, which motivated the authors of the quoted article to rebel against the “paradox of guaranteeing rights by restricting them” (p. 96). See also **Stavru, St.** Zakonoproektat za fizicheskite litsa i merkite za zakrila – shans ili zaplaha [The Draft Natural Persons and Protection Measures Bill – an Opportunity or a Threat] In: *Sobstvenost i pravo* [Property and Law], 2015, No. 12, pp. 28–37.

<sup>124</sup> See Colin, Ambroise, H. Capitant. *Cours élémentaire de droit civil français*, tome premier, Paris: Libraire Dalloz, 1914, p. 571 [original French text: “L’article 489 semble indiquer plusieurs causes d’interdiction, car nous y lisons qu’elle atteint le majeur qui est dans un état habituel d’imbécillité, de démence ou de fureur. En réalité, toutes ces causes se ramènent au même fait, à savoir le dérangement des facultés intellectuelles rendant l’individu incapable d’exercer lui-même ses droits avec discernement et l’exposant, dès lors, à commettre des actes préjudiciables à sa fortune et à sa dignité personnelle”, corresponding to p. 749 of Bulgarian translation quoted by the author. – Translator’s Note]. The authors state that “it is not necessary that the disability should be total and should have affected all abilities of the person; just a rather profound disorder suffices to expose the person to the dangers of which the interdiction must protect him” [original French text: “il n’est aucunement nécessaire que la démence soit totale et affecte l’ensemble des facultés de l’individu; il suffit d’un trouble assez profond pour que l’individu soit exposé aux dangers contre lesquels l’interdiction doit le garantir”, p. 572 of the French original corresponding to p. 750 of Bulgarian translation quoted by the author – Translator’s Note]. In this monograph the main comparison is with French civil law as Bulgarian statutory framework of interdiction adopts the pattern of the French Civil Code. See **Tsankova, Ts.** Vaprosi na deesposobnostta [Questions concerning the capacity to act] In: *Yubileen sbornik posveten na 80-godishninata na prof. d.yu.n. Vasil Mrachkov* [A Collection on the 80th Anniversary of Prof. Vasil Mrachkov, Doctor of Juridical Science]. S., 2014, p. 208, p. 210.

article 5 PFA seeking to have a person placed under interdiction is such person's capacity to act and the ground for such claim is the presence of "mental illness or feeble-mindedness" (medical criterion), on the one hand, and the inability of the person suffering from such illness or from feeble-mindedness "to take care of his/her affairs" (legal criterion), on the other hand. Both requirements must be present in order that a limitation of person's capacity to act or a declaration of person's full incapacity to act be pronounced. "Feeble-mindedness is a mental deficiency from birth such as idiocy, imbecility, debility, oligophrenia, and mental illness (psychopathy) is a suffering of a mentally developed person, which, however, results in such disorder of the mind that points to a change in personality and determines inadequate behavior. The second cumulative necessary condition for placing a person under interdiction is the legal criterion: such person must be unable to take care of his/her affairs. In order to be able to take care of his/her affairs the person must understand the prescriptions of legal rules and conform his/her conduct to them, must be able to manage his/her actions by judging their consequences. Care of one's affairs also includes one's attitude toward society and the conformity to the order established in the society. If a dependency on the cumulativeness of the two criteria of the law is established this would mean that in order to place the person under interdiction it is not sufficient that such person should suffer from feeble-mindedness or (and) mental illness. In view of the particular behavior of the person an assessment must be made as to whether (s)he is able to care for his/her own affairs."<sup>125</sup> The said premises should be assessed by the court imposing the interdiction based on court's personal impressions about the person. Therefore one of the requirements in the proceedings for placement under interdiction is to interrogate the person: "the interrogation of the person sought to be interdicted must be done personally by the court that considers the case for [such person's] placement under interdiction in order that the court should get personal impressions about the person being placed under interdiction, check his/her intellectual abilities, manner of communication, his/her ability to have quickness of mind [*saobrazitel'nata vazmozhnost*], so that the court can be able to make a conclusion as to whether there is feeble-mindedness or not"<sup>126</sup>. The court must "have personal impressions and personal judgment of the abilities of the person to be interdicted, whether (s)he adapts correctly to the circumstances and whether there are actually any deviations from the mind that is normal for his/her age"<sup>127</sup>.

Today, *prodigality* has been eliminated as a reason for placement under interdiction.<sup>128</sup> This is so because the capacity to act ("the natural capacity to act") is defined as the ability of the person "to understand the legal significance of his/her acts and (to) have the strength to act according to that understanding"<sup>129</sup>. It should be noted that the requirement for recognizing the capacity to act is that the person "should be able to think rationally and should be of full age"<sup>130</sup>. "Being able to think rationally" does not, however, actually mean (always or at least for the most part) "to act rationally". A person can take unreasonable risks and engage in irrational behavior but if (s)he does so while an ability "to think rationally" is present and if (s)he does not cause harm to another by his conduct (s)he may not be deprived of his/her capacity to act. Of course if (s)he breaks the law, such person will be held responsible or different coercive administrative measures can be applied with respect to him/her but this will not take the capacity to act away from him/her. Prodigality used to be precisely such reason for placement under interdiction associated with the extent to which the person acts rationally in the management of his/her mostly property-related affairs. However, in prodigality only the rationality of the legal acts, and not the ability of the person to act rationally, was being assessed – an ability, which – as we have stated – could also remain unexercised if such is the will of the person. The focus on the ability of the person, and not on the rationality of his/her legal acts, has led to the elimination of prodigality as a reason for interdiction. The historical development of interdiction, however, shows that irrationality of a legal act per se could be neither an argument, nor a motive for limiting/taking away the capacity to act of the person who commits such act.

<sup>125</sup> See Judgment No. 235 of 9 February 2015 delivered by SAC under civil case 1540/2011.

<sup>126</sup> See Judgment No. 1892 of 14 July 1978 delivered under civil case No. 1010/1978 by II Civil Division

<sup>127</sup> See Judgment No. 1664 of 21 June 1976 delivered under civil case No. 1051/1976 by II Civil Division, where it is stated that: "the morbid condition caused by atherosclerosis is not a mental but a neurological disease. It is not synonymous with feeble-mindedness (oligophrenia) as well unless as a result of atherosclerosis a state of dementia has occurred, and one that leads to the conclusion of manifested feeble-mindedness at that, [which is] an impediment to the management of the affairs of the person certified [with such disease]. [...] Atherosclerosis is not a mental illness even if it affects nerve cells. The affection of memory sphere in Atherosclerosis is just a symptom of the disease but it is not a sign of mental suffering. It is natural that at her age 90, the defendant cannot remember and hear. This, however, does not make her incapable of acting. The circumstance that due to infirmity of age she needs to be attended to does not mean that she is unable to manage her actions. Getting up at night to look for food, the fear that someone might hurt her, are not in themselves a manifestation of mental illness."

<sup>128</sup> It used to be a reason for placing the person under interdiction according to article 115 of the Persons Act of 1907, which was repealed by the adoption of PFA.

<sup>129</sup> See *Torbov, Ts.* Istoriya i teoriya na pravoto [History and Theory of Law]. S., 1992, p. 455. See also *Ganev, V.* Uchebnik po obshta teoriya na pravoto. Tom II. Chast parva: pravni subekti [General Theory of Law. A Textbook. Volume II, Part 1: Legal Subjects]. S., 1915, p. 225, where the capacity to act is defined as the "abstract quality of human personalities and their formal ability to act so that the legal rule should actually attach to their innerly manifested ideas and desires the legal consequences, which, in their essential elements, are desired by the capable person". Although Venelin Ganev defines the capacity to act as a "quality" he examines the capacity to act as an element of the set of facts of every lawful legal act – something that attests the specific evidentiary function of the (in)capacity to act as we will see below.

<sup>130</sup> See *Torbov, Ts.* Istoriya i teoriya na pravoto [History and Theory of Law]. S., 1992, p. 455.

Another legal notion that has been dropped is the so-called “curator *de ventre*”\*, who is appointed in cases where after the death of the husband the widow declares she is pregnant. The curator *de ventre* acted in the interest of the heirs of the deceased husband. The purpose of curatorship *de ventre* was to prevent the wife from “committing fraud of two kinds: to conceal a child and to feign herself with a child”. The widow could conceal a child in order either to acquire the entire estate of the deceased (if he has no other children – in such case the curator *de ventre* also had the functions of a temporary administrator of the estate of the deceased husband), or to acquire a greater share of it (if there are other children). The widow could commit a supposition of a child (declaring feign pregnancy or being pregnant from another man) in order that the child should receive the estate instead of deceased’s other heirs and the widow should keep “for many years the usufruct of her husband’s estate” as such usufruct was stipulated for her in her capacity of parent.<sup>131</sup>

## 1.2. Interdiction and confinement

It should be considered that interdiction was historically associated<sup>132</sup> with one’s **confinement** [*zatvaryane*] (today: the measures for physical restriction and involuntary<sup>133</sup> commitment): in order to commit the person to a health facility, (s)he had to be placed under interdiction. The procurator\* could demand that anyone be placed under interdiction in order to apply subsequently measures for forced treatment with respect to such person.<sup>134</sup> Gradually, interdiction – as a *protection measure under civil law*<sup>135</sup> was separated from confinement – as a *coercion measure under administrative law*.<sup>136</sup> Thus, the interdiction is focused on protection and support of the interdicted person, which also includes taking his/her actual will in the “lucid periods” of his/her disease into consideration. Thus, the invalidity of transactions is a consequence that does not sanction the parties and should be applied only when the interdict was actually unable to understand his/her legal acts. On the other hand, confinement is approved as a measure of protection for the family and society from possible dangerous and harmful acts of the person committed by him/her in a state of “madness”. In cases of such confinement the restriction of one’s freedom is not a forced treatment as an end in itself but a way to prevent more serious harm.<sup>137</sup>

\* French for “curator in pregnancy”; called “curator ventris” in Roman law or “curateur au ventre” in French law – Translator’s Note.

<sup>131</sup> For more details, see Planiol, Marcel. *Traité élémentaire de droit civil conforme au programme officiel des Facultés de droit*, onzième édition, tome premier, Paris, 1928, pp. 618-619 [original French text: “ses fonctions consistent à surveiller la mère pour empêcher deux sortes de fraudes: la suppression de part et la supposition de part. Une suppression de part peut être à craindre si la femme est donataire ou légataire universelle de son mari, et surtout si elle n’a pas d’autres enfants: celui qu’elle attend réduira de moitié par la naissance l’effet de la libéralité qu’elle a reçue. La mère sera peut-être tentée de faire disparaître son enfant pour soutenir qu’elle n’en a jamais eu. La supposition de part est à redouter dans l’hypothèse inverse: la mère qui se trouve veuve sans enfants et qui n’a reçu de son mari ni don, ni legs, va voir la fortune du défunt passer à des héritiers éloignés: si elle avait un enfant, et surtout un tout jeune enfant, elle conserverait pendant de longues années la jouissance légale de la fortune de son mari, qui serait recueillie par leur enfant. Elle pourra alors être tentée de faire croire à une grossesse, de se procurer un enfant nouveau-né, et de le faire passer pour sien. On voit que dans ce dernier cas, le curateur au ventre agit non pas dans l’intérêt de l’enfant, puisqu’il n’y en a pas, mais dans l’intérêt des héritiers du mari”, corresponding to pp. 113–114 of Bulgarian translation quoted by the author. – Translator’s Note]

<sup>132</sup> For this connection that is also manifest in contemporary legislations, see **Pathare, S., L. Shields** Supported Decision-Making for Persons with Mental Illness: A Review. – Public Health Reviews, 2012, Vol. 34, No. 2, p. 3. Ibid. (pp. 9–15) one can find a comparative law study of different countries in terms of the legal means of support на the persons with disabilities upon decision-making provided by the state.

<sup>133</sup> For the terminological debate as to whether the phrase “compulsory treatment” or “forced treatment” is to be used, see **Zinovieva, D.** Administrativnopravni i drugi yuridicheski vaprosi otnosno litsata s psihicheski uvrezhdaniya [Issues under Administrative Law and Other Legal Issues concerning Persons with Mental Disabilities] In: Zinovieva, D. N. Gevrenova. Praven rezhim otnosno litsata s psihicheski uvrezhdaniya (administrativnopravni, trudovopravni i drugi pravni aspekti) [Legal Regime Concerning Persons with Mental Disabilities (administrative law, labor law and other legal aspects)]. S., 2012, pp. 45–46.

\* i.e. the “public prosecutor”, “district attorney” – Translator’s Note.

<sup>134</sup> See **Colin, Ambroise, H. Capitant.** Cours élémentaire de droit civil français, tome premier, Paris: Libraire Dalloz, 1914 [p. 751 of Bulgarian translation quoted by the author. – Translator’s Note.].

<sup>135</sup> For the definition of interdiction as a “kind of coercive civil measure”, see **Rachev, Φ.** Grazhdansko pravo spored novite zakoni za grazhdanskata registratsiya, yuridicheskite litsa s nestopanska tsel, politicheskite partii i religioznite obshtnosti [Civil Law According to the New Laws on Civil Status Registration, not-for-profit legal entities, political parties and religious communities]. S., 2003, p. 220.

<sup>136</sup> For the qualification of compulsory treatment as coercive administrative measure, see **Lazarov, K., P. Donchev, F. Lazarov.** Prinuditelno lekuvane na bolni ot alkoholizam. Sbornik pavnii izsledvaniya [Forced Treatment of Alcoholics. A Collection of Legal Studies]. S., 1992, p. 60.

<sup>137</sup> For details about compulsory treatment and other forms of medical coercion with respect to persons with mental disabilities under the Bulgarian legislation in force see **Zinovieva, D.** Administrativnopravni i drugi yuridicheski vaprosi otnosno litsata s psihicheski uvrezhdaniya [Issues under Administrative Law and Other Legal Issues concerning Persons with Mental Disabilities] In: Zinovieva, D. N. Gevrenova. Praven rezhim otnosno litsata s psihicheski uvrezhdaniya (administrativnopravni, trudovopravni i drugi pravni aspekti) [Legal Regime Concerning Persons with Mental Disabilities (administrative law, labor law and other legal aspects)]. S., 2012, pp. 46–56. However, they do not represent a sanction and should be take into consideration of dignity of the person with respect to who, they are applied. See **Trifonova, D.**

While interdiction is focused on the person's ability to *understand* his/her actions, confinement is related to person's ability to *control* his/her conduct. Each of the two concepts offers adequate measures for the attainment of its specific aims: respect for the actual will of the person (in interdiction) and attainment of control of person's conduct (in confinement).

The separation of confinement from interdiction has freed the latter of its functions protecting the public order and enabled it to develop in a context where what is decisive is the interdict's rights and interests which increasingly seem ones related to ensuring the autonomy and guaranteeing the freedom of his/her will rather than property rights and interests. Thus, interdiction is associated with a *requirement for respecting the actual will of the interdict*, and this means: on the one hand, disrespect for the actions committed in a state where the interdict was unable to understand the nature and the consequences of his/her conduct (the "dark periods") and, on the other hand, respect for the acts done by the interdict when (s)he was able to understand the nature and the consequences of his/her conduct (the "lucid periods").

### 1.3. Legal consequences of interdiction

Although the interdiction is viewed as a legal notion that affects (limits or takes away) only<sup>138</sup> the capacity to act of natural persons, it also reflects upon their general legal capacity to have rights [*pravosposobnost*] (mostly in terms of the acts they may do only in person).<sup>139</sup> It should be clearly stated that the general legal capacity to have rights [*pravosposobnost*] as "possession of rights" is "dependent" on the capacity to act: "Only in some cases the general legal capacity to have rights [*pravosposobnost*] is made dependent upon the capacity to act. Such is the case where the general legal capacity to have rights [*pravosposobnost*] is viewed not per se, as an abstract ability of human persons to be bearers of rights and obligations and in relation to the possession of rights, to the actual possession of engendered rights and obligations"<sup>140</sup>. In this sense the general legal capacity to have rights [*pravosposobnost*] ("not per se") acquires actual meaning precisely via the capacity to act (as capacity to act). The restriction/taking away of the capacity to act also reflects on the general legal capacity to have rights [*pravosposobnost*], by practically virtualizing it, turning it into an abstraction, in "pure" interest (without will) that must be taken into consideration by the other legal subjects, by their judgment and on the basis of their decision. Incapacity to act deprives the full interdict of "his/her will" by reducing him/her to "his/her interest" ("his/her interests"). His/her "general legal capacity to have rights [*pravosposobnost*]" remains (entirely) "per se" if there are no mechanisms of taking the person's actual will into consideration.

The placement of a person under interdiction under the Bulgarian legislation currently in force has extremely serious *legal consequences*.<sup>141</sup> It deprives the person of a number of rights exercisable by such person only if (s)he is fully capable

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Prava na patsienta. Sravnitel'nopraven analiz [Patient's Rights. A Comparative Law Analysis]. S., 2003, p. 53.

<sup>138</sup> See for example **Barov, D.** Uchebnik po grazhdansko pravo s uvod v pravoto [Civil Law Textbook with an Introduction to Law]. Svishtov, 1948, p. 122, where it is stated that interdiction does not relate "to the legal capacity of the subject as personality because it does not concern a the deprivation of personality of a given subject as a human being and putting him/her in a state of rightlessness".

<sup>139</sup> For the unity of the general legal capacity to have rights [*pravosposobnost*] and the capacity to act as a guarantee for freedom and equality of adults see **Shabani, N., P. Aleksieva, M. Dimitrova, A. Genova, V. Todorova.** Novata paradigma na pravosubektnostta: chl. 12 ot Konventsiyata na OON za pravata na horata s uvrezhdaniya [The New Paradigm of Legal Personality: article 12 of UN Convention on the Rights of Persons with Disabilities] In: *Pravna missal* [Legal Thought], 2014, No. 1, pp. 81, 84. The general legal capacity to have rights [*pravosposobnost*] is defined as "an instrument for "humanization" of man" that includes a static element, i.e. the general legal capacity to have rights [*pravosposobnost*] (as an abstract possibility of possessing rights and obligations) and a dynamic element, i.e. the capacity to act (as a possibility of personal exercise of the rights being possessed). These two components are in an "indivisible unity" (p. 90) because "the capacity to act determines the overall autonomous life of the person in all areas of life, as the access to a number (in practice, to all) of them is *de facto* through the rights and the capacity to act turns out to be the key to them" (p. 84), "as a result of the deprivation of the capacity to act what is human is taken away from man" (p. 88). See also the quoted **Quinn, G.** Concept paper: Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD. HPOD Conference, Harvard Law School, 20 February, 2010, accessible online at: [www.nuigalway.ie/cdlp/documents/publications/Harvard%20Legal%20Capacity%20gq%20draft%202.doc](http://www.nuigalway.ie/cdlp/documents/publications/Harvard%20Legal%20Capacity%20gq%20draft%202.doc) See and **Kolev, T.** Teoriya na pravoto [Theory of Law]. S., 2015, p. 398, where he states that "in general, legal personhood is a virtuality" that is permanent. Its realization, however, depends precisely on the capacity to act. The indivisibility of the general legal capacity to have rights [*pravosposobnost*] and the capacity to act can be examined as a part of the tendency of universalization of legal personhood, for that see **Ganev, V.** Uchebnik po obshta teoriya na pravoto. Tom II. Chast parva: pravni subekti [General Theory of Law. A Textbook. Volume II, Part 1: Legal Subjects]. S., 1915, p. 231, as well as **Torbov, Ts.** Istoriya i teoriya na pravoto [History and Theory of Law]. S., 1992, pp. 450–451.

<sup>140</sup> See **Ganev, V.** Uchebnik po obshta teoriya na pravoto. Tom II. Chast parva: pravni subekti [General Theory of Law. A Textbook. Volume II, Part 1: Legal Subjects]. S., 1915, p. 229.

<sup>141</sup> Especially the placement under full interdiction. Quite telling is even the circumstance that the full interdict may not keep even his/her identity documents – according to article 8, paragraph 1, item 3 of the Bulgarian Identity Documents Act Bulgarian identity documents must be kept by the lawful representatives of the persons placed under full interdiction. According to article 31a, paragraph 2 BIDA the application for issuance of an ID card to persons placed under interdiction must be submitted in person and in the presence of a tutor or a curator who subscribes a signature in the application and subsequently receives the person's ID card (article 31a, paragraph 5 BIDA). The same rules also apply for the issuance of passport – article 45 BIDA.

of acting. Let us list some specific deprivations (part of the things (s)he is explicitly incapable of doing): the person placed under interdiction<sup>142</sup>):

- may not elect state and municipal bodies and may not participate in referendums (article 42, paragraph 1 CRB);
- may not be a deputy to the National Assembly (article 65, paragraph 1 CRB);
- may not be a municipal councilor (article 30, paragraph 4, item 1 LSGLAA);
- may not be a juror (article 71, item 2 of JA);
- may not be a notary public (article 33, item 2 NNA) or an assistant notary public (article 42, paragraph 1, item 2 NNA);
- may not be a private enforcement agent (article 31, paragraph 1, item 2, hypothesis 2 PEAA) or an assistant private enforcement agent (article 38, item 3, hypothesis 2 PEAA);
- may not be a civil servant (article 7, paragraph 1, item 3 of Civil Service Act);
- may not be a member of the academic body at higher educational institutions (article 58, paragraph 1, item 8 of Higher Education Act);
- may not be a mediator (article 8, paragraph 1 of Mediation Act);
- may not be a witness, an interpreter or a translator in notarial proceedings (article 584, item 1 of CPC);
- may not register a health facility (article 45, paragraph 1, item 8, hypothesis 3 HFA);
- may not practice unconventional methods for beneficial influence on individual health under article 166 HA (article 172, paragraph 1, item 2 HA);
- may not be a veterinary doctor (article 35, paragraph 2, item 2 of VMAA);
- may not practice forestry (article 239, item 3 FA);
- may not carry out geodesy, mapping and cadastre activities (article 21, paragraph 1, item 2 CPRA);
- may not be a sole trader (article 60a CA), a member of OOD (article 125, paragraph 1, item 1 CA). In cases of full interdiction (s)he may not be a partner in a general partnership. The latter is dissolved upon the placement under full interdiction of any of its partners – article 93, item 4 CA, as the law stipulates a possibility to agree otherwise. This is an exceptional case where it is allowed to negotiate under a specific component of the capacity to act of a person placed under interdiction;
- may not be a receiver (article 657, paragraph 1, item 2 CA);
- may not be a founder of mutual insurance cooperatives (article 19 K3) as the full interdiction deprives the person of the possibility to be a member of cooperatives (article 7, paragraph 1 of Cooperatives Act);
- may not be a member of a not-for-profit association (article 22, paragraph 1, item 2 NFPLEA);
- may not apply for adoptive family (article 32, item 2 of Child Protection Act);
- may not be a donor of organs, tissues and cells for transplantation (article 24, paragraph 6 TOTCA) and may donate his/her body after his/her death only with the written consent of his/her tutor (article 19, paragraph 2 TOTCA);
- may not be a donor of eggs (article 130, paragraph 5, item 1 HA);
- may not participate in medical scientific research (article 200, paragraph 1 HA).

When a person is placed under interdiction the following shall *be terminated*:

- the authorizations made by him/her (article 41 OCA, save for the cases expressly stipulated in commercial law: article 25, paragraph 2 CA and article 472 paragraph 2 CA);
- the contracts for consortia\* (article 363, letter “B” OCA) and commission contracts (article 287 OCA) entered into by him/her;
- the lease contracts entered into by him/her in his/her capacity of tenant farmer (article 27, paragraph 1, item 5 LAA);
- the effect of the certificate of qualified electronic signature is terminated (article 27, paragraph 3, item 1 EDESA).

## 2. Flaws (insufficiency) of the legal regulation and the question concerning the purposes of interdiction

The statutory provisions governing interdiction currently in force are characterized by two specific features, which in my opinion render it insufficient and to a certain extent even inadequate as a regime of protection of the persons with disabilities in the context of contemporary views on the rights of such persons.<sup>143</sup> These two *peculiarities* could be designated as follows.

<sup>142</sup> The cases where the legislator has used precisely the term “under interdiction” when introducing the specific restriction or prohibition are listed here.

\* I.e. an unincorporated company – Translator’s Note.

<sup>143</sup> See also see *Shabani, N., P. Aleksieva, M. Dimitrova, A. Genova, V. Todorova*. Novata paradigma na pravosubektnostta: chl. 12 ot Konventsiyata na OON za pravata na horata s uvrezhdaniya [The New Paradigm of Legal Personhood: article 12 of UN Convention on the Rights of Persons with Disabilities] In: *Pravna missal* [Legal Thought], 2014, No. 1, p. 88, who emphasize the “lack of options in cases of intervention in the capacity to act”.

## 2.1. Homogeneity (non-proportionality) of the legal consequences of interdiction

The legal consequences of interdiction are **homogeneous (the same) for all persons** placed under interdiction, *regardless of the specifics of their needs*.<sup>144</sup> The only difference<sup>145</sup>, conditioned by the degree of severity of their condition is the one between full and limited interdiction.<sup>146</sup>

In *full interdiction* the will of the person is devoid of any juridical relevance whatsoever and in his/her stead his/her rights and obligations are realized by another person – by the tutor.

In *limited interdiction* the will of the person may acquire juridical relevance only if a declaration of will for curator's assistance by the part of curator is added to it. In practice, the position of the person placed under limited interdiction is not much different than the one of the person placed under full interdiction. Because his/her will is invalidated the person placed under limited interdiction may not influence his/her curator: (s)he has not right to dispute or appeal<sup>147</sup> curators's actions and it depends precisely on the latter's will whether the [will] expressed by the person placed under limited interdiction will have legal significance.

Under *both regimes* there is no possibility to take into consideration the specific peculiarities of each individual case and of each particular individual placed under interdiction. Neither the person placed under full interdiction, nor the one placed under limited interdiction may *choose his/her tutor and curator* (the latter is appointed not by the court but by the tutorship and curatorship body: the mayor of the municipality or an official named by the mayor<sup>148</sup>), nor there exist any legislative mechanisms for taking into account their desires and feelings<sup>149</sup> when the person, who will represent them, and, respectively, will lend juridical validity to their declarations of will, is determined.<sup>150</sup>

<sup>144</sup> See **Mental Disability Advocacy Center**. Guardianship and Human Rights in Bulgaria. Analysis of Law, Policy and Practice, S., 2007, p. 69, conclusion under indicator No. 27: "There is no opportunity in law to individually tailor either partial or plenary guardianship to address the varying levels of capacity or needs of individual adults", as well as the conclusion under indicator No. 20: "The scope and authority of the guardian is all-encompassing rather than limited to the areas where the person concerned needs assistance.". See also pp. 107–108 of the review of court practice.

<sup>145</sup> For the distinction of the concepts of "mental illness" ("lasting, morbid disorder of mental activity that excludes free will"), "mental weakness" ("mental abnormality of lower degree that does not exclude but only diminishes free will") and "mental defects" ("defects of even less intensity"), see **Tuhr, Andreas von**. Bürgerliches Recht. Allgemeiner Teil. [Civil Law. General Part]. An authorized [Bulgarian] translation of the third German edition of 1928 by Aleksandar Kozhuharov, Judge at the District Court of Sofia. S., 1932, pp. 32–33.

<sup>146</sup> For the practical problem of differentiating the criteria for placement under full and under limited interdiction under article 5, paragraph 2 PFA see **Voynov, V., Iv. Voynov**. Za stepenite na nedeosposobnostta [Of Degrees of Incapacity to Act] In: *Sotsialisticheskoto pravo* [Socialist Law], 1987, No. 5, p. 65. As an advantage of the criterion under article 5, paragraph 2 PFA – the severity of the condition of the person (if it is not "so severe" – the person is placed under limited interdiction, if it is "so severe" the person is placed under full interdiction) it is stated that it "gives the expert psychiatrist the freedom to take into consideration every new discovery in the field of medical science".

<sup>147</sup> For the recognition of such rule in French law more than 100 years ago see **Colin, Ambroise, H. Capitant**. *Cours élémentaire de droit civil français*, tome premier, Paris: Libraire Dalloz, 1914, p. 595: the interdicts "must be able to appeal the refusal of their curator to assist them, firstly, because such refusal might be contrary to the law, then and especially, even where it is excused for good considerations, because it could indirectly result in the person placed under supervision of a curator being prevented from exercising some purely personal rights that are beyond such supervision" [original French text: "enfin le prodigue et le faible d'esprit doivent avoir la disposition d'un recours contre le refus d'assistance de leur conseil judiciaire, d'abord parce que ce refus peut être abusive, ensuite et surtout parce que, meme justifié par le bonnes raisons, il pourrait avoir, indirectement, pour résultat de contrarier, chez l'individu placé sous le contrôle d'un conseil, l'exercice de certains droits purement personnels et soustraits à ce contrôle", corresponding to pp. 779–780 of Bulgarian translation quoted by the author. – Translator's Note]]. For the procedural rights of the persons with intellectual disabilities in contemporary context see for example **Cremin, K**. Challenges to Institutionalization: The Definition of "Institution" and the Future of Olmstead Litigation. – *Texas Journal on Civil Liberties & Civil Rights*, 2012, Vol. 143, No. 17, pp. 171–173; **Garner, R**. Litigation as a Tool for Forcing Accountability in State-Based Long Term Care Settings For the Intellectually and Developmentally Disabled: An Illinois Focus. – *Annals of Health Law*, 2013, Vol 22, pp. 121–132, as well as **Dlugacz, H., Ch. Wimmer** The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings. – *Saint Louis University Journal Of Health Law & Policy*, 2011, Vol. 4:331, pp. 331–370.

<sup>148</sup> For the nature of the control exercised on the actions taken by the tutorship and curatorship body see **Markov, G**. Sadebniyat control varhu deynostta na organa po nastoynichestvo i popechitelstvo. [Judicial review of the Activity of the Tutorship and Curatorship Body] In: *Sotsialisticheskoto pravo* [Socialist Law], 1987, No. 9, pp. 43–46.

<sup>149</sup> As this has been done for children for example – in paragraph 1, item 5, letter "a" of the Transitional Provisions of OCA the assessment of the best interest of the child includes taking his/her desires and feelings into account. A detailed examination of the significance of individual components that are taken into consideration when an assessment of the best interest of the child is made in the cases of granting the exercise of parental rights after divorce, see **Todorova, V**. Mayki i bashti v spor za roditelskite prava: za nov "polov red" v semeynoto pravo? [Mothers and fathers in dispute over parental rights: for a new "gender order" in family law?] In: Shopov, An. (ed) *Semeynite otnosheniya v promenyashitiya se svyat* [Family Relationships in the Changing World]. S., 2014, pp. 297–302.

<sup>150</sup> See **Mental Disability Advocacy Center**. Guardianship and Human Rights in Bulgaria. Analysis of Law, Policy and Practice, S., 2007, p. 44, conclusion under indicator No. 10: "Legislation does not provide sufficient criteria for evaluation of the guardian because the selection of the guardian is primarily based upon familial relationships rather than on the



The law does not also stipulate an opportunity for the appointment of a tutor only in certain field<sup>151</sup>, or for the appointment of several persons to represent the interests of the person placed under interdiction in different areas. This could be valid for both under tutorship and under curatorship. In historical and comparative law perspective, the so-called *plurality of tutors* was allowed and the appointment of that two separate tutors acting in different fields was possible: a tutor to the person, i.e. an honorary position engaged in education and satisfaction of the personal needs of the person placed under interdiction, and a tutor to the property – a paid appointment related to the management, protection and disposition of the property of the person placed under interdiction.<sup>152</sup> This distinction was based on the circumstance that different skills, which were not always possessed by the same person, were needed for the performance of different actions to assist the person placed under interdiction. Another possible analogy is to the parents, who (in contrast to the tutor), as a rule, are two and usually split the parental functions and give different patterns of conduct and provide different support to their minor children.

Another possibility was also available: the appointment of *ad hoc tutors* having a limited term of office and named for a specific task. Today the function of *ad hoc tutors* could be carried out by attorneys named by the tutor but the power of representation of such attorneys would be derivative and would depend entirely on the will of the tutor. In cases of variance between his/her interests and the interests of the person under tutorship as well as where the tutor is prevented from carrying out his/her duties the tutor's functions are carried out by the deputy tutor, and curatorship body could appoint a special representative (article 169, paragraph 1 FC). The special representative appointed by the tutorship and curatorship body as per the procedure stipulated in article 169, paragraph 1, hypothesis 2 FC is the closest equivalent of the institution of *ad hoc tutor* under the legislation in force.

The reason for the pronouncement of *two judgments* is precisely the unproportionality of the deprivation of capacity to act (as is the case with interdiction under Bulgarian civil law) in *terms of comparative law: Judgment of the Constitutional Court of Latvia of 27 December 2010* delivered under case No. 2010-38-01<sup>153</sup> and *Judgment of the Constitutional Court of the Slovak Republic of 28 November 2012*.<sup>154</sup> Both countries have established a unified regime (status) of deprivation of the capacity to act of persons with intellectual disabilities or mental disorders, as such regime does not allow for the specific peculiarities of the condition and inabilities of such person to be taken into consideration. According to the national legislations a private constitutional complaint can be filed by an individual natural person with both constitutional courts and individual natural person also recognize the right of a person deprived by his/her civil capacity to act to file a constitutional complaint. Deprivation of civil capacity to act does not take away the constitutional capacity to act of the person, including the legal possibility of the respective person to seek protection of his/her rights in person before the Constitutional Court of his/her country. Quite indicative in this respect are the arguments of the Constitutional Court of Latvia where the court states that the meaning of constitutional complaint is that every person can defend his/her fundamental rights and that there is no way to exclude the persons deprived of capacity to act under the civil law from the circle of possible complainants because this would be an inadmissible violation of their rights. Deprivation of capacity to act radically affects the right to personal and family life because the person is deprived of the opportunity to independently make decisions concerning his/her life.

The Constitutional Court of Latvia<sup>155</sup> advanced arguments by consistently applying the criteria of proportionality of the

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individual needs of the adult or the prospective guardians' plan for meeting those needs. Additionally, there is no legislative provision to ensure that the wishes of the person concerned are considered and given due weight". There are serious doubts as regards the efficiency of municipal officials or directors of certain facilities appointed by the civil status official as tutors while discharging their functions. For the so-called "public guardians" in comparative law perspective, see **Siemon, D., S. Hurme, Ch. Sabatino** Public Guardianship: Where Is It and What Does It Need? – Clearinghouse Review, 1993, Vol. 27, p. 588–599.

<sup>151</sup> For the so-called "partial incapacity to act" where "without the mind being deeply and completely affected the ill person may not take care for his affairs only in certain area, in which his actions are controlled by delusional experiences". Jealous paranoia is cited as an example: "motivated by delusional experiences of jealousy the ill person might carry out transactions involving alienation [of property] in order to punish the "unfaithful" wife or the children who are, in his opinion, adulterous offspring and thus substantially harm his close relations' property interests." See **Voynov, V., Iv. Voynov**. Za stepenite na nedeosposobnostta [Of Degrees of Incapacity to Act] In: *Sotsialisticheskovo pravo* [Socialist Law], 1987, No. 5, p. 68. The authors state (p. 69) that the discussion of the issue of partial incapacity to act "has rather theoretical value as we are unaware of any such cases having been heard in the court practice of Bulgarian courts". They link (pp. 70–71) partial incapacity to act with article 27 OCA and reject the possibility of placing such a person under interdiction precisely because article 5 PFA affects the capacity to act of the person in all areas and does not allow for a differentiated treatment of each particular case.

<sup>152</sup> See **Planiol, Marcel**. *Traité élémentaire de droit civil conforme au programme officiel des Facultés de droit*, onzième édition, tome premier, Paris, 1928, p. 89 [of Bulgarian translation – Translator's Note.]. In view of the possibility for a person to own properties both in France and in the colonies French civil law stipulated the possibility for the appointment of the so-called "protutor", a tutorship concerning only the properties of the person on the territory of French colonies. This is a historical and comparative law example of a territorial differentiation of the competence of the several tutors of the person.

<sup>153</sup> The judgment is accessible online at: [www.satv.tiesa.gov.lv/upload/judg\\_2010-38-01.htm](http://www.satv.tiesa.gov.lv/upload/judg_2010-38-01.htm)

<sup>154</sup> The judgment is accessible online at: [http://mdac.info/sites/mdac.info/files/slovak\\_const.\\_court\\_e.t.\\_english.pdf](http://mdac.info/sites/mdac.info/files/slovak_const._court_e.t._english.pdf)

<sup>155</sup> Here I will examine the judgment of the Constitutional Court of Latvia because it was pronounced first and contains the main arguments also specified in the Judgment of the Constitutional Court of the Slovak Republic.

measure of “deprivation of capacity to act” of the persons with disabilities. **The assessment** of the proportionality of the measures stipulated by the law with respect to the persons with disabilities includes *three separate components*: I. an assessment of appropriateness: whether the stipulated measure can achieve the legitimate aim of the law; II. an assessment of necessity: could the legitimate aim of the law be achieved by another measure that violates the rights of the person to a lesser extent?; III. an assessment of compliance: whether the benefit achieved by applying the measure is greater than the detriment done to the rights of the person.

In order to make the three assessments with respect to interdiction it is necessary to define its **legitimate aim**. The Constitutional Court of Latvia defines as the aim of civil law measures applied with respect to the persons with disabilities and taking away their capacity to act, *the protection precisely of those persons with respect to whom the civil law measures are applied*, and not the attainment of some public interest or the protection of the interests of other persons (the typical “civil law interest”, i.e. the certainty of civil-law transactions could also be included here). The latter are ensured by other measures, including measures of medical coercion, which aim to ensure the administration of certain treatment in order to reduce the risk of any actions that are dangerous for the relatives of the person with disabilities and for the society at large. I would add that the civil law measures applied with respect to the people with disabilities should protect not only and not predominantly their interests but the authenticity of their will. As it is precisely the will that is affected by the respective disability, it should be the main focus of the civil law measures and should be given priority when their aims are defined and correlated.

Given the legitimate aim of the civil law measures applied to the people with disabilities thus defined, **the three components** of the assessment of proportionality could be examined one by one.

Firstly, the aim of the measures, i.e. to establish and respect the actual will and interests of these persons, cannot be attained by taking away the capacity to act of the people with disabilities (*assessment of appropriateness*). In terms of its effect the interdiction is completely inappropriate to the aim pursued because it does not assist in any way the persons with disabilities when they form and express their will – on the contrary, it deprives them of the opportunity to form and express a will by transferring the care for their interests into the charge of another person (tutor).

Secondly, there are numerous different measures known in international and comparative law perspective that enable the court to take into consideration the different difficulties facing each particular person with disabilities and to offer the most adequate legal regulation possible, which affects the least the rights of such persons (*assessment of necessity*). The most telling example in this respect is the appointment of a supporting person only in the areas and with respect to the matters for which there are difficulties or inability to express a will by the particular person (and not an effect of the measure with respect to any will expressed by the person in all areas of his/her life) as well as only in the periods of time when such difficulties or inability are manifested (and not an effect of the measure always and at any time). The Constitutional Court of Latvia cites as an example the legislation of other European states with similar legal systems: Estonia (where the measures are applied only for certain areas of person’s life), the Netherlands and Luxembourg (where supervisors are appointed to the people with disabilities to support the latter in certain areas), Norway (where the persons with disabilities can enter into contracts on their own as such contracts, however, can be voided by their curators).

Thirdly, it is precisely because they do not pursue a legitimate aim and do not take into consideration the actual legitimate aim in particular (“tailor-made response”), i.e. to assist the people with disabilities when they express their will, make decisions on their lives and exercise their rights, that the civil law measures taking away the capacity to act harm the persons to whom they are applied to a much greater and inadmissible extent than they achieve the aforesaid legitimate aim (*assessment of compliance*). The protection of certain public interest or of the interest of other persons may not be a reason for robbing a person of the opportunity to exercise his/her rights and to make the decisions on his/her life. The “interests” of such person defined as the need of preservation of his/her property, whether for him/herself, for his/her creditors or for his/her heirs, may not be a justification for such “taking away” as well.

Thus, all three components of the assessment of proportionality reject the deprivation of civil capacity to act as an adequate (proportionate) statutory measure. Therefore the Constitutional Court of Latvia declared invalid the respective provisions of the Civil Code of Latvia by **rejecting as a possible counter-argument** the circumstance that *if they are repealed a worse effect would be attained because there will not be a legal regime*, which can be applied to persons with intellectual disabilities and mental disorders – an argument that ostensibly turned out to be decisive for the Bulgarian Constitutional Court in its Judgment No. 12 of 17 July 2014 of the Constitutional Court (CC) under constitutional case No. 10/2014 in which CC refused to declare the provision of article 5 PFA unconstitutional. The protection of the fundamental rights of the citizens and especially of the people with disabilities who due to their special condition are additionally impeded in the realization of the protection of their rights is assumed as a principal constitutional and as an important international commitment of the state. The failure to fulfill it could not be justified by the omission of the current legislator and by the lack of fulfillment of the international commitments assumed by the state with respect to its citizens and their rights.

## **2.2. Staticity (lack of periodic re-consideration and absoluteness) of the legal consequences of interdiction**

The persons placed under interdiction **are treated** in view of their capacity to act *in the same manner, regardless of the dynamics of their condition*, which has resulted in their placement under interdiction. Bulgarian legislation in force does

not provide for any requirement of periodic ex officio re-consideration<sup>156</sup> of the placement under interdiction in view of the dynamics of person's condition, nor has an opportunity been provided for the very person to request the revocation of his/her interdiction: such opportunity is only provided for the tutorship and curatorship body and for the tutor (article 340, paragraph 2 of CPC). This legislative omission has been overcome to a certain extent by the clarifications given by the Plenum of SC in item 10 of Decree No. 5/1979 of 13 February 1980, according to which the limited interdict may request the revocation of his/her interdiction not only with the assistance of his/her curator but also by his/her own. Such special procedural capacity to act is not allowed by SC for the full interdict, who can, however, request from the tutorship body or the tutorship council to approach the Regional Court [*okruzhnen sud*]\* that has pronounced the interdiction to have the latter revoked: "In such cases the interdict ascertains his recovery by a medical document or a protocol of MAC. In such proceedings the interdict is the plaintiff. If the curator of the limited interdict, the tutorship body or the tutorship council of the person placed under full interdiction refuse to request revocation of the interdiction, the person placed under interdiction may file an application with the prosecutor and request that the latter lodges a claim for revocation of the interdiction." It should be noted that Decree No. 5/1979 was pronounced while the repealed CPC of 1952 was still in force in the version of article 277 of CPC (repealed) of SG, issue 12 of 8 February 1952, which exhausted itself by the following text: "The proceeding for revocation of the interdiction shall be the same as the one for imposing it". By SG, issue 28 of 1983 a new, second paragraph was inserted in article 277 of CPC (repealed), which expressly specifies that the revocation of interdiction may also be requested by the tutorship body or by the tutor. The same clarification is also contained in article 340, paragraph 2 of CPC currently in force. As far as article 277, paragraph 2 of CPC (repealed) and article 340, paragraph 2 of CPC supplement and do not restrict the rules applicable for the revocation of interdiction we should accept that Decree No. 5/1979 has preserved its relevance to date and is mandatory for the courts.

### 2.3. "Presumption of madness"

Staticity of legal regime of interdiction has one more side. As stated in the legal doctrine, by placing a person under interdiction a "**presumption of madness**"<sup>157</sup> is introduced with respect to such person, which is irrefutable and which effaces, "eliminates, so to speak, the lucid intervals" (the periods when the person was completely free to act reasonably). This presumption was introduced *in view of proving* the person's incapacity and voiding the transactions entered into by him: "For a person in whose brain there are alternating moments of derangement and reason it would be quite difficult, if need be, to contest the transactions he has entered into; in such cases one will have to prove the circumstance, which is sometimes almost impossible, that at the time when he entered into the obligation the deranged was under the sway of madness"<sup>158</sup> (such is the requirement under article 31 OCA currently in force).<sup>159</sup> In Roman law "the madman was considered completely incapable, at least for as long as he was under the sway of his disease. [...]. In return, the madman became completely capable during his lucid intervals; then he could also act on his own and his acts were valid". This decision was subject to criticism in view of the "difficulties [that could] be caused by this swinging from the state of crisis and the lucid intervals"<sup>160</sup>.

<sup>156</sup> See **Mental Disability Advocacy Center**. Guardianship and Human Rights in Bulgaria. Analysis of Law, Policy and Practice, S., 2007, p. 70, conclusion under indicator No. 28: "Bulgarian legislation does not ensure that the need for either plenary or partial guardianship is ever reviewed".

\* In Bulgaria regional courts are the courts of appeal; trial courts are the *district courts* [*rayonen sud*] – Translator's Note.

<sup>157</sup> See **Planiol, Marcel**. *Traité élémentaire de droit civil conforme au programme officiel des Facultés de droit*, onzième édition, tome premier, Paris, 1928, p. 196 [of Bulgarian translation quoted by the author – Translator's Note]. As pointed out by the author, the act commissioned by the interdict nevertheless remains "an act of a madman, even if done in a lucid interval" [p. 677 of the original French text: "tandis que l'acte fait par un interdit est réputé l'œuvre d'un fou, même quand il a été fait dans un intervalle lucide"; corresponding to p. 199 of Bulgarian translation quoted by the author – Translator's Note].

<sup>158</sup> See **Colin, Ambroise, H. Capitant**. *Cours élémentaire de droit civil français*, tome premier, Paris: Librairie Dalloz, 1914, p. 559 [original French text: "Car, si on laissait livré à lui-même l'individu dans le cerveau duquel alternent des périodes de crises et des périodes d'intelligence, il serait très difficile, le cas échéant, d'attaquer les actes qu'il aurait passés; il faudrait prouver, chose parfois presque impossible, qu'au moment où il contractait, l'aliéné se trouvait sous l'empire de la folie"; corresponding to p. 734 of Bulgarian translation quoted by the author – Translator's Note]

<sup>159</sup> See also **Ganev, V.** *Uchebnik po obshta teoriya na pravoto*. Tom II. Chast parva: pravni subekti [General Theory of Law. A Textbook. Volume II, Part 1: Legal Subjects]. S., 1915, p. 227, where it is stated that "when examined through the prism of its legal essence it (the capacity to act – author's note) is not a legal quality but a present element of the set of facts of lawful juridical acts. It is transformed into a legal quality not because of its main legal essence but for technical considerations for the sake of purposefulness: it is easier to prove the specific presence of psychological and ethical experiences included in the set of facts of the lawful juridical acts and forming the essence of the general legal capacity to have rights [*pravosposobnost*]".

<sup>160</sup> See **Colin, Ambroise, H. Capitant**. *Cours élémentaire de droit civil français*, tome premier, Paris: Librairie Dalloz, 1914, p. 567 [original French text: "Le Droit romain considérait le fou comme frappé d'une incapacité complète, tant au moins qu'il était sous l'empire de la maladie. Un curateur lui était nommé en conséquence pour veiller aux soins exigés par son état et pour administrer ses biens. En revanche, le fou redevenait pleinement capable durant les intervalles de lucidité; il pouvait alors agir seul et ses actes étaient valables (3, 4, Inst. Just. I, 23)"; "On comprend à quelles difficultés devait donner lieu ce départ entre les périodes de crises morbides et les intervalles de rémission.", corresponding to p. 744 of Bulgarian translation quoted by the author – Translator's Note]

As far as it is all about a difficulty in proving, and yet, a proof that must be conducted by the contracting parties of the ill person, we should expect that the presumption introduced by interdiction is one having procedural significance, i.e. a refutable one. However, this is not the case: the presumption is “absolute” and irrefutable as the main argument to support that solution is the stability of civil-law transactions. In order to void the transaction entered into by an incapable person (full or limited interdict) under article 27, hypothesis 1 OCA it will suffice if the regime of interdiction has not been complied with, without examining the specific condition of the person as at the time of transaction (as made under the hypothesis of article 31, paragraph 1 OCA). Everyone who enters into contracts with a person placed under interdiction also accepts the risk of their transaction being voided – by the tutor of the interdict or his/her heirs. It is precisely the heirs who benefit from the presumption of incapacity contained (nowadays, just implicitly) in interdiction. They are the ones who, for the want of it, experience the “difficulty” to prove that their testator was under the sway of the illness as at the time of performance of the respective legal act. Thus the interests of heirs – “the concern over preservation of properties within the family”<sup>161</sup> – prevail over the interest of the interdict<sup>162</sup>, i.e. to be recognized the possibility of making valid legal acts during the periods when (s)he is not under the influence of the disease.

#### 2.4. Significance for the validity of transactions

The “presumption of madness” has important significance in view of the questions concerning *the (in)validity of transactions*.

Where *the person is not placed under interdiction* (i.e. in the so-called “natural incapacity to act”<sup>163</sup>), the heirs will have to prove that as at the time when the particular transaction was made the deceased was unable to understand the nature and the consequences of his/her acts (article 31 OCA). However, this is a difficult task; moreover, it is restricted by the law. The hypothesis under article 31, paragraph 2 OCA stipulates special guarantees against a possible abuse by the part of the heirs who protect the rights of the third parties<sup>164</sup> who have dealt with the deceased. According to article 31, paragraph 2 OCA a contract entered into by a person capable of acting may be requested to be voided after the death of the person if such person was unable to understand or manage his affairs at the time when the contract was entered into unless (s) he has been sought<sup>165</sup> to be interdicted<sup>166</sup> before his/her death or if the proof of incapacity to act stems from the same

<sup>161</sup> See **Colin, Ambroise, H. Capitant**. *Cours élémentaire de droit civil français*, tome premier, Paris: Libraire Dalloz, 1914, p. 588 [original French text: “le souci de la conservation des biens dans les familles” corresponding to p. 770–771 of Bulgarian translation quoted by the author – Translator’s Note]

<sup>162</sup> For this conclusion but in the context of the question as to who and for what considerations can request that the incapable person be placed under interdiction, see **Mental Disability Advocacy Center**. *Guardianship and Human Rights in Bulgaria. Analysis of Law, Policy and Practice*, S., 2007, p. 27: “Bulgaria’s legislation seems to define the right to file an application for guardianship in terms of the interest of the applicant rather than the needs of the person concerned. The legislation makes no specific mention of filing an application for the purpose of protecting the vulnerable individual from abuse or exploitation”. This possibility becomes even more dangerous if the circumstance that the interdict has no adequate protection against the appointment of a tutor in cases of conflict of interests is also taken into consideration because Bulgarian legislator has not defined the cases of possible conflicts of interests between the interdict and his/her tutor (p. 46). The appointment of an “additional supervisory guardian” stipulated in the French legislation, who sees to the occurrence of conflicts of interest between the tutor and the interdict has been pointed out as an example of good practices as well as standard 16 of the National Guardianship Association introduced in USA that reads: “The guardian shall avoid even the appearance of a conflict of interest or impropriety when dealing with the needs of the ward. Impropriety or conflict of interest arises where the guardian has some personal or agency interest which might be perceived as self-serving or adverse to the position or best interest of the ward” (p. 43)

<sup>163</sup> For the use of the terms “natural” and “civil” incapacity to act see for example **Dikov, L.** *Kurs po balgarsko grazhdansko pravo*. Tom I. Obshta chast [Course in Bulgarian Civil Law. Volume I. General Part]. S., 1936, pp. 162–163.

<sup>164</sup> The hypothesis of voiding a transaction after the death of the person (article 31, paragraph 2) should be distinguished from the one of voiding a transaction made before one’s placement under interdiction (article 31, paragraph 1 OCA). Under the repealed OCA in order that a transaction made by the person before such person is placed under interdicted be voidable the other party to the transaction must have acted in bad faith. See **Apostolov, Iv.** *Osnovni nachala na grazhdanskoto pravo*. Lektsii na prof. Iv. Apostolov [Fundamental Principles of Civil Law. Lectures delivered by Prof. Iv. Apostolov]. S., 1946, p. 47. An explicit provision in this sense is article 112 PsA (repealed). See also Judgment No. 495/1923 of I Civil Division, Judgment No. 429/1926 of I Civil Division quoted in **Maksimov, Hr.** *Zakon za litsata*. Razyasnen s praktikata na Varhovniya kasatsionen sad [Persons Act. Explained by the Case Practice of the Supreme Court of Cassation]. S., 1941, pp. 134–137, etc. While the Persons Act was effective the court practice accepted that in order to apply that provision the condition of the person must have been such as to be a reason for his placement under full interdiction – for example Judgment No. 114/1927 of I Civil Division (pp. 137–140)

<sup>165</sup> By the death of the person the proceedings for his/her interdiction is terminated. In this sense see item 8 of Decree No. 5/1979 of 13 February 1980, Plenum of SC: “By the death of the defendant, which occurred during the course of the proceedings, the case is terminated and the judgment of the trial court, if any, is invalidated. It is inadmissible that the lawsuit be continued by the heirs of the deceased by changing the cause of action of the claim as such in order to establish that before his death the deceased was in a condition worthy of having him placed under full or limited interdiction. The legal transactions made by such person before his/her placement under interdiction as well as in cases where the proceedings are terminated by reason of death should be contested as per the general procedure. This is also valid for legal actions, which are not transactions but which have legal consequences.”

<sup>166</sup> There was also an opportunity to lodge such claim where the decease was committed for forced treatment while

contract<sup>167, 168</sup>. The reason for the said prohibition is that after the death of the person it would be difficult for the court to make an assessment of his/her mental state as at the time when the transaction was made and the heirs could easily take advantage of the voidability by claiming that any disposition made by the deceased which is unwanted for them had been made by the deceased in a condition in which (s)he was unable to understand or manage his/her affairs. Thus the possibility to have such a transaction voided by the heirs is allowed only in cases where the person's placement under interdiction had been sought while (s)he was still alive or where the proof of inability is contained in the very contract whose voiding is being sought.<sup>169</sup>

Where *the person has been placed under interdiction* (i.e. in case of the so-called "civil incapacity to act"), the heirs will be able to attach legal meaning to the invalidity of the legal acts made by the interdict only in the grounds of the interdiction existing as at the time when the transaction was made. The dispute here is over the type of invalidity: nullity (by reason of lack of consent under article 26, paragraph 2, hypothesis 2 OCA) or voidability (under article 27, hypothesis 1 OCA). Traditionally, in Bulgarian legal doctrine it is accepted that the transactions entered into by fully incapable persons (minors and full interdicts) are null by reason of lack of consent – article 26, paragraph 2, hypothesis 2 OCA, while transactions entered into by persons with limited capacity to act (minors aged 14-18 and limited interdicts) but in violation of the stipulated requirements of the law, are voidable by reason of incapacity to act (article 27, hypothesis 1 OCA). Below I will attempt to offer a new interpretation in the relationship between article 26, paragraph 2, hypothesis 2 OCA and article 27, hypothesis 1 OCA, which could be applied with respect to full interdicts.

I would like to proceed from the correlation between article 26, paragraph 2, hypothesis 2 OCA and article 31, paragraph 1 OCA mentioned above, which has been considered in the practice of the courts. The accepted *priority of article 31, paragraph 1 OCA over article 26, paragraph 2, hypothesis 2 OCA* in certain cases could allow me to pose also the question concerning the reconsideration of the relation between article 26, paragraph 2, hypothesis 2 OCA and article 27, hypothesis 1 OCA. It is accepted<sup>170</sup> that what is meant by article 26, paragraph 2, hypothesis 2 OCA (lack of consent as a ground for nullity) is a conscious lack of consent while the unconscious lack of consent leads to voidability under article 31, paragraph 1 OCA (actual inability of the person). This conclusion was formulated in several judgments of SCC. Thus, in Judgment No. 1344 of 1 August 2002 delivered by IV Civil Division of SAC under civil case No. 1864/2001 it is stated that: "[p]ursuant to article 26, paragraph 2, hypothesis 2 OCA the contracts in which there is no consent are null. The lack of consent must be conscious because if it is unconscious the rules on voidability shall apply. There is no consent in cases of mental agreement, joke or violence where there is total lack of valid consent to enter into a contract. The facts asserted by the sellers are that there is mental illness and senile dementia which allegedly prevented them from understanding and managing their actions upon the sale of the property. These circumstances do not justify the application of any of the aforesaid hypotheses of missing consent because they do not point out that the lack is a conscious one. Therefore the appellate court has correctly examined the objection as one for voidability of the transaction as one entered into by persons capable of acting, who, at that time, were unable to understand or manage their actions". In Judgment No. 488 of 7 October 2003 delivered by I Civil Division of SCC under civil case No. 11/2003, it is also accepted that "[a]s far as the transaction was entered into by a person capable of acting who was unable at that time to understand or manage his actions it cannot be qualified as null by reason of lack of consent under article 26, paragraph 2 OCA, because by that hypothesis the law means a conscious lack of will but it is subject to voiding according to article 31 OCA." This judgment should be supported with the reservation that the inability under article 31, paragraph 1 OCA should be distinguished as a disturbance of consciousness from the full unconsciousness (for example deep sleep or epileptic fit), where any will is missing at all and article 26, paragraph 2, hypothesis 2 OCA should apply.<sup>171</sup>

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still alive. See **Planio, Marcel**. *Traité élémentaire de droit civil conforme au programme officiel des Facultés de droit*, onzième édition, tome premier, Paris, 1928, p. 202 [of Bulgarian translation quoted by the author. – Translator's Note]. Under the statutory provisions currently in force there is no suggestion that the transactions made by a person while coercive medical measures were applied with respect to him are invalid. They could be contested subject to the procedure stipulated in article 31, paragraph 1 OCA but not under article 31, paragraph 2 OCA, unless, of course, the premises of the second paragraph are present.

<sup>167</sup> The presence of these two hypotheses is not sufficient to void the transaction – the premise under article 31, paragraph 1 OCA must also be present: upon the entry into the contract the person should have been unable to understand and manage his/her actions.

<sup>168</sup> Third parties are additionally protected by the possibility recognized in article 336, paragraph 1 of CPC that the petition to have a person interdicted may be filed by "anyone who has legal interest in such interdiction." In Decree No. 5/1979 of 13 February 1980, Plenum of SC it is accepted that a person of such legal interest might be "a creditor of the defendant whose interdiction is sought" of a person who "has entered into a transaction with him".

<sup>169</sup> The Persons Act of 1907 contained a provision that made it possible for "[t]he acts done before the interdiction, ... to be voided if the reason for the interdiction existed at the time when such acts were done, and in all cases where the nature of the contract, the great damage it gives or might give rise to for the interdict, or any other circumstance ascertaining the bad faith of the person who has entered into a contract with him" (article 112 PsA). The provision attached legal meaning to two specific circumstances: the disadvantageousness of the transaction for the interdict and the bad faith of the person that entered into the contract with the interdict.

<sup>170</sup> See **Rozanis, S.** *Nedeystvitelnost na sdedlkite* [Invalidity of Transactions]. S., 2005, p. 91.

<sup>171</sup> In this sense see **Malchev, M.** *Unishtozhaemost na grazhdanskopravnite sdelki* [Voidability of Civil-law Transactions]. S., 2010, pp. 121–122.

It could be accepted that there would be voidability under article 27, hypothesis 1 OCA, and not nullity under article 26, paragraph 2, hypothesis 2 OCA [i.e.] *precedence of article 27, hypothesis 1 OCA over article 26, paragraph 2, hypothesis 2 OCA*, also in the case where the transaction has been made in person by a full interdict.<sup>172</sup> The opposite thesis<sup>173</sup>, according to which the transactions made by a minor child or by a person placed under full interdiction are null by reason of a lack of a declaration of will or consent, is defended by adducing the argument that the scope of application of article 27, hypothesis 1 OCA is limited, on the one hand, by the explicit provision of article 73, paragraph 3 1985FC corresponding to article 130, paragraph 4, sentence 1 of FC currently in force and, on the other hand, by the cases where the incapable persons have entered into the transactions “without understanding their meaning and the substance of their legal consequences”<sup>174</sup>. In these two hypotheses (being limitations of the scope of application of article 27, hypothesis 1 OCA) the transactions are not voidable but null by virtue of article 73, paragraph 3 1985FC (article 130, paragraph 4, sentence 1 FC), respectively by virtue of article 26, paragraph 2, hypothesis 2 OCA.<sup>175</sup> I fully accept the first limitation of the scope of application of article 27, hypothesis 1 OCA because the nullity of certain transactions is explicitly stipulated in article 130, paragraph 4, sentence 1 FC and thus article 130, paragraph 4, sentence 1 FC is special with respect to article 27, hypothesis 1 OCA.

The second restriction, however, could be discussed. Especially in the context of the distinction made in this monograph between the position of minors, on the one hand, and of full interdicts, on the other hand<sup>176</sup>. The arguments supporting the lack of will within the meaning of article 26, paragraph 2, hypothesis 2 OCA are most often associated with the early age of the child who participates in the conclusion of the transaction.<sup>177</sup> It is stated that the transaction entered into by an incapable person would be null under article 26, paragraph 2, hypothesis 2 OCA “in all cases where – while strictly bearing in mind the nature of transaction itself – the early age of the incapable person leads to a lack of consent causing a lack of will”<sup>178</sup>. However, as if the quoted text allows for a specific assessment to be made in each individual case as well as a possibility that some of these cases (where there is a consciously expressed will) might fall within the scope of application of article 27, hypothesis 1 OCA and not within the scope of application of article 26, paragraph 2, hypothesis 2 OCA. It appears to me that such cases where there will be a will consciously formed and expressed by an incapable person are quite possible in the “lucid periods” of the condition of a full interdict. Interdicted persons are not minors (immature and inexperienced), on the contrary: they are most often ones who have attained majority, have certain experience and in many cases their condition is dynamic and in some periods makes it possible that a conscious will can be formed and expressed. The application of article 27, hypothesis 1 OCA (instead of article 26, paragraph 2, hypothesis 2 OCA) could allow that the “lucid periods” in the condition of limited interdicts be taken into consideration by preserving the effect of the transactions entered into by them. They would not be null under article 26, paragraph 2, hypothesis 2 OCA but merely voidable under article 27, hypothesis 1 OCA. Such transactions would be voidable by the tutor, by the heirs or by the interdict him/herself (in case that his/her interdiction is revoked) but this will depend on the will and the judgment of these persons.

More arguments could be adduced for the application of article 27, hypothesis 1 OCA with respect to transactions entered into by the full interdicts. Transactions entered into by the full interdict used to be voidable according to the express provision of article 205 of the repealed OCA.<sup>179</sup> Article 27, hypothesis 1 of OCA currently in force reflects precisely

<sup>172</sup> This thesis is currently supported only by **Rachev, Φ.** *Grazhdansko pravo spored novite zakoni za grazhdanskata registratsiya, yuridicheskite litsa s nestopanska tsel, politicheskite partii i religioznite obshtnosti* [Civil Law According to the New Laws on Civil Status Registration, not-for-profit legal entities, political parties and religious communities]. S., 2003, p. 220. For the adoption but also for a criticism of that permission while OCA (repealed) was still in effect, see **Dikov, L.** *Kurs po balgarsko grazhdansko pravo. Tom I. Obshta chast* [Course in Bulgarian Civil Law. Volume I. General Part]. S., 1936, p. 164. The criticism was caused by the fact that while article 10 OCA (repealed) was in effect if a formally capable person made a transaction in a state of madness it would be “absolutely null”. The transactions made by a formally incapable person, however, “regardless of whether they have been made in a lucid moment or not, [are always] voidable”.

<sup>173</sup> See **Tadzher, V.** *Grazhdansko pravo na NRB. Obshta chast. Dyal II* [Civil Law of the People’s Republic of Bulgaria. General Part. Section II]. S., 2001, p. 537, **Stefanov, G.** *Grazhdansko pravo. Obshta chast. Yuridicheski litsa, sdelki, predstavitelstvo, pogasitelna davnost* [Civil Law. General Part. Juridical Persons, Transactions, Representation, Liberative Prescription]. S., 1995, p. 135, **Dzherov, Al.** *Grazhdansko pravo. Obshta chast* [Civil Law. General Part]. S., 2012, p. 479.

<sup>174</sup> See **Pavlova, M.** *Grazhdansko pravo – obshta chast* [Civil Law – General Part]. S., 2002, p. 553.

<sup>175</sup> The same is accepted also by **Dzherov, Al.** *Grazhdansko pravo. Obshta chast* [Civil Law. General Part]. S., 2012, pp. 492–493, where it is accepted that article 27, hypothesis 1 OCA is a special case of article 42 OCA because it concerns acts made by the representative (the lawful representative of the minor aged 14-18 and of the limited interdict), which – if the voidability provided for in article 27, hypothesis 1 OCA did not exist – would be invalid until their validity is affirmed under article 42 OCA.

<sup>176</sup> See below.

<sup>177</sup> This is quite obvious in the example given in **Vasilev, L.** *Grazhdansko pravo. Obshta chast* [Civil Law. General Part]. S., 2000, p. 306 – a transaction entered into by a child aged 8.

<sup>178</sup> See **Vasilev, L.** *Grazhdansko pravo. Obshta chast* [Civil Law. General Part]. S., 2000, p. 306.

<sup>179</sup> See **Mevorah, N., D. Lidzhi, L. Fahri.** *Komentar na Zakona za zadalzhenyata i dogovorite. Chl. chl. 1 – 333* [Commentary of the Obligations and Contracts Act. Articles 1-333]. S., 1924, p. 414, where it is stated that “the judgments under cases where the incapable has acted alone would also be voidable. Such judgments are subject to voiding under article 205

that legislative permission. The provision of article 27, hypothesis 1 OCA was passed simultaneously with article 26, paragraph 2, hypothesis 2 OCA, from which it follows that the legislator took both provisions into consideration by stipulating the milder form of invalidity for the cases of transactions entered into by an incapable person. OCA was passed (SG, issue 275 of 22 November 1950, in force as from 1 January 1951), after PFA had already come into force (SG, issue 182 of 9 August 1949, in force as from 10 September 1949), which stipulated the two regimes of interdiction – full and limited – that are still in force at the present.<sup>180</sup> This could allow us to assume that the provision of article 27, hypothesis 1 OCA is a special one with respect to article 26, paragraph 2, hypothesis 2 OCA and is a manifestation of legislator's wish to preserve the effect of the declarations of will made by full interdicts by providing a possibility for the would-be vitiation in their will to be attached legal meaning by lodging a claim to have the transaction declared void. This desire of the legislator can be found in article 21, item 3 in relation to article 20 of the Marriage Ordinance-Act of 1945 (repealed), article 17, paragraph 1, item 1 in relation to paragraph 2 FC of 1968 (repealed), article 96, paragraph 1, item 1 FC of 1985 (repealed), which all stipulate voidability and not nullity of the civil marriage entered into by a person placed under full interdiction, as well as in article 46, paragraph 1, item 1 FC which is currently still in force.<sup>181</sup> Similarly, the violation of the requirement of article 13 SA stipulating that the person who makes a testament should not have been placed under full interdiction leads to voiding (article 43, paragraph 1, letter "a" SA) and not to nullity of the testament. The circumstance that the person making an acknowledgment was incapable of acting also leads to voiding (article 67, hypothesis 3 FC), and not to nullity of the acknowledgment. The circumstance that the adopter is not capable of acting also leads to voiding (article 106, paragraph 1, item 1, hypothesis 2 FC in relation to article 78 FC) and not to nullity of adoption. Under the statutory regulation currently in force the person's actual inability to form and express will, a circumstance which is presumed if there is a formally pronounced interdiction, is also a ground for voidability (article 31, paragraph 1 OCA) and not for nullity of the transaction. As far as the substantive reason: the person's lack of ability to understand the nature and the consequences of the act being carried out by him/her and to control his/her conduct, is provided by the legislator as a ground for voidability of the legal transaction made by him/her, then it should be expected that the legislator will provide the same legal consequence also in cases where this inability of the person has been formally ascertained by placing him/her under interdiction. It is precisely this expectation that is met by the provision of article 27, hypothesis 1 OCA.

Thus, it is not article 26, paragraph 2, hypothesis 2 OCA that restricts the scope of application of article 27, hypothesis 1 OCA, but the other way round: article 27, hypothesis 1 OCA will "detract" from the scope of application of article 26, paragraph 2, hypothesis 2 OCA. The voidability of the transaction entered into by an incapable person could be viewed (and supported by arguments) as a compensation of a kind for the absolute nature of the "presumption of madness" in full interdiction, which "compensation" enables both the tutor and the interdict him/herself (in case of a future abolition of interdiction) to preserve the effect of the transaction thus entered into – for example in the cases where it corresponds to the actual desires of the interdict because it has been entered into in a "lucid period" ("lucid interval") of his/her morbid condition.

## 2.5. On the purposes of interdiction, again

The interdiction's aim of *preserving "the properties in the family"* stood out most clearly when interdiction was applied to the prodigals. The tendency of its gradual abandonment in the regulation of interdiction can be clearly traced out in the dynamics of the legal regime applicable for *the prodigals*. By the reforms in French law the regime of restriction of their capacity to act has been gradually liberalized. Initially they had the legal status of full interdicts. Subsequently, instead of a tutor they were appointed a curator who offered them "a cure proportionate to the pain" – the need of curator's assistance arose in specifically defined cases as the "measure changed depending on the circumstances and on the manner in which the needs of those who need such assistance had to be satisfied" (for example demanding assistance upon any disposition or only upon alienation of immovable properties, only upon legal representation but not in cases of substantive law acts, etc.). Today prodigality is not a reason for placement of a person under full interdiction or under limited interdiction, including under Bulgarian law.

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because the judgments are but legal contracts".

<sup>180</sup> Even before OCA (SG, issue 275 of 22 November 1950, in force as from 1 January 1951) and PFA (SG, issue 182 of 9 August 1949, in force as from 10 September 1949) the transactions entered into by the full interdict were considered voidable. See for example **Apostolov, Iv.** Osnovni nachala na grazhdanskoto pravo. Lektsii na prof. Iv. Apostolov [Fundamental Principles of Civil Law. Lectures delivered by Prof. Iv. Apostolov]. S., 1946, p. 46.

<sup>181</sup> For the thesis according to which the marriage contracted by a full interdict is voidable but only "if the person comprehended the nature and the significance of the act" see **Tsankova, Ts.** Vaprosi na deesposobnostta [Questions concerning the capacity to act] In: Yubileen sbornik posveten na 80-godishninata na prof. d.yu.n. Vasil Mrachkov [A Collection on the 80th Anniversary of Prof. Vasil Mrachkov, Doctor of Juridical Science]. S., 2014, p. 214. However, it is stated that "otherwise (i.e. – if the full interdict did not comprehend the nature and the significance of the marriage contracted by him/her – author's note) the marriage would be null although there is no express regulation". If, however, the person placed under full interdiction did comprehend the nature and the significance of the marriage contracted by him/her then what is the cause for its voidability? If the concerns are over his/her ability to realize the potential of the legal relationship of marriage this could be taken into consideration by means of another ground for termination of marriage – divorce because of deep and irretrievable breakdown of marriage. The assessment as to the presence of such breakdown of marriage, however, should be a different assessment that is always case-specific.

One of the succession law concepts aiming at “preserving the properties in the families” is the *fideicommissary substitution* – it rendered the properties obtained by succession “unalienable and unsequestrable in the hands of the prodigals”<sup>182</sup> and enabled them to use them for as long as they lived but required them to provide them after their death to their own children. Thus the properties remained in the family. It is precisely that substitution that is banned today by the provision of article 21, paragraph 2 SA, under which the testator may not oblige the heir to preserve the estate received by the latter in succession in full or in part and pass it after the heir’s death to a third party. The elimination of prodigality as a ground for interdiction and the statutory ban of the fideicommissary substitution attest the changed attitude of contemporary civil law towards the principle of “preservation of properties in the families”, which yields to the requirement of taking the autonomous will of the owner (the heir) into consideration.

Today, the irrefutable presumption of incapacity to act “hiding” behind interdiction is opposed to the principled declaration of the capacity to act of adults as an expression of “an irrefutable presumption of freedom and equality of individuals as from their birth”<sup>183</sup>. Even the examination of interdiction as a “refutable presumption for incapacity to act” that enables its own overcoming in the presence of “lucid periods” in the disease of the person is rejected as an irrefutable presumption of capacity to act is proposed for all persons with disabilities who should benefit from support measures, which help them exercise their rights in person. In this context the Roman law idea of respecting the “lucid periods” finds its modern interpretation in the person of the so-called *functional capacity to act*. This is a capacity to act, which the person retains even after (s)he is placed under interdiction in areas in which (s)he is fully capable of making conscious and considered decisions. The opportunity stipulated in French legislation of listing the transactions that the person may make independently of his/her tutor is cited as an example of respecting the functional capacity to act of the interdicts. The judge does so after the opinion of a medical expert is heard.<sup>184</sup>

## 2.6. Interdiction and the rights of people with disabilities

The impossibility of assessing the specific condition in which the person placed under interdiction as at the time of performance of each of his/her acts in some cases *violates the rights of the persons*, placed under interdiction.<sup>185</sup> If the presence of intellectual disabilities [*umstveni zatrudneniya*] (“feeble-mindedness” according to the terminology of article 5 PFA) is a condition that is relatively permanent and homogeneous, the *persons with mental disorders* (“mental illness” according to the terminology of article 5 PFA) most often pass through different periods as some of them are characterized by inability to care for their affairs (within the meaning of article 5 PFA) but in other periods these persons do not substantially differ in anything from other capable natural persons. One of the premises that should be present in order to have the person placed under interdiction is that his/her mental illness (mental disorder) must be permanent but not necessarily uninterrupted condition – this determines the existence of the so-called “*lucid periods*” or “*lucid intervals*” (intervalles lucides\*), “intervals of reasonability”.<sup>186</sup> Thus the alternation of “dark” and “lucid” periods cannot

<sup>182</sup> For all quotations in this and in the preceding paragraph, see See **Colin, Ambrose, H. Capitant**. Cours élémentaire de droit civil français, tome premier, Paris: Libraire Dalloz, 1914, p. 588-589 [original French text: “La remède change suivant les circonstances, et c’est la nature de chaque affaire qui règle la manière dont on doit pourvoir aux besoins de ceux à qui ces secours sont nécessaires” and “inaliénables et insaisissables entre les mains du prodigue” corresponding to p. 771 of Bulgarian translation quoted by the author – Translator’s Note]. As additional consideration for the restriction of prodigals’ capacity to act they cite “the interest of the family and above all of the descendants” and “the concern for the public morals” (p. 590) [the original French text is: “l’intérêt de la famille et surtout des descendants”; “le souci de la moralité publique”, corresponding to p. 772 of Bulgarian translation quoted by the author. – Translator’s Note]. It should be noted that the entry into speculative transactions as well as the incurrance of “useless and random expenses, which considering the great property status of the interested person would not yet amount to his income” (p. 591) [original French text: “De même des dépenses inutiles et désordonnées, qui, vu la grande fortune de l’intéressé, n’égalaient pas encore ses revenus, ne sauraient donner lieu à nomination d’un conseil judiciaire” corresponding to p. 774 of Bulgarian translation quoted by the author – Translator’s Note] were not viewed as prodigality and as a ground for restriction of the capacity to act. See also **Planio, Marcel**. Traité élémentaire de droit civil conforme au programme officiel des Facultés de droit, onzième édition, tome premier, Paris, 1928, pp. 212–213 [of Bulgarian translation quoted by the author – Translator’s Note]

<sup>183</sup> See **Todorova, V.** The Bulgarian Discussion on Guardianship Between the Judgment of the Constitutional Court and the Draft Law on Natural Persons and Support Measures In: *Sufficiency of Law, Deficiency of Rights. The Legal Capacity to Act as a Universal Standard of Being Human The International Perspectives and the Bulgarian Legal Reform*. S., 2015, p. 81.

<sup>184</sup> See **Mental Disability Advocacy Center**. Guardianship and Human Rights in Bulgaria. Analysis of Law, Policy and Practice, S., 2007, p. 57.

<sup>185</sup> There could be distinguished approaches that exclude the persons with disabilities from social interactions such as the regulative approach of interdiction which does not take into account the “lucid periods” and the specific abilities of the interdicted person, and redistributive approaches which offer ways of integration of persons with disabilities, without taking away their capacity to act. See **Hvinden, B.** Redistributive and Regulatory Disability Provisions: Incompatibility or Synergy? – In: Quinn, G., L. Waddington (eds), *European Yearbook of Disability Law*. Antwerp-Oxford-Portland, 2009, Vol. 1, pp. 5–27, where different forms of synergy between regulatory and distributive measures are proposed, which should to be applied with respect to the persons with disabilities.

\* in French in the original – Translator’s Note.

<sup>186</sup> The term “transient” incapacity to act is also used: in the maniac and melancholic episodes of cyclophrenia, acutely occurring psychoses with or without derangement of the mind as well as in psychoses of chronic course with permanent psychopathological symptoms (delusions and hallucinations) with formally preserved intellectual and memory abilities”.



be taken into account by the legal regime of interdiction. If we use the metaphor of light the placement under interdiction leads to the establishment of a dark period with no exceptions, in which all “lucid periods” are legally irrelevant.

The principle under which the interdiction takes away the legal validity of will of the person for all acts, without exception, has been challenged in historical perspective and in comparative law terms. There has been authors who thought that *the interdict might make validly “certain acts” “when he is in a lucid interval”*. According to one thesis these are the “acts that cannot be carried out by an attorney” – “so we should use his lucid periods to give him an opportunity to carry out some acts by his own”. Marriage and adoption have been pointed out as such acts. According to another thesis these are the acts “which are concern only of the person and family relations” – because the interdiction aims at preserving the estate of the interdict but does not affect his/her non-property rights.<sup>187</sup> Marriage and child acknowledgement have been pointed out as such acts.<sup>188</sup> It is precisely these three acts: marriage (in both opinions), child acknowledgement and adoption, together with one more act, which, as a rule, can only be made in person, the testament, that are the acts for which exceptions to the regime of the limited and, in some cases (such as testament), also of the full interdiction are allowed in the current statutory regulation in Bulgaria by taking into consideration the possible “lucid periods” of person’s mental condition.

### 3. Examination of the actual (presumable) will

Under *full interdiction* the will of the person is substituted for the will of his/her tutor as the law does not require that the will of the latter should correspond to the presumable will of the person placed under interdiction. The “presumable will” of the interdict could be ascertained in the cases where (s)he has been of full age and capable of acting, i.e. (s)he expressed relevant and valid will for certain period of time. In this sense is Principle 9, item 1 of Recommendation No. R(99)4 of the Committee of Ministers of the Council of Europe entitled “Principles concerning the legal protection of incapable adults” according to which “the past and present wishes and feelings of the adult should be ascertained, and should be given due respect”.

#### 3.1. Interdict’s past desires

*The past desires* of the interdict could be established by means of documents created especially by him/her such as preliminary instructions for treatment, living wills and powers of attorney “surviving the incapacity to act”, which give rise to their legal effect in cases where the person falls into unconsciousness or upon his/her placement under interdiction. In Bulgarian legislation in force there are no instructions whatsoever as regards the manner of exploration of interdict’s past desires. For that reason the proposed text of article 28, paragraph 2 of the Draft Natural Persons and Support Measures Bill (in its redaction of 9 April 2015), deserves to be strongly supported as well as the text of article 29, paragraph 4 of the Draft Natural Persons and Support Measures Bill (in its redaction of 31 July 2015), respectively, according to which the interpretation of one’s desires and preferences should take into account the following mandatory criteria: the interpretation should not be based solely on person’s external conduct and condition; all relevant circumstances should be taken into consideration; all necessary efforts should be made to enable the person to make the decision on his/her own; the circumstances related to the maintenance therapy in particular should be discussed; past and present desires, feelings, beliefs and values of the person should be taken into consideration; the points of view of person’s close relations should be discussed and taken into consideration.

##### 3.1.1. Inability to express informed consent to treatment under article 162, paragraphs 2 and 3 HA

The instructions specified in the Draft Natural Persons and Support Measures Bill when seeking for the person’s actual (presumable) will could be extremely helpful in the hypothesis under article 162, paragraph 3 HA. It is about the case where the court orders the compulsory treatment of the person and ascertains *his/her inability to express informed consent to treatment*. It is about a specific particular inability, the occurrence of which does not depend on whether the ill is placed under interdiction. The inability to express informed consent to treatment under article 162, paragraph 2 HA is a specific medical incapacity to act that is established by the court for the period of the ordered compulsory treatment to the maximum (there is no reason for the court to reconsider the presence/lack of the ability to express informed consent, independently and separately from the need of continuation of the compulsory treatment).

When the court establishes an inability to express consent to treatment the court appoints a person among the close relations of the patient to “express informed consent to the treatment” (article 162, paragraph 3, sentence 1 HA). If there is a conflict of interests or if there are no close relations the court appoints a representative from the municipal

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See *Voynov, V., Iv. Voynov*. Za stepenite na nedeosposobnostta [Of Degrees of Incapacity to Act] In: *Sotsialisticheskopravo* [Socialist Law], 1987, No. 5, pp. 65–66. further on (pp. 67–68) the authors link the “transient” incapacity to act to article 31, paragraph 1 OCA and exclude it as a ground for placement under interdiction. The diseases specified (on pp. 65–66) by them (cyclophrenia, psychoses, etc.) are, however, among the typical examples of diseases where a placement under interdiction could be sought.

<sup>187</sup> The “nature” of property rights is also used to explain “the disuniting of the general legal capacity to have rights [pravosposobnost] and the capacity to act”. See *Alexiev, S.* Obshta teoriya na pravoto. Kurs v dva toma. Tom II [General Theory of Law. A Course in Two Volumes. Volume II]. S., 1985, p. 129.

<sup>188</sup> See *Planiol, Marcel*. Traité élémentaire de droit civil conforme au programme officiel des Facultés de droit, onzième édition, tome premier, Paris, 1928, pp. 197–198 [of Bulgarian translation quoted by the author – Translator’s Note]

healthcare service or a person named by the mayor of the municipality by the domicile of the health facility “to express informed consent to the treatment of the person” (article 162, paragraph 3, sentence 2 HA). However, the law does not specify when and how the person appointed under article 126, paragraph 3 HA expresses an informed consent to the treatment of the compulsory placed person. At least two questions arise. On the one hand, the treatment ordered by the court is compulsory and in this sense no informed consent to treatment is needed for the administration thereof. What is then *the role of the person under article 162, paragraph 3 HA* with respect to a compulsory treatment? Does the expression of a formal consent to treatment by him/her exhaust such role? Or the person under article 162, paragraph 2 HA has an opportunity to make a refusal to compulsory treatment of the ill? On the other hand, no criteria are stated, on the basis of which the person under article 162, paragraph 3 HA expresses his/her consent to the treatment of the ill. Must such person motivate his/her decision and submit a report (to whom?) on the informed consents to treatment expressed by him/her? By what could such person motivate his/her decisions? The answers to the questions so posed, in my opinion, require legislative intervention. It should be expressly stated that the person appointed under article 162, paragraph 3 HA expresses informed consent to treatment for all medical interventions outside the scope of the compulsory treatment of the mental diseases having caused the application of the measures under article 155 HA. With respect to these medical interventions, where they do not hamper the attainment of the objectives of the compulsory treatment, the person under article 162, paragraph 3 HA should be enabled to make a refusal to treatment. The person under article 162, paragraph 3 HA should motivate his/her decisions by the presumable will of the patient by examining and taking into consideration all data available to him/her. (S)He could also be guided by the instructions contained in the aforesaid article 28, paragraph 2 of the Draft Natural Persons and Support Measures Bill.

### **3.1.2. Authorization surviving the interdiction**

Let us now pay much more attention to the question of whether it is admissible to make such powers of attorney “in the event of incapacity to act” and mostly of **powers of attorney “in the event of placement under interdiction”**. According to article 41, paragraph 1, hypothesis 4 OCA the authorization terminates by the placement under interdiction of the authorizing person or of the attorney. The question we ask ourselves here is whether this provision is a dispositive or a peremptory one. In order to answer this question we should analyze the meaning and the purpose of the provision.

The reason for termination of the authorization made upon the *placement under interdiction of the authorized person* is the inability to carry out the power of representation existing in his/her favor, which inability occurs upon his/her placement under interdiction: (s)he will not be able to carry out legal acts on behalf of the authorizing person at all (where (s)he is placed under full interdiction) or will be able to carry out such legal acts but with the curator’s assistance of his/her curator (where (s)he is placed under limited interdiction).

In the first case (the authorized person’s placement under full interdiction) there will be an effect resembling the one re-authorization. The admissibility of such an effect – that actions be carried out, instead of the attorney, by attorney’s tutor on behalf of the authorizing person – could be contemplated within the limits of article 43, paragraph 1 OCA. According to article 43, paragraph 1 OCA the re-authorization is admissible “if (s)he is empowered to do so or if the re-authorization has been necessitated for the protection of the interests of the authorizing person”. Thus, the question is: if the parties have so agreed or if it has been necessitated for the protection of the interests of the authorizing person, is it possible that the tutor of the attorney placed under full interdiction act on behalf of the authorizing person. The negative answer to this question under the statutory provisions in force follows from: a) the personal judgment [*pretsenka*] contained in each authorization<sup>189</sup> – the attorney is chosen in his/her personal quality by the authorizing person and in the same personal quality (s)he has been entrusted to carry out the a re-authorization (under the first hypothesis of article 43, paragraph 1 OCA) or the attorney him/herself makes the judgment as to whom (s)he should reauthorize by taking into consideration the personal qualities of the re-authorized person. In contrast to the stated peculiarities that are typical for the re-authorization the tutor is appointed by the tutorship body without any legally relevant participation by the part of the interdict (the authorized person). In this sense there is no judgment and choice of personal qualities of the re-authorized person by the authorized person, which are decisive for making the re-authorization under article 43 OCA; and b) the functions and responsibility of the tutor: the tutor is appointed in order to care for and keep the interests of the person placed under interdiction (the authorized person) and not in order to “keep the interests” of a third party such as the authorizing person. In this sense the tutor of the interdict (the authorized person) should not be entrusted with functions that are unusual for him/her, which could divert him/her from his/her main task – the protection of interdict’s interests.

In the second case (the authorized person’s placement under limited interdiction) the will of the authorized person will not be sufficient so that (s)he can act on behalf of the authorizing person. Its effect will be dependent on the will of a third party – the curator. Similarly to the tutor, the curator has functions of protecting the interests of the interdict, who has no participation in the appointment of the curator. This dependence of the authorized person’s power of

<sup>189</sup> For the “relationships of personal trust” between the authorizing person and the authorized person in the context of article 41, paragraph 1, hypothesis 4 OCA see **Takov, Kr.** Dobrovolno predstavitelstvo [Voluntary Representation]. S., 2006, p. 407. An additional argument against the construct where the authorized person acts through his/her tutor, or, with the curator’s assistance of his/her curator, respectively, is that such construct is “excessively complicated” (pp. 406–407).

representation on the curator's assistance of his/her curator, on the one hand, does not correspond to the meaning of the authorization (a person chosen in view of his/her personal qualities representing another), and, on the other hand, it could "distract" the curator away from his/her responsibilities in relation to the protection of the interests of the interdict. The power of representation of the attorney placed under full or under limited interdiction goes beyond the judgment of the personal qualities made by the authorizing person, and therefore the law has envisaged its termination. Similarly to the tutor, the curator has been chosen neither by the authorizing person, nor by the authorized person. There is no impediment, however, to the authorizing person authorizing directly both the tutor and the curator, as in such cases the power of representation will arise to their benefit. Then, however, there will also be a judgment made by the authorizing person as regards the personal qualities of these persons.

For the considerations as aforesaid the termination of the authorization when the authorized person is placed under interdiction stated in article 41, paragraph 1, hypothesis 4 OCA is justified and should be retained. It is another question of whether such rule should not be considered dispositive as it protects the interests of the authorizing person. The inclusion into the power of attorney of a statement by the authorized person that (s)he will continue to act even after the possible placement of the authorized person under full interdiction, could be viewed as an authorization under dilatory condition to the benefit of an identifiable [*opredelyaemo*] person – "the tutor of the authorized person". The power of representation of the authorized person will be "suspended" by the interdiction but such power will arise in favor of his/her tutor – it will exist for as long as the tutorship lasts (after the revocation of interdiction the power of representation of the interdict will be reinstated). As regards the placement of the authorized person under limited interdiction, it could be viewed as a condition for alteration upon the occurrence of which the power of representation of *the authorized interdict* changes as a joint representation arises for the duration of the interdiction between him/her and his/her curator, whereupon the curator participates only by an approving declaration of will. The said interpretation of the will of the authorizing person in the cases of placement of the authorized person under interdiction could be an attempt to preserve and take into consideration his/her desires. Although it seems complicated and risky for the authorizing person, ultimately (s)he is free to make such decisions and they should not be taken away from him/her for paternalistic considerations.

The reason for termination of the authorization having already been made when *the authorizing person is placed under interdiction* is associated with the need of guaranteeing his/her rights and interests. It is stated that the termination of the power of attorney upon the placement of the authorizing person under interdiction prevents "the parallel existence of two representatives (the new, mandatory one and the old, voluntary one)" and the possible collisions between them – in full interdiction it respectively prevents "the danger that the interdict "might not comprehend when (s)he must terminate the already established representation or, even if (s)he comprehends it, it turns out that the interdict cannot terminate it"<sup>190</sup>. This danger, however, is eliminated to a considerable extent if the interdict has expressly stated that (s) he wants to retain the authorization even if the authorized person is placed under limited interdiction. It could also be taken into consideration if an opportunity is stipulated for a withdrawal by the limited interdict on his/her own (without the need of curator's assistance) of the authorizations made by him/her before (s)he is placed under interdiction. Such a solution would take into consideration the purpose of such authorizations – the use of the existing bond of trust between the authorizing person and the authorized person, and would prevent the hypothesis being examined here from being similar to the hypothesis of the so-called "irrevocable powers of attorney"<sup>191</sup> – such a similarity would exist if after his/her placement under limited interdiction the authorizing person is deprived of the opportunity to withdraw the authorization on his/her own.

It is also stated that the regime of interdiction, i.e. of taking away/limiting the capacity to act and appointing a tutor/curator, could protect and defend the interests of the interdicted person to an extent greater than the attorneys appointed before the interdiction. Moreover, in practice it is quite likely that the authorizations made by the authorizing person are made by him/her in the condition that has subsequently become the reason for his/her placement under interdiction. The following question arises: as far as the legal regime of interdiction is imperative, should the provision of article 41, paragraph 1, hypothesis 4 OCA stipulating the termination of the authorization upon the placement of the authorizing person under interdiction be also viewed as an imperative one precisely for that reason?

Is it possible that the authorizing person has chosen as his/her attorney his/her most trusted person (we have already stated the importance of personal qualities of the authorized person for the authorizing person), by explicitly stating that (s)he wants precisely that (the trusted) person to represent him/her in case that his/her capacity to act is taken away? Do we have to take away the legal effect of such declaration made before the placement of the authorizing person under interdiction? If the validity of such covenant is not allowed, including in the cases where it has been made by the authorizing person while (s)he fully comprehended the nature and the meaning of the act, this will lead to a substitution of the interdict's will by the will of the tutorship and curatorship body. Upon the appointment of the tutor the tutorship and curatorship body is not obliged to examine, let alone, to take into consideration the will of the person placed under full interdiction, even if it has been ascertained and even if it is clear.

<sup>190</sup> See **Takov, Kr.** Dobrovolno predstavitelstvo [Voluntary Representation]. S., 2006, p. 407.

<sup>191</sup> For the examination of the "irrevocable powers of attorney" as simulative powers of attorney that conceal a cession, see **Dabev, D.** Dogovorno predstavitelstvo [Representation by Contract]. S., 1931, p. 366. It is stated that the power of attorney is always revocable and always in the interest of the authorizing person.

The statutory regulation in the case of person's placement under limited interdiction is slightly different. According to article 155, paragraph 3, sentence 2 FC when curatorship is established on a person placed under limited interdiction the tutorship and curatorship body must give a hearing to the interdict. This provides an opportunity to possibly take into consideration his/her will as regards the person who will provide him/her with curator's assistance. I think that such a right to a hearing could be extended in order to cover all cases of interdiction and could be provided to the benefit of each interdict who is able and wants to express such an opinion. The broadening of the right to opinion also to include the fully interdicted persons is granted to the benefit of each interdict who is able and wants to formulate and express such an opinion. The broadening of the right to opinion to also include the fully interdicted persons is also supported by the circumstance that in children the right to be given a hearing arises when they attain the age of 10 years although they are still underage, i.e. fully incapable of acting, until they turn 14. Therefore the criteria for allowing the interdicts to be given a hearing should also be less strict and should afford the persons placed under full interdiction an opportunity to express an opinion as well. The specific ability of the person to express an opinion and not his/her formal incapacity to act should be the guiding [principle].

If the actual will of the interdict is fully taken into consideration this should allow the legal effect of a power of attorney, in which it is explicitly stated that the power of representation should be retained even after the authorizing person is placed under interdiction or the emergence of the power of representation under which is placed under dilatory condition being the placement of the authorizing person under interdiction. The provision of article 41, paragraph 1, hypothesis 4 (placement of the authorizing person under interdiction) OCA guards the interests of the authorizing person. This, however, should not be done despite the will of the authorizing person, especially if it is expressed in lucid consciousness and ability to control his/her conduct. The ambition to protect the authorized person "from his own self" by not allowing the possibility for an express derogation of article 41, paragraph 1, hypothesis 4 (placement of the authorizing person under interdiction) OCA, would lend a peremptory nature to a provision, which, as a rule, protects private interest. There are no considerations in view of legal certainty here because the authorizing person has been placed under interdiction and not the authorized person – (s)he can enter into valid and actual legal transactions, including in the name of another, as every other capable person can. The express recognition of the dispositive nature of the rule under article 41, paragraph 1, hypothesis 4 (placement of the authorizing person under interdiction) OCA (this could be done by inserting "unless otherwise stated in the power of attorney") could be combined with an express statutory regulation of the legal meaning of the will of the interdict, expressed before his/her placement under interdiction. As a whole we could say that considering the delicacy of the questions concerning the capacity to act, a change is needed to Bulgarian legislation in force, which should stipulate mechanisms taking into account the past desires and declarations of will of the interdict, including the ones made by him/her especially for the cases of his/her placement under interdiction.

### **3.2. Interdict's present desires**

**Present desires** of the interdict should be taken into consideration when all actions carried out in his name are being carried out, also including within the legal proceedings envisaged to protect his/her interests such as for example: in the proceedings for granting permission for the performance of certain acts of disposition under article 130, paragraph 3 FC, when an informed consent or refusal to treatment is obtained under article 87, paragraph 4 HA, when the residence of the interdict is being determined under article 163, paragraph 1 FC, etc. In the report submitted by him/her under article 171 FC the tutor must adduce arguments for his/her actions on behalf of the interdict not only with their economic expedience but also in view of the desires and feelings of the interdict. In order to know the actual desires and feelings of the interdict, the tutor should *hold periodic meetings* (in the cases where the two do not share a residence) and conversations (in any case) with him/her in which the actions to be taken by the tutor on behalf of the interdict will be described in a proper and accessible manner.

A possible legislative solution is also the requirement that in all administrative and court proceedings the court must take the opinion of the person placed under interdiction into consideration. However, is it possible to also justify such a conclusion under the legislation currently in force by assuming that the reference made in under article 5, paragraph 3 PFA includes a reference to article 15, paragraph 1 of Child Protection Act that grants every child who has attained 10 years of age the right to be given a hearing in any administrative or legal proceedings affecting his/her rights or interests? The interdict's right to be given a hearing should be recognized not only in administrative and legal proceedings (the notarial proceedings should also be added here) but also when other legal acts, which are important to him/her are being performed such as for example giving an informed consent to treatment, performance of transactions of disposition of his/her property, etc. In such case the obliged subject of the interdict's right to be given a hearing will be his/her tutor.

The failure to meet the requirement for examination and establishment of the presumable (actual) will of the interdict should lead to *tutor's sanctioning* as well as to the occurrence of a possibility to seek civil-law liability from him/her for the damages caused on his pupil.

The most recent amendments and supplementations of the Social Assistance Act (SAA), promulgated in SG, issue 8 of 29 January 2016 adopted the approach of respecting the personal (actual) will of the interdict upon his/her placement in special institutions and in residence-type social service homes in the community. These social services are provided by the district court having jurisdiction over the present address of the person further to a petition for placement filed by the Social Assistance Directorate *on the basis of a desire declared in writing by the person and an opinion of the tutor*

(article 16"б", paragraphs 1 and 2 SAA). Social Assistance Directorate by the present address of the person could only carry out a temporary placement as per the administrative procedure in the event that until the court pronounces its judgment there is no other option to provide care for the person. Such temporary placement in special institutions and in residence-type social service homes in the community of adults placed under full interdiction is made by order of the head of the Social Assistance Directorate again on the basis of the person's wish declared in writing and tutor's opinion (article 16"б", paragraph 1 and paragraph 4 SAA). Upon temporary placement the Social Assistance Directorate is obliged to make a request to the district court having jurisdiction over the person's current address within one month after the order is issued.

In the legal proceedings for permission for placement in special institutions and in residence-type social care institutions in the community the court may collect evidence on its own initiative and *must examine the will of the person*, whose placement has been requested, including by participation of experts (article 16"в", paragraph 2 SAA). There is an established sequence in the provision of the social services as it is stipulated that upon request for placement in a specialized institution the court may grant it only in case that in the course of the proceedings no other option is found to have the person taken care of in a home environment or for placing him/her in a residence-type social service homes in the community. The possibility of appealing both the acts of the head of the Social Assistance Directorate – subject to the procedure stipulated by the Administrative Procedure Code (article 16"б", paragraph 6 SAA), and the judgments of the court – according to the procedure stipulated in CPC before the regional court whose decision is conclusive (article 16"в", paragraph 8 SAA).

The said change to SAA introduces an exception to the principled permission for substitution of the will of the persons placed under full interdiction for the will of his/her tutor contained in article 5 PFA. The personal desire of the full interdict is decisive for the commencement of the proceedings seeking the placement in special institutions and in residence-type social service homes in the community. His/her tutor only submits an **opinion, which is different in terms of its contents and legal effect than curator's assistance** provided by the curator upon the expression of a legally valid will by the part of a person placed under limited interdiction. The same is also valid for the cases of limited interdiction where instead of curator's assistance the curator provides an opinion as regards the requested placement in special institutions and in residence-type social service homes in the community (an argument of article 16"a", paragraph 3 SAA).

According to article 16a, paragraph 3 SAA social services for adults placed under interdiction are provided as per the desire of the person and the opinion of his/her tutor or curator, as *in case of contradiction the desire of the person who needs a social service is overriding*. In the general case of article 5, paragraph 3 in relation to article 4, paragraph 2 PFA the declarations of will of the limited interdict are valid only if accompanied by the curator's assistance of curator. The request of the interdict for placement in special institutions and in residence-type social service homes in the community, however, is also valid in the cases where it is filed without any additional or substituting declaration of will by the part of the curator, or, respectively of the tutor. The required opinion of the tutor/the curator is additional evidence to be examined by the court without the latter being obliged to take into consideration. In this sense the opinion of the tutor under article 16"б", paragraph 2 SAA and of the curator under article 16"a", paragraph 3 SAA is not decisive for the validity of the request for placement made by the interdict and the lack of such a request may not be overcome by the opinion of the tutor/the curator.

The decision is made by the court but the proceedings could be initiated only if there is a desire declared by the full interdict. Such desire is legally relevant in the proceedings under article 16"б" SAA, regardless of the fact that article 5, paragraph 3 in relation to article 4, paragraph 1 PFA pronounces the full incapacity to act of the full interdict. The presence of a desire expressed in person by the part of the full interdict, however *does not predetermine the admission of the requested placement*. **The judgment of the court** will depend on the court's assessment as regards the need, adequacy and sequence of social services that could be provided to the particular interdict. The court is entrusted with the obligation to examine the will of the person placed under interdiction in the proceedings. It is precisely for that reason that the following documents must be attached to the request for placement: a report containing also an opinion as regards the opportunities for care for the person in a home environment; an individual opinion on persons' needs of support and the individual plan of support as the periods of updating and reconsideration of the assessment and the plan must be specified; information about the existing appropriate social services in the community and special institutions in the field and the vacancies (article 16"б", paragraph 3 SAA).

From the said provisions one can draw the conclusion that *the actual will of the interdict should be assessed in toto* with the remaining circumstances which are stipulated by the law and which have occurred in particular. However, the actual and not the presumable will of the interdict is an important component of the arguments and motives of the court as to whether to grant the placement in special institutions and in residence-type social service homes in the community or not. In any case the court must examine the will of the interdict and discuss it when substantiating its judgment.

It should be noted that the request for placement before the district court is not made by the person placed under interdiction him/herself but by Social Assistance Directorate on the basis of the person's desire expressed in writing and tutor's opinion. In this sense, no locus standi has been provided to the interdict in order to be able to initiate proceedings at court although the presence of a declared desire is a premise for that. Thus the desire of the full interdict becomes a necessary condition for the commencement of the legal proceedings for his/her placement in special institutions and in residence-type social service homes in the community (article 16"б", paragraph 2 SAA), however, it is not sufficient in order

that such proceedings can commence. The desire of the interdict is, however, in itself a ground for the commencement of administrative proceedings before the Social Assistance Directorate for temporary<sup>192</sup> placement in special institutions and in residence-type social service homes in the community (article 16"б", paragraph 4 SAA). Here one can find a reason for a different answer to the question of *whether the interdict may appeal independently and in person the judgment* of the court (under article 16"в", paragraph 8 SAA), respectively of the head of Social Assistance Directorate (under article 16"б", paragraph 6 SAA). If the initiation of the legal proceedings depends on the head of Social Assistance Directorate, then the initiation of the administrative proceedings for temporary placement is directly dependent on the interdicted person. If we assume, by principle, that the right to appeal should be granted to the person having initiated the proceedings then the interdict will be able to appeal the act of the head of Social Assistance Directorate (under article 16"б", paragraph 6 SAA) but not the judgment of the district court (under article 16"в", paragraph 8 SAA). I think that the new approach adopted by SAA of respecting and taking into consideration the will of the interdict requires that the latter should be able to appeal independently and in person not only the decision of the head of Social Assistance Directorate but also the judgment of the district court. Of course, considering the special nature of such proceedings, i.e. the fact that they are initiated at the request of the persons to whom the final judgment refers, the appeal will be, as a rule, conceivable in the cases of denied admission to placement. It is possible, however, that in the course of the very proceedings the interdict changes his/her desire as regards the placement, which should be a reason for the principled assumption of the possibility that (s)he would also appeal the judgment of the court granting the placement in special institutions and in residence-type social service homes in the community as requested by the head of Social Assistance Directorate.

As a **final conclusion** it can be pointed out that the changes to articles 16–16"в" SAA (SG, issue 8 of 29 January 2016) attach legal meaning to the desires (article 16"б", paragraph 2 and paragraph 4 SAA) and to the will (article 16"в", paragraph 2 SAA) of the full interdict, *without making the latter into a party having capacity to have procedural rights* in administrative proceedings (before the head of Social Assistance Directorate) and in legal proceedings (before the district court) seeking the admission of placement in special institutions and in residence-type social service homes in the community. And yet, considering the aim of the statutory amendments, i.e. respecting the actual will of the full interdict, we could justify the opportunity for the latter to appeal in persona both the act of the head of Social Assistance Directorate and the judgment of the court although this approach can be justified more easily with respect to the acts of the head of Social Assistance Directorate than with respect to court judgments.

#### 4. Allowing and respecting independent (autonomous) legal acts

##### 4.1. Grounds necessitating that the performance of independent legal acts by the interdicts should be allowed

**Limited interdiction** in practice makes the person placed under it fully dependent on the will of the appointed curator – (s)he must provide curator's assistance, without which the will of the person placed under limited interdiction is legally irrelevant. The legal effect of *limited interdiction under the Persons Act of 1907* was different: According to article 115 PsA "[t]he feeble-minded whose condition is not so disturbed as to be placed under full interdiction and the prodigal may be declared by the regional court incapable of appearing before the court, of contracting, of making loans, of receiving money, of releasing from responsibilities, of alienating and mortgaging their properties and of making any other act that goes beyond the limits of mere management without the assistance of a curator who is appointed by the court after the opinion of the family council or the council of relatives is heard."<sup>193</sup> It is notable that limited interdiction did not affect the interdict's ability to make an independent act of mere management of his/her property as well as to exercise of his/her non-property rights.

According to PFA in force the person placed under interdiction needs the assistance of his/her curator when making any act except for those for which the law has stipulated an explicit exception. (S)he does not have a juridical tool for influencing his/her curator whenever the latter does not exercise his/her curator's functions or when they *disagree as to the manner of exercising* of certain rights of the person placed under limited interdiction.<sup>194</sup> It is possible, by virtue of the reference contained in article 5, paragraph 3 PFA, to assume that the provision of article 124, paragraph 3 FC applies with respect to the interdict, according to which in case of disagreement between a parent and a child the latter may apply in person for assistance at the Social Assistance Directorate. If the child has turned fourteen years of age and if the disagreement

<sup>192</sup> Placement in special institutions of persons placed under interdiction made by the court is also temporary as it may not be for a period exceeding three years (article 16, paragraph 3 SAA).

<sup>193</sup> See **Maksimov, Hr.** Zakon za litsata. Razyasnen s praktikata na Varhovniya kasatsionen sad [Persons Act. Explained by the Case Practice of the Supreme Court of Cassation]. S., 1941, p. 148 [in the original the quoted text is reproduced in the spelling used before the 1945 orthographic reform – Translator's Note].

<sup>194</sup> Such an opportunity does not exist in the case of persons placed under full interdiction. See **Mental Disability Advocacy Center.** Guardianship and Human Rights in Bulgaria. Analysis of Law, Policy and Practice, S., 2007, p. 61, conclusion under indicator No. 25: "The law does not provide for a complaint mechanism to trigger review of a guardian's acts or omissions". See *ibid.* (p. 48) for the assumption that limited interdicts may appeal the acts of the tutorship and curatorship body as interested persons under article 161 FC as such a right does not exist for persons placed under full interdiction. For possibility of referral of the matter by the limited interdict to the court upon curator's refusal to provide assistance see **Planiol, Marcel.** Traité élémentaire de droit civil conforme au programme officiel des Facultés de droit, onzième édition, tome premier, Paris, 1928, pp. 216–217 [of Bulgarian translation quoted by the author. – Translator's Note].

is on essential matters, then the child may refer the dispute for settlement to the district court having jurisdiction over the child's present address c/o the directorate as the judgment may be appealed subject to the general procedure. The respective application of the said provision should provide the full interdict with an opportunity to independently request assistance from the Social Assistance Directorate and the limited interdict with an opportunity to approach the court for the settlement of the dispute that has arisen between him/her and his/her curator. However, the provision of article 124, paragraph 3 FC is to a great extent specialized in view of the peculiarities of the conflicts arising in the "parent – child" relationships and its application with respect to an interdicted person would face some specific difficulties stemming from the peculiarities in the condition of such persons. Despite that the respective application of article 124, paragraph 3 FC remains the only possibility to justify a specific capacity to have procedural rights [*protseusualna pravospobnost*] for initiating certain actions for protection before the Social Assistance Directorate.

## 4.2. Contracting civil marriage

The difficulties upon justification of the possibility of exerting control of the acts of the curator on the initiative (legally relevant) of the person placed under limited interdiction are offset to a certain extent by specific legislative provisions, which provide the person placed under limited interdiction with opportunities to act independently in certain areas *without the need of curator's assistance*. The examples most often cited are in the field of family law where the principle of personal performance of certain acts applies (article 5 FC, article 65, paragraph 1 FC), i.e. acts that can only be made in person because of their dependence on the personal motives of the person and because of the personal nature of a great part of their consequences. Thus the limited interdict may contract **civil marriage** without the need of curator's assistance.<sup>195</sup> This conclusion follows from the provisions of article 7, paragraph 1, item 2 FC, which stipulates only the full interdiction<sup>196</sup> as an impediment to the contract of marriage as well as from those of article 18, paragraph 2, hypothesis 3 FC, which stipulates *mandatory application of the statutory regime of community marital property* where the persons to be married are limited interdicts – this regime is believed to protect<sup>197</sup> to a greater extent the interests of the spouse placed under limited interdiction.<sup>198</sup> However, there would be an impediment to contract a marriage if the

<sup>195</sup> For the acceptance of the thesis that *de lege ferenda* marriage contracted by a full interdict should be considered valid "if the forensic mental expert's analysis ascertains that at the time when the marriage was contracted the mental state of the ill made it possible for him/her to express a valid consent", see **Rachev, M.** Nishtozhnost na braka i razvod pri psihichno bolni [Nullity of Marriage and Divorce in Mentally Ill]. Lovech, 1994, p. 10. This is an example of attaching legal meaning to the "lucid periods" not only in limited but also in full interdicts: "the lucid period is not an impediment to contracting marriage and therefore is not a ground for a marriage to be pronounced null and void". The author flatly states that "full interdiction is not a "clearly defined limit" and does not operate with very "clear situations" (p. 12), instead one must examine whether the specific psychic state of the person makes it possible for him/her to form a valid declaration of will.

<sup>196</sup> Placement of a person under full interdiction, however, is not *per se* a ground for termination of marriage. According to article 173, paragraph 2 FC the tutor of the full interdict or the curator of the limited interdict is the interdict's capable spouse.

<sup>197</sup> See **Tsankova, Ts.** Vaprosi na deesposobnostta [Questions concerning the capacity to act] In: Yubileen sbornik posveten na 80-godishninata na prof. d.yu.n. Vasil Mrachkov [A Collection on the 80th Anniversary of Prof. Vasil Mrachkov, Doctor of Juridical Science]. S., 2014, pp. 208, 213, where she poses the question of whether as far as the marriage emancipates the minor aged 14-18 who has contracted it the latter (and thus the limited interdict who has contracted marriage as well) should not be given an opportunity to independently enter into a marriage contract. The ultimate answer is negative because such an opportunity "will undermine the protective nature of the rule of article 6, paragraph 4 FC, and an abuse of right might not be ruled out". The marriage contract might be of much wider content compared to the disposition of immovable properties: it could include "property clauses affecting the present and the future property rights".

<sup>198</sup> For the "opportunity for a madman placed under full interdiction to contract marriage in a *lucid interval*" while the repealed article 22, item 2 PFA, in its redaction in Izv., issue 89/1953, was still in effect, see **Nenova, L.** Semeyno pravo. Kniga parva. Nova redaktsiya na prof. d-r Metodi Markov po noviya Semeen kodeks ot 2009 g. [Family Law. Book One. A New Redaction by Prof. Dr. Metodi Markov under the new Family Code of 2009]. S., 2009, p. 182. According to the repealed article 22, item 2 PFA in the redaction of Izv., issue 89 of 1953 "a person who suffers from mental or physical illness which prevents him or her from expressing actual consent to enter into marriage or which might expose the health of the other party of the offspring to danger may not enter into marriage". For a detailed analysis and criticism of the quoted text, which was into force from 6 November 1953 until FC of 1968 was passed (promulgated in SG, issue 23 of 22 March 1968, in force as from 22 May 1968), see in **Chavdarov, L.** Usloviya za vstavvane v brak [Conditions for contracting a marriage] In: *Vaprosi na semeyното pravo* [Questions of Family Law]. S., 1956, pp. 29–35. Arguments supporting the need of not allowing the possibility for a valid marriage to be contracted by a full interdict in a "lucid period" of his/her condition are adduced by Prof. Nenova stating that "the ability of marital coexistence requires a minimum of lasting mental equilibrium. Marriage with a feeble-minded or mentally ill person who is in so severe condition that necessitates his/her full interdiction can not be a healthy marriage and can not ensure an opportunity for normal marital relations". After the full interdiction was introduced as an impediment to marriage (this is accepted in FC of 1968, 1985 and in article 7, paragraph 1, item 2 of FC currently in force) it prevents the valid contracting of civil marriage "regardless of the possible changes to the condition of the person" (such marriage is voidable according to article 46, paragraph 1, item 1 FC). See also **Venedikov, P.** Komentar na Naredbata-zakon za braka [Commentary of the Marriage Ordinance-Act]. S., 1947, p. 21, where as if there is an inclination to afford the full interdict an opportunity

person formally placed under limited interdiction “suffers from mental illness or feeble-mindedness”, which are grounds for his/her placement under full interdiction, because this circumstance is a stand-alone reason for the inadmissibility of marriage (article 7, paragraph 1, item 2, hypothesis 2 FC).<sup>199</sup>

In contrast to the cases where the marriage is entered into by a minor aged 14-18 who has attained 16 years of age (article 6, paragraphs 2 and 3 FC), when marriage is contracted by a limited interdict it is not stipulated that *non-contentious legal proceedings* should be undergone, where the district judge, if there are important reasons, can make a judgment on the expediency of the designed marriage in order to protect the interest of the minor aged 14-18.

The Draft Natural Persons and Support Measures Bill (DNPSMB) stipulates a *special procedure of advising the persons* with intellectual disabilities, mental disorder and dementia before contracting civil marriage (article 10, paragraph 3 DNPSMB in its two redactions of 9 April 2015 and of 31 July 2015). DNPSMB stipulates amendments to the Family Code manifested in the insertion of a new paragraph 3 in article 7 FC, under which any person who, as a result of intellectual disability, mental disorder or dementia, experiences serious difficulties to understand the nature of his/her actions and of their consequences upon the performance of specific legal acts and desires to contract marriage must: a) receive in advance and in an appropriate manner information about the possible consequences of his/her desires; b) receive in an appropriate manner information about the legal essence and the consequences of civil marriage, including the relationships between the spouses, the termination of marriage and the parental rights and obligations; and c) get support, if necessary, by an interpreter upon the contract of marriage. The information under letters a) and b) must also be received by the partner with whom the marriage is to be contracted. Although DNPSMB does not provide for an amendment of article 46, paragraph 1, item 1 FC regulating the grounds for voidability of marriage, among which is also the failure to comply with the obstacles under article 7 FC, I think that the violation of the proposed new paragraph 3 FC should not reflect on the validity of marriage – this would lead to aggravation of the legal regime of limited interdiction currently in effect, which lacks any special requirements for the limited interdicts to contract civil marriage. The measure under article 10, paragraph 3 DNPSMB should be regulated precisely as a measure of assistance upon the formation of the will of the person with disabilities as, however, it should not reflect on the validity of the will expressed by such person to contract marriage (such is the effect of the remaining obligations for provision of appropriate consult under article 10, paragraphs 1 and 4 DNPSMB). Article 10 DNPSMB stipulates that the exercise of personal rights of the persons with disabilities is made independently (article 10, paragraph 1 DNPSMB), as all support measures upon the exercise of these rights are invalid (article 10, paragraph 2 DNPSMB). By leaving aside the inaccuracy of the expression because in my opinion the provision of appropriate consulting is a kind of support measure (a measure of assistance to be precise), the draft bill distinguishes between the personal rights in view of their significance by stipulating “independent exercise” for them. If DNPSMB wants to retain that requirement for the exercise of personal rights it should regulate the appropriate consulting precisely as a measure of assistance, which should not reflect on the validity of the expressed will, [or] in the case under article 10, paragraph 3 DNPSMB – on the validity of marriage.

### 4.3. Child Acknowledgment

As personal assessment and personal motives are also the leading ones when an acknowledgment is made as “for the biological origin there is no criterion of “age” or “capacity to act”, the legal doctrine has maintained the opinion that limited interdicts may also carry out acknowledgment in person, without the need of curator’s assistance.<sup>200</sup> The ability of limited

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to contract marriage in the “lucid periods” of his/her condition: “There are mentally ill persons who, although they are so severely ill that they must be placed under interdiction, might express a reasonable will in some respects or in some periods of time. A madman who suffers from a severe mania might comprehend the meaning of marriage”. The author points out that “inefficiency” of a marriage where the husband is severely ill rather than inability is the reason for its inadmissibility. “The essential consideration is that marriage with a mentally ill, who is so deranged that (s)he must be placed under interdiction is not a healthy marriage and does not provide an opportunity for normal marital relationships.” For older redactions of the ban to marriage for persons suffering from a disease that prevents them from fulfilling their marital duties, see **Kiranov, P., M. Genovski**. Brak i brakorazvod po Ekzarhiyskiya ustav i drugi nashi zakonopredlozheniya – komentar [Marriage and Divorce according to the Exarchate Statutes, a Commentary]. S., 1928, p. 60: “persons who are unable to understand or cannot apply the sanctity of marriage, whether through their own fault or by reason of natural or other accidents, should not contract marriage”.

<sup>199</sup> In this sense see **Mateeva, E.** Semeyno pravo na Republika Balgaria [Family Law of the Republic of Bulgaria]. S., 2010, p. 85.

<sup>200</sup> See **Tsankova, Ts.** Vaprosi na deesposobnostta [Questions concerning the capacity to act] In: Yubileen sbornik posveten na 80-godishninata na prof. d.yu.n. Vasil Mrachkov [A Collection on the 80th Anniversary of Prof. Vasil Mrachkov, Doctor of Juridical Science]. S., 2014, p. 216, as well as **Cholakova, A.** Deesposobnost za izvarshvane na pripoznavane [Capacity to Act for Child Acknowledgment] In: *Savremenna pravo* [Contemporary Law], 2015, No. 1, pp. 50–52. For an opportunity of making an acknowledgement also to the benefit of full interdicts but under the effect of article 35, sentence 1 of the repealed FC (1985) in its version from SG, issue 63 of 15 July 2003., see **Petrova, M. P.** Deesposobnostta pri pripoznavaneto [Capacity to Act and Child Acknowledgment] In: Nauka i sotsialna praktika [Science and Social Practice]. Scientific conference, Legal Sciences Section, 28 October 2005. Union of Scientists, Varna and Chernorizets Hrabar Free University of Varna, Varna. 2006, p. 81. The same author, under FC of 2009 currently in force, examines the problems of minor parents when establishing the origin of their children (including their incapacity to make an acknowledgment) In: **Petrova, M. P.** Za pravata na maloletnite roditeli pri ustanovyavane i osporvane na proizhod [Of the Rights of Minor Parents in Establishing and Contesting Filiation]. In: Nauchni trudive na Instituta za darzhavata i pravoto [Scientific Works of the Institute of State and Law]. Bulgarian Academy of Sciences. Institute of State and Law. Volume VII. S. 2012, pp.



interdicts to make acknowledgment is also associated with their *special capacity to have procedural rights* [protseualna pravospobnost] under marriage claims.<sup>201</sup> According to article 319 of CPC minors aged 14-18 and the spouses under limited interdiction may lodge marriage claims on their own and be responsible under such claims. Marriage claims are the claims for divorce, for voiding the marriage and for ascertainment of the existence or non-existence of marriage between the parties (article 318 of CPC). The special capacity to have procedural rights [protseualna pravospobnost] stipulated in article 319 of CPC applies equally only for the spouses and could be viewed as a partial emancipation (in procedural law) of a kind of the persons placed under limited interdiction, which occurs upon the conclusion of civil marriage. However, it is of the nature of exception and could hardly be applied by analogy for the acknowledgment by limited interdicts who have not contracted marriage.<sup>202</sup>

The arguments for allowing the opportunity for limited interdicts to make independent acknowledgment should be looked for elsewhere. On the one hand, such argument is *the significance of acknowledgment as a method of ascertainment of the origin of a child* – article 7, item 1 of the Convention on the Rights of the Child proclaims the right of the child to know his or her biological parents.<sup>203</sup> Acknowledgment is becoming a method that is used more and more for establishment of origin in contemporary societies where children are born predominantly without a civil marriage between their parents.<sup>204</sup> The restriction of the opportunity of the limited interdicts to use such method could hamper the timely establishment of the origin of a child which could harm his/her interests. On the other hand, if the opportunity of legal recognition of the existing biological origin by means of an out-of-court and, as a rule, stimulated method such as acknowledgment is taken away, this could also be considered *a violation of the Convention on the Rights of Persons with Disabilities*, which requires that these persons should not be deprived of their capacity to act – a principle that has quite intense sounding in the area of family relations. The interests of these persons should be protected by stipulating mandatory consultation before making the acknowledgment.

De lege ferenda one could think of the express recognition of the ability of limited interdicts to make acknowledgment by ensuring protection of their interests, for example by stipulating non-contentious legal proceedings analogous to the proceedings preceding the contracting of marriage by persons who have not yet attained majority. The stipulation of some kind of *non-contentious legal proceedings* analogous to the proceedings under article 6, paragraphs 2 and 3 FC to be held before the acknowledgment is made<sup>205</sup> should relate only to the examination of the person's ability to understand the consequences of the act of acknowledgement, without examining the actual existence of biological origin between the limited interdict and the child being acknowledged by him. Otherwise, acknowledgment would lose its nature of out-of-court means of establishment of origin and would resemble the legal proceedings further to a claim seeking a declaratory judgment for positive outcome of origin. It is precisely because what is decisive in acknowledgment is to establish origin and not to take parental care, acknowledgment should not, in my opinion, lead automatically<sup>206</sup> and in all

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165–168. For the possibility of a limited interdict making an acknowledgment without the need of curator's assistance, see **Kozhuharov, Al.** Pripoznavane i isk za bashtinstvo [Child Acknowledgment and Paternity Claim] In: *Arhiv za pravni nauki* [Archive for Legal Sciences], 1942, II, 2–3, pp. 15–16. The argument supporting this conclusion states that the acknowledgment is a “purely personal family law effect” being “an admission” in its substance or “refusal to object that another has cohabited with the woman during the period of conception” and not a kind of transaction under the law of contracts and therefore the general requirement for a capacity to act is not applied for its validity. Other criteria are used for its validity – the person must have attained certain age or the person must have “reason” at the time when the acknowledgment is made. The ability of the acknowledging person to understand his acts is a condition for the validity of acknowledgment (p. 23). It is about a factual assessment in each particular case as it might be positive not only in persons placed under limited interdiction but also in minors aged 14-18.

<sup>201</sup> See **Chavdarov, L.** Proizhod [Origin] In: *Vaprosi na semeynoto pravo* [Questions of Family Law]. S., 1956, p. 214, **Konstantinov, D.** Poizhodat po balgarskoto semeyno pravo [Origin according to Bulgarian family law]. S., 1973, p. 142, who compares the capacity to act of the limited interdict to make an acknowledgment with the capacity to be held criminally responsible: “[t]he adults must understand what they are doing”, i.e. the acknowledgment must have been made in a “lucid period” of the disease of the limited interdict. See also **Tsankova, Ts., M. Markov, A. Staneva, V. Todorova** Komentar na noviya Semeen kodeks [Commentary of the new Family Code]. S., 2009, p. 255. A special capacity to have procedural rights [protseualna pravospobnost] is also recognized in article 8, item 1, hypothesis 2 of Protection from Domestic Violence Act according to which the person placed under limited interdiction may file a petition for opening proceedings for a protection order.

<sup>202</sup> In this sense see **Mateeva, E.** Semeyno pravo na Republika Bgaria [Family Law of the Republic of Bulgaria]. S., 2010, p. 352. The out-of-court nature of acknowledgment has been pointed out as a cause for that as the consequence of the acknowledgment by a limited interdict without curator's assistance is the voidability of acknowledgment (an argument under article 67 FC).

<sup>203</sup> For the note that acknowledgment is an act “which by its ethical and legal basis is a performance of a moral duty”, see **Chavdarov, L.** Proizhod [Origin] In: *Vaprosi na semeynoto pravo* [Questions of Family Law]. S., 1956, p. 214.

<sup>204</sup> For the existing statistical data according to which almost 60 % of all born-alive infants in the Republic of Bulgaria in were born out of wedlock, see **Cholakova, A.** Deesposobnost za izvarshvane na pripoznavane [Capacity to Act for Child Acknowledgment] In: *Savremenno pravo* [Contemporary Law], 2015, No. 1, p. 45.

<sup>205</sup> A proposal for such proceedings, although it is not expressly formulated, can be found in **Cholakova, A.** Deesposobnost za izvarshvane na pripoznavane [Capacity to Act for Child Acknowledgment] In: *Savremenno pravo* [Contemporary Law], 2015, No. 1, p. 50.

<sup>206</sup> As is the case with the so-called “tacit emancipation”. The emancipation under article 6, paragraph 4 FC is also a “tacit”

cases to the emancipation of the limited interdict<sup>207</sup> (such would be the effect of contracting a marriage for the minor aged 14-18 – article 6, paragraph 4 FC). The revocation of limited interdiction should be done as per the procedure stipulated in the law when the grounds for its imposition are dropped. Procedures could be stipulated *de lege ferenda* for partial emancipation (*ad hoc* emancipation) of the persons placed under interdiction for the performance of specific legal acts desired by them or for their participation in specific proceedings. Such a procedure could commence on the initiative of these persons (they must have independent capacity to have procedural rights [*protsesualna pravosposobnost*] in order to be capable of making such requests) before the court and the latter will examine their ability to make the decisions for which they have requested to be emancipated. In such proceedings seeking emancipation the fundamental principle will remain one's participation in person and the formation of court's opinion as a result of court's direct interaction with the petitioner. In its judgment the court should be able to determine that the emancipation can occur only if certain conditions are fulfilled (for example mandatory consulting, waiting for a certain period of time before the transaction is made, etc.) or for a certain period (temporary emancipation, for as long as certain condition of the person lasts). Such a legislative solution will make it possible that the actual abilities of the person can be taken into consideration and that the incapacity to act can be "localized" only in the areas where it is really needed for the protection of the interdict.

An experiment could also be made with the approach adopted in article 141, paragraph 2 HA, which states that genetic research on persons with mental disorders and persons placed under interdiction are made after the permission of the commission of medical ethics at the respective health facility.<sup>208</sup> Of course, the provision of article 141, paragraph 2 HA is stipulated in view of actions to be taken in medical institutions (and therefore a reference is made to the commission of medical ethics at the respective health facility) but this could be generalized and used *de lege ferenda* as a procedure (means) of assistance and control when certain more important and more specific decisions are being made by the person with mental disorders – such as for example child acknowledgement, commencement of certain professional activity, etc. The requirement of the presence of a *positive opinion of the ethical commission on the matters pertaining to the capacity to act* could take into consideration the specific peculiarities of each individual case and allow for the discussion of the possible solutions in an interdisciplinary and meta-juridical aspect while taking into account the numerous ethical dilemmas that occur.

If the acknowledgment is false the limited interdict will have the opportunity to *void it due to error or fraud* (article 67 FC). Because of the special meaning of the capacity to act in civil law being the reason for the peremptory nature of its regulation, the said opportunity for acknowledgment in favor of the persons under limited interdiction must be expressly stipulated in the law and should not be deduced by way of interpretation. The obligation of Bulgarian state to explicitly introduce such a rule, as it has been done with the possibility for contracting civil marriage by limited interdicts<sup>209</sup>, could be deduced from two international acts, to which the Republic of Bulgaria is a party: the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

#### 4.4. Adoption

The situation is different in the case of **adoption**. According to article 78 FC any person capable of acting who has not been deprived of parental rights may adopt<sup>210</sup>. Considering the special intention of adoption, i.e. that a child be raised up while his/her best interest is taken into consideration, the law stipulates a requirement not only with respect to adopter's capacity to act but also to his/her ability to be a parent – on the one hand, (s)he should not have been deprived of parental rights (article 78 FC), on the other hand – his/her "*fitness to adopt a child*" is examined by the Social Assistance

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one because in order to occur no formal act of its announcement is necessary. See **Planiol, Marcel**. *Traité élémentaire de droit civil conforme au programme officiel des Facultés de droit, onzième édition, tome premier*, Paris, 1928 [pp. 161–162 of the Bulgarian translation quoted by the author. – Translator's Note].

<sup>207</sup> Such a possibility is proposed by **Cholakova, A.** *Deesposobnost za izvarshvane na pripoznavane* [Capacity to Act for Child Acknowledgment] In: *Savremenno pravo* [Contemporary Law], 2015, No. 1, p. 49.

<sup>208</sup> The permission of another ethical commission, the Ethical Commission of Transplantation, is required for the cases of taking self-regenerating tissue from persons who have not attained the age of 18 years (article 27, paragraph 1, item 4 TOTCA). Under the effect of article 24, paragraph 6 TOTCA, which bans taking of organs, tissue and cells from persons placed under interdiction, no self-regenerating tissue under article 27, paragraph 1 TOTCA may be taken from such persons as well. In case of a possible liberalization of the regime and if an opportunity is allowed for taking self-regenerating tissue or cells from persons placed under interdiction, the requirement of article 27, paragraph 1, item 4 TOTCA could also be applied with respect to such persons. Such permission is supported by the provision of article 5, paragraph 3 PFA, which refers to the regime for minors and minors aged 14-18 for the regime of persons placed under interdiction (regardless of the fact that article 27, paragraph 1 TOTCA adopts age as its criterion).

<sup>209</sup> See **Tsankova, Ts., Markov, M., A. Staneva, V. Todorova, V. Petrov, E. Balevska, B. Decheva, V. Mircheva** *Semeen kodeks. Prilozhen komentar. Problemi na pravoprilaganeto. Analiz na sadebnata praktika. Normativen tekst* [Family Code. Comments on application. Problems of the application of the law. Analysis of court practice. Statutory text]. S., 2015, p. 43.

<sup>210</sup> The violation of that requirement leads to voidability of adoption (article 106, paragraph 1, item 1, hypothesis 2 FC). The adopter, the adopted person and each of the parents of the adopted person until the adopted attains majority (article 106, paragraph 4 FC) as well as the procurator acting "to the benefit of the general public" (article 106, paragraph 6 FC) may request that the adoption be voided.

Directorate (article 86, paragraph 2 FC).<sup>211</sup> In adoption there is no actual biological connection between the adopter and the adopted person, which exists between the person who acknowledges and the person being acknowledged. In this sense it has a constitutive rather than a declarative effect. Thus the arguments which grant the limited interdict the right to make an acknowledgment and thus juridically attach legal meaning to the extant biological origin between him/her and the person being acknowledged, are inapplicable in the case of adoption. This is the reason why the legal doctrine accepts that the interdict may not adopt, regardless of the type of interdiction.<sup>212</sup>

This conclusion is also confirmed by the significance attached to interdiction by the provisions governing adoption. According to article 89, paragraph 4 FC the consents of the parents to adoptions and of the spouses of the adopter and person being adopted – consents, which, as a rule, are necessary in order to effect the adoption, are not required if such person are minors or persons placed under interdiction. Where these persons are placed under limited interdiction, they express *an opinion on adoption* subject to the procedure stipulated in article 90, paragraph 2, item 2 and item 3 FC.<sup>213</sup> When they are placed under full interdiction they neither give consent, not express an opinion – in contrast to minor parents and minor spouses who do express an opinion (this is a case where the persons placed under full interdiction have less rights than minors). The prohibition against the appointment of incapable persons as tutors and curators has been stated as an argument against the possibility of adoption by the limited interdicts<sup>214</sup>. The idea is that the tutor has functions analogous to the ones of the parents and as far as incapable persons may not be appointed tutors, they may not be adopters as well. In the Bulgarian legislation in force the said ban is contained in article 158 FC according to which the incapable persons, the persons deprived of parental rights and the persons sentenced for intentional crimes may not be members of a tutorship council, curators and deputy curators. The text of the law, however, could also be used as an argument to the contrary thesis: the limited interdict is not “incapable of acting” but one “with limited capacity to act” and when this distinction is made (s)he does not fall among the persons who may not be tutors and curators according to article 158 FC.

Despite the principled objections by the part of the legal doctrine the Supreme Court has accepted in its practice that the limited interdicts may be adopters. The argument supporting this thesis is associated with the opportunity allowed by the law for such persons to conclude civil marriage on their own, which *enables them to be fully-fledged parents of their children* (of course they could also be such by virtue of an acknowledgment made by them outside and independently of marriage). In its Judgment No. 58 of 21 February 1989 delivered under civil case No. 887/1988, II Civil Division SC accepted that the law does not “establish a prohibition for a person placed under limited interdiction to contract marriage. From this it follows that such person can set up a family and has children. In the section of the Family Code as regards the relationships between parents and children there are no restrictions of the rights and obligations of parents who are minors aged 14-18 as well as of persons placed under limited interdiction. Any restrictions could only be created by judgment of the district court if the conditions of article 74 and article 75 FC (provisions of the repealed FC of 1985, which provide for a possibility of taking away or restricting the parental rights – author’s note) are present. Therefore, there is no restriction for the limited interdict to take care of his/her children and to exercise parental rights with respect to them. If he can take care of children of his own there is no impediment to being able to adopt a child and take care of it.”<sup>215</sup> Although the conclusions were made while the repealed FC of 1985 was still in force they are also applicable now, under the FC of 2009 currently in force, in which the opportunity for the limited interdicts to contract a valid civil marriage on their own has been preserved and no restrictions have been stipulated for the parental power that arises for them. The

<sup>211</sup> The considerations that the legislator should deny the person placed under interdiction the opportunity to be adoptive family are the same (article 32, item 2 of the Child Protection Act). See **Tsankova, Ts.** Vaprosi na deesposobnostta [Questions concerning the capacity to act] In: Yubileen sbornik posveten na 80-godishnina na prof. d.yu.n. Vasil Mrachkov [A Collection on the 80th Anniversary of Prof. Vasil Mrachkov, Doctor of Juridical Science]. S., 2014, p. 218.

<sup>212</sup> See **Nenova, L.** Semeyno pravo. Kniga parva. Nova redaktsiya na prof. d-r Metodi Markov po noviia Semeen kodeks ot 2009 g. [Family Law. Book One. A New Redaction by Prof. Dr. Metodi Markov under the new Family Code of 2009]. S., 2009, pp. 154–155: “Such persons may not express a valid will for the adoption itself. They are also unable to carry out meaningfully parental functions. Care for others may not be entrusted to them provided that they are unable to care for their own affairs. Therefore the judgments of SC accepting that the limited interdict may adopt are utterly perplexing (Judgment No. 58–89–II, 136–90–5c-b)”. The assessment concerning the capacity to act of the person being adopted should be made not only as at the time of submission of the petition for adoption but also as at the time of delivery of the court judgment of adoption. See also **Tsankova, Ts., M. Markov, A. Staneva, V. Todorova** Komentar na noviia Semeen kodeks [Commentary of the new Family Code]. S., 2009, p. 301, **Mateeva, E.** Semeyno pravo na Republika Balgaria [Family Law of the Republic of Bulgaria]. S., 2010, p. 377. The same conclusions *de lege lata* **Tsankova, Ts.** Mozhe li ogranicheniyat zapreten da osinovyava? [May the Limited Interdict Adopt?] In: Smeyno pravo [Family Law], 1991, No. 9, p. 59, where, however, it is stated that the question may be posed *de lege ferenda*.

<sup>213</sup> For the use of that argument against the assumption of the opportunity of adoption by a limited interdict, see **Tsankova, Ts.** Mozhe li ogranicheniyat zapreten da osinovyava? [May the Limited Interdict Adopt?] In: *Smeyno pravo* [Family Law], 1991, No. 9, p. 54, where it is stated that it is ridiculous to accept that instead of consent the adopter-limited interdict must give an opinion as well as that the limited interdict may adopt with the curator’s assistance of his/her curator, which would not “fulfill the intended use and substance of adoption.”

<sup>214</sup> See **Tsankova, Ts.** Mozhe li ogranicheniyat zapreten da osinovyava? [May the Limited Interdict Adopt?] In: *Smeyno pravo* [Family Law], 1991, No. 9, p. 58.

<sup>215</sup> For a detailed analysis and criticism of the judgment, see **Tsankova, Ts.** Mozhe li ogranicheniyat zapreten da osinovyava? [May the Limited Interdict Adopt?] In: *Smeyno pravo* [Family Law], 1991, No. 9, pp. 53–60.

placement of one parent under full interdiction does not automatically lead to the deprivation of the interdict of parental rights, nor is the interdiction per se a reason for taking away his/her parental rights. According to article 131, paragraph 2 FC the parental rights may be restricted or withdrawn where due to a prolonged physical or mental illness or for other objective reasons the parent is unable to exercise his/her parental rights. The provision requires a specific and substantive assessment, which does not depend on the formal placement of the parent under interdiction.

#### 4.5. Making a testament

Another interesting case, where certain acts are permitted to be made by persons placed under interdiction in person and on their own, could be found in the provision of article 13 SA. According to article 13 SA “any person who has attained 18 years of age and who is not placed under full interdiction by reason of feeble-mindedness and is capable of acting rationally” may dispose of his/her property for after his/her death by means of a **testament**. Two conclusions could be drawn from the text of article 13 SA. On the one hand, it allows every person having attained<sup>216</sup> 18 years of age (here what is decisive is precisely the age and not majority – therefore the emancipation of persons under age who enter into a marriage does not grant them a testamentary capacity) to dispose of his/her property by testament – even if placed under limited interdiction. *The limited interdict* may bequeath entirely on his/her own, without the need of any curator’s assistance whatsoever. The inadmissibility of curator’s assistance again stems from the personal motives and the nature of testamentary disposition and also from the requirement of its voluntariness: principles that have resulted to the prohibition under article 15 SA, according to which two or more persons may not bequeath by the same act either to the benefit of each other, or to the benefit of third parties. If the limited interdict has made a testament at time when (s)he “was incapable of bequeathing” (article 43, paragraph 1, letter “a” SA), i.e. at a time when (s)he was not “capable of acting reasonably” (article 13 SA), the testamentary disposition will be voidable.

On the other hand, article 13 SA explicitly states the reason for the placement under full interdiction, which is an impediment to making a testament. *A person* having attained 18 years who is *placed under full interdiction* by reason of feeble-mindedness may not bequeath his/her property. *Per argumentum a contrario* a person having attained 18 years who is placed under full interdiction by reason of mental disease may bequeath.<sup>217</sup> As far as the law allows for the possibility that the limited interdicts and the full interdicts [interdicted] by reason of “mental illness” may carry out testamentary dispositions they should be acknowledged the possibility to forgive unworthiness by an act with notarized contents or by testament (article 4, paragraph 1 SA).

It is curious that the text of article 13 SA (in force as from 29 April 1949), passed before PFA (in force as from 10 September 1949) and in force for more than 65 years, allows us (today<sup>218</sup>) to differentiate what has remained unnoticed in the legal regime of interdiction – the essential difference in the condition of the persons with intellectual disabilities (“feeble-mindedness” according to the terminology of article 5, paragraph 1 PFA) and the condition of the persons with mental disorder (“mental illness” according to the terminology of article 5, paragraph 1 PFA). In contrast to the persons with intellectual disabilities, whose difficulties are permanent and retain their nature continuously over time but they could be overcome by means of appropriate measures, the persons with mental disorders are characterized by alternating periods of severity of disease (“dark periods”), which robs them from or severely restricts their capacity to understand and control their conduct and periods of completely normal mental state in which they can take care of their own affairs quite easily (“lucid periods”). The said difference has crucial impact on the persons’ ability to take care of their own affairs (according to the terminology of article 5, paragraph 1 PFA), i.e. to understand the nature of their decisions and their consequences when making certain legal acts (according to the terminology of article 9, paragraph 1 DNPSMB<sup>219</sup>). The persons with intellectual disabilities

<sup>216</sup> The decisive moment is the time when the testamentary disposition is made and not the time of occurrence of testator’s death. For the existing dispute as regards whether the testator must have been capable of acting not only as at the time of making the testamentary disposition but also as at the time of occurrence of his/her death in order for the testament to be valid see **Maksimov, Hr.** Zakon za litsata. Razyasnen s praktikata na Varhovniya kasatsionen sad [Persons Act. Explained by the Case Practice of the Supreme Court of Cassation]. S., 1941, p. 133, where a judgment of the French Court of Cassation dated 19 October 1937 is quoted.

<sup>217</sup> In this sense see **Rozanis, S.** Nedeystvitelnost na sdedlkite [Invalidity of Transactions]. S., 2005, p. 89.

<sup>218</sup> IA was passed while the Persons Act of 1907 (PsA) (repealed) was in effect, which stipulated interdiction only by reason of feeble-mindedness, without using the term “mental illness”. According to article 100 PsA “The person who has attained majority and the emancipated minor [*nepulnoleten*] who are in an habitual state of feeble-mindedness, which makes them incapable of caring for their interests shall be interdicted.” [the quoted text is in the spelling used before the 1945 Bulgarian orthographic reform – Translator’s Note] In this sense it is stated that “by the word “feeble-minded” the law means all forms of mental deficiency [*psihichesko nerazvitiie*] or mental illness. This means that idiots, mad people, in the various forms known to psychiatry, etc. shall fall within this definition.” See **Apostolov, Iv.** Osnovni nachala na grazhdanskoto pravo. Lektsii na prof. Iv. Apostolov [Fundamental Principles of Civil Law. Lectures delivered by Prof. Iv. Apostolov]. S., 1946, pp. 45–46. In this sense the historic interpretation leads to a conclusion that the possibility of making a will is denied to all full interdicts. For the distinction between the contents of the terms “feeble-mindedness” within the meaning of article 100 PsA (repealed), which is a reason for placing a person under interdiction, and “idiocy” within the meaning of article 187, item 7 of the Exarchal Statute, which is a reason for dissolution of marriage, see **Maksimov, Hr.** Zakon za litsata. Razyasnen s praktikata na Varhovniya kasatsionen sad [Persons Act. Explained by the Case Practice of the Supreme Court of Cassation]. S., 1941, pp. 117–118. It quotes Judgment No. 248/1926 of I Civil Division under which “idiocy” is only one of the (most severe) cases of “feeble-mindedness”.

<sup>219</sup> Support measures under DNPSMB are provided to every person in need of support, i.e. an adult who as a result of

are characterized by difficulties, which resemble the ones experienced by minors and minors aged 14-18. Therefore the reference to article 5, paragraph 3 PFA, which subjugates the legal regime of limited interdicts to the one of minors aged 14-18, and the legal regime of full interdicts to the one of minors, is adequate for them to a considerably greater extent. The persons with mental disorders are, as a rule, persons who do not have problems in their intellectual development but due to certain disease they fall into conditions in which they are unable to take care of their own affairs.<sup>220</sup> These conditions are not, however, permanent<sup>221</sup> but are characterized by a diverse and often unforeseeable dynamics. The regime of minors and minors aged 14-18 is not appropriate for such persons because it cannot take into consideration the “lucid periods” of their diseases. If for the persons with intellectual disabilities the taking away/restriction of the capacity to act reflects the permanent nature of their inability to take care of their own affairs, for the persons with mental disorders such taking away/restriction of the capacity to act deprives them of the capacity to act in the periods when they are able to understand and control their conduct. In this sense the more appropriate regime for the first group of persons is a “static” one that take away/restricts their capacity to act to a permanent incapacity by providing an opportunity (including at the request of the person him/herself) for the elimination of such incapacity when the person overcomes his/her intellectual disabilities. The appropriate regime for the second group of persons is “dynamic” which takes into consideration the exercise of their capacity to act as per their specific condition (which must be examined and taken into consideration). The first regime could be the regime of placement under interdiction (taking away/restriction of the capacity to act in principle) but the second regime should be one providing the person with a system of support measures (recognition of the capacity to act in principle). The first regime could be named a “dark theory” of the incapacity to act of the persons with intellectual disabilities, and the second one named a “lucid theory” of the capacity to act of the persons with mental disorders.

#### 4.6. Acceptance and refusal of inheritance

The recognition of testamentary capacity to the limited interdicts (an argument under article 13 SA), in my opinion, contains a ground to assume the possibility that they can carry out on their own<sup>222</sup> **acceptance** and **refusal of inheritance**, although they can do so after the permission of the district court. In this sense *de lege ferenda* the acceptance and refusal of inheritance should be included among the actions under article 130, paragraph 3 FC, for whose performance a permission must be obtained from the court although their performance by the interdict does not depend on the provision of curator’s assistance. As regards the *acceptance of inheritance*, it should be pointed out that the provision of article 61, paragraph 2 SA requires the incapable persons to accept the inheritance only as per the inventory. The limited interdicts, however, are not incapable of acting but ones with limited capacity to act, and therefore go beyond the scope of the rule if the text is read literally. The legal doctrine, however, is consistent in the assertion that the limited interdicts can accept the inheritance only as per inventory.<sup>223</sup> The requirement for making an inventory of the estate accepted by the limited interdict is a measure of protection of his/her interests, which, together with the requirement of obtaining a permission from the district court, could be a reason for elimination of the requirement for curator’s assistance. When granting permission the court should not proceed only from the best interests of the limited interdict but must also examine the autonomy of interdict’s decision. i.e. the court must assess whether the latter understands the nature and the meaning of the act being made. The actual conscious will of the interdict should be decisive and not his/her interests (as is the case for example with the assessment under article 6, paragraph 4 FC). The opposite option would mean that everyone who consciously acts contrary to his/her interests will need such a permission granted by the court and this is not a reason for their placement under interdiction. Where in case of children the leading [criterion] is their interest – it must be attained even despite their will, in the case of adult interdict their autonomy should be the leading [criterion] – it should be ensured even if this is done despite their interests.

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intellectual disability, mental disorder or dementia experiences serious difficulties in the process of making decisions on specific legal acts (article 9, paragraph 1 DNPSMB). The terms “intellectual disability” and “dementia” replace “feeble-mindedness” (under article 5 PFA), the term “mental disorder” replaces “mental illness” (under article 5 PFA), and the phrase “serious difficulties in decision-making” replaces “inability to take care of their affairs” (under article 5 PFA). The quotes are as per the redaction of DNPSMB of 31 July 2015.

<sup>220</sup> For the designation of the incapacity to act of the interdicts as “psychopathological incapacity to act” in contrast to the incapacity to act of minors, which is called “age (physiological) incapacity to act”, see **Rachev, I.** Deesposobnost i psihichni zabolyvaniya [Capacity to Act and Mental Diseases]. Lovech, 1993, p. 7.

<sup>221</sup> Therefore the legal approach depriving such persons of capacity to act in all areas of their lives is cited as inadequate. See **Gooding, P.** Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law, Psychiatry, Psychology and Law, 2013, Vol. 20, No. 3, pp. 431–451.

<sup>222</sup> In the opposite sense see **Planiol, Marcel.** Traité élémentaire de droit civil conforme au programme officiel des Facultés de droit, onzième édition, tome premier, Paris, 1928, p. 220 [of Bulgarian translation quoted by the author. – Translator’s Note], , who accepts that the refusal of inheritance is a kind of disposition and the acceptance thereof is an encumbering act by which all obligations of the deceased are assumed and therefore both should be carried out with curator’s assistance.

<sup>223</sup> For the need that the person with limited capacity to act should accept the inheritance as per the inventory, see also **Tsonov, Al.** Komentar na Zakona za nasledstvoto [Commentary of the Succession Act]. S., 1993, p. 156, **Mateeva, E.** Semeyno pravo na Republika Bgaria [Family Law of the Republic of Bulgaria]. S., 2010, p. 451, as well as **Petrov, V.** Dopustim li e otkaz ot nasledstvo ot nenavarshilo palnoletie litse [Is The Refusal of Inheritance by a Minor aged 0-14 Admissible?] In: Stavru, St., V. Petrov. Diskusii v balgarskoto nasledstveno pravo. Kniga parva [Discussions in Bulgarian Succession Law. Book One]. S., 2013, pp. 358–359.

The leading assertion in Bulgarian legal doctrine denies the limited interdicts the opportunity to make a *refusal of inheritance* because it is a waiver of rights.<sup>224</sup> The reason is the provision of article 130, paragraph 4, sentence 1 FC, according to which a donation, a waiver of rights, grant of loan and securing another's obligations by a child who has not yet attained majority are null. The said ban is also applicable with respect to the limited interdicts by virtue of the reference contained in article 5, paragraph 3 PFA: the said actions are also null if made by interdicted persons.

In the contemporary doctrine of succession law it is opined that minors aged 14-18 as ones of limited incapacity to act may carry out a refusal of inheritance *with curator's assistance and with the permission of the district court*, as the possibility under article 51, paragraph 2 SA (tacit refusal if the heir with limited incapacity to act does not express an opinion of whether (s)he accepts or refuses the inheritance within the term extended to him/her by the court)<sup>225</sup> is also applicable with respect to them. The reason stated for such conclusion is that the refusal of inheritance is not a waiver of a subjective right and it does not fall within the scope of application of article 130, paragraph 4 FC. A proposal has been made *de lege ferenda* that the refusal of inheritance should be included in the hypothesis under article 130, paragraph 3 FC, which requires that a permission should be obtained from the district court so that the minor aged 14-18 can perform the actions specified therein.

In my opinion the modern legal regulation, which respects the rights of the persons with disabilities, should take into consideration their peculiarity compared to the position of minors aged 14-18. In contrast to minors aged 14-18 the limited interdicts are not deprived of experience but suffer from a disease, which in some moments robs them of the ability to understand the nature and the consequences of their acts. The legal regime applicable for them should not be the one stipulated by the law for minors aged 14-18. In this sense the reference to article 5, paragraph 3 PFA, in the part concerning the limited interdicts, does not take into account the specific nature of the reasons having necessitated the placement of a person under limited interdiction, nor does it take into account the aims pursued by the limited interdiction.<sup>226</sup> The legal regulation must take into account the limited interdicts' ability to understand their actions – in the so-called "lucid periods" or "lucid intervals" of their condition. It should recognize the legal acts *made* in these "lucid periods" by the limited interdict *on his/her own* as valid ones if they are entirely dependent on the personal judgment of the person. Such actions for which entirely personal motives could exist are the refusal, and the acceptance of the inheritance, respectively. The decision of whether to accept or refuse an opened succession is governed not only by purely economic criteria (the ratio of assets and liabilities of the estate) but also take into account a number of moral considerations (for example to what extent the involvement of the limited interdict in strained relations among the co-heirs is desired<sup>227</sup>). Such an approach of succession-law emancipation of the limited interdicts would allow them to carry out in person, without curator's assistance, testamentary dispositions, forgiveness of unworthiness, acceptance (compulsorily by inventory) and refusal of inheritance. The concerns over the limited interdict's ability to realize the nature of the legal act being carried out by him/her *de lege ferenda* could be taken into consideration by stipulating that a *permission* must be obtained from *the district court* (the motion to include the refusal of inheritance in the actions under article 130, paragraph 3 FC) or by means of the requirement that such act must be done in some *special form in order to be valid*, for example – notarized as the limited interdict's ability to understand the nature and the consequences of his/her act should be examined upon the fulfillment of such requirement.

<sup>224</sup> See for example under the effect of article 130, paragraph 3 FC, **Mateeva, E.** Semeyno pravo na Republika Bgaria [Family Law of the Republic of Bulgaria]. S., 2010, p. 451, as well as **Petkova, Tsv., Al. Tonev** Nyakoi protivorechiya v praktikata na sadilishkata odnosno priemaneto na naspedstvo ot nenavarshili palnoletie litsa [Some Contradictions in Court Practice as regards the acceptance of inheritance by persons having not attained majority] In: *Sobstvenost i pravo* [Property and Law], 2013, No. 3, pp. 34–43. For the thesis according to which the refusal of inheritance is a waiver of subjective right, see also **Tadzher, V.** Problemi na grazhdanskata pravospodobnost i deesposobnost na nenavarshilite palnoletie [Problems related to the civil capacity to have rights and capacity to act of persons not attained majority] In: GSUYuF [Yearbook of the University of Sofia, Faculty of Law], vol. LXVI (1975/1976). S., 1976, p. 124, **Valchev, N.** Za haraktera na ogranichenieto po chl. 73, al. 3 ot Semeyniya kodeks [Of the Nature of the Limitation under article 73, paragraph 3 of Family Code] In: Darzhava i pravo [State and Law], 1990, No. 6, p. 48 as well as **Staneva, A.** Predstavitelni i popechiteliski funktsii na roditelite [Representative and Curator's Functions of Parents]. S., 1992, p. 50. In the opposite sense – for the admissibility of the refusal of inheritance by a minor aged 14-18, see **Markov, M.** Semeyno i nasledstveno pravo – pomagalo [Family and Succession Law – A Teaching Aid]. S., 2011, p. 257, както and **Gospodinov, G.** Nasledstvoto i delbata mu [Inheritance and Its Partition]. S., 1995, p. 76.

<sup>225</sup> See **Petrov, V.** Dopustim li e otkaz ot nasledstvo ot nenavarshilo palnoletie litse [Is The Refusal of Inheritance by a Minor aged 0-14 Admissible?] In: Stavru, St., V. Petrov. Diskusii v balgarskoto nasledstveno pravo. Kniga parva [Discussions in Bulgarian Succession Law. Book One]. S., 2013, pp. 395–396, 400–401.

<sup>226</sup> In the opposite sense – against the introduction of "dualism in the legal regulation" of the incapacity to act in minors/minors aged 14-18 and full/limited interdicts, see **Tsankova, Ts.** Vaprosi na deesposobnostta [Questions concerning the capacity to act] In: Yubileen sbornik posveten na 80-godishninata na prof. d.yu.n. Vasil Mrachkov [A Collection on the 80th Anniversary of Prof. Vasil Mrachkov, Doctor of Juridical Science]. S., 2014, p. 223.

<sup>227</sup> The example is given for the minor child aged 14-18 in: **Petrov, V.** Dopustim li e otkaz ot nasledstvo ot nenavarshilo palnoletie litse [Is The Refusal of Inheritance by a Minor aged 0-14 Admissible?] In: Stavru, St., V. Petrov. Diskusii v balgarskoto nasledstveno pravo. Kniga parva [Discussions in Bulgarian Succession Law. Book One]. S., 2013, pp. 397–398.

#### 4.7. Expressing informed consent to treatment

Another example of actions, which are entirely dependent on the personal assessment of the person and which concern information that is closely connected to his/her personality, are the decisions for **administration of treatment or refusal to treatment**. According to article 87, paragraph 2 where the patient is a minor aged 14-18 or has been placed under limited interdiction in order that medical actions can be carried out the consent of his/her parent or curator is also needed in addition to his/her own informed consent. The consent of the parent or of the curator, however, is not necessary for *health consultation, routine prevention examinations and tests* of person having attained the age of 16 years (article 87, paragraph 3 HA). A reference is made to an ordinance of the minister of healthcare, which is still non-existent until now, for the specific types of actions related to consulting, routine prevention examinations and tests that can be made without the consent of the curator. I think that the specification of the cases where an independent consent to treatment may be given by minors aged 14-18 and by the limited interdicts should be complied with the peculiarities of the two groups of persons and such cases can not be identical. It should be pointed out again that in the case of minors aged 14-18 it is presumed that the possible difficulties that they could experience upon the assessment of the need of treatment are due to their inexperience while in the case of the limited interdicts due to mental illness (mental disorder) the reason for the limitation of their capacity to act is linked to the impact of a morbid condition which, however, is not permanent. In my opinion this determines the need of differentiating the regimes for minors aged 14-18 and for limited interdicts as in the case of the latter considerably greater freedom of informed consent to treatment should be allowed in the cases where the person is in the "lucid periods" of his/her disease. This ability of the said person, depending on the risks of the planned medical intervention, could be assessed in some cases by the physician in charge of the treatment, and in other cases by the ethical commission at the respective health facility, and in third cases – also by the court. De lege ferenda the refusals to treatment expressed by the limited interdict and carrying a serious risk for his/her health should be taken into consideration after an opinion of the ethical commission and by stipulating proceedings to contest them before the court.<sup>228</sup>

Under the statutory provisions currently in force the desires and feelings of the persons placed under full interdiction have no legal significance upon the administration of their treatment. The informed consent for the performance of certain medical interventions on such persons is given by their tutor (article 87, paragraph 4 HA), who is not obliged either to consult the full interdict, or to inform him/her of the nature, reasons and the expected consequences of the imminent treatment. De lege ferenda the regulation under article 87, paragraph 4 HA should adopt the requirements currently in effect for giving a consent on behalf of an incapable person to his/her participation in *clinical trials for medicinal products*. According to article 96, paragraph 4 MPHMA the informed consent to participation in clinical trials of medicinal products of an incapable adult is given by his/her lawful representative as the lawful representative's consent must represent the participant's presumable will and may be withdrawn at any time without negative consequences for the participant (article 96, paragraph 4, sentence 2 MPHMA). But the incapable adult is provided with information about the trial, the possible risks and benefits in compliance with his/her ability to understand (article 96, paragraph 6 MPHMA), and the express desire of the incapable adult to refuse to participate or to withdraw at any time from the clinical trial must be taken into consideration by the researcher, and, if necessary, by the chief researcher (article 96, paragraph 7 MPHMA). "Taken into account" does not necessarily mean "taken into consideration" but it means that the desires of the incapable person must be examined and assessed in view of the specific circumstances of each individual case. The regime under MPHMA differs from the one under HA because clinical trials of medicinal products under MPHMA are not approved medical procedures that have proven their curative effect in contrast to the treatment under HA, which, as a rule, is considered to be conducted in the interest of the patient (the incapable person) provided that the respective indications exist and that the existing medical standards are abided by. There is no reason, however, that the said approach of examination of the interdict's desires should not be adopted also for the giving of consent to treatment by his/her tutor in the cases where this is possible. A procedure must also be stipulated to enable the interdict or third parties to contest tutor's refusal to treatment.

#### 4.8. Choice of residence

One decision which depends, as a rule, on the personal judgment of the person is the decision on the place of his/her residence. The interdicts, regardless of the form of interdiction, are deprived of their right to **choose their residence**. According to article 163, paragraph 1 FC the person under tutorship lives with the tutor unless there are important reasons necessitating that (s)he lives apart. Where the person placed under tutorship deviates or is deviated from the residence determined for him/her the tutor may petition the district court to bring him/her back after the court gives him/her a hearing (article 163, paragraph 2 FC). The order of the court may be appealed before the regional court as the appeal does not stop the execution. The person is brought back as per the administrative procedure. If the court establishes the presence of important reasons, article 163, paragraph 1 FC makes a reference to article 126, paragraph 3 FC, which applies

<sup>228</sup> For the proposal that a special procedure be stipulated in our legislation for obtaining informed consent in the cases where the person is not placed under interdiction but his/her condition is such that (s)he is unable to understand the information provided to him/her in relation to the treatment, see **Zinovieva, D.** Administrativnopravni i drugi yuridicheski vaprosi otnosno litsata s psihicheski uvrezhdaniya [Issues under Administrative Law and Other Legal Issues concerning Persons with Mental Disabilities] In: Zinovieva, D. N. Gevrenova. Praven rezhim otnosno litsata s psihicheski uvrezhdaniya (administrativnopravni, trudovopravni i drugi pravni aspekti) [Legal Regime Concerning Persons with Mental Disabilities (administrative law, labor law and other legal aspects)]. S., 2012, p. 67.

with respect to children who have deviated from their residence with their parents: the court refuses to bring the child back to his/her parent and notifies the Social Assistance Directorate by the current address of the child and the directorate immediately takes protection measures. The respective application of the said rules established in order to be applied in the parents-children relations should take into consideration *the following peculiarities* with respect to the interdicts: a) “important reason” within the meaning of article 163, paragraph 1 FC is also the consciously expressed desire and motives of the the interdict who must be given a hearing by the court; b) the procedural decision on bringing the person back must be appealable by the interdict in order to ensure actual protection of his/her rights. The decision of the tutor on interdict’s placement in an institution should also be appealable by the interdict; c) the legislation must ensure an opportunity for the application of the requirement of article 126, paragraph 3 FC as regards the notification to the Social Assistance Directorate by the current address of the person under tutorship as the said directorate must immediately take protection measures – currently such protection measures are stipulated only with respect to children and not for persons placed under interdiction. The same rules also apply with respect to the limited interdict (article 167, paragraph 1 FC). This permission is quite disputable, especially in view of limited interdicts’ opportunity to enter into civil marriage on their own, an opportunity recognized by the law. In such case according to article 173, paragraph 2 FC the capable spouse is his/her curator by operation of law and, as a rule, the spouses have common residence. What happens, however, where the marriage is made between two limited interdicts? Does marriage emancipate them in their choice of residence<sup>229</sup>? Can they choose their residence independently of the will of his/her curators or is it at least possible that the court takes that into consideration as an “important reason” within the meaning of article 163, paragraph 1 FC? As far as they can contract civil marriage don’t we have to recognize them also the opportunity to cohabit: an actual cohabitation is a possible manner to create a family, moreover, given that the limited interdicts can acknowledge children? Is the actual cohabitation with another person an “important reason” within the meaning of article 163, paragraph 1 FC?

## 5. Some general conclusions and proposals

### 5.1. Monism or dualism in the statutory regulation governing the (in)capacity to act

Under the statutory provisions currently in force one could pose the question of whether the opportunities provided to children under the Child Protection Act (CPA), including the requirement that the child be *given a hearing* under article 15 CPA, should be applied accordingly also for the limited interdicts. As far as the requirement to be given a hearing is expressly stipulated for every child having attained the age of 10 should it not be accepted that for much more solid reason such requirement must also be taken into consideration with respect to the limited interdicts who, according to article 5, paragraph 3 PFA, are ***equated to the legal status of minors aged 14-18***, i.e. the persons having attained the age of 14 years.<sup>230</sup> An objection to the affirmative answer to the question thus worded could be found in the provision of article 155, paragraph 3 FC. According to the said provision “the tutorship and curatorship body must give the child a hearing under the conditions of article 15 of Child Protection Act and obtain an opinion from the Social Assistance Directorate. When curatorship is established for a person placed under limited interdiction the interdict must also be heard.” It is notable that article 155, paragraph 3 FC regulates two different (parallel) regimes of taking into account the desires of the child and of the interdict. The two sentences of article 155, paragraph 3 FC apply for different hypotheses: where a curator is appointed to a child (an opinion must be obtained from the Social Assistance Directorate – in all cases – the child must also be given a hearing if (s)he is above the age of 10) and where a curator is appointed to an interdict (the limited interdict must also be given a hearing – in all cases). This parallelism of the two regimes seems to testify of the distinction made by the legislator between the child protection measures stipulated in CPA and the measures which apply with respect to the interdicts and which cover (as if) only the regulation (restriction and deprivation) of their capacity to act. This poses once again the question of the need of an additional regime of protection and support for the persons with intellectual disabilities [*umstveni zatrudneniya*] and mental disorders, the said additional regime should contain warranties analogous to the ones provided by the Child Protection Act for children, but also guarantees brought into line with the peculiarities of the persons suffering from mental deficiency and mental disorders.

The corresponding reference to article 5, paragraph 3 PFA also poses the question of *the emancipation of the limited interdict upon the contracting of civil marriage* – such possibility as we have stated above is afforded by FC currently in force.<sup>231</sup> However, I think that such full emancipation will not always be appropriate with respect to the limited interdicts.

<sup>229</sup> The legal doctrine expresses an opinion that in such case “everyone remains under the curatorship of his/her parents”. See **NeNova, L.** Semeyno poravo. Kniga parva. Nova redaktsiya na prof. d-r Metodi Markov po noviya Semeen kodeks ot 2009 g. [Family Law. Book One. A New Redaction by Prof. Dr. Metodi Markov under the new Family Code of 2009]. S., 2009, p. 181. The author accepts that the conclusion of marriage by a limited interdict does not emancipate the latter; such emancipatory effect exists with respect to the minor aged 14-18 under article 6, paragraph 4 FC. In this sense see **Tsankova, Ts.** Mozhe li ogranicheniyat zapreten da osinovnyava? [May the Limited Interdict Adopt?] In: Smeyno pravo [Family Law], 1991, No. 9, p. 55.

<sup>230</sup> For the “full identity” of the status of minors aged 14-18 and interdicts while the Persons Act was still in effect and also the explicit specification of the differences existing between the two regimes, which has resulted in their examination in two different sections of the textbook, see **Dikov, L.** Kurs po balgarsko grazhdansko pravo. Tom I. Obshta chast [Course in Bulgarian Civil Law. Volume I. General Part]. S., 1936, p. 481.

<sup>231</sup> **NeNova, L.** Semeyno poravo. Kniga parva. Nova redaktsiya na prof. d-r Metodi Markov po noviya Semeen kodeks ot 2009 g. [Family Law. Book One. A New Redaction by Prof. Dr. Metodi Markov under the new Family Code of 2009].



If the emancipation under article 6, paragraph 4 FC occurs in view of the assumption that as soon as a person having attained 16 years of age has entered into civil marriage (subject to the fulfillment of the requirements and the procedure stipulated by the law), such person is most likely sufficiently mature to exercise all of his/her rights in person with some small exceptions. This assumption, however, should not be made in the same way in the case of limited interdicts. They are characterized by the existence of a condition that “produces” incapacities in the understanding of the nature and the consequences of the legal acts carried out by them. This calls for providing adequate help for such persons’ decision-making. This need does not drop when the limited interdict concludes civil marriage, on the contrary, it even gains new dimensions and requires new forms of support. Thus, the conclusion of marriage by the person with limited capacity to act should be related to the application of specific support measures, part of which could restrict his/her capacity to act as such measures must be regulated by the legislator and ensured for each person who needs them.

## 5.2. “Dark” and “lucid” periods – possible approaches

If (let us call it) the “*dark theory*” of the incapacity to act of persons with certain disabilities (disability is a rule and ability is an exception) is adopted the legislator should allow the legal relevance of the “lucid periods” – the periods in which the person placed under interdiction was able to understand and manage his/her conduct and therefore was able to express a legally valid will. Under the statutory provisions currently governing the interdiction as a regime that takes away/restricts the capacity to act and is one of the darkest nuances of the “dark theory” of the incapacity to act of the persons with certain disabilities, Bulgarian legislator has stipulated some legal significance of person’s ability to understand and control his/her conduct in this particular case. The provision of article 47, paragraph 1 OCA releases from delictual responsibility “the person who is unable to understand or manage his/her actions”: according to the said provision (s) he “is not responsible for the damages caused in such a condition unless the inability has been caused though his/her own fault”.<sup>232</sup> The criterion for capacity to be held responsible for delicts<sup>233</sup> introduced by article 47, paragraph 1 OCA is a substantive (an actually existing ability) and not a formal criterion (the presence of a court judgment for the placement of the person under interdiction). Thus article 47, paragraph 1 OCA attaches legal meaning to the “dark periods” (as an impediment to the realization of delictual responsibility) in the diseases of the persons with mental disorders. Usually it is accepted that capable persons are dealt with. The provision of article 47, paragraph 1 OCA does not contain such clarification. This allows us to pose the question concerning the application thereof with respect both to persons not placed under interdiction and to persons placed under interdiction (including full interdiction). Thus, the provision of article 47, paragraph 1 OCA (*per argumentum a contrario*) could also be used to adduce arguments supporting the possibility of realizing juridical responsibility for the acts done in the “lucid periods” of otherwise incapable persons or persons with limited capacity to act. In such case, although the interdict is treated, as a rule, as unable to carry out lawful legal acts (a person with limited capacity to act or a person incapable of acting), (s)he will be treated, as a rule, as capable of unlawful acts (capable of being held responsible for delicts or with “limited” capacity to be held responsible for delicts). In the “lucid periods” of his/her disease (s)he is unable to abide by the law and thus obtain legal consequences beneficial for him/herself but (s)he will bear responsibility if(s)he breaks the law (this is especially valid for persons placed under limited interdiction). This legislative approach is justified as follows: “[t]he measures established in order to patronize the incapable person may not allow him/her to harm others with impunity where he actually realizes the guilt he commits”<sup>234</sup>. The argumentation is completely true but it leads to one more conclusion (rejected by the quoted author): the measures established “to patronize the unable person should not take away the possibility of expressing a legally valid will when “in fact (s)he realizes” the nature and the consequences of his/her actions. The approach of article 47, paragraph 1 OCA, which takes into consideration the actually existing ability of the person as at the specific time, should be applied not only when the unlawful acts of the persons with intellectual disabilities and mental disorders are sanctioned but also when the validity of their lawful acts while (formally) placed under interdiction is respected. Thus, one can find in article 47, paragraph 1 OCA a “negative” (realization of delictual responsibility for unlawful acts of the persons with mental disabilities) to that “positive” (respect for the legal validity of lawful acts of the persons with mental disabilities), which is absent as a general rule from Bulgarian legislation in force.

The relevance of the “lucid periods” is a balancing component in any “dark theory” of the incapacity to act, whose specific content should be carefully assessed. The stability of civil-law transactions requires formality of the taking away of capacity to act. Taking away the capacity to act of a natural person, however, is associated with substantial legal consequences for such person: incapacity to form a legally relevant will and incapacity to defend his/her interests, which can neither be “justified”, nor legitimated by the stability of civil-law transactions. Thus, the “uniform” and static character of interdiction as a legal regime that takes away/restricts should not turn “the person’s inability to care for his/her own

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S., 2009, p. 181, **Tsankova, Ts.** Mozhe li ogranicheniyat zapreten da osinovyava? [May the Limited Interdict Adopt?] In: Smeyno pravo [Family Law], 1991, No. 9, p. 55 answer in the negative. See also **Mateeva, E.** Semeyno pravo na Republika Bgaria [Family Law of the Republic of Bulgaria]. S., 2010, p. 85. The capable spouse becomes by contracting marriage *ex lege* the curator of the limited interdict.

<sup>232</sup> See **Malchev, M.** Unishtozhaemost na grazhdanskopravnite sdelki [Voidability of Civil-law Transactions]. S., 2010, p. 119, footnote No. 194.

<sup>233</sup> Also referred to as “sanity”. See for example **Tashev, R.** Obshta teoriya na pravoto. Osnovni pravni ponyatiya [General Theory of Law. Fundamental Legal Concepts]. S., 2004, pp. 303–304.

<sup>234</sup> See **Colin, Ambroise, H. Capitant.** Cours élémentaire de droit civil français, tome premier, Paris: Libraire Dalloz, 1914 [pp. 770–759 of Bulgarian translation quoted by the author. – Translator’s Note],

affairs” from an actually existing premise, which is carefully examined by the court when the person is placed under interdiction, into a formally examinable and self-sustaining fiction.

If (let us call it) the “*lucid theory*” of the *incapacity to act* of the persons with certain disabilities (disability is a rule and ability is an exception) is adopted the legislator should take into account the significance of the “dark periods” – the period in which the person was unable to understand and manage his/her conduct and therefore was unable to express a legally valid will. In the cases examined above where the limited interdicts can act on their own (contracting marriage, making an acknowledgment, making a testament) provide for their principled ability to express their will without needing the assistance of another person. In most cases, however, the possibility of voiding the acts made by them in the cases where their will has been vitiated due to an error or fraud (article 67 FC, article 43, paragraph 1, letter “a” SA) has been reserved. Thus, the legislator has recognized a specific capacity to act of the limited interdicts by respecting the legal relevance of the “dark periods” in their dynamic mental state. Even in the case of a possible abolition of interdiction in the future and its replacement by a heterogeneous regime of various support measures provided to a person who, as a rule, is capable of acting (as proposed by the Draft Natural Persons and Support Measures Bill), the legislation must preserve the possibility that some of the transactions entered into by such persons could be voided because they have been concluded by a person capable of acting who “was unable to understand or manage his/her acts upon the conclusion thereof” (article 31, paragraph 1 OCA).

The relevance of the “dark periods” is again the balancing component in any “lucid theory” of the capacity to act so that the actual difficulties of the respective person can be taken into consideration. Otherwise, the favoring of the capacity to act as an irrevocable characteristic of every human being having attained certain age will again turn into a self-proving fiction, which – instead of defending – will harm the interests of the persons with intellectual disabilities [*umstveni zatrudneniya*] and mental disorders.

As a final conclusion we could point out that the legal provisions governing interdiction currently in force do not provide the *care* owed by the Bulgarian state to the persons with mental disorders and mental deficiency. This care *could hardly be proposed within the framework of the legal notion of interdiction*, which despite its flexibility (unfortunately unknown to Bulgarian legislation) has its limits determined by historical past, the structure and nature of the notion. Thus for example, despite the attempts made by me above, there is still doubt as to the extent to which the interdiction has and is suited to carry out any purposes associated with respecting the interdict’s authentic will, or, as a rule, it serves only the interests of other persons. I think it is undoubted that the civil-law status of the persons with mental disorders and mental deficiency must be governed by law’s fundamental principle of respecting human freedom. This means that the legislator should use precisely the will of the persons with mental disabilities and not their interest as a center and ensure around that center the necessary regulation and protection. Thus the main tools in such an approach will aim to ascertain, support and respect for the authentic will of the persons with mental inabilities, and in the cases where the formation and expression of authentic will turns out impossible – to ensure protection based on the ascertainment and respecting the presumable will of the persons with mental inabilities [*umstveni nesposobnosti*].

In the first case that should be the prevailing one, i.e. *the person experiences difficulties but if given the appropriate help could express his/her authentic will*, the decisive task of the law is to offer forms of interaction with the person in need of support, which take into consideration his/her needs and meet them in the most adequate manner. The support measures stated in the beginning of this monograph (an expression of the care owed by the state upon the exercise of the capacity to act of the persons with mental disabilities) and restraining measures (an expression of the idea of privatization of the incapacity to act and liberalization of the opportunity of the person controlling the juridical validity of the processes of formation and expression of his/her will) should be included here as part of the possible “technical” panoply of juridical means.

In the second case that should be an exception: *the person, despite the efforts made to do so, is unable to form and express his/her authentic will*, it is decisive that the law should stipulate forms of defense of the person in need of protection, which should not merely keep his/her property interests but take into consideration the presumable will such person would have in a specific situation. The protection measures specified in the beginning of this monograph (an expression of the protection due by the state upon the exercise of the capacity to act of the persons with mental disabilities) as well as the means of transferring the will to future situations (preliminary declarations, preliminary instructions for treatment, etc.) should be included here as part of the possible “technical” panoply of juridical means. Protection measures should not be legitimated by the interest of the person but should offer efficient tools for the attainment of the decision that the protected person would have made in the particular situation should (s)he be able to. The possible approaches to the attainment of that aim are, on the one hand, exploration of the biographical information about the person (how the person would act by taking into consideration his/her previous conduct and his/her dynamics over time), and, on the other hand, taking into account the opinion of person’s significant others (how the person would have acted according to his/her close relations to whom the person has confided his/her decisions and the motives for them). Precisely these two approaches should also be applied when the preliminary declarations and instructions left by the person are respected in order to establish whether the will expressed therein has retained its actuality despite the time that has elapsed since the execution thereof.

**Table No. 3 “Types of inabilities and measures”**

Affected ability	Type of inability	Leading criterion	Specific means
Formation and expression of will	disabilities	authentic will	support measures; obstruction measures;
	Leading purpose: Care for the person		Bond of trust
	Inability	presumable will	preliminary instructions; protection measures

In both cases, however, the decisive resource that should be used in different legislative measures of respecting the will of the person, is the existing connections between such person and his/her significant close relations. The latter could provide irreplaceable assistance both when the authentic will of the person is established and expressed (in the first case) and when the presumable will of the person is defined and formulated (in the second case). The respect for such connections takes into consideration the interpersonal pattern of identity, by emphasizing the circumstance that a great part of our personality is “deposited” “in the eyes” of our significant others. This “deposit” can be “withdrawn” in order that our will be respected in the cases where we experience difficulties or are unable to express our desires and preferences. This also explains the significance in the various support measures of the so-called “*bond of trust*” between the supported person and the person supporting him/her. The trust we have confided defines the circle of persons among whom we can look for and gather the “pieces” of our “dispersed” identity in the cases where we have completely lost our ability to form and express authentic will and where different protection measures need to be applied. These are also the cases in which the concept of “post-identity” appears: be it temporary (for example when one falls unconscious), or permanent (for when the Alzheimer’s disease progresses). “Post-identity” is a manner to preserve the autobiographical identity of a person – thanks to its interpersonal nature: although I am unconscious or in an advanced state of dementia, thanks to the persons whom I have confided my decisions my will can be “extended” and repeatedly “reconstructed”.

The application of the said measures and tools of care for the persons with mental disabilities should take into account one more specific feature between *two categories of persons*: I. the persons with mental disorders in whom the problems with inability are unlocked at certain stage of their life and are ones of episodic nature because they are commonly associated with the occurrence of crisis conditions; and II. the persons with mental deficiency, in whom the problems with inability are present by birth and are ones of permanent nature because that are connected with permanent condition of lowered cognitive abilities. The persons of the first category have the opportunity, before the occurrence of the disease or in its so-called “lucid periods”, to choose in advance a system of support measures assessed by them as appropriate, which should enable them to overcome their crisis condition. The persons of the second category do not have the said opportunity to control in advance or from time to time the peculiarities of their mental disability but if given adequate and competent care they could develop skills, which – although within the limits of their cognitivity – should help them manage their lives independently. The stated peculiarities in the difficulties faced by the two categories of persons should be taken into consideration when defining the content of the care to be ensured by means of different protection and support measures. In the case of the persons with mental disorders not only their will during the so-called “lucid periods” should be taken into consideration but also the threshold borders between the “lucid” and “dark” periods should be mitigated as much as possible so that they can integrate into a single (common and overall) life of the person. In the case of the persons with mental deficiency mechanisms for respecting their authentic desires and preferences defended and supported by arguments in different degrees of well-foundedness and rationality should be stipulated in order thus to allow the integration of different and not only cognitively conditioned, patterns of decision making into community life.

**Table No. 4 “Possible resources for taking care”**

Category of persons with disabilities	Possible approach of care		Aim
Persons with mental disorders	Respecting the “lucid” periods	Respecting the “color periods”	Intergation of periods of crisis into a single: common and overall life of personality
Persons with mental deficiency	Respecting different intensity of cognitive abilities	Development of skills for managing on one’s own	Integration of different degrees of cognitive abilities in the life of community

The “superseding” of the “lucid” and “dark” periods into “colorful” continuities (in persons with mental disorders) as well as the emphasis on gaining specific skills for independent coping (in persons with mental deficiency) could be used as theoretical resources for provision of care in a new legislation in the field of civil incapacity to act. It will not be until this new legislation takes into consideration the specific problem of the different categories of persons with mental disabilities when defining the typical content of the protection and support measures proposed by such legislation that the care for the freedom of human beings will become a legitimating foundation of the legislation on the incapacity to act.

## Once again: Priorities and Approaches in “will – interest” interaction

When weighing up the criteria of “authentic will” and “the best interest” in the assessment of the validity of the decision of a person the primacy (priority) of will should be taken into account. The authentic will is synonymous with **human freedom**, and therefore it should be established, supported and respected and, also in the cases where it does not meet the best interest of the person, and even in the cases where it harms it. It is precisely the respect for the authentic will that is underlying for the right to self-assertion that is more and more often differentiated as a specific part of *the right to self-determination*. The assumption that the capacity to act is a cognitive threshold under which the will is juridically irrelevant is a form of invalidation of a possible freedom. The battle for freedom should be waged not only on the territory of the fully autonomous legal subjects (if any) but in the grey zones of different incapacities to understand, communicate and justify decisions.<sup>235</sup> The battle for the abolition of the incapacity to act as a phenomenon of the sharp border underneath which the expressed will is not respected juridically, is in fact part of the process of affirmation of human freedom. The paramount role of the will as a subjective phenomenon generated from the “inside” and taking precedence over the interest as a possible construct imposed from the outside, although with a pretence of objectivity, must be examined precisely in this context.

The will is the manner in which man self-determines him/herself. Self-determination also includes the determination of one’s interests. So the will is what generates, designates and empowers different interests. *My will determines my interests*. Interest is a secondary, derivate concept. My principal interest is to be myself, to be free in myself. Being free means to self-determine myself, i.e. to have my will respected by others. Thus the will should always be respected, if present, regardless of its quality although the latter matters for the degree to which it could be binding upon others. The degree of certain intellectual or volitional ability could reflect on the degree in which the will expressed based on such ability is mandatory as, however, the will thus expressed is not entirely excluded and derealized. Only in extreme cases, for example if the person becomes unconscious or is a persistent vegetative state and when there are no data whatsoever about the presumable will of such person – interest may substitute the will as a criterion for decision-making. Only in this case the interests generated by the will can “live” their own and relatively independent life and be used as a skeleton for fixing a feigned and juridically valid will expressed by a person (representative) on behalf and at the expense of another (represented person).

The opposite approach, i.e. the adoption of the **interest** not as a possible feedback to the will but as a framework in which the will is valid: a valid will means only the will that corresponds to the interests of the person or in the worst case the will that does him/her no harm, carries a number of risks. The priority of the best interest is a convenient tool for locking up and devaluating the will, and hence, for compromising the freedom of the person on whose behalf and at whose expense someone else is making decisions “of his own will”. This is not a borrowed will – the full interdict does not “use” the will of his/her tutor (as, for instance, is most often the case in authorization), but an export of will – the will of the tutor determines the “legal conduct” of the interdict. “Management of another’s affairs” but not of one’s own will, although in another’s interest. The full interdict can hardly “exercise” the will of his/her tutor as such will is another’s freedom and another’s freedom very often is an abandonment of one’s own. In fact the decisions are made on behalf and at the expense of one’s interests rather than on behalf and at the expense of the person. This *substitution of man by his/her interests*, however, is also a substitution of his/her freedom<sup>236</sup>. The adoption of the “best interests” criterion does

<sup>235</sup> The pursuit for respect for the will in its different degrees, regardless of the manner of its expression should also be viewed in this context. Will should be respected even when it can be established by means of special devices that people, as a rule, do not have available in their usual communication – for example the attempts to establish the will of patients in comatose conditions (persistent vegetative state) by registering their brain activity by using functional magnetic resonance tomography. See for example **Naci L, A. Owen** Making every word count for nonresponsive patients. – JAMA Neurology, 2013, Vol. 70, No. 10, pp. 1235–1241, where it is established that the comatose patients respond to commands and even binary questions (i.e. ones answered by ‘yes’ or ‘no’) by identifiable change in their brain activity that can be registered. For the importance “locked-in” syndrome, see **Pearl, A.** Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and the Legal Capacity of Disabled People: The Way Forward? – Leeds Journal of Law and Criminology, 2013, Vol. 1, No. 1, p. 19. For the application of the principles of CRPD, that do not allow the person’s will to be substituted for an assessment based solely on person’s interests, even in cases of persistent vegetative state or coma, see **Minkowitz, T.** Abolishing Mental Health Laws to Comply with the Convention on the Rights of Persons with Disabilities. – In: McSherry, B., P. Weller (eds), Rethinking Rights-Based Mental Health Laws, Oxford and Portland, 2010, p. 157. For the question concerning the possibility of expressing will by means of brain waves, although in another context, see **Stavru, St.** Pravni izyavleniya, “obektivirani” chrez mozachni valni? [Legal Statements “Objectified” Via Brain Waves?] In: Challenging the Law, a professional legal website, published on 1 March 2011 and accessible online at: <http://challengingthelaw.com/biopravo/izyavlenia-mozachni-valni/>

<sup>236</sup> It is precisely for that reason that the substituting decision making is stated as a last resort for the exercise of the rights of persons who are unable to express their will. See **Bach, M.** Supported Decision Making under Article 12 of the UN Convention on the Rights of Persons with Disabilities. Questions and Challenges. Notes for Presentation to Conference on Legal Capacity and Supported Decision Making Parents. Committee of Inclusion Ireland. Athlone, Ireland – November 3, 2007, p. 7. It is a “last resort” precisely because the approach of substitution results in the person whose will is substituted not being recognized by the law as a full person.

not allow the persons to self-harm. They become servants of their interests – the will is instrumentalized in view of the service of interests inventoried from the outside, interests ascribed as one’s own to the very same will but at the same time independent from it. In such a construction the will cannot transcend the interest as a context of its public use.

The observance of the interest masks the lack of freedom by constructing foreseeable and controllable relations designated in their entirety as “civil-law transactions”. The construction of the subject via the interest – especially in the cases where the expressed will is not sufficient to serve the interest recognized from the outside or at least rationalize the deviation from it – is the most secure *mechanism of stability* of social relations. Interest reduces the subject from a hard to catch wave (will) to a fixed and recognizable point (interest) on which an actual, valid and binding legal relationship can very easily be “hanged”. Interest “anchors” and tames the will it has replaced and turns the subject it has re-conceived into a space that is foreseeable and livable for the juridical rules. The will becomes conditioned by interest that subjects it to two tests: the test of usefulness – to what extent the expressed will meets the needs of the person (freedom is only one of these needs), and a test of rationality – to what extent the expressed will contains and adequate judgment and logically founded juxtaposition of the beneficial and harmful consequences of the respective decision made (restriction/extension of freedom is only one of these consequences).

Interest can be easily expropriated to an external construct, to an “alienated thing” recreated and lost its authenticity, made an “**act of power**”, an “anti-will” imposed from the outside and existing in order that the will should not exist. In such cases the *interest acts as a “will machine”*, where the decision is made by means of automatism by applying algorithmic interests. Interest functions as a rational component of a mathematical formula in which the only unknown and variable has been the authentic will but it has been eliminated due to its elusiveness. This mathematical convenience, however, comes at a price. The interests constructed from the outside seizes the will, especially when it becomes institutionalized by the law and is transformed into the leading criterion for decision-making on behalf and at the expense of someone else – of the person placed under interdiction. The subjective rights actually “conceal” (hide) in themselves interests but their exercise remains a matter of will and it is precisely the freedom that activates (defines) the possible interests of the person. This is a process of generation of interests from the inside – the will as a “source of interests”. By the external reconstruction of the interest of a person, however, his/her will can be easily re-fabricated (and thus effaced) when in its authenticity it has been judged inconvenient or unintelligible.

**Table No. 5 “Will and interest: a comparison”**

WILL	INTEREST
<b>PECULIARITIES</b>	
<i>Generated “from inside out”</i>	<i>Could be constructed “from inside out”</i>
Priority subjective phenomenon	Possible objectifications
Related to one’s freedom	Related to one’s welfare
Inconsistency is possible	Presumes stability
Irrationality is possible	Presumes rationality
Can be supported	Can be imposed
<b>DIRECTION OF INTERACTION</b>	
<i>Will determines the significance of interest</i>	<i>Interests determines the validity of will</i>

“The best interest” adopted as an ultimate criterion for validity of decisions degrades the subject to a set of situations whose meaning is sought by making mathematical calculations. The empowered interest is univocal – it does not enable you to harm yourself. But there are other values besides keeping one’s own fortunes and welfare. Interest should not be an aggressor for the will. It should intervene only as an additional criterion and should be used as a leading one only as a ultimate means, i.e. where no assisted formation and expression of actual/authentic will is impossible and where the establishment of one’s presumable will is impossible. The primacy of will is primacy of freedom. It demands the consistent realization of three steps as each subsequent step should be taken only if the preceding one is inefficient:

- *to support the authentic will*

(by means of different measures for support of the will that are conducive for the formation and expression of the will of the person such as for example: providing information, advice, need of joint making and/or expression of decisions, etc.);

- *to explore and formulate the presumable will*

(by means of different measures for preservation of the will by reconstructing the values, beliefs and preferences expressed by the person such as for example: preliminary instructions for treatment, preliminary declarations, lasting

powers of attorney and therein contained instructions, medical testaments, defining an individual plan for future action and mutual aid networks);

- *to formulate the leading interest of the person*

(by means of different measures for protection of the interests of the person, which take into account the foreseeable consequences – benefits and harms – of the making of one decision or another such as for example: the court granting permission for the performance of the respective action only if such action meets the best interest or at least does not harm the person for whom it is being carried out).

If the will is something that exists from “before the law” and can be “found” by it, then the interest is rather a purely juridical tool and often an aggressive mechanism for regulation and event construction of a feigned will. For paraphrasing and even curling the will. We could provisionally say that the inclination that has found its own purpose and has been transformed into an aspiration must pass through two barriers before being recognized as a legally valid will: the inner barrier of consciousness and reason (rationality test) and the external barrier of benefit and harm (interest test). Both barriers are used by Bulgarian legislation: the first one – upon the assessment regarding the capacity to act of the person understood as his/her ability to independently exercise his/her rights, and the second one – upon the assessment concerning the lawfulness and validity of the specifically expressed will. The aspiration must pass both tests – of rationality and of interest – in order to be integrated as a juridically valid will that is binding upon other legal subjects. The rationality test examines the person’s intellectual and volitional abilities and the test of interest – what consequences would follow if the will is respected. Here the interest is not only the own interest of the person whose will is “tested” but also the interest of another – the interests of the other legal subjects. Depending on the different cases of ***interrelation between will and interest*** the following validations of the will are possible in the range from those valid for best reason to increasingly invalid ones (presented as simply as possible):

- *will without harm*

(recognized by the law): here are included all actions falling into the rule according to which everyone is free to do what they will as far as no harm is done to the others (for example conclusion of contract, exercise of ownership right, etc.);

- *will with harm for oneself but with a legitimate interest (one’s own/another’s)*

(recognized by the law): here are included various forms of self-harm as in such case, however, the possible benefit is deemed to outweigh and justify the harm caused (for example extra or dangerous work, donorship of organs during one’s lifetime, etc.);

- *will with harm for oneself and without a legitimate interest (one’s own/another’s)*

(often not recognized by the law because of paternalistic considerations or in view of the fact that another’s interest is indirectly affected): here are included various acts of self-harm, which do not bring per se any economic or property benefit to person (for example bodily modifications for the sake of experimentation, amputation of limbs, suicide, etc.), but could harm another’s interests, mostly the interests of one’s creditors (for example a disposition of one’s own property without return consideration manifested in donation of one’s own thing or waiver of property rights);

- *will with harm for another but with a legitimate interest (one’s own/another’s)*

(recognized by the law): here are included the acts by which possessive and potestative rights are exercised and which result in the occurrence of certain legal consequences, including ones that are disadvantageous for the addressees of these rights (for example dissolution of contracts, demanding one’s thing back, demand for destruction of a building erected without a permit, acts of inevitable self-defense or in dire need, etc.);

- *will with harm for another and without a legitimate interest (one’s own/another’s)*

(banned by the law): here are listed various illegal acts, whose commissioning is associated with the realization of juridical responsibility (for example damaging or destruction of another’s property, insult, slander, theft, murder, etc.).

The thoughts above as regards the incapacity to act emphasize the cases of ***will with harm for oneself and without legitimate interest (one’s own/another’s)***. Do we have to allow people with intellectual disabilities and mental disorders to be able to make valid decisions that harm themselves without the existence of a legitimate (acceptable for the public) interest? Isn’t one’s interest in one’s self-determination, in being free and making on one’s own decisions on one’s life sufficiently “legitimate”?<sup>237</sup> These questions, naturally, could be posed with respect to the autonomous legal subjects that are capable of acting, who in a number of cases are forced by the law to undergo paternalistic restrictions of their will imposed “in their interest” (for example the use of safety belt in cars, motorcycle helmets, the ban on disposition of organs, etc.). However, they most often arise in cases where there are doubts as to the efficiency of the first, inner barrier of aspirations that I mentioned above, and namely: the rationality test. The inability to rationalize the motives for decision-making, combined with intellectual or mental disabilities experienced by the person (the failed rationality test)

<sup>237</sup> CRPD seems to give an affirmative answer to this question. See also **Kanter, A.** The United Nations Convention on the Rights of Persons With Disabilities and Its Implications for the Rights of Elderly People under International Law. – Georgia State University Law Review, 2009, Vol. 25, No. 3, p. 563. See also **Flynn, M.** Olmstead Plans Revisited: Lessons Learned from the U.N. Convention on the Rights of Persons with Disabilities. – Law and Inequality, 2010, Vol. 28, No. 2, p. 424.

causes a tightening and much *greater severity for letting the will pass the second, external barrier – the interest test*. As far as there are doubts over the reasonability and rationality of the processes leading to the formation of one's desires only the interest can validate such desires as a will. If there is no legitimate interest to "justify" the will as in cases of will with harm and without legitimate interest (one's own/another's) the desire should not be juridically validated as a will. But in order not to make this devaluation whenever the person expresses a will (multiple application of the interest test) it is more efficient to take away his/her capacity to act as capacity to express desires in general (single application of the rationality test). Instead of repeating follow-up control of the validity of every particular declaration of will of the person (article 31, paragraph 1 OCA) a front running approach of taking away the capacity to act is adopted (article 5, paragraph 1 PFA). Precisely this technique of efficiency is underlying for the interdiction viewed as an irrefutable presumption of the incapacity to act devaluing any form of will-formation and will-expression in the full interdict. The price for that efficiency is paid by the freedom of the person converted in notions of his/her own interests and placed on the secondary market for legal personhood (with a guarantee for the stability of civil-law transactions). "Secondarity" is manifested in the fact that the person placed under full interdiction is no longer a "bearer of a capacity to act" – understood as primary and most authentic form of legal personhood and freedom – but a "bearer of a general legal capacity to have rights [*pravospobnost*]" – offered as a juridical by-product of the processing and annihilation of freedom and legal personhood. The battle for a new paradigm in the statutory framework governing the incapacity to act, including the idea of (re)privatization of the incapacity to act is an attempt to restore<sup>238</sup> freedom in its authentic and full-fledged form that is inextricably connected with the will of the person.<sup>239</sup>

By taking away the capacity to act when a person is placed under interdiction (s)he is deprived of the right to make any decisions, which have not been complied with his/her "generally-accepted" interests. The full interdict is not only unable to carry out such actions on his/her own but they are also inaccessible for his/her legal representative (tutor), who may carry out only actions that are in the interest of the person under tutorship. This **principle of domination of interest** has been adopted also by Bulgarian legislation for the assessment needed to allow some possible acts of disposition on behalf and at the expense of the incapable person. According to article 130, paragraph 2 FC currently in force the performance of acts of **disposition** of immovable properties, movable property by means of a formal transaction and by deposits as well as of securities belonging to the child is allowed with the *permission* of the district court having jurisdiction over the child's current address provided that the disposition is *not contrary to the interests of the child*. It is sufficient that there is no contradiction with the interests of the child, and the interests of the person placed under interdiction, respectively (article 5, paragraph 3 PFA in relation to article 130, paragraph 2 FC). Interests function as boundaries of the will by not allowing the legal effect of statements that transgress these boundaries. The assessment on the border crossing leading to the devaluation of these "refugee wills" is made by the court (the district court having jurisdiction over the person's current address).

In historical perspective interest used to have even greater significance for the admissibility (validity) of the acts of disposition on behalf of the child, and, respectively, on behalf of the person placed under interdiction (article 5, paragraph 3 PFA in relation to article 130, paragraph 2 FC), under the repealed Family Code of 1985 (1985FC), which was in force in Bulgaria until 1 October 2009. According to article 73, paragraph 2 1985FC "the alienation of immovable and movable items of property except for the fruits and things that are rapidly perishable, their encumbering with charges and, in general, the performance of acts of disposition relating to properties of children who have not attained majority, shall be allowed with the permission of the district court having jurisdiction over their residence *only if need be or if there is an apparent benefit for them*". This wording is considerably more "aggressive" towards the will: the will to perform the said legal acts may be allowed by the court only if its content has been conformed to a need of the person or brings such person apparent benefit. Both criteria given alternatively by the law, "need" and "benefit", are in a semantic orbit around the concept of "interest". The interest in the effect of article 73, paragraph 2 1985FC not only embraced in itself the possible will of the incapable person but also determined its content in substance. A legally valid will to perform the acts under article 73, paragraph 2 1985FC was allowed by the court only if the interest test objectified in the form of "need" or "apparent benefit" is passed.

But let us get back to FC currently in force. It stipulates a special regime with respect to certain kinds of legal acts, which are considered ones that harm the interest of the person who commits them which is due, as a rule, to their nature of

<sup>238</sup> However, the prejudices deeply embedded in the society against the persons with cognitive disabilities and mental disorders referred to as "sanism" should be overcome to that end ("sanism" – a derivative of "sanity", which is translated as "[of] sound mind" [*zdrav razum*]; the first two words in quotation marks in the brackets are in English in the original – *Translator's Note*). See **Perlin, M.** On "Sanism". – 46 SMU Law Review, 1992, Vol. 46, p. 373, as well as **Perlin, M.** International Human Rights and Mental Disability Law: When the Silenced are Heard. Oxford, 2012, p. 33. For the various legal practices and tools fighting the sanism, see **Poole, J.** Behind the Rhetoric: Mental Health Recovery in Ontario. Fernwood Publishing Co. 2011, where the pattern aiming at the "restoration" of the persons with mental disabilities is criticized as one empowering other correctional practices. See also "Sanism: Dr. Jennifer Poole at TEDxRyersonU", accessible online at: [www.youtube.com/watch?v=hZvEUbtTBes](http://www.youtube.com/watch?v=hZvEUbtTBes)

<sup>239</sup> To that end is also the justified change to the social policy towards persons with cognitive difficulties, which must include different means for compensation and enhancement of their abilities (cash compensation, personal enhancement, status enhancement and targeted resource enhancement). See **Wolff, J.** Cognitive disability in a society of equals. – *Metaphilosophy*, 2009, Vol. 40, No. 3–4, pp. 402–415, where the so-called "self-directed support" (support for independence) is examined.



acts without return consideration. According to article 130, paragraph 3 FC **donation, waiver of rights, loan lending and securing another's obligations made** by a child who has not attained majority are null as the securing of another's obligations by means of pledge or mortgage may be made, by way of exception, after the permission of the district court – in case of need or apparent benefit for the child or in case of extraordinary needs of the family. Donation, waiver of rights, loan lending and suretyship are legal acts that remain *entirely inaccessible* for the child, respectively for the person placed under interdiction (article 5, paragraph 3 PFA in relation to article 130, paragraph 3 FC). It turns out that the imposition of (full) interdiction, apart from the fact that it takes away (fully) capacity to act of the person (understood as a legally recognized ability of the person to exercise his/her rights and obligations in person and on his/her own), in any case it also takes away part of his/her general legal capacity to have rights [*pravosposobnost*] (understood as the legally recognized ability of the person to be a bearer of certain rights), and namely: his/her capacity to be a donor, a person waiving his/her rights, lender, surety. The argument to support the exception allowed by article 130, paragraph 3, sentence 2 FC i.e. the giving of security interest to secure another's obligation by means of a pledge or mortgage, is not the presumable will of the person but, again, the identification of different legitimate forms of the interest: either the interest of the incapable person him/herself ("in case of need or apparent benefit for the child"), or the interest of the family ("in case of extraordinary needs of the family"). As the phrase "*in case of need or apparent benefit for the child*" and its effect for the will have already been examined in the comment of article 73, paragraph 2 1985FC, let me tell a couple of words about the second phrase, "in case of extraordinary needs of the family".

The formula "*in case of extraordinary needs of the family*" is closely linked and testifies to the systematic place of article 130, paragraph 3, sentence 2 FC and of the focusing of its regulative effect with respect to the (in)capacity to act of children (the persons not attained 18 years of age). Seemingly, the corresponding application of article 130 FC with respect to the persons placed under interdiction (article 5, paragraph 3 PFA) should exclude the "in case of extraordinary needs of the family" criterion as a reason for the application of the exclusion under article 130, paragraph 3, sentence 2 FC because the interdict who has attained majority is not part of the family of his/her parents ((s)he is not their child) anymore. However, it is possible that another approach is adopted where the "in case of extraordinary needs of the family" criterion is applied with respect to the family set up by the interdict him/herself – i.e. with respect to his wife and children in which case the "extraordinary needs" of that family would be relevant.

Even these quite briefly stated questions concerning the application of article 130 FC with respect to the persons placed under interdiction (article 5, paragraph 3 PFA) show the need that a **dualistic approach (dualism)** should be adopted in the *statutory framework governing the (in)capacity to act of children* (the persons having not attained the age of 18) and *the (in)capacity to act of the interdicted persons* (the persons suffering from intellectual disabilities or mental disorders). It is precisely upon the adoption of such dualism that the interdiction as an insensitive and univocal legal concept affecting not only the capacity to act, but also the general legal capacity to have rights [*pravosposobnost*] of the person, with respect to whom the interdiction has been imposed could be replaced by a system of diverse and flexible support measures and measures for protection of the persons who experience difficulties with the formation and expression of their will. If the restrictions introduced with respect to children, including the ones affecting their general legal capacity to have rights [*pravosposobnost*], aim at preserving their property for the time when the child, as a rule, will attain full age and will be able to autonomously exercise his/her will, then the special regime of exercising the capacity to act of adults with intellectual disabilities or mental disorders should not have as its priority purpose to limit their capacity to act, let alone to take away parts of their general legal capacity to have rights [*pravosposobnost*]. This special regime should initially aimed to respect the authentic will of the person of full age and to ensure different measures of its formation, expression and ascertainment<sup>240</sup> The juridical approach to the persons who have attained majority should not be an analogue to the attitude taken by the law to children. This approach should take into consideration the peculiarities of the age of adult persons that has provided them with certain personal experience, although, of course, such experience is understood and used to different degrees by different persons (this is true irrespective of the differences in the intellectual and in the volitional abilities of different persons). Majority, as a formal criterion related to the attainment of certain age, should be an entrance to the full (or at least full-fledged) freedom being promised and guaranteed by the law, which all legal subjects receive in the same volume. Experiencing certain difficulties in the exercise of adult's is a question that should cause, as a rule, reactions of support and not the imposition of restraining measures. For the affirmation of personal freedom and a fundamental principle of legislation it is decisive that the authentic will of the persons should be respected and supported, especially when such persons experience difficulties in formation and expression of their will.

<sup>240</sup> This is precisely what the shift from a status-based approach, the one offered by interdiction, to a functional approach examining the (in)abilities of the person on a case-by-case basis and offering "functional" solutions is all about. See **Lewis, O.** Advancing legal capacity jurisprudence. – *European Human Rights Law Review*, 2011, No. 6, pp. 700–714, as well as **Quinn, G.** A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities. – In: Quinn, G., L. Waddington (eds), *European Yearbook of Disability Law*. Antwerp-Oxford-Portland, 2009, Vol. 1, p. 105. The status-based approach is also designated as an "outcome-based approach" – see **Pearl, A.** Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and the Legal Capacity of Disabled People: The Way Forward? – *Leeds Journal of Law and Criminology*, 2013, Vol. 1, No. 1, p. 13. The introduction of a different status of the persons with intellectual disabilities and mental disorders is an approach of classification, which reduces the diversity of people and simplifies it into categories that do not correspond to reality but are convenient for the purposes of regulation. See also **Perlin, M.** "Simplify You, Classify You": Stigma, Stereotypes and Civil Rights in Disability Classification Systems. – *Georgia State University Law Review*, 2008, Vol. 25, No. 3, pp. 607–639.

Restriction should be resorted to only in extreme cases, in view of specific act and prevention of specific danger as well as in observance of the principle of proportionality: the restriction must be imposed only for such specific actions and with such level of intensity as are sufficient to prevent the occurrence of a serious danger for the person. All loosely defined terms used in the preceding sentence require detailed statutory regulation and attentive court jurisprudence in order that the freedom proclaimed as the highest value in every democratic legal system can be attained.

The application of article 130, paragraph 3 FC with respect to the persons placed under interdiction with intellectual disabilities and mental disorders deprives them of a specific portion of their right to self-determination, which could be conditionally designated a “**right to self-harm**”. “Self-harm” in the context of article 130, paragraph 3 FC should be understood both as harm done to the property interests and as physical injury to the health, and life of the person<sup>241</sup>. Law reacts to the danger of harming the health and life of the person by different coercive medical measures such as articles 155–165 of the Health Act under the Bulgarian legislation in force: the persons with ascertained serious disturbance of mental functions (psychosis or severe personality disorder) or with manifested permanent mental injury as a result of mental disease as well as the persons with moderate, severe or profound mental retardation or vascular and senile dementia who could, because of their disease, commit a crime, which poses a *danger to their family [blizkite] or to the people around them or which seriously threatens their own health* are subject to compulsory placement and treatment.

The right to self-harm, however, could also have some purely property dimensions. Such cases are associated with the right of the person to make *irrational legal acts with property consequences*, such as the legal transactions without return consideration could most often look like. Making legal transactions without return consideration in civil law is substantiated by their special cause, i.e. *donandi causa* or intent, intention to donate. The approach of interdiction adopted in Bulgarian legislation currently in force denies the interdict the opportunity to form a valid intention to donate, which can override by law the doubt as to the irrationality of donation. Due to the strictly personal nature of such intention to donate it cannot be formed and expressed on behalf and at the expense of the interdict by his/her tutor. The same impossibilities are also present with respect to the waiver of rights, lending of loan and securing another’s obligation. And the same arguments could also be applied with respect to other legal acts, which seem illogical and irrational in each particular case.<sup>242</sup> These acts are assessed and allowed only in view of the interests of the interdicted person, without examining his/her actual or presumable will. The will, even if negated to interdict’s “desires and preferences”, is juridically “inaccessible” in order to substantiate the validity of “irrational” legal effect. The interdicted persons cannot damage their property and cannot be irrational because their desires (their will) are not only placed “under supervision” (and should be aided by support) but are not examined at all (they cannot be used as an argument for allowing one legal effect or another by the court). Thus, the imposition of interdiction to a great extent takes away the right of the person to harm him/herself and to make irrational decisions for him/herself<sup>243</sup>.

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<sup>241</sup> For the last ones as different forms of the right to self-injure see **Stavru, St.** Choveshkoto tyalo kato predmet na veshtni prava [Human Body as an Object of Real Rights]. S., 2008, pp. 78–95.

<sup>242</sup> For the requirement that the legal subject must be a rational “atom” in the social order see also **Quinn, G.** Concept paper: Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD. HPOD Conference, Harvard Law School, 20 February, 2010, accessible online at: [www.nuigalway.ie/cdlp/documents/publications/Harvard%20Legal%20Capacity%20gq%20draft%202.doc](http://www.nuigalway.ie/cdlp/documents/publications/Harvard%20Legal%20Capacity%20gq%20draft%202.doc)

<sup>243</sup> Arguments could be adduced for everybody’s right to self-harm and to make irrational decisions for oneself in parallel with the so-called moral right to do something that is wrong from moral point of view (for example membership in a party leaning to extreme nationalism and racism), we have the right to do it (right to free political activity) as far as by the very exercise of such right we do not harm another person as the others are obliged not to intervene and not to prevent us from doing so when we exercise this right. Although I do not have a moral justification for what I do I can have the moral right to do it. See **Waldron, J.** A Right to Do Wrong. – Ethics, Special Issue on Right, 1981, Vol. 92, No. 1, pp. 28–31.

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\* Titles are first transliterated and then given in English translation in square brackets. The quotations from original French texts are translated into English from their Bulgarian translations used by the author as at times the original French is reproduced for reference. Bulgarian translations of works in English have been reverted to the original. Where available the English translations of non-English titles are given. – Translator’s Note

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## Privatizing the incapacity to act: a possible attempt at a private-law interpretation of the rights of people with disabilities

Velina Todorova

The book *Incapacity to Act of Natural Persons. Contemporary Challenges* by Sr. Stoyan Stavru<sup>1</sup> is the first Bulgarian monograph on a subject that is yet an unspoken challenge to Bulgarian law doctrine. The author's courage to write on such matters, the rich scientific apparatus he uses and many of the conclusions he makes should be praised and a reason for satisfaction at the opening of a broader scientific discussion on this topic.

The reader is offered a multidisciplinary study in which a transition from international-law standards of the rights of people with disabilities (article 12 of the Convention on the Rights of Persons with Disabilities, CRPD) to Bulgarian civil-law theory and statutory regulation of interdiction has been made. Philosophical, psychological and medical-law arguments have been skillfully used alongside the civilist ones. The text is rich in ideas, some of them are extensively supported by arguments, others are only sketched and propose a platform for discussion. In this diversity one feels the absence of categorical position, the refusal to make extreme opinions and conclusions, which is also attained by frequently changing the directions of analysis and proposals. Generally, the work displays caution and a "soft" entry into the subject which can be seen in circumventing the polemics with established theoretical constructs, in the quest for terminological balance as well as in the moderate suggestions *de lege ferenda*. The reader can feel free to choose his/her own theses, arguments and conclusions to further develop them.

The study is structured in two chapters where the author's position is stated by a predominantly philosophical analysis in the first chapter and a predominantly legal one in the second. The subject of study is the legal notion of *full interdiction* to whose consequences the author also equals the *limited interdiction*, a view I support. Within the limits of the assumption that interdiction is a single, "monolithic" and "monotonous" regime of replacement of the person in his/her legally significant life, for which the author has repeatedly offered evidence, he also builds his theses for the alternative to the statutory regulation of interdiction currently in force. His approach is to patiently discuss the key grounds of the regulation: protection, interests of the person with mental disability or mental disease, the property interests, the security of legal transactions and their juxtaposition to the will and its contemporary significance for the autonomy of the person and his/her freedom. The reader will not find ready-made answers, the invitation to active involvement in the conditional discourse of the author is obvious. It is not until the end of the book that we find the more categorical position that new legislation in the field of civil incapacity to act is needed. In this sense the book is an invitation to discussion, an invitation that is academically tolerant to the outlined two positions on the subject: the one of moderate "reformism" visible in a well-known judgment of the Constitutional Court, and the one of the radically new approach to incapacity to act, which is found by the author in the Draft Natural Persons and Support Measures Bill.

The object of the study is the "interest – will" relation. The thesis is that the focus of regulation in interdiction is the protection of the interest, which leads to substitution and depersonalization of the subject in his/her legal being while the actual protection of interests as defined by one's free will remains a privilege of the person capable of acting. Such is also the philosophy behind article 12 CRPD: the equality before the law and the realization of the capacity to have rights [*pravosposobnost*] by means of legal acts motivated by the person's will are attained by the equal capacity to act for everyone. What could be achieved by focusing the regulation on the will is in fact the privatization of incapacity to act, its transformation from public to private issue, which, according to the author, would result in a change to the notion and bringing it into compliance with the requirements of article 12 CRPD.

The logical and substantial border between the two parts of the study is blurred, which could be a sought-after effect. The first chapter examines mostly the notion of incapacity to act of natural persons (*understood as difficulties and inabilities to form and express a will*) and the possible approaches to its "privatization" as an antipode of its public use for persons' legal depersonalization (*by means of three groups of legislative measures: protection measures (protective measures or measures protecting the interest), support measures (facilitating measures or measures facilitating the formation and expression of will) and obstruction measures (impeding measures or measures making it difficult to express the will<sup>2</sup>)*). The focus of the second chapter is the limited interdiction and its possible improvements in view of the privatization of incapacity to act.

The structure, intelligently devised but unusual for legal study, as if compromises the logic of the text and, accordingly, brings discord in its reception. The analysis revolves in circle as it starts by a criticism of full interdiction supported mainly by arguments concerning its protective function as reflected in the statutory regulation. An emanation of that function

<sup>1</sup> Stoyan Stavru is Doctor of Civil and Family Law and Doctor of Philosophy.

<sup>2</sup> See the same measures proposed in the Draft Natural Persons and Support Measures Bill.

is the interdict's interest defined by his/her substitute in legal relations – the tutor (curator, considering the assumed absolute similarity in the consequences). The interest's antipode is the will of the person, which – according to the author – must replace the interest by abolishing the (full) interdiction and by privatizing the incapacity to act. The analysis goes on by examining the subject of the will, its extraction, formulation and legitimization by means of a regime or regimes of protection, support and restrictions parallel to the limited interdiction. Then, the author returns to the interest but now understood and formulated by the person him/herself.

Thus structured, the text is burdened by numerous repetitions, returns to matters having already been discussed (e.g. the inevitable legal analysis of interdiction and its consequences for the natural person which opens both chapters, a repeated discussion, with monotonous arguments, of interest and will and of measures that should neutralize the inabilities, the topic of the type of invalidity of transactions entered into by the interdict, or under the conditions of factual inability, the theory of lucid and dark periods, etc.) and a philosophical analysis of serious volume, which is hard to gradate into conclusions of legal significance. For that reason the text becomes difficult to reception despite the vivid and metaphorical language of the author, which is colored, in places, by some unexpected linguistic finds.

**In the first chapter**, the author finds heuristic potential in the well-known and criticized judgment of the Constitutional Court (CC)<sup>3</sup>, out of which he induces two arguments: the one concerning the protective function of the regime of incapacity to act, which legitimizes it and the one concerning the risk of opening a gap in the law in case that the statutory regulation under article 5, paragraphs 1 and 3 of the Persons and Family Act (PSA) is pronounced unconstitutional.

While examining the protective function the author convincingly refers to arguments, both ones having already been stated and new ones of his own, to justify his thesis that the protection is unclear in terms of the addressee thereof, that it is achieved by inappropriate means and that it does not correspond to the contemporary understanding of the value of autonomy of persons and their equality before the law. At this stage of the study, the author does not engage in a dispute with CC's judgment. He merely uses it to develop a legal and philosophical analysis of the criteria of interest<sup>4</sup> and will for empowerment of legal persons. The indirect criticism of the judgment is contained in the second chapter where he examines two judgments delivered by the constitutional courts of the Slovak Republic and Latvia in order to prove the non-proportionality of the measure of interdiction to attain the aimed protection of the persons (p.76 *et seq.*). In fact, this is a very strong, even if non-explicit criticism, of Bulgarian CC, which, after approached by a request to pronounce a judgment on the protection of rights, has conveniently shifted the issue onto the place of protection/safeguarding and has remained there.

The conclusions that in the “interdiction – incapacity to act” paradigm the aim is to protect the person and that it is attained by safeguarding his/her interests (as explicitly stated in the legislation) and not by his/her will (desires and preferences) are justified. At this stage the author does not engage in a theoretical discussion about the content of the concept of “will” and the extent to which it is inherent in persons with disabilities, which is underlying for the contemporary concept of interdiction. It is not until we get to the second chapter that we find his reasoning in this direction. It is interesting that the author introduces an old and rejected understanding of the capacity to act not as a quality of legal persons but as mental and ethical experiences of the subject, a part of the set of facts constituting the transaction. Such an understanding could be further developed in the contemporary context and ensure a theoretical foundation for the abolition of interdiction.

According to the contemporary understanding of interdiction, it is natural that the interests should dominate over will of the person with disability, contrary to the importance of will for the legal validity of the acts of persons capable of acting. Hence the author's aim to demonstrate that the change to the statutory regulation should proceed in the direction of a “revenge” for the will: to ensure a primacy of will over interest if the aim is to protect the rights of the person with mental disabilities or mental and social problems. This would ensure a more reliable protection because the person can decide on his/her own what interests should be protected and how. If the aim is to protect third parties and civil-law transactions, then it is attained by the statutory regulation of the invalidity of transactions (in which it is precisely the will of the parties thereto that is examined), if, of course, we are willing to do without the “convenience” offered by interdiction. And in order to reconcile the actual paradigm and the new one (contained in article 12 CRPD) the author has devised the original concept of “privatization” of the incapacity to act by the support measures and minimum public intervention.

The author shares the opinion that what turns out to be “more protected” under the regime of incapacity to act are person's property interests<sup>5</sup>, and mostly his/her property, but not so much because of its function as a resource and for

<sup>3</sup> Judgment No. 12 of 17 July 2014 of the Constitutional Court (CC) under constitutional case No. 10/2014: “... the regime of incapacity to act ensures that no legal actions harming the interests of the interdicted person, of third parties and of the general public are allowed”.

<sup>4</sup> The term used in the Family Code is “interest” and not “best interest”. The author refers to article 130 FC but the more accurate reference is article 156 FC and not article 164 FC, a general text on the rights and obligations of the tutor to which article 168 refers. Interests are criteria when managing and disposing of the property of the person under tutorship [*podnastoen*] – article 165, paragraph 1 – and the person under curatorship [*podopechen*] on the grounds of the reference made in article 168, paragraph 2 CK.

<sup>5</sup> See also Shabani, N., P. Aleksieva, M. Dimitrova, A. Genova, V. Todorova. *Novata paradigma na pravosubektnostta: chl. 12 ot Konventsiyata na OON za pravata na horata s uvrezhdaniya* [The New Paradigm of Legal Personhood: article 12 of

the sake of “serving” [him/her] as for the sake of the common good: “(T)he interest of the property as a future object of civil-law transactions is as a rule an interest of its preservation and increase.” The historical legal arguments used in this direction are quite convincing. The author returns to this criticism in the second chapter where he discusses the change to legislator’s position of increased protection of personal rights at the expense of property ones (examples: the abolition of prodigality as a reason for interdiction and the ban of the fideicommissary substitution in succession law (p. 85).

Different interests could arise with respect to the property, if we set aside the rights to it, and the law can ensure protection to some of them<sup>6</sup>. The problem is that the protection of property does not always coincide with the interest of keeping it, and the law is generally silent about the manner of identification of the protected interest of the person with mental disability or mental disease. On the one hand, the property interest has been taken out of holder’s control as the generally accepted understanding is that such interest must preserve and not serve. On the other hand, the formulation of interests is granted to the tutor or the curator without any of them being obliged to discuss the opinion, desires and preferences of the holder of property right, let alone *his/her presumable will* (the total supremacy of reason is manifested in the full juridical disqualification of feelings, desires and preferences, which is unacceptable in contemporary society even for the law). Thus, we have to agree that the statutory regulation stipulates to a much greater extent a protection of third parties’ interest (for example, preservation of property for the heirs) or the civil-law transactions (but the general and the special regulation of transactions have the same purpose), which delegitimizes the protection by means of the incapacity to act. As a result of this analysis the author comes to two questions: how should we resolve the conflict between the interest protected by the statutory regulation and the will which is an expression of the authentic desires and preferences of the person with disability and how should we ensure its supremacy (which could only be possible by abolishing interdiction – my note).

Along this line of the study one logically arrives at the categorical conclusion that Bulgaria has not fulfilled her obligation arising out of article 12, item 2 CRPD to protect the capacity to act of persons with disabilities “on an equal basis with others in all aspects of life”. The proposal that is made is to abolish the full interdiction as part of the commitment made (p.16), a seemingly palliative, if not declaratory statement: having earlier equated the two forms of interdiction in terms of their legal consequences why shall we now abolish only the full interdiction provided that the limited interdiction is as useless and harmful for the person as the full one.

The unmasking of interdiction’s protective function brings forth arguments that also refute the thesis of CC that if the statutory regulation is declared unconstitutional a gap will arise in the law (i.e. the persons with disabilities will not receive the protection recognized for them by the Constitution). The author proves that the thesis is false but by moving onto the plane of comparative international law analysis. A gap does exist even without such an intervention but it is the result of the inconsistency of Bulgarian statutory regulation with article 12, item 3 CRPD<sup>7</sup>. According to CRPD the protection is attained not by means of exclusion of the persons by using the interdiction but on the contrary: by recognizing their equal capacity to act and by providing persons with disabilities with the support they need in order to independently exercise their rights.

The overcoming of this gap calls for another approach to the incapacity to act as a public-law antipode of the capacity to act of natural persons (a passage from status to functioning). Quite ingeniously the author defines this approach as “**the privatization of incapacity to act**”. The idea is that protection must make room for the autonomy of persons. The person’s inabilities (incapacities to act) [*ne(dee)sposobnosti*] in certain areas must be offset not by substituting the subject in the civil-law transactions by another person “capable of acting” (a tutor or a curator) but by introducing measures that allow for an independent exercise of the rights. The existing ability will be thus “intensified”, established (communicated) and legally validated, which means a restoration of the significance of the will (even if understood as one fragmented into *desires* and *preferences* as the author puts it) at the expense of the interest. This theoretical construct explains the diverse measures stipulated in the Draft Natural Persons and Support Measures Bill (DNPSMB)<sup>8</sup>.

The applied research method is not only ingenious. It is attractive to the proponents of the new paradigmatic approach of CRPD because it allows the refutation of the argument of protection and its replacement by the argument of autonomy, rights and equality before the law contained in article 12 CRPD. The privatization of incapacity to act is made by introducing a palette of measures to protect not the interest but the will and thus, the authenticity and autonomy of the legal person. As far as they exist the person’s deficiencies or difficulties (which we may also call *inabilities*, to use the author’s term, but with the reservation that it is close to the established term being criticized) will be overcome not by denying his/her capacity to act but by introducing support measures, ones that facilitate but also impede him/her in specific areas that are significant for the law and rights but without the total exclusion of the person from legal life. Which will in fact

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UN Convention on the Rights of Persons with Disabilities] In: Pravna misal [Legal Thought], 2014, No. 1.

<sup>6</sup> Even as regards the property of children the law now allows transactions to be made, which have been perceived as harming the interests of the child until quite recently (article 130, paragraph 4 FC). It has also been adopted that the property of the child can serve another’s interests – article 130, paragraph 2 and paragraph 4 FC.

<sup>7</sup> Formally, CC has not delivered its opinion on this matter because it was not approached by it because it is excluded from Ombudsman’s competence – article 150, paragraph 3 of the Constitution.

<sup>8</sup> Adopted by Decision of the Council of Ministers of 27 July 2016. It is to be introduced to the National Assembly.

also bring us closer to the aim: to protect the person and his/her rights and not his/her interests so as the latter are understood and defined by another person (the substitute in decision-making).

The privatization of incapacity to act has one more aspect: the palette of measures aims at bringing and communicating the person's authentic will, desires and preferences, which would result in the protection of his/her interests as (s)he him/herself understand them. It is even proposed (although not exactly along person's self-determination lines) that rules and mechanisms should be set up to establish and take into consideration one's mimics as "movements of the will" of the person with disability (p. 50). They are the ones that should be fully supported, they also manifest the philosophy of DNPSMB.

The author does not define the concept of "will". The approach is one of a gradual introduction of elements and even nuances of its substance without engaging in a dispute with the established names and their concepts. Thus, in the beginning the emphasis is on the cognitive elements, self-control, then "desires and preferences" defined as fragments of the will are included: („(d)esires and preferences of people with disabilities are part of their freedom and although they do not have the coherence and univocality of the will...")<sup>9</sup>. Will is examined in its manifestations of "past", "actual", "presumable" will, its relation to memory and its "disappearance" in certain juridical facts. Generally, the text offers a free use of, even a play with the term in certain slightly unexpected relations and hypotheses.

However, we remain within the framework of the so far unshakable understanding of the will as a characteristic defining the capacity to act, which is a quality of the reasonable person as his/her cognitive abilities are key to his/her legal being (to understand but also to control his/he actions). Although we are offered not to favorize the persons' cognitive abilities (the capacity to act is aptly defined as cognability in this paradigm). Options for discussion are sought in justification of the right to err, in the legal validation of emotional experiences, desires, preferences as ones motivating behavior but left without significance for the law. The monograph also sets topics for future studies: the parallel between error and irrational decision as juridical criteria for the validity of the will, typologization of transactions by the criterion of motive, which would add a significance of "emotional transactions" as the author calls them. This means that the irrelevance of the motive or the cause in transactions we get to the conclusion that interdiction may not be based on the aim of protection against irrational transactions: the law should not be interested in the motive but in the extent to which any third parties' interests are affected: the general rules under the Obligations and Contracts Act (OCA) apply.

One can only regret that the author does not comment on and does not use in his analysis UN Committee on the Rights of Persons with Disabilities' General comment No. 1 (2014) on Article 12: (CRPD/C/GC/1/2014) where these matters are examined based on the submissions made by the member states in their reports and also based on theoretical and other studies. The comment emphasizes the relative nature of cognitive abilities<sup>10</sup> and refutes the understanding of capacity to act as a function of medical diagnosis (disability-disease) or of functionality (a deficiency in decision-making) or of the outcome of person's acts (harmful acts, for instance<sup>11</sup>). As stated in the comment (item 15): "[T]he concept of mental capacity\* is highly controversial in and of itself. Mental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity." Moreover, the unshakable equation of the capacity to act with cognitive abilities presumes that we have the ability to precisely measure the processes and connections in human brain in any case of doubt (i.e. the medical diagnosis). In Bulgarian statutory regulation this complex assessment is assigned to the court that should make it by means of an external expert's assessment and by means of a set of questions at a brief personal meeting with a person who is placed in an extremely unusual environment and framework of examination. On the other hand, the medical diagnosis becomes the reason for examination of the persons' mental abilities in view of their future legal acts while for persons with no diagnosis the question of mental abilities is not posed. This is precisely what the discriminatory approach of Bulgarian regime is all about, as justly pointed out by the author: "(i)f before the interdiction irrationality was an integrated part of the will of that person and the decisions it "produced" were respected by the law as valid acts of freedom, the interdict's interests and rationality tests predominate after the interdiction. The subjective part of will formation assessed as "compromised" by the court is replaced by the construct of "the best interest" that asserts itself as an objective one."

In his criticism of total deprivation of capacity to act the author refers to other options which would be more proportional for the purposes of **protection**. Such option is the "ad hoc" deprivation of person's ability to express his/her consent,

<sup>9</sup> There is also a problem in the translation: in the official English text of General comment No. 1 General comment No. 1 of UN Committee on the Rights of Persons with Disabilities the word "will" is used, which can be translated into Bulgarian as "volya" but also as "zhelanie" [desire].

<sup>10</sup> "Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors" – item 13 of General comment as well as in many relevant judgments of the c.

<sup>11</sup> Bulgarian civil-law theory does not allow the subject to harm his/her interests by his/her actions. See Pavlova, M. Graždansko pravo – obshta chast [Civil Law – General Part]. S., 2002, p. 230.

\* In the original Bulgarian text the phrase "kognitiven kapatsitet" [literally: "cognitive capacity"] is used to translate "mental capacity" from the original text of General comment No. 1 (2014). – Translator's Note.

modeled after the regulation of forced treatment (“... *in contrast to the total alienation of will in interdiction, the compulsory medical measures are regulated as an ad hoc intervention, in the event of specific need – if the person is dangerous for him/herself or for others*”). The author’s contribution in this plane of analysis is the introduction of the criterion of “*presumable will*” as adopted in medical law (article 96, paragraph 4 of Medicinal Products in Human Medicine Act and article 27a, paragraph 4 of Transplantation of Organs, Tissues and Cells Act) as one that is considerably more sensitive to person’s authentic will (p. 20 *et seq.*). The sources of the presumable will are diverse: past decisions of the person (*projections of autobiographical decisions*), statements made by his relatives as well as ones taken *from* documents made by the person at a previous time (*preliminary instructions for treatment, welfare attorneys, etc.*). Despite the criticism against the latter, especially by means of the argument for making dependent the person’s actual will the author convincingly proves that this will is much closer to the actual will – desires and preferences – than the will of person’s tutor or curator. Therefore, the preliminary documents left by the person must be recognized by the law.

A serious portion of the study is dedicated to the **philosophical debate** about identity. This multidisciplinary context of the legal notion of interdiction is innovative and requires certain willingness for its reception by the reader. I think that the conclusions that “*(b) by separating the capacity to act from the general legal capacity to have rights [pravosposobnost] the interdiction enables a feigning of identity by delegation – the tutor constructs identity on behalf and at the expense of the interdict. Thus in order to ensure juridical continuity (legal personhood, legal personality) it suffices to attribute connectedness (general legal capacity to have rights [pravosposobnost]) of certain interests united around individual’s bodily and property integrity (care for one’s own affairs) and interpreted as per the narrative of rationality (preference for benefit over damage), the only one possible for them*” should be fully supported. The philosophical discourse enables the author to prove again that interdiction is an emanation of person’s interest over his/her will (desires, preferences). The alternative is the right to provide an opportunity for preservation of person’s identity by privatizing the incapacity to act – by ensuring the support measures at the phases and in the areas where the person experiences difficulties.

Thus the author returns to his initial debate over the supremacy of interest or the supremacy of will. Having demonstrated that the domination of interest over will leads to a depersonalization of the subject he proposes a restoration of the significance of will as well as means for its identification, deduction and announcement. Hence the direction of the analysis goes from the adoption of the mandatory primacy of will, from which the adequate approach to the protection of interest is deduced. An interesting emphasis upon the juxtaposition of the two schemes explaining the subjective rights – the theory of interest and the theory of will – is the addition of the criterion of “memory” of the subject as something that influences the capacity to act and the possibilities of its restriction. A philosophical narrative of memory, its loss, especially in the Alzheimer’s disease and its legal significance is also included and the reader is put in a position of getting lost in the structure of the text. A review is also made of the lawful juridical facts according to the criterion of participation of the will as it is concluded that for juridical facts of the category of resultative acts the participation of one’s will is irrelevant and therefore their legal consequences occur directly for the interdicts. While for other lawful juridical facts the regulation protects the interest as the interdict cannot do them because of the irrelevance of his/her will. For persons of limited capacity to act such transactions and acts are accessible.

In this part of the study the author justifies four proposals for change to the regulation, which he himself defines as “palliative” because they are based on the theory of options in mental being (“lucid and dark periods”). Firstly, the author adduces arguments deduced from the interpretation of the regulation of civil capacity to be held responsible for delicts [*deliktosposobnost*] (article 47 OCA) and the invalidity of transactions (article 26 and article 27 OCA). The author refers them to the theory of “dark” and “lucid” periods in the consciousness of mentally ill persons. For instance, the literal and comparative interpretation of the term “unable” (and not “incapable of acting”) of article 47 OCA justifies a conclusion that in the hypothesis of civil-law delict the law permits the presence of “lucid intervals” in the mind of the person, the presence of factual capacity to act, even if the person is formally under full interdiction. Another argument comes from the comparative analysis of the texts of article 26, paragraph 2, hypothesis 2 OCA and article 27, hypothesis 1 OCA. The conclusion is that the pronouncement of transactions made by an interdict to be null from the outset prevents one from taking into consideration the possibility of such transactions being made consciously, in a “lucid” period of the person’s consciousness and therefore it is more acceptable if such transactions are merely voidable. If the facts are different, the transaction could be voided on the initiative of the heirs of the interdict him/herself (in case that his/her interdiction is revoked) but this will depend on the will and the judgment of such persons. The last proposal is to establish full validity of transactions made during the lucid period as to that end a medical certification could be stipulated for the specific period (introduction of a “medical notary”). This means that we come back to the status, to the diagnosis as the defining feature of capacity to act, which we have already denied.

The conclusion made is that a differentiated regime of capacity to act is possible because persons function differently, their condition is a dynamic and not a constant value, there might be “dark” and “lucid” periods in their cognitive and volitional abilities (if we put it in author’s “colorful” language: to introduce *different dimensions (nuances) of gray* in the black-and-white world of interdiction). The proposal is to integrate the theory of “lucid” and “dark” periods into the legislation (thus avoiding the need of its interpretation, especially for the acts of limited interdicts).

The theory of “lucid” and “dark” intervals in the mind of mentally ill persons, which reflects the dynamics of their condition, is a good idea in principle (it is also discussed in several places in the work) and which is now being used in the theoretical analysis of specific hypotheses. It is another question that this theory could be applied only for persons suffering from a mental disease. Persons with mental injuries for whom the condition is irreversible and, in this sense no dark and lucid periods are possible, remain outside the analysis (the author admits that in the end of the text, p.112). He helps himself out of this difficulty thus: “... *the will of the persons with mental disabilities [shall] not only be taken into consideration in the cases where it meets certain “threshold” psychological criteria but shall also be integrated into its dynamics and in its different degrees of intensity, rationality and well-foundedness.*”

Yet it is acknowledged that the approach of “lights and darks” in the mind is not appropriate for the full consideration of persons’ authentic will. The most appropriate approach for that is the one of diverse measures (protective, facilitating and restricting), which, however, must be combined with the abolition of interdiction. The gradation in which the measures are expressed in the work is also embarrassing: the protection measures come first (Although the author himself admits their potential to substitute the will). It is also unacceptable to apply the medical criterion, which brings us back to the system of interdiction. However, the analysis of the two other kinds of measures applicable in both types of disabilities: facilitating measures and self-binding measures. The study provides a good basis for discussion of the last type of measures whose effect is precisely the self-binding by “*transferring*” a valid will over time and keeping its binding effect – preliminary declaration, binding agreements, “lasting power of attorney” and others (pp. 55-57). The question of the bond of trust is also posed here as the basis for the privatization of incapacity to act and then follows the convincing conclusion that the privatization of incapacity to act is done by negotiating the capacity to have rights [*pravosposobnost*], how it is to be exercised by the person, from a measure into public order, it becomes a private-law instrument for respecting the authentic will in persons’ legal life.

In the **second chapter** it is stated that the possible changes to the statutory regulation of interdiction are to be discussed, although the same statement closes the preceding chapter. The outlined framework of the study is a provocation for the reader: could there be non-exhausted, “hidden” resources of interdiction as a legal notion and as far as they can offer any alternative to the current and to the proposed statutory regulations. The research approach is reversed here: we proceed from the will and the manners of its deduction, communication, toward the interest it protects.

The opening theses are promising but repetitive: the restriction/deprivation of the capacity to act also reflects on the capacity to have rights [*pravosposobnost*] by practically virtualizing, turning it into an abstraction, in “pure” interest (without will) that must be taken into consideration by the other legal subjects, by their judgment and on the basis of their decision (the substitution in decisions, which is inadmissible for the free person, my note). The incapacity to act deprives the full interdict of “his/her will” by reducing him/her to “his/her interest” (“his/her interests”). His/her “capacity to have rights [*pravosposobnost*]” remains (entirely) “per se” if there are no mechanisms of taking the person’s actual will into consideration. An illustration of the interdict’s “virtual” “capacity to have rights [*pravosposobnost*]” in a number of fields of life is made accompanied by a list inaccessible rights (pp. 73-74). The characteristics of the regime are listed (homogeneity/non-proportionality, staticity), which have already been pointed out in the literature as this list takes up a lot of space but the author also adds some ideas of his own.

Again, we come back to theory of “lucid” and “dark” periods which is defined as a “functional capacity to act” that can be combined with interdiction. The functional capacity to act is opposed to the idea of introducing an irrefutable presumption of persons’ legal capacity to act, which would be rather harmful according to the author: “... *the favorizing of the capacity to act as an irrevocable characteristic of every human being having attained certain age will again turn into a self-proving fiction, which – instead of defending – will harm the interests of the persons with intellectual disabilities [umstveni zatrudneniya] and mental disorders.*”

We get back to the methods to express and respect the authentic will of the person: by taking into consideration of past will (pp. 89-90) with an emphasis on the different types of powers of attorney but also by respecting the **present desires**: by obligations for the tutor or the curator to inform him/herself of them and to justify all of his/her actions by the interdict’s desires and preferences. Thus we enter again a parallel discussion of the regulation of child protection. It is proposed that the interdict should be given a hearing in all proceedings affecting him/her (not only in the proceedings for placement under interdiction). The problem is that the hearing is a way of informing the will the person, which does not in any way attach mandatory nature to either opinion, or desire. Without going into details, I would say that the hearing is a means of protection of the interest and not a means of validation of one’s will. The hearing only informs the decision-maker (again, we are within the paradigm of substitution, which, if interdiction is abolished, could be allowed as an exception subject to specifically stated criteria, p. 50).

In the end of the study the reader is provoked again by the question of what the approach to the legal regulation of (in) capacity to act should be: monistic or dualistic. The author again invites us to compare children to adults with mental disabilities and psychosocial problems. The reason is the monism at the present. My categorical answer is: the dualistic approach is a must if we accept the specifics of subjects. If the protective approach to children is justified by their developing capacity to act (another argument from article 5 of Convention on the Rights of the Child), then the approach to adults cannot be other than offsetting their difficulties in their legal being by a privatization of incapacity to act.

Therefore, we should read critically the reasoning by which we are offered a regime parallel to interdiction, which regime should ensure, following the example of the regime of protection of children, permanent examination of the interests, **protection** and support for the persons of intellectual disabilities and mental disorders. The additional regime must contain guarantees analogous to the ones the Child Protection Act grants to children but also guarantees that take into consideration the peculiarities of persons suffering from mental deficiency and mental disorders. We find the same thesis in the final conclusions.

A change to the Social Assistance Act as regards the placement of persons with disabilities in social institutions is also discussed. The example is hardly appropriate although at first glance it is in the direction of the change being sought: the premise of person's express consent to the placement is introduced and as if thus the will triumphs. It is doubtful to what extent this dimension reflects a fundamental change to the philosophy of the concept of interdiction. It is rather a direct reaction to a judgment of the European Court of Human Rights and is not associated with a change to the main regime under PFA. For this reason this is a convincing illustration of the impossibility to improve the system "piece by piece". It must simply be abolished. The extensive discussion of the hypotheses of exercising personal rights in the field of family & matrimonial and parental law should be viewed along the same lines. In this plane the author finds potential for expanding the possibilities for performance of independent valid legal acts by interdicts.

In the end of his work the author returns to his initial enthusiasm: *"...there is still doubt as to the extent to which the interdiction has and is suited to carry out any purposes associated with respecting the interdict's authentic will, or, as a rule, it serves only the interests of other persons. I think it is undoubted that the civil-law status of the persons with mental disorders and mental deficiency must be governed by law's fundamental principle of respecting human freedom."*

This end leaves a flavor of a play with the reader, of a (intended) ambiguity of position, which is also an author's position of a kind. We can accept it because the book generously offers a set of ideas, arguments and provocations for a more extensive discussion on the topic of interdiction and its forthcoming abolition.

2 August 2016



## Afterword

This book is far from perfect. Perfection is not among its aims. It aims to pose the question concerning the inability/incapacity (to act) by keeping it “on the border” between two highly specialized expert fields of differing approaches, such as law and philosophy.

The interdisciplinary approach thus chosen renders the text “hermaphroditic” and turns it into a real challenge for the expert-reader. Looking at the same problem through different expert keyholes often arouses a feeling of repetitiveness: ultimately we are looking at the same problem area. And although what we are looking at is seemingly “the same” our gazes do not repeat. By taking the risk that such a feeling of repetitiveness could be evoked, in this book I use the approach of overlapping visual fields as a form of methodological advocacy in favor of the thesis about the integration of these fields. When they are overlapped and joined together the space being looked at ceases to be “the same”, it gets layered, it “opens” into different strata and offers diversity where one can also find what Assoc. Prof. Velina Todorova calls a “soft” approach. i.e. one where the reader chooses (consciously or not) his/her way into the multitude of corridors of meanings. I will make a digression here in order to say that the opportunity for such a choice is also set in the book as a physical volume: it was printed with three different covers as each reader is invited/prompted to choose “his/her own” cover and to read the book “corresponding” to it while ignoring the fact that the characters confined in the graphical space of all three covers are the same.

Turning the text into a multi-dimensional labyrinth of meanings and possible interpretations, no matter how unpleasant it could be for an “orthodox” jurist, is a real pleasure for quite a few philosophers. Of course, there is a long list of exceptions. And yet, the approach of the two types of specialists could (with all risks it entails but what is the text if not running the risk of the writing being understood differently and always of not being true) can be generalized: if law decides, philosophy problematizes and the conversation between them, especially if it drags on, can confuse almost everyone. Neither the reader, nor the author is insured against such confusion. However, I would not even take out such insurance. Assuming that confusion is a powerful generator of various doubts I think it is an appropriate environment for cultivation (ripening) of new solutions to the question posed. The state of confusion is especially useful when we have actually stopped asking the question and merely attach the established old solutions to it out of habit.

In the following several paragraphs I would like to reveal the conception behind the peculiar dramaturgy of the text. I was provoked to do so also by the polemical review by Assoc. Prof. Velina Georgieva to whom I am grateful and thankful for her in-depth reading of this book and for her comments.

What is the dramaturgy of the text, actually?

Let me present it in four winding steps:

1. I proceed from the thesis that we can solve the problem by improvements to the existing legal regulation of interdiction. This is an optimistic beginning, and as Faina Ranevskaya says: optimism is a shortage of information. The beginning is optimistic and everything seems decided beforehand – a reform is needed but it must also be a realistic, it must take into consideration the traditions of Bulgarian law of persons and seek support in the historical roots of the concept of interdiction which offer a great variety of forgotten instruments;
2. At a certain time that could turn out to be different for the author and each of the readers it turns out that the reform must be serious as we should pass from the “black-and-white” view of the problem (as an opposition of “capable of acting – incapable of acting”) to the introduction of a different number of “nuances of gray” (granting procedural rights to the interdict, respect for the “dark” and “lucid” periods, etc.), including by attempting to soften, and where necessary, even to efface, the most vivid shades of “black” (undoubtedly, one of them is the full interdiction, which in its present form can be compared to the state of “civil death”). At this stage, the first more prolonged doubts start to emerge, which gradually take away the calm of initial enthusiasm;
3. Limited interdiction, however, turns out to be not less “black” as in practice it leads (as full interdiction does) to a deprivation of legal significance of the limited interdict’s will – the will expressed by the latter is legally irrelevant (especially if we accept that nullity, and not voidability, is at hand in this case), where the added declaration of will under the “magic” legal name of “curator’s assistance” is missing. In everyday practice curator’s assistance often consists merely of “curator’s omission”, which deprives of legal relevance the acts of the limited interdict. The point here is not some “right to a veto” manifested in the possibility of curator’s stopping certain acts but a constitutive type of curator’s participation in the juridical validation of the interdict’s will. A possible outcome is the final conclusion (at least this is my conclusion) that limited interdiction is only a more amiable and estheticized mutation of interdiction but it continues to be an approach of deprivation, exclusion and prohibition in its essence. The declaration of will of the limited interdict remains “natural”, which loses its legal significance without the curator’s assistance. Despite being shinier and more

difficult to be seen the transparent cover of interdiction is there and separates the interdict and his/her will in a space invalidated by statute;

4. Ultimately, I propose that the law should create a “world of capacity to act” where all colors of (in)ability would be present. This means an abolition of those concepts (both full and limited interdiction come under this heading) that do not take into consideration the nuances in the (in)abilities of natural persons. This “colorful” world, no matter how naïve it might seem to a number of jurists who have both their feet on the ground could be populated by a many new instruments aimed at the inclusion of persons into the social and legal life of the community. Yes, “community” is a word of increasingly negative charge in a world professing individualism. Yes, people have so many problems (of their own) that they hardly spare any time to make systemic efforts to include someone (else) into something (community), which is, one way or another, (only) an interim constraint for them (which they bear until they get to their home castle in front of their world screen). Yes, the state is overburdened by claims and commitments and hardly keeps up its competences. Yes, dangers “lurk” everywhere. Yes, we have to be careful. Yes! Despite all these “ayes”, in my opinion it is not only worth it but we are also obliged to “paint” our common world in different normative colors enabling different possible inclusions. Protection measures (which are closest to the restraining approach of interdiction), facilitation measures (which are closest to the approach proposed by the Draft Natural Persons and Support Measures Bill) and obstruction measures (which are farthest from the debate in Bulgaria) are just one of the many classifications through which one can see the new opportunities for legal regulation of inability/incapacity (to act).

The said four-step “turn” is neither unconditionally structured, nor strictly algorithmicized. I have not aimed that. It happens in tides as the way out of a confusion does. In it one can find both the amplitudes of possible hesitation and the features of a catharsis of a kind. The thesis about the unused potential of interdiction as an ancient legal concept and thereto related arguments as initially adopted did not hold out. Despite the effort made and the maximum level of convincingness of the thesis about the preservation of interdiction, it turned out that the present situation is unbearable. Yes, a realistic reform including the full abolition of full interdiction and “repairing” of limited interdiction is possible but it would be best if we entirely abandon the paradigm of confinement (exclusion) of persons with inabilities and if we start not only to experiment but also to build a new paradigm based on respect for (inclusion of) persons with inabilities.

A “turn” can also be found in the affirmation of the dualistic approach in the regulation of inability/incapacity (to act) of children and inability/incapacity (to act) of persons with mental and intellectual disabilities. The equation of the legal regime of inability/incapacity (to act) of the two categories is part of the consequences of the application of the approach of effacement of nuances (differences) that turns multi-dimensionality into binarity. The main difference between the two groups of persons is not only in their experience but also in what experience has turned into for their identity. It is precisely at this point that another component, memory, is added to interest and will. Thus, the philosophical question of identity penetrates into the legal regulation of capacity to act.

An important difference should be noted by the law also in the group of persons who are currently brought together (juridically and linguistically “sentenced” in general and en masse) into the concept of “interdicts”. If an approach, forgotten but traceable back to Roman law, should be restored for persons with mental disabilities, an approach of respecting the “lucid” and “dark” periods, then an entirely new approach is needed for persons with intellectual disabilities, an approach that attempts to integrate, as juridically significant, a number of different, indefinable in advance, levels of man’s interaction with the world, which permits the adoption not only of reason but also of emotionality as a decisive criterion for (legal) capacity. The most serious challenge to contemporary law lies precisely in the legal regulation of persons with intellectual disabilities. And the question is: Can we reject the principle under which the gradual quantitative deprivations (‘accumulations’ in the original maxim) lead to abrupt qualitative changes? Can we replace the threshold thinking of capacity (to act), i.e. the thinking where everything (everyone) has a its (his/her) (lower) limit beyond which law becomes different, by a “detective” approach of investigation of every will, regardless of its level of well-foundedness, completeness and representativeness? These are the questions that still stand before the reader even after the last page of this book is read.

It is true that the analysis revolves but not in “circle”. And thus a definite aim is pursued. Let us take the example of interest:

“The analysis revolves in circle as it starts by a criticism of full interdiction supported mainly by arguments concerning its protective function as reflected in the statutory regulation. An emanation of that function is the interdict’s interest defined by his/her substitute in legal relations – the tutor (curator, considering the assumed absolute similarity in the consequences). The interest’s antipode is the will of the person, which – according to the author – must replace the interest by abolishing the (full) interdiction and by privatizing the incapacity to act. The analysis goes on by examining the subject of the will, its extraction, formulation and legitimization by means of a regime or regimes of protection, support and restrictions parallel to the limited interdiction. Then, the author returns to the interest but now understood and formulated by the person him/herself.”

This “circle” is not merely a semantic circling, it is a painful “rebirth” of interest from a definition in which it is “what public reason says is useful” into a position according to which your most important (proto)interest is that “your interest in your

interest should be defined by your will". We set off from one concept of interest and we arrive at another understanding of interest. In this sense this is not a vicious circle, it is rather inscribed in a spiral. The semantic vibration is a sought-after approach also when the other key concepts in the book are used. This explains somewhat the absence of definitions (including a definition of the concept of "will"). Roman jurists notoriously feared the use of definitions, which confine, as a rule, the variety of meanings (and possible cases) into a single meaning (and solution) and which definitions, now legal (turned into norms and having become as authoritative as possible), are so beloved by the additional provisions of Bulgarian laws in force. Instead of the act of "fixing-into-an-item" (i.e. turning the concept into a fixed content, into an item you can lean on), which is law's approach of defining, the freedom of "budding" has been chosen in this book (i.e. to exploit the concept as a source of "blooming" of different possible meanings), which is philosophy's approach of problematizing. Of course, this approach could also provide a good shelter for me: I could escape the juridical requirements for specification by philosophical problematization and I could cut off the philosophical objections by the stringency of a selection of legal definitions. But this is my responsibility as an author: I must keep the possible outcomes for the reader despite the whirling dramaturgy of the text. And I am convinced that this book is only a way stop for the discussion on inability/incapacity (to act) offering a uneasy and temporary shelter, which will quickly prompt responses from different people and specialists, and by doing so, also a further movement along the winding route of the truth that always slips away from us.

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Stoyan Stavru







**This book is a study of civil-law matters of incapacity to act of natural persons in the context of the proposed reform of Bulgarian personal law. It examines the boundaries of the potential contained in the legal notion of interdiction as an approach of restriction and exclusion as well as the opportunities to have it replaced by a diverse set of supportive and inclusive legal tools. The leading method of the study is interdisciplinary as the solutions are sought and verified through the alternating perspectives of law and philosophy.**

**The book is a challenge to specialists in different fields: lawyers, philosophers, sociologists, psychologists, psychiatrists, physicians, medical specialists. It would also intrigue anyone interested in the contemporary debate over the legal status of people with intellectual and volitional inabilities.**

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