6 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in the Catalan legal system

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1. Why is it necessary for Catalonia to have its own chapter? Catalan legislative competence

The assumption of exclusive legislative competence in civil matters by the autonomous community of Catalonia may come as a surprise to outside observers, but it derives directly from the institutional framework established in the Spanish Constitution of 1978[1] (hereinafter, C78.), which allowed not only the preservation of the so-called historic rights but also their modification and development. This recognition affected not only Catalonia but also other Spanish territories, such as Aragon, the Balearic Islands, the Basque Country, Galicia and Navarre.

In the specific case we are dealing with, that of Catalonia, the legislative power stems from Article 149.1.8 and the 1st Additional Provision of the Constitution, as well as Article 9.2 of the 1979 Statute of Autonomy (EA79), which was subsequently replaced by Article 5 of the 2006 Statute of Autonomy (EA06). The publication in 2010 of Book II of the Catalan Civil Code on persons and the family[2] makes it necessary to consider the

1 Article 149.1.8 C78 The State has exclusive competence over the following matters: Civil legislation, without prejudice to the preservation, modification and development by the autonomous communities of civil, foral or special laws, wherever they exist. In any case, the rules relating to the application and effectiveness of legal rules, civil-legal relations relating to the forms of marriage, the organisation of registrers and public instruments or entities, the basis of contractual obligations, rules for the resolution of conflicts of laws and the determination of the sources of law, with respect, in the latter case, to the rules of foral or special law.

1st Additional Provision C78.

The Constitution protects and respects the historical rights of the foral territories.

The general updating of this foral regime shall be carried out, where appropriate, within the framework of the Constitution and the Statutes of Autonomy.

Article 9. EA79: The Generalitat of Catalonia shall have exclusive power over the following matters: (1) organisation of its institutions of self-government, within the framework of this Estatut, and (2) preservation, modification and development of Catalan civil law.

Article 5. EA06 Historical rights.

The self-government of Catalonia is also based on the historical rights of the Catalan people, on its secular institutions and on the Catalan legal tradition, which this Estatut incorporates and updates under Article 2, the second transitional provision and other precepts of the Constitution, from which derives the recognition of a singular position of the Generalitat in relation to civil law, language, culture, the projection of these in the field of education, and the institutional system in which the Generalitat is organised.

2 The Codi Civil de Catalunya has been created using the open code system through the publication of different laws: in 2003, Book I, on the structure and basic content, was approved; in 2006, Book V, on rights in rem; in 2008, Book III, on legal persons; and Book IV, on successions; in 2010, Book II on persons and the family, was published; and finally, in 2017, Book VI on obligations and contracts.

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application of Article 12 of the United Nations Convention on Persons with Disabilities to Catalan substantive law.

I will try concisely, and not exhaustively, to point out some of the historical circumstances that have been decisive in shaping the current constitutional framework.

The maintenance of its own legal institutions dates back to the Middle Ages, when the Iberian peninsula was divided into different kingdoms and territories.[3] Thus, in Catalonia – following the etymology of Roman law – the *Constitucions i altres drets de Catalunya* (Constitutions and other rights of Catalonia) were promulgated in 1422. In 1704, the Third Compilation of the Constitutions of Catalonia was published as an ordered summary of all the provisions considered applicable in legal matters, mainly those of civil law.

In the War of the Spanish Succession (1701–1714), Catalonia sided with Archduke Charles of Austria, who lost the battle against the Bourbon pretender.[4] The new King Philip V, by means of the Nueva Planta Decree, abolished[5] the historical rights of his adversaries. It is true that the derogation affected above all the jurisdictional sphere and left civil institutions in place:

> *In everything else that is not provided for in previous chapters of this decree, the constitutions that previously existed in Catalonia shall be observed; it being understood that they are newly established by this decree, and that they have the same force and effect as the individual provisions of the decree.*

In other words, the Nueva Planta Decree maintained the traditional Catalan civil law, but without the possibility of adapting and updating it, as it abolished the Catalan legislative bodies.

Surprisingly, some of them survived in the inheritance and family spheres. The permanence of these institutions, which are deeply rooted in the Catalan social structure, cannot be explained without their link to their own language,[6] which has remained alive in Catalonia throughout the centuries. The combination and preservation of these two elements, law and language, determine the idiosyncrasy of the Catalan people.

During the 19th century, when codification was undertaken in Spain, an attempt was made to enact appendices to the Spanish Civil Code that included the so-called historical and foral rights.[7] In the Catalan sphere, the work of the jurisconsult Manuel Duran

3 As I have already mentioned, Catalonia is not the only territory which maintained historical rights: in chronological order of the publication of the respective compilations, we find Vizcaya and Alaba (1959), the Balearic Islands (1961), Galicia (1963), Aragon (1967) and Navarre (1973).

4 The conflict ended with the capitulation of Barcelona (1714).

5 It is debated whether the derogation was legal since the Constitucions were not revoked according to the procedure they contemplated but according to the Decrees of the Nueva Planta. The following procedure is established in the Constitucions: *Statuim i ordenem que les Constitucions de Cathalunya, Capitols, i Actes de Corts no pugan esser revocades, alterades, ni suspeses, sinó en Corts Generals i si el contrari sia fet no tinga ningun força ni valor (lib. 1.tit.17.const.18.pag.52).*

6 Catalan is a Western Romance language. It is the official language of Andorra and the official language of three autonomous communities in Spain: Catalonia, the Valencian Community and the Balearic Islands. It also has a semi-official status in the Italian territory of Alghero. It is spoken in the department of Oriental Pyrénées in France and in two other areas of Spain: the eastern fringe of Aragon and the Carche area in the Region of Murcia. The language evolved from Vulgar Latin in the Eastern Pyrenees area.

7 The *fueros* are laws or statutes granted in the Middle Ages to a territory.

i Bas[8] stands out. He wrote a report on the institutions of the Civil Law of Catalonia, a document that is still currently used as a plea for the Catalan legal system. Great admirer of Savigny, he successfully defended the continuity of the legal systems of the territories with their own law within the Spanish state at the Congress of Spanish Jurists in 1885.

Article 5 of the Foundation Act (Ley de Bases) of May 11, 1888, stipulated that the provinces and territories in which foral law subsisted would retain it for the time being in its entirety, without their legal system being altered by the publication of the Code, which would govern only as supplementary law in the absence of that which was applicable in each of those provinces and territories by their special laws. The government had to submit the corresponding appendices to the Cortes.

This did not take place until 1960, with Law 4/1960 of July 21 on the Compilation of the special law of Catalonia. A similar situation to the one of the Nueva Planta Decree was once again created, since the Compilation of Special Law provided for the systematisation of historical institutions, taking into account their validity and applicability in 1960. However, the same problems remained, the Compilation could not innovate because it had the same conservative purpose of traditional law as the Nueva Planta Decree, and Catalonia's legislative capacity was not restored. It should be noted, however, that the preamble to the Compilation of Special Law of Catalonia stated that

> this Act is a compilation of ancient laws that remain in force and are justified by their centuries-long permanence, by their undeniable observance and roots, and whose basis lies in being an expression of social and legal peculiarities with authentically national roots.

Two different working methodologies were followed in the codification of Catalan law: firstly, the system of an appendix to the Spanish Civil Code embodied in Law 40/1960[9] and the system of a compilation of its own – which would end up being imposed – as a consequence of the Decree of May 23, 1947 (the result of the National Civil Law Congress held in Zaragoza in 1946).

With the promulgation of the 1978 Constitution and the Statute of Catalonia (1979),[10] a decisive milestone was reached: the recovery by the Catalan Autonomous Community of exclusive legislative competence in civil matters – for their preservation, modification and development – is the culmination of a long-desired process.

It was necessary to adapt the Compilation of Special Law of Catalonia to constitutional principles and to resume the drafting of historical law in Catalan; the result was

8 Manuel Durán y Bas (1823–1907) is perhaps the most influential Catalan jurist of the contemporary era, father of the so-called Catalan legal school. Professor of Elements of Commercial and Criminal Law, Extension of Commercial and Criminal Law, and Philosophy of Law and International Law at the University of Barcelona. A great admirer of Savigny, he was the founder of the Spanish Commission of the Savigny Foundation and its president from 1869. He was a speaker at the Congress of Spanish jurists in 1885 and successfully defended the continuity of the legal regimes of the territories with their own law within the Spanish state; as a member of the General Codification Commission, he wrote the famous Report on the institutions of the civil law of Catalonia (1883), which has served as the basis for the various projects of appendices and compilations. He was Minister of Grace and Justice in 1889, and his great prestige and influence promoted the maintenance of the historical rights of Catalonia.

9 Law 40/1960 was drafted in Spanish, the only official language at the time.

10 In 2006, after a long and controversial process, a new Statute of Catalonia was approved, replacing the 1979 Statute as the basic institutional norm in Catalonia.

reflected in Llei 13/1984 of March 20, 1984, on the Compilation of Civil Law of Catalonia (Compilació de Dret Civil de Catalunya). The possibility of reforming and updating the law – within the competences established by the 1978 Constitution and the Statute of Autonomy – made possible the appearance of different legislative bodies – Llei de Successió intestada (1987), Codi de Successions (1991) and Codi de Família (1998) – which crystallised in the promulgation of the Codi Civil de Catalunya.

2. Presentation of the subject

The existence of functional and psychological diversity – that is, disability – is consubstantial to humanity.

There are three models of disability: a first model, which could be called dispensation, in which the causes of disability are assumed to be religiously motivated and in which people with disabilities are considered unnecessary for different reasons: because they do not contribute to the needs of the community or because they are the consequence of the anger of the gods, for example. As a consequence of these premises, society decides to do without people with disabilities, either through the application of eugenic policies or by placing them in the space destined for the abnormal and the poor classes, as objects of charity and subjects of assistance.

The second model is the so-called rehabilitative model. Its philosophy considers that the causes of disability are not religious but scientific (derived from the individual limitations of people). People with disabilities are no longer considered useless or unnecessary but only to the extent that they are rehabilitated. That is why the main aim of this model is to normalise people with disabilities.

Finally, a third model, known as the social model, considers that the causes of disability are neither religious nor scientific but are, to a large extent, social. This philosophy insists that people with disabilities can contribute to society in the same way as other people – without disabilities – but always based on valuing and respecting differences. This model is closely related to the assumption of certain values intrinsic to human rights and aims to promote respect for human dignity.

Both illness and other extrinsic and intrinsic factors or the normal deterioration of the body and mind lead to the coexistence in our society of people who do not conform to the predominant 'canon'. For centuries, these people have been marginalised or cornered, and the exercise of their legal capacity has been limited for most of them.[11]

The United Nations Convention on the Rights of Persons with Disabilities (hereinafter 'the Convention' or 'the CRPD') was adopted – after years of debate, especially around its Article 12 – on December 13, 2006, by the United Nations General Assembly. Article 12, on equal recognition as a person before the law, stated the following:

1. *States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*
2. *States Parties shall recognize that persons with disabilities have legal capacity on an equal basis with others in all aspects of life.*

11 A. Fernández de Buján, *Derecho Privado Romano*, 11th ed., Iustel, Madrid, 2022, p. 211 y ss; A. Fernández de Buján, *Derecho Romano*, 6th ed., Dykinson, Madrid, 2022, p. 156 ff.

3. *States Parties shall take appropriate measures to provide access for persons with disabilities to the support they may require in exercising their legal capacity.*
4. *States Parties shall ensure that all measures relating to the exercise of legal capacity provide adequate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free from conflict of interest and undue influence, are proportionate and tailored to the person's circumstances, are implemented in the shortest time possible and are subject to periodic reviews by a competent, independent and impartial authority or judicial body. The safeguards shall be proportionate to the extent to which such measures affect the rights and interests of individuals.*
5. *Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the right of persons with disabilities, on an equal basis with others, to own and inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.*

Spain signed the Convention and ratified it, and it was incorporated into the Spanish legal system in 2008. However, most of the reforms promoted by the Convention were not completed until Law 8/2021[12] on the reform of civil and procedural legislation to support persons with disabilities in the exercise of their legal capacity (hereinafter Law 8/2021). From 2008 to 2021, this process of adaptation to the principles of the Convention has been developed in Spain.[13]

The cornerstone of the whole regulation of the Convention – as Professors Bravo Bosch and Iglesias Canle rightly point out in their work – is to be found in Article 12, which deals with the concept of 'legal capacity' and especially with 'the exercise of legal capacity' of persons with disabilities. In our legal tradition, the notion of legal capacity would be divided into two: legal capacity and capacity to act. However, the Convention does not admit the distinction between legal capacity and the exercise of legal capacity of persons with disabilities, advocating an indistinct treatment of legal capacity and the exercise of legal capacity[14] from the age of majority onwards.

12 I would like to thank Professors María Paz García Rubio, president of the Codification Commission of the section on persons of the Spanish Civil Code, and Mª del Carmen Gete-Alonso Calera, president of the Codification Commission of the section on persons of the Civil Code of Catalonia, for their help and indications.

13 See in this sense Implementation of art. 12 of the un convention on the rights of persons with disabilities into the legal system of Spain, from María José Bravo Bosch and Inés Celia Iglesias Iglesias Canle.

14 There are many works on this subject in Spanish civil law, without being exhaustive:

A. Fernández de Buján, Convención de 2006 sobre los derechos de las personas con discapacidad y proceso de incapacitación, *Revista de las Facultades de Derecho y Ciencias Económicas y empresariales*, no. 83–84, Especial 50 Aniversario ICADE, 2011, pp. 119–155; A. Fernández de Buján, Constitución y discapacidad: la protección de las personas con discapacidad como paradigma del estado social, *Revista Jurídica de la Universidad Autónoma de Madrid*, 2022, no. 46, 2022, p. II; A. Fernández de Buján, La Ley 8/2021, para el apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica: Un nuevo paradigma de la discapacidad, *La Ley*, November 26, 2021, pp. 1–13; A. Fernández de Buján, *Incapacitation and disability, Derecho de familia*, coord. G. Díez-Picazo Giménez, TR Civitas, España, 2011 [2012], pp. 1903–1954; García Rubio, M. Paz, Contenido y significado general de la reforma civil y procesal en materia de discapacidad, *Familia y sucesiones: Cuaderno jurídico*, 2021, no. 136, pp. 45–62, ISSN 1889–2299; García Rubio, M. Paz, Las medidas de apoyo de carácter voluntario, preventivo o anticipatorio, *Revista de Derecho Civil*, September 2018, vol. V, no. 3, p. 32; P. Cuenca Gómez, Sobre la inclusión de la discapacidad en la teoría de los derechos humanos, *Revista de Estudios Políticos (nueva época)*, October–December 2012, no. 158,

The Autonomous Community of Catalonia has legislative competence in the civil sphere and therefore has its own regulations, which is why this work is proposed separately from the one on the implementation of Article 12 of the Convention in the Spanish legal system. However, as Catalonia does not have competence in the procedural sphere, I refer in its entirety to the excellent work by Professors Bravo Bosch and Iglesias Canle, which logically includes the procedural aspects of the reform brought about by the reform of Law 8/2021.

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pp.103–137, Madrid, ISSN: 0048–7694; A. Castro-Girona Martínez, La Convención de los Derechos de las personas con discapacidad y la actuación notarial: El Notario "ombuds-man social", *Red Iberoamericana de expertos en Discapacidad y Derechos Humanos*, May 2011, www.derechoshumanos.aequitas.org/documentos.php; A. Castro-Girona Martínez, Nuevos retos para el Notariado tras la Convención de Nueva York, in: *Nuevas Orientaciones del Derecho Civil en Europa*, Aranzadi, 2015, pp. 165–182; S. De Salas Murillo, Repensar la curatela, *Derecho Privado y Constitución*, 2013, no. 27, pp. 11–48; Sofía de Salas Murillo, coord., *Los mecanismos de guarda legal de las personas con discapacidad tras la Convención de las Naciones Unidas*, Civil Law Monographs Collection, Dykinson, Madrid, 2013; C. Ganzenmüller Roig, Garantías y derechos de las personas con discapacidad especialmente vulnerables en la Convención de Nueva York. 2003–2012: 10 years of legislation on non-discrimination of persons with disabilities in Spain, in: *Studies in homage to Miguel Ángel Cabra Luna*, coord. Luis Cayo Pérez Bueno, Gloria Esperanza Álvarez Ramírez, 2012, p. 401 *et seq.*, https://dialnet.unirioja.es/servlet/libro?codigo=520544; C. Guilarte Martín-Calero, El procedimiento para la adopción de las medidas de protección: Una propuesta de reforma, *Jornadas de Tossa*, 2012, vol. XVII; C. Guilarte Martín-Calero, *La curatela en el nuevo sistema de capacidad graduable*, McGraw-Hill, New York, 1997; C. Guilarte Martín-Calero, dir., *Comentarios a la Ley 8/2021 por la que se reforma la legislación civil y procesal en materia de discapacidad*, Thomson Reuters Aranzadi, España, 2021; A. Legeren-Molina, *Instrumentos de protección de la discapacidad a la luz de la Convención de las Naciones Unidas*, coord. María E. Rovira-Sueiro, Antonio Legerén-Molina, Sofía de Salas Murillo, María Victoria Mayor del Hoyo, España, 2015, pp. 63–224; C. Martínez de Aguirre, El tratamiento jurídico de la discapacidad mental o intelectual tras la Convención sobre los derechos de las personas con discapacidad, in: *Los mecanismos de guarda legal de las personas con discapacidad tras la Convención de Naciones Unidas*, coord. Sofía de Salas Murillo Civil Law Monographs, Dykinson, Madrid, 2013; A. Palacios Rizzo, La progresiva recepción del modelo social de la discapacidad en la legislación española, in: *Hacia un Derecho de la Discapacidad. Studies in Homage to Professor Rafael de Lorenzo*, Thomson-Reuters Aranzadi, Madrid, 2009, p. 143 et seq.; F. Santos Urbaneja, A propósito de los efectos en el Código Civil de la Convención de las Naciones Unidas sobre los derechos de las personas con discapacidad, *Conclusiones de las Jornadas de Fiscales Especializados en la protección de las personas con discapacidad y tutelas*, 2009, Estudios Jurídicos number, p. 21 et seq.; I. Vivas-Tesón, *Los 25 temas más frecuentes en la vida práctica del derecho de familia*, coord. Francisco Lledó Yagüe, Alicia Sánchez Sánchez, Oscar Monje Balsameda, vol. I, Dykinson, Madrid, 2011, pp. 363–374. In the field of Roman law: S. Castán Pérez-Gómez, *Discapacidad y Derecho Romano. Reus Ed*, November 2019, https://www.editorialreus.es/static/pdf/primeraspaginas_9788429021745_discapacidad-y-derecho-romano_reus.pdf; N. Coch Roura, Sistemas de protección para las personas con enfermedad mental, de las XII Tablas a la nueva reforma de la ley 8/2021, de 2 de junio, por la que se reforma la legislación civil y procesal para el apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica, referencia especial a la cura furiosi, *RGDR*, 2021, vol. 37; N. Coch Roura, Modification of the capacity to act: The cases of furiosus and prodigus from the xii tables to the United Nations convention on the rights of persons with disabilities, *RGDR*, 2018, no. 30; N. Coch Roura, La curatela a luz de la convención de las naciones unidas sobre los derechos de las personas con discapacidad y su antecedente en la cura furiosi, *La Notaria*, 2018, no. 1. This article was also published in *Revista General de Derecho Romano, RGDR*, 2018, no. 31; Martínez de Morentín, M. Lourdes, Tutela y Curatela en Derecho Romano, *RGDR*, 2020, vol. 35, p. 6; Martínez de Morentín, M. Lourdes, Anotaciones acerca de la discapacidad en Derecho Romano, *RGDR*, 2020, vol. 34; Martínez de Morentín, M. Lourdes, Régimen jurídico de la prodigalidad: de Roma a la Ley 8/2021 de reforma de la legislación civil y procesal en materia de discapacidad, *RGDR*, 2022, 38.

3. The application of the Convention in the Catalan Civil Code prior to Law 8/2021

Law 25/2010 of July 29, 2010, on Book II of the Catalan Civil Code (hereinafter CCCat) – which came into force on January 1, 2011 – included in its preamble the principles inspiring the Convention[15] and incorporated a wide variety of instruments[16] for protection[17] which aimed to cover a wide range of situations in which people with disabilities could find themselves:[18]

1. Under the rehabilitation and extension of parental authority (Article 236–33 CCCat), parents exercise the function of protection not as guardians but as holders of parental authority, although their powers will be determined by the content of the judgment. As holders of parental authority, they have no obligation to draw up an inventory or to render annual accounts, and they may grant a binding voluntary deed of delation/appointment to decide who will be the guardian of their child when they die or when their authority is extinguished – and therefore, this appointment must be respected by the judge with only few exceptions, such as not appointing the person appointed by the parents if this person currently suffers from dementia at the time when he/she is to exercise this protective function. Parental appointments shall be maintained in cases in which it is reasonable to assume that a measure of protection and support of a substitutive nature will be maintained throughout the life of the person with disabilities.

15 The incorporation of the principles of the CRPD could not be complete since the Spanish Civil Code maintained in its Article 199, the causes of modification of capacity, and also the Spanish procedural legislation retained the procedures for judicial modification of capacity, which were not eliminated until Law 8/2021, of June 2, which reformed civil and procedural legislation to support persons with disabilities in the exercise of their legal capacity.

16 These instruments have been affected by Decree-Law 19/2021 of August 31, adapting the Catalan Civil Code to the reform of the procedure for the judicial modification of capacity. Guardianship has been relegated to the age of minority, and curatorship has disappeared completely.

17 However, in Decree-Law 19/2021 and in the bill currently being processed in the Parliament of Catalonia, this terminology is left aside, as it is understood that, applying the principles of the Convention, persons of legal age – with or without disabilities – should not be protected but rather supported or helped. The idea of protection is reserved for minors. This paper will continue to use the notion of protection while examining legislation prior to Law 872021 and Decree-Law 19/2021.

18 Without being exhaustive, they deal with this matter in the Catalan sphere: Gete-Alonso y Calera, Ma C. Condición civil de la persona y género. Actualidad Civil. 2008. Gete-Alonso y Calera, Ma C. (Dir.) and Solé Resina, J. (Coord.) Tratado de derecho de la persona física Madrid, Civitas, 2013; Gete-Alonso y Calera, C. Ma, J. Solé Resina, *Actualización del derecho de filiación. Repensando la maternidad y la paternidad*, Tirant lo Blanch, Valencia, 2021; E. Arroyo, E. Bosch, J. Ferrer, E. Ginebra, A. Lamarca, S. Navas, A. Vaquer, *Dret Civil. Part General i dret de la persona*, Atelier Llibres Jurídics, Barcelona, 2013; E. Bosch Capdevila, P. Del Pozo Carrascosa, A. Vaquer Aloy, *Les institucions de protección de la persona en el Dret Civil de Catalunya*, Centre d'estudis jurídics i formació especialitzada, Departament de Justícia, Barcelona, 2012; J. Ribot Igualada, Las bases de la reforma del Código Civil de Cataluña en materia de apoyos al ejercicio de la capacidad jurídica, *Jornades sobre el nou model de discapacitat/coord. per Ma del Carmen Gete-Alonso Calera*, 2020, https://dialnet.unirioja.es/servlet/articulo?codigo=7652393; J. Ribot Igualada, The assistance regulated by the civil code of Catalonia, *Revista de derecho privado*, February 2014, no. 98, pp. 41–68; J. Ribot Igualada, The new "curatela" differences with the previous system and perspectives of operation, in: *Claves para la adaptación del ordenamiento jurídico privado a la convención de Naciones Unidas en materia de discapacidad*, dir. Sofía de Salas Murillo, María Victoria Mayor del Hoyo, 2019, pp. 215–252, https://www.revista-aji.com/wp-content/uploads/2022/04/AJI-16-1.pdf.

In the case of rehabilitation, the judgment may limit the rehabilitation to only one of the parents if justified by the child's interests.

As the judgment can determine the content and scope of the protective mechanism, it is perfectly feasible that the rehabilitated parental authority would operate as a curatorship or that the parents would only have to authorise certain acts that are specified in the judgment and would not represent their child in general. It is also possible for parental authority to be reinstated with the content of a curatorship, with one parent having the powers of personal care and the other parent having the powers of property.

What characterises the concept of parental authority in Book II of the CCCat is not the intensity of the power[19] but the nature of its holders, as it can only be exercised by the parents and for this reason it enjoys a differentiated treatment and only in the interest of the offspring.

2. Guardianship (Article 222–1 CCCat) as a substitute institution for the will – which could be either partial or total. A mechanism delimited in the image and likeness of parental authority whose typical characteristic is that it implies the representation of the ward or dependent, at least in the content determined by the sentence of modification of capacity. The regulation of guardianship includes the figure of the Guardianship Council, Article 222–54, a little known but decisive figure of control of the guardian.

   The voluntary disclosure or declaration of guardianship is also formulated (Article 222.4 CCCat), regulated in broad and flexible terms, which can also be applied to the case where a guardianship is necessary.
3. The patrimonial administrator as the legal representative of the person with a disability within the scope of his or her competences (Article 222–12 CCCat). Special administration is also regulated (donation, inheritance, Article 222–41 CCCat).
4. Curatorship (*curatela*) (Article 223–1 CCCat) is designed as a flexible and complementary figure of the will with a minimum content established by law, delegating to the courts the power to determine the maximum content in each specific case. The legislative technique used to regulate different institutions is interesting because it is a minimum or noninvasive regulation, with this flexibility the specific regulations in each case are left to the judicial system. It also incorporates a modality of curatorship in which the attribution of powers of administration to the curator is admitted, and in which the latter may even act as a representative (Article 223–6 CCCat), thus attenuating the differences between guardianship and curatorship.
5. As a great novelty, the voluntary figure of the assistant (Article 226–1 CCCat) was introduced as a support for people whose capacity has not been judicially modified. It was originally intended for elderly people without cognitive impairements but in whom the simple passage of time produces a decrease in their capacities. It also regulated the possibility that in certain cases the assistant could have powers of estate administration. This was a non-incapacitating and protective figure with a predominantly supportive and complementary content but which in its original wording could even have a certain representative content. Not only would the idea that the only institution that can be representative is guardianship be broken (we have already seen that the so-called

19 It is a departure from the concept of parental authority contemplated in the Spanish Civil Code, which had a markedly 19th-century character, configured as the broadest power that can be held over children. In the Civil Code of Catalonia, parental authority is not understood if it is not implemented in the interests of the children and not as a display of power and authority.

curatorship can be representative) but also, in this case, the substitution would not have its origin in a sentence of incapacitation. This is a sign of the flexibility of the institutions that were shaped with Law 25/2010 of July 29.

6. Preventive powers of attorney (Article 222–2 CCCat) is a voluntary instrument for the self-regulation of persons, without requiring judicial ratification.
7. *De facto* guardianship (*guarda de hecho*) (Article 225–1) refers to the care of a minor or a person in whom there were causes for modification of capacity, without originally having any legal title or designation. We can also see a sign of flexibility in this institution since the ruling that establishes it can provide it with the appropriate content to the specific needs.
8. The judicial defender of protector (*defensor judicial*) has two possible forms (Article 224–1):

   8.a. a 'transitory' figure as long as the guardianship or curatorship is not constituted, but also when for any reason the guardian or curator does not exercise his or her duties;
   8.b. where there is a conflict of interest between the holder of the protection measure and the protected person.

9. Autonomous community protected assets (*patrimonio protegido autonomico*). A figure different from the one regulated in the national Law 41/2003 of November 18, on the patrimonial protection of people with disabilities, in terms of its legal configuration but not in terms of its purpose, is the patrimonial protection of people with disabilities. In the autonomous Catalan legislation, it is configured as a fiduciary estate or *trust*.

In short, the entry into force of Book II maintained the traditional institutions of protection linked to incapacitation, but in a much more malleable form and, in addition, it regulated others that operated or could eventually operate outside it, in accordance with the observation that in many cases the person with a disability or their relatives prefer not to promote this disability. This flexibility in institutions and diversity of protection regimes was in line with the duty to respect the rights, will and preferences of the individual and with the CRPD principles of proportionality and tailoring of supports and safeguards to the circumstances. In particular, the references to the fact that any rule or ruling affecting a person with a disability should be interpreted in the least restrictive sense for personal autonomy, requiring to take into account his or her personality, wishes and expectations.

The irruption of the Catalan autonomous regulation meant an important advance for the legal equal treatment of people with disabilities; for the first time in Spain, there were people with disabilities that, thanks to the figure of the assistant, could enjoy a support, without the need to be judicially incapacitated, maintaining both their legal capacity and the exercise of the latter.

4. Development of jurisprudence in the Catalan sphere until 2021

Based on the diversity of protection measures – to which we have referred in the previous section – and the legislative technique of establishing in the autonomous text-only minimum contents, the Catalan courts carried out an important task of elaboration and adaptation of the protection measures to the specific cases, preferably choosing the institution of curatorship as a capacity modification measure which is more respectful with the rights

of persons with disabilities and anticipating the application of the principles of the CRPD. We will specifically analyse two judgments of the Provincial Court of Barcelona (18th section) which has been a pioneer in terms of the CRPD: the first examines the institution of curatorship and the second recognises, for the first time, the right to vote of persons with disabilities.

4.1. Judgement of the Provincial Court of Barcelona (SAP), 754/2019 of November 13

The magistrate-speaker (*magistrado-ponente*) was Francisco-Javier Pereda Gámez, who gave a detailed and in-depth analysis of the matter.

The appeal concerned a verdict in which the person concerned – who was suffering from a mental health pathology – was declared partially incapacitated and was subject to a guardianship that only affected the estate sphere in the concrete and specific terms set out in the judgment of the court of first instance.

The speaker (*ponente*) gives a sharp and thoughtful review of the different issues raised. He begins with a reference to the doctrine of the Supreme Court regarding the reception of the Convention. He continues distinguishing between guardianship and curatorship, a reflection which we reproduce in order to analyse the decision in its entirety. The speaker states, for the Supreme Court, 'guardianship is the most intense protective measure, the person under guardianship lacks capacity, it involves a legal representation of the affected person, and the High Court maintains that it is reserved for total incapacitation'. On the contrary, 'curatorship means that the person under curatorship is capable, but requires a complement of capacity, it is the least intense support that, without replacing the person with disability, helps him/her to make decisions that affect him/her, it is conceived in more flexible terms; it is designed for partial incapacitation'. In short, the case law of the Supreme Court characterises curatorship as 'a flexible institution characterised by its content of assistance and supervision, not by its personal or patrimonial scope or by the extent of the acts in which it is called upon to be provided'.

As the aforementioned judgment rightly stated, the scope and extent of incapacity was regulated in the Spanish Civil Code – before Law 8/2021 – and the regulation of the specific protective measures was contained in the Catalan Civil Code (CCCat). It is precisely for this reason that the statements of the Supreme Court relating total incapacitation to guardianship and partial incapacitation to curatorship, according to the Barcelona SAP, 'were not clearly transposed to the Catalan legal system'. The verdict stated,

> The Catalan High Court of Justice assumed the interpretative line of the High Court, but with some particular clarifications of the specific Catalan autonomous legislation – which came into force after the ratification of the CRPD. The Catalan High Court of Justice clearly establishes that curatorship can be extended to acts of personal assistance and health.

From the legislative precedents examined by the ruling, the Catalan autonomous legislation already configured the curatorship as a much more elastic and accommodating institution than the homonymous regulated in the Spanish Civil Code; it was structured as a complement to capacity in all acts that by law or because the court ruling stipulated it, the person with disabilities could not carry out on their own, being able – if the court decision so determined – to even exclude the concurrence of a guardian in certain acts. Furthermore, although the general principle prevailing in national legislation established that the guardian did not exercise the legal representation of the person subject to the

protection measure, exceptionally, in the judgment of the Barcelona Court of Appeal we are examining, it states that 'depending on the degree of discernment or judgement of the incapacitated person and for specific legal acts', the curator could be the legal representative on an *ad hoc* basis, as it was already established in the autonomous legislation prior to the Civil Code of Catalonia, specifically Article 75 of Law 39/91.

The ruling of the Provincial Court (hereinafter AP) subsequently referred to the judgment of the Catakab High Court of Justice of Catalonia[20] (hereinafter TSJC) of June 4, 2018, which refers to the principles already established in the previous legislation and which were also included in the preamble of Book II of the Catalan Civil Code. Among them, we find the possibility of admitting that representation functions can be conferred to the curator in the patrimonial administration sphere, the factual specification is produced in Article 223–6 of the CCCat. And in the opposite sense, it also includes the possibility of exempting the guardian and the curator from representation in some cases.

The ruling of the Barcelona Provincial Court 754/2019, of November 13, also argued the possibility that this exceptional function of representation could be extended to other areas outside property or patrimonial administration, for two reasons. Firstly, the aforementioned STSJC of June 4 invoked, where it was stated that 'capable' persons can request the courts to appoint an assistant ex Article 226 CCCat when their physical or mental faculties are diminished so that this person can receive the information or give consent. Secondly, (articles 212-1 and 212-2 CCCat), this consent can also be given by relatives. Based on the above assumptions, ruling 754/2019 concludes that the function of exceptional representation can be extended to other areas if it is entrusted to a curator who has been granted this possibility by a court decision.

The speaker expresses his full agreement with the Catalan High Court of Justice (TSJC) when it states,

> This means that the functions of the guardian or curator are not always as clear as they might seem, the fundamental factor in establishing one or the other – without denaturalising them – being the intensity of the modification of the personal capacity that has been declared and the type of protection that [the incapacitated person] needs according to his particular characteristics and the pathology he suffers.

In his conclusion, the speaker of the ruling – highlighting in a conciliatory mood – avoids the controversy with the Supreme Court as to whether a total incapacitation must always correspond to a guardianship and a partial incapacitation to a curatorship and does so because he chooses a solution that is more respectful of fundamental rights while highlighting his experience in the field of persons with disabilities.

Thus, he rightly states that

> it is utopian to think that always and, in all cases a protective measure of capacity configured as a complement to it will be sufficient in all cases in which decisions need to be taken. We find many cases in which the person to be protected is neither aware of his or her pathology nor able to form his or her own will, even with a supplementary aid.

20 The High Court of Justice completes the judicial organisation in the territorial scope of the Autonomous Community of Catalonia, without prejudice to the jurisdiction corresponding to the Supreme Court and to those matters requiring constitutional guarantees, which are the competence of the Constitutional Court.

Therefore, taking into account the legislative background, which has been maintained and reinforced in Book II, in the jurisprudence of the Catalan Provincial Courts and especially in the judgement of the Catalan High Court of Justice of June 4, 2018, the speaker solves the problem raised, extending the traditional curatorship as a complement to configure an exceptional representative curatorship. The speaker resorts to this possibility only in those cases in which it is understood that the dual scheme-curatorship as a complement, not only entails a support, but may even harm the affected person himself.

In the specific case dealt with in the judgment, there was an underlying problem of administration close to what the doctrine has been considering prodigality, which is why the magistrate expressly includes this case as a necessary case of intervention and representation by the guardian 'when there is a risk that the affected person may squander his assets' and rightly argues,

> A curatorship with representative and substitution powers must be possible in some area in which, due to the circumstances of the illness, it is not appropriate simply to complement the decision-making capacity or when this complement is expected to be difficult to implement, blocked by incapacity or unavoidable confrontation between the guardian and the affected person, due to the circumstances of the illness, it is not appropriate to simply supplement the decision-making capacity or when this supplement is expected to be difficult to implement, blocked by an incapacity or an unavoidable confrontation between the curator and the ill that could affect his health or endanger his assets.

At the end of the ruling, it was recognised that the protected person will be exempted from the curatorship in provisions of up to 80 euros per week.

We therefore understand that curatorship was preferred as a more respectful institution than guardianship, and surprisingly, in the same judgment, it was given a triple treatment. First, in terms of content, it was not limited to the traditional patrimonial sphere but could reach any sphere of the individual (health) with the limitations established in the court ruling. Second, the curatorship was projected beyond its main complementary function towards a representative modality, provided that it was expressly included in the court ruling and provided that a prejudice to the subject in need of protection could be inferred from the dual scheme. And third, the institution could disappear in cash provisions of up to 80 euros per week.

This ruling reflected the flexibility of the guardianship contemplated in the Civil Code of Catalonia, which adopts different virtualities with the main purpose of restricting the use of guardianship to those cases where it is strictly essential. It is also worth highlighting the detailed technical-legal wording of the court ruling, the famous 'tailor-made suit',[21] which is configured as a mechanism for the defence of the rights of people with disabilities.

4.2. Judgement of the Provincial Court of Barcelona, (SAP) 183/2014 of March 13

The appeal was about a verdict that considered that the total incapacitation of a person was appropriate and, taking into account the deterioration of the person's mental faculties,

21 This expression was used for the first time in Supreme Court Judgement 282/2009 of April 29, 2009, for which Dr. Encarna Roca Trías was the rapporteur, and its use has become widespread.

justified the deprivation of the right to vote because the judge considered that the person in question was unaware of the political parties and chose without any known criteria.

This ruling – which was the first to give this treatment to the right to vote in Catalonia – begins by analysing the relevant international legislation, in particular:

1. The CRPD, specifically Article 12 and particularly Article 29, which recognised the protection of the right of persons with disabilities to cast their vote in secret in public elections and referenda without intimidation (also to participate fully and effectively in political and public life and even the right to be elected).
2. The Recommendations of the Council of Europe n. R (92) 6, of April 9, 1992, and 1185 (1992), of May 7, preached that governments and competent authorities were invited to seek and encourage the effective and active participation of disabled people in community and social life, and Recommendation (2006) 5 of April 5, for the promotion of the rights and full participation of disabled people in society, defended that the participation of all citizens in the life in political and public life and in the democratic process was essential for the development of democratic societies and that society should reflect the diversity of its citizens and draw on their multiple experiences and knowledge. It was therefore argued that it was important for persons with disabilities to be able to exercise their right to vote and to participate in such activities.
3. The case law of the European Court of Human Rights was already sensitive to the protection of the right to vote and in the judgement of May 20, 2010, handed down in Case n. 38832/06, Alijos Miss v. Hungary stated (para. 42), that the Court could not admit that the imposition on any person under curatorship of an absolute ban on voting, irrespective of their actual faculties was unacceptable. And furthermore, where a restriction of fundamental rights applies to a particularly vulnerable group in society, which has suffered considerable discrimination in the past, such as mentally disabled persons, then the state has a rather narrow margin of appreciation, and there must be very strong reasons for imposing such restrictions (and quotes other cases on discrimination – on grounds of sex [Aduláis, Cabales and Barandal v. United Kingdom], race [D.H.R. v. United Kingdom, D.H.R.; D.H.R. United Kingdom; D.H. and Others v. Czech Republic] and sexual orientation [E.B. v. France] – insofar as certain classifications are justified by the fact that these social groups have in the past been subjected to unfavourable treatment leading to their exclusion from society). It therefore condemns uniform applications without the possibility of individually assessing their capacities and needs (Chtoukatourov v. Russia, March 27, 2008).

That is to say, at the time of the ruling in question, only the CRPD unequivocally defended the right to vote for persons with disabilities. What European law did was to condemn the systematic application of deprivation of persons with disabilities.

With regard to national legislation, Article 23.1 of the Spanish Constitution established and currently establishes as a fundamental right the right to participate in public affairs as a manifestation of the principle of political representation. However, Organic Law 5/1985 of June 19, 1985, on the General Electoral System, despite preaching in its Preamble that the right of vote should be exercised in full freedom and that the people should freely make the majority decision on government affairs, Article 3[22] regulated exceptions to the

22 Paragraphs b and c of the article were subsequently deleted by Organic Law 2/2018.

exercise of the right of vote. Among these exceptions were those declared incapable by virtue of a final court ruling, provided that the ruling expressly declared them incapable of exercising the right to vote, and those interned in a psychiatric hospital with judicial authorisation, provided that the judge expressly declared them incapable of exercising the right to vote.

The judgment also invoked the principles set out in the preamble to the Catalan Civil Code and, on the basis of these legal grounds, concluded that the right to political participation, through the exercise of the right to vote, could not be discriminated against on the grounds of mental illness nor could a judge establish a standard of requirement of cognitive or intellectual capacities superior to those predictable in any citizen to prevent the exercise of the right to vote so that only very specific, motivated, justified reasons, in the interests of the alleged disabled person or for reasons of public order, could legitimise a limitation of the right to vote. A limitation of this right could not be justified on the basis of the disabled person's lack of knowledge of political options or on the basis of criteria of irrationality in the choice of options.

Surprisingly, although the applicable legislation for the determination of the right to vote was basically the same (Article 23.1 of the Spanish Constitution and Article 3 of Organic Law 5/1985 of June 19, 1985, on the General Electoral System), the courts of other Spanish autonomous regions and the Spanish Supreme Court maintained very distinct positions from the one of the Barcelona Provincial Court[23] until the modification of the electoral legislation.

5. The application of the CRPD in Catalan legislation after Law 8/2021

Since 2018, the Persons and Family Section of the Codification Commission of Catalonia has undertaken the task of reviewing Catalan civil legislation with the aim of updating it fully with the principles and the new concept of a legal capacity. Although the most important part focuses on the adaptation of the Second Book of the Civil Code of Catalonia, the cross-cutting nature of disability meant that all regulations referring to it had to be reviewed.

Prior to this, the Codification Commission's Section on Persons and the Family discussed and drafted a first text of these bases in order to make it available to all persons, natural and legal persons and institutions directly affected, so that they could participate in the reform project. The basis for the reform of the Catalan Civil Code in matters of support for the exercise of legal capacity were the first instrument for starting a broad dialogue between all those involved. Subsequently, the drafting of a preliminary draft bill titled Preliminary Draft Bill for the modification of certain articles of the Catalan Civil Code regarding support in the exercise of legal capacity was undertaken, which is currently at an initial stage.

The enactment of national Law 8/2021, of June 2, reforming civil and procedural legislation to support persons with disabilities in the exercise of their legal capacity (Law 8/2021), made it necessary to rethink the process that was being carried out in parallel in Catalonia.

23 See in this sense the "*Caso Caamaño Valle contra España*" in Implementation of art. 12 of the un convention on the rights of persons with disabilities into the legal system of Spain, from María José Bravo Bosch and Inés Celia Iglesias Iglesias Canle.

Law 8/2021 entailed the disappearance of the causes of incapacity and the elimination of the distinction between legal capacity and capacity to act as regards application in the field of disability, as well as the abolition of the procedure for judicial modification of capacity. These circumstances made it necessary to urgently adapt Catalan legislation to the CRPD provisions in order to avoid legal loopholes.

As a matter of urgency, the Catalan government enacted Decree-Law 19/2021 of August 31, adapting the Catalan Civil Code to the reform of the procedure for the judicial modification of capacity by virtue of Law 8/2021. In its explanatory memorandum, it was already indicated that while the process of adaptation of the Catalan Civil Code was not concluded with the approval by the Parliament of Catalonia of the regulations implementing a new regime fully adapted to the CRPD, it was necessary and urgent to establish a transitional regime, derived from the suppression of the judicial modification of capacity operated by Law 8/2021.

5.1 Decree-Law 19/2021

The decree-law came into force on September 2 2021, in order to avoid the legal vacuum that would have occurred on September 3, with the entry into force of Law 8/2021. As we have outlined in the explanatory memorandum, it was already stated that the law that would adequately adapt the provisions of the Catalan Civil Code should be published within a reasonable period of time. The decree-law was therefore provisional in terms of its temporary application,[24] but this provisional nature did not affect the content, since the principles and core rules for the definitive reform were already set out in the decree-law.

In terms of its structure, the decree-law consists of an explanatory memorandum that introduces the content of the regulation, which boils down to two articles – specifically, Article 2 contains the modification of Chapter II of Title II of the Catalan Civil Code (CCCat) – three transitory provisions and two final provisions.

The most important innovations or regulatory cores can be highlighted as follows:

1. Recognition of the capacity of all persons

The explanatory memorandum states,

> The abolition of the judicial modification of capacity implies a new concept of the legal capacity of the person . . . it is necessary to recognise that all persons with disabilities have legal capacity on equal terms with all other citizens, in all aspects of life, and that all persons with disabilities must have access to the support measures they may need to exercise their legal capacity . . . it is urgent to establish a transitional regime to respond to the needs that arise once the judicial modification of capacity has been abolished.

These statements are reflected in Article 1[25] of the decree-law.

24 The government undertook to present, within 12 months of its entry into force, a draft law amending the Catalan Civil Code in support for the exercise of the legal capacity of persons with disabilities (Final Provision Four), but this deadline has not been met.

25 Article 1. Provision of support in accordance with Catalan civil legislation: 'A person of legal age who needs support to exercise his or her legal capacity under equal conditions may request the constitution of the assistance regulated by articles 226–1 to 226–7 of the Civil Code of Catalonia'.

2. Elimination of legal representation of persons of legal age

The entry into force of Decree-Law 19/2021 entails the abolition of guardianship, curatorship and extended and rehabilitated parental authority for persons of legal age. The reason for the disappearance of these institutions – formerly known as protective measures – is based on the fact that it is not possible for there to be a person – a legal representative – to replace the will of the person with a disability who needs support for the exercise of his or her legal capacity.

This eradication is set out in the Second Transitional Provision[26] and in the Third Final Provision.[27]

3. Disappearance of prodigality

The recognition of full legal capacity for all persons and the exercise of this legal capacity inevitably entails the elimination of prodigality as a limitation on the individual's property or patrimonial rights.

The decree-law indicates that those already constituted should be extinguished. The truth is that to find a ruling – both in Catalonia (since the entry into force of Book II of the Civil Code of Catalonia) and in Spain – that based the modification of capacity solely on prodigality, one has to go back to the 1960s. We can find limitations in the patrimonial sphere of individuals, but these disorders in patrimonial management had to be caused by some kind of pathology, normally of mental health, which gave rise to it. In short, although the decree-law provides for the extinction of curatorship constituted due to prodigality, *de facto* the curatorships that are extinguished for this reason will be practically none.

4. Review of the judicial measures in force

If, as mentioned, the disappearance of prodigality made it necessary to review the judgments that could be based on it, the same happened for the abolition of guardianships and curatorships, and the extended and rehabilitated parental authority made it necessary to re-examine the judgments in force that contemplated these institutions in the light of the new regulatory framework. In the interim of these revisions, the principles of the decree-law oblige persons exercising guardianship to act in accordance with the new paradigms. The most important consequence is that guardians should not act in substitution of the will of the person with a disability, even if the revision of the guardianship (or curatorship as the case may be) had not taken place at that time.

26 Second Transitional Provision: from the entry into force of this decree-law, guardianship, curatorship and extended or rehabilitated parental authority regulated by the provisions of Title II of Book Two of the Civil Code of Catalonia may not be constituted in relation to persons of full age.

27 Third Final Provision: all references in current legislation to guardianship, curatorship or extended or rehabilitated parental authority for persons of legal age shall be understood to refer to the new system of support measures for persons with disabilities established by this decree-law.

Fortunately, the deadlines[28] that the decree establishes to carry out this review are the same as those of national Law 8/2021, in order to avoid mismatches. In this sense, the need to adapt to the new paradigms on capacity in the face of possible institutional conflicts at national- and autonomous-community-level predominates.

5. *Support measures in the new configuration*

Catalan legislation definitively opted for the institution of assistance,[29] which already existed in the Catalan Civil Code. This institution was one of the great innovations of the Catalan Civil Code, however, we must be aware that assistance had a very residual character until the entry into force of this decree-law. The original wording of the assistance in Book II of the CCCat referred to very limited cases, whereas after the entry into force of the decree-law it was configured as a universal support mechanism. Thus, the regulation of assistance had to be redrafted in order to accommodate the diversity of situations in which a person with a disability could require support for the exercise of his or her legal capacity. This led to the new wording of Articles 226–1 to 226–8 CCCat:

Article 226–1. Concept and type of designation.

1. *A person of full age may request the designation of one or more persons to assist him or her in accordance with the provisions of this Chapter, if he or she needs it in order to exercise his or her legal capacity on an equal footing.*
2. *The constitution of the assistance can be carried out by the execution of a notarial deed or in accordance with the voluntary jurisdiction procedure for the provision of judicial support measures for persons with disabilities.*
3. *The judicial designation of the assistance may also be requested by the persons legitimised by the Voluntary Jurisdiction Act to promote the file for the provision of judicial measures of support for persons with disabilities, in the event that it has not been previously constituted voluntarily, and provided that there is no preventive power of attorney in force that is sufficient to provide the support that the person requires.*
4. *The exercise of care functions must correspond to the dignity of the person and must respect his or her rights, wishes and preferences.*

28 Second Transitional Provision: review of the judicial measures in force:

2. Guardianships, curatorships and extended or rehabilitated parental powers constituted prior to the entry into force of this decree-law shall be maintained until the review referred to in paragraphs 3 and 4.
3. Persons with judicially modified capacity, parents with extended or rehabilitated parental authority and persons exercising guardianship or curatorship may at any time request a review of the measures that have been established to adapt them to the suppression of the judicial modification of capacity and to apply, if applicable, the assistance regime regulated by Articles 226–1 to 226–8 of the Civil Code of Catalonia. The review of the measures must be carried out within a maximum period of one year from the application.
4. In the absence of the request mentioned in paragraph 3, the review must be carried out ex officio by the judicial authority or, at the request of the Public Prosecutor's Office, within a maximum period of three years from the entry into force of this decree-law.

29 Guardianship is limited to the area of minority.

Article 226–2. Judicial designation of the person who has to provide assistance.

1. *The will, wishes and preferences of the person concerned shall be taken into account with regard to the appointment of the person who is to provide the required assistance.*
2. *When the assisted person is unable to express his will and preferences, and has not granted the document referred to in article 226–3, the designation of the person providing the assistance must be based on the best interpretation of the will of the person concerned and of his preferences, in accordance with his life history, his previous manifestations of will in similar contexts, the information available to persons of trust and any other consideration relevant to the case. In such a case, it is obligatory to communicate to the judicial authority all the circumstances that are known in relation to the wishes expressed by the person assisted.*
3. *Exceptionally, by means of a reasoned decision, what has been stated by the person concerned may be disregarded when serious circumstances unknown to that person are established or when, in the event of appointing the person indicated by that person, he/she would be in a situation of risk of abuse, conflict of interest or undue influence.*
4. *The judicial authority may establish such control measures as it deems appropriate in order to ensure respect for the rights, will and preferences of the individual, and also to prevent abuse, conflicts of interest and undue influence.*
5. *The appointment of the person assisting and the assumption of office must be recorded in the civil registry by means of the communication of the corresponding court decision.*
6. *The assistance measure shall be reviewed ex officio every three years. Exceptionally, the judicial authority may set a longer review period, which may not exceed six years.*

§ 226–3. Notarial appointment by the person himself.

1. *Any person of full age, in a public deed, in anticipation or appreciation of a situation of need of support, may appoint one or more persons to exercise assistance and may establish provisions with respect to the functioning and content of the appropriate support regime, including with respect to the care of his person. It may also establish such control measures as it deems appropriate in order to ensure their rights, respect for their wishes and preferences and to prevent abuse, conflicts of interest and undue influence.*
2. *The granting of a subsequent act of designation of assistance revokes the previous act in all respects in which it modifies or is incompatible with the previous act.*
3. *In the case of voluntary designation of assistance, substitutions may be made. If several persons are appointed and the order of substitution is not specified, the one named in the subsequent document is preferred and, if there is more than one, the one appointed first.*
4. *The designations of assistance granted in a public deed must be communicated to the civil registry for registration in the individual register of the person concerned and also to the register of non-testamentary appointments of support for legal capacity or the one that replaces it.*
5. *The judicial authority, in the absence or due to insufficiency of the measures taken voluntarily, may establish other supplementary or complementary measures. Exceptionally, by means of a reasoned decision, it may dispense with what the person concerned has stated, when serious circumstances unknown to him/her are accredited or when, in the event of appointing the person he/she has indicated, he/she would be in a situation of risk of abuse, conflict of interest or undue influence.*

Article 226–4. Content of the assistance constituted judicially.

1. *The person's wishes, desires and preferences must be taken into account with regard to the type and extent of assistance.*
2. *In the decision appointing the assistance, the judicial authority must specify the functions to be performed by the person providing the assistance, both in the personal and property spheres, as appropriate.*
3. *The judicial authority, in a reasoned decision and only in exceptional cases in which it is indispensable due to the circumstances of the person assisted, may determine the specific acts in which the person providing assistance may assume the representation of the person assisted.*

Article 226–5. Ineffectiveness of acts of the person assisted.

Legal acts that the person assisted makes without the intervention of the person assisting him, if such intervention is necessary in accordance with the voluntary or judicial measure of assistance, are annullable at the request of the person assisting, of the person assisted and of the persons who succeed him by inheritance within four years of the conclusion of the legal act.

Article 226–6. Legal regime.

The rules of guardianship apply to care insofar as they do not conflict with the care regime, interpreted in accordance with the International Convention on the Rights of Persons with Disabilities.

Article 226–7. Modification of assistance.

1. *The persons entitled to request the establishment of assistance may request its modification or revision if there is a change in the circumstances that gave rise to it.*
2. *If the person assisting becomes aware of circumstances that allow for the termination of the assistance or the modification of its scope or functions, he/she shall inform the judicial authority.*

Article 226–8. Termination of assistance.

1. *Assistance shall cease for the following reasons:*

    (a) on the death or declaration of death or absence of the person assisted.
    (b) the circumstances that led to it have ceased to exist.

2. *In the case of paragraph 1.b), the judicial authority, at the request of a party, shall declare the event giving rise to the termination of the assistance and shall terminate the appointment of the assistant.*

A major novelty introduced in the new regulation of assistance consists of the possibility of constituting it by means of a notarial deed. This represents an important step forward in terms of the de-judicialisation of support measures for people with disabilities in the exercise of their legal capacity.

6. Maintenance of the other institutions that are compatible with the new conception of capacity

We refer specifically to the preventive powers of attorney and the declarations made by the same person[30] which were already contained in the CCCat, the decree-law maintains their effectiveness and those powers of attorney and/or declarations will be taken into account in the event that the person requests an assistant.

5.2 Structure of the preliminary draft bill to amend the Catalan Civil Code in the area of supports in the exercise of legal capacity according to the basis for the reform of the Catalan Civil Code in the area of supports[31]

The change brought about by the extension of the exercise of legal capacity to persons with disabilities at national and autonomous community levels is going to change the systematic structure of Title II of Book Two of the Catalan Civil Code, which until now had been named '*Institutions for the protection of the person*', but it is planned to be renamed '*Institutions for the protection and support of the person*'. The term 'protection' is only predicated on minors because legal representation and its legal regime are still maintained. This situation opposes the one of adults, who are not considered to be protected, but rather to be supported or assisted, and who as a general rule cannot be legally represented, and only very exceptionally can their will be substituted.

A distinction will therefore be made between two blocks: on the one hand, the institutions for the protection of minors, to which Chapter I will be dedicated, and, on the other hand, the measures to support the exercise of legal capacity in Chapter II.

5.2.1. Chapter I: Institutions for the protection of minors

In addition to the parental power that acts in the relationship of filiation, the institutions proper to the minority of age will be: guardianship, de facto guardianship (*guarda de hecho*) and those applicable in the situation of abandonment.

It is foreseeable that the curatorship of minors will disappear – the one for adults has already been extinguished by Decree-Law 19/21. The reasons that have led to the elimination of the curatorship of minors are clear. In the regulation (still in force in the CCCat), the curatorship of minors fulfils a residual and minimal function. In contrast to the curatorship agreed for persons whose capacity was judicially modified, the curatorship of minors only acted when emancipation existed, in order to grant consent to certain acts in which the autonomy of the emancipated person was limited.

It seems that the Codification Commission understands that it makes no sense to maintain an institution such as this when it is possible to cover the cases to which it could be

30 Third transitional provision: self-determination.

1. The declarations made by the person himself in the case of judicial modification of capacity remain effective and apply, if applicable, in the event that the appointment of a person to assist the grantor in the exercise of his legal capacity is requested.
2. The provisions of Article 226–3 of the Catalan Civil Code shall apply to these declarations.

31 This information is not public at the time of writing, we took as a reference the bases for the reform of the Catalan Civil Code regarding the provision of support, following the advice of the president of the section, Professor Ma del Carmen Gete-Alonso Calera, so we must warn that the information we provide may be modified, both in the draft law and in its parliamentary processing.

applied by resorting to another institution: judicial defence (*defensa judicial*). When the emancipated person needs the consent, in the new regulation, he or she should request the specific judicial appointment of a person to do so.

Judicial defence would be the only institution common to minors and adults. It would be regulated in Chapter III, under the heading of transitional measures of protection and support, the function of which is to facilitate the decision-making required by a person in specific and non-permanent matters, both for adults and minors.

The most important characteristic of these institutions is their exclusivity, i.e. they would be the monopoly of minors. The Codification Commission wants to remove the references to the regulations of the rules specific to persons of legal age, in order to avoid certain misunderstandings that are already occurring in the application of Law 8/2021, which did include these references.

5.2.2. Chapter II: Measures to support the exercise of legal capacity

We will only[32] deal with the general principles – which are included in the basis for the reform of the CCCat regarding support in the exercise of legal capacity, non-formalised support, formalised support and safeguards.

5.2.2.1. GENERAL PRINCIPLES

The provisions of this section are general principles applicable to all types of support and will naturally not be innovative as they take up the notions of the Convention, in particular Article 12 and the interpretation that has been made of it. Therefore, they do not deviate from the principles that have informed the state reform contained in Law 8/2021. However, they do contain special features specific to the Catalan regime. The reform will take into account the following principles:

a. Recognition of the legal capacity of all persons All persons have legal capacity and are entitled to exercise their rights and to have the means to do so on an equal basis.

No one, not even the persons closest to the person affected by a disability, can assume the representation of another person, only exceptionally, when it is not possible to rely on the will of the person and he/she has not granted a preventive power of attorney or appointed a person to assist him/her, it is admissible that others can act for him/her. In the case of acts of mere formality and those of little economic significance that cannot be delayed, this would be dealt with in accordance with the general rules on the handling of the business of others without a mandate.

As a consequence, prodigality, as a limitation of a person's financial or patrimonial capacity, must disappear completely from the system. The person who has problems in managing and controlling his or her assets (as in the case of compulsive gambling, among others) can use the ordinary means but can also provide himself or herself with the appropriate support to help him or her. The elimination of prodigality does not mean that the person concerned can apply for other support.

32 It is planned that this chapter will be divided into five sections: (1) general principles, (2) non-formalised support, (3) power of attorney, (4) notarial and judicial assistance and (5) safeguards.

The recognition of the capacity of all persons implies, from a civil legal point of view, that in order to adopt a support it is not necessary to justify anything, to grant a preventive power of attorney, or to agree on an assistance, their will is sufficient. It is not even necessary to have a disability.

Disability shall be understood as a situation that gives rise to the adoption of those measures, in particular civil measures, necessary to guarantee the full exercise of rights by the persons themselves. From the civil perspective, disability is that situation of the person due to the concurrence of one or multiple permanent physical, mental, intellectual or sensorial conditions that interfere with the development of life and inclusion in the social environment, which can and must be supported and assisted in order to guarantee the exercise of rights.

b. Pre-eminence of the will Right to support: All persons in need have the right to request and receive support to exercise their rights without having to justify their situation or meet certain requirements. As explained, the only requirement is the will of the person, whether or not they are entitled to administrative support.

The will of the person is the guidance that determines all the questions concerning the support measures to be applied to him/her, their configuration, characters, people who provide it, exclusions, types of support, moments in which they must act, and so on.

In situations in which the person is unable to express his/her will, despite this circumstance, it must be investigated whether he/she has previously expressed it. If this is not the case, an attempt must be made to find out what it would have been if he/she had been able to express it (the hypothetical will). All possibilities must be exhausted since imposition is considered exceptional.

This will, which must indeed be taken into account, is what governs the adoption of the measure and its type and scope, both positively and negatively. The person concerned has the right to reject specific issues, such as the exclusion of certain people, as well as the support itself, and even to terminate it when he/she deems it appropriate.

The supremacy of the will of the person shall be absolute; this does not mean that, exceptionally it can be disregarded. Exceptions to this principle may be made in specific situations, in particular in the case of certain illnesses.

Derived from the paradigm shift established by the Convention, which moves from the traditional 'interest of the person with disabilities' to 'respect for the will of the person with disabilities', support measures have been articulated, giving preference to those that are agreed and implemented without the need to go to court, which are considered more appropriate and less harmful to the person affected.

c. Principle of proportionality The point of reference of the support measure is the needs of the person, as the objective is to enable him/her to resolve his/her affairs and make decisions adapted to his/her situation. Hence, together with his/her will, it is the personal circumstances and situations which determine the type of help, how and with what scope and intensity the support measure for each person should operate. As opposed to the previous model of guardianship and curatorship, which responded to a fairly consolidated and rigid standard – although we have seen that the jurisprudential elaboration had a great deal of autonomy in the determination of the support needs – the model that will be applied will essentially be born as a specific model for each person.

5.2.2.2.2 NON-FORMALISED SUPPORT

The regulation will distinguish between non-formalised support, which advocates that help for people who need it comes from their family and social environment, and formalised support, which in turn can be extrajudicial and judicial.

The reform will contemplate non-formalised support, which advocates that help for people who need it comes from their family and social environment, and formalised support, which in turn can be extrajudicial and judicial. These non-formalised supports seem to correspond to what before Decree-Law 19/2021 was called de facto guardians (*guardadores de hecho*). It is foreseen that the de facto guardianship of adults will disappear from the regulation, but the recognition of non-formal care and support will survive in any case.

It is considered that the Codification Commission decided to abolish *de facto* guardianship because it does not fully respect the Convention, on the understanding that it has a protection component that is not specific to adults, whether or not they have a disability.

Non-formalised support will try to accompany, help and advise so that the person concerned can make his or her own decisions.

5.2.2.3. FORMAL SUPPORTS

Formal support will be the one originating from the designation made by the affected party: this would include, on the one hand, the preventive power of attorney – which is formalised in a notarial deed – as an instrument of prevention for the future and, on the other hand, assistance.

Assistance consists of the voluntary designation of the person or persons who will provide support for a person. Assistance is the formal support institution around which – as from Decree-Law 19/2021 – the provision of support in Catalonia is materialised.

There are two modalities: judicial and notarial. It would be possible for the parliamentary procedure to introduce the possibility of assigning the function of appointing an assistant to an entity, although this is not currently envisaged in the draft.

The will of the person, as has been repeatedly explained, is, in formal support, what governs its delimitation, i.e. content and scope, in the identification of the persons who have to provide it, and of course, it is what determines its permanence. That is to say, the existence, modification and subsistence of the support depends on the will of the person, except in exceptional cases.

The relevance of the person's will implies that as long as he or she is able to express his or her will, it is the person who determines its scope, modifies it and revokes the designation of support. Revocation and modification may be subject to certain requirements or formalities, including a period of reflection.

For their part, the persons designated to assist may relinquish the assignment, as long as it ensures that the person in need of support can continue to receive the support they require.

The acts carried out by the assisted persons – whether with the participation of the assistant or not – may be declared ineffective, but not for lack of consent but due to the defects of the consent, which must be subject to a careful study and reelaboration.

In general, one would start from the consideration that the different types of support, formal and non-formal, are not necessarily mutually exclusive; that is to say, given the characteristics of each of them, a person can enjoy several at the same time, of different types, provided, of course, that they are not incompatible. Besides, this is the most usual

and common situation in the reality of people's lives – the one that best suits the principles and their needs.

5.2.2.4. SAFEGUARDS

Finally, safeguards will be addressed, the aim of which is to ensure that the person providing the support acts with respect for the rights, will and preferences of the person concerned and that there is no abuse, undue influence or conflict of interest between them.

These guarantees are mandatory in the notarial and judicial sphere in the determination of support measures, taking into account the pre-eminence of the will of the person concerned.

In this section we would find the aptitude requirements to be met by the persons providing support. Continuing with the preference for avoiding remissions, these requirements will be delimited in a specific and separate manner from those that will be demanded of the guardianship positions of minors.

It will also include the monitoring of the activities carried out by the assistant, the periodic review of the support measure itself and the accountability regime, all with the aim of ensuring the proper functioning of the support measures and safeguards.

It is likely that reference will be made to mediation as a mechanism for resolving conflicts that may arise in the designation of the persons who are to exercise the support, or in the content of the support measure, or in the determination of the willingness of the person in need of support.

6. Active legal capacity of persons with disabilities and its restrictions in the light of statistical data before and after the ratification of the UN Convention on the Rights of Persons with Disabilities

There are no public judicial statistics available on the situation in Catalonia before the entry into force of Law 8/2021 and Decree-Law 19/2021, let alone after the legislative modifications.

In Catalonia there are around 635,000 people with some kind of disability according to the absolute figures for 2021 provided by the Directorate General for Social Protection of Catalonia.[33] The statistics offer different classifications: according to the degree of disability, the type of disability, age and gender. In this regard, if we look at age, we can see that 5% is concentrated in the first years of people's lives but then decreases and concentrates from the age of 55 onwards to a percentage of 69.8% of people with disabilities, which reveals that age-related degeneration and the dementias associated with it constitute the most important group of people whose exercise of their legal capacity may be affected.

33 Year 2021, https://dretssocials.gencat.cat/web/.content/03ambits_tematics/15serveissocials/estadistiques/persones_discapacitat/any2021/5-Pers.discap.-tipologia-grau-sexe-i-grups-dedat-2021.pdf; Year 2020, https://dretssocials.gencat.cat/web/.content/03ambits_tematics/15serveissocials/estadistiques/persones_discapacitat/any2020/5-pers-discap-tipologia-grau-sexe-edat-2020.pdf; Year 2008, https://dretssocials.gencat.cat/web/.content/03ambits_tematics/15serveissocials/estadistiques/persones_discapacitat/any_2008/Estadistica_Discapacitat_-2008.pdf.

Concluding remarks

Since Catalonia regained legislative competence in the civil sphere, and especially with the approval of Law 25/2021 of July 29 on Book II of the Catalan Civil Code concerning the person and the family,[34] work has been done to harmonise autonomous legislation as far as possible with the UN Convention on the Rights of Persons with Disabilities, especially with regard to Article 12. Book II of the CCCat already included the principles of the Convention in its preamble and was a pioneer in introducing an institution – then called protection – such as assistance, which was not of an incapacitating nature. It was not until the reform of State Law 8/2021 modified the procedural aspects[35] that further progress could be made in the implementation of Article 12. Decree-Law 19/2021 was a step forward and at the same time a break with the traditional institutions of guardianship, curatorship and de facto guardianship. The final reform – the harmonisation of the whole Book II – is in process. We have dealt with the principles – contained in the basis drafted by the section on the person and the family of the Codification Commission – which are being used for the new drafting of Book II of the Catalan Civil Code relating to the person and the family. This transitory situation should not lead us to believe that the mandate of Article 12 is not being fulfilled. In terms of content, the reform of Decree-Law 19/2021 marked the culmination of the process.

34 https://www.boe.es/eli/es-ct/l/2010/07/29/25/con.

35 See in this sense Implementation of art. 12 of the un convention on the rights of persons with disabilities into the legal system of Spain, from María José Bravo Bosch and Inés Celia Iglesias Canle, and especially its Annex II and in procedural matters.