

The New Juridical Institutes for the Protection of Persons with Psychosocial Disabilities Introduced by the Romanian Law No. 140/2022

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Abstract: *The institute of placing under the ban was a protection measure applicable in Romania for a very long time, so that it remained ingrained in public perception as the only institute that could be applied to people with mental disabilities likely to affect their discernment. The consequence of the application of this institute emerges from its very name, namely the fact that the person targeted by the “protection” promised by the establishment of the prohibition, in fact acquired the stigma of being “forbidden” in the life of the civil circuit, more precisely, the guardian of the court-ordered banned person was in charge of absolutely all his/her fundamental rights and freedoms, excluding him/her completely from participation in social-economic and legal life.*

Key Words: *Civil Law; Human Rights; Rights of People with Disabilities; Protection of Persons with Psychosocial Disabilities; Special Protection; Protective Measures; Judicial Counselling; Romania.*

Introduction

In Romania, as it will be evident from the present paper, the regulation of the institute of prohibition has become anachronistic, insufficient or obsolete in relation to the current socio-economic changes and the international emancipation of the support and protection regime for adults with mental disabilities.

The massive reform that impacted the Romanian legislation in this matter was aimed at implementing democratic mechanisms and fulfilling the commitments assumed by the Romanian State through the United Nations Convention on the Rights of Persons with Disabilities and through international treaties which aimed to restore dignity, equality and non-discrimination of adults with mental disabilities.

Therefore, the consequences of the application of the ban provided by the Article 164 para. (1) of the Civil Code of Romania could not be aligned with the view expressed by the Constitutional Court of Romania

in its Decision No. 601/2020 which stated that “any measure of protection must be proportionate to the degree of capacity, be adapted to the person’s life, be applied for the shortest period of time, be reviewed periodically and take into account the will and the preferences of people with disabilities,”¹ which is why the Romanian legislator established through the Law No. 140/2022 on Some Protection Measures for Persons with Intellectual and Psychosocial Disabilities and Amendment and Completion of Some Normative Acts (hereinafter referred to as the “Law No. 140/2022”) a new protection system for these persons. The new juridical institutes of special guardianship and legal counsel, thus replacing incarceration, are based on the concept stating that different degrees of disability must be accorded appropriate degrees of protection in order to minimize the attitudinal and environmental barriers that prevent their full and effective participation in society and ensure the full exercise of all fundamental human rights and freedoms, without any kind of discrimination.

In short, we have to mention that the fundamental distinction between the need to apply those two measures is rendered by the degree of deterioration of the person’s mental faculties; namely in the case where the deterioration of the mental faculties is partial and protection cannot be achieved by establishing assistance in conclusion of legal acts, the application of judicial advice is recommended, and in the situation on the contrary, when the deterioration of the person’s mental faculties is total, the institute of special guardianship is recommended, which proves to be the most intrusive measure of protection in terms of a civil capacity.

Brief considerations regarding the impacts of the Decision of the Constitutional Court of Romania No. 601/2020

The socio-economic changes that have taken place in the last decades have led to the initiation of a massive reformation process regarding the legislation in Romania, with the aim of satisfying all the rigors specific to the Euro-Atlantic integration, as well as respecting the commitments assumed by the Romanian State through the international conventions or international treaties.

¹ See *Decision of the Constitutional Court of Romania No. 601/2020 on the Exception of Unconstitutionality of the Provisions of the Article 164 para. (1) of the Law No. 287/2009 on the Civil Code of Romania* [2020-07-16].

This process of reforming the legislation in Romania represents a considerable effort on the part of the Romanian legislator; not infrequently it will have to pass the test of constitutional compatibility, a circumstance that will determine appropriate legislative corrections until it reaches a reasonable uniformity in accordance with the dynamics of socio-economic life.

Even through the adoption of the Civil Code of Romania in year 2009, it can be seen that the legislator strove to modernize the civil legislation, and, in terms of the protection of the indiscriminate natural person, he preferred to take over the old regulation regarding the institute of prohibition. This institute of placing under the ban had as a consequence the loss of the legal capacity of an adult, practically being assimilated to the minor who has not reached the age of 14 years, being able to conclude legal acts only through a legal representative.

Despite the Romanian State's ratification of the United Nations Convention on the Rights of Persons with Disabilities,² a ratification that took place before the entry into force of the Civil Code of Romania, the practice of placing under the ban continued unhindered, being used to the routine of solving these such requests, but without asking to what extent these solutions are compatible with the protection of fundamental human rights. The United Nations Convention on the Rights of Persons with Disabilities is not the only representative legislative norm in the matter of the protection of persons with disabilities applicable in Romania, because, after the signing of this Convention, the Law No. 448/2006 on the Protection and Promotion of the Rights of Persons with Disabilities³ and the Government Decision HG No. 268/2007 for the Approval of the Methodological Norms for the Application of the Provisions of the Law No. 448/2006, according to the Article 2 para. (1) of this Law, take the definition established in the United Nations Convention on the Rights of Persons with Disabilities which provides that persons with disabilities are "those persons whose social environment, not adapted to their physical, sensory, mental, mental and/or associated deficiencies, totally prevents or limits their access to opportunities equal to the life of society,

² See Law No. 221/2010 for the Ratification of the Convention on the Rights of Persons with Disabilities, adopted in New York by the United Nations General Assembly on December 13, 2006, opened for signature on March 30, 2007, and signed by Romania on September 26, 2007.

³ See Law No. 448/2006 on the Protection and Promotion of the Rights of Persons with Disabilities.

requiring protective measures in support of social integration and inclusion.”

It is true that the legislator established through the provisions of the Articles 943 *et seq.* of the Civil Procedure Code of Romania the possibility of lifting this judicial prohibition measure, but, in judicial practice, too few such solutions were identified, what means a circumstance that confirms that once instituted, this measure became permanent and thus the “protected person” acquired the stigma of “forbidden” to the life of the civil circuit.

Following the application of the provisions of the institute of judicial interdiction, the person concerned by this measure suffered negative consequences, in the sense that he/she was subjected to discriminatory situations manifested by exclusion from social life, refusal to employ, exposure to abuse, exploitation or poverty, all fuelled by the prejudice that the “forbidden” person cannot be equal to others because he/she is incapable of making his/her own decisions, regardless of the degree of impaired discernment. All these discriminatory situations were presented by non-governmental organizations from Romania and beyond, through the elaboration of numerous reports, studies, as well as organizing conferences with the aim of raising awareness of the adverse consequences suffered by these people, and in particular of harmonizing the national legislation with the conditions imposed by the United Nations Convention on the Rights of Persons with Disabilities.

After almost a decade, the Constitutional Court of Romania addressed the issue of incompatibility between the measure of placing under prohibition regulated by the Article 164 of the Civil Code of Romania and the Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, which recognizes the legal capacity of the disabled persons equally with the other persons, pronouncing the Decision of the Constitutional Court of Romania No. 601/2020 in which it was stated that the measure of placing under prohibition regulated by the Article 164 para. (1) of the Civil Code of Romania violates the Article 50 of the Constitution of Romania, in the light of the Article 20 para. (2), as well as of the Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, since “any measure of protection must be proportionate to the degree of capacity, be adapted to the person’s life, be applied for the shortest period of time, be reviewed periodically and take into account the will and the preferences of people with disabilities [...]

different degrees of disability must be assigned appropriate degrees of protection, the legislator in the regulation of legal measures having to identify proportional solutions..."⁴

In essence, the old institute of the prohibition of the person to be placed under a prohibition of the person's custody requires the evaluation by the judge of the medical documents showing the mental alienation or mental debility of the person to be placed under a prohibition of the person's custody, as well as the evidence proposed both by the person who formulated the request for the prohibition of the person's custody and by the prosecutor of the case. Following these assessments, the judge may issue a court order that the patient be placed under a judicial prohibition order without the need for admission to a mental health facility. The judge may order the patient to be placed in a mental health centre during the trial only provisionally and only if the patient's mental state needs to be observed for a longer period of time.

Therefore, through the above-stated Decision, the Constitutional Court of Romania correctly presented the essence of the protection of persons with disabilities, in the sense that it results precisely from the recognition of legal capacity on equal terms with other persons, and the support that such a person would need should be adapted in such a way as to reflect his/her will and preferences while respecting his/her autonomy as much as possible.

Decision of the Constitutional Court of Romania No. 601/2020 meant a real challenge for the Romanian legislator who had to identify the most suitable legislative formula, with the aim of integrating people with intellectual or psychosocial disabilities within this formal equality, and similarly the Law No. 140/2022 through which new juridical institutes were established for the protection of adults who cannot take care of their own interests due to a deterioration of their mental faculties.

The emergence of these new protection juridical institutes comes to replace the measure of placing under prohibition, so that the Article 164 of the Civil Code of Romania was amended by the Law No. 140/2022, in the sense of regulation of the protection measures – the special guardianship and the judicial advice, which we will analyse very briefly in the following part of the paper.

⁴ See Paragraph 46 of the *Decision of the Constitutional Court of Romania No. 601/2020 on the Exception of Unconstitutionality of the Provisions of the Article 164 para. (1) of the Law No. 287/2009 on the Civil Code of Romania* [2020-07-16].

As it can be seen in the statement of reasons for the draft law on some protective measures for people with intellectual and psychosocial disabilities, the entire process of reconfiguration and renaming of the old institute carried out by the Law No. 140/2022 rests on three important pillars, namely: the necessity arising from the purpose of protecting the vulnerable persons; subsidiarity, because these measures are ordered only if the court considers that the establishment of other measures provided for by law and proportionality are not sufficient; respectively, the protection regime must be adapted and individualized according to the needs of the persons placed under protection.

The new regulation was designed to create a fair balance between the need to protect the interests of both disabled people and other people and the need to safeguard the autonomy of the vulnerable persons, in a way that is in accordance with the rules of the United Nations Convention on the Rights of Persons with Disabilities, but, at the same time, aligned with the vision expressed in the European Court of Human Rights' jurisprudence, as well as with the recent practice of the Constitutional Court of Romania in the matter.⁵

Legal advice – a middle solution

The Civil Code of Romania defines the civil capacity as that part of legal capacity that consists in the person's ability to exercise civil rights and to assume civil obligations by concluding legal acts. It is divided into capacity for use and capacity for exercise.

In the case of the minor, the capacity is formed gradually, in the sense that first it is completely lacking, then the legislator grants him/her circumspect trust during the period of the restricted capacity to exercise, i.e. at the age of 14 – 18 years, and, at the age of majority, the natural person receives the ability to manage their own affairs and to make their own decisions without the need for the intervention of other people.

The old regulation was simple and clear-cut, in the sense that either the natural person had the legal capacity and thus could conclude legal acts, or he/she lacked the capacity completely; in that case the existence of a distinction was irrelevant. This solution does not at all promote the idea of proportionality that governs today the foundations of the Law

⁵ See N. Miclăuş-Bădin in BAIAS, F.-A., E. CHELARU, R. CONSTANTINOVICI and I. MACOVEI, coord. *Cod civil: Comentariu pe articole* [Civil Code: Comments on Articles]. 3-a ed. Bucureşti: C. H. Beck, 2021, pp. 189-191. ISBN 978-606-18-1059-8.

No. 140/2022, through which the legislator recognized that between the full exercise capacity and the lack of exercise capacity there are intermediate situations in which certain people may find themselves and in which discernment is diminished, but not completely absent.

Therefore, as the basis of this regulation, we find the Decision of the Constitutional Court of Romania No. 601/2020 regarding the exception of unconstitutionality of the provisions of the Article 164 para. (1) of the Civil Code of Romania regarding the measure of placing under the ban, which did not take into account the fact that there can be different degrees of incapacity, nor the diversity of a person's interests.

In the same vein, the Constitutional Court of Romania also mentioned the fact that protective measures must reflect the idea of the possibility of existence of different degrees of incapacity, which must be attached to the corresponding degrees of protection, and thus proportional solutions can be expressed.⁶

The Law No. 140/2022 regarding some protection measures for people with intellectual and psychosocial disabilities fundamentally changes the old juridical institutes of the Civil Code of Romania in the matter of the protection of the adults, when introducing the institute of judicial counselling, or, so to speak, the possibility of restricting the exercise capacity of the adults without eliminating it definitely.

The notion of judicial advice can be found in the normative text of the Article 164 para. (1) of the Civil Code of Romania, which stipulates that "the adult who cannot take care of his/her own interests due to a temporary or permanent, partial or total impairment of his/her mental faculties established following medical and psychosocial assessment, and who needs support in the formation or expression of his/her will, he/she can benefit from the judicial counselling or the special guardianship, if taking this measure is necessary for the exercise of his/her civil capacity, under conditions of equality with other persons," and in the normative text of the same Article in para. (2) which highlights the particularities of legal advice, namely the partial nature of the impairment of the mental faculties of the protected person and the continuous nature of the protection. As we can see, based on the analysis of this legal text, the role of the legal advice protection measure is not to deprive the beneficiary of his/her

⁶ See Paragraph 46 of the *Decision of the Constitutional Court of Romania No. 601/2020 on the Exception of Unconstitutionality of the Provisions of the Article 164 para. (1) of the Law No. 287/2009 on the Civil Code of Romania* [2020-07-16].

rights, but, on the contrary, to offer him/her support in the exercise of these rights under conditions of equality with other persons.

The partial character of the deterioration of the mental faculties is the defining element that differentiates the extent of protection through the judicial counselling from the special guardianship, an aspect that must be proven through medical and psychological evaluation report.

The actual procedure for establishing the measure of judicial advice is identifiable in the Articles 936 – 943 of the Civil Procedure Code of Romania and is organized in two steps represented by the preliminary measures and the actual judgment.

As regards the preliminary measures, these primarily concern the communication of the person in respect of whom the institute of the protection measure is requested, copies after the request and from the attached documents, and if the protected person has not chosen a lawyer, it is up to the guardianship court the obligation to appoint an *ex officio* lawyer. It is essential that during the procedure, the lawyer plays an active role in ensuring correct information adapted to the state of the protected person about the conduct of the judicial procedure, making sure in this sense that his/her rights are respected.

The prosecutor is also responsible for conducting the necessary investigations, in the sense that he/she will order medical and psychological evaluation, and, if necessary, requests the doctor's point of view, while establishing the term in which they must be carried out. At the same time, the prosecutor will order drafting of a social investigation report by the guardianship authority.

Also, as a preliminary measure to the judgment of the request, the legislator provided in the Article 939 of the Civil Procedure Code of Romania the existence of the possibility of the guardianship court to order, at the request of the prosecutor and after the hearing of the vulnerable person, provisional involuntary internment, which will have the purpose of longer observation of his/her state of health.

Finally, regarding the second step of the actual trial of the request for the institute of judicial counselling, we specify that this will take place in the presence of the prosecutor and the lawyer elected or appointed *ex officio* for the person whose protection is requested. The most important stage in the trial is the hearing of the person targeted by the protection measure, at which point the court has the opportunity to form its convic-

tion regarding the necessity and opportunity of establishing the protection measure. The hearing will not only be necessary when the protective measure is adopted, but also when it is extended, lifted or replaced.

The only exceptional situation, in which it is not required the hearing of the person whose protection is requested, is prefigured in the normative text of the Article 940 para. (5) of the Civil Procedure Code of Romania, according to which “the extension of the measure of special guardianship for a duration longer than 5 years can be ordered without the hearing of the protected person if it is mentioned in the medical report that his/her hearing is likely to affect his/her state of health or he/she is unable to express his/her will.”

The two main effects of the prohibition are maintained also in the current regulation on persons, namely the deprivation of the prohibited person’s legal capacity and the opening of guardianship, but with certain substantial changes.

If, according to the old regulation, the only person who had limited legal capacity was the minor between the ages of 14 and 18 years, currently this category includes also adults who benefit from legal advice, and, as regards the conclusion of legal acts by them, an opinion of the family council is also needed in the cases provided by law.⁷

The text of the law that was subjected to the most important changes is that of the Article 41 para. (3) of the Civil Code of Romania – its new form provides for a series of additional legal acts that the person with limited exercise capacity can conclude alone, such as acts of acceptance of an inheritance or acts of acceptance of liberalities without encumbrances.

Last but not least, the provisions of the Article 177 of the Civil Code of Romania state the cases of termination of the measure of judicial advice, respectively that the measure of protection ceases by the death of the protected person, at the expiration of the duration for which it was instituted, in the case of its replacement, as well as at its lifting.

Taking into account the existence of the guardian’s obligation to notify the guardianship court at least 6 months before reaching the deadline for the measure to be re-evaluated, we consider that a protection meas-

⁷ For more, see CHELARU, E. *Drept civil: Persoanele: În reglementarea NCC* [Civil Law: Persons: In the Regulation of the New Civil Code]. 3-a ed. București: C. H. Beck, 2012. 236 p. ISBN 978-606-18-0016-2.

ure should not cease upon the expiration of the duration for which it was established, because, in the case otherwise, the legal guardian will be held liable for any damage caused in the interim period between the expiry of the protection measure and its re-adoption.

Of course, given the intermediate nature of the measure of judicial advice, the latter can be replaced by a more restrictive measure of protection, namely that of special guardianship.

In any case, the temporary character of the protection measures is one of the most important and beneficial changes, not only because it is likely to defend the personal autonomy of the beneficiary, but also because it prevents the permanence of a measure which, over time, can be removed from the purpose for which it was established.⁸

Special guardianship – the new institute in the matter of protection of persons with intellectual and psychosocial disabilities

Through a brief presentation of the institute of special guardianship we appreciate that it is the most intrusive institute in terms of civil capacity, in the sense that the person to be placed under such a protection will lose his/her capacity to exercise, but only in the situation where he/she needs legal representation when concluding a civil legal act. Usually, this protection measure will, according to the new provisions established by the Romanian legislator, only apply to people whose mental faculties are totally or permanently impaired, a fact that prevents the person from expressing his/her will in his/her own name.

An essential characteristic of the institute of special guardianship is represented by subsidiarity, which the court must take into account when it is referred to an action of establishing special guardianship, because it will be applied only to the extent that the protection of the person concerned cannot be achieved through the establishment of another less intrusive protection measure, namely assistance in concluding legal acts or judicial advice.

An additional series of guarantees is mentioned by the legislator in the normative text reproduced by the Article 168 of the Civil Code of Ro-

⁸ See CONSTANTINOVICI, R. coord. *Ocotirea majorului: Reforma legislativă realizată prin Legea nr. 140/2022* [Protection of the Persons with Disabilities: Legislative Reform Carried Out by the Law No. 140/2022]. 1-a ed. București: Solomon, 2023, p. 172. ISBN 978-606-96283-9-3.

mania, characterized by temporality, in the sense that the applicability of the special guardianship protection measure cannot exceed 5 years and cannot be extended for more than 15 years. At the same time, these limits cover also the reviewable character of the protection measure, by the fact that the legislator gives the possibility to the guardian or the representative of the protected person to notify the guardianship court whenever data or circumstances arise that justify the reassessment of the protection measure, as well as by the fact that the guardianship court can determine in relation to the protection measure which categories of documents should be covered by it or that the measure can concern only the person or only his/her assets.

Regarding the appointment of the guardian, there can be no more doubts, because, according to the new law, the guardian is appointed by the same decision by which the measure of special guardianship is instituted, thus proving that the direct effect of taking the protection measure of special guardianship is the “birth”, by the will of the judges, of a subjective “right” of the representative to act in the name and the interest of the protected person, taking care of that person and his/her goods. Of course, this special legal prerogative of the representative comes with an intrinsic duty that requires him/her to be exercised exclusively in the interest of the person for whom it was granted and within the limits established by the court decision.⁹

Within the mechanism of appointing the guardian, the guardianship court must take into account the preferences expressed by the person to be placed under protection, his/her usual relationships, the interest of the person to be appointed guardian shown in relation to the vulnerable person, the possible recommendations made by close people, as well as the lack of interest contrary to the protection of the vulnerable person.¹⁰

At the same time, the legislator wanted to highlight the fact that the care of the protected person must primarily reflect a moral duty of his/her family and the fact that between the protected person and the person of the protector should be a relationship of trust, which is why, according to the legal text of the Article 170 para. (2) of the Civil Code of

⁹ For more, see CHIRICĂ, C. Ocrotirea anumitor persoane fizice prin măsura punerii sub interdicție judecătorească în lumina dispozițiilor noului Cod civil și a noului Cod de procedură civilă [Protection of Certain Natural Persons through the Measure of Adjudication of Incapacity in the Light of the Provisions of the New Civil Code and the New Code of Civil Procedure]. *Dreptul* [Law]. 2012, nr. 1, pp. 26-59. ISSN 1018-0435.

¹⁰ See the Article 170 para. (4) of the *Law No. 287/2009 on the Civil Code of Romania*.

Romania, priority must be taken into account when choosing the guardian: “husband, parent, a relative, a friend or a person who lives with the protected person if the latter has close ties and is stable with the ward, able to fulfil this task, taking into account, as the case may be, the bonds of affection, the personal relationships, the material conditions, the moral guarantees presented by the one called to be appointed guardian, as well as the proximity of the residences.”¹¹

In other words, if no person from those listed above will be able to assume the responsibility of the guardianship, the Romanian legislator, through a new regulation, came up with a solution inspired by the French model, which is enunciated by the provisions of the Article 170 para. (3) of the Civil Code of Romania and provides that in such a situation, the person who acquired this capacity according to the special law will be appointed the personal representative. However, the operationalization of this institute is postponed until the moment when it will be regulated by the future special law on the profession of a personal representative, respectively, of a professional body having this purpose.

Regarding the termination of the special guardianship protection measure, we recall the provisions of the Article 177 of the Civil Code of Romania which provide that it may terminate upon the death of the protected person, the expiration of the duration for which it was instituted, except for the situation in which it was extended, by replacing or lifting it, as a result of the termination or modification of the causes that determined its adoption.

At the end of our brief analysis of the major changes brought by the Law No. 140/2022 in such a sensitive matter, we commendably appreciate the effort of the legislator who tried to balance both the needs and interests of the vulnerable persons and the protection of the interests of other people, having as a permanent benchmark the importance of respecting human dignity and belonging to humanity, with emphasis laid on the standards of diversity of individuals, among others.

¹¹ For more, see AFRASINIE, M., M.-L. BELU MAGDO, A. BLEOANCA, et al. *Noul Cod civil: Comentarii, doctrină și jurisprudență: Vol. I. – Vol. III.* [New Civil Code: Commentaries, Doctrine and Case Law: Vol. I. – Vol. III.]. 1-a ed. București: Hamangiu, 2012. 1418 p., 1067 p. and 1229 p. ISBN 978-606-522-729-3.

Conclusions

Starting from the idea that there is no perfect regulation and that it is practice that determines most of the legislative changes, while considering the Romanian legislator's efforts to reach a legislative reworking as much as possible in line with the needs of the individuals without discernment, we appreciate as considerable the way in which the legislator has achieved the intended objectives with the new law.

It is indisputable that the new protection measures for individuals with intellectual and psychosocial disabilities, as regulated in the Law No. 140/2022 on Some Protection Measures for Persons with Intellectual and Psychosocial Disabilities and Amendment and Completion of Some Normative Acts, are clearly superior to the juridical institutes of the old regulation, namely to the institute of judicial prohibition, which did not offer increased protection, proportionate and adapted to the needs of this category of persons.

Through this new law not only has the legal possibility been created for persons with partial intellectual incapacity to enjoy forms of protection of their interests, alongside persons whose intellectual capacity was totally impaired, but the involvement of the public prosecutor who acts as a guarantor of the rights and legitimate interests of the minors, persons who are to benefit from legal advice or special guardianship, missing persons and other persons in difficulty, has been increased.

Therefore, the current regulation in the matter can only be considered as an important progress in the fight against social exclusion and discrimination of vulnerable and disadvantaged people, offering them a real support in their active participation on equal terms in civil life and their socio-economic integration or reintegration or in improvement of their health status.

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