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The system of protection of the elderly with disabilities in french law: diversification and proportionality of measures*

El sistema de protección de las personas mayores en el derecho francés: diversificación y proporcionalidad de las medidas

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Abstract

The main purpose of this research is to disclose the legal model for the protection of the elderly in French law in which, based on Law No. 2007-308 of March 5, 2007 (whose entry into force is from the year 2009 and that mainly modifies the norms of the Civil Code) has brought about a substantial transformation from that only medical or welfare conception of disability (still in force in our country) to a social-legal vision, which demands respect for autonomy and the conservation of the legal capacity of persons, as much as possible; foreseeing, however, certain limitations (necessary and reasonable) of the capacity to act that does not mean, we believe, an attack on the legal personality of the most vulnerable.
Keyword: Elder protection; disability; capacity.

Resumen

Esta investigación tiene por objeto principal dar a conocer el modelo legal de protección de las personas mayores en el Derecho francés en el que, a partir de la ley Nº 2007-308 de 5 de marzo de 2007 (cuya entrada en vigor fue en el año 2009 y que modifica principalmente las normas del Código civil) ha operado una transformación sustancial desde aquella concepción únicamente médica o asistencial de la discapacidad (aún vigente en nuestro país) a una visión social- jurídica, que exige el respeto de la autonomía y la conservación de la capacidad jurídica de las personas, todo lo posible; previendo, sin embargo, determinadas limitaciones (necesarias y razonables) de la capacidad de obrar que no significan, creemos, un atentado a la personalidad jurídica del mayor vulnerable.

Palabras-clave: *Protección de mayores; discapacidad; capacidad.*

1 Introduction

A prior and fundamental affirmation is that in order to protect a person with a disability[1], he or she must not be declared incapable. Only on the basis of this unavoidable premise do we believe that the principles established in the United Nations Convention on the Rights of

. *Artigo traduzido por Inteligência Artificial.

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[1] We are referring to people with mental or intellectual disabilities, the only area in which their capacity could be discussed in legal terms. Likewise, when we speak of capacity, we refer to the capacity to act or capacity to exercise (understood as the possibility of acting on one's own in the life of the Law, without the ministry or authorization of another and not to that recognized as capacity for enjoyment (which corresponds to every person by the mere fact of being such). This is although, as we shall see, at the international level the concept of comprehensive "legal capacity" is used, in the interpretation of the Committee on the Rights of Persons with Disabilities, both of the capacity to enjoy and to exercise.

Persons with Disabilities[2] and, in particular, the provisions of Article 12 thereof are adequately interpreted (Aguirre, 2014, p. 87-88).[3] However, not every restriction of the capacity to act in itself means a contravention of Article 12 of the Convention, much less discrimination, as we will explain.

Thus, the objective of this work is to demonstrate, through French legislation, that the key to a support system (which is not necessarily a substitution of will) lies precisely in not restricting or abolishing a *priori* the capacity to act; unless the interest of the subject of protection so requires[4].

To this end, we will present some general aspects of the system of protection of French law[5], such as the legislation in force, the main institutions of protection of French law and the development of some essential concepts such as "vulnerability", "capacity" and "disability". We will then present and critically analyse the principles underlying this legislation in order to justify its adaptation to article 12 of the Convention, and we will also refer to the observations made by the Committee in this regard[6]. We will end with some reflections that will serve in themselves as a conclusion[7]. At all times, as well as alluding to the positive aspects to be highlighted, we will also refer to those shortcomings detected by the doctrine in this matter.

On this occasion, we chose French law[8] because we believe that it is one of the legislations, although in many respects perfectible, most in line with international treaties and the current principles that they promote in relation to the protection of persons with disabilities,

[2] Adopted by the United Nations General Assembly on 13 December 2006. Hereinafter, indistinctly so called, or "the Convention", or ICPD.

[3] And this, among other things, because *"... there are incapacitated persons who have a capacity much greater than that of many minors, or in whom the incapacitation translates into the subjection of certain patrimonial acts, especially important, to the assistance of a guardian; in these cases there is legal incapacity, but there is not that radical deprivation of the capacity to act that seems to be revealed by the word used by the law".*

[4] This is a recurrent and much discussed issue regarding the extension of the autonomy of persons with disabilities Although we will not develop it *in extenso* in this work, we will refer to it when dealing with the principles of proportionality and equality, and also in the section dedicated to art. 12 of the International Convention on the Rights of Persons with Disabilities.

[5] Although the system of protection institutions in French law recognizes three groups of people as addressees: minors; emancipated minors and adults; We will focus only on adults and, particularly, on adults with an intellectual disability.

[6] The Committee on the Rights of Persons with Disabilities is a body of human rights experts responsible for monitoring the implementation of the Convention. In accordance with the mandate set out in Article 35 of the CRPD, States Parties are obliged to submit to the Committee comprehensive reports on the measures they have taken to comply with the Convention and on the progress made in this regard within two years of its entry into force.

[7] We will only make a few brief allusions to other legal systems, when it appears necessary and it is considered that they can serve as an example or warning for those countries that are just beginning a path of evolution towards a fairer system of protection of the elderly and treatment of disability.

[8] In previous works we have analysed the Spanish legal system and later the Swiss system of capacity will be analysed.

as we will try to demonstrate in each of the sections of this work (Barranco; Cuenca; Ramiro, 2012, p. 53-80).[9]

Perhaps the noblest justification of this work is given by the possibility that we will grant the reader to know a complex system that requires not only a conscientious and exhaustive review, but also the understanding and adequate systematization of a significant number of normative bodies, doctrine and specialized jurisprudence, not always easily accessible and that mean, as is evident, a handling of civil law and the Gallic language[10].

2 General aspects relating to the protection of adults in french law

1) Legislation

The situation of persons with disabilities was previously provided for in Act No. 75-543 of 30 June 1975; and mainly governed by Act No. 2005-102 of 11 February 2005 on equal rights and opportunities in participation and citizenship for persons with disabilities, which substantially amended numerous articles of the Code of Social Action and Families; the Labor Code, the Public Health Code, and the Electoral Code, among others. It is Law No. 2007-308 of 5 March that complements these provisions, which came into force on 1 January 2009 and which reforms the regime for the protection of the elderly (Caron-Déglise, 2016, p. 1-5).

As for the French Civil Code[11], it is Titles IX, X and XI of the book dedicated to "persons" that have regulated the main institutions that are related to incapacity: parental authority, guardianship, protection of the elderly, etc.

Article 425 of the CCF provides that any person who is unable to look after his or her interests on his or her own by reason of a medically verified alteration[12] of either his or her mental or bodily faculties of such a nature as to prevent him or her from expressing his or her will may benefit from one of the legal protection measures provided for in the chapter "Measures of legal protection of the elderly" (Chapter II of the title XI). The main measures are judicial safeguarding, guardianship, guardianship and the mandate of future protection.

The safeguarding of justice is provided for in article 433 of the Code of Civil Procedure and is aimed at a person who, being in one of the circumstances provided for in article 425, is

[9] We believe that it is a social model that "tears the veil" that justified the total exclusion of people with disabilities.
[10] All translations have been made by the writer, except for those that have an official text in Spanish and that will be indicated where appropriate.
[11] Hereinafter Ccf.
[12] It may seem, at first glance, that this is a requirement. But, as we will see later, that is not the meaning of the rule. However, we agree that the mention of the medical finding in the Civil Code does not seem appropriate.

in need of temporary protection to be represented only for a specific act. It may be a measure followed by a guardianship or guardianship if the circumstances that gave rise to it extend over time. Guardianship is enshrined in articles 440 et seq. of the Ccf and is provided for in respect of a person who, unable to act on his or her own, needs, for any of the reasons provided for in article 425, to be continuously assisted or supervised in important acts of civil life. This measure is determined only when the safeguarding of justice does not appear to be sufficient to safeguard the interests of the protected person. Guardianship, on the other hand, is rather of a residual nature, and only takes place in those circumstances in which, having tried the other measures, none of them has served the purposes that are required, according to the state and circumstances of each person[13]. It is the same article 440 of the Ccf that provides that if the person needs to be represented in a continuous manner in the acts of civil life, he or she may be placed under such a measure[14]. Finally, the mandate of future protection (dealt with on the basis of article 477 of the CCF) is a voluntary (non-judicial) measure by virtue of which any person who is not the subject of a guardianship measure or a family habilitation may entrust one or more persons with their representation in the foreseeable that they will find, in the future, in any of the situations contemplated in the aforementioned art. 425 of the CCF[15]. It will also be necessary to consult articles L. 3212- L. 3216, L. 3221 of the Public Health Code (hereinafter Csp); and arts. L.114, L.146, L.149, L.241- L.247 of the Code of Social Action and Families (hereinafter Casf); in addition to the articles of the French Code of Civil Procedure (hereinafter Cpc), all of which will be mentioned throughout this work.

2) *The notion of vulnerability and its interpretation in French law*

Namely, the word vulnerability comes from the Latin *"vulnerabilis*"; of the notion " *violare"* which strictly means *"wound"*. The Official Dictionary of the Spanish Language designates with the adjective *"vulnerable"* anyone who is susceptible to being injured or suffering a mental or moral injury (Estupiñan-Silva, 2014, p. 89-113).

[13] Throughout this work we will refer constantly to guardianship and guardianship, making it clear that the latter is neither the general rule nor is it applied (or should be applied) but in subsidy of any other less harmful protection mechanism. Beyond whether or not it is called guardianship, what is really relevant is the need for representation of those who, under no support, will be able to know and want and, therefore, freely and voluntarily express their will.

[14] It is important to note that the curator, unlike what happens in Chile, will never have powers of representation, as is the case with guardianship. From this point of view, the tutela has been strongly criticized, as we will see later, on the understanding that the interpretation made by the Committee with respect to Article 12 of the Convention implies eliminating all forms of representation.

[15] In this paper we will not refer to measures of a voluntary nature, but only to those that are of a judicial nature.

Vulnerability is a notion that has invaded our environment in recent years and the Law is no exception: colloquiums, symposia, research, social policies and judgments have been the scene of this concept that is difficult to define and which, however, is the central axis of any protection system (Burgorgue, 2014, p. 7).[16]

Like many metaphorical notions, vulnerability is a variable concept. Not all older people are vulnerable and not all people with disabilities are always vulnerable. Members of these categories (and, of course, others) will only be vulnerable under certain circumstances, at certain times, and in certain social contexts.

On the other hand, although vulnerable people are fragile, we cannot say that fragility is the same as vulnerability; although vulnerable people are also dependent, dependence is not the same as vulnerability. Nor should vulnerability be confused with the notion of dignity (being vulnerable does not mean the loss of dignity) (Denizeau, 2014, p. 117-150)[17]-[18], nor with the concept of disadvantage or insecurity (Besson, 2014, p. 59-85). The only thing that is certain is that vulnerable people are identified with those who, due to different conditions (such as age, illness, or another factor) require special and more intense protection from the legislator, in order to allow the exercise of their rights on an equal basis with others; and that this quality does not imply a negative connotation, much less a discriminatory one.

Thus, vulnerable is defined as a person marked by a structural, psychological or social fragility that does not allow them to live fully autonomously and who is exposed to a threat or abuse (Estupiñan-Silva, 2014, p. 93 et seq.; Dubout, 2014, p. 31-57; Besson, 2014, p. 60-61).[19,20] Vulnerability goes beyond the idea of the need for help (Estupiñan-Silva, 2014, p. 90). Although it does not mean the same thing, vulnerability seems to affect people who are in some way injured or weak, either by nature (in the case of minors, people with disabilities, and

[16] It explains how the phenomenon of vulnerability has been taking place in the world and the development it has had in recent decades.

[17] The philosopher KEMP points out that the vulnerable person is a human being whose autonomy, dignity and integrity require protection due to his or her fragility and considers that the notion of vulnerability cannot be separated from autonomy or integrity.

[18] According to the author, it is one of the first "rights" that must be guaranteed to vulnerable people.

[19] A *"threat"* is defined by the Inter-American Court of Human Rights as a violation of the convention alleged by the alleged victim (i.e., violation of fundamental rights). The Court has also recognized the person with disabilities as a subject with a higher level of risk of being exposed to the violation of his or her rights; whether in terms of equal treatment, access to justice, right to medical treatment, etc. (p. 102).

[20] In the same sense, BESSON defines vulnerability, pointing out that, in general terms, it is the quality of an individual or a group susceptible to being the object of an attack on their interests. He pointed out that vulnerability was of such importance to the European Court of Human Rights that it had never wanted to define it or justify its role.

foreigners, for example) or because they have been classified as such (such as women in certain circumstances) (Denizeau, 2014, p. 124).[21]

The European Court of Human Rights links vulnerability to the prohibition of discrimination. It is used as a dynamic criterion for the identification of a list, although not exhaustive, of groups to be protected. In this way, it seems that vulnerability is a means (although not the only one) to determine the new groups against which there can be no discrimination (transsexuality, sexual orientation and, of course, disability) (Besson, 2014, p. 73 et seq., Carbonnier, 2017, p. 624-625).

In France, if we consider (as has been said) that vulnerability implies the "weakness" of an individual, we can find the implicit presence of the notion in the preamble to the 1946 Constitution: the application for asylum, the special treatment of children, mothers and elderly workers; all of them are the objects of specific protection precisely because of their vulnerability[22]. This notion is of an individual nature and not general (inherent to all individuals), which we consider a success since, in the words of Lagarde: vulnerability is not only the "risk" of being exposed to harm; and a global conception of it, which leads to considering as such only those who are under the angle of exposure to risk would be a mistake (Denizeau, 2014, p. 144). However, it can be seen that vulnerability in French law is not an operative notion, that it does not have a clear legal consistency and that there is no conceptual unity of it. This, therefore, is another of the so-called "indeterminate legal concepts".

3 List of concepts: capacity, incapacity, disability

In general terms, it is not the same to speak of "incapacitated" as "incapable". Among the incapable are the disabled, but not all the incapable are. The foregoing is equivalent to saying that not every incapable person has been declared as such through a judicial procedure, but that it is often the law that grants him this condition *a priori*, as is the case, for example, with minors. Therefore, every incapacitated person is incapable, but not every incapacitated person has been judicially incapacitated. Total incapacitation is accompanied by the deprivation of the capacity

[21] In society, certain individuals are vulnerable by nature and everyone else can find themselves in a situation of vulnerability any day; and, in this sense, vulnerability is a probability that the Law must take into account. On the following page, the author complains that the concept of vulnerability is practically ignored by both French and UK judges, and that it is more widely used in the field of criminal law than in family or personal law.

[22] Moreover, it is indicated that every human being who, by reason of his age, his physical or mental state or economic situation, is unable to work, has the right to obtain from the community the means that are convenient for his existence. Translation of paragraph II, second sentence of the Preamble to the French Constitution.

to act, through a judicial procedure that, in the case of French law, is restricted only to guardianship, as we shall see, under which the protected person even retains the power to perform certain acts such as those called strictly personal (such as the recognition of a child, the will, etc.) (Barranco; Cuenca; Ramiro, 2012, p. 53-80).[23]

In France, the so-called legal capacity (*capacité juridique*) is the ability of a person to be the holder of rights and to exercise them by himself. It is composed of the *capacity for enjoyment* (*capacité de jouissance*) and the capacity for exercise (*capacité d'exercice*) (Malaurie, 2016, p. 240-251; Kjaerum, 2016, p. 9).[24] The capacity to enjoy is recognized for all, as an attribute of legal personality, and can only be partially restricted in relation to certain rights, as is the case, for example, in the case of foreigners without the right to vote (Carbonnier, 2017, p. 542 et seq.; Malaurie, 2016, p. 233).[25] The inability to exercise, on the other hand, is intended to protect the person who is deprived of the capacity to act: this is the case, for example, of a minor or a person with a disability provided that the state of health of the latter, as we shall see, merits the restriction (or abolition) of his capacity[26] and there is a process through which he is denied the exercise of certain rights or the celebration of the of certain acts or contracts[27].[28]

[23] Traditionally, it has been understood that incapacitation (at least total) means a status of incapacity to act and, therefore, a general restriction of the ability that is assumed of every person to freely exercise his or her fundamental rights. This, although it is unacceptable in a state of sound mind, we believe that it is even reasonable in a situation of disability that prevents self-government (a disability that, by the way, is not given by the legislator, but by nature or some external event that affects the life of the person with a disability).

[24] We do this because not all legal systems make the same distinction, which leads to problems, and in what interests us now, when it comes to determining what capacity the Convention actually refers to. In Spain, for example, we speak of "legal capacity" to identify the possibility of being the holder of rights and duties (what we understand as the capacity to enjoy and which is, precisely, the attribute of personality) and what we call "capacity to exercise" and which can also be found in some foreign texts as the "capacity to act" is known as "capacity to act". which is why we call it that in this work. For its part, it should be noted that there is no international definition of legal capacity.

[25] He is incapable of enjoyment, then, he who cannot be the holder of rights. It should be borne in mind, however, that since the 1968 law the legislator has practically eliminated the word "incapable" to speak rather of "protected persons", a differentiation that becomes important in the field of protected adults since not all of them are incapable, as has already been said.

[26] From now on, when I refer to the "capacity" alone, we will be referring to the capacity to exercise (or also called the capacity to act).

[27] A process that may or may not mean their (total) incapacitation.

[28] This is not the case in Chile, for example, with the so-called *"insane"* by art. 1447 of the Chilean Civil Code *: "The insane, the prepubescent and the deaf or deaf-mute who cannot make themselves clearly understood are absolutely incapable. His acts do not even produce natural obligations, |and do not admit of surety"* The insane person, therefore, is an incapable person without the need to be incapacitated, by the sole fact of mental disability, the proof of which must be exercised a *posteriori* in the event of requesting the nullity of the act he has entered into (the interdiction is only valid as a means of proof). In other words, a minor (between 0 and 12 years of age for a female and 14 years of age a male) and a demented person, from the point of view of the capacity to act, in Chile have the same legal treatment (an issue that is unpresentable in the light of the principles of the Convention).

Article 414 of the French Civil Code provides for the principle of the capacity of adults (18 years of age) to enter into valid legal acts, notwithstanding the possibility of obtaining the annulment of the same, if it is proven that there has been a mental disturbance at the time of their conclusion (Molin, 2017, p. 18-19; Voirin; Goubeaux, p. 239-240; Teyssie, 2016, p. 392 et seq.; Malaurie, 2016, p. 239 et seq.)[29]. The burden of proof is evidently on the person alleging the disturbance[30]. The action for nullity, as provided for in art. 412 of the same Code, corresponds only to the interested party, so that we understand that it is a sanction of relative nullity aimed at the protection of the person who has entered into the act or contract (Carbonnier, 2017, p. 546; Malaurie, 2016, p. 243-244).[31]

Disability, on the other hand, is defined by Act No. 2005-102 of 11 February 2005, which creates art. L. 114 of the Code of Social Action and Families, as any limitation of activity or restriction of participation in life in society suffered by a person in his or her environment, due to a lasting or definitive substantial alteration of one or more of his or her mental, sensory, mental, cognitive or physical functions of a multiple disability (understood, we believe, such as the alteration of several of the above functions at the same time), or of a disabling alteration of their health.

It is important to note, and this in view of the possible modifications that may be made in our legal system, that in France, although people with disabilities are excluded from criminal liability, civil liability in certain cases subsists (art.489-2) (Carbonnier, 2017, p. 637 et seq.)[32].

Finally, and in order to clarify all concepts, old age, although it is a frequent cause of incapacitation, does not in itself imply the alteration of mental faculties or the loss of

[29] Although the altered mental faculties of the author do not always authorize the annulment. The date on which it is demanded will be of great importance. The statute of limitations for the action is 5 years as provided for in article 1304 of the same Code, however, it will be necessary to distinguish whether it is a protected or unprotected adult. In the first case, the time limit is calculated from the day on which the person has become aware of the act and can "validly redo" it (an expression that, although it generates problems of interpretation in French doctrine and jurisprudence, has been understood as an allusion to the moment when the protection measure ceases); while in the second case the term is counted from the execution of the act or contract that is intended to be annulled.

[30] From the harmonious interpretation of the CCF and the laws relating to the protection of the elderly, it can be deduced that the legislator uses the word "trouble" to refer not only to a serious disorder, but also to any disorder or disturbance that could affect a free and spontaneous declaration of will. This clarification is important, because if the reader looks up the meaning of "trouble" in the dictionary, he could imagine, without knowing the history of the law or the French legal system, that it is a certain degree of mental illness, which is not correct. See also what is stated in the French dictionary Le Nouveau Petit Robert, which defines a disorder without reference to its severity, and even without referring exclusively to mental faculties: *"Modification pathologique des activités de l'organisme ou de comportement (physique ou mental) d'être vivant"*.

[31] Obviously, and as indicated in article 468, paragraph III of the CCF, depending on his faculties, it is an action that can also be filed by the guardian, or by the affected person himself with the assistance of his guardian.

[32] The same is true, for example, in the Spanish legal system. The new Civil Code, which came into force in June of this year (2021), although it eliminates incapacitation, maintains the civil liability of those people who require support for decision-making (see art. 299 of the Spanish Civil Code).

independence. The mere fact of being elderly does not mean being a person with a disability or disabled. If the elderly have a disability that alters their abilities to understand and will, then they must be protected and that is when the capacity support mechanisms are activated, more or less intense, as appropriate (Malaurie, 2016, p. 292-293).

4 Principles that inspire the system of protection of the elderly in the french legal system (Kjaerum, 2016, p. 25 et seq.)[33]-[34]

As Molin states, while Law No. 68-5 of January 3, 1968[35], was a legislation for the protection of the property of the "incapable"; the current law of March 5, 2007 is a law of "freedom" that reaffirms the fundamental principles applicable to protected adults (Molin, 2017, p. 20-21, Baudis, 2012, p. 31).[36] and which are reflected in the current articles of the CCF. Thus, article 415, paragraph II, states precisely that protection measures shall be established in a context of respect for individual freedoms, fundamental rights and the dignity of the person. For its part, art. 425, paragraph II makes it clear that the measures contained in the CCF are intended not only to protect the property of the protected person, but also to protect his or her person, although the guardianship judge may (Malaurie, 2016, p. 252-253; Defenseur des Droits, 2016, p. 39),[37] as a duly justified exception, limit the measure either exclusively to

[33] In this section, we will not study the principles that inspire the Convention (ratified by France after the Law of 5 March 2007), but rather the French legislation on protection: the Ccf and other related regulations, although many of them, as we will see later, coincide. A study of the principles underlying the Convention and the recommendations made by the Committee of Ministers of the Council of Europe can be found in KJAERUM.

[34] The order, number and structure of principles to be dealt with is not based solely on the text of the law, nor on any particular doctrine.

[35] Before the 2007 reform.

[36] The author also points out, and quite rightly, that this is a legal novelty but not a legal one, since the jurisprudence had been affirming since 1989 that the protection measures were not only aimed at the property, but also at the person of the then incapable; in the same sense BAUDIS: the author states that these are practices that had already been established by the jurisprudence and that the 2007 law enshrines these practices through a dimension adapted to the current needs of the elderly under protection. The White Paper aims to raise public awareness of the improvements that can be made in the implementation of the law of 5 March 2007.

[37] A Guardianship Judge is a judge specialized in the adoption of protection measures. All measures are discussed before him and not only, as one might think, the tutela. It was created in 1964 and is a key part of the protection of both adults and minors. The competent territorial judge is the one who corresponds to the habitual residence of the protected person. The Ombudsman has already ruled on the relevance of renewing his name to that of "judge for the protection of the elderly", a notion that would better coincide with the breadth of his functions. As a basic notion, it should be understood that the Ombudsman (Défenseur de Droits) is designated by the Government as an independent mechanism, responsible for monitoring the implementation of the Convention on the Rights of Persons with Disabilities. In this way, the mission of accompanying people with disabilities in the knowledge and defence of their rights is ensured. The Rapport, on the other hand, is an analysis that is carried out to account for the state of the application of the Convention in France and is prepared based on the requirements of the population and the testimonies and hearings of the actors on the ground who are in daily contact with the problems addressed in it.

the protection of the property, or exclusively of the person (Carbonnier, 2017, pp. 652-653; Malaurie, 2016, p. 330).[38]

The principles that inspire French protection legislation are inevitably related to the materialization of certain fundamental rights on which they are also based: equality, dignity, development of personality, among others; however, it is not possible to subsume fundamental rights into a single principle, nor vice versa; especially when "principle" and "fundamental right" do not mean the same thing[39].

1) Principle of necessity

The field of application of protection regimes in the French system is given precisely by "necessity" (Malaurie, 2016, p. 291). Such a need is related to the alteration of a person's faculties. That is the criterion on the basis of which protection systems must be activated: only if a person's faculties are affected should he or she be protected; otherwise, the assumption of any protection measure is not justified (Voirin, 2016, p. 237).[40]

Article 425, paragraph I of the Ccf provides that any person who is unable to protect his or her interests by himself, due to a medically verified alteration of either his or her mental faculties or of his or her physical or bodily faculties that prevents the expression of his or her will, may benefit from a measure of legal protection. of those contained, says the legislator, in this chapter, (referring to the following articles). It is necessary that whenever a protection measure is opened, it must be backed by a medical basis (Carbonnier, 2017, p. 654).[41] Such a medical finding may only be granted by one of the professionals registered on the list drawn up by the Attorney General for that purpose.

Therefore, when we speak of the "principle of necessity", it means that there must be at least two basic conditions for the opening of a measure of legal protection, already established

38 We take advantage of this section to explain how the implementation of protection measures is financed. In the first place, it is the responsibility of the public community, because of national solidarity; A part of the expenses are borne by the protected adult, taking into account the state of his resources (his families or his heirs).

39 If we go even further, we can even affirm that all principles, in turn, are related to each other; However, in order to maintain a clear outline that allows a greater understanding of the system, we will treat each of them separately.

40 It could be thought that this is a criterion that applies only to judicial protection measures. However, for example, the mandate of future protection (which is a voluntary measure), although it is not conceived under a state of necessity of the person who confers it, is intended to take effect only when the powers of the person who has made such designation are altered and, therefore, a state of future necessity. We will see the figure of the future protection mandate later.

41 However, and this is important to clarify, the medical aspect is not conditioned to the civil aspect, nor vice versa. The civil regime and medical treatment are independent of each other, but the civil regime can be influenced by medical or extra-medical aspects. We do not believe that it is negative to take into account a medical opinion, as it would be to base the protection system solely on it. Art.490-1 of the CCF.

in the 1968 law and preserved by the 2007 law, namely: an alteration of the person's faculties, medically verified; and the impossibility of self-government (that is, of protecting its own interests).

It is important to note, however, that, even if these two presuppositions exist, the opening of a measure is not justified when there is another mechanism for protecting the interests of the person concerned: such as, for example, protection by the family or the help of a third party, or even a mandate for future protection (Molin, 2017, p. 49-50).[42] Therefore, and as a categorical and fundamental affirmation, there is no automaticity or immediate consequence between the existence of a disability and the implementation of a protection measure, since a mechanism can only be established, either of support or substitution of will, when the conditions established by the legislator are met (Pecqueur; Caron-Deglise; Verheyde, 2016, p. 958).[43]

2) Principle of subsidiarity[44]

Linked to the above, we believe that there are two clear aspects of subsidiarity, as the basis of the system of protection of elderly people with disabilities. On the one hand, we have the subsidiarity of State intervention, in such a sense that it will only take place when the family cannot take care of the elderly, or when there is no other mechanism already established by the legislator for support or substitution of will, as the case may be, in which there is no intervention either administratively or judicially (Baudis, 2012, p. 15).[45] In addition, only if no member of the family or anyone close to him or her is able to assume guardianship or guardianship, a judicial representative for the protection of the elderly person will be appointed (see the provisions of arts. 447-450 1 of the CCF). On the other hand, subsidiarity also operates within the legal protection system in such a way that those measures that do not restrict the capacity of the protected person will be preferred, whenever possible, with guardianship occupying the

[42] It is here that the rules of common law relating to representation must be taken into account, in the first place; and, secondly, those rules relating to the rights and duties of the spouses and matrimonial regimes. See Articles 217 and 219 of the CCF, which allow the guardianship judge to authorize one of the spouses to perform a specific act or to represent his or her spouse in a general manner. See also articles 1426 and 1429, which give one of the spouses the possibility of applying to the court for the substitution of the will of the other. What we want to warn is that in the Ccf there are other mechanisms that do not necessarily mean the opening of a measure, in order to protect those who are prevented from expressing their will. This relates, of course, to the principle of subsidiarity.
[43] This is one of the clear manifestations from which we can point out that the French system is in line with the requirements of the Convention, as we will say later.
[44] We can also call it the principle of *ultima ratio,* since that is what its content effectively points to.
[45] The role of the family is reinforced, as indicated in article 415 of the CCF. Already in 2010 in France, shortly after the 2007 law came into force, 47% of guardianships and guardianships were entrusted to families (a family whose notion is also expanded by law, taking into account sociological developments and the reality of the ties that currently exist between individuals).

"last place on the list" (Carbonnier, 2017, p. 551-553; Defenseur de Droits, 2016, p. 16).[46] This second aspect of subsidiarity is also related to proportionality, as we will see below.

3) Principle of proportionality

When we talk about proportionality, we must refer to two fundamental aspects that must be taken into account when adopting a given protection measure: graduation and temporality (the latter also related to the monitoring of the measure).

The graduation is related to the need to individualize the measure, according to the state, more or less profound, of alteration of the faculties of the protected person (Guilarte Martín-Calero, 2016, p. 61, Carbonnier, 2017, p. 547 et seq.).[47]. Article 428, paragraph II of the Ccf is sufficiently graphic when it states that the judge is called upon to adapt and individualize the protection measure according to the degree of alteration of the personal faculties of the interested party. In this way, and in the words of Molin (2017, p. 51), the judge, even in cases of guardianship and guardianship, must "modulate" the capacity of the protected person[48].

In short, it is not a rigid system of general application, but rather a case-by-case application, after studying the personal circumstances of the protected person. *"There must be a reasonable correspondence between the natural capacity to know and will, and the legal intervention on the possibilities of action in legal life."*. Thus, *"... the principle of protection of persons with disabilities* (...) *and the free development of the personality* (...) *complement and, at the same time, limit each other, determining the balance that civil regulation must find, so that it does not fall into such exacerbated protection that it suffocates the possibilities of development of the personality, nor gives it so much breadth that it ends up establishing a regime of protection that is markedly insufficient to the detriment of the mentally disabled*

46 As is evident, then, incapacitation (judicial deprivation of the capacity to act) is of an exceptional nature. The Ombudsman considers that such a mechanism will only be applied exceptionally, only for those cases in which a person is in a situation of "total incapacity" to express his or her will or preferences and in the event that he or she is unable to activate another form of accompaniment or measure adapted to his or her needs.

47 This is because disability is not relevant in itself, but only if it affects the capacity for self-government. In this sense, see, for example, Guilarte Martín-Calero, Cristina who points out that disabilities can be classified into two groups: those that are deeper and that could only be remedied in legal terms through a measure that involves representation (guardianship, for example), and those that are less serious, which are actually intermediate disabilities and that can be remedied instead through mere assistance (such as, for example, the conservatorship).

48 In this regard, we can also cite article 440, paragraphs II and IV of the Ccf, from which it follows that a measure such as guardianship or guardianship (or even family habilitation) should not be pronounced if the judicial safeguard (measure without any intervention in the acts of the protected person) appears to be sufficient for the protection of the elderly.

themselves" (Martínez de Aguirre, 2014, p. 49-50; Guilarte, 2016, p. 61-62, 73 et seq.)[49]-[50]. In Malaurie's words, if in one way or another the protection is either insufficient or excessive, the incapable will suffer. The alteration of faculties can be more or less profound and the incapacity or lack of aptitude, therefore, more or less widespread (Malaurie, 2016, p. 244).[51]

For its part, and as far as temporary nature is concerned, the law of 5 March 2007 set a maximum duration of protection measures of 5 years, under penalty of expiration. Once this period had elapsed, the measure was reviewed and if it was not renewed, it automatically expired. However, in view of the practical difficulties of complying with such deadlines (mainly due to the high workload of guardianship judges), the law of 16 February 2015 (No. 2015-177), has amended (among other provisions) articles 441 and 442 of the Ccf In this way, the maximum term of the duration of the measures has been increased to 10 years, provided that such duration is duly justified; and the possibility of renewal is preserved, providing for a maximum duration of 20 years that did not exist before (Defenseur De Droit, 2016, p. 37 et seq.).

4) ***Respect for and promotion of autonomy*** (Baudis, 2012, p. 32 et seq.)

In the words of Noguero (2016, p. 964), there is an international movement in favour of the self-determination of the most vulnerable (Guilarte, 2016, p. 72).[5253]

Autonomy is defined as human self-determination, the ability to act freely. The loss of autonomy goes hand in hand with the loss of legal capacity (Denizeau, 2014, p. 138), but not with the loss or alteration of personality. The 2007 law establishes as one of its fundamental pillars the preservation of legal capacity, the action of the elder, and the prevalence of his will in decision-making; all edges of the principle of respect for the autonomy of the protected.

It has been defined as the *"ability to control, face and make, on one's own initiative, personal decisions about how to live according to one's own norms and preferences as well as*

[49] On p. 64 the author speaks very aptly of the *"personalization of the protection measure".*
[50] The expression "tailor-made suit" used by the First Chamber of the Supreme Court of Spain in the judgment of 1 July 2014 is already well known: *"it is a tailor-made suit that requires precise knowledge of the situation in which that person finds himself...".*
[51] The author also points out that for a long time mental alienation was the only cause of disability and that other causes have been incorporated, such as old age, especially when it is accompanied by senile dementia or Alzheimer's disease (pp. 300 and 301).
[52] Self-government can be understood as the *"attitude necessary to act for oneself, to act freely...".* Both the definition of autonomy and dependency have been extracted from Spanish Law 39/2006 of 14 December, on the promotion of personal autonomy and care for people in a situation of dependency.
[53] Article 3 of the Convention establishes respect for individual autonomy, including the freedom to make one's own decisions and the independence of individuals. The same is dealt with in Article 12 of the same Convention, to which we will refer later.

to carry out the basic activities of common life". Dependency, on the other hand, is understood: *"the permanent state in which people find themselves who, for reasons derived from age, illness or disability, and linked to the lack or loss of physical, mental, intellectual or sensory autonomy, require the care of another person or persons or important help to carry out their work .basic activities of daily living or, in the case of people with intellectual disabilities or mental illness, other supports for their personal autonomy*" (Supreme Court of Spain, 2014).

Article 458 of the Code of Civil Procedure provides that acts whose nature is such that they imply strictly personal consent may not take place or be carried out under the assistance or representation. The following is a non-exhaustive list of some acts (legally) considered to be personal: the declaration of birth and the recognition of a child; acts of parental authority relating to the person of the child; and the consent given for the adoption itself, among others (French Court of Cassation, 2015).

Article 459, paragraph I, of the same Code states that the protected person shall take decisions concerning his or her person in proportion to the extent that the measure adopted and his or her condition so permit, so that assistance or representation in such acts does not apply in principle. even when a tutela has been adopted, unless the judge has expressly provided otherwise, either at the time of opening the measure or through a subsequent act. Both the judge and the family council, if constituted, may exercise the protection of the elder in acts relating to his person, if he is not in a position to make decisions for himself (Art. 459, paragraph II). In addition, and in line with the principle of proportionality, the judge must ensure at all times that the modalities of the protection measure adopted are adapted to the state of health of the elderly person (art. 457, paragraph I).

Finally, and in order to guarantee the autonomy and exercise of the individual freedom of the protected person, the Act of 5 March 2007 confers on the protected adult the general right to be informed of his or her personal situation, the acts carried out and their usefulness, the effects and consequences of his or her refusal to carry out a particular act. etc. (art. 457, paragraph I). This right, as we shall see, is qualified or gives rise to exceptions in certain

circumstances (Molin, 2017, p. 104 et seq.; Teyssie, 2016, p. 490 et seq.; Malaurie, 2016, p. 253 et seq., 338).[54, 55]

Even with all that has been said, we believe that the preservation of autonomy and self-determination cannot be an absolute principle, and this is precisely because intellectual disabilities can vary and be very different from each other. We do believe that, wherever possible, autonomy should be promoted. We also believe that if such autonomy is not possible, the representation must always look after the interests of the protected person and incorporate him or her either through his or her opinion or his or her life history if it is not possible for him or her to emit any type of bodily manifestation. How could a person in an irreversible deep coma or one who is in a final stage of a neurodegenerative disease express their will? (Noguero, 2016, p. 966). This is unthinkable and therefore their will must be replaced through a protection mechanism that necessarily implies their representation (and therefore, the loss of autonomy). Therefore, in order to determine the level of autonomy that a person with disabilities should or can enjoy, it is necessary to look at their real state of health and understanding. Hence, the key is proportionality: the greater the alteration of mental faculties, the less autonomy and vice versa. We believe that French law meets that nuance, even though the Committee has observed its legislation[56]. Autonomy presupposes a lucid will and there can be no autonomy without limits because that would be rather pernicious.

[54] Thus, for example, the judicial representative of a protected person whose condition does not allow him to receive such information shall forward the background information to one of the members of the Family Council, if it is constituted or, failing that, to a relative or close friend (art. L.471-8, paragraph III, of the Casf.). The Family Council is a complementary figure to guardianship, which, although it is not mandatory, can be very useful. Article 456 of the Ccf stresses the subsidiary nature of the Family Council and establishes two fundamental requirements for its configuration and action: That the protection needs of the person or the consistency of his or her assets justify it; That the composition of his family and his environment allow it. It is the guardianship judge who appoints the members of the Family Council for the duration of the guardianship, and is composed of at least four members, including the guardian and the substitute guardian. There is no maximum number of members and these are appointed taking into consideration what is expressed by the protected person, his usual relationships, his interest and the possible recommendations of close relatives, as well as his environment. The composition of the Family Council is one of the discretionary powers of the guardianship judge. The Council can function with or without it. When it works with the Guardianship Judge, it is summoned by the latter as provided for in Article 1234 of the CPC. When it operates without it, its purpose is to prevent any abuse and its action is subject to two conditions: the prior authorization of the guardianship judge, as provided for in art. 1237 of the CPc; and the appointment by the Council of a judicial representative for the protection of the elderly as guardian or surrogate guardian.

[55] There are specific rules regarding the decision whether or not to undergo a particular medical treatment (or to terminate the treatment that is being carried out) for older people who are under protection measures, and how they can express their will. See, to this effect, the Code de la Santé Publique, arts. L. 1110-5; L.111-6; L.111-11; and L.111-12, introduced by Law No. 2016-87 of February 2, 2016. There are also special provisions that regulate the possibility of contracting marriage or signing a civil union agreement by the protected adult, an issue that we will not go into on this occasion. Anyone wishing to consult the CCF should refer to Articles 460 to 462.

[56] We will refer to the observations made basically on the figure of guardianship in a later section.

5) Interest of the protected adult

As we have already announced, this is a controversial issue that is hotly discussed in seminar sessions, congresses or conversations referring to the capacity of people with disabilities and the confrontation of their autonomy with their best interest.

Article 415 of the CCF in its paragraph III indicates that the measures established by the legislator will have as their purpose the "interest of the protected person". From such wording, as pointed out by Pecqueur *et alii* (2016, p. 960), it could be assumed that there would be an objective, unique and overriding interest that the guardianship judge and the person in charge of carrying out the protection measure must respect. However, we believe that this is not the spirit of the legislator, and that interest should be understood only as the obligation to "take the least possible risk" in the execution of the measures. The notion of the interest of the protected major is not unique and, therefore, we would have to speak of interests in the plural. Such interests should be determined by optimally observing their essential needs and their current life choices and habits. However, it does not seem reasonable to think that this interest will be based on the wills and preferences of the person to be protected because if he does not have sufficient skills to express his will, then the judicial decision could not avail itself of something that does not exist. On the other hand, what you want (and that with or without a disability) is not always the best; and yes, everyone assumes that risk, it is true, but when we are faced with people who have a disability such that their faculties are altered to the point of not generating an adequate decision-making process, then we cannot hold them responsible for those decisions; and if they cannot answer, then they cannot decide either: it is necessary for another to decide and, as a guarantee, for that other to respond if the decision is unjust, arbitrary, or not based on the real needs of the protected person.

That said, we believe that there are basically two clear manifestations of respect for the interest of the protected major (although perhaps all the principles studied point in the same direction[57], which is why we have left it for the end). We are referring to the right to be heard and the adversarial principle prevailing in the processes of opening protection measures.

Articles 432 and 494.4 of the Ccf impose on the guardianship judge the obligation to hear the major before instituting a protection measure, or at least the obligation to summon him to be heard. The conditions under which such a hearing must be held are contemplated in articles 1120 and 1121.1 of the CPC. Among some of its particularities we can mention: the possibility of having the support of a medical professional, if the judge deems it appropriate; the non-

[57] Primarily the principle of respect for and promotion of the autonomy of the elderly.

publicity of the hearing and the different places where it can be carried out (habitual residence of the person to be protected, residential center, hospital or court office, as the case may be) (Molin, 2017, p. 61 et seq.). It should be noted, however, that the guardianship judge, by means of a specially reasoned decision and under the warning of a doctor registered on the list of the Public Prosecutor (and of a very exceptional nature), may determine that the hearing of the person concerned will not be allowed in the following cases: if the hearing could be detrimental to the health of the adult; if the adult is in such a condition of health that is prevented from expressing his or her will. It seems to us that those safeguards taken by the legislator are precisely along the lines of protection and of not exposing to the consequences of a decision those who are not in a position to make it on their own. To do otherwise would be a lack of protection, and would go against what is imposed by Article 12 of the Convention in its paragraph III. It is true that in those cases the protected subject must be further safeguarded and that guarantees must be established in his favor: this would be fulfilled with the obligation to justify the measure and with the subsequent accountability, or an adequate system of responsibility to which whoever acts in the place and on behalf of the protected person will be obliged.

Decree No. 2008-1276 of 5 December 2008 recalls in general terms the importance of the adversarial principle for all decisions and measures adopted by the tutela judge and regulates the applicable procedure (to which we will not refer specifically at this time). We can also mention Decree No. 2016-185 of February of the same year, which regulates matters relating to family habilitation. These rules replaced Chapter X, Title I, Book III of the CPC. These are articles applicable not only for the opening of the measures, but also for the renewal of these, if appropriate, except for certain exceptions that we will see in due course.

According to art. 432 of the CCF, the person to be protected may be accompanied, during the hearing, by a lawyer or, subject to confidentiality and with the agreement of the judge, by another person of his choice. This rule is complemented by art. 1214 of the CPC, which provides that in all instances relating to the opening of a protection measure, its modification or its lifting, the adult to be protected or the protected person, as the case may be, may choose a lawyer or request that one be appointed ex officio and that the interested parties be informed of their rights at the time of the summons (Defenseur De Droits, 2016, p. 27).[58]

[58] In this regard, the Ombudsman has warned that, taking into account the effects that a protection measure may have, it would be optimal for the hearing of the elderly to always be held in the presence of a lawyer, so that he or she can assume his or her representation in court, if necessary, or provide assistance throughout the proceedings.

6) Principle of equality

The Code of Social Action and Families in its art. L. 114-1 establishes that every person with a disability has the right to the solidarity of the entire national community, which guarantees, by virtue of this obligation, access to the fundamental rights recognized to all citizens, as well as the full exercise of their citizenship. Paragraph II of the same art. points out that the State guarantees equal treatment of persons with disabilities throughout the territory, defining the multiannual objectives of action.

We believe, however, that those situations that are not of an ordinary nature cannot be treated in a common way and, therefore, a differentiated treatment would be justified precisely in the special situation in which a vulnerable person finds himself (in this case, a person with a disability as long as his volitional capacities and decision-making are affected). it is therefore unreasonable to denounce an attack on equality or discrimination in the strict sense derived from the assumption of measures aimed at their protection[59]. Respect for difference does not and cannot mean ignorance of it. You cannot act as if people with disabilities are not (Noguero, 2016, p. 965).[60] Differentiation cannot be ignored; moreover, ignoring it would mean a lack of protection to the detriment of those who cannot govern themselves.

5 Is french legislation compatible with article 12 of the united nations convention on the rights of persons with disabilities?

France ratified the United Nations Convention on the Rights of Persons with Disabilities on 18 February 2010 through Law No. 2009-1701 of 31 December 2009, undertaking to take all appropriate measures to amend or repeal both legal and regulatory provisions and practices that constitute a source of discrimination in relation to persons protected or to be protected and to ensure that the staging of their fundamental rights (Martínez, 2016, p. 590).[61]

The Convention sets forth a vast set of economic and social rights for persons with disabilities on the basis of equality and non-discrimination with others, and the obligations imposed therein seek to guarantee them the effective enjoyment of those rights. The person

[59] The concept of discrimination on the basis of disability granted by Article 2 of the Convention should also be taken into account here.

[60] It is necessary to admit, the author points out, that each of us (referring to those who do not suffer from disabilities) also loses skills in certain circumstances and also loses opportunities to perform some acts in others; and this does not mean, in any of the cases, a breach of equality.

[61] It is important to take into account that the European Court of Human Rights has been pointing out that the Convention is a mechanism of general interpretation, even for those countries that have not ratified it.

with a disability is defined by article 1, paragraph II as: *"... those who have long-term physical, mental, intellectual, or sensory impairments that, when interacting with various barriers, may prevent their full and effective participation in society, on an equal basis with others"* (Blatman, 2016, p. 169).[62]

Although it is true that all disabilities should be of interest or are of actual interest to the Law, the only ones that really determine the need to have protection mechanisms that involve a system of support or substitution of capacity, are the alterations that affect the possibility of freely and clearly expressing the will, that is, alterations of a psychic or mental nature (Martínez De Aguirre, 2014, p. 35-36).[63]

Article 12 of the Convention affirms a principle of equality in the recognition of the personality and legal capacity of persons with disabilities, addressing the issue of legal capacity from a human rights perspective[64]. The so-called "social model" provides a vision based on fundamental rights that implies the understanding that all people, including those who suffer from disabilities, are subjects of rights and not simply objects of welfare policies. And *"It is not a question, in this sense, of making people with disabilities have specific rights because they are different (specification process), but simply that they enjoy the same rights as the rest of the people on equal terms (generalization process)"* (Barranco et al., 2012, p. 56).

[62] Article transcribed from the Spanish version of the Convention. It has been judged as a broad definition that seems more like a "non-definition."

[63] *"Indeed, the problem of a person with a physical disability, or in the vast majority of cases, of a purely sensory disability, is not that of making free and conscious decisions...*". The author gives an example by referring to the case of a blind person or a person in a wheelchair. It is true that in both cases, the Law is concerned with providing mechanisms that will mean, in the end, the action by themselves and not supported or represented by another. In the first case, when writing in Braille, for example, one does not read in place of the blind person, but it is the blind person who reads for himself; In the case of those who move in a wheelchair, the installation of a ramp enables them to access public transport on their own, for example, and it is not necessary for another person to do it for them. In the case of people with mental disabilities, the matter is completely different and, as has already been said, on some occasions their capacity to act must be restricted or annulled, precisely for their protection.

[64] *"States parties reaffirm that persons with disabilities everywhere have the right to recognition as a person 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. 3. States Parties shall take appropriate measures to provide persons with disabilities with access to the support they may require in the exercise of 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 abuses 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 individual, that there is no conflict of interest or undue influence, that they are proportionate and adapted to the circumstances of the individual, that they are implemented in the shortest possible time and that they are subject to periodic review by a competent authority or judicial body, independent and impartial. The safeguards shall be proportionate to the extent to which such measures affect the rights and interests of individuals. 5. Without prejudice 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 economic 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."*

The recognition of legal capacity is, without a doubt, essential for people with disabilities to be able to act effectively in society. Therefore, it is not enough that they are holders of rights but also that they can exercise them. However, and as we have stated, it does not seem that this principle is so absolute as to prevent the mechanism of representation from being used in certain circumstances (Martínez Pérez, 2016, p. 584).

In light of the general principles set forth in Article 3 of the Convention, the Committee on the Rights of the United Nations for the implementation of the Convention in France[65], in its General Comment No. 1 (May 2014),[66] reaffirms that the fact that a person has a disability, it is not justification for her to be deprived of her legal capacity or, consequently, of any of the rights provided for in the Convention (Defenseur De Droit, 2016, p. 9).

However, there is an international trend that considers that any regime of legal protection of older persons with disabilities that limits their legal capacity is, for that reason alone, contrary to article 12 of the Convention. Thus, tutela, as a regime of representation and, therefore, a substitute for will, is especially criticized (Defenseur De Droits, 2016, p. 54).[67] While it is true that the social model promoted by the Convention opts for autonomy whenever possible, we do not believe that this is the spirit of the international legislator, because there are circumstances in which disability is of such intensity that the people affected will not be able, not even with support, to make determinations for themselves. so that guardianship (or any other system that means representation) cannot be replaced by mechanisms of accompaniment.

The Committee points out that in order for the full capacity of persons with disabilities to be respected, on an equal basis and without discrimination, systems of substitution such as guardianship, guardianship and mental health laws that allow for forced treatment must be abolished, a view that in itself we believe could be extremist (Noguero, 2016, p. 964-965, Pecqueur, et al. 2016, p. 958-959; Martínez de Aguirre, 2014, p. 25; Blatman, 2016, p. 264). Allowing people with mental or intellectual disabilities to participate fully and effectively in legal life in any event would either be impracticable or would have serious consequences (Aguirre, 2014, p. 48). We believe that the outright suppression of all forms of representation could undermine the protection of the most vulnerable. A system of representation cannot

[65] The French State decided in July 2011 to grant its committee the function of an independent mechanism in accordance with the provisions of Article 33 of the same Convention.

[66] Comments available in http://www.convenciondiscapacidad.es/wp-content/uploads/2019/01/Observaci%C3%B3n-1-Art%C3%ADculo-12-Capacidad-jur%C3%ADdica.pdf [last visited 05 November 2021].

[67] It states: Tutela, as a mechanism for substituting the will of the protected person, is contrary to the Convention and undermines the legal capacity of the protected adult and must, therefore, be taken as a regime of exception, intended only for those cases in which the person is absolutely unable to express his or her will (paraphrasing).

simply be abolished, nor can it be considered in itself as obsolete or an attack on the integrity of people (Molina Toledo; Astorga Gatjens; Gómez Motta, 2012, p. 74). It is a reality: there are people who cannot govern themselves and who require protection against abuses and the consequences of bad decisions they may make (Kjaerum, 2016, p. 10; Schulze, 2010, p. 76 et seq.).[68]. Of course, and here we fully agree with the expressions contrary to representation, these must be exceptional situations, in which the judicial authority intervenes, in which an adequate review system operates, and in which, in addition, whoever acts on behalf of the person with disabilities must (for certain acts) request authorization either from the justice or the administration.

In view of the above, we believe that the French State does comply with the implementation of Article 12 of the Convention into its legal system. The French law on the protection of the elderly, in the words of Pecqueur *et alii*, is founded on the principles of necessity, subsidiarity and proportionality of the measure and, together with the principle of regular review of the protection mechanisms adopted, as defined in art. 442 et seq. of the CCF, support such an affirmation (Noguero, 2016, p. 965; Defenseur De Droits, 2016, p. 16; Barranco et al., 2012).[69] We believe, therefore, that the Committee's observation and the interpretation of article 12 in the sense of abolishing any system of substitution of will should be questioned, since this would imply, as we have already stated, not only practical problems, but also a lack of protection. However, the mere fact of the limitation of legal capacity does not mean the civil death of the protected person. The support system should prevail, whenever possible, over a system of substitution (subsidiarity, proportionality).

We believe that the French system is in the interests of the protected person and favours, as far as possible, his or her autonomy. Act No. 2007-308 of 5 March has established the protection of the person and property of the most vulnerable, who are subject to a protection regime that is optional, whether judicial or conventional, and which respects, as stated in article 415 of the CCF, individual freedoms, fundamental rights and dignity of the person.

[68]In addition, the report points out that a large number of European states contain in their legislation mechanisms that restrict or deprive the legal capacity of the protected person (pp. 40 et seq.). There, moreover, it is clear that the grounds for the absolute non-abolition of a system of substitution are given by the extreme cases in which representation is undoubtedly required.

[69] In the same vein, Noguéro expresses himself when he points out that he subscribes to the opinion of the judges in such a sense of defending that depriving a vulnerable person of any mechanism of capacity substitution, solely by a fight against "discrimination", can turn against people who require due protection.

6 Final thoughts

The question of respect for the legal capacity of persons with disabilities is a particular challenge for States that have ratified the Convention, which means, or should mean, an effort to harmonize their domestic norms with the requirements of the international treaty.

It is not enough to prohibit the conclusion of acts and contracts, but it is a question of finding an adequate mechanism that means the protection of the person and property of those who, for whatever reason, require another to act in the life of the law.

It is important to distinguish between the notion of legal personality and the capacity to act or exercise. Although legal personality cannot suffer any type of limitation (because it implies the capacity to enjoy), the capacity to exercise can be seen and must in certain cases be limited in a reasonable and objective manner (Blatman, 2016, p. 265; Molina, 2012, p. 26).[70] Limitation alone for the sake of protection cannot be considered discrimination per se.

Those limitations must respond to exceptional situations and always operate in a subsidiary manner. Support systems should prevail over replacement systems whenever possible and sufficient for protection. As Martínez De Aguirre points out, from a certain point of view, incapacitation (understood as the deprivation of the capacity to act) is even beneficial for the person with a disability who, if he were not replaced in his manifestation of will (which, by the way, he is not in a position to grant), would not be able to exercise the rights to which he is entitled on his own.

Representation, whatever name is attributed to it, is a reasonable mechanism when, as a result of intellectual or mental disability, a person's natural capacity to know and will is almost non-existent.

A position such as that developed by the Committee in its General Comment could lead, as has already been said, to the absence of any measure of protection for those persons who are truly unable to govern themselves, since in such cases any form of accompaniment would be insufficient and illusory.

We believe that France respects in its norms the principles laid down in the Convention, through the diversification of figures that allow for the proportionality and gradation of protection, placing guardianship and therefore representation in a subsidiary position compared to the model of accompaniment or assistance.

[70] However, the Convention confuses the concepts. Some authors also do so, such as Molina, when he points out that the disregard of "legal capacity" translates into the denial of the right of "legal personality".

It is clear that, as in any system, there are issues that in practice still need to evolve, such as, for example, the popular and sometimes judicial understanding of subsidiarity such as abstention or rejection of judicial protection; or the requirement by certain public bodies of a protection measure as a requirement for procedures such as obtaining certain benefits; or the practical problems presented by the figure of guardianship Reinforced; the response times of the judges, the lack of budget of the families to assume internally the protection of the elderly, the still scarce use of the mandate of future protection, the lack of adaptation of the rules of the Ccf with those of the Public Health Code, and others (Baudis, 2012, p. 30; Defenseur de Droits, 2016, p. 56).[71]

Chile urgently needs a reform (or rather the creation) of a system of guards that respects the parameters established in the Convention, that is based on respect for human rights and that means not a medical model but a social one; but that does not imply an absolutist vision of Article 12 of the Convention based solely on human rights, but is in accordance with the basic principles of civil law: autonomy, responsibility, legal certainty, among others.

Finally, it is important to understand and take into account that the practical difficulties that may exist will not be resolved, either in France or in any other country, by a change in nomenclature or legislation, but by the evolution of the practices carried out by the bodies involved and the improvement of their actions. in order to bring the practice as close as possible to the letter of the law.

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[71] The users themselves denounce that the implementation of the system for the protection of the elderly is not fully effective and that there are certain dysfunctions that remain. Denunciations highlighted by Baudis in the "White Paper".

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