ACCESS TO JUSTICE

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1. INTRODUCTION

a) What do we mean by access to Justice?

While it would initially seem that reference to the United Nations Convention on the Rights of Persons with Disabilities and access to justice would involve simply to analyse of article thirteen of the international treaty, I would like here to discuss access to justice from a broader perspective, and will therefore first set out what we should understand by access to justice, in order then to argue that the issue cannot be analysed without turning also to other principles such as accessibility, reasonable accommodation, capacity and equality before the law, access to public employment, and in fact the whole treaty which proclaims this paradigm shift with regard to disability.

What is the objective of this study? Improved quality in the public justice service with regard to equality and non-discrimination, equal recognition before the law, access to justice, personal liberty and security, freedom of expression and access to information, setting out the fundamental principles Ehich have to guide all internal regulations of every country, alongside the European union regulations.

If we were to conduct a survey, the most common response would be confined solely to access by citizens to the jurisdictional bodies responsible for judgment and the enforcement of judgments, taking into consideration only the perspective of citizens wishing to assert their rights before courts and judges, as plaintiffs, defendants or respondents.

Leaving aside distinctions as regards distributive, commutative or coercive injustice, and others regarding social and individual justice, I will focus only on two distinctions:

From a subjective perspective, when we refer to the PUBLIC JUSTICE SERVICE this would include:

A) What one might refer to as the justice administration per se, in terms of the operations of one of the three estates, according to Montesquieu's classic division, which would include not only the courts and judges but also those constitutional bodies entrusted with upholding the rights of individuals: departments of public prosecution and public ombudsmen.

B) The administrative structure working directly with Justice involves all the administrative machinery associated with it, including various forms of staff, [1]and would in the broadest sense include administrative personnel connected with justice and even national law enforcement agencies,including police or prision staf as one would infer from article thirteen of the Convention itself.

C) The public officials or functionaries given responsibility by the State for preventive legal security, in other words essentially the notarial institution[2] and public register systems.

From a historical/objective perspective, in accordance with Mezquita del Cacho, who on the basis of Roman Law draws a distinction between legal security in terms of *respondere, postulare and cavere,* all tending to crystallise justice, and necessarily based on the criteria, principles and guarantees enshrined in the Convention:

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1 Diccionario Crítico de Ciencias Sociales. Terminología Científico-Social (Baena del Alcazar, Mariano)

2 "Napoleon, back in the era of codification in 1803, granted the French notariat, by means of the Ventôse Act, the status of public servants. The preamble to the Act contains a precise explanation of the importance of notaries, and it is therefore worth reproducing here, if only in part: "Alongside the functionaries who reconcile and rule as to disagreements, public order requires other functionaries who, acting as the disinterested advisors of the parties, and the impartial scribes of their will, inform them of all obligations they enter into, drawing up their undertakings in a clear manner, giving them the status of an authentic act and the force of a judgment handed down at the final instance, perpetuating the record thereof and faithfully preserving the corresponding archive, preventing the emergence of any differences among men of good faith, and preventing men, with the hope of success, from wishing to undertake any unjust act of dispute. These disinterested advisors, these impartial scribes, these voluntary judges, as it were, placing irrevocable obligations on the contracting parties, are the Notaries: This Institution is the Notariat..." Castro-Girona Martinez, Juan Ignacio in the address "La Seguridad Jurídica en el tráfico de bienes y derechos con especial énfasis en el tema del control de la legalidad y el uso de nuevas tecnologías en el ámbito notarial"

a) *Respondere* would refer to theory and dogma, and ultimately the legal security of *respondere* would be given from these and crystallised in the form of positive law, in other words the legislature.

b) Meanwhile, *postulare* would refer to sanctions for the restitution of any infringement of positive law, in other words, the legal security of *postulare* is the certainty that a violation of subjective laws, and hence of the legal structure, will prompt the State to react through its judges and impose a penalty on any party which has violated the rights of another, along with restitution for the party whose rights have been violated, restitution which in many cases cannot be applied in natura, but rather by means of an equivalent estimate which does not truly achieve present and future certainty. This would thus be a legal security of amends for a violation which had already occurred, and where it would be impossible truly to restore the situation which existed prior to that contravention. It would then refer to the function of judgment and the enforcement of judgment.

c) The legal security of *cavere*, essentially entrusted to notaries, represents the certainty that through their actions, in other words through the authorisation of public instruments, subjective rights will be guaranteed and the legal dealings involved will be safeguarded, enshrining the autonomy of free will both in personal relations and in family and property matters, thereby avoiding actions involving the aspect of postulare.

IMPORTANCE AND GENERAL PRINCIPLES OF THE CONVENTION.

The approval by the UN of the International Convention on the Rights of Persons with Disability (hereinafter, the CRPD) represented a historic milestone for more than 650 million people worldwide in that it positions disability on the plane of Human Rights and represents a paradigm shift in the treatment and consideration of people with disabilities, who rather than being considered as the "objects" of rights, charity or medical and rehabilitation treatment, will instead be the "subjects" of rights, the purpose of the Convention is to *"promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity"*.

It was approved on the 13 December 2006 following an incredibly swift negotiation process on the international stage, jointly involving not only the

governments of the various States but also civil society, and in particular the body of associations of people with disabilities, a reflection of the now established principle of *"nothing about disability without disability"*.

It entered into force on 3 May 2008, thirty days after the twentieth ratification by the States Parties of the CRPD, becoming a binding legal instrument for all those States which have ratified it.

In Spain, as in other UE countries, international Conventions and Treaties, following ratification and official publication, become part of national law, and the legal principles they contain are directly applicable with a twofold effect: first of all in terms of interpretation, in that all legal agents (judges, prosecutors, notaries, lawyers...) must interpret legislation in accordance with the convention, and also in that they impose on States an overriding requirement to adapt their own legal texts[3].

This event marked, in the words of the Vice-President of the EU Executive and Commissioner for Justice, Viviane Reding, "a milestone in the History of Human Rights", representing as it did "the first time that the EU has become party to an international treaty, the chief consequence of which is that all legislation, policies and programmes of the Union must comply with the provisions of the Convention, within the limits of the responsibilities of the European Union[4].

What is the purpose of the convention?

According to Article 1, to:

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[3] We do, therefore, find examples of the application of the Convention by national courts:

NATIONAL HIGH COURT; PUBLIC AUTHORITY LITIGATION; Judgment of 2 November 2009, Proceedings 160/2007. "The entry into force of the Convention must clearly involve the adaptation of Spanish legislation to this international instrument in all aspects where it is contravened, but also allows the court bodies immediately to interpret the regulations in force in accordance with the Convention, supplementing any gaps in our own legal system by means of the text of the Convention itself, thereby guaranteeing effective application of the rights recognised on the part of people with disabilities in this international regulation"

[4] http://www.europapress.es/epsocial/politica-social/noticia-ue-ratifica-convencion-onu-derecho-discapacitados-20110105193536.html

"promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."

Don MacKay, New Zealand's representative before the United Nations, stressed that the many objectives of the Convention do not include a mission to create new rights, but rather to guarantee rights through the prohibition of all discrimination against people with disabilities , while promoting a genuine shift in the public perception of them. The existence of an international Treaty dedicated exclusively to the human rights of people with disabilities does not mean that this group of citizens have or should have separate human rights, other than the universal rights which may be proclaimed for all human beings. The rights of such people are identical to those of other human beings, although it is well known that their rights are not applied with the same intensity or guarantees as in the case of others, this lack of protection is a specific consequence of their disability.

This purpose thus represents the founding principle of any future actions intended to adapt legal structures to the parameters of this new regulation, in order to ensure that progress from actual inequality to legal equality will be truly effective.

The regulatory review demanded by the Convention must be performed at all times with consideration for disability in the broad sense, thus taking into consideration the different forms of disability which exist, their degree and their nature, which may vary over a person's life for different reasons as well as interaction with society.

Disability is thus defined in Article 1 as follows:

"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

As the Preamble to the Convention stresses, "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".

GENERAL PRINCIPLES

Meanwhile, Article 3 recognises the General Principles of particular importance, as set out in Article 3 itself:

a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

b) Non-discrimination;

c) Full and effective participation and inclusion in society;

d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

e) Equality of opportunity;

f) Accessibility;

g) Equality between men and women;

h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

The text thus prohibits "discrimination on the basis of disability", defined as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the **recognition, enjoyment or exercise**, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation. (Article 2).

"Reasonable accommodation" means, according to the CRPD, necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. (Article 2).

A FUNDAMENTAL CONCEPT:

Awareness-raising (Article 8)

With regard to what the Convention refers to as "awareness-raising", it requires that "States Parties undertake to adopt immediate, effective and appropriate measures:

a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life.

c) To promote awareness of the capabilities and contributions of persons with disabilities."

ARTICLE 13: ACCESS TO JUSTICE

It is article thirteen of the Convention which specifically refers to access to justice, providing as follows:

“Article 13. Access to justice.

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."

This brief article of just two paragraphs represents a wake-up call for domestic legal systems, as it establishes "*access to justice by people with disabilities*" as the set of measures, services and supports allowing them, free of any form of discrimination, to use the public Justice service in order effectively to exercise their rights on an equal basis with others, through the personal or technical supports required in order to secure their level of personal autonomy in this sphere.

The first section implies the need for the Justice administration to be adapted in two regards, and is intrinsically linked to article twelve of the Convention, as we will subsequently see:

A) The physical perspective: which must be based on universal design or design for all, implying the need for actual adaptation of the judicial body in order to offer people with disabilities full protection, through the creation of new spaces guaranteeing accessibility to justice (appropriate means of transport allowing citizens to arrive at courthouses, accessible buildings, waiting conditions, physical placement of professionals without steps, podiums or benches, in convenient and accessible spaces).

People with disabilities require the Justice Administration before the proceedings to adopt the set of measures, services and supports allowing them, free of any discrimination, to use court services in order thereby effectively to **exercise** their rights on an equal footing with others.

B) The substantive perspective, or **participation** of people with disabilities in procedures , as plaintiff or respondent/defendant, witness, jury member or any other party involved in proceedings, allowing them to exercise their rights on a basis of equality with others.

In order to guarantee that people with disabilities can fully exercise their rights the following specific aspects will be required: with regard to the right of information, they must be duly informed from the outset of the proceedings, by all corresponding authorities, and informed of the nature of their involvement in all procedures required, with a clear and simple explanation of the purpose and potential outcome of the action.

Particular mention should be made in this regard of the recent reform of the Jury Act in Spain and the Notarial Regulation regarding the involvement of persons with disabilities as witnesses of public instruments[5].

Depending on the disability in question, this right must be effectively applied (Intellectual disability: simple language, hearing disability: interpreters, sight disability: audio devices, etc.).

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[5] Paragraph 1 of Article 182 states: "The following are deemed incapable or unsuitable to act as witnesses of a deed:
1. Those who do not possess the necessary discernment in order to appreciate and issue declarations or comprehend the act or contract to which the public instrument refers".

The right to personal privacy and image demand that during the proceedings both the court authority and the public prosecutor ensure that this will not at any point be jeopardised through publications, presentations or reproductions.

This likewise affects all spheres of the law: civil, employment, industrial tribunals, public authority and corporate legislation. Meanwhile, this requirement for adaptation must enshrine principles of accessibility, information rights, personal autonomy and effective participation at every stage of the proceedings.

The second paragraph specifies within this context the terms of article eight regarding awareness-raising, while going further in that all legal agents must be aware of the importance of a knowledge of the differing needs of people with disabilities, in order to ensure that resources are employed to guarantee the enjoyment of equal opportunities and access and exercise of rights on an equal footing.

Public authorities must promote training for justice administration personnel, with the consequence that the judicial authorities, the public prosecution department and support staff responsible for the proceedings must receive appropriate training through the design of programmes and courses specifically focused on raising the awareness of legal agents with regard to the situation of disabled people.

We can not forget that For people with intellectual disability, two areas are of special concern:

1. Legal incapacitation procedures deprive many persons with intellectual disability of access to justice and the basic possibility to fight for their rights. Present procedures in many member states and accession countries lead to legal incapacitation .
2. Current legal procedures often make it almost impossible for persons with intellectual disability to defend their rights, because of the inefficient or non-existing provisions for adequate legal support

SPECIFIC ASPECTS OF ARTICLE THIRTEEN WITH REGARD TO OTHER PRINCIPLES:

ACCESS TO PUBLIC EMPLOYMENT IN THE JUSTICE ADMINISTRATION.

We must make brief reference to access to public employment on the part of people with disabilities within the Justice administration, which we here base on the report drawn up by the Æquitas Foundation for the Spanish Ministry of Justice, which in its conclusions in the field of employment, based on the assumption that this is an obligation on the States Parties, proposes in general terms and as a fundamental approach the following key aspects:

1. Introduction of a **global public employment model**. The traditional system has placed the emphasis on access to civil service positions. Just as important, if not more so, is on-the-job training, the moulding of PHYSICAL AND PERSONAL context (including training for colleagues and superiors), the adaptation of worksplaces, monitoring of the progress of workers with disabilities, etc.

2. A precise definition is required of the **reasonable accommodations needed** in selection and recruitment processes within the civil service, rather than leaving this to the discretionary authority of selection panels. These issues must not be left within the purview of the terms of the recruitment specifications. Precise definition is required of the point at which applications are to be presented, the deadline for a decision, the binding assumption in the event of no reply (in our judgement, this should be positive), the submission of arguments, etc.

3. We support the creation of a specialist **Advisory Body** with at least consultative powers which would be involved in drawing up the recruitment specifications and the entire process of civil service access.

It should be remembered that the European Disability Strategy 2010-2020 is currently in force, identifying supplementary measures at the EU level in addition to national initiatives and establishing the mechanisms required in order to apply the Convention within the Union, this being directly tied to the Convention, thereby providing a clear human rights focus.

It centres above all on the removal of barriers, and in this regard identifies eight priority spheres of action: accessibility, equality, employment, education and training, participation, social protection, health and overseas action, all of which must be taken into consideration in the sphere of justice[6].

[6] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0636:FIN:ES:PDF

PHYSICAL AND INTELLECTUAL ACCESSIBILITY TO JUSTICE: design for all. (Articles 9, 20 and 21).

"Universal design" should be understood as the design of products, environments, programmes and services which can be used by all people, to the greatest extent possible, without the need for any specialist design or adaptation.

"Universal design" will not exclude technical aids for specific groups of people with disability if so required.

The approach taken by public authorities to accessibility represents a challenge based on an acknowledgement of its core role. It is not simply a question of removing physical barriers, but of taking on board all aspects involved in protection. This is a basic right any breach of which automatically represents discrimination. As a result, under the terms of Article 20 "States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities".

Meanwhile, Article 21 on freedom of expression and opinion, and access to information, deals with two aspects:

A) It is to begin with substantive in nature, with regard to the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication;

B) it also represents an instrumental right, in that it allows many other rights which are recognised and may be demanded under the terms of the Convention to be exercised (access to justice, mobility, education, health and participation in political and public life).

"Communication" should be understood in the terms of Article 2 of the international text, including:

languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology.

The idea is that public authorities should adopt all such measures guaranteeing that people with disabilities have access to information in public services, along with the procedures and bureaucratic processes they undertake from this perspective.

We therefore propose the following two specific actions within the field of the public Justice service with regard to physical accessibility:

1) All court buildings must be constructed on the basis of universal design, which means not only access to the building itself but also appropriate use of the facilities in place, such as for example washroom services.

2) A fully visible guidance and signage system must be established in order to facilitate access and movement by people with disability within Court Offices.

In addition to the European Strategy, the European Commission plans to publish an Accessibility Plan in 2012 with a view to achieving its objective of a Europe completely free of barriers by 2020. The object of the Accessibility Act will be to ensure that people with disabilities have access on equal terms to the physical environment, transport and information and communication services. New technologies today play a role in practically every aspect of our lives, and if people with disability cannot use them, or are subject to limitations, they thereby suffer a considerable disadvantage.

LEGAL ACCESS: ACCESS TO INFORMATION.

We will deal later with the need for greater and more specific readiness at every level of the judiciary and the Justice Administration, although in terms of measures required in order for access to information within court proceedings to be made effective for people with disabilities, and on the basis of the Report drawn up for the Spanish Ministry of Justice[7], we would by way of example declare the following specific steps in this regard:

1) The need for a general, systematic and appropriate approach to the presence at all Court Bodies of Sworn Interpreters allowing for effective intervention in all court proceedings by any individuals affected by certain sensory impairments.

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[7] http://el-observatorio.org/wp-content/uploads/2010/06/informe-final-expertos.pdf

2) A system of Braille Translators will also need to be introduced.

3) It is vitally important that, given the complexity and technical nature of court proceedings, Legal Guidance Services be set up for people with disabilities at the courts and tribunals themselves. A number of Court Bodies in Spain already offer this type of service for all litigants who require so , although it would seem that the use of such services requires consideration with a particular focus on the person with disabilities.

High-quality, specialist legal support and defence must be promoted, through the creation by the Ministries of Justice, in coordination with Lawyers' Associations, of specific duty lawyer rosters for people with disabilities, with specific training in the application of the UN Convention and all other applicable regulations.

4) The presence of Psychologists and Social Workers and individuals providing support for people with disabilities is likewise recommendable, as far as possible, within the context of the Justice Administration in order to serve better people with disabilities.

5) Efforts must meanwhile be made to ensure at the actual Court Body where a person with a disability is to appear, as a party, witness or expert witness, that the climate created should make the whole legal process easy to understand and comprehend, ensuring that oral exchanges should predominate, employing simple, appropriate language, with support offered by members of technical staff to assist in comprehension, avoiding as far as possible, and without any form of privilege being applied, any lengthening of court proceedings, including the possibility of preferential rostering of court time.

6) As previously suggested in the Brasilia Regulations, there is a need as regards people with disabilities in particular to employ Arbitration and Mediation systems as a formula for the resolution of any legal conflicts in which they may be involved.

7) People with disabilities who require so should be permitted to draw on the support of their relatives or companions in their communications with the Justice Administration.

8) No public functionary or public authority should be allowed to claim unfamiliarity or lack of resources preventing application of the rights of people with disabilities.

SPECIALISATION OF THE COURTS AND ALL PARTIES ACTING: SPECIFIC TERMS OF THE SECOND PARAGRAPH OF ARTICLE 13.

The second paragraph of article thirteen enshrines, as seen earlier, the need for all those involved in the justice administration to receive training.

All judges, public prosecutors, lawyers, court agents and functionaries serving in the Justice Administration must bear in mind that within society, and more specifically within the group of people who have recourse to Court Bodies, there are people with disabilities who require equal treatment with regard to those who are not disabled, and who require particular attention in all aspects in order to enable them to pursue their personal actions in any lawsuits or proceedings in which they may be engaged before the Justice Administration. Such specialisation must be provided in all jurisdictional fields: civil law, industrial tribunals and labour law, public authority, corporate and criminal litigation.

Judges, public prosecutors, clerks and functionaries must be given ongoing, updated training regarding legal, medical and social aspects connected with the world of disability.

Mandatory multidisciplinary training to be delivered periodically by specially qualified forensic doctors, judges and specialist public prosecutors, notaries and those responsible for associations and organisations representing people with disabilities. The subject matter covered by the entrance examinations for the Justice Administration and Judicial Authority must include specific aspects of the process of "adaptation of the legal capacity to act" (or "*provision of support for decision-making*") , and access by people with disabilities to the Justice Administration and application of the New York Convention.

It is essential that manuals of good practice be drawn up in this regard, with one striking new example having been produced by the General State Attorney's Office in Spain[8].

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http://www.fiscal.es/cs/Satellite?c=Page&cid=1240559967837&pagename=PFiscal%2FPage%2FFGE_buscadorDocEspecialista&vest=1240559967837

There is a particular need for training in the criminal field, and a quest for mechanisms to ensure that in criminal proceedings the Justice administration does not overlook the existence of a disability which could then affect the sentence or the way in which it is to be served.

Mechanisms to deal with people with disabilities in prison must be extended, and the resources required for this further developed.

THE FUNDAMENTAL ISSUE OF ARTICLES TWELVE AND THIRTEEN OF THE UNITED NATIONS CONVENTION:

If we are to speak of access to justice then we must necessarily speak of how rights are exercised by people with disabilities, making article twelve the very cornerstone of the Convention.

Hence the fact that authors such as Palacios and Bariffi assert that legal capacity, understood as the capacity to act, is "the door through which all rights may be exercised", "an essential precondition in order to enjoy and exercise all rights on the basis of equal opportunities[9]".

The right to equal recognition as a person before the law is fundamental, not only as a right itself but also as a prerequisite in order to fully enjoy other rights, since only through recognition as a person before the law can rights be protected by the courts (the right to appeal), the execution of contracts enabled (the right to work, along with others), to purchase and sell assets (the right to own assets independently or in association with others), to marry and raise a family[10].

WHY IS THIS OF VITAL IMPORTANCE FOR ALL INDIVIDUALS?

Imagine if you were deprived of your capacity to take decisions, sign contracts, vote, defend your rights before the courts or choose a medical

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[9] Bariffi F "Capacidad jurídica y capacidad de obrar de las personas con discapacidad a la luz de la Convención de la ONU" in "Hacia un derecho de la discapacidad. Estudios en homenaje al profesor Rafael de Lorenzo." 2009.

[10] Bariffi F "Capacidad jurídica y capacidad de obrar de las personas con discapacidad a la luz de la Convención de la ONU" in "Hacia un derecho de la discapacidad. Estudios en homenaje al profesor Rafael de Lorenzo. " 2009 .

treatment, get married, set up a family, draw up a will... simply because you have a disability.

For many people with disabilities this is a reality, and the consequences can be serious. When people lack the legal capacity to act they are deprived of their capacity to defend and exercise their rights, with the substitution mechanisms currently seen in all national legal systems then coming into play [11].

Although considerable progress has been achieved in certain areas in support of people with disabilities, such as for example education, employment and accessibility, there had been a lack of progress in terms of the legal capacity of the people with disabilities. The social concept of disability, understood as a limitation, needs to be transformed into a legal concept, in the sense of a **different way of exercising capacity with the required supports. The United Nations has given the wake-up call[12].**

The drafting of the final text of this article gave rise to serious argument, and even threatened to endanger the very adoption of the final text of the Convention, with the debate focusing on the distinction between legal capacity and the ability to act, since whereas the countries of the the Western world, both in Europe and the Americas, led by the EU, argued for the full recognition of the capacity to act, others, such as the Islamic countries, China and Russia, drew the line at legal capacity, leading to the startling inclusion of an exception in the form of an unprecedented "footnote" to the article itself,

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[11] Spanish Civil Code, Articles 199 and following.
Bolas Alfonso J, "La integración de los discapaces de lo nacional a lo universal": "The general theme of Private Law up until the 20th century was to seek to protect the disabled. A good example of this is the Spanish Civil Code, which focuses its regulations in this field on the safekeeping and custody of the person and property of the "incapacitated" through the custodian body or extended guardianship. And such protection is dispensed only to an incapacitated individual, in other words not those who are incapable but those who have been declared to be so by the courts. This results in two fundamental concepts:
A) Private law focuses its concerns on protection, but not the integration of disabled people within society.
B) And the actions taken are, in general, based on an assumption that disabled people form a homogeneous group, as if all those suffering any form of limitation, in particular a mental impairment, required the same treatment. The expression "full capacity" is employed, as something which one has or does not have, when we should in truth be considering the concept of "sufficient capacity" for the case in question. "

[12] Bolas Alfonso, J. "La integración de los discapaces: de lo nacional a lo universal" As has been stated, it is essential that modern legal systems should distinguish between physical and mental disability, offering different responses to different situations based on the principle of full recognition of the equality and personal status of all human beings. For centuries legislators have employed the same hypocritical and divisive language, as they were interested not in integration but simply the protection of individuals and, above all, property. Our 21st-century society cannot continue to use the same language nor adopt the same attitude.

subsequently deleted in the final text approved by the UN General Assembly, following which the definitive version of the aforementioned article reads as follows:

"Article 12. Equal recognition before the law. 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property."

This principle draws a clear distinction between the two traditional concepts of legal capacity, or the entitlement to rights and obligations, an inherent condition of every person simply as a human being, and the capacity to act, or the ability to exercise such rights and enter into obligations which is, meanwhile, a graded concept, and which in the field which here concerns us refers clearly to individuals with intellectual or mental disabilities, as those suffering physical or sensory disability face no "challenges" in terms of their ability to act, a quite separate issue from the need to put in place technical

resources or eliminate any barriers preventing them from exercising that ability to act.

The issue is thus raised in terms of mental or intelectual disability, and we must furthermore make a distinction within this sector as to types or degrees of disability, hence some of the voices raised in concern in the theoretical debate as to the absence from the Convention of references to diversity within disability since, as mentioned above, the measures required in order for persons with physical or sensory disabilities fully to enjoy their rights are very different from those required by persons with mental or intelectual disability.

Consequently, on the basis of the traditional concept which presides in Western countries and which was steadfastly and forcefully championed by the European Union in the preparatory work involved in drafting the Convention, we find that the first two paragraphs of this article refer to the recognition of legal capacity, inherent in all individuals, as does the last paragraph, in speaking of the recognition of the right to property, specifically on the basis of inheritance.

In truth, as highlighted by Pérez Bueno in the first paragraph it does not involve an *ex novo* creation, but rather asserts and underpins a prior, pre-existing legal situation, the rights of people with disabilities to have their legal personality recognised.

The second is more categorical, has a greater scope of application and unleashes more disruptive consequences, since it quite clearly asserts that people with disabilities enjoy the same legal capacity as other men and women in all aspects of life.

The most controversial paragraphs, however, are the third and fourth, with the former recognising the power to act, while making no express reference to such a term, although this is clearly the meaning of "exercising their legal capacity", obliging the States to adopt the relevant measures in order to provide persons with disability with the support required in order to allow them to exercise their rights.

Particular mention should be made of paragraph four it is an obligation for the States to provide persons with disabilities with **appropriate and effective safeguards** in exercising their legal capacity, not as a limitation but to prevent abuse, ensuring that in all cases such safeguards, or "reasonable accommodations" should guarantee respect for the rights and "*autonomy*" of

individuals, free of conflict of interest and undue influence, ensuring at all times that these safeguards are proportional and tailored to the "*person*", subject to review by "**an authority or judicial body", in accordance at all times with the "*higher interest of persons with disabilities*".**

Having reached this point we must now recognise that we are faced with a pioneering provision which places obligations on States, the vast majority of which will be required to reform their national legislation regarding legal capacity, reforms in which the **traditional model based on the "substitution" of the person** will need to give way to a model of human rights based on the intrinsic dignity of all persons as enshrined in the Convention, establishing **a system of "supporting decision making ".**

SPECIAL REFERENCE TO PARAGRAPH FOUR: What measures could be adopted?

It is clear, then that the States Parties to the CRPD will be required to adapt their legislation to its demands from the point of ratification onwards, and this is where the controversy arises as to the appropriateness or otherwise of the legal incapacitation of persons with disability and the suitability, and now even the need, or to go further "the obligation" to establish, alternative procedures, different methods based on respect for the person, contributing to the development of all capacities and aptitudes, the only way in which we will achieve the full social integration of persons with disability.

This reform provides the basis for people with disabilities to exercise their rights and enjoy effective access to justice, which means the need for modifications to the legal systems in terms of: legal capacity and capacity to act; the institutions of guardianship and protection; there must also, though, be a review of how people with disabilities exercise their fundamental rights, the private legal mechanisms for the protection of the property of people with disabilities; greater flexibility in inheritance law.

Reforms to the guardianship and protection systems:

As may be seen, the fourth paragraph of article twelve refers to the obligation on States to provide appropriate and effective safeguards allowing rights to be exercised, establishing a series of conditions, such as respect for autonomy, the interests of the disabled person, flexible and temporary arrangements and

oversight by an "***authority or judicial body***"**, at all times in accordance with the "*best interests of people with disabilities*".**

This then leads us on to a discussion of:

A) the need to reform the judicial procedure for the provision of support:

A person with disability who has been adjudged by the courts to be incapacitated suffers what many authors refer to as "civil death", since his or her actions are substituted by a legal proxy, a guardian who exercises his or her rights, with the possibility that such a situation of judicial incapacitation could apply to a person involved in such court proceedings and subject to the legally established grounds, namely , in Spain, "persistent physical or mental illness or impairment preventing the person from exercising autonomy", meaning that the grounds for incapacitation are entirely based on the conceptual principles behind the former medical or rehabilitation model.

The substantive civil and procedural standards governing the systems of guardianship and protection for people with disabilities in our civil legal structures must be modified, as they are based on this medical model, establishing substitution as the general rule in violation of the terms of the Convention.

The reform of national legal systems with regard to disability will need to take into consideration the objectives established by the UN Convention, which means that the social and legal structure to be created must provide guarantees for all situations, given the diversity which exists, with a priority wherever possible given to **the modification of partial capacity by means of specific, temporary support,** without however overlooking more severe situations which, because of their exceptional basis, will require, in order for individuals to be allowed to exercise their rights and have their interests protected in certain acts, a **total modification of the capacity to act, substitution rather than mere support,** or what we could call intense support. This represents a complex and delicate task of legislative reform which must be taken step by step.

The process should be as follows:

1-Agreement as to the objectives to be achieved, based on the presumption that all people are equal, with the same rights, but that the

effective recognition and exercise therefore requires the adoption of unequal measures.

2- Examination of current laws.

3- Identification of shortcomings and inadequacies in the current laws.

4- Draft reform proposals.

Meanwhile, the reform of substantive law must go hand-in-hand with specialisation by the Courts dealing with proceedings for the "adaptation of the legal capacity to act" (or the "provision of support for decision-making").

It is not sufficient to create quasi - specialist judicial bodies simply by changing the sign over the door of the courthouse while maintaining the same personnel structure and exactly the same material resources as any other Court of First Instance. They must be provided with the special human and material resources required in order to fulfill their function.

It is essential that they be staffed by personnel who have a certain sensitivity and specific training in this field. A proper programme must therefore be drawn up in order to guarantee not only that such specialist training exists, but that it is periodically updated, thereby fulfilling Article 4 of the Convention.

In proceedings for the establishment of supports and safeguards, where the applicant is a diferentt person than the one with disability him or herself requesting the establishment of such measures, then there must be clear specification of the reason (need, purpose, problem) why the proceedings have been instigated. The instigator of proceedings of this type will therefore need to argue what is intended by means of the application, and to what extent the establishment of the support measure will constitute a benefit for the person with a disability.

The objective of the reform promoted by the Convention must be not only protection but also integration and the furtherance of autonomy. Social and employment integration are being achieved step by step, but what we are lacking is the legal integration of people with disabilities, their participation not only in social life, employment, education, etc., on the same footing as any other person and subject to no form of discrimination, but also their involvement in decisions affecting property (and not only personal property) affecting them in their daily life, or in any regards which do or could affect them. Integration must apply to every aspect of ordinary life, and this must be given particular consideration when interpreting what constitutes sufficient capacity. I would in this regard again stress that there cannot truly be any

standard of capacity; all people have more capacity for some things than for others, and one must therefore consider the specific case and the contextual circumstances applicable to the person. As a result, for example, within the procedural setting the same approach should not be adopted in all different cases which may arise, since as one may imagine the situation of a person born with a mental disability and living with his or her parents is not the same as that of an elderly person with senile dementia or alzheimer surrounded by relatives and assets which could potentially be sold.

The legal system must provide coverage for all situations, with a priority wherever possible given to the modification of partial capacity by means of specific, temporary support, without however overlooking more severe situations (a coma) which, because of their exceptional basis, will require, in order for individuals to be allowed to exercise their rights and have their interests protected in certain acts, a total modification of the capacity to act, substitution rather than mere support.

This demands that we devise even more flexible, temporary, reviewable and voluntary forms of protection, addressing more the needs of the person than of property, helping individuals to take and implement appropriate decisions rather than depriving them of their capacity to do so.

This is a worldwide trend.

The aim must be to strike a balance between the unrestricted development of people with disabilities in terms of their rights and freedoms, with full respect for their personal autonomy, as a consequence moderating the mechanisms for representation and increasing assistance for support, while also offering the necessary legal safeguards which must exist in this regard, and thus while respecting the rights and autonomy of people with disabilities, reducing as far as possible any cases of conflict and dispute which could come before the courts.

This leads us to discuss:

B) The need to establish more flexible, temporary forms based on the autonomy of the individual, supervised by an "authority" in accordance with the best interests of the disabled person: voluntary jurisdiction.

The main problem faced by the Convention is perhaps that, for the moment, we only have access to limited practical examples which give precedence to

personal autonomy, and these practices are not sufficient in order to establish how we should ensure ongoing assistance in the supporting decision-making of people with disabilities, and hence effective implementation of the system of support.

The Member States and disabled people's organisations need to try out practical models of supporting decision-making in order to settle this important issue.

We cannot, however, overlook the fact that there has been a trend in international law since the end of the last century: increased flexibility in custodianship and protection systems, such as "Betreuung" in Germany, based on voluntary jurisdiction, the "safeguard system" in French justice and future "protection mandates" and "support administrators" in Italian law, along with preventive powers and "protected property of a person with disability" in Spain.

Particular mention in terms of Spain should be made of the recent reform of the Catalan autonomous regional law, the preamble to which sets out a number of principles on which the regulatory text is based, drawn directly from the Convention:

a) the need to respect as far as possible the autonomy of will and capacity of individuals.

b) the definitive abandonment of the dogma of the need for judicial incapacitation in order to adopt measures of protection for those of legal age.

c) the abandonment of the dogma that secure and stable institutions can only be established following a prior adversarial process.

d) confirmation that the rigidity of the structure governing guardianship systems does not always meet the needs of the individual and care for property[13].

The fundamental aspect is to establish **confidence and provide legal guarantees** for supporting decision making systems for all people with disabilities, since otherwise people with disabilities could themselves be marginalised from economic and social life, given that any system which

[13] http://noticias.juridicas.com/base_datos/CCAA/ca-l25-2010.t1.html

gives rise to insecurity is rejected by society, as proclaimed in the Convention with its reference to "authority or judicial body".
In this field we may distinguish between formal an informal supporters decision makers attending to the decision and its legal relevance.

This ties in with so-called Voluntary Jurisdiction, which would remove a burden from the courts and reduce judicial involvement in people's daily lives.

As Fernández Bujan points out, this allows us to resolve non-disputed cases where a private individual requests the intervention of a legal authority. In some cases this authority will need to be a court, but there are many other circumstances, essentially where there is no contradiction or dispute, where judges could be relieved of such functions and replaced by another authority, as in the case of notaries, the aforementioned author asserting that "The procedures involving such cases will be processed more rapidly, simply and immediately, improving the legal circumstances of people with disabilities, by providing greater flexibility and guarantees in the proceedings affecting this sector of the population both in and out of court".

The concept of authority in Article 12 would include the institution of the Latin-Germanic Notariat [14], a public authority exercising its function by delegation of the State, overseeing the legality of the acts and contracts authorised, and providing them with powers of enforcement and proof, and offering legal guarantees in the personal, economic, property and social relationships involved.[15]

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[14] Carrión Garcia de Parada P. "El notariado en Europa" These characteristics are fulfilled by the notariats belonging to the European Union and grouped together in the body known as the CNUE[14], which are at present, as a result of EU expansions, alongside the traditional countries such as Germany, Austria, Belgium, Spain, France, Greece, the Netherlands, Italy, Luxembourg, Malta, Portugal, others which have subsequently joined, including Poland, Estonia, Latvia, Lithuania, Hungary, the Czech Republic, Slovakia, Slovenia and, since 1 January 2007, Romania and Bulgaria. It would exclude those countries which, as we have seen, have a very different concept of the notary, namely Great Britain, Ireland, Cyprus, Denmark, Finland and Sweden.

[15] Carrión Garcia de Parada P. "The Latin notary is the true author of the document, but is also an interpreter, technical advisor, legal broker or agent, professional, legal consultant or counsellor. The Latin system involves institutional documentary consultancy in the interest of the parties, the private individuals, as the Latin notary ascertains, interprets, cooperates in the formation of their will, advises them in order to allow their legal relationships to have the intended effect in accordance with the legal provisions applicable to the relationship, fulfilling the legal requirements demanded in law and ensuring that the will of the parties is expressed in a legally permitted manner.

Latin notarial documents are generally acknowledged as having a particular degree of effectiveness, in contrast with that attributed to a private document. The law appreciates the fact that a notarial document is the work of a professional specialising in private law who, on an immediate and decisive basis, through advice and consultancy, helps ensure that the individual intentions documented comply with the conditions of

The culmination of what we might refer to as the notarial process must be that the parties appearing and acting in the notarial public instrument ultimately, and specifically because of the involvement of a notary, know (1) that the legal business being consummated complies with their intentions, (2) that it complies with the legal structures as a result of the prior legal oversight required of the notary, (3) that the legal trappings given to their will are the most legally appropriate, and (4) all the effects, not only those initially intended but also those expressly derived in law, which will result from their action.

All the above, along with the other benefits derived from notarial involvement, namely a judgment as to the capacity of the parties acting, the fact that their will has been freely arrived at and expressed, and the guarantees provided by the notary's role as a public officer or authority , all clearly assist in achieving substantial levels of the legal security referred to earlier.

We must also bear in mind that the judgement of the notary as to capacity will be based not only on the intellectual qualities of the individual and the nature of the instrument or contract to be executed, but also the general principle of the greater interest of the person with disability, a consideration to be applied

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suitability required in order to achieve the desired effects. Hence the fact that notarial documents enjoy a twofold presumption of lawfulness and legality. This supreme effectiveness does not, nor can it ever, mean that the documented circumstance cannot be challenged, although this can only be performed before the courts, since in commercial dealings, until such time as a court judgement has been handed down, the document will enjoy full effect, both between the parties and with regard to third parties.

In drawing up the document the Latin notary sets out the circumstances and the will of the private individuals, which has been ascertained and specified following consultation, in accordance with the reality, with nothing being added or removed without the consent or knowledge of the parties involved. This compliance with the truth is a professional habit and also a duty assumed by notaries. Strict compliance with this duty has earned notaries a public reputation for truthfulness, and has allowed the law to vest notarial documents with a particular degree of effectiveness, known as authenticity, which means that the circumstances and wills seen or heard by the notary and expressed by him or her in the document are deemed to comply with the reality without the need for any further evidence, and until such time as the instrument is challenged as being false, and its falsity has been proven by means of a court judgment. Latin notarial documents enjoy authenticity of corpus, authenticity of authorship, with regard to the supervising notary and also the parties, authenticity of date and authenticity of ideology.

Through their actions notaries guarantee the legality of the act, provide legal safeguards and stability in legal relationships, promote justice, make "equal" those who are unequal, guarantee the ownership rights of citizens and companies, underpin cross-border legal and economic transactions through the circulation of notarial documents, and defend both public and private interests.

Notaries achieve this because they are delegated powers by the sovereign State, enjoy a social position and recognition, broad territorial establishment, technical training, they are rooted in society and enjoy its trust, and are an approachable figure for the parties involved."

by the notary in accordance with the legal supervisory principle which governs notarial practice.

As Cabello de Alba asserts, notaries enjoy a privileged position in this regard for various reasons: knowledge of the social and economic reality of the person in question, his or her family circumstances, proximity to the specific case being considered, a relationship of trust with the individuals calling on the notary to act and what is more, a decision confined to the specific case raised in that instance, encircled by known parameters, which are therefore easier to evaluate.

This task furthermore clearly corresponds to the very nature and purpose of the notarial function: to match the legal provisions to the specific case, in accordance with the circumstances involved.

This means, no more nor less, assuming a task which fosters the proper development of people with disabilities, promoting, as enshrined in the Convention, their inclusion within society, ensuring that as far as possible their will is given due expression in order to control their person and property, and ultimately, that rather than being objects, they will, as fully as possible, be the subjects of law, given that the notariat intrinsically belongs to what article twelve of the New York Convention refers to as "authority", in accordance with the terms of Articles 60 and 61 of the Notarial Regulation and further European legislation.
Is It possible that a person with disability sets up his or her own formal supported decision makers system in a public instrument ? why not….

The Convention clearly eradicates legal systems restricting legal capacity as a result of disability. It is not, however, solely or purely negative, but rather, as Ganzemüller reminds us, positively establishes the paradigm of support, and although this is not defined or regulated in detail, it does establish the guiding principles, the relevant framework, allowing each State in accordance with its circumstances, its history and its regulatory model, to generate its own system in accordance with the CRPD.

It is now incumbent on the States to implement the system of support, and this requires the proper adaptation of the involvement of the various public authorities, both judicial and non-judicial, which are called on to provide a response to the multitude of cases which occur in real life, given the diversity which exists, fulfilling the concept of "tailored" treatment of each individual, guaranteeing respect for their rights and their "autonomy", avoiding any

conflict of interest and undue influence, with the safeguards being proportional and suited to the "person".

We trust that national and European Community politicians and legislators will show the necessary decisiveness and sensitivity in order to ensure that the principles laid down in the Convention will soon be a glorious reality worldwide, thereby representing a definitive step forward in the legal and social treatment of all aspects regarding the development, protection and integration of people suffering any form of disability.

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