THE PROTECTION OF PEOPLE WITH DISABILITIES IN AUSTRIA

LA PROTECCIÓN DE LAS PERSONAS CON DISCAPACIDAD EN AUSTRIA

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RESUMEN: En este documento se presenta una visión general seleccionada de la normativa legal relativa a las personas con discapacidad en Austria. Se hace hincapié en la Ley austriaca de protección de los adultos de 2018 que ha sustituido la anterior normativa sobre la tutela legal. Además, con respecto a la supuesta importancia de la normativa para las personas con discapacidad, destacamos el marco legal de los tratamientos médicos, las privaciones de libertad y los tratamientos médicos forzados, ciertos campos dentro del derecho de familia, el trabajo y el empleo, la educación y, por último, pero no menos importante, el derecho de voto.

PALABRAS CLAVE: CDPD, tutela, curador, protección de adultos, discapacidades, Austria, compensación, empírica, tratamientos médicos, privación de libertad, tratamiento médico forzoso, esterilización, capacidad jurídica, capacidad procesal, matrimonio, adopción, reproducción artificial, trabajo, educación, voto.

ABSTRACT: *Within this paper a selected overview on the legal regulations concerning persons with disabilities in Austria is presented. A focus is put on the Austrian Adult Protection Law 2018 which has replaced the previous regulations on legal guardianship. Furthermore, with respect to the assumed importance of the regulations for persons with disabilities, we highlight the legal framework of medical treatments, the deprivations of liberty and forced medical treatments, certain fields within family law, work and employment, education and last but not least the right to vote.*

KEY WORDS: *CRPD, guardianship, guardian, adult protection, disabilities, Austria, clearing, empirical, medical treatments, deprivation of liberty, forced medical treatment, sterilisation, legal capacity, procedural capacity, marriage, adoption, artificial reproduction, work, education, voting.*

I. GENERAL INTRODUCTION.

The protection of people with mental disabilities[1] who are not able to take care of their own matters without a high risk of exploitation has been an important principle of the Austrian legal system for a long time.[2] Their protection traditionally weighs heavier than the interests of others, e.g. other contracting parties. If someone contracts (e.g. by ordering a product online) although he or she lacks decision-making capacity, he or she is not bound by the contract. The contacting partner may demand the return of the exchanged transfers but he/she is bearing the risk of a reduction of worth or even the complete loss of the transfer. Hence, the decision-making capacity draws the line between the accepted and protected individual autonomy and the granted protection of persons considered vulnerable.

The United Nations Convention on the Rights of Persons with Disabilities dated 13/12/2006 (CRPD) and the associated Optional Protocol were both ratified by Austria in 2008 without any reservations or interpretative declarations[3], but under the condition of transforming the rights of the Convention into national Austrian law for becoming applicable (Erfüllungsvorbehalt).[4] Hence, without this

1 People with physical disabilities are not subject to guardianship, but they can choose an attorney to substitute their decisions like everyone else.

2 The central norm is § 21 ABGB (General Austrian Civil Code; *Allgemeines Bürgerliches Gesetzbuch*) which already determined the protection of minors and mentally disabled people in this way in 1812, when the ABGB came into effect; see Ganner, M.: *Selbstbestimmung im Alter*, Springer Verlag, Vienna, 2005, pp. 80 ff.

3 Other countries like France, Norway, Australia and Canada declared explicitly that they will not abstain from substituted decision making instruments; https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en (11.12.2014).

4 See Ganner, M., Barth, P.: "Die Auswirkungen der UN-Behindertenrechtskonvention auf das österreichische Sachwalterrecht", *BtPrax,* 2010, No. 5, pp. 204 f.

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transformation there is no direct application of the CRPD within Austria and individuals may not directly ground their claims on the CRPD. Nevertheless, the CRPD is of impact on the national legal system as national norms should be interpreted in coherence with international law.[5] Furthermore, the Austrian governments were keen to implement the obligations under die CRPD within the last years. E.g. the creation of national monitoring mechanisms was triggered by the CRPD: The Federal Ministry of Labour, Social Affairs and Consumer Protection (BMASK, Bundesministerium für Arbeit, Soziales und Konsumentenschutz) has been and still is the driving force in the area of disability politics in Austria. Shortly after Austria became a member state of the CRPD, the BMASK was designated to serve as the coordination mechanism and the focal point within the government under Art 33 (1) CRPD. The Federal Disability Advisory Board set up a nation-wide Monitoring Committee with the task of monitoring the implementation of the convention on the national level (Art 33 (1) CRPD). And as Austria is composed of nine federal states (Länder), which have their own executive and legislative bodies as well as their own administrations, the monitoring of nation-wide measures would leave big gaps in the monitoring of the CRPD. Hence, by early 2015 all federal states established own monitoring mechanisms for matters within the federal states' competencies as required by Art 33 (2) CRPD.[6]

One of the most important reforms within the Austrian Civil law that was triggered by the CPRD was the reforming process of the Austrian guardianship law. As Article 12 CRPD requires primarily supported decision-making instruments instead of substitute decision making, the Austrian regulations were profoundly re-evaluated, reformed and renamed into "Adult Protection Law". As these regulations are of immense importance within the Austrian Civil Law, we will focus on them within this paper. With regard to practical relevance, we will also address the legal framework for medical treatments (III.1.), the deprivation of liberty and forced treatments (III.2.), certain aspects of family law (marriage, adoption, artificial reproduction and PGD; III.3.); work and employment (III.4.); education (III.5.) and the right to vote (III.6.).

II. THE AUSTRIAN ADULT PROTECTION LAW 2018.

1. Introduction.

The Austrian adult protection law has long sought to strike a balance between preserving the autonomy of the persons concerned and the protection from legal

5 Voithofer, C.: "Privatrechtsangleichung durch internationale Menschenrechtsübereinkommen", in AA.VV.: *Europäische und internationale Dimensionen des Privatrechts. Festschrift für Andreas Schwartze* (coord. by S. Laimer, C. Kronthaler, B.A. Koch), Jan Sramek Verlag, Wien, 2021, p. 86.

6 Lamplmayr, A., Nachtschatt E.: *Observing Legislative Processes: Implementation of the CRPD*, innsbruck university press, Innsbruck, 2016, p.53.

exploitation and abuse. But it has repeatedly failed to do so in the details because it involves sensitive individual decisions and a systematic approach cannot do full justice to this. The Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB) of 1811 placed "incapacitated" persons on an equal footing with minor children.[7] This was not changed by the incapacitation order of 1916, even though a social change in the conception and perception of the human took place with the declaration of human rights by the United Nations and the subsequent development of an individual awareness of fundamental rights as well as the pan-European psychiatric reforms in the 1970s. It was not until the guardianship law of 1984 that a more flexible system of care and protection was created that was tailored to the individual needs of affected persons. This human rights-based model, oriented to the affected person and his or her needs, was quite unique in international comparison and in this respect also served as a model for the German guardianship law which was introduced in 1992.

However, the Austrian guardianship law of 1984 largely maintained the childlike position of adult persons with a guardian. An almost complete separation of the law of parent and child from the law of guardianship was only achieved in 2006. The asset management is still governed by almost the same legal provisions for children and adults with a guardian (§§ 215 cont. ABGB).

The guardianship law of 1984 was revised at the beginning of the 2000s and underwent a far-reaching reform and expansion with the 2006 Amendment Act (Sachwalterrechts-Änderungsgesetz 2006[8]) which in many respects anticipated the requirements of the CRPD. The CRPD was signed at about the same time but not ratified until later (2008) and was thus included in the expert discussion much later. In 2006, for example, provisions on health care proxies and representation by family members were included in the law for the first time, and the autonomy of persons concerned was strengthened by a comprehensive duty on the part of the guardian to determine their wishes.[9]

However, full compliance with the requirements of the CRPD was still not achieved, so that the creation of a new adult protection law was both necessary and reasonable. In particular, the automatic restriction of "capacity to act" (Handlungsfähigkeit) for people with a guardian, the required consent of the guardian in the case of marriage and the lack of instruments to protect against

7 Persons were declared "delusional and stupid"; see Ganner, M.: "Entwicklung und Status quo des Sachwalterrechts und seiner Alternativen in Österreich", in AA.VV.: *Festschrift 200 Jahre ABGB* (coord. by C. Fischer-Czermak, G. Hopf, G. Kathrein, M. Schauer), Manz Verlag, Vienna, 2011, p. 359.

8 BGBl. I Nr. 92/2006.

9 Ganner, M.: "Europäische Entwicklungen im Erwachsenenschutz", in AA.VV.: *Sozialwissenschaftliche Aufklärung der Rechtspolitik und –praxis als Berufung. Festschrift für Arno Pilgram zum 75. Geburtstag* (coord. by V. Hofinger, H. Mayrhofer, C. Pelikan, W. Fuchs, W. Hammerschick, R. Walter), LIT Verlag, Wien, 2021, p. 211.

abuse, as well as the only rudimentary supported decision-making rooted in the law, required a new reform, which was completed with the entry into force of the 2nd Adult Protection Act (2. Erwachsenenschutzgesetz[10]) on July 1, 2018.

2. The significance of the CRPD for the reform.

The reform of the Austrian guardianship law by the 2nd Adult Protection Act was preceded by the fundamental criticism by the UN Committee according to Art 34 CRPD in its Concluding Observations of 30.9.2013 in the context of the first state report procedure of Austria according to Art 35 f CRPD.[11] The Committee doubted that the Austrian legal situation was compatible with Article 12 CRPD and criticized that in 2012, 55.000 people in Austria were under guardianship and half of the guardians were entrusted with the competence for all matters.[12] E.g. Article 12 (5) CRPD states: "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."

The Committee recommended Austria to replace representative decisions with supported decision-making mechanisms[13] that are accessible to the persons concerned, so that the autonomy of the person concerned is taken into account in all areas of law.[14]

Although the Committee's recommendations are not binding as soft law under international law, they cannot be completely ignored by the contracting states,

10 BGBl. I Nr. 59/2017.

11 CRPD/C/AUT/CO/1.

12 CRPD/C/AUT/CO/1 n. 27.

13 See Buchner, *T.*: "Das soziale Modell von Behinderung. *Supported Decision-Making* und Sachwalterschaft: ein Spannungsfeld?", *iFamZ*, 2011, No. 5, pp. 266-268; Mayrhofer, *H.*: "Modelle unterstützter Entscheidungsfindung. Beispiele guter Praxis aus Kanada und Schweden", IRKS Working Paper No. 16, IRKS, Vienna, 2013; Ganner, *M.*: "Modelle unterstützter Entscheidungsfindung. Vom Verhaltenskodex bis zu zum Representation Agreement", *iFamZ*, 2014, No. 2, pp. 67-71; Mayrhofer, *H.*: "Begriffsbestimmungen und entscheidende Fragen an eine gute Praxis unterstützter Entscheidungsfindung. Anregungen für die Implementierung dieses Unterstützungsmodells", *iFamZ*, 2014, No. 2, pp. 64-67; Barth, P., Ganner, *M.*: „I. Allgemeiner Teil", in AA.VV.: *Handbuch des Erwachsenenschutzrechts*[3] (coord. by. P. Barth, M. Ganner), Linde Verlag, Vienna, 2018, pp. 11-215 (19 f); Ganner, *M.*: *Grundzüge des Alten- und Behindertenrechts*[3], Jan Sramek Verlag, Vienna, 2020, pp. 118 ff.

14 "The Committee recommends that supported decision-making structures respect the person's autonomy, will and preferences, and be in full conformity with article 12 of the Convention, including with respect to the individual's right, in his or her own capacity, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry, to work and to choose his or her place of residence. […]." CRPD/C/AUT/CO/1 n. 28.

since they have a "duty to take account of or deal with them" under international law.[15]

Already during Austria's ongoing first State Report procedure, the Ministry of Social Affairs commissioned an expert report "on Austria's obligations arising from the UN Convention on the Rights of Persons with Disabilities", which was completed in February 2014 – i.e. after the Committee had issued its Concluding Observations.

However, the specific need for adaptation of Austrian guardianship law in order to achieve conformity with the provisions of the CRPD has already been discussed in the literature. Barth/Ganner,[16] Buchner,[17] Ganner,[18] R. Müller[19] and Schauer,[20] for example, pointed out the need for reform of Austrian guardianship law. Buchner, for example, identified the need for a change from the "model of legal representation [... to the] model of legal support" already in 2009.[21]

At the core of the criticism were restrictions on the exercise of self-determination by persons with cognitive impairments, even though the reform of 2006 already aimed to increase the autonomy of persons with impaired decision-making abilities.[22] In the search for causes, the criticism was and is usually accompanied by the indication that it is not so much the legal norms themselves, but rather the lived practice that hinders the realisation of all human right for persons with disabilities.[23] On the level of the CRPD, Article 8 deserves

15 Faculty of Law of the University of Innsbruck, expert opinion n. 55 (2014); https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=278.

16 Cf. Ganner, M., Barth, P.: "Die Auswirkungen", cit., pp. 204-208.

17 Buchner, *T.*: "*Meine Wünsche sollen ernst genommen werden!* Sachwalterschaft und Selbstbestimmung im Spiegel der Wahrnehmung von Klientinnen mit intellektueller Behinderung", *iFamZ*, 2009, No. 2, pp. 120-123 (122 f).

18 Cf. Ganner M.: "Stand und Perspektiven des Erwachsenenschutzes in rechtsvergleichender Sicht – Teil 1", *BtPrax*, 2013, No. 5, pp. 171 ff.

19 Müller, *R.*: "Entwicklungsbedarf des Sachwalterrechts aufgrund der UN Behindertenrechtskonvention. Gesetzeskonforme Ausgestaltung der Sachwalterschaftspraxis als größte Herausforderung", *iFamZ*, 2013, No. 5, pp. 241-245.

20 Cf. Schauer, *M.*: "Das UN-Übereinkommen über die Behindertenrechte und das österreichische Sachwalterrecht. Auswirkungen und punktueller Anpassungsbedarf", *iFamZ,* 2011, No. 5, pp. 258-266 (259 ff).

21 Buchner, *M.*: "*Meine Wünsche*", cit., p. 122.

22 RV 1461 BlgNR 25. GP 1, 5. See also, for example, on the goal of increasing the autonomy of persons affected since the introduction of the law on guardianship Buchner, T.: "*Meine Wünsche*", cit., pp. 120 f; Ganner, *M.*: "Der Einfluss der Behindertenrechtskonvention unter besonderer Berücksichtigung der Beteiligung von Menschen mit Behinderung am Reformprozess", in AA.VV.: *Erwachsenenschutz statt Sachwalterschaft. Schritte zum selbstbestimmten Leben* (coord. by G. Brinek), Edition Ausblick, Vienna, 2017, pp. 119-130 (120 f); Müller, *R.*: "Unterstützung statt Stellvertretung: Was sichert wirklich Selbstbestimmung?", in AA.VV.: *Erwachsenenschutz statt Sachwalterschaft. Schritte zum selbstbestimmten Leben* (coord. by G. Brinek), Edition Ausblick, Vienna, 2017, pp. 25-43 (26-28). In accordance with the goal of autonomy, the Austrian reform in 2006 anchored the obligation to determine wishes and the obligation to provide information in Section 281 (2) of the General Civil Code (§ 281 Abs 2 ABGB).

23 Buchner T.: "*Meine Wünsche*", cit., pp. 121 ff; Ganner, M.: "Stand und Perspektiven", cit., p. 171; Müller, *R.*: "Entwicklungsbedarf des Sachwalterrechts", cit., pp. 241 ff; Parapatits, F.: "*Das Konsenspapier Bankgeschäfte*

special mentioning. Article 8 CRPD demands States Parties to take immediate, effective and appropriate awareness-raising measures. The reference in the Concluding Observations of the Committee, according to which Austria was also recommended to carry out trainings with all relevant actors in practice, so that the contents of Article 12 of the CRPD actually arrive in practice, is to be understood in this direction.[24]

The criticism of the Committee in the context of the first State Report as well as the result of the expert opinion could therefore not come as a complete surprise to Austria, although at the time of ratification Austria obviously assumed that ratification of the CRPD would not require any major legal changes.[25]

3. Legal Capacity and Procedural Capacity.

The recommendations of the UN-Committee on the revisions of the legal capacity were taken seriously by the Austrian government.[26] Now every person, irrespective of his/her individual capabilities, under special circumstances even the not yet born Nasciturus, has legal capacity ("Rechtsfähigkeit"). If legal capacity does not only include rights, but also duties, its extent is limited by law. That is the case with the contracting capacity ("Geschäftsfähigkeit") or the capacity to decide in general ("Entscheidungsfähigkeit") and specifically on marriage ("Ehefähigkeit") or to set up the last will ("Testierfähigkeit") etc. As far as children are concerned, legal presumptions determine the limitation of their capacity. For adults (at least 18 years of age) all these capacities are presumed,[27] some already before 18.[28] In general the current mental capacity determines the special decision-making abilities. Hence there is a difference between legal and mental capacity.

Legal capacity with the meaning of the power provided by the law to decide on legal acts ("Handlungsfähigkeit") requires, depending on the legal act, a certain mental capacity of the individual. Mental capacity in this context is understood as the degree of understanding and memory the law requires to uphold the validity of or to hold someone responsible for a particular act or transaction.

und Erwachsenenschutz. Ein Handlungsleitfaden zur Reform", *iFamZ*, 2018, No. 2, pp. 81-90 (81); Ganner, M.: Grundzüge des Alten- und Behindertenrechts, edition Jan Sramek, Wien, 2020, pp. 17, 118 f, 160; Ganner, M.: "Erfahrungen zum österreichischen Erwachsenenschutzrecht 2018", *RP Reha*, 2021, No. 2, p. 61.

24 CRPD/C/AUT/CO/1 n. 28.

25 See Ganner, M.: "Stand und Perspektiven", cit., pp. 171-175 (171).

26 Ganner, M., Dabove, I.: "Developments in Austrian and Argentine Guardianship Law", in *Liber Amicorum Makoto Arai* (coord. by D. Coester-Waltjen, V. Lipp, D.W.M. Waters), edition Nomos, Baden-Baden, 2015, pp. 318-341. Ganner, M.: "The new Austrian Adult Protection Law of 2018", *Julgar*, 2020, No. 41, pp. 178 f.

27 The burden of proof lies with the party who denies the specific capacity (§ 17 AGCC).

28 From the age of 14 people can decide about medical treatments, but need the consent of a parent, if the treatment may have severe consequences (for more than 24 days; § 173 ABGB). Also children under 14 may have the cognitive abilities, which are required for the decision about medical treatment. All these people, hence also children, who have "*Einsichts- und Urteilsfähigkeit*" can successfully veto any medical treatment.

The criteria of the so called "Entscheidungsfähigkeit" (decision-making-capacity/ capacity of discernment) are defined by § 24 (2) ABGB: "A person is capable of making decisions if he/she understands the meaning and consequences of his/her actions in the respective context, can determine his/her will in accordance to this realization and can act accordingly. In case of doubt, this is presumed for adults". The requirements for the decision-making-capacity are therefore: (1) Ability to understand the reason and meaning of the planned legal act (capacity to perceive); (2) Ability to determine the will according to this understanding (capacity to form the will); (3) Ability to behave accordingly (capacity to control behaviour).[29]

If a person lacks this mental capability, he or she is not bound to the decision. In these cases, the reason for the limitation/restriction of the decision-making ability is to protect those people from obligations, which they potentially cannot fulfil, endanger their lifestyle (e.g. property) or are not in their best interest, and secure reasonable legal relations.

Nonetheless, persons of full age do not require any kind of cognitive ability to conclude legal transactions of everyday life if these do not exceed their living conditions (§ 242 (2) ABGB) when they fulfil their contractual obligations, e.g. by paying the purchase price.

In any case, the "contractual capacity" of the cognitive impaired person is limited by the fact that the transaction may not exceed his/her living conditions. It therefore depends on the person's individual income and wealth whether a transaction is legally binding or not. In order to protect the person concerned, the representative may also restrict the assets at free disposal of the represented person.[30]

A major exception of the new concept of legal agency, according to which there should be no automatic restriction of the contracting capacity by the mere fact of the existence of a legal representative, is the entitlement to take legal actions. According to § 1 (2) Austrian Civil Procedure Code (ZPO), a person is not capable to be a party in those proceedings that fall within the sphere of competency of an adult representative or of a person authorised by an Enduring Power of Attorney (see below II.5.B)).[31] This provision contradicts the core principles of the legal guardianship reform as well as the provisions of Article 12 CRPD.[32] A justification

29 Cf. legislative materials: ErlRV 1461 BlgNR 25. GP. p. 9 (https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01461/fname_608002.pdf accessed on 04/02/2020)

30 Ganner, M.: "The new Austrian Adult Protection Law of 2018", *Julgar*, 2020, No. 41, pp. 179 f.

31 In the adult protection procedure, however, the persons concerned have special procedural rights. In particular, they may carry out procedural acts irrespective of their procedural capacity; cf. § 116a AußStrG.

32 Different opinion: legislative materials ErlRV 1461 BlgNR 25. GP. 79 (https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01461/fname_608002.pdf accessed on 04/02/2020).

does not exist. Why should a limitation of the legal agency be more necessary in procedural law than the limitation of contractual capacities?

In the administrative procedure law, however, there is no comparable restriction of the procedural capacity. Rather, persons with a representative remain procedurally capable in administrative law (e.g. § 24 and § 242 (1) ABGB in conjunction with § 9 General Administrative Law Act = AVG).[33]

4. The Reform Process itself.

With a delay of several years the process of the implementation of the CRPD into national law, particularly concerning legal guardianship, started in 2013. The Ministry of Justice organized regular meetings of all representatives of possible interest groups with a strong emphasis on the involvement of people with disabilities. This also served to fulfill the obligation of Art. 4 (3) of the CRPD: "In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations."

But Art. 4 (3) CRPD remains under the condition of legal implementation (Erfüllungsvorbehalt; constitutional reservation). There are no other comprehensive and legally binding guidelines on the involvement of persons (with disabilities) in legislative processes. The "Standards of Public Participation" (Standards der Öffentlichkeitsbeteiligung)[34] which were adopted by the Austrian federal government in 2008 are not obligatory and it is only recommended to be applied. The intensive involvement of affected persons in legislative processes is not usual in Austria. The reform of the guardianship law is in that respect exceptional.

"The process of amending the Austrian guardianship system conducted by the Ministry of Justice serves as an example for best-practice in terms of participatory approaches. An interdisciplinary working group including persons with disabilities and DPOs [Disabled People's Organisations] was set up in order to enable participation throughout the whole process. Both participants from civil society and Ministry officials were satisfied with their progress and viewed it as a joint effort to create amendments for the existing regulations."[35]

33 Cf. Parapatits, F., Perner, S.: "Die Neuregelung der Geschäftsfähigkeit im 2. Erwachsenenschutzgesetz", *iFamZ*, 2017, No. 3, p. 165.

34 https://www.oeffentlicherdienst.gv.at/verwaltungsinnovation/oeffentlichkeitsbeteiligung/Standards_der_Oeffentlichkeitsbeteiligung_2008.pdf?8bg93v (15.3.2022).

35 Lamplmayr, A., Nachtschatt, E.: *Observing Legislative,* cit., p.53.

5. Pillars of representation.

A) General aspects.

The Austrian guardianship-system provides four types of "legal" representation:

(1) Enduring Power of Attorney

(2) Elective Representation

(3) Statutory Representation

(4) Court-appointed Representation

Enduring Powers of Attorney, Elective and Statutory representatives can be established with public notaries, lawyers or Adult Protection Associations. Court-appointed Representations are established by the family court.

All forms of adult representation (including the Enduring Power of Attorney) must be registered with the ÖZVV (Central Austrian Representation Register). In the case of registration of an Elective or Statutory Representation, a medical certificate is required, which certifies the loss of the decision-making capacity of the person to be represented.[36] The same applies if, in the case of a preventive Enduring Power of Attorney, the occurrence of the preventive case, therefore the coming into effect of the power of attorney due to the loss of decision-making ability of the person giving the power of attorney is to be registered.

Certain persons are not allowed to act as representatives authorised by an Enduring Power of Attorney or as adult representatives. § 243 ABGB provides three reasons for the exclusion in this regard: (1) if the person him-/herself is in need of protection, that is a person who does not have full decision-making capacity; (2) if a beneficial exercise of representation to the welfare of the adult person is not to be expected, e.g. due to a criminal conviction; (3) if the potential person authorised by an Enduring Power of Attorney or the person's representative is in a dependent relationship or in a comparably close relationship with an institution in which the adult person is staying or is being cared for. This applies in particular to employees of nursing homes, but not to relatives.

Adult representations and Enduring Powers of Attorney are largely exercised by private individuals (relatives or volunteers). They may not take over more than 15 Enduring Powers of Attorney and adult representations (§ 243 (2) ABGB). Only

36 Legislative materials ErlRV 1461 BlgNR 25. GP. p. 95 (https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01461/fname_608002.pdf accessed on 04/02/2020).

if such are not available or if special legal matters need to be dealt with, professional representatives (lawyers, public notaries or Adult Protection Associations) are required by law.

For the revocation of an Enduring Power of Attorney, an Elective Representation or for the objection against a Statutory Representation neither the decision-making capacity nor any special form is required. The ability to express oneself on the basis of a "natural" formation of will is sufficient. This also applies to living wills.[37]

B) Enduring Power of Attorney (Vorsorgevollmacht).

Enduring Powers of Attorney must be issued in writing by a public notary, lawyer or an adult protection association. The principal must have full contractual capacity. If the public notary, the lawyer or an employee of the Adult Protection Association has reasonable doubts about the decision-making ability of the principal at the time of the establishment of the Enduring Power of Attorney, she/he must demand the submission of a medical certificate on this subject.[38] The power of representation only comes into force upon registration of the loss of the decision-making capacity of the principal in the Central Austrian Representation Register. The loss of the principal's decision-making capacity must be certified by a medical attest. In two cases the representative needs a court authorisation with an Enduring Power of Attorney. That's the fact for decisions on the permanent transfer of residence abroad and on medical treatments, if they are to be taken against the wishes of the person without decision-making capacity (§§ 258 (4) and 254 (1) ABGB). There is no regular judicial control over the attorney, as it is the case with other forms of adult representation. However, the person granting the Enduring Power of Attorney may revoke it at any time, as may the court.

C) Elective Representation (Gewählte Erwachsenenvertretung).

The Elective Representation was created as a completely new instrument within the Austrian adult protection law 2018. It is essentially an "Enduring Power of Attorney light". In contrast to the Enduring Power of Attorney, which requires full decision-making and contractual capacity for its establishment, a reduced decision-making capacity is sufficient for the Elective Representation. The represented person only needs to be "able to understand the meaning and consequences of a power of attorney in broad terms and to act accordingly".[39]

37 Ganner, M.: "The new Austrian adult protection law of 2018", *Julgar*, 2020, No. 41, p. 175.

38 Cf. Legislative materials ErlRV 1461 BlgNR 25. GP 40 (https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01461/fname_608002.pdf accessed on 11/02/2022).

39 Cf. Supreme Court ruling: OGH 21/05/2015, 1 Ob 91/15m.

The reason for the creation of this instrument is that many people postpone their plans to establish an Enduring Power of Attorney until their decision-making capacity is no longer sufficient. The Elective Representation creates the possibility of choosing a representative even when reduced decision-making capacity is already at place.

The Elective Representation is subject to a higher level of judicial control than the Enduring Power of Attorney, due to the reduced decision-making capacity of the represented person, his or her ability to control the Elected Representative is reduced in comparison to the person authorised by an Enduring Power of Attorney. In contrast to the Enduring Power of Attorney, where full private autonomy prevails, the Elected Representative must be a "close" person. Thus, a personal close relationship is assumed, but not a specific family status.

The Elective Representation can be limited to "co-decisions" in two ways (§ 265 (2) ABGB). Firstly, in such a way that the adult representative can only carry out legally effective representative acts with the consent of the person represented. Moreover, vice versa, in such a way that the person represented can only conduct legally binding decisions with the consent of the representative (§ 265 (2) ABGB).

In practice, a relative, who is also willing to exercise the Elective Representation, accompanies the person concerned to the adult protection association, public notary or lawyer. There, after appropriate consultation, an agreement on the Elective Representation is concluded between the person to be represented and the relative and it is registered in the Central Austrian Representation Register.

D) Statutory Representation (Gesetzliche Erwachsenenvertretung).

The Statutory Representation of adults (§§ 268 to 270 ABGB) is the legal representation by family members.[40] Hence it might be similar to the "guarda de hecho" in Spain. It is based on the legal presumption that, if persons are no longer able to manage their own affairs, they wish to be represented by their closest relatives. However, this presumption of law can be rebutted, in particular by drafting an objection in advance or afterwards against representation by certain close relatives. The Statutory Representative's power of representation can cover all necessary property and health matters. Before the 2018 reform, the scope of the power of representation was limited to minor property matters and simple medical treatments as a risk of abuse was feared.

The group of "next of kin" who may act as Statutory Representatives is the following: parents and grandparents, children and grandchildren of full age, siblings,

40 The power of representation no longer comes into effect ex-lege, i.e. automatically with the loss of decision-making capacity by the person to be represented, but only upon registration in the ÖZVV.

nieces and nephews, spouses or registered partners and a cohabitant, if the latter has lived in the joint household for at least three years, as well as any person designated by the person to be represented in a Representation Directive (§ 268 (2) ABGB).

The Statutory Representation of adults is, like the Court-appointed Representation, limited to three years and ends automatically if it is not renewed before (§ 246 (1) 5 ABGB).

E) Court-appointed Representation (Gerichtliche Erwachsenenvertretung).

Court-appointed Representation of adults (§§ 271 to 276 ABGB) is the ultima ratio and therefore, in terms of subsidiarity, subordinate to all other forms of adult protection (Enduring Power of Attorney, elected and Statutory Representation of adults).[41] The court appoints a person as Court-appointed Representative after the conclusion of a judicial procedure in which the conditions for the appointment of a representative are examined. The powers of the Court-appointed Representative are limited to specific acts of representation. It is not possible to entrust the representative with "all matters" on a blanket basis.[42] The Court-appointed Representation of adults ends automatically after three years, as does the Statutory Representation.

As Court-appointed Representatives professional representatives, i.e. Adult Protection Associations, as well as lawyers and notaries public (including the respective professional candidates) are preferably appointed. For the other forms of representation, relatives and acquaintances are acting on a voluntary basis. Lawyers and notaries (including the respective future professionals) are legally obliged to take over up to five Court-appointed Representations (§ 275 ABGB).

6. Clearing.

"Clearing" refers to the out-of-court clarification of whether the appointment of a Court-appointed Representative is absolutely necessary (ultima-ratio principle) and what alternatives may exist.[43] The primary task is to determine in which matters the person concerned needs support or, if necessary, representation and whether people in the personal environment are available for this purpose.

41 Legislative materials ErlRV 1461 BlgNR 25. GP. p. 43 f (https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01461/fname_608002.pdf, accessed on 04/02/2020); of course, this was already the case before the 2nd ErwSchG.

42 The guardianship for "all matters" was by far the most common form (more than 50%), even if the law intended otherwise; legislative materials ErlRV 1461 BlgNR 25. GP. p. 2 (https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01461/fname_608002.pdf accessed on 04/02/2020).

43 Detailed Ganner, M.: "Selbstbestimmung 2.0 – Österreichische Revision des Erwachsenenschutzes und Clearing Plus", in AA.VV.: *Selbstbestimmung 2.0 (coord. by D.* Rosch, *L.* Maranta*)*, h.e.p., Bern, 2017, p. 57.

In the clearing procedure (done by social workers), the main focus of assessment is on the psychosocial needs of persons concerned, while in the judicial appointment procedures, the medical criteria (expert opinions) are regularly in the foreground. All relevant circumstances, including those in the social environment of the person concerned, should be ascertained.

The aim of the clearing is to strengthen the autonomy of affected persons and "supported decision-making" in the sense of the CRPD, as well as to reduce the number of Court-appointed Representations. Trials, which have been ongoing since 2006, have shown that alternatives to adult representation can be found in four out of ten cases.[44]

Clearing is now mandatory in all procedures for the appointment and renewal of a Court-appointed Representation. The court must commission the respective adult protection association to do so and must carry out easily accessible surveys (such as land register excerpts, company register queries, pending court proceedings, social security information).[45] In addition, a clearing procedure is also obligatory in the case of a permanent change of residence if the represented person has indicated in the course of the hearing by the court – the permanent change of residence requires prior court approval[46] – that he or she rejects the change of residence.[47]

For the procedure, internal guidelines of the association have to be observed, which require the approval of the supervising Ministry of Justice. Accordingly, the person concerned must be informed from the outset and a consensus with him or her must be sought.

7. Adult Protection Associations.

The Adult Protection Associations are organised as associations under private law, but are mainly financed by the Ministry of Justice. They are not a public authority. There are currently, regionally distributed, four Adult Protection Associations in Austria.[48] Their suitability is determined by decree of the Ministry

44 Fuchs, W., Hammerschick, W.: "Sachwalterschaft und Clearing – Ergebnisse einer empirischen Studie", *iFamZ,* 2014, No. 2, pp. 71 ff; Hammerschick, W., Mayrhofer, H.: "Clearing und Clearing Plus: wirksame Schritte zur Vermeidung von Sachwalterschaft", *iFamZ, 2016, No.2*, p. 96.

45 Legislative materials ErlRV 1461 BlgNR 25. GP. p. 66 (https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01461/fname_608002.pdf accessed on 04/02/2020).

46 In the case of an Enduring Power of Attorney, this is only the case if a permanent transfer of residence abroad is planned.

47 See § 257 (3) ABGB in conjunction with § 131 (2) AußStrG und § 4b ErwSchVG.

48 (1) VertretungsNetz - Sachwalterschaft, patient advocacy, residents' representation; (2) Niederösterreichischer Landesverein für Sachwalterschaft und Bewohnervertretung; (3) Institut für Sozialdienste: ifs Sachwalterschaft; (4) Salzburger Hilfswerk, association for guardianship.

of Justice.[49] Only one association can be responsible for a specific field of activity in a given area.

The 2018 amendment considerably extended the tasks of Adult Protection Associations. They are now supposed to be the 2central hub of legal care, support and representation" for persons of full age (Adult Protection Association Act – ErwSchVG). The former tasks consisted of taking over the role of guardians (Court-appointed Representation), conduct training and advanced training of voluntary adult representatives and, in general, to counsel and represent in the event of restrictions of freedom in psychiatry and in inpatient nursing institutions and institutions for people with disabilities (see III.2.).

The following new tasks were added in 2018:

- the Clearing, i.e. the out-of-court clarification in advance of a possible appointment of a Court-appointed Representative; see below;

- comprehensive free advice in the field of adult protection, in particular advice on the Enduring Power of Attorney, other forms of adult representation and alternatives thereto, as well as advice during an upright representation;

- the establishment of an Enduring Power of Attorney or an agreement on elected representation;[50]

- the registration of Enduring Powers of Attorney, Elected and Statutory Representatives, anticipated Representation Directives, their coming into effect and termination as well as the revocation of an Enduring Power of Attorney or elected representation and an objection against a Statutory Representation in the Central Austrian Representation Register (§ 140 NO = Public Notary Act).

In order to promote autonomous precaution, low cost contributions for the respective measures of the Adult Protection Associations have been set by law.[51]

49 Federal Act on Adult Protection Associations (Erwachsenenschutzvereinsgesetz – ESchuVG); so far "Vereinssachwalter-, Patientenanwalts- und Bewohnervertretergesetz", Austrian Federal Law Gazette: BGBl. Nr. 156/1990 in the version BGBl. I Nr. 92/2006 (cf. https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002937 accessed on 04/02/2020).

50 The obligation to set up an Enduring Power of Attorney, an adult Representation Directive or an Elective Representation exists only in accordance with the possibilities – especially in terms of personnel. Enduring Powers of Attorney may only be issued by employees who are legally qualified; cf. legislative materials ErläutRV 1461 BlgNR 25. GP. p. 87 (https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01461/fname_608002.pdf accessed on 04/02/2020).

51 75 € for the establishment of an Enduring Power of Attorney, 50 € for an adult Representation Directive, 50 € for the registration of a Statutory Representation, 25 € for a home visit in this context; § 4e Erwachsenenschutzvereinsgesetz (ErwSchVG).

8. Empirical experience with the Adult Protection Law since 2018.

In a survey with over 200 questionnaires, initial experiences with the new adult protection law were collected in 2019.[52]

In particular, the new role of adult protection associations as a central point of contact for advice, clearing, setting up and registering powers of attorney and elected and statutory adult representation is welcomed by all. Admittedly, there are still deficits in this area in 2022 (especially long waiting times), which are mainly due to low staff resources. The (cost-effective) establishment of health care proxies and living wills – this possibility was created by the amendment to the Patient Decree Act 2019 – is therefore still only possible in exceptional cases at the adult protection associations.

However, mandatory clearing has undoubtedly been crowned with success. Many Court-appointed adult representatives can now be avoided and referred to alternatives.

People who have a Statutory or Court-appointed Adult Representative consider the time limit of three years to be very positive.

Some changes in the judicial process are also seen as particularly positive. In addition to mandatory clearing, these include the abolition of mandatory oral hearings and the compulsory presentation of affected persons, the abolition of expert opinions in certain cases, and the greater involvement of relatives.

The obligatory annual life situation report to the court, the reduction of the obligation for lawyers and judges to take over the case, and the comprehensive registration of all forms of representation in the Austrian Central Register of Representation (ÖZVV) are also often seen as an improvement over the previous legal situation.

However, the practice of adult protection law is also – not entirely surprisingly – characterised by pronounced persistence. The reform has been well received in many areas and also by the public. Nevertheless, banks and authorities, for example, often still behave as if nothing had changed as a result of the new adult protection law. In fact, an adult representation or health care proxy no longer implies any restriction of decision-making capacity, so that the persons concerned can regularly act for themselves and are entitled to determine their own affairs without having to obtain the consent of the adult representative. Banks reduce

52 See https://www.uibk.ac.at/rtf/.

their risk by de facto only making payments to the adult representative if the amount involved goes beyond "everyday business".

A major practical problem is the federal states, which are increasingly trying to withdraw from social assistance by awarding it only upon application rather than ex officio. The applications are often complex and cannot be handled by the persons concerned without assistance. In many cases, merely formal adjustments have been made by replacing the term "guardianship" with "adult representative" without any actual adaptation of the guidelines to the new adult protection law.

However, the same problems exist with the federal authorities. An easier application process through the use of easy language as well as more support would be necessary.

The hope that many people would register on the "list of attorneys and notaries particularly qualified to take over powers of attorney for health care and judicial adult representation" and thus that there would always be enough potential judicial adult representatives has also not been fulfilled. Rather, the number of interested parties seems to be decreasing, which could also be related to the fact that in individual cases lawyers and notaries become victims of the system when they are entrusted with judicial adult representation for persons with whom more than 80 court proceedings are pending, without being able to refuse this and without being paid for it. The idea underlying the guardianship law of 1984 that in the medium term adult representation should be taken over exclusively by professional employees of the associations, is no longer realistic. The use of lawyers and notaries outside of representation measures, for which legal expertise is required, seems anachronistic and is less suited to the needs of the persons concerned today than ever before.

The staff of Adult Protection Associations, judges and patient representatives in particular are largely positive about the new Adult Protection Law, while lawyers and public notaries are also sceptical. Statutory Representation is – not entirely surprisingly – the big hit, but is also seen as problematic by Adult Protection Associations and the judiciary, because it can easily circumvent the autonomy and supported decision-making process and, in particular, limiting the scope of action to absolutely necessary matters may not be sufficiently implemented in practice.

Abuse has been identified in this regard in connection with Covid-19. A mother of an adult with disabilities had herself registered by a lawyer as Statutory Representative to prevent the vaccination of the son, who, however, wanted the vaccination so that he could go to restaurants. The Supreme Court seized by the institution in which the son lives decided that the son is capable of making his

own decisions.[53] So the lawyer who registered the mother and the doctor who confirmed the inability to make decisions did wrong.

"Supported decision making" has so far been used only slightly more frequently than before the reform. This then mostly concerns health matters, whereby the new regulations on medical treatment (see III.1.) are often not known to physicians and are therefore not applied at all.

A very central improvement is the extended scope of duties of the Adult Protection Associations. The obligatory clearing before appointing a Court-appointed Representative, the low-threshold access to counselling as well as the establishment and registration of Elective and Statutory Representations are particularly positively evaluated.

The same applies to the judicial procedure for the appointment of a Court-appointed Representative (a) for the abolition of the compulsory presentation at court of persons concerned, (b) for the abolition of the compulsory expert opinion (medical examination) and (c) for the abolition of the compulsory oral hearing.

All in all, the 2nd Adult Protection Law is assessed positively, even if its full potential has not yet been exhausted.[54]

III. SPOTLIGHTS ON FURTHER IMPORTANT FIELDS.

1. Medical treatments[55].

The 2nd Adult Protection Act also meant a revision of the civil law regulations (§§ 252 to 254 ABGB) on medical treatments of persons with mental disabilities in order to ensure compliance with the provisions of the CRPD.[56]

The new statues clarified that persons of full age, who are capable of making decisions, must always consent to medical treatments by themselves, irrespective

53 OGH 2.12.2021, 3 Ob 206/21x, ÖZPR 2022, p, 25 (Ganner).

54 The results of the survey are published here: *University of Innsbruck*, https://www.uibk.ac.at/rtf/.

55 Parts of this chapter are modified version of Ganner, M.: "The new Austrian Adult Protection Law of 2018", *Julgar*, 2020, No. 41, pp. 191 f.

56 See also the consensus paper of the health care professions, which contains guidelines for the new legal situation as well as practice-oriented recommendations for specific cases; https://www.justiz.gv.at/web2013/home/justiz/erwachsenenschutz/konsenspapiere-mit-institutionen~43.de.html accessed on 22/01/2020); cf. also Koza, I.: "Einwilligung in die medizinische Behandlung nach dem 2. Erwachsenenschutz-Gesetz", *iFamZ, 2017 No. 3*, p. 169; Klein, S. J., Voithofer, C., Ganner, M., Pixner, T.; Valentin, A.; Joannidis, M.: "Nicht einwilligungsfähige Patienten in der Intensiv- und Notfallmedizin. Vorgehen nach dem 2. Erwachsenenschutz-Gesetz in Österreich", *Wiener klinisches Magazin,* 2020, https://doi.org/10.1007/s00740-020-00374-w.

of the kind of medical treatment e.g. a vaccination against COVID[57] or the removal of a birthmark, a reproductive medicine treatment or a regular check-up at the dentists'. The decisive legal aspect hence is the decision-making capacity. A person who understands the meaning and consequences of treatment or non-treatment, determines his/her will in accordance to this understanding and directs his/her behaviour accordingly. Only in situations of emergency the consent is not required before starting the treatment (§ 252 (4) ABGB). In case of doubts about the decision-making capacity the physician must initiate a process of supported decision-making, aiming to ensure or establish the patient's decision-making capacity in as many cases as possible by using adequate forms of support. According to § 252 (2) ABGB the physician "[…] must verifiably seek the assistance of relatives, other close persons, persons of trust and experts who are particularly experienced in dealing with people in such difficult life situations and who can support the person of full age in regaining his/her decision-making capacity. However, if the person indicates that he or she does not consent to the intended involvement of others and the disclosure of medical information, the doctor must refrain from doing so."

In the case of a lack of decision-making capacity, which can also not be achieved through means of supported decision-making, a substituted decision is required (§ 253 (1) ABGB). The substituted decision must be based on the (presumed) will of the patient.[58] If the physician and the representative (person authorised by an Enduring Power of Attorney or Adult Representative) agree and the patient does not object to the treatment (general consensus), the treatment can be carried out. Anyways, the patient must be informed about the medical treatment and asked for his/her opinion.

If the patient explicitly or implicitly rejects the treatment, the representative's decision must be approved by the court (§ 254 ABGB) in order to guarantee the patient's fundamental rights.[59] "In case of doubt, it must be assumed that the represented person wishes to receive medically indicated treatment." (§ 254 (2) ABGB). The courts approval is not required "[…] if the delay associated with such court proceedings would involve a risk to life, a risk of serious damage to health or severe pain. If the medical treatment is likely to continue even after these moments of danger have been averted, it shall be commenced and the court shall be seized without delay." (§ 254 (3) ABGB).

Any treatment against the patient's active physical resistance is prohibited irrespective of a court's approval. Only in psychiatric institutions treatments

57 E.g. OGH 2.12.2021, 3 Ob 206/21x iFamZ 2022, 25 (Ganner).

58 An advance health care directive must be observed in this respect; § 253 (4) ABGB.

59 The judicial procedure shall be initiated at the request of the concerned person and his Statutory Representative or at the suggestion of the person treating him (see § 131 (4) AußStrG).

against the patient's physical resistance is possible within the strict boundaries of the Hospitalisation Act (Unterbringungsgesetz; see below III.2.).

During the Nazi-regime, persons with disabilities were very often sterilised without consent or even without being informed of the measure. Hence, this is a very sensible matter within the Austrian jurisdiction. Irrespective of the historical burden we have to bear, each sterilisation without consent of the person affected means of course in legal terms an interference in the private and family life, including reproductive rights, as protected under Article 8 EHRC as well in the physical integrity. In accordance with the provisions of Article 8 EHRC Article 23 (1) lit b CRPD states: "The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided […]." Nonetheless, § 255 ABGB allows a sterilisation of a person with lacking decision-making capacity against his/her will in case of "[…] a threat to life or a risk of serious damage to health or severe pain due to permanent physical suffering." The consent of the representative needs the courts approval; furthermore, a separate representative from an Adult Protection Association represents the person with disabilities in that trial in order to secure his/her rights (§ 131 (3) AußStrG).[60] Also, this treatment may not be performed against the physical resistance of the disabled person. The requirements for admissibility stated in § 255 ABGB must be interpreted very narrowly so as not to violate Article 23 CRPD and Article 8 EHRC. It needs to be noted, that the prescription of contraceptives also is a medical treatment and is within the scope of the requirements of §§ 252-254 ABGB. A potential interfere with the rights guaranteed under Article 23 CPRD and Article 8 EHRC must be kept in mind.

2. Deprivation of Liberty and forced medical treatment[61].

In Austria, deprivations of liberty to avoid serious and substantial endangers of life or health are regulated exclusively under public law for the psychiatric sector in the Hospitalisation Act (Unterbringungsgesetz, UbG) and for other inpatient facilities (nursing homes, facilities for people with disabilities and hospitals) in the Nursing Home Residence Act (Heimaufenthaltsgesetz, HeimAufG). Compulsory detention with the consent of the representative (e.g. guardian of a person authorised by an Enduring Power of Attorney) is not permitted. The order for the coercive measure is issued by the head of the psychiatric department (Hospitalisation Act) or by a physician or by personnel commissioned by the institution (Nursing

60 E.g. Parapatits, F.: "§ 255 ABGB. Sterilisation", in AA. VV.: *ABGB-ON*[1.03] (coord. by A. Klete□ka, M. Schauer), Manz Verlag, Vienna, 2019, n. 5.

61 This chapter is a slightly modified version of Ganner, M.: "The new Austrian Adult Protection Law of 2018", *Julgar*, 2020, No. 41, pp. 193 f.

Home Residence Act), who act in this capacity as federal (state) organs. Forced detention under the Hospitalisation Act is subject to mandatory review by a court commission (judge, expert, patients' advocate), and forced detention under the Nursing Home Residence Act is optional, i.e. upon request, also reviewed by a court commission (judge, expert, residents' representative) if the restrictions have not been lifted within four days (Hospitalisation Act) or seven days (Nursing Home Residence Act). However, a subsequent review on application is possible in any case.[62]

With the new Adult Protection Law 2018, the scope of application of the Nursing Home Residence Act has been extended to children and youth facilities. This means that all public and private child and youth welfare institutions fall within the scope of application of the Nursing Home Residence Act. The lack of review of restrictions on freedom in child and youth welfare institutions has been criticised in many cases, in particular by the Ombudsman's Office and its Human Rights Advisory Board, because it was abstruse that institutions for minors were not subject to comparable controls as those for adults.[63] In the case of minors, however, it is necessary to distinguish between "age-typical measures of education and care" – these are not subject to state control due to the family autonomy guaranteed by Article 8 ECHR – and those which go beyond this due to illness and therefore have to be treated according to the procedure of the Nursing Home Residence Act.

The six OPCAT commissions[64] within Austria, which carry out unannounced inspections of all institutions where restrictions on freedom are imposed, are an additional supervisory body for restrictions of freedom in institutions. However, the staffing of these commissions cannot guarantee close monitoring of all institutions. Rather, the OPCAT commissions serve as a parallel control system, also in the other institutions under the Nursing Home Residence Act and the Hospitalisation Act.

Forced medical treatment is only permitted in accordance with the Hospitalisation Act and criminal law. According to §§ 35 f. UbG, coercive treatment may not be carried out against the will of a patient who has decision-making

62 The interests of those affected are protected in particular by existing representations for these areas: the patient advocacy in the Hospitalisation Act and the residents' representation in the Nursing Home Residence; in detail Kopetzki, C.: *Grundriss des Unterbringungsrechts*[3], Springer Verlag, Vienna, 2012; Strickmann, G.: *Heimaufenthaltsrecht*[2], Linde Verlag, Vienna, 2012; Ganner, M.: "Unterbringungsgesetz" and Hollwerth, J.: "Heimaufenthaltsgesetz" in AA.VV.: *AußStrG II* (coord by E. Gitschthaler, J. Höllwerth), *Manz Verlag,* Vienna, 2017.

63 This might be a violation of the principle of equal treatment and thus a violation of the Austrian constitution.

64 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; this is a resolution of the United Nations General Assembly extending the 1984 Convention against Torture to include an international system of inspection of places of forced detention. In Austria, these commissions are located at the Ombudsman's Office.

capacity. If a patient has a legal representative (adult representative, representative authorised by an Enduring Power of Attorney, parents in the case of minors), his or her consent is required. Serious medical treatments additionally need the courts approval in advance. Of course, this does not apply in case of imminent danger. In criminal law (§ 69 of the Austrian Penal Procedure Code), compulsory medical treatment is permissible if "a prisoner, despite having been instructed to do so, refuses to cooperate in a medical examination or treatment that is absolutely necessary under the circumstances of the case". The forced treatment must be approved by the Ministry of Justice in advance; this again does not apply in cases of imminent danger. The same applies to the forced feeding of prisoners.

3. Marriage, Adoption, Artificial Reproduction, PGD.

Before the 2nd Adult Protection Act entered into force, persons under legal guardianship needed the approval of their guardian or the court in order to enter into marriage (§ 3 Austrian Marriage Act, EheG) or to enter into a registered partnership (§ 4 Austrian Registered Partnership Act, EPG). This was considered a violation of the provisions of the CPRD (especially Art. 12 (5), Art. 23 (1) lit b) as well as of constitutional requirements.[65] Hence, the 2nd Adult Protection Act revised the relevant statues. Now the necessary decision-making capacity for entering into marriage/registered partnership at the moment of entering is required in general, irrespective of the existence of a guardianship. This means, one must be able to understand what a marriage is and what it means to enter into it and to be able to act according to this understanding.[66] Decision-making capacity is also required for adopting a child (§ 191 ABGB) or for using reproductive medicine (§ 8 Reproductive Medicine Act, FMedG). Nonetheless reports indicate that persons with disabilities face several burdens adopting a child.[67] Hence, the CPRD-Committee recommended Austria to enhance measures to fight stereotypes according to which people with disabilities are bad parents and to enhance support measures for parents with disabilities.[68]

For persons who carry a genetic inherited disease, preimplantation genetic diagnosis (PGD) via reproductive medicine is available if, due to the genetic disposition, there is a serious risk of miscarriage or stillbirth or of a hereditary disease in the child (§ 2a (1) FMedG). The hereditary disease is further explicated in § 2a (2) FMedG as follows: "A hereditary disease within the meaning of para. 1 subpara. 3 exists if the child becomes ill during pregnancy or after birth in such

65 E.g. Faculty of Law of the University of Innsbruck, expert opinion n. 420 ff. (2014); https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=278; ErlRV 1461 der Beilagen XXV. GP p. 60.

66 See ErlRV 1461 der Beilagen XXV. GP p. 60.

67 E.g. Wurzinger, C.: "Frauen und Mädchen mit Behinderungen. Ein Streifzug durch UNCPRD, CEDAW und Lebenswirklichkeiten in Österreich", *juridikum,* 2015, No. 1, pp. 104 f.

68 See CRPD/C/AUT/CO/1 n. 22.

a way that it 1. can only be kept alive by the constant use of modern medical technology or the constant use of other medical or nursing aids that severely impair his or her lifestyle, or 2. has severe brain damage or 3. will suffer permanently from severe pain that cannot be effectively treated and, in addition, the cause of this illness cannot be treated." The PGD as genetic analysis needs the written consent of the persons the genetic material is derived from.[69] Hence, a PGD without the intended parents' knowledge and without their consent is prohibited.

4. Work and Employment.

In the general civil law there are no specific rules for persons with disabilities for entering into an employment contract. Hence, the contract either requires the necessary decision-making capacity (§ 865 (1) ABGB) or, in case of a lack of decision-making capacity, the consent of the representative (§ 865 (3) ABGB). Of high importance, irrespective of the kind of disability, are the special provisions at federal level, which want to enhance the employment rate of persons with disabilities and protect those already employed. The Disabled Persons Recruitment Act (Behinderteneinstellungsgesetz, BEinstG)[70] is based on a three pillar system: 1. an obligation to employ a certain quota of persons with disabilities; 2. a system of subsidies if more than "the quota" is employed; 3. protective provisions for the employed. According to § 1 BEinstG, "all employers who employ 25 or more employees in the federal territory are be obliged to employ at least one disabled person for every 25 employees." Only persons with a disability degree of 50 and more percent fall under the quote and the scope of protection of the BEinstG (§ 2 BEinstG) and are called "beneficiary disabled persons" (Begünstigte Behinderte). Irrespective of the disability degree or status as "beneficiary", the BEinstG provides special anti-discrimination provisions with respect to employment (§§ 7a-7s BEinstG) which supplement the provisions in the federal Disability Equality Act (Behindertengleichstellungsgesetz).

For becoming a "beneficiary disabled" in legal terms, an individual application of the person with disabilities is necessary. Hence, no one becomes part of this legal category without his/her consent. The criteria resulting in the categorisation are based on a medical-model of disabilities. According to the "Assessment Regulation" (Einschätzungsverordnung), the health damages of a person are evaluated. On this basis it is estimated how those disabilities influence the (in)capacity to work in the open and general work market. Hence, the disability degree does not consider special working conditions (e.g. within IT or construction branch).[71] Beneficiary

69 See Voithofer C., Böttcher, B.: "§ 2a FMedG. Präimplantationsdiagnostik", in AA.VV.: *FMedG und IVF-Fonds-Gesetz* (coord. By Flatscher-Thöni/Voithofer), Verlag Österreich, Vienna, 2019, n. 78 ff.

70 See Wirnsberger, W.: "IV Arbeit", in AA.VV.: *Alltag mit Behinderung Ausgabe 2021/22* (coord. by H. Hofer), nwv Verlag, Vienna, 2021, pp. 121-138.

71 See Wirnsberger, W.: "IV Arbeit", cit., p. 123.

disabled persons are those who fall under the quota of § 2 BEinstG; furthermore, they enjoy increased protection against dismissal (§ 8 BEinstG). In case a company does not fulfil its quota, it has to pay a fine (§ 9 BEinstG). The CPRD-Committee was concerned about this fact, as "[…] reports that the majority of employers prefer to pay a fine rather than comply with the quota requirement. It notes that only 22 per cent of employers actually fulfil their obligations under the Disability Employment Act which governs this quota system."[72] This fact still was under critique in 2020.[73] Therefore, it seems that nothing has changed since the concluding observations of the CPRD-Committee were published in 2013.

Another aspect that needs highlighting is the divided labour market. The competencies for policies on the labour market and on labour law are divided in Austria among the federal authority and the nine federal states. A very high percentage of persons with disabilities works in segregated "sheltered" workplaces or "workshops", where they gain "pocket money" instead of a salary and have no adequate social insurance.[74.]

Against this background, the disability ombudsmen suggested:

- "Revision of the criteria for determining incapacity to work with the introduction of a sufficiently long trial period under realistic working conditions and taking into account existing support structures of a technical and personnel nature.

- Full insurance in the statutory social insurance system for persons with disabilities in day structure facilities; only through independent health and pension insurance is a self-determined and non-discriminatory lifestyle of persons with disabilities made possible.

- Development of an adequate model for payment of remuneration to the employed persons with disabilities."[75]

72 CRPD/C/AUT/CO/1 n. 45.

73 Rubisch, M.: "The UN Convention on the Rights of Persons with Disabilities in Austria: From the state review 2013 to the second and third State Report 2019", in AA.VV.: *The implementation of the UN Convention on the Rights of Persons with Disabilities in Austria and Germany* (coord. by M. Ganner, E. Rieder, C. Voithofer, F. Welti), Innsbruck university press, Innsbruck, 2021, p. 86.

74 See Hofer, H.: "Working group 3: Implementation of Art 27 UN CRPD in Austria", in AA.VV.: *The implementation of the UN Convention on the Rights of Persons with Disabilities in Austria and Germany* (coord. by M. Ganner, E. Rieder, C. Voithofer, F. Welti), Innsbruck university press, Innsbruck, 2021, p. 190.

75 See Hofer, M.: "Working group", cit., p. 190.

5. Education[76].

Education plays a fundamental role in increasing equal opportunities in society. Hence, exclusions from access to education are particularly critical. The UNESCO World Education Report, according to which millions of children with disabilities have no chance of school education, makes very clear that exclusions due to disability/disabilities still exist.[77] Those considered particularly at risk of not being able to make use of the right to education are: "persons with intellectual disabilities or multiple disabilities, persons who are deafblind, persons with autism, or persons with disabilities in humanitarian emergencies."[78]

Article 24 (1) CRPD enshrines the equal human right to education of persons with disabilities. According to this provision, the entire training and education system must be designed as an inclusive one[79], irrespective whether the provider is a public or private one[80] or of the level (primary, secondary or tertiary) of education. Also all other fields of education and training fall under the scope of Article 24 CPRD. Inclusive education is incompatible with institutionalisation in the long run. That is why the states parties need to initiate a deinstitutionalisation process.[81]

In order to realise the rights under Article 24 CRPD and Article 23 (3) of the UN Convention on the Rights of the Child, children with disabilities must be provided with adequate assistance and support. Support and promotion measures should take effect as early as possible. According to the latest shadow report of the Austrian Federal Monitoring Committee, segregated schools have not only continued to receive financial support, but new facilities have even been created. In addition, the financial resources for school and care assistance is still considered lacking.[82]

Looking at the Austrian legal framework, the division of competencies among the state and the nine federal states seems to be a crucial burden in order to achieve a full inclusive educational system. The nation-wide provisions set the

76 Parts of this chapter are a modified version of Voithofer, C.: "Working group 2: Right to education (Art 24 UN CRPD)", in AA.VV.: *The implementation of the UN Convention on the Rights of Persons with Disabilities in Austria and Germany* (coord. by M. Ganner, E. Rieder, C. Voithofer, F. Welti), Innsbruck university press, Innsbruck, 2021, pp. 135-146.

77 UNECSO: *Inclusion and Education. All means all* (2020), https://en.unesco.org/gem-report/report/2020/inclusion (15/03/2022).

78 CRPD/C/GC/4 n. 6.

79 CRPD/C/GC/4 n. 8; Krajewski, M., Bernhard, T.: Art 24 UN-BRK n. 2, 3 in AA.VV.: *UN-Behindertenrechtskonvention* (coord. by A. Welke), Dt. Verein für Öffentliche und Private Fürsorge, Berlin, 2012.

80 Krajewski/Bernhard, cit., n. 2.

81 CRPD/C/GC/4 n. 66.

82 Austrian Federal Monitoring Committee, *Monitoring Report to the UN Expert Committee for the Rights of People with Disabilities on the Occasion of the Second Constructive Dialogue with Austria*, p. 23 f.

general framework; but each federal state has its own provisions for schools. Furthermore, the levels of education are regulated separately and universities enjoy as well certain regulating competencies. Therefore, we can only highlight the most central regulations in this article. Starting with the compulsory education everyone has to obtain and everyone has a right to experience.

The federal Compulsory School Act (Schulpflichtgesetz) demands all children from the age of 6 and living in Austria to attend school (§§ 1, 2 Compulsory School Act). The compulsory education period lasts at minimum nine school years (§ 3 Compulsory School Act) and in general a maximum 10 school years (§ 32 School Education Act = Schulunterrichtsgesetz). Students with "special educational needs" may under certain conditions attend school up to a maximum of 12 school years (§ 32 School Education Act).

§§ 8, 8a, 8b Compulsory School Act include special provisions for students with "special educational needs" (sonderpädagogischer Förderbedarf). The "Directorate of Education" (Bildungsdirektion) upon request or on its own initiative determines the special educational needs of a student in form of an official decree. Special educational needs means that "as a result of a disability, the child is not able to follow the lessons in the primary school, secondary school or polytechnic school without special educational support." (§ 8 (1) Compulsory School Act). These provisions sound quite supporting and in accordance with the CPRD. Reading § 8 (1) Compulsory School Act further one might become doubtful: "In the course of the determination of special educational needs, it shall be stated which special school is to be considered for attendance by the child or, if the parents or other guardians so request, which general school is to be considered. Taking this determination into account, the Directorate of Education shall determine whether and to what extent the student is to be educated according to the curriculum of the special school or another type of school. In making this determination, the aim shall be to ensure that the student receives the best possible support." This provision can be understood as being in support of a non-inclusive educational system. The parents or another representative of the child has to explicitly request that the child can attend the general school. Hence, the special school is the role model for students with special educational needs. Furthermore, it is among the scrutiny of the Directorate of Education to determine the curriculum according to which the student will be taught. A more flexible solution would be preferable. Otherwise, there is a risk of going the easy way, which means using the special school curriculum instead of supporting the student in such a way that he/she can achieve the intended learning outcomes of the regular curriculum. Of course, this is a matter of sufficient resources: teachers and schools have to be provided with enough resources to teach and support their students in achieving the educational goals.

In accordance with this critique, the CPRD-Committee already recommended in 2013 "[…] greater efforts [have to] be made to support students with disabilities in all areas of inclusive education from kindergarten to secondary school. It particularly recommends that the State party ensure[s] that persons with disabilities, including children with disabilities and their representative organizations, are involved in the day-to-day implementation of the inclusive education models introduced in various Länder. The Committee further recommends that greater efforts be made to enable persons with disabilities to study at universities and other tertiary institutions. The Committee also recommends that the State party step up its efforts to provide quality teacher training to teachers with disabilities and teachers with sign language skills, so as to enhance the education of deaf and hearing-impaired girls and boys, in accordance with the formal recognition of Austrian sign language in the Constitution of Austria."[83]

Students who are not able to fulfil certain tasks due to a physical impairment have a right to be graded differently or not to be graded in this field (§ 18 (6) School Education Act; § 2 (4) Performance Assessment Ordinance = Leistungsbeurteilungsverordnung). According to some examination regulations at secondary educational level, precautions in the organisational procedure and in the conduct of the examination have to be taken to enable the examination candidate to take the examination (e.g. § 3 (4) Examination Regulation AHS = Prüfungsordnung AHS). At tertiary educational level alternative examination methods and settings are provided (e.g. § 59 (1) No 12 University Act = Universitätsgesetz) in case students with disabilities request those.

For achieving a high level of education the competencies of teachers and teachers to be in inclusive education are crucial. Those are considered crucial as well for shifting from a separated school model to an inclusive one.[84] Hence, this should be a compulsory content in all educational studies and teaching curricula. In fact, inclusive teaching is only an optional part of the curricula (§ 38 (2) and (2a) of the Higher Education Act = Hochschulgesetz) among others.

6. Right to vote.

The right to vote and be voted has to be guaranteed for all adults irrespective of their mental capacities (Article 29 CRPD). In Austria all restrictions of that right due to the mental status were eliminated by the Constitutional Court in 1987.[85] Hence, the appointment of a legal guardian has no consequences on the personal right to vote of the represented person; a fact that was pleased by the

83 CRPD/C/AUT/CO/1 n. 43.

84 Also see Corazza, R., Levc, B., Mahn H., Prammer, W.: "III Bildung" in AA.VV.: *Alltag mit Behinderung Ausgabe 2021/22* (coord. by H. Hofer), nwv Verlag, Vienna, 2021, p. 64.

85 VfGH, 7.10.1987, G 109/87, ÖJZ VfGH 1988/14, 315 = ZfVB 1988/1210/1245/1335.

CPRD-Committee within its concluding observations on the initial state report of Austria.[86] One might conclude that unpleasant election results are in any case not due to the fact that persons under guardianship are not excluded from voting.[87]

IV. OUTLOOK.

Legislation in the field of disability is multifaceted and affects all areas of life (work, housing, care and nursing, social security etc.). A strong focus on prohibitions of discrimination, accessibility and support measures is very common within the disability rights discourse. The EU is primarily responsible for disability policy and labour legislation. The member states implement directives and regulate the details in other areas of life (especially housing and social services).

The Austrian disability concept, which has already been adopted at the federal level in 1992, is based on the principle of mainstreaming. Accordingly, disability policy is seen as a task for the whole society and is relevant in all (social) areas. In 2005, as part of a new Disability Equality System, laws especially dealing with disability rights were amended and created:

The federal Disability Equality Act (Behindertengleichstellungsgesetz) creates a statutory ban on discrimination for persons with disabilities in nearly all areas of everyday life. The prohibition of discrimination applies to the public sector as well as private services; it standardises the prohibition of discrimination against persons with disabilities in matters of federal administration, as well as in access to and provision of public goods and services (e.g. transportation, shopping, stores, hospitals and doctors' offices, events, and recreational activities). In case of discrimination due to disability, people are entitled to compensation and the ordinary court procedure is preceded by an arbitration procedure.

The Federal Disability Act (Bundesbehindertengesetz) established the Federal Disability Advisory Board (Bundesbehindertenbeirat) the Disability Advocate ("Anwalt für Gleichbehandlungsfragen für Menschen mit Behinderungen").

The Disabled Persons Recruitment Act (Behinderteneinstellungsgesetz) regulates the obligation for companies to employ persons with disabilities and protective measures for them in the labour market.

86 CRPD/C/AUT/CO/1 n. 5.

87 Ganner, M.: "Herausforderungen und Reform des Erwachsenenschutzes im internationalen Vergleich", *BtPrax*, 2016, No. 6, p. 211.

At the level of the federal provinces, aspects of disability law are mainly regulated in Equal Opportunities Acts or Participation Acts (Chancengleichheitsgesetze und Teilhabegesetze).[88]

The CRPD as an overarching legal basis, has a major influence on all developments concerning disability policies since 2008. The main result of the implementation of the CRPD into Austrian law is till now the creation of the Adult Protection Law 2018. But there is still much to be done in other areas of life and law. We are already eagerly awaiting the Concluding Observations of the CRPD-Committee of the 2nd and 3rd Austrian state reporting procedures, which is pending due to COVID since 2020.

88 Ganner, *M.: Grundzüge des Alten- und Behindertenrechts*[3], Jan Sramek Verlag, Vienna, 2020, p. 96.

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