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ERKNER, NEAR BERLIN, GERMANY: 14 – 17<sup>TH</sup> SEPTEMBER 2016

## “Legal protection of adults – an international comparison”

by

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### Notes:

(1) *This paper is drawn from (a) my address to the opening plenary session of the Congress on 14<sup>th</sup> September 2016 (text from that address as delivered appears in single quotation marks in this paper), (b) PowerPoint slides presented at Panel Session 11 “Decision Makers in Formal Support” at the Congress on 15<sup>th</sup> September 2016, (c) information from countries represented at the Congress provided in response to questionnaire circulated by the organisers prior to the Congress, (d) information published in “The International Protection of Adults” (Frimston, Ruck Keene, van Overdijk, Ward), Oxford University Press, 2015, (e) the researches of the Essex Autonomy Three Jurisdictions Project: see final report available at <http://autonomy.essex.ac.uk/eap-three-jurisdictions-report>, and (f) personal contacts at the Congress and elsewhere, and other information available to me.*

(2) *The comparative information under numbered headings in this paper is drawn almost exclusively from the responses to questionnaires referred to at (1)(c) above. Omissions of other countries imply no more than that responses to the questionnaire were not received from them.*

### **Definitions**

“AWI 2000”:	Adults with Incapacity (Scotland) Act 2000
“CRPD”:	UN Convention on the Rights of Persons with Disabilities
“UN Committee”:	United Nations Committee on the Rights of Persons with Disabilities
“General Comment”:	General Comment No 1 (2014) by the UN Committee entitled “Article 12: Equal Recognition before the Law”
“ECHR”:	European Convention on Human Rights
“EAP3J”:	Essex Autonomy Three Jurisdictions Project

‘Good afternoon. My first words, on behalf of myself and all of us, must be to thank our hosts for bringing us all together here, for their warm welcome, and for structuring our discussions to take us from the many questions which face us, through to possible answers.

‘Good answers depend upon asking the right questions. At this early stage of our gathering, I shall focus mainly upon questions.

‘As we look around us here, we see both unity and diversity.

‘Above all, what unites us is that we are all human beings. Our fundamental needs and aspirations are universal. They are reflected in our internationally acknowledged universal human rights, shared

with every human being on this planet. And we share the obligation to play our own part in delivering compliance with those human rights to everyone.

‘There is also splendid diversity in this room: diversity in our starting-points, our career journeys, and our travels to come here. But we are hit with the first question upon arrival at a gathering about guardianship. Just as my aeroplane was a vehicle to bring me here, guardianship is at best a vehicle, to deliver what? To take its passengers to what destination? And what is guardianship? If there is one lesson to be learned from the brief comparative summary which I shall present shortly, it is that “guardianship” means as many things as there are countries which use the term, with further variation in how it is actually delivered.

‘We should not start with a concept which is at best one answer, and an uncertain one, until we have formulated the question, and the destination for which – for each individual – we may want to find the most appropriate vehicle.

‘I offer you this formulation of that question:

**How can modern, human-rights compliant, legal systems best respond to the needs of people who may require support in the exercise of their legal capacity, and who may – or may not – be capable of proactively and validly exercising their legal capacity?**

‘In that formulation, “**proactively**” means not only making decisions, about which there has been so much discussion, but identifying the need to act, and acting; and in setting the agenda for decisions which need to be made. “**Validly**” means ensuring that actions, transactions and decisions leave third parties with no doubts about validity, nor cause to hesitate or even refuse to accept and to act upon them. And we must be careful about the word “**support**”. Article 12.4 of the UN Convention on the Rights of Persons with Disabilities (“CRPD”) requires that relevant measures “**respect the rights, will and preferences of the person**”. Importantly, “preferences” is in the plural. When we have to make a difficult decision, we often have to balance conflicting preferences. Even more importantly, those three elements may be in conflict with each other. Here is a simple example from my own experience. A young man had severe learning disabilities, sometimes with challenging behaviour. He could communicate only through the interpretation of his behaviour by skilled carers who knew him well. His behaviour deteriorated. He aggressively resisted anyone or anything going near his mouth. His clear will was to stop any interference with his mouth. His preference was that the toothache which he had developed should end. His right was to receive appropriate healthcare. Support meant ensuring that he received treatment, using legal measures to assure the dentist that he could properly deliver it.’

This anecdote subsequently produced reactions ranging from “I would have done my best to persuade him to accept treatment, but if that failed I would not have forced treatment, so that by his choice he would continue to suffer the toothache” (a member of the UN Committee) to “If he had not been treated, he would have clawed at his face to try to remove the pain until he caused serious – even fatal – damage” (an experienced registered nurse who is also a qualified lawyer).

‘The next few days will tell us whether we can find unity even in the questions to which our diverse systems seek answers. I turn now to three different diversities.

‘The first is the diversity of reasons why such support may be required, and of relevant factors. This was emphasised in a report less than a year ago by the Law Commission of Ontario.

**“While legal capacity, decision-making and guardianship legislation does not refer to specific classes of persons, some persons are more likely to be found legally incapable or to be assumed to be legally incapable, including persons with developmental, intellectual, neurological, mental health or cognitive disabilities. It would be difficult to overstate the diversity among those directly affected by legal capacity and decision-making laws. Differences in the nature of the impairment in decision-making abilities may significantly affect needs so that a person whose impairment is episodic will have quite different needs from the law from those of a**

**person whose abilities are stable or declining. The stage of life at which needs for assistance arise has considerable implications for the nature and extent of the social and economic supports available. As well, gender, culture, family structures, geographical location and many other factors will affect how this legislation is experienced.”**

‘That diversity, and the greater diversity of disabilities generally, presents the danger of “discrimination within non-discrimination”: the danger that responses to disability focus too narrowly upon selected disabilities. There tends to be a hierarchy, with physical disabilities at the top, sensory disabilities next, then the great variety of intellectual disabilities; and within intellectual disabilities, further hierarchies. The sheer numbers of people who have or fear ageing conditions capture attention, as do people vocal in their protests at the way that psychiatric services may have treated them. There is a danger of neglecting people with less prominent intellectual disabilities. To test our systems, we have to take these marginalised people and put them at the centre. A good test of a system is to see whether it performs best for people who are most marginalised, and who need it most.

‘Differences in priority reflect in different starting-points for relevant legislation: the elderly in Japan, people with significant learning disabilities in New Zealand.

‘The second diversity is in the historical perspective. My remit today is comparative, not historical. But two historical themes are relevant to a comparative understanding. One is the diversity of perceptions and objectives that lawmakers have tried to answer. The other is the repeated importation of child law concepts, and their application to adults. In Scotland we imported the Roman tutor-at-law for adults in 1585<sup>1</sup>. In 1913 we created a form of plenary personal guardianship, guardians’ powers being defined by reference to the guardians of young children<sup>2</sup>. The purpose was to remedy “lasting injury to the community” caused by learning disabled people “at large in the population”<sup>3</sup>. That was abolished in 1984 in favour of a statutory guardianship with fixed and narrow interventionist powers, aimed at ensuring protection and support, but used as a last resort in problem situations<sup>4</sup>. That left a gap, filled by non-statutory developments, until our present regime ensued in 2002<sup>5</sup>, specifically rejecting the child law concept of best interests.’

The rejection of a “best interests” test was explained in paragraph 2.50 of Scottish Law Commission Report No 151 on Incapable Adults, September 1995, as follows:

**“Our general principles do not rely on the concept of best interests of the incapable adult ... We consider that ‘best interests’ by itself is too vague and would require to be supplemented by further factors which have to be taken into account. We also consider that ‘best interests’ does not give due weight to the views of the adult, particularly to wishes and feelings which he or she had expressed while capable of doing so. The concept of best interests was developed in the context of child law where a child’s level of understanding may not be high and will usually have been lower in the past. Incapable adults such as those who are mentally ill, head-injured, or suffering from dementia at the time when a decision has to be made in connection with them, will have possessed full mental powers before their present incapacity. We think it is wrong to equate such adults with children, and for that reason would avoid extending child law concepts to them. Accordingly, the general principles we set out below are framed without express reference to best interests.”**

The principles referred to are those now contained in section 1 of AWI 2000.

‘Today we face unprecedented challenges, but they are welcome, for they challenge us to do better. Many are driven by international and regional instruments, and the debates surrounding them. In a world of increasing mobility, and of incessant difficulties facing vulnerable people in cross-border

<sup>1</sup> Curators Act 1585 (c18).

<sup>2</sup> Mental Deficiency and Lunacy (Scotland) Act 1913.

<sup>3</sup> Report by the Royal Commission on the Care and Control of the Feeble-Minded, 1908, Cd4202.

<sup>4</sup> Mental Health (Scotland) Act 1984.

<sup>5</sup> Part 6 of AWI 2000, providing for guardianship and intervention orders, was brought into force on 1<sup>st</sup> April 2002.

situations, we have the disgrace that the Hague Convention 35 on the International Protection of Adults of 2000 has been ratified by only nine countries. In Europe we have the challenge of compliance with ECHR, including Article 8 – respect for private and family life – and Article 5 on deprivation of liberty. We have the problem of apparent incompatibility between that Article 5 and Article 14 of CRPD. And we have the challenges presented by CRPD itself, to which I shall return.’

Article 5 of ECHR provides *inter alia*:

**“Everyone has the right to liberty and security of person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...**

**e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; ...”**

This is not the place to narrate the substantial and growing jurisprudence on when care and accommodation arrangements for people with intellectual disabilities, who are deemed incapable of consenting to those arrangements, do and do not engage with Article 5 of ECHR. CRPD teaches us that we may have to think more creatively about ways in which those deemed incapable of consenting to those arrangements are in fact able to manifest legally valid assent in other ways. On the other hand, while “of unsound mind” is a precondition for lawfulness under Article 5(e) of ECHR, Article 14 of CRPD prohibits detention on grounds of disability:

**“1. States Parties shall ensure that persons with disabilities, on an equal basis with others:**

**a. enjoy the right to liberty and security of person;  
b. are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.”**

‘The third diversity is among the regimes in different countries. In the British Isles we hit diversity before we travel further.’

Relevant differences between the law of England & Wales, on the one hand, and the Law of Scotland, on the other, include the following:

<b>England &amp; Wales</b>	<b>Scotland</b>
Common law	Civil law (hybrid)
Best interests	Principles, leading to constructing decisions approach
Decision-making	Acting and deciding
Automatic statutory protection for intervention, without statutory appointment, on best interests basis	Principle of necessity only
Specialist court – Court of Protection	No specialist court (but proposal to transfer to unified tribunal also covering mental health and adult support and protection)
Inherent jurisdiction (no statutory provision)	Adult Support and Protection (Scotland) Act 2007

Prescribed forms for powers of attorney

For powers of attorney – statutory requirements but no prescribed form, allowing flexibility (1) to use very simple, easy-read styles and (2) to introduce supported decision-making and co-decision-making clauses

Hague 35 (Convention on International Protection of Adults) not ratified

Hague 35 ratified

'Ireland has a further two jurisdictions both the subject of more recent legislation, taking account of CRPD.

'Moving out into the wider world, we find that wherever there is scope for diversity, there is diversity. The following is a brief distillation of the valuable information from your responses to questionnaires, also responses to previous questionnaires for other purposes. Comparison of key features shows a complex interplay of various centres of emphasis, rather than distinct groupings of uniform regimes. My comparisons are descriptive, not evaluative nor comprehensive, but may help to stimulate our thinking.'

### **1. Age of adulthood**

'To start, at what age are people adults? In Scotland 16, in the rest of the British Isles and many other countries 18. In New South Wales, 16 for medical matters and 18 for financial matters. In Turkey 18, but 15 by court declaration with parental consent. In China 18, but at any time from 16 if earning their own living. In British Columbia 19. In Japan 20. In Singapore 21<sup>6</sup>. In some other countries also 21. For non-integrated indigenous people in Brazil, minimum 21.'

### **2. Directly equating adults to children**

'Next, are adults with intellectual disabilities nevertheless in some respects treated as children? This can happen explicitly. In Slovenia, parental rights can be extended, and an adult equated to a minor over the age of 15. In Brazil, persons determined to have partial capacity are equated to 16 to 18-year olds.'

### **3. *Ex lege* family representation**

'Then there is a group of arrangements and provisions which could be seen negatively as infantilising adults, or positively as respecting the importance and strength of the family. Firstly, we have automatic *ex lege* family representation for all or some purposes in Argentina, Austria, Czech Republic, Japan, Netherlands, Norway, South Korea, Spain and Switzerland, with proposed introduction in Sweden.'

### **4. Close relatives preferred for appointment as guardians**

'Secondly, there are presumptions in favour of close relatives for appointment of guardians. In some cases, importantly, the adult's own choice takes priority: Austria, Brazil, China, France, Netherlands, Turkey. In Scotland, there is a presumption in favour of relatives only for joint appointments.'

### **5. Two-tier childhood of Roman law applied to adults**

'More broadly, we hear echoes of child law in adult provision. The two-tier childhood in Roman law provided a ready-made response to concepts of general incapability, and limited capability, as in the

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<sup>6</sup> But we heard in a pre-congress event that new legislation will apply to persons from age 18.

influential structure in France, with loss of legal capacity under tutelle; and with a degree of advice and/or supervision in entering important transactions, but no incapacitation, under curatelle.'

## **6. Incapacitation?**

'This takes us to a group of questions centred upon the concept of "incapacitation". Some regimes have incapacitation followed by appointment of a guardian. In the following examples, incapacitation is by a court but appointment of a guardian is, in China, by the Neighbourhood Committee or the Villagers' Committee; in Hong Kong and Malta, by a Guardianship Board; in Russia, the Regional Social Care Authority; in Slovenia, the Social Work Centre. In Estonia, there is a different division: restriction of legal capacity and appointment of guardian by a court, or curatorship established by the local municipality. Norway has guardianship with deprivation of legal capacity by a court, or guardianship without deprivation of legal capacity by the County Governor.

'There are combined procedures of full or partial incapacitation and appointment of a guardian in Argentina, France, Taiwan and Turkey.

'In Finland, the appointment of a legal representative may be backed up by restriction of capacity if that is necessary to protect the interests of the adult.'

## **7. No explicit incapacitation? Specialist courts?**

'In many countries – too many for detailed analysis here – there is no explicit incapacitation, and indeed (as here in Germany) provision that appointment of a guardian has no effect on legal personality and status. However, in many such countries, and for understandable protective reasons, at least in economic matters the adult has no competence, within the scope of the guardian's powers, without the consent of the guardian, raising the question whether in practice powers are accurately aligned to incapacities. One would reasonably expect better alignment with specialised courts such as exist in England, Germany and the Netherlands; or in Australia's specialised tribunals. It may also be helpful for a court to be explicitly given an inquisitorial role, as in Germany.

'In some jurisdictions an appointee has explicit power to object to the validity of a purported act by the adult – for example, a supporter in the Czech Republic.'

## **8. Other applications of guardianship concepts**

'Finally, we have guardianship concepts extended beyond cases of intellectual disability. In Turkey: as a criminal punishment. In Brazil: non-integrated indigenous people. In the Netherlands and elsewhere: financial incompetence or prodigality.'

## **9. What are the criteria which appointees must apply when acting?**

Argentina: Safeguard the person's welfare or property, and promote greatest possible autonomy.

Australia, England, New Zealand & Sweden: Best interests.

China: Protection.

Czech Republic: Supporters must not jeopardise person's interests through improper persuasion, nor enrich themselves.

Hong Kong: Promote and protect the person's interests.

Italy: Must act as a "good family father" would.

Japan: A duty of care, being the care of a good manager acting in compliance with the main purpose of the mandate.

Malta: Best interests, support exercise of capacity so far as possible, consult.

Netherlands: “No clear standard regarding representation”, but there are requirements for subsidiarity, proportionality and effectiveness.

Norway: Care for the interests of the person, listen to the opinion of the person before making significant decisions.

Poland: Due diligence as required by the interests of the ward and the interests of society.

Scotland: Comply with principles (leading to a constructing decisions approach).

Slovenia: Take all measures required to protect the ward’s interests.

South Korea: “to serve in good faith and skill”, respecting welfare and preferences or wishes.

Taiwan: Respect person’s intent, consider person’s physical and mental condition, exercise the care of a good administrator.

## **10. Respect for rights, will and preferences?**

Czech Republic: Person may express will to have affairs administered in a certain way, by a certain person, or to have a certain person appointed as legal representative.

Estonia: Consent of adult required for appointment of curator.

Malta: Guardian must take rights, will and preferences into account and respect them “as far as possible”.

Netherlands: Regarding choice of guardian, court must respect the person’s preference, and give explanation if that is overruled.

Scotland: The court, guardians, attorneys and others must take account of the person’s past and present wishes and feelings, if ascertainable by any means of communication.

Slovenia: In choice of guardian, Social Work Centre must “respect the wishes of the ward” if the ward is capable of expressing them.

## **11. How are will and preferences balanced against rights when they are perceived to be in conflict?**

Czech Republic: A supporter has explicit power to object to the validity of a purported act by the adult.

Germany: Betreuer must respect adult’s wishes provided they are not contrary to the adult’s welfare.

Norway: Appointee must act in accordance with the person’s will unless legal capacity is deprived or the person is incapable of understanding the consequences.

Slovenia: In choice of guardian, Social Work Centre must “respect the wishes of the ward” if the ward is capable of expressing them.

South Korea: Welfare must be respected if preferences or wishes are contradictory to welfare.

## **12. Supervision and support for appointees?**

Czech Republic: A legal representation council may be requested.

Italy: Annual written reports to court.

Japan: Education and support programme for supporters provided by local government.

Netherlands: Periodic reports must be submitted to Guardianship Court (there are 11, but one with specialised staff concentrates on supervision activities).

Norway: Supervision by County Governor.

Poland: Court supervises, may make recommendations, consent of court required for important matters.

Scotland: Local authority in personal welfare matters, Public Guardian in property and financial matters.

Slovenia: Account or report to the Social Work Centre.

South Korea: Court may appoint a supervisory guardian but is reluctant to do so where guardians are family members or professionals.

Sweden: By Chief Guardian.

Taiwan: Court may request a report, investigate. Guardian requires court's permission for major transactions.

### **13. Use of trust for administration**

Argentina: "Living trust".

France: The fiducie.

Japan: "Guardianship trust".

Scotland: Largely superseded by current regime, but still competent.

### **14. Private mandates/powers of attorney?**

Available in:

- Argentina
- Czech Republic
- Finland
- France – mandat de protection future
- Germany
- Hong Kong (medical certificate required to trigger)
- Japan (agency contract – may commence immediately or upon disability)
- Japan – Also: voluntary guardianship contract, which comes into effect upon appointment of a supervisor by the Family Court
- Liechtenstein
- Netherlands – "Living Will" promoted by notaries and estate planners, with national register: legislation awaited
- Norway

Powers of attorney ended by incapacity of granter: Brazil, Estonia (probably), Italy, Russia, Turkey (unless explicit provision, or necessary implication, that they should continue, but applicable to property and financial matters only).

More information on private mandates/powers of attorney in Europe will become available in the course of the Council of Europe review of implementation of Ministerial Recommendation (2009)11 on principles concerning powers of attorney and advance directives for incapacity.

'But let me now draw my large bundle of diversities back into the universality of human rights. We all look forward to hearing shortly from [Prof. Dr] Theresia Degener, representing the UN Committee on

the Rights of Persons with Disabilities. I have published significant criticism of some of the Committee's comments. Let me counter-balance that by summarising part of my own contribution to the final report of the Essex Autonomy Three Jurisdictions Project.

'The UN Committee has been criticised for offering neither precise definitions, nor precise instructions as to how safeguards within Article 12 should be operationalised. Instead of regretting that we saw it as an opportunity.

'Article 1 of CRPD says:

**The purpose of the present 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.**

'For that purpose to be achieved, it must become the shared objective of the whole of human society. Within each jurisdiction, we have to take ownership, not thrust responsibility back upon the UN Committee. Its role is to consider, suggest, and make general recommendations. We must each structure support and safeguards that will work, and deliver them in practice. Diversity will continue, but targeted towards the common project of realising Article 1, not random diversity for historical reasons.

'Let me conclude by reverting to the key phrase "**respect the rights, will and preferences of the person**". How strongly are will and preferences respected? The primacy of autonomous measures over guardianship, and other responsive measures, is emphasised by Ministerial Recommendation in Europe. There is serious under-provision, and under-utilisation, of autonomous measures, which must be remedied. Even under autonomous measures, operation raises issues about respect for will and preferences. Across all types of measure, we see isolated shafts of respect, like sunbeams through a cloudy sky. I have examples far beyond the time now available: some will appear in the written version<sup>7</sup>, and will be reviewed tomorrow. We need to deliver respect comprehensively, and effectively in practice. We need to develop and apply techniques such as **constructing decisions**, and **reversed jurisprudence**.'

"**Constructing decisions**" is a term which I adopted when seeking to describe the methodology required by the regime introduced by the (then new) AWI 2000. As to the title of that Act, as is clear from the definitions in section 1 "incapacity" is derived from "incapable", not from any concept of incapacitation. Originally the working title was "Incapable Adults Act" but any implication of total incapability was rejected, and "Adults with Incapacity" was adopted as a shortening of "adults with impairments of capacity (still in the sense of capability)". I have already described the rejection of a "best interests" approach in favour of the application of principles. What did those principles require, when a particular decision was to be made? If persons other than the adult in question were to be involved, their role was not to impose what they thought best. It was to engage in what I described as a process of assisting the construction of what should be, both in law and in fact, that adult's decision, not anyone else's. All aspects of the decision should be derived from the adult, directly as far as possible, and failing that indirectly from best available information. A flavour of this approach can be obtained from the short extract in Appendix 1 to this paper from Chapter 15 ("Constructing Decisions") of my book *Adult Incapacity*<sup>8</sup>.

On an international scale, thinking developed rapidly over the ensuing decade, and continues to do so. However, I would suggest that the "constructing decisions" approach, in rejecting a paternalistic "best interests" methodology in favour of seeking to construct an adult's own decision, can be viewed as an early traveller along the same broad highway as led to paragraph 21 of the General Comment:

**"Paragraph 21**

**"Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the 'best interpretation of will and preferences' must replace the 'best interests' determinations. This respects the rights, will and**

<sup>7</sup> See under headings 9, 10 and 11 above.

<sup>8</sup> W Green, 2003.

**preferences of the individual, in accordance with article 12, paragraph 4. The ‘best interests’ principle is not a safeguard which complies with article 12 in relation to adults. The ‘will and preferences’ paradigm must replace the ‘best interests’ paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.”**

Where do I find myself on that highway in the aftermath of the World Congress? I heard significantly divergent reactions to the decision of the First Senate of the German Federal Constitutional Court (Bundesverfassungsgericht) dated 26<sup>th</sup> July 2016 and published 25<sup>th</sup> August 2016. I have written about that case in the UK’s Mental Capacity Law Newsletter<sup>9</sup>. As is evident from that report, I am fascinated by the potential of the leap forward from the concept of supporting decision-making, to that of supporting the formation and communication of a person’s will. Suddenly, “will” has ceased to be a single word with obvious meaning. The decision of 26<sup>th</sup> July 2016 describes four different types of “will”. Crucially, what did the drafters of Article 12 of CRPD mean by that word when they proposed that states parties to CRPD should commit themselves to safeguards which “shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person ...”. In my own journey along that highway, I find myself at a red traffic light, until that has been clarified.

The concept of “*reversed jurisprudence*” derives from concerns that I expressed a decade earlier, in *A New View*<sup>10</sup>. See “Postscript: A Contradiction and a Vision” on page 198 of the English-language edition. Twenty years later I had an opportunity to describe the concept in the context of both child and adult law, in the passage quoted in Appendix 2 of this paper. If human rights are universal, then why should law not be universal? The contradiction, as I wrote in 1993, is that using a term such as “adult incapacity law” or “mental capacity law” could imply that we are putting everyone with an intellectual disability into a fixed category; that this “could also imply that this category differs from ‘the norm’”; that there could be similar implications even by referring to a category of “intellectual disability”; and that: “It would be contradictory to argue that the law should move away from fixed categories; yet in describing the law, to create such categories”.

I wrote that:

**“Laws everywhere are based on assumptions – a norm – which do not fit everyone, in every situation. So special rules of law are needed for some people, in some situations. The category of ‘the norm’ forces the creation of other categories, outwith the norm. The difficulty is caused by the boundary put round the category described as the norm. It is a boundary reinforced with strands of ignorance and fear, outdated but persistent. People outside the boundary may be deprived, unnecessarily, of participation in what is normal. People inside the boundary may be disqualified from receiving special help and special provision, even though they may need it.”**

I proposed that such a boundary be removed and concluded that:

**“This approach requires reorientation of some legal concepts, and care in application. But it has the potential to humanise legal systems for the benefit of all, particularly those who perceive the law as threatening, rather than helpful.”**

Of course, even my 2013 formulation of what might be described as “universal design” for law itself, would now require to be developed and updated.

‘In the Essex Autonomy Project, we concluded that the existing regimes in England & Wales, and in Scotland, are non-compliant with CRPD, but remedially non-compliant. Our recommendations included an attributable duty to determine will and preferences; provision of adequately-funded

<sup>9</sup> See <http://www.39essex.com/content/wp-content/uploads/2016/11/MC-Newsletter-November-2016-Capacity-outside-the-Court-of-Protection.pdf>.

<sup>10</sup> ILSMH, English-language edition, 1993, published also in Russian, Czech, Estonian, Lithuanian and Polish in ensuing years.

advocacy services to support people to overcome obstacles to exercise of legal capacity for themselves, or alternatively to identify and articulate their will and preferences; support all aspects of the exercise of legal capacity, not merely communication or decision-making; development of the full potential of autonomous measures; and of clear definitions and robust safeguards to comply with Article 12.4; extending CRPD compliance broadly across all areas of legal systems; and establishing regular monitoring and review<sup>11</sup>. I shall leave you with the text of the recommendation which we put at the head of our list:

**“Recommendation 1: Respect for the full range of the rights, will and preferences of everyone must lie at the heart of every legal regime. That must be achieved regardless of the existence and nature of any disabilities. Achieving such respect must be the prime responsibility of anyone who has a role in taking action or making a decision, with legal effect, on behalf of a person whose ability to take that action or make that decision is impaired. The role may arise from authorisation or obligation. The individual with that role should be obliged to operate with the rebuttable presumption that effect should be given to the person’s reasonably ascertainable will and preferences, subject to the constraints of possibility and non-criminality. That presumption should be rebuttable only if stringent criteria are satisfied. Action which contravenes the person’s known will and preferences should only be permissible if it is shown to be a proportional and necessary means of effectively protecting the full range of the person’s rights, freedoms and interests.”**

‘Almost all of the regimes which I have reviewed appear to be non-compliant with CRPD, but remediable non-compliant.

‘We have work to do.

‘Thank you.’

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<sup>11</sup> For the full text of the Recommendations, and the reasons for them, see the report referred to at (e) in the note at the beginning of this article. I personally learned much from my own involvement in that project, which gave me a helpful background for my participation in the drafting group which proposed revision to the Yokohama Declaration. The revised Declaration was adopted by acclamation at the last plenary session of the international part of the World Congress. With reference to my opening comments, it does not contain the words “guardianship” or “guardian”.

## APPENDIX 1

### CONSTRUCTING DECISIONS

#### Extract from Ward, *Adult Incapacity*, Greens, 2003

“15-9 The possible elements of the construct can be stated hierarchically as follows:

- (1) The adult's present competent decision.
- (2) The adult's past competent decision.
- (3) The adult's decisive present choice.
- (4) The adult's significant present choice.
- (5) The adult's present wishes and feelings.
- (6) The adult's past wishes and feelings.
- (7) Information about the adult from, and the views of, the persons closest to the adult.
- (8) Input of others with significant personal or professional knowledge of the adult, or specific appointments or roles in relation to the adult.
- (9) The shared views and ethos of the adult's family.
- (10) The shared views and ethos of any other grouping with which the adult is immediately and substantially associated.
- (11) The shared views and ethos of any religious, ethnic or other group of which the adult, or the adult's family, is a member.
- (12) The norms of the society of which the adult is a member.”

“15-10 In general terms, an element higher in the list will prevail over an element lower; and at each step down the hierarchy, lower elements will only impinge upon a higher one if and to the extent that they strongly and persuasively indicate that it would be appropriate for them to do so. However the steps are not equal. For example, there are qualitative differences between competent decisions, past and present, and the other elements. There are also qualitative differences between elements (1)-(6), which all relate to the adult's own input, and the subsequent elements which do not. On the other hand, in some circumstances and for some purposes consecutive elements represent points along a continuum, rather than separately definable steps.”

## APPENDIX 2

### REVERSED JURISPRUDENCE

#### Excerpt from chapter on Great Britain, pp249 et seq., by Ward, of *Kinderrecht und Elternkonflikt*, Giesecking (2013)

In this chapter, “legal personality” is used to mean the whole rights and status attributable to a human being, and “capacity” to the ability to exercise and assert those rights and that status. Section 3 of Part II of this chapter narrated the lengthy journey which children have made over very many centuries from being treated principally as possessions towards recognition of the concept that they have legal personality, and that the function of child law is to facilitate the exercise and assertion of that personality, including the assertion and protection of their fundamental human rights; so that at last, under documents such as the UN Convention [on the Rights of the Child], we have a strengthened focus on the legal personality of children – upon their rights and status, and that they should have the same fundamental rights and freedoms as adults. In parallel, for adults with disabilities, including those with impairments of capacity, there has been similar progress – now supported by an equivalent Convention [CRPD] - towards recognition of their full legal personality, and recognition that the only differentiation in relation to their disabilities and incapacities should be the positive one of providing mechanisms to enable their freedoms and rights to be fully safeguarded and exercised.

The time has perhaps come to recognise that this trend at last brings these two areas of law closer together in a way which is potentially helpful to both, rather than potentially confusing and unhelpful as in the past. Other similarities between the two areas are emerging. It is a well-recognised problem

that wishes and feelings voiced by children, and even evidence given by them, can be affected by the exercise of undue influence. The effects of undue influence are being increasingly recognised in situations of conflict involving adults with impaired capacity. Such adults may alternate between inconsistent expressions of wishes and feelings, depending upon whether they feel themselves to be within the influence of one or another of different spheres of influence in dispute with each other. This author, in his practice, has experience of such contradictions where two spheres of influence have represented two factions of a family in dispute, or where they have represented family on the one hand and professional carers on the other. The inability to resist undue influence, or even to act and decide in a manner independent of benign influence, could reasonably be regarded as an aspect of impaired capacity – impairment of the capacity to act independently of undue or benign influence, and thus give true expression to the person’s own personality and legal personality.

The factors now drawing child law and adult incapacity law closer together lead to fundamental questions. Why do we have these areas of special law at all? Why does our law treat healthy adults as the norm – indeed, historically, healthy adult males as the norm – and then deal specially with others? Why should the norm be those least in need of the law’s protections and safeguards? Should we not reverse that whole structure and start, generically, with an assumption that we should apply all protections and safeguards such as have been developed in both child law and adult incapacity law, to everyone, and then relax them by way of exception to the extent that individuals clearly do not need them? It would be impractical to seek to re-write large areas of law re-orientated in such ways. It might however be valuable in future legislative processes to address such questions, and to test proposed legislation against the answers arrived at to them<sup>12</sup>.

A simple example, from Scotland, would be the requirement in child law to take account of the ascertainable wishes and feelings of the child, and the requirement in adult incapacity law to take account of “the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication”<sup>13</sup>. Definitions of “child” and “incapacity” include some people but arbitrarily exclude others – an unjustifiable discrimination. A reversed jurisprudence would simply provide that in any proceedings directly addressing the rights, interests, welfare or status of any person who is not a party to those proceedings, the wishes and feelings of that person, if ascertainable, must be taken into account.

Documents such as the United Nations Universal Declaration of Human Rights and the European Convention on Human Rights already provide a strong foundation upon which such a reversal of jurisprudence might be constructed, by declaring fundamental rights of all human beings, rather than those within circumscribed categories.

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<sup>12</sup> For an early consideration of such issues by this author see Ward *A New View* (ILSMH, English-language edition 1993) “Postscript: A Contradiction and a Vision”, page 198 [referred to in the preceding paper].

<sup>13</sup> AWI 2000, section 1(4)(a).