

NOTARIAL GUIDE OF GOOD PRACTICES FOR PEOPLE WITH DISABILITIES:

THE NOTARY AS AN INSTITUTIONAL SUPPORT AND PUBLIC AUTHORITY

Human Rights Commission (HRC)
International Union of Notaries (UINL)



Unión Internacional del Notariado
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As President of the UINL, on an institutional level we are very pleased to have established the legal defence for persons, specifically those in particularly vulnerable situations, as one of the main priorities of the legislature. We are aware of the great challenge and responsibility we have taken on and are very satisfied with the positive efforts being made by the Notariats of all 88 UINL member countries, though we are well aware of the long road ahead.

The UINL allows legal cooperation and the exchange of experiences across the different Notariats to become a reality. This in turn aids each country in providing the most appropriate legal response to the needs of its citizens and guaranteeing legal certainty by way of the notarial institution. As such, we're doing our bit to uphold higher values such as freedom, equality, justice, legal certainty, truth and social peace, which are inextricably linked to the rights of the individual and to social development.

The Notarial Good Practices Guide, which is now published in English, French and Spanish, examines the impact of the UN Convention on the Rights of Persons with Disabilities on notarial activities across the various International Union of Notaries member countries to which it is addressed.

The report submitted to the General Assembly of the United Nations by the special rapporteur for the Rights of Persons with Disabilities, Catalina Devandas, highlights the importance of the notarial judgement of capacity and the need for training in the new paradigm enshrined in the Convention. Point 77 expressly states that "in the performance of their duties, notaries assess the capacity of persons entering into a legal relationship." She adds that the notariat should take into account the recognition of the exercise of legal capacity and the support paradigm brought forward by the Convention, "in order to ensure that their work does not translate into a de facto restriction of legal capacity."

Its content is general in nature and does not refer to specific cases, but will rather require notariats in each country to apply and adapt it. In the absence of the necessary legislative reforms, this Guide sets out guidelines as to how the notary should proceed, distinguishing between persons with disabilities who have been subject to an incapacitation ruling, and those for whom this ruling has not been applied (who are the majority), presenting the notary as a means of support and an authority in the exercise of their rights.

The Guide begins by highlighting the significance of the Convention - the first treaty ratified by the European Union - its principles, its purpose, its impact and the recommendations for legal accessibility: a duty to give advice, information, support, etc.

It then provides an in-depth study of the vitally important article 12 from the point of view of exercising rights with the necessary support. Notaries provide institutional support in order for persons with disabilities to receive all the information and specific recommendations to allow them to exercise their rights on an equal basis.

Ultimately, it explains the ways in which the notary can provide such institutional support by means of a judgement of capacity, or more specifically, a judgement as to the discernment or understanding of the specific act being performed.

The publication closes by proposing the legislative reforms required in order to adapt countries' laws to the Convention, making reference to the notariat as the instigator of such reforms. For instance, Spain's Law on the Protected Heritage of Persons with Disabilities, the Horizontal Property Law, inheritance agreements, preventive powers, self-guardianship, and many others which demonstrate the notaries' creative legal efforts.

I end these few lines in the hope that this Guide will contribute to improving and changing the reality of disabilities across the world. There is still a great deal left to do, but I would call on the Spanish and worldwide notariats to continue to apply the Convention on a daily basis in the interests of the more than 650 million people with disabilities.

José Marqueño de Llano
President of the UINL
Notary in Barcelona





We have drawn up this Notarial Good Practices Guide on the matter of disability under the Spanish Presidency of the UINL. It is the result of the hard work carried out by the Human Rights Commission and aims to provide guidelines to the international notariat regarding the need to adapt to the UN Convention on the Rights of Persons with Disabilities.

The 2006 study of the New York Convention has been an absolute priority for the Spanish UINL Presidency and allowed this Guide to be approved by representatives of the international notariat's 88 member countries when they met in Veracruz in May 2019.

In the report submitted to the United Nations Assembly in December 2017 by the United Nations special rapporteur, Catalina Devandas, related to the exercise of legal capacity by persons with disabilities, there is specific reference made to the notariat as an authority for the exercise of rights and its duty to undertake further training in disability matters.

In April 2018 a debate was held at the United Nations headquarters in Geneva, attended by representatives from more than 50 countries, regarding the impact of the international treaty on the notarial function. The result of this rich international debate is the Guide we are presenting today, which stresses the role of the notary as an authority figure, institutional support and trusted adviser who provides legal solutions to people with disabilities and their families because our bread and butter is not paperwork, but people.

Lastly, I would like to thank the UINL, the international notariat and each and every notary who acts as a guarantor for the exercise of individuals' rights. In particular, I thank every member of the UINL Human Rights Commission, over which I have had the honour of presiding during this legislature, for their dedication, tremendous effort and hard work. Lastly, I thank our President, Mr José Marqueño de Llano, for his strong commitment to placing disability among the most significant issues to be dealt with by the international notariat and asserting the role of the Spanish notariat as a champion in the protection of the rights of people with disabilities.

Almudena Castro-Girona Martínez
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THANKS

The members of the Human Rights Commission (HRC) of the International Union of Notaries (UINL) would like to thank the President of the Union, Me José Marqueño de Llano, as well as the members of the Steering Committee and of the General Council of the UINL for their support.

We also thank the United Nations Special Rapporteur on the Rights of Persons with Disabilities, Ms. Catalina Devandas Aguilar, and the Research Coordinator of the UN Special Rapporteur, Mr. Alberto Vasquez, for their precious collaboration.

Finally, we want to greet notaries around the world and all the people who live with a disability as well as their families.

SUMMARY

Convention on the Rights of Persons with Disabilities is in force since 2008. Its approval was an historic event because the Convention puts disability on the level of Human Rights and entails a paradigm shift in the treatment and conception of persons with disabilities. The authors present the general principles of the Convention and discuss its article 12 – its corner stone – who states full and equal recognition before the law for persons with disabilities. Then they examine the impact of the Convention on notarial activity. After having explored the role of the notary as a provider of institutional support to persons with disabilities, the authors discuss the oversight of lawfulness performed by the notarial authority and the implementation of the so-called judgement of capacity, discernment and understanding of the parties executing a notarial act. Finally, the authors propose to notaries from around the world concretes measures to better support the exercise of capacity by persons with disabilities and promote their full and effective participation in society and the respect of their rights.

INTRODUCTION

The concern of different States and international organizations for defending and respecting the rights of vulnerable people such as children, the elderly and persons with disabilities is clear. Consider the following:

The year 2000 Convention on the International Protection of Adults and the Recommendation of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults adopted on 23 February 1999 , stating that:

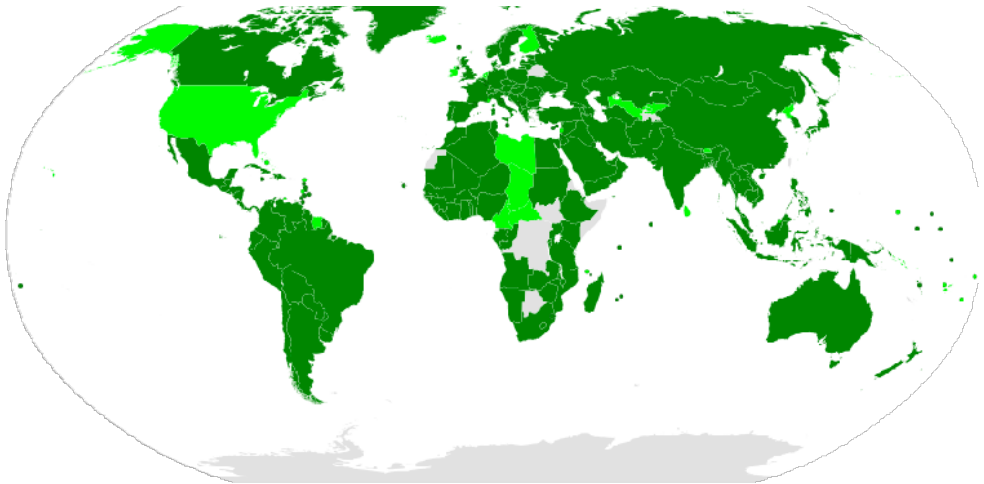
1. National laws need an adequate legislative framework providing for sufficient flexibility to allow for various legal responses, and it is the work of these laws to define the selection of the chosen means.
2. The law must offer protection measures or other simple and inexpensive legal arrangements.
3. Measures that do not necessarily restrict the legal capacity of the person concerned or a specific intervention should be decided without the need to appoint a representative with continuing powers.
4. Measures requiring a representative to act jointly with the adult concerned and take them into consideration should be considered, along with measures providing for the appointment of more than one representative.

The Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities , the San Jose Charter on the Rights of Older Persons of Latin America and the Caribbean (2012) , the recently signed Inter-American Convention on Protecting the Human Rights of Older Persons , which is being ratified, and the Brasilia Regulations Regarding Access to Justice for Vulnerable Persons .

Globally, the 2006 UN Convention on the Rights of Persons with Disabilities (CRPD) , in force since 3 May 2008 and ratified by more than 160 countries, of which almost 90 have ratified their optional protocol .

The Convention is overseen by the Committee on the Rights of Persons with Disabilities , which has the power to penalize States for breach of obligations arising from the treaty.

It was ratified by the EU, meaning it became part of the Union's legislative body in January 2011.



CRPD states parties and signatories:

- Signed and ratified
- Signed but not ratified
- Neither signed nor ratified

The Convention on the Rights of Persons with Disabilities is important within Human Rights and should have an impact on notarial activity.



I. THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRDP)

The UN's approval of the Convention on the Rights of Persons with Disabilities was an historic event for more than 650 million people around the world, putting disability on the level of Human Rights and entailing a paradigm shift in the treatment and conception of persons with disabilities.

It was approved on 13 December 2006 following an incredibly swift negotiation process on the international stage, jointly involving not only the governments of the various States but also civil society, and in particular the body of associations of people with disabilities, a reflection of the now established principle of **"Nothing about us without us"**.

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

A. THE IMPORTANCE OF THE CRPD

The place that this international human rights treaty holds in each country's sources of law depends on the mechanism adopted by each State for its reception as a binding national law, i.e., whether a monist or dualist system is adopted.

Once incorporated into the legal system of each country, it becomes part of national law, and the legal principles they contain are directly applicable with a twofold effect: first of all in terms of interpretation, in that all legal agents (judges, prosecutors, notaries, lawyers...) must interpret legislation in accordance with the convention, and also in that they impose on States an overriding requirement to adapt their own legal texts, considering that because it is a human rights treaty it is incorporated into the sources of law with a constitutional value.

B. ITS PURPOSE AND ITS GENERAL PRINCIPLES

Article 1 of the CRPD sets out its purpose and a broad definition of disability by establishing that the purpose 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.

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

In addition, Article 3 recognizes general principles, such as:

- a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons.
- b) Non-discrimination.
- c) Full and effective participation and inclusion in society.
- d) Respect for difference.
- e) Accessibility.
- f) Equality between men and women.
- g) Respect for the evolving capacities of children with disabilities and respect for their right to preserve their identities.

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

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

The CRPD enshrines a number of rights which we may classify as:

- a) Equal rights, such as equality and non-discrimination (Article 5), accessibility (Article 9), equal recognition before the law (Article 12) and equal access to justice.
- b) Protection rights, such as the right to life (Article 10), protection in situations of risk and humanitarian emergencies (Article 11), etc.
- c) Personal liberty and autonomy rights, such as liberty and security of person (Article 14), liberty of movement and nationality (Article 18), etc.
- d) Rights of participation, such as participation in political and public life (Article 29); and
- e) Basic social rights, such as education, work and employment or health.

C. A FUNDAMENTAL IDEA

Awareness-raising in article 8:

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

- a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;
- b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life.
- c) To promote awareness of the capabilities and contributions of persons with disabilities.

D. THE UNAVOIDABLE ISSUE OF ARTICLE 12

CRPD article 12 is the cornerstone for the exercising of rights by persons with disabilities, since legal capacity, understood as the capacity to act, is "the door through which all rights may be exercised", an essential precondition in order to enjoy and exercise all rights on the basis of equal opportunities.

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

The drafting of the definitive text of this article gave rise to serious discussions and even threatened to endanger the very adoption of the final text of the Convention, with the debate focusing on the distinction between legal capacity and capacity to act, since whereas the countries of the Western world, both in Europe and America, led by the EU, argued for full recognition of the capacity to act, others, such as the Islamic countries, China and Russia, drew the line at legal capacity, leading to the startling inclusion of an exception in the form of an unprecedented "footnote" to the article itself, subsequently deleted in the final text approved by the UN General Assembly, following which the definitive version of the aforementioned article reads as follows:

"Article 12. Equal recognition before the law:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property."

In truth, the first paragraph does not involve an ex novo creation, but rather asserts and underpins a prior, pre-existing legal situation, the rights of people with disabilities to have their legal personality recognized.

Paragraph 2 is more categorical, deploys a greater scope and triggers more destabilizing effects, since it specifically asserts that persons with disabilities have legal capacity on an equal basis with other men and women in all aspects of life and, in order for this to be realised, it is necessary not only for it to be effective with regards third parties, but also to recognize the validity and effectiveness of the rights exercised and acts granted on equal terms.

Paragraph 3 recognizes the capacity to act, although not expressly mentioned with this Latin terminology, but that we know it means "exercising the legal capacity", imposing on States the obligation to adopt the pertinent measures that provide persons with disabilities with the necessary support that allows them to exercise it, setting out in point 5 specific expressions of the exercise of rights, expressly indicating that States must "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".

Particular mention should be made of paragraph four in that it obliges the States to provide persons with disabilities with appropriate and effective safeguards in exercising their legal capacity, not as a limitation but to prevent abuse, ensuring that in all cases such safeguards, or "reasonable accommodations" should guarantee respect for the rights and "autonomy" of individuals, free of conflict of interest and undue influence, ensuring at all times that these safeguards are proportional and tailored to the "person", subject to review by "an authority or judicial body", in accordance at all times with the "higher interest of persons with disabilities".

different signatory countries to remove obstacles that could entail inequality or discriminatory treatment with regard to persons with disabilities. Consider Article 8, which refers to "promoting awareness of the capabilities... of persons with disabilities" or Article 26, indicating that States shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. Then there is Article 32.1 which, based on the importance of international cooperation, sets out as a measure "facilitating and supporting capacity-building, including

through the exchange and sharing of information, experiences, training programmes and best practices, between States"; Article 16.3, which in order to prevent the occurrence of all forms of exploitation, violence and abuse imposes on States appropriate forms of "assistance and support"; Article 19(b), concerning the right to live independently and be included in the community, referring to "in-home, residential and other community support services"; Article 23.2, establishing that "States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities" and Article 23.3 "States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families".

That said, the direct relationship between the principle of personal autonomy and the exercise of legal capacity with civil legal support is clear, meaning that, without attempting to downplay the importance of the CRPD articles overall, Article 12 is perhaps one of the precepts to which we must grant most importance in the sphere of private law, which is, per se, the branch that regulates the exercise of rights on the part of individuals.

This article has to be put in relation to the **general comments prepared by the CRPD monitoring committee** concerning the interpretation of Article 12, which literally read:

"Normative content of Article 12

Article 12, paragraph 1

- Article 12, paragraph 1, reaffirms the right of persons with disabilities to be recognized as persons before the law. This guarantees that every human being is respected as a person possessing legal personality, which is a prerequisite for the recognition of a person's legal capacity.

Article 12, paragraph 2

- Article 12, paragraph 2, recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all areas of life. Legal capacity includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships. The right to recognition as a legal agent is provided for in article 12, paragraph 5, of the Convention, which outlines the duty of States parties to "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... ensure that persons with disabilities are not arbitrarily deprived of their property".

- Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.
- In most of the State party reports that the Committee has examined so far, the concepts of mental and legal capacity have been conflated so that where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed. This is decided simply on the basis of the diagnosis of an impairment (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person's decision-making skills are considered to be deficient (functional approach). In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.

Article 12, paragraph 3

- Article 12, paragraph 3, recognizes that States parties have an obligation to provide persons with disabilities with access to support in the exercise of their legal capacity. States parties must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect.
- Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making. Article 12, paragraph 3, does not specify what form the support should take. "Support" is a broad term that encompasses both informal and formal support arrangements,

of varying types and intensity. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication. Support to persons with disabilities in the exercise of their legal capacity might include measures relating to universal design and accessibility – for example, requiring private and public actors, such as banks and financial institutions, to provide information in an understandable format or to provide professional sign language interpretation – in order to enable persons with disabilities to perform the legal acts required to open a bank account, conclude contracts or conduct other social transactions. Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences.

- The type and intensity of support to be provided will vary significantly from one person to another owing to the diversity of persons with disabilities. This is in accordance with article 3 d), which sets out "respect for difference and acceptance of persons with disabilities as part of human diversity and humanity" as a general principle of the Convention. At all times, including in crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected.
- Some persons with disabilities only seek recognition of their right to legal capacity on an equal basis with others, as provided for in article 12, paragraph 2, of the Convention, and may not wish to exercise their right to support, as provided for in article 12, paragraph 3.

Article 12, paragraph 4

- Article 12, paragraph 4, outlines the safeguards that must be present in a system of support in the exercise of legal capacity. Article 12, paragraph 4, must be read in conjunction with the rest of article 12 and the whole Convention. It requires States parties to create appropriate and effective safeguards for the exercise of legal capacity. The primary purpose of these safeguards must be to ensure the respect of the person's rights, will and preferences. In order to accomplish this, the safeguards must provide protection from abuse on an equal basis with others.

Article 12, paragraph 5

- Article 12, paragraph 5, requires States parties to take measures, including legislative, administrative, judicial and other practical measures, to ensure the rights of persons with disabilities with respect to financial and economic affairs, on an equal basis with others. Access to finance and property has traditionally been denied to persons with disabilities based on the medical model of disability. That approach of denying persons with disabilities legal capacity for financial matters must be replaced with support to exercise legal capacity, in accordance with article 12, paragraph 3. In the same way as gender may not be used as the basis for discrimination in the areas of finance and property, neither may disability".

WE SHOULD HIGHLIGHT:

1. This is an example of a pioneering provision which places obligations on the States, the vast majority of which will be required to reform their domestic legislation regarding legal capacity, reforms in which the traditional model based on the "replacement" of the person will need to give way to a model of human rights based on the intrinsic dignity of all persons as enshrined in the Convention and which champions a "support" system.
2. Few national laws are presently adapted to the terms of the Convention; generally all laws, through the incapacitation procedure and appointment of a guardian, deprive persons with disabilities of the exercise of legal capacity on the basis of what the committee calls "mental capacity", i.e., the ability to make decisions which, logically, varies from one person to another not only because of the existence of a disability but also for family, cultural, social or environmental factors. However, the incapacitation procedures in our laws based exclusively on a status, outcome or functional approach do not provide the necessary support to exercise rights but rather DEPRIVE persons with a disability of the possibility of exercising them.
3. The support system must respect the principles set out in Article 12.3 and which vary both in intensity and the manner in which they are provided, as they must be suitable for the individual in question.
4. This is an international standard embedded in most legal systems with a quasi-constitutional value, meaning that it is binding and enforceable for all legal practitioners.



II. THE IMPACT OF THE CRPD ON NOTARIAL ACTIVITY

Confusion abounds today as we have a directly applicable higher-ranking law (the UN Convention) pointing in one direction and, alongside it, national laws pointing in another direction.

All public and private stakeholders are called on, as long as precise legislative reforms do not take place, to, on the one hand, promote these legislative reforms and, on the other, adapt the current regulations to the requirements of the Convention.

Neither the scope of preventive legal certainty of which notaries form part nor the scope of remedial or punitive legal certainty (Judges, Prosecutors, Forensic Doctors) can remain oblivious to this requirement. The legal and judicial instruments currently in place must therefore be interpreted and adapted, i.e., "reasonably accommodated", in a way that enables the highest possible compliance with the principles of the Convention, without this constituting a waiver of the full enforceability of what is enshrined in it. Indeed, the opposite, as it demonstrates the need for such legislative reform, given that the current situation generates more legal uncertainty and will depend on the sensitivity of each practitioner producing one outcome or another.

Law must respond to today's social reality, which is why the New York Convention now reflects the new concept of disability focussed not on the existence of a deficiency in the individual, but a barrier in society preventing him or her from acting. That is why private law, and civil law in particular, must adapt to this new paradigm. 21st-century society cannot be allowed to provide a single mechanism rendering a person with disabilities as legally incapable as this would be contravening the Convention, leaving the question of whether this procedure is adapted to the Convention in the hands of the sensitivity of each legal practitioner and, more importantly, not ensuring the free and equal development of the personality of persons with disabilities nor the exercise of their legal capacity under the terms recognized by the Convention.

We must explore the role of notaries in promoting and respecting the right of persons with disabilities to exercise their legal capacity, since if there is a quintessential authority before which very diverse rights are exercised by any member of the public, it is the notarial authority. Having arrived at this point, we must ask how the notarial authority should engage in the correct implementation of the Convention and the measures arising from it.

The United Nations rapporteur, in her Report presented to the UN General Assembly in December 2017, refers to notaries as **authorities**, to the importance of **judgement of capacity carried out by the notary** and the **need for training** . Specifically she states in point 77 that "In doing so, notaries make assessments of the capacity of individuals entering into legal relationships". She adds that the notariat should be aware of the recognition of the exercise of legal capacity and the support paradigm brought forward by the Convention, "in order to ensure that their work does not translate into a de facto restriction of legal capacity".

We know that in practice, when a person with disabilities who is not legally incapacitated attempts to conclude a legal business for which they would need such assistance or support and this situation is detected by the legal practitioner, generally a notary, practically the only option afforded under national laws is that in order to avail themselves of such assistance they must be previously incapacitated. Thus restriction to legal capacity arises de facto, since instead of receiving assistance and support for exercising their capacity, they are deprived of the very capacity they are trying to assist and support.

The Latin-Germanic notariat, or as the rapporteur labels it, "civil law tradition" is, essentially, an element of preventive legal certainty, an authority which, in exercising its public function as a legal professional, advises and informs private individuals in the field of their private legal relations. The notary establishes and brings documentary form to the acts or contracts governing these relations, bestowing authenticity on them through the authority to attest to documents invested on notaries by the State, and as such provides them with particular probative value, in trial and beyond, as well as enforcement status.

Notarial authority is thus configured within the laws of these countries as a legal professional on whom authority to attest to documents is invested and who as such acts as a security instrument in legal relations among citizens or, if the prevailing terminology is preferred, among consumers. This comes irrespective of the social condition, culture, gender, age, ethnicity, education or other personal conditions of the individual who requires their services.

On an institutional level, the UINL is aware of the great responsibility and challenge facing notaries and has established legal defence of the individuals as one of the priorities of its legislation, with particular emphasis on those in especially vulnerable situations.

We are aware of the great challenge and responsibility we have taken on and are very satisfied with the positive efforts being made by the Notariats of all 87 UINL member countries, nevertheless we are well aware of the long road ahead.

That is why a technical event was held at the United Nations Office in Geneva on 23 and 24 April, attended by several international experts from the UN and the Hague Conference and more than 40 notaries from 19 UINL member countries. The technical debate which took place reached a series of conclusions that were subsequently discussed and expanded on at the forum entitled **"THE NOTARIAT AND PEOPLE IN A SITUATION OF VULNERABILITY: CHALLENGES FOR THE FUTURE"** held in Buenos Aires in early October 2018.

The specific objectives of the forum were to discuss the challenges facing notaries with regards the legal defence of persons in a situation of vulnerability and to exchange experiences to allow each notary to provide the most appropriate legal response for his or her citizenry through the legal certainty provided by the notarial institution. A final objective was to strengthen the partnership between the international human rights system, notaries and organizations for people with disabilities in order to share with global institutions and governments our expertise in the protection of fundamental rights, providing that which defines us: legal certainty to enable development and social cohesion.

Finally, **the Assembly of the UINL's 87 member Notariats, meeting in Buenos Aires** on 1 October 2018 in a joint session with the General Council, unanimously adopted the following **Recommendations on the Role of the Notary as a Provider of Institutional Support to Persons with Disabilities**.

1. Empowering the figure of the notary as an institutional support provider for persons with disabilities.
2. Reinforcing the judgement of capacity or discernment that notaries carry out at each notarial act they authorise in order to guarantee the exercise of rights on behalf of persons with disabilities.
3. Strengthen the figure of the notary as an authority that ensures the existence of safeguards to prevent abuse and undue influence, as well as ensuring respect for the will and preferences of persons with disabilities.
4. When receiving information, the duty of assessment and advice, and when issuing free and informed will, the notary provides reasonable accommodation. Direct communication with the notary is essential and therefore physical and legal accessibility must be ensured by promoting the use of new technologies to make such communication feasible and a reality.

5. Promoting legislative reforms recognizing the exercise of legal capacity under the terms of the Convention: in this regard, call upon the legal creativity of the notary to draw up new legal instruments that respond to the new social reality, as has been the case in other areas, such as time-sharing and common holds in real estate, or as protected assets or preventive power with regards the rights concerning individuals. The Notariat is aware of the new problems facing society and we can provide a legal response.
6. The intervention of a notary can ensure the exercise of rights by persons with disabilities on a basis of equality. In order for this to happen in reality it is not only crucial that they hold effects in relation to third parties, but also that the validity and effectiveness of the rights exercised and acts granted are recognised. For this reason, it is essential to reinforce the judgement of capacity or discernment made by the notary.
7. Dissemination in the Notariat via the UINL: congresses, seminars, legal research awards, publications and to establish a day in order to raise awareness of this aspect within the UINL.
8. Where applicable, assess the preparation of recommendations, operational protocols and indicators of the existence of abuse or conflict of interest.
9. Training for notaries on the key elements of the system and the use of supports, all in line with the Convention. This is referred to in point 60 of the Rapporteur's report. At the Notarial University, for instance.
10. Draw up a joint UINL action plan alongside the United Nations Rapporteur and the Monitoring Committee. In this regard, the rapporteur's commitment to participating in the international forum on this issue should be stressed.
11. Detect private judicial standards that limit freedom of will in designing self-regulation systems, or discriminatory standards limiting the exercise of rights by persons with disabilities.
12. Each notariat is encouraged to contact both their respective governments and tertiary sector organisations on a national level in order to provide cooperation in the implementation of the Convention under the premise of "systemic neutrality", thus ensuring the exercise of rights on equal terms.

A. THE NOTARY: AUTHORITY AND INSTITUTIONAL SUPPORT

There are two sides to the civil law notary: public authority and legal practitioner. These sides should not conflict with each other, but rather the former should define the function and the latter describe a part of it.

In this system, the civil law notary is, essentially, an element of preventive legal certainty, an authority which, acting as a legal professional, advises and informs private individuals in the field of their private legal relations. The notary establishes and brings documentary form to the acts or contracts governing these relations, bestowing authenticity on them because of the authority to attest to documents invested on notaries by the State, and as such provides those documents with particular probative value, in trial and beyond, as well as enforcement status.

As part of each country's legal system and due to the regularity of legal businesses, the Notary is responsible, in the extrajudicial legal field, for ensuring adequate respect for the protection safeguards established in each system at the time of entering into a legal business in order for it to be validly born and be effective in the legal process, since in our legal structure notarial intervention takes place at a crucial moment: that in which wills are defined, consent is awarded, rights are exercised and legal businesses are generated. The civil law notary is configured as an instrument of preventive legal certainty in legal relations among citizens.

Notarial intervention enables any citizen, regardless of their origin or status, to exercise their legal capacity, their capacity for self-regulation and the exercise of their autonomy within the legal framework established by each system. In short, it allows individuals to exercise their rights on a daily basis, whether they are purely patrimonial (sale or mortgage loans), personal (preventive powers, decision-making powers...), family-related (prenuptial agreements, marriage, recognition of children, divorce...) or concern issues of inheritance (wills and divisions of estate...).

As a jurist, the notary does not simply collect statements of intent; rather, his or her essential function is to provide consultancy, advice and assistance, and it is essential for our function to provide special assistance to the most needy party, thereby performing a balancing function between the parties. In this regard, **the notary performs micro-empowerment in each act at the most sensitive and important moments, enabling citizens to exercise their rights on an equal basis and providing them with due legal certainty.**

The notary is an authority who, in performing his or her function, is closely related to the individual: with the exercise of their rights, personal development, economic activities and personal interests.

If there exists one group which has historically been ignored by civil law, specifically in terms of exercising their rights given there was only ever an interest in protection of their property and not integration, it is the group of people with disabilities.

If we are to include the elderly within this group, then we are dealing with one of today's largest minority groups. We must consider the ageing of the population, among others in Europe and in North America. Ageing can lead to physical or cognitive losses, which can cause an incapacity or a disability to some people.

As such, the Notariat must be well prepared to deal with the social demands of these groups; crucially; if the Notariat fails to do so, we will be impeding the development of their personalities and respect for their rights, ensuring their freedom of will.

We are currently in the process of applying an international treaty, regarding which:

1. We have international organisations that monitor its implementation and examine each country in terms of its internal legislation (New York Convention Monitoring Committee).
2. It informs the legal system with this interpretative function that all legal practitioners who must apply the international treaty on a day-to-day basis must know.
3. It imposes on signatory states the duty to reform their domestic civil law system, which must respect the principle of "systemic neutrality", i.e., respect for the legal configuration of each country with the necessary adaptations to the new social reality. As such, the Latin-Germanic tradition systems in which notaries are a fundamental part of legal certainty must provide a response to these changing social demands.

Notaries can and must offer what, in the terms of the convention is termed "support" in exercising capacity, just as they do for any citizen, by assessing, warning and advising on the scope and consequences of any business, as well as giving their own opinion regarding the opportunities entailed, as we do for any citizen who requests our intervention.

In this regard I would emphasize the role of the **notary as an institutional support** for the exercise of rights and an authority in relation to **safeguards** in two areas: positively, to respect rights, will and preferences, and negatively, to prevent abuse and undue influence.

So let us take a look at the **"notarial process"** on the basis of expression of will, consultancy work, judgement of capacity or discernment carried out by the notary and provision of informed consent, since it is in this process where:

- The will and preferences of the individual are communicated and will is expressed in a specific case.
- This consultancy and advisory role of the notarial function should be provided for the exercise of a particular right.
- The legal capacity of the parties involved must be respected, enabling the exercise of rights with institutional support by the notary in a specific act and not generically.
- Access to the necessary support must be made available on equal terms.
- This judgement of capacity, discernment and understanding is performed by the notary in each notarial act to guarantee the equal exercise of rights, since in order for this equality to be real and effective it is essential that the rights exercised be valid and effective and that they are not approached solely on the basis of disability, since if this does not occur in reality, they would fall outside of regular legal affairs.

B. A NOTARIAL PROCESS

This is a phase in which the presentation of the requesting or appearing party's intentions and will and the advice provided by the notary can become confused and the notary has to investigate and interpret the party's will.

Communication or immediacy with the notary is required in order for the parties to explain what they want and for the notary to inform them of the legal consequences of their actions and the effects and scope of the representations to be incorporated into the instrument drawn up by the notary and, ultimately, assumed by them.

Reasonable accommodation must therefore be provided in this area in order for such communication to be made, so that persons with disabilities can access notarial services on an equal footing to any other person.

C. EXPRESSION OF WILL: RECOMMENDATIONS FOR LEGAL ACCESSIBILITY

To this end we have a series of recommendations for legal accessibility:

- Accessibility requirements for the exercise of legal capacity.
- Accessibility of information, communications and other services.
- Facilitate the use of sign languages, Braille, augmentative and alternative communication and all other means, modes and formats of accessible communication.
- The duty to provide reasonable accommodation.

1. Train notaries and notary staff

The Rapporteur herself, in Recommendation F, expressly states that training on the right to legal capacity of persons with disabilities should be promoted and provided for matters to be put to public authorities, covering judges, notaries, service providers, persons with disabilities, their families and other key actors.

2. Ensure effective communication

Effective communication must be provided in accordance with the needs of the person with disabilities and the reasonable accommodation that is needed to facilitate communication with the notary.

The purpose is to ensure the understanding of the information provided by the notary and the correct communication between the notary and the person with disabilities. The services of expert sign-language interpreters, guide-interpreters or mediators and other means –including appropriate technological means– and any other means of communication required must be procured to ensure effective communication between the person with disabilities and the notary.

Active listening to the person, his/her opinion, will and wishes are essential.

3. Use plain language

It is advisable to write short sentences in plain language with no technical jargon, using as neat handwriting as possible and in a format that facilitates reading and understanding.

Persons with an intellectual and/or psychosocial disability, as well as the deaf, the hearing impaired, the deafblind and the elderly, may require more time and personal availability on the part of the practitioner to communicate.

Applying the necessary accommodation is suggested as good practice, including, for example, in the case of not understanding something being asked by a person with disabilities, asking them to say it again without making him or her feel nervous, giving each person the time they need to speak and clearing up questions in simple, clear language.

An instructional, simplified and explanatory reading of the public document by the notary is essential.

The person with disabilities (PWD) should be given time to express themselves in lieu of the long-standing practice of replacing them.

4. Remain within the PWD's field of vision

In the case of hearing impaired people who communicate orally and lip-read, the practitioner must position him or herself within the person's field of vision, articulate and modulate their words correctly at a moderate pace, with or without voice, as indicated by the person.

5. Provide basic information on rights and obligations

The Brasilia Rules for the field of remedial justice (judges and prosecutors) include the recommendation to provide basic information on the rights and obligations of PWDs at all stages of the judicial or extrajudicial process in order to ensure effective access to justice on an equal basis with others.

In the notarial sphere, this information and consultancy role is essential and is enshrined in the laws of each country, as we will see further on.

Persons that notaries must advise include persons with disabilities. Notaries must provide all the technical and legal support required by PWD, as they do with any other citizen who appeal to them, acting for and providing institutional support to the person with disabilities.

6. Seek information on the way they require or would prefer to receive information

There is a general belief concerning the use of certain forms of communication by certain groups of persons with disabilities (use of Braille by blind people or sign language by deaf people). Notaries should ask the person about the way they require or would prefer to receive information and not presume they have a certain preference or favoured form.

By way of example, only 10-15% of blind people read Braille, and 93% of visually impaired people have a residual or some degree of vision that may differ functionally from one person to another. Similarly, the modalities that each deaf person has in the use of sign language may be different.

It is therefore advisable to adapt the language used according to circumstances such as age, maturity, level of education, intellectual capacity, disability or socio-cultural status. We suggest that questions and information be set forth clearly and in a simple structure.

7. Ask whether they need any support and what kind

From the first intervention, and in the event that the notary does not know or has doubts about how to interact with a person with disabilities, it is advisable to ask them about their need for any kind of support.

In such cases the definition of support will be prioritized by the person with disabilities him or herself. Consequently, the necessary elements should be gathered to design an appropriate intervention strategy for that particular person and to make and/or request the necessary support so that the person can act on an equal footing with others.

8. Treat persons with disabilities naturally and not as children

Sometimes, when addressing a person with disabilities or an elderly person, people can treat them as they would a child, either by using diminutives or via the tone of voice they employ, for example.

In all cases, and in particular with regards persons with intellectual or psychosocial disabilities, the deaf and hearing impaired, they should be handled naturally, not overacting and using simple but not babyish language (e.g. excessive use of diminutives), preventing the loss of the required technical rigour reconciled with due simplicity.

9. Consider the perception of the listener and not of the speaker

Stigmatizing words and/or phrases based on negative stereotypes about the identity of persons with disabilities are often used.

We recommend using respectful treatment while at the same time verifying the PWD's understanding and, if misunderstandings exist, finding alternative ways to explain matters.

To check whether words or phrases are stigmatizing, consider the perception of the person who hears them and not the person who speaks them.

10. Address persons with disabilities directly and not outsource communication

If the person with disabilities is accompanied, we recommend that the practitioner speak directly to the PWD and not to their companion or interpreter, thus avoiding outsourcing in the handling of information.

We would note that more credibility is often given to the word of the person's family than to their own. The same applies to health professionals, who sometimes dismiss the word of the PWD, particularly those with a psychosocial and/or intellectual disability. This is also the case for deaf people, particularly when their family members are "hearing".

11. Avoid any type of invasion of personal space

Sometimes the PWD may require adaptations and accommodation (e.g., with respect to blind people, indication of the specific place to sign; people with physical disabilities of the upper limbs may sign with their feet or mouth).

Each person knows what accommodation they need and what is most comfortable and convenient for them. You should therefore ask them what their specific requirement is.

Any invasion of their personal space should be avoided (e.g., taking their arm if they are blind or putting a pencil in their mouth unless expressly requested).

12. Physical accessibility

Training in "universal design" integrated in the social and human rights model of disability is recommended.

Particularly to facilitate the circulation of people with sensory disabilities (visual, auditory and deaf blind), signage is suggested in suitable places and accessible formats.

For people with a physical disability, it is advisable to remodel spaces for entry and movement, lifts and the construction of ramps, as well as the installation of automated lifting systems.

We recommend providing adequate physical space for the PWD to have access to the notary office and carry out other acts on an equal footing with others. (Table and counter heights).

Confidentiality at reception or consultation sites:

Appointments or consultations with persons with disabilities should be held in places that generate security and trust in the case of persons with psychosocial or intellectual disabilities, where they are guaranteed privacy and confidentiality, as well as for reading out loud (persons with sensory disabilities).

General recommendations for interacting with persons with disabilities:

- Act naturally.
- Speak directly to the person, even if they have a companion with them.
- Request information from the person with disabilities about any help they may need before providing it to them.
- If you do not understand what the person wants to tell you, ask whether he or she can make the appropriate clarifications.
- Focus on what they have and not what they are missing.
- If you regularly extend your hand to shake a client's at the beginning of the appointment, do so with the person with disabilities too.
- Do not generalize – the behaviour of one person with disabilities is not necessarily that of another.

Recommendations for interacting with a PwVD

- Do not take a visually disabled person's cane as it is a means of security and a key guide for them.
- Do not replace words and phrases you regularly employ such as 'look at it this way', 'see here', etc., as they also use them frequently.
- Provide information on things they can't see, such as the characteristics of the place you are in or the people present. Do not accompany instructions with gestures that cannot be seen or words without a specific reference, such as 'here' or 'there'; instead, provide more details with information on spatial situation to make location easier, such as: "to the right of the table", "on your right", etc. Another option is to ask whether you can guide their hand towards the object.
- Many times a person with a visual disability has a good handle on the area around them, seeming to see more than they can; ask them what kind of help they need.
- To indicate where a chair is, for example, ask whether you can place their hand on the back of the chair or on the railing of a staircase, etc., or whether verbal instructions are enough.
- Inform them when someone enters or leaves the room.

Recommendations for interacting with a PwMD

- When faced with an obstacle, staircase or architectural barrier, always ask a person with a motor disability how you can help.
- Sometimes a wheelchair-using PwMD can walk and only uses the chair to conserve energy or get around faster.
- Ask before offering help; do not force them to receive unnecessary aid.
- There are no objections to using expressions such as 'walk', 'run', etc.

Recommendations for interacting with a PwHD

- Ask the deaf or hearing impaired person whether they use spoken or sign language.
- Request, where applicable, an expert interpreter or communication mediator to enable interaction and communication with the notary.
- Speak in front of the person.
- Get their attention with a signal before you talk to them. To do this, it is better to approach them and touch their shoulder gently or wave your hand in the visual space of the person with a hearing disability.
- Do not cover your mouth with your hand when speaking.
- Vocalize clearly, but without exaggerating or yelling. Do not talk quickly.
- Respect turns to speak.
- Use short, simple sentences.
- If necessary, aid communication with a gesture or written word.
- If you mention unusual forenames, family names or words during the conversation, put them in writing.
- If several people are to be involved in the conversation, arrange them in a circle as this enables good visibility for all the people engaging in the conversation.

Recommendations for interacting with a PwID

- Treat people with an intellectual disability in accordance with their age.
- Stay calm and employ active listening.
- Do not be afraid to ask the person to repeat something if you did not understand what was said.

- Do not finish sentences for them; let them do it.
- Use clear and simple language, short sentences, avoid abstractions, metaphors and ambiguous language.
- Reframe concepts if necessary.
- Remember that, unless legally restricted or incapable, they have full legal capacity.

D. THE DUTY OF CONSULTANCY

Strictly speaking, information, advice, assistance and consulting activities are integral parts of notarial consultancy in its broadest sense:

What happens if the person appearing before a notary is a person with disabilities? Of course they must, like any person, receive the full notarial action essential to the public official and the legal professional. They are users of the public service provided by the notary in both its senses (public authority and legal practitioner) with all the aspects we are going to develop, i.e. consultancy, information, social advocacy, etc., and we must provide them with the accessibility measures and reasonable accommodation they need.

As such, notaries offer what, in the terms of the Convention is termed "support" in exercising capacity, just as they do for any citizen, by assessing, warning and advising on the scope and consequences of any business, as well as giving their own opinion regarding the opportunities entailed, as we do for any citizen who requests our intervention.

1. Information

Notaries must, most importantly, inform the client and, on the basis of their aspirations, the purpose pursued and their business will, inform them of the requirements for the validity of the legal business, bringing to them the most appropriate legal form, and inform them of the scope and consequences of the legal act which they intend to pursue.

Unlike lawyers, who have a professional duty of partisanship, notaries must attend equally to the interests of the different parties at stake, since the public function "must be provided to all on an equal footing"; with the special feature that, when informing, this impartiality must not be simply formal, which in cases of conspicuous inequality of grantors would entail a true taking of the side of one of them, but substantial, so that the notary must provide an extra dose of assistance and more complete and comprehensive information to the contracting party in need of special assistance, either because the other party is advised by a lawyer and they are not, or for cultural or social conditions or because of a disability.

2. Advice

When informing, the notary explains the possible ways to achieve the purposes the grantors intend, with their characteristics, risks and implications, and recommends the most appropriate way within the possibilities. Therefore, individuals usually require counselling or guidance from their notary, and this is a sign of the trust that society has placed in the profession, based not only on our proven technical knowledge but, above all, our ongoing service based on the truth and prudence which accompanies our intervention.

The service that notaries provide to society as advisors falls within the public dimension of their function, to the extent that the duty to advise, which falls within scrupulous respect for and control of lawfulness, prevails even when the request for guidance is not accompanied by a simultaneous documentary requirement, and the advice may well consist of not drafting one.

3. Assistance

The duty of assistance has a twofold manifestation, since on the one hand it arises from the duty of impartiality that sees notaries provide the most thorough assistance to the most needy party, and on the other entails a lasting commitment since, once the parties have been advised, informed and counselled, the notary will accompany them along the entire legal road they have chosen.

4. Consultancy in the strict sense

This duty adds quality and utility to the exercise of notarial public faith and is inherent to the notarial function.

Consultancy, per se, is what the notary must by trade provide to any client who so requires it and who appears in a situation of imbalance with regard to another, more powerful, more cultured party or one with their own legal assistance, i.e., what we call the levelling function of grantors.

Notaries should be impartial but cannot be neutral before the risk of injustice, fraud or abuse, nor before the absence of civil liberty in the manifestation of will. Notaries conclude their actions in the last redoubt of the duty to provide consultancy, which is nothing but the "explanatory" reading of the deed, which cannot be conceived as a merely routine and aseptic disclaimer of a written text, but as an understandable and operational communication (making it possible to decide with sufficient grounds) of its entire content. To this end, this communicative reading must be carefully adapted to the capacity and culture of the grantors so that they know at the time of signing, which is the moment of truth, what they are going to be obliged to do.

From the first visit, the requesting party makes to the notary's office through to the "explanatory" reading that we have just seen and subsequent signing of the deed, there is a succession of steps the Notary must personally undertake in performing his or her consulting mission.

In this notarial process it is the notary alone, in the privacy of his or her office, who must receive, advise and help shape the will of the person and the party and who transfers it to the document, a process in which each notary applies not only their training and personal judgement, but also their own code of ethics and moral considerations.



III. PROVIDING INFORMED CONSENT IN ACCORDANCE WITH THE LAW: JUDGEMENT OF CAPACITY, DISCERNMENT AND UNDERSTANDING

The culmination of this entire **notarial process** is the provision of informed consent in accordance with the law, for the oversight of lawfulness performed by the notarial authority and the implementation of the so-called judgement of capacity, discernment and understanding which entails parties executing a notarial public instrument knowing and understanding the following precisely because of this notarial intervention:

- The appropriateness of the legal business that delivers on their intentions.
- Its adaptation to the law by virtue of prior checking, which is the obligation of the notary.
- That the form of legal transaction according to their will is the most legally compliant to it and
- All the purposes which it deploys, not only those initially intended, but also those that expressly derive from the law and which will result from the actions.

The "judgement of capacity, discernment and understanding" is one of the most important functions performed by the notary in what we have called the "notarial process", in order to confer legal certainty on the business formalized by means of the public instrument, which is also a manifestation of the control of legality incumbent on the notary.

It is the notary who checks that consent has been formed in accordance with the law, absent from vices and after being duly informed. This is one of the premises of the validity of the business: the importance of the notarial action is made clear by assessing and confirming the capacity of the grantors, since the notary must ensure that in his or her judgement the grantors have **sufficient civil capacity** to grant the act or enter into the specific business, as it will depend on the nature of the act or contract and on the requirements that substantive law provides regarding the capacity of individuals.

It is not a question of examining the person with disabilities (through an intelligence test or any other manner) in order to determine the extent of his or her limitations. The notary's role is not to verify that a person with disabilities exceeds a certain threshold of minimum competence. The minimum requirement that the notary must establish is not a certain personal competence, but that of ensuring that the contract effectively contains an informed, conscious and freely expressed will, even if the grantor needed to receive a high level of support in order to form it. This support does not rule out, but can instead require a high level of advice and consulting work to help them form their business will.

The notary's judgement as to capacity or understanding will be based not only on the intellectual qualities of the grantor and the nature of the instrument or contract to be executed, but also the will and preferences of the person, a consideration to be applied by the notary in accordance with the legal supervisory principle which governs notarial practice.

To that end the notary enjoys a privileged position for various reasons: knowledge of the social and economic reality of the person in question, his or her family circumstances, proximity to the specific case being considered, a relationship of trust with the individuals calling on the notary to act and, what is more, their decision is limited to the specific case raised in that instance, surrounded by parameters which are known to them and therefore easier to evaluate. This task furthermore clearly corresponds to the very nature and purpose of the notarial function: to match the legal provisions to the specific case, in accordance with the circumstances involved.

This must under no circumstances be understood as a subversion of applicable legal provisions or court decisions, nor as a detriment to the legal certainty which must preside over notarial practice, but rather just as an imperative to adapt them to the specific case and the assumption of an interpretative approach which favours social inclusion and respect for the human rights of persons with disabilities.

This means, no more nor less, than assuming a task which fosters the proper development of persons with disabilities, promoting, as enshrined in the Convention, their inclusion in society, ensuring that as far as possible their will is given due expression in order to control their person and property, and ultimately, that rather than being objects, they will, as fully as possible, be the subjects of law, given that notaries belong to what article 12 of the New York Convention refers to as an "authority", as the UN rapporteur indicated in her report.

For this reason, notaries must ensure the rights of persons with disabilities, either when they are personally involved in a notarial act or when their interests are compromised in a legal business. If a person with disabilities exercises their rights on their own, they must ensure that they are working with discernment, intent and liberty, i.e., that they really understand the scope of the instrument they wish to grant as the notary does with any member of the public.

The principles of civil law stipulate that human acts must be voluntary and consensual to produce effects. Voluntariness requires a basic understanding of its meaning and consequences. Therefore, the conclusion of the contract must be based on consent and, if the business is being authorized by an authority or public official, the authority or public official must assess that there is sufficient consent for the specific act. The notary will therefore assess capacity, i.e., the consent given by the parties, in accordance with the general rules, including in the case of PWD.

Likewise, when a person with disabilities requires the use of other supports in addition to the institutional support of the notary and this has previously been established by a court ruling or before the notarial authority itself, the notary will require the involvement of another person/s to provide this established support. In that case, the notary also has to assess that the person providing support understands the business and its legal consequences, including ensuring that he/she has a good understanding of the nature and responsibility of their actions in support of the person with a disability. All of these wills combined, i.e., that of the person with a disability and the person providing support, whether voluntary, compulsory or institutional, make up a single party allowing the former to exercise his or her rights on an equal basis.

Pending the necessary legislative reform, knowing that the notary by fulfilling his/her consultancy task and check on legality is complying with the role of support and authority to control safeguards and enable the exercise of rights, we will analyse the cases **in which we could find ourselves in notarial practice:**

A. PERSONS WITH A COURT RULING OF INCAPACITATION SUBJECT TO CARE AND PROTECTION SYSTEMS

In this case, as long as the legislator does not correct these situations and does not establish a transitional regime:

It will be necessary to comply with the rules of substantive law. As a public authority, we cannot authorize documents that can be sanctioned as null and void because they fail to comply with the requirements of substantive law.

We must work in accordance with the court ruling determining incapacitation and the care and protection system established by it, but in this case we have to remember:

- a) There are certain highly personal rights that cannot fall within the scope of a court decision, e.g., marriage, voting and wills, in respect of which we must comply with the specific rules set out in our respective legal systems.
- b) Even if the person is subject to a replacement system, with the involvement of a guardian or curator being necessary for the validity and legal effectiveness of the act, we must procure the effective engagement of the person with a disability, who will also be provided with advice and information since the notarial document will contain a legal act of theirs, e.g. acceptance of an inheritance or sale.

While it is true that the latter is not required by law, we cannot admit that an act in the life of a person takes place without the person's meaningful involvement and without their knowledge and consent.

B. PERSONS WITHOUT A COURT RULING: WITHOUT INCAPACITATION AND WITHOUT A CARE AND PROTECTION SYSTEM

This is the situation in which most people with disabilities live their legal life outside of incapacitation:

They buy bread, go to the movies, take the bus, buy clothes... without the so-called "care and protection system provided for by our national laws" being deployed in their regard, and it is these people who in most cases are forced to have themselves declared incapacitated when they have to perform a specific legal act for some reason, such as accepting an inheritance from their parents. This aspect is referred to by the rapporteur, who says that we can become a de facto impediment to the exercise of rights and a source of incapacitation.

This situation leads us to draw several conclusions about the current system:

1. The care and protection system is **only deployed in favour of incapacitated persons**, not PWDs seeking the protection of their assets nor person, and without any purpose of integration and promotion of personal autonomy or development.

2. **And actions taken are, in general, based on an assumption that persons with disabilities form an homogeneous group**, as if all persons with any form of limitation, particularly an intellectual one, **required the same treatment**.

The expression "full capacity" is used, whether one has it or not, when in reality the idea of "sufficient capacity" should be considered for each case and this will depend on many factors such as education, culture, life experience, etc. The social concept of disability, understood as a limitation, must be turned into a legal concept, in the sense of exercising capacity, which is what the Convention enshrines when recognizing the exercise of capacity to all people with the paradigm of support.

In these cases we must not only bear in mind the Convention – which is an internal law with a constitutional value – and the recognition of the exercise of capacity according to Article 12, but also the fact that, in accordance with national laws, given the ruling of incapacitation does not exist, our civil codes recognize capacity, as there is a presumption of capacity. This means that, in this case, the notary has a wide margin of manoeuvre in this work covering consultancy, advice, institutional support, informed consent and judgement of capacity of a person with the institutional support of the notary who checks the lawfulness of the instruments he or she authorizes, considering the **following recommendations**:

- With the exception of a court ruling, capacity is always presumed and there are no restrictions.
- Notaries do not perform a medical judgement: the "decisive" factor is not whether the person has a particular condition or to what extent, it is not a purely medical appraisal since various factors or circumstances can influence it as they can for any human being – such as cultural, educational, social factors, etc. The decisive factor for the notary is checking whether the person with disabilities has a clear perception, in accordance with their aptitude and discernment, of the consequences of the act they are entering into and for which the necessary support systems have been used in the absence of undue influence or abuse of any type.

- Notarial judgment of capacity or discernment does not refer to an abstract capacity or perfect capacity regarding any aspect of life. We do not do that with people who don't have a disability, either. Our judgement of understanding refers to a particular fact and act with specific coordinates and a specific moment.
- That in exercising capacity, the necessary support must be provided, assessing the individual's needs and preferences and the significance of the act or contract they wish to perform, in accordance with sufficient capacity for the specific case. Accepting a gift is not the same as taking out a loan, making a will or purchasing a bottle of water in the supermarket – the intensity of support will be different in each case.
- There is no exhaustive list by which support or reasonable accommodation is to be understood, as it will depend on the person concerned and the instrument to be granted or right to be exercised. There can be various supports from a functional point of view, such as the use of linguistic supports (sign language, Braille, tablets and computer devices) and material supports (assisted consent, assent made by other people...) and in all cases the notarial activity itself is configured as a form of institutional support.
- It is advisable to record in the public instrument all the actions performed by the notary as institutional support, as well as the material and functional support measures or other measures that allowed the person to exercise the specific right in question.
- "Undue influence" should not be confused with "support", as there is no limit to the intensity of support received, nor as to the bigger or smaller "part" that the will of the third party represents in the formation of the final joint will. In this regard, notaries must concern themselves with checking that influence is not undue, because it involves a conflict or clash of interests, and this must be recorded in the public instrument.
- Support is not the person signing with the PWD but the means, persons or reasonable accommodation necessary for the individual to understand and form his or her will in connection with a particular legal act.
- Consideration must be given to the specific circumstances involved, among others:
 1. The intensity of the support received.
 2. The economic and legal significance of the act.
 3. The prior fulfilment of performance.
 4. The establishment of future obligations by the PWD.

- The work of preventing abuse and undue influence that the notary should do as a public official.
- The notary's demand for true business consent: With more or less support or, if they prefer, none other than that provided by the notary, the person with disabilities **must want and understand** what he or she is entering into or deciding.
- The notary must check that the support is not a substitute, either because it forces or twists the will of the person with a disability or because it does not attempt to help shape and express this will and becomes a unilateral expression of the person providing the support, in the event of an absent or misunderstood attitude on the part of the person with a disability.
- Notarial checking that the support is acceptable and sufficient for the person with disabilities to form their own consent.
- The notary must rate the final result of the action with support; in the case of a negative judgement, the notary can and must refuse authorization if they consider there is no coherent, free, conscious and informed will.

IV. THE NECESSARY LEGISLATIVE REFORMS: THE NOTARY AS CREATOR OF LAW

One of UINL's recommendations was to:

Promote legislative reforms recognizing the exercise of legal capacity within the context of the Convention: in this regard, it welcomes the legal creativity of notaries in order to draw up new legal instruments in line with the new social reality, just as has been the case in other fields such as timeshare, common hold law, preventive powers and protected assets. The Notariat is aware of the new problems facing society and we can provide a legal response.

The main problem faced by the Convention is perhaps that, for the moment, we only have access to few global reforms and limited practical examples which give precedence to personal autonomy, and these practices are not enough to establish how we should

ensure ongoing assistance in the decision-making of persons with disabilities, and hence effective implementation of the support system.

The fundamental aspect is to establish **confidence and provide legal guarantees** for support systems for all people with disabilities, since otherwise disabled people could themselves be marginalised from economic and social life, given that any system which gives rise to insecurity is rejected by society, as proclaimed in the Convention with its reference to "authority or judicial body".

The characteristics of this NEW SYSTEM must be in our opinion the following:

1. It must dissociate itself from the previous concept of incapacitation. The distinction between capable and incapable is overridden by the Convention, i.e., **the exercise of legal capacity cannot be denied, but instead of denying, we must start from a positive point of view: the RIGHT to provide support to persons with disabilities in the exercise of their legal capacity must be acknowledged:** we could call them procedures to provide support in exercising legal capacity.
2. The support provision system must have the required legal certainty in order to guarantee persons with disabilities the right to exercise their capacity and to engage with third parties, so that they are not left out of the market. This is what the equal exercise of rights really involves. Therefore, judicial and non-judicial measures must be arbitrated with the intervention of the concept of an "authority" such as the notary or, where applicable, "judicial body" of the Convention to determine the support system. There will be formal and informal support depending on the legal significance of the act and the involvement of third parties.
3. Support shall vary depending on the subject, since we all have a different mental capacity, different environment, culture, different training and education, and depending on the purpose, that is, based on the exercise of the right in question and on its impact on third parties, given that buying a cinema ticket is not the same thing as buying a house: the so-called 'tailor-made suit'. Support based on these variants may be formal or informal.
4. The purpose of the support system must be to ensure the exercise of rights and it must be based on the person's preferences and will.
5. This demands that we devise even more flexible, temporary, reviewable and voluntary forms, addressing more the needs of the person than of the assets, helping individuals to take and implement their decisions rather than depriving them of their capacity to do so.

6. The supervision by an authority or judicial body should provide adequate safeguards in two dimensions:

A) Positive: the determination of support measures must guarantee the respect for the rights, will, and preference of the individual.

B) Negative: abuse must be prevented by the implementation of control mechanisms: an adequate control system of the actions of the physical person or legal entity that is responsible for the "support or assistance in exercising the legal capacity" of persons with disabilities. Such a control regime does not always need to be straightforward: it can simply foresee the need for certain supplementary consents or technical assistance in those cases where the person that has designed the protection mechanism has not provided for them.

7. Training and specialisation of all legal professionals is essential.

8. Support-determination systems should be established with an adequate advertising strategy in order to ensure their effective control and to ensure due knowledge by third parties, in order to enforce respect for the rights of persons with disabilities and to avoid people claiming lack of awareness or ignorance when their interests have been affected.

9. The liability regime for people and institutions performing support actions must be hardened, for those who perform such actions by direct appointment of the person with disabilities or their families. In addition to subjecting their work to the supervision of the public authority, a system should also be established, where appropriate, to make these people accountable to the individual and their assets, and/or to impose the creation of special guarantees, at least in cases where the person asking for the provision has not excluded them.

10. Intervention by the public administration should follow its own guiding principles: need (public intervention when the subject's factual, physical and mental circumstances require it), subsidiarity (adoption of public protection measures whenever privately adopted measures are not sufficient or adequate to protect the vulnerable person) and proportionality (adaptation of the measure to the person's personal circumstances and periodic review of the measure to check it is still suitable).

11. In parallel, social, fiscal, employment, educational and health measures must also be adopted.

CONCLUSION

Article 12 of the Convention on the Rights of Persons with Disabilities represents the fulfilled aspiration of those who have dealt with the proclamation of the rights of persons with disabilities, not as newly created rights, but as the updating and specification of the culture of fundamental rights for people who have a disability component that prevents them from exercising them on an equal basis with other people.

That is why the philosophy that informs and enshrines the entire Convention involves the exercise of rights with support by the person with a disability and in those aspects where it is impossible to exercise their aid complement, while always respecting and taking into account their will and preferences. This also requires public bodies to act as a watchdog to ensure that protection does not cover up exploitation by the people who should support the person with disabilities.

It is essential to establish as soon as possible a system of JUDICIAL AND EXTRAJUDICIAL FORMAL support in light of the guidelines set out in Article 12. In a way, the effectiveness of these measures depends on the success of the article, since if there is no confidence in the support system, the measures can hardly be considered as such and the easiest solution would be to go back to the replacement system, which has proven difficult to move past.

To this end, legal practitioners must be trained in such a way that they know where and how they can get support. In this respect, full collaboration between public and private institutions will be needed, so that all available means can be leveraged.

This leveraging is essential, and even more so given the current state of the economy, where budget cuts are increasingly significant and, unfortunately, social policies severely impacted. On the other hand, we must not forget that PWD are not a homogeneous group, and consequently each situation requires a differential treatment. Support measures must therefore be substantial and diverse in order to deliver on all possible situations, making engagement between public and private agents essential. We must prevent the standardization of support measures. This solution is the most convenient and is a simple way of washing one's hands of the problem; and that is exactly why the effort must be greater.



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