

Switzerland

Prof. Michelle Cottier

International law: Switzerland has ratified the *Hague Convention of 13 January 2000 on the International Protection of Adults* in 2009, and the *UN Convention on the Rights of Persons with Disabilities (CRPD)* in 2014. The Swiss Federal Council, Switzerland's government, declared in 2012 that it didn't envisage the ratification of the Optional Protocol to the CRPD before Switzerland has gained some experience with the periodic reports and the practice of the Committee¹. Switzerland is a monist State and the CRPD didn't need to be transposed into Swiss law to have effect in the Swiss legal order. Switzerland has submitted its initial report in 2016, and the NGO shadow report has been published in 2017².

The reform of the Swiss Civil Code of 2013: On 1 January 2013, the completely revised Swiss adult protection law entered into force. Before that, and since the Swiss Civil Code first came into force in 1912, adult protection law had only undergone one small revision in 1981, adapting the law on deprivation of liberty to the requirements of article 5 of the European Convention on Human Rights³. The process leading up to the reform of 2013 had already started in 1993⁴, and was thus not a reaction to the adoption of the CRPD. However, according to the Swiss Federal Council, the new adult protection law corresponds to the requirements of the Convention⁵. The aims of the total revision of 2013 were namely: the *encouragement of self-determination* through the introduction of instruments of the lasting power of attorney and the advance medical directive; the strengthening of the role of the *family* in the legal representation of vulnerable adults; the introduction of *tailor-made measures* of adult protection; and the introduction of *professional and interdisciplinary child and adult protection authorities*⁶.

Swiss adult protection law can mainly be found in the Swiss Civil Code in Part two ("Family Law"), Division Three ("The Protection of Adults"; articles 360 to 456 of the Swiss Civil Code SCC)⁷. The general norms on legal capacity are laid down in articles 11 to 19d SCC.

Instruments encouraging self-determination: The 2013 reform introduced the following two instruments with the aim of encouraging self-determination for the case of legal incapacity: 1. Lasting power of attorney (*Vorsorgeauftrag/mandat pour cause d'inaptitude/mandato precauzionale*, articles 360 to 369 SCC), which allows for granting decision-making powers concerning personal and medical care and/or financial issues to a person of one's own choice. 2. In the advance medical directive (*Patientenverfügung/directive anticipée du patient/direttive del paziente*, articles 370 to 373 SCC) advance decisions concerning medical treatment can be taken for the case of incapacity, and a representative for medical decision-making can be designated.

Representation held *ex lege* by family members: In line with the reform's aim of strengthening the role of the family in adult protection, the Civil Code designates certain family

¹ See Message of 12 December 2012, BBl 2013 661, 666 https://www.admin.ch/opc/de/federal-gazette/2013/index_4.html (French and Italian versions of the Messages are accessible by clicking on the button at the top of the page).

² https://www.inclusion-handicap.ch/de/themen/uno-brk/schattenbericht_0-257.html

³ See Message of 17 August 1977, BBl 1977 III 1, https://www.admin.ch/opc/de/federal-gazette/1977/index_39.html.

⁴ See Message of 28 June 2006, BBl 2006 7001, 7008.

⁵ See Message of 12 December 2012, BBl 2013 661, 690. As for the controversy in legal literature see below.

⁶ See Message of 28 June 2006, BBl 2006 7001.

⁷ The most important legal concepts are cited here in all three official language versions of the Swiss Civil Code, i.e. German, French and Italian. See the links below.

members as representatives *ex lege* in the case of incapacity. If a person has not granted a lasting power of attorney to a particular person, and no curatorship is in place, the spouse or registered partner⁸ represents the incapable adult for matters concerning everyday life (articles 374 SCC). For decisions regarding medical treatment, the spouse or registered partner and, subsidiarily, the cohabitant, descendants, parents and siblings (in this order) are eligible for representation in medical matters if they regularly and personally assist the person lacking capacity (article 378 SCC).

Tailor-made adult protection measures: The core of the 2013 reform was undoubtedly the introduction of tailor-made adult protection measures, in the form of different flexibly adaptable curatorships, which replaced three standardised adult protection measures. The supporting curatorship (*Begleitbeistandschaft/curatelle d'accompagnement/Amministrazione di sostegno*, article 393 SCC) is restricted to giving support especially in handling financial affairs without limiting the person's legal capacity. The representation curatorship (*Vertretungsbeistandschaft/curatelle de représentation/Curatela di rappresentanza*, articles 394 and 395 SCC) can be adapted to the vulnerable adult's needs, by giving more or less powers of representation to the curator and by limiting more or less the person's own legal capacity. The cooperation curatorship (*Mitwirkungsbeistandschaft/curatelle de cooperation/curatela di cooperazione*, article 396 SCC) means that certain acts of the person need the consent of the curator to be valid. These three first curatorships can be combined (article 397 SCC). The comprehensive curatorship (*umfassende Beistandschaft/curatelle de portée générale/curatela generale*, article 398 SCC) finally is the most far-reaching measure, excluding the vulnerable adult's own legal capacity and giving far-reaching powers of representation to the curator.

Introduction of professional and interdisciplinary child and adult protection authorities: Although the organisation of child and adult protection authorities (CAPAs) remains a cantonal matter, the 26 Swiss cantons are since 2013 required to organise their CAPAs as professional, interdisciplinary authorities. Even if the professionalization of authorities has largely been achieved through the reform, the organisation is still very heterogeneous: The majority of cantons have organised their CAPAs as administrative authorities (20 cantons), and a minority as courts (6 cantons). In addition, the unification of procedural law for the area of child and adult protection has not been fully accomplished in Switzerland, and important differences between the cantons remain.

Evaluation of the 2013 reform and current debates: Following the entry into force of the reform, there has been a fierce political controversy and media campaign around the functioning of the new child and adult protection authorities, accusing them of taking child and adult protection measures too quickly and of appointing too frequently a professional curator instead of a family member to the position of curator. As a reaction to the critique and based on an expert evaluation, the Federal Council has published in 2017 a rather limited list of reform issues, among them the goal of improving the position of family members in child and adult protection.⁹ A reform proposal is expected for the year 2019. The question of conformity of Swiss adult protection law with article 12 CRPD is discussed controversially in the legal literature. Whereas some authors call for a reform in line with the CRPD's paradigm shift from substituted decision-making towards supported decision-making, others are of the opinion that an interpretation of the existing legal instruments which is

⁸ Marriage is only open to opposite-sex couples (article 94 SCC), registered partnership is only available for same-sex couples (article 2 section 2 Law on registered partnerships).

⁹ French version of the different reports: <https://www.ejpd.admin.ch/ejpd/fr/home/aktuell/news/2017/2017-03-29.html>;
German version: <https://www.ejpd.admin.ch/ejpd/de/home/aktuell/news/2017/2017-03-29.html>

compatible with the new paradigm is possible. The Federal Council intends to wait for the CRPD Committee's concluding observations regarding Switzerland's initial report before making any reform proposal¹⁰.

Statistics and empirical studies: The Swiss Conference of Child and Adult Protection Authorities publishes statistics every year¹¹. The latest available statistics are from 2017. At that time a total of 90'719 adults were concerned by at least one adult protection measure, which makes 13 cases in 1000 adults in the overall adult population of Switzerland (6'963'149). The most frequent measure is the representation curatorship (articles 394 and 395 SCC), with a total of 72'532 adults concerned. The most far-reaching measure, the comprehensive curatorship (article 398 SCC), was in place for 15'383 adults in 2017 (2 adults in 1000 in the overall adult population). The evaluation of the 2013 reform has further shown, that 46 % of curators are non-professional curators (the proportion of family members among them is unknown), 54 % are professional curators¹². Sociology of law observes big differences regarding the likelihood of the appointment of a curator due to immense local and regional differences in legal culture¹³.

Official online versions of the Swiss Civil Code:

German: <https://www.admin.ch/opc/de/classified-compilation/19070042/index.html>

French: <https://www.admin.ch/opc/fr/classified-compilation/19070042/index.html>

Italian: <https://www.admin.ch/opc/it/classified-compilation/19070042/index.html>

Non official English version:

<https://www.admin.ch/opc/en/classified-compilation/19070042/index.html>

¹⁰ Report of the Swiss Federal Council of 29 March 2017, p. 76 (German version), p. 69 French version (see links in note 9).

¹¹ <https://www.kokes.ch/de/dokumentation/statistik/aktuellste-zahlen>

¹² INTERFACE Politikstudien Forschung Beratung, Evaluation Kindes- und Erwachsenenschutzrecht, Bericht zu Handen des Bundesamtes für Justiz vom 5. April 2016, Lucerne, p. 58 <https://www.ejpd.admin.ch/dam/data/bj/aktuell/news/2016/2016-05-04/ber-interface-evaluation-kesr-d.pdf>

¹³ Josef Estermann and Walter Fuchs, Zu Häufigkeit und Determinanten rechtlicher Betreuung - Eine vergleichende Analyse von Daten aus Deutschland, Österreich und der Schweiz, Zeitschrift für Rechtssoziologie 36.1 (2016): 154-186.