

Poland

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Domestic legal regulation and international obligations

1. Poland has ratified the CRPD in 2012 (Dziennik Ustaw 2012, poz. 1170 – Journal of Laws 2012, item 1170), but not its Optional Protocol. It is in power since Oct. 25th 2015. Poland has made “declaration of interpretation” about art. 12 of the Convention, because of Polish regulation about right to marry of the incapacitated persons. The Hague Convention 2000 has been signed by Poland, but not ratified yet.

In September 2018 the UN Committee on Disabled Persons criticized strongly the way of the implementation of the Convention. It recommended to abolish the institution of incapacitation and, i.a., to establish the institution of “personal assistant”.

The legal regime of incapacitation has been the same, not counting details, from 1946, so it's over 70 years now. It is regulated in the Civil Code from 1964, with two kinds of incapacitation: full (complete – Art. 13) and partial (Art. 16) and respectively two kinds of protection: *tutela* (guardianship) and *curatela* (curatorship). Guardianship (*tutela*) implied almost total lack of capacity (comparable to minority) and representation by a guardian. Curatorship (*curatela*) allowed the circle of capacity to be judicially tailored, but it demanded lack of capacity for *inter vivos* acts of disposal. As a rule, the curator would control through authorization the acts that were performed by the person under protection (assistance). In both cases, not only is legal capacity to act restricted but also legal capacity to entitle some personal rights (right to marry, right to acknowledge paternity, right to exercise parental responsibilities or to write a will). Also Family and Guardianship Code from 1964 regulates an institution of curator for a person with disability who is not incapacitated (Art. 183).

2. There are plenty of acts regulating different legal aspects of life of the disabled persons. Financial help is the most important.

As a curiosity you should mention Act on Sept. 11th 2015 on elderly persons (Journal of Laws 2015, item 1705), which does not regulate legal status of the elderly persons (over 60), but says only about the ways monitoring the situation of these people. The government says it is the first step to regulate legal status of the old persons in a complex way.

3. The available data regarding incapacitation in 2012: a/ 12983 petitions for incapacitation, b/ 7456 judgments of full incapacitation, c/ 763 judgments of partial incapacitation. Altogether there were around 75000 persons incapacitated in 2012. You should remember that guardianship and curatorship is decided by court in the separate proceedings after incapacitation judgment.

4. The Civil Law Codification Committee has prepared in 2012 a draft amending Civil Code, Family and Guardianship Code and Code of Civil Procedure in accordance with the Convention. The draft in 2014-2015 was on a first stage of the government legislation proceedings, but new government in 2015 blocked it. The draft is on very high level and discusses they ways of the possible regulation by studying examples from EU countries laws. I don't know why the legislative process was stopped.

5. Judgment of the Constitutional Tribunal 22 Nov. 2016, K 13/15

The Ombudsman was questioning the wording of Art. 12 of Family and Guardianship Code, according to which “no one who is suffering from a psychological illness or mental retardation

can marry. However, if the psychological or physical state of the person does not endanger the marriage or the health of any future offspring, and if the person is not totally incapacitated, the court may authorize the marriage.” The Ombudsman claimed that the notions of “psychological illness” and “mental retardation” are not precise enough, according to the present state of knowledge. As a consequence, they may limit the constitutional right to marry. This touches bigger issue, of whether persons with mental afflictions may marry at all. The problem was important because of ratifying the UN Convention of the Rights of the Persons with Disabilities of 13 Dec. 2006, signed in New York.

The Constitutional Tribunal decided that Art. 12 of the Family Code is in accordance with Polish Constitution, especially Art. 18, which protects marriage and family.

Let me add the according to Art. 11 of Family and Guardianship Code a person who is fully incapacitated cannot marry at all.

6. The government has announced that in March (but not yet!) new Strategy for the Disabled Persons