DISABILITY AND THE RIGHT TO HAVE RIGHTS: SHIFTING FROM SUBSTITUTED TO SUPPORTED DECISION-MAKING IN THE PHILIPPINES*

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ABSTRACT

In 2018, the Report of the Special Rapporteur brought to light the need for the Philippines to review the legal provisions which allow for the restriction of legal capacity on the basis of impairment, abolish the current guardianship regime, and replace it with a supported decision-making system. Supported decision-making is a mechanism of accommodation that would enable an individual to make and communicate their own decisions instead of delegating that power to another person, as in substituted decision-making systems like guardianship.

The Special Rapporteur's recommendations are based on Article 12 of the Convention on the Rights of Persons with Disabilities, which mandates States Parties to protect the full legal capacity of persons with disabilities on an equal basis with others and is also known as "the right to have rights."

This paper argues that this obligation should not only be interpreted in a way that commands States Parties to take a less restrictive route in maintaining the ideal decision-making system in theory, but at the same time enables them to be flexible enough to accommodate all types of decision-making needs in practice. It first analyzes the legal definition of disability in the Philippines. Next, it examines guardianship as the country's primary substituted decision-making system, then discusses the supported decision-making model. It concludes with recommendations for the revision of the guardianship regime and the adoption of supported decision-making into the Philippine legal system.

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I. INTRODUCTION

Legal capacity is a right inherent in all people but at the same time still limited in some others. Article 12 of the Convention on the Rights of Persons with Disabilities ("the Convention") provides for the equal recognition of persons with disabilities before the law and requires States Parties to acknowledge that they have *full* legal capacity on an equal basis with others.[1] This provision, also known as "the right to have rights," promises self-determination for all regardless of impairment, veering away from the traditional notion that equates disability with an *in*ability to hold and to exercise rights and obligations.[2] This theory obligates states to assume these responsibilities *for* them and facilitates the *parens patriae* approach.[3] When one who is diagnosed with an impairment, makes a decision considered to have negative consequences, or is considered to have deficient decision-making skills,[4] they are seen as persons with limited capacity,[5] thus prompting state action to "protect" their best interests

Now, however, the Committee on the Rights of Persons with Disabilities ("the Committee"), which monitors the implementation of the Convention and issues interpretations of its contents through General Comments,[6] is promoting a shift to the human rights-based model of disability, where persons with disabilities are considered as rights holders instead of "mere receivers of protection, rehabilitation or welfare."[7] Article 12 has thus spearheaded the movement towards the abolition of guardianship, an age-old regime whereby the judgment of persons deemed unfit by courts to make their own decisions are substituted by that of their court-appointed guardians.

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[1] Convention on the Rights of Persons with Disabilities [hereinafter "CRPD"], art. 12, Dec. 13, 2006, U.N. Doc. A/RES/61/106. The Philippines signed the Convention on September 25, 2007 and ratified it on April 15, 2008.

[2] Committee on the Rights of Persons with Disabilities, General Comment 1, ¶ 12, U.N. Doc. CRPD/C/GC/1 (2014).

[3] Ruby Rosselle L. Tugade, *Understanding Insanity: Making Sense Out of Mental Illness in Philippine Law and Jurisprudence*, 90 PHIL. L.J. 859, 870 (2017).

[4] General Comment 1, *supra* note 2, at ¶ 15.

[5] Tugade, *supra* note 3.

[6] *Introduction to the Committee*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER WEBSITE, *at* https://www.ohchr.org/en/treaty-bodies/crpd/introduction-committee (last accessed July 5, 2023).

[7] Human Rights Council, Report of the Special Rapporteur on the rights of persons with disabilities [hereinafter "Report of the Special Rapporteur"], ¶ 20, U.N. Doc. A/HRC/37/56 (2018).

Guardianship finds its roots in Anglo-Norman tradition, which subscribed to the theory that persons who exhibited lunacy or idiocy were deemed unable to make reasonable decisions and needed to be under the care of the king as the protector of the people.[8] It has also been used to enable family members to administer the inherited property of minors in their charge.[9] Since then, guardianship of incompetent persons has branched out to matters of both the estate *and* the person.[10] This denial of legal capacity and creation of agency on the basis of impairment in guardianship regimes is discriminatory[11] and precisely what hinders the realization of "universal legal capacity," which States Parties to the Convention are obligated to uphold.[12] Instead, States Parties are encouraged to replace systems which remove or surrogate a person's decision-making ability with a supported decision-making system.

Supported decision-making is a fairly new concept in the Philippines, introduced formally through Republic Act No. 11036 or the Mental Health Act of 2017. It is defined therein as "the act of assisting a service user who is not affected by an impairment or loss of decision-making capacity, in expressing a mental health-related preference, intention or decision. It includes all the necessary support, safeguards and measures to ensure protection from undue influence, coercion or abuse."[13] It is a right available to service users, or those with a lived experience of any mental health condition,[14] who may designate "supporters" to assist them in matters related to their treatment or therapy.[15]

This Note aims to examine in what ways the Philippine definition of disability and the guardianship regime fail to comply with the Convention, and how these inconsistencies can be remedied. It then considers the supported decision-making model holistically, and explores how it fits into the current legal environment in the Philippines. These questions are prompted by the 2018 Report of the Special Rapporteur on the Philippines and its recommendation to "take steps to abolish the guardianship regime and the

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[8] Lawrence Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 601 (1981).

[9] Scott Shackelford and Lawrence Friedman, *Legally Incompetent: A Research Note*, AM. J. LEGAL HIST. 321, 323 (2007).

[10] Frolik, *supra* note 8, at 602.

[11] Committee on the Rights of Persons with Disabilities, General Comment 6, ¶ 47, U.N. Doc. CRPD/G/C/6 (2018).

[12] General Comment 1, *supra* note 2, at ¶ 25.

[13] Rep. Act No. 11036 (2017) [hereinafter "Mental Health Act"], § 4(v). Mental Health Act.

[14] Mental Health Act, § 4(t).

[15] Mental Health Act, § 11.

legal provisions allowing for the restriction of legal capacity on the basis of impairment, and replace it with a supported decision-making system."[16] These findings also echo the Committee's call to "take action to develop laws and policies to replace regimes of substitute decision-making [with] supported decision-making, which respects the person's autonomy, will and preferences."[17] Ultimately, this Note argues that these obligations under the Convention should be interpreted in a way that commands States Parties to take a less restrictive route in maintaining the ideal decision-making system in theory, but at the same time enables them to be broad and flexible enough to accommodate all types of decision-making needs in practice.

This Note is divided into the following sections: *Part II* delves into the legal definition of disability in the Philippines and in other jurisdictions, and analyzes how its definition in Philippine law falls short of the duty to uphold the rights of persons with disabilities. *Part III* examines guardianship as the country's primary substituted decision-making system and measures it against that of other countries and the standards in the Convention. *Part IV* discusses in-depth the supported decision-making model, both as a concept and as implemented in other countries. *Part V* explores the application of the model into the Philippine context and crafts recommendations for where to begin. *Part VI* concludes.

II. DISABILITY, DEFINED

In order to understand supported decision-making as a concept, it is essential to get to know the persons who may be subjected to this substituted decision-making regime. In particular, the definition of disability and how it is used in the Philippines must be examined because it determines the rights and obligations of persons with disabilities, as well as their capacity to act.[18]

A. Philippine Laws and Jurisprudence

"Disability" is defined in Republic Act No. 7277, as amended by Republic Act No. 9442, or the Magna Carta for Disabled Persons ("Magna Carta"), as "(1) a physical or mental impairment that substantially limits one or more psychological, physiological or anatomical function of an individual

[16] Committee on the Rights of Persons with Disabilities examined the report of the Philippines, United Nations Office of the High Commissioner Website, Sept. 13, 2018, at https://www.ohchr.org/en/press-releases/2018/09/committee-rights-persons-disabilities-examined-report-philippines.

[17] General Comment 1, *supra* note 2, at ¶ 26.

[18] *See* Tugade, *supra* note 3, at 863.

or activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment."[19] Moreover, the Magna Carta defines "disabled persons" as "those suffering from restriction or different abilities, as a result of a mental, physical or sensory impairment, to perform an activity in the manner or within the range considered normal for a human being."[20]

The Magna Carta also distinguishes disability from impairment, the latter which is "any loss, diminution or aberration of psychological, physiological, or anatomical structure or function,"[21] and handicap, which is "a disadvantage for a given individual, resulting from an impairment or a disability, that limits or prevents the function or activity, that is considered normal given the age and sex of the individual."[22]

Putting all these terms together, disability and impairment seem to be synonymous and may both result in a handicap. But while impairment is defined as the loss or diminution itself, disability is the *manifestation* of such impairment—the limitation of the functions or activities of an individual. Thus, though the word impairment is used in the definition for a disabled person, what characterizes their struggle is the manifestation of the impairment that imposes a restriction on them. In short, the disability "suffered" by an individual makes them a "disabled person."

These definitions are important not because they classify individuals, but because they affect their entitlement to and enjoyment of rights. One such right is the right to full enjoyment of legal capacity, as provided by the Convention.[23]

The concept of legal capacity in the New Civil Code is understood to have two aspects: "Juridical capacity, which is the fitness to be the subject of legal relations, is inherent in every natural person and is lost only through death. Capacity to act, which is the power to do acts with legal effect, is acquired and may be lost."[24] This latter aspect may be restricted, modified, or limited by circumstances such as "[m]inority, insanity or imbecility, the state of being a deaf-mute, prodigality, and civil interdiction[.]"[25] For instance, a

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[19] Rep. Act No. 7277 (1992) [hereinafter "Magna Carta"], § 4(c). Magna Carta for Disabled Persons, as amended by Rep. Act No. 9442 (2006).

[20] § 4(a).

[21] § 4(b).

[22] § 4(d).

[23] CRPD, art. 12.

[24] CIVIL CODE, art. 37.

[25] Arts. 38–39.

person under 18 years old may not validly consent to a contract[26] or execute a will,[27] and a person who has been sentenced to the accessory penalty of civil interdiction is deprived of parental rights and marital authority.[28]

This Note is particularly concerned with the states of insanity, imbecility, and of being a deaf-mute, which are considered disabilities in Philippine law and may hinder persons from the full exercise of their capacity to act.[29] Each of these circumstances are defined in turn below, with a view to assessing how people are classified as having them and how this classification is used as a basis to restrict their capacity to act. In other words, how do Philippine laws determine who has the limited capacity to act?

First, insanity is mentioned in both the New Civil Code and the Revised Penal Code,[30] but is defined in neither. One of the first definitions of insanity in this jurisdiction is found in Section 1039 of the Revised Administrative Code, which provides:

> "Insane person," as herein used, is a person afflicted with insanity, which, in the intendment of this law, is a manifestation in language or conduct, of disease or defect of the brain, or a more or less permanently diseased or disordered condition of the mentality, functional or organic, and characterized by perversion, inhibition, or disordered function of the sensory or of the intellective faculties, or by impaired or disordered volition.[31]

As an exempting circumstance, insanity was already recognized in Philippine case law as early as 1905,[32] and though the wording of the provision in the Revised Administrative Code implies that its definition is limited to the Code's purposes, it has been cited in one of the leading criminal law cases on insanity, *People v. Ambal*.[33] Before *Ambal,* there was the case of *People v.*

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[26] Art. 1327(1).

[27] Art. 797.

[28] REV. PEN. CODE, art. 34.

[29] *See* Magna Carta, § 4(c).

[30] REV. PEN. CODE, art. 12.

[31] REV. ADMIN. CODE (1917), art. XIII, § 1039.

[32] United States v. Odicta, 4 Phil. 309, 312 & 314 (1905). In this case, the accused was charged with and pleaded guilty to the crime of parricide. He argued that he was drunk and did not know what he was doing, which put in issue whether insanity attended the commission of the crime and may thus acquit the accused. The Court held that the presumption that the accused had acted in his right mind was not rebutted by the defense, which had the burden of showing that he suffered from mental derangement or was in a fit of insanity. Instead, the Court appreciated his intoxication, which influenced him to commit the crime, as a mitigating circumstance.

[33] [Hereinafter "*Ambal*"], G.R. No. 52688, 100 SCRA 325, Oct. 17, 1980.

Formigones,[34] which adopted the Spanish Supreme Court's definition of insanity as the complete deprivation of reason or discernment and freedom of the will.[35] It further provided for the tests of legal insanity, which the Court succinctly described in the recent case of *People v. Paña*:

> The formulation in *Formigones* gave rise to two distinguishable tests in determining the existence of legal insanity: (1) the test of cognition; and (2) the test of volition. The test of cognition requires a "complete deprivation of intelligence in committing the [criminal] act" while the test of volition requires a "total deprivation of freedom of the will." Despite the existence of these standards by which legal insanity can be measured, a review of jurisprudence shows more reliance on the test of cognition.[36]

After *Formigones*, only twice has insanity been successfully invoked as a defense.[37] One is the 1996 case of *People v. Austria*, where the finding of insanity was based on the accused's previous confinements, erratic behavior prior to the commission of the offense, and the psychiatrist's testimony that he was having a relapse of his schizophrenia.[38] The other is the similar 2016 case of *Verdadero v. People*, where it was sufficiently proven that the accused was diagnosed with schizophrenia and experienced a relapse at the time the offense was committed.[39]

The difficulty of the insanity defense lies in the fact that insanity is a condition of the mind which is only manifested through external acts.[40] Since direct evidence may not always be available to prove a person's mental condition, the Court in *Austria* declared that clear and convincing *circumstantial* evidence of such mental condition during a reasonable period before and after the commission of the offense may be employed.[41] The common practice is thus to seek expert opinion to testify on the mental state of the accused, as they help establish causation between their mental illness and their behavior.[42]

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[34] [Hereinafter "*Formigones*"], 87 Phil. 658 (1950).

[35] *Id.* at 661, *citing* GUILLERMO GUEVARA, COMMENTARIES ON THE REVISED PENAL CODE OF THE PHILIPPINE ISLANDS 42–48 (4th ed.).

[36] People v. Paña [hereinafter "*Paña*"], G.R. No. 214444, slip op., Nov. 17, 2020. (Citations omitted.)

[37] *Id.*

[38] People v. Austria [hereinafter "*Austria*"], G.R. No. 111517, 260 SCRA 106, 119, July 31, 1996.

[39] Verdadero v. People, G.R. No. 216021, 785 SCRA 490, 506, Mar. 2, 2016.

[40] People v. Opuran, G.R. No. 147674, 425 SCRA 654, 665, Mar. 17, 2004.

[41] *Austria*, 260 SCRA at 117.

[42] *Paña*, G.R. No. 214444.

In both *Austria* and *Verdadero*, expert testimony was crucial in helping the Court understand the deviation of the mental condition of the accused from that of a person of sound mind. Notably, even the Court in *Paña* wrote that expert opinion would have bolstered the defense's insanity claim, instead of the sole testimony of the accused-appellant's mother that his actions were caused by a mental illness.[43]

There have been many other legal discussions on insanity and its different tests, but the *Formigones* doctrine is what prevailed until *Paña* was promulgated. This decision is remarkable for three reasons. For one, it reformulated the *Formigones* guidelines into a three-way test:

> [F]irst, insanity must be present at the time of the commission of the crime; second, insanity, which is the primary cause of the criminal act, must be medically proven; and third, the effect of the insanity is the inability to appreciate the nature and quality or wrongfulness of the act.[44]

In addition, it clarified that because insanity is not an element of the crime charged, it need not be proven beyond reasonable doubt, but only by clear and convincing evidence.[45] Lastly, *Paña* exhibited the Court's shift away from the notion that equated insanity with incompetency and harmfulness to the community.[46] The Court's appreciation of mental conditions reflected the evolution of the attitude towards mental health and set a precedent on how to treat cases involving mental health issues in the future, emphasizing that "[p]ersons who suffer from mental illnesses are no longer viewed as wild beasts who are absolutely devoid of mental faculties."[47]

Second, imbecility is likewise defined in criminal law jurisprudence and originally referred to interchangeably or in conjunction with insanity[48] but it has since been distinguished from the latter. An imbecile is defined as "a person marked by mental deficiency[,] while an insane person is one who has an unsound mind or suffers from a mental disorder."[49] Imbecility is characterized by the same deprivation of reason or discernment and freedom of will as in insanity, but is qualified as "feeblemindedness or a mental condition approaching that of one who is insane," and is found in "one who,

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[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *See* Tugade, *supra* note 3, at 863.
[47] *Paña*, G.R. No. 214444.
[48] *Formigones*, 87 Phil. at 660–61.
[49] *Ambal*, 100 SCRA at 331–32.

while advanced in age, has a mental development comparable to that of children between two and seven years of age."[50] Aside from expert testimony, it may be proven by showing one's Intelligence Quotient ("IQ") and other medical records.[51]

Since insanity and imbecility are both conditions of the mind, those deemed to exhibit them may fall under the definition of service users in the Mental Health Act. As previously mentioned, service users are "person[s] with lived experience of any mental health condition including persons who require or are undergoing psychiatric, neurologic or psychosocial care."[52] Therefore, persons living with insanity or imbecility may fall within the protections of the Act and avail of the rights therein. Significantly, however, the Mental Health Act does not provide its own definition of disability even though it refers to disability in several provisions[53] and one of its policies is to "comply strictly with its obligations under […] the Convention on the [R]ights of Persons with Disabilities."[54]

Third, the state of being a deaf-mute is another restriction on capacity to act, plainly defined in dictionaries as the inability of a deaf person to speak.[55] This condition has no similar definition either in statutory or case law, but it is certainly treated differently from insanity and imbecility.[56] Specifically, the right of persons who are deaf-mute to testify is recognized by the Rules of Court.[57] On several occasions, their capacity to consent or to resist sexual advances regardless of their impairment has been upheld by the Supreme Court.[58]

Aside from the Civil Code, the foregoing circumstances also find relevance in guardianship proceedings as provided by the Rules of Court. Rule 92, Section 2 states:

> Under this rule, the word "incompetent" includes persons suffering the penalty of civil interdiction or who are hospitalized lepers, prodigals, deaf and dumb who are unable to read and write, those

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[50] People v. Nuñez, G.R. No. 112429, 276 SCRA 9, 19, July 23, 1997, *citing* LUIS B. REYES, I THE REVISED PENAL CODE 215 (1981 ed.).

[51] People v. Rabelas, G.R. No. 253603, June 14, 2021.

[52] Mental Health Act, § 4(t).

[53] *See* §§ 4(d), 5(b), 8, 17.

[54] § 2.

[55] *Deaf-mute Definition & Meaning*, MERRIAM-WEBSTER DICTIONARY WEBSITE, *at* https://www.merriam-webster.com/dictionary/deaf-mute#.

[56] *Formigones*, 87 Phil. at 661.

[57] People v. XXX, G.R. No. 249999, Sept. 28, 2022.

[58] People v. Cubay, G.R. No. 224597, 911 SCRA 53, 77, July 29, 2019.

> who are of unsound mind, even though they have lucid intervals, and persons not being of unsound mind, but by reason of age, disease, weak mind, and other similar causes, cannot, without outside aid, take care of themselves and manage their property, becoming thereby an easy prey for deceit and exploitation.[59]

Here, "incompetent" is an umbrella term meant to encompass those with limited capacity to act in the Civil Code, but takes their circumstances to such a degree where they are unable to take care of themselves or their property and are easy prey for deceit and exploitation. It should be noted that the finding of one's incompetence cannot merely be alleged and must be grounded on clear, positive, and definite evidence.[60] Moreover, the provision introduces the word "dumb" in conjunction with "deaf," and it is to be understood as similar to the term "deaf-mute" in the Civil Code.[61] Both "deaf-mute" and "deaf and dumb" are used interchangeably in jurisprudence, with the common thread being a diminished ability to communicate.[62]

B. International Definitions

Disability in the Convention is an *evolving concept* which "results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."[63]

The Convention prohibits any kind of *disability-based discrimination*, or "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."[64] In the Committee's General Comment 6, disability-based discrimination is classified into direct and indirect discrimination. Direct discrimination "occurs when, in a similar situation, persons with disabilities are treated less favourably than other persons because of a different personal status in a similar situation for a reason related to a prohibited ground."[65] On the other hand, indirect discrimination "means that laws, policies or practices appear

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[59] RULES OF COURT, Rule 92, § 2.

[60] Oropesa v. Oropesa, G.R. No. 184528, 671 SCRA 174, 180, Apr. 25, 2012.

[61] *See Deaf-and-dumb definition and meaning*, COLLINS ENGLISH DICTIONARY WEBSITE, *at* https://www.collinsdictionary.com/dictionary/english/deaf-and-dumb.

[62] People v. Cabuntog, G.R. No. 136337, 368 SCRA 112, 117, Oct. 23, 2001.

[63] CRPD, pmbl.

[64] Art. 2.

[65] General Comment 6, *supra* note 11, at ¶ 18(a).

neutral at face value, but have a disproportionate negative impact on a person with a disability."[66]

Furthermore, General Comment 1 singles out *harassment* as a form of discrimination when, in relation to one's disability, it violates one's dignity and creates a hostile or degrading environment. The Committee states, "It can happen through actions or words that have the effect of perpetuating the difference and oppression of persons with disabilities."[67]

Some countries have modified their legal definitions of disability after ratifying the Convention in order to conform to its mandates. In Iceland, the Icelandic Penal Code abolished the use of discriminatory words in describing persons with disabilities, such as the word "idiot," which was originally in the same enumeration as a mentally ill or an intoxicated person, but has now been replaced by "individual with a developmental disorder."[68] In addition, "deaf-mute" has been replaced with "a person with combined vision and hearing impairment," and "*fatlaður*," which is Icelandic for "cripple," is now "person with a disability."[69]

Notably, amendments in laws relating to persons with disabilities across the globe only conform insofar as eliminating discriminatory and archaic language. There is yet to be legislation that recognizes disability in general as an *evolving concept,* the way the Convention envisions it to be. This will be further explored below.

C. Analysis and Observations

Do the Philippine definitions and treatment of disability measure up to the Convention's standards? There are three areas of note which point to a negative conclusion.

First, the Philippine statutory understanding of the word disability is different from that in the Convention. While the Magna Carta defines disability as the limitation on the functions or activities of an individual by reason of their impairment, the Convention describes it as the limitation on persons by reason of their interaction with barriers that hinder their full and effective participation in society on an equal basis with others. In other words,

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[66] *Id. at* ¶ 18(b).

[67] *Id. at* 18(d).

[68] *Icelandic Government removes discriminatory words from penal code*, INCLUSION EUROPE WEBSITE, Oct. 24, 2014, *at* http://www.inclusion-europe.eu/icelandic-government-removes-discriminatory-words-from-penal-code/.

[69] *Id.*

in the Magna Carta, disability is the cause; in the Convention, it is the effect. This is also referred to as the human rights model of disability or the rights-based approach, which the Committee distinguishes from the medical model of disability as follows:

> Under the medical model of disability, persons with disabilities are not recognized as rights holders but are instead "reduced" to their impairments. Under these models, discriminatory or differential treatment against and the exclusion of persons with disabilities is seen as the norm and is legitimized by a medically driven incapacity approach to disability.
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> The human rights model of disability recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It acknowledges that disability is one of several layers of identity. Hence, disability laws and policies must take the diversity of persons with disabilities into account. It also recognizes that human rights are interdependent, interrelated and indivisible.[70]

It can be gleaned from this distinction that the current definition of disability in Philippine law adheres to the medical model. Rather than caging disability within set parameters or enumerating conditions that are considered disabilities, the human rights model and the Convention's "evolving concept" of disability appreciate the unique circumstances of each individual. This means that disability should be seen as the result of a combination of factors and that having a certain impairment does not automatically classify one as having a disability. However, Philippine law does the opposite and uses impairment in itself as justification for restricting rights, thus equating diagnosis with disability. The implication of this is that a finding by the Supreme Court in one case that an impairment is considered a disability can be binding precedent on another case involving the same impairment, even though impairments can vary in degree and should be examined against the circumstances of each case in order to arrive at a conclusion that a person has a disability.

To illustrate further, under Philippine law, one who is unable to see can be considered a person with disability by reason of their blindness alone. A blind person walking down the street is already a person with a disability as far as Philippine law is concerned. Under the Convention, however, one who

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[70] General Comment 6, *supra* note 11, at ¶¶ 8–9.

is unable to see will only be considered a person with disability if there are barriers that prevent them from participating in society on an equal basis with others. Such barriers usually take the form of facilities that cater to certain impairments. Thus, when a blind person walks down the street, but they are assisted by a seeing eye dog or there is tactile paving[71] on the road that helps them navigate footpaths, they are able to move around just like persons who are not visually-impaired. The absence of these facilities which hinders the blind person's movement is a failure on the part of *society* to uphold the person's rights and facilitates the existence of the disability.

Interestingly, the Magna Carta recognizes social barriers, which are "characteristics of institutions, whether legal, economic, cultural, recreational or other, any human group, community, or society which limit the fullest possible participation of disabled persons in the life of the group."[72] Another sign of progress is how the Department of Social Welfare and Development (DSWD) in 2010 began to adopt the Convention's definition of disability, even though the Magna Carta's definition remained the same post-ratification of the Convention in 2008. In DSWD Administrative Order No. 019-10, persons with disabilities are defined as "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."[73] While these small shifts are encouraging, they cannot be considered fully compliant with the demands of the Convention because the DSWD's Administrative Order is a mere executive issuance, and what is needed is legislative change.

Second, the fundamental misunderstanding of the definition of disability may be discriminatory in effect. Among the laws and jurisprudence reviewed above, the Civil Code provision restricting capacity to act based on disability in particular is the most consequential because codal amendments are generally rare. Granted, the Supreme Court in recent rulings has taken a more proactive stance on disability that is more reflective of what the Convention expects of its States Parties. *People v. Paña* is one such case that exhibits an outlook that recognizes the humanity in people living with mental

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[71] "Tactile paving is a system of textured ground tiles that indicate potential hazards and direction of travel." Kathryn Wortley, *Yellow brick roads: How Japan's tactile paving aids solo travel*, THE JAPAN TIMES, Aug. 22, 2020, *at* https://www.japantimes.co.jp/news/2020/08/22/national/social-issues/tactile-paving-visually-impaired/.

[72] Magna Carta, § 4(f).

[73] Dep't of Social Welfare & Dev't Adm. Order No. 019-10 (2010). Guidelines on the Implementation of the Comprehensive Program for Children/Persons with Disabilities (C/PWDs).

conditions. But however progressive its language may be, *Paña* still ultimately failed to employ the rights-based approach.

For one, it zeroed in on the medical aspect of insanity as a mental condition, making expert testimony a key element in proving its existence and its effect on one's behavior, and in effect reducing persons to their impairment.[74] In addition, *Paña*'s reformulation of the insanity defense highlights the court's reliance on expert testimony when it comes to mental conditions in particular because they are less overt, making the evidentiary hurdle higher.

The first step in addressing these discriminatory effects is to modify the definition of disability. As written, disability has been reduced to the impairment itself, which is an act of discrimination. Making this arbitrary distinction opens the door to needlessly restricting the capacity to act of persons with disabilities, which is why changing the current definition to conform to the rights-based approach would have a huge impact on their rights. It is important to make this shift because the very idea of using disability or impairment as basis to limit one's legal capacity is precisely what the Convention prohibits.

Third, the terms themselves are outdated and no longer politically correct. Insanity and imbecility are now viewed as negative words which should be replaced with less offensive terminology that would help minimize the stigma around individuals who are living with mental illnesses.[75] In addition, the term "deaf-mute" is now considered obsolete and even offensive. According to the National Association of the Deaf:

> Another offensive term from the 18th-19th century, "mute" also means silent and without voice. This label is technically inaccurate, since deaf and hard of hearing people generally have functioning vocal chords. The challenge lies with the fact that to successfully modulate your voice, you generally need to be able to hear your own voice. Again, because deaf and hard of hearing people use various methods of communication other than or in addition to using their voices, they are not truly mute. True communication occurs when one's message is understood by others, and they can respond in kind.

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[74] *Paña*, G.R. No. 214444.

[75] Jennifer Rabbino, *Mental Illness in the Criminal Justice System: Erasing the Stigma on a Global Scale*, 46 BROOK. J. INT'L L. 641, 668 (2021).

> For many people, the words "deaf" and "hard of hearing" are not negative. Instead, the term "hearing-impaired" is viewed as negative. The term focuses on what people can't do. It establishes the standard as "hearing" and anything different as "impaired," or substandard, hindered, or damaged. It implies that something is not as it should be and ought to be fixed if possible.[76]

Therefore, the rights-based approach must also be reflected in the language used in relation to impairments, and there must be an effort to change these archaic terms.

III. THE SUBSTITUTED DECISION-MAKING MODEL

Knowing the definition of disability in general is important in understanding how it may be used as a basis for restricting one's capacity to act, but its appreciation becomes more specific in the context of guardianship, a substituted decision-making regime which the Philippines uses. Guardianship is founded on the state's *parens patriae* power, which impels it to step in to protect those who lack cognitive intellectual capacity and are thus seen as vulnerable to potential abuse or undue influence.[77] However, as discussed in the previous section, this school of thought is premised on a misconception which is violative of the Convention and may have detrimental effects. States Parties must therefore use less restrictive means in regulating the rights of those with impaired decision-making skills.

A. Evolution of Philippine Guardianship Laws

Guardianship in the Philippines originates from the Spanish Civil Code of 1889, Article 199 of which provides that it involved the custody and care of the persons and/or property of those who were incapable of managing their own affairs.[78] Specifically, minors not legally emancipated, insane or demented persons, deaf-mutes unable to read and write, persons who had been declared prodigals by final judgment, and persons suffering the penalty of civil interdiction may be subjected to guardianship.[79] If the incapacitated

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[76] *Community and Culture – Frequently Asked Questions*, NATIONAL ASSOCIATION OF THE DEAF WEBSITE, *at* https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/.

[77] Kristin Booth Glen, *The Perils of Guardianship and the Promise of Supported Decision Making*, 48 CLEARINGHOUSE REV. 17, 17 (2014).

[78] CIVIL CODE (1889), art. 199.

[79] Art. 200.

person was insane or deaf-mute, guardianship was only granted to their family members.[80] One provision of note is that minors and incapacitated persons subjected to guardianship *owed* respect and obedience to the guardian and could even be punished by the latter.[81]

Article 213 required a prior judicial determination of incapacity before a guardian could be appointed, after which the extent of guardianship was determined according to the degree of incapacity.[82] For there to be a finding of incapacity, there needed to be a hearing with a family council composed of persons designated by the father or mother,[83] and a personal examination of the person alleged to be incapacitated[84] in a summary proceeding.[85]

The involvement of the family council in the appointment of guardians was repealed by the Code of Civil Procedure in 1901.[86] This Code laid down the procedure for such appointment, which essentially mirrored the Spanish Civil Code insofar as a hearing was required before the grant of the petition for guardianship[87] in order to determine that the person alleged to be incapacitated was incapable of taking care of themselves and managing their property.[88] This Code also specified the guardian's duties to pay the ward's debts,[89] settle their affairs,[90] manage their estate,[91] and make an inventory and account,[92] among others.

After the Spanish Civil Code of 1889 came the Civil Code of 1949, which no longer included extensive provisions of guardianship and only mentioned guardianship in relation to other legal relationships and transactions.[93] The rules on guardianship were governed by the 1940 Rules of Court, which did not contain any major departures from the previous laws. What is striking is that while the rules on guardianship of minors have constantly evolved through the years, the rules on guardianship of

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[80] Art. 220.
[81] Art. 263.
[82] Art. 213.
[83] Art. 294.
[84] Art. 216.
[85] Art. 218.
[86] CODE OF CIVIL PROCEDURE (1901), § 552.
[87] § 559.
[88] § 560.
[89] § 563.
[90] § 564.
[91] § 565.
[92] § 567.
[93] *See* CIVIL CODE (1949), arts. 313, 351, 354, 1027(3), 1081, 1109, 1389, 1391 & 1491(1).

incapacitated or incompetent persons have remained largely unchanged. In fact, the definition of "incompetent" as written in the current Rules of Court is an exact replication of its 1940 progenitor.[94]

Today, the rules on guardianship of incompetent persons[95] are found in Rules 92 to 97 of the Rules on Special Proceedings. Whereas, the rules on guardianship of minors are now covered by a special law of their own. Under Rule 93, Section 1, any relative, friend, or other person on behalf of the incompetent may petition for the appointment of a guardian for the person and/or estate of the incompetent. If the incompetent is an insane person who should be hospitalized or is an isolated leper, the Director of Health may also file the petition.[96] It is essential for the petition to include the fact of incompetency rendering the appointment necessary or convenient, among others.[97] Rule 93, Section 4 then permits any interested person to file a written opposition contesting the petition, with one of the grounds being the *competency* of the alleged incompetent.[98] Before the petition for guardianship is granted, there must be a hearing, one of the functions of which is to establish the incompetency of the ward.

The creation of judicial guardianship gives the guardian numerous duties, such as the care and custody of the ward and/or management of the estate;[99] payment of debts;[100] settlement of accounts and the corresponding right to demand, sue, and receive debts due to the ward;[101] representation of the ward in all actions, unless another is appointed for that purpose;[102] and preparation of an inventory of the estate within three months from the issuance of the letters of guardianship.[103] In general, the guardian is tasked with the faithful execution of duties of the trust, management and disposition of the estate according to the ward's best interests, and care, custody, and education of the ward.[104] Furthermore, they must make a true and just

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[94] RULES OF COURT (1940), Rule 3, § 5.

[95] For purposes of discussing the rules on guardianship, the word "incompetent" will be used to remain faithful to the text of the law. However, the author firmly advocates for the amendment of this term to reflect the Convention's rights-based approach.

[96] RULES OF COURT, Rule 93, § 1.

[97] § 2(b).

[98] § 4.

[99] Rule 96, § 1.

[100] § 2.

[101] § 3.

[102] *Id.*

[103] § 7.

[104] RULES OF COURT, Rule 95, §§ 1 & 5; Rule 96, § 1.

accounting of the estate and its proceeds, and follow all other orders of the court.[105]

B. International Standards

Guardianship is a mechanism by which one is given the power to make decisions and exercise legal acts for another by reason of the latter's inability to do so for oneself. As such, the right to full legal capacity exists at its core and is put into question. Legal capacity is characterized by the Committee as follows:

> 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.
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> 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.[106]

According to the Committee, legal capacity and mental capacity have historically been conflated such that one's legal capacity has been made to depend on their mental capacity. In particular, the diagnosis of an impairment, the judgment that one's decision is considered to have negative consequences, and the belief that one has deficient decision-making skills have been used as bases to restrict or remove one's legal capacity.[107] However, this is a violation not only of the Convention, but of other international human rights instruments as well.

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[105] Rule 94, § 1(d).

[106] General Comment 1, *supra* note 2, at ¶¶ 12–13.

[107] *Id. at* ¶ 15. Also known as the status approach, outcome approach, and functional approach respectively.

Indeed, persons with disabilities are the ones most affected by the discriminatory application of these approaches,[108] because they attempt to assess the human mind[109] and use perceived or actual deficits in mental capacity, in the guise of "unsoundness of mind," as justification for denying legal capacity.[110] But the right to full legal capacity as embodied in the Convention is actually derived from Article 6 of the Universal Declaration of Human Rights ("UDHR") and Article 16 of the International Covenant on Civil and Political Rights ("ICCPR"), which apply to *all* persons.[111] Both of these provisions establish that legal capacity, or the right to equal recognition as a person before the law, is a core human right enjoyed by everyone.

Article 12 of the Convention, which provides for equal recognition before the law or "the right to have rights," declares that "States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life."[112] This mandate includes providing the support that persons with disabilities may need in exercising their legal capacity; safeguarding such exercise from abuse in a degree proportionate to the extent that the person's rights and interests are affected; ensuring respect for the rights, will, and preferences of the person; and upholding the person's property rights.[113]

The classification of the right to equal recognition before the law as a universal right is underscored by the Committee when it said, "[T]he right to equal recognition before the law is operative 'everywhere'. In other words, there are no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited." The ICCPR also states that this is a non-derogable right, even in times of public emergency.[114] In addition, as a civil and political right, the right to equal recognition before the law attaches at the moment of ratification and is subject to immediate realization. The concept of progressive realization, whereby economic, social, and cultural rights are provided in relation to the States Party's available resources,[115] finds no application here.[116]

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[108] *Id.*

[109] *Id.*

[110] *Id. at* ¶ 13.

[111] *Id.*

[112] CRPD, art. 12.

[113] *Id.*

[114] International Covenant on Civil and Political Rights, art. 4, ¶ 2, Dec. 19, 1966, 999 U.N.T.S. 171.

[115] CRPD, art. 4, ¶ 2.

[116] General Comment 1, *supra* note 2, ¶ 30.

The unequivocal call to protect the right to equal recognition before the law under all circumstances is particularly powerful when taking into consideration the fact that it is persons with disabilities who have been disproportionately prejudiced from the denial of legal capacity.[117] The Committee states:

> The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights. It acquires a special significance for persons with disabilities when they have to make fundamental decisions regarding their health, education and work.
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> The Committee reaffirms that a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12. All practices that in purpose or effect violate article 12 must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.[118]

Another provision that is inextricably connected to and usually cited together with Article 12 is Article 5, which provides for equality under the law. This provision not only prohibits discrimination on the basis of disability but also protects the right to equal and effective legal protection against discrimination.[119] According to the Committee, the connection between Articles 5 and 12 stems from the fact that equality under the law necessarily includes equal recognition before the law, such that denial of decision-making on the basis of disability is discriminatory.[120]

One of the mechanisms that gives teeth to the fight against discrimination is the concept of reasonable accommodation, which is defined as "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

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[117] *Id. at* ¶ 8–9.
[118] *Id.*
[119] CRPD, art. 5.
[120] General Comment 1, *supra* note 2, at ¶ 32.

with others of all human rights and fundamental freedoms."[121] This concept is described by the Committee as both an *ex ante* duty, whereby systems and processes must be accessible without regard to the need of any particular person with disability, and an *ex nunc* duty, whereby it must be provided from the moment a person with a disability requires access to non-accessible situations or environments, or wants to exercise their right.[122]

The obligation to provide reasonable accommodation is almost all-encompassing, limited only by reason and non-excessiveness, and requires duty bearers to be proactive as well as reactive. Thus, the obligation "should also apply in situations where a potential duty bearer *should have realized* that the person in question had a disability that might require accommodations to address barriers to exercising rights."[123] Yet the obligation to ensure that all persons have full legal capacity is broader and does not have the same limits as that of the obligation to provide reasonable accommodation.[124]

It is with these principles in mind that the Committee has strengthened the call to abolish all practices that violate the right to have rights either in purpose or effect[125] for being contrary to Articles 5 and 12.[126] These include guardianship laws and other substituted decision-making regimes which remove one's legal capacity or appoint someone other than the person concerned as a substitute decision-maker.[127] Instead, States Parties must institute supported decision-making systems which respect persons' autonomy, will, and preferences.[128]

Guardianship is still very much the accepted practice in many jurisdictions. Some states in the U.S. are notorious for granting guardians broad decision-making powers in all aspects of a ward's life.[129] One recent example is the case of American popstar Britney Spears. Her massively publicized string of turbulent behavior, and alcohol and drug use affected the upbringing of her children and the management of her finances.[130] These

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[121] CRPD, art. 2.

[122] General Comment 6, *supra* note 11, at ¶ 24.

[123] *Id.* (Emphasis supplied.)

[124] *Id. at* ¶ 48.

[125] General Comment 1, *supra* note 2, at ¶ 9.

[126] *Id. at* ¶ 26.

[127] *Id. at* ¶ 27.

[128] *Id.*

[129] Jonathan Martinis & Jessalyn Gustin, *Supported Decision-Making as an Alternative to Overboard and Undue Guardianship*, 60 ADVOCATE 41, 42 (2017).

[130] Ronan Farrow & Jia Tolentino, *Britney Spears's Conservatorship Nightmare*, NEW YORKER, July 3, 2021, at https://www.newyorker.com/news/american-chronicles/britney-spears-conservatorship-nightmare.

actions in turn led the people around her to believe that she lacked the mental fitness to care for herself.[131] After what was described to be a mere ten minutes in the courtroom, and without even examining her, a conservatorship—California's version of guardianship—was constituted over Spears's person and estate, lasting over 13 years.[132] Throughout the conservatorship, Spears was ruled not to have the capacity to retain an attorney, forced to perform on tour, and denied her reproductive rights and the right to make her own medical decisions, among others.[133] During this time, she was able to release four albums, headline a global tour grossing USD 131 million, and perform in a Las Vegas residency for four years.[134] Despite these ventures, her numerous attempts to question the conservatorship which was premised on the continuing requirement to prove that it remained necessary and that less restrictive options had been sought but proved futile were ignored.[135]

At the same time, the abolishment of guardianship regimes or at least the limitation of their scope is not a new concept abroad. As early as the 1980s, Australia instituted a limited guardianship reform model, where multi-disciplinary tribunals, instead of the courts, were given the power to rule on guardianship matters.[136] Additionally, other countries have also taken steps to amend the way they classify the fitness of persons to be subjected to a substituted or supported decision-making scheme. In Victoria, the Guardianship and Administration Bill of 2014 uses decision-making capacity as a measure for seeking guardianship and provides threshold characteristics for such capacity.[137] In effect, it is not disability that triggers the need for guardianship but decision-making capacity.

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[131] *Id.*

[132] "California requires that conservatees be given five days' notice before a conservatorship takes effect, but this can be bypassed if a judge decides that they could suffer 'immediate and substantial harm.'" *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] Terry Carney, *Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective*, 4 LAWS 37, 40 (2015).

[137] Victoria Guardianship and Administration Bill of 2014, Cl. 4(1). For the purpose of this Act, a person has capacity to make a decision in relation to a matter (decision making capacity) if the person is able —

(a) to understand the information relevant to the decision and the effect of the decision; and

(b) to retain that information to the extent necessary to make the decision; and

(c) to use or weigh that information as part of the process of making the decision; and

(d) to communicate the decision and the person's views and needs as to the decision in some way, including by speech, gestures or other means.

C. Analysis and Observations

It is evident that the Philippine guardianship regime has not undergone any substantial changes from its conception in the 1889 Spanish Civil Code and corresponding 1901 Code of Civil Procedure to its current state in the 1997 Rules of Court. Although the Convention was only ratified in 2008, there is still no news of a move on the part of the legislature to update the rules on guardianship to reflect the Philippines' duties as a State Party. It therefore comes as no surprise that the current Philippine guardianship regime does not pass the Convention's muster.

First, the imposition of a limitation on legal capacity on the basis of disability violates Article 5 of the Convention.

For one to be a valid subject of guardianship, there must first be a hearing to establish their incompetency rendering the appointment necessary or convenient.[138] Historically, there has been a finding of incompetence in people with a below average intelligence level and fragile mental state,[139] schizophrenia coupled with the total loss of control over mental faculties,[140] and senility and vascular dementia,[141] among others. A survey of case law also shows that the trial court is given almost unbridled discretion in making this conclusion, so long as it is anchored on clear, positive, and definite evidence that the subject has any of the impairments that make them unable to take care of themselves.[142] This is further supported by how the Supreme Court treats incompetency as a factual finding by the lower courts, which the former must generally respect in the absence of a compelling reason for review.[143]

On its face, the requisite hearing to establish incompetence seems logical. It is also helpful that incompetence is expressly defined in the Rules, unlike insanity and imbecility, whose definitions can only be culled from jurisprudence. However, the hearing requirement becomes problematic *as applied* when taking into account the criteria for the finding of incompetence and the jurisprudential history of *who* is considered incompetent. As discussed in the preceding section, the Philippines' adoption of the medical model uses impairment in itself as justification for restricting rights and equates diagnosis

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[138] RULES OF COURT, Rule 93, § 3.

[139] Hernandez v. San Juan-Santos [hereinafter "*Hernandez*"], G.R. No. 166470, 595 SCRA 464, 469, Aug. 7, 2009.

[140] Catalan v. Basa, G.R. No. 159567, 528 SCRA 645, 655, July 31, 2007.

[141] Goyena v. Ledesma-Gustilo, G.R. No. 147148, 395 SCRA 117, 120, Jan. 13, 2003.

[142] Manubay v. Dirige, A.C. No. 13419, Aug. 31, 2022.

[143] *Hernandez*, 595 SCRA at 473–74.

with disability.[144] Even though the Rules do not explicitly state that persons with disabilities are incompetent, the overlap between the two realms and the lack of rights-based parameters almost always means that the persons who are declared incompetent under the Rules are persons with disabilities. In particular, those who experience cognitive impairments, such as people with intellectual disabilities, people with mental illnesses, people with acquired brain injuries, and people living with dementia, are usually the ones involved.[145] This is a prime example of indirect discrimination, where the law *appears* neutral at face value, but actually has a disproportionate negative impact on persons with disabilities.[146]

In contrast, the presence of rights-based parameters such as the one developed and adopted by Victoria[147] tempers the discriminatory effect of having a guardianship regime in the first place. Thus, although the wisdom behind the hearing requirement is laudable and it should not be done away with altogether, there should instead be a disability-neutral way to determine who can be the subject of guardianship.

Second, in general, guardianship as it is now takes the form of a substituted decision-making system which violates Article 12 of the Convention.

There are multiple ways in which the autonomy of persons with disabilities is disregarded in the guardianship regime. Although the jurisdiction of the guardianship court is limited to the determination of incompetence and can only direct delivery of the ward's property in special cases,[148] the Rules authorize the court to sell or encumber property,[149] order the investment of proceeds, and direct the management of the estate[150] if such courses of action are deemed to be in the ward's best interests. As a catch-all, the court is also allowed to make such other orders for the management, investment, and disposition of the estate and its effects, as the circumstances may require.[151] The court is given wide latitude to determine what exactly is in the best interests of the ward, and the guardian would then be bound to obey. Indeed, "such other orders" can include virtually anything reasonably related to what is covered by the guardianship.

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144 *See supra* Part II.C.
145 Carney, *supra* note 136, at 38.
146 General Comment 6, *supra* note 11, at ¶ 18(b).
147 *See supra* note 136.
148 Paciente v. Dacuycuy, G.R. No. 58319, 114 SCRA 924, 929, June 29, 1982.
149 RULES OF COURT, Rule 95, §§ 1–2.
150 § 5.
151 *Id.*

The state's *parens patriae* power legitimizes the proposition that it is only right for the state to step in when it comes to persons with disabilities and those who are placed in vulnerable positions in general.[152] The definition of incompetent itself belies the state's goal to look after those who are "easy prey for deceit and exploitation."[153] The Convention's requirement of granting full legal capacity to everyone at all costs and without distinction tends to go against this power, and the fact that persons with disabilities are a protected class is used to substantiate this argument. The equal protection clause[154] mandates similar treatment for those who are similarly situated,[155] but because persons with disabilities are viewed as a class of their own, any differential treatment of them by the state may be considered justified.

This was the pronouncement in *Drugstores Association of the Philippines, Inc. v. National Council on Disability Affairs*,[156] where the Supreme Court stated:

> Persons with disability form a class separate and distinct from the other citizens of the country. Indubitably, such substantial distinction is germane and intimately related to the purpose of the law. Hence, the classification and treatment accorded to the PWDs fully satisfy the demands of equal protection. Thus, Congress may pass a law providing for a different treatment to persons with disability apart from the other citizens of the country.[157]

However, this ruling that persons with disabilities are a protected class should not necessarily be taken as license to maintain a substituted decision-making regime. First of all, the Court's equal protection ruling in *Drugstores Association* was made in the context of upholding the constitutionality of the 20% discount in the Magna Carta, which aims to augment the expenses of persons with disabilities for medicines, travel, and recreation, among others.[158] In contrast, the use of *parens patriae* as justification for substituted decision-making violates a non-derogable universal right.[159] It *takes away* from persons with disabilities rather than benefits them.

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[152] Glen, *supra* note 77.

[153] RULES OF COURT, Rule 92, § 2.

[154] CONST. art. III, § 1.

[155] ABAKADA Guro Party List v. Purisima, G.R. No. 166715, 562 SCRA 251, 273–74, Aug. 14, 2008.

[156] [Hereinafter "*Drugstores Ass'n*"], G.R. No. 194561, 803 SCRA 25, Sept. 14, 2016.

[157] *Id.* at 56.

[158] Magna Carta, § 32.

[159] *See* General Comment 1, *supra* note 2, at ¶ 5.

Moreover, it should be noted that aside from having a substantial distinction which makes for real differences, one of the other requisites for a valid classification that does not violate the equal protection clause is that the distinction be germane to the law's purpose.[160] In other words, the distinction must be examined in the context of the law that creates it. In *Drugstores Association*, the Court recognized the Magna Carta's policy to promote the rehabilitation, self-development, and self-reliance of persons with disabilities, which led it to the logical conclusion that augmenting their expenses would achieve the Magna Carta's purpose.[161] On the other hand, there is no such explicit purpose in the rules on guardianship which can guide the Court in its rulings. This leads to the last point, that unlike the Magna Carta, which was created by Congress in the exercise of its police power, guardianship is a judicial process governed by the Rules of Court, and the judiciary has no such power. The Court itself recognized this when it said that "*Congress* may pass a law providing for a different treatment to persons with disability apart from the other citizens of the country."[162]

The fact that persons with disabilities may belong to a different class must be weighed against the clear and unequivocal international mandate for states to uphold the right to equal recognition before the law as absolute entitlements. This makes *any* denial of full legal capacity to persons with disabilities violative of the Convention and no derogation can be made therefrom even in the name of upholding its best interests as a protected class. It is thus incumbent upon States Parties to use their *parens patriae* powers sparingly and refrain from unreasonable encroachments on the rights of persons with disabilities.

At this point, a comparison may be drawn between guardianship of incompetent persons and guardianship of minors[163] vis-à-vis the universal right to equal recognition. At the international level, this right is not expressly provided in the Convention on the Rights of the Child.[164] Instead, Article 12 thereof provides that "States Parties shall assure to the child who is capable of forming [their] own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."[165] For children with disabilities in particular, the Committee on the Rights of the Child encourages

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[160] Victoriano v. Elizalde Rope Workers' Union, G.R. No. 25246, 59 SCRA 54, 78, Sept. 12, 1974.

[161] *Drugstores Ass'n*, 803 SCRA at 56.

[162] *Id.* (Emphasis supplied.)

[163] GUARDIANSHIP OF MINORS RULE.

[164] Convention on the Rights of the Child, Sept. 20, 1990, 1577 U.N.T.S. 3.

[165] *Id.* art 12.1

their involvement in decision-making processes that relate to them and value their views, which must be respected in accordance with their evolving capacities.[166] But what sets this Convention apart from the Convention on the Rights of Persons with Disabilities is the primacy of the role of parents and guardians in the development of children,[167] which sets the stage for guardianship of minors.

At the domestic level, there is a clear provision in the Family Code that substantiates guardianship of minors[168] and to which the Supreme Court's Rule on Guardianship of Minors applies suppletorily.[169] In contrast, there is no similar codal or statutory support for the guardianship of incompetent persons. Moreover, guardianship of minors is granted not because of minority *per se* but generally only in the absence of the persons exercising the parental authority over the minor,[170] unlike guardianship of incompetent persons, which is granted purely by reason of incompetence. Guardianship of minors is automatically terminated when the minor comes of age or dies,[171] which is a certain event, whereas incompetence may be permanent or otherwise unpredictable.

To reiterate, the right to equal recognition before the law permits no derogation. It is a universal right inherent in everyone by virtue of their humanity. At its core, guardianship of incompetent persons allows one to make decisions for another person once there is a finding of incompetence in the latter. While the law, as it currently is, sufficiently addresses any potential abuse of the ward's estate "by reason of their incompetency," in trying to protect the ward, it also fails to uphold their most basic right to legal capacity and autonomy. Therefore, States Parties are implored to instead undertake a less restrictive route when it comes to those with impaired decision-making skills. This would enable them to still use their constitutionally-recognized *parens patriae* powers but in such a way that does not impinge on persons with disabilities' universally-recognized rights.

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166 Committee on the Rights of the Child, General Comment 9, ¶ 32, U.N. Doc. CRC/C/GC/9 (2007).

167 Convention on the Rights of the Child , *supra* note 164, art. 5.

168 FAMILY CODE, art. 222. The courts may appoint a guardian of the child's property or a guardian ad litem when the best interests of the child so requires.

169 GUARDIANSHIP OF MINORS RULE, § 1.

170 GUARDIANSHIP OF MINORS RULE, § 4.

171 GUARDIANSHIP OF MINORS RULE, § 25.

IV. THE SUPPORTED DECISION-MAKING MODEL

The legal imperative to adopt the supported decision-making model is founded on Article 12 of the Convention, which prohibits States Parties from depriving persons with disabilities of their right to equal recognition before the law[172] and discriminatorily denying legal capacity based on disability in purpose or effect.[173] The Philippines has been bound by these obligations as a signatory to the Convention since 2008. In 2018, the Special Rapporteur recommended that the Philippines "take steps to abolish the guardianship regime and the legal provisions allowing for the restriction of legal capacity on the basis of impairment, and replace it with a supported decision-making system."[174]

A. In General

Supported decision-making can be defined as "a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life."[175] In simple terms, it is a mechanism of accommodation that would enable an individual to make and communicate their own decisions instead of delegating that power to another person.[176] "Support" as characterized by the Committee, is a broad term that covers all types of arrangements which assist persons with disabilities in exercising their legal capacity, such as peer support, advocacy, communication assistance, universal design and accessibility measures, and advanced planning, among others.[177] These different support mechanisms may vary in intensity based on the needs of the individual but what is most important is that their autonomy and capacity to make decisions are respected at all times.[178]

Practically speaking, the role of the supporter would be to help the individual understand the choices they have or to help them communicate

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[172] General Comment 1, *supra* note 2, at ¶ 24.

[173] *Id.* at ¶ 25.

[174] *Supra* note 16.

[175] Robert Dinerstein, *Implementing Legal Capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8, 10 (2012).

[176] Piers Gooding, *Supported Decision-Making: A Rights-Based Disability Concept and Its Implications for Mental Health Law*, 20 PSYCHIATRY PSYCHOL. & L. 431, 434 (2013).

[177] General Comment 1, *supra* note 2, ¶ 17.

[178] *Id.* at ¶ 18.

their intentions to others by interpreting their wishes and preferences.[179] In some versions of supported decision-making, a support network consisting of friends and family members is chosen by the individual to assist with understanding and articulating their wishes.[180] To reiterate, no matter the shape or form supported decision-making takes, the legal power to make the decision must stay with the individual, who must be viewed as an equal and a peer with rights "rather than an object of care and welfare."[181]

Other than upholding the full enjoyment of a universal human right,[182] supported decision-making has the following practical benefits:

> From a civil rights perspective, it recognizes the personhood of persons with cognitive and intellectual disabilities and avoids stripping them of their fundamental freedoms. It is also consistent with the [Convention's] call for states to provide access to the support that persons with disabilities "may require in exercising their legal capacity." From a disability rights perspective, the supported decision-making model is consistent with the social model of disability that sees disability as socially constructed and seeks to avoid the use of disabling labels such as "incompetent." Adoption of supported decision-making has been described as presenting "an opportunity to re-imagine the disabled legal subject" and may thus have political and symbolic value in and of itself. From a public health perspective, supported decision-making has the potential to improve the overall physical and psychological well-being of persons with cognitive and intellectual disabilities by creating a sense of empowerment, which in turn has been linked to positive health outcomes.[183]

Notably, the supported decision-making model envisioned by the Committee has the following key characteristics:

> (a) Supported decision-making must be *available to all*. A person's level of support needs, especially where these are high, should not be a barrier to obtaining support in decision-making;

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[179] United Nations et al., Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities, U.N. Doc. 14-2007, 90 (2007), *available at* https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities.html.

[180] Gooding, *supra* note 176, at 443.

[181] *Id.*

[182] *See supra* Part II.B.

[183] Nina Kohn, Jeremy Blumenthal & Amy Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship*, 117 PENN ST. L. REV. 1111, 1127 (2013). (Citations omitted.)

(b) All forms of support in the exercise of legal capacity, including more intensive forms of support, must be based on the *will and preference* of the person, not on what is perceived as being in his or her objective best interests;
(c) A person's *mode of communication* must not be a barrier to obtaining support in decision-making, even where this communication is non-conventional, or understood by very few people;
(d) *Legal recognition of the support person(s) formally* chosen by a person must be available and accessible, and States have an obligation to facilitate the creation of support, particularly for people who are isolated and may not have access to naturally occurring support in the community. This must include a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge the action of a support person if they believe that the support person is not acting in accordance with the will and preferences of the person concerned;
(e) In order to comply with the requirement, set out in article 12, paragraph 3, of the Convention, for States parties to take measures to "provide access" to the support required, States parties must ensure that support is available at *nominal or no cost* to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of legal capacity;
(f) Support in decision-making *must not be used as justification for limiting other fundamental rights* of persons with disabilities, especially the right to vote, the right to marry, or establish a civil partnership, and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty;
(g) The person must have the *right to refuse support and terminate or change the support relationship* at any time;
(h) *Safeguards* must be set up for all processes relating to legal capacity and support in exercising legal capacity. The goal of safeguards is to ensure that the person's will and preferences are respected.
(i) The provision of support to exercise legal capacity should not hinge on mental capacity assessments; new, *non-discriminatory indicators of support needs* are required in the provision of support to exercise legal capacity.[184]

[184] General Comment 1, *supra* note 2, at ¶ 29. (Emphasis supplied.)

Among these cornerstones, one of the concepts emphasized by the Committee in its General Comment is the primacy of the individual's will and preferences. Thus, if "after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the '*best interpretation* of will and preferences' must replace the 'best interests' determinations."[185] Indeed, even though undue influence must be properly guarded against, such protection must still respect the individual's rights, will, and preferences, even to the point of allowing them to take risks and make mistakes.[186]

B. Supported Decision-Making in the Philippines

Supported decision-making proper in the Mental Health Act is designed as follows:

> A service user may designate up to three (3) persons or "supporters", including the service user's legal representative, for the purposes of supported decision making. These supporters shall have the authority to: access the service user's medical information; consult with the service user *vis-a-vis* any proposed treatment or therapy; and be present during service user's appointments and consultations with mental health professionals, workers and other service providers during the course of treatment or therapy.[187]

The difference between supporters and legal representatives is that the latter are designated by the service user to provide support and help, act as a substitute decision-maker when there is a finding of temporary impairment of their decision-making capacity, assist them in the exercise of any right provided by the Act, and consult with them regarding their treatment or therapy.[188] Moreover, the Act allows advanced directives, through which service users may set out their preference in relation to treatment.[189] Though not classified in the Act as such, advanced directives are a common supported decision-making mechanism abroad. It should be noted, however, that supported decision-making in the Act is reserved only for those who are *not* affected by an impairment or loss of decision-making capacity, and can only

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[185] *Id. at* ¶ 21. (Emphasis supplied.)

[186] *Id. at* ¶ 22.

[187] Mental Health Act, § 11.

[188] § 10.

[189] § 9. "A service user may set out his her preference in relation to treatment through a signed, dated, and notarized advance directive executed for the purpose. An advance directive may be revoked by a new advance directive or by a notarized revocation."

be used in relation to mental health-related preferences, intentions, or decisions.[190]

Before the formal introduction of supported decision-making in the Mental Health Act, there were only ever traces of reasonable accommodation across Philippine law, and mostly for persons who exhibited physiological impairments. For instance, the laws on testamentary succession make sure to preserve the sanctity of the execution of the wills of testators who are blind or deaf-mute.[191] In addition, the Supreme Court has on several occasions recognized the capacity of persons who are deaf to testify,[192] as well as their capacity to consent or to resist sexual advances.[193] There are more illustrations of courts making a positive effort to understand persons who are deaf, perhaps because of the possibility of providing sign language interpreters,[194] whereas it is more difficult to categorically interpret the thoughts of someone who has a mental condition. Regrettably, there is yet to be an effort to broaden the scope of reasonable accommodation for the latter group both in statute and in case law.

C. Supported Decision-Making in Other Jurisdictions

There are numerous countries which have adopted supported decision-making in its many iterations and through different modes. Some have introduced it into their legal systems, others have done so in informal ways that are completely independent of the law, and still others through a balance of both.[195] These iterations can be grouped into three main supported decision-making models that have been implemented across the globe: *first*, by creating legal support relationships; *second*, by creating extra-legal support relationships; and *third*, by mandating that guardianship and other substitute decision-making schemes are only resorted to when supported-decision making fails or is no longer feasible.

To the *first* group belongs the Canadian experience, which promotes support through legislation. British Columbia has legalized "representation agreements," which are a formal support relationship and private contract alternative to guardianship where an "associate" appointed by the individual is engaged to help the latter make personal, health, and financial decisions.[196]

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[190] § 4(v).
[191] *See* CIVIL CODE, arts. 807–08.
[192] People v. XXX, G.R. No. 249999, Sept. 28, 2022.
[193] People v. Cubay, G.R. No. 224597, 911 SCRA 53, 77, July 29, 2019.
[194] People v. XXX, G.R. No. 249999, Sept. 28, 2022.
[195] Carney, *supra* note 136, at 39.
[196] Gooding, *supra* note 176, at 433.

Proof of competency to enter into representation agreements is not needed, the only requisites being the individual's desire to have an associate, the ability to communicate their decisions, and a relationship of trust with the associate.[197] The supported individual is presumed to be capable of entering into the agreement unless proven otherwise, and who retains their full legal capacity.[198] The associate is required to consult the principal to the extent reasonable and comply with their wishes when reasonable to do so.[199]

Saskatchewan likewise provides for the appointment by the court of a co-decision-maker who can help individuals with an impaired cognitive capacity when they need assistance in making personal and/or property decisions.[200] Emphasis is placed on maximizing the individual's participation, and their decisions must be respected by the co-decision-maker so long as the decision could have been made by a reasonable person and will likely not result in a loss to the estate.[201]

Sweden employs a similar mechanism, where a "*god man*" is appointed by the court upon the proposal of the Chief Guardian to assist in the protection of rights, administration of property, and provision of needs,[202] but without it affecting the individual's legal capacity.[203] Interestingly, however, this concept is quite paradoxical, for "the *god man* is said to act with the consent of the person with cognitive challenges and to be limited in [their] ability to act without that consent; however, the *god man* can be appointed without consent and for an individual who lacks capacity to provide consent."[204] This is complemented by Sweden's "*PO Skåne*" program, which provides for a whole network of support relationships that advocate for the individual instead of a single one under guardianship.[205]

To the *second* group belongs the United States, which has also made a recent shift to preferring supported decision-making over guardianship. Guardianship laws in Texas were amended in 2015 to promote "Supports and Services," which are formal and informal resources that assist with personal,

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[197] Nicholas Caivano, *Conceptualizing Capacity: Interpreting Canada's Qualified Ratification of Article 12 of the UN Disability Rights Convention*, 4 W. J. LEGAL STUD. 1, 22 (2014).

[198] Kohn, *supra* note 183, at 1122. (Citations omitted.)

[199] *Id.*

[200] *Id.* at 1124.

[201] *Id.*

[202] A. Frank Johns, *Person-Centered Guardianship and Supported Decision Making: An Assessment of Progress Made in Three Countries*, 9 J. INT'L AGING L. & POL'Y 1, 6 (2016).

[203] Kohn, *supra* note 183, at 1124.

[204] *Id.*

[205] Gooding, *supra* note 176, at 444.

healthcare, and financial decisions and serve as an alternative to guardianship.[206] Vermont also instituted a task force in 2016 which brought together communities and professionals with the goal of coordinating how best to support persons with disabilities "rather than each entity operating in a vacuum."[207] In practice, instead of ordering guardianship outright, lawyers and judges can work with agencies that would direct persons with disabilities to the support systems they need.[208] This can also be observed when a substituted decision-making relationship is brought to an end. When Britney Spears's conservatorship was finally terminated in 2021, an accountant was retained to perform limited administrative powers such as managing her estate planning and her trust.[209] She is now able to take control of her estate, but also seek assistance when needed.

To the *third* group belongs New South Wales in Australia, which uses a "Capacity Toolkit" as guidance for handling supported decision-making cases.[210] Part of this toolkit are the presumption that an individual has capacity, the assessment of an individual by their decision-making ability and not their decisions per se, and the requirement that substitute decision-making be the last resort.[211] Reform in the United States has also increased the level of due process that must be provided before guardianship is ordered, such as an elevated standard of proof, the right to appeal, and a provision for periodic review.[212] Moreover, guardians are mandated to use the standard of "substituted judgment," whereby they must determine what the individual would decide instead of what the guardian thinks is best for the individual.[213]

Of note is that these three models are not mutually exclusive and in fact are often used together. An example is Canada, where less restrictive and less intrusive means are promoted by law *before and instead of* court-ordered guardianship:

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[206] Lucy Beadnell & Jonathan Martinis, *Rethinking Guardianship and Substitute Decision Making: Supported Decision-Making and the Reform of Virginia Law, Policy, and Practice to Protect Rights and Ensure Choice*, 39 DEV. MENTAL HEALTH L. 1, 8 (2020).

[207] Martinis, *supra* note 129, at 43.

[208] *Id.*

[209] Joe Coscarelli & Julia Jacobs, *After 13 Years, Spears Regains Right to Control Her Own Life*, N.Y. TIMES, Nov. 13, 2021, at A1, *available at* https://www.nytimes.com/2021/11/12/arts/music/britney-spears-conservatorship-ends.html.

[210] New South Wales Gov't, Capacity Toolkit (2008), *available at* https://www.tag.nsw.gov.au/sites/default/files/2020-10/CapacityToolkit2020_1.pdf.

[211] *Id.* at *6*.

[212] Dinerstein, *supra* note 175.

[213] *Id.*

> In some jurisdictions, a specific provision is made for supported decision making as an option to be considered before and instead of court-ordered guardianship; in others, it can be a disposition of a court or administrative tribunal. It can also take the form of a specific legal relationship, similar to agency, created through written agreements between adults and their families and support networks, but subject to monitoring and other forms of oversight, especially with respect to assisted financial management. These provisions are often buttressed with legislated principles affirming every adult's right to autonomy and self-determination and to the least restrictive and intrusive, but most effective, form of support and assistance when incapable and in need. Court proceedings should only be used as a last resort and legislation often codifies the long standing, rebuttable, common law presumption of capacity of *all* adults.[214]

This same rule is followed in some American courts. In Texas, there must be clear and convincing evidence that the individual cannot make decisions through Supports and Services before a guardian may be appointed.[215] In fact, the court need only assess "whether the person's needs could be met through support, not the validity or existence of an agreement. […] [T]he focus is on the individual in [their] particular context."[216] In Idaho, for guardianship to be ordered, there must first be failed attempts to empower individuals to deal with their own financial or health needs through supported decision-making.[217] In Washington D.C., the probate court case of *In re Tecora Mickel* is also illustrative of this principle:

> [I]n *In Re Tecora Mickel,* a person with mental illness successfully petitioned the court to terminate her guardianship because she used [supported decision-making]. Ms. Mickel was under a plenary guardianship and her guardian had no contact with her. Because her right to enter into contracts was removed by the court, she could not sign a lease or an agreement for job training. Therefore, she was unemployed and homeless. Ms. Mickel presented evidence and argued that she did not need a guardian because she had a support system of friends and professionals that was willing to, and did, help her make decisions and direct her life. After a contested hearing, the court terminated her guardianship and authorized her

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[214] Johns, *supra* note 203, at 12.

[215] Beadnell, *supra* note 207.

[216] Nina Kohn, *Legislating Supported Decision-Making*, 58 HARV. J. ON LEGIS. 313, 351 (2021).

[217] Martinis, *supra* note 129, at 44.

> attorney and others to serve as her [supported decision-making] team.[218]

Yet, given these forms of supported decision-making and their decades-long existence worldwide, the countries that have implemented them face two common challenges. The first is the lack of evidence showing how effective supported decision-making is in achieving its goal of empowering those who need it.[219] There is a dire need for information on how supported decision-making schemes have panned out in practice so that the necessary adjustments can be made.

The second challenge is the inability to completely eliminate the substituted decision-making aspect in the way that the Committee requires,[220] which stems from the classification of the right to equal recognition before the law as non-derogable. From the language of the Committee's General Comment, there appears to be no two ways about this. But although laudable, this absolutist approach has generally been difficult for states to achieve. In fact, Australia and Canada, both pioneers of supported decision-making even pre-Convention, made reservations upon ratification that some form of substituted decision-making would still be permitted, though subject to appropriate safeguards and only as a last resort or when appropriate.[221] Nicholas Caivano expounds on this by analyzing the drafts of Article 12, which referred to the appointment of personal representation as a matter of last resort:

> The term "as a matter of last resort" indicates that the drafters viewed substituted decision-making as a secondary option to be used only if the convention's preferred approach of supported decision-making failed to allow the person with disabilities to exercise their legal capacity. The final text of Article 12(3), which eliminates the draft language discussing guardianship, could be interpreted as prohibiting substituted decision-making. *The drafters, however, did not replace the language permitting substituted decision-making with language that explicitly prohibits it altogether.* Instead, the final text was left more ambiguous than the working text from the seventh session with respect to whether or when guardianship is permitted. The final version of the CRPD provides for legal capacity "on an equal basis with others in all aspects of life," with Article 12(3) not precluding any mechanism whereby a person makes decisions with the assistance of another person in order to exercise that capacity.

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[218] Beadnell, *supra* note 206, at 11.
[219] Kohn, *supra* note 183, at 1129.
[220] *See supra* p. 15.
[221] Dinerstein, *supra* note 175, at 73 n.23.

> The extent of that assistance is not specified. For these reasons, the lexical changes to the working text of Article 12 suggest that the drafters of the CRPD moved towards a stronger presumption of capacity in composing the final text of the article.[222]

The reality is that the intricacies of the human mind and what it can and cannot do can hardly be captured by a single mechanism and subjected to a rigid prohibition. After all, the right to equal recognition before the law is not the only right that must be protected. Treating such a right as absolute could lead to the abandonment of other rights provided by the Convention, like the right to life and the right to protection and safety of persons with disabilities in situations of risk.[223] This is why viewing substituted and supported decision-making schemes in a spectrum is helpful. Supported decision-making must be broad and flexible enough to accommodate all types of needs for it to be feasible, thus:

> From this view, the focus would shift away completely from determining whether or not a person lacks capacity. Instead, efforts would be directed to identifying a person's decision-making impairments—but *only* as a means to identify the necessary support [they] require[ ] to exercise legal capacity, supports that the state is then obliged to provide.[224]

Not only would this approach help bring supported decision-making to life; it would also uphold the rights-based model of disability.

V. THE ROAD TO SUPPORTED DECISION-MAKING

The challenge in reconciling substituted and supported decision-making is two-fold. The Philippines must obey the Convention's mandate to uphold universal legal capacity immediately, but it must do so in a way that keeps the prevailing decision-making regime both practical and sustainable. This section tackles the short-, medium-, and long-term approaches to this challenge, first by exploring the application of the model into the Philippine context and then by crafting recommendations for where to begin.

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[222] Caivano, *supra* note 197, at 13. (Emphasis supplied.)

[223] Jill Stavert, *The Exercise of Legal Capacity, Supported Decision-Making and Scotland's Mental Health and Incapacity Legislation: Working with CRPD Challenges*, 4 LAWS 296, 300 (2015).

[224] Gooding, *supra* note 176, at 438.

A. Situating Supported Decision-Making in the Philippine Context

Implementing supported decision-making in the Philippines as an alternative to guardianship is a big question mark, not least because supported decision-making as envisioned by the Committee seems like uncharted territory against the country's current decision-making system. However, it is increasingly apparent, based on international experience, that the absolutist approach to Article 12 is prone to defeat its very purpose:

> While repeal of guardianship is easy, realizing [sic] the correlative socio-economic right to support without incurring an all too common resultant paternalism and undue influence within the civil society settings which remain is not at all easy to address. Since it is rare indeed for people to *actually* ever make an entirely independent autonomous decision without taking into account external views of others (or community 'expectations'), merely removing barriers to autonomous decision-making as an end in itself cannot take us far at all; we need to know to what extent autonomy is *achieved*. Rather than such a starry-eyed consequential "status" of self-actualisation [sic], […] the focus is better placed on a more modest notion such as the *means* by which people can be assisted to more fully and/or more often exercise their "will" and/or "preferences."[225]

Therefore, instead of immediately rebuking the current guardianship regime altogether, the prudent starting point would be to identify which parts of it do meet the goals of Article 12, and which parts may be amended to better respond to the Convention's demands. Guardianship should no longer be assessed purely based on compliance with the letter of the Convention but also with a view to upholding its spirit, using the key supported decision-making characteristics in General Comment 1 as a guide.

The ways guardianship complies with the Committee's directive are as follows. First, guardianship is a proceeding *available*[226] and *accessible*[227] to all, and the Rules do not discriminate as to who may institute such an action so long as they have sufficient interest. Second, the Rules

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[225] Terry Carney, *Prioritising Supported Decision-Making: Running on Empty Or a Basis for Glacial-to-Steady Progress*, 6 LAWS 1, 7 (2017). (Citations omitted.)

[226] General Comment 1, *supra* note 2, at ¶ 29(a).

[227] *Id.* at ¶¶ 29(c) & 29(e).

sufficiently provide for the individual's *autonomy*[228] in the sense that they can themselves terminate the guardianship through a petition for the judicial determination of their competency.[229]

On the other hand, the ways guardianship *fails* to comply are as follows. First, given that the Philippine definition of disability and how incompetency is the standard for pursuing guardianship, there is a lack of *non-discriminatory indicators of support needs*[230] in the current Rules. By viewing decision-making capacity in a spectrum, the focus shifts away from dated ideas of disability and instead determines capacity only in the context of the decisions to be made and the support needed. Finally and most importantly, the Rules are still bound by "best interests" determinations instead of respect for the individual's *will and preferences*.[231] Though there are *safeguards*[232] in place, these operate more to limit abuse by the guardian than to actually serve the ward and should thus be amended.

B. Recommendations

From the foregoing, the possible points of action which would address the Convention's requirements may be summarized as follows.

First is the redefinition of disability in Philippine law. The new definition must embody the Convention's evolving concept which "results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."[233] The Philippine legal system must disengage from familiar notions that disability is the cause that hinders individuals from the full enjoyment of their rights instead of being the effect of living in a world that does not do enough to let them. The human rights model of disability must be reflected in both the language of the law and the principles that propel it.

Second is the institution of legal and extra-legal support mechanisms. The expansion of supported decision-making in the Mental Health Act should be seriously considered, such that it would not be

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228 *Id.* at ¶ 29(g).
229 RULES OF COURT, Rule 97, § 1.
230 General Comment 1, *supra* note 2, at ¶ 29(i). (Emphasis supplied.)
231 *Id.* at ¶ 29(b).
232 *Id.* at ¶ 29(h).
233 CRPD, pmbl.

reserved only for service users *without* impaired decision-making capacities, and that it would be applicable even outside the context of mental health-related decisions. The many iterations of supported decision-making, such as representation agreements and co-decision-making relationships, should also be explored.

It must also be remembered that supported decision-making can exist in informal settings as well and may not require engaging the law at all.[234] Government actors, specifically from the executive department, can tap all sorts of stakeholders, from barangays to non-government organizations, to create a community of support for those who need it without necessarily having to wait for legislation. The creation of support agreements, which set out "the types of decisions for which support will be sought, and about what types of assistance and behaviors the individual being supported would find helpful,"[235] should be promoted. Though such agreements do not create any new rights and do not have an independent legal status, they are both a meaningful avenue for assistance and tangible evidence of the extent of the support relationship.[236]

Third is the amendment of the Rules of Court to require that guardianship be the last resort. There is much to be desired when the current rules on guardianship are measured against the Convention, and there definitely should be an effort to make it compliant with the Committee's key supported decision-making provisions. Aside from this long-term goal, however, one of the simplest ways other countries protect the autonomy of persons with disabilities is to mandate meaningful attempts at supported decision-making before guardianship is deemed permissible. Only when all reasonable accommodations are first made and exhausted should the more restrictive path of guardianship be pursued.

Fourth is the creation of a technical working group to implement supported decision-making schemes in the long run. There is a scarcity of evidence of supported decision-making's results abroad, and it is even scarcer still for third-world countries with similar resources and cultural practices as the Philippines. Therefore, before any groundbreaking steps are made towards the full adoption of supported decision-making in the

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[234] *See* Carney, *supra* note 136, at 53.
[235] Kohn, *supra* note 217, at 346.
[236] *Id.* at 347.

country, it should first be studied holistically and specifically in the Philippine context.

VI. CONCLUSION

Persons with disabilities have labored under the weight of stigma for a long time. Until now, disability is used to classify them and to justify the denial or restriction of their rights. The human rights model of disability upholds the inherent humanity in persons with disabilities—not by using their disability as a basis for differential treatment, but by recognizing that it is not the only aspect of their identity. It also creates a positive obligation to remove barriers that would hinder their full and effective participation in society on an equal basis with others.

Guardianship as an institution is bound by these traditional notions of disability, making it difficult to approach it from a rights-based perspective. To remedy this dilemma, the use of the state's *parens patriae* power in a way that first and foremost empowers is key. Maintaining a strong presumption of capacity and finding recourse in guardianship only as a last resort ensure that the least restrictive means are used in upholding the right to have rights and protecting all other rights of persons with disabilities.

Contrary to first impression, substituted and supported decision-making systems do not necessarily have to be mutually exclusive. While the obligation of states to uphold the rights of persons with disabilities to equal recognition before the law is a fundamental one, it is equally important to acknowledge that an individual's choices cannot be completely divorced from the influence of others. Thus, legal systems must be prepared for the eventuality that rigid application of the law must not get in the way of achieving the law's goals. Support for those who need it does not have to be perfect; it just has to be fervent, with the sincere desire to help the individual. It is by adopting this perspective that the right to full legal capacity can be enjoyed by all.

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