

SPAIN

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Executive summary

Definitions

- [1]. In Spain, the definitions corresponding to the notions “mental disorder” and “intellectual disability” are scattered over a large number of legal norms. Within the Spanish legal framework “mental disorder” would correspond to the notions “*trastorno mental*” y “*disturbio psicológico*” whereas “intellectual disability” corresponds to “Discapacidad intelectual”. In summary, the same concepts are used by the Spanish legal framework. Anti-discrimination
- [2]. Spain ratified the Convention for the Rights of Persons with Disabilities (CRPD) and its Optional Protocol on 3 December 2007. Besides, there is a large number of national legal rules on non-discrimination and equality.

Specific fundamental rights

- [3]. Article 15 of the Spanish Constitution (CE) guarantees “the right to life and physical and moral integrity” to all citizens, without exception and without discrimination.
- [4]. Article 17.1 CE states that “Every person has the right to liberty and security”.
- [5]. Legally incapacitated persons lack the procedural competence to participate in trial proceedings and can only act through their legal representatives.
- [6]. According to Article 18.1 CE, the right to honour, personal and family privacy, and to the own image is guaranteed to all persons.
- [7]. If reasonable doubt exists as to whether the persons concerned are capable of giving consent and accept the obligations of marriage, the judge responsible for the Civil Registry will have to decide whether the person concerned can be considered capable to give consent after having received a report from the forensic department and the opinion of the Public Prosecutor’s Office.
- [8]. With regard to the right to have children, it should be noted that the Criminal Code allows for the sterilisation of persons incapacitated on grounds of mental deficiencies in very specific, exceptional cases.
- [9]. Incapacitated person under a representative regime lacks the capacity to acquire possession of property.
- [10]. Persons with intellectual disabilities or mental disorders have the right to exercise the right to vote.

Involuntary placement and involuntary treatment

- [11]. Article 763 of *Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*¹ [Civil Procedure Act] is the central legal norm within the Spanish legal order relating to involuntary treatment of persons with mental disorder. It should be noted that Article 763 neither contains a definition of the term “mental disorder” nor the reasons which make an involuntary placement necessary. Besides, article 763 fails to stipulate

¹ Spain/ State Official Journal no. 7 of 08.01.2000.

expressly that the involuntary placement is an *ultima ratio* admissible only if no other less restrictive measures of providing appropriate care are available. The involuntary treatment is regulated generally (not only as regards persons with mental disorder) by Article 9 par. 2 and 3 of the Act on the Autonomy of the Patient. It should be noted that no judicial authorization is required for the involuntary treatment. However, according to a Draft Proposal of the Government of 2006 the involuntary treatment of patients shall become in the future subject to a judicial authorization.

Competence, capacity and guardianship

- [12]. The declaration of incapacity implies a reduction or limitation of the defendant's capacity to act and his/her subjection to a representative (guardianship) or assistance (curatorship) regime, or a regime which may be either (extended or reinstated parental authority), depending on the content of the judgment. The custody and care of a person and his assets or only of the person or the assets of minors or incapable persons shall be carried out, when appropriate, by means of: 1° Guardianship; 2° Curatorship; 3° Judicial defender.
- [13]. The conditions required for placing adults lacking capacity under the protective systems established by national law are a Court ruling declaring the defendant incapacitated and the establishment of a regime of representation or assistance.

Miscellaneous

- [14]. No issues falling under this section have been detected.

1. Definitions

- [15]. Within the Spanish legal framework “mental disorder” would correspond to the notions “*trastorno mental*” y “*disturbio psicológico*” whereas “intellectual disability” corresponds to “*incapacidad psíquica*” o “*invalidéz o minusvalía mental*”. (See comment on Summary, page 3) However, it should be noted that since there is no specific Mental Health Act in Spain, the different concepts of these terms are scattered over a large number of legal norms in different legal areas. Besides, these concepts have been also subject to a social evolution. The following definitions contained in different Acts are worth mentioning:
- [16]. Article 49 of the Spanish Constitution (1978) refers to the “*discapacitados mentales*” (mentally handicapped) establishing that the public authorities shall implement a policy of prevention, treatment, rehabilitation, and integration of those who are physically, sensorially, or mentally handicapped, who shall be given the special attention which they require and be afforded special protection for the enjoyment of the rights which the Constitution grants to all citizens. This definition covers both mental disorder and intellectual disability.
- [17]. The Spanish *Código Civil*²[Civil Code] (Articles 199, 200 and 201) and the *Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*³ [Civil Procedure Act] (Articles 756-763) stipulate that a person can be declared “*incapaz*” [incapable] only by a judicial judgment and under the conditions established by the law. The concept used by those legal norms is the one of “*disturbio psicológico*” (psychological disturbance or also mental disorder). The criteria for the declaration of incapacity are flexible so that the judge can decide on the concrete degree of incapacity of the person affected by the disturbance. Accordingly, the mental disorder (psychological disturbance) must be of permanent character and impede the person’s “self-government”.
- [18]. The *Código Penal*⁴ [Criminal Code] of 1995 (Article 20 par. 1) establishes that persons with “*enajenación mental*” [mental illness] are criminally incapable. “*Enajenación mental*” exists in the event of “*anomalías o alteraciones psíquicas*” [abnormality or mental disorders, disturbances] impeding the person affected to percept the illegality of his/her actions and to act in conformity with this perception. According to the case-law of the Spanish *Tribunal Supremo* [Supreme Court] it must be established if the offender concerned is able to identify the good and the bad and to distinguish between good and bad as regards the basic elements of life, such as sexual relations”⁵.
- [19]. At the same time the Criminal Code uses also the notion “*trastorno mental transitorio*” [temporary mental disorder].
- [20]. Furthermore, the *Ley General de la Seguridad Social, texto refundido aprobado por Real Decreto Legislativo de 20 de junio de 1994*⁶ [General Act on Social Security (recast)] distinguishes between two concepts of “*minusvalía*” [disability] depending on the working situation of the person concerned:
- As regards contributory benefits, disability is the “situation of workers who, after undergoing prescribed treatment and receiving medical discharge, suffer severe anatomical or functional impairment that may be objectively determined and is likely to be permanent, and that diminishes or removes their ability to work” (Article 136 par. 1).

² *Real Decreto de 24.07.1889* [Royal Decree of 24.07.1889] with further amendments, Spain/ Official Journal of Madrid of 25.07.1889

³ Spain/ State Official Journal no. 7 of 08.01.2000.

⁴ Spain/ State Official Journal no. 281 of 24.11.1995.

⁵ Spain/ Judgment of the Supreme Court no. 1032/2000 of 06.06.2000 (See Annex).

⁶ Spain/ State Official Journal no. 154 of 29.06.1994.

- As regards non-contributory benefits, “impairments likely to be permanent, whether physical or mental, congenital or otherwise, which alter or render ineffective the physical, mental or sensory capacity of those suffering from them” (Article 136 par. 2).

- [21]. The *Ley 13/1982 de Integración Social de los Minusválidos*⁷ [Act on the Social Integration of Persons with Disability] (hereinafter: *LISMI*) also uses the notion “*minusválido*” [person with disability]. The Act aims at the social and labour integration of persons with disability. The definition of “disability” used in this Act is much more extensive than the one given by the General Act on Social Security insofar that it refers to the consequences of the impairment and the integration of disabled people not only in work field but also in other fields such as education and society. Accordingly, a disabled person is “any person whose capacity for integration in education, work, or society is found to be diminished as a consequence of a impairment, congenital or otherwise, that is likely to be permanent, in their physical, mental, or sensory capacities”.
- [22]. Furthermore, *Ley 51/2003, de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad*⁸ [Act 51/2003 on Equal Opportunities, Non-Discrimination and Universal Accessibility of Persons with Disabilities] (known as *LIONDAU*) uses the term “*discapacidad*” [disability] and provides that: “For the purposes of this Act, persons with disability shall be deemed to be those with an attested degree of disability of at least 33 per cent. In any case those with a recognized entitlement to Social Security pensions for permanent disability rated as total, absolute or severe shall be deemed to be affected by a degree of disability of at least 33 per cent. The same applies to passive-class pensioners with a recognized entitlement to a retirement pension or a pension for retirement due to permanent incapacity”. The degree of disability must be attested by the competent authority.
- [23]. As for the interpretation of the notion “*discapacidad*” [disability] used in the Employment Framework Directive 2000/78/EC of 27 November 2000 and thus also in the *Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de carácter social*⁹ [Act on fiscal, administrative and social measures] transposing the Directive, the judgement of the Court of Justice of the European Communities (hereinafter: ECJ) in the case Case C-13/05, *Chacón vs Eurest*¹⁰ referred for preliminary ruling by the Social Court no. 33 of Madrid is worth mentioning. The ECJ held that the concept of “disability” “must (...) be given an autonomous and uniform interpretation” (paragraph 42) and, in the context of Directive 2000/78, “the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life” (paragraph 43). “However, by using the concept of ‘disability’ in Article 1 of that directive, the legislature deliberately chose a term which differs from ‘sickness’. The two concepts cannot therefore simply be treated as being the same” (paragraph 44). It also states that “in order for the limitation to fall within the concept of ‘disability’, it must therefore be probable that it will last for a long time” (paragraph 45).
- [24]. It should be noted that there is no further case-law contributing to the definition of the above mentioned terminology.

⁷ Spain/ State Official Journal no. 103 of 30.04.1982.

⁸ Spain/State Official Journal no. 289 of 03.12.2003.

⁹ Spain/ State Official Journal no. 311 of 31.12.2003.

¹⁰ Available at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurftp=jurftp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnrec=alldocnrec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C-13%2F05&ddatefs=&mdatefs=&ydatefs=&ddatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100&Submit=Submit> (14 October 2009). (See also Annex).

2. Anti-discrimination

2.1. Incorporation of United Nations standards

- [25]. The main focus of the Thematic Study of the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities (A/HRC/10/48, of 26 January 2009)¹¹ lies on the legal measures necessary for the ratification and effective application of the Convention on the Rights of Persons with Disabilities. The Study places Spain correctly among the countries which incorporate ratified and officially published international treaties into their internal legal order (Article 96 of the Spanish Constitution) so that those international treaties are directly applicable since their entry into force.
- [26]. In Spain¹², between 60%-90% of people affected by mental health problems are unemployed. According to the survey developed by IMSERSO published in 2003, only 15% of people with mental illness surveyed were working at the time or had worked before. People with mental illness usually find occasional jobs whereas people with other disabilities are more likely to have more stable contracts. This information reveals a major instability and vulnerability of people with mental health problems on the labour market. The National Action Plan for Social Inclusion (2006-2008) included the elaboration of the Strategy on Mental Health of the National Health System. This is the only direct reference made to mental health. In the Social Inclusion Report (2005-2006), there was a mention of the creation of a Committee in order to redact the Strategy referring to the cooperation of scientific associations and FEAFES. However, in Spain mental illness is mainstreamed in the different actions targeted at people with disabilities.
- [27]. Furthermore, the Second Disability High Level Group report on implementation of the UN Convention on the Rights of Persons with Disabilities (June 2009) presents a panoramic view over the legal regulation and administrative plans relating to the issue of disability (also to mental disability) in Spain. The thematic areas treated by the Report are: Accessibility, Legal capacity, Access

¹¹ Available at:
<http://daccessdds.un.org/doc/UNDOC/GEN/G09/104/55/PDF/G0910455.pdf?OpenElement>
(13 October 2009).

¹² M.H.E. From Exclusion to Inclusion – The Way Forward to Promoting Social Inclusion of People with Mental Health Problems in Europe An analysis based on national reports from MHE members in 27 EU Member States.

to justice, Independent living, Voting rights, Monitoring mechanism and Empowerment of people with disabilities.

- [28]. Spain ratified the Convention for the Rights of Persons with Disabilities (CRPD) and its Optional Protocol on 3 December 2007. The Convention and the Optional Protocol entered into force in Spain on 3 May 2008¹³. It should be noted that in order to ratify the Convention no modifications of the Spanish legislation was necessary. Rather, the CRPD was incorporated into the internal legal order with a rank of an Act since its publication in the State Official Journal (Article 96 of the Spanish Constitution). A legal provision contrary to the Convention would become inapplicable so that the provisions of the Convention would apply instead of those legal provisions. Thus, the instruments and measures of protection established by the CRPD may be applied directly by the Spanish courts. The public authorities may consult the web site created especially in order to guarantee the knowledge of the Convention and its efficiency: <http://www.convenciondiscapacidad.es/prontuario.html>.
- [29]. After the entry into force of the Convention, the Executive Council of the *Consejo Nacional de la Discapacidad* [National Disability Council] (known as CERMI) adopted on 29 September 2009 the report “Spain 2008 Human Rights and Disability”¹⁴. The Report observes that the CRPD contains a new definition of the concept of disability and thus, the necessary modifications of the terminology and content of the correspondent national rules should be made. According to the Report, Article 1 of the *LIONDAU* should be amended including the notion of disability established by the CRPD. Furthermore, Articles 200 ff. of the Spanish Civil Code should be amended introducing the guarantees provided for by the CRPD regarding the procedure of declaration of incapacity.
- [30]. It should be highlighted that as consequence of the entry into force of the CRPD, a transitory provision has been included into *Ley 1/2009, de 25 de marzo, de reforma de la Ley de 8 de junio de 1957, sobre el Registro Civil, en materia de incapacitaciones, cargos tutelares y administradores de patrimonios protegidos, y de la Ley 41/2003, de 18 de noviembre, sobre protección patrimonial de las personas con discapacidad y de modificación del Código Civil, de la Ley de Enjuiciamiento Civil de la normativa tributaria con esta finalidad*¹⁵ [Act 1/2009 amending the Act on the Civil Registry with respect to incapacitations, guardianship and administrators of protected property and of Act 41/2003 on Protection of the Patrimony of Persons with Disability as well as of the Civil Code and the Civil Procedure Act and of Tax Regulations to this end] in order to adapt the existing procedure for declaration of the incapacity to the requirements of the CRPD. Accordingly, the Government shall submit to the Parliament within a time limit of six months after the entry into force of this Act

¹³ Spain/ State Official Journal of 21.04.2008.

¹⁴ Available at: <http://www.convenciondiscapacidad.es/informes.html> (in Spanish) (13 October 2009).

¹⁵ Spain/ State Official Journal no. 73 of 26.03.2009.

a draft proposal on the amendment of the judicial procedures for declaration of the incapacity. These procedures shall be renamed in procedures for the modification of the capacity to act in order to be adapted to the requirements of the CRPD.

2.2. The anti-discrimination national framework

- [31]. There are several anti-discrimination/equality rules in respect of persons with mental disorders and intellectual disability at constitutional level.
- [32]. Article 14 (Equality) of the Spanish Constitution establishes that the Spaniards are equal before the law, without any discrimination for reasons of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance. This provision is applicable also to discrimination on the grounds of disability (mental and physical).
- [33]. Besides, Article 9 (Rule of Law) of the Spanish Constitution establishes that “It is the responsibility of the public powers to promote conditions so that liberty and equality of the individual and the groups he joins will be real and effective; to remove those obstacles which impede or make difficult their full implementation, and to facilitate participation of all citizens in the political, economic, cultural, and social life.” It should be highlighted that positive action regarding persons with mental disorders and persons with intellectual disability are based on this article.
- [34]. Furthermore, Article 49 (Persons with Disability) of the Spanish Constitution words: The public authorities shall implement a policy of prevention, treatment, rehabilitation, and integration of those who are physically, sensorially, or mentally handicapped, who shall be given the special attention which they require and be afforded special protection for the enjoyment of the rights which this Title grants to all citizens.
- [35]. At the legislative level, worth mentioning is the *Ley 51/2003, de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad*¹⁶ [Act 51/2003 on Equal Opportunities, Non-Discrimination and Universal Accessibility of Persons with Disabilities] (known as *LIONDAU*). This Act has been developed by:
- Real Decreto 1414/2006, de 1 de diciembre, por el que se determina la Consideración de Persona con Discapacidad a los efectos de la Ley 51/2003 de Igualdad de Oportunidades, no Discriminación y Accesibilidad Universal 18

¹⁶ Spain/State Official Journal n° 289 of 03/12/2003.

- de las Personas con Discapacidad¹⁷ [Royal Decree 1414/2006, of 2 Decembre, which states the consideration of person with disability, for the purposes of the Act 51/2003 on Equal Opportunities, Non-Discrimination and Universal Accessibility of Persons with Disabilities]
- Real Decreto 1417/2006, de 1 de diciembre, por el que se establece el Sistema Arbitral para la Resolución de Quejas y Reclamaciones en Materia de Igualdad de Oportunidades, no Discriminación y Accesibilidad por Razón de Discapacidad¹⁸ [Royal Decree 1417/2006, of 1 Decembre, which establishes the Arbitration System for solving claims and complaints with regard to Equal opportunities, non discrimination and accessibility on grounds of disability.
- *Real Decreto 366/2007, de 16 de marzo, por el que se establecen las condiciones de accesibilidad y no discriminación de las personas con discapacidad en sus relaciones con la Administración General del Estado*¹⁹ [Royal Decree 366/2007 of 16 March, which sets forth the conditions of accessibility and non-discrimination of people with disabilities in their relations with the General State Administration].
- *Real Decreto 505/2007, de 20 de abril, por el que se aprueban las condiciones básicas de accesibilidad y no discriminación de las personas con discapacidad para el acceso y utilización de los espacios públicos urbanizados y edificaciones*²⁰ [Royal Decree 505/2007 of 20 April, which sets forth the basic conditions of accessibility and non-discrimination of people with disabilities for accessing and using public spaces and buildings].
- *Real Decreto 1494/2007, de 12 de noviembre, por el que se aprueba el Reglamento sobre las condiciones básicas para el acceso de las personas con discapacidad a las tecnologías, productos y servicios relacionados con la sociedad de la información y medios de comunicación social*²¹[Royal Decree 1494/2007, of 12 November, by which the Regulations on basic conditions for access for disabled persons to technologies, products and services related to the information society and social communication media are passed].
- Real Decreto 1544/2007, de 23 de noviembre, por el que se regulan las condiciones básicas de accesibilidad y no discriminación para el acceso y utilización de los modos de transporte para personas con discapacidad²² [Royal Decree 1544/2007, of 23 November, by which the basic conditions of accessibility and non-discrimination for access to and the use of means of transportation by people with disabilities are regulated].

¹⁷ Spain/ State Official Journal n°. 300 of 16/12/2006

¹⁸ Spain/ State Official Journal n°. 297 of 13/12/2006

¹⁹ Spain/ State Official Journal no. 72 of 24.03.2007.

²⁰ Spain/ State Official Journal no. 113 of 13.05.2007.

²¹ Spain/ State Official Journal no. 279 of 21.11.2007.

²² Spain/ State Official Journal no. 290 of 04.12.2007.

- Ley 49/2007, de 26 de diciembre, por la que se establece el régimen de infracciones y sanciones en materia de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad.²³ [Law 49/2007, of 26 December, which establishes the Offences and Sanctions regarding equal opportunities, non-discrimination and universal accessibility for disabled people]
- Orden PRE/446/2008, de 20 de febrero. Especificaciones y características técnicas de las condiciones y criterios de accesibilidad y no discriminación establecidos en el Real Decreto 366/2007, sobre requisitos de accesibilidad en las relaciones de las personas con discapacidad con la Administración General del Estado²⁴. [Order No. PRE/446/2008 of 20 February 2008 determining the technical specifications and characteristics of the conditions and criteria of accessibility and non-discrimination established in Crown Decree No. 366/2007]

[36]. Furthermore, it should be pointed out that *Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de carácter social*²⁵ [Act on fiscal, administrative and social measures] transposes the Employment Framework Directive 2000/78/EC of 27 November 2000.

[37]. Besides, the *Ley 13/1982 de Integración Social de los Minusválidos*²⁶ [Act on Social Integration of Persons with Disability] (hereinafter *LISMI*) should be mentioned.

[38]. *Ley 39/2006 de promoción de la autonomía personal de las personas en situación de dependencia*²⁷ [Act 39/2006 of 14 December, on the Promotion of Personal Autonomy and care for people in a situation of dependency] sets forth in Article 1 that the purpose of this Act is to regulate basic conditions that guarantee equality when exercising the civil rights of citizenship, the promotion of personal autonomy and care for people in a situation of dependency, in the terms established in the Act, through the creation of a System for the Autonomy and Care of dependent people, with the collaboration and participation of all Public Administrations and the guarantee of the General State Administration of minimum equal rights for all citizens anywhere in Spain.

[39]. Furthermore, *Ley 49/2007, de 26 de diciembre, por la que se establece el régimen de infracciones y sanciones en materia de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad*²⁸ [Act 49/2007 on Infringements and Sanctions within the field of Equality of Opportunities, Non-Discrimination and Universal Accessibility of Persons with

²³ Spain/ State Official Journal n°. 310 of 27/12/2007.

²⁴ Spain/ State Official Journal n° 48 of 25/02/2008

²⁵ Spain/ State Official Journal no. 311 of 31/12/2003.

²⁶ Spain/ State Official Journal no. 103 of 30/04/1982.

²⁷ Spain/ State Official Journal no. 299 of 15.12.2006.

²⁸ Spain/ State Official Journal no. 310 of 27.12.2007.

Disability] establishes sanctions for acts involving direct or indirect discrimination due to reasons of disability.

- [40]. As for anti-discrimination/ equality rules established by the courts it should be noted that according to the case-law of the Spanish Constitutional Court although Article 14 of the Constitution does not mention expressly the notion “disability”, the prohibition of discrimination on the grounds of disability is covered by this provision²⁹.
- [41]. The principle of “positive action” is established by the Spanish Constitution: Article 14 formally recognizes equality before the law, without discrimination on any of the grounds listed in the Constitution, while Article 9 par.2 requires the public authorities to promote “the conditions to ensure that the freedom and equality of individuals and of the groups to them that belong are real and effective”. The positive action required by Article 9 par.2 should not be regarded only as a “legitimate exception” but as a guarantee of the effectiveness of the principle of equality.
- [42]. In this connection, the Constitutional Court has repeatedly held that positive action measures are not discriminatory. Rather, the Court has established that actions of the public authorities in order to remedy the employment disadvantage of certain socially marginalized groups are actually required by a commitment to equality properly understood³⁰.
- [43]. In the field of employment, the *Estatuto de Trabajadores*³¹ [Workers’ Statute] (art. 17 par. 2) stipulates that the Parliament may regulate measures of exclusion and reservation (quotas) as well as preferential measures in the field of employment for certain groups at a disadvantage on the labour market. Besides, the Government “may regulate reservation, duration or preference measures in employment”.
- [44]. As for the field of education, the *Ley Orgánica 1/1990, de 3 de octubre, de Ordenación General del Sistema Educativo*³² [Organic Act on the General Organization of the Education System] stipulates that “In order to render effective the principle of equality in the exercise of the right to education, the authorities develop compensatory actions targeted at persons, groups and territorial regions in unfavourable situations, and provide the necessary economic resources” (art. 63).
- [45]. Furthermore, Act 62/2003 transposing Directive 2000/78 contains several provisions regarding preferential measures Art. 35 provides for the field of

²⁹ Spain/ Judgment of the Constitutional Court no. 269/1994 of 03.10.1994.

³⁰ Spain/ Judgment of the Constitutional Court no. 269/1994 of 03.10.1994.

³¹ *Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores* [Royal Legislative Decree 1/1995 on the Workers’ Statute (recast)]. Spain/ State Official Journal no. 75 of 29.3.1995.

³² Spain/ State Official Journal no. 238 of 4.10.1990.

employment and occupation that “with a view to ensuring full equality on the grounds of ...disability..., the principle of equality shall not prevent maintaining or adopting specific measures in favour of certain groups in order to prevent or compensate for disadvantages that they may encounter”.

- [46]. Besides, there has been a great range of positive action measures as regards persons with disability since the implementation of the Act on the Social Integration of Persons with Disabilities (*LISMI*). Its objective (art. 38) is the complete personal fulfilment of the persons with disability and their total social integration so that the necessary assistance and protection to the seriously disabled shall be provided, discrimination due to disability is prohibited, and a quota system and other acts in favour of job integration for the disabled are provided. The Spanish Constitutional Court has recognized the legality of the reservation of quotas for persons with disability in the selection of employees³³.
- [47]. Furthermore, the *LIONDAU* provides a series of positive action measures to combat the discrimination suffered by persons with disability (art. 8):
- [48]. “1. Positive action measures shall be those forms of specific support intended to prevent or to offset the disadvantages or special difficulties experienced by disabled people on entering and taking part in the various spheres of political, economic, cultural and social life, in keeping with the various types and degrees of disability.
- [49]. 2. The public authorities shall adopt additional positive action measures for disabled people that objectively experience a greater degree of discrimination, or lesser equality of opportunities, such as women with disabilities, disabled people with severe handicaps, disabled people that cannot represent themselves, or those who suffer greater social exclusion owing to their disabilities, along with disabled people that live in a rural environment.
- [50]. 3. Furthermore, within the framework of official policy for protecting the family, the public authorities shall adopt special positive action measures in respect of families with disabled members.”
- [51]. In order to integrate persons with disability into the ordinary labour market, the *LIONDAU* provides for several preferential measures:
- A quota system (the workforces of public and private companies with 50 or more employees must include at least 2 per cent of workers with disabilities);
 - Incentives: Indefinite contracts with persons with a degree of disability of at least 33 per cent are subsidised (aid of 3,900 Euros to companies for each indefinite contract); bonuses in Social Security contributions (reduction of companies’ Social Security contributions, offset by the public employment

³³ Spain/ Judgment of the Constitutional Court no. 269/1994 of 03.10.1994. (See also Annex).

services), support for professional training, bonuses for adaptation of work stations (subsidies for the adaptation of the work place) and fiscal measures. As regards temporary contracts, a reduction (in force until 1992) and bonuses in companies' Social Security contributions are provided for.

- [52]. The reiterated failure of companies to comply with the requirement established by the LIONDAU that at least 2 per cent of the workers shall be persons with disability, has resulted in the enactment of *Real Decreto 27/2000, de 14 de enero, por el que se establecen medidas alternativas de carácter excepcional al cumplimiento de la cuota de reserva del 2 por 100 en favor de trabajadores discapacitados en empresas de 50 o más trabajadores*³⁴ [Royal Decree 27/2000 on Alternative measures for the compliance with the quota in favour of disabled workers in companies with at least 50 workers]. Accordingly, two types of substitute measures for the mentioned quotes are provided:
- The possibility of contracts of supplies and services with Special Work Centres (where at least 70 per cent of the workers are persons with disability;
 - Donations to foundations and NGO's dedicated, among others, to the promotion of the work integration of disabled persons.
- [53]. It should be noted that the allocation of quota regarding persons with disability applies also to employment within the public administration.
- [54]. In this context it should be highlighted that the Spanish Constitutional Court held in the landmark case 269/1994 that an allocation of quotas for employment in the public administration reserved to persons with disability is not contrary to the Constitution provided that the candidates with disabilities pass the competition under the same conditions as the rest of the candidates³⁵.
- [55]. As stated above, the Employment Framework Directive 2000/78/EC of 27 November 2000 was transposed by Act 62/2003 on fiscal, administrative and social measures. It should be pointed out that Act 62/2003 is a "*Ley de acompañamiento*" [Accompanying Act], called so due to the fact that such kind of Acts are passed along with the adoption of the General National Budget. The Act transposes besides the Employment Framework Directive 2000/78 also the Racial Equality Directive 2000/43 and contains furthermore amendments of over fifty existing laws.
- [56]. Article 27 par. 1 of Act 62/2003 reads: "This chapter has the objective to establish measures for the real and effective application of the principle of equal treatment and non-discrimination, particularly on the grounds of racial or ethnic origin, religion or beliefs disability, age or sexual orientation". The Act mentions not expressly whether the notion "*discapacidad*" [disability] includes also persons with mental disorder. Act 62/2003 rather offers no definition of the term "*discapacidad*". However, according to the judgment of the Court of

³⁴ Spain/ State Official Journal of 26.01.2000.

³⁵ Spain/ Judgement of the Constitutional Court STC 269, 1994 of 03.10.1994.

Justice of the European Communities in the Case C-13/05, *Chacón vs. Eurest* on a question referred for preliminary ruling by Social Court no. 33 of Madrid, in the context of Directive 2000/78, “the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life” (paragraph 43).

- [57]. There is no Spanish case-law dealing specifically with the question whether the notion “disability” in Act 62/2003 transposing Directive 2000/78 shall include also persons with mental disorder. However, many Spanish courts have already reiterated in their case-law the definition of “disability” established by the ECJ. For instance, the *Tribunal Superior de Justicia de la Comunidad Valenciana* [Superior Court of Justice of the Autonomous Community of Valencia] referred to the definition of the notion “disability” established by the ECJ in its judgement N° 709/2007 and declared void the dismissal of an employee with attested psychical disability. The Court held that due to the shift of the burden of proof in discrimination cases, the employer failed to prove that the dismissal of the disabled worker was not based on his disability (see also the Annex below).
- [58]. Furthermore, it should be highlighted that the Act on the Social Integration of Persons with Disability (*LISMI*) also prohibits in Article 37, modified by Act 62/2003, discrimination on the grounds of disability and overlaps insofar with the provisions of the Transposition-Act. In this context it should be mentioned that the *LISMI* is a “horizontal” Act establishing positive measures and non-discrimination rules applicable not only to the employment field but also to education etc. However, Article 7 of this Act establishes that for the purposes of the Act a disabled person is “any person whose capacity for integration in education, **work**, or society is found to be diminished as a consequence of a impairment, congenital or otherwise, that is likely to be permanent, in their physical, **mental**, or sensory capacities”(emphasis added).
- [59]. By way of conclusion it could be said that the notion “disability” in Act 62/2003 transposing Directive 2000/78, interpreted in accordance with the case-law of the ECJ and reiterated by the Spanish courts as well as in systematical interpretation with Article 7 of the *LISMI*, includes also persons with mental disorder.
- [60]. Act 51/2003 on equal opportunities, non-discrimination and universal accessibility of persons with disabilities (*LIONDAU*) prohibits the discrimination on the grounds of disability and provides for positive actions in order to attain a “universal accessibility” for disabled persons. The Act applies to areas other than employment, such as telecommunication and information society, urban public spaces, infrastructure and buildings, transport, goods and services available to the public and relations with the public administration. The *LIONDAU* states that “For the purposes of this Act, persons with disability shall be deemed to be those with a degree of disability of at least 33 per cent.” The

degree of disability must be attested by the competent public authority. The Act offers no definition of the notion “disability”. It should be pointed out that the main focus of the *LIONDAU* is on the physical accessibility of the public spaces, services etc., since the Act states that it builds upon the principles of normal life implying universal access for disabled people and “design for all” relating to the creation of products usable by all people (Article 2). However, although the Act apparently aims mainly at the promotion of positive actions relating to physically disabled persons, it mentions several times (Articles 8 par. 1 and 2, 10 par. 3) the “different types of disability”. In this context it should be highlighted that *Real Decreto 1971/1999, de 23 de diciembre, de procedimiento para el reconocimiento, declaración y calificación del grado de minusvalía*³⁶ [Royal Decree 1971/1999 of 23 December on Procedure for the Recognition, Attest and Qualification of the Degree of Disability] establishes that the types of disability are psychical, physical and sensory. Besides, according to Article 8 par. 2 of the *LIONDAU* the public authorities shall take particularly measures (positive action) related to especially vulnerable disabled persons such as those who cannot represent themselves who are as a general rule persons with mental disorder. In summary it could be said that the *LIONDAU* refers also to persons with mental disorder. This paragraph (60) must be updated taking into account the Royal Decree 1414/2006 which states the consideration of person with disability, for the purposes of the Act 51/2003, already included in this revision as a development of *LIONDAU* (see para. 35). Under this Royal Decree, persons with disability shall be deemed to be those with a degree of disability of at least 33 per cent, and it establishes the procedure for recognition of that degree. On the other hand, the *LIONDAU* does not focus only on physical accessibility but on “universal accessibility” (as indicated in the title itself and defined in the law), which include all accessibility requirements for all types of disability, therefore including non only physical, but also sensorial and intellectual disabilities. Therefore, above mentioned references within the law to “different types of disability” are coherent with the general scope of the law.

- [61]. Furthermore, the *LISMI* aims at the integration of disabled persons into the social, cultural and working life. The Act expressly includes persons with psychical (mental) disability into the notion “disability”. The Act establishes that all disabled persons shall enjoy social protection including health care (also medical-functional rehabilitation) and pharmaceutical assistance, a minimum income and financial aid for the support provided by third persons as well as subventions for mobility (transport costs etc.) and for occupational training. Furthermore, disabled persons are entitled to social services including support by specialized staff at home or placement in a special centre as well as participation in culture and sport activities and in other leisure activities. As regards education, the Act establishes the principle of integration of disabled persons into the general education system. If this is not possible due to the degree of disability of the person concerned, special education is provided within the facilities of the general education centre in order to promote the

³⁶ Spain/ State Official Journal no. 22 of 26.01.2000.

future integration of the disabled person into the general education system. Special education is provided in special centres only as *ultima ratio*.

- [62]. Instead, neither the *LIONDAU* nor the *LISMI* prohibit the discrimination of disabled persons as regards housing. However, it should be highlighted that according to Article 512 of the Criminal Code persons, who, exercising their professional or business activity, deny to provide a service to a person on grounds of his/her disability, are punished with an occupational ban for a period of one up to four years.
- [63]. It should be noted that there is no relevant case-law related to the inclusion of persons with mental disorder into the notion “disability” as regards areas other than employment.
- [64]. Act 62/2003 transposing Directive 2000/78 introduced a new Article 37 bis into the *LISMI* stating that “employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.” There is no case-law on this regulation so far.
- [65]. Furthermore, *Real Decreto 2271/2004, de 3 de diciembre, por el que se regula el acceso al empleo público y la provisión de puestos de trabajo de las personas con discapacidad*³⁷ [Royal Decree 2271/2004 on the Access of Persons with Disability to the Public Sector Employment] establishes that within the selection phase (including exams, occupational and practical training) the time and the mediums shall be adapted to the needs of candidates with a degree of disability (psychical or physical) of at least 33 per cent. Those candidates shall upon request dispose of additional time for the performance of the exam and shall obtain all personal, technical or technological support necessary.
- [66]. Furthermore, it should be highlighted that during the last years the Supported Employment model has gained in importance as regards the integration of persons with intellectual disability into the ordinary labour market. According to *Real Decreto 870/2007, de 2 de julio, por el que se regula el programa de empleo con apoyo como medida de fomento de empleo de personas con discapacidad en el mercado ordinario de trabajo*³⁸ [Royal Decree 870/2007 regulating the Programme of Supported Employment as a Promotion Measure for the Employment of Persons with Disability in the Ordinary Labour Market] “supported employment” shall be deemed to be the totality of orientation activities and individual assistance and support in the workplace provided by specialized work coaches in order to facilitate the social and labour accommodation of the employees with disability. The Job Coach provides support to the employee in order to learn the skills required for the job and to adapt to the workplace. Besides, the Job Coach follows up the performance of

³⁷ Spain/ State Official Journal no. 303 of 17.12.2004.

³⁸ Spain/ State Official Journal no. 168 of 14.07.2007.

the work by the person with disability and provides aftercare for maximum 2 ½ years. The Job Coach also provides information and advises the employer on the necessary accommodations of the workplace. Employers who hire persons with disability using a “Supported Employment” programme receive a state subvention. It should be noted that the Royal Decree is applicable to persons with intellectual disability whose degree of disability is of at least 33 per cent.

- [67]. Besides, Article 4 of the *LIONDAU* establishes for the areas of telecommunication and information society, urban public spaces, infrastructure and buildings, transport, goods and services available to the public and relations with the public administration and subsidiary for the employment field that the denial to provide reasonable accommodation violates the right of people with disability (psychical or physical) to equal treatment. According to the *LIONDAU*, “reasonable accommodation” shall mean the measures necessary in order to adapt the physical and social environment and the behavior patterns to the special needs of the persons with disability, which, effectively and practically and not implying a disproportionate burden, facilitate the accessibility and participation of the persons with disability upon equal conditions as the other citizens. In this context it should be highlighted that *Ley 49/2007, de 26 de diciembre, por la que se establece el régimen de infracciones y sanciones en materia de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad*³⁹ [Act 49/2007 on Infringements and Sanctions regarding Equality of Opportunities, Non-Discrimination and Universal Accessibility of Persons with Disability], developing the *LIONDAU*, establishes that the denial of reasonable accommodation shall be deemed to be a grave infringement punishable with a administrative sanction of up to 90.000 Euros.
- [68]. As for the area of education it should be pointed out that the Act on Social Integration of Persons with Disability establishes reasonable accommodation for university students with disability. The Act establishes that upon request the number of the attempts available for passing the exams may be increased and the degree of the difficulty of the exams may be adapted to the characteristics of the disability of the person concerned.
- [69]. The *LIONDAU* replaced the former State Council for People with Disabilities by the *Consejo Nacional de la Discapacidad* [National Disability Council] (known as CERMI) and assign it wider competences in the field of equal opportunities and non-discrimination. The National Disability Council is an inter-ministerial collegiate advisory body that institutionalizes the collaboration of associations of disabled people and their families with national government with a view to defining and coordinating a policy of integral care for persons with disability. It is attached to the Ministry of Labour and Social Affairs (Department of Social Services, Families and Disability). Its functions include the issuing of reports, of a mandatory, non-binding nature, on draft regulations

³⁹ Spain/ State Official Journal no. 310 of 27.12.2007.

affecting equal opportunities, non-discrimination and universal accessibility. Besides, the Council has a Special Permanent Bureau responsible for promoting equal opportunities, non-discrimination and universal accessibility for disabled people. The Special Permanent Bureau provides legal advice and support to victims of discrimination on the grounds of disability (also to persons with intellectual disability) and victims of discrimination may lodge a complaint with it. However, the Council is no formal decision-making body. There is a confusion here between the National Disability Council and CERMI. They are different bodies. CERMI is the Spanish Committee of People with Disabilities Representatives, the Spanish umbrella organisation of associations of persons with disabilities, created in 1997. As for the State Council of Persons with Disabilities (created in 1999), the 2nd Final Disposition of LIONDAU replaces its name by the National Disability Council (Consejo Nacional de la Discapacidad), and updates it on the light of this law. The National Disability Council is an inter-ministerial collegiate advisory body, integrated by all Ministries as well as by CERMI. In this sense, the National Disability Council means the institutionalization of the collaboration between the General State Administration and the representatives of persons with disabilities (through CERMI).

[70]. Besides, it should be noted that the Ombudsmen (national or regional, whenever they exist) are not deprived of their competences by the creation of the Council. Therefore, a victim of discrimination on the grounds of disability may lodge a complaint with the Ombudsman when the discriminatory act emanates from the Public Administration. However, the Ombudsman is also no formal decision-making body but may issue recommendations or lodge an individual complaint for protection with the Spanish Constitutional Court.

3. Specific Fundamental Rights

3.1. The Right to life

- [71]. Article 15 of the Spanish Constitution (CE) guarantees “the right to life and physical and moral integrity” to all citizens, without exception and without discrimination.
- [72]. The only legal regulation that may by some be considered an exception to this rule is article 417bis of the Spanish Criminal Code of 1973 (introduced by Organic Act 9/1985 and maintained by the Criminal Code of 1995), which decriminalizes abortion (during the first 22 months of pregnancy) under certain conditions, one of them being the risk “that the foetus will be born with grave physical or mental defects”. A leading case in which the Spanish Constitutional Court analyzes various aspects of the right to life is STC 53/1985. In this case, the Court concludes that the exceptional grounds on which abortion is allowed (technically, excluded from criminal liability), as provided in Article 417 bis, are constitutional⁴⁰.
- [73]. However, on 2 October 2009 the Spanish Government presented a bill on “sexual and reproductive health and the voluntary interruption of pregnancy”, seeking to reform the present regulations on abortion. The text of the bill no longer contains any reference to mental deficiencies, but speaks of “grave risk for the life or the health of the pregnant woman”, “risk of grave anomalies in the foetus” and “foetal anomalies incompatible with life” (article 15).⁴¹

3.2. The right to freedom from torture or cruel, inhuman or degrading treatment or punishment

- [74]. Article 15 CE also states that no one may “be subjected to torture or inhuman or degrading punishment or treatment”. In addition, Article 49 CE states that “The public authorities shall implement a policy of prevention, treatment, rehabilitation, and integration of those who are physically, sensory, or mentally handicapped, who shall be given the special attention which they require and **be afforded special protection for the enjoyment of the rights which this Title grants to all citizens**”. (emphasis added)

⁴⁰ Spain/Judgment of the Constitutional Court 53/1985, of 11 April. See Annex.

⁴¹ Spain/Official Journal of the Congress of Deputies no. 41-1 of 02.10.2009.

- [75]. In the field of health care, the *Ley 41/2002, de 14 de noviembre, básica reguladora de la autonomía de paciente y de derechos y obligaciones en materia de información y documentación clínica*⁴² [Basic Act regulating the Autonomy of Patients and the Rights and Obligations concerning Clinical Information and Documentation] (hereinafter: Act on the Autonomy of the Patient) regulates the information that should be provided to patients and requires the informed consent of all patients before initiating any kind of treatment, thus preventing that treatments are used which the patient might consider inhuman or degrading.
- [76]. If a patient due to his/her mental state is intellectually or emotionally incapable of understanding the proposed treatment, is not capable of providing informed consent or has been incapacitated, the informed consent will be requested from his/her (legal) representatives or family members, who will always, within the limits of the patient's capabilities, take into account his/her opinion. Patients at all times have the right to withdraw in writing the consent given by them for any treatment.
- [77]. In a more general sense, the *LIONDAU* obliges the Spanish public administration to take measures against "any conduct related to the disability of a person, which seeks to violate, or leads to a violation of the dignity of that person, or creates an environment which is intimidating, hostile, degrading, humiliating or offensive" (Article 7).
- [78]. There is no case law available on this issue.

3.3. The right to freedom from exploitation

- [79]. According to Article 37 of the *LISMI* the primary goal of employment policies regarding workers with disabilities is their integration into the regular workplace in conditions that guarantee the application of the principle of non-discrimination. This principle shall not prevent measures from being taken to prevent or compensate certain disadvantages resulting from the disability concerned (including, if necessary, the creation of specially adapted work centres).
- [80]. The *LIONDAU* aims to establish measures to guarantee the right to equal opportunities of persons with disabilities. As stated above, this Act is elaborated further by *Ley 49/2007, de 26 de diciembre, por la que se establece el régimen de infracciones y sanciones en materia de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad*⁴³ [Act on the rules regarding infringements and sanctions in the field of equal opportunities, non-discrimination and universal accessibility of persons with

⁴² Spain/ State Official Journal no. 274 of 15.11.2002.

⁴³ Spain/State Official Journal n° 310 of 27.12.2007.

disabilities]. Based on this Act, the public administration can impose financial penalties ranging from 301 to 1.000.000 Euros for varying acts of discrimination regarding persons with disabilities by companies, institutions or public bodies.

- [81]. As for the sexual exploitation of persons with intellectual disabilities, the Spanish Criminal Code penalizes with higher degrees of punishment the crimes of inducing or forcing persons with mental disabilities to prostitute themselves (art. 187 and 188). Specific provisions penalize those who make persons with mental disabilities participate in exhibitionist or pornographic spectacles, or who produce, distribute or sell pornographic material in which persons with mental disabilities have participated.⁴⁴
- [82]. There is no case law available.

3.4. The right to liberty and security

- [83]. Article 17.1 CE states that “Every person has the right to liberty and security. No one may be deprived of his liberty without observance of the provisions of this article and only in the cases and in the form prescribed by law”.⁴⁵
- [84]. The protection of the right to liberty of persons with intellectual disabilities or mental disorders is of particular importance in the case of involuntary treatment and placement, which is extensively dealt with in Section IV of this report. Other circumstances in which protection of this right is important are the investigation and judgment of criminal suspects with mental disabilities or disorders and their penitentiary treatment in case they are convicted. According to Article 20 of the Spanish Criminal Code, he who, when committing a crime, was not able to understand the illegality of his actions due to a mental anomaly or alteration, will be exempt from criminal responsibility. The same applies to those who from birth or childhood have suffered alterations in their perceptions which seriously affect their notion of reality.⁴⁶
- [85]. Naturally, the degree of mental disability or disorder may vary and must be substantiated by means of legally admitted proof (e.g. independent experts), which may lead also to partial exemption. In case of exemption, the Court may however decide that the defendant be placed in an institution in order to receive medical care (art. 101). If convicted to prison term, “those who present physical or mental disorders or deficiencies will be separated from those who are able to

⁴⁴ The Spanish Criminal Code uses the term “*incapaces*”, which strictly speaking only means “handicapped” or “persons with a disability”, without explicitly referring to mental disabilities. The criminal acts described and the fact that the same provisions also refer to minors suggest that in fact persons with mental disabilities are referred to.

⁴⁵ The Spanish Constitutional Court decided on the constitutionality of the judicial procedure on involuntary placement in STC 129/1999, of 01.7.1999. See Annex.

⁴⁶ Spain/State Official Journal n° 281 of 24.11.1995.

follow the normal prison regime” (art. 16 of *Ley Orgánica 1/1979, de 26 de septiembre, General Penitenciaria*⁴⁷ [General Penitentiary Act]).

[86]. There is no case law available.

3.5. The right to fair trial

[87]. Legally incapacitated persons lack the procedural competence to participate in trial proceedings and can only act through their legal representatives (art. 7.1, 7.2 and 8 of the Civil Procedure Act. They cannot act as witnesses either (art. 361 Civil Procedure Act).

[88]. If, in the case of proceedings to decide someone’s legal capacity, the person concerned nor his/her lawyer are able to appear in Court, the Public Prosecutor’s Office will act as judicial defender (*defensor judicial*) in defence of the person concerned. In case the action has been brought by the Public Prosecutor’s Office itself, an independent (public) judicial defender will be appointed to defend the person concerned (art. 758 Civil Procedure Act).

[89]. Also in cases regarding legal capacity where a conflict of interests exists between the person concerned and his/her guardian or curator, the Public Prosecutor’s Office can act as judicial defender.

[90]. There is no case law available.

3.6. The right to privacy, including the access to one’s own confidential medical records

[91]. According to Article 18.1 CE, the right to honour, personal and family privacy, and to the own image is guaranteed. Article 10 of *Ley 14/1986, de 25 de abril, General de Sanidad*⁴⁸ [General Act on Healthcare] states that “Everyone has the following rights in their relations with the different public health administrations:

[92]. 1. Respect for his/her personality, human dignity and privacy, without being discriminated on the grounds of race or gender, for social, economic, ideological or political reasons, or due to the membership of a trade union. [...]

⁴⁷ Spain/State Official Journal n° 239 of 05.10.1979.

⁴⁸ Spain/ State Official Journal n° 102 of 29.4.1986.

- [93]. 3. To the confidentiality of all the information related to his/her care and stay in public health institutions and private institutions collaborating with the public health system.
- [94]. 4. To be advised as to whether the prognostics, diagnostics and therapeutical treatment carried out may be used for any teaching or research purposes, which under no circumstance may entail additional danger for his/her health. In any case, the previous written authorisation of the patient will be required, as well as the acceptance of the physician and the management of the health centre concerned.
- [95]. Furthermore, Article 7 of the Act on the Autonomy of the Patient bearing the title “The right to privacy”, states that everyone is entitled to the confidentiality of information regarding his/her health, to which nobody will have access without previous authorisation regulated by law.
- [96]. According to Article 4, patients have the right to receive all the information available related to acts regarding their health, except the information excluded by law. Clinical information shall be provided “in a comprehensible way adapted to the needs of the patient, allowing him/her to take decisions of his/her own free will. According to paragraph 2 and 3 of Article 5 even in case a patient has been incapacitated he/she must be informed to the extent of his/her capability of comprehension, while at the same time his/her legal representative should be informed. In case a patient, according to medical opinion, is not capable of understanding the information due to his/her mental or physical state, his family members or other close relations must be informed.
- [97]. There is no case law available.

3.7. The right to marry, to found a family and to respect of family life

- [98]. According to article 32.2 CE “The law shall regulate the forms of marriage, the age at which it may be entered into and the required capacity to do so, the rights and duties of the spouses, the grounds for separation and dissolution, and the consequences thereof”. Article 56 of the Civil Code (hereinafter: CC) provides that “if any of the contracting parties shows mental deficiencies or anomalies a medical opinion shall be requested concerning his/her capacity to give consent”. Thus, if reasonable doubt exist as to whether the persons concerned are capable of giving consent and accept the obligations of marriage, the judge responsible for the Civil Registry will have to decide whether the person concerned can be considered capable to give consent after having received a report from the forensic department and the opinion of the Public Prosecutor’s Office. The absence of this decision does not lead to a formal defect in the marriage

agreement, but does constitute possible proof for the future annulment of the marriage due to lack of consent (art. 73.2 CC).

- [99]. Separation and divorce procedures cannot be initiated by means of representation as these actions imply a change of civil status, which can only be decided by the person directly affected. The annulment procedure, however, can be instituted by the spouses, the Public Prosecutor or any person having a direct and legitimate interest in the annulment (art. 74 CC).
- [100]. There is no case law available.

3.8. The right to have children and maintain parental rights

- [101]. With regard to the right to have children, article 156 of the Criminal Code allows for the sterilisation of persons incapacitated on grounds of mental deficiencies in very specific, exceptional cases. According to this article the sterilisation of an incapacitated person shall not be punishable provided: he/she has severe mental deficiencies which do not permit him/her a basic understanding of sexuality; the measure was authorised by the Court at the request of the legal representative of the person concerned and in his/her own interest; two expert opinions are taken into consideration; the incapable person him/herself is heard and examined; the Public Prosecutor participates in the proceedings. The Constitutional Court has made clear that this legal provision is not susceptible to extensive interpretation and can only be applied in absolutely exceptional cases.⁴⁹
- [102]. A person who has been declared incapacitated by judicial decision cannot exercise paternal authority, which shall be exercised exclusively by the other parent (art. 156 CC). This does not necessarily imply that a parent suffering a mental disorder will be deprived of his/her relations with his/her children; it only means that in case the disorder might negatively affect the children these will be protected.
- [103]. The recognition of a child out of wedlock by an incapable person valid, although judicial approval is required after hearing the Public Prosecutor (art. 121 CC). This recognition is strictly personal and cannot be done by any tutelary person or organ. The incapable person does not have the right to adopt children (art. 175 CC), as this requires the full possession of civil rights.
- [104]. There is no case law available.

⁴⁹ As established by the Constitutional Court in the judgement STC 215/1994 of 14.07.1994.

3.9. The right to property

- [105]. Article 33 par. 1 of the Spanish Constitution (CE) states that “The right to private property and inheritance is recognized”. The incapacitated person under a representative regime lacks the capacity to bind him/herself (art. 1301, 1263 and 1264 CC), to accept or make donations (art. 624 and 626 CC), and to acquire possession of property (art. 439 and 443 CC). Incapable persons can carry out material acts of possession, but not institutional acts with legal repercussions as established by law or judicial decision. Therefore, they cannot alienate property or property rights. Incapacitated persons under an assistance regime can legally bind themselves, although with the assistance of their curator or parents.
- [106]. Incapacitated persons can bequeath goods by will, provided he/she was lucid at the moment of drawing up the will (art. 666 CC). In any case, this capacity needs to be demonstrated before a notary based on the opinion of two expert chosen by the notary (art. 665 CC).
- [107]. There is no case law available.

3.10. The right to vote

- [108]. Article 23.1 CE states that “Citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage”. Accordingly, persons with intellectual disabilities or mental disorders have the right to exercise the right to vote.
- [109]. Persons who have been incapacitated by judicial decision can also exercise the right to vote and be elected, unless this right has been expressly limited by the judicial decision. Article 3.1 b) of the *Ley de Régimen Electoral General*⁵⁰ [Act on the General Electoral System] further provides that “the Courts ruling on procedures regarding incapacitation and involuntary placements should expressly rule on the incapacity to exercise the right to suffrage. In case this incapacity is found to exist, the Court shall notify the Civil Registry in order to modify the pertinent records” (art. 3.2).
- [110]. There is no case law available.

⁵⁰ Spain/ Official State Journal no. 147 of 20.06.1985.

4. Involuntary placement and Involuntary Treatment

- [111]. There are no reports, concluding observations or another document of the United Nations Committee Against Torture (CAT) addressing the issue of involuntary placement and involuntary treatment in Spain.
- [112]. As for the findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) related to the same issue, it should be highlighted that the Committee visited Spain and especially the San Juan de Dios Psychiatric Hospital in 1998. The Committee made some remarks on the issue of involuntary placement in its report from 13. April 2000⁵¹. According to the Committee all of the involuntary patients at San Juan de Dios Psychiatric Hospital had been placed there under Article 211 of the Civil Code⁵², which inter alia provides that the involuntary placement of a mentally disturbed person requires a judicial authorisation. The Judge, after having examined the person and heard the opinion of a doctor appointed by him, shall grant or refuse the authorisation. The Committee informs that pursuant to these provisions, San Juan de Dios Hospital is visited once a week by a forensic doctor who reviews the situation of all newly-admitted involuntary patients. However, the forensic doctor concerned is not a psychiatrist and the delegation of the Committee was told that few of the state-appointed doctors who are called upon to carry out such tasks in psychiatric establishments have any professional qualifications in psychiatry. In the view of the Committee, the formal decision to place persons in a psychiatric hospital against their will should always be based on the opinion of at least one doctor with professional qualifications in psychiatry, and preferably of two.
- [113]. Besides, the Committee states that although Article 211 of the Spanish Civil Code prescribes an automatic review by a judge on a regular basis (at least every six months) of the necessity to continue an involuntary placement in a psychiatric establishment, reviews of the need to continue involuntary placements are conducted at intervals longer than those foreseen by law, based upon the advice of a doctor with no qualifications in psychiatry. Moreover, neither that doctor's report to the judge nor the judge's decision contain reasoned grounds but rather use forms employing a standardised wording for every patient reviewed.

⁵¹ Report CPT/ Inf (2000) 5, available at: <http://www.cpt.coe.int/documents/esp/2000-05-inf-eng.pdf> (08 October 2009).

⁵² Replaced by Article 763 Civil Procedure Act in 2001.

4.1. Legal Framework

- [114]. Article 763 of the Civil Procedure Act is the central legal norm within the Spanish legal order relating to involuntary treatment of persons with mental disorder⁵³. Article 763 of the Civil Procedure Act replaced in 2000 the former Article 211 of the Spanish Civil Code. The Civil Procedure Act was adopted on 07.01.2000 and entered into force one year later, on 08.01.2001. Article 763 par. 1 reads: “The involuntary placement on the grounds of mental disorder of a person not capable to take this decision on his/her own requires, even if the person concerned is under guardianship or parental custody, a judicial authorization...”. It should be noted that Article 763 neither contains a definition of the term “mental disorder” nor the reasons which make an involuntary placement necessary⁵⁴. Besides, article 763 fails to stipulate expressly that the involuntary placement is an *ultima ratio* admissible only if no other less restrictive measures of providing appropriate care are available, as established by Article 17 par. 1 iv. of the Council of Europe Recommendation (2004) 10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder.
- [115]. In this context it should be highlighted that in 2004 the parliamentary group of the political party *Convergència i Unió* [Convergence and Union] (CiU) submitted a draft proposal on the amendment of Article 763 of the Civil Procedure Act including a new paragraph 5 relating to involuntary ambulatory treatment. According to the draft proposal, three options of involuntary ambulatory treatment shall be established: as alternative to the involuntary placement, as its complementation or after an involuntary placement as well as preventive measure instead of involuntary placement. However, after a report of the Spanish Ombudsman on this issue was submitted in 2005, the draft proposal did not proceed ahead. According to this report, there is no legal gap to be closed since Article 6 of the Oviedo - Convention of 1997⁵⁵ and Article 9 of *Ley 41/2002, de 14 de noviembre, básica reguladora de la autonomía del paciente y*

⁵³ It should be highlighted that the heading of Article 763 words “*Internamiento no voluntario por razón de trastorno psíquico*” [Involuntary Treatment on the grounds of Mental Disorder].

⁵⁴ According to Article 17 of the Council of Europe Recommendation (2004) 10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder a person may be subject to involuntary placement amongst others only if the person’s condition represents a significant risk of serious harm to his or her health or to other persons.

⁵⁵ Oviedo - Convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine of 1997. Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm> (12 October 2009).

Article 6: Protection of persons not able to consent:

Subject to Articles 17 and 20 below, an intervention may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit. Where, according to law, an adult does not have the capacity to consent to an intervention because of a mental disability, a disease or for similar reasons, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law.

*de derechos y obligaciones en materia de información y documentación clínica*⁵⁶[Basic Act on the Autonomy of the Patient and the Rights and Duties relating to Information and Medical Documentation] (hereinafter: Act on the Autonomy of the Patient), implementing Article 6 of the Oviedo-Convention into the Spanish legal order, provide for the involuntary treatment of persons with mental disorder (see section 114).

- [116]. Article 763 of the Civil Procedure Act is applicable in the entire Spanish territory. Nevertheless, since according to Article 148 of the Spanish Constitution the Autonomous Communities may legislate in the field of health care, some Autonomous Communities made use of this authorization and enacted legal norms related to involuntary treatment which are complementary applicable to the basic state norms in this area. Besides, the Autonomous Community of Catalonia has a special legislative competence as regards civil law. Accordingly, Article 255 of the *Ley 9/1998, de 15 de julio, del Código de Familia*⁵⁷ [Catalan Family Code] regulates the involuntary treatment of persons with mental disorder in Catalonia. The wording of Article 255 is very similar to the one of Article 763 of the Civil Procedure Act. In the case of Catalonia, the state legal norms are supplementary applicable.
- [117]. As for the legal framework relating to involuntary treatment, it should be noted that according to Article 9 par.2 of the Act on the Autonomy of the Patient “a person may be subject to the medical treatment necessary for his/her health without his/her consent if there is an immediate significant risk of harm to his/her psychical or physical health” and if the authorization by his/her next-of-kin cannot be obtained due to the circumstance of the case⁵⁸. Besides, according to Article 9 par. 3 a person who do not have the capacity to take such kind of decisions (medical treatment) may be subject to involuntary treatment after having received the consent of his/her legal representative or, if existing, or of his/her next-of-kin. It is noteworthy that Article 9 of the Act on the Autonomy of the Patient regulates the involuntary treatment merely from the point of view of the lack of consent of the patient and establishes no judicial authorization. Therefore, some representatives of the legal doctrine are in favour of the analogical application of Article 763 of the Civil Procedure Act requiring in this manner a judicial authorization also for the involuntary treatment.
- [118]. However, involuntary treatment shall be regulated in the future by the Act on Voluntary Jurisdiction. The *Proyecto de Ley 121/000109 Jurisdicción voluntaria para facilitar y agilizar la tutela y garantía de los derechos de la persona y en materia civil y mercantile* of 2006⁵⁹ [Draft proposal of the

⁵⁶ Spain/ State Official Journal no. 274 of 15.11.2002.

⁵⁷ Spain/ State Official Journal no. 198 of 19.08.1998.

⁵⁸ Please note that Article 10, 6 b of the General Act on Health mentioned by the “Report on Compulsory Admission and Involuntary Treatment of Mental Ill Patients – Legislation and Practice in EU- Member States” (2002), page 131 was repealed by the Act on the Autonomy of the Patient in 2002.

⁵⁹ Spain/ Official Journal of the Congress of Deputies no. 109-1 of 26.10.2006.

Government on Voluntary Jurisdiction in order to facilitate and further the Protection and the Guarantee of the Rights of the Persons in the Civil Law and Commercial Law areas] contains in Chapter IX rules on the judicial authorization of involuntary treatment of persons with mental disorder. According to Article 84 of the Draft proposal the Act shall concern the authorization of involuntary treatment of persons with mental disorder who are not able to take this decision. The Draft proposal provides for that the spouse of the person concerned or his/her partner as well as his parents, children, brothers and sisters, the guardian, the attending doctor and the *Ministerio Fiscal* [Public Prosecutors Office] shall be entitled to request the judicial authorization of the involuntary treatment.

- [119]. As stated above, the Spanish legal framework distinguishes between involuntary placement (Article 763 of the Civil Procedure Act) and involuntary treatment (Article 9 of the Act on the Autonomy of the Patient) although there is no legal definition of those terms. A great part of the legal doctrine assumes that the involuntary treatment is covered by the involuntary placement according to the principle *ad maiore ad minus*.
- [120]. In this context it is noteworthy that according to the Spanish legal doctrine⁶⁰ the Spanish legislation provides no involuntary placement without treatment although Article 763 of the Civil Procedure Act does not establish it expressly. This principle is attributed to the assignment made by Article 49 of the Spanish Constitution to all public authorities to implement a policy of treatment, rehabilitation, and integration of those who are mentally disabled.
- [121]. Furthermore, Article 763 of the Civil Procedure Act contains no provisions on aims pursued by the involuntary placement. The general constitutional assignment of Article 49 of the Constitution indicates that the treatment of the patient as well as his rehabilitation and future social integration are some of the aims pursued by the involuntary placement. As for the involuntary treatment, according to Article 9 par. 2 of the Act on the Autonomy of the Patient the aim pursued by this measure is the protection from harm to the health of the person with mental disorder (but according to Article 9 not the protection from harm to other persons).

⁶⁰ Santiago DELGADO BUENO, José María RUIZ DE LA CUESTA, “Aspectos médico-legales del internamiento y de incapacitación”, in Pedro González Poveda, José Marcos Piñón Martín, Los discapacitados y su protección jurídica. Estudios de Derecho Judicial 22, 1999, page 42-46; Carmen DE LA FUENTE, Fiscal Jefe de la Audiencia Provincial de Bilbao, “Protección civil de los incapacitados. Derechos humanos y discapacidad. Análisis desde la perspectiva del internamiento y el tratamiento involuntario de enfermos mentales y discapacitados psíquicos, in Curso sobre “Protección jurídica de personas con discapacidad” celebrado del 24 de enero al 2 de febrero del 2005, Page 24. Available at: http://www.cermi.es/bibliografia/proteccion_juridica/Curso%20Proteccion%20Juridica%20de%20Personas%20con%20Discapacidad/docs/Html/Indice.html; Bernardo RODRÍGUEZ GARCÍA, “El internamiento involuntario de las personas con discapacidad psíquica”. Available at: <http://www.calidadyriesgo.es/informacionjuridica/49-el-internamiento-involuntario-de-las-personas-con-discapacidad-psiquica>.

- [122]. Article 763 par. 4 of the Civil Procedure Act establishes the obligation of the attending doctor to inform periodically the judge on the need to maintain the involuntary placement. These periodical reports shall be issued at least every six months. Nevertheless, the judge may order that reports are submitted with major frequency. In contrast, Article 9 of the Act on the Autonomy of the Patient establishes no aftercare-measures due to the fact that there is no judicial authorization in order to subject a person with mental disorder to involuntary treatment. However, the Draft Proposal of the Government 121/000109 regarding the Act on Voluntary Jurisdiction provides for a periodical review of the need of involuntary treatment by a judge. To this end, the attending doctor shall submit at least every three months reports on the state of the patient and the need to maintain the involuntary treatment.
- [123]. As regards the involuntary treatment of minors, Article 9 par. 3 of the Act on the Autonomy of the Patient establishes the so called “*consentimiento por representación*” [consent granted by representatives] which means that if the minor (every minor, not necessarily one with mental disorder) is intellectually and emotionally not capable to understand the importance of the treatment, it depends on the consent of his legal representatives taking into consideration the opinion of the minor if he/she is at least twelve years old. However, it should be noted that there is no special legal norm addressing the involuntary treatment of minors or young adults with mental disorder.
- [124]. In contrast, according to Article 763 the involuntary placement of minors (and generally of persons under guardianship) shall be authorized by a judge so that the consent of the parents (respectively of the guardian) is not sufficient. Furthermore, Article 763 par. 2 establishes that minors shall be subject to involuntary placement in establishments for mental health which are appropriate to their age and after having received a report of the Service for Assistance of the Minor.
- [125]. As for the involuntary placement of offenders with mental disorder it should be noted that Articles 95, 101 and 20 par.1 of the Criminal Code provides for that the judge may order the involuntary placement in a mental institution of an offender who is criminally incapable because of a psychical abnormality or disturbance. According to Article 101 the aim of the involuntary placement is the medical treatment or the special education of the offender. It should be pointed out that the involuntary placement may not exceed the period of time of the imprisonment which would have be imposed if the offender was criminally capable. Furthermore, an offender who is criminally incapable due to an addiction to alcohol, drugs etc. may be subject to involuntary placement in a public or private dehabitation institution. In both cases, the offenders may not leave the establishments without a judicial authorization. In summary, it should be noted that the involuntary placement of an offender is provided only for the case of criminal incapability.

4.2. Criteria and Definitions

- [126]. According to Article 763 par. 1 of the Civil Procedure Act the main criteria to be fulfilled in order to subject a person to involuntary treatment is the mental disorder of the person concerned. Besides, the person must be incapable to take the decision on the hospitalization. In this context it should be noted that unlike Article 16 of the Council of Europe Recommendation Rec (2004) 10, Article 763 refers not to the capacity to consent but to the capacity to understand the importance of the hospitalization. Although not expressly mentioned by Article 763, it can be assumed that there must be a need for the involuntary placement. However, Article 763 contains no provisions on the criteria in order to establish the necessity of the placement (danger etc.). As stated in the “Report on Compulsory Admission and Involuntary Treatment of Mental Ill Patients – Legislation and Practice in EU- Member States” (2002)⁶¹, Article 763 of the Civil Procedure Act builds upon a clinical criterion. This means that any clinical circumstance that strongly requires the provision of treatment under hospital conditions would be sufficient to order the involuntary placement.
- [127]. As for the criteria to be fulfilled to order an involuntary treatment it should be pointed out that Article 9 par. 2 of the Act on the Autonomy of the Patient requires an immediate significant risk of harm to the psychical or physical health of the person concerned. Besides, the medical treatment must be necessary for the health of the patient. Furthermore, Article 9 par. 3 provides for the so called “consent by legal representative” in the case that the patient is not capable to take the decision regarding the medical treatment.
- [128]. In summary, the Spanish legal rules on involuntary placement and involuntary treatment is very general and contains various indefinite legal concepts (e.g. mental disorder, lack of capacity to take the decision on hospitalization or medical treatment, need of hospitalization or medical treatment, immediate significant risk of harm to health) which leads in practice to a interpretation on a case-by-case-basis.
- [129]. As stated above, Article 763 fails to stipulate expressly that the involuntary placement is an *ultima ratio* admissible only if no other less restrictive measures of providing appropriate care are available, as established by Article 17 par. 1 iv. of the Council of Europe Recommendation (2004) 10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder. The same applies to the rules regarding involuntary treatment.
- [130]. According to Article 763 par. 3 of the Civil Procedure Act, the Court “will hear” the person affected by the involuntary placement. However, the opinion of the patient is not conceived as a criterion for involuntary placement.

⁶¹ Page 132.

- [131]. Furthermore, it should be pointed out that the Spanish legislation offers no definition of the risk level of danger. As states above, Article 9 par. 2 of the Act on the Autonomy of the Patient establishes the need of an immediate significant harm to the physical or psychical health of the patient in order to subject a person to involuntary treatment. However, the Act contains no definition thereof and mentions no specific danger thresholds.

4.3. Assessment, Decision Procedures and Duration

- [132]. The decision procedure requires a compulsory medical opinion (art.763.3 Civil Procedure Act). Although article 497 of the Act on the Judicial Power (LOPJ) provides that the technical assistance in the medical field is given by forensic physicians, in practice, due to the complex nature of these matters, assistance is provided to the Court by a psychiatrist or forensic psychiatrist. It is essential that the forensic psychiatrist is familiar with the clinical history of the patient and that he/she can hear the doctor that usually attends the patient.
- [133]. In order to guarantee the impartiality of the medical opinion in the procedure for ratification of urgent placements it is established that the opinion should be given by a doctor who is not the one who requests placement nor the one who admitted the patient to the centre in the first place. However, the Court can also decide to consult other professionals.
- [134]. The (written) opinion of at least one physician is compulsory. Where considered relevant, the Court can request additional opinions.
- [135]. Involuntary placement can be decided jointly with the procedure on incapacitation or by voluntary jurisdiction proceedings. It is not a measure that necessarily has to be decided as part of the incapacitation procedure, not even as a protective measure.
- [136]. The Spanish Courts have exclusive competence regarding decisions on involuntary placement for persons who have their usual place of residence in Spain (art. 22.3 LOPJ). The recognition of foreign judicial decisions regarding involuntary placement for the purpose of execution within Spain is not admitted. The material competence for this decision in principle pertains to the Civil Courts, but Criminal Courts can also adopt this measure of a civil nature. Territorial competence pertains to the Court of First Instance in the place where the person affected by the placement resides (art. 763.1 Civil Procedure Act) or in urgent cases in the place where the centre is located in which the involuntary placement has occurred (art. 763.2 Civil Procedure Act). In places where specialized Incapacitation Courts exist (Madrid, Barcelona, Valencia, Bilbao, Granada and Vitoria) these will hear the case.

- [137]. Placements of less than 24 hours do not require judicial control. The resumption of treatment or re-admittance into the centre where the involuntary placement is carried out due to temporary interruptions do not require judicial control either (night hospital treatment).
- [138]. Considering that the authorisation for involuntary placement/treatment is given so that the medical service can carry out a therapy against the will of the patient and depriving him/her of his/her freedom, it is the physician who ought to decide to terminate treatment if he/she considers that the measure is no longer necessary as it has fulfilled its objective. The termination of involuntary placement is a medical decision which should immediately be notified to the competent Court (art. 763.4 Civil Procedure Act). Even so, in the course of the involuntary placement the physicians are obliged to periodically inform the Court (at least once every six months, unless the Court decides otherwise). At all times, the Court can demand to be informed in order to decide whether or not to discontinue the placement/treatment. In case of difference of opinion between the physician and the relatives of the patient the opinion of the physician will prevail. If a physician discharges a patient incorrectly, he/she may be committing professional negligence which may imply civil and/or criminal liability. However, if the Court were to be involved in the decision, the physician would be exempt from liability.
- [139]. In the case of voluntary placement the written personal consent of the patient is required, as well as the consent of the physician who admits him/her. No judicial authorisation is required. The consent of the patient must be assessed by the physician of the medical centre where he/she wants to be treated. If the physician has any doubts regarding his/her capacity to decide or his/her consent, the physician should notify the Court in order to have the measure ratified. In the course of the treatment the physician should continuously evaluate the capacity to decide of the patient. If the capacity to decide is deemed insufficient, the Court shall be notified in order to change the voluntary placement into an involuntary placement.
- [140]. If at a later stage the patient wishes to leave the medical centre and the physician refuses considering that the treatment should be continued on an involuntary basis, the physician should notify the Court in order to ratify the change from voluntary to involuntary treatment. At the same time the patient will be informed to guarantee his/her right to defence and give him/her the possibility to present an appeal at the Court against the decision. The procedure for the ratification of this measure is the same as the urgent procedure for involuntary placement.
- [141]. In this case, a distinction should be made between ordinary procedures and urgent procedures for involuntary placement. In ordinary procedures there is no maximum period between the moment the medical assessment is received and the conclusion of the judicial procedure. Nonetheless, the time to take a decision on the case should be as short as possible considering the fact that

fundamental rights may be affected. The procedure for urgent placement is initiated by the Court ex officio after having been notified by the physician of the medical centre where the patient has been admitted and having received his/her report. In order to guarantee the impartiality of the medical opinion in the procedure for ratification of urgent placements it is established that the opinion should be given by a doctor who is not the one who requests placement nor the one who admitted the patient to the centre in the first place. The urgent procedure requires a decision to be made “within a maximum of 72 hours following notification of the placement to the Court” (art. 763.1 Civil Procedure Act).

- [142]. A patient can be placed against his will in a psychiatric clinic in case of urgency. The decision to admit the patient pertains to the clinic’s responsible physician who must notify the Court competent in the area where the clinic is located within 24 hours and present a report containing all the essential elements which have led to regard the situation as urgent, as well as a description of the diagnostic and the treatment being applied. This notification will lead to the institution ex officio of a procedure for the ratification of the involuntary placement. In case of urgent involuntary placement the judge normally visits the psychiatric clinic accompanied by an independent (forensic) physician to examine the patient and draw up a medical report. The Court must decide within a maximum of 72 hours following notification of the placement to the Court (art. 763.1 Civil Procedure Act).
- [143]. An involuntary placement can never be indefinite and is subject to periodical controls. According to the case law of the Spanish Constitutional Court, which in this respect follows the doctrine of the ECHR, “placement cannot validly be extended when the mental disorder that caused it no longer subsists”.⁶²
- [144]. In the course of the involuntary placement the physicians are obliged to periodically inform the Court (at least once every six months,⁶³ unless the Court decides on a higher frequency). At all times, the Court can demand to be informed in order to decide whether or not to discontinue the placement/treatment. In addition, the patient shall at all times be entitled to request the Court to take the necessary steps for the assessment of his/her personal situation. Finally, as mentioned previously, the attending physician can at all times decide to discharge the patient when considering that the grounds for the involuntary placement have disappeared, of which he/she will immediately inform the judicial authorities.
- [145]. There are no express legal provisions regulating the referred mental health care interventions. Article 9.2 of the Act on the Autonomy of the Patient which

⁶² Spain/ Judgments of the Constitutional Court STC 129/1999 and STC 112/1988, legal ground 3. Doctrine of the ECHR, *Winterwerp*, 24-10-1979.

⁶³ Article 255 of the Catalan Family Code contains a regulation on involuntary placement which is identical to the Spanish law; the only difference is that the term for periodical judicial revision is two months.

refers to the limits of informed consent and the consent given by the patient's representatives, provides that the medical staff may carry out interventions considered indispensable for the patient's health, without his/her consent, when there are imminent serious risks for the physical and mental health of the patient and it is not possible to obtain his/her consent, in which case, if the circumstances so permit, his relatives or other close persons shall be consulted.

- [146]. However, although there exists no express legal regulation, various documents and guidelines are available regarding the therapeutical application of restrictive measures to psychiatric patients⁶⁴ which can be used as reference material for developing written protocols regulating the application of restrictive measures during hospitalisation.
- [147]. Several hospitals are already using this kind of protocols, which regulate restrictive measures such as physical restraint, therapeutical seclusion, forced medical treatment and restricted external communications. They clearly state that these measures are only to be used under exceptional circumstances. The protocols are made available to patients, their relatives, accompanying persons and legal representatives.
- [148]. Against the judgment on incapacity appeal can be lodged within five days following its notification (arts. 455 y 734.3 Civil Procedure Act). The appeal suspends the execution of the judgment, which might be detrimental to the patient if he/she is the one lodging the appeal. Against the decision in appeal an extraordinary appeal for breach of procedure can be lodged, as well as an appeal in cassation. Those who consider that their fundamental rights have been violated can also lodge an individual appeal for protection (*recurso de amparo*) with the Spanish Constitutional Court, provided public organs were involved. As a last resort an appeal can be made to the European Court of Human Rights.
- [149]. Moreover, a habeas corpus procedure can be instituted with the examining judge competent in the area where the medical centre is located to contest the deprivation of liberty as a result of the involuntary placement in a public psychiatric clinic which is considered unlawful. In this procedure the person affected, his/her spouse or equivalent person, descendants, ascendants, brothers and sisters, the Public Prosecutor and the National Ombudsman have standing. The judge will decide within 24 hours; a recognition of habeas corpus does not necessarily imply an annulment of the measure, but may entail moving the patient to another medical centre which is more appropriate.

⁶⁴ An example are the 2002 Guidelines with recommendations for the therapeutical application of restrictive measures to psychiatric patients elaborated by the Catalan Advisory Committee on Bioethics (an organ related to the Health Department) entitled (in translation) "Unvoluntary placement and the therapeutical application of restrictive measures to psychiatric patients and demented persons".

- [150]. Besides the periodical controls established by law or by the Court, the person concerned is at all times entitled to demand that adequate steps be taken to assess his/her personal situation.
- [151]. In procedures concerning involuntary placement the Public Prosecutor will participate in the defence of the person concerned. The incapacitated person will be assisted by his/her legal representatives and, lacking these, a judicial defender will be appointed.
- [152]. In view of this, it can be concluded that the standards concerning reviews and appeals established by Article 25 of the Council of Europe's Committee of Ministers Recommendation Rec(2004)10 have been met.
- [153]. According to Spanish legislation legal counsel is required depending on the type of procedure. If the involuntary placement is decided jointly with the incapacitation, the defendant will necessarily be assisted by a lawyer, provided he/she is not assisted by the Public Prosecutor or – in case the Public Prosecutor instituted the procedure – by a judicial defender (art. 750.1 Civil Procedure Act). If the person concerned wishes to appoint a lawyer and does not have sufficient means to do so, free legal support will be provided. However, if the placement is decided in a voluntary jurisdiction procedure the appointment of a lawyer is optional (art. 763.3 Civil Procedure Act).

5. Competence, Capacity and Guardianship

- [154]. The management of the affairs of persons with mental disorders and persons with intellectual disability is regulated in the Spanish legal system by Title IX of the Civil Code entitled “On incapacitation” and by Book IV, Title I of the Law on Civil Procedure, entitled “On the procedures regarding capacity, filiation, matrimony and minors”.
- [155]. The management of personal property is regulated by *Ley 41/2003, de 18 de noviembre, de protección patrimonial de las personas con discapacidad y de modificación del Código Civil, de la Ley de Enjuiciamiento Civil y de la Normativa Tributaria con esta finalidad*⁶⁵[Act on the financial protection of persons with disabilities and modification of the Civil Code, the Law on Civil Procedure and Tax Regulations to this end] and by Act 1/2009 amending the Act on the Civil Registry with respect to incapacitations, guardianship and administrators of protected property and of Act 41/2003 on Protection of the Patrimony of Persons with Disability as well as of the Civil Code and the Civil Procedure Act and of Tax Regulations to this end (cited above under section 36).
- [156]. The objective of these laws is to create specially protected property for persons with mental disabilities. The request for its creation, administration and liquidation is done under the supervision of the Public Prosecutor’s Office and the control of the Courts. The establishment of this kind of property is stimulated by a series of fiscal incentives allowing for free contributions and by the preferential treatment regarding succession rights. Act 1/2009 establishes in its First Final Provision that within six months after its entry into force (26-06-2009) the Government shall submit to Parliament a bill on the reform of the legislation regulating the procedures for modifying legal capacity in order to adapt them to the provisions of Convention on the Rights of Persons with Disabilities, adopted by the UN on 13 December 2006. It should be pointed out, though, that these regulations do not refer specifically to persons with mental disorders and persons with intellectual disabilities, but to persons with disabilities in general.
- [157]. Spanish legislation does not expressly define the concepts of “competence” and “capacity”. The only legal definition concerning persons with disabilities is found in article 7.1 of the *LISMI*, based on a medical interpretation of disability. A person with disability is defined as “anyone whose possibilities of

⁶⁵ Spain/State Official Journal n° 277 of 19.11.2003.

educational, labour or social integration is diminished as the result of a foreseeably permanent deficiency of his/her physical, mental or sensorial capacities, be it congenital or not”. By virtue of the provisions of Title I, Chapter III, the system included in Annex I establishes the objective criteria for determining the degree of autonomy of persons with disabilities based on the capacity to perform basic daily activities, as well as the need for support and supervision of persons with intellectual disabilities or mental disorders.

- [158]. Article 200 of the Civil Code (CC) states that “Diseases or lasting physical or mental deficiencies that prevent a person from managing his own affairs are deemed to be grounds for incapacity”. This general article does not contain a predetermined exhaustive enumeration of causes, which are to be determined on the basis of an examination of the disease or mental deficiency of each person, its lasting character and the degree to which the capacity of selfmanagement is lost. Thus the open definition of article 200 CC comprises diseases of a physical origin, non-congenital mental disorders and mental deficiencies of somatic origin.⁶⁶
- [159]. Article 760.1 of the Civil Procedure Act provides that “the judgment by which incapacitation is declared shall determine its scope and limits”. This delimitation is the exclusive competence of the Court, which is not bound by the petitions of the parties. To this end, the Court shall take into account the degree of discernment of the defendant as established during the examination in court, as well as his/her social, family and financial circumstances and shall avail itself of the compulsory medical reports.⁶⁷
- [160]. The declaration of incapacity implies a reduction or limitation of the defendant’s capacity to act and his/her subjection to a representative (guardianship) or assistance (curatorship) regime, or a regime which may be either (extended or reinstated parental authority), depending on the content of the judgment (art. 760.1 and 759.2 Civil Procedure Act). The “reduction” only means a curtailment of the capacity to act; it does not imply the complete deprivation of the person’s capacity to act. The Court or the law should specify the necessary scope of action of the guardian or parent. In case of “limitation” the incapacitated person maintains his/her capacity to act with the exception of specific acts, which he/she will have to carry out with the intervention of another person completing his/her own capacity (curator or parents).
- [161]. Someone’s incapacitation implies a reduction or limitation of his/her capacity to act, but never a complete deprivation. Thus, there are certain highly personal acts which an incapable person can carry out by him/herself and the validity of which depends on the current capacity with which they are performed, such as contracting marriage, making a will, recognition of a child born out of wedlock

⁶⁶ According to the interpretation of the Spanish Supreme Court, STS 10-2-1986 (RJ 1986, 520), Legal Ground 2.

⁶⁷ Article 759.1 LEC provides that “no decision shall be made regarding incapacity without a previous medical report being ordered by the Court”.

or exercising one's right to vote. Actions which are automatically affected by the judicial declaration of incapacity are: the exercise of paternal authority, the administration and use of acquisitions in wedlock, the capacity to act as guardian, the capacity to adopt and as for litigation, the capacity to appear in Court and act as a witness.

[162]. According to article 215 CC "The custody and care of a person and his assets or only of the person or the assets of minors or incapable persons shall be carried out, when appropriate, by means of: 1° Guardianship; 2° Curatorship; 3° The judicial defender." Moreover, article 171 CC provides that "The parental authority over children who have been incapacitated shall be extended by operation of law when the children reach majority. If an unmarried child having reached majority and living with his parents, or one of them, is declared incapacitated, parental authority shall be reinstated; the parental authority shall be exercised by the person to whom the authority would have been given if the child was under age". Therefore, the systems of protection of adults lacking capacity established by Spanish law are: guardianship, curatorship, the judicial defender and extended or reinstated parental authority. All these types of protection must be decided by the Court taking into account the existing limitations of the capacity to act of the incapable person, depending on his/her degree of discernment (art. 760.1 Civil Procedure Act).

[163]. The basic features of these legal protective regimes, having regard to the scope of the incapacitation which is to be proportional to the degree of discernment, are the following:

- **Guardianship:** to be applied when the degree of discernment is minimal, therefore in the most serious cases. Guardianship is a regime of representation. The guardianship is compulsory, stable, potentially remunerated, and may be exercised by a single person or jointly. The guardian acts on behalf and in representation of the incapable person, shall carry out the acts determined by the judgment and, if the judgment does not do so, determined by the law. Guardianship is regulated by the Civil Code in Title X, "On Guardianship, Curatorship and the Custody of Minors and Incapable Persons", Chapter II, articles 222-285.
- **Curatorship:** to be applied to persons with a minor incapacity whose have a higher degree of discernment. Curatorship is a stable system of financial protection leading to occasional interventions with the objective of providing assistance (no representation) regarding the acts determined by a Court decision on incapacitation or, failing that, by the law. The incapable person maintains his full capacity to act, however, the Court orders him to act in certain cases jointly with the curator, who complements his capacity. Curatorship can be renounced and may be remunerated. Curatorship is regulated by the Civil Code in Title X, "On Guardianship, Curatorship and the Custody of Minors and Incapable Persons", Chapter III, articles 286-293.

- The judicial defender: if during a incapacitation procedure the Public Prosecutor cannot act in defence of the presumably incapable person for having initiated the proceedings, a judicial defender will be appointed in order to defend the presumably incapable person during the proceedings in case he/she is not able to do so (art. 758 Civil Procedure Act). The judicial defender acts as the legal representative of the defendant and represents his interests exclusively during the court proceedings. The judicial defender can also act in situations where a conflict of interests exists between the incapable person and his/her legal representatives or curator. Finally, in the case where, for whatever reason, the guardian or curator do not fulfil their duties, a judicial defender can be appointed until this situation ends or until another guardian or curator is appointed. The regulations on the judicial defender are found in the Civil Code in Title X, “On Guardianship, Curatorship and the Custody of Minors and Incapable Persons”, Chapter IV, articles 299-302.
- Extended or reinstated paternal authority: when the incapable person is a minor, the paternal authority does not end when he/she reaches majority, but is extended by operation of law until the parents die, the incapable person is adopted, the declaration of cessation of incapacity or the incapable person contracts marriage. If the adult unmarried child living with (either of) his parents is incapacitated, the Court will reinstate the parental authority of the person who would have had this authority if the child were still under age. The extended or reinstated paternal authority is exercised based on the provisions of the judgment on incapacitation or, failing this, of the law (art. 171 CC).

[164]. The conditions required for placing adults lacking capacity under the protective systems established by national law are a Court ruling declaring the defendant incapacitated and the establishment of a regime of representation or assistance (art. 760.1 Civil Procedure Act). The law allows the joining of the procedures for incapacitation and the appointment of a guardian/curator; in general, the judgment declaring incapacity also establishes the protective regime. However, if the two procedures are not joined, a new procedure for the appointment of a guardian/curator will be initiated as soon as the ruling on incapacity has become final. Judicial decisions on guardianship and curatorship ought to be recorded in the Civil Registry of the domicile of the incapacitated person (art. 218 CC and art. 88-89 of the Act on the Civil Registry⁶⁸).

[165]. The Spanish legal system does not establish any time limits with regard to protection measures for incapacitated adults. The protection measures established by judicial decision will remain in force until a positive or negative development occurs in the mental health of the incapacitated person justifying the institution of new proceedings aimed at modifying the existing protective system (including, where appropriate, restoring the full capacity of the person concerned; art. 761 Civil Procedure Act).

⁶⁸ Spain/ Act of 08.06.1957.

- [166]. The right of standing in procedures on incapacitation is regulated by Article 757 of the Civil Procedure Act. The declaration of incapacity may be requested by the (possibly) incapable person him/herself, his/her spouse or equivalent persons, descendants, ascendants, brothers and sisters of the person concerned. If these are non-existent or if they have not requested his/her incapacitation, the Public Prosecutor should institute proceedings. Any person is considered competent to provide information to the Public Prosecutor which may be relevant for the incapacitation. Authorities and civil servants who, due to their position, are aware of possible causes for incapacitation, are to inform the Public Prosecutor. The law allows the joining of the procedures for incapacitation and the appointment of a guardian/curator; this is normally done so. However, if the two procedures are not joined, a new procedure for the appointment of a guardian will be initiated as soon as the ruling on incapacity has become final. This procedure can also be instituted due to the conclusion of the previous guardianship or the termination of the parental authority to which the incapacitated person was subjected. This procedure may be instituted ex officio by the Court or the Public Prosecutor. Relatives who are called to serve as guardians (spouse living with the incapable person, parents or persons designated by the parents in their will, descendants, ascendants, brothers and sisters), as well as the person having custody of the incapable person are obligated to request the setting up of a guardianship (art. 228-229 CC).
- [167]. Article 22.3 of *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*⁶⁹ (LOPJ) [Organic Act on the Judiciary] states that only Spanish Courts are competent to declare an adult residing in Spain legally incapacitated. Material competence pertains to the Courts of First Instance and territorial competence is determined by the place where the person concerned resides. In several cities (Madrid, Barcelona, Valencia, Bilbao, Granada and Vitoria) special Incapacitation Courts exist for this purpose. The Incapacitation Court or otherwise the Court of First Instance is competent to declare the legal incapacity of an adult, to take measures directed to the protection of the person, to take measures directed to the property of the person and to ensure and monitor the implementation this measures.
- [168]. The parties can lodge an appeal with the Provincial Court against a judgment on incapacitation done by the Court of First Instance within five days after notification (art. 455 Civil Procedure Act). Admission of the appeal will suspend the effects of the declaration of incapacitation as it affects the civil status of the person concerned, in which case no provisional execution is permitted (art. 524 ff Civil Procedure Act). However, in the course of the appeal any provisional/protective measures decided by the Court of First Instance will be maintained and the judicial defender will continue to carry out his duties. Against the decision in appeal an extraordinary appeal for breach of procedure can be lodged with the High Courts of Justice of the Autonomous Communities (art. 468 ff Civil Procedure Act) and appeal in cassation with the Spanish

⁶⁹ Spain/State Official Journal n° 157 of 02.07.1985.

Supreme Court (art. 477.3 Civil Procedure Act). In exceptional cases a revision appeal can be brought before the Supreme Court or the High Courts of Justice (art. 509 ff Civil Procedure Act).

- [169]. In case a guardian is to be appointed the preferred candidate will be the person designated by the incapable person (the Spanish legal system allows for so-called “auto-guardianship” (art. 223, 224 and 239 CC) which means that any person having sufficient legal capacity may, in anticipation of being declared incapable in the future, adopt in a notarial public instrument all provisions with respect to his person or assets, including the designation of his/her guardian), the spouse living with the incapable person, parents, the person(s) who have been designated by the parents in their will once they have died, descendants, ascendants, brother and sisters, or third persons (art. 234 CC). The Court will appoint as guardian the person which it considers most qualified to carry out the duties involved and may alter, based on a motivated ruling, the above-mentioned order of preference or even disregard all of them if so required in the interest of the person concerned.
- [170]. There are persons who legally cannot be appointed as guardians, among others: those who by a judicial decision have been deprived of parental authority, or suspended in its exercise, or totally or partially suspended in the exercise of the rights of custody and education; those that have been legally removed from a prior guardianship; those condemned to a jail term; persons declared guilty of a felony that leads to believe with good reason that they will not discharge the guardianship properly; those having a substantial conflict of interest with the incapable person (art. 243-245). The guardian may renounce his duties within 15 days after being appointed on the legally established grounds.
- [171]. The legal provisions regulating the appointment, ineligibility, excuse and removal of guardians are also applicable to curators. The law expressly provides that bankrupts and undischarged insolvent debtors may not be appointed as curators (art. 291 CC). If the persons subject to curatorship has been previously under guardianship, his/her old guardian shall be appointed his curator, unless the Court decides otherwise (art. 292 CC).
- [172]. Both guardianship and curatorship may be performed by legal entities, provided they are non-profit organizations whose objectives include the protection of incapable persons (art. 242 CC).
- [173]. The judicial defender is appointed by the Court, which will select the person it deems most suitable for the office, following voluntary jurisdiction proceedings on his own initiative, or upon petition of the Public Prosecutor or any other person competent to appear in Court (art. 300 CC). The grounds for ineligibility, excuse and removal of guardians and curators are also applicable to the judicial defender (art. 301 CC).

- [174]. Extended or reinstated parental authority shall be exercised by the person to whom the authority would have been given if the child was under age. The extended parental authority is terminated by the death or the declaration of death of both parent or of the child; by the adoption of the child; by the declaration of cessation of the incapacity; or by the marriage of the incapable person. If at the end of the extended parental authority the state of incapacity remains, a guardianship or curatorship shall be set up, as applicable (art. 171 CC).
- [175]. The guardian acts on behalf, and in representation of his/her ward, performs specific acts established by the judgment declaring incapacity or, failing these, by the law. Art. 269 CC provides that the guardian is required to look after the ward, provide for his support, to promote the acquisition or recovery of the capacity of the ward and his best integration in society and report annually on the status of the incapable person and to render him an annual account of his administration.
- [176]. The sole guardian and, where applicable, the guardian of the assets is the legal administrator of the assets of his/her ward and is bound to exercise such administration with due diligence (art. 270 CC). However, the guardian needs judicial authorisation to perform certain acts: to commit the ward to an establishment for mental treatment or to have him/her admitted to an establishment for special education; to alienate or encumber his/her property or companies, precious items or securities, to conclude contracts or carry out acts of a sales nature (which may be registered), to renounce rights, accept agreements or submit to arbitration matters affecting the ward; to accept without the benefit of inventory any inheritance, or to repudiate an inheritance or donations; to intervene in the partition of an inheritance or the division of common property (in this case judicial authorisation is given afterwards); to incur extraordinary expenses concerning assets; to start a legal actions in the name of his/her ward, except in the case of urgent matters or small amounts; to lease assets to a third party for more than six years; to lend and to borrow money; to dispose by a gratuitous title of assets or rights belonging to the ward; to assign to third parties credits which the ward has against his/her guardian and to acquire for a valuable consideration credits that third parties have against the ward (art. 271 and 272 CC).
- [177]. In addition, a person to perform a tutelary duty is forbidden to receive donations from the ward or his successors in interest; represent the ward while simultaneously acting in his/her own name or in the name of a third party and a conflict of interest exists; acquire for a valuable consideration assets of the ward or to convey to the ward assets that belong to such a person, also for a valuable consideration (art. 221 CC). The guardian must prepare an inventory of the assets of the ward within sixty days following the date on which his appointment started. Upon leaving his office, the guardian must render a documented general account of his administration to the judicial authorities. The guardianship terminates, among others, at the time a judicial decision puts

an end to the incapacity, or amends the judgment declaring the incapacity, substituting the guardianship for a curatorship (art. 277 CC). The guardian may be removed by the Court *ex officio*, or at the request of the Public Prosecutor, the ward or any other interested party (art. 248 CC).

- [178]. To the actions of curators the same limits apply as to those of guardians. However, the purpose of the curatorship of the incapable person is providing assistance for those acts expressly laid down in the judgment establishing the curatorship.
- [179]. A judicial defender represents and protects the interests of incapable persons in the cases where there exists a conflict of interest between them and their legal representatives or curator. He/she will act as guardian or curator if these do not perform their duties, until the determining cause disappears or another person is designated to discharge the office (art. 299 CC). The judicial defender shall have the authorities vested in him by the Court, to which he/she shall render account once his/her duties are concluded (art. 302 CC).
- [180]. Against incapacitation judgments appointing a guardian or curator and rulings done in voluntary jurisdiction proceedings for the appointment of a guardian or curator the same appeals can be lodged as described under section 165.
- [181]. Decisions of incapacity are not periodically reviewed. However, Article 761 of the Civil Procedure Act regarding the recovery of capacity and the modification of the scope of incapacity makes clear that the judgment on incapacity does not preclude the institution of new proceedings aiming to reverse or modify the original ruling in case new circumstances arise. The request for modification may be made by the spouse or equivalent person, descendants, ascendants, brothers and sisters of the person concerned, persons performing tutelary duties or having the custody of the person concerned, the Public Prosecutor or the incapable person him/herself (if he/she has been deprived of the capacity to appear in Court, express judicial authorisation should be requested in order to do so). During the proceedings the required proof will be sought *ex officio* (the relatives and other people who are close to the incapable person will be heard, the incapable person him/herself will be examined and the relevant expert reports will be requested). The judgment should determine whether the incapacitation should be annulled or not, or whether its scope and limits should be modified.
- [182]. In the resolution setting up the guardianship or in a subsequent resolution, the Court may establish in the interest of the ward the measures deemed appropriate for its supervision and control. Likewise, the Court may at any time demand from the guardian a report on the situation of the incapable person and the status of the administration (art. 233 CC). In addition, the guardian must report annually on the status of the incapable person and to render the Court an annual account of his/her administration (art. 269 CC). At any time, the Public Prosecutor may demand from the guardian similar reports (art. 232 CC). The

Court may order and the Public Prosecutor may request at all times that other measures of supervision and control are adopted in the personal or financial interest of the incapable person. In some Autonomous Communities, besides judicial intervention, the intervention of other tutelary organs is provided for (Board of Relatives or Tutelary Council) to authorize specific acts and demand periodical accounts. Upon leaving his/her office, the guardian must render a documented general account of his/her administration to the judicial authorities.

- [183]. The activities of the curator are not excluded from judicial control. However, due to the fact that the curator does not perform administrative or representative acts, but only provides assistance, he/she is only required to request authorisation for carrying out specific acts.
- [184]. Parents with extended or reinstated parental authority must also request judicial authorisation to perform certain acts and render final accounts if the child so requests within a period of three years after the parental authority ended.

6. Miscellaneous

- [185]. No issues falling under this section have been detected.

Annexes-Case Law

In different Sections of the Guidelines, experts have been asked to refer to case law. Please present the case law reference in the format below

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| Case title | STC 1032/2000 |
| Decision date | 06.06.2000 |
| Reference details (reference number; type and title of court/body; in original language and English [official translation, if available]) | Judgment no 1032/2000 <i>Tribunal Supremo</i> [SupremeCourt], <i>Sala Segunda de lo Penal</i> [Second Criminal Section] |
| Key facts of the case (max. 500 chars) | The applicant was charged with the accomplice to the sexual abuse of her daughter by the father. The applicant has a mental disability (intellectual capacity of a 6 – 10 years old child. |
| Main reasoning/argumentation (max. 500 chars) | The defence of the applicant argued that being a person with mental disability, the applicant is criminally incapable according to Article 20 of the Criminal Code. |

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| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | The Court held that although the perceptions of the applicant are affected by her disability, her capacity to distinguish between good and bad as regards the basic elements of life, such as sexual relations or relations between children and parents is not affected by her disability. |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | As a result, the Court held that the applicant is criminally capable and confirmed the judgement of the lower instance. |
| Proposal of key words for data base | Criminal capability of persons with mental disability |

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| Case title | <i>Chacón v. Eurest</i> |
| Decision date | 11.07.2006 |
| Reference details (reference number; type and title of court/body; in original language and English [official translation, if available]) | C- 13/05 Court of Justice of the European Communities, Grand Chamber |

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| Key facts of the case (max. 500 chars) | Mrs Chacón Navas was dismissed by the company Eurest while on sick leave on 28 May 2004. The company recognized that her dismissal was unlawful and offered her compensation. Mrs Chacón Navas filed a suit against Eurest asking for her dismissal to be declared void and for the company therefore to be obliged to take her back. Before making a ruling on the issue, the judge of Social Court no. 33 in Madrid referred a question for a preliminary ruling (OJ 19.3.2005) to the Court of Justice of the European Communities. |
| Main reasoning/argumentation (max. 500 chars) | The applicant argued that since the dismissal proceeded due to her temporal incapacity to work, it is discriminatory on the grounds of disability so that it should be declared null and void. |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | The ECJ held that in the context of Directive 2000/78, “the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life” (paragraph 43). “However, by using the concept of ‘disability’ in Article 1 of that directive, the legislature deliberately chose a term which differs from ‘sickness’. The two concepts cannot therefore simply be treated as being the same” (paragraph 44). It also states that “in order for the limitation to fall within the concept of ‘disability’, it must therefore be probable that it will last for a long time” (paragraph 45). About the protection of disabled persons as regards dismissal, the Court establish that “a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78”. |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | As a result, the Court held that sickness cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination. |

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| Proposal of key words for data base | Disability Directive 2000/78/EC |
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| Case title | STC 269/1994 |
| Decision date | 03.10.1994 |
| Reference details (reference number; type and title of court/body; in original language and English [official translation, if available]) | Judgment no 269/1994 <i>Tribunal Constitucional</i> [Constitutional Court], <i>Sala Primera</i> [First Section] |
| Key facts of the case (max. 500 chars) | The Autonomous Community of Canarias called an open competition for civil servants within the public administration. 6 of the 189 free positions were reserved for persons with mental, physical or sensorial disability who passed the exams under the same conditions as the rest of candidates. A candidate without any disability lodged an objection against the positioning of the candidates arguing that the allocation of quotas is a discriminatory and therefore unconstitutional act. |
| Main reasoning/argumentation (max. 500 chars) | The applicant, one of the candidates with disability, lodged an individual appeal for protection with the Constitutional Court arguing that the allocation of quotas is a positive action in order to guarantee real equality covered by the Constitution. |

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| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | The Court held that Articles 9 par. 2, 14 and 49 of the Constitution relating to the principle of equality and non-discrimination shall be interpreted in conformity with the Convention 159 of the International Labour Organization (ILO). According to the Constitutional Court, the allocation of quotas for persons with disabilities is necessary in order to achieve a real and effective equality. In order for allocation of quotas to be in conformity with the Constitution, the equal conditions for the passing of the exams shall be established. |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | As a result, the applicant was readmitted in her position as a winner of a civil servant post. |
| Proposal of key words for data base | Quotas disability |

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| Case title | STC 53/1985 Publication BOE 119, 18/05/1985 |
| Decision date | 11/04/1985 |
| Reference details (reference number; type and title of court/body; in original language and English [official translation, if available]) | Reference number: 53/1985 <i>Tribunal Constitucional</i> [Constitutional Court], <i>Pleno</i> [Plenary Session] |

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| Key facts of the case (max. 500 chars) | 54 Members of the Spanish House of Deputies file a complaint of constitutionality previous to the adoption of a modification of Article 417 bis of the Spanish Criminal Law, which regulates the circumstances under which abortion is not considered punishable. According to the plaintiffs, the law reform would eliminate criminal provisions safeguarding the right to life. They ask the Court whether criminal provisions are to be considered essential for the protection of this right or not. |
| Main reasoning/argumentation (max. 500 chars) | The plaintiffs allege that this question should be answered affirmatively; the respect for human life requires protection by criminal provisions, which should establish the type of acts which infringe this fundamental right. According to the plaintiffs, the scope of application of the right to life includes unborn children in all phases of gestation. |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | With regard to the punishability of so-called “eugenic abortion” regulated in Article 417 bis, under 3°, the Constitutional Court concludes that penalizing pregnant women for practising abortion on a foetus which presumable will be born with grave physical or mental defects would “entail imposing a conduct which exceeds what may normally be required from a mother or a family”. The Court therefore considers that excluding eugenic abortion from criminal liability is not unconstitutional. |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | The Constitutional Court concludes that the proposed modification is not constitutional for reasons not related to the grounds contained in Article 417 bis excluding abortion from criminal liability. |
| Proposal of key words for data base | Abortion, physical disabilities, mental disabilities. |

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| Case title | STC 129/1999 Publication BOE 181 30/07/1999 |
| Decision date | 01/7/1999 |

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| Reference details (reference number; type and title of court/body; in original language and English [official translation, if available]) | Reference number: 129/1999 <i>Tribunal Constitucional</i> [Constitutional Court], <i>Pleno</i> [Plenary Session] Publication BOE 181 30/07/1999 |
| Key facts of the case (max. 500 chars) | Question of unconstitutionality brought by a lower Court deciding on the need for involuntary placement of a woman, the mother of a son, suffering from schizophrenic syndrome. |
| Main reasoning/argumentation (max. 500 chars) | The lower Court asks whether Article 211.2 Civil Code (in the version established by Act 13/1983) is incompatible with Article 24.1 and 24.2 of the Spanish Constitution which provides for the right to effective judicial protection and the right to use all pertinent proof, considering that the involuntary placement in a psychiatric clinic is allowed based on a court decision without the party concerned being able to defend herself or oppose the decision. The lower Court also considers that incompatibility exists with Article 17.1 of the Constitution, which establishes the right to personal freedom, as the judicial authorisation is given in the absence of a specific procedural rule. |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | The Constitutional Court considers that involuntary placement is constitutional if certain conditions are met: the mental alienation of the person concerned should be proven by an objective medical report; the alienation should justify the involuntary placement; and the necessity of placement should be monitored over time. As far as the deprivation of personal freedom that all placements entail, the TC considers that Article 17.1 of the Constitution is not violated as the decision on placement can only be made by judicial authorisation, adopted under a previously existing rule regulating the decision. |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | The TC declares Article 211 of the Civil Code (in the version established by Act 13/1983) is not incompatible with the Spanish Constitution. |
| Proposal of key words for data base | Involuntary placement; right to effective judicial protection. |

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| Case title | Terra Mítica S.A. |
| Decision date | 13.02.2007 |
| Reference details (reference number; type and title of court/body; in original language and English [official translation, if available]) | Judgment no 709/2007 Tribunal Superior de Justicia de la Comunidad Valenciana [Superior Court of Justice of the Autonomous Community of Valencia], Sala de lo Social [Social Section] |
| Key facts of the case (max. 500 chars) | The applicant was dismissed by his employee, the theme park Terra Mítica, shortly after the competent administrative authority had attested his psychical disability to the amount of 37%. Terra Mítica gave as a reason for the dismissal the reorganization of the area “Show programmes” implying lower budget and therefore less show programmes. |
| Main reasoning/argumentation (max. 500 chars) | The applicant challenged the dismissal before the competent courts arguing that the reason for his dismissal was his newly attested psychical disability of 37% and therefore discriminatory. According to the <i>Estatuto de Trabajadores</i> [Workers’ Statute] discriminatory decisions of the employee are null and void. |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | <p>The Court reiterated the definition of the notion “disability” of Article 1 of Directive 2000/78 established by the ECJ in its judgement C-13/05 in the Case <i>Chacón vs. Eurest</i>. The ECJ established that that in the context of Directive 2000/78, “the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”.</p> <p>The Court held that the applicant established facts from which it may be presumed that there has been direct discrimination, so that according to the shift of the burden of proof provided for by Article 10 of Directive 2000/78 and the Spanish transposition Act, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. The Court held that the respondent failed to prove that the reason for the dismissal was not the disability of the applicant.</p> |

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| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | The Court declared the dismissal void. |
| Proposal of key words for data base | Definition disability Directive 2000/78 |
| Case title | STC 215/1994 |
| Decision date | 14.7.1994 |
| Reference details (reference number; type and title of court/body; in original language and English [official translation, if available]) | Reference number: 215/1994 <i>Tribunal Constitucional</i> [Constitutional Court] (Plenary) |
| Key facts of the case (max. 500 chars) | Question of unconstitutionality posed by a regular Court in a procedure in which the parents (legal representatives) of an incapacitated woman with Down's Syndrome request her sterilisation by the ligation of the Fallopian tubes. |

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| Main reasoning/argumentation (max. 500 chars) | <p>The judge asks the Constitutional Court whether article 428 of the Criminal Code (currently art. 156), which depenalizes the sterilisation of a person incapacitated on the grounds of severe mental deficiencies provided it has been authorised by the Court at the request of the legal representative, after hearing two experts and the Public Prosecutor and after having examined the person concerned, could be contrary to Article 15 of the Constitution as it recognizes that “everybody has the right to life and to physical and moral integrity”.</p> |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | <p>The Court establishes that the provision always refers to specific and exceptional circumstances and radically excludes any government policy on the sterilisation of persons with mental deficiencies, as it can only be authorised by the Court at the request of a party with standing under specific guarantees. It further declares that the right to physical and moral integrity not only protects the inviolability of the person against external attacks, but also against all kinds of interventions regarding which the person concerned has not been able to give his consent.</p> |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | <p>The Court concludes that paragraph two, last subsection of art. 428 of the Criminal Code, drafted in accordance with art. 6 of Organic Act 3/1989 (currently article 156) is not contrary to the Spanish Constitution.</p> |
| Proposal of key words for data base | <p>Sterilisation of a incapacitated person</p> |