

# JOURNAL OF INTERNATIONAL AGING LAW & POLICY

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## **WORLD CONGRESS TO NATIONAL SUMMIT: MOVING GUARDIANSHIP EXCELLENCE TO REALITY**

*SALLY BALCH HURME* \*

### *I. INTRODUCTION*

The Yokohama Declaration, developed by the First World Congress on Adult Guardianship Law, and the Standards for Guardians, drafted by the Third National Guardianship Summit, demonstrate a consistent movement toward enhanced performance by guardians across the world and stronger respect and recognition of the rights of persons under guardianship.

World attention has focused on the purpose of the civil intervention of guardianship. This spotlight reflects the inherent tension of the need to provide protection to vulnerable adults while respecting every adult's basic human right to self-determination and self-direction. Societies around the world recognize the need for some sort of state-sponsored process to provide support and services to those individuals who are unable to care for themselves to some extent because of a mental condition or disability. Typically, the process is for a court to make a determination that the individual is incapable of making his or her own decisions regarding aspects of his or her safety, health, personal choices, and finance management. The court then appoints someone with the authority to make decisions about how an individual is to spend his or her life and money.

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\* Sally Balch Hurme, J.D., is a Project Advisor with AARP, Washington, D.C. Ms. Hurme attended the World Congress on Adult Guardianship Law and, as Chair of the National Guardianship Network, was a lead planner of the Third National Guardianship Summit.

Much-needed attention is moving beyond the purpose of guardianships, the appropriate due process that states should apply when determining incapacity, and the selection of a guardian. Societies are currently focusing more on the appropriate role of the court-appointed guardian. How do, and how should, guardians exercise their authority and responsibility? By what standards should guardian performance be measured?

Two important conferences have directed the world's attention to the critical issue of guardians' performance as they make decisions on behalf of the adults for whom they are charged to care. In October 2010, guardianship experts from around the world convened at the First World Congress on Adult Guardianship held in Yokohama, Japan. They promulgated the Yokohama Declaration, which includes sixteen standards for guardian performance among other provisions.<sup>1</sup> The following year, in October 2011, in Salt Lake City, Utah, the delegates to the Third National Guardianship Summit took a close look at existing standards for American guardians. The delegates recommended forty-three standards that provide clearer guidance to guardians on how they should make decisions and to courts on how they should evaluate that performance.<sup>2</sup>

Part II of this Article examines the proceedings of the World Congress. Part III provides an analysis of the Yokohama Declaration provisions that set the standards for guardians in any country and will review the influence of the United Nations Convention on the Rights of Persons with Disabilities on the Yokohama Declaration. Part IV compares the standards developed

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<sup>1</sup> Int'l Guardianship Network, *Yokohama Declaration 2* (Oct. 4, 2010) (available at [http://www.guardianship.org/pdf/IGN\\_Yokohama\\_Declaration\\_2010.pdf](http://www.guardianship.org/pdf/IGN_Yokohama_Declaration_2010.pdf)) [hereinafter *Yokohama Declaration*]. The Second World Congress on Adult Guardianship was held on October 15–17, 2012 in Melbourne, Australia, and specifically focused on the United Nations Convention on the Rights of Persons with Disabilities. Austrl. Guardianship & Admin. Council, *2nd World Congress on Adult Guardianship*, <http://agac2012.conorg.com.au/> (accessed Mar. 21, 2013).

<sup>2</sup> Natl. Guardianship Network, *Third National Guardianship Summit Releases Standards and Recommendations*, [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011\\_aging\\_summit\\_recs\\_1111.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_summit_recs_1111.authcheckdam.pdf) (2011) [hereinafter *Summit Standards and Recommendations*].

during the Third National Guardianship Summit with the Yokohama recommended standards. While the wording may slightly vary, on the whole, the two sets of standards are substantially similar and demonstrate a consistent movement toward enhanced performance by guardians across the world and stronger respect and recognition of the rights of persons under guardianship.

## II. *WORLD CONGRESS ON ADULT GUARDIANSHIP*

Yokohama, Japan, was the host city for the First World Congress on Adult Guardianship Law held in October 2010. The World Congress brought together 450 delegates from seventeen countries “to learn from each other in a frank exchange of ideas about the current situation of adult guardianship law around the world.”<sup>3</sup> During three days of presentations and workshops, guardianship experts explained how their respective legal systems functioned<sup>4</sup> and highlighted significant trends.<sup>5</sup> Sessions included

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<sup>3</sup> Makoto Aria, Chairperson of the Organizing Committee on the World Congress on Adult Guardianship Law 2010, Welcoming Remarks (Oct. 2, 2010). Organizers of the World Congress on Adult Guardianship Law included the Japan Adult Guardianship Law Association, Max Planck Institute for Foreign and International Social Law, International Conference on Public Trustees and Public Guardians, International Guardianship Network, Legal-Support Adult Guardian Center, Tokyo Bar Association, Japanese Association of Certified Social Workers, Japan Federation of Certified Public Tax Accountants’ Associations, University of Tsukuba, and University of Tokyo.

<sup>4</sup> See e.g. Maria Mammeri-Latzel, *Overview of German Adult Guardianship Law from the Perspective of a German Probate Judge* 149 (World Congress on Adult Guardianship Law 2010 Reports 2012) [hereinafter Reports]; Teruaki Tayama, *Operational Support Structure for Adult Guardianship System: Judicial and Administration Elements* 40 (World Congress on Adult Guardianship Law 2010 Program Abstract 2010) [hereinafter Program Abstract]. Note on citation: All participants were provided with program abstracts translated into English and Japanese. Subsequently in 2012, the World Congress organizing committee published The World Congress on Adult Guardianship Law 2010 Reports that contains the full text of many of the presentations in English or Japanese. The full English text will be cited to the Reports when it is available. The official proceedings will be translated into both English and Japanese in 2012, but that work is not available at the time of this writing.

<sup>5</sup> See e.g. Park Inhwan, *The New Adult Guardianship System in the Proposed Amendment of the Korean Civil Code*, in Program Abstract, *supra* n. 4, at 71; Thomas Meyer, *Adult Guardianship Legislation in Germany*, in Reports, *supra* n. 4, at 259.

discussions of medical treatment decision-making<sup>6</sup> and assessment of capacity<sup>7</sup> as well as the use of trusts<sup>8</sup> and powers of attorney<sup>9</sup> as alternatives to court-imposed guardianship. Participants compared the various roles of guardians, judges, attorneys, social workers, physicians, and volunteers<sup>10</sup> and compared their contributions to the guardianship arena. Elder abuse,<sup>11</sup> dementia,<sup>12</sup> traumatic brain injury,<sup>13</sup> court monitoring,<sup>14</sup> guardian training,<sup>15</sup> voting rights,<sup>16</sup> and program funding<sup>17</sup> were among the topics discussed in additional workshops.

Despite differences in the languages used to describe the workings of the many varied guardianship systems, the common voice expressed an eagerness to respect the rights and enhance the autonomy of the adult while providing assistance as needed through the least-restrictive interventions. Ulrich Becker of the Max Planck Institute for Foreign and International Social Law in Munich, Germany, noted that “German guardianship law has undergone a remarkable shift towards a better protection of private autonomy. At the same time, the personal relation between the

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<sup>6</sup> See e.g. Waichiro Iwashiro, *Legal Guardianship for Medical Acts: Legal Status and Current State of Interpretation in Japan*, in Program Abstract, *supra* n. 4, at 18.

<sup>7</sup> See e.g. Osamu Matsuda, *Assessment of Capacity in Guardianship for Adults: The Many Facets of Changes in Capacity Brought on by Dementia and Aging, and Their Assessment*, in Program Abstract, *supra* n. 4, at 47.

<sup>8</sup> See e.g. Lusina Ho, *Trust and Adult Guardianship in Hong Kong*, in Reports, *supra* n. 4, at 424.

<sup>9</sup> See e.g. Volker Lipp, *Continuing Powers of Attorney in Germany*, in Reports, *supra* n. 4, at 336.

<sup>10</sup> See e.g. Ingrid Nagode, *Volunteer Adult Guardians in Austria*, in Reports, *supra* n. 4, at 330.

<sup>11</sup> See e.g. Joan Braun, *Guardianship Law in British Columbia Canada: Benefits and Limitations in Protecting the Elderly from Abuse or Mistreatment*, at Program Abstract, *supra* n. 4, at 36.

<sup>12</sup> See e.g. Andreas Kruse, *Dementia and Quality of Life: An Empirical and Ethical Approach*, in Reports, *supra* n. 4, at 276.

<sup>13</sup> Hideo Hasegawa, *Encouraging the Use of the Adult Guardianship System for People with Acquired Brain Dysfunction Caused by Traffic Accidents*, in Program Abstract, *supra* n. 4, at 66.

<sup>14</sup> See e.g. Anita Smith, *The Essential Elements of Effective Guardianship: An Examination of the Appointment, Monitoring and Review of Effective Guardians*, in Reports, *supra* n. 4, at 82.

<sup>15</sup> See e.g. Stefan Tappeiner, *Full Guardianship, Limited Guardianship and Caretaking with Residual Capacity for the Ward in Italy with Particular Regard for the Choice and Training of Full/Limited Guardians and Guardians for the Caretaking*, in Reports, *supra* n. 4, at 331.

<sup>16</sup> See e.g. Isao Takenaka, *The Voting Rights of Wards and Articles 15 and 13 of the Japanese Constitution*, in Program Abstract, *supra* n. 4, at 51.

<sup>17</sup> See e.g. Jay Chalke, *Public Support for Guardians: Fostering Public Support for Public Guardianship through Transparent Performance Reporting*, in Program Abstract, *supra* n. 4, at 53.

guardian and the incapacitated person . . . is getting more and more important in the field of guardianship.”<sup>18</sup>

Professor Robert Gordon of Simon Fraser University in Vancouver, Canada, noted the trend in Canadian provinces to

downgrad[e] the use of guardianship in favour of less restrictive, intrusive, and stigmatizing alternatives such as supported decision-making, health care and personal care substitute decision-making, and the use of planning options (e.g., representation agreements, advance care directives, enduring powers of attorney, and discretionary trusts) buttressed by adult protection legislation and intervention systems. . . . An effort is being made to ensure that the rights to autonomy and self[-]determination are available to all adults in Canada are not unduly eroded by a potentially countervailing right to the most effective but least intrusive and restrictive form of support and assistance when needed.<sup>19</sup>

Anita Smith with the Guardianship and Administration Board in Tasmania described the effective Australian guardian as one who

will consult with the represented person, taking into account that person’s wishes, as far as possible, in [decision-making] on his or her behalf. An effective guardian also acts as an advocate for that person and enhances [his or her] ability to exercise [his or her] legal identity rather than remove it. Ideally[,]

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<sup>18</sup> Ulrich Becker, *Guardianship and Social Benefits Law*, in Report, *supra* n. 4, at 10.

<sup>19</sup> Robert M. Gordon, *Developing Alternatives to Guardianship: A Canadian Perspective*, in Program Abstract, *supra* n. 4, at 7.

the role of a guardian should aim to be self-defeating, so that a guardian encourages the represented person to become capable of making decisions and participating in the life of the community to such an extent that the guardian is no longer needed.<sup>20</sup>

Another thread of discussion in several presentations was the impact of the United Nations Convention on the Rights of Persons with Disabilities on guardianship practices.<sup>21</sup> This human rights treaty adopts a broad categorization of people with disabilities<sup>22</sup> and reaffirms that all people with all types of disabilities must enjoy all human rights and fundamental freedoms. The core principle of the Convention is the right of all people to “[f]ull and effective participation and inclusion in society.”<sup>23</sup> It clarifies how all categories of rights apply to people with disabilities, and it identifies areas where adaptations have to be made for people with disabilities so they can effectively exercise their rights and where protection of rights must be reinforced. Unequivocally, the Convention recognizes the right of people with disabilities to dignity, to live in the community, to exercise their legal capacity, and to enjoy the inherent right to live life on an equal basis with others.<sup>24</sup> In its various articles, it calls upon countries ratifying the treaty to

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<sup>20</sup> Smith, *supra* n. 14, at 82.

<sup>21</sup> Convention on the Rights of Persons with Disabilities, A Res. 61/106, 61st Sess., UN Doc. A/RES/61/106 (2006) [hereinafter *UN Convention*]. Although the United States was one of the 153 signatories to the Convention, it has not yet joined the 125 countries that have ratified it. UN, *Convention and Optional Protocol Signatures and Ratifications*, <http://www.un.org/disabilities/countries.asp?Id=166> (accessed Mar. 21, 2013).

<sup>22</sup> The convention includes no definition of disability, but it includes “those who have long-term physical, mental, intellectual, or sensory impairments.” *UN Convention*, *supra* n. 21, at 4; see Arlene S. Kanter, *The United National Convention on the Rights of Persons with Disabilities and Its Implications for the Rights of Elderly People under International Law*, 25 Ga. St. U. L. Rev. 527, 549–551 (2009) (explaining why no definition was included).

<sup>23</sup> *UN Convention*, *supra* n. 21, at 5.

<sup>24</sup> Kanter, *supra* n. 22, at 552.

- abolish “existing laws, regulations, customs, and practices that constitute discrimination against persons with disabilities”,<sup>25</sup>
- guarantee that persons with disabilities enjoy their inherent right to life on an equal basis with others;<sup>26</sup>
- prohibit discrimination on the basis of disability and guarantee equal legal protection;<sup>27</sup>
- ensure the equal right to enjoy legal capacity in all aspects of life and to control their financial affairs;<sup>28</sup>
- ensure access to justice on an equal basis with others;<sup>29</sup>
- ensure that they enjoy the “right to liberty and security” and are not “deprived of their liberty unlawfully or arbitrarily”,<sup>30</sup>
- prohibit medical or scientific experiments without the consent of the person concerned;<sup>31</sup>
- not subject people with disabilities to arbitrary or illegal interference with their “privacy, family, home, correspondence[,] . . . or communication”,<sup>32</sup>
- enable persons with disabilities to live independently, to be included in the community, to choose where and with

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<sup>25</sup> *UN Convention, supra* n. 21, at 5.

<sup>26</sup> *Id.* at 9.

<sup>27</sup> *Id.* at 6.

<sup>28</sup> *Id.* at 9.

<sup>29</sup> *Id.* at 10.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 13.

whom to live, and to have access to in-home, residential, and community-support services.<sup>33</sup>

Additionally, the treaty calls for an adequate standard of living and equal access to information, employment, education, social and health services, habilitation, technology, transportation, and political life.<sup>34</sup>

Article 12 primarily pertains to guardianship issues by calling for equal recognition before the law.<sup>35</sup> It requires that the states participating in the treaty to “recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”<sup>36</sup> Article 12, Section 4 speaks specifically to guardianship as a state action that relates to the exercise of legal capacity. Countries should have in place safeguards that “respect the rights, will[,] and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible[,] and are subject to regular review by a competent, independent[,] and impartial authority of judicial body.”<sup>37</sup> Additionally, the “safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.”<sup>38</sup> Section 3 mandates that states ensure that people with disabilities have access “to the support they may require in exercising their legal capacity.”<sup>39</sup>

American scholars have argued that Article 12 proposes the abolition of guardianship by directing states to provide support in enabling individuals to exercise their legal capacity instead of denying them this right.<sup>40</sup> Reforms in American states’

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<sup>33</sup> *Id.* at 12.

<sup>34</sup> *Id.* at 8, 12–18.

<sup>35</sup> *Id.* at 9.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Kanter, *supra* n. 22, at 559–560. “As such, Article 12, marks an important paradigm shift from the practice of depriving people of their rights simply on the basis of their perceived lack of capacity to

guardianship laws have moved from a medical model, focusing only on a diagnosis of incapacity, to a model that assesses the adult's capacity not based on labels or age, improves due process, uses limited orders, seeks less- restrictive alternatives, and expands guardian accountability.<sup>41</sup> Nevertheless, the guardian is still a substitute decision-maker and not a supporter of decisions made by the adult. Instead of the paternalistic guardianship laws that substitute a guardian's decision for that of the individual, the Convention's supported-decision-making model recognizes that all people have the right to make decisions and choices about their own lives and get support when they need help making decisions.<sup>42</sup> The supported-decision-making model has the potential to change how governments address those born with mental disabilities and those who cannot take care of themselves, such as the elderly.<sup>43</sup>

In the United States, the separate laws of each of the fifty states and the District of Columbia govern guardianship matters. Thus, we can talk only about general trends rather than any consistency in law or practice. The Uniform Guardianship and Protective Proceedings Act, as a model law for states to adopt or modify as they see fit, can be used as a guide to how most, but not necessarily all, states structure the decisional relationship between the guardian and the person under guardianship. Section 314(a) of the Uniform Guardianship and Protective Proceedings Act (Uniform Act) states,

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the promotion of national policies and laws[,] which comport to the goal and principles of the CRPD, including autonomy, dignity, and independence." *Id.* at 560.

<sup>41</sup> Sally Hurme & Erica Wood, *Introduction to the Third National Guardianship Summit*, \_\_\_ Utah L. Rev. \_\_\_, (forthcoming 2012); see also Rebecca C. Morgan, *Least Restrictive Alternative, Limited Guardianship and the Ward's Autonomy: Trends in the United States in the 21st Century*, in Report, *supra* n. 4, at 64.

<sup>42</sup> Kanter, *supra* n. 22, at 563.

<sup>43</sup> *Id.* at 563–564.

Except as otherwise limited by the court, a guardian shall make decisions regarding the ward's support, care, education, health, and welfare. A guardian shall exercise authority only as necessitated by the ward's limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian at all times shall act in the ward's best interest and exercise reasonable care, diligence, and prudence.<sup>44</sup>

Clearly, the first sentence gives the guardian the authority to make decisions, taking away that right from the person under guardianship. The guardian's absolute authority may be limited by the court and is tempered by the statutory directive to encourage the adult to participate in decisions and to allow the adult to act on his or her own behalf to the extent possible. Encouraging the adult to participate in decision-making when his or her decision-making authority has been removed by the court is not the same as assisting the individual to make his or her own decisions. Cardozo Law School Professor Leslie Salzman argues that a guardianship system that limits an individual's right to make his or her own decisions marginalizes the individual and imposes a form of segregation and discrimination.<sup>45</sup> According to Salzman, this system violates the Americans with Disabilities Act,<sup>46</sup> which mandates providing services in the most integrated and least-restrictive manner.<sup>47</sup> She proposes that incorporating decision-making support as a less restrictive form of assistance into existing guardianship systems would enhance the independence, autonomy,

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<sup>44</sup> Unif. Guardianship & Protec. Proc. Act § 314(a) (1997).

<sup>45</sup> Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. Colo. L. Rev. 157, 160 (2010).

<sup>46</sup> Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2006).

<sup>47</sup> Salzman, *supra* n. 45, at 160.

and inclusion of those with limited decision-making abilities.<sup>48</sup> North Carolina attorney and long-time advocate for guardianship reform Frank Johns concurs that “tinkering” with existing guardianship systems is necessary and doable to “provide guardians with clear standards that emphasize person-centered decision making as well as education and training, empowering them to implement person centered decision making for the individuals they serve.”<sup>49</sup>

Volker Lipp of Georgia Augusta University in Gottingen sees the Convention as “nothing less than a paradigm shift, for it [treats] people with disability as [a] subject and no longer as objects of care . . . with the same human rights and fundamental freedoms as people without disabilities. . . . They have the right to live their lives autonomously, just as any other person without a disability.”<sup>50</sup>

Canadian Professor Robert Gordon, in his keynote lecture at the World Congress, highlighted the efforts being made in the Canadian provinces to comply with the UN Convention to ensure that the rights to autonomy and self-determination are available to all Canadians through the most effective but least intrusive and restrictive form of support and assistance when needed.<sup>51</sup> For example, the British Columbia Representation Agreement Act allows an adult to authorize a representative to help the adult make decisions about personal care, routine financial management,

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<sup>48</sup> *Id.* at 157–158.

<sup>49</sup> A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 Utah L. Rev. \_\_\_\_ (forthcoming); see Lawrence A. Frolik & Linda S. Whitton, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 Utah L. Rev. \_\_\_\_ (forthcoming) (analyzing the theories of substituted judgment and best interest and their application in United States guardianship statutes and practice).

<sup>50</sup> Volker Lipp, *Autonomy and Guardianship: Foes of Friends?* in Report, *supra* n. 4, at 96.

<sup>51</sup> Robert M. Gordon, *Developing Alternatives to Guardianship: A Canadian Perspective*, in Report, *supra* n. 4, at 75.

major and minor health care, and obtaining legal services.<sup>52</sup> The representative must consult with the individual and comply with current wishes if it is reasonable to do so.<sup>53</sup> If the adult becomes incapacitated so that current wishes cannot be determined, the representative must comply with any instructions or wishes the adult expressed while capable.<sup>54</sup> If there are no known instructions, the representative must act on the basis of known beliefs and values and then act in the adult's best interests if beliefs and values are not known.<sup>55</sup> Although the authority delegated is similar to that given in an enduring power of attorney, a Representation Agreement is the only way for a Canadian to select someone to assist in making decisions about healthcare, personal care, and routine financial affairs.

In the United Kingdom, independent mental-capacity advocates are available to provide support to an adult without a support network or designated surrogate so the adult "may participate as fully as possible in any relevant decision" regarding serious medical treatment or placement in a hospital, care home, or residential accommodation when the adult lacks the capacity to agree to the arrangements.<sup>56</sup> The advocate should also determine what the adult's wishes and feelings would likely be, and the beliefs and values that would likely influence the adult if he or she had capacity.<sup>57</sup>

Sweden has replaced its guardianship system with two forms of assistance: the *god-man* (or mentor) and the *forvaltare* (or administrator). Both are statutory based and publicly funded to provide guidance and support to persons with disabilities.<sup>58</sup> The appointment of a *god-man* or *forvaltare* by a district court does not

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<sup>52</sup> Representation Agreement Act, ch. 405, pt. 2, § 7 (1996).

<sup>53</sup> *Id.* at pt. 3, § 16(2).

<sup>54</sup> *Id.* at pt. 3, § 16(3).

<sup>55</sup> *Id.* at pt. 3, § 16(4).

<sup>56</sup> Mental Capacity Act 2005, ch. 9, pt. 1, §§ 35–39.

<sup>57</sup> *Id.* at § 36(2)(c).

<sup>58</sup> Stanley S. Herr, *Self-Determination, Autonomy and Alternatives for Guardianship* 3 (2001) (available at <http://ruralinstitute.umn.edu/transition/handouts/Self-Determination.Herr.pdf>).

alter the adult's civil rights, including the right to vote.<sup>59</sup> Swedish law emphasizes that the *god-man* should act with the consent and volition of the adult.

With a personal assistant, recipients have the right to decide what the assistant will do, when he or she will do it, and how it will be done, as well as from whom the recipients choose to have the assistance. It has increased opportunities for recipients to live on their own or with family, to study, to work, and to participate in community life.<sup>60</sup>

The main use of these mentors is for people with mental retardation, illness, or deteriorating health who need help looking after their legal, financial, or personal interests. Applications for appointment are generally based on direct consent of the adult; the court procedure is informal without the need for a hearing and without cost to the adult, and the process takes two to three weeks to complete. For those unable to consent, the court appoints a *god-man* based on a medical certification of the adult's lack of capacity to consent.<sup>61</sup> *God-men*, who are paid for their services, are most commonly relatives, but they could also be retired teachers, social

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<sup>59</sup> *Id.* at 4–5. In the United States, a growing number of jurisdictions require the court to determine if a person under guardianship retains the right to vote. Sally Hurme & Paul Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 McGeorge L. Rev. 931, 933 (2007).

<sup>60</sup> Ulla Clevnert & Lennarth Johansson, *International Encyclopedia of Rehabilitation, Personal Assistance in Sweden* 7 (2012) (available at <http://cirrie.buffalo.edu/encyclopedia/article.php?id=137&language=en>).

<sup>61</sup> Herr, *supra* n. 58, at 5 The Swedish *forvaltare* may be appointed when the adult objects to the appointment of a god-man and property or personal interest are in serious jeopardy. The legal role is more like a guardian in that the *forvaltare* may make substituted decisions without the assent of the adult. The key concept with this procedure is to ensure that the adult retains all civil rights but is granted significant legal protections for any seriously improvident act. The *forvaltare* has the authority to set aside any financial transaction or contract the adult is not entitled to make, such as obtaining a credit card, managing an inheritance, selling real estate, or managing a specific bank account. *Id.* at 7; see Salzman, *supra* n. 45, at nn. 242–245 for further descriptions of the *god-man* and *forvaltare* procedures.

workers, bank employees, or “politicians who wish to display their civic-mindedness.”<sup>62</sup>

### III.     *THE YOKOHAMA DECLARATION*

One of the objectives of the World Congress was to make “a proclamation to the world on the proper use of the adult guardianship system.”<sup>63</sup> The resulting Yokohama Declaration was promulgated with the hopes that it “will contribute to the continued development of the Adult Guardianship Law around the world.”<sup>64</sup> The international part of the declaration acknowledges the worldwide demographic reality that more people are living longer, and the expected increase in longevity will have a serious socioeconomic impact for decades.<sup>65</sup> It further acknowledges the concomitant increase in the number of people with age-related impairment as well as an increase in the number of younger people with psychiatric illnesses, learning disabilities, and acquired brain injuries.<sup>66</sup> Adults of all ages are also vulnerable to abuse in both the family and institutional environment.<sup>67</sup> Because of these concerns, the Declaration calls on all countries to improve their adult guardianship systems to incorporate modern thinking and best practices into their procedures for substituted, proxy decision-making on behalf of adults who lack the capacity to make decisions for themselves.<sup>68</sup>

The Declaration sets out five key principles that should be at the core of any adult guardianship system:

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<sup>62</sup> Herr, *supra* n. 58, at 6.

<sup>63</sup> *Yokohama Declaration*, *supra* n. 1, at 2.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1–2.

<sup>66</sup> *Id.* at 2–3.

<sup>67</sup> *Id.* at 1.

<sup>68</sup> *Id.* at 1–2. The Declaration also affirms the principles and provisions of the Hague Convention on the International Protection of Adults and the United Nations Convention on the Rights of Persons with Disabilities. *Id.* at 1; see Nancy Coleman et al., *Cases That Cross Borders*, 1 J. Intl. Aging L. & Policy 69, 69–93 (2005) (discussing complex international jurisdictional issues and explaining the Hague Convention); Sally Hurme, *A Journey through Trans-National and Multi-State Guardianship Jurisdictions*, in *Comparative Perspectives on Adult Guardians* (Kim Dayton ed., 2012) (in process).

- (1) a person must be assumed to have the mental capacity to make a particular decision unless it is established that he or she lacks capacity;
- (2) a person is not to be treated as unable to make a decision unless all practicable steps to help him or her do so have been taken without success;
- (3) legislation should recognize, as far as possible, that capacity is both “issue specific” and “time specific” and can vary according to the nature and effect of the decision to be made, and can fluctuate in an individual from time to time; and
- (4) measures of protection should not be all-embracing and result in the deprivation of capacity in all areas for decision-making, and any restriction on an adult’s capacity to make decision should only be imposed where it is shown to be necessary for his or her own protection, or in order to protect third parties.
- (5) measures of protection should be subject to periodic and regular review by an independent authority wherever appropriate.<sup>69</sup>

In this section of the Declaration are embedded the concepts of presumption of capacity, supported decision-making, fluctuating capacity, limited guardian, and monitoring that were mentioned by the speakers during the World Congress.<sup>70</sup>

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<sup>69</sup> *Yokohama Declaration*, *supra* n. 1, at 1.

<sup>70</sup> See e.g. Morgan, *supra* n. 41; Smith, *supra* n. 14.

The next section of the Declaration sets out the characteristics of a competent guardian, or what might be called standards of performance that protect the rights and autonomy of a vulnerable adult. This section specifically refers to those individuals who must rely on a guardian because they are without any other means of support or representation, or in other words, those who are under a substituted-decision-making regime in the absence of supported decision-making. A guardian shall

- (1) act with due care and diligence when making any decision on behalf of the adult;
- (2) act honestly and in good faith;
- (3) act in the best interest of the adult;
- (4) respect and follow the adult's wishes, values and beliefs to the greatest possible extent, when these are known or can be ascertained, and clearly will not result in harm to the adult;
- (5) limit interference in the adult's life to the greatest possible extent by choosing the least intrusive, least restrictive, and most [normalizing] course of action;
- (6) protect the adult from ill-treatment, neglect, abuse and exploitation;
- (7) respects the adult's civil and human rights, and take action on his or her behalf whenever those rights are threatened;
- (8) provide the adult with assistance and support, and actively pursue things to which he or she may be entitled, such as pensions, benefits, or and social services;

- (9) not take advantage of his or her position as guardian;
- (10) be alert to, and seek to avoid, any conflict between his or her interests as guardian and the interests of the adult for whom he or she is acting;
- (11) actively assist the adult to resume or assume independent or interdependent living wherever possible;
- (12) involve the adult in all decision-making processes to the greatest possible extent;
- (13) encourage participation and help the adult to act independently in those areas where he or she is able;
- (14) keep accurate accounts records, and be ready to produce them immediately whenever required to do so by the court, tribunal, or public authority that appointed him or her;
- (15) act within the scope of the authority conferred upon him or her by the court, tribunal, or public authority that appointed him or her; and
- (16) keep under review the continuing need for any form of guardianship.<sup>71</sup>

The Declaration finally calls upon countries to develop professional standards and a satisfactory infrastructure supported by adequate resources.<sup>72</sup>

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<sup>71</sup> *Yokohama Declaration*, *supra* n. 1, at 2–3.

As the Yokohama Declaration was being disseminated, in the United States, a coalition of guardianship organizations was laying the groundwork for a national summit to develop professional standards for American guardians.

#### IV.     *THE THIRD NATIONAL GUARDIANSHIP SUMMIT*

Serving as a guardian is one of society's toughest tasks, yet often guardians assume the daunting responsibilities of managing possibly all aspects of another person's financial affairs and personal life with little guidance on how to do their job. The letters of guardianship will delineate the scope and areas of authority; some statutes may provide minimal direction; and in a few locations, basic instruction on how to be a guardian may be available. Additionally, the National Guardianship Association<sup>73</sup> has a comprehensive set of voluntary *Standards of Practice*.<sup>74</sup> However, many guardians and courts are unaware of the standards, and comprehensive training on the standards for new guardians is scarce.

In an effort to push to the forefront this critical and practical component of any guardianship system, the National Guardianship Network<sup>75</sup> convened the *Third National*

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<sup>72</sup> *Id.* at 3.

<sup>73</sup> The National Guardianship Association is a membership organization for those who serve as guardians as well as judges, court administrators, lawyers and other professional who are involved in the guardianship system. The "NGA seeks to protect incapacitated adults by ensuring that their guardians receive quality education and is recognized as the leading national resource for professional development." Natl. Guardianship Assn., *Overview and History* (accessed Mar. 21, 2013) (available at <http://www.guardianship.org/overview.htm>).

<sup>74</sup> Natl. Guardianship Assn., *NGA Standards of Practice* (2007) (available at [http://www.guardianship.org/documents/Standards\\_of\\_Practice.pdf](http://www.guardianship.org/documents/Standards_of_Practice.pdf)) [hereinafter *NGA Standards of Practice*].

<sup>75</sup> The National Guardianship Network includes ten national organizations that focus on effective adult guardianship law and practice. Member organizations include the AARP, American Bar Association Commission on Law and Aging, American Bar Association Section of Real Property, Trust and Estate Law, Alzheimer's Association, American College of Trust and Estate Counsel, Center for Guardianship Certification, National Academy of Elder Law Attorneys, National Center for State Courts, National College of Probate Judges, and National Guardianship Association. Additional grant support for the Summit came from the State Justice Institute and the Borchard Foundation Center on Law and Aging. Contributing co-sponsors included the American Bar

*Guardianship Summit: Standards for Excellence* in October 2011. The Summit's objective was to produce recommendations on widely recognized and understood standards to guide guardians after appointment by the courts. The focus on standards grew out of earlier efforts to provide non-statutory direction to guardians about how best to make decisions on behalf of the individuals with diminished capacity. In 1989, the first national gathering of American guardianship experts recommended that "[r]oles and standards for performance should be clearly defined, communicated[,] and monitored."<sup>76</sup> They urged that guardian standards of conduct are essential because "the absence of guardian performance standards . . . makes it difficult to measure guardian performance . . . [and] that model guardian performance standards would be useful in setting out basic principles, duties, and requirements."<sup>77</sup>

Thirteen years later, at the Second National Guardianship Conference held in 2001, conferees recommended that "[s]tates [should] adopt minimum standards of practice for guardians using the National Guardianship Association's *Standards of Practice* as a model."<sup>78</sup>

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Association Commission on Mental and Physical Disability Law, The Arc, The Bazelon Center for Mental Health Law, National Adult Protective Services Association, National Association of State Long-Term Care Ombudsman Programs, National Association of State Mental Health Program Developers, National Committee for the Prevention of Elder Abuse, The Center for Social Gerontology, and National Disability Rights Network. See [www.guardianshipsummit.org](http://www.guardianshipsummit.org) for more information about the Summit.

<sup>76</sup> American Bar Assn. Commn. on Mentally Disabled & Commn. on Leg. Problems of Elderly, *Guardianship: An Agenda for Reform—Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* 4 (1989) (available at [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011\\_aging\\_gship\\_agda\\_refrm.au\\_thecheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_gship_agda_refrm.au_thecheckdam.pdf)).

<sup>77</sup> *Id.* at 25; see also Sally Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 Stetson L. Rev. 867, 885 (2002).

<sup>78</sup> Second Natl. Guardianship Conf., *Wingspan—The Second National Guardianship Conference Recommendations*, 31 Stetson L. Rev. 59, 604 (2002).

## A.     Current Standards

The current National Guardianship Association's *Standards of Practice*, originally drafted in 1991 and most recently revised in 2007, elaborates on how guardians should carry out the typically broad-stated duties found in some state statutes about protecting the guardianship estate and caring for the person under guardianship in the least-restrictive environment.<sup>79</sup> The twenty-five standards provide specific statements as to how to carry out the multiple duties and responsibilities facing guardians. Standard One simply notes that the guardian must comply with federal and state statutes and comply with court orders.<sup>80</sup> Standard Two requires guardians to stay within the authority granted by the court, to report to the court as required, and to recognize that compensation must comply with applicable laws and court orders and be reviewed by the appointing court.<sup>81</sup> These two standards are similar to the Yokohama provision that guardians should "act within the scope of authority granted."<sup>82</sup>

Standard Three prohibits personal relationships, including sexual relationships, unless the relationship existed before the appointment.<sup>83</sup> Standard Four requires the guardian to protect and encourage the ward's relationships with family members and friends as well as to keep them informed about medical issues and get their input when appropriate, subject to the general duty of confidentiality of Standard Eleven.<sup>84</sup> Under Standard Five, the guardian is to stay informed about available community services, ensure the individual receives high-quality services, monitor the services provided, and hire professionals necessary to meet the

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<sup>79</sup> Karen Boxx & Terry Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardian Standards of Conduct and Codes of Ethics*, 2012 Utah L. Rev. \_\_\_\_ (ms. at 2) (forthcoming).

<sup>80</sup> *NGA Standards of Practice*, *supra* n. 74, at 3; see Boxx & Hammond, *supra* n. 79, at ms. 5–11 for a full description of each standard and their correlation with other professional standards.

<sup>81</sup> *NGA Standards of Practice*, *supra* n. 74, at 3.

<sup>82</sup> *Yokohama Declaration*, *supra* n. 1, at 3.

<sup>83</sup> *NGA Standards of Practice*, *supra* n. 74, at 3.

<sup>84</sup> *Id.* at 3–8.

individual's needs.<sup>85</sup> This standard, as well as Standard Sixteen, also protects against conflicts of interest by prohibiting the guardian from providing direct services to the individual.<sup>86</sup>

The next several standards provide the bases on which guardians must make decisions in a variety of contexts. Standard Six sets out how to exercise the individual's right to informed consent when making medical decisions,<sup>87</sup> while Standard Seven sets out the core principle to apply substituted judgment, or to make the decision the individual would have made except when that judgment would result in substantial harm to the individual or the individual's wishes cannot be known.<sup>88</sup> Standard Ten, the underpinning to Standard Seven, emphasizes the guardian's duty to become informed about and to understand the individual's values, beliefs, and culture.<sup>89</sup> Yokohama Standard Four similarly calls upon the guardian to "respect and follow the adult's wishes, values[,] and beliefs."<sup>90</sup> NGA Standard Eight requires the guardian to balance independence and choices with protection and safety when identifying the least-restrictive alternative.<sup>91</sup> The Yokohama Standard goes further in having the guardian "actively assist the adult to resume or assume independent living."<sup>92</sup> NGA Standard Nine requires the guardian to maximize the participation of the individuals in decision-making and to assist them in regaining capacity and control over their personal and financial affairs.<sup>93</sup> The stronger language from Japan is to "involve the adult

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<sup>85</sup> *Id.* at 4.

<sup>86</sup> *Id.* at 12–13.

<sup>87</sup> *Id.* at 4–5.

<sup>88</sup> *Id.* at 5–6; see Frolik & Whitton, *supra* n. 49, at 17–18 (elaborating on the differences and difficulties in applying these standards).

<sup>89</sup> *NGA Standards of Practice*, *supra* n. 74, at 7.

<sup>90</sup> *Yokohama Declaration*, *supra* n. 1, at 2.

<sup>91</sup> *NGA Standards of Practice*, *supra* n. 74, at 6.

<sup>92</sup> *Yokohama Declaration*, *supra* n. 1, at 2.

<sup>93</sup> *NGA Standards of Practice*, *supra* n. 74, at 6–7.

in all decision-making processes.”<sup>94</sup> This group of standards relates Yokohama Standards Three (acting in the best interest of the adult),<sup>95</sup> Four (respecting and following the individual’s wishes, values, and beliefs),<sup>96</sup> Five (choosing the least intrusive and restrictive interference),<sup>97</sup> and Twelve (involving the adult in decision-making).<sup>98</sup> Of note are the provisions in both Yokohama Standard Four and NGA Standard 7(II)(C) that the individual’s known wishes will be followed unless doing so would “cause substantial harm”<sup>99</sup> or “result in harm.”<sup>100</sup>

The next group of standards relates to the duties of a guardian of the person. This grouping specifies the guardian’s responsibilities to make sure residential arrangements are optimal, medical and other services are pursued, court approval for extraordinary actions are obtained, required reports are filed, and the guardianship is modified or terminated as appropriate.<sup>101</sup> Both NGA Standard 12(H) and Yokohama Standard Sixteen require the guardian to proactively seek a reduction in the guardian’s authority when appropriate.<sup>102</sup> Other NGA standards set out best practices for managing the ongoing relationship with the individual, such as preparing a guardianship plan, meeting with the individual and caregivers, seeking second medical opinions, and making medical decisions that follow the wishes of the individual.<sup>103</sup>

Standards Seventeen through Twenty deal with the duties of guardians of the estate. Estates must be managed only for the benefit of the individual and investments must be managed prudently.<sup>104</sup> Standard Eighteen gives necessary and practical

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<sup>94</sup> *Yokohama Declaration*, *supra* n. 1, at 3.

<sup>95</sup> *Id.* at 2.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 3.

<sup>99</sup> *NGA Standards of Practice*, *supra* n. 74, at 5.

<sup>100</sup> *Yokohama Declaration*, *supra* n. 1, at 2.

<sup>101</sup> *NGA Standards of Practice*, *supra* n. 74, at 8–9.

<sup>102</sup> *Id.* at 9; *Yokohama Declaration*, *supra* n. 1, at 3.

<sup>103</sup> *NGA Standards of Practice*, *supra* n. 74, at 9–12.

<sup>104</sup> *Id.* at 14–17.

steps for securing, insuring, managing, inventorying, and disposing of the estate.<sup>105</sup> The guardian cannot sell, encumber, or otherwise transfer property unless such action is consistent with the individual's wishes and estate plan.<sup>106</sup> This conflict-of-interest provision relates to the Yokohama standard to be alert to and avoid conflicts of interest.<sup>107</sup> Standard Twenty is a blanket prohibition against self-dealing in transactions involving the individual's property and reinforces the need to obtain prior court approval for use of funds for third parties and other actions that give the appearance of conflict of interest or profiting by the guardian.<sup>108</sup> Likewise, the Yokohama standard prohibits taking advantage of the position of the guardian.<sup>109</sup>

Standard Twenty-One reiterates the goal of limiting the guardian's authority and regaining or maintaining the individual's autonomy. The guardian has a duty to return to court to modify or terminate the order as the individual's regains capacity if a less-restrictive alternative becomes available or when the guardianship no longer benefits the person.<sup>110</sup> Standard Twenty-Two addresses fees and the need for them to be reasonable and subject to court approval.<sup>111</sup>

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<sup>105</sup> *Id.* at 14–15.

<sup>106</sup> *Id.* at 15–16.

<sup>107</sup> *Yokohama Declaration*, *supra* n. 1, at 2.

<sup>108</sup> *NGA Standards of Practice*, *supra* n. 74, at 16–17.

<sup>109</sup> *Yokohama Declaration*, *supra* n. 1, at 2.

<sup>110</sup> *NGA Standards of Practice*, *supra* n. 74, at 17; *see Yokohama Declaration*, *supra* n. 1, at 3 (stating to “keep under review the continuing need for any form of guardianship”).

<sup>111</sup> *NGA Standards of Practice*, *supra* n. 74, at 17–18; *see Catherine Seal & Spenser Crona, Standards for Guardian Fees*, 2012 Utah L. Rev. \_\_\_\_ (forthcoming).

The final three standards apply to specialized situations, such as the need to keep caseloads to a manageable size when the guardian has multiple clients,<sup>112</sup> the need to obtain independent quality assurance,<sup>113</sup> and how to sell a guardianship practice.<sup>114</sup>

In a background paper prepared for the Third National Guardianship Summit, Boxx and Hammond noted that the call for standards for a guardian's performance has been echoed for decades as a critical tool for the courts to use to be able to judge an individual guardian's performance. They also can be used to educate well-meaning but inexperienced guardians. With clear standards on the scope of their responsibilities and the methodology that should be used in decision-making, guardian performance should improve.<sup>115</sup> But very little progress has been made. Standards based on the NGA Standards of Practice have been adopted in several states, but they do not yet have widespread force of law.<sup>116</sup>

## B.     Summit Standards

The delegates to the 2011 deliberative summit adopted a far-reaching set of recommendations for guardian standards as well as additional recommendations for action by courts, legislatures, and other entities. The summit planners identified five key substantive areas—medical decision-making, financial decision-making, residential decision-making, guardian compensation, and guardian relationship with courts—that would be the focus of pre-conference research as well as attention by separate working groups. The research papers, provided to all participants several weeks before the summit, examined existing standards, issues, or barriers to the wide-scale implementation of those standards.<sup>117</sup> Two additional papers and their related working groups focused on

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<sup>112</sup> *NGA Standards of Practice*, *supra* n. 74, at 18.

<sup>113</sup> *Id.* at 18–19.

<sup>114</sup> *Id.* at 19–20.

<sup>115</sup> Boxx & Hammond, *supra* n. 79, at ms. 26.

<sup>116</sup> *Id.* at ms. 28.

<sup>117</sup> The research papers will be published in a special issue of the *Utah Law Review* in 2012.

the appropriate character of standards as ethical precepts, disciplinary mandates or best practice guidance, and how best to implement the Summit recommendations nationally and in every state.<sup>118</sup>

The key theme highlighted throughout the recommendations of each working group was how to better incorporate the emergent concept of person-centered planning into guardianship practice and standards. The current United States guardianship system has been criticized for marginalizing the individual when the right to make one's own decisions about life's most important choices is removed and delegated to another, often a stranger.<sup>119</sup> While most states direct guardians to maximize the person's self-determination and make decisions with the individual's values and preferences in mind,<sup>120</sup> the person is not yet at the center of the decision-making process.

The direction of the UN Convention and the Yokohama Declaration<sup>121</sup> to involve the adult in all decision-making processes is reflected in multiple Summit Standards. Standard 1.1 calls on guardians to develop and implement a plan that emphasizes person-centered philosophy and sets forth short-term and long-term goals for meeting the needs of the person.<sup>122</sup> Standard 4.4 directs the conservator to "encourage and assist the person to act on his or her own behalf and to participate in decisions."<sup>123</sup> While making healthcare decisions, the guardian must maximize the

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<sup>118</sup> Boxx & Hammond, *supra* n. 79; Julia Nack et al., *Creating and Sustaining Guardianship Interdisciplinary Committees*, 2012 Utah L. Rev. \_\_\_\_ (forthcoming ).

<sup>119</sup> Salzman, *supra* n. 45, at 242.

<sup>120</sup> See e.g. Unif. Guardianship & Protec. Proc. Act § 314(a) (stating that "[a] guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian").

<sup>121</sup> *Yokohama Declaration*, *supra* n. 1, at 3.

<sup>122</sup> *Summit Standards and Recommendations*, *supra* n. 2, at 1.

<sup>123</sup> *Id.* at 2.

participation of the person.<sup>124</sup> Standard 5.2 sets out the steps the guardian needs to take to be able to provide informed medical consent on behalf of the individual. The guardian should first have a clear understanding of the medical facts, the health care options, risks and benefits, and he or she should “encourage and support the individual in understanding the facts and directing a decision.”<sup>125</sup>

In the realm of residential planning, the guardian must “seek to ensure that the person leads the residential[-]planning process” and that the person participates in the process.<sup>126</sup> According to Standard 6.1, while making any residential decisions, the guardian must identify and advocate for the person’s goals, needs, and preferences. This residential standard sets out the steps the guardian should use before making a placement decision.

- First, the guardian shall ask the person what he or she wants.
- Second, if the person has difficulty expressing what he or she wants, the guardian shall do everything possible to help the person express his or her goals, needs, and preferences.
- Third, only when the person, even with assistance, cannot express his or her goals and preferences, the guardian shall seek input from others familiar with the person to determine what the individual would have wanted.
- Finally, only when the person’s goals and preferences cannot be ascertained, the guardian shall make a decision in the person’s best interest.<sup>127</sup>

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<sup>124</sup> *Id.* at 3.

<sup>125</sup> *Id.* at 3.

<sup>126</sup> *Id.* at 5.

<sup>127</sup> *Id.* at 4. Standard 6.4 specifically requires the guardian to “make and implement a person-centered plan.” *Id.* at 5.

Whether making financial, medical, or residential decisions as delegated responsibilities, the guardian of either person or property has clearer guidance than previously available in sometimes vague statutory listings of authority granted by the court. Under most statutory provisions, guardians are told that they are authorized to make a decision, but they are given little direction on how to go about exercising that authority. The Summit standards, with their new emphasis on including the individual in the decision-making process and not just considering his or her wishes and preferences while exercising substituted judgment, could bring about a significant change in how guardians make decisions.<sup>128</sup>

Corresponding to the Yokohama recommendation to choose the least intrusive and restrictive course of action,<sup>129</sup> Summit Standard 4.1 requires the fiduciary to “manage financial affairs in a way that maximizes the dignity, autonomy, and self-determination of the person.”<sup>130</sup> Standard 4.2 expects the fiduciary to consider the best interests of the person when making financial decisions.<sup>131</sup> Further, the fiduciary should “give priority to the needs and preferences of the person” when making any financial decision “regarding investing, spending[,] and management of income and assets.”<sup>132</sup> Standard 4.3 continues this emphasis by requiring the fiduciary to “promote the self-determination of the person and exercise authority only as necessitated by the limitations of the person.”<sup>133</sup>

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<sup>128</sup> See Frolik & Whitton, *supra* n. 49 (comprehensively reviewing the complexities of the standards of substituted judgment and best interest and the difficulties guardians have in applying theory to day-to-day decision-making).

<sup>129</sup> *Yokohama Declaration*, *supra* n. 1, at 2.

<sup>130</sup> *Summit Standards and Recommendations*, *supra* n. 2, at 2.

<sup>131</sup> *Id.* at 2.

<sup>132</sup> *Id.* at 3.

<sup>133</sup> *Id.* at 2.

The Yokohama statement that the guardian should “help the adult to act independently”<sup>134</sup> is specifically represented in Summit Standard 4.5 that the “conservator shall assist the person to develop or regain the capacity to manage the person’s own financial affairs.”<sup>135</sup> The related Yokohama provision that the guardian should actively assist the adult to resume or assume independent living<sup>136</sup> is expressed in Summit Standards 6.3 and 6.4. Standard 6.3 establishes a “priority for home or other community-based settings”<sup>137</sup> while 6.4 directs the guardian to make and implement a person-centered plan that seeks to “fulfill the person’s goals, needs, and preferences.”<sup>138</sup> The plan “shall emphasize the person’s strengths, skills, and abilities to the fullest extent in order to favor the least restrictive setting.”<sup>139</sup>

The Summit standards relating to financial decision-making bring to bear the realization that the guardian of the estate’s responsibilities are more than merely conserving or managing an estate. The conservator’s focus should be on the person, not just the dollars. In their background article prepared for the Summit, Morgan and Fleming concluded that

the guardian does not make a decision in a vacuum and is something “more” than just a fiduciary. There are a number of factors that a guardian must consider. The guardian must involve the ward, recognizing that a ward can express a preference in a number of ways and that the ward has a great stake in the outcome. Guardian must give the ward an “honest” role in expressing a preference and not just give lip service to the requirement of the ward’s involvement. That is to say that the guardian may not always be able to honor a ward’s preference, for

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<sup>134</sup> *Yokohama Declaration*, *supra* n. 1, at 3.

<sup>135</sup> *Summit Standards and Recommendations*, *supra* n. 2, at 2.

<sup>136</sup> *Yokohama Declaration*, *supra* n. 1, at 2.

<sup>137</sup> *Summit Standards and Recommendations*, *supra* n. 2, at 4.

<sup>138</sup> *Id.* at 5.

<sup>139</sup> *Id.*

various reasons, but it is critical to give the ward as much autonomy and self-determination as the ward is capable of handling. It seems to us that the guardian has a more “holistic” role, in that the guardian must consider a number of factors when making any of the myriad of decisions that a guardian of the estate must make on a day[-]to[-]day basis for the ward.<sup>140</sup>

Summit Standard 1.4, which requires that the guardian “promptly inform the court of any changes in the capacity of the person that warrants an expansion or restriction of the guardian’s authority,” is in accord with the Yokohama direction to keep under review the continuing need for any form of guardianship.<sup>141</sup> Just as the Yokohama declaration expects the guardian to protect the adult from ill-treatment, neglect, abuse, and exploitation, Summit Standard 1.5 requires the guardian to promptly report abuse, neglect, and/or exploitation to the appropriate authorities, as defined by state statute.<sup>142</sup> It is most striking that the Yokohama provision to respect the adult’s civil and human rights and take action if they are threatened is not specifically referenced in either the NGA Standards or the Summit Standards.<sup>143</sup> This is not an intentional void or avoidance but rather an oversight that should be addressed as the National Guardianship Association reviews its standards in light of the Summit’s recommendations.

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<sup>140</sup> Robert Fleming & Rebecca Morgan, *Standards for Financial Decision-Making: Legal, Ethical and Practical Issues*, 2012 Utah L. Rev. \_\_\_\_ (forthcoming).

<sup>141</sup> *Summit Standards and Recommendations*, *supra* n. 2, at 1; *Yokohama Declaration*, *supra* n. 1, at 3.

<sup>142</sup> *Summit Standards and Recommendations*, *supra* n. 2, at 1.

<sup>143</sup> *Yokohama Declaration*, *supra* n. 1, at 2; see *Summit Standards and Recommendations*, *supra* n. 2, at 5 (requiring the guardian with residential decision-making authority to enforce residents’ rights, legal. and civil rights).

*V. CONCLUSION*

In light of the significant changes initiated by the UN Convention on the Rights of Persons with Disabilities to respect the personhood, self-autonomy, and decisional abilities of persons with disabilities, guardianship systems around the world and across the United States need to re-examine the role and status of the people placed under guardianship. While it is very unlikely that the American states will radically revise the current provisions for the protection of incapacitated adults, initial steps are being taken in the right direction.

The Centers for Medicare and Medicaid Services (CMS) have proposed adding a requirement for person-centered planning for individuals with long-term care needs who receive home and community-based services through Medicaid. According to the CMS,

[T]he person-centered process enables the individual to choose others to serve as important contributors and members of the team in the planning process. These participants in the person centered planning process enable and assist the individual to identify and access a personalized mix of paid and non-paid services. This process and the resulting service and support plan, also called a plan of care, will assist the individual in achieving personally defined outcomes in the most integrated community setting. The process is conducted in a manner that reflects what is important for the individual to meet identified clinical and support needs determined through a person[-]centered functional needs assessment process and what is important to the individual to ensure delivery of services in a manner that reflects personal preferences and choices and contributes to the assurance of health and welfare . . . The identified

personally defined outcomes, preferred methods for achieving them, and the training supports, therapies, treatments, and other services the individual needs to achieve those outcomes become part of the written services and support plan. . . . The plan resulting from this process should reflect the individual strengths and preferences, as well as clinical and support needs (as identified through a person-centered functional assessment). The plan should include individually identified goals, which may include goals and preferences related to relationships, community participation, employment, income and savings, health care and wellness, education, and others. The plan should reflect the services and supports (paid and unpaid) that will assist the individual to achieve identified goals and who provides them. The plan should reflect risk factors and measures in place to minimize them. The plan must be signed by all individuals and providers responsible for its implementation, and should reflect the approach in place to ensure that it is implemented as intended. A copy of the plan must be provided to the individual and their representative(s).<sup>144</sup>

While this federal provision is not related to guardianship services, it is apparently the first federal recognition of the importance of putting the individual receiving services at the center of the planning.

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<sup>144</sup> 76 Fed. Reg. 21311 (proposed Apr. 15, 2011) (to be codified at 42 C.F.R. pt. 441).

Within the various guardianship-statutory provisions, one will not find a direct prohibition against including the adult in post-appointment decisions, although some codes are silent as to the point.<sup>145</sup> The Uniform Guardianship and Protective Proceedings Act recognizes that a “guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian at all times shall act in the ward’s best interest and exercise reasonable care, diligence, and prudence.”<sup>146</sup> Many states have enacted the same or similar language in their guardianship statutes.<sup>147</sup> Frolik and Whitton, in their statutory analysis of decision-making guidance, identified “any provision that directed a guardian to consider the ‘desires,’<sup>148</sup> ‘personal values,’<sup>149</sup> ‘wishes,’<sup>150</sup> ‘views,’<sup>151</sup> or ‘preferences’<sup>152</sup> of the incapacitated person.”<sup>153</sup> Just how guardians implement the statutory doctrine is not known, as well as whether they actually apply the doctrine in practice at all.<sup>154</sup> Obviously, encouraging the guardian to “consider” the desires and values of the adult falls somewhat short of a mandate to make the individual’s goals and preferences the center of the decision-making process.

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<sup>145</sup> Frolik & Whitton, *supra* n. 49, at 6, nn. 22 (citing the twenty-eight of fifty-two jurisdictions examined with no general decision-making standard for guardians).

<sup>146</sup> Unif. Guardianship & Protec. Proc. Act, § 314(a).

<sup>147</sup> See e.g. Mich. Comp. Laws Ann. § 700.5314 (West 2002) (providing that “[w]henver meaningful communication is possible, a legally incapacitated individual’s guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual”).

<sup>148</sup> Frolik & Whitton, *supra* n. 49, at 5, nn.16 (citing the provisions that directed a guardian to consider the desires of the incapacitated person).

<sup>149</sup> *Id.* at 6, nn. 17 (citing the provisions that directed the guardian to consider the personal values of the incapacitated person).

<sup>150</sup> *Id.* at 6, nn. 18 (citing the provisions that directed the guardian to consider the wishes of the incapacitated person).

<sup>151</sup> *Id.* at 6, nn.19 (citing the provisions that directed the guardian to consider the views of the incapacitated person).

<sup>152</sup> *Id.* at 6, nn. 20 (citing the provisions that directed the guardian to consider the preferences of the incapacitated person).

<sup>153</sup> *Id.* at 5.

<sup>154</sup> See *id.* at 53–56 (discussing a survey of how guardians make decisions in states with various statutory doctrines).

The Summit participants took the dual positions that universally recognized guardian standards would be one step in orienting the focus on the individual while simultaneously working on the arduous process of statutory revision to set forth mandatory duties for all guardians.<sup>155</sup> In addition to recommending that the Uniform Guardianship and Protective Proceeding Act be revised, the Summit called for court or administrative rules to be adopted that reflect the principle of self-determination and preference for substituted judgment set out in the Summit recommendations.<sup>156</sup> Of key importance is the declaration that the “guardian shall make and implement a person-center plan that seeks to fulfill the person’s goals, needs, and preferences. The plan shall emphasize the person’s strengths, skills, and abilities to the fullest extent in order to favor the least restrict setting.”<sup>157</sup>

Both the Yokohama Declaration and the Summit Standards and Recommendations demonstrate that guardianship advocates and practitioners are willing to push the existing systems forward toward a better balance between necessary protections and respect for the rights of people with disabilities.

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<sup>155</sup> *Summit Standards and Recommendations*, *supra* n. 2, at 1.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 5; *see also id.* (directing the guardian wherever possible to seek to ensure the person leads the residential-planning process and that the person participates in the process); *id.* (directing that the guardian “attempt to maximize the self-reliance and independence of the person”).

**KOREAN ELDER LAW FOR A REASONABLE  
DEVELOPMENT,  
BASED ON A NEW CONSTITUTIONAL JURISPRUDENCE**

*CHEOLJOON CHANG* \*

*I. INTRODUCTION*

Strictly speaking, there is no coherent body of “Elder Law” in Korea. This means one cannot approach Korean laws relating to the elderly as one comprehensive concept of Elder Law because the scattered legal rules regulating the government for the benefit of the elderly are not systematically related to each other. Koreans have often ignored the significance of a structural enforcement of Elder Law under the slogan of “fast economic development,” while special treatment and respect for the elderly, long held by Confucianism in Korea, were considered anachronistic in Korean society after its modernization. In addition to economic and cultural reasons, Korean legal systems could not grant special care or social benefits to the elderly due to the uniform principle governing welfare rights of all citizens.

However, circumstances surrounding the elderly have drastically changed, and Korea is mandated to develop a new legal paradigm governing constitutional rights of the elderly. Understanding Elder Law in Korea should be broadened further and include stronger constitutional justifications. Specifically, courts should consider special positions of elder rights and develop new constitutional mechanisms that reflect new perspectives on Elder Law in decision making. This can be only realized when courts pay special attention to legislative intent for a comprehensive concept of Elder Law that reflects society’s sensitivity on social rights, rather than stick to a uniform principle governing all social rights.

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The most crucial factor that accounts for recent changes concerning the elderly is the surge of an elderly population. Statistics revealed that, in 2011, 10.3% of all the people entitled to the National Health Service are elderly.<sup>1</sup> Since 2000, Korea has become an aging society and, according to estimated projections, Korea will remain an aged society through 2018, subsequently followed by a post-aged society in 2026. Meanwhile, the total birth rate of Korea in 2010 remained at 1.23, one of the lowest in the world.<sup>2</sup>

Such demographics suggest that Korean government needs to begin actively taking care of the elderly—through family sustenance, economic stability, and enhanced autonomy—for several reasons. First, with increasing medical expenses and the elderly special needs, families now require a more supportive governmental health insurance and public assistance system than ever before. As a solution, the government can seek to protect the economically active population through those institutions. Second, the government can try to save its budget by preventing diseases that are plaguing the elderly. Prevention is not cheap, but future benefits always outweigh costs, especially considering life-expectancy statistics. Third, seen through growing elderly populations protesting against the government's failure to consider their social rights, the elderly are gaining a stronger political voice. Thus, legal remedies for their entitlements have started to develop accordingly.

However, there are still many difficulties in Korea, suggesting even more elder protection is necessary. For quite a long time, Korea has not prepared itself for a growing aged society. Since the birth of the Republic in 1948, powerful political

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<sup>1</sup>Nat'l Health Ins. Corp., *Major Statistics of the Health Insurance in the First Half Year of 2011*, at 1 (discussing how "elderly" persons are those who are older than sixty-five).

<sup>2</sup>Statistics Korea, *Annual Report on Live Births and Deaths Statistics* 39, 42 (Govt. Rpt.).

figures within the governmental powers have been compelling people to accept that economic growth is the supreme policy to follow. Even though the governments did succeed in their tasks through economic achievement, their tasks often came at the expense of rights and interests of certain minorities—laborers, peasants, women, the handicapped, and the elderly. Only after democratization did Korea begin consider creating policies for minorities, for prior to democratization, the Korean government's primary concern was economic development.<sup>3</sup>

Therefore, since Elder Law is a fairly new concept to the Korean legal system, it is only natural that there are very few Elder Law attorneys. Legal academia has only recently started to consider the possibility of an independent body of Elder Law.<sup>4</sup> The practical cause for the belated movement of Elder Law academia is undoubtedly that an official Elder Law market has not been formulated.<sup>5</sup>

However, things have changed and Korean attorneys will soon jump into Elder Law cases. Thus far, Korean academia has understood Elder Law as not only based on the idea of general legal services, but also on the idea of social welfare. Now being aware of diverse Elder Laws extant in other countries, academia is trying to integrate scattered laws and legal systems concerning elderly into a coherent body of law—Elder Law.

Moreover, when one approaches Elder Law under the Korean's current constitutional interpretation (with the uniform principle governing all social rights and not specific rights for the

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<sup>3</sup> In Korean academia of politics, 1992 is considered as the period of democratization because the military regimes ended and civilian government was restored.

<sup>4</sup> The first production of Elder Law research by law scholars was published in 2009: Il-Sun Hong, Sang-Duk Moon, In-Hwan Park, Sang-Hoon Kim, Ji-Hyun Cho, Kun-Ho Lee, In-Young Lee, Byung-Keun Kang, Jin-Gon Kim, Tae-Young Yoon., *A Study on Elder Law Regulations: For the Paradigm Shift of Welfare of the Aged* (SamWoo Publg. Co. 2009). The study is an anthology of ten individual scholars with diverse specialties.

<sup>5</sup> *Id.* Given the first production of Elder Law research as published in 2009, it stands to reason that the belated movement of Elder Law Academia is a result of the lack of an official Elder Law market in Korea. *Id.*

elderly), it is unlikely that the elderly will be highly protected. The elderly can claim their entitlements as the position of beneficiaries of specific welfare institutions based on their constitutional rights, but they cannot argue for active governmental action to enlarge their entitlements outside the given institution. This is the limitation on social rights claims prescribed in Civil Law jurisprudence: Unlike rights-to-freedom claims, social rights claims cannot create governmental actions as it wishes—these claims are highly subject to governmental discretions that are at the mercy of financial situations. Even the judiciary gives much freedom to both the Legislature and Executive regarding the control of welfare institutions. Therefore, the only way to lay a strong foundation for Elder Law is to wait for governmental sympathy. Thus, as a social rights holder, the elderly are essentially powerless within this legal framework. To solve this problem, constitutional jurisprudence concerning welfare rights must be altered. Specifically, courts should stop insisting on unreasonable outlooks on all welfare and social rights, which have been set as mainstream precedents binding to many Elder Law cases. And, if the courts alter their perspectives on general social rights to specifically include social rights for elders, then Elder Law in Korea can begin to embrace stronger constitutional justifications.

Therefore, in this Article, I will attempt to locate a proper position of Elder Law within the Korean constitutional law framework. Because Elder Law is working as an enforcement system of social rights under the Korean Constitution, I will analyze the theories and principles of constitutional discussion. Moreover, I will also introduce Elder Law in practice. After these factual discussions, I will put forward my agenda: understanding Elder Law in Korea should be broadened and include stronger constitutional justifications.

However, the courts' uniform principle in decision making on social rights for all persons is not always inefficient. In European states, such as Germany and the other Scandinavian countries, the uniform principle still guarantees strong welfare programs. Those states identify themselves as social states or welfare states in their respective Constitutions. They have broader entitlements fortified within constitutional principles governing social rights. In that sense, the social rights principle under the Constitution of the Civil Law countries may suggest a way to answer many public health insurance questions arising, for example, in the United States. However, within Korea, serious concerns for elder welfare arose only recently, even though the Constitution has had general welfare provisions from the beginning of the Republic. Thus, new constitutional jurisprudence regarding social rights for the elderly, specifically, is necessary to recognize Elder Law as one legal concept, thus affording more legal protections and rights to the elderly.

## II.     *CONSTITUTIONAL PRINCIPLES GOVERNING THE RIGHTS OF THE ELDERLY IN KOREA*

Adopting the fabric of the German Constitution, the Korean Constitution, which was created after the Second World War, identifies the Republic as a "social state." The social state identity stems from the Weimar Republic Constitution in 1919. Although the Korean Constitution does not have an explicit expression of social state self-identification, scholars generally agree that one can infer the existence of a social state identity from the evidence of several enumerated provisions: the rights of education, labor, social security, and the environment.<sup>6</sup> That is, the Republic of

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<sup>6</sup> Republic of Korea Const. art. 31 (1987). Article 31 provides the following:

- (1) All citizens shall have an equal right to receive an education corresponding to their abilities.
- (2) All citizens who have children to support shall be responsible at least for their elementary education and other education as provided by Act.
- (3) Compulsory education shall be free of charge.
- (4) Independence, professionalism and political impartiality of education and the autonomy of institutions of higher learning shall be

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guaranteed under the conditions as prescribed by Act.

(5) The State shall promote lifelong education.”

(6) Fundamental matters pertaining to the educational system, including in-school and lifelong education, administration, finance, and the status of teachers shall be determined by Act.

Art. 32

(1) All citizens shall have the right to work. The State shall endeavor to promote the employment of workers and to guarantee optimum wages through social and economic means and shall enforce a minimum wage system under the conditions as prescribed by Act.

(2) All citizens shall have the duty to work. The State shall prescribe by Act the extent and conditions of the duty to work in conformity with democratic principles.

(3) Standards of working conditions shall be determined by Act in such a way as to guarantee human dignity.

(4) Special protection shall be accorded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions.

(5) Special protection shall be accorded to working children.

(6) The opportunity to work shall be accorded preferentially, under the conditions as prescribed by Act, to those who have given distinguished service to the State, wounded veterans and policemen, and members of the bereaved families of military servicemen and policemen killed in action.

(1) To enhance working conditions, workers shall have the right to independent association, collective bargaining and collective action.

(2) Only those public officials who are designated by Act, shall have the right to association, collective bargaining and collective action.

(3) The right to collective action of workers employed by important defense industries may be either restricted or denied under the conditions as prescribed by Act.

(1) All citizens shall be entitled to a life worthy of human beings.

(2) The State shall have the duty to endeavor to promote social security and welfare.

(3) The State shall endeavor to promote the welfare and rights of women.

(4) The State shall have the duty to implement policies for enhancing the welfare of senior citizens and the young.

(5) Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons shall be protected by the State under the conditions as prescribed by Act.

(6) The State shall endeavor to prevent disasters and to protect citizens from harm therefrom.

Art. 35

(1) All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.

(2) The substance of the environmental right shall be determined by Act.

(3) The State shall endeavor to ensure comfortable housing for all citizens through housing development policies and the like.

Art. 36

Korea is believed [to be] a social state through its constitutional provisions concerning social rights.<sup>7</sup> Therefore, social rights provisions within the Korean Constitution function, not only to technically act as the norm and guarantee enumerated rights, but also to ideologically identify Korea as egalitarian.<sup>8</sup>

#### A.     Social Rights and Their Performance

Even though social rights hold dual significance under the Constitution, in reality, the people's power to claim social rights has been quite limited. First, the Republic's identity of a social-state, as mentioned earlier, has been disregarded because of national priority given to the economy. Thus, social rights have been the government's subordinate concern. Specifically, authoritarian military governments that lacked much needed democratic justification often resorted to the hope of building a wealthy nation and fighting against communism to the people, in order to appeal to emotion and fear and subdue the grumbles of minor segments of the population. Therefore, only after democratization did people begin to recognize the importance of individual rights and later moved attention toward the various constitutional provisions concerning social rights, which enabled a social rights movement to grow.

Secondly, constitutional jurisprudence governing social rights has generally been listless and inactive. In essence, social rights activity under the Constitution highly depends on governmental will. Unlike the guarantee to right to freedom, guaranteeing social rights requires much more active governmental

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(1) Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.

(2) The State shall endeavor to protect mothers.

(3) The health of all citizens shall be protected by the State.

Jong-Sup Chong, *Constitutional Law*, 205(2007); *The Constitutional Court Decision*, 2002 Hun-Ma 52 (Dec. 18, 2002).

<sup>7</sup> *Republic of Korea Const.*

<sup>8</sup> *Id.* at art. 32, 35, 36.

action.<sup>9</sup> These rights cannot be initiated unless the legislature enacts a statute governing a specific social right. If the government does not carry out this responsibility, however, the people can file a suit against the government—which is often the case in the United States Supreme Court’s strong decisions that have compelled the government to fulfill its responsibility for social rights when the Constitution orders.

In Germany, by contrast, the very self-identification of the “social state” lays a firm foundation for the government’s duty to recognize and mandate social rights.<sup>10</sup> This declaration of a social state redeems the fact that specific social rights provisions were not promulgated in the German Constitution (Basic Law). After experiencing the ineffectiveness of the Weimar Republic Constitution’s excessive social rights promulgations, Germans were afraid that even rights to freedom, which they found crucial after the World Wars, could be considered insignificant when additional social rights are mandated.<sup>11</sup> The founders expected governments to formulate concrete features of social rights through diverse statutes under the direction of this social state identity. Excessive stresses on social rights and hyper-liberal policies under the Weimar Constitution had brought about many populist slogans prevalent in society that eventually caused the advent of totalitarian regimes. Eventually, elaborate social rights provisions became useless: they could display only nominal powers. German Basic Law’s freedom rights-based approach was the reflection of this particular history. However, many governmental institutions including the Federal Constitutional Court of Germany have

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<sup>9</sup> For this reason, social rights in the Civil Law tradition can be categorized as “positive rights,” rather than “negative rights,” which refer to the rights free from a governmental intervention. As to the negative and the positive rights, see Stephen Holmes & Cass Sunstein, *The Cost of Rights* 35–48 (W.W. Norton & Co. 1999).

<sup>10</sup> Article 20, section 1 of the *Basic Law for the Federal Republic of Germany* (Grundgesetz) says, “The Federal Republic of Germany is a democratic and social federal state.”

<sup>11</sup> Sung Bang Hong, *German Basic Law and Social Rights*, 11:2 Sogang L. Rev. 47, 48–50 (2009).

successfully made up for the formal drawbacks of the constitutional stipulation by strictly observing the mandate of social-state identity in their applications.

However, the Korean Constitution took the opposite stance: the enumeration of social rights with no ascertainment of a social state identity. Without the courts' resolute intention to offset the weakly guided social-rights promotions, the provisions have not had the binding powers on the governmental institutions from their very existence in the Constitution. That is, the National Assembly has been relatively reluctant to enact welfare acts to enforce social rights, so the people, who deserve social rights guarantees, have not enjoyed them. Furthermore, the Constitution Court of Korea has ruled when it comes to social rights cases, the legislature holds much latitude for legislation based on judicial restraint.<sup>12</sup> This attitude assumes that, basically, social rights are up to legislative discretion, with much consideration to financial situations and the political determination of wealth distribution.<sup>13</sup> Consequently, no governmental institutions have actively tried to design a more perfect mechanism to guarantee social rights.

Now, this does not mean that the Korean Constitution has no device to coerce the government to guarantee social rights. Through Chapter 11, Article 10 of the Constitution, the government imposes a duty to value all individual rights.<sup>14</sup> However, there is no direct way to enforce the government to observe this duty except through judicial relief when not obligatory to Constitutional mandate. Making use of this loophole with the help of the court's restraint, the government is not bound by social rights provisions.

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<sup>12</sup> Seok Jin Yoon, *The Characteristic of the Right to Social Security*, 8:2 Chung-Ang L. Rev. 57, 57 (2006); *The Constitution Court Decision*, 2000 Hun-Ma 342 (2001).

<sup>13</sup> *Id.*

<sup>14</sup> *Republic of Korea Const.* Art. 10 ("All citizens shall be assured of human dignity and worth have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human right of individuals.").

Moreover, recently, people's attitudes toward social rights, especially toward welfare, have changed. With economic development, there are more resources to provide special care through strengthened welfare institutions. Broadened welfare enjoyment has been possible through the political field. Thus, we need only to develop new constitutional jurisprudence to overturn the court's adamant attitude and guarantee social rights protections for the elderly.

The Constitutional Court's crucial problem concerning social rights was that it only tried to look at whether the legislature enacted the statute regarding specific social rights or not. If there was no statute, the Court denied the constitutional complaint filed by the possible beneficiary when a proper law was enacted.<sup>15</sup> There is a test to decide unconstitutionality regarding the legislature's negligence of its legislative duty: the "above minimum" protection test.<sup>16</sup> Because the government has the obligation to protect and guarantee individual rights afforded by the Constitution, the protection and guarantee of rights should be "above the minimum" level.<sup>17</sup> However, this test fails to provide a clear and objective standard to determine what "minimum level" is. In order to decide the extent of this minimum level of social rights protection, the Court depends on its own discretion.

Therefore, one way to reduce the legislative and the judiciary discretion, and extend social rights promises beyond the generic "welfare" guarantees, is to study and reflect upon the legislative process.<sup>18</sup> Throughout the entire legislative procedure,

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<sup>15</sup> *The Constitution Court Decision*, 2002 Hun-Ba 15 (June 24, 2004); 2007 Hun-Ba 34 (Feb. 25, 2010); 2006 Hun-Ma 1098 (Oct. 30, 2008)..

<sup>16</sup> Jong Bo Kim, *Objectivity of Constitution and National Obligation to Protect Fundamental Rights*, 11:4 Pub. L.J. 27, 30 (2010).

<sup>17</sup> *Id.*

<sup>18</sup> Cheoljoon Chang, *A Legisprudential Approach on the Change of Welfare Discourses*, 40 L. & Socy. 65, 72 (2011).

lawmakers, executive officials, and other authorities continuously congregate and debate about a bill. Regardless of its success or failure, the most useful information regarding a bill—its legislative purposes, optimal promulgations, etc.—are communicated and recorded. If the Constitutional Court refers to this information, it can solve social rights problems with more flexibility and higher democratic justification. Theoretically, this process makes more sense because a social rights matter, including welfare policy, usually contains political questions. The legislative process provides all members in a society with a platform. Therefore, if the Court stays away from the current, rigid technicality and adopts the more reasonable and flexible constitutional jurisprudence to protect social rights, Elder Law in Korea will thus progress accordingly.

#### B.     Welfare Rights of the Elderly

According to Article 34 of the Korean Constitution, “the State shall have the duty to implement policies for enhancing the welfare of senior citizens and the young.”<sup>19</sup> Moreover, “Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons shall be protected by the State under the conditions as prescribed by Act.”<sup>20</sup> These clauses are evidence that the Constitution gives special considerations to the elderly regarding welfare. Combining these two clauses and Article 10—the State’s general duty to protect individual rights—one can infer that welfare for the elderly deserve active governmental protections. These provisions have withstood since the founding Constitution of 1948. Considering the earlier Chosun Dynasty, when Confucianism worked as a life-world rule, these promulgations are reflections of the founding period’s social atmosphere.

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<sup>19</sup> *Republic of Korea Const.*, art. 34.

<sup>20</sup> *Id.* at section 5.

Accordingly, it is the government's responsibility to enact proper statutes to set-up and guarantee welfare for the elderly. As mentioned before, the government can do this by reflecting on the legislative process. Furthermore, the elderly have the ability to petition the government based on the Constitution. When the legislature does not carry out its obligation to enact a statute, the elderly population can file a constitutional complaint to the Constitutional Court. When the Court decides the constitutionality of an existing elder law or the governmental omission of enactment, it should refer to legislative debates to institute more elder laws. Thus, the government has the ability to enact laws for the protection of the elderly, and they should do so while considering that the Korean Constitution clearly grants the elderly special considerations. Therefore, the government has the ability to broaden social rights for the elderly and, if it chooses to do so, Elder Law will progress accordingly.

## II.      *WELFARE INSTITUTIONS FOR THE ELDERLY*

As mentioned, there is no comprehensive, systematic concept of Elder Law in Korea.<sup>21</sup> First, the diversity for Elder Law is quite narrow. The only law designated for the elderly is the Act on Long-term Care Insurance for the Aged. Comparing the integrated Elder Law system in the United States, Korea has scarce and scattered regulations for the welfare of the elderly.<sup>22</sup> Therefore, whenever the elderly want to enjoy broader benefits, they must find and rely upon a statute because the justifying norms within the Constitution cannot work as a direct legal ground for their welfare entitlement. Fortunately, there is a general rule regarding elderly welfare: the Welfare of the Aged Act. However, Korean academia and the Constitutional Court do not see this law

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<sup>21</sup> *Supra* n. 4, 5.

<sup>22</sup> For example, rules of guardianships, special need trusts, nursing home rights, planning retirement, and so forth. Mike E. Jorgensen, *Elder Law* i-xvi (Vandeplas Publ'g. 2008).

as having direct binding power.. I believe this is unreasonable, given that the Welfare of the Aged Act is specific enough as a binding rule in welfare rights cases in the Court.

A.        The Welfare of the Aged Act

The purpose of this law is to contribute to the promotion of the health and welfare of the elderly through preventing, or finding in advance, the sicknesses of the elderly; sustaining mental and physical health by proper treatment and recuperation; and devising appropriate measures for the stability of lives of the elderly (Article 1). The purpose provision contains the law's main concerns: health and welfare. This law provides guidance on how to organize governmental institutions regarding welfare and what to regulate specifically for the purpose of the elder population's health and welfare.

Direct welfare benefits should be granted to the elderly in addition to those provided indirectly through the institutions. Grants can help family members of the elderly reduce their expenses for general medical care. Whereas indirect benefits signify a selective welfare service, direct benefits embody universal welfare services for the elderly. Even though grants cost more than the institutional care the government provides, grants substantially contribute to the household budget. One problem of Welfare of the Aged Act is that beneficiaries and amount of the grants for the elderly are far too limited, which contradicts the law's entire purpose.<sup>23</sup>

The Welfare of the Aged Act was enacted in 1981. This means Korea has not had any general rule providing guidelines governing welfare for the elderly before then. Even though the economy was still able to afford institutional welfare for the elderly before 1981, it was difficult to form [an] agreement from

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<sup>23</sup> Kwang-Seok Cheon, *Korean Social Security Law* 512 (2007).

both government and society for enacting a general rule.<sup>24</sup> This lack of a general rule is why Korea was so late in adopting the basic law concerning welfare for the elderly.

Furthermore, the most serious problem of this Act is its deficient binding power. There has been no big advancement from the governmental stance in the Constitution following the enactment of the law. This is because this law does not mandate the government to enact specific legislation for the elderly; most rules in this law are, in fact, agenda settings, which are optional. Typical mandates, except for some declaratory provisions, request something superficial and ambiguous: An investigation into the actual conditions of the elderly,<sup>25</sup> counselor for welfare,<sup>26</sup> the duties and issues of licensing medical treatments and protecting workers,<sup>27</sup> the installation of an emergency telephone,<sup>28</sup> and, finally, the establishment of a specialized agency for elderly protection measures.<sup>29</sup>

## B. The Act on Long-Term Care Insurance of the Aged

The National Assembly enacted the Act on Long-Term Care Insurance of the Aged in 2007 after long controversies. Even

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<sup>24</sup> Oye Sung Hyun, *A Study on the Formulation and Change Processes of the Welfare Law for the Elderly in Korea*, 14 J. of Welfare for Aged 67, 76 (2001).

<sup>25</sup> *Welfare of the Aged Act*, art. 5 (“The Minister for Health, Welfare and Family Affairs shall investigate the actual conditions of the health and welfare of the aged every three years and publicly announce the results thereof.”).

<sup>26</sup> *Welfare of the Aged Act*, art. 7 (“In order to take charge of the welfare of the aged, counselors for welfare of the aged shall be placed in Special Self-Governing Province and Si/Gun/ Gu.”).

<sup>27</sup> *Welfare of the Aged Act*, art. 39-2 (“A person who establishes and operates a welfare institution for the aged shall employ medical treatment and protection workers specialized in performing duties such as support to physical activities or household activities of the aged, etc. as prescribed by Ordinance of the Ministry for Health, Welfare and Family Affairs.”).

<sup>28</sup> *Welfare of the Aged Act*, art. 39-4 (“The State and local governments shall install emergency telephones so as to prevent any maltreatment of the aged and to receive reports at any time.”).

<sup>29</sup> *Welfare of the Aged Act*, art. 39-5 (“The State and local governments shall establish the specialized agency for protection of the aged in charge of the duties relating to the maltreatment of the aged.”).

though the legislature did manage to pass the law after much struggle, general infrastructures for its implementation are not well equipped. The number of institutions for long-term care is not enough throughout all provinces.<sup>30</sup> The government is not sufficiently prepared to enforce the law that requires a number of financial commitments. Furthermore, the budget for long-term care insurance is highly subjected to the National Health Insurance Fund, funded by taxpayers' money. Hence, the care is, in the end, highly dependent upon financial situations of the government.<sup>31</sup> As mentioned before, this is a huge limitation on the possible progress of Elder Law in Korea—if social rights claims are highly dependent on the economy, claims for specific groups of people, like the elderly, may never be recognized.

Moreover, an "elderly citizen" is the beneficiary of this law, which is defined as "an elderly person of not less than sixty-five years of age or of less than sixty-five years of age but who suffers from a senile disease specified by Presidential Decree, such as Alzheimer's disease, a cerebrovascular disease, etc."<sup>32</sup> According to Article 1 of the Act, the purpose is

[T]o pursue the improvement of health of elderly citizens and the stabilization of their livelihood during post-retirement life, relieve family members from the burden of supporting them, and enhance the quality of life of citizens by providing for matters concerning long-term care benefits, such as aid provided in physical activities, household chores, etc. to elderly citizens who have difficulties in carrying on with daily life on their own due to old age or senility.<sup>33</sup>

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<sup>30</sup> Hye Ji Choi, *Contents and Issues on the Act on Long Term Care Insurance of the Aged*, 103 *Welfare Trend* 20, 22 (2007).

<sup>31</sup> Ji Hyun Cho, *Problems and Ways of Improvement of the Act on Long Term Care Insurance of the Aged*, 18:4 *Bus. Administration & L.* 293, 303–304 (2008).

<sup>32</sup> *The Act on Long-term Care Insurance of the Aged*, art. 2.

<sup>33</sup> *Welfare of the Aged Act*, art. 1.

Based on this agenda, the law compels the government to provide specific services for the elderly—long-term care insurance, long-term care benefits, domiciliary or facility benefits, and so forth.

*IV. CONCLUSION: A NEW CONSTITUTIONAL  
INTERPRETATION FOR ELDER LAW*

Elder Law in Korea is still in its infancy. Laws related to the welfare for the elderly were unable to be systematically organized or integrated. The foremost problem prohibiting the development of Korean Elder Law arises from traditional constitutional interpretation on social rights, often relating to welfare. The Constitutional Court's unyielding view on general social rights has been chiefly responsible for the problem. Considering the drastically changing environments surrounding the elderly, however, it seems Koreans would need to take an advanced step toward welfare development. To solve the interpretive problems relating to social rights and improve current welfare institutions, I believe establishing effective communications—within both the Court's decision-making process based on a new constitutional jurisprudence and within the legislature's law-making process based on democratic deliberations—is necessary to guarantee elderly populations within Korea their deserving social rights.

# THE REGULATION OF REVERSE MORTGAGES IN SPAIN AS A FINANCIAL INSTRUMENT TO CONTRIBUTE TO THE SUPPORT OF DEPENDENT PERSONS<sup>1</sup>

MARÍA DEL CARMEN GARCÍA-GARNICA \*

## I. THE IMPORTANCE OF THE PHENOMENON OF DEPENDENCY

In recent years, developed countries have become aware of the qualitative and quantitative implications of the phenomenon of dependency, because the increase in the number of people in this situation due to either age or illness is a global phenomenon.<sup>2</sup> This concern has resulted in an attempt to provide a conceptual definition of dependency itself, understood in general terms as a permanent situation in which some people—for reasons of age, illness, or physical or psychological disability—lack the functional capacity to perform the basic activities of daily living without the assistance of third parties or other support for their personal autonomy. Thus, two differentiated elements characterize dependency: on the one hand, the inability to carry out the activities of daily living,<sup>3</sup> and on the other hand, the need for third-party care or assistance, which, by definition, must be long-term care.

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<sup>2</sup> In this respect, see Sempere Navarro, *Prologue* in Inmaculada B. Puig, *La Protección de la Dependencia: Un Estudio Global. Claves Para Su Aplicación y Desarrollo Legislativo* 17 (Navarra 2007).

<sup>3</sup> The World Health Organization includes six activities of daily living in its international classification of deficiencies, adopted in Geneva in 1997: bathing; dressing; eating and drinking; grooming; cooking and housework; and participation in mobility. World Health Org., *International Classification of Functioning, Disability and Health (ICF)*, <http://www.who.int/classifications/icf/en/> (accessed Dec. 19, 2012).

In terms of this conceptual definition, it is important to emphasize that dependency does not presuppose a person's legal incapacity or any limitation on his or her capacity to act, although this sometimes may be the case. Thus, responses to the state of dependency can only be partially found in the traditional categories of Spanish civil law, which prioritize a person's capacity for self-government—basically understood as his or her ability to understand and desire the results of his or her actions and, finally, to validly carry out legal proceedings and transactions—over his or her autonomy and functional capacity.<sup>4</sup>

Equally important is the fact that dependency is not necessarily related to age because, in addition to this factor, it may be the result of certain illnesses or disabilities, either physical or psychological. However, the incidence unquestionably increases exponentially among the elderly, because longer lives are accompanied by a much higher risk of losing autonomy and the functional capacity to perform the activities of daily living by oneself without the need for any assistance. The data reveal that around 80% of dependency cases occur among persons over the age of 65. Furthermore, 32% of persons over 65 years old suffer from some disability, while this number is only 5% for the rest of the population.<sup>5</sup>

This fact merely accentuates the importance of the phenomenon as the demographic evolution of the world population—and that of Spain in particular—is characterized by a

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<sup>4</sup> According to Article 200 of the Spanish Civil Code, "the causes of disability are illnesses or persistent deficiencies that are physical or psychological in nature and which deprive a person of self-government." Accordingly, Article 315 of the Spanish Civil Code is limited to providing that "the custody and protection of the person and goods or only the person or goods of minors or disabled persons will be done, where appropriate, through: 1. Guardianship. 2. Curatorship. 3. Guardian ad litem."

<sup>5</sup> Cf. Off. Bull. of State No. 299 (dated 15 December) [hereinafter BOE No. 299] (explanatory memorandum for Law 39/2006, dated 14 December, on the promotion of personal autonomy and care for dependent persons); Instituto Nacional de Estadística, *Survey on Disability, Personal Autonomy and Dependency*, [www.ine.es](http://www.ine.es) (accessed Dec. 19, 2012).

progressively aging population. Moreover, not only is there a relative increase in the population of the “old,” understood as the ratio of people over 65 years old to the total population, but there is also the phenomenon of the so-called “older old” wherein life expectancy for both men and women is increasing over time, leading to an increase in the number of persons over the age of 80 within the group over the age of 65. All of this increases the risk of dependency and the number of dependent persons.<sup>6</sup>

## II.     *MAIN FACTORS CONTRIBUTING TO THE GROWING SOCIOECONOMIC CONCERN FOR DEPENDENT PERSONS*

Traditionally, especially in Mediterranean countries, the protection of dependent persons due to age or health has been taken on by the family, particularly by women. Consequently, the phenomenon of dependency was not experienced as a social problem. However, an accelerated evolution in the simultaneous confluence of a series of economic, social, and demographic phenomena has turned the issue of dependent care into a problem of critical global and socioeconomic importance.

### A.     The Demographic Factor

From a demographic point of view, a multitude of circumstances has led to the increase in the number of dependent persons. Among them, the Spanish legislature has emphasized the increase in survival rates for some chronic illnesses and congenital deformities thanks to advances in science and medicine; the increase in the number of people lacking functional autonomy due to accidents, particularly traffic and workplace-related accidents; and especially the progressive aging of the population, caused in

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<sup>6</sup> This fact was highlighted by the Spanish legislature in the explanatory memorandum for Law 39/2006 (BOE No. 299, *supra* n. 2), which noted that the number of people over the age of 65 has doubled in the last thirty years (from 3.3 million in 1970, i.e., 9.7% of the total population, to more than 6.6 million in 2000, i.e., 16% of the total population). *Id.* At the same time, the number of persons over the age of eighty has doubled in only twenty years. *Id.*

turn by longer life expectancies among the general population and a parallel decrease in the birth rate.

Statistical studies have shown, in short, that the number of disabled persons who find it difficult to carry out the basic activities of daily living has increased considerably among people over the age of 65 and also indicate that, starting at the age of 45, women have a higher rate of disabilities than men—a difference that increases in absolute terms as the two population groups age.<sup>7</sup> These data illustrate that the greater life expectancy enjoyed today brings with it an increased risk of some type of disability or, in other words, that a longer life is not synonymous with a healthy life. In many cases, it merely results in increasing the number of years lived in bad health.

## B. The Sociological Factor

Another factor adding to this increase in the number of people who are either currently dependent or at risk of finding themselves in this situation in the long- or medium-term is the evolution that has taken place in the family and social spheres of dependent persons over the last few years. Equally important is the growing institutional concern about the appropriate protection of and attention to dependent persons. In Mediterranean countries, the health care and financial needs of dependent persons have traditionally been handled by their close family members or other relatives, i.e., by informal, nonprofessional caretakers.<sup>8</sup> More

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<sup>7</sup> By way of illustration, in the group of people 85 years old and older, for every 100 women with some disability, there are only 41 men. In relative terms, however, as they age men's rates reach 90% of the women's rate. Instituto Nacional de Estadística, [www.ine.es](http://www.ine.es) (accessed Dec. 19, 2012). The disparity in the total number of men and women with some disability in this age group is explained by the higher death rates among older men, i.e., there are simply more women in this group. *Id.*

<sup>8</sup> In fact, according to data from a survey conducted by the National Statistics Institute (NSI) in collaboration with the Ministry of Education, Culture and Sport (through the Directorate General for the Coordination of Sectoral Policy for Disabilities and IMSERSO—the Institute for Elderly and Social Services, a governmental body dependent on the Ministry for Health, Culture and Equality),

specifically, women have taken on (and continue in) the care of their children and parents as a priority when, because of age or illness, their ability to take care of the basic activities of daily living becomes limited.<sup>9</sup> This has meant that until recently, social security has covered dependency in a very limited and nonspecific way through retirement and disability pensions and health care services.

However, phenomena such as the large-scale incorporation of women into the labor market beginning in the last quarter of the twentieth century have made it more difficult for them to continue to assume the traditional role of caretaker for dependent family members. Additionally, the traditional family model characterized by an intergenerational renewal that de facto ensured that the elderly would be cared for by their descendents has been replaced today by an increase in single-parent families, which when combined with the significant decrease in the birth rate has made “passing on the baton” more complicated.

As changes in social settings and family structures have also significantly contributed to the way in which dependent

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the ONCE Foundation (Spanish Organization for the Blind), CERMI (Spanish Committee of Representatives of Disabled Persons), and FEAPS (Spanish Conference for Persons with Mental Retardation), there is at least one confirmed disabled person residing in a total of 3.3 million Spanish homes, i.e., 20.0% of all Spanish homes. Instituto Nacional de Estadística, *Survey on Disability, Personal Autonomy and Dependency*, [www.ine.es](http://www.ine.es) (accessed Dec. 19, 2012). In 608,000 of these homes, the disabled person lives alone. *Id.* However, much more common are two-member households where one member has some disability. Ministerio de Empleo y Seguridad, *Seguridad Social*, <http://www.seg-social.es/> (accessed Dec. 19, 2012). According to the IMSERSO data, in most of these cases, the disabled people are assisted by members of their own family. Portal Mayores, *Portal Especializado en Gerontología y Geriatria*, <http://www.imsersomayores.csic.es> (accessed Dec. 21, 2012).

<sup>9</sup> According to data from the EDAD study cited above, the profile of the typical principal caregiver is female, between 45 and 65 years old, and residing in the same home as the person receiving the care. Ministerio de Empleo y Seguridad, *Seguridad Social*, <http://www.seg-social.es/> (accessed Dec. 19, 2012). More specifically, 76.3% of people identified as caregivers are women, 43% are daughters, 22% are wives, and 7.5% are daughters-in-law of the person receiving the care. *Id.* By age, for each man below sixty-four years of age performing caregiving tasks, there are four women. *Id.* However, among persons eighty and over, caregiver work is divided equally between the sexes. *Id.* In terms of the residence of the principal caregiver, 79.3% live in the same home as the person receiving the care. *Id.* Of the remaining 20.7%, nine out of every ten caregivers are women. *Id.*; Portal Mayores, *Portal Especializado en Gerontología y Geriatria*, <http://www.imsersomayores.csic.es> (accessed Dec. 21, 2012).

persons are cared for, the pressing nature of the problem has become clear. In place of the traditional model in which the needs of dependent persons were met by family and personal circles, there is now a growing demand for professional caregivers and financial and health care support from public institutions to guarantee the appropriate care and the promotion of autonomy for dependent persons, as well as to adopt aid programs to limit dependency. This does not discount the work performed by informal caregivers who must be supported and its social and financial importance recognized with measures adopted to improve the information available to them, their training and quality of life.<sup>10</sup>

### C. The Economic Factor

Considered from a strictly economic point of view, it is clear that meeting health care needs and promoting the autonomy of dependent persons entails long-term costs, which become more significant as the degree of dependency grows and which have repercussions both on the individual and on his or her family and social environment.

Although until recently care for dependent persons has been primarily handled by informal or nonprofessional caregivers working without compensation,<sup>11</sup> a clear, indirect economic cost

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<sup>10</sup> See, Steven H. Zarit & Bob G. Knight, *A Guide to Psychotherapy and Aging. Effective Clinical Interventions in a Life-Stage Context* (Am. Psychol. Assn. 1996) (stating that “caring for elderly dependent persons has been identified as one of the most stressful factors, leading to family and work conflict, a decrease in free time and social activities, and clinical disorders”); see also IMSERSO, *Situación y Evolución del Apoyo Informal a los Mayores in España. Informe de Resultados*, <http://www.imsersomayores.csic.es> (accessed Dec. 21, 2012).

In fact, following the experience in other countries, Law 39/2006, in addition to recognizing possible financial assistance for family care, notes the need for the Territorial Council of the System for the Autonomy and Care of Dependent Persons (SAAD) to promote supportive actions, including training and information programs and measures to provide rest periods. Law 39/2006, art. 18 (2006). Royal Decree 615/2007 dated 11 May, in turn, regulates social security for caregivers for dependent persons.

<sup>11</sup> A 1995 IMSERSO study estimates that 88.6% of caregivers for dependent persons are informal caregivers. Pilar Rodríguez Rodríguez et al., *Las Personas Mayores en España, Perfiles y*

was involved. Studies have shown that the obligation of caring for dependent family members results in an increase in the number of people who either do not join the labor market or leave it, with the subsequent reduction in income for the nuclear family. Furthermore, when informal caregivers try to combine these tasks with a job, this leads to an increase in worker absenteeism and the use of leave days, a decrease in productivity, and so forth.<sup>12</sup> These costs become pressing when the dependent person's family or personal situation makes it necessary to turn to professional, residential, technical, or health care services, the costs of which are often difficult for the average citizen to pay and which are also usually long-term expenses. Additionally, these needs can raise a host of assumptions when the dependent person—because of age or health—no longer forms part of the labor market, with the subsequent reduction in their income and, consequently, his or her purchasing power. In other words, his or her income decreases as the costs to cover his or her health and care needs increase.<sup>13</sup>

In short, the impossibility of adequately responding to the health care and economic requirements of dependent persons within the family has created the need to professionalize care and to find formulas to support this group economically. At the same

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*Reciprocidad Familiar* (Madrid 1995). In a 2004 IMSERSO study, 89.3% of informal caregivers reported performing domestic tasks (cleaning, ironing, cooking, etc.); 92.1% performing daily errands (going out, shopping, going to the doctor, etc.); and 76.1% providing personal care (bathing, dressing, eating, etc.). *Situación y Evolución del Apoyo Informal a los Mayores in España. Informe de Resultados* (Madrid, 2004) [hereinafter *Situación y Evolución*].

<sup>12</sup> This was highlighted in a report on the situation in the United States done in 1995 by the ICEA (Cooperative Investigation between Insurance and Pension Fund Entities) called *Seguros de Salud y Long-Term Care*, Report No. 600. In Spain, the 2004 IMSERSO study cited above drew attention to the main financial problems encountered by informal caregivers: 26.4% are unable to work outside the home, 15% have financial problems, 11.7% have had to quit their jobs, 11.2% have had to reduce the number of hours they work, 10.7% have problems meeting their schedules, and 7.2% say that their work has suffered. *Situación y Evolución*, *supra* n. 11.

<sup>13</sup> Recently, the European Commission's annual report on social protection and social inclusion (using 2007 data) stated that Spain—along with Greece and Italy—is among the countries in which social transfers least reduce the risk of poverty, which is around 17%. Mercedes Alcalde, *El Gasto en Pensiones Según el Sistema Europeo de Estadísticas Integradas de Protección Social (SEEPROS)*, www.mtas.es and www.europa.eu.int/comm/eurostat/ (2005). This report also states that Spain has the second highest percentage of the population (20%) in risk of poverty in the European Union, surpassed only by Lithuania (21%) and on the same level as Italy and Greece. *Id.* In Spain, the elderly (28%) and children (24%) are particularly at risk. *Id.*

time, the general principal of equality necessitates the articulation of a series of measures to allow dependent persons to enjoy their rights by increasing their autonomy and quality of life.<sup>14</sup> Without a doubt, the question of adequate care for dependency is a problem related to the dignity of human life.<sup>15</sup> Today, with the impetus from different international groups, social rights in the area of long-term health care have become recognized as what is now known as the “fourth pillar of the welfare state.”<sup>16</sup>

### III. *PUBLIC SUPPORT FOR DEPENDENCY AND ITS LIMITATIONS*

Consistent with the preceding and with the constitutional configuration of the Spanish state as a social state, for the first time in the Spanish legal system, Law 39/2006 designed a public system of care specifically for dependent persons. To that end, and insofar as the powers relating to social care are granted to the autonomous communities (Art. 148.1 EC), the state legislature established a system based on cooperation between the state and the regional administrations,<sup>17</sup> with the National State Administration ensuring minimum common rights for all citizens anywhere on Spanish-state territory.<sup>18</sup>

<sup>14</sup> This is exactly how the Spanish legislature expressed it in Article 1 of Law 39/2006, stating that the law’s “objective is to regulate the basic conditions to ensure equality in the exercise of personal autonomy and the care of dependent persons in the terms established by law.”

<sup>15</sup> This has been established on several occasions by the White Paper on care for dependent persons issued by the Ministry of Labour and Social Affairs, through the State Secretariat for Social Services, Families and Disability. Sistema Para la Autonomía y Atención a la Dependencia, *IMSERSO Libro Blanco de Atención a las Personas en Situación de Dependencia*, [http://www.dependencia.imserso.es/dependencia\\_01/documentacion/documentos\\_de\\_interes/documentos\\_clave/libro\\_blanco/index.htm](http://www.dependencia.imserso.es/dependencia_01/documentacion/documentos_de_interes/documentos_clave/libro_blanco/index.htm) (Dec. 23, 2004). Resolution 46/91 on the United Nations Principles for Older Persons establishes the principles of independence, care, self-fulfilment, and dignity. 74th Plenary mtg., UN Doc A/RES/46/91 (December 1991)

<sup>16</sup> To name a few, the United Nations, Council of Europe, World Health Organisation, International Labour Organization, and the European Union have all made important contributions.

<sup>17</sup> See Law 39/2006, art. 1, art. 3(l), art. 3(o), arts. 6–12, art. 40.4, & art. 47.

<sup>18</sup> Consistent with this, the law dictates the extent of the state’s exclusive rights to regulate the basic conditions to ensure the equality of all Spaniards in the exercise of their rights and discharge of their constitutional duties, established by Article 140.1.1 of the Constitution. Law 39/2006. Regarding the system’s minimum level of protection for personal autonomy and care for dependent persons, these

Without entering into an analysis of the System for the Autonomy and Care of Dependent Persons (SAAD) established in this law, at this time it suffices to highlight two pillars. The first pillar establishes and defines three degrees of dependency, each made up in turn of two levels according to the greater or lesser autonomy of the person and the intensity of the care he or she requires.<sup>19</sup> The second pillar sets forth the public benefits to be given out according to the degree of dependency.<sup>20</sup>

Although the state—largely through social security—was the guarantor of adequate living standards for the elderly and disabled throughout the twentieth century, there is a growing consensus that this model may not be economically sustainable

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are guaranteed by the National State Administration, Royal Decree 99/2009 (Feb. 6, 2009) (modifying Royal Decree 614/2007 (May 11, 2007)), and BOE No. 43 (Feb. 19 2009).

<sup>19</sup> The classification for evaluating dependency is established in Chapter III and provides that the degrees shall be as follows: (a) First Degree, moderate dependency, which applies when the person requires assistance to carry out several basic activities of daily living at least once a day or needs intermittent or limited assistance for his or her personal autonomy; (b) Second Degree, severe dependency, which applies when the person requires assistance to carry out several basic activities of daily living at least two or three times a day but does not want the permanent assistance of a caregiver or need extensive assistance for his or her personal autonomy; and (c) Third Degree, high dependency, which applies when the person requires assistance to carry out several basic activities of daily living several times a day and, because of his or her total loss of physical, mental, intellectual or sensory autonomy, requires the vital and continuous assistance of another person or generalised assistance for his or her personal autonomy. Therefore, the parameter for evaluating a person's dependency or lack of autonomy is determined by his or her ability to carry out basic activities of daily living (BADL) on his or her own. The law understands these as "a person's most basic tasks, which [allows him or her] to function with a minimum of autonomy and independence, such as: personal care, basic domestic activities, essential mobility, the recognition of people and objects, orientation, understanding and following orders[,] and carrying out simple tasks."

<sup>20</sup> The public benefits associated with the SAAD will become effective according to a schedule that implements them gradually, culminating, in principle, in 2014 (unless the Territorial Council of the SAAD suggests otherwise), because the whole-scale implementation of this system without a long period of *vacatio legis* would have an impact that would be difficult for the public system to handle. To that end, Section 1 of the first final provision of Law 39/2006 establishes that the benefits recognized in the law will become effective on 1 January 2007 for the Third Degree, high dependency, levels one and two; in the second and third year (i.e., 2008 and 2009) for the Second Degree, severe dependency, level two; in the third and fourth year (2009 and 2010) for the Second Degree, level two; in the fifth and sixth year (2011 and 2012) for the First Degree, moderate dependency, level two; and finally, in the seventh and eighth year (2013 and 2014) for First Degree level-one dependents. However, this schedule is not definitive, as Section 3 of the final provision establishes that after progressively applying the benefits for three years, i.e., in 2010, the Territorial Council of the SAAD will evaluate the results of the system and propose any modifications to its implementation deemed necessary.

today. The main factors leading to these concerns include, again, demographic factors indicating that as the number of dependent persons grows due to the aging of the population and the increase in life expectancy, the birth rate has fallen. At the same time and, in part, as a corollary to the above, the imbalance between contributors and pensioners is not only growing, but also becoming more pronounced in this era of economic recession. In short, the current economic and demographic evolution is calling into question the state's ability to successfully provide a quality system of social protection for dependent persons efficiently and sustainably, given that it cannot, or at least should not, take on debt or unlimited expenses. This is the position not only of academics,<sup>21</sup> but also of the Spanish legislature.<sup>22</sup>

Given this situation, suggestions have been made that private solutions for the social protection of dependent persons may need to be introduced for a number of reasons, including most notably: (a) the need to mitigate the lack of social security resources; (b) the desirability of preventing the state from taking on unlimited debt; (c) the possibility that the private sector could contribute to the maintenance of a rational cost structure, reducing public health expenses and contributing efficiency criteria based on its experience with managing risks and the selective control of services; and (d) the possibility that private insurance, through the

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<sup>21</sup> Although up to now the welfare state has been largely based on state intervention and on social security in particular, during times of economic recession, its financial limits become especially clear. Sastre Ibarreche, *Pensiones Públicas y Edad Avanzada: Una Visión General*, in *La Ley* (2009); M. Alonso Perez, Eva María Martínez Gallego, & J. Reguero Celada, *Protección Jurídica de los Mayores* (La Ley ed., Madrid, 2004); see also González Rabanal, *Luces y Sombras de la Globalización: El Futuro de los Sistemas de Bienestar* 53 (2002); González Rabanal, *La Necesidad de Repensar el Estado de Bienestar* 15 (2001); Durán López, *Origen, Evolución y Tendencias del Estado del Bienestar* 557 (1996). On the cyclical nature of the controversy on the economic viability of the social security system, see López Gandía & Ochando Claramunt, *Crisis Económica y Estado del Bienestar* 75 (1998).

<sup>22</sup> By way of illustration, the explanatory memorandum for Law 35/2006 dated November 28 regulating income tax for individuals notes that "all developed countries are currently experiencing a process of population ageing which, in the mid-term, is making it difficult to sustain public pension systems." BOE No. 285 (Nov. 29 2006).

application of mutual principles of solidarity, could assist in handling the difficult costs inherent in dependent care for patients and their environment.<sup>23</sup>

In light of this controversy, it would seem that although public protection is the logical social corollary to the Spanish-state model, it does not have to be seen as excluding the private sector either from the perspective of providing services or from a financial perspective. This has been shown by the European experience, in which—while the public coverage of dependency is the main solution—private financing formulas and services are relevant and real.<sup>24</sup> Indeed, despite important public support in developed countries for the protection of this type of risk (making it the fourth pillar of the welfare state), given the limitations of this solution, there are increasing demands for collaboration from the private sector, and complementary private systems to help manage and finance the public model are gradually being introduced. Support for the use of private instruments is also growing as the public becomes more conscious of this contingency.

Accordingly, after designing a public system of care for dependent persons, Law 39/2006, Article 33 lays the grounds for the participation of beneficiaries in the financing of public services according to the type and cost of the service and their personal financial circumstances, entrusting the development of this provision to the Territorial Council of the SAAD under the framework of the cooperation agreements between the National State Administration and each autonomous community.<sup>25</sup>

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<sup>23</sup> See Hernández González, *El Seguro Privado Dentro de la Protección Social de la Dependencia: Perspectivas y Riesgos Asociados* 42–43 (2001).

<sup>24</sup> In this regard, see the analysis of the experience in some EU and OECD countries presented in Chapter XI of the White Paper on care for dependent persons. White Paper, *supra* n. 15, at 34, 39, 57, 69–70, 74.

<sup>25</sup> See Law 39/2006, art. 10; Res. (Dec. 2, 2008) (publishing the agreement by the Territorial Council of the SAAD on the determination of the financial status of beneficiaries and the criteria for their participation in services provided for autonomy and care for dependency). The White Paper, in turn, states that

the participation of the patient or his or her family in the cost of dependency is being consolidated in all systems through the co-payment of part of the service or financing the difference between the provision and cost of the

Furthermore, in its seventh additional provision, the law gives the government six months to promote the appropriate legislative modifications to regulate private coverage of situations of dependency and establish the tax treatment for private instruments covering dependency.

#### *IV. PRIVATE INSTRUMENTS FOR THE FINANCIAL SUPPORT OF DEPENDENT PERSONS. SPECIAL REFERENCE TO REVERSE MORTGAGES*

As suggested by the preceding considerations, the promotion of autonomy and protection of dependent persons is a highly complex, cross-cutting, and multi-disciplinary problem in which a number of social, economic, legal, and work-related aspects and challenges converge at the same time. Almost from the start, this complexity, together with the general nature of the phenomenon, has highlighted the need to combine public and private efforts to tackle the issue of care for dependent persons, in terms of both health care<sup>26</sup> and finances. In this respect, at a time when questions and concerns about the sustainability and limits of the public system are growing,<sup>27</sup> the Spanish legislature has expressly opened the door to private contributions to the financial support of dependency.

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service. This is one way to hold the citizen responsible and control the cost. All systems recognize care for those who do not have the means to pay the differential between the provision and the services. Private insurance today is considered a means of support or complement to public insurance but in no case the predominant form of protection.

White Paper, *supra* n. 15, at 69.

<sup>26</sup> In this respect, along with the care provided by public institutions and professional caregivers for dependent persons, it was deemed important to recognize and give institutional backing to the work carried out by third-sector institutions and members of the dependent person's family, referred to in the law as nonprofessional or informal caregivers. See Law 39/2006, art. 18.4 & Provision 4; Royal Decree 614/2007 (regulating social security for caregivers of dependent persons); Res. (Dec. 2, 2008) (publishing the agreement by the Territorial Council of the SAAD regarding common criteria for accreditation to ensure the quality of the centres and services associated with this system).

<sup>27</sup> *Supra*, n. 20.

The first regulatory intervention in the Spanish legal system to promote the use of private instruments to handle dependency was Law 35/2006, which sought to provide incentives through tax breaks, thus fulfilling the dictates of the OECD. This was immediately followed by Law 39/2006, which not only provided for the possibility that the beneficiaries of dependency benefits participate in their financing according to the type and cost of the service and their personal financial circumstances (Art. 33), but also authorized the government to promote the appropriate legislative modifications to regulate private coverage of situations of dependency and establish the tax treatment for private instruments covering dependency in its seventh additional disposition. Following this mandate, and for the first time in the Spanish legal system, Law 41/2007<sup>28</sup> provided regulation for two instruments already in use in other legal systems for the private coverage of dependency: reverse mortgages and dependency insurance. Reverse mortgages offer people who are already considered dependent the possibility of accessing their real-estate holdings and thus obtaining some income flow, allowing them to meet their financial needs related to this situation and increase their autonomy and well-being, all without requiring them to surrender the use or ownership of their home. Dependency insurance, on the other hand, is aimed at people who wish to cover the risk of being in a situation of dependency. At the same time, classic measures from Spanish civil law (some of which had fallen into disuse) are being employed to help with the financial support of dependent persons, such as life annuities and food contracts.

Generally speaking, these instruments are simply designed to promote and safeguard the independence of their beneficiaries, to ensure the resource capacity to handle the costs of care related to dependency if necessary, and to complement (not take the place of) public services, decreasing the economic pressure that dependent care represents for the public treasury. This Article will focus on

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<sup>28</sup> Law 41/2007 (Dec. 7, 2007) (modifying Law 2/1981 (Mar. 25, 1981) (regulating the mortgage market and other regulations in the mortgage and financial system, regulating reverse mortgages and dependency insurance, and establishing new taxation legislation)); BOE No. 294 (Dec. 8, 2001).

these lines to describe the legal form that the Spanish legislature has used to introduce reverse mortgages into the country's legal system within the framework and for the purpose of providing financial support for dependent persons.<sup>29</sup>

### A. Reverse Mortgages: Concept and Purpose

In light of the financial costs inherent in the long-term services and care needed by dependent persons and the subsequent increase in their income requirements, real-estate mortgages offer a financial instrument that dependents can use to liquidate their real-estate holdings and thus obtain some income flow, allowing them to meet their financial needs and increase their autonomy and well-

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<sup>29</sup> For a look at other private instruments that can be used to help with the financial support of dependent persons, see María del Carmen García Garnica, *Estudios sobre discapacidad y dependencia*, (Aranzadi-Thomson Reuters 2011).

There is a particularly large body of academic writing analysing life annuities and food and life contracts. By way of illustration, see AAVV, (2003); Patricia Lopez Pelaez, *La financiación de la calidad de vida de las personas mayores: renta vitalicia y contrato de alimentos* 107–133 (Madrid 2007); Pérez Gurrea, *La renta vitalicia y el contrato de alimentos: su régimen jurídico y consideraciones jurisprudenciales*, 1,707–1,726 (2011); Riera Alvarez, *Las instituciones de prevención patrimonial: la renta vitalicia, los contratos de alimentos y los seguros de dependencia* (2007); Riera Alvarez, *Consideración de los contratos de renta vitalicia y de alimentos como contratos de asistencia* 159–198 (2009); Toral Lara, *Hipoteca inversa o contrato de renta vitalicia, una alternativa viable* (2009).

Regarding life annuities specifically, see among others, Domínguez Barrero & López Laborda, *Fiscalidad y elección entre renta vitalicia y capital único por los inversores en planes de pensiones: el caso de España* (2010); Martínez Cerezo, *La renta vitalicia como alternativa de financiación de las residencias* 119–121 (2004); Montserrat Junyent, *Cesión de inmuebles a cambio de renta vitalicia: extinción del contrato por condiciones abusivas: lo que dicen los jueces* 54–56 (2007); Núñez Muñiz, *La renta vitalicia como opción para la subsistencia, La protección de las personas mayores* 313–328 (2007); Poveda Díaz, *Algunas cuestiones en torno al contrato de renta vitalicia* 2831–2846 (2009).

Regarding food and life contracts in particular, see Cobacho Gómez, *Acerca del contrato de alimentos* 919–932 (2006); Echevarría de Rada, *El nuevo contrato de alimentos: estudio crítico de sus caracteres* 3461–3481 (2006); Gómez Laplaza, *El contrato de alimentos* 2,059–2,082 (2004); Gómez Sánchez, *El nuevo contrato civil de alimentos: protección al discapacitado* 27–31 (2004); Lambea Rueda, *Caracteres del contrato de alimentos y estructura del contrato de alimentos a favor de tercero* 2,447–2,496 (2006); López Peláez, *El contrato de alimentos: su tratamiento en el ordenamiento jurídico español* (2004); Llamas Pombo, *La tipificación del contrato de alimentos* 193–222 (2004); Mesa Marrero, *El contrato de alimentos, régimen jurídico y criterios jurisprudenciales*, (Thomson-Aranzadi, 2006); Roca Guillamón, *El vitalicio. Notas sobre el contrato de alimentos en el Código Civil (Ley 41/2003)* 641–657 (2006); Verdera Izquierdo, *El contrato de alimentos: configuración actual* 241–248 (2006).

being. Furthermore, as a mortgage-backed credit, it has the advantage (as opposed to other legal instruments like life annuities) of not depriving the person of his or her property. It also comes with a number of tax and tariff incentives. As the legislature indicated in its explanatory memorandum for Law 41/2007, the provision of this type of mortgage in the Spanish legal system is designed to “help mitigate one of the most pressing socioeconomic problems in Spain and in most developed countries: meeting the increase in income needs during the later years of a person’s life.”

The development of a reverse-mortgage market to increase income among the elderly has great potential to generate economic and social benefits. The possibility of being able to use the savings accumulated in a home during one’s life would significantly smooth out the profile of income and consumption over the life cycle with a consequent positive effect on well-being.<sup>30</sup> Despite unquestionable difficulties, given the current market situation in Spain, this option could encounter optimal market expectations. Not only is the life expectancy of the population on the rise and the number of dependent persons progressively increasing, but Spain is also one of the countries with the highest rates of home ownership in Europe,<sup>31</sup> and it has the greatest propensity to use mortgage loans.<sup>32</sup>

Having established its social and financial usefulness, the law presents the essential elements of reverse mortgages in its first additional provision,<sup>33</sup> referring to corresponding supplementary legislation for the matters that are not regulated and discusses tax

<sup>30</sup> For more information, see part VIII of the explanatory memorandum for Law 41/2007.

<sup>31</sup> María Del Carmen García Garnica & Rafael Rojo Álvarez-Manzaneda, *Real Estate Investment Trusts (SOCIMIs): A New Instrument to Boost the Rental and Property Market in Spain*, *European Company Law* (2011); María del Carmen García Garnica, & Rafael Rojo Álvarez-Manzaneda, *El Papel de las socimi en el Mercado Inmobiliario y en el Mercado de Alquiler* 87, in *Las Sociedades Anónimas Cotizadas de Inversión en el Mercado Inmobiliario: Comentarios a la Ley 11/2009, de 26 de Octubre, y Análisis de Derecho Comparado* (1st ed., Cizur Menor: Aranzadi Editoria 2010).

<sup>32</sup> Claude Taffin, *La Hipoteca Inversa o Vitalicia* 5, [http://www.unizar.es/eueez/mercadoinmobiliario/files/hipoteca\\_vitalicia.pdf](http://www.unizar.es/eueez/mercadoinmobiliario/files/hipoteca_vitalicia.pdf) (accessed Dec. 27, 2012).

<sup>33</sup> Subsequently, Royal Decree 716/2009 (BOE No. 107 dated May 2) developed some aspects of Law 2/1981 including reverse mortgages.

incentives. The law tries to define reverse mortgages, very imprecisely,<sup>34</sup> not by referring to the collateral,<sup>35</sup> but to the guaranteed loan, indicating that this is a loan or credit guaranteed through a real-estate mortgage (on the applicant's principal residence). The requirements listed are (a) applicants and any beneficiaries they may designate must be at least 65 years of age or suffer from severe or high dependency; (b) the mortgagor will receive the amount of the loan or credit, or in one lump sum, or in regular payments; (c) the debt is only payable to the creditor and the obligation to pay deferred until the borrower dies or, if thus stipulated in the contract, when the last of the beneficiaries dies; and (d) the mortgaged property has been assessed and insured against damage in accordance with the terms and requirements established in Articles 7 and 8 of Law 2/1981 regulating the mortgage market.

In this description, the reverse nature of this mortgage loan is determined by the fact that the credit institution makes the contributions, usually in regular payments, in favor of the beneficiary who does not have to repay any of the debt to the creditor. Usually, the financial institution only recovers the credit used plus interest when the owner of the mortgaged property dies, the debt is paid off by the heirs, or the mortgaged security is

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<sup>34</sup> Enrique Rubio Torrano, *De la Ley Que Define la Hipoteca Inversa y Regula Otras Muchas Cosas in Aranzadi Civil: Revista Doctrinal* (2007); Antonio José Quesada Sánchez, *Apuntes Jurídico-Civiles Sobre la Llamada "Hipoteca Inversa": Inquietudes Iniciales Sobre la Cuestión in Consultor Inmobiliario: Revista Mensual de Actualidad Para Profesionales* (2008).

<sup>35</sup> Bear in mind that in the Spanish legal system, mortgages are a limited or alien right that act as a guarantee because they allow the mortgagee to realize the value of the encumbered assets in the event of credit default. They must be registered with the land registry and are characterized by being an *erga omnes* entitlement; therefore, the assets can be pursued even when ownership has passed to a third party other than the mortgagor, incidental to the guaranteed credit and indivisible. For an overview of the general characteristics of mortgages in the Spanish legal system, see Carlos Lasarte Álvarez, *Derechos Reales y Derecho Hipotecario* 37 (8th ed., Marcial Pons 2010); Enrique Lalaguna Domínguez, *El Derecho Real de Hipoteca y Su Sonexión Con el Crédito Garantizado in Tratado de Garantías en la Contratación Mercantil* vol. 2, § 2, 19 (Miguel Muñoz Cervera & Ubaldo Nieto Carol ed., 1996); José María Navarro Viñuales, *El Derecho Real de Hipoteca Inmobiliaria en la Reciente Doctrina de la Dirección General de los Registros y del Notariado* 1917 in *Revista Crítica de Derecho Inmobiliario* (1999).

terminated. Furthermore, and given the social use of this financial product, the law tries to provide incentives through a number of tax breaks as long as they meet a set of requirements regarding encumbered assets and beneficiaries.

## B. Legal Regulation and Development of Reverse Mortgages in Spain

The Spanish legislature has not generally established the admissibility of reverse mortgages but demands that they meet the following subjective and objective requirements.

### 1. *The Creditor*

Loans guaranteed by reverse mortgages can only be granted by credit institutions and insurance carriers authorized to operate in Spain in accordance with the limits, requirements, and conditions imposed upon insurance entities by their sector-specific regulations. Additionally, they are subject to the marketing and transparency conditions established by the Ministry of Economy and Finance for the protection of customers.<sup>36</sup> Specifically, the law stipulates that institutions granting reverse mortgages provide independent-advisory services to mortgage applicants, considering their financial circumstances and the financial risks that may be related to underwriting this product. These advisory services must be given in accordance with the conditions, form, and requirements established by the Ministry of Economy and Finance<sup>37</sup> and in accordance with the regulations on protecting consumers and users.<sup>38</sup> In this respect, it is particularly important that the credit

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<sup>36</sup> 1st AD § 3.

<sup>37</sup> This provision was criticized during the proceedings on the regulation, arguing that it is unrealistic to empower the credit institutions themselves to make an independent, impartial assessment of the different tenders on the market, suggesting that it be replaced by "clear and precise information" about the product. Official Gazette of the Spanish Congress (BOCG), Amendment 66 (Nov. 6 2007). However, the final draft has the merit of not entrusting this task to the customer ombudsman, as initially envisioned. BOCG Congressional Amends. 24, 54, 102 Congress of Deputies, Series A (May 9, 2007, No. 127-7).

<sup>38</sup> In this respect, the obligations regarding information and transparency in operations and customer protection made incumbent upon financial institutions by the ministerial order dated Dec. 12 1989

institutions supply the appropriate pre-contractual information, on the one hand, bearing in mind that this is a new financial product in the Spanish legal system, and on the other hand, bearing in mind the particular characteristics of the recipients, most of whom are elderly.<sup>39</sup>

## 2. Mortgageable Property

Reverse mortgages are real-estate mortgages. Although their legal definition refers exclusively to principal residences as the asset that can be encumbered by this real guarantee,<sup>40</sup> the law stipulates that they may be applied to other properties.<sup>41</sup> The question of whether to bind the mortgage to the mortgagor's principal residence was one of the most controversial issues during the proceedings on the law, with different parliamentary groups arguing that it should apply to any real-estate property.<sup>42</sup>

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(BOE Dec. 19), and specifically for mortgage credits by the ministerial order dated May 5, 1994 (BOE No. 112 May 11) and Law 22/2007 regarding financial service distance marketing for consumers (BOE No. 166, July 12) will apply, as well as Article 60 of the consolidated text of the General Law for the Defence of Consumers and Users and other complementary laws (BOE No. 287, Nov. 30 2007).

<sup>39</sup> Taffin, *supra* n. 32, at 3–4 (noting that the complexity of a product aimed especially at the elderly, who may be very vulnerable, has led to dubious practices on the part of lenders, brokers, and other types of salespeople who have a clear interest in using the sums of money available in the United States). As a result, the granting of these types of loans by the federal state is currently subject to evaluation by an outside expert before the contract is signed. The outside advisor must explain the characteristics of the product and its associated risks to the potential borrower, as well the existence of other alternatives for elderly persons.

Similarly, in the United Kingdom, the principal lenders have voluntarily established a code of good practices, taking on obligations such as transparency in the legal aspects of the loan, cost transparency, assistance to borrowers from an outside expert unrelated to the financial institution, and the establishment of a limit on the loaned capital to ensure that it does not surpass the value of the property. *Id.* In Spain, the following authors have warned about the risk of including abusive clauses in these contracts and the risk that the establishment of the mortgage will not always result in a beneficial trade for the elderly person: Rosa Maria Anguita Rios, *Regulación Relativa a la Hipoteca Inversa Según la Ley 41/2007, de 7 de Diciembre* 6 20 in *El Consultor Inmobiliario* (2008); Carlos Ballugera Gómez, *Hipoteca Inversa (Notas Prácticas)* 71 in *Seminario de Derecho Registral, Bilbao, Boletín del Colegio de Registradores de la Propiedad* (2007).

<sup>40</sup> 1st AD § 1.

<sup>41</sup> *Id.* at § 10.

<sup>42</sup> In particular, see Congressional Amendments 98 and 122 (BOCG, Congress of Deputies, Series A dated 9 May 2007, No. 127-7), and Senate Amendments 22 and 64 (BOCG, Series II dated 6 November 2007, No. 130).

Consistent with this, the final draft of the law allows that reverse mortgages can be granted for properties other than the applicant's principal residence despite the fact that this is not reflected (as would have been desirable) in the legal definition of this new type of mortgage presented in the first section of the first additional provision. Thus, it was stipulated in practice prior to Law 41/2007 under freedom of contract.

However, the operation will only receive the tax and tariff incentives established in Law 41/2007 when the lien is placed on the applicant's principal residence. In particular, reverse mortgages that adhere to the stipulations in the law's first additional provision will be exempt from proportional fees for notary documents like the tax on capital transfers and documented legal acts as well as public deeds for the establishment, subrogation, amending novation, and cancellation of the mortgage (1st AD, section 7). To calculate the notarial fees for these deeds, the corresponding tariffs will be established for "documents without specified amounts" as envisioned by Royal Decree 1426/1989, regarding notarial tariffs (1st AD, section 8), while registry fees will be reduced by 90%.

Regarding what is considered a principal residence, the Directorate General for Taxation has specified that it must follow regulations established for tax purposes.<sup>43</sup> It has also stipulated that the borrower be the owner of the property under lien and be the only holder of the bare legal title,<sup>44</sup> as well as the possibility that the residence subject to lien be jointly owned even when only one of the titleholders is over the age of 65 or has a severe or high degree of dependency.<sup>45</sup> In any case, and although proprietary ownership belongs to only one of the spouses, it appears that in order to place a lien on a residence with a reverse mortgage, it must be done in accordance with Art. 1320 of the civil code and with the explicit consent of both spouses or, when applicable, judicial authorization to dispose of the property rights.

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<sup>43</sup> Directorate General for Taxation [hereinafter RDGT] resolution dated Apr. 3, 2010.

<sup>44</sup> RDGT dated May 20, 2007 and May 26, 2009.

<sup>45</sup> See RDGT dated Apr. 22, 2009.

### 3. Secured Credit

As established by law (and unlike what was previously customary in practice), for reverse mortgages to enjoy the tax and tariff incentives established by Law 41/2007, they do not take the form of lifelong or aleatory contracts in the respect that the beneficiaries have the right to receive regular payments until their deaths, regardless of when this event occurs. This is a loan in which the homeowner will make withdrawals (usually regular payments, though it may be a lump sum payment),<sup>46</sup> up to a maximum amount determined by a percentage of the appraisal value at the moment the loan is established. When this percentage is reached, the elderly or dependent person will cease to receive payments, although the debt will continue to generate interest until its expiration.<sup>47</sup> The possibility of complementary insurance for future income is preserved (which will undoubtedly increase the operation's costs), making it possible to avoid the eventuality of the beneficiary reaching an advanced age beyond the limit of the availability of the mortgage credit and allow them to receive income during the final years of their lives.<sup>48</sup>

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<sup>46</sup> The credit guaranteed by this mortgage can take two forms: a loan (either in a lump sum or regular payments) or a credit account or credit line. See Directorate General of Registries and Notaries [hereinafter RDGRN] resolutions dated Jan. 10, 2010, Apr. 11, 2010, Dec. 21, 2010, Jan. 1, 2011. In this regard, see Taffin, *supra* n. 32, at 3.

<sup>47</sup> In this regard, see the first additional provision, Section 1, letter b.

<sup>48</sup> As Luque Jiménez noted the main advantage of this insurance, which all banking institutions that offer reverse mortgages advise and provide, is to guarantee that the owner receive a lifelong income, even though the term of the mortgage has passed. Luque Jiménez, *Una nueva modalidad de hipoteca: la hipoteca inversa* 235 (2009). The disadvantage is its cost, which is usually around 6% of the home's assessed value and is calculated according to the owner's age, sex and life expectancy (the cost is usually higher for women, given their longer life expectancy). *Id.*

Zurita Martín, in turn, believes that the legislature should clearly have specified the randomness or risk inherent in the fact that the beneficiary of this mortgage will stop receiving the income needed to meet the basic needs of life once the credit has been exhausted. Zurita Martín, *La nueva normativa reguladora de la hipoteca inversa* 1316 (2008). However, she trusts that the independent advisory service providers envisioned in the law will fill this gap and inform applicants of the risks related to this financial product. *Id.*

In order to determine the maximum amount of the guaranteed loan, the property to be encumbered with the reverse mortgage will be appraised, and the loan will consist of a percentage of the appraisal value. When that percentage is reached, the beneficiary will cease to receive the agreed income, although the debt will continue to generate interest until its expiration. Additionally, the encumbered asset will have to be insured against damage in accordance with the terms and requirements established in Articles 7 and 8 of Law 2/1981 regulating the mortgage market.

It is important to note that this point deals with one of the notable special characteristics of this mortgage loan, which differentiates it from the way in which mortgages are generally configured in Spanish law and reveals one of its greatest financial risks. Until recently, real estate, and in particular, urban real estate, was considered a safe haven. Not only did it appear to be immune to the risk of depreciation, but also it appeared immune to the constant rise in market value over the last few decades, until 2007,<sup>49</sup> which led to a widespread belief that appreciation is inherent in this type of asset. This, in turn, combined with other factors, contributed to the overvaluation of real-estate investment (and particularly ownership of principal residences) as the main type of savings for Spanish families who trusted that real estate would generate capital gains, which is precisely what these mortgages are designed to access.

However, this trend has been broken. When the real-estate bubble burst and the price of property in general—and urban property in particular—fell and stagnated, fears about negative equity emerged (wherein the real estate value is less than the outstanding balance on the mortgage loan), endangering the solvency of financial institutions. In short, there is some risk

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<sup>49</sup> According to data published by *The Economist*, the price of real estate in Spain increased 80% over the last two decades while during the same period, the increase in England was around 40% and a little more than 20% in the United States. See *Asia's Frothiest Housing Markets Are Calming Down. Is America's Bottoming?* *The Economist* (July 9, 2011) (discussing the effects and future of the housing bubble worldwide).

involved in overvaluing the assets encumbered by this type of mortgage in that it could produce a phenomenon similar to that occurring in the United States as a result of subprime mortgages.<sup>50</sup> This fact, combined with the difficulty entailed in calculating the operation's financial risk, derived from the inherent uncertainty regarding the termination of the debt (calculated according to when the mortgagor or of the last of the beneficiaries dies), special prudence is required when assessing the property and determining the maximum amount to be guaranteed by the encumbered property for the reverse mortgage.<sup>51</sup>

#### 4. *The Mortgagor and Beneficiaries*

The law requires that applicants and any designated beneficiaries be at least 65 years of age or suffering from severe or high degrees of dependency. Thus, not all dependent persons are eligible for this financial product because their degree of dependency must coincide with the stipulations in Law 39/2006.<sup>52</sup> This point was highly criticized during the proceedings on the law, but in the end, the amendments proposing its extension to all dependent persons were not approved.<sup>53</sup> In fact, provisions of this type are common in other countries for the mere reason that in practice the process of determining the value of the loan does not only consider the value of the property to be encumbered and its

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<sup>50</sup> Verification of these risks (which are greater with floating and balloon mortgages), when added to the legal insecurity generated by the imprecise way in which Law 41/2007 develops the legal system for these new types of mortgages, has led to the presentation of a motion to modify it by the mixed Parliamentary Group. vid. BOCG, Congress of Deputies, Series D, No. 119 dated Dec. 5, 2008. In the specific case of reverse mortgages, these risks, as well as the increase in costs for this type of mortgage, see Taffin, *supra* n. 32, at 3–4.

<sup>51</sup> After criticising the legal regulation for its imprecision, the insecurity it creates, its lack of exposure and special characteristics, Carrasco Perera and Cordero Lobato propose the configuration of reverse mortgages as limited mortgages, unless an interest capitalisation agreement is included. Carrasco Perera & Cordero Lobato, *supra* n. 51.

<sup>52</sup> See *supra*, n. 18.

<sup>53</sup> See the amendment presented in the Congress of Deputies, No. 58 (BOCG, Congress of Deputies, Series A dated 9 May 2007, No. 127-7), and Nos. 65 and 78, presented in the Senate (BOCG, Series II dated 6 Nov. 2007, No. 130).

expected evolution, but also the borrower's age, given that these are lifetime loans.<sup>54</sup> It is interesting, then, that the law provides for the possibility of several beneficiaries and does not limit the number that the mortgagor can designate, and it does not establish any other requirements beyond those relating to the beneficiary's age or degree of dependency; the beneficiary does not have to share kinship, live with the mortgagor, or reside in the home on which the lien is placed.<sup>55</sup>

### 5. *Availability of Credit and the Conditions under Which the Debt Is Due*

As noted above, the law establishes that the debtor must receive the credit in either a lump sum or regular payments until the maximum amount of the credit granted by the creditor is reached according to the value of the mortgaged asset, without having to make any repayment during his or her lifetime. In light of this, the uniqueness of this mortgage loan lies in the fact that the debt can only be demanded by the creditor and the guarantee paid off when the borrower or, if thus stipulated in the contract, the last of the beneficiaries, dies. Hence, some authors have argued that the burden for future estate inherent in this type of mortgage could act as a disincentive for dependent persons who are likely to have future heirs.<sup>56</sup>

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<sup>54</sup> Usually, the younger the borrower, the less capital granted; therefore, this type of loan is only designed for people who are quite old. The borrower's average age has been estimated to be around 75 years old. In the United States, there is a theoretical threshold of 62 years old, while in the United Kingdom the age is 60 and sometimes even 55 years old. See Taffin, *supra* n. 32, at 4.

<sup>55</sup> By way of illustration, parents can place a lien upon their home with a reverse mortgage, designating their severely or highly dependent child as the beneficiary, even when he or she is a patient in a residential centre and does not live at home due to his or her degree of dependency. Alternatively, two members of a couple made of up elderly partners can be the beneficiaries of a reverse mortgage without the debt coming due until both are dead.

For an appraisal of how this lack of certainty regarding possible beneficiaries could be a source of family conflict with the applicant's future heirs, see Jiménez, *supra* n. 48, at 225, 255.

<sup>56</sup> Herranz González, Zurita Martín, and Luque Jiménez have all called attention to the importance of sociological and/or psychological (and even cultural) factors in these operations. See Herranz González, *Hipoteca inversa y figuras afines*; Martín, *supra* n. 49, at 1314; Jiménez, *supra* n. 48, at 219. This is particularly important in the Spanish common hereditary system, since it is deeply entrenched the idea that the descendants and the widowed spouse, and occasionally the ascendants, have a number of legitimate rights in the estate of the deceased (i.e. Arts. 806 and ff. of Spanish Civil Code). Thus, this kind of mortgage could be seen as a risk to those expectatives.

However, provisions have been made for the creditor to declare the early termination of the credit guaranteed by the reverse mortgage if the mortgaged property is voluntarily transferred by the mortgagor unless a sufficient substitution is made for the guarantee. This provision, which is designed to justify the very personal nature of this loan, implies a limitation of the right to dispose of the encumbered property—usually the principal residence—and was another of the most contested points during the proceedings on the law.<sup>57</sup> This provision was introduced into the final text of the law after Congressional Amendments 55 and 103 and Senate Amendment 67 were accepted. They state that “in the case of reverse mortgages, the loan or credit has a very personal nature, since it is bound to circumstances such as the age of the titleholder. For that reason, the transfer of estate ownership, which the project does not restrict in any way, must at least result in the early termination of the loan or credit.”

However, it can be argued that the highly personal nature of this mortgage credit is the real rationale behind early termination because the law allows for the existence of beneficiaries other than the lienor. This possibility may determine whether the mortgagor dies survived by other beneficiaries during the lifetime of the mortgage loan, in which case a transfer “*causa mortis*” may take place if the law does not provide for the termination of the credit before the death of the last beneficiary. This does not explain why the law excludes the mandatory transfer of the asset or, for example, its adjudication to someone other than the beneficiary after the community property is liquidated.<sup>58</sup> In

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<sup>57</sup> Some amendments have suggested considering the alienation or transfer of the property without necessarily entailing the early termination of the credit. For example, Congressional Amendment 53 and Senate Amendment 97 established that “the real estate property will continue to be considered as constituting the applicant’s principal residence when the mortgagor rents it out, moves in with a family member or enters a care facility.” Congressional Amendment 26 proposed giving the borrower the right to use the mortgaged property after notifying the lending institution, as long as the usufruct and lifelong right to use and inhabit the home guaranteed by the mortgage was maintained.

<sup>58</sup> For a critique of this limitation on the right of disposal, see Carrasco Perera & Cordero Lobato, *supra* n. 51.

fact, the real reason for the early termination of reverse mortgages in the case of the voluntary alienation of the mortgaged property seems to be, principally, to prevent these mortgages from being used for speculative purposes in order to take advantage of the tax and tariff incentives that are legally established for this type of mortgage and must be interpreted as an exceptional possibility.<sup>59</sup>

In any case, with the exception of the early termination of the debt in the terms discussed above, termination, generally speaking, will take place when the mortgagor or, when applicable, the last beneficiary of the reverse mortgage, dies. At this time, the heirs can cancel the loan within the stipulated timeframe, paying the creditor the entirety of the accumulated debts with interest without the creditor being able to demand any cancellation compensation (1st AD, section 5). During the proceedings on the law, the legislators considered the possibility of establishing a legal minimum time in which the heirs could opt to repay the loan or not in order to prevent lenders from contractually imposing deadlines that could not be met.<sup>60</sup> However these amendments were not approved, and this will have to be stipulated in the corresponding mortgage contract.

If the mortgagor's heirs decide not to repay the accumulated debts and interest, the creditor can only collect reimbursement up to the depletion of the assets of the estate with the responsibility limited to the value of the mortgaged assets

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<sup>59</sup> Regarding the limits inherent in this restriction on the mortgagor's right of disposal, see, among others, RDGRN dated Jan. 1, 2011. This states that, generally speaking, limitations on the mortgagor's right of disposal are abusive, because they directly contravene the principles of the rights to freedom of contract, freedom of movement and the promotion of territorial credit, as well as Art. 27 of the mortgage law, an abundance of Supreme Court jurisprudence and studies by the DGRN. Law 41/2007 provides for this possibility as an exception, given the *intuitu personae* nature of reverse mortgages, but it is only valid when the debtor can provide a substitution for the guarantee if the mortgaged property is sold, as required by the second paragraph of section 5 of the first additional provision. Otherwise, as in the case of the supposition in this resolution, the agreement would be illegal and would have no real effectiveness.

This resolution also declares null the clauses that prohibit the mortgagor from leasing the encumbered property (as infringing on Article 27 of the mortgage law), unless the effects of the early termination of the loan are restricted to leases exempt from the principle of purging subsequent liens.

<sup>60</sup> See Congressional Amendments 103 and 123 and Senate Amendments 23 and 67.

(unlike provisions in other legal systems),<sup>61</sup> without prejudice to the personal assets of the mortgagor's eventual heirs. To this end and with respect to the mortgage guarantee, given the unique way in which this mortgage loan is reimbursed, it is important to note that time restrictions will not be applied to the payment of the interests accrued by the mortgage, as established in Art. 114 of the mortgage law.

## V. CONCLUSION

The stipulations relating to reverse mortgages included in the first additional provision of Law 41/2007 regulating the mortgage market and in other regulations regarding financial and mortgage systems, reverse mortgages, and dependency insurance, and for which new tax legislation has been established, mark an advance in the social and economic protection of elderly and dependent persons.

Although it must be technically improved in several aspects (as this study has shown), Spanish law has institutionalized and given a certain legal security to a financial product, already consolidated in other countries, which some financial institutions in Spain had already begun to try out under the auspices of freedom of contract. The legal system of mortgages has been made more flexible, and dependent persons have been given an important legal and economic tool to achieve liquidity using their real estate without having to forfeit use or ownership.

In Spain, the most important advantages offered by this instrument are its potential, given the high rate of homeowners in

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<sup>61</sup> This was one of most highly contentious points in the bill. Congressional Amendment 25 and Senate Amendments 24 and 98 proposed restricting responsibility to the mortgaged asset in order to make it easier for elderly people to establish reverse mortgages without the opposition of their heirs and to protect their estate. The same was proposed in Congressional Amendments 100 and 124 and Senate Amendments 26 and 68 which deemed that this type of mortgage would be more burdensome than normal mortgages. However, these amendments were not approved either, without prejudice to the admissibility of the agreement otherwise, thus limiting overall pecuniary liability to the debtor.

the country who have locked up most of their life savings in their homes and the tax and tariff incentives that come with establishing a mortgage of this type. However, getting this product off the ground and consolidating it in Spain will entail some difficulties, particularly, dealing with the still-existing disinformation about the special characteristics and risks inherent in this product (as opposed to other alternatives backed by a stronger Spanish legal tradition), its high cost and, for banking and credit institutions, the financial risks associated with the appropriate valuation of the mortgaged property.

## FISCAL MEASURES ADOPTED IN THE KINGDOM OF SPAIN FOR THE PROTECTION OF PERSONS WITH SPECIAL NEEDS

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### I. PRELIMINARY IDEAS

As we have developed in other works,<sup>1</sup> people with special needs, their families, and the society to which they belong, demand comprehensive answers from the authorities because only the complete exercise of their rights and obligations will allow them to feel full and free as citizens of Spain. In these preliminary ideas, in which we only seek to contextualize the purpose of the present study, we must start with the only possible conclusion: without the involvement of all actors that make up the fabric of our society we cannot offer a comprehensive response that goes beyond merely tranquilizing our consciences to the problems we face. From a legal angle and with a clear anchor in Articles 49 and 50 of the

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<sup>1</sup> See Juan López Martínez & José M. Pérez Lara, *El estatuto patrimonial del discapacitado: Una necesidad*, [*The Heritage Status of the Disabled: A Need*] in *Revista de la Facultad de Derecho de la Universidad De Granada* 195 (2002) [hereinafter Martínez & Lara, *El estatuto patrimonial*]; see also Juan Lopez Martinez & Jose M.P. Lara, *La fiscalidad de las personas con discapacidad en la imposición directa estatal y autonómica* [*Taxation of People with Disabilities at the State and Regional Levels*], in *Régimen jurídico de las personas con discapacidad en España y en Europa* Comares 225 (2006); Juan Lopez Martinez & Jose M.P. Lara, *Impuestos y Discapacidad*, [*Taxes and Disability*] in *Cuadernos de Aranzadi jurisprudencia tributaria* 24 (Cizur Menor (Navarra) Thomson-Aranzadi 2006) [hereinafter Martínez & Lara, *Impuestos y Discapacidad*].

Spanish Constitution— among others—a comprehensive system of care for people with special needs must be configured, from a global perspective. This has to be done with the active participation of the whole of society to try to achieve the three criteria established by the European Union itself when designing policies for its Member States: universality, high quality and financial viability.<sup>2</sup>

To build this integrated system, the first agent to act as a catalyst for these policies has to be the State itself both by constitutional mandate and by conviction. The Spanish State has traditionally used two mechanisms to meet the needs of groups with special needs: first, public financing, through the creation of a series of economic assistance, grants or transfers, directly or indirectly, to individuals, their families or institutions working to remove barriers of inequality in our society, and second a fiscal stimuli, through the tax system to achieve the so-called “extra-fiscal” purposes of taxes.

As specialists in this matter, our first analysis of the measures offered by public authorities for people with special needs focused on the performance of the fiscal instruments designed by public entities. We studied the set of measures that the tax system uses to address these needs, and we soon concluded that two features of these technical actions prevented a comprehensive and global response to the problem.

First, the measures offered by the public authorities have been designed to respond to what can be called a “historic haste.” The measures fail to offer a structured and coordinated response either at the horizontal level, in the relationship of the public body with the people with special needs, or the vertical level, in the distribution of competences of the various local authorities and institutions that make up the State. Consequently, the distribution

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<sup>2</sup> Eur. Comm’n, *The Future of Health Care and Care for the Elderly: Guaranteeing Accessibility, Quality and Financial Viability*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001DC0723:EN:NOT> (Dec. 5, 2001).

of the legal instruments analyzed, their lack of coordination, and their inadequacies continue to prevent the achievement of socially acceptable levels of protection. The mismatch between the goals pursued and the instruments and means provided to achieve the goals is also one of the main shortcomings.

Second, we soon came to the conclusion that a strictly fiscal answer to these problems is, by itself, insufficient to meet the objectives,<sup>3</sup> if only because of the very nature of tax institutions which act on financial capacity, actual or potential, and therefore are only relevant for persons, albeit with special needs, who have some source of income or assets available.

It is these constraints that have led us to structure this work by starting from the financial architecture of the Dependency System envisaged in Law 39/2006 of December 14<sup>4</sup> (the "Act") in relation with the tax consequences that arise from it, or that are the outcome of the implementation of the benefits system provided therein. We seek to present the basic structure of this type of measure since, in our view, this is the first serious attempt to address the problems under study and point in the right direction to construct the "System." For the same reasons, although in a very different direction, the focus of our study subsequently will be a

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<sup>3</sup> Because, as we have noted elsewhere, while recognizing the importance of fiscal measures, to which extensive reference will be made later in the present work, the same, however complete and advanced they may be, cannot be the focus of solutions that are designed, not only because they are partial and sometimes misleading instruments to address the problem studied, but also because the tax law works on legal institutions provided for in other sectors of the legal order, which must first be restated in relation to the factual circumstances under review.

Martínez & Lara, *El estatuto patrimonial*, *supra* n. 1, at 195. And that is so, even though we cannot forget that the non-tax functions of taxes can solve many problems for people with special needs. In this sense, Jiménez-Reyna Rodríguez notes that fiscal measures have serious limitations to meet the objectives of social and economic policy, due to its complexity, the technical difficulties in adapting the ratio of benefits to the aims pursued and the possibilities of avoidance that all tax benefits bring with them. Diego Rodríguez Rodríguez, *La discapacidad en el sistema tributario español [Disability in the Spanish Tax System]*, in *Colección Informes y textos legales* 10 (Madrid Escuela libre, 1997).

<sup>4</sup> Law to Promote Personal Autonomy and Care of Dependent Persons, 39/2006, 299 (BOE 2006).

simple explanation of the tax measures that have been enacted to assist people with special needs. This will show the long road that still has to be travelled, and their study should serve to develop our final considerations.

## II. *THE FINANCIAL ARCHITECTURE OF THE LAW OF DEPENDENCY*

In order for protective systems to achieve sustainability over time as well as universality, all the territorial and institutional powers of the State, according to their respective competences, and all public and private stakeholders that are part of the fabric of our society have to be fully involved. This, in our view, was the proposal made by the legislature in establishing the financial architecture of the Act. Although it may have left room for improvement, this Act is an example of the direction that the public authorities must take if they want to put their words into actions and program active policies to assist people with special needs.<sup>5</sup> Indeed, in accordance with the architecture of the autonomous State of the Kingdom of Spain, with its seventeen autonomous communities with their extensive powers and obligations, the Act designed a system of joint financial responsibility and actions to implement the policies needed to achieve the different objectives. These take into account not only the three levels of territorial authorities that comprise it and its institutional administration but also demand special collaboration from the so-called third sector, which, as stated in the Preamble to the Act, must be placed on the fourth pillar of the welfare system to deal with situations of dependency.<sup>6</sup>

To achieve this goal, a System for autonomy and care for dependency has been created and aims principally at ensuring the

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<sup>5</sup> This is why we have considered it opportune to include some brief references to its structure in a work we have intended should be more general.

<sup>6</sup> The Act defines the Third Sector as: private organizations arising from the social citizen initiative or under different modalities that meet criteria of solidarity, purposes of general interest and non profit, driving the recognition and exercise of social rights. (This is an unofficial translation of the Act.) See Law to Promote Personal Autonomy and Care of Dependent Persons, 39/2006, 299.

basic conditions and levels of protection envisaged in the Act under discussion. This system will serve as a channel for the participation of all public administrations, optimizing the public and private resources available. In our view, the transcendent step taken by this Act is to shape a subjective right grounded on the principles of universality, equity and accessibility, developing a comprehensive care model for the citizen who has the right to participate in “the System.”

To achieve this ambitious goal, and to endow the “System” with sustainability, the Act provides three different levels of protection and develops a complex system of funding based on these levels and inter-governmental collaboration. In addition, the beneficiaries of the system contribute financially to the financing of services that comprise it, progressively and according to their financial capacity, taking into account the type of service received and its cost.

The first level, called minimum protection, has to observe the parameters referred to in Article 9 of the Act. The funding comes from central government, which, for this purpose, annually fixes the financial resources in the State’s General Budget, according to the parameters established in Article 32 of the Act.

A second level of protection is set by the agreements referred to in Article 10 of the Act between the State and each autonomous community, which will establish the objectives, means, and resources for the implementation of services and benefits in addition to the minimum level of protection provided universally. These agreements govern the funding from each administration under the parameters laid down in Article 32 of the Act.

As a third level of protection each autonomous community can add financing from its own budget, as stated in Article 11 of the Act, and it may adopt rules for access and enjoyment as it deems appropriate. Additionally, the Act provides for the participation of local authorities in managing care services for dependency, according to the rules of each autonomous community, which are permitted to participate in the territorial council of the System, as clarified in Article 12 of the Act. Finally, in regard to the financial architecture, the Act envisages the participation of beneficiaries to help fund the system, depending on the type of benefits received, the cost of the services provided, and their personal financial situation. For such participation, as stated in Article 33 of the Act, the distinction between healthcare services and those of maintenance and board and lodging has to be taken into account.<sup>7</sup>

Each of the above rules considers the nature of the assistance, which may come in the form of services or financial help. The catalogue of services that appears in Article 15 must be given priority so that only if these services are not available under the agreements established in Article 10 will an economic benefit be provided as subsidiary. The amount of the subsidiary is calculated in relation to the costs of the services provided under the individual program referred to in Article 29 of the Act, depending on the parameters of Article 17, all provided that they are administered by an entity or accredited center for the care system.

Priority for access to services is determined by the degree and level of dependency, and the degree and level of the applicant's financial capacity. As provided in Article 14 of the Act, until the network of services is fully implemented, those in a situation of dependency who cannot access the services of the designated priority scheme will be entitled to the cash benefits

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<sup>7</sup> It is the Territorial Council of the System that fixes the criteria of participation of the beneficiaries in the financing of the services received. These criteria have to be developed in the Agreements referred to in Article 33 of the Act, guaranteeing that no citizen shall be left outside the cover provided by the System for lack of financial resources.

referred to above. To this possibility of financial benefit, Article 18 of the Act adds another exceptional financial provision for non-professional caretakers or caretakers in the family, subject to appropriate living conditions and habitable housing as established in the individual program of care and attention, and provided that the caregiver meets the conditions specified in the reference order.

Article 19 of the Act provides financial assistance for people with a high degree of dependency to contribute to the recruitment of a personal assistant to facilitate access to education, work and a more independent life in the exercise of basic activities. However, it is important to bear in mind the provisions in Article 31 of the Act, which state that the amount of financial benefits received will be deducted from the amount under any similar scheme whose nature and purpose are set out in the public social security schemes.

Finally, we must take into account the terms of the third additional provision of the Act, which provides for grants to be accorded depending on budgetary provisions by the state administration and the autonomous communities, either to obtain technical assistance or instruments necessary for the normal development of ordinary life, or to facilitate accessibility and the necessary adaptations to the house, in order to help improve mobility at home.

This study is the first serious attempt to address the problems from the parameters of responsibility and sustainability required by the European Union. Although the Act is a momentous step in the right direction, the financial structure and competences have obvious shortcomings that can be resolved through the establishment of a “system” that does not exhaust all measures necessary to implement a comprehensive mechanism of protection, both objectively and subjectively.

### III. *TAX MEASURES TAKEN FOR THE PROTECTION OF INDIVIDUALS WITH SPECIAL NEEDS*

To evaluate whether we have moved towards the construction of the “system”, the focus of this work has to be the presentation of a simple outline of the tax measures that were enacted to develop the Act or this “historical haste” which have become the tax measures taken to assist people with special needs.

Simple visualisation has to be sufficient to substantiate both our point of departure and our conclusion: only transversality and interdisciplinarity will form “the system.” Precisely because we still lack a comprehensive system for everyone with special needs, this section has to distinguish the tax measures adopted for dependent persons, for minors, for persons classified as elderly, and finally, for those suffering from disability.

The main tax provisions adopted for people with special needs are tax benefits such as exemptions, reductions, deductions, or bonuses that directly affect this group. To achieve the aims outlined in this study, we intend to gather schematically those provisions adopted relative to the Law on Personal Income Tax,<sup>8</sup> which is the one that most influences the personal circumstances of the members of these groups.<sup>9</sup> We must also consider the measures that the State legislation has established that are applicable to all taxpayers regardless of their tax residence. However, we cannot and should not ignore the measures established by the autonomous communities of a common system that apply to taxpayers residing in the respective communities, which, too often, are not sufficiently considered or balanced when

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<sup>8</sup> Personal Income Tax and partial amendment of the laws on business taxes, income tax on non-residents and wealth tax hereinafter Personal Income Tax Law, 35/2006, 285 (BOE 2006) [hereinafter Personal Income Tax Law].

<sup>9</sup> The foregoing does not mean that we cannot find in this as in any other category of persons with special needs, other extra-fiscal actions in the rest of the taxes that make up the Spanish system, measures that cannot even be enumerated in a work like the present. See Martínez & Lara, *Impuestos y Discapacidad*, *supra* n. 1, at 24.

dealing with fiscal responsibility.<sup>10</sup> Thus the need arises for each to be presented separately.

### *1. Dependent Persons*

- Exemption from tax of the public benefits linked to care in the family and personal assistance, arising from the Act.<sup>11</sup>
- Exemption from capital gains tax produced by the transfer of the habitual residence of people with severe or high dependency.<sup>12</sup>
- Reduction in the overall tax base for the premiums paid to private insurance companies to cover exclusively the risk of dependence or serious dependency, as provided in the Act.<sup>13</sup>
- Exemption of earned income for dependent persons for contributions from social security systems made in their favor, up to a maximum annual amount of three times the Public Income Index of Multiple Effects, obtained in the form of income. This limit is taken together with the income derived from contributions to protected assets that disabled individuals eligible for such benefits can receive.<sup>14</sup>

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<sup>10</sup> Obviously, we cannot even summarize in a work like the present the various measures adopted by the different autonomous communities. However, to illustrate what we want to show we have incorporated some of the most representative examples.

<sup>11</sup> Personal Income Tax Law, at art. 7x.

<sup>12</sup> *Id.* at art. 33.4.

<sup>13</sup> *Id.* at arts. 51, 52.

<sup>14</sup> *Id.* at art. 7w.

- Exemption of the amounts received through a reverse mortgage for people in a situation of severe or high dependency.<sup>15</sup>

## 2. *Minors*

- Exemption from taxes of financial benefits received from public institutions for the fostering of minors, whether in the simple mode, permanent or prior to adoption or the equivalent under the laws of the autonomous communities including fostering in compliance with a court order for the minor to live with a person or family as provided by Organic Law 5/2000, January 12, governing the criminal liability of minors.<sup>16</sup>
- Exemption from taxes on public benefits for birth, delivery, adoptions, dependent children, and orphans and public maternity benefits received from the autonomous communities or local authorities.<sup>17</sup>
- Exemption from taxes on public benefits and family allowances received from any public authority, whether linked to birth, adoption, fostering or care of minor children.<sup>18</sup>
- Increased minimum protected income for offspring less than three years of age.<sup>19</sup>

## Andalusia:

- Tax deduction of EUR 50 per child under three years who is part of the taxpayer's household when the taxpayer

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<sup>15</sup> *Id.* at additional provision 15.

<sup>16</sup> *Id.* at art. 7i.

<sup>17</sup> *Id.* at art. 7h.

<sup>18</sup> *Id.* at art. 7z.

<sup>19</sup> *Id.* at art. 57.2.

would be entitled to receive financial assistance for a child under three years when another child is born.<sup>20</sup>

- Tax deduction for domestic help.<sup>21</sup>
- Tax deduction for the single parent.<sup>22</sup>

Aragon:

- Tax deduction on the birth or adoption of a third or subsequent child.<sup>23</sup>
- Tax deduction on the birth or adoption of a second child, when it suffers a degree of disability equal or superior to 33 percent.<sup>24</sup>

Canary Islands:

- Tax deduction for each child born or adopted in the tax period who is part of the taxpayer's household.<sup>25</sup>
- Tax deduction for childcare expenses.<sup>26</sup>

Cantabria:

- The taxpayer who is required to make a tax return may deduct EUR 100 for each child under three years of age.<sup>27</sup>

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<sup>20</sup> RDL 1/2009, 177, art. 10 (BOJA 2009).

<sup>21</sup> *Id.* at art. 15.

<sup>22</sup> *Id.* at art. 13.

<sup>23</sup> RDL 1/2005, 128, art. 110-2 (BOA 2005).

<sup>24</sup> *Id.* at art. 110-3.

<sup>25</sup> RDL 1/2009, 77, art. 10 (BOC 2009).

<sup>26</sup> *Id.* at art. 12.

<sup>27</sup> RDL 62/2008, 128, art. 2 (BOC 2008).

- Tax deduction for care of children fostered in the family.<sup>28</sup>

#### Castile-La Mancha:

- Tax deduction of EUR 100 for each child born or adopted in the tax period, provided that the taxpayer is entitled to apply the minimum protected income for offspring under state law on personal income tax.<sup>29</sup>

#### Castile-Leon:

- Tax deduction for the birth or adoption of children during the tax period generating the right to apply the "minimum for descendent" provided that the taxpayer is entitled to apply the minimum protected income for offspring regulated in the state law on personal income tax.<sup>30</sup>
- Tax deduction for multiple births or simultaneous adoptions.<sup>31</sup>
- Tax deduction for taxpayers who, because of their work, whether self-employed or working for others, have to leave their children in the care of a person employed as a domestic worker or in daycare or childcare centers.<sup>32</sup>
- Taxpayers who, at the date of a chargeable event, have a child under 4 years of age to whom the minimum protected income for offspring is applicable as governed by the law on personal income tax, may deduct 30 percent of the amounts paid in the tax period to social security as

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<sup>28</sup> *Id.*

<sup>29</sup> L 9/2008, 127. art. 1 (BOE 2008).

<sup>30</sup> RDL 1/2008, 190. art. 4 (BOCYL 2008).

<sup>31</sup> *Id.* at art. 4a.

<sup>32</sup> *Id.* at art. 6.

contributions for a worker falling within the special scheme for domestic employees, with a ceiling of EUR 322.<sup>33</sup>

Catalonia:

- Tax deduction for the birth or adoption of a child.<sup>34</sup>

Madrid:

- Minimum protected income for offspring under three years.<sup>35</sup>
- Tax deduction for birth or adoption of children and multiple births or adoptions.<sup>36</sup>
- Tax deduction for care of children fostered in the family.<sup>37</sup>
- Tax deduction for education expenses.<sup>38</sup>

Valencia:

- Tax deduction for birth or adoption and multiple birth or adoption.<sup>39</sup>
- Tax deduction for 15 percent of the amounts paid during the taxable period in daycare and early childhood education

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<sup>33</sup> *Id.*

<sup>34</sup> L 21/2001, 22. art.1.3 (BOE 2002).

<sup>35</sup> RDL 1/2001, arts.2, 4, 6, and 11 (Dec. 28, 2001).

<sup>36</sup> *Id.* at art.4.

<sup>37</sup> *Id.* at art. 6.

<sup>38</sup> *Id.* at art. 11.

<sup>39</sup> L 13/1997, art. 4 (Dec. 23, 1997).

up to a maximum of EUR 270 for each child under age 3 in the taxpayer's custody.<sup>40</sup>

- Tax deduction of EUR 418 for each child over three years and under five years.<sup>41</sup>

#### Extremadura:

- Tax deduction for multiple births.<sup>42</sup>
- Tax deduction for fostering a child.<sup>43</sup>

#### Galicia:

- Tax deduction for birth or adoption of children or multiple births.<sup>44</sup>
- Taxpayers who because of their work, whether self-employed or working for others, have to leave their children in the care of a person employed by the household or in daycare or child care may deduct 30 percent of the amounts paid in the period, up to a maximum of EUR 200.<sup>45</sup>
- Tax deduction of EUR 300 for each child in simple foster care, permanent, temporary or pre-adoptive administrative or judicial foster care, formalized by the competent organ for children of the autonomous government of Galicia, provided that they live with the child for more than 183 days during the tax period and have no family relationship.<sup>46</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> L 19/2010, 19. art. 7 (BOE 2011).

<sup>43</sup> *Id.* at art. 8.

<sup>44</sup> L 14/2004, art. 1 (Dec. 29, 2004).

<sup>45</sup> *Id.*

<sup>46</sup> L 15/2010, art. 1.2 (Dec. 28, 2010).

La Rioja:

- Tax deduction for birth and adoption of the second or subsequent child.<sup>47</sup>

Asturias:

- Tax deduction for multiple births.<sup>48</sup>
- Tax deduction for care of children fostered in the family.<sup>49</sup>

Murcia:

- Tax deduction for childcare expenses for children less than three years of age.<sup>50</sup>

### 3. *Elderly Persons*

- Exemption from tax on financial benefits received from public institutions for the placement of people over 65.<sup>51</sup>
- Financial assistance granted by public institutions for persons over 65 to finance their stay in residential care or day centers, provided the rest of their income does not exceed twice the public income index of multiple effects.<sup>52</sup>
- Exemption from capital gains produced by the transfer of the habitual residence of persons over 65.<sup>53</sup>

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<sup>47</sup> L 10/2010, art. 2 (Dec. 16, 2010).

<sup>48</sup> L 13/2010, art. 2 (Dec. 28, 2010).

<sup>49</sup> *Id.*

<sup>50</sup> RDL 1/2010, art. 1.3 (Nov. 13, 2010).

<sup>51</sup> Personal Income Tax Law, at art. 7i.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at art. 33.4.

- Exemption of the amounts received through a reverse mortgage for people of the residence by persons over 65.<sup>54</sup>
- Reduction of taxes on employment income for workers over 65.<sup>55</sup>
- Minimum protected income due to the taxpayer's age.<sup>56</sup>
- Minimum protected income when an ascendant over the age of 65 lives with the taxpayer and has no annual income.<sup>57</sup>

Andalusia:

- Tax deduction of EUR 100 for each ascendant who lives with single parent families, where they are entitled to the application of the minimum protected income for ascendants over 75 years.<sup>58</sup>

Aragon:

- Tax deduction of EUR 150 for the care of persons over 75 provided that they live at least half the year with the taxpayer and their annual income, excluding tax-free income, does not exceed EUR 8,000. The sum of the general tax base and the minimum savings per taxpayer and all descendants of the family unit cannot exceed EUR 35,000.<sup>59</sup>

Canary Islands:

- Tax deduction of EUR 120 for taxpayers aged 65 or over.<sup>60</sup>

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<sup>54</sup> *Id.* at additional provision 15.

<sup>55</sup> *Id.* at art. 20.2.a.

<sup>56</sup> *Id.* at art. 57.

<sup>57</sup> *Id.* at art. 59.

<sup>58</sup> RDL 1/2009, at art. 13.

<sup>59</sup> RDL 1/200X, art. 110-5 (Apr. 21, 200X).

<sup>60</sup> RDL 1/2009, at art. 11.

Cantabria:

- Tax deduction of 10 percent up to an annual limit of EUR 300 of the amounts paid in the tax period for renting out their residence by taxpayers aged 65 or over.<sup>61</sup>
- The taxpayer who must file a tax return may deduct EUR 100 for each ascendant over the age of seventy.<sup>62</sup>

Castile-La Mancha:

- Tax deduction of EUR 100 for taxpayers over the age of 75.<sup>63</sup>
- Tax deduction of EUR 100 for each ascendant over the age of 75 for whom the taxpayer is caring, when the taxpayer is eligible for the application of the minimum protected income for ascendants over 75 years provided for in state law on personal income tax.<sup>64</sup>

Catalonia:

- Tax deduction for rental of the taxpayer's habitual residence when the taxpayer is a widow or widower and aged sixty-five or over.<sup>65</sup>

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<sup>61</sup> RDL 62/2008, at art. 1.1.

<sup>62</sup> *Id.* at art.1.2.

<sup>63</sup> L 9/2008, at art. 4.1

<sup>64</sup> *Id.* at art. 4.2.

<sup>65</sup> L 31/2002, art. 1.1 (Dec. 30, 2002).

Madrid Community:

- Taxpayers can deduct EUR 900 per person over sixty-five who lives with the taxpayer for more than one hundred eighty three days a year as a member of the family without making payment when it does not give rise to obtaining grants or subsidies from the Community of Madrid.<sup>66</sup>

Valencia Community:

- Tax deduction for ascendants over 75 years of age.<sup>67</sup>

Balearic Islands:

- Tax deduction of EUR 50 for the Balearic Islands residents aged 65 or over.<sup>68</sup>

Principality of Asturias:

- The taxpayer may deduct EUR 341 for every person over 65 who lives with him for more than 183 days a year as a member of his family without compensating him.<sup>69</sup>

*4. Persons with disabilities*

- Financial assistance received from public institutions for fostering people with disabilities.<sup>70</sup>
- The financial support granted by public institutions for people with disabilities with a degree of disability equal to or greater than 65 percent to finance their stay in residential or day care is exempt from tax, provided the rest of their

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<sup>66</sup> RDL 1/2010, art. 7 (Oct. 21, 2010).

<sup>67</sup> L 6/2007, art. 4.1h (Dec. 23, 2007).

<sup>68</sup> L 6/2007, art. 3 (Dec. 27, 2007).

<sup>69</sup> L 13/2010, at art. 2.

<sup>70</sup> Personal Income Tax Law, at art. 7i.

income does not exceed twice the public income index of multiple effects.<sup>71</sup>

- Exemption from tax for the taxpayer of non-contributory family benefits received from social security for dependent children with disabilities.<sup>72</sup>
- Exemption from tax of benefits from social security or substitute institutions received as the result of permanent disability (total or high degree of invalidity) whatever the cause.<sup>73</sup>
- Exemption from tax of unemployment benefits in the form of a lump sum received by workers who are disabled to enable them to become self-employed.<sup>74</sup>
- Tax exemption for the benefits obtained in the form of disability payments corresponding to contributions to social security systems made in the taxpayer's favor, as well as employment income derived from contributions to protected capital, up to a maximum annual amount of three times the minimum wage.<sup>75</sup>
- Reduction for people with disabilities who receive income from work as active workers.<sup>76</sup>
- Reduced salary calculation as liable to tax for active workers who prove the need for help from third parties or

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at art. 7h.

<sup>73</sup> *Id.* at art. 7f–g.

<sup>74</sup> *Id.* at art. 7n.

<sup>75</sup> *Id.* at art. 7w.

<sup>76</sup> *Id.* at art. 20.3.

with reduced mobility, or a degree of disability equal to or greater than 65 percent.<sup>77</sup>

- In the system for determining salaries an objective assessment method shall quantify as liable to tax 60 percent of actual salary for salaried staff with a degree of disability equal to or higher than 33 percent, and if non-salaried, the calculation is 75 percent.
- Reduction for persons with disabilities whose net income results from the realization of economic activities.<sup>78</sup>
- Reduction of tax liability for persons with disabilities who effectively exercise an economic activity and who have an accredited need for help from third parties or with reduced mobility by at least 65 percent.
- Reduction in the tax base for contributions to social security systems (pensions, mutual welfare, secured pension plans, corporate pension plans, and dependency insurance) for persons with disabilities. The contribution must be made for people with a physical disability or sensory impairment equal to or greater than 65 percent or mental disability equal or greater than 33 percent, or with legally declared disability regardless of the degree.<sup>79</sup>
- Contributions to these social security systems in favor of persons with disabilities are not subject to inheritance and gift tax.<sup>80</sup>
- Reduction for contributions for protection of capital for persons with disabilities (physical or sensory disability equal to or greater than 65 percent or mental disability

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at art. 32.2.

<sup>79</sup> *Id.* at art. 53, additional provision 10.

<sup>80</sup> *Id.* at art. 53.3.

equal to or greater than 33 percent). The excess over the limits of the reductions will be taxed as inheritance and gift tax.<sup>81</sup>

- Minimum protected income for disability of the taxpayer.<sup>82</sup>
- Minimum protected income for disability of ascendant.<sup>83</sup>
- Minimum protected income for disability of offspring.<sup>84</sup>
- Minimum protected income for expenses for caring for each ascendant or descendant who needs help from other persons or with reduced mobility, or degree of disability equal to or greater than 65 percent.<sup>85</sup>
- Deduction in the amount of tax for works and installations made in the taxpayer's habitual residence required by reason of the disability of the taxpayer, spouse or any relative within the third degree including directly or collaterally, by consanguinity or affinity, who lives with him. It also applies to the co-owners of the property where the residence is located for works of modification of the common elements of the building to serve as a necessary step between the property and public access, as well as to the necessary installation of electronic devices to overcome barriers to sensory communication or promoting safety.<sup>86</sup>

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<sup>81</sup> *Id.* at art. 54.

<sup>82</sup> *Id.* at art. 60.1.

<sup>83</sup> *Id.* at art. 60.2.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at art. 60.

<sup>86</sup> *Id.* at art. 68.4.

Andalusia:

- For the taxpayer's disability. Taxpayers who are legally considered as persons with a disability equal or greater than 65 percent are entitled to a deduction from personal income tax of EUR 100, provided that the sum of the taxable incomes and savings generally does not exceed EUR 19,000 in case of individual taxation or EUR 24,000 in case of joint taxation.<sup>87</sup>
- For the disability of ascendants or descendants. Taxpayers who are entitled to the application of minimum protected income for disability of descendants or ascendants in accordance with the applicable state law on personal income may deduct from the regional tax the amount of EUR 100 per person with disability, provided that the amount of taxable income and savings generally does not exceed EUR 80,000 in individual taxation or EUR 100,000 in case of joint taxation.<sup>88</sup>
- For care: when it is proven that people with disability need the help of third parties and have the right to the application of the minimum protected income for care costs according to state law on personal income tax, the taxpayer may deduct 15 percent of the amount paid to social security from the regional tax by way of a fixed fee of the employer's contribution in accordance with the provisions of the special provisions of the social security for fixed domestic workers with a limit of EUR 500 per taxpayer per year.<sup>89</sup>

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<sup>87</sup> RDL 1/2009, at art. 12.

<sup>88</sup> *Id.* at art. 14.1.

<sup>89</sup> *Id.* at art. 14.2.

- Taxpayers who are single parents at the date of accrual of the tax shall be entitled to apply a deduction of EUR 100 from regional personal income tax provided that the sum of the general tax base and savings does not exceed EUR 80,000 in individual taxation or EUR 100,000 in the case of joint taxation.<sup>90</sup>

Aragon:

- Tax deduction on the birth or adoption of a second child, who has a degree of disability equal to or greater than 33 percent.<sup>91</sup>
- Tax deduction of EUR 150 for the care of an ascendant or descendant with a degree of disability equal to or greater than 65 percent, irrespective of age as long as the person lives at least half the year with the taxpayer and the person's annual income, excluding exemptions, does not exceed EUR 8,000. The sum of the general tax base and of savings shall be reduced by the minimum per taxpayer and for all descendants of the family unit but cannot exceed EUR 35,000.<sup>92</sup>

Canary Islands:

- Taxpayers ordinarily residing in the Canary Islands who make a cash donation to their offspring or adopted children who are legally recognized as persons with disabilities exceeding 33 percent may deduct 2 percent of the amount donated from their regional tax up to EUR 480 per donee if

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<sup>90</sup> *Id.* at art. 13.

<sup>91</sup> RDL 1/2005, at art. 110.3.

<sup>92</sup> *Id.* at art. 110.5.

the donation is destined for the acquisition or rehabilitation of the main residence of the donee in the Canary Islands. If the degree of disability is not less than 65 percent the taxpayer may deduct 3 percent with a limit of EUR 720.<sup>93</sup>

- Tax deduction for each child born or adopted who has a physical or mental disability, or sensory impairment of more than 65 percent.<sup>94</sup>
- Tax deduction of EUR 300 for taxpayers with disabilities greater than 33 percent.<sup>95</sup>
- Tax deduction for large families when one of the spouses or offspring to whom the personal and family minimum protected income for tax applies has a degree of physical or mental disability or sensory impairment of at least 65 percent. The deduction will be EUR 500 and EUR 1,000 respectively.<sup>96</sup>
- Tax deduction of 0.75 percent for investment in works of adaptation of the habitual residence by persons with disabilities.<sup>97</sup>

#### Cantabria:

- Deduction of 10 percent up to EUR 300 of the amounts paid in the tax period for renting a principal residence when the taxpayer has a legally recognized physical, mental or sensory impairment with a degree of incapacity of at least 65 percent according to the schedule to which Article 148

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<sup>93</sup> RDL 1/2009, at art. 9.

<sup>94</sup> *Id.* at art. 10.

<sup>95</sup> *Id.* at art. 11.

<sup>96</sup> *Id.* at art. 13.

<sup>97</sup> *Id.* at art. 14b.

of the Consolidated General Law on Social Security refers, approved by Royal Legislative Decree 1/1994, 20 June.<sup>98</sup>

- The taxpayer who must file a tax return may deduct EUR 100 for each ascendant or descendant legally recognized as having a physical, mental or sensory impairment of at least 65 percent and who lives with the taxpayer at least 183 days per year and whose income is no more than EUR 6,000.<sup>99</sup>

Castile-La Mancha:

- Tax deduction of EUR 300 for taxpayers with disabilities who have an accredited degree of disability equal to or above 65 percent and who are entitled to the application of the minimum protected income for disability of the taxpayer, as provided in the State Law on Personal Income Tax.<sup>100</sup>
- Tax deduction of EUR 200 for each ascendant or descendant with an accredited degree of disability equal to or above 65 percent if the taxpayer is entitled to the application of minimum protected income for disability of ascendants or descendants, respectively, established by the state law on personal income tax.<sup>101</sup>
- Tax deduction of 1 percent of the amount spent during the period in question for investment to make a residence suitable for persons with disabilities.<sup>102</sup>

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<sup>98</sup> RDL 62/2008, at art. 2.1.

<sup>99</sup> *Id.* at art. 2.2.

<sup>100</sup> L 9/2008, at art. 2.

<sup>101</sup> *Id.* at art. 3.

<sup>102</sup> *Id.* at art. 6.

Castile-Leon:

- Tax deduction of EUR 492 when either spouse or children to be computed to quantify for the minimum protected income for descendants regulated by the state law on personal income tax, has a degree of disability of at least 65 percent.<sup>103</sup>
- Deduction for the birth or adoption of children having a recognized degree of disability of at least 33 percent, generating entitlement to apply the minimum protected income for descendants regulated by the state law on personal income tax.<sup>104</sup>
- Tax deduction for taxpayers resident in Castile-Leon affected by disability.<sup>105</sup>
- Tax deduction for investment in environmental facilities and adaptation in the habitual residence for persons with disability.<sup>106</sup>

Catalonia:

- Deduction for rent paid for the habitual residence of the taxpayer with a degree of disability equal to or greater than 65 percent.<sup>107</sup>
- An increase in the percentage of the deduction for investment in the habitual residence to 6.45percent for taxpayers with a degree of disability equal to or greater than 65 percent.<sup>108</sup>

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<sup>103</sup> RDL 1/2008, at art. 3.

<sup>104</sup> *Id.* at art. 4.

<sup>105</sup> *Id.* at art. 7.

<sup>106</sup> *Id.* at art. 9b.

<sup>107</sup> L 31/2002, at art.1.

<sup>108</sup> *Id.*

- An increase in the percentage of deduction for adapting the habitual residence of persons with disabilities to 8.6 percent.<sup>109</sup>

Community of Madrid:

- Tax deduction of EUR 900 for each disabled person with a degree of disability equal to or greater than 33 percent living with the taxpayer for more than one hundred eighty three days a year as a member of the family without compensating the taxpayer when it does not result in obtaining grants or subsidies from the community of Madrid.<sup>110</sup>
- Tax deduction for the increased costs of borrowing funds for investment in a habitual residence resulting from higher interest rates.<sup>111</sup>

Valencia:

- Tax deduction for birth or adoption of a physical or sensory disabled child with a disability equal to or above 65 percent, or with a degree of mental disability equal to or greater than 33 percent.<sup>112</sup>
- Tax deduction of EUR 179 for disabled taxpayers, with a degree of disability equal or superior to 33 percent, aged 65 years and over.<sup>113</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> RDL 1/2010, at art. 7.

<sup>111</sup> *Id.* at art. 10.

<sup>112</sup> L 13/1997, at art. 4.1c.

<sup>113</sup> *Id.* at art. 4.1g.

- Tax deduction for ascendants over 65 with physical or sensory impairment, with a degree of disability equal to or above 65 percent, or who are mentally handicapped with a degree of disability equal to or greater than 33 percent.<sup>114</sup>
- Tax deduction for amounts paid for the acquisition of a habitual residence for people with physical or sensory impairment with a degree of disability equal to or greater than 65 percent, or mental disability with a degree of disability equal to or greater than 33 percent.<sup>115</sup>
- Tax deduction for renting a habitual residence when the tenant is physically disabled or suffers from sensory impairment with a degree of disability of at least 65 percent, or mentally disabled with a degree of disability of at least 33 percent.<sup>116</sup>
- Tax deduction for the increase in the cost of borrowing funds to invest in the habitual residence resulting from higher interest rates on mortgage loans.<sup>117</sup>

Extremadura:

- Tax deduction for renting a habitual residence for disabled persons with a degree of disability equal to or above 65 percent.<sup>118</sup>
- Tax deduction of EUR 150 for every ascendant or descendant with a legally recognized physical, mental or sensory impairment with a degree of disability equal to or above 65 percent.<sup>119</sup>

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<sup>114</sup> *Id.* at art. 4.1h.

<sup>115</sup> *Id.* at art. 4.1l.

<sup>116</sup> *Id.* at art. 4.1n.

<sup>117</sup> *Id.* at art. 4.1s.

<sup>118</sup> RDL 19/2010, art. 4 (Dec. 12, 2010).

<sup>119</sup> *Id.* at art. 5.

- Tax deduction for domestic assistance.<sup>120</sup>
- Tax deduction for a single parent.<sup>121</sup>
- Tax deduction for improvement works in the habitual residence.<sup>122</sup>

Galicia:

- Tax deduction for large families when one of the spouses or children to whom the personal and family minimum applies has a degree of disability equal to or greater than 65 percent.<sup>123</sup>
- Tax deduction for taxpayers aged 65 and over affected by a degree of disability equal to or greater than 65 percent and requiring the help of third parties.<sup>124</sup>

Balearic Islands:

- Tax deduction of 15 percent of contributions paid during the tax period up to a maximum of EUR 300 for disabled taxpayers with a degree of disability equal to or greater than 65 percent.<sup>125</sup>
- Tax deductions for each taxpayer and, where applicable, for each member of the household living in the Balearic

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<sup>120</sup> L 19/2010, at art. 2.

<sup>121</sup> *Id.* at art. 6.

<sup>122</sup> *Id.* at art. 9.

<sup>123</sup> L 14/2004, at art. 1.

<sup>124</sup> *Id.* at art. 4.

<sup>125</sup> L 6/2007, at art. 5.

Islands legally recognized as a person with physical, mental or sensory impairment.<sup>126</sup>

- Tax deduction for adaptation works for the habitual residence for people with disabilities.<sup>127</sup>
- Tax deduction for sums paid out as transfer taxes and documented legal acts, in the form of onerous transfer of property by reason of the acquisition of a habitual residence for a disabled person with a degree of disability equal to or greater than 65 percent.<sup>128</sup>
- Tax deduction for fees paid out as transfer taxes and documented legal acts during the purchase of a habitual residence for a disabled person with a degree of disability equal to or greater than 65 percent.<sup>129</sup>
- Tax Deduction for sums paid out as transfer taxes and documented legal acts during the purchase of a habitual residence qualified as protected by the Administration for a disabled person with a degree of disability equal to or greater than 65 percent.<sup>130</sup>

#### Asturias:

- Tax deduction for the purchase or adaptation of a habitual residence in the Principality of Asturias for taxpayers with disabilities.<sup>131</sup>

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<sup>126</sup> *Id.* at art. 6.

<sup>127</sup> L 1/2009, art. 2 (Feb. 25, 2009).

<sup>128</sup> *Id.* at art.3.

<sup>129</sup> *Id.* at art.4.

<sup>130</sup> *Id.* at art.6.

<sup>131</sup> L 13/2010, at art. 2.2.

- Tax deduction for the purchase or adaptation of a habitual residence for taxpayers who live with their spouses, ascendants or offspring with disabilities.<sup>132</sup>
- Tax deduction for single parents with adult children with disabilities.<sup>133</sup>

#### *IV. BY WAY OF EPILOGUE*

In conclusion, the fiscal stimulus measures, although absolutely necessary to address the problems under study, are by themselves clearly insufficient even when they do not mask the inability of public authorities to establish a proper system of protection for people with special needs. As we have mentioned, there are a number of reasons for this.

In part, it is because the measures taken have been drafted in "historic haste" at both state and autonomous community levels. In the state legislation, the measures set out are not sufficiently calibrated to ensure their sustainability as they apply to the different groups and situations of people with special needs. Indeed, because they developed unsystematically they are short-term solutions in nature and they lack internal consistency.

The measures taken at the regional level also present a number of issues. First, they create a lack of legal certainty due to constant changes in regulations so that it is difficult to know with certainty what the current text is, the extent to which it is applicable in a given tax period, and how funds may be allocated in the budget. This is exacerbated by the existing regulatory dispersal. Second, their limited effectiveness cannot pass without

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<sup>132</sup> *Id.* at art. 3.

<sup>133</sup> *Id.* at art. 12.

comment as in most cases, the deduction amounts are insignificant. Additionally, while the different protection systems cannot be classified, it is obvious that there are undesirable differences in the treatment different groups receive according to their tax residence in one autonomous community or another.

Moreover, assistance that relies exclusively on tax measures is clearly insufficient because its scope only benefits persons who, while having special needs, also have some source of income subject to taxation or available capital, leaving outside their protection precisely those with special needs who most require assistance.

Precisely for the reasons stated, when articulating the structure of this work, we chose to start, after a few lines explaining the Spanish context, by presenting the financial architecture offered by the law on dependency. This law attempts to involve all the powers of the state—territorial and institutional and all actors—both public and private—who are part of the fabric of our society. This signals a pathway directed to creating a system that provides comprehensive protection, a system which, with the necessary adaptations and regulatory developments, can exponentially improve the existing protection and is effective as well from the tax perspective.

However, we cannot ignore the fact that there are perspectives that remain to be analysed that are possibly the most important of the measures implemented from the fiscal point of view: their effectiveness, their level of efficiency, and sustainability. We fear greatly that the absence of such analysis<sup>134</sup> serves only to legitimize the deficiencies listed, which are tragically common to most of the measures discussed in this

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<sup>134</sup> In this sense, we continue to work within the framework of the Research project of National Plan *Las medidas fiscales como instrumento de protección de la familia: personas con discapacidad versus dependencia. Evolución y eficiencia de las medidas estatales y autonómicas* [Fiscal Measures as a Protective Instrument of the Family: Dependency versus Disability. Evolution and Efficiency of State and Regional Measures], which is financed by the Ministry of Science and Innovation.

"historical haste" and especially those included within the fiscal perspective. Indeed, save for some honourable exceptions,<sup>135</sup> few studies are oriented in this direction, and without their conclusions we can hardly build a true "system." A report on the economic effect of a law or a measure is not enough; there has to be an analysis of its effectiveness and efficiency, as well as a comprehensive costing of the package of measures to enable us to judge the overall sustainability of the "system" precisely so that it can exist. This is a clear demonstration of the need for interdisciplinary action, which will include the area of taxation, to guide these instruments towards providing a fiscal stimulus for families, caregivers, and private actors, to cooperate in the development of these essential functions. As we have tried to show, strictly sectorial measures are totally inadequate to achieve a comprehensive response to the problem under study, even in the legal field.

In a previous work,<sup>136</sup> we reflected on the use of two legal institutions that could contribute to advance the instruments of equality required by people with special needs: charitable and other foundations, and the so-called individualized dependence assistance. But in that work we enumerated the almost endless possible actions of the various branches of the legal system that, in coordination, could provide a comprehensive response to the situations analyzed.<sup>137</sup> We demanded action—as we still demand

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<sup>135</sup> See the work of Martos García & Espin Marín, *Análisis económico tributario de la discapacidad en el IRRPF [Economic Analysis of Disability Tax in IRRPF]* (2002–2004).

<sup>136</sup> Martínez & Lara, *El estatuto patrimonial*, *supra* n. 1, at 195.

<sup>137</sup> Among many others, we should probably act on the very concept of family or household, so that the actions do not focus on the subject of allocation rules, or on ascendants or descendants, otherwise other situations of legal guardianship will arise. Survival situations for progenitors had to be contemplated as well as supervening or future disabilities to regulate the instruments that will enable architectural barriers to be removed. We also studied the non-physical barriers that could give the dependent person self-determination such as promoting policies of job placement or self-employment for the disabled or conciliating the work of non-professional caregivers. The policies of individual local authorities with competences in the matter should be coordinated; legislation and civil procedure governing the assets of the disabled themselves should be instituted. On successions

it—to establish a global framework that would ensure true compliance with the constitutional mandates that require protection of the groups analysed.

It would be extremely unfair if we concluded this epilogue stating that in the first decade of the new century there has been little progress on this matter in our country. On the contrary, many things have been done and they have been good. Chief among them, for example, are the law on the assets of the disabled just referred to; the reform of the law governing funds and pension plans; the legal regime of the reverse mortgage; or the great advance resulting from the implementation of the regulation of insurance on dependency. However, until progress is made on the interdisciplinarity and the transversality of the measures adopted;<sup>138</sup> even with new and better tools, we still lack the “system” and a transversal and interdisciplinary treatment that is able to build a comprehensive legal framework to provide the necessary assistance—on pre-established principles of universality, quality and sustainability—for people with special needs.

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and donations, the institution of guardianship should be reformed, allowing future planning. Procedural law on the declaration of disability should be studied in depth. Existing institutions should be introduced into the law of the autonomous communities such as self-guardianship or preventive guardianship.

<sup>138</sup> For further development of what we have only been able to point out here see our work Juan López Martínez & José M. Pérez Lara, *La protección trasversal e interdisciplinar de las personas con necesidades especiales. Un apunte desde el ordenamiento tributario* [Transversal and Interdisciplinary Protection of Persons with Special Needs. A Note from the Tax System], in *Estudios sobre dependencia y discapacidad* (Aranzadi, Thomson Reuter 2011).

# HUMAN DIGNITY AT ANY AGE: THE LAW'S RESPONSE TO AN AGING POPULATION

**REMARKS OF THE RIGHT HONOURABLE BEVERLEY McLACHLIN,  
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*AT THE NATIONAL ACADEMY OF ELDER LAW ATTORNEYS  
CONFERENCE  
APRIL 26, 2012  
SEATTLE, WASHINGTON*

## I. INTRODUCTION

It is an honour to be here today to at the National Academy of Elder Law Attorneys annual conference. As we are all becoming aware, older people make up an increasing segment of our society. Last year marked the year that the first baby boomers turned sixty-five. And so began a demographic wave that will roll through our society for decades to come. Its impact will be unprecedented. By 2030, one in five Americans will be over the age of 65,<sup>1</sup> and in Canada, it will be closer to one in four.<sup>2</sup> Low fertility rates and rapid increases in life expectancy around the world mean that the changes occurring in North America are part of a much larger worldwide phenomenon. In 2010, the British media reported that seventeen percent of the British population will live to see their 100th birthday.<sup>3</sup> Recent statistics out of eastern European countries predict that by 2060, persons over the age of sixty-five

<sup>1</sup> Dept. of Health & Human Servs., Admin. on Aging, *Aging Statistics*, [http://www.aoa.gov/aoaroot/aging\\_statistics/index.aspx](http://www.aoa.gov/aoaroot/aging_statistics/index.aspx) (Sept. 1, 2011).

<sup>2</sup> The StarPhoenix, *Asa Quake*, [http://www.canada.com/saskatoonstarphoenix/news/weekend\\_extra/story.html?id=c8f6c75c-a31e-44c4-bec5-5fad04d72c40](http://www.canada.com/saskatoonstarphoenix/news/weekend_extra/story.html?id=c8f6c75c-a31e-44c4-bec5-5fad04d72c40) (Feb. 9, 2008).

<sup>3</sup>Becky Barrow, *One in Six Will Live to Be 100: Official Figures Predict 10m Alive Today Will Get Royal Telegram*, Daily Mail (Dec. 31, 2010) (available at <http://www.dailymail.co.uk/health/article-1342589/1-6-live-100-Official-figures-predict-10m-alive-today-roval-telegram.html>).

will comprise over sixty percent of the population.<sup>4</sup> The United Nations has referred to this trend as a “process without parallel in the history of humanity.”<sup>5</sup>

This changing dynamic is beginning to impact many aspects of our society. In the economic arena, population aging will have an impact on economic growth, savings, investment, consumption, labour markets, pensions, taxation, and intergenerational transfers. In the social sphere, the aging population influences family composition and living arrangements, educational needs, housing demand, migration trends, epidemiology, and the need for health care services. In the political arena, population aging may shape voting patterns and political representation. Few aspects of our society will remain unaffected by what some have termed the “longevity revolution.”

Perhaps the most challenging aspect of this phenomenon will be our society’s ability to remain committed to the idea of dignity at any age, the idea that every human being, regardless of their age, possesses inherent and equal fundamental dignity and basic rights. I will explore this issue by focussing on two key questions. First, what does “human dignity” mean in the context of the older members of our society? Second, how should the legal profession respond to the special challenges presented by this emerging demographic phenomenon?

## II. *HUMAN DIGNITY AT ANY AGE*

Let me first address human dignity and how it plays out in the lives of the elderly. We’re all familiar with the term “human dignity.” Indeed, it has taken on the flavour of a value so ubiquitous as to be trite. Since as early as the eighteenth century, “dignity has been seen as both the ultimate foundation of human

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<sup>4</sup> Ioana Patran & Same Cage, *Europe’s East Grows Older and Poorer*, *Globe & Mail* A13 (Apr. 2, 2012).

<sup>5</sup> Dept. of Econ. & Soc. Affs., United Nations, *World Population Ageing 2007: Executive Summary* xxvi, <http://www.un.org/esa/population/publications/WPA2007/wpp2007.htm> (2007).

rights, as well as their final end.”<sup>6</sup> The concept of dignity appears in the Charter of the United Nations, as the Preamble’s “reaffirmation” of the “faith in . . . the dignity and worth of the human person.”<sup>7</sup> It is also present in the Universal Declaration of Human Rights, which declares that “all human beings are born free and equal in dignity.”<sup>8</sup> But human dignity is more than a ubiquitous ideal, more than a legal cliché. At its core, it consists of three elements: (1) everyone has human dignity; (2) everyone must respect everyone else’s human dignity; and (3) the state should help everyone to realize his or her full human dignity.<sup>9</sup>

In the context of the elderly, the concept of dignity has been central in framing the applicable rights. The 1991 United Nations Principles on Older Persons states that “old persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity.”<sup>10</sup> Article 25 of the European Union Charter of Fundamental Rights proclaims, “The Union recognizes and respects the rights of the elderly to lead a life of dignity.”<sup>11</sup> Dignity also forms a core principle of the 2002 Madrid International Plan of Action on Ageing.<sup>12</sup> And just a few months ago, following several scandals involving the treatment of elderly people, twenty-one prominent British public figures called for hospitals, care homes, and other institutions to agree to a set of

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<sup>6</sup> Frédéric Mégret et al., *Dignity: A Special Focus on Vulnerable Groups* 7, [http://www.udhr60.ch/report/HumanDignity\\_Megret0609.pdf](http://www.udhr60.ch/report/HumanDignity_Megret0609.pdf) (2008).

<sup>7</sup> UN Charter preamble.

<sup>8</sup> Universal Declaration of Human Rights, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810, 71 (1948).

<sup>9</sup> Mégret, *supra* n. 6, at 3.

<sup>10</sup> United Nations Principles on Older Persons, GA Res. 46/91, UN GAOR, UN Doc A/RES/46/91 (1991).

<sup>11</sup> *Charter of Fundamental Rights of the European Union*, Article 25, 2000 O.J. (C 364) 1 (& December 2000). CONF

<sup>12</sup> Second World Assembly on Ageing, Madrid International Plan of Action on Ageing, UN Doc. A/197/L/2 (2002).

common standards of care to protect the dignity of elderly patients.<sup>13</sup>

What emerges, then, is universal acknowledgement that dignity is the central, guiding concept in our approach to the elderly. Human dignity for the elderly has two facets. First, the dignity of the elderly means that the elderly should enjoy equal opportunity for well-being, for the realization of talents and for the discovery of their capabilities to the same extent as anyone else. Older persons should not be treated less well because of their age.

Second, and just as importantly, maintaining human dignity for the elderly requires pro-active affirmative action, different approaches that take into account the particular needs of the elderly. To ignore generational differences and treat the elderly just like the younger generation is to perpetuate the elderly's marginalization in society and deny their intrinsic worth and claim to human dignity. This dual approach to dignity—equal rights plus pro-active affirmative action—should form our perspective as we manage an increasingly older population.

Unfortunately, the dignity of the elderly is far from guaranteed. On the contrary, it is increasingly under siege. The enemy? Something called "ageism." The term, as coined by Robert Butler in 1968, refers to an attitude in our culture and society that "allows the younger generations to see older people as different than themselves; thus they subtly cease to identify with their elders as human beings."<sup>14</sup> One of the consequences of this detachment is a spreading depiction of the elderly in negative stereotypical terms: older adults are seen as dependent and vulnerable, unable to make appropriate decisions for themselves, and not contributing to society. Elderly people are seen as less vital and less important than younger people. They've had their day. Their life-forces are waning. They're on the way out. Even

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<sup>13</sup> BBC News, *Call for Dignity Code to Protect Elderly Patients*, <http://www.bbc.co.uk/news/uk-17124054> (Feb. 22, 2012).

<sup>14</sup> Robert N. Butler, *Why Survive? Being Old in America* (Harper & Row 1975).

our language is imbued with this stereotype: codger, old coot, geezer, and hag—just to name a few.

Ageism is exacerbated by the fact that, we live in a society that more and more prizes youth. Advertisers value the eighteen to forty-nine age group much more than the sixty-five-plus demographic, despite the fact that the latter group has more disposable income. Our newspapers, magazines, and television screens brandish the culture of youth. We all want to be young and will do virtually anything to stay young, or to try to stay young. Plastic surgery and reconstructive techniques are booming businesses. The message is that youth is good; growing older is not so good. The elderly are human beings, yes, but diminished human beings.

Ageism has real consequences. The aged are less valued in economic and statistical contexts. For instance, the U.S. Office of Management and Budget that, when assessing the relative impact of environmental hazards, advised the Environmental Protection Agency that the costs of an older person's death should be appraised at sixty-three percent of a younger person's death.<sup>15</sup> Inaccurate stereotypes about aging may also impact the medical care provided to the elderly. Physicians who subscribe to the myth of "senility" as a normal consequence of aging may delay the assessment, diagnosis, and treatment of various disorders, including dementia.<sup>16</sup>

Why are our attitudes toward the older members of our society important? Because research has shown that it is negative attitudes towards elder people that lead to marginalization and

<sup>15</sup> Jon Hendricks, *Ageism: Looking Across the Margin in the New Millennium*, 29(3) *Generations* 5–7 (2005).

<sup>16</sup> Monique M. Williams, *Invisible, Unequal, and Forgotten: Health Disparities in the Elderly*, 21 Notre Dame J.L. Ethics & Pub. Pol'y 441, 444 (2007).

abuse.<sup>17</sup> Unless we understand these attitudes—unless we acknowledge ageism as our particular cultural default zone—marginalization and abuse will continue. Even if we are among the majority who would never consciously do wrong to an old person, the cultural warp in favour of youth may lead us astray. So we have to constantly remind ourselves that the elderly are worthy human beings endowed with the full measure of human dignity, for however long they may live and in whatever state they may find themselves.

How do we give concrete meaning to the concept of dignity? Let me suggest this: by asking what that entails. Dignity means that every person in our society is entitled to three things: (1) to live free of discrimination; (2) to live in security; and (3) to live as an autonomous human being. This applies to the old as much as the young. These imperatives, which I will discuss in more detail in a moment, are enshrined in our respective constitutions and reflected in the complex matrix of our social laws and practices. True, not every person in fact enjoys equality, security, and autonomy. But to the extent they do not, we tend to regard this as failure to achieve what we should. In the next few minutes, I want to focus on how the law can help ensure that these needs—the freedom from discrimination, security, and autonomy—are met.

#### A. Discrimination

The first imperative for the elderly connected to the fundamental value of human dignity is protection from discrimination. The cultural bias of our society in favour of youth fosters conscious and unconscious discrimination against the elderly. Because of a person's age, he or she doesn't get to do something that others get or get to do. Or, because of age, he or she is asked to bear a burden that others are not.

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<sup>17</sup> Ont. Human Rights Commn., *The Changing Face of Ontario: Discrimination and Our Aging Population: Consultation Paper 1–2*, <http://www.ontla.on.ca/library/repository/mon/3000/10302333.pdf> (accessed Jan.30, 2013).

Discrimination against the elderly may take many forms. I am not giving a judgment today and my list should not be taken as a prediction of how courts will view in a particular situation. Suffice it to say that claims for age-based discrimination may arise in many contexts—in the employment context, with respect to mandatory retirement rules; in the driving context, with respect to age-based license restrictions; and in the social services context, with respect to equal access to care and treatment, to mention only three.

In both Canada and the United States, laws protect people against age discrimination. The law can be a powerful tool in preventing discrimination. In one Canadian case, a tribunal held that an employer had discriminated against an individual by discouraging him from applying for a job as an apprentice electrician because he was too old.<sup>18</sup> In another, a complainant was awarded \$2,000 in compensation for being asked discriminatory questions during the hiring process, including her age.<sup>19</sup>

Yet, anti-discrimination laws do not always provide a complete solution. For example, in 1990, the Supreme Court of Canada upheld the constitutionality of mandatory retirement rules on the ground that this was justified in order to permit younger people to enter the work force.<sup>20</sup> It was not until a few months ago that the Canadian government repealed portions of legislation that permitted mandatory retirement for federally regulated employees.<sup>21</sup> Similarly, in the United States, the Age

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<sup>18</sup> Ont. Bd. of Inquiry, 2 C.H.R.R. D/504 (1981).

<sup>19</sup> Ont. Bd. of Inquiry, 26 C.C.H.R. D/58 (1993).

<sup>20</sup> *McKinney v. U. of Guelph*, 3 S.C.R. 229 (Can. S. Ct. 1990); *Harrison v. U. of Brit. Colum.*, 3 S.C.R. 451 (Can. S. Ct. 1990); *Stoffman v. Vancouver Gen. Hosp.*, 3 S.C.R. 483 (Can. S. Ct. 1990).

<sup>21</sup> Supporting Vulnerable Seniors and Strengthening Canada's Economy Act, c. 15 (June 26, 2012) S.C. 2011 (available at <http://laws-lois.justice.gc.ca/eng/acts/S-25.5/index.html>).

Discrimination in Employment Act<sup>22</sup> prohibits discrimination against older workers in hiring decisions. Yet in practice, claims of age discrimination are difficult to prove, particularly after the United States Supreme Court decision in *Gross v. FBL Financial Services, Inc.*,<sup>23</sup> which held that a plaintiff must prove—by preponderance of evidence—that age was the proximate cause for adverse employment action.<sup>24</sup> As a result, lawyers have suggested laws against age discrimination often are not enforced.<sup>25</sup>

### 1. Security

The second aspect of dignity is security. Here we encounter the problem of elder abuse, which takes many forms. In 2011, the World Health Organization defined abuse and neglect of older adults as “a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.”<sup>26</sup> Elder abuse, often stemming from discriminatory attitudes, denies the elderly the security they are entitled to as human beings.

Like other forms of abuse in our society, elder abuse may be expressed in physical, emotional, or financial abuse, the restriction or denial of rights, and active or passive neglect. Because of a higher incidence of disabilities, poor health, and financial and emotional dependency, seniors are particularly vulnerable to abuse and exploitation. Sadly, elder abuse is a fact of life and thus constitutes a central concern of Elder Law.

Providing accurate, current information on the prevalence of elder abuse is a challenge, due to lack of research and lack of consensus on what constitutes abuse. According to the best information available in Canada and the United States,

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<sup>22</sup> 29 U.S.C. §§ 621–634 (2006).

<sup>23</sup> 557 U.S. 167 (2009).

<sup>24</sup> *Id.* at 189–190.

<sup>25</sup> See Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda*, 31 U. Rich L. Rev. 757, 777–778 (1997).

<sup>26</sup> World Health Org., *Elder Maltreatment*, <http://www.who.int/mediacentre/factsheets/fs357/en/index.html> (Aug. 2011).

approximately seven percent of seniors have suffered some form of physical, emotional, or financial abuse or neglect.<sup>27</sup> However, as is the case with any abuse, it is often a hidden problem that many feel uncomfortable reporting. Indeed, reports suggest that only one in six cases of elder abuse is reported.<sup>28</sup> What is clear, however, is that the impact of elder abuse can be devastating. Abuse can lead to declining physical and mental health, depression, and even suicide. The impact of abuse bears heavily on our social, health, and justice systems.

We have a plethora of laws aimed at preventing elder abuse. Most jurisdictions across Canada and the United States have adopted mandatory reporting laws for abuse. Often, elder abuse is a crime, like physical or sexual assault, threats, theft, fraud, or misapprehension of funds by a position of trust. Just last month, the Canadian government announced that it will introduce tougher sentences for those convicted of elder abuse. The changes will make age-related abuse an aggravating factor at sentencing, which will result in stiffer sentences.<sup>29</sup>

At the same time, the stereotypes of ageism mean there is often a marked lack of interest in advancing or protecting the rights of the elderly and difficulties in reporting and prosecuting abuse. In a case before the Supreme Court of Canada, *R. v. Khelawon*,<sup>30</sup> five elderly residents of a retirement home told various people that they had been assaulted by the home's manager.<sup>31</sup> By the time of trial, two and a half years later, four of the complainants had died,

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<sup>27</sup> CBC, *Elder Abuse: A Growing Dilemma in an Aging Population*, <http://www.cbc.ca/news/canada/story/2011/03/01/f-elder-abuse-trends.html> (Mar. 1, 2011); see generally Claudia Cooper et al., *The Prevalence of Elder Abuse and Neglect: A Systematic Review* 37 *Age & Ageing* 151 (Mar. 2008) (available at <http://ageing.oxfordjournals.org/content/37/2/151>).

<sup>28</sup> Williams, *supra* n. 16, at 445.

<sup>29</sup> The Canadian Press, *Elder Abuse Sentences to be Toughened*, <http://www.cbc.ca/news/canada/story/2012/03/15/pol-elder-abuse-sentences.html> (Mar. 15, 2012).

<sup>30</sup> 2 S.C.R. 787 (Can. S. Ct. 2006).

<sup>31</sup> *Id.*

and the fifth was no longer competent to testify.<sup>32</sup> The Supreme Court upheld the acquittal of the defendant on the basis that the hearsay statements provided by the complainants could not safely be received in evidence.<sup>33</sup>

Even when prosecution is a realistic possibility, some question the utility of criminal law as a response to elder abuse. While the criminal law may be a powerful weapon against abuse, it is often too blunt an instrument to be effective.<sup>34</sup> The criminal law does not always address the complexities of intimate relationships. Given that in ninety percent of elder abuse cases, the perpetrators are spouses or relatives, a victim may avoid initiating the prosecution because of fear of rejection by other family members, loss of care, or being left alone. The intimacy of the abuser-victim relationship and the accommodation of abusive behaviour over time may obscure the criminality of the conduct, and physical retaliation against a complaining elder is a real possibility. Similar problems beset the pursuit of civil remedies. Often, the elderly are hampered in their access to the legal system because they do not recognize their rights, or are unable to navigate the impediments the legal culture has placed between them and justice.

What then can the law do to remedy elder abuse? First, it can attempt to minimize the barriers to criminal and civil prosecution, as was done a few decades ago in the case of child abuse. Changes in the law and education, which I will speak of in greater detail in a moment, may alleviate barriers. Second, lawyers and jurists can work with others to inform the public about the prevalence and illegality of elder abuse. Our society once swept child abuse under the rug. It must not permit the same thing to happen in the case of elder abuse. The abuse of a vulnerable person is a moral and legal wrong, whatever the age of the victim.

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Manitoba Law Reform Commn., *Adult Protection and Elder Abuse* 14–15, <http://www.gov.mb.ca/justice/mlrc/reports/103.pdf> (Dec. 1999).

## B. Independence and Autonomy

The third need of a growing numbers of older people is connected with the values of independence and autonomy. Unfortunately, dependency, a common reality for the elderly, is closely linked with a loss of dignity in the dependent person. As one scholar noted,

[I]imited mobility or privacy can contribute to undermine one's life experience. Perhaps more importantly, the inability to make decisions about oneself . . . can give rise to a feeling of alienation. There is also a sense that dependence may entail a relationship of submission to others, which may in itself involve humiliation.<sup>35</sup>

Much of the same can be said for the impact that an inability to fully participate in society may have on an elderly person. Dignity entails being able to live a full social life, in which one can interact with others. Unfortunately, many elderly persons see their ability to participate limited or even denied. Transportation—often key to social interaction—may be a problem. Older people may no longer be able to drive, and other means of transportation may not always be available. As one scholar writes, this “can make the difference between an older person being able to make it to a job or visit and care for a sick relative, or tutor a child.”<sup>36</sup> Exclusion, marginalization, and solitude can result.

The reality is that dignity is highly dependent on being able to maintain autonomy, meaningful social interactions, and

<sup>35</sup> Mégret et al., *supra* n. 6, at 20–21.

<sup>36</sup> Sarah Moses, *A Just Society for the Elderly: The Importance of Justice as Participation*, 21 Notre Dame J.L. Ethics & Pub. Pol'y 335, 353 (2007).

participation in decision-making processes. It is through these actions that our sense of relevance in the world is maintained.

The front line on these issues lies with government and various professionals. Yet the law has a role to play. Lawyers and courts may be called upon to pursue claims that the needs of older people are not being met, in breach of legislation or the constitution.<sup>37</sup> Elder cases increasingly form an increasingly high component of disability law cases. In the *Eldridge*<sup>38</sup> case, for example, the Supreme Court of Canada held that a province must provide the services of an interpreter for the deaf so that they can access medical in the same way as non-disabled people.<sup>39</sup> While the plaintiffs in *Eldridge* were young, the same principle may apply to people who, because of age-related disabilities, find themselves unable to fully access the medical system. Or take the example of a British judge who criticized placing elderly in mixed-sex hospital wards.<sup>40</sup> While being cared for in a mixed-gender ward may appear insignificant for the younger generation, the modesty of elderly patients, and the impact of its denial on their dignity are real.

Let me summarize. Different stages of life are characterized by different needs. The last stage of life is no exception. Among the needs that are critical at this stage are the need to be protected from discrimination, the need for security and protection from abuse, and the need for appropriate care and the need for autonomy. These are critical aspects of an elderly person's ability to maintain his or her dignity. The law plays a vital role in meeting these needs. This brings me to the next question: how can the legal profession ensure the law meets this challenge?

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<sup>37</sup> See *Chaoulli v. Quebec (Attorney General)*, 1 S.C.R. 791 (Can. S. Ct. 2005) (available at <http://www.escri-net.org/docs/i/399162>).

<sup>38</sup> *Eldridge v. British Columbia (Attorney General)*, 3 S.C.R. 624 (Can. S. Ct. 1997).

<sup>39</sup> *Id.*

<sup>40</sup> Rebecca Smith, UK: *Judge Condemns Mixed-Sex Hospital Wards*, <http://www.telegraph.co.uk/news/uknews/1577357/Judge-condemns-mixed-sex-wards.html> (Feb. 2, 2008).

### III. HOW CAN THE LEGAL PROFESSION MEET THE CHALLENGE OF MEETING THE NEEDS OF THE ELDERLY?

More and more, as they respond to the needs that I have outlined, lawyers will find themselves practising what is referred to as “Elder Law.” But there will also be many more lawyers who will serve the needs of elders without realizing they are practising Elder Law. Professor Lawrence Frolik, one of the founders of the “Elder Law” practice, relates an illuminating anecdote: He was asked by a lawyer once for a definition of “Elder Law” and he explained what he thought it was, at which point the lawyer replied in obvious surprise, “Oh, that’s what I do.”<sup>41</sup> Whether or not you realize you are practicing Elder Law, the legal profession plays an important role in our response to the special challenges presented by our rapidly aging population. We should think of Elder Law as a problem of access to justice. Without access to justice, the dignity that is the right of every person will be denied to the older people in our society. We can promote access to justice for the elderly by doing three things: (A) specialization to improve legal services to the elderly; (B) legal reform through protective legislation and impact litigation; and (C) education and social sensitization.

A. Specialization to Improve Legal Services to the Elderly

The first thing the profession can do, in my opinion, is to recognize the importance of Elder Law and the unique challenges it poses to those who practice it. These challenges suggest that

<sup>41</sup> Paul A. Sturgul, *The Rise of the Elderly*, 25 GPSolo 10, 12 (2008).

there may be merit in recognizing Elder Law as a specialty worthy of special study and support.

In this country, the notion of Elder Law has firmly taken root since the introduction in 1965 of The Older Americans Act.<sup>42</sup> It is currently one of the fastest-growing areas of law. Most state bar associations now include Elder Law sections or committees, which are engaged in a variety of tasks including information-sharing and support for members, education and training of the legal community, consumer education and advocacy. Lawyers can now be certified in Elder Law through the National Elder Law Foundation. Since 1985, the Association of American Law Schools has included a section on aging and the law. As a result, numerous law schools presently offer classes focusing on Elder Law, public benefits law, or some other topic related to aging and the law. And recognizing the need for scholarly analysis in this field, the University of Illinois College of Law created *The Elder Law Journal* in 1983. Clearly, Elder Law is a mature practice area in this country.

In Canada, the term "Elder Law" may not be as familiar as it is in the United States, but that is rapidly changing, thanks to the efforts of organizations such as the Advocacy Centre for the Elderly, the Canadian Centre for Elder Law Studies, and the Canadian Bar Association, which recognized Elder Law as a new practice area and created, in 2002, the national Elder Law section. More recently, in 2008, the Canadian Centre for Elder Law released the first issue of the *Canadian Journal of Elder Law*.

### *1. Appropriate Counselling Advice*

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<sup>42</sup> *The Public Health and Welfare, Programs for Older Americans*, 12 U.S.C. § 3001 (1965). The Act led to the creation of a network of legal services for older adults to monitor the actions of the state, local and federal agencies as they administered programs designed to benefit older adults. As a result, the American Elder Law literature has tended to focus not on relationships, but more on older adults as recipients of program benefits.

As you all know, the practice of Elder Law is demanding. Elder law lawyers are expected to bring to their practice more than just legal expertise. In order to properly serve their clients' interests, the lawyers must understand how to counsel older people, understand the aging process, and be familiar with the network of aging services available to meet their clients' needs. Above all, they must be capable of dealing with the special legal and ethical issues that may arise in the course of the representation of older persons.

Appropriate counseling means understanding and effective communication. Different areas of the practice of law require different communication techniques. It means talking the talk of the client, whoever he or she may be. The older person who has never had much to do with the law may see it as threatening and foreign. This can interfere with the flow of information and the ability of the client to tell her story, state her needs, and understand advice. This leads us to a second challenge in Elder Law—dealing with—conflicts and getting instructions.

## 2. Conflict and Getting Instructions

Take the all too familiar problem of family intervention. A lawyer owes a duty of complete loyalty to her client, to the exclusion of all others. This duty may be challenged when family members become involved in the legal concerns of the older person. The lawyer must avoid taking instructions from, or giving advice to, these family members, and ensure that her client's intentions are truly her own. This may require meeting with the client alone and probing into her instructions, especially if there is any indication that the client may be in a vulnerable position or open to undue influence. That is not to say the family should never be involved. But if so, the lawyer must be satisfied that what the

family member says his mother or father wants is truly what they desire.

### *3. Dealing with Limited Mental Capacity*

A third and related issue concerns the client's mental capacity. Cognitive decline affects many seniors; often it is a slow and gradual process. In the early stages, people can successfully manage their affairs and instruct a lawyer. But as the decline progresses, clients may begin to lose their reasoning skills. Eventually, they may reach a stage where they are no longer competent to give instructions. Lawyers practising Elder Law need to be particularly aware of the red flags that may signal a lack of competence, such as relatives insisting on being present to clarify your client's wishes, contradictory statements from one visit to the next, and requests for things that are inappropriate or impossible.

### *4. Flexible Practice Models*

In addition to dealing with the special problems inherent in Elder Law, lawyers in this practice may find it necessary to adapt the way they practice to the reality of their clients lives. For example, hospital calls, currently viewed by many lawyers as exceptional, may become an integral part of Elder Law practice. To take another example, Elder Law lawyers may find it necessary to coordinate their work with that of other professionals to a degree uncommon in other areas of practice, working closely with doctors, social workers, and care providers to help their clients live as well and as independently as possible, while maintaining their dignity.

### *5. Summary*

The four special challenges I have mentioned of practising Elder Law argue in favour of specialized study and practice. Against this, however, the Law Commission of Canada in 1999

worried that a separate area of law and legal practice for the elderly may inadvertently reinforce the pernicious belief that older persons are less capable, less deserving of respect, and less needful of independence and autonomy.<sup>43</sup> It seems to me that if Elder Law is founded on the inclusionary value of respect for the full humanity of those with special needs, it can have the opposite effect. Elder Law specialization will no more spread the belief that elders are less capable than corporate law specialization has spread the belief that capitalists are less capable. It can help reverse ageist stereotypes rather than perpetuating them, while better meeting the special needs of the aging.<sup>44</sup>

## B.      Legal Reform: Legislation and Impact Litigation

The second thing lawyers can do to ensure that the profession meets the needs of the elderly is to promote and assist in drafting legislation to palliate some of the disadvantages that may come the way of the aging and aged. As one scholar noted, "Each of this country's civil rights movements has had a strong legal component, including a significant emphasis on impact litigation i.e., litigation brought for the purpose of establishing important legal precedents or otherwise advancing systemic reforms."<sup>45</sup> Many threats to the dignity of the elderly—from impediments to transport, to barriers to equal access, to social and medical services—may be amenable to alleviation through legislation and regulation.

As already mentioned, several jurisdictions in Canada have already enacted legislation to protect older adults who are victims

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<sup>43</sup> Law Commn. of Can., *Does Age Matter? Law and Relationships between Generations*, <http://publications.gc.ca/collections/Collection/JL2-23-2003E.pdf> 41 (Feb. 2004).

<sup>44</sup> Marie Beaulieu & Charmaine Spencer, *Older Adult's Personal Relationships and the Law in Canada: Legal, Psycho-social and Ethical Aspects* 14 (Law Commn. of Can. 1999).

<sup>45</sup> Nina A. Kohn, *The Lawyer's Role in Fostering an Elder Rights Movement*, 37 Wm. Mitchell L. Rev. 49, 62 (2011).

of physical or sexual abuse, mental cruelty or inadequate care or attention, and to better coordinate legal, health, and social service interventions. Detractors call this a “child welfare model” and complain that it fails to respect the independence of older adults and will inevitably infantilise them. While this is a danger, again, I am not so pessimistic. We have a strong record of assisting people when they need special assistance, while maintaining their independence and human dignity to the greatest extent possible.

### C. Education and Social Sensitization

A third way in which the legal profession can ensure that it is meeting the needs of the senior sector of the population is by educating the public and the elderly population itself, on the rights of the elderly and the appropriateness of seeking legal redress for the wrongs that have been done to them.

I earlier spoke of the culture of youth that dominates our society and of the social stereotype of older people as less worthy than their younger peers. Lawyers and judges, in their work and in their dealings with the public, should take care that their acts and words send the message that all human beings are inherently worthy and possess human dignity, the elderly no less so than others.

Educating elders in their rights is also important. Many baby boomers now entering senior ranks may be fully attuned to the fact that they possess legal rights, and fully aware of how to assert those rights. However, many older seniors are the products of an era that pre-dated individual rights and freedoms. The generation that lived through the Great Depression and the Second World War grew up with an ethos of self-sufficiency and personal responsibility.<sup>46</sup> Many elders have led their lives without contemplating the notion that they may have personal rights that may be asserted and protected by the legal system. Indeed, they

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<sup>46</sup> Beaulieu, *supra* n. 44, at 22.

may view the need to have recourse to the law as a mark of personal failure.<sup>47</sup> Yet they should not for that reason, be denied protection of the law.

A factor impeding access to justice for the elderly is that they too often see the law as foreign and inaccessible, rather than as something that can help them. So they rarely go to lawyers.

The answer lies in public information and education—information that sends the message that the law is there to assist and protect our society’s senior citizens, information that fosters self-determination and autonomous decision-making, and helps with the ability to resist coercion.

A number of educational initiatives have been introduced at the community, state and federal levels. In Canada, the Advocacy Centre for the Elderly, a legal clinic funded by Legal Aid Ontario provides a range of legal services, including telephone advice and information, representation before courts and tribunals, public legal education services, community development projects, and law reform activities to low-income seniors. The Canadian Centre for Elder Law Studies provides important research, law reform, and education relating to legal issues of interest to older adults. The Canadian Bar Association Elder Law Section offers an opportunity to engage in informed dialogue on case law and legislation affecting this emerging area of practice. Finally, the idea emerging in British Columbia of “hubs,” where citizens can come to learn where they can go to solve their particular legal problems, may well prove to be of great assistance to the elderly.

The same is true in the United States. The National Center for State Courts serves as an online clearinghouse of information

<sup>47</sup> *Id.* at 29.

on aging issues and provides an online community to exchange information. The National Center on Elder Abuse, among its other efforts, provides funding to assist communities in developing multidisciplinary approaches to address elder abuse. The National Committee for the Prevention of Elder Abuse provides research, education, and advocacy programs aimed at protecting the safety, security, and dignity of America's elder population. The Clearinghouse on Abuse and Neglect of the Elderly allows for computerized access to a collection of elder abuse materials and resources. Finally, the American Bar Association's Commission on Law and Aging is involved in Elder Law research, policy development, technical assistance, advocacy, education, and training.

I return to the question I posed earlier: how will the legal profession meet the challenge of promoting the dignity of the elder? The answer lies in (1) professionalizing and deepening the study and practice of Elder Law; (2) promoting legal reform; and (3) education and social sensitization to reduce the barriers that impede understanding and access by the elderly to the legal system. If the profession does these things, it will go a long way to ensuring that it meets the legal needs of our aging population and that the rights of this important segment of our population are fully protected.

#### *IV. CONCLUSION*

We find ourselves in a society where people are living longer and that is one of human civilization's greatest accomplishments. However, a rapidly growing elderly population changes the nature of our society. The impact of the aging baby-boomer generation will be profound, with major consequences and implications for all facets of life.

What should remain steadfast, however, is our commitment to the principle that every person, regardless of age, is entitled to live in dignity. This means being able to live in security, to be free

from discrimination and abuse, and to be entitled to make one's own choices to the maximum degree possible. In achieving these goals, we will need the expertise of economists, social workers, health care professionals, and many others, but the law, and the legal profession, also have an important role to play.

We can build a profession that is sensitive to needs of older people. We can pursue legal reform through legislation and litigation. And we can educate and sensitize the public and seniors themselves in the rights and needs of older demographic.

In embracing this task, let us take courage from the words of Betty Friedan who, having helped to spur the women's revolution turned next to the situation of elders. Friedman wrote, "Ageing is not 'lost youth' but a new stage of opportunity and strength."<sup>48</sup> We, in the law, can help make it so.

<sup>48</sup> Betty Friedan, *How to Live Longer, Better, Wiser*, Parade Mag. 4 (Mar. 20, 1994).

## RAWLSIAN SUPPORT OF ELDER LAW

CAITLEIN JAYNE JAMMO \*

### I. INTRODUCTION

John Rawls's *A Theory of Justice* contemplates a system of justice that is created by people in the original position.<sup>1</sup> Behind the veil of ignorance, people are not aware of any of their own personal characteristics or beliefs, or the moral or political state of their society.<sup>2</sup> Since they have had all bias and personal interest removed, these original people are able to decide on the justice system and make unbiased decisions that do not benefit people who have morally irrelevant characteristics.<sup>3</sup>

A person's race,<sup>4</sup> gender,<sup>5</sup> or physical limitations<sup>6</sup> have been found to be examples of morally irrelevant characteristics. When behind the veil, the original people will be unaware of their race, gender, or disability, so they will not be biased towards a certain characteristics and will create a justice system in which certain races, genders, or types of disabilities that people have are all considered and treated equally.<sup>7</sup> In addition, because people with disabilities have been found to be disadvantaged by their

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<sup>1</sup> John Rawls, *A Theory of Justice* 146–147 (Belknap 1971); Michael D. Weiss, *A Jurisprudence of Blindness: Rawls' Justice and Legal Theory*, 42 Drake L. Rev. 565, 570 (1993).

<sup>2</sup> Rawls, *supra* n. 1, at 146–147; Weiss, *supra* n. 1, at 570.

<sup>3</sup> Rawls, *supra* n. 1, at 146–147; Weiss, *supra* n. 1, at 570.

<sup>4</sup> Marion Smiley, *Democratic Citizenship v. Patriarchy: A Feminist Perspective on Rawls*, 72 Fordham L. Rev. 1537, 1602 (2004).

<sup>5</sup> Tommie Shelby, *Race and Social Justice: Rawlsian Considerations*, 72 Fordham L. Rev. 1697, 1697–1698 (2004).

<sup>6</sup> W. Robert Gray, *The Essential-Functions Limitation on the Civil Rights of People with Disabilities and John Rawls's Concept of Social Justice*, 22 N.M. L. Rev. 295, 313 (1992).

<sup>7</sup> Smiley, *supra* n. 4, at 1602; Shelby, *supra* n. 6, at 1697–1698; Gray, *supra* n. 6, at 313.

limitations, Rawls's Difference Principle<sup>8</sup> supports giving support (an inequality) that protects those people and is to the advantage of those who are disadvantaged (people with disabilities in that instance).<sup>9</sup>

These analyses, as applied to race, gender, and disability, apply to the elderly and the legal area of Elder Law as well because Rawls theory supports the laws relating to elders in the same manner that it supports law relating to race, gender, and disability. Age should be considered a morally irrelevant characteristic, and therefore, original people should not know what their age is when they are no longer beyond the veil. Then, original people would ensure that the system is equal to all, regardless of age.

In addition, since elders are faced with hardships including poverty and vulnerability to abuse, they should also be considered a disadvantaged group under Rawls' theory. Then, similar to the Rawlsian analysis of legislation relating to people with disabilities, the area of Elder Law, which protects the basic rights and liberties of elders, is supported by the Difference Principle. As a result, Rawls's *A Theory of Justice* supports the creation and practice of the area of Elder Law.

## II. GENERAL BACKGROUND OF RAWLS'S *A THEORY OF JUSTICE*

Rawls's *A Theory of Justice* has become so essential to American philosophers and in its field that it has reached a point whether other philosophers must either use this theory as support

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<sup>8</sup> The Difference Principle has been defined as, "Social and economic inequalities are to be arranged so that they are to be of the greatest benefit of the least-advantaged members of society." Rawls, *supra* n. 1, at 47.

<sup>9</sup> Gray, *supra* n. 6, at 313.

or explain why they do not.<sup>10</sup> The basic tenet of *A Theory of Justice* is “justice as fairness.”<sup>11</sup> *A Theory of Justice* is about determining the “basic structure” of society, which is defined as, “the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.”<sup>12</sup> Rawls makes it clear that the political, social, and economic aspects of a society are exceedingly important because when those looked at together, those three aspects of a society determine the rights and duties of men, their ability to succeed, and their expectations and hopes of what they can become.<sup>13</sup> The political, social, and economic aspects of a society are upon what Rawls focuses his theory because they are so essential to a society and are “present from the start.”<sup>14</sup>

Rawls’s *A Theory of Justice* focuses on equality as the central aspect of social justice.<sup>15</sup> Rawls asserts that any system of justice must conform and fulfill five constraints: generality, universality, publicity, ordering, and finality.<sup>16</sup> Within these constraints there are two main principles of Rawls’s *A Theory of Justice*.<sup>17</sup> First, each person should be granted basic rights and liberties that are equal to the basic rights and liberties granted to everyone else.<sup>18</sup> Those rights and liberties should fit within the same system for everyone, and “in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.”<sup>19</sup> Second, any social inequalities that do exist must fulfill two conditions: any advantages that exist for particular members are shared by everyone in society, and they must only work to the

<sup>10</sup> *Id.* at 297; Robert Nozick, *Anarchy, State and Utopia* 183 (1974).

<sup>11</sup> John Rawls, *A Theory of Justice* xi (rev. ed., Harvard U. Press 2003).

<sup>12</sup> Rawls, *supra* n. 1, at 7.

<sup>13</sup> *Id.* at 7; Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 *Fordham L. Rev.* 1537, 1540 (2003–2004).

<sup>14</sup> Rawls, *supra* n. 1, at 7; Okin, *supra* n. 13, at 1540.

<sup>15</sup> Gray, *supra* n. 6, at 297.

<sup>16</sup> Rawls, *supra* n. 1, at 112–118; Shelby, *supra* n. 6, at 1703.

<sup>17</sup> Mark S. Stein, *Rawls on Redistribution to the Disabled*, 6 *Geo. Mason L. Rev.* 997, 999 (1997–1998).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

benefit of those members of society who would be considered the most disadvantaged.<sup>20</sup> Rawls describes people who have the least advantages as those with the least amount of primary goods.<sup>21</sup> Primary goods are defined as

- a. “basic rights and liberties”
- b. freedom of movement and free choice of occupations against a background of diverse opportunities
- c. powers and prerogatives of offices and positions of responsibility in the political and economic institutions of the basic structure
- d. income and wealth
- e. the social bases of self-respect.<sup>22</sup>

According to *A Theory of Justice*, Rawls sets a just system of principles based upon what people behind the veil of ignorance would decide.<sup>23</sup> Rawls describes the original people in the initial position as “continuous persons (family heads, or genetic lines)” determining the “basic structure of society;” deciding between a list of alternatives at any age during which they have the ability to reason; confined by the conditions of generality, universality, publicity, ordering, and finality; behind the veil of ignorance; motivated by not interest in the outcome; “taking effective means to ends with unified expectations and objective interpretation of probability”; agreeing unanimously; assuming strict compliance; and under the confines of general egoism.<sup>24</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> John Rawls, *Political Liberalism* 181 (Columbia U. Press 1993). Stein, *supra* n. 17, at 999.

<sup>23</sup> Weiss, *supra* n. 1, at 569.

<sup>24</sup> *Id.* at 570.

Going behind the veil is described as having all of one's personal beliefs and personal characteristics stripped away and being in the initial position.<sup>25</sup> Original people, people who are behind the veil of ignorance, are not aware of their own personal characteristics, like race, gender, physical abilities, etc.<sup>26</sup> People in the original position are also not aware of their own personal beliefs or the overall values of their society.<sup>27</sup> This allows people in the initial position to set up a justice system that is fair to all members of that society.<sup>28</sup> Original people are not aware of their personal beliefs because people behind the veil are unaware of their own characteristics and, therefore, would not make decisions that could disadvantage them upon entering back into society.<sup>29</sup>

Rawls's focus on "justice as fairness" stems from a contractarian way to choosing the general principles of a justice system.<sup>30</sup> These principles are based on what a free and rational person would pick when in the initial position in which everyone is equal.<sup>31</sup> In the initial position, people are unaware of the inequalities that are imposed by society because those inequalities are not justified by merit.<sup>32</sup> "Accidents of natural endowment," for instance being particularly good at athletics, are considered morally arbitrary by Rawls.<sup>33</sup> Rawls's concept of justice as fairness ignores these accidents of natural endowments and other characteristics that resulted in people being treated different by society because those personal qualities have no rational relation to the societal inequalities that they create.<sup>34</sup>

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<sup>25</sup> *Id.* at 569.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 570.

<sup>28</sup> *Id.* at 569–570.

<sup>29</sup> *Id.*

<sup>30</sup> Gray, *supra* n. 6, at 309.

<sup>31</sup> *Id.*; Nozick, *supra* n. 10, at 183.

<sup>32</sup> Gray, *supra* n. 6, at 309; Nozick, *supra* n. 10, at 183.

<sup>33</sup> Stein, *supra* n. 17, at 998.

<sup>34</sup> Gray, *supra* n. 6, at 309–310; Nozick, *supra* n. 10, at 183.

Rawls argues in *A Theory of Justice* that there are two characteristics to all moral persons: they completely understand their primary good<sup>35</sup> and express this by having a “rational plan of life;” and they have the ability to have and over time gain an understanding of a system of justice and have the urge to comply and act upon the principles of that system of justice to a certain extent.<sup>36</sup>

Rawls discussed how obtaining and maintaining this system of justice is very difficult.<sup>37</sup> He was concerned that when people in the original position move beyond the veil, they will find it difficult to continue to comply with the principles they chose when they were behind the veil.<sup>38</sup> To combat this concern, Rawls put a lot of focus on the “sense of justice” in people that are part of society, with the idea that this would promote compliance with the principles of justice chosen when behind the veil.<sup>39</sup> In line with this thought process, while generally unmentioned by Rawls, family was discussed and their institutions were assumed to be just.<sup>40</sup>

### III. SPECIFIC EXAMPLES OF RAWLSIAN SUPPORT OF LAWS HELPING DISADVANTAGED GROUPS

#### A. Race as Determining a Disadvantaged Group

In order to simplify his theory, Rawls makes the basic assumption that there is full compliance rather than “partial compliance” with his theory of justice.<sup>41</sup> Therefore, Rawls’s

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<sup>35</sup> Rawls defines primary goods as defined as “things which a rational man wants whatever else he wants.” Rawls, *supra* n. 1, at 92.

<sup>36</sup> *Id.*

<sup>37</sup> Okin, *supra* n. 13, at 1520.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Rawls, *supra* n. 1, at 75, 490; Okin, *supra* n. 13, at 1520.

<sup>41</sup> Anita L. Allen, *Race, Face, and Rawls*, 72 Fordham L. Rev. 1677, 1695 (2003); Shelby, *supra* n. 6, at 1697–1698.

theory cannot be extended to some of the more difficult subjects within racial injustice such as reparations for past injuries and the best way to fix racial discrimination that continues to exist within areas like employment and housing.<sup>42</sup> Rawls does not explicitly comment about racism and the disadvantages based on race.<sup>43</sup> However, in spite of this, there is support and there are answers to discussions of racial justice that can be found in Rawls's theory, and his theory has been deemed "indispensable" for making those determinations.<sup>44</sup> Some have stated that while he may not have specifically stated his views on race, "it is pretty clear from reading Rawls that he did not want race to matter in just societies."<sup>45</sup>

Behind the veil of ignorance, the people in the original position are not aware of their race.<sup>46</sup> In the original position, people do not know what race they are, whether that race is advantaged or disadvantaged, or whether those disadvantages or advantages are based on social circumstances, actual traits of the group, or some combination of both.<sup>47</sup> In addition, those in the original position do not know anything about the status of their society including the "political situation" and "the level of civilization and culture it has been able to achieve."<sup>48</sup> This includes the amount of racial discrimination, if any, the racial demographics, and the social status or advantage that relates to different races in their society.<sup>49</sup> On an individual level, original people do not know what their own value system is, how they view what is right and what is wrong, what their racial attitudes are in terms of their own race or to the race of others, or whether loyalty or attraction to others in their own race is involved in their moral spectrum.<sup>50</sup>

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<sup>42</sup> Shelby, *supra* n. 5, at 1697–1698.

<sup>43</sup> *Id.* at 1698.

<sup>44</sup> *Id.*

<sup>45</sup> Allen, *supra* n. 41, at 1695.

<sup>46</sup> *Id.* at 1699.

<sup>47</sup> *Id.* at 1700.

<sup>48</sup> Rawls, *supra* n. 1, at 118; *see also* Shelby, *supra* n. 5, at 1700 (add an explanatory parenthetical due to the signal).

<sup>49</sup> Shelby, *supra* n. 5, at 1700.

<sup>50</sup> *Id.*

Because of this, people in the original position behind the veil would not choose any principle that requires racial injustice.<sup>51</sup> Original people will have no reason to choose unfair principles that advantage one race over another because they will be unaware of their own race and, therefore, the social position that would entail in a racially unjust society.<sup>52</sup> No person in the original position would create a system of principles that are dependent upon race because someone in the original position would not be aware if that would be to his or her advantage or disadvantage.<sup>53</sup>

While not extremely vocal on racial injustice, Rawls clearly stated,

Inevitable, then, racial and sexual discrimination presupposes that some hold a favored place in the social system which they are willing to exploit to their advantage. From the standpoint of persons similarly situated in an initial situation which is fair, the principles of explicit racist doctrine are not only unjust. They are irrational. For this reason we could say that they are not moral conceptions at all, but simply means of suppression. They have not place on a reasonable list of traditional conceptions of justice.<sup>54</sup>

From Rawls' Perspective, racial discrimination, including denying equal citizenship in a morally arbitrary way, is "an insult to human dignity."<sup>55</sup> In addition, racial discrimination goes beyond disadvantage in a manner that affects a socioeconomic

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<sup>51</sup> *Id.* Rawls said that people in the original position would not "put forward the principle that basic rights should depend on the color of one's skin or the texture of one's hair. No one can tell whether such principles would be to his advantage." Rawls, *supra* n. 1, at 118.

<sup>52</sup> Shelby, *supra* n. 5, at 1700.

<sup>53</sup> *Id.*; Rawls, *supra* n. 1, at 129.

<sup>54</sup> Rawls, *supra* n. 1, at 129–130.

<sup>55</sup> Shelby, *supra* n. 5, at 1709.

status but also in other ways, including a loss of a sense of self-worth.<sup>56</sup>

The principle of fair equality has been used to show Rawlsian support for the condemnation of racial inequality.<sup>57</sup> Rawls defines this principle as

[T]hose who are at the same level of [natural] talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system. In all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed. The expectations of those with the same abilities and aspirations should not be affected by their social class.<sup>58</sup>

The fact that the life prospects and socioeconomic status of people of certain races are diminished arbitrarily based solely upon race is addressed by the fair equality of opportunity principle, which clearly condemns racial inequality that is created by society's history of racism.<sup>59</sup> If the principle of racial equality was accepted broadly and universally, this may ease the tensions and hurt that are brought on by resentment for previous racial injustice.<sup>60</sup> Some argue that this may ease tensions even further by leading to people that are of a disadvantaged race to reconsider claims for reparations for those previous racial injustices.<sup>61</sup>

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<sup>56</sup> *Id.* (citing Bernard R. Boxill, *Blacks and Social Justice* 186–204 (rev. ed., Rowman & Littlefield Pub. 1992)); see generally Michele M. Moody-Adams, *Race, Class, and the Social Construction of Self-Respect*, 24 *Phil. F.* 251 (1992–1993).

<sup>57</sup> Shelby, *supra* n. 5, at 1712.

<sup>58</sup> Rawls, *supra* n. 1, at 63.

<sup>59</sup> Shelby, *supra* n. 5, at 1712.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

A system of justice that is based on the fair quality of opportunity for all people, no matter the race, would alleviate the social and economic burdens that society places on members of disadvantaged racial groups due to society's history of racial injustice.<sup>62</sup> While there would be no way to determine whether one's socioeconomic status is affected by previous racial injustice, under this principle, members of disadvantaged races would know that their life and socioeconomic status prospects would be the exact same regardless of society's past racial discrimination.<sup>63</sup> Race would have no bearing on one's prospects, and people of disadvantaged races would have the same prospects as those who are "similarly gifted and motivated" and members of advantaged races and born into higher social positions.<sup>64</sup>

Rawls does not endorse formal equality, but rather he accepts the class system that is in place.<sup>65</sup> It appears, however, to allow one's prospects of improving one's class to be unaffected by race.<sup>66</sup> Rawls hopes for the end of racial discrimination and poverty and argues that a society should be one where each has a fair chance to realize his conception of the good, to carry out an autonomously arrives at rational plan of life, without being inhibited in this pursuit by one's race or class origin."<sup>67</sup>

Society no longer finds unconcealed expressions of racism to be acceptable, so racism is not as noticeable and previously, and thus, it is harder to detect it.<sup>68</sup> However, subversive racism continues to be extremely injurious to the victims of racial discrimination.<sup>69</sup> Rawls's theory supports racial equality through

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<sup>62</sup> *Id.* at 1711–1712.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1712.

<sup>69</sup> *Id.*

promoting that the life prospects of citizens not be based upon morally arbitrary concepts, and being part of a race, whether advantaged or disadvantaged, is morally irrelevant.<sup>70</sup>

### B. Gender as Determining a Disadvantaged Group

Rawls's *A Theory of Justice* has been also found to be supportive of gender equality.<sup>71</sup> Original people behind the veil of ignorance do not know whether they are in relationships, mothers, or caretakers.<sup>72</sup> This means that the choices made in the original position setting up a justice system find that gender and relationships to be morally irrelevant.<sup>73</sup> Rather, the decisions made by the original people will be based on universality and rationality, not looking to gender at all.<sup>74</sup>

Original people who are behind the veil, women or men, will be detached from their own moral and political values in developing these general principles of justice.<sup>75</sup> As a result, not knowing one's gender, this will result in challenging patriarchy in both the private and public aspects of life.<sup>76</sup>

Many feminist critics of Rawls's theory argue that people in the original position will force women to make decisions that are in direct conflict with the high value placed on care and relationships.<sup>77</sup> However, the response to this is that everyone behind the veil will similarly be unaware of their own particular moral and political person, and this is necessary in order to create these principles of justice.<sup>78</sup> Rawls makes this concept clear when defending the Original Position:

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<sup>70</sup> *Id.* at 1713.

<sup>71</sup> Smiley, *supra* n. 4, at 1602.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1604.

<sup>76</sup> *Id.* at 1600.

<sup>77</sup> *Id.* at 1602.

<sup>78</sup> *Id.* at 1604–1605.

As a device of representation its abstractness invites misunderstanding. In particular, the description of the parties may seem to presuppose a particular metaphysical conception of the person; for example, that the essential nature of persons is independent of and prior to their contingent attributes, including their final ends and attachments, and indeed their conception of the good and character as a whole.

...I believe this to be an illusion cause by not seeing the original position as a device of representation... It is important to distinguish three points of view: that of the parties in the original position, that of citizens in a well-ordered society, and finally that of ourselves—of you and me who are elaborating justice as fairness and examining it as a political conception of justice.<sup>79</sup>

While some critics have been concerned that women would not be able to separate themselves and violate their own personal moral beliefs when in the original position, this does not take into consideration that any person may be able to stand back look hypothetically at the decisions to be made in the original position regardless of their moral and political life.<sup>80</sup> Because people behind the veil are unaware of personal characteristics, like gender, the system of justice created by those in the original position would not have gender inequalities.<sup>81</sup>

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<sup>79</sup> *Id.* at 1605.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1624.

## C. Disabled as a Disadvantaged Group

Rawls's theory has been interpreted as categorizing people with disabilities as those who have lost the "natural lottery."<sup>82</sup> In examining the two tenet principles of the theory, one looks at particular members of the group and evaluates the effects of the chosen principle of justice from their perspective.<sup>83</sup> Applying the principle of equal liberty to the representatives of these groups includes determining whether the distribution of income and wealth is equal among the different groups of people.<sup>84</sup> In doing so in light of people with disabilities, it is clear that there is an uneven distribution of income and wealth to the disadvantage of people with disabilities due to how they have been affected by the natural lottery.<sup>85</sup>

People with disabilities fall into Rawls's category of disadvantaged because of the primary goods they lack.<sup>86</sup> First, people with disabilities have lower legal status, and case law supports that they only get a rational basis level of scrutiny.<sup>87</sup> In addition, people with disabilities also have a lower socio-economic status.<sup>88</sup> They are historically deprived and in need, which was viewed as a result of the limitations, physical or mental, of their disability.<sup>89</sup> Disabled persons are faced with some of the greatest

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<sup>82</sup> Gray, *supra* n. 6, at 313.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 314–315.

<sup>87</sup> *Id.*; see e.g. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding that equal protection issues concerning people with disabilities are to be examined under the rational basis standard, the lowest level of scrutiny because they have less protection than any other protected class).

<sup>88</sup> Gray, *supra* n. 6, at 313 (stating, "This range of naturally acquired physical and mental traits has caused people with disabilities to have diminished civil rights and lower socio-economic status"). Studies show that there are "significant disparities" between the incomes of those with and those without disabilities. Am. Psychol. Assn., *Disability & Socioeconomic Status*, <http://www.apa.org/pi/ses/resources/publications/factsheet-disability.aspx> (stating that in 2006, those with no disability had a median income of \$28,000, compared to those with a disability had a median income of \$17,000).

<sup>89</sup> H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 25 (1990).

hardships including unemployment, poverty, emotional abuse, and physical deprivation.<sup>90</sup>

Support for this view is seen in legislative history, such as the findings that “people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.”<sup>91</sup> Therefore, not only in looking at their physical or mental limitations, but also because of the socioeconomic hardships that face people with disabilities, this group of people would be classified under Rawls’s definition of disadvantaged people, and thus, it would then be appropriate to examine their plight under Rawls’s Difference Principle.<sup>92</sup>

First, the Difference Principle has been analyzed through the lens of a system of natural liberty, in which all careers are equally open to all. In this system, careers in society conform to the inequalities that Rawls argues are morally arbitrary.<sup>93</sup> When there is no substantive assistance to ensure that there is complete equity of opportunity, only formal equality is served for there is equality of opportunity in theory but not in actual practice.<sup>94</sup> This has been seen in case law, such as *Alexander v. Choate*,<sup>95</sup> which made accommodations for people with disabilities which were similar to affirmative action.<sup>96</sup> The benefits of this were to allow people with disabilities to be a part of a medical program in the same manner as people without disabilities without giving

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<sup>90</sup> *Hearings on D. 933, to Establish a Clear and Comprehensive Prohibitions of Discrimination on the Basis of Disability, Before the Subcommittee on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 38 (1989) (statement of Arlene B. Mayerson, Disabilities Rights Education and Defense Fund).

<sup>91</sup> 42 U.S.C.A. § 12101(a)(6) (West 2012); Gray, *supra* n. 6, at 315.

<sup>92</sup> Gray, *supra* n. 6, at 315.

<sup>93</sup> Rawls, *supra* n. 1, at 72; Gray, *supra* n. 6, at 316.

<sup>94</sup> Gray, *supra* n. 6, at 314–315.

<sup>95</sup> 469 U.S. 287 (1985).

<sup>96</sup> Gray, *supra* n. 6, at 317.

disproportionate help that would then make it unfair for people without disabilities.<sup>97</sup>

Formal equality, or “even-handed”<sup>98</sup> equality, on the other hand, takes little or no notice of the morally arbitrary inequalities that are created by the natural lottery.<sup>99</sup> It has also been found by lower federal courts that it is their mission to include under the Rehabilitation Act protection for people who have disabilities from the effect of “misinformed stereotypes.”<sup>100</sup> The basis of this Act is to determine whether that person, stripped of the stereotypes, will either be able to do the essential functions of the job or not.<sup>101</sup> An issue arises, however, when the problem stems from an inability to perform the essential functions of the position rather than stemming from stereotypes.<sup>102</sup>

Under the liberal interpretation of the Difference Principle, the principle of fair equality of opportunity examines jobs as careers open to talents. With this interpretation it is argued that people with similar skills and abilities should have similar life prospects, no matter their initial place in the society.<sup>103</sup> This interpretation thus improves upon the system of natural liberty by addressing inequality bases on income and class, but it still allows wealth and income distribution to be based on the results of the natural lottery.<sup>104</sup>

Finally, the democratic interpretation consists of the combination of the principle of fair equality of opportunity, making jobs equally open to all, and the Difference Principles for

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<sup>97</sup> *Id.* at 314–315.

<sup>98</sup> *Alexander v. Choate*, 469 U.S. 287, 303 (1985).

<sup>99</sup> Gray, *supra* n. 6, at 314–315.

<sup>100</sup> *Mantolite v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985); *see also Airline v. Sch. Bd. of Nassau Co.*, 772 F.2d 759, 765 (11th Cir. 1985), *aff'd* 480 U.S. 273 (1987); *Pushkin v. Regents of the U. of Colo.*, 658 F.2d 1372, 1386 (10th Cir. 1981).

<sup>101</sup> Gray, *supra* n. 6, at 318.

<sup>102</sup> *Id.* at 314–315.

<sup>103</sup> Rawls, *supra* n. 1, at 73.

<sup>104</sup> Gray, *supra* n. 6, at 319.

the definition of “everyone’s advantage.”<sup>105</sup> This combination of the Difference Principle and the principle of fair equality of opportunity results in a combination that is different from the effects that the two concepts have separately.<sup>106</sup> The Difference Principle states that only when the initial inequality is to the advantage of the disadvantaged, people with disabilities in this case, can the inequality be deemed morally just.<sup>107</sup> It is argued that the improved life prospects are incentives for a more efficient economic process because the higher the expectations for more primary goods encourages entrepreneurs to help improve the life prospects of the disadvantaged, like people with disabilities.<sup>108</sup>

Under any interpretation of Rawls’s *A Theory of Justice*, the two principles remain.<sup>109</sup> Any sort of injustice, whether based on race, gender, or physical limitation, is disallowed by the first principle that requires all basic rights and liberties be given equally to all citizens of the society.<sup>110</sup> In addition, when a group of people, in particular people with disabilities, may be a disadvantaged group due to the natural lottery, the Difference Principle requires that any advantages be granted to people with disabilities to ensure them the most amount of equality possible.<sup>111</sup>

#### IV. A THEORY OF JUSTICE APPLIED TO ELDER LAW

##### A. General Background of Elder Law

The legal area of Elder Law is “the representation of elder Americans and their family members with legal problems.”<sup>112</sup>

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<sup>105</sup> *Id.* at 320.

<sup>106</sup> *Id.* at 320; Rawls, *supra* n. 1, at 83.

<sup>107</sup> Rawls, *supra* n. 1, at 78; Gray, *supra* n. 6, at 320.

<sup>108</sup> Rawls, *supra* n. 1, at 78; Gray, *supra* n. 6, at 320.

<sup>109</sup> Stein, *supra* n. 16, at 999.

<sup>110</sup> *See id.*

<sup>111</sup> Rawls, *supra* n. 1, at 78; Gray, *supra* n. 6, at 320.

<sup>112</sup> Rebecca C. Morgan, *Elder Law in the United States: The Intersection of the Practice and Demographics*, 2 J. Intl. Aging L. & Policy 103, 105 (2007).

While there has been particular growth in the area of Elder Law in the past twenty-five years, 2012 marks the forty-year anniversary since it was recognized as a practice area.<sup>113</sup> Distinguishable from other areas of the law, the substance of Elder Law is more fluid and determined by each individual client.<sup>114</sup>

Elder Law is the practice of law that typically involves elderly clients, who are generally defined as persons of age sixty-five or older. The term “elderly” has been applied to people as young as fifty-five, or even younger, but because sixty-five has been the conventional retirement age and is the age when Social Security retirement benefits commonly begin, sixty-five is the favored age.<sup>115</sup> In the end, however, the specific age is not significant because it is the client, not his age, who defines the nature of the work an attorney performs.<sup>116</sup>

Looking at the area of Elder Law more generally, it can be divided into three major categories: health care, income protection, and autonomy.<sup>117</sup> Looking at health care, elderly people tend to have more legal issues arising out of health issues.<sup>118</sup> In looking at this age group as a whole, this is generally considered first because the elderly tend to be in poorer health.<sup>119</sup> In particular, they tend to suffer more chronic illness and suffer more incidents of acute illness that are more severe than what is faced by younger people.<sup>120</sup> In addition, the elderly are more faced with physical decline due to aging, including loss of aerobic capacity, muscle, and flexibility, than do younger people,<sup>121</sup> and most also

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<sup>113</sup> *Id.* at 106.

<sup>114</sup> *Id.* at 105.

<sup>115</sup> Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 Elder L.J. 1, 2–3 (1993).

<sup>116</sup> *Id.*

<sup>117</sup> Morgan, *supra* n. 111, at 106; Lawrence A. Frolik & Melissa Brown, *Advising the Elderly or Disabled Client* 3 (Rosenfeld Launer Publ'ns 1992).

<sup>118</sup> Robert C. Atchley, *Social Force and Aging* 91 (5th ed., Wadsworth Pub Co 1988).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> David A. Tomb, *Growing Old* 15 (Rosenfeld Launer Publ'ns 1984).

experience hearing and vision decline as well.<sup>122</sup> Finally and perhaps most notably, many elderly eventually require some sort of long-term care whether at home or in a nursing facility.<sup>123</sup>

The higher inclination towards having health issues soon become legal issues for the elderly.<sup>124</sup> Health issues result in some needing a living will or advanced directive, some need advice as to how make decisions for a family member who is incapacitated, and others need help with the issues that arise out of Medicaid reimbursement.<sup>125</sup> Clients who have less money could have difficulties in applying or being eligible for Medicaid, while more wealthy clients may have questions regarding financing long-term nursing home care, as well as becoming eligible for Medicaid.<sup>126</sup> Some clients will be looking for assistance in defending the rights of another who is in a nursing home or protecting family members who may have been the victim of elder abuse or neglect.<sup>127</sup> Finally, Elder Law also consists of helping clients who have had a decline in their mental capacity by filing a guardianship claim, representing an alleged incapacitate person, and supporting or challenging the decisions of a guardian of someone who is incapacitated.<sup>128</sup>

Regarding income protection, the elderly also have financial concerns.<sup>129</sup> Many elderly clients will have questions or concerns in regards to the financial or legal aspects of their employment including their rights in terms of their pension plans, the implications of the income and estate tax, or even employment

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<sup>122</sup> Lawrence A. Frolik & Alison P. Barnes, *An Aging Population; A Challenge to the Law*, 42 Hastings L.J. 683, 694–696 (1991).

<sup>123</sup> Generally House Select Comm. on Aging, *Exploding the Myths: Caregiving in America*, 100th Cong. 2d Session. (1988).

<sup>124</sup> Frolik, *supra* n. 114, at 3.

<sup>125</sup> *Id.* at 9–18.

<sup>126</sup> *Id.* at 3.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 3–4.

discrimination.<sup>130</sup> Other financial considerations with which elders are worried about including establishing eligibility for Supplemental Security Income or handling veterans' benefits.<sup>131</sup> Finally, elders also face the traditional challenges involved in testamentary planning including estate planning, tax planning, drafting of wills and trusts, drafting durable powers of attorney, among others.<sup>132</sup>

Legislation has been enacted in order to protect elders within the Elder Law field. Many consider elders to be vulnerable, and they have become increasingly the victims of scams and others who prey on them and financially, and sometimes physically, exploit them.<sup>133</sup> Seeing this, it is becoming increasingly more common for states to criminalize this type of elder abuse, but many find that at this time, "governmental responses to elder abuse is where domestic violence responses were twenty years ago."<sup>134</sup>

In addition, there has been other legislation enacted in order to protect the elderly, not only from abuse, but also from the prevalence of poverty. Social Security is a traditional concept that originally consisted of younger family members taking care of the elders, but with the transition from farming to industrialization, societies began to step in and financially aid elderly members of society.<sup>135</sup> Social Security in the United States has expanded from 222,488 people receiving Social Security in 1940, to 54,031,968 people receiving it in 2010.<sup>136</sup> Social Security has blossomed over

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Morgan, *supra* n. 111, at 106.

<sup>134</sup> *Id.* There are seven kinds of elder abuse: physical abuse, sexual abuse, emotional or psychological abuse, neglect, abandonment financial or material exploitation, and self-neglect. Natl. Ctr. Elder Abuse, *Why Should I Care about Elder Abuse*, [http://www.ncea.aoa.gov/NCEARoot/Main\\_Site/pdf/publication/NCEA\\_WhatIsAbuse-2010.pdf](http://www.ncea.aoa.gov/NCEARoot/Main_Site/pdf/publication/NCEA_WhatIsAbuse-2010.pdf) (accessed Apr. 3, 2012).

<sup>135</sup> Soc. Sec. Admin., *Historical Background and Development of Social Security*, <http://www.ssa.gov/history/briefhistory3.html> (accessed Oct. 15, 2012).

<sup>136</sup> Soc. Sec. Admin., *Annual Statistical Supplement, 2010*, <http://www.ssa.gov/policy/docs/statcomps/supplement/2011/5a.html#table5.a4> (accessed Oct. 15, 2012).

the years into a source of protecting elderly people from the higher prevalence of poverty that they face.

## B. Elders as Equals

Similar to the previous applications of *A Theory of Justice*, Elder Law also finds support in Rawls' theory. Just like an original person behind the veil would not know what gender,<sup>137</sup> race,<sup>138</sup> or what physical capability he would be,<sup>139</sup> similarly, he would also not know what age he would be. Because a person in the original position would be unaware of his age, his decisions behind the veil would ensure the protection of the basic rights and liberties of the elderly and ensure that the elderly do not face inequality.

The age of a person should be considered to be a morally irrelevant consideration. As has been seen, someone's race,<sup>140</sup> gender,<sup>141</sup> and physical or mental disability<sup>142</sup> are not morally relevant considerations under Rawls's theory. The only age requirement of Rawls is that people behind the veil are of an age in which they are able to reason.<sup>143</sup> Therefore, when behind the veil of ignorance, people in the original position should not know what their ages are when they are beyond the veil, and, therefore, the original people would not know whether they fall into the category of "elderly."

Since people behind the veil are not aware of their own age, they will ensure full equality, regardless of one's age. The rights of the elderly will be protected in the same manner of younger

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<sup>137</sup> Smiley, *supra* n. 4, at 1602.

<sup>138</sup> Shelby, *supra* n. 5, at 1697–1698.

<sup>139</sup> Gray, *supra* n. 6, at 313.

<sup>140</sup> Shelby, *supra* n. 5, at 1697–1698.

<sup>141</sup> Smiley, *supra* n. 4, at 1602.

<sup>142</sup> Gray, *supra* n. 6, 313.

<sup>143</sup> Rawls, *supra* n. 1, 146–147; Weiss, *supra* n. 1, at 570.

counterparts. This follows suit from Rawlsian analysis of racial and gender inequality. Since both race and gender are not known behind the veil, people in the original position would not create the general principles of the justice system that would lead to inequalities based on either race,<sup>144</sup> gender,<sup>145</sup> or disability,<sup>146</sup> because they would not know how that affects them. Therefore, similar to the analysis of race and gender, because people behind the veil are not aware of their age, they will not create a justice system that has principles that have inequalities that disadvantage the elderly.

This proposition that people behind the veil are unaware of their age will ensure equality for all ages finds even further strength in Rawls theory because age is something everyone hopes to face. While a person behind the veil does not know what race, gender, or physical capability he is, he is hopeful that at some point he will age to the point of falling under the scope of Elder Law. Thus, original people would look out for the welfare of the elderly and ensure their protection when defining justice.

### C. Elders as a Disadvantaged Group

The elderly should be considered a disadvantaged group, and thus Rawls's Difference Principle will allow for some inequalities that will advantage the elderly. There are numerous hardships that elders face. First, when considering the health care costs, one in six elderly persons are considered to be in poverty.<sup>147</sup> As of 2011, approximately 5,009,300 people (12%) who were sixty-five or older are considered to fall below the poverty line.<sup>148</sup> In addition, elders also face being vulnerable to both physical and

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<sup>144</sup> Shelby, *supra* n. 5, at 1697–1698.

<sup>145</sup> Smiley, *supra* n. 4, at 1602.

<sup>146</sup> Gray, *supra* n. 6, at 313.

<sup>147</sup> *Elderly Poverty Jumps According to Census Bureau's Alternative Research Measurement*, [http://www.huffingtonpost.com/2011/01/13/elderly-poverty-rate-census\\_n\\_808797.html](http://www.huffingtonpost.com/2011/01/13/elderly-poverty-rate-census_n_808797.html) (May 25, 2011).

<sup>148</sup> The Henry J. Kaiser Family Foundation, *Poverty Rate by Age*, <http://www.statehealthfacts.org/comparebar.jsp?typ=1&ind=10&cat=1&sub=2> (accessed Nov. 8, 2012).

emotional abuse, and while the statistics are difficult to verify, elder abuse and neglect have become more and more prevalent.<sup>149</sup> Between 2% and 10% of the elderly are abused, approximately 1 to 2 million of whom have been abused or neglected by someone upon whom they depend.<sup>150</sup> Unfortunately, this abuse is highly unreported.<sup>151</sup> Because of the high prevalence of poverty and their vulnerability to abuse, elders should be deemed to fall under Rawls's category of being disadvantaged.

Since elders fall in to Rawls's category of disadvantaged, the Difference Principle is supportive of taking steps that are to the advantage of the elderly. Just like *A Theory of Justice* is supportive of legislation and other acts to help people with disabilities to ensure them the highest degree of equality possible, similarly here, legislation and the entire area of law of Elder Law helps the elderly overcome those disadvantages. Therefore, while Elder Law may give an advantage, it is to the advantage of the disadvantaged and, therefore, is supported by the Difference Principle, and, overall, Rawls's *A Theory of Justice*.

## V. CONCLUSION

Rawls's *A Theory of Justice* ponders the creation of a system of justice that is created by people behind the veil of ignorance. In this original position, people are not away of the status of their society or any of their own personal characteristics or beliefs, and it is because these people are the ones deciding on the justice system, they will be able to make unbiased decisions that do not benefit people who have morally irrelevant characteristics.

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<sup>149</sup> National Center on Elder Abuse, *Elder Abuse Prevalence and Incidence*, [http://www.ncea.aoa.gov/ncearoot/Main\\_Site/pdf/publication/FinalStatistics050331.pdf](http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/publication/FinalStatistics050331.pdf) (accessed Mar. 5, 2012).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* Only one in fourteen incidents, not including self neglect, are reported to authorities, and only one out of twenty-five instances of financial exploitation are reported. *Id.*

These morally irrelevant characteristics have been found to include one's race, gender, or physical limitations. The justice system created by people in the original position would have no racial, gender, or disability inequalities because they would not know whether beyond the veil they fit into that classification and would be harmed by the inequality. In addition, because people with disabilities have been found to be disadvantaged by their limitations, Rawls's Difference Principle supports granted help (an inequality) that protects those people and is to the advantage of those who are disadvantaged.

This analysis applies to the area of Elder Law. People behind the veil should not know what their age is beyond the veil because age is morally irrelevant under Rawls's theory. Therefore, original people will ensure that the system is equal to all, regardless of age. In addition, because elders are faced with hardships including, poverty and vulnerability to abuse, they should also be considered a disadvantaged group. Then, similar to Rawlsian analysis of legislation relating to people with disabilities, the area of Elder Law that protects the basic rights and liberties of elders, is supported by the Difference Principle. As a result, Rawls's *A Theory of Justice* supports the creation and practice of the area of Elder Law.