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"Legal protection of adults – an international comparison"

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Good afternoon. My first words, on behalf of myself and all of us, must be to thank our hosts for bringing us all together here, for their warm welcome, and for structuring our discussions to take us from the many questions which face us, through to possible answers.

Good answers depend upon asking the right questions. At this early stage of our gathering, I shall focus mainly upon questions.

As we look around us here, we see both unity and diversity.

Above all, what unites us is that we are all human beings. Our fundamental needs and aspirations are universal. They are reflected in our internationally acknowledged universal human rights, shared with every human being on this planet. And we share the obligation to play our own part in delivering compliance with those human rights to everyone.

There is also splendid diversity in this room: diversity in our starting-points, our career journeys, and our travels to come here. But we are hit with the first question upon arrival at a gathering about guardianship. Just as my aeroplane was a vehicle to bring me here, guardianship is at best a vehicle, to deliver what? To take its passengers to what destination? And what is guardianship? If there is one lesson to be learned from the brief comparative summary which I shall present shortly, it is that "guardianship" means as many things as there are countries which use the term, with further variation in how it is actually delivered.

We should not start with a concept which is at best one answer, and an uncertain one, until we have formulated the question, and the destination for which – for each individual – we may want to find the most appropriate vehicle.

I offer you this formulation of that question:

> **How can modern, human-rights compliant, legal systems best respond to the needs of people who may require support in the exercise of their legal capacity, and who may – or may not – be capable of proactively and validly exercising their legal capacity?**

In that formulation, **"proactively"** means not only making decisions, about which there has been so much discussion, but identifying the need to act, and acting; and in setting the agenda for decisions which need to be made. **"Validly"** means ensuring that actions, transactions and decisions leave third parties with no doubts about validity, nor cause to hesitate or even refuse to accept and to act upon them. And we must be careful about the word **"support"**. Article 12.4 of the UN Convention on the Rights of Persons with Disabilities ("CRPD") requires that relevant measures **"respect the rights, will and preferences of the person"**. Importantly, "preferences" is in the plural. When we have to make a difficult decision, we often have to balance conflicting preferences. Even more importantly, those three elements may be in conflict with each other. Here is a simple example from my own experience. A young man had severe learning disabilities, sometimes with challenging behaviour. He could communicate only through the interpretation of his behaviour by skilled carers who knew him well. His behaviour deteriorated. He aggressively resisted anyone or anything going near his mouth. His clear will was to stop any interference with his mouth. His preference was that the

toothache which he had developed should end. His right was to receive appropriate healthcare. Support meant ensuring that he received treatment, using legal measures to assure the dentist that he could properly deliver it.

The next few days will tell us whether we can find unity even in the questions to which our diverse systems seek answers. I turn now to three different diversities.

The first is the diversity of reasons why such support may be required, and of relevant factors. This was emphasised in a report less than a year ago by the Law Commission of Ontario.

> **"While legal capacity, decision-making and guardianship legislation does not refer to specific classes of persons, some persons are more likely to be found legally incapable or to be assumed to be legally incapable, including persons with developmental, intellectual, neurological, mental health or cognitive disabilities. It would be difficult to overstate the diversity among those directly affected by legal capacity and decision-making laws. Differences in the nature of the impairment in decision-making abilities may significantly affect needs so that a person whose impairment is episodic will have quite different needs from the law from those of a person whose abilities are stable or declining. The stage of life at which needs for assistance arise has considerable implications for the nature and extent of the social and economic supports available. As well, gender, culture, family structures, geographical location and many other factors will affect how this legislation is experienced."**

That diversity, and the greater diversity of disabilities generally, presents the danger of "discrimination within non-discrimination": the danger that responses to disability focus too narrowly upon selected disabilities. There tends to be a hierarchy, with physical disabilities at the top, sensory disabilities next, then the great variety of intellectual disabilities; and within intellectual disabilities, further hierarchies. The sheer numbers of people who have or fear ageing conditions capture attention, as do people vocal in their protests at the way that psychiatric services may have treated them. There is a danger of neglecting people with less prominent intellectual disabilities. To test our systems, we have to take these marginalised people and put them at the centre. A good test of a system is to see whether it performs best for people who are most marginalised, and who need it most.

Differences in priority reflect in different starting-points for relevant legislation: the elderly in Japan, people with significant learning disabilities in New Zealand.

The second diversity is in the historical perspective. My remit today is comparative, not historical. But two historical themes are relevant to a comparative understanding. One is the diversity of perceptions and objectives that lawmakers have tried to answer. The other is the repeated importation of child law concepts, and their application to adults. In Scotland we imported the Roman tutor-at-law for adults in 1585. In 1913 we created a form of plenary personal guardianship, guardians' powers being defined by reference to the guardians of young children. The purpose was to remedy "lasting injury to the community" caused by learning disabled people "at large in the population". That was abolished in 1984 in favour of a statutory guardianship with fixed and narrow interventionist powers, aimed at ensuring protection and support, but used as a last resort in problem situations. That left a gap, filled by non-statutory developments, until our present regime ensued in 2002, specifically rejecting the child law concept of best interests.

Today we face unprecedented challenges, but they are welcome, for they challenge us to do better. Many are driven by international and regional instruments, and the debates surrounding them. In a world of increasing mobility, and of incessant difficulties facing vulnerable people in cross-border situations, we have the disgrace that the Hague Convention 35 on the International Protection of Adults of 2000 has been ratified by only nine countries. In Europe we have the challenge of compliance with the European Convention on Human Rights, including Article 8 – respect for private and family life – and Article 5 on deprivation of liberty. We have the problem of apparent incompatibility between that Article 5 and Article 14 of CRPD. And we have the challenges presented by CRPD itself, to which I shall return.

The third diversity is among the regimes in different countries. In the British Isles we hit diversity before we travel further. England & Wales is a common law jurisdiction, incapability renders acts and transactions voidable if the other party is aware of the incapability, it uses a best interests test, and gives automatic statutory protection for anyone intervening – without formal appointment – on a best interests basis. Scotland is a civil law country, incapability results in voidness regardless of who knows what, a best interests test was rejected in favour of statutory principles, and any similar automatic protection was rejected. England's legislation focuses on decision-making, Scotland's on acting as well as deciding. England has a specialist court. Scotland doesn't, but Scotland has a statutory regime to protect and support any adult who is vulnerable and at risk. England doesn't. England has fixed forms of power of attorney. Scotland doesn't. Scotland has ratified Hague 35: England hasn't.

Ireland has a further two jurisdictions both the subject of more recent legislation, taking account of CRPD.

Moving out into the wider world, we find that wherever there is scope for diversity, there is diversity. The following is a brief distillation of the valuable information from your responses to questionnaires, also responses to previous questionnaires for other purposes. Comparison of key features shows a complex interplay of various centres of emphasis, rather than distinct groupings of uniform regimes. My comparisons are descriptive, not evaluative nor comprehensive, but may help to stimulate our thinking.

To start, at what age are people adults? In Scotland 16, in the rest of the British Isles 18. In Turkey 18, but 15 by court declaration with parental consent. In China 18, but at any time from 16 if earning their own living. Elsewhere 21. For non-integrated indigenous people in Brazil, minimum 21.

Next, are adults with intellectual disabilities nevertheless in some respects treated as children? This can happen explicitly. In Slovenia, parental rights can be extended, and an adult equated to a minor over the age of 15. In Brazil, persons determined to have partial capacity are equated to 16 to 18-year olds.

Then there is a group of arrangements and provisions which could be seen negatively as infantilising adults, or positively as respecting the importance and strength of the family. Firstly, we have automatic *ex lege* family representation for all or some purposes in Argentina, Austria, Czech Republic, Japan, Netherlands, Norway, South Korea, Spain and Switzerland, with proposed introduction in Sweden.

Secondly, there are presumptions in favour of close relatives for appointment of guardians. In some cases, importantly, the adult's own choice takes priority: Austria, Brazil, China, France, Netherlands, Turkey. In Scotland, there is a presumption in favour of relatives only for joint appointments.

More broadly, we hear echoes of child law in adult provision. The two-tier childhood in Roman law provided a ready-made response to concepts of general incapability, and limited capability, as in the influential structure in France, with loss of legal capacity under tutelle; and with a degree of advice and/or supervision in entering important transactions, but no incapacitation, under curatelle.

This takes us to a group of questions centred upon the concept of "incapacitation". Some regimes have incapacitation followed by appointment of a guardian. In the following examples, incapacitation is by a court but appointment of a guardian is, in China, by the Neighbourhood Committee or the Villagers' Committee; in Hong Kong and Malta, by a Guardianship Board; in Russia, the Regional Social Care Authority; in Slovenia, the Social Work Centre. In Estonia, there is a different division: restriction of legal capacity and appointment of guardian by a court, or curatorship established by the local municipality. Norway has guardianship with deprivation of legal capacity by a court, or guardianship without deprivation of legal capacity by the County Governor.

There are combined procedures of full or partial incapacitation and appointment of a guardian in Argentina, France, Taiwan and Turkey.

In Finland, the appointment of a legal representative may be backed up by restriction of capacity if that is necessary to protect the interests of the adult.

In many countries – too many for detailed analysis here – there is no explicit incapacitation, and indeed (as here in Germany) provision that appointment of a guardian has no effect on legal personality and status. However, in many such countries, and for understandable protective reasons, at least in economic matters the adult has no competence, within the scope of the guardian's powers, without the consent of the guardian, raising the question whether in practice powers are accurately aligned to incapabilities. One would reasonably expect better alignment with specialised courts such as exist in England, Germany and the Netherlands; or in Australia's specialised tribunals. It may also be helpful for a court to be explicitly given an inquisitorial role, as in Germany.

In some jurisdictions an appointee has explicit power to object to the validity of a purported act by the adult – for example, a supporter in the Czech Republic.

Finally, we have guardianship concepts extended beyond cases of intellectual disability. In Turkey: as a criminal punishment. In Brazil: non-integrated indigenous people. In the Netherlands and elsewhere: financial incompetence or prodigality.

Shortly I shall leave you tantalisingly in mid-air, as I have similar comparative material on questions such as: What are the criteria which appointees must apply when acting? What arrangements exist to supervise guardians, and to support them? What autonomous measures are available: private mandates or powers of attorney (and the potential to extend power of attorney documents to cover supported decision-making and co-decision-making), advance directives, trusts for administration? How frequently do countries revise their legislation, in order to keep it up to date? The published version of this talk will cover all of these. In all such matters there is as much diversity as in those which I have described.

But let me now draw my large bundle of diversities back into the universality of human rights. We all look forward to hearing shortly from Theresia Degener, representing the UN Committee on the Rights of Persons with Disabilities. I have published significant criticism of some of the Committee's comments. Let me counter-balance that by summarising part of my own contribution to the final report of the Essex Autonomy Three Jurisdictions Project.

The UN Committee has been criticised for offering neither precise definitions, nor precise instructions as to how safeguards within Article 12 should be operationalised. Instead of regretting that we saw it as an opportunity.

Article 1 of CRPD says:

> **The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.**

For that purpose to be achieved, it must become the shared objective of the whole of human society. Within each jurisdiction, we have to take ownership, not thrust responsibility back upon the UN Committee. Its role is to consider, suggest, and make general recommendations. We must each structure support and safeguards that will work, and deliver them in practice. Diversity will continue, but targeted towards the common project of realising Article 1, not random diversity for historical reasons.

Let me conclude by reverting to the key phrase **"respect the rights, will and preferences of the person"**. How strongly are will and preferences respected? The primacy of autonomous measures over guardianship, and other responsive measures, is emphasised by Ministerial Recommendation in Europe. There is serious under-provision, and under-utilisation, of autonomous measures, which must be remedied. Even under autonomous measures, operation raises issues about respect for will and preferences. Across all types of measure, we see isolated shafts of respect, like sunbeams through a cloudy sky. I have examples far beyond the time now available: some will appear in the written version, and will be reviewed tomorrow. We need to deliver respect comprehensively, and effectively in practice. We need to develop and apply techniques such as constructing decisions, and reverse jurisprudence.

In the Essex Autonomy Project, we concluded that the existing regimes in England & Wales, and in Scotland, are non-compliant with CRPD, but remediably non-compliant. Our recommendations included an attributable duty to determine will and preferences; provision of adequately-funded advocacy services to support people to overcome obstacles to exercise of legal capacity for themselves, or alternatively to identify and articulate their will and preferences; support all aspects of the exercise of legal capacity, not merely communication or decision-making; development of the full potential of autonomous measures; and of clear definitions and robust safeguards to comply with Article 12.4; extending CRPD compliance broadly across all areas of legal systems; and establishing regular monitoring and review. I shall leave you with the text of the recommendation which we put at the head of our list:

> **"Recommendation 1: Respect for the full range of the rights, will and preferences of everyone must lie at the heart of every legal regime. That must be achieved regardless of the existence and nature of any disabilities. Achieving such respect must be the prime responsibility of anyone who has a role in taking action or making a decision, with legal effect, on behalf of a person whose ability to take that action or make that decision is impaired. The role may arise from authorisation or obligation. The individual with that role should be obliged to operate with the rebuttable presumption that effect should be given to the person's reasonably ascertainable will and preferences, subject to the constraints of possibility and non-criminality. That presumption should be rebuttable only if stringent criteria are satisfied. Action which contravenes the person's known will and preferences should only be permissible if it is shown to be a proportional and necessary means of effectively protecting the full range of the person's rights, freedoms and interests."**

Almost all of the regimes which I have reviewed appear to be non-compliant with CRPD, but remediably non-compliant.

We have work to do.

Thank you.

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