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**Autonomy, self-determination and human rights:  
Legal safeguards in Argentina to prevent elder abuse and neglect**

María Isolina Dabove<sup>1</sup>

ABSTRACT

Elder abuse and neglect is one of the most important social problems in the world and it has grown together with global ageing. In this research, we analyze the meaning of elder abuse and its relationship to personal autonomy. After that, we study the scope and content of the Argentinean and Inter-American legal institutions presently in force designed to empower older people and prevent this problem. Fortunately, Argentinian Law and the new Inter-American Convention recognize some strong instruments to prevent elder abuse, promote personal autonomy and the empowerment of the elderly in dependency situations. The first steps have been taken.

I. INTRODUCTION

Autonomy, which includes self-determination and legal capacity, is relevant to our dignity and human condition. It is based on the principle of equality and non-discrimination contained in Article 2 of the Universal Declaration of Human Rights, which claims that ‘everyone is entitled to all the rights and freedoms...without distinction of any kind, such as race, color, sex, language, religion, political choice, national or social origin, property, birth or other status’. (United Nations [UN], 1948).

Thus, the principles of equality and non-discrimination declare that all people must be treated equally before the law. This is key to ensuring the exercise of rights and freedoms on an equal basis for everyone (Dworkin, 1978, 1987; Dabove, 2002). However, there are many circumstances in which this principle is not achieved. Some are the prejudices against affected groups. On a global scale, for example, the elderly and people with mental illnesses or disabilities are often restricted unlawfully in the exercise

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<sup>1</sup> Researcher at National Council of Scientific and Technological Research ('CONICET') and Buenos Aires University. Law School. Av. Figueroa Alcorta 2263 – 1° P. (1425CKB) Ciudad Autónoma de Buenos Aires. Argentina. [isolinadabove@gmail.com](mailto:isolinadabove@gmail.com)

**Citation:** María Isolina Dabove; Autonomy, Self-determination, and Human Rights: Legal Safeguards in Argentina to Prevent Elder Abuse and Neglect, *International Journal of Law, Policy and the Family*, Volume 32, Issue 1, 1 April 2018, Pages 80–92, <https://doi.org/10.1093/lawfam/ebx017> of their legal capacity or may even lose it completely precisely because of cultural biases about ageing or impairment (Lipp, 2016). Other situations are even worse, such as the problem of abuse and violence against older people and people with serious disabilities.

This article paper is aimed at considering ways of preventing these kinds of abuses, mistreatment and negligence in regard to capable and healthy elders, and also in regard to older adults with significant mental problems. If the promotion of autonomy and independent life is a good strategy, how do human rights ensure this self-determination? What are the legal safeguards protecting these people against exploitation and domination. Finally, in what ways can Elder Law contribute to developing a self-determined life that allows the elderly to act autonomously and independently in their daily life (Lipp, 2016).

To fulfill these purposes, the article first discusses what elder abuse really means, its most common cases and the Argentinian and American legal instruments which refer to this problem. Second, it considers the concept of ‘personal autonomy’ to identify the most appropriate institutions for the prevention of abuse of capable older people in Argentinian Law and in the Inter-American system of human rights. Third, it analyses the legal acts in force in the region that empower elder people who are judicially restricted in their capacity.

## II. ELDER ABUSE AND NEGLECT

### 1. Concepts, cases and elements

Elder abuse and neglect is one of the most important social problems in the world and it has grown together with global ageing. It can cause serious physical injuries, emotional suffering, long-term psychological disorders or even the death of an older person -capable or incapable, and it can occur in the public or private sphere (WHO, 2002, 2008; Quinn et al.1997; Cohen et al. 2010). The new Inter-American Convention on Protecting the Human Rights of Older Persons, approved by the OAS General Assembly on 15 June 2015 and in force since January 2017, defined it as ‘a single or repeated act or omission to the detriment of an older person that harms their physical, mental or moral integrity and infringes the enjoyment or exercise of their human rights and fundamental

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Globally, between four and six per cent of old people have experienced some form of abuse (WHO, 2015) and it is estimated that one in ten experiences abuse each month (WHO, 2016). But as the number\_of the elderly is growing fast. from 12 per cent to 22 per cent between 2015/2050, this figure will increase too, unless legal systems do something to prevent it (WHO, 2015, 2016). While there is little information regarding abuse and neglect in Argentina, at least around 5,71 per cent of victims of violence are 60 and even older (Consejo Nacional de Mujeres, 2016). Unfortunately, not all the cases are reported, in part because older people are often afraid of reporting cases of abuse to family, friends or to the authorities. Consequently, any prevalence rates are likely to be an underestimate (WHO, 2016).

Many old people are mistreated in their own homes, in relatives' homes and even in institutional settings, especially in long-term care facilities (International Network for the Prevention of Elder Abuse. [INPEA], 2016; Ayalon 2016; Doron and Marnin, 2013). Abusers are often adult children or other family members, such as grandchildren, spouses or partners of the elders (Helpguide.org 2016; National Committee for the Prevention of Elder Abuse [NCPEA], 2016; Consejo Nacional de Mujeres, 2016). But also, 'judicial practices perpetuate age-based stereotypes and discrimination,' (Love et al (2013); Kelly and Doron, 2013, 253). Older women are the most vulnerable of all (American Psychological Association [APA], 2016).

The Toronto Declaration (WHO, 2002) and the new Inter-American Convention on Protecting the Human Rights of Older People recognize different kinds of abuse. They include financial abuse, physical and sexual violence, psychological mistreatment, expulsion from the community and any form of abandonment or negligence that takes place within the family or household unit or that is perpetrated or tolerated by the State or its agents, regardless of where it occurs (Article 9, OAS, 2015).

Financial or material exploitation is the illegal or improper use of an elder's funds, property, or assets. Physical violence is the use of physical force that may result in bodily injuries, physical pain, or impairment. Sexual abuse is the non-consensual sexual contact of any kind with an elderly person. Psychological mistreatment is the infliction of anguish, pain, or distress through verbal or non-verbal acts or ageism. Abandonment is

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According to the WHO, the most common types of abuse in developed and developing countries are:

- ✓ Physical abuse: 0.2-4.9 per cent.
- ✓ Sexual abuse: 0.04-0.82 per cent.
- ✓ psychological abuse: 0.7-6.3 per cent (based on substantive threshold criteria).
- ✓ Financial abuse: 1.0-9.2 per cent.
- ✓ Neglect: 0.2-5.5 per cent.

Data on the extent of these problems in institutions such as hospitals, nursing homes and other long-term care facilities is scarce. A survey of nursing-home staff in the USA, however, suggests rates may be higher; 36 per cent witnessed at least one incident of physical abuse of an elderly patient in the previous year; 10 per cent committed at least one act of physical abuse towards an elderly patient; and 40 per cent admitted to have abused patients psychologically (WHO, 2016).

In Argentina, the main cause of elder abuse is linked to unmet needs for housing, health and food. In respect to the types of violence, 47 per cent is psychological, 27 per cent is abandonment, while physical aggression and financial violence both stand at 13 per cent. In addition, 75 per cent of older adults who report abuse are women (Gobierno de la Ciudad de Buenos Aires, Secretaría de la Tercera Edad, 2016; Consejo Nacional de Mujeres, 2016).

## **2. Argentinian legal instruments and the Inter-American Law**

As human beings, older people have the right to a life without any kind of violence or mistreatment on an equal basis with all the people. For this reason, states, communities and families have the obligation to work to eradicate stereotypes, prejudices and misconceptions which often undermine the quality of life of the elderly (Arias and Iacub, 2015). The Argentinian Constitution recognizes those rights and duties especially in articles 16 and 37 about equality, and in article 18 when it refers to the abolition of the death penalty for political reasons and the prohibition of all kinds of torture and whipping.

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According to these instruments, claims of violence can be made by the victims themselves; relatives, spouses or partners; friends, curators or legal guardians; social or educational welfare services (public or private); health professionals; any public official because of their work; or any person who has knowledge of these facts. Complaints may remain anonymous and may be processed at the nearest police station, or before any judge, or the Attorney General, or the Office of Domestic Violence of the National Supreme Court (OVD), or before the National Committee Coordinating Actions for the Development of Sanctions regarding Gender Violence (CONSAVIG), among others. Once the complaint is submitted, the judges must decide quickly on the basis of evidence obtained in the investigation. They can choose between household exclusion of the aggressor, his detention, establishing a measure prohibiting presence or communication with the victim, requiring the aggressor to undergo psychological treatment, and other preventive measures (Dabove, 1999; Dabove and Urrutia, 2015).

### III. THE PROMOTION OF AUTONOMY OF THE ELDERLY

#### 1. **Autonomy: concept and elements**

‘Autonomy’ derives from the Greek word meaning ‘self-rule and self-government’ and legally refers to the ability to decide by oneself, to make informed choices, free of coercion, based on one's own personal beliefs and values (NCPEA, 2016). It is also the sphere of personal independence, freedom and opportunities, within which each person exercises his/her own power, rights and duties, without invading those that belong to others (Dabove, 2016). The law has the mission to protect and to guarantee

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Nevertheless, it is important to say that the Argentine Law has experienced a significant change in relation to personal autonomy as a result of the reception of the UN Convention on the Rights of Persons with Disabilities (CRPD)- (Rosales, 2013; Palacios, 2007). In particular, article 12 of the CRPD introduced a Copernican revolution in the concept of autonomy through reform of the law of legal capacity which protects the right of people with disabilities to exercise legal agency with more clarity than any prior human rights instrument (Arstein-Kerslake & Flynn, 2017; Minkowitz, 2017).

First, the CRPD does not draw any distinction between capacity for enjoyment (on the one hand) and capacity for exercise (on the other), once these capacities have been fully acquired at the age of 18 years (Article 12). Second, it considers that any person with disabilities (even those with mental illnesses) has the right to the acknowledgment of their legal capacity on equal terms with everyone else (Articles 1, 3, 5 and 12). Furthermore, the Convention denies categorically any restriction on legal capacity that implies the total substitution of the person's will (Article 12 (v)). Finally, it inserts the social paradigm of disability. The Convention says that disability is the consequence of barriers set by the social environment (Preamble, e), which avoid granting persons with disabilities their full and effective participation in society under equal conditions (Dabove, 2016; Smith 2014; De Bhailís, and Flynn, 2017; Dhanda, 2017).

So, under the current Argentinian legislation, personal autonomy comprises two elements: legal capacity and will. Legal capacity is an important attribute that the law recognizes in everyone. including people with judicial restrictions on it, governing such basic things as: name, address and civil status. There are two kinds of legal capacity: the capacity of enjoyment (the person's prerogative to be entitled to enjoy rights and to fulfill duties) and the capacity of exercise (the right to legal agency, which refers to the ability to exercise these rights and assume these duties) (Argentine Civil Commercial Code [ACCC], Article 22).

From the age of 18, all people are considered capable of enjoyment and exercise (adults). So they are presumed to have decision-making abilities for themselves, discernment, self-determination and freedom in all areas of their lives (ACCC, Article

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Thus, the legal system's treatment of capacity and will guarantee the right to be free from unwanted interference and to require a legal or a judicial justification for any restriction of personal autonomy, all of which help towards the prevention of abuse of the elderly (NCPEA, 2016; Smith, 2014; Flynn, E., & Arstein-Kerslake, A. (2017).

## **2. Legal instruments of Argentinian and Inter-American Law**

The legal protection of autonomy of adults is recognized by the National Constitution (NC) and by the International and the Inter-American Treaties on Protecting Human Rights ratified by Argentina (NC Art. 75 inc. 22 and 23). One of the most important instruments concerning capacity and autonomy is the UN Convention on the Rights of Persons with Disabilities (Rosales, 2013; Palacios, 2007). However, now the Organization of American States has added another: the new Inter-American Convention on Protecting the Human Rights of Older Persons. This instrument was approved by the General Assembly on 15 June 2015 and it will be in force in the Inter-American system of human rights in January 2017 (Sabatino, 2015; Roqué, 2015).

The Inter-American Convention covers the special situation of the elderly (people aged 60 and over) and the special cases of persons who also suffer certain kinds of disabilities or diseases, especially affecting the oldest (Jessurun, 2016). But, in addition, other relevant instruments for protecting autonomy should be mentioned: the Argentinian Civil and Commercial Code that came into force in August 2015, the National Rights of

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### **3. Institutions to empower older people and guarantee autonomy**

In Argentina, there are different kinds of legal instruments that allow capable adults to exercise personal autonomy by themselves or by representatives designated by them and can help to prevent elder abuse. Among others, they are: advance directives or living wills, informed consents, contracts for mandate for their own disability forecast (explained below), representation to act in legal or financial matters (power of attorney), living trusts and substitution or replacement carried out by family members (Rajmil, and Llorens, 2010, 2016).

‘Advance directives or living wills’ are legal documents that provide guidance or instructions concerning personal issues. Argentinian Law recognizes three kinds. 1) They can be established for medical, health-care decisions or for the disposition regarding their own body, excluding euthanasia practices. 2) They can also be used for property management. 3) They can be given for the designation of the person who will exercise guardianship in the event the relevant elder becomes unable to make such decisions (ACCC - Articles 60; 139). This appointment has to be taken into account by judges in any future judicial proceedings concerning capacity. All can be affected by notarial deeds or by judicial procedures and they are registered in the National Information Center of Registers of Advance Directives).

A capable person can give ‘informed consent’, a declaration of will expressed by the patient, issued after receiving clear, accurate and appropriate information regarding medical procedures and health research (CCC - Art. 59). It is also possible to conclude a ‘contract for mandate for their own disability forecast and appoint a future guardian’ to take care of the elder person’s properties. This designation should be taken into account by judges in the judicial process of restriction of (ACCC - Article 60 and 1319 to 1334). Moreover, any adult can designate a ‘representative to act in legal or financial matters’ in favour of any person who has his confidence and it is not necessary for the representative



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A capable adult can also constitute a ‘living trust’ which is a special contract, different from a mandate or power of attorney. In Argentina, it is regulated by the National Civil and Commercial Code and it is applied throughout the country (ACCC - Articles 1666 to 1670). According to article 1666, there is a trust agreement when one party, called the settlor, conveys or agrees to transfer the ownership of his goods to another person, called the trustee, who is obliged to exercise it for the benefit of another, called the beneficiary, who is assigned by the contract. The trustee has the obligation to transfer the property upon completion of a deadline or condition, to the trustee. So, a trust agreement is a contractual relationship whereby property is held by one party for the benefit of the trust's beneficiaries. The beneficiary could also be the settlor; therefore, a capable person could enter into this contract on behalf of himself and in anticipation of his own inability.

Another possibility is ‘substitution or replacement carried out by family members’. This is an informal or a factual way of representation which takes effect automatically (*ex lege*), when a person of full age who suffers from a mental disability is not able to take care of her or his own issues and there is no judicial process concerning her or his capacity (*parens patria*). Family members, and therefore possible substitutes or replacements, are: the spouse, the cohabiting partner, consanguineous relatives within the fourth grade, such as parent, child, and grandparent, and great-grandparent (Guzmán, Huenchuan and Montes de Oca, 2003; Arias, 2013). The State through the Public Ministry can also act to protect the person at risk (CCC - Art. 102).

#### IV. THE ELDERLY WITH RESTRICTED CAPACITY: JUDICIAL MEASURES AND MONITORING SYSTEMS OF GUARDIANSHIP

##### 1. Concepts, cases and elements

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When autonomy is affected significantly due to a cognitive impairment that puts personal life and property at risk, according to the new Civil and Commercial Code and the conventions on human rights, a judge may order restraints concerning legal capacity (of exercise) in three type of situation: partial restrictions in specific areas of personal autonomy; where there is inability because of prodigality and in cases of incapacity or total incompetence in extremely critical situations (Dabove, 2016). In these cases, as a general rule judges should designate an appropriate support system for decision-making, such as personal assistants, legal representatives, or guardians (only for severe mental disabilities), specifying their functions based on the needs and circumstances of the person. In any case, they should promote the autonomy and favour decisions that respond to the preferences of the protected person. (ACCC Art. 31, 32, 43; 100 and 101).

During the judicial procedure concerning capacity of exercise, judges should choose between appointing a representative, a personal assistant or a guardian ‘ad litem’ or temporary. But at the end of the trial, they have to designate the permanent guardian. They can also select between a guardianship of the person, a conservatorship of the property and a full guardianship. Only judges can decide on the appointment of a supporter/legal representative. This disposition can be revised at any time, at the request of the person concerned. But the decision must be reviewed by the judge within a period not exceeding three years, on the basis of new assessments and involving a personal interview with the applicant (ACCC, Art. 40). The judge can terminate this declaration if the person is completely recovered (Dabove, 2016).

## **2. Judicial measures and the principle of least restricted capacity**

There are several conditions which could bring about a judicial procedure concerning capacity (ACCC, Articles 22 and 3) such as: drugs and alcoholic addictions, a permanent or prolonged mental impairment of sufficient severity, the risk of damage to a person’s life or their property and the absolute impossibility of acting and making choices by themselves (e.g. in terminal illness). During the trial, interdisciplinary assessments must be made to prove those conditions. Judges have to undertake personal interviews with the alleged incapable person. The decision should be made regarding the following aspects related to the person concerned: a) diagnosis and prognosis; b) period when the situation was manifested; c) personal, family and social resources; d) protection

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Another important innovation is article 33 of the new ACCC concerning the parties who have standing to request a judicial declaration of restricted capacity, inability or incapacity. This can now be requested by the person concerned, a spouse who is not separated in fact, a cohabiting partner while cohabitation has not ceased, relatives within the fourth degree (grandparents, parents, sons or grandsons), if they have affinity within the second degree (parents-in-law, sons and daughters-in-law), or the Public Ministry. The judicial procedure should be developed with the necessary participation of the Public Ministry (ACCC - Art. 103), but the operation of this procedure varies in each province, because Argentina is a Federal Republic and procedural regulations are within the domain of each province (Dabove, 2016).

### **3. The new guardianship**

Guardianship is a legal institution, to safeguard the welfare or the property of an adult whose intellectual or mental impairment prevents them from making responsible decisions. Traditionally, the term ‘guardianship’ was used to describe the substitute decision-making for both person and property. But the new Argentinian Civil and Commercial Code has changed this and recognizes new meanings of guardianship such as: representation and personal assistance, support and reasonable safeguards (Articles 32-43 and 100-140). However, the Code has maintained other meanings connected with judicial procedures such as guardianship ad litem or temporary guardianship; definitive guardianship; guardianship of the person; conservatorship of property, and full guardianship (Ganner and Dabove, 2015). Nevertheless, any guardian will assist restricted persons only in relevant acts concerning patrimonial matters as specified by the court. The guardian can also be responsible for other functions too, such as giving assistance in health care, housekeeping, or entertainment if the person is not able to perform these functions autonomously. The guardian must report his activities to the judge (ACCC, Art. 130 to 134).

In Argentina professional supporters, legal representatives or guardians participate in the judicial procedure. Before any judicial decision is reached, the court has to appoint a 'temporary guardian' –or a 'supported decision-maker', whose task is to

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In court proceedings, the role of the 'temporary guardian' can never be assumed by a family member or by the person who files the incapacity lawsuit, because there could be a conflict of interest between the petitioner and the respondent. What is sought throughout the process is the designation of a third party, to ensure that the respondent is assured of effective protection in court.

The appointment of a special guardian to property occurs only when it is necessary to take urgent action, before the judicial decision is reached. It is a precautionary measure in the form of an anticipatory jurisdiction because a person is denied the management of his asserts without the mediation of judgment. It should only be adopted when it has been shown that, if urgent conservation action is not taken, the person's estate will be adversely affected. Only this function may be performed by a family member during the judicial procedure, and it is not necessary for him/her to be a lawyer. However, if this is not possible or desirable, the function can be assigned to a state official or a private attorney, according to the value of the estate of the person whose capacity is in question.

The costs for procedures and the supporter/legal representative are paid in two ways. If the person has sufficient resources, the court appoints a private attorney, who is selected from a list of professionals who have been previously registered in the Court of Appeal. The fees are met from the person's assets, unless the application is rejected and, in that case, the fees should be covered by the petitioner. If the person has no adequate resources to meet the potential costs, the judge will designate a public lawyer, as a temporary or maybe as a definitive guardian. In each province, the role of the public guardian (temporary or definitive), for people without resources, is allocated to the Poor and Absent Defenders, public lawyers that their salaries are paid by each State (Ganner and Dabove, 2015; Dabove, 2016).

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**4. Monitoring systems: the role of families, volunteers and judges**

During the judicial procedure, family members have to be available to attend properly prepared so the process can take place without delays. If urgent action is needed before the final judicial decision is made, some of them can be designated as a ‘guardian to property’ in patrimonial actions as a precautionary measure to protect the person’s estate only.

After the trial, the court appoints the definitive guardian of the person. The guardian may be one or more relatives; preferably the wife, husband or an adult child, in accordance with ACCC, articles 100-103. So, there may be more than one ‘definitive’ guardian. In any case, this guardian is designated to render assistance, support or representation to anyone whose capacity is restricted and this function ends when the person dies or when the person regains legal capacity under ACCC, article 138. Otherwise, according to the new ACCC, article 139, a capable person can (with a living will) appoint a person as his future guardian.

On other hand, in Argentinian Law, volunteers (who have full legal capacity: ACCC. Art. 110) can make complaints to the public ministry if a person is living in a dangerous situation and they can give support by making decisions regarding the person’s conduct, managing his property and performing any required legal acts with the corresponding judicial authorization. Meanwhile, guardians, supporters or legal representatives are supervised to ensure that the rights, the will, and the preferences of the adult concerned are respected (cf. Art. 12 section four UN CRPD). Every year, they have to present a complete report to the court, specifying all their activities. The duty of filing the report is on the individual and only those who fulfill it will receive judicial approval according to ACC, Art. 130 to 140 (Ganner and Dabove, 2015).

## V. CONCLUSIONS

The promotion of personal autonomy and the empowerment of the elderly in dependency situations contribute to eradicate elder abuse. Argentinian Law and the new Inter American Convention recognize some instruments to fulfill this purpose.

These include living wills or advance directives, free and informed consent on health matters, intervention of volunteers and social networks, access to phone calls or

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computer monitoring systems, judicial control on safeguards relating to the exercise of legal capacity, the development of training programs about elder rights for family members, caregivers, guardians, security forces, judges, lawyers, notaries and their diffusion by mass media.

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