

Autonomy and Capacity: About Human Rights of Older Persons in Dependency Situations

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Abstract This paper discusses the scope of the current Argentine legal model concerned with autonomy of older people who are in a state of dependency, as part of the Elder Law. So, it studies the juridical system of capacity and will -significant components of personal autonomy- and analyzes the regime of adult guardianship, support systems, assistance and representation for older people. To fulfill these aims, the research takes into account the new Argentine Civil and Commercial Code -which comes into force from August 2015-; the National Rights of Patients Act (No. 26,529) and the National Mental Health Act (No. 26,657). This article considers too the evolution of jurisprudence in this area and contemplates the connection of the normative system and judicial decisions with the Inter-American Convention on Protecting the Human Rights of Older Persons, approved by the General Assembly of the Organization of American States (OAS) on June 15 2015. Finally, in this paper it is considered the importance of the actual development of the International Convention on Human Rights of Older Persons of the United Nations to this field.

Keywords Autonomy · Capacity · Will · Dependency situation · Guardianship · Human rights · Elder law

Introduction

In the legal world, autonomy can be understood as an individual space within each person exercises their own power over their life and their property and establishes rules and plans for developing their personality under equal conditions, without trespassing on those spaces that belong to others. It is the field of independence in which each

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person exercises their fundamental rights and duties subjectively, in such personal areas as: identity, life, health, physical and moral integrity, honour, self-image, and privacy, individual liberty (e.g. the right to movement and expression, as well as ideological, religious or sexual liberty, among others) and the own heritage. So, it also includes the ability to deal with the disposal and management of their assets; their occupations and leisure time and their relationships with others. Therefore, autonomy contains the whole sphere of freedom and vital opportunity that brings reality and consistency to our human condition. In summary, it is the individual territory that everyone is able to support on their own, which coexists with the territory of other members of society and on equal terms with them. Law has the mission to protect and to guarantee this territory in this way, especially when autonomy belongs to persons who are in vulnerable situations or dependent, such as of the elderly subject of this work (Dabove 2011; 2015).

Under the Argentinian current legislation, the existence of legal capacity and will constitute two important elements of the legal consideration whether any particular person is able to exercise personal autonomy. Legal capacity is an important general attribute that the law recognizes in everyone -including people with judicial restrictions on it- governing such basic things as: assumption of name, address and the right to marry, among others. Free will is a personal discernment, ability to form intention and to exercise freedom of action and is central to the determination of rights and liabilities under the law.

From the philosophical perspective of western culture, autonomy has always been deemed to be a central concern. Consequently, it has been the foundation of debates on the human condition; on liberty, equality and fraternity and on the fundamental rights and duties of human beings. It has also been a starting place for the formulation of theories of the social contract which have been the key to the establishment of the liberal, modern state. Furthermore, these debates are central to Kantian theory on autonomy as the basic principle for the operation of the legal system (Kant's moral categorical imperative); to which the assumption of an abstract, formal and universally acknowledged concept of a legal person is key.

Thus, under this philosophical framework, continental law (European and Latin American Law, based on the Napoleon Civil Code of 1804) introduces the concept of autonomy as a general principle, originally conceived in the operation of the law of contract. This concept has also given guiding criteria to judges when deciding tough cases. However, even if this abstract model of legal person and autonomy was being applied to social reality in the nineteenth century, this paradigm was undermining by several relevant facts in favor of a new concept of autonomy, respectful of the specificities of humans.

Between them, it could be mentioned: the contemporaneous industrial revolution, scientific breakthroughs and demographic changes, the global increase in life expectancy, among other things, played a leading role in this process. There were also gradual developments in labour law and in social security; the emergence of the welfare state and the concepts of socialism in the twentieth century; the organization of the United Nations and the development of the international process of specification of Human Rights, protecting vulnerable groups, since 1950. Also, the regional integration processes and the establishment of the current Constitutional State model, characterized by the prevalence of human rights in the Constitutional Law of each State and the permanent judicial oversight of the constitution. In short, all these phenomena

described above, have gradually changed the approach to the question of personal autonomy to a new one: a concept that works as the main principle of human right to each person “considered in their own particular circumstances”.

In this paper, we will analyze the emerging normative dimension of the legal regime in Argentina that deals with personal autonomy, in order to discern whether or not it is sociologically functional and compatible with the fundamental rights of freedom and equality, guaranteed by the constitution. Next, we will look at the scope of the Argentine juridical model, concerned with individual autonomy and its application to the care of older persons in dependency situations, as part of the law governing treatment of elderly people. In doing so, we will consider the concept of legal capacity; the procedure to invoke adult guardianship and procedures for making applications to the court; taking into account the new Civil and Commercial Code (Argentine Civil and Commercial Code, ACCC 2015)¹, i and the Inter-American Convention on Protecting the Human Rights of Older Persons. Finally, we will show the importance of the concept of autonomy in capacity, will and care of the older persons, to enable the evolution of Elder Law that contribute strongly to the continuing development of the International Convention on the Rights of Older People.

Autonomy and Capacity in an Ageing World: to the Elder Law

As never before, the twentieth century gave us all the true possibility of living longer, as it is demonstrated by the long lifespan indexes. Accordingly, now, in the twenty-first century, the ageing of people in society is seen as a global and multigenerational phenomenon (Dabove 2008, 2013, 2015). Nevertheless, it is worth keeping in mind that old age undoubtedly carries some deficits in relation to a person’s physical, psychological and occupational capabilities that may be translated into a change in levels of self-esteem; in their relationship to society; and, mainly, in their place in the family unit. These factors may combine to provoke an identity crisis called “gerontolence”, the consequences of which are not always positive for the older person’s mental health, even though the condition might be temporary (Bär 2013; Iacub 2011).

Consequently, even when a person lives into a disease-free old age, some old people are still fitter than others. It is not always possible for elderly people to find conditions that promote a total bio-psycho-social equilibrium, which is ideal for developing their evolving lifestyle. They might not always enjoy personal autonomy that provides them with a basic framework of freedom for the exercise of their rights, the fulfillment of their duties and for their vital development. Being in such disadvantaged circumstances may put the elderly in a disadvantaged legal position that makes them easy prey for predators. They can then easily be at risk of being harmed, or morally or physically hurt; even deprived of the very space needed to exercise the autonomy of the will to escape from the situation (Dabove and Di Tullio Budassi 2015; Dabove et al. 2007)

In current law “being old” still means to remain subject to a situation of triple vulnerability: sociological -juridical acts-; legal -normative system- and in justice - equity and fairness- (Goldschmidt 1987; Ciuro Caldani 2000, 2007, 2011; Dabove

¹ Argentine Civil and Commercial Code, ACCC 2015 Available at <http://www.boletinoficial.gov.ar/> (Accessed Nov. 10 2015)

2005). Thus, according to the tri-dimensional perspective of law, it is possible to observe that legal and social dynamics make the elderly vulnerable because they become stereotyped and constrained in their acting sphere (Holstein 2015). The juridical normative system weakens them still further, since it does not offer a frame of empowerment and legal protection adequate to deal with the particular features of their vulnerability. The elderly are also weakened by the prevailing of general principles of justice that not recognize sufficiently old age as a relevant differential datum to solve juridical problems between people, in the legal system. Therefore, it is not strange that in general the elderly perceive that their own capacity to exercise their will has been weakened and that they then suffer real legal discrimination. Accordingly, their lives and property might become negatively affected, owing to the flaws of a system not adapted to the realities of ageing (Dabove 2005; Dabove et al. 2007).

At present, the stage of global ageing raises a set of questions that have not been properly identified before (Leeson 2009a, 2009b, 2011). The first symbolic legal document: about that is the Resolution of the United Nations: the World Assembly on Ageing held in Vienna in 1982 (Cohen 1978; Marshall and Kapp 2000; Doron 2009; Kapp 2010). Since then, studies have gradually looked at the exercise of social responsibility towards older people, evidenced by such considerations as: legal capacity, empowerment and autonomy; freedom and civil rights; integrity and health; abuse of older people and the showing of violence towards them, as well as property rights; access to justice; further family legal issues; social rights, and social security issues (Dabove 2015; Frolik and Kaplan 2003).

In Argentina, Elder Law has been based on the United Nations Principles for Older Persons: Independence—Participation—Care—Self-fulfillment - Dignity (United Nation 1991) and on the new Inter-American Convention on Protecting the Human Rights of Older Persons. (OAS, General Assembly 2015). Thus, it is concerned with five principal issues: (Dabove and Prunotto Laborde 2006; Dabove 2015).

1. Age discrimination, vulnerability and legal capacity in the elderly. *Self-fulfillment*;
2. Human rights of autonomy: freedom and self-determination in old age. *Independence*;
3. Human rights of participation (in family, social and political matters). *Participation*;
4. Social security rights: equality and social inclusion of the elderly. *Care*;
5. Warranty protection systems: access to justice for older people. *Dignity*.

Individual autonomy and care of older persons in dependency situations are connected with all of these points. However, now these are also being mentioned in relation to: age discrimination, vulnerability, legal capacity and human rights of autonomy (freedom and self-determination in old age). Moreover, all these issues are also recognized by a lot of articles of the Inter-American Convention on Protecting the Human Rights of Older Persons, such as articles 5 to 7, 9 to 16, 19, 23, 24 and 30. (OAS, General Assembly 2015).

This legal text recognizes the right to independence and autonomy, that is: *the right of older persons to make decisions, to determine their life plans, to lead an autonomous and independent life in keeping with their traditions and beliefs on an equal basis, and to be afforded access to mechanisms enabling them to exercise their rights*. Besides,

this Convention specifically establishes the State's 'duty to adopt programs, policies, or actions to facilitate and promote full enjoyment of those rights by older persons, facilitating their self-fulfillment, the strengthening of all families, their family and social ties, and their affective relationships.'

In particular, they have to ensure:

- a) *respect for the autonomy of older persons in making their decisions, and for their independence in the actions they undertake;*
- b) *that older persons have the opportunity, on an equal basis with others, to choose their place of residence and where and with whom they live, and are not obliged to live in a particular living arrangement; that older persons progressively have access to a range of in-home, residential, and other community-support services, including personal assistance necessary to support living and inclusion in the community and to prevent their isolation or segregation from the community (OAS. General Assembly 2015).*

The following sections are intended for studying the development of the right to autonomy of older persons, within the Argentine legal system.

Legal Capacity and the Elderly Person's Will: Legal Institutions and the Legal System

In Argentine Law, capacity and will constitute two important elements of the legal position that each person is able to achieve/adopt within the legal system (personal autonomy). Thus, each person develops their life plans, exercises their rights and duties and produces, in sum, juridical acts. In accordance with the new Argentine Civil and Commercial Code ('ACCC') -Article 259-, this means: *human, voluntary and lawful acts that have the direct purpose of establishing relationships between persons to create, modify, transfer, keep or extinguish legal relationships.* (Garrido Cordobera et al. 2015).

Legal capacity: a person's unavoidable attribute

Legal capacity is a general person's attribute recognized by Law in the ACCC (articles 21 and others) and it could be understood in sociological, normative and values terms. From a sociological dimension, legal capacity is the real ability to comprehend and put into practice competences, skills or prerogatives that the law grants to each person equally and constitutes their sphere of individual liberty. Normatively, legal capacity is also the ground of individual autonomy and is defined in ACCC as every person's ability (whether a natural or other legal person), to acquire rights and to assume obligations according to ACCC Article 22 (Zannoni et al. 2015). In axiological terms, legal capacity is justified owing to the end-in-itself condition that every person has (Tobías 2009; Borda 2001). In total, legal capacity is the full -personal capacity of enjoyment and personal capacity of exercise ability- of all rights and duties according to law and it is strongly protected in the Inter-American Convention on Protecting the Human

Rights of Older Persons, especially in Articles 12 and 19 (OAS. General Assembly 2015).

So, the new Code recognizes two types of legal capacity: A) the capacity of enjoyment: the person's prerogative to be entitled to enjoy rights and to fulfill duties; B) the capacity of exercise, which is referred to the ability to exercise these rights and assume these duties. Concerning human persons, in accordance with ACCC Article 22 (Garrido Cordobera et al. 2015), legal capacity (capacity of enjoyment and exercise) is acquired gradually until the person reaches the age of majority at 18 years; under ACCC, Article 25, 22, 23 and 31 (Garrido Cordobera et al. 2015). Moreover, once acquired, it cannot be lost due to the mere passage of time. Only severe causes, or situations that pose a risk to their lives or their property, might allow restrictions on an individual's right to exercise their own legal capacity to act and make choices; ACCC, Articles 32 and 48 (Clusellas et al. 2015). Moreover, such restrictions may be set only by a judge.

The Argentine legal system has experienced a significant evolution in relation to the law of capacity. There were two relevant events between 1869 and 1994, before the last constitutional reform. But there are other relevant factors since 2008, after the national assumption of the UN-Convention on the Rights of Persons with Disabilities (CRPD). Under Argentine Law, this document is a constitutional instrument and, by virtue of the Argentine Constitution, Article 75 inc. 22 over-rides lesser legal sources: Codes, Acts, national or local legislation, judgments, contracts, etc.

The first milestone was set in 1869/1871 with the entry into force of the National Civil Code and the establishment of the general legal regime relating to persons (and the determination of their capacity or incapacity, etc.) and to the determination of legal facts and legal acts (by reference to will, discernment, intention, liberty, etc.) Act N° 340/1869. The second milestone was set in 1968 with the passing of Act N° 17.711, which modified the old Civil Code, by adding the inability institution in Article 152 bis.² The third milestone was set in 2008, with the passing of Act N° 26.378, which imported the International Convention on the Rights of Persons with Disabilities (CRPD) into Argentine Law.

The fourth milestone was set with the entry into force of three important Acts between 2009 and 2012: Act N° 26.579 in 2009/2010, that reduced the age conferring full legal capacity from 21 to 18 years, in order to fit the Convention on the Rights of the Child, which is constitutionally valid. The Patient Protection Act, N° 26,529, in 2010 amended in 2012, including the principle of autonomy as the most relevant criterion in this matter. The Mental Health Act, N° 26,657, in 2011, that modified the old Civil Code regarding the

² Old ACC – Article 152 bis: *You can legally disabled (inability):1) Those who by habitual drunkenness or drug use are exposed to grant legal acts detrimental to your person or property.2) At its powers diminished when not to the case provided for in Article 141 of this Code, the judge considers that the exercise of their full capacity can be presumed damage to his person or property.3) Those who by prodigality in acts of administration and disposition of its assets exposed his family to the loss of heritage. In this case, only proceeds the disqualification if the person concerned hath spouse, parents or children and any squandered an important part of their heritage. The action for this disqualification shall be restricted to the spouse, ascendants and descendants. A guardian will be appointed to the disabled and the rules relating to the declaration of disability and rehabilitation dementia apply as appropriate. Without the consent of the disabled curator may not dispose of their property by "inter vivos". The disabled may grant themselves acts of administration, except that limits disqualification sentence given the circumstances.(Article incorporated by Article 1 of Law No. 17,711 BO 04/26/1968). Available from <http://www.infoleg.gov.ar/infoleginternet/anexos/105000-109999/109481/texact.htm> (Accessed Jan. 23, 2015).*

restrictions on capacity, caused by mental illnesses (Article 152 ter).³ The last one is the new Civil and Commercial Code that replaces previous legislation and follows up the process started by the importation of the CRDP.⁴

Thus, the CRPD introduced a Copernican revolution in the concept of legal capacity in several ways (Bach 2012). First, it 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). Secondly, 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; 12).

What is more, the Convention denies categorically any restriction on legal capacity which implies the substitution of the person's will; according to Article 12.⁵ Finally, it inserts the social paradigm of disability. The Convention says that discapacity is mainly the consequence the barriers set by the social environment (Preamble, e), which avoids granting persons with disabilities their full and effective participation in society under equal conditions (Smith 2014).

The Will

In Argentine Law the will constitutes a central element or device related to the characterization of legal facts and legal acts. It will be mentioned briefly, although it is known as the energy or the power source that enables each person to decide or develop different activities by themselves. Related to legal capacity, it is also a complex legal instrument under the Code, which requires that the person in question should somehow demonstrate possession of the will's three inner components: discernment, intention and liberty (ACCC 205—Article 260).

For the civil doctrine, discernment is the prerogative of reasoning or the personal competence to recognize and distinguish right from wrong, just from unfair, convenient

³ Old ACC—Article 152 ter: *judicial declarations of disqualification or disability shall be based on a review of faculty comprised. Of interdisciplinary assessments. They may not be imposed for more than three (3) years and shall specify the functions and actions that are limited, ensuring that the interference with personal autonomy is the least possible.* (Jan. 23, 2015, 9:30 AM). Available from <http://www.infoleg.gov.ar/infoleginternet/anexos/105000-109999/109481/texact.htm>. (Accessed Feb. 25, 2015).

⁴ Available from <http://www.un.org/disabilities/convention/conventionfull.shtml> (Accessed Jan. 21, 2015).

⁵ CRPD -Convention on the Rights of Persons with Disabilities. Available from <http://www.un.org/disabilities/convention/conventionfull.shtml> (Article 12: *Equal recognition before the law. 1. States parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. 2. States parties will recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. 3. States parties will take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. 4. States parties will ensure that all measures relating to the exercise of legal capacity appropriate and effective safeguards are provided to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, that there is no conflict of interest and undue influence, that they are proportional and tailored to the circumstances of the individual, that they be implemented in the shortest possible time and that they are subject to regular review by an authority or a competent, independent and impartial judiciary. The safeguards will be proportional to the degree to which such measures affect the rights and interests of individuals. 5. Notwithstanding the provisions of this Article, States parties will take all measures that are relevant and effective to guarantee the right of persons with disabilities, on an equal basis with others, to own and inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and will ensure that persons with disabilities are not deprived arbitrarily of their property.* (Accessed Jan. 21, 2015).

from inconvenient. Intention is the will's direction or tendency, enlightened by discernment, which allows each person to put an idea into practice. Liberty is understood as the possibility of personal choice and the subject's independence to exercise their rights and duties.

Moreover, according to the new ACCC, each of these components of the will might be affected by defects that may cause negative consequences in the legal acts (i.e. nullity *ab initio* or liability to annulment). For instance, the discernment may be stale by error -factual or legal error-, article 265 (ACCC 2015) or by the subject's dementia or lack of reason, under ACCC: Article 261. The intention might be affected by deceit or the explicit desire to harm, according to ACCC—Article 271 and liberty can be vitiated by violence or intimidation pursuant to ACCC Article 276 (Cifuentes 2004; Zannoni 2013). In old age, it is possible to come across different types of vulnerability that can produce flaws in the will and can contribute to generate disability or dependency situations. Discernment and liberty are the most involved, especially because of ageism—the prejudice against old people.

In addition to those general rules, the Patient Protection Act, N° 26,529 of 2010/2012, specifically introduced the principle of autonomy as the most relevant criterion in this matter (Article 2) and Article 11 recognizes living wills as legal instruments for the first time in Argentine private law.⁶ Fortunately, the new ACCC continues this and, therefore, it admits the principle of autonomy at Article 59 and living wills at Article 60. Article 60, in particular, says: *Any capable person can anticipate directives and confer mandates for their health and their own inability forecast. They can also designate one person or more to express consent for medical procedures and to exercise guardianship. Living wills involving euthanasia practices are forbidden. This declaration of will can be freely changed at any time.*

So, the principle of autonomy and living wills are important and powerful legal tools; particularly because of their viability to protect preventatively old people's capacity and will, whether they are capable or incapable at the time a decision must be made, and because of their power to protect the wards too.

Restrictions on Legal Capacity of Older Persons in Dependency Situations

The new ACCC establishes three types of restraints concerned with capacity of exercise (Article 23 ACCC) partial restrictions to specific areas of personal autonomy⁷

⁶ Article 11: *Any capable adult can have advance directives about their health and may consent or refuse certain medical, preventive or palliative treatments, and decisions concerning their health. The directives must be accepted by the physician in charge, except those involving euthanasia.* Available from <http://www.infoleg.gov.ar/infolegInternet/anexos/160000-164999/160432/norma.htm> (Accessed Nov. 10 2015).

⁷ ACCC—Article 32. *Person with restricted capacity and incapacity: The judge may restrict the capacity for certain acts of a person older than thirteen who suffers addiction or a permanent or prolonged mental impairment of sufficient severity, if they consider that the exercise of their full capacity can be damaging to his person or property. In connection with those acts, the judge should designate appropriate support or assistance according to Article 43, specifying the functions with reasonable adjustments based on the needs and circumstances of the person. Supports allocated should promote the autonomy and favor the decisions that respond to the preferences of the protected person. Exceptionally, when the person is absolutely unable to interact with their environment and express their will by any means, medium or appropriate format and support system, the judge may declare the incapacity and appoint a curator.*

incapacity or total incompetence⁸ and inability because of prodigality (article 32 and 48 ACCC).

Partial restrictions are established by law or by judges in case of mental weakness, habitual drunkenness or narcotic abuse that may affect different areas of individual autonomy. Sociologically, these limits can be determined whenever a person has any deficiency in his will, without completely affecting their discernment. For that reason, Article 32 specifies that: *The judge may restrict the capacity for certain acts of a person older than thirteen who suffers addiction or a permanent or prolonged mental impairment of sufficient severity, if he or she considers that the exercise of their full capacity can be damaging to his person or property* (Article 32 ACCC).

In this new system, an important precedent was the Article 152 bis of the old Argentine Civil Code mentioned above. However, from a perspective of values, this article establishes better ways of solving this question than others stipulated by the old Civil Code. Particularly, and according to the CRPD, it says: *...In connection with those acts, the judge should designate appropriate support or assistance according to Article 43, specifying the functions with reasonable adjustments based on the needs and circumstances of the person. Supports allocated should promote the autonomy and favour the decisions that respond to the preferences of the protected person* (Article 32 ACCC).

A declaration of incapacity is an exceptional judicial measure that could be made in respect of an old person in a case of a severe cognitive impairment that puts their life and property at great risk and involves almost their whole personal autonomy ACCC, article 32, *in fine*. From a sociological point of view, the problem is the lack of ability to act by themselves. The practical consequence is the loss of the exercise of autonomy for the person concerned and the replacement of his or her will by the guardian's (or conservator's), who will be his/her substitute decision-maker (or legal representative), with respect to some acts. From a normative perspective, incapacity is the result of a judicial decision with appropriate jurisdiction that declares someone to be incompetent and provides them with a guardian or curator.

According to the Mental Health Act⁹ this judgment must be renewed every 3 years and must specify the acts in which the participation of the incapacitated person will be totally prohibited. Fortunately, this mechanism is kept with improvements by the new ACCC following the CRPD. From a perspective of values, incapacity is defined as a particular legal tool for protecting dignity and the personal autonomy of someone with severe cognitive impairment, as well as a safe means of caring about everybody connected with them.

⁸ ACCC—Article 24. *Persons incapable of exercise*: A) the unborn person; B) the person who does not have the age and a sufficient maturity, to the extent provided in “*Autonomy and Capacity in an Ageing World: to the Elder Law*” of this Chapter; C) the person declared incapable by court, to the extent disposed in that decision. Article 32. *Person with restricted capacity and incapacity*: Exceptionally, when the person is absolutely unable to interact with their environment and express their will by any means, medium or appropriate format and support system, the judge may declare the incapacity and appoint a curator.

⁹ ACCC – Article 48: *Prodigals*. A person may be under inability because of prodigality if he or she exposes his or her spouse, partner or underage or disabled children, to loss of their heritage, because of his or hers management. A person is considered a disabled person, who has a permanent or long-term physical or mental functional impairment, which in relation to their age and social environment entails considerable disadvantage for their family, or for their social, educational or professional integration.

The concept of inability (or partial incapacity), introduced in 1968, was created as a more flexible judicial solution than total incapacity, in order to solve hard cases of cognitive decline (specifically due to mental weakness, habitual drunkenness, narcotic abuse, and prodigality, without completely affecting their discernment –Old ACC, Article 152bis-.¹⁰ But in 2011 it was reformed by Article 152 ter of the Old ACC.¹¹ However, now, under the new ACCC, inability can be established only in one case: whenever a person shows factually any insufficiency in his/her will due to prodigality, without being completely affected in his/her discernment, in accordance with ACCC Article 48.

From the normative perspective, inability must be determined by a judge too. The judicial decision must address individual, personal decisions and specify which legal acts will need personal assistance. But these restrictions can refer only to property issues under ACCC Articles 49 and 50.¹² Anyway, from a value viewpoint, these restrictions are legal tools for protecting personal autonomy.

In old age, the cases of restriction of capacity to exercise autonomy are often connected with any of the three kinds of restriction, but the most important are caused by cognitive impairments (dementia) and mental weakness; secondly by prodigality and last, by alcoholism and drug-addiction, according to the application of ACCC Articles 24, 32 and 48. However, people (and courts) sometimes confuse these incapacitating situations with “gerontolence”: emotional problems or affective disorders, caused by family abandonment, income decrease after retirement; weakening of general health, the effects of ageism or negative preconception about the elderly among others which can combine to prevent the regular exercise of the rights of the elderly (Dabove and Di Tullio Budassi 2014). But these cases are only examples of “dependency situations” that should not be included in the formal list of causes of restrictions by virtue of true legal incapacity.

Guardianship and the New Paradigm of Care: Support, Assisted Decisions and Reasonable Safeguards

Guardianship is a legal institution, to safeguard the welfare or the property of an older person whose intellectual or mental impairment prevents them from making responsible decisions (Moye et al. 2007). It is an involuntary procedure, imposed by the state, upon the ward for their own protection and the term ‘guardianship’ is, in general, used to describe the substitute decision-making for both person and property (Dayton 2014; Moye et al. 2007).

But the new Civil and Commercial Code widens this institution and it now recognizes several types of guardianship in articles 32, 43, 44, 48 and 100–140

¹⁰ Old ACC, Article 152 bis. Available from <http://www.infoleg.gov.ar/infolegInternet/anexos/105000-109999/109481/texact.htm> (Accessed Nov. 10 2015).

¹¹ Old ACC, Article 152 ter. Available from <http://www.infoleg.gov.ar/infolegInternet/anexos/105000-109999/109481/texact.htm> (Accessed Nov. 10 2015).

¹² *Id. art. 12:60. Article 49. Effects. The declaration of inability necessitates the appointment of supports, which should assist the disabled person in the making of dispositions, inter vivos acts and other acts that the court specifies in its order Article 50. Cessation of inability. Cessation of inability can be ordered by the judge that declared it, after considering an interdisciplinary examination that favours the restoration of the person's autonomy. If restoration is not complete, the judge can extend the list of acts that the person can do alone or only with support.*

(Clusellas et al. 2015). it provides for representative and personal assistants, other supports, reasonable safeguards, guardianship ad litem or temporary guardianship; definitive guardianship; guardianship of the person; conservatorship of property, and full guardianship.

The evolution of the capacity system in Argentina and the development of the recognition of personal autonomy has also had a significant impact on legal regulation, concerning the presentation of evidence of cognitive impairment, besides influencing the guardianship itself. This system has shifted from a purely medical criterion, requiring only psychiatric evidence for the mental or intellectual disability in question (Old CC—article 141), to the interdisciplinary criterion. Accordingly, at last, the new ACCC has adopted the CRDP model of ward, support and assisted decision-making and, nowadays, the existence of a mental illness is neither enough, in itself, to restrict the legal capacity of a person, nor to define inabilities or incapacities. It is now also necessary to prove that the mental illness obstructs self-care and the normal administration of the person's property.

On the other hand, in the new system, the guardian will assist restricted persons only in relevant acts, previously specified by the court, with patrimonial matters. However, the legal system has slowly allowed the guardian to 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.

Moreover, the CRPD and the new ACCC have changed the traditional concept of guardianship in favour of its recognition as an instrument of support, with safeguards for people with restricted capabilities. In this context, it is interesting to mention the Costa Rican Doctrine and the interpretation given by the Supreme Court of Mexico (México. Corte Suprema de Justicia 2013), on the need to understand guardianship as a support system for decision-making. From these perspectives, the Argentine Law should ensure that the person concerned is not forced to give up their freedom and self-governance completely. Therefore, within this new definition of guardianship, under the influence of the Mexican Convention, the substitution of personal will should happen only in extreme and exceptional situations.

In Argentina, the judicial procedure is being developed, with the necessary participation of the Public Ministry, according to ACCC article 103¹³. But the operation of this procedure varies in each province, because Argentina is a Federal Republic. After any judicial decision, the court has to appoint a 'temporary guardian' –or a 'supported decision-maker', whose mission is to control the legitimacy of the process, under ACCC articles 34 to 37 (Clusellas et al. 2015). This guardian must be a lawyer, who is appointed to intervene at the beginning of the process and who is there until it finishes. For the designation of the 'temporary guardian', judges weigh the economic situation of those entitled to be guardians according to the ACCC.

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. Their 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. In this instance, the role of the 'temporary guardian' can never be assumed by a family member or by the person

¹³ Available from <http://www.infoleg.gob.ar/infolegInternet/anexos/235000-239999/235975/texact.htm> (Accessed Nov. 10 2015)

who files the incapacity lawsuit, because there could be a conflict of interest between the petitioner and the respondent. What is sought throughout is the designation of a third party, to ensure that the respondent is assured of effective protection in court.

However, when 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 and their salaries, obviously, are paid by each State.

At the end of the trial, the court appoints the definitive guardian of the ward. This person could be one or more relatives; preferably the wife, husband or an adult child, in accordance with ACCC, articles 100–103.¹⁴ 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 y 139.¹⁵ Otherwise, according to the new ACCC, article 55, 60 y 61, a capable person can appoint a person as their future guardian with a living will.

The appointment of guardianship to property occurs only when it is necessary to take urgent action, before the judicial decision. It is a precautionary measure and evidences an advanced jurisdiction because, without the mediation of judgment, the person is denied the management of their assets. This measure should be adopted when it has been shown that, if urgent conservation action is not taken, the person's estate will be adversely affected. This function may be performed by a family member, and it is not necessary that they 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 measure of the estate of the person whose capacity is in question.

Judicial Answers Relating to Older Persons in Dependency Situations

In old age, it is very common to recognize different kinds of dependency situations deriving from abusive lawsuits seeking declarations as to the subject's capacity restriction, inability or incapacity, against persons that are simply old. However, although this general suspicion may be corroborated by reading decided cases in Argentina, some good decisions in the Argentine Court of Appeal in this regard should not be forgotten. Some of them are before, and others are after the CRPD and the ACCC.

- 1) The first significant leading case in Elder Law before the Convention was a resolution in which the judges were able to distinguish between old age (normal ageing) and senility (pathological ageing) (Méndez Costa 1983). They had to consider a restriction to a person's capacity, in the precedent: "F. de G. B., A. C. s/ inability". As the Civil National Court of Appeal of Buenos Aires, Sala D, showed in 1982 —*neither the basic attitude of understanding -discernment- nor reasonableness of judgment, nor the possibility of externalizing resolutions*

¹⁴ Available from <http://www.infoleg.gob.ar/infolegInternet/anexos/235000-239999/235975/texact.htm> (Accessed Nov. 10 2015)

¹⁵ Available from <http://www.infoleg.gob.ar/infolegInternet/anexos/235000-239999/235975/texact.htm> (Accessed Nov. 10 2015)

*through their manifestation decrease only by the normal course of life, without prejudice to these kinds of deteriorations occurring frequently in the elderly.*¹⁶

In another decision from 2004, a son, “E. de R., N. s/ inability”, applied for a declaration of his mother’s inability based on a pretended case of prodigality (Old ACC - Article 152 bis). In the first instance, the petition was rejected and the Court of Appeal confirmed it by asserting that *old age, as a normal physiological process, does not exclude health. It is not reasonable to assume that older people lack good health when the medical science does not register any pathology in them. The fear that an older person does not conduct good business, as anybody else may do, shall not find a remedy in the inability process. In total, the restriction of capacity can only happen in view of pathology.*¹⁷

This precedent was followed in “S., L. F., D F y P, s/ incapacity”, another Court of Appeal decision of 2009”.¹⁸ Here, the court rejected a daughter’s inability claim for her 90-year-old father, due to the large expenses of his daily life. The court considered that *the fact of having a considerable amount of money each month for his expenses does not configure an absurd use of the money in the management of his business and finance, and his aim to maintain a high standard of living is not irrational, as long as it does not compromise the totality of his assets. The ailments and disorders of old age cannot by themselves become a source of incapacity or inability.*¹⁹

- 2) Another important precedent before the CDPD is the Civil National Court of Appeal’s decision of December, 04, 1980, in Buenos Aires.²⁰ “M. M.P. de V. s/ inability” was a hard case, highlighting the importance of personal contact between the judges and the older person in question, as a guarantee of the proper defense of their rights. It was connected as well to the rights of such people to be heard and to express their views freely on all matters affecting them, with effective access to justice.

In this case, a son claimed an inability declaration against his mother, based on her alleged mental weakness, occasioned by her very old age (Old ACC—Article 152 bis inc 2°) and on her prodigality (Old ACC - art. 152 bis inc. 3°). The court rejected the medical expert’s reports that allegedly proved the older woman’s mental weakness, because personal contact with her persuaded the judges of her normal mental conditions and her perfect competency to continue administering her assets by herself.²¹ Nowadays, the current Argentine Civil and Commercial

¹⁶ “F. de G. B., A. C. s/ inability” (Argentina. Cámara Nacional Civil de Buenos Aires, Sala D, junio 22, 1982) La Ley A 1983, 313–316

¹⁷ “E. de R., N. s/ inability” (Argentina. Cámara Nacional Civil de Buenos Aires, June 1, 2004). La Ley 18/ 08/2004, 10.

¹⁸ “S., L. F., D F y P, s/ incapacity” (Argentina. Cámara de Apelaciones Civil y Comercial de Junín, September, 22, 2009). La Ley online 2010, 214.

¹⁹ “S., L. F., D F y P, s/ incapacity” (Argentina. Cámara de Apelaciones Civil y Comercial de Junín, September, 22, 2009). La Ley online 2010, 214. “M., D. N. s /inability” (Argentina. Juzgado Nacional en lo Civil N°88, octubre 4, 2014).

²⁰ “M. M.P. de V.s/ inability” (Argentina. Cámara Nacional Civil de Buenos Aires. Sala G, diciembre 4, 1980). La Ley B 1981, 23–26.

²¹ “M. M.P. de V.s/ inability” (Argentina. Cámara Nacional Civil de Buenos Aires. Sala G, diciembre 4, 1980). La Ley B 1981, 23–26.

Code compel judges to have personal contact with the person in question (Article 35).

- 3) The third leading case -“J. L. del V. s/ inability”- relates to the necessity of considering gradual capacity restrictions, in order to protect personal autonomy in the best possible way.²² Thus, in 1985 (August, 12) the Civil National Court of Appeal in Buenos Aires, stressed the judicial power of determining which legal acts were to be allowed and which ones were to be prohibited for an incapacitated person. The court established this decision because of a petition by a Mental Health Director who relied on the possibility of employing an incapacitated patient who lived under his control and who, according to the Director, would benefit from the situation.

The judges decided in favor of this claim, based on the patient’s biography, his social position in the hospital, his abilities for the job and *the legal duty of respecting disabled people’s personal autonomy in every possible way*.²³ In this case, the court concluded that not allowing the employment would involve an unreasonable and frustrating denial of autonomy, freedom and dignity. Furthermore, in a similar precedent from 2010 (“L. C. y Otros s/ incapacity”), the National Civil Court of Appeal of Buenos Aires also stated that *if the main objective of guardianship in this situation is the recovery of capacity and self-governance for the incapacitated person, the decisive importance of self-determination cannot be ignored*.²⁴ Fortunately, the new ACCC picks up this perspective too (Article 24; 32; 43; 48; 49).

- 4) Regarding guardianship, specifically, precedents of leading cases have appointed shared guardians in order to guarantee better care for the person, in contradiction to our Civil Code’s system of unique guardianship (Dabove 2007). In most cases, they referred to parents’ claims to the guardianship of their children, but cases also included brothers or sisters, sons or daughters, who were in charge of their disabled relatives. In a precedent from 2011,²⁵ a sister and her mother applied for ‘shared guardianship’ in relation to the disabled brother and son. His mother, the first and current guardian, was very old and afraid of not being able to perform her duties well in the future. She and her daughter wanted the appointment of two guardians before the old woman became weak, since it was a situation that could carry a serious risk to her son.

The court approved this petition and declared the unconstitutionality of the Civil Code system on the basis of the International Instruments of Human Rights incorporated in the Argentine Constitution (Articles 75 inc. 22 and 23). It declared, too, that this solution satisfied the guardianship’s purpose of protection, assurance of the quality of life and the right to welfare of the incapacitated person in a better way than that specified by the old Civil Code system. Fortunately, the new Civil and Commercial Code considers the possibility of shared guardianship ACCC Article 105.²⁶

²² “J. L. del V. s/ inability” (Argentina. Cámara Nacional Civil de Apelaciones de Buenos Aires. Sala C, August 12, 1985). La Ley E 1985, 47.

²³ “J. L. del V. s/ inability” (Argentina. Cámara Nacional Civil de Apelaciones de Buenos Aires. Sala C, August 12, 1985). La Ley E 1985, 47.

²⁴ “J. L. del V. s/ inability” (Argentina. Cámara Nacional Civil de Apelaciones de Buenos Aires. Sala C, August 12, 1985). La Ley E 1985, 47.

²⁵ “L., A. D. s/ curatela”, Cámara Civil y Comercial de Mar del Plata, Sala 3ª, February, 24, 2011 (Lexis N° 70068178).

²⁶ Available from <http://www.infoleg.gob.ar/infolegInternet/anexos/235000-239999/235975/texact.htm> (Accessed Nov. 10 2015)

Concerning good practice from Argentine jurisprudence on autonomy and Elder Law after the Convention on human rights of persons with disabilities, at least three leading cases can be cited. The first one -“B., J. M. s/insania”- occurred on June 12, 2012. The Supreme Court of Justice, the highest court, ruled in a case concerning the legal capacity of a 90-year-old man of great fortune. The Court made the distinction between old age (normal ageing) and senility (pathological aging), applied as mentioned before, in 1982, by inferior courts.

The innovative aspect here was the invocation of the Mental Health Act, the Convention on the Rights of Persons with Disabilities and the Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities, the purposes of which are not only to ensure the recognition of the exercise of legal capacity but also to ensure the implementation of all necessary support mechanisms, safeguards and so that those who are affected by a disability may be able to exercise their legal capacity on an equal basis with other people.²⁷

In the same year, a first instance judge reviewed his decision on an elderly woman’s legal capacity in the case: “C., M. s/Article 152 ter, Código Civil”.²⁸ Considering that her condition had improved, the judge modified the legal description of her condition from ‘incapacity’ to ‘inability’ (or partial disability). Based on the Convention on the Rights of Persons with Disabilities, the judge ruled that, from that moment onwards, the person would only need her guardian’s intervention when performing acts with economic relevance.

The attempt to implement the Convention is seen here in the distinction made by the judge, according to which the guardian is neither a legal representative nor a substitute of the person’s will. His duty is to ‘accompany’ the person’s decisions when dealing with significant economic affairs.²⁹

More recently, on April 10th, 2014,³⁰ a first instance judge restored the legal capacity of an 86-year-old woman in the precedent “M., D. N. s /inability”. Until then, she had been unable to perform relevant economic acts on her own. This modification was required by the public guardian, who highlighted that the old lady managed her life autonomously. Again, citing the Convention on the Rights of Persons with Disabilities, legal capacity restrictions were removed after realizing that they were no longer necessary owing to the person’s health improvement. The judge highlighted it, considering there was no reason for keeping the case open.

²⁷ Argentina. Corte Suprema de Justicia de la Nación. 2012. Recurso de hecho deducido por J. P. B. en la causa “B., J. M. s/insania” para decidir sobre su procedencia. Expte. B-241. Año 2010. Tomo 46. Sentencia 12 de junio de 2012. Available from <http://www.csjn.gov.ar> (Accessed Nov. 10 2015).

²⁸ C., M. s/Article 152 ter Código Civil” (Argentina. Juzgado Nacional en lo Civil N°7, Junio 18, 2012). Expte. 99.247/1996.

²⁹ C., M. s/Article 152 ter Código Civil” (Argentina. Juzgado Nacional en lo Civil N°7, Junio 18, 2012). Expte. 99.247/1996.

³⁰ M., D. N. s /inability” (Argentina. Juzgado Nacional en lo Civil N°88, Octubre 4, 2014).

Conclusions

In this article, the autonomy and care problems of elderly people have been addressed on two main premises: the development of the demographic ageing, which besides being global and multi-generational, is culturally ambivalent with the elderly because of the human difficulties to assume the end of life, on one hand, and the necessity of taking Elder Law into account, based on the paradigm of human rights and the new legal capacity system in Argentina. According to these parameters, autonomy was defined as that individual space within which each person exercises, by themselves, power over their own and property; establishes norms or plans that are referred to them and that let them develop under conditions which are equal with other people and are not damaging others.

It was recognized that, in current Argentine law, legal capacity and will constitute the two main ingredients of personal autonomy. Legal capacity, because of its condition of personality belongs to every person, along with their name, address, and marital status. The will comprises discernment, intention and liberty and is the most important element from which legal capacity can be determined.

Consequently, in relation to the law that relates to elderly people, it is submitted that those dealing with the future UN Convention on the Rights of Older People, the new American Convention on the Rights of Older People and the courts that have to apply the new CCC in Argentina, should take personal autonomy into account as a principle key to determining legal capacity in elderly people. In particular, it will be crucial to achieve:

- The fullest possible recognition of personal autonomy in all situations. The promotion of political and legal measures that maximize the equal treatment and the inclusion of older people in dependency situations.
- The establishment of a capacity regime, which avoids being restricted to the cases we studied in this text.
- The establishment of supported decision-making systems, which allow people with mental disabilities to decide as much as they can on their own. If their cognitive abilities are—even with the help of supported decision-making instruments – not sufficient to make informed and reasonable decisions, a representative (e.g. guardian) can decide on behalf of, and according to, the presumed will of the person with disabilities.
- The possibility of imposing a judicial duty to take interdisciplinary tests into account.
- The judiciaries seek to distinguish the features of normal old age from pathological old age.
- The promotion of the judicial duty to make personal contact with the allegedly disabled.
- The establishment of the duty to respect all living wills within the context of the judicial and guardianship systems, so as to discern and implement the disabled person's will and preferences.
- The establishment of the duty to respect all living wills and advanced directives like enduring Powers of Attorney.

Compliance with Ethical Standards

Conflict of interest The author declares that she/he has no conflict of interest.

Informed Consent Informed consent was obtained from all individual participants included in the study.

Ethical Treatment of Experimental Subjects (Animal and Human) All procedures performed in studies involving human participants were in accordance with the ethical standards of the institutional and/or national research committee and with the 1964 Helsinki declaration and its later amendments or comparable ethical standards.

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References

- Bach, M. (2012). El derecho a la capacidad jurídica en la Convención de la ONU sobre los Derechos de la Persona con Discapacidad: conceptos fundamentales y lineamientos para una reforma legislativa. In A. Palacios & F. Bariffi (Eds.), *Capacidad jurídica, discapacidad y derechos humanos: Una revisión desde la convención internacional sobre los derechos de las personas con discapacidad* (pp. 55–107). EDIAR: Buenos Aires.
- Bär, N. (2013). Entrevista a Alexander Kalache. *La Nación*, October 14, 2013. Available from: <http://www.lanacion.com.ar/1629017-alexandre-kalache-estamos-creando-una-nueva-etapa-de-la-vida-que-antes-no-existia-yo-lo-llamo-gerontolescencia>. Accessed Oct. 2015.
- Borda, G. A. (2001). *La persona humana*. Buenos Aires: La Ley, Tomo I.
- Cifuentes, S. (2004). *Negocio jurídico* (2nd ed., pp. 46–114). Astrea: Buenos Aires.
- Ciuro Caldani, M. A. (2000). *La conjetura del funcionamiento de las normas jurídicas: metodología jurídica*. Rosario: Fundación para las Investigaciones Jurídicas.
- Ciuro Caldani, M. A. (2007). *Metodología jurídica y Lecciones de Historia de la Filosofía del Derecho*. Rosario: Zeus.
- Ciuro Caldani, M. A. (2011). *Estrategia Jurídica*. Rosario: Universidad Nacional de Rosario.
- Clusellas, E. G., et al. (2015). *Código Civil y Comercial: Comentado, anotado y concordado: modelos de redacción sugeridos*. Buenos Aires: Astrea.
- Cohen Elias, S. (1978). Editorial: law and aging. *Lawyers and Gerontologists*, 18(3), 229.
- Dabove, M. I. (2005). *Los derechos de los ancianos*. Buenos Aires: Ciudad Argentina.
- Dabove, M. I. (2007). La ancianidad y la salud mental: el régimen legal argentino sobre incapacidad y necesidad de reformas. In *Envejecimiento, memoria colectiva y construcción de futuro: memorias del II Congreso Iberoamericano y I Congreso Uruguayo de Psicogerontología*, 533–541.
- Dabove, M. I. (2008). Derecho y multigeneracionismo: o los nuevos desafíos de la responsabilidad jurídica familiar en la vejez. *Revista de Derecho de Familia*, 40, 39–54.
- Dabove, M. I. (2011). Autonomía y atención de las personas mayores en situación de dependencia en España: Una cita entre generaciones. In *Oñati Socio-Legal Series I (8)*. Available from: <http://opo.iisj.net/index.php/osls/article/view/76/138>. Accessed Oct. 2015.
- Dabove, M. I. (2013). Elder law: a need that emerges in the course of life. *Ageing International*, 40, 138–148. doi:10.1007/s12126-013-9193-4.
- Dabove, M. I. (2015). *Derechos humanos de las personas mayores: Acceso a la justicia y protección internacional* (p. 2015). Buenos Aires: Astrea.
- Dabove, M. I., & Di Tullio Budassi, R. G. (2014). *Derecho de la Vejez y salud mental: Luces y sombras de la jurisprudencia argentina en torno al nuevo paradigma de la capacidad* (pp. 125–135). Rosario: Revista de Derecho de la Universidad Nacional de Rosario.
- Dabove, M. I., & Di Tullio Budassi, R. G. (2015). Prestaciones alimentarias en la vejez multigeneracional: nuevas consideraciones del derecho argentino. *Revista Chilena de Derecho*, 42(1), 7–33.

- Dabove, M. I., & Prunotto Laborde, A. (2006). *Derecho de la vejez: Perspectiva interdisciplinaria*. Juris: Rosario.
- Dabove, M. I., Spósito, M. A., & Di Tullio Budassi, R. G. (2007). La ancianidad y la salud mental: el régimen legal argentino sobre incapacidad y necesidad de reformas. In *Envejecimiento, memoria colectiva y construcción de futuro: Memorias del II Congreso Iberoamericano y I Congreso Uruguayo de Psicogerontología* (pp. 533–541). Montevideo: Universidad de la República del Uruguay.
- Dayton, K. (2014). *Comparative perspectives on adult guardianship*. Durham, North Carolina: Carolina Academic Press.
- Doron, I., ed. (2009). *Theories on law and aging: the jurisprudence of elder law*, doi 10.1007/978-3-540-78954-3.
- Frolik, L. A. & Kaplan, R. L. (2003) *Elder law*. 3rd edn. St. Paul: Thompson West.
- Garrido Cordobera, L. M. R., Borda, A., Alferillo, P., & Krieger, W. (2015). *Código Civil y Comercial Argentino: Comentado, anotado y concordado*. Buenos Aires: Astrea, Tomo I.
- Goldschmidt, W. (1987). *Introducción filosófica al Derecho. La teoría trialista del mundo jurídico y sus horizontes* (6th ed.). Buenos Aires: Depalma.
- Holstein, M. (2015). *Women in late life: Critical perspectives on gender and age* (p. 2015). Lanham: Rowman & Littlefield.
- Iacob, R. (2011). *Identidad y envejecimiento*. Buenos Aires: Paidós.
- Kapp, M. B. (2010). *Legal aspects of elder care*. Sudbury: Jones and Bartlett Publishers.
- Leeson, G. W. (2009a). Future Aging in Southeast Asia: Demographic trends, human capital and health status. In Nurvidya, Evi & Ananta, Aris (Eds.). *Older Persons in Southeast Asia*. Singapore: Institute of Southeast Asian Studies (ISEAS), 47–67.
- Leeson, G. W. (2009a). Demography, politics and policy in Europe. In P. Ludow (Ed.), *Setting EU priorities 2009* (pp. 102–124). The European Strategy Forum: Ponte de Lima, Portugal.
- Leeson, G. W. (2011). Prepared or not, Latin America faces the challenge of aging, current history. *Journal of Contemporary World Affairs*, 110(733), 75–80.
- Marshall, B., & Kapp, J. D. (2000). MPH Professional Development in Law, Health Care, and Aging: A Model Fellowship Program. *The Gerontologist*, 40(3), 364–366.
- Méndez Costa, M. J. (1983). Los ancianos en la legislación civil. *La ley-A*, 302.
- México. Corte Suprema de Justicia (2013). *Amparo en revisión 159/2013*. RACR, October 16th, <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=150598>. Accessed Nov. 2015.
- Moye, J., et al. (2007). A conceptual model and assessment template for capacity evaluation in adult guardianship. *The Gerontologist*, 47(5), 591–603. doi:10.1093/geront/47.5.591 (Accessed Dec. 2015).
- OAS. General Assambly (2015). Inter-american Convention on protecting the human rights of older persons. Available from http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp. Accessed Nov. 2015.
- Smith, A. (2014). Are guardianship laws and practices consistent with human rights instruments? In A. K. Dayton (Ed.), *Comparative perspectives on adult guardianship* (pp. 247–271). Durham, North Carolina: Carolina Academic Press.
- Tobías, J. W. (2009). *Derecho de las Personas* (pp. 97–137). La Ley: Buenos Aires.
- United Nations. General Assembly (1991). *Resolution 46/91*. Available from: <http://www.un.org/documents/ga/res/46/a46r091.htm>. Accessed 11 Nov 2015.
- Zannoni, E. A. (2013). *Ineficacia y nulidad de los actos jurídicos*. Buenos Aires: Astrea.
- Zannoni, E. A., Mariani de Vidal, M., Zunino, J., Shina, F., Ramos, G., & Kemelmajer de Carlucci, A. (2015). *Código Civil y Comercial: Concordado con el régimen derogado y referenciado con legislación vigente: exégesis de los fundamentos de la Comisión redactora y las modificaciones del PEN*. Buenos Aires: Astrea.

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