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Respect for the Will of the Person

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ABSTRACT: Ongoing law reform efforts aim to achieve inclusive recognition of legal capacity for persons living with disabilities, as required under the *United Nations Convention on the Rights of Persons with Disabilities*. This article focuses on the ways in which the legal concept of the will [*voluntas*] plays a role in defining a regime of legal capacity. Full legal capacity requires the ability to exercise legal agency in creating, modifying or terminating legal relationships. An analysis of legal history and modern civil codes demonstrates the extent to which juridical agency is conceptually dependent upon a legally fundamental but largely undefined concept of a person's will. The result: practices of will-ascription, will-attestation and will-nullification serve to establish the boundary conditions for the recognition of legal capacity. These practices are regulated by the legal doctrine of the will and by principles of legal ethics. The current configuration of these practices serves to exclude many persons with cognitive or psycho-social disabilities. The exclusionary principles that govern those practices are deeply embedded in legal history and in the foundations of modern civil law. Two strategies for reform are distinguished and assessed.

KEYWORDS: human rights; disability; United Nations Convention on the Rights of Persons with Disabilities; legal capacity; will; the legal doctrine of the will; vices of the will; property; contract; law reform; Solon (c560-c630 BCE); Plutarch (46-c119 CE); Francisco de Enzinas (c1518-1530); *Natural Persons and Support Measures Bill* (Bulgaria).

The concept of the will plays a role in CRPD Art 12[1] in two different ways: one explicit and one implicit. The concept makes its explicit appearance in the provisions of Art 12 that address the need for *safeguards*. Specifically, CPRD Art 12(4) requires states parties to ensure that 'measures relating to the exercise of legal capacity respect the rights, *will* and preferences of the person' (emphasis added). But already in this formulation we can detect the second, implicit reliance on the concept of the will. For this call to respect the will of persons with disabilities pertains specifically to measures concerning the *exercise of legal capacity*. As we shall find in detail below, the very idea of legal capacity itself

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[1] UN General Assembly, Convention on the Rights of Persons with Disabilities [CRPD], A/RES/61/106, May 3rd, 2008, New York.

implicates the concept of the will, as well as a broader *legal doctrine of the will* and *practices of ascription and attestation* in which that concept is embedded. In contemplating the next steps in the ongoing struggle for disability rights (and in understanding some recent setbacks in that struggle), we therefore need to come to terms with the concept of the will – not least because the legal doctrine of the will has long functioned to exclude persons with disabilities from full participation in society and full enjoyment of their rights.

My plan is as follows. I begin (I) with some ancient history, examining one of the oldest recorded law reforms in Europe, together with an episode from the history of its interpretation in early modern times. In these episodes from the history of law reform we can trace the social and legal architecture of an ancient regime of legal capacity in which the concept of the will came to occupy a crucial place. I then turn (II) to contemporary law in Europe and Latin America, analysing modern civil codes in order to show that and how the concept of will plays a role as a legally primitive notion. In (III), I consider ways in which the legal doctrine of the will structures and constrains practices of will-ascription, will-attestation and will-nullification in ways that exclude persons with significant cognitive and psycho-social disabilities from full enjoyment of legal capacity. I conclude (IV) by considering the implications of these findings for reform initiatives intended achieve more inclusive recognition of legal capacity for persons with disabilities, as required under CRPD Art 12.

Before turning to the work at hand, a preliminary terminological observation is in order. In the matters that will concern us in what follows, the English language is unusual in using the one word where other languages typically use two. In one familiar sense, to speak of a person's will is to refer narrowly and specifically to a formal legal document (duly signed and witnessed) that relates to the distribution of a person's assets after death. Lawyers sometimes use the phrase 'last will and testament' to refer to this distinctive legal instrument. A will in this narrow sense is known as a *testamentum* in Latin, *el testamento* in Spanish, *le testament* in French. But of course we also use the same English word, 'will,' in a broader and more fundamental sense, corresponding to the term *voluntas* in Latin, *la voluntad* in Spanish, *la volonté* in French. As these translations indicate, this second sense of the word 'will' is closely related to the notion of an action being *voluntary*. Indeed as a first approximation we might say that a voluntary action is one that reflects the agent's will (*voluntas*). Both of these two concepts of will figure in the discussion below, but it will be important not to confuse them. I shall also be concerned with the relation between these two concepts. In Section I, we will see how the concept of will (*testamentum*) came to be elaborated in terms of the concept of will (*voluntas*). In Section II we will see that the concept of will (*voluntas*) has a distinctive status in modern civil law.

I. An Ancient Law Reform and its Ontology

In the early 6th century BCE, Solon organised a celebrated reform of the laws of Athens. Included among his reforms was a new law concerning inheritance. Writing nearly eight centuries later, Plutarch described Solon's legal innovation, crediting him with the invention of the legal instrument that we now refer to as a person's 'last will and testament' [in Latin: *testamentum*; in Spanish: *el testamento;* in French: *le testament*]. Here is the key passage from Plutarch's *Life of Solon*:

> He was also famous for his law on wills. Before Solon, you couldn't make a will; the money and the house had to remain in the family of the deceased. By allowing someone, if he does not have children, to give his possessions to whomever he wishes, Solon gave more value to friendship than to ties of blood, and to favour than to obligation, and transformed wealth into the property of its owners.[2]

Plutarch's *Lives of the Noble Greeks and Romans* was hugely successful and influential, and nowhere more so than in the Spanish-speaking world.[3] The first translation of the *Lives* into a western vernacular came already in the 14th century, when Juan Fernandez de Heredia, the Grand Master of the Knights Hospitaller, arranged for a translation into Aragonese. The first translation directly from the original Greek into Castilian Spanish followed in 1551, undertaken by Francisco de Enzinas.[4] Enzinas' translation is expansive and free. The last clause of the passage about wills had occupied just eight words in Plutarch's Greek: *kaì tà chrémata ktémata tõn èchónton époíesen*. Enzinas elaborated this thought as follows:

> In this way, it seemed necessary to establish and confirm the dominion and possession of things, judging that the estate and possessions were the property of the one who possesses them, and that he, as a lord, could do with his things at his will [*à su voluntad*].

My focus in this chapter is not primarily inheritance law and its history – although it is worth remembering that the rights to own and to inherit property figure among the enumerated rights in Art 12. What matters for our purposes here is rather the network of concepts, categories and relationships in terms of which

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[2] PLUTARCH, "Life of Solon," in *Lives of the Noble Greeks and Romans* 21.2.

[3] A. PÉREZ-JIMÉNEZ, 'Plutarch's Fortune in Spain' in S. Xenophontos and K. Oikonomopoulou (eds), *Brill's Companion to the Reception of Plutarch*, Brill, Leiden 2019, pp. 606-621.

[4] PLUTARCO (1551), Las Vidas de Illustres y excellentes varones Griegos y Romanos, transl. Francisco d' Enzinas, Argentina [i.e., Strasbourg], Augustin Frisio. Enzinas was a significant figure in the Protestant Reformation and lived most of his life in exile. He studied Greek with Melanchthon at Wittenberg (where he prepared a Spanish translation of the New Testament) and briefly taught Greek at Cambridge University.

Solon's innovation is articulated and understood, as well as the ontology of legal capacity that it both presupposes and projects.

We can map that structure in three stages. The most prominent concept in these reports on Solon's law reform is certainly that of the will [*testamentum*]; the Greek word is *diathéke*, deriving from *diatíthemi*: to place separately, to distribute. The will is of course the now-familiar legal instrument whereby a person provides for the disposition of their property after death. On Plutarch's telling, this concept, and the practices associated with it, emerged with Solon's constitutional innovations in Athens.[5] Legally recognised inheritance itself certainly pre-dates Solon; there are many surviving speeches in which Athenian lawyers quarrel about who should inherit an estate. But the adjudication of those disputes focused on the laws and customs of primogeniture (which varied in their particulars from city to city and over time) and the available evidence (which was often disputed and sometimes forged) about parentage, order of births and marriages. The innovation credited to Solon concerned the novelty of choosing one's heir.

Notice the way in which these explications of Solon's novel concept of the will implicates the further concept of *choice according to one's preferences*. Enzinas describes the new authority to give one's possessions 'to whomever one wants' [*aquien quisiesse*]. In this we find what we can aptly describe as *the primary essence of the will* [*testamentum*], which is a mechanism for *giving legal force to one's own preferences* in the disposition of one's wealth and possessions after death.

But there is more to the ontology of the will than just this connection between the psychological state of the testator and the legal fate of his estate. Here we come to the second stage of our ontological mapping. Both Plutarch and Enzinas claim that Solon's legal innovation inaugurates a new order, in the form of a new set of relationships between persons and objects, and a new understanding of the status and standing (the mode of being) of those persons and objects. As we have seen, Plutarch reports that the new law on wills [*testamenta*] 'transforms wealth into the property of its owners.' Enzinas goes further, emphasising the import of this change for the owner of this property, who now, 'as a lord [*como señor*] could do with his things at his will.' Plutarch's thought seems to be that, prior to the institution of the will [*testamentum*], a person could not properly be said to *own* his estate, since he could not dispose of it as he deemed fit. So what had been simply 'useful things' or 'wealth,' (the Greek is *ktémata*; originally:

[5] I set aside here the disputed question as to the reliability of Plutarch's reports. For discussion, see: R. LANE-FOX, 'Aspects of Inheritance in the Greek World' (1985), 6 *History of Political Thought*, 208 and D. LEÃO, 'Consistency and Criticism in Plutarch's Writings Concerning the Laws of Solon,' in J Opsomer et al. (eds.), *A Versatile Gentleman: Consistency in Plutarch's Writings*, Leuven University Press, Leuven 2016, pp.243-54.

things that were useful in the household, later money, or a generic term for wealth) now for the first time becomes *chrémata*: property. According to Enzinas, this transformation in the status of objects itself transforms the status of persons as well, bringing with it the new status of lordship. The lord, on Enzinas' 16th century accounting, is defined as someone who is recognised as having the authority to act according to his will [*à su voluntad*].

This new status, however, was not available to all. Here we come to the third and final stage of our mapping. Already inscribed in these early European regimes of legal capacity we find *principles of exclusion*. Some of these exclusionary principles pertain to socio-economic status. Obviously, the new law concerning wills [*testamenta*] could only be used by those who had something to bequeath. This served to exclude not only the unpropertied poor, but also slaves and most women, who lacked ownership rights. Moreover, under Solon's law, only someone who 'has no children' (or, as Enzinas has it: 'who lacked a legitimate heir') was recognised as having the legal authority to choose who would inherit their estate.[6] For other estate-holders, the principles of male primogeniture continued to apply.

But there is also a second set of exclusions woven into the new regime, and these pertain more to the *psycho-social* than to the socio-economic condition of the testator. For having enunciated this new authority to choose, Solon immediately goes on to curtail it. As Plutarch reports, Solon 'did not permit all manner of gifts without restriction or restraint.' In particular, no bequests were valid under Solon's law if the will was made under the influence of sickness, or under the influence of drugs, or while imprisoned or under compulsion, or consequent upon 'yielding to the persuasions of his wife.' And what is the principle that informs this list of exclusions? Plutarch explains that Solon saw these as forces with the power 'to pervert a man's reason.' Enzinas' ampliative translation goes on to explain that a valid bequest can only be made at a time when the testator is possessed of 'healthy judgment' [*sano juicio*]. The import is clear: the new testamentary authority to act on one's preferences was to be recognised only in those whose power of reasoning (*logismòn*) was deemed to be intact.

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[6] 'Has no children,' in the Athenian context, effectively means *has no sons*. The application of the principle of male primogeniture to estates where the deceased had only daughters was a chronic source of debate and social instability in the ancient world. Solon's law of wills seems to have been devised in no small part as a legal strategy to resolve this social problem. For a discussion, see R. LANE-FOX, 'Aspects of Inheritance in the Greek World' (1985), 6 *History of Political Thought*, 208

II. A Legally Primitive Notion

Let's turn our attention from the ancient to the modern world, and from ancient to modern regimes of legal capacity. Although it has been more than 26 centuries since Solon's law reforms, we find an underlying architecture of legal recognition which exhibits clear continuities with the ancients. In this section I focus on the place of the concept of will [*voluntas*] in the foundations of modern civil law. In the section that follows I consider the modern echoes of Solon's exclusion principles and their bearing on the rights of persons with disabilities.

As our point of re-entry into the modern world, let's come back to CRPD Art 12. As we have seen, the central focus of Art 12 is the concept of legal capacity. Its central normative principle is that persons with disabilities should 'enjoy legal capacity on an equal basis with others in all aspects of life' (CRPD Art 12(2)). Despite its centrality to Art 12 and to the Convention as a whole, the concept of legal capacity is not itself defined in the CRPD. However, the UN Committee on the Rights of Persons with Disabilities (hereafter: the Committee), has aptly emphasised that '[l]egal capacity includes the capacity to be both a holder of rights and *an actor under the law*.'[7] The Committee goes on to elaborate this second, active aspect of legal capacity as follows: 'Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships' (ibid., emphasis added). In what follows I shall refer to this power as *juridical agency*; I refer to particular exercises of juridical agency as *juridical acts*.[8]

Because juridical agency is so fundamental to legal capacity, and because legal capacity is so central to Art 12, it is worth considering carefully how the notion of juridical agency is constructed in modern law. Although the concept is highly abstract, it plays a fundamental role in structuring modern law and legal practice. Informally, we can think of the concept as the genus whose species include such actions as marrying, divorcing, concluding a contract, instructing a solicitor, and indeed making a will [*testamentum*]. In each of these cases we find an instance of 'creating, modifying or ending' legal relationships; and in each case we find the essential structure that we found articulated in Solon's law of wills [*testamenta*]: a person's choice in accordance with their own preferences takes on legal standing and force.

So how is this overarching concept formally treated in modern law? One good way to find out is to look to modern civil codes. While such codes are by no means homogenous, a common conceptual structure recurs. As a first example,

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[7] UN Committee on the Rights of Persons with Disabilities. General Comment No. 1: Article 12 (Equal recognition before the law), eleventh session, 11th April, 2014, CRPD/C/GC/1, para 12; (emphasis added).

[8] For a history of the term 'juridical act,' see N. DAVRADOS, 'A Louisiana Theory of Juridical Acts', (2020) 80:4 *Louisiana Law Review*, 1119

consider the Dutch Civil Code. The Dutch term for juridical act is *rechtshandeling*. It is defined in Art 3.3:

> A juridical act [*rechtshandeling*] requires the will [*wil*] of the acting person to establish a specific legal effect, which will must be expressed through a statement [*verklaring*] of the acting person.

The first thing to notice here is the use of the word 'will' [*wil*] in the *definiens*. Under the Dutch Civil Code, every juridical act requires the will of the legal actor to establish a specific legal effect; moreover, it requires that this will be expressed through a statement [*verklaring*] by the person who is acting. The key point here is that the overarching and legally fundamental concept of a juridical act *is itself defined* in terms of the concepts of 'will' and 'expression of will.' We shall soon see that this can already have significant exclusionary consequences. But what matters for present purposes is a second feature of the Dutch approach. For while the concept of will is *used in the definition* of this fundamental legal term, it is *never itself defined* in the Code. On this basis we can aptly describe the concept of will as a *legal primitive* in Dutch law: it is used to define a legally fundamental concept but it is never itself given a legal definition. Will is legal bedrock.

Let's consider a second variation. The first Book of the German *Bürgerliches Gesetzbuch* (hereafter: BGB) constitutes its 'General Part.'[9] Unlike the Dutch code, the BGB does not provide general positive definitions of the terms that concern us here. And while it does on occasion use the term '*Rechtshandlung*' (this would be the direct German correlate of the Dutch, *rechtshandeling*), this term does not play a significant role in the BGB. Despite these differences, however, we find a variation on the same commitments that we found in the Dutch code.

The initial Divisions [*Abschnitte*] of the BGB effectively lay out an ontology for German civil law. What are the kinds of entities with which the law concerns itself? It deals with persons (both natural and artificial); this is the focus of the First Division. It also deals with things [*Sache*] and animals – the focus of the Second Division. But every bit as fundamental to the ontology of the law is a third category of legally recognised entities: *Rechtsgeschäfte* or 'legal transactions.' This is the focus of the Third Division of BGB Book 1. The paradigmatic example of a legal transaction is signing a contract, but the term encompasses a range of other broadly financial or commercial actions such as taking out a mortgage, transferring ownership, forgiving a debt or even disclaiming an inheritance. (See BGB §§1822 and 1825 for lists of legal actions that are included under this heading.) So once again we have here a generic term.

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[9] *Bürgerliches Gesetzbuch* [BGB], in the version promulgated on January 2nd, 2002, *Bundesgesetzblatt* I, p. 42, 2909; 2003 I p.738 (last amended by Art 3 of the Act of July 16th, 2021, *Bundesgezetsblatt* I p. 2947).

Moreover, the treatment of legal transactions in the BGB has broader implications for other areas of civil law, since the conditions associated with legal transactions are also used to restrict other exercises of legal capacity. (See for example, BGB §1304.) So the concept has far-reaching significance for articulating a regime of legal capacity.

Unlike the Dutch Civil Code, however, the BGB offers no explicit positive definition of this generic term. Instead, its meaning is effectively constructed contextually – and negatively. Let's attend to how this works in detail. The first Title of the Third Division of BGB Book 1 carries the title '*Geschäftsfähigkeit*.' This term is sometimes translated as 'capacity to contract,' but this is misleading. The term for 'contract' in the BGB is '*Vertrag*,' which becomes the focus only in Title 3 et seq. *Geschäftsfähigkeit* is a broader legal concept, perhaps best rendered as 'capacity to transact' – i.e., *the capacity to engage in legal transactions*. Here again, however, the BGB offers no positive definition.[10] What we find instead is a series of axioms that govern its use. The very first such axiom appears in §104, and is formulated negatively. That is, what is defined is not the positive concept of *capacity to transact,* but instead its negative correlate: *incapacity to transact*.

> §104 Incapacity to transact. A person is incapable of transacting if: (1) he is not yet seven years old, (2) he is in a state of pathological mental disturbance that precludes the free exercise of will [*die freie Willensbestimmung*], unless the state by its nature is a temporary one.

The following section goes on to introduce the concept of a *Willenserklärung* – literally a 'making clear of [one's] will,' or more colloquially: a 'statement or declaration of intent.' Notice the three layers of conceptual structure here: legal (trans)actions are fundamental to the ontology of German law; legal (trans)actions themselves require agents who are capable of such transactions; in order to engage in a legal transaction, an agent must exercise their will. Although the legal details vary between the Dutch and German codes, the dependence on the concept of will recurs. And what is an 'exercise of will'? The term is not defined in the BGB; once again we have reached legal bedrock.

This is not the place to undertake an exhaustive survey of civil codes, but it is perhaps worth mentioning a few other examples, particularly from the Latin American context. Art 49 of the Cuban Civil Code defines a juridical act as 'an express or implied lawful manifestation of will, which produces the effects provided by law, consisting of the creation, modification or termination of a

[10] On the absence of a definition of '*Rechsgeschäft*' from the BGB, see N. DAVRADOS, 'A Louisiana Theory of Juridical Acts', (2020) 80:4 *Louisiana Law Review*, 1119, 1137.

juridical relation.'[11] The Peruvian Civil Code (Art 140) defines a juridical act as a 'manifestation of will destined to create, regulate, modify or extinguish legal relations.'[12] So in both of these cases we find variants of the direct conceptual dependence on the concept of the will, just as we found in the Dutch code.

Before turning to our next topic, it will be worth pausing over one instructive variation from the pattern that we have considered so far. The codes that we have examined to this point have one thing in common: they all rely on, but do not define, the concept of will. The Argentinian Civil Code varies from this pattern in two respects.[13] The first is incidental: rather than defining a juridical act with reference to the agent's *will*, the Argentinian code relies in its definition on the concept of a *voluntary act*:

> Art 259: Juridical act. A juridical act is a lawful voluntary act whose immediate purpose is the acquisition, modification or termination of legal relationships or situations.

The second difference is more substantial: the Argentinian Code then proceeds to provide a definition of this term.

> Art 260: Voluntary act. A voluntary act is an act executed with discernment, intent and freedom, which is manifested by an external fact.

We will have reason to return to this Argentinian provision in the next section. For now, the key point to note is that in order to be legally recognised in Argentina as acting voluntarily in a matter, a person's act must be characterised by 'discernment, intent and freedom.' The Argentinian code goes on to specify that an act is 'involuntary on the grounds of lack of discernment' when, at the time of acting, the person is either (i) a child or (ii) an adult who is 'deprived of reason' (Art. 261).

III. *Furiosi Voluntas Nulla Est*

Let's pause to take stock. We started by tracing to the ancient world a regime of legal capacity which makes it possible for the preferences of an ordinary individual (i.e., not a king or a designated legislator) to take on legal force and standing. We then saw how that ancient regime of legal capacity was articulated

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[11] Cuban Civil Code [Código Civil de Cuba]. Ley 59, de 17 de julio de 1987. Gaceta Oficial de la República de Cuba, 15 de octubre de 1987, Republic of Cuba.

[12] Peruvian Civil Code [Código Civil peruano]. Decreto Legislativo N° 295, el 24 de julio de 1984, November 14th, 1984, Republic of Peru (la última modification el 24 de julio 2021, que incorporó el artículo 2017-A).

[13] Argentinian Civil Code [Código Civil y Comercial de la Nación]. Ley 26.994, de 7 de octubre de 2014. Boletín Oficia Republica Argentinal, 8 de octubre de 2014, núm. 32985, Argentina, p.1.

in early modern times in terms of the concept of a person's will, and that the concept of will itself now occupies a prominent place at the foundation of all civil law. In this section, our task is to elicit and document a consequence that is already implicit in these initial findings. To hazard a first formulation: *the outer boundaries of a modern regime of legal capacity are set in part by its practices of will-ascription*.

Before considering this point in detail, we should note first that the absence of a legal definition of the concept of will in most modern civil codes certainly does not mean that the term lacks meaning in those jurisdictions. Formal definitions are, after all, only one (and an essentially derivative) method for fixing meaning. But the absence of a formal definition does show that the meaning of this foundational legal notion must somehow be determined outside those civil codes themselves. Where does this happen? Some might be inclined to look to philosophy or psychology or even theology for the answer; each of these discourses has its own ways of engaging the concept of the will – and its own controversies surrounding it. But if we want to know the meaning of the term will *in law*, then we need to look to the legal practices of will-ascription, will-attestation and (as we shall see shortly) *will-nullification* that prevail in a particular jurisdiction.[14] For it is ultimately by being embedded in these distinctive practices that the legal concept of will sustains its distinctive meaning. These practices are themselves governed both by explicit legal principles and by what I shall refer to here as *legal ethics*, by which I mean the habits, customs and mores that serve to define responsible legal practice.

The basic unit of analysis in this domain is what I shall call *will-ascription*: the act of ascribing a particular will in a particular matter to a particular person at a particular time. Example: if I answer 'I do' in the appropriate context at a wedding ceremony, the presiding official ascribes to me the will to marry the person with whom I am exchanging vows. In so doing, the official assembles one of the elements of the juridical act of marrying. Will-ascription is often accompanied in legal practice by one or another form of *will-attestation*. In our example, the official's signature on the marriage certificate attests to the fact that the bride and groom manifested the will to marry one another.

At this juncture there are two points which, while perhaps obvious, nonetheless need to be emphasised. First, it is important to recognise that a will, in the sense relevant in law, is something distinct from a mere wish or a want, and that the ascription of a will to a person must go beyond a determination that the person *desires* a particular object or outcome. We can appreciate this point by thinking of the mundane act of consumer shopping. From a legal perspective, the

[14] These practices are undoubtedly shaped, often profoundly, by debates and developments in philosophy, psychology and theology – and vice versa. The history of these intertwinements has yet to receive the attention that it merits. But the legal practices nonetheless also operate according to their own canon, as will become clear presently.

act of purchasing a consumer product is a juridical act; the sale itself takes the legal form of a contract in which the purchaser agrees to pay a particular price in exchange for a particular object. In order for such a sale to proceed, both parties must *manifest the will* to effect the exchange. But of course *willing* to purchase a particular consumer object is not the same as simply *desiring* the object, or *wishing* that one owned it – as anyone shopping with limited funds can attest! On any particular shopping trip, I might *desire to purchase* a whole host of things, but I might *manifest the will to purchase* only one of them – or none at all. In the particular context of shopping, one manifests one's will not by expressing a desire or wish but by *making or accepting an offer*.

This in turn relates to a second point that is in its own way obvious, but perhaps also easy to miss: every act of will-ascription or will-attestation involves an act of *interpretation*. In the context of shopping, an offer might be made orally, or in writing, or in the gesture of handing over money, by clicking on a website or by touching one's ear at an auction. These actions are interpreted as manifestations of will in light of the prevailing local customs and norms of exchange, the meaning of words in the relevant natural language, the conventions regarding the meaning of symbols on a page or screen, etc., etc. And of course the same point holds more generally: a particular will or intention is ascribed and recognised through an act of interpreting the behaviour (including, but not limited to, the linguistic behaviour) of the person to whom the will is ascribed.

To say that will-ascription involves interpretation certainly does not mean that anything goes. On the contrary, the practice of ascribing a will to a person is governed by a number of principles which we can think of collectively as the legal doctrine of the will. The major headings of this doctrine exhibit considerable consistency across jurisdictions, despite a number of significant variations in the details.[15] Interestingly, its central principles are formulated negatively, with the most striking example being the legal doctrines concerning the *vices of the will,* themselves closely related to the *vices of consent*. These so-called 'vices' are factors which, when present, compromise or degrade (vitiate) the quality and legal status of an act of willing; in the limiting case they preclude the ascription of a will altogether.

The core list of these vices has remained largely the same across historical time and jurisdictional boundaries, comprising error, fraud, threat and coercion. If the presiding official at the wedding discovers that I have been coerced into agreeing to marriage, or that my intended bride has been secretly replaced with another woman, then he can no longer attest to my will to marry the person who stands at the altar. Depending on the jurisdiction, a purported juridical act of marriage under such conditions is either void or voidable. The Cuban civil

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[15] For discussion, see the essays and case studies collected in R. SEFTON-GREEN, (ed.), *Mistake, Fraud and Duties to Inform in European Contract Law*, Cambridge University Press, Cambridge 2005.

code expresses the point concisely, describing juridical acts as voidable when 'the manifestation of the will is vitiated by error, fraud or threat.' In its catalogue of specific vices, the Argentinian code stipulates that an essential error of fact 'vitiates the will and causes the nullity of the act.' That is, where an act of willing is sufficiently compromised by vice, the juridical act of which it forms an essential part is nullified. Notice the logic at work here. Civil codes may not typically offer a *definition* of the concept of will, but in systematically elaborating the distinctive vices associated with the will, they both determine the concept and constrain the practices of will-attestation.

These negative legal principles regarding the vices of the will themselves have positive correlates in legal ethics. Consider the circumstance of a notary who is engaged by her client to certify a deed of gift of some property. A responsible legal professional acting in such circumstances will be alert for signs that her client is acting under coercion or duress, in the grip of an error, or as a victim of threat or fraud.[16] She will take positive steps designed to elicit such signs if she suspects that any of these factors may be present. Confronted with indicators that one or another vice of the will is at work, the ethical notary will adjust her practice appropriately. She may have a legal obligation to report or investigate such matters. But over and above any such obligations, the responsible notary will exercise particular care before attesting to her client's will in the matter. For example, if she suspects that her client is being coercively controlled by a family member, she may take steps to meet with the client apart from that family member, or in the presence of a trusted supporter, seeking to ensure that the manifestation of will is indeed freely given and genuinely expresses the client's intention in the matter. Such steps are partly constitutive of ethical conduct in the practices of the responsible notary. The same point applies, *mutatis mutandis*, in the many other professions (solicitor, estate-planner, real estate agent, stockbroker, hospice admissions officer, etc.) which involve attesting to the will of a client in a matter.[17]

But the catalogue of vices by no means exhausts the legal doctrine of the will, nor does it provide a complete accounting of the practices and boundary conditions of will-attestation. A further set of principles are built in to the very foundations of civil law that we examined above. Here we must recall the ancient principles of exclusion that we found at work already in Solon's laws, exclusions which restricted recognition of legal capacity to those whose reason was not 'perverted,' and who were acting at a time when they were possessed of 'healthy judgment.' In the ancient world, principles of exclusion were incorporated explicitly into the legal doctrine of the will in the Justinian Code (529-534 CE) at

[16] R. A. CONSTANTINO CAYCHO, 'The Flag of Imagination: Peru's New Reform on Legal Capacity for Persons with Intellectual and Psychosocial Disabilities and the Need for New Understandings in Private Law' (2020) 14 *The Age of Human Rights Journal*, 155

[17] Note to editors: Please add Cross-Reference to Renato and Renata's contribution to this volume here.

Digest 29.2.47: *Furiosi voluntas nulla est*. This Justinian axiom is difficult to translate with deference to modern sensibilities. Black's classic legal dictionary is undoubtedly dated, but captures something of its raw force: *The madman has no will*.[18]

The Justinian axiom reverberates through subsequent centuries of law reform and codification. We hear one modern echo in the Argentinian Civil code, which (as we have seen) recognises an act of will only where discernment is present, and recognises discernment only in those who are not 'deprived of reason.' It is important to appreciate the cascade of legal consequences that immediately follow. Where there is no discernment, there is no voluntary act; where there is no voluntary act there is no juridical act; where there is no juridical act there can be *no exercise of legal capacity*. In this way, the doctrine of the will, together with the practices of will-attestation that it regulates, serves to restrict recognition of full legal capacity, leaving some – particularly those with significant cognitive or psycho-social disabilities – outside its ambit altogether.

The details of the legal doctrine of the will vary by jurisdiction, and practices of will-attestation vary both across and within jurisdictions. As a result, the boundary conditions for recognition of full legal capacity can be more or less expansive, and more or less well defined. The Argentinian boundary is marked with the broad and rather ill-defined concept of being deprived of reason. But in other jurisdictions the boundary is marked differently. Consider again the Dutch code, which recognises a juridical act only where the acting person *wills to establish a specific legal effect*. This principle shapes and constrains the practices of will-ascription and will-attestation in the Netherlands. If a Dutch official is called upon to attest to a person's will in a matter, part of his role must be to determine whether the person wills to establish the specific legal effect in question – i.e., whether it is that person's intention to create, modify or terminate a particular binding legal relationship. In attesting to the presence of such a will, the official attests to the fact that the person in question *understands* the legal effect in question, and indeed has some understanding of what it means to be party to a binding legal relationship. In the absence of such an understanding, the person cannot be said to have the requisite will, so no juridical act can be recognised. The upshot: there is a *cognitive load* associated with legally attestable willing in the Netherlands. Only those with the capacity to carry that load are recognised as juridical agents. For persons with sufficiently severe cognitive or psycho-social disabilities, these legal principles, laid deep in the foundations of civil law and its history, can create an insurmountable bar to entry into the domain of full legal capacity.

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[18] H. C. BLACK, A Law Dictonary: Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, 2nd Edition, West Publishing, St Paul, Minnesota, USA, 1910, p.530. A more literal rendering of the Latin might be: 'The will of the furiously mad person is null [i.e., nothing, void].'

IV. Will and Law Reform

The adoption of the CRPD by the UN General Assembly in 2006 helped to create a legal and political environment that spawned law reform movements all over the world. The aims of these movements are diverse, but one common theme and challenge has been to devise more inclusive regimes of legal capacity in order to foster greater respect for the human rights of persons with disabilities. In its most ambitious form, the aim has been to eliminate all barriers to the recognition of full legal capacity for all persons, regardless of disability.[19] One important strategy in these movements has been to use strategic litigation and legislation to overturn or dismantle systems of plenary guardianship. But this negative moment goes hand-in-hand with a variety of positive initiatives, particularly those which have sought to establish systems of support for persons with disabilities in their exercise of legal capacity, as required under CRPD Art 12(3). So what lessons does the foregoing analysis hold for this reform agenda? And what strategies does it suggest for those seeking to advance it?

In addressing these questions, we can take our bearings from our two principal findings: that the concept of will has long played a fundamental role in defining regimes of legal capacity, and that the boundary conditions for modern regimes of legal capacity are determined in part by practices of will-ascription, will-attestation and will-nullification that exclude persons with significant cognitive or psycho-social disabilities from full participation in those regimes. It is important to appreciate the extent to which these two findings constrain the strategic options for reform. Under prevailing regimes of legal capacity, juridical agency is recognised only where a particular will in a particular matter can be ascribed to the juridical actor. If the goal of law reform is to remove all barriers to the recognition of universal legal capacity, then either (a) this link between legal capacity and the will must be broken; or (b) we must revise our practices of will-ascription and will-attestation, along with the legal doctrine of the will and the principles of legal ethics that govern them. The two strategies are not necessarily exclusive, but they do point in rather different directions, and present different challenges and opportunities. By way of conclusion, it will be useful to consider the choice between these two strategic options as it pertains to a notable episode in the recent reform movement.

[19] For an example of the most ambitious aim, see para. 14 of UN Committee on the Rights of Persons with Disabilities. General Comment No. 1: Article 12 (Equal recognition before the law), eleventh session, 11th April, 2014, CRPD/C/GC/1: 'Legal capacity is an inherent right accorded to all people, including persons with disabilities. … Legal capacity means that all people, including persons with disabilities, have legal standing and legal agency simply by virtue of being human.'

In Bulgaria, the *Natural Persons and Support Measures Bill* was introduced in the National Assembly in the Summer of 2016, following a series of national consultations about how to bring Bulgarian law into compliance with the CRPD.[20] The aim of the proposed legislation (which to date has not been adopted) was to abolish the existing system of guardianship in Bulgaria, replacing it with an innovative system of supported decision-making.[21] The original draft bill was notable, in part, for its explicit inclusion of language drawn directly from the CRPD, which Bulgaria had ratified in 2012. In particular, the bill enumerated a set of principles that were to regulate all supported decision-making measures in Bulgaria. In the initial draft of this list of principles, the second principle was formulated as follows: зачитане на волята и предпочитанията на подкрепения – *respect for the will and preferences of the supported person*. The term for 'will' here is волята (pronounced 'volyata') which is a direct etymological variant of the Latin, *voluntas*.

The incorporation of this principle into the legal architecture of the Bulgarian bill would seem to be natural and fitting. Systems of decision-making support are a prime example of 'measures that relate to the exercise of legal capacity.' And as we have seen, CRPD Art 12(4) requires safeguards to ensure that such measures respect the rights, will and preferences of the person. Moreover, the Bulgarian Assembly had at this stage already ratified the CRPD, which under Bulgarian law meant that it already had pre-emptive priority over any domestic legislation with which it conflicted. So the proposed language in effect served to reaffirm a principle to which Bulgaria was already legally committed. Despite all this, the inclusion of the draft second principle engendered resistance in Sofia, and in the end a compromise was sought. In the bill that was finally submitted in the Bulgarian Assembly in August, 2016, the word 'волята' was replaced with 'желанията' (zhelaniyata) – meaning 'wishes' or 'desires.' As a result, the revised principle intended to govern the provision of supported decision-making in Bulgaria was ultimately formulated as follows: 'зачитане на желанията и предпочитанията на подкрепения' – *respect for the wishes and preferences of the supported person*. Although the *Natural Persons and Support Measures Bill* has not itself become law, this revised principle was ultimately adopted by the Bulgarian Assembly as Art 66.5 of the *Persons with Disabilities Act* (2018).[22]

In thinking about this episode in the history of CRPD-inspired law reform, it is worth reflecting first on the resistance to the original drafting of this

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[20] Natural Persons And Support Measures Bill. Introduced August 4th, 2016. Available in Bulgarian at: https://parliament.bg/bills/43/602-01-48.pdf.

[21] N. SHABANI and M. DIMITROVA 'The Tipping Point: The Bulgarian Example of Changing the Paradigm of Substituted Decision-Making Towards the Exercise in Person of Decision-Making', in [editors: please add cross reference to this volume]

[22] Persons With Disabilities Act [Закон за хората с увреждания]. December 11th, 2018. State Gazette no. 105, December 12th, 2018, Bulgaria, p.3-26.

principle in the bill. The resistance is noteworthy in part because it falls outside the familiar controversies that so often characterise this area of law and public policy. Debates about reform in this area typically run in familiar grooves of '*respect vs protect*.' One side argues for greater respect for the autonomy of persons with disabilities while the other side argues for protective measures that may compromise autonomy. The proponents of greater autonomy reply that the protective measures are unacceptably paternalistic, and the debate unfolds … .[23] In this instance, however, it is clear that we are outside of these grooves. After all, if one's concern was that the original principle of 'respect for will and preferences' might preclude appropriate protective measures when necessary, then one would hardly agree to the principle of respect for *wishes and preferences* as an acceptable compromise. So what motivated the resistance to the original framing?

If nothing else, the analysis undertaken above helps to make sense of this. From the perspective of the legal establishment, the original language of the Bulgarian bill challenged a long-standing, deeply entrenched, but often unstated assumption. Within the context of the prevailing regime of legal capacity, it was simply assumed that the people who were subject to guardianship orders were not capable of having a will of their own. As Shabani and Dimitrova explain in their contribution to this volume, 'According to conservative legal doctrine, will is mainly inherent to a rational person'.[24] In a potent illustration of the continuing afterlife of the Justianian axiom, one Bulgarian legal professional expressed the point bluntly in private conversation, saying simply: *'Those people don't have a will.'* In seeking to establish a principle of respect for the will of persons with cognitive and psycho-social disabilities, the reform movement was working against the grain of principles and practices of exclusion that are deeply embedded in civil law and its history. Moreover, these exclusionary practices themselves have an established legal rationale: if willing has cognitive pre-requisites, there will inevitably be forms of impairment that preclude ascription of will.

If our analysis in this way helps to make sense of the resistance to the original drafting of the Bulgarian principle, what can it teach us about the emancipatory potential of the compromise language? And more importantly: what can it tell us about the steps that need to be taken to realise that potential? In considering these questions, much comes to depend on which of the two reform strategies are adopted in seeking to achieve an inclusive regime of legal capacity. Is the strategy to dismantle the longstanding nexus of legal capacity, juridical agency and will? Or is the strategy to leave that entrenched interdependency in

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[23] See for example, P. APPELBAUM, 'Saving the UN Convention on the Rights of Persons with Disabilities – From Itself' (2019), 18:I *World Psychiatry*, 1, together with the response by G. NEWTON-HOWES and S. GORDON, 'Who Controls your Future?' (2020), 54:II *Australian and New Zealand Journal of Psychiatry*, 134

[24] N. SHABANI and M. DIMITROVA 'The Tipping Point: The Bulgarian Example of Changing the Paradigm of Substituted Decision-Making Towards the Exercise in Person of Decision-Making', in [editors: please add details of this volume and xref pp.]

place while developing more inclusive practices of will-ascription and will-attestation?

In principle, the Bulgarian compromise might be put to work in the service of either of these strategies. On the first approach, the strategy must be to delink legal capacity from the requirement of a manifestation of will, making it possible to recognise juridical agency on the basis of a person's manifest wishes and preferences. In order for such a strategy to realise its potential, however, this delinking strategy will require far-reaching revisions elsewhere in civil law. The concept of will may have been excised from the principles governing Bulgarian supported decision-making, but it retains a prominent place elsewhere in Bulgarian law. Consider two notable examples: Art 20 of the Bulgarian *Obligations and Contracts Act* stipulates that 'the actual common will of the parties shall be sought in interpreting a contract.'[25] Art 31 of the same Act establishes that a contract shall be subject to invalidation if 'upon conclusion of the contract the person was not able to understand it or was not able to guide his acts.' (It is noteworthy that even in the revisions to contract law that were proposed under the *Natural Persons and Support Measures Bill*, these provisions of the *Obligations and Contracts Act* were retained.) We can recognise in these provisions the entrenched *status quo ante*: the law as we have it recognises a contract (or any other juridical act) only where it attributes a will; and the law provides for nullification of juridical acts in circumstances where understanding is absent. As long as such provisions remain unchanged, the first strategy of reform remains incomplete. In order for all such provisions to be changed, civil law as we know it would require a thoroughgoing transformation.

The alternative strategy is to leave in place the traditional dependence of legal capacity on the concept of will, and to focus reform efforts instead on changes to the practices that sustain the ascription and attestation of will in cases where it has, in the past, been pre-emptively denied. There is more than one way in which this alternative strategy might be pursued. One possibility is to exploit the distinctive status of the concept of will as a largely undefined legal primitive. Precisely because the concept lacks an agreed legal definition, its meaning is open to ongoing legal development. Under prevailing conceptions of the will in legal practice and legal ethics, the will is understood to have cognitive prerequisites: only someone with the right *logismòn* is understood to be capable of willing. The good news here is that the history of philosophy, psychology and theology is filled with examples of *non-cognitive* conceptions of the will: Martin Luther, Thomas Hobbes and Arthur Schopenhauer each offer leads that are worth exploring.

Alternatively, the prevailing cognitive understanding of the will might be retained along with its entrenched place in the foundations in civil law, with the

[25] Obligations And Contracts Act [Закон за задълженията и договорите], November 22nd, 1950, State Gazette [Държавен Вестник] no. 2, December 5th, 1950, Bulgaria (last amended on April 27th 2021, State Gazette n. 35)

strategy for achieving greater inclusivity shifting to strategies for *cognitive load-sharing*. On this approach, the Bulgarian principle of respect for wishes and preferences would need to become the starting point and touchstone for an interpretative process that culminates in recognising an actionable will of the person who is being supported. Exploiting this lead requires the development of practices whereby the cognitive load intrinsic to willing is carried jointly between the supporting and supported person. Here the good news is that cognitive load-sharing does not need to be invented from scratch. It is a process that happens every day in the many professions (solicitor, estate planner, real estate agent, stockbroker, hospice admissions officer, etc.) in which the more-or-less inchoate wishes and preferences of a client are given a form that provides the basis for juridical action that is carried out for and in the name of the client. It is also a process that in recent years has been investigated intensively by philosophers, sociologists and cognitive scientists, so once again there are research foundations upon which to build. But much remains to be done in seeking to draw on these research findings in devising novel legal instruments which, like Solon's wills [*testamenta*], serve the function of giving legal force to a person's preferences.[26]

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