Challenges to implement Article 12 CRDP
Equal Recognition before the law and the issue of Supported decision making

**Article 12 - meaning**

1. Article 12(1) of the CRPD states that:
   - States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. 
     See Volio’s definition of legal personality as “individual’s ‘personhood’ in society” and see Article 16 of the International Convention on Civil and Political Rights (ICCPR).

2. Article 12(2) states that:
   - States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
     - = capacity to have rights AND capacity TO ACT, that is to say make legally binding arrangements with others: personal care, health care, property, finances, ...

3. Article 12(3) states that:
   - States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

**Article 12: a new paradigm**

Article 12 UNCRPD requires a real shift towards a Human rights approach of legal capacity, that means: replacing substitute decision-making by appropriated supports and safeguards.

**Article 12: the essence**

Legal recognition of universal legal capacity: right to full legal capacity (capacity to have rights and capacity to act) by all persons without discrimination on the basis of disability

- No more plenary guardianship
- No automatic loss of rights
- Shift partial guardianship to supported decision-making
- Introduction of supported decision-making and other alternatives to guardianship with effective safeguards

**Consequences:**

Article 12 calls for an end to substitute decision-making laws where they provide for this determination on the basis of disability.
Article 12 obliged States to provide people with disabilities the supports they need to exercise their legal capacity (with supported decision making people have full legal capacity)

Challenges to implement Art. 12

- Economic and Financial reasons
- Attitudes in the society towards people with intellectual disabilities, including the lack of knowledge on the meaning of legal capacity e.g. distinction between support person and guardian; what are the necessary safeguards in a supported decision-making model...
- Legal framework
- Political will

Overview of legal capacity legislations and practices in Europe
There is a variety of situations – from very progressive models to old-fashion ones. Everywhere we observe a general trend to reform capacity law and to implement „modern guardianship“ laws, including in Central and Eastern European Countries.

2. Modernized guardianship laws: Example from France: Guardianship Law of 2007 (Civil Code) or Italy which introduces a flexible measure of legal support alongside the traditional guardianship Amministratore di sostegno (support manager) (2004)
3. Traditional old-fashion laws, mainly Central and Eastern European Countries – laws from the 60s

Moving forwards
- Most countries are/will review their laws on legal capacity in the coming years – driven force is the UN CRPD
- Important supreme Court decisions on legal capacity
- Pilot legislations and pilots projects

Core principles underpinning Article 12 and supported decision making:

Principle 1: Everyone is capable of taking decision
Everyone has full legal capacity without discrimination on the basis of disability. The legislation should therefore be disability-neutral and amended to include a presumption of capability

Principle 2: Recognition of all forms of communication
Recognition in legislation of all forms of communication is a pre-requisite for a model of supported decision-making, because the way how people communicate should not be a reason to question their decision-making ability.

Principle 3: Neutral test of capacity to enter an agreement
Functional, decision-specific test must be applied in assessing or finding incapacity. Capability test (with support and duty to accommodate) must be done for the specific decision (safeguard)
GOOD PRACTICE FROM CANADA

Principle 4: Every effort should be made to support people to exercise legal Capacity
The legal concept of reasonable accommodation in the CRPD also applies to Article 12.

States Parties have an obligation to establish systems of support and to impose duties to accommodate, in order to assist persons with intellectual disabilities in the exercise of their legal capacity.

Principle 5: Individualised and Person centred Approach
A wide range of support services must be available and sustainable to provide support. Individual and Flexible measures: for each person, there is a specific answer.

GOOD PRACTICE FROM GERMANY

Principle 6: Network as Safeguards
Support networks can be based on existing trust relationships or on created relationships for people with intellectual disabilities (for example people from institutions)

GOOD PRACTICE FROM CANADA

Principle 7: Mainstream mechanisms for the protection of the interests of a person
Using mainstream mechanisms for the protection of the interests of people with disabilities and making these mechanisms accessible to people with disabilities (consumer protection, employee’s rights…) is essential.

Principle 8: Empowerment of people with disabilities
Support for Self-advocacy should be developed already at schools and along the life of people with disabilities.

Conclusions

Questions and answers