

The Legal Capacity of Persons with Disabilities in Light of the United Nations Convention on the Rights of Persons with Disabilities

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Abstract

The recognition and protection of the legal capacity of persons with disabilities is of paramount importance for the exercise of their human rights (such as the right of access to justice). This paper focuses on Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which generally guarantees the right to recognition as a person before the law, and specifically introduces detailed guidance on the issue of legal capacity of persons with disabilities. The paper makes three claims: firstly, that a sharp distinction must be drawn between different forms of disability, in order for us to understand what the normative requirements of Article 12 are. Secondly, that this approach to Article 12 allows us to better evaluate the different models for the determination of capacity in the light of the UNCRPD and its principles. The third claim is that this interpretation of Article 12 requires both changes in national law, as well as changes in the interpretation of national law relating to the determination of capacity for persons with disabilities.

Introduction: the challenges of human rights protection for persons with disabilities

Persons with disabilities are a particularly vulnerable social group. Their impairments, either physical or mental, may impede them from enjoying a full protection of their rights. This can happen in two very different ways. The first way that disability may interfere with the rights of persons with disabilities is extraneous to the persons with disabilities. Imagine for instance, the case of an employee who has poor vision and cannot be informed of her rights as a disabled employee, because there no leaflets available in large print. Naturally, this lack of information has no bearing on the employee's capacity to exercise her rights, if she eventually hears about them.

This example is also a poignant illustration of the social model of disability. The social model of disability, which also underpins the UNCRPD, makes a crucial distinction between impairment and disability. Impairment is the underlying biological factor, (e.g. mobility impairment), whereas disability manifests itself within a social environment which restricts persons with impairments by placing barriers which hinder these persons from fully participating in social life (e.g. architectural barriers such as the unavailability of lifts). In this way, the social model argues that the cause of the problem is not the

person, but rather the negative social response provided to the impairment of the person by the society in which she lives.

The second way that disability may interfere with the rights of persons with disabilities is entirely different: there are many cases where the impairment of the person actually affects the person's decision-making capacity which is required to exercise the rights in question. This is particularly the case of persons with intellectual disability, who may lack the requisite intellectual skills to assess the relevant information and reach an informed decision about a particular issue. For example, a person with intellectual disability is ill and must undergo an operation. However, she cannot understand what the operation is all about and cannot, therefore, give an informed consent to the medical treatment.

From the perspective of the social model of disability, the impairment of the person who lacks decision-making capacity is, usually, a cognitive impairment. The negative social response which transforms this cognitive impairment into a disability is the lack of appropriate education and support which would enable the person with cognitive impairment to exercise her rights more freely.

In legal terms, this example can be translated in a different way. In these instances where a person with disabilities is considered not to have legal capacity, the law has tried to resolve in very different ways who decides on behalf of a person that is considered to lack decision-making capacity and on what criteria.

This paper aims to examine how the UNCRPD and, more importantly, the principles underpinning the Convention, and the social model of disability in particular, may influence the way that different jurisdictions have addressed the issue of capacity determination for persons with disabilities. The paper makes three claims: firstly, that a sharp distinction must be drawn between different forms of disability, in order for us to understand what the normative requirements of the UNCRPD are in relation to legal capacity. Secondly, that this approach allows us to better evaluate the different legal models for the determination of capacity in the light of the UNCRPD and its principles. The third claim is that this interpretation of legal capacity requires both changes in national law, as well as changes in the interpretation of national law relating to the determination of capacity for persons with disabilities.

For these reasons, the first section of this paper will present the legal difference between physical and intellectual disability. The second section of the paper will examine Article 12 of the UNCRPD, which relates to the legal capacity of persons with disabilities. The third section will briefly assess how different jurisdictions have addressed the issue of

legal capacity of persons with disabilities, in the light of Article 12 of the UNCRPD. The final section will make specific suggestions for changes in national law and practice relating to the determination of legal capacity for persons with disabilities.

The legally important difference between physical and intellectual disability

In philosophy and legal theory, autonomy and decision-making capacity are two concepts that are intimately connected. If a person is able to decide for herself she is considered autonomous.

On the other hand, persons with intellectual disability are commonly not able to decide for themselves. Persons with intellectual disability are different from other members of society or the political community in liberal societies, because they lack, to a greater or lesser degree, the individual characteristic on which liberalism is based, i.e. autonomy. Liberal theory presupposes that all members of society are autonomous. Liberalism protects, and places great emphasis on the protection of autonomy, since it allows the individual to be responsible for making important choices about her life; to be true to her character, her convictions and beliefs and act in accordance to these. Moreover, autonomy in liberalism is protected independently of the subjective fact whether the individual is actually making these important choices out of personal conviction, a deeper sense of responsibility or because of sheer impulse and irrationality.

Persons with intellectual disability, to the extent that their disability allows, may or may not have that sense of oneself. They may or may not feel they are acting out of conviction, or of a deeper sense of what their life plan is. In many instances, persons with intellectual disability may not have much control over their daily lives, as they may lack the skills for even simple menial tasks.

For these reasons, we must distinguish the case of intellectual disability from that of physical disability. Most commonly, physically disabled persons are faced with external, physical barriers, which make it difficult for them to have full mobility and control over their lives. In certain instances, the effect of these barriers may exclude the person from social life, to such a degree of intensity, that she may not be able to lead a fulfilling life. State action can therefore be required to remove these barriers.

On the contrary, a person with intellectual disability is not faced with extraneous, physical impediments, which interfere with controlling her own life. In layman's terms, the psychological definition of intellectual disability is low IQ, combined with limitations in adaptive skills. In legal terms, intellectual disability translates in three typologies, of limited, impaired or no autonomy.

A person with intellectual disability can have limited autonomy, when she retains autonomy for some actions, but not others; e.g. she may be able to buy things from stores, because she knows how to count money, but may not understand what complicated medical surgery entails. Impaired autonomy here designates persons with intellectual disability with fluctuating capacity; persons with borderline intellectual disability would be an example of this. Finally, the typology of no autonomy describes situations like persons with severe intellectual disability, who do not have ability to communicate. In all these categories, the intellectual disability of the person may impede her from making decisions, either simple or complicated.

In this sense, the disability that physically disabled persons have is very different from the disability that persons with intellectual disability have. Persons with intellectual disability lack in cognitive skills, which makes it difficult for them to make decisions on their own. Their intellectual disability is a legal concept, called lack of autonomy, or lack of decision-making capacity.

It is now time to turn to the UNCRPD and see how this sharp distinction between physical and intellectual disability helps to better understand and interpret the provisions relating to legal capacity of persons with disabilities.

The normative content of Article 12 of the UNCRPD

The starting point for this section is the provision of the UNCRPD relevant to legal capacity. Article 12 of the UNCRPD is entitled “Equal recognition before the law”. The choice of words in paragraph 1 of Article 12 is deliberate: they repeat verbatim Article 6 of the Universal Declaration of Human Rights, which proclaims: “Everyone has the right to recognition everywhere as a person before the law”.

For this reason, paragraph 1 of Article 12 reaffirms the right of persons with disabilities to be recognised everywhere as persons before the law: “States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law”.

The issue of determining the legal capacity of persons with disabilities is then dealt with in the following paragraphs, 2 to 5 of Article 12. Paragraph 2 imposes the following obligation: “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”.

In this way, Article 12 the UNCRPD is firmly placing the issue of legal capacity within the wider context of legal personhood: the implied connection here is that if a person is refused recognition of her legal capacity, then her status as a legal agent, as person in law, becomes problematic.

In terms of international human rights law, then, the position is clear: as a general principle, the disability that a human being may have cannot be used to refuse that person legal capacity.

In national law, however, the position may be very different. The well-known case of *X and Y v the Netherlands* is a typical illustration of this.

Furthermore, it is common ground that national legal systems have introduced criteria for the determination of legal capacity, which usually preclude the legal capacity of persons with limited cognitive skills, i.e. persons with intellectual disability.

Given then that national laws typically restrict the legal capacity of persons with (intellectual) disability, how are we to interpret the normative requirements of Article 12 of the UNCRPD? How are States Parties supposed to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life? Does this mean that persons with intellectual disability should retain legal capacity, whatever their cognitive impairment?

The paper claims that the focus of the analysis should be the “equal basis” requirement of paragraph 2. Formal equality demands that similar things be treated in a similar manner, whereas different things should be treated differently.

In other words, the obligation of States, in paragraph 2 of Article 12, to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life translates into a correlative right of persons with disabilities “not to be arbitrarily deprived of their decision-making capacity”.

Seen from this perspective the “equal basis” requirement introduces, and ultimately justifies, difference in the determination of legal capacity, based on whether the person has physical, or intellectual disability. Intellectual disability is different from physical disability, so that a difference in the recognition of legal capacity between persons with intellectual disability on the one hand, and persons with physical disability on the other, is ultimately justified (and not arbitrary).

Furthermore, the negative right entrenched in paragraph 2 of Article 12 “not to be arbitrarily deprived of decision-making capacity” is enhanced by the positive right protected by paragraph 3 of Article 12: “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. This positive right is entirely in line with the spirit of the UNCRPD, which stresses the indivisibility of the human rights protected by its articles. Paragraph 4 of Article 12 provides the procedural safeguards necessary to avoid that deprivation of decision-making capacity is arbitrary, whereas paragraph 5 sets down benchmarks, or

goals, that national legal systems should take into account when regulating the legal capacity of persons with disabilities.

This section has tried to interpret the normative scope of Article 12 of the UNCRPD, particularly that of paragraph 2: Persons with disabilities retain their legal capacity on an equal basis with others. Based on the legally important difference between physical and intellectual disability, this means that intellectual disability may justify different treatment of their legal capacity. In order for us to determine whether the difference in treatment is justified, we must turn to examine how national legal systems have addressed the determination of legal capacity.

The competing models of capacity determination

The typologies of intellectual disability mentioned in an earlier section show that the greater the extent of intellectual disability, the weaker the claim to autonomy is. In this sense, persons with intellectual disability are disadvantaged in relation to other members of society, in that they do not have the necessary skills to make important decisions which would define their own lives for themselves. To the extent that persons with intellectual disability have and communicate wishes, their decisions perhaps may even endanger their own safety or health. For instance, a severely person with intellectual disability may refuse to take medication against her epileptic seizures, thus risking severe harm to herself. These decisions may also be erratic, and in certain instances, may flow from pathological reasons, such as phobias; in the above example the person may be in mortal fear of doctors. Moreover, the lack of adaptive skills and intelligence that persons with intellectual disability usually display makes them vulnerable to abuse.

The central claim of the disability rights movement has been to enable persons with disabilities to have more control over their daily lives, to enjoy more freedom of choice and, most importantly, to have their wishes respected. In this sense, the social model of disability dictates that even if the person with disability is considered as lacking capacity, her wishes remain central to the decision-making process. This is very clearly reflected in paragraph 4 of Article 12, which sets down procedural safeguards concerning the determination of decision-making capacity.

In terms of national legal systems, the basic typologies of capacity determination are two: the approach of civil law and the common law approach. Both approaches begin with the assumption of capacity: i.e., that the person has decision-making capacity, unless otherwise contested. This is where the two systems diverge.

Civil law countries, such as Germany, have developed an approach to the determination of capacity which is ultimately based on the status of the person as being designated not to have decision-making capacity. In other words, the court declares that the person may have capacity for some matters, but not others. For instance, a person may be declared wholly incompetent, or incapacitated in only financial issues or personal matters. What matters, in this approach, is that the other members of society are informed that the person is incapacitated, so that they are protected from e.g. entering into invalid contracts with the incapacitated person.

On the other hand, the common law approach is squarely based on the decision to be made. The focus of the law is whether the person has the requisite capacity to make the relevant decision. In other words, the common law follows a case by case approach. The same person may have capacity over financial issues, but not personal matters; however, there is no general declaration by a court of law to that effect. This approach has the advantage of not placing an incapacity label over the person with disability, yet on the other hand, it does little to help legal certainty, e.g. since a person can be declared incompetent with regards to a specific contract that has already been promised.

Conclusion: Implications for national legal systems

As the previous section of this paper has tried to show, different legal systems have responded differently as to how the procedure for interfering with the decision-making capacity for persons with disabilities must be carried out.

Whatever the specific approach of national law, Article 12 of the UNCRPD requires that three very basic changes are implemented in terms of national law and practice:

Firstly, that more emphasis should be placed on the provision of adequate support in order to help persons with disabilities (especially intellectual disability) to acquire more capacity and greater freedom of choice. For example, in non-urgent medical interventions, the incapacitated person with disabilities should receive the appropriate support in order to become able to reach an informed decision about the proposed medical intervention.

Secondly, that respect for the will and the wishes of the person should also entail the recognition of veto rights for persons with disabilities. In other words, even if persons with disabilities are considered incapacitated, their eventual denial concerning a specific decision should be respected. A concrete example of this comes again from German law, where sterilisations for incapacitated persons cannot be carried out against the will of the incapacitated person.

Finally, that respect for the will and the wishes of the person must lead to the adoption of a coherent approach when deciding on behalf of an incapacitated person with disabilities.

The person's needs, problems, potential, life-style, health, wishes, aspirations should be interpreted as a dynamic system that any decision made on behalf of the incapacitated person with disabilities should be compatible with. For example, an incapacitated person with intellectual disability has been living in a big city for all her life. She cannot be taken to live in the countryside, simply because she will receive better health care there. Any decision made as to where she will reside must take into account her way of living, as well as her wishes as to whether she should remain in an urban area.

Summing up this analysis of how the legal capacity of persons with disabilities should be regulated in light of Article 12 of the UNCRC, this paper has tried to show that a sharp distinction must be drawn between capacity determination for persons with physical disabilities and persons with intellectual disability. Article 12 of the UNCRC allows national legal systems to reduce or even remove the decision-making capacity of persons with intellectual disability, given the fact that many persons with intellectual disability lack the cognitive skills necessary to reach decisions on their own. On the other hand, Article 12 sets down a positive right to provision of support for enhancing decision-making capacity, as well as a comprehensive framework of procedural safeguards against arbitrary interference with decision-making capacity for persons with disabilities.

National law and practice are faced with the challenge to regulate the decision-making capacity of persons with disabilities in a way that will effectively implement the requirements of Article 12 of the UNCRC. Otherwise, national law and practice will only pay lip service to the equal recognition of persons with disabilities as persons before the law.