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Right to Legal Capacity

- **Theory (construction, interpretation of legal capacity)**
- **Practice (guardianship, ECtHR)**
- **Where to move (Paradigm shift, benchmarks, law reform)**

Theory



Construction of Legal Capacity

The concept of legal capacity is based on two aspects:

- capacity to have rights
- capacity to act.

Capacity to have rights means the capacity to be a potential holder of rights and obligations (**STATIC ELEMENT**), while capacity to act means the capacity to exercise these rights and to enter into legal relationships (**DYNAMIC ELEMENT**).

Capacity to have rights

Each person has a PERSONALITY which refers only to them.

Each person has an IDENTITY.

It means in legal terms that everybody has the capacity to be a potential holder of rights and obligations.

It does not mean that each person can exercise these rights and can be subject to these obligations themselves.

Capacity to act

Human beings are active persons who have AGENCY.

Capacity to act is acknowledged when people can conduct their affairs themselves.

People with intellectual disabilities, psychosocial disabilities are often denied the capacity to act component of legal capacity and placed under guardianship.

Is it a fact or a fiction?

Art 12(1) of the CRPD

12 (1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

This paragraph fulfils the IDENTITY requirement of legal capacity by acknowledging that people with disabilities have the CAPACITY TO HAVE RIGHTS. In other words, Article 12 (1) recognizes the PERSONHOOD of people with disabilities.

Modern democracies acknowledge that capacity to have rights cannot be subject to limitations.

Art 12(2) of the CRPD

12 (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

Article 12(2) addresses the AGENCY requirement of legal capacity and obliges States Parties to ensure that people with disabilities can exercise their individual autonomy equally with others. In other words, Article 12 (2) covers not only the „capacity to have rights” element of legal capacity, but the CAPACITY TO ACT component as well.

Is there a consensus on this?

Legal Capacity and the VCLT

Section 3 of the 1969 Vienna Convention on the Law of Treaties (VCLT) gives the rules of interpretation of treaties, according to which “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” (Section 3, Article 31, para 1 of the VCLT)

Art 31(3) (b) highlights that “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall be taken into account.

Art 32 of the VCLT mentions the importance of consideration of *travaux préparatoires*, as a supplementary mean of interpretation.

Legal Capacity and the OHCHR

According to the background conference document on legal capacity prepared by the Office of the United Nations High Commissioner for Human Rights (OHCHR) for the Ad Hoc Committee drafting the CRPD:

“The paper concludes that the two terms ‘recognition as a person before the law’ and ‘legal capacity’ are distinct. The ‘capacity to be a person before the law’ endows the individual with the right to have their status and capacity recognised in the legal order. The concept of ‘legal capacity’ is a wider concept that logically presupposes the capability to be a potential holder of rights and obligations, but also entails the capacity to exercise these rights and to undertake these duties by way of one’s own conduct.” (Executive summary)

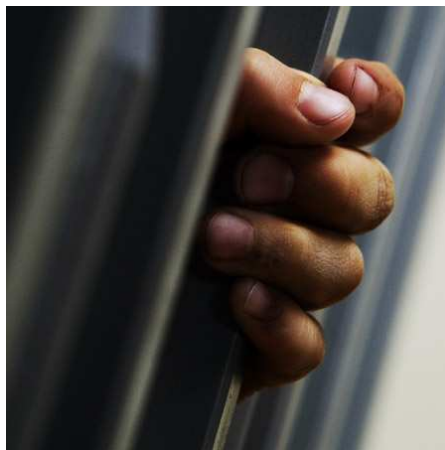
Legal Capacity and the ComRPD

Concluding Observations of the Committee on the Rights of persons with Disabilities (ComRPD):

“The Committee is (...) concerned that no measures have been undertaken to replace substitute decision-making by supported decision-making in the exercise of legal capacity.” (CRPD/C/ESP/CO/1) Para 33.

“The Committee recommends that the State party review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person’s autonomy, will and preferences. It further recommends that training be provided on this issue for all relevant public officials and other stakeholders.” (CRPD/C/ESP/CO/1) Para 34.

Practice



Denying/limiting Legal Capacity

When people are placed under guardianship they fully or partially lose their capacity to act. In most cases, guardian becomes a substitute decision-maker who acts on behalf of the adult and makes 'best interest decisions' in place of them.

Guardianship laws and practices prevent adults under guardianship from exercising a series of basic human rights. Some significant examples are

- right to access to justice (Article 13),
- right to decide where to live (Article 19),
- right to marry and found a family (Article 23),
- right to decide on medical treatment (Article 14 and 25),
- right to work (Article 27),
- right to vote and stand for election (Article 29).

ECtHR and Legal Capacity

The European Convention on Human Rights (ECHR) does not mention the right to legal capacity. However, the European Court of Human Rights (ECtHR) considers this right as an important part of the right to respect for private life under Article 8 of the ECHR.

Shtukurov v. Russia

Application no. 44009/05, judgment 27 March 2008

ECtHR held that

- Judicial proceedings cannot be regarded as fair in terms of Article 6 if a person whose legal capacity is being decided upon is completely excluded from them.
- Mr Shtukurov's hospitalization violated the right to liberty guaranteed in Article 5 as it was based only on his guardian's decision.
- Full legal incapacitation as such was a disproportionate measure and, therefore, violated the applicant's right to respect for his private life under Article 8. The Court noted that the interference with the applicant's private life had been very serious. His deprivation of legal capacity had been applied indefinitely, and could not be challenged otherwise than through his guardian who opposed any such attempts. (Para 90)

How to deal with the approach according to which „the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation?“ (Para 94)

Kruskovic v. Croatia

Application no. 46185/08, judgment 21 June 2011

ECtHR held that

It was impossible for the applicant to have his paternity recognised under domestic law as he had lost legal capacity (Violation of Article 8)

The Court could not accept that this situation was in the best interests of either the father or the child. (Para 41)

How to deal with the approach according to which „the Court accepts that restrictions on the rights of persons divested of legal capacity, even when they occur in the sphere of their private and family life, are not in principle in contradiction with the requirements of Article 8 of the Convention?“ (Para 30)

Kiss v. Hungary

Application no. 38832/06, judgment of 20 May 2010

ECtHR held that

Article 3 of Protocol no. 1 to the ECHR was violated regarding free elections since „[t]he applicant in the present case lost his right to vote as the result of the imposition of an automatic, blanket restriction on the franchise of those under partial guardianship. He may therefore claim to be a victim of the measure.” (Para 43)

How to deal with the approach according to which „an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote.” (Para 44)

Salontaji-Drobjnak v. Serbia

Application no. 36500/05, judgment 13 October 2009

ECtHR held that

- limitation of the applicant’s legal capacity as a means to stop „vexatious litigation” was disproportionate and violated Article 8 of the Convention. (Para. 144)

- domestic courts had failed to examine the applicant’s requests regarding the full restoration of his legal capacity during four years, and domestic legislation does not seem to provide for a periodical judicial reassessment of the applicant’s condition and violated Article 6(1) of the Convention. (Para. 134)

Recent judgments of the ECtHR

Stanev v. Bulgaria

Application no. 36760/06, judgment 17 January 2012

D.D. v. Lithuania

Application no. 13469/06, judgment 14 February 2012

Where to move?



Paradigm Shift

The paradigm shift of Article 12 of the CRPD is based on the clear obligation on states not to remove legal capacity, but instead to “provide access by persons with disabilities to the support they may require in exercising their legal capacity (Article 12 (3)).”

In other words, states are obliged to transform from systems of substituted decision-making, such as guardianship, to ones in which supported decision making is the default model.

Art 12(3) of the CRPD

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

Society needs to provide *informal* supported decision-making frameworks, and also more *formal* support measures which can include personal assistance, personal budget systems, and “access to a range of in-home, residential and other community support services.” (Article 19(b) of the CRPD)

Paradigm Shift – Theory

Everyone has the RIGHT to make their own decisions (autonomous decision-making).

States are OBLIGED to provide adequate support to persons with disabilities if they need it in order to enable them to exercise their legal capacity (supported decision-making).

Autonomous decision-making and supported decision-making are not contradictory; they can be used in interaction; interdependence between people is an acknowledged way how decisions get made.

Paradigm Shift - Principles

GUARDIANSHIP	SDM
Medical model	Social/human rights model
Legal capacity is denied/restricted	Legal capacity is intact
Substituted decision-making	Interdependent decision-making
Imposed power	Empowerment
Paternalistic subordination	Relationship of trust
Guardians are appointed by a court or other authority	Free agreement on a voluntary basis
One/at most two guardians	Network can be established
Professional guardians are paid	Supporters are usually unpaid
Rigid	Flexible

Paradigm Shift - Practice

Examples:

Swedish Personal Ombudsperson system (PO)

Circles Network

Planned Lifetime Advocacy Network

Vela Microboard Association

Intentional Peer Support

...

Paradigm Shift - Safeguards

When setting up safeguards for the system of supported decision-making, Articles 12 (4), 13 and 16 of the CRPD should be considered.

Article 12 (4) talks about safeguards, which

- are appropriate
- are effective
- prevent abuse
- ensure that measures (support) relating to the exercise of legal capacity
 - respect the rights, will and preferences of the person
 - are free of conflict of interest and undue influence
 - are proportional and tailored to the person's circumstances
 - apply for the shortest time possible
 - are subject to regular review by a competent, independent and impartial authority or judicial body, and
- are proportional to the degree to which such measures affect the person's rights and interests.

Benchmarks for law reform

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.

Legal Capacity law reform

Hungary

Czech Republic

Latvia

Slovakia

Lithuania ...

and all over the world.

Challenges in implementing Art 12.

- Economical/Financial
- Attitudinal
- Legal
- Political

Challenges at national level

- Lack of self-advocacy movement and organizations of people with psychosocial disabilities → *Capacity building*
- Lack of involvement of People with Disabilities (PWDs) in policy and decision making → *Empowerment and involvement of PWDs.*

Art. 4(3) In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

Challenges at national level

Laws prevent PWD to exercise their right to legal capacity → *screening exercise: identifying legal capacity related laws with the view of guardianship law reform*

Art. 1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

(a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

Challenges at national level

- Lack of support networks → *international cooperation, identifying existing communities and encourage them to become support networks for PWD*

- Lack of financial resources to develop effective and accessible community-based services → *mapping out existing resources; needs assessment at all level; match needs and resources*

- Lack of knowledge (e.g. Distinction between support person and guardian; safeguards) → *capacity building*

- Lack of information on best practices → *international cooperation*

- Negative attitudes, stigma, abuse → *awareness raising, capacity building, engaging the Media*

Challenges at EU level

- Inappropriate translation of legal capacity / Declarations, Reservations → *Facilitating common approach*
- Lack of knowledge on good practices in Member States → *Facilitating exchange of experiences; encouraging cooperation between Member States; organising trainings/workshops*
- Lack of information on rights-based approach to disability in Member States → *Providing guidance for Member States by using soft law measures*
- Limited scope of the duty to provide reasonable accommodation → *Extend the provision to all areas of life including the right to legal capacity*
- *Map out legal capacity related areas where EU has competency and bring EU legislation in line with the CRPD*

Conclusion

http://www.youtube.com/watch?v=U9o3leF_LAI

States Parties shall RECOGNIZE that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

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Thank you for your attention!

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