

## 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.

1. **Models based on self-determination** : Example from Germany: Betreuungsgesetz (1992)
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**