

The Legal Capacity of Persons with Disabilities

Article 12 UNCRPD and the
dispute about its interpretation

Dr Oliver Tolmein, lawyer
Kanzlei Menschen und Rechte

Outline

- **Basic problem underlying the legal capacity of persons with disabilities**
- **Article 12 UNCRPD: Genesis**
- **Analysis of statutory rule**
- **Practical relevance/case studies: substitute decision-making, supported decision-making**
- **Draft General Comment**
- **Outlook**

Current status

- **Persons with disabilities are denied self-determination in the legal sense**
- **Instead: guardianship, assistance, forced treatment options**
- **Principle: others decide what is best for the persons concerned who allegedly are not able to take such decisions**
- **Result: Principle of equal treatment is not applied**

Discussion about Article 12 UNCRPD

- Right of self-determination to be guaranteed by according “full legal capacity”
- Without full legal capacity, economic, cultural and social rights cannot be exercised
- Result: restrictions imposed on physical integrity, no full reproductive choice/freedom to have children, restrictions imposed on decisions about medical treatment
- Concerns all persons with disability, however, in particular persons with cognitive impairments or mental disorders

Article 12(1) and (2)

- **Article 12: cross-sectional provisions → affect all aspects of life of persons with disabilities**
- **Right to recognition as persons before the law (Art. 6 Universal Declaration of Human Rights)**
- **Legal capacity on an equal basis with others in all aspects of life: Fleshes out paragraph 1 for practical purposes**
- **Important: no differentiation as to the nature and seriousness of disabilities → applies equally to all persons with disabilities**

Article 12(3)

- **Obligation for States Parties**
- **Provide access to support**
- **To the extent required, to ensure exercise of legal capacity**
 - **Person with disability (who wants access) play active role**
 - **Support measures must exist in reality**
 - **Model of supported legal capacity**
 - **Problem: level of support remains unclear. Full support possible?**

Article 12(4)

- Refers to Article 12(3)
- Safeguards to prevent abuse by adopting “measures that relate to access to support”
 - Will and preferences of the person concerned must be respected in all circumstances
 - Safeguards are subject to review by judicial body (or competent independent authority)
 - Principle of proportionality to avoid excessive safeguards

Article 12(5)

- Ensuring equal right to control own financial affairs
- Rights of defence (against deprivation of property and restrictions)
- Accorded rights of access (to bank loans, mortgages, other forms of financial credit)

Article 12 Application I

- Law of legal capacity (s. 104, 105 Civil Code)
 - Legal incapacity: “cognitive dysfunction ruling out the free exercise of will” (severe mental disability)
 - Consequence: declarations of intent are null and void (ineffective from the outset)
- In view of Article 12:
 - Inadmissible because, if declaration of intent is ineffective due to disability, supported decision-making cannot be provided

Article 12 Application 2

- **Non-consensual sterilisation (1905 German Civil Code)**
 - Sterilisation in case of permanent incapacity to give consent: may be carried out without consent
 - Not against an individual's will (interpreted strictly in case law)
 - Requirements:
 - Expected pregnancy
 - Pregnancy poses a health risk for the person concerned
 - Pregnancy cannot be prevented in a reasonable manner
 - Requires medical opinion and authorisation by guardianship court
- **With a view to Article 12:**
 - No support measure, no reference to resources that enable persons with disabilities to take their own decisions. No means to provide support to parents. Discriminatory measure (serious intervention without consent)
 - Clear breach of UNCRPD

Article 12 Application 3

- **Other examples**
 - **Persons placed under guardianship in all matters have no right to vote (s. 13(2) German Elections Act)**
 - **Non-consensual psychiatric treatment (s. 1906 German Civil Code, mental illness legislation of Germany's federal states)**

Draft General Comment I

Shift from substitute decision-making to supported decision-making is necessary (human-rights-based model of disability)

Evident from Article 3 UNCRPD (principle of dignity, autonomy, freedom to make one's own choices)

Draft General Comment 2

- Attention drawn to distinction between mental capacity and legal capacity
- Legal capacity: ability to hold rights and duties and to exercise these rights and duties
- Mental capacity: decision-making skills of an individual (depends on many factors)
- No interdependence between legal and mental capacity
- However, state reports suggest that limited mental capacity leads to restrictions of legal capacity → contrary to Article 12 UNCRPD

Draft General Comment 3

- Support
- Broad term: significantly varying types of support, depending on an individual's requirements and preferences (e.g. peer support, assistance in communication)
- No obligation to use support
- However, support should never amount to substitute decision-making

Draft General Comment 4

- **Obligations of States Parties:**
 - In particular: review the laws allowing for guardianship and trusteeship
 - Replace regimes of substitute decision-making by supported decision-making
 - Characteristics of substitute decision-making:
 - Persons concerned are not allowed to take any decisions at all or to a limited extent only
 - Decision-maker can be appointed without the approval and against the will of the person concerned
 - Decisions that are taken by the decision-maker are guided by the perceived “best interests” of the person concerned, not by the individual’s will and preferences

Draft General Comment 5

- **Supported decision-making:**
 - **Characteristic:** based on the will and preferences of the individual
 - An individual's mode of communication must be respected, even where this communication is unconventional
 - Free choice of support persons must be facilitated and these must be recognised
 - Access to support must not be made difficult by cost
 - Need for support must not be used to justify limiting other fundamental rights such as the right to marry, reproductive rights, parental rights, the right to give consent for medical treatment and the right to liberty
 - Right to refuse support
 - Safeguards: goal = safeguards must ensure that the person's will and preferences are being respected

Draft General Comment 5

- **Special relationship of Article 5 with Articles 13, 14, 17, 18, 19, 21, 23, 25, 29**

Outlook

- Article 12: strict rejection of current image of persons with disabilities
- However, also a great challenge
- Rights of self-determination / level of protection
- Departure from concept of protection as an alternative to self-determination
- Self-determination consistently seen as protection
- Fair to say that actual abuse may be less prevalent (although it does exist) because it is less systematic than the current state concept of systematic discrimination

Kanzlei Menschen und Rechte

Dr Oliver Tolmein, lawyer and
specialist for medical law

Borselstrasse 26

22765 Hamburg

www.menschenundrechte.de

kanzlei@menschenundrechte.de

+49.40.600094700

+49.40.600094747 (fax)