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PERSON

Legal Capacity
in International
Human Rights
Law



Overview

- CRPD and Article 12
- CRPD Committee Jurisprudence
- Substituted Decision-Making
- Support for the Exercise of Legal Capacity and Supported Decision-Making

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CRPD



- First human rights convention of 21st century
- Fastest negotiated and highest number of ratifications in a short period after adoption
- Deepest involvement of civil society
- Unique domestic monitoring provisions
- Strong representation of disabled people on CRPD Committee

Article 12

- 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
- 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
- 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.

CRPD Committee

- “[The State Party must] 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”

Concluding Observations

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GENERAL COMMENT



- Authoritative interpretation of the treaty text by its monitoring body – used to guide States
- 5 year drafting process including 1 day of General Discussion in 2009
- Draft published in October 2013 for comment
- Final General Comment (No. 1) adopted in April 2014

Legal Capacity

- Legal capacity includes the capacity to be both a holder of rights and an actor under the law.
- Legal capacity to be a holder of rights entitles the person to full protection of his or her rights by the legal system.
- Legal capacity to act under the law recognizes the person as an agent with the power to engage in transactions and in general to create, modify or end legal relationships.

Universal Legal Capacity

- In order to fully recognize “universal legal capacity”, whereby all persons (regardless of disability or decision-making skills) inherently possess legal capacity, State parties must abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect.

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SUBSTITUTED DECISION-MAKING

Substituted Decision-Making

- (i) legal capacity is removed from a person, even if this is just in respect of a single decision;
- (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will or
- (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences.

- Legal capacity and mental capacity are distinct concepts.
- Legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency). It is the key to accessing meaningful participation in society.
- Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.
- Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.

No parallel systems

- State parties' obligation to replace substitute decision-making regimes by supported decision-making requires both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives.
- The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention.

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**SUPPORT TO EXERCISE
LEGAL CAPACITY**

- Support is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity.
- For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication.

Core Requirements

- Available and accessible to all – support needs & communication should not be a barrier
- Will and preferences to replace ‘best interests’
- Legal recognition available for supporters
- Nominal or no cost to persons with disabilities
- Cannot limit other fundamental rights
- Right to refuse support or end relationship
- Not based on mental capacity assessments

Support in Hard Cases

- Where, after significant efforts have been made, it is not practicable to determine the will and preference of an individual, ‘best interpretation of will and preference’ must replace ‘best interests’ determinations.
- The ‘best interests’ principle is not a safeguard which complies with article 12 in relation to adults.

Support can include

- Advance planning and support agreements, but not based on mental capacity assessments
- Delegating decision-making (on an equal basis) e.g. granting a power of attorney
- Appointment of an outside decision-maker as a last resort where will and preferences are unknown – to find the ‘best interpretation’
- Some people just need equal recognition and will not want to use ‘support’

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EXAMPLES OF GOOD PRACTICE



Examples of good practice

- Support agreements (Ireland, British Columbia)
- Personal advocacy/ombuds (Sweden)
- Developments of model legislation with high participation of civil society (Bulgaria, India, Newfoundland & Labrador)
- Supported decision-making pilot projects (Bulgaria, Australia, US and Israel)

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STEPS TO REFORM



- Abolish substituted decision-making regimes that meet the Committee's definition
- Recognise legal capacity of persons with disabilities on an equal basis with others
- Establish options for people to use support in the exercise of their legal capacity
- Do so with the meaningful participation of persons with disabilities and DPOs