



“Advocacy Note on Legal Capacity”

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Capacity in law constructed by society:

The first thing to appreciate in relation to legal capacity is that it is socially constructed and is thus reflective of choices societies have made at different points of time. Historically capacity has been an attribute or a presumption that the law has conferred or denied from populations. A useful illustration of this process is provided by the legal management of the capacity of women. The negotiable content of the concept is again demonstrated by the Convention on the Rights of the Child acknowledging the evolving capacities of the child and explicitly incorporating the right to participation. (article 12) Therefore when we are asking for the legal disqualifications applicable against us (persons with psychosocial disability) to be lifted we are in a manner of speaking treading paths traversed by other excluded groups. We are saying that the allegation of incapacity that society makes in relation to some or all of us is false and we have a right to live like any other on our own terms.

Cognitive Capabilities Privileged in Legal Construction of Capacity

Whilst accepting the constructed nature of legal capacity it is necessary to understand that it is primarily constructed from a normative standard of cognitive capabilities. This privileging of cognitive capabilities is questionable as not all of us use cognitive capabilities to make our decisions. Should those of us who use an emotive or intuitive basis for reaching decisions be considered incapable? The law by according primacy to a certain way of being in the world seems to be manufacturing incapacity labels. If the presumption comes into being because of the way in which the law treats different kinds of intelligences then evidently a Disability Rights Convention needs to change this presumption and recognize these differences. This process would stand initiated if the Convention should unequivocally state that all persons with disabilities have legal capacity.

Legal Capacity not to do with Wisdom of Choices

One of the arguments put forth for substituted decision-making is that a number of persons do not have the wisdom to exercise legal capacity. But legal capacity is about the freedom to make choices and not the wisdom of those choices. There is an inherent freedom for all human beings to make the same or new mistakes and to learn or not learn from them. This liberty to learn from mistakes is at other than legal sites referred to as experimentation or even learning from trial and error. Humanity has progressed by allowing people the freedom to make mistakes. This may be because it has often been found that the blunder of today becomes the discovery of tomorrow. Whenever any people are not accorded the freedom to make their own errors they are in effect not being allowed to develop in accordance with their own genius and it is this discrimination and deprivation that needs to be addressed in relation to persons with psychosocial disability. Dignity of risk and the right not to be protected are inherent rights of all adults. A Convention which is being negotiated to return to persons with disability their full personhood has necessarily to interrogate all stereotypes because if it were to get entrapped by stereotypes it would not just reinforce a mistaken impression it would legitimize it.

Need to Distinguish between a Norm and its Implementation

It is next contended by the proponents of guardianship that supported decision-making cannot substitute for guardianship and even if it could such support is not available. These arguments it is submitted conflate the concerns of implementation into the adoption of norms. Should these constraints of implementation provide the basis for adoption of norms under the Convention especially

when the norms adopted under the Convention will be the basis of all future discourse on rights of person with disabilities? A pragmatic approach for the implementation of norms is acceptable but a similar perspective towards the adoption of norms is questionable because this is letting the limitations of today confine the developments of tomorrow.

Substituted Decision Making will apply to all persons with psychosocial disability

A further argument by proponents of some form of substituted decision-making is that as a rule all persons with disability have legal capacity but there are a very small percentage of persons with severe disability for whom supported decision-making will not be sufficient and for whom guardianship will need to be provided. Proponents argue that these guardianship arrangements should be put in place subsequent to determination by a judicial body after due observance of fair procedure safeguards. They contend that this substituted decision-making will be the exception not the rule and would apply to a small percentage of cases.

The first consequence of accepting this argument will be that the rule of substituted decision-making will need to be incorporated in the Convention. Now the rule according to its proponents has been incorporated only for a very small percentage of persons with psychosocial disability. It therefore becomes necessary to ask by what procedure this small percentage of persons will be identified. Evidently this will be done from case to case. This process of identification will render the capacity of all persons with psychosocial disability open to question.

This would give rise to a situation where for questionable advantages to a small group of persons all persons with psychosocial disability shall be disadvantaged. The contention of questionable advantage is being made because studies evaluating the functioning of guardianship have found abuse isn't in fact prevented with guardianship, it is facilitated. Further these arrangements once made cause the guardian to take all decisions on behalf of and without consultation with the ward. This ouster makes for the civil death of the persons subjected to guardianship.

Supported Decision Making the Sole Model

In the circumstances it may be worthwhile to ask if the paradigm of supported decision-making would be a preferable option for all persons with disability as it would keep us at the centre of all decisions affecting us. It would interrogate the cognitive privileging existing in present laws and yet allow persons with disabilities along with others needing help to seek assistance in those tasks which require higher reliance on cognitive capabilities.

Assistance provided irrespective of the will of the recipient is an infliction and not a support. In making this statement, the general humanitarian impulse of helping people in distress or in life endangering situations is not being questioned. We are questioning the procedures whereby persons with psychosocial disability are displaced from governing their own lives. Whilst an acknowledgement of human interdependence furthers the human rights of all persons, the imposition of dependence is a negation of human aspiration, respect and choice. It is for this recognition of human interdependence that supported decision-making needs to displace guardianship in legal constructions of capacity.