

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/33834> holds various files of this Leiden University dissertation

Author: Lewis, Oliver

Title: Legal capacity in international human rights law

Issue Date: 2015-07-01

Legal Capacity

in International Human Rights Law

PROEFSCHRIFT

ter verkrijging van

de graad van Doctor aan de Universiteit Leiden,

op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,

volgens besluit van het College voor Promoties

te verdedigen op woensdag 1 juli 2015

klokke 13.45 uur

door

Oliver Lewis

geboren te Bristol, UK

in 1975

Promotiecommissie:

Promotor: Prof. dr. A.C. Hendriks

Overige leden: Prof. dr. A. Popma

Prof. dr. M.L.P. Loenen

Prof. dr. A.M. van Hemert

Prof. dr. T.J. Mellema

Prof. dr. J.E. Goldschmidt (Universiteit Utrecht)

Prof. dr. J.E. Bickenbach (Queens University, Kingston,
Canada)

Table of Contents

CHAPTER 1: INTRODUCTION	6
1. OUTLINE	7
2. CONTEXT	8
3. BACKGROUND TO THE RESEARCH	12
4. PURPOSE OF THE BOOK	15
5. SCOPE AND DELIMITATIONS	18
ROADMAP	19
BLOCK ONE	19
BLOCK TWO	21
BLOCK THREE	23
6. DEFINITION OF TERMS	25
LEGAL CAPACITY	25
MENTAL DISABILITY	25
BLOCK ONE	27
CHAPTER 2: THE DEVELOPMENT IN INTERNATIONAL LAW OF LEGAL CAPACITY OF PEOPLE WITH MENTAL DISABILITIES	28
1. INTRODUCTION	29
2. CONCEPTUAL ISSUES	31
A. CONTEXT AND UNDERLYING PRINCIPLES	31
B. SCOPING OUT SUPPORTED DECISION-MAKING	36
C. ARTICLE 12 CRPD: THE NATURE OF THE OBLIGATION	40
3. UNITED NATIONS	44
A. COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES	46
B. HUMAN RIGHTS COMMITTEE	53
C. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS	55
D. RESERVATIONS AND INTERPRETATIVE DECLARATIONS	56
4. COUNCIL OF EUROPE	62
A. COMMITTEE OF MINISTERS	62
B. PARLIAMENTARY ASSEMBLY	67
C. COMMISSIONER FOR HUMAN RIGHTS	68
5. EUROPEAN UNION	71
6. CONCLUSIONS	78
CHAPTER 3: LEGAL CAPACITY GUARDIANSHIP AND SUPPORTED DECISION-MAKING	82
1. INTRODUCTION	83
2. DEFINITIONS, AND THE MEANING OF FUNCTIONAL INCAPACITY	86
3. POSITIVE DUTY TO PROTECT	89
4. GUARDIANSHIP AS A HUMAN RIGHTS ISSUE	89
5. RECOMMENDATION R(99)4: PRINCIPLES CONCERNING THE LEGAL PROTECTION OF INCAPABLE ADULTS	93
6. THE NEED FOR A FLEXIBLE APPROACH	94
7. PROCEDURAL ASPECTS OF LEGAL INCAPACITY AND GUARDIANSHIP	97
SUFFICIENT NOTICE	100
INCAPACITY ASSESSMENT	101
RIGHT TO BE HEARD IN PERSON	105

ADEQUACY OF EVIDENCE	105
DISCLOSURE OF DOCUMENTS	106
LEGAL REPRESENTATION	107
APPEAL RIGHTS	110
LENGTH OF PROCEEDINGS	111
CHOOSING A GUARDIAN	111
CONTESTING DECISIONS MADE BY A GUARDIAN	113
DELAY IN APPOINTING GUARDIAN	115
PERIODIC REVIEW OF GUARDIANSHIP	116
8. CONCLUDING REMARKS	118

CHAPTER 4: THE EXPRESSIVE, EDUCATIONAL AND PROACTIVE ROLES OF HUMAN RIGHTS: AN ANALYSIS OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES **120**

1. INTRODUCTION	121
2. EXPRESSIVE VALUE OF HUMAN RIGHTS: THINKING	125
A. ARTICULATED PRINCIPLES	127
B. SILENCE AS EXPRESSION	129
3. EDUCATIONAL VALUE OF HUMAN RIGHTS: TALKING	132
A. TRANSPOSING INTERNATIONAL NORMS	133
B. BRINGING NEW ACTORS INTO DISABILITY RIGHTS DISCOURSE	136
C. POVERTY AND DISABILITY	138
4. PROACTIVE VALUE OF HUMAN RIGHTS: DOING	141
A. SPECIFICITY OF ACTION	141
B. INDEPENDENT MECHANISMS	142
C. PARTICIPATION BY PEOPLE WITH DISABILITIES	151
D. CO-ORDINATING IMPLEMENTATION	154
5. CONCLUSION	158

BLOCK TWO **161**

CHAPTER 5: ADVANCING LEGAL CAPACITY JURISPRUDENCE **162**

1. ABSTRACT	163
2. THE EMERGENCE OF LEGAL CAPACITY AS A RIGHT	164
3. UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES	170
4. BULLDOZING AWAY BARRIERS TO THE LIFE-WORLD	174
5. JURISPRUDENTIAL TRACKS	180
6. ARTICLE 8 OF THE ECHR	181
7. ARTICLE 6 OF THE ECHR	185
8. THE VALUE OF LITIGATION	188

CHAPTER 6: STANEV V. BULGARIA: ON THE PATHWAY TO FREEDOM **192**

1. INTRODUCTION	193
2. LIVING CONDITIONS WERE DEGRADING	196
3. LIBERTY WAS DENIED	199
4. LEGAL CAPACITY WAS HARDLY EXAMINED	201
5. CONCLUSIONS	204

BLOCK THREE **208**

CHAPTER 7: DISABILITY, HEALTHCARE LAW AND ETHICS **209**

1. INTRODUCTION	210
------------------------	------------

2. DEFINITION OF DISABILITY	212
3. LEGAL AND ETHICAL THEORY	215
A. FROM ETHICS TO LAW	215
B. FROM PITY AND CHARITY TO HUMAN RIGHTS	217
4. DISCRIMINATION	219
A. DEFINITION	219
B. DISCRIMINATION AND HEALTHCARE	222
C. MULTIPLE DISCRIMINATION	224
D. DISCRIMINATION AND JUSTICE	224
5. AUTONOMY	225
A. DEFINITION	225
B. THE CRPD AND AUTONOMY	226
6. THE CRPD AND HEALTHCARE	228
A. WHEN TREATMENT BECOMES ILL-TREATMENT	231
B. A FRAMEWORK FOR POLICY DISCUSSION	235
7. CONCLUSIONS	235
REFERENCES	237

**CHAPTER 8: DISABILITY, TORTURE AND ILL-TREATMENT: TAKING STOCK AND
ENDING ABUSES** **246**

1. INTRODUCTION	247
2. TORTURE PREVENTION	248
3. A DISABILITY-SPECIFIC FOCUS IN INTERNATIONAL LAW	250
4. FROM DETENTION TO THE COMMUNITY	253
5. WHY MONITORING MATTERS	256
A. SEGREGATION AND HUMAN SUFFERING	256
B. OFF THE MONITORING RADAR	260
C. IMPUNITY AND ACCESS TO JUSTICE	263
6. THE AIMS OF THIS SPECIAL ISSUE	266
7. OVERVIEW OF PAPERS	267
8. RECOMMENDATIONS FOR ACTION	269
A. RECOGNISE THE RANGE OF HUMAN RIGHTS VIOLATIONS	269
B. VISIT NON-TRADITIONAL PLACES OF DETENTION	270
C. VALOURISE THE CRPD	270
D. ENSURE PARTICIPATION	271

CHAPTER 9: CONCLUSIONS **272**

1. INTRODUCTION	273
2. FINDINGS	275
3. LIMITATIONS	284
4. FUTURE RESEARCH AGENDA	285
5. POLICY IMPLICATIONS	286
6. CRITICAL CONVERSATIONS	287

SUMMARY IN ENGLISH **289**

SUMMARY IN DUTCH **293**

DEDICATION **298**

ACKNOWLEDGMENTS **299**

CURRICULUM VITAE **301**