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Legal capacity in international human rights law

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Cover Page



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Summary in English

The book is divided into three blocks. After Chapter 1 that serves as an introduction, comes Block 1 (chapters 2, 3 and 4). These chapters examine the substantive content of the right to legal capacity and how it is situated within the architecture of international human rights law. Block two (chapters 5 and 6) examines the role of the judiciary and analyses the key jurisprudence on the right to legal capacity. Finally, block three (chapters 7 and 8) examines two areas that are impacted by legal capacity: medical law (and ethics) and the international framework on torture prevention.

Block one

Chapter 2 sets out the history of legal capacity under international human rights law. It establishes the approach to legal capacity articulated in Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD) and summarises theoretical approaches to legal capacity. The CRPD is the standard by which legislation and practice must be assessed so the relevant provisions are examined in detail. The chapter explains how substituted decision-making systems of guardianship are incompatible with the CRPD. It analyses how the text calls for law reform to create systems based on autonomous decision-making plus supports that a person may need in order to forge their way through life. The chapter analyses a significant threat to the roll-out of CRPD-compliant laws, namely the interpretative declarations and reservations which nine States have entered on Article 12 of the CRPD. The chapter suggests how many of these reservations are unlawful under established public international law.

Chapter 3 analyses how traditional guardianship regimes fare against Article 6 (fair trial) and Article 8 (privacy) of the European Convention on Human Rights. It argues that courts and legislators should take guardianship issues more seriously.

Chapter 4 steps outwards and takes a macro view of disability rights. It explains why the CRPD exists, how it serves its beneficiaries and how it progresses the human rights project as a whole. The chapter sets out the provisions of the CRPD which are relevant to mental health law. It suggests that the CRPD embodies the expressive role of human rights by encouraging actors to rethink assumptions, evaluate positions and shift existing concepts or paradigms. It reviews the independent mechanisms at international and domestic levels, something which can only be done if beneficiaries – people with disabilities – are entitled to legal capacity and enabled to act.

Block two

Chapters 5 and 6 examine how courts have grappled with the right to legal capacity. Chapter 5 analyses how courts have dealt with the challenge of implementing the right to legal capacity in the CRPD era. It lays out some of the benefits of strategic litigation as an advocacy technique to highlight the otherwise largely invisible plight of people with mental disabilities and suggests ways to conceptualise a strategic approach to bringing test cases in this field.

Chapter 6 is an extended case-summary of the European Court of Human Rights' judgment of *Stanev v. Bulgaria* in 2012, which is arguably one of the most important disability cases decided by the Strasbourg court so far. Its importance lies in the fact that it is the first case where the Court has found a violation of the right to liberty of someone who had been placed in a social care institution against his will, and the first disability case in which the Court has found a violation of Article 3 of the European Convention on Human Rights. The chapter explains how these violations only took place because Mr Stanev was deprived of his legal capacity.

Block three

Chapters 7 and 8 each examine a domain in which people deemed incompetent. Chapter 7 is a book chapter co-authored with Aart Hendriks which layers medical law and ethics onto disability. It sets out the relevant legal and ethical theory, and explores the rights, principles and issues most prominent for the interrelationship between disability on the one hand and medical law and ethics on the other. The chapter discusses the various meanings of the term ‘disability’, and the way this concept was finally defined in the CRPD. It outlines the implications flowing from human rights standards for the right to health in theory, and for healthcare professionals in practice.

Chapter 8 is a paper co-authored with Dorottya Karsay and returns to a central theme of the thesis explored particularly in chapters 2, 5 and 6, namely the nexus between legal capacity and institutionalisation, and the human rights and other legal implications. Focusing on abuse and neglect, the chapter sets out how torture prevention mechanisms established by international law have tended to focus on prisons and police stations to the detriment of assessing the situation of people in psychiatric and social care institutions, leaving people with mental disabilities in these institutions prone to being exposed to torture and ill-treatment carried out with impunity.

The book finishes with Chapter 9, which sets out the conclusions and attempts to answer the two research questions: namely the consequences of deprivation of legal capacity, and the extent to which international law has recognised the right to legal capacity. Despite the universal agreement at the inter-governmental level both about how legal capacity sits at the core of the so-called paradigm shift which the CRPD seeks to usher in, and also about the need for action at legislative, policy and service delivery levels, the content of Article 12 of the CRPD is a matter of significant contention. International human rights law is nearly consistent in recognising the right to legal capacity of people with mental disabilities. The UN and European political mechanisms are now agreed at the principle level but governments are pushing back against high principles they consider unfeasible to transpose

into domestic norms. The risk is that the sorts of legal reforms suggested by the CRPD Committee would arguably leave a small cohort of people with disabilities vulnerable neglect – even if unintended – such as being denied healthcare where the person is not able to clearly consent to treatment, or being left without any mechanism to help with financial planning. This approach would not eliminate harm, some governments argue, but merely shift it. The CRPD Committee has suggested that every scenario can be dealt with under supported decision-making and there is never any need for substituted decision-making. This approach has resulted in significant confusion and angst among those charged with developing domestic policies to meet this international standard. Further work is required to launch and evaluate pilot projects on supported decision-making so as to allay the legitimate fears of policy makers. The chapter ends by suggesting that a way to narrow the gap between human rights rhetoric and lived reality is to encourage critical conversations: between diplomats, between lawyers and judges, between parliamentarians, and between civil society and governments. Open discussions can help put flesh on high-level principles. Ultimately, the conclusion chapter suggests notwithstanding the fact that the human rights framework does not set out operational detail, its value is in establishing a global vision of respect for diversity, the obligation to recognise autonomy and to provide access to support. Crucially, the human rights framework gives people a way to raise their concerns when things go wrong.