Inclusive Justice- Leaving No One Behind:

Legal Capacity Laws, Policies and Practices, and
Women with Intellectual and Psychosocial Disabilities

Background Reading
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I

The right to equal recognition before the law (Article 12), provided for in the Convention on the Rights of persons with Disabilities (CRPD) is not a new human right. Article 6 of the Universal Declaration of Human Rights states clearly: “Everyone has the right to recognition everywhere as a person before the law”. Other Conventions have guaranteed this right, particularly the International Covenant for Civil Political Rights and the Convention to the Elimination of All Forms of Discrimination against Women (CEDAW). Article 15 of CEDAW provides that “States Parties shall accord to women equality with men before the law” and that “States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity”. CEDAW provides further, that, “[A]ll contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void”. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has recognized since long that legal capacity restrictions and denials affect women disproportionately and some disadvantaged groups in the gender spectrum.

That the gender and human rights discourse around the globe has since long struggled with realizing the right to full legal capacity is evidenced in a long list of concluding observations by the CEDAW Committee in varying intersectional, cultural and geographic country contexts. In their Concluding Observations, the CEDAW Committee has given guidance on the repeal of laws that deny legal capacity and decision-making power to women, including women with intellectual and psychosocial disabilities\(^1\),\(^2\). The CEDAW Committee has also recognized legal capacity issues in the context of informed consent across a variety of health care settings, sexual and reproductive health and rights, abortion, forced sterilization and forced institutionalization. The struggles to enjoy full legal capacity have been for women generally, and for women in marginalized positions, such as poor women, indigenous women, non-binary persons, women

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\(^2\) CEDAW/C/INDIA/CO/4-5 Concluding Observations of the CEDAW Committee on the combined 4th and 5th Periodic Reports of India, 2014.
with disabilities, women with intellectual, psychosocial disabilities, etc.3, 4, 5 and that it continues to be a struggle is demonstrated by the “urgent call for a paradigm shift”, and the theme for a Day of General Discussion hosted by the CEDAW Committee on 22 February 2023 on Equal and Inclusive systems Equal and Inclusive Representation of Women in Decision-Making Systems6, towards a General Recommendation No. 38 by the Committee. Despite the unequivocal articulation on the right to full legal capacity, the drafting of Article 12 of the CRPD was strewn with resistance from several stakeholders, with challenges from both state and non-state actors. Inclusive participation of organizations of persons with disabilities, strong arguments, testimonies, and the collaboration of organizations of persons with disabilities through the International Disability Caucus ultimately resulted in rendering the final text on Article 12, guaranteeing the right to equal recognition before the law. What the CRPD provided in addition, was a clear elaboration of the substantive legal content of the right to equal recognition before (holder of rights) and under the law (agent). Being specifically focused on the rights of persons with disabilities, Article 12 formed the bulwark of human rights for this major stakeholder group, without exception. The interpretation of Article 12 was further elaborated in General Comment 17, the very first General Comment issued by the CRPD Committee. The CRPD Committee herein recognized, like the CEDAW Committee, that some groups were disproportionately impacted by the legal incapacity laws and guardianship historically, naming persons with mental, intellectual and psychosocial disabilities, among them. Further, Article 12 is a civil political right and is immediately realizable: Governments need wait no further to make changes in law and legal practice. Judicial elaborations are found in their Concluding Observations issued by the CRPD Committee in several country reviews. Of particular mention, is the detailed guidance on alternatives to substituted decision making, found in General Comment 1, and the strong advisory on not diluting the substantive content of Article 12. Finally, the indivisibility of civil, political, social, economic and cultural rights encapsulated in a single Convention, also elevated development related initiatives from ‘entitlements’ to ‘human rights’. Thus, a bridge was created between human rights and disability inclusive development.

Through several iterations following the adoption of the CRPD, the CEDAW Committee has spotlighted human rights violations with respect to legal capacity over the decades. Other UN human rights mechanisms, such as the OHCHR resolutions on Mental Health and Human Rights, reports by the Special Rapporteur on the Rights of Persons with Disabilities, the Special Rapporteur for the Convention on Torture, the Special Rapporteur for violence against women

7 CRPD/C/GC1 ‘General Comment 1 Equal recognition before the Law’.
and girls, and the Special Rapporteur for the highest standard of health and wellbeing, have all given their consistent finding regarding the denials placed by legal incapacity provisions found in law, in multiple contexts, often naming health care systems as perpetrators\textsuperscript{8,9} of human rights violations, even addressing some violations, including institutionalization, under the rubric of ‘cruel, inhuman, torturous treatments’. In academic literature, this denial of personhood in law has resulted in ‘hermeneutical injustice’ wherein one group enforces their group norms on another group, resulting in overwriting lived experiences, reported effects of iatrogenic damage or withdrawal from medications and even in denial of the right to life and liberty\textsuperscript{10}.

Legal incapacity laws allow perpetrators of violence and exploitation against women and children to escape the justice system, as these laws cancel the personhood of the victims disqualifying their entry into the justice system\textsuperscript{11}. The recent UN Guidelines on De-institutionalization, including during emergencies, adopted in September 2022, has clarified that “Institutionalization ... involves de facto denial of the legal capacity of persons with disabilities, in breach of article 12”\textsuperscript{12}. Indeed, there is a universal ambience within UN human rights mechanisms in dismantling the legal incapacity provisions, including those associated with institutionalization.

II

Article 12, in conjunction with other articles of the Convention, particularly Article 4 on General obligations, and Article 3 on General principles, guides states parties to

1. Recognize all persons with disabilities as being equal before the law with legal personhood as well as the capacity to act.

2. All persons with disabilities shall be provided the supports required to exercise this right.

3. That it is not the ‘best interests’ interpretation but rather the ‘will and preference’ interpretation that will guide supported decision making.

4. That the financial and property rights of persons with disabilities will be realized, on equal basis with others.

Over the years since the advent of the CRPD, there has not been a faltering note in the way the Committee has enunciated the core contents of Article 12, and the obligations thereof, of


\textsuperscript{12} CRPD/C/S ‘UN Guidelines on De-institutionalization, including during emergencies’. Geneva.
governments. Particularly, the CRPD Committee has continued to provide in significant detail, the “do’s and don’ts” of supported decision making. The interpretive value and content of Article 12 weathered several storms over the years, especially coming from service provider communities, who earlier aspired to maintain medical control over capacity decisions\textsuperscript{13}, but in recent times, acceded to the CRPD, and have tabled proposals for a ‘balanced’ practice of substituted as well as supported decision making\textsuperscript{14}. In the early years, a small number of countries, 13 out of the 181 countries that ratified the CRPD, issued reservations, interpretations and Declarations on Article 12. The reservations were referenced against traditional laws or domestic laws; or state party’s interpretation of the CRPD, for example, that the CRPD allows involuntary commitment or that, it allows incapacity to be applied in some cases.

Legal scholars, basing their analysis on the interpretation provided by the Committee, have largely grappled with the implications of ‘removal of barriers’; legal reforms and new solutions needed; how to encapsulate supported decision making in law; and finally, some questions to which guidance has not been available from the extant CRPD jurisprudence. Of interest has been the question whether, there exists a disability neutral way of understanding limiting legal capacity and allowing state intervention, the assumption being that, in common law, there would be occasions when capacity decisions would have to be made. So, an exception cannot be made in law, only for persons with disabilities, that all persons with disabilities at all times have the right to exercise full legal capacity. There could plausibly be an occasion when a person, after all conditions of supporting decision making are met, is unable to do so and may pose a risk to their own health and safety, whether disabled or not\textsuperscript{15}. This legal strategy broadens the question of capacity to universal applicability of capacity in law. Of course, abolitionist viewpoints would favour the opinion that legal incapacity as a way of denying personhood should not be applied at all, on anybody.

Practically, persons with mental, intellectual, multiple and psychosocial disabilities, neurodiverse persons, autistic persons, deaf blind, persons who are at risk for institutionalization for using substances, women with disabilities, children with disabilities, elderly with disabilities and those at identity intersections of gender, sexual orientation and disability, are at risk for having their capacity denied in a variety of contexts of daily living. Such denial could be formally initiated through guardianship or conservatory arrangements, applied for a limited purpose or time, but however may in practice, spill over various areas of life and decision making, including in the context of health care. When the incapacity provisions applied in law gets entrenched into the daily lives of persons with disabilities, such persons lose dozens

of rights and entitlements, including the right to vote and political participation, denial of access to justice, disqualifying the right to own and manage property or bank account, to marry, to have custody over children, to adopt, limiting or removing contractual capacity, allowing proxy consent, etc. The denial of rights is universal and often referred to as ‘civil death’ by organizations of persons with disabilities, as their personhood is not recognized nor validated. The denial of legal capacity and its impact on the lives of persons, especially women with disabilities, has been described from different geographic and cultural contexts. Post-colonial nations in the Asia Pacific region have, depending on their colonial histories, a diverse range of legal traditions and denial of capacity for women, children and persons with disabilities.

In the arena of mental health law making, new trends are seen, with legislations granting full legal capacity, however, reinstating the disqualifying regime by using ‘mental capacity’. For example, the Indian Mental health care Act of 2017 allows full legal capacity, making the exercise of this right condition upon passing the ‘mental capacity’ test. This new baseline in mental health laws on mental capacity shifts standards for deprivation of liberty and substituted decision making to mental capacity assessments. While scholars debate the potential for ‘mental capacity’ tests in the context of consent, decision-making and personhood, General Comment 1 of the CRPD Committee clearly prohibits this diminution of the substantive content of Article 12 through the use of mental capacity tests.

III

Over 15 years of the CRPD, studious guidance given to dozens of states parties and several decades of work by the CEDAW Committee has still not resulted in the dismantling of the legal incapacity provisions in law around the world. Indeed, legal mapping of these laws around the world is far from complete. Practitioners of law, relying on case law and advancing it, have largely not reflected on the process of law making on legal capacity. Countries which placed a reservation on Article 12, or their own interpretations, are yet to retract them, compromising the standards for international co-operation on realizing the CRPD. Only a few good practice examples exist on supported decision making, as the topics of access to justice and legal

capacity has not been a priority area, and investments are far below what is needed. Even though immediately realizable, governments need guidance and the legal system needs to invest in research and pilots to develop new inclusive solutions.