

The Norm of Universal Legal Capacity

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Capacity

The normative issue that we want accepted in article 12 is that all persons with disability possess legal capacity. This assertion is made by appreciating the fact that legal capacity is not a natural attribute which people possess or do not possess. It is instead a recognition which the law confers on people. The reason to use the term confer is because the law has denied this legal capacity to different persons at different points of human history. Women are the most obvious example though this exclusion has not been confined to them. Every society has created its own group of excluded populations who by reason of caste, colour, creed, ethnicity have been termed incapable by the law. This incapacity has meant both that they are not considered as persons before the law and hence not accorded the freedom to make their own life decisions and live their life in accordance with their own preferences. These preferences and choices could be right and wrong, wise and unwise. It is about giving to each person the dignity of making their own mistakes and learning or not learning from them. It is not being said here that people live their lives disconnected from society, family and friends. What is being said is that the law does not give persons with disability the choice of connection or disconnection. The right to live in the community presumes legal capacity. Similarly be it work or leisure for each of these rights to be rendered real for all persons with disability it is necessary that the legal capacity of all persons with disability is recognized. In fact we cannot speak about rights without personhood and there is no personhood without legal capacity.

When we speak of the rights of access, education, health and rehabilitation we are asking for the opportunity to develop our functioning and build our capabilities. Now the opportunity to develop, flows from the belief that there is a capacity which can be developed. Each of us to a greater or lesser extent goes as far as we are allowed to go. The point we are making especially with intellectual, psychosocial and to a greater or lesser extent with all disabilities is that the moment you attribute lack of capacity to any person you stranglehold that persons growth you give birth to what we term social disability.

This opportunity a Convention enshrining the rights of persons with disability cannot deny to any person with disability. Any such denial will be discrimination on the ground of disability and would cut at the root of this Rights Convention.

Norm of Supported Decision-Making

It is necessary to distinguish the norm of supported decision-making from the actual support networks and the difficulties of setting them up, retaining them. Therefore these two shall be dealt with separately. On the normative level what is being said is that even as all persons with disability possess legal capacity any person with disability is entitled to seek support to exercise this capacity. The reason why this principle needs to be introduced is because traditionally independent and autonomous functioning has been included as an integral component of legal capacity. The moment such autonomous functioning is not possible and assistance is obtained the legal capacity of the person seeking the assistance is open to question. The “principle of support” is asking the legal myth of independence to be replaced by the reality of human interdependence. The norm of interdependence can degenerate into dependence on the supporter or oppression by the person providing support which is why it needs to be stressed that the support shall not be tainted by conflict of interest, undue influence etc.

The Setting up of Support Systems

Here two kind of issues are being raised one revolves around those who may due to communication difficulties or high support needs be not in a position to seek support. The other revolves around the actual difficulties of finding trustworthy viable support.

Assistance to seek support

It is to deal with the first situation that the present text states that “Such support measures shall include the assistance required to seek and obtain support”. When guardianship systems are set up someone other than the person for whom the guardian is required activates the system to have a guardian appointed. Similarly for persons with high support needs somebody else can help him or her obtain support. The difference between this system and the guardianship or substitution system is that this system is premised on the capacity of the person with disability. Consequently the person providing support has to continually engage with the person with disability and has to provide support without exercising undue influence with no conflict of interest etc. This system provides the high support where required but without closing the doors of opportunity to enhance functioning and develop capability. The guardianship system at best sets up a caretaking arrangement for a person with disability. However the person with disability is rendered faceless as his legal identity has been taken over by another. For this caretaking arrangement to be displaced the person with disability has to prove the resumption of capacity. Unlike the support system, this system has been designed to function presuming on the incapacity of the person with disability---- a situation which reinforces incapacity rather than providing opportunity for growth of capability.

Difficulties of Setting up Arrangements

The difficulties of setting up support arrangements are no greater or lesser than the difficulties that may be faced in setting up substitute arrangements. As a part of the general uncertainty of life, support systems may break down, but this uncertainty is not unique to support systems, it extends as much to substitute arrangements. The issue is that for support networks to be set up, the legal capacity of all persons with disability has to be a non-negotiable premise. It is true that relationships cannot be manufactured through laws, but laws can create the environment for the birth and development of supportive relationships. The subsisting legal disqualifications and social prejudice are major impediments to the creation of supportive relationships. In asking for the recognition of the full legal capacity of all persons with disability, we are asking for the removal of the legal disqualification. This removal is necessary if we are to obtain any success in challenging social prejudice. It is true that nobody can be forced into entering into an agreement with another. But when the law attributes incapacity it actively asks persons not to enter into an agreement with the disqualified other.

Difficulty of obtaining Agreement

It is true that in asking for the recognition of the legal capacity of all persons with disability we are challenging a two thousand year practice. However the length of time for which a prejudice has subsisted does not make it valid. Also if this prejudice is to be successfully challenged in law it is necessary that it should be totally negated. If any exception clause is accepted, then in the face of this centuries old prejudice, every person with disability shall need to establish that they are not covered by the exception. Consequently law in practice will again reinforce social prejudice.

Negotiating A Disability Rights Convention

The Convention is being negotiated to recognize the rights of persons with disabilities. It is these rights and not the apprehensions of third parties which should determine how we should construct legal capacity in the Convention.