



# Impact of Human Rights approach in Member States' legislation: Legal capacity in Ireland

Dr Charles O'Mahony  
School of Law  
National University of  
Ireland Galway





# Overview of Presentation



**1. Background**

**2. The UN Convention on the Rights of Persons with Disabilities (CRPD)**

**3. European Convention on Human Rights**

**4. Assisted Decision-Making (Capacity) Act 2015**

**5. Conclusions**



# 1. Background





# Differences Between Legal Capacity & Mental Capacity



- Capacity is an important legal concept.
- The law in many jurisdictions has been designed to respect individual autonomy. However, persons with disabilities are at risk of having their decisions ignored.
- Mental capacity is a concept used to define the line between legally effective and legally ineffective decisions.
  - If you are considered to **have mental capacity** you have the legal capacity to act – meaning your decisions or choices will be respected.
  - If you are considered **not to have mental capacity** you will not be considered to have legal capacity to act – meaning your decisions may be disregarded and decisions will be made by others on your behalf (this is known as substitute decision-making).



# Approaches to Decision-Making (Legal Capacity)



There 3 traditional main approaches to legal capacity:

1. the **status approach**
2. the **outcome approach** &
3. the **functional approach** (guardianship)

## New Approach

1. **Supported decision-making** (new approach required by the CRPD).



# Legal Capacity and International Human Rights Law



- Modern guardianship systems typically adopt a functional approach to assessing mental capacity
- This approach assesses whether a person understands the information relevant to a particular decision, weighs up that information, retains the information and communicates their decision.
- There are many critiques of the functional approach and as we will discuss shortly this approach does not accord with Article 12 of the UN CRPD as it permits substitute decision-making.



# Background to Article 12



- As we will see the CRPD does not create new human rights for persons with disabilities.
- Article 12 of the CRPD has its origins in other human rights treaties (ICCPR & CEDAW).
- Article 16 of the **International Covenant on Civil and Political Rights (ICCPR)** sets out the right that everyone has the right to recognition everywhere as a person before the law. This right was included in the ICCPR as colonizing countries had denied indigenous / colonized persons recognition before the law.
- Subsequently Article 15 of the **Convention on the Elimination of Discrimination Against Women (CEDAW)** recognised that women have 'legal capacity' on an equal basis with men as domestic laws and customs throughout the world expressly denied women legal capacity.
- **Reason for inclusion of Article 12 in CRPD?** Persons with Disabilities similarly denied legal capacity – persons living with mental health problems and intellectual disability are particularly vulnerable to the denial of their legal capacity.



# Legal Capacity and International Human Rights Law



- Early sources of international human rights standards from the UN & COE (predated the CRPD) called for States to take a more tailored approach to deprivation of legal capacity and to provide procedural safeguards when legal capacity was encroached upon.
  1. **United Nations:** ‘The protection of persons with mental illness and the improvement of mental health care’ (aka the MI Principles) (United Nations: A/RES/46/119, 1991).
  2. **Council of Europe:** ‘Recommendation Rec(1999)4 on Principles Concerning the Legal Protection of Incapable Adults’ (Council of Europe: Adopted by the Committee of Ministers on 23 February 1999).
- These standards have been succeeded by the CRPD





## 2. The UN Convention on the Rights of Persons with Disabilities





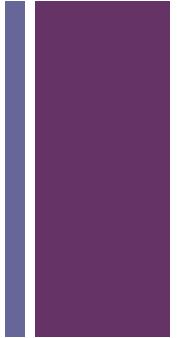
# Purpose of CRPD

- The United Nations Convention on the Rights of Persons with Disabilities was the first UN Convention of this millennium.
- It was felt that a specific Convention was needed to deal with the human rights of persons with disabilities as the existing body of UN human rights framework was not inclusive of disability and insufficient in challenging national laws that excluded persons with disabilities from participating in society.
- The purpose of the CRPD was to clarify the existing human rights law as it relates to persons with disabilities as opposed the creation of new human rights.





## Article 12 CRPD: Legal Capacity



1. States Parties reaffirm that persons with disabilities have the **right to recognition everywhere** as **persons** before the law.
2. States Parties shall recognize that persons with disabilities enjoy **legal capacity** on an **equal basis** with others in **all aspects of life**.
3. States Parties shall take **appropriate measures** to provide access by persons with disabilities to the **support** they may require in **exercising** their **legal capacity**.



# Article 12 CRPD: Legal Capacity



4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for **appropriate** and **effective safeguards** to **prevent abuse** in accordance with international human rights law. Such **safeguards** shall ensure that measures relating to the exercise of legal capacity **respect the rights, will and preferences** of the person, are free of conflict of interest and undue influence, are **proportional** and **tailored** to the person's circumstances, apply for the **shortest time possible** and are subject to **regular review** by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.



## Article 12 CRPD: Legal Capacity



5. Subject to the provisions of this article, States Parties shall take **all appropriate and effective measures** to ensure the **equal** right of persons with disabilities to own or **inherit property**, to **control their own financial affairs** and to have **equal access** to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not **arbitrarily deprived of their property**.



# What Does Article 12 Mean?



- It provides for 'universal legal capacity' while providing for differences between persons with disabilities through strategies such as reasonable accommodation and support.



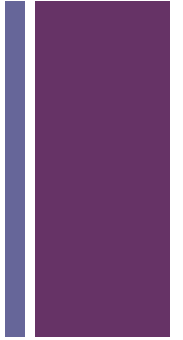
# General Comment on Article 12



General Comment No. 1: Equal Recognition Before the Law (article 12)' (Geneva: UN Committee on the Rights of Persons with Disabilities, 11 April, 2014).



# General Comment on Article 12



“States parties must holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others. Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.” **Paragraph 7**



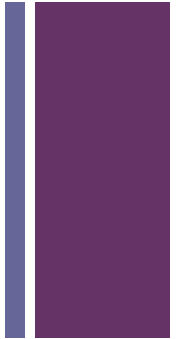


# General Comment on Article 12



“In most of the State party reports that the Committee has examined so far, the concepts of mental and legal capacity have been conflated so that where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed... The functional approach attempts to assess mental capacity and deny legal capacity accordingly... This functional approach is flawed for two key reasons. The first is that it is discriminatorily applied to people with disabilities. The second is that it presumes to be able to accurately assess the inner-workings of the human mind and to then deny a core human right – the right to equal recognition before the law – when an individual does not pass the assessment. In all these approaches, a person’s disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but rather requires that support be provided in the exercise of legal capacity.”

## **Paragraph 13**



# CRPD & Other Debates

- Requires abolition of mental health laws – involuntary detention for persons with mental health problems (Article 14 – the right to liberty)
- Requires abolition of the insanity defence and other similar defences (Article 12 – Legal Capacity)
- Prohibits forced psychiatric treatment (Article 17 – Integrity of the Person)





# Criticism of the CRPD from Some Psychiatrists



“The UN Convention on the Rights of Persons with Disabilities (CRPD) is a major milestone in safeguarding the rights of persons with disabilities. However, the General Comment on Article 12 of the CRPD threatens to undermine critical rights for persons with mental disabilities, including the enjoyment of the highest attainable standard of health, access to justice, the right to liberty, and the right to life. Stigma and discrimination might also increase. Much hinges on the Committee on the Rights of Persons with Disabilities’ view that all persons have legal capacity at all times irrespective of mental status, and hence involuntary admission and treatment, substitute decision-making, and diversion from the criminal justice system are deemed indefensible. The General Comment requires urgent consideration with the full participation of practitioners and a broad range of user and family groups.”



# Criticism of the CRPD from Some Psychiatrists

- See Melvyn Colin Freeman, Kavitha Kolappa, Jose Miguel Caldas de Almeida, Arthur Kleinman, Nino Makhashvili, Sifi so Phakathi, Benedetto Saraceno, Graham Thornicroft 'Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities' (Lancet Psychiatry, 2015).

## THE LANCET Psychiatry





# Ratification of the CRPD in Ireland



- Ireland played an important role in advancing the CRPD.
- Ireland was one of the first countries to sign the Convention on the Rights of Persons with Disabilities, when it opened for signature in 2007.
- However, Ireland has not ratified the Convention and has not signed the Optional Protocol to the Convention on the Rights of Persons with Disabilities.
- Common law tradition.
- Roadmap to ratification published in 2015.



### 3. European Convention on Human Rights





# European Convention on Human Rights



- Until recently, the European Court of Human Rights' jurisprudence on legal capacity has been underdeveloped.
- In the past number of years there have been a number of important cases decided by the ECtHR in the area of legal capacity.
  - Winterwerp v Netherlands (Application no 6301/73, 24 October 1979).
  - Shtukaturv v Russia Application (Application No 44009/05, 27 June 2008).
  - Alajos Kiss v Hungary (Application no 38832/06, 20 May 2010).
  - Stanev v Bulgaria (Application no 36760/06, 17 January 2012).
  - DD v Lithuania (Application no 13469/06, 14 February 2012).
  - Kędzior v Poland (Application no. 45026/07, 16 October 2012).
  - Lashin v Russia (Application no 33117/02, 23 January 2013).
  - Ivinovic v Croatia (Application no 13006/13, 18 September 2014).



# European Convention on Human Rights



- The ECtHR has held that deprivation of legal capacity can amount to an interference with the private life of the person concerned (Article 8 of the ECHR) cases also deal with breaches of Articles 3, 5 and 6 of the ECHR.
- Even where there is only partial deprivation of legal capacity.
- However, the ECtHR recognises that there can be interference with legal capacity (but requires fair procedures to regulate the interference).



# **+ 4. Assisted Decision- Making (Capacity) Act 2015**





# Legal Capacity in Ireland

- The Wards of Court system was the current and exclusive mechanism for managing the affairs of persons considered to be lacking decision-making capacity in Ireland.
- Lunacy Regulation (Ireland) Act 1871
- The President of the High Court had responsibility for the Wards of Court system and the Registrar and staff of the Office of Wards of Court administer the system.
- The deficits with the Ward of Court System are widely known and accepted.
- Power of Attorney Act 1996 – Enduring Power of Attorney





# Why New Legislation?

- Seeks to realise government policy commitment to Repeal Lunacy Regulation (Ireland) Act 1871
- Meet human rights obligations that will facilitate ratification of the UN Convention on the Rights of Persons with Disabilities, also requirements of the European Convention on Human Rights.
- Despite many commitments significant delays in the introduction of the new legislation.
- The Department of Justice, Equality and Law Reform published the scheme of the Mental Capacity Bill in 2008 – based on the work of the Law Reform Commission.
- Since 2008 CRPD increasingly important.





# Lobbying & CRPD



- A range of interest groups, professionals and other stakeholders were centrally involved in the law reform process through feeding into the Law Reform Commission's consultation process and more recently through engaging in discussion with Government on the resultant legislation to repeal and replace the ward of court system.
- Amnesty International Ireland in partnership with the Centre for Disability Law and Policy at NUI Galway and a range of organisations and individuals came together in 2011 to impact the law reform process.
- The coalition engaged with the Joint Oireachtas Committee on Justice, Defence and Equality's public hearings on the new legislation.
- The coalition produced a document entitled 'Essential Principles: Irish Legal Capacity Law' (2012) – set out the requirements of the CRPD.
- Assisted Decision-Making (Capacity) Bill 2013.



# **Assisted Decision-Making (Capacity) Act 2015: The New Framework**



## **Decision-Making**

1. Assisted decision-making
2. Co-decision-making
3. Decision-making representative
4. Court ordered interventions

## **Advance Planning**

1. Enduring Powers of Attorney
2. Advance Healthcare Directives



# Commentary on the Legislation



- On publication of the 2013 Bill the then Minister for Justice Alan Shatter considered that the Assisted Decision-Making (Capacity) Bill 2013 was sufficiently ‘framed to meet Ireland’s obligations under Article 12 of the Convention in line with the Government’s commitment in the Programme for Government to introduce this legislation’.
- However, the Assisted Decision-Making (Capacity) Act 2015 represents a mix of supported decision-making and substitute decision-making that falls short of the requirements of Article 12.
- While there is wide support the legislation the retention of substitute decision-making provisions has been criticised from a human rights perspective.



# Commentary on the Legislation



- It has been argued that the substitute decision-making provisions undermine the supported decision-making provisions in the legislation.
- The Irish Human Rights Commission (IHRC) for example expressed concern that the 2013 Bill did not sufficiently comply with the requirements of Article 12 of the CRPD.
- The IHRC described that the provisions in the Bill authorising substitute decision-making as a ‘repackaging’ of the present system.



# Guiding Principles



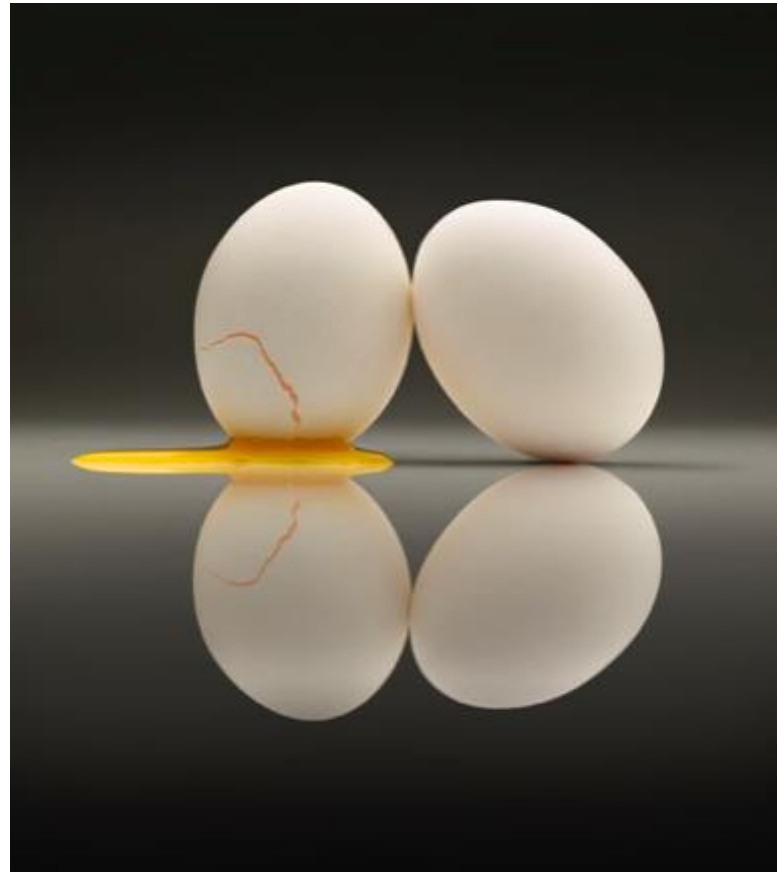
- While the 2015 Act continues to provide for substitute decision-making, which is at odds with the CRPD there is explicit recognition in the guiding principles of the centrality of respecting the will and preferences of the person (EG section 8(7)(b)).
- This inclusion in the guiding principles reflects the paradigm shift in thinking required by Article 12 of the CRPD.
- The guiding principles do not contain the 'best interests' principle, which is to be seen as positive.





# Assisted Decision-Making (Capacity) Act 2015: Informal decision-making

- The provisions on informal decision-making in the 2013 Bill attracted much criticism for failing to comply with the CRPD.
- The language has been changed in the 2015 Act but there is concern that informal decision-making may nonetheless undermine the supported decision-making provisions.
- Chemical restraint





# **Assisted Decision-Making (Capacity) Act 2015: A Mix of Supported & Substitute Decision-Making**



## **Decision-Making**

1. Assisted decision-making
2. Co-decision-making
3. Decision-making representative
4. Court ordered interventions

## **Advance Planning**

1. Enduring Powers of Attorney
2. Advance Healthcare Directives



## 5. Conclusions





# Conclusions



- There is a growing body literature examining what supported decision-making looks like in practice.
- Questions remain about what the ‘support paradigm’ might look like in situations of crisis or emergencies and we need to recognise that models of supported decision-making are lacking in many fields.
- Nevertheless the need to further develop support models does not weaken the importance of the requirement contained in Article 12 of the CRPD.
- Ireland has signed and will shortly ratify the Convention.



# Conclusions



- Despite concerns the Assisted Decision-Making (Capacity) Act 2015 is to be welcomed.
- When commenced the legislation will provide a range of legal options for persons who are at risk of having their legal capacity removed/restricted.
- We need to be aware that this legislation seeks to comply with the CRPD but falls short of what is required.
- A premium has to be placed on developing supported decision-making for persons requiring support to exercise their legal capacity and that the use of substitute decision-making provisions are curtailed.



# Conclusions



- The ECtHR are increasingly referring to the CRPD in its judgments. In the future the ECHR may be interpreted in line with the CRPD.
- The Assisted Decision-Making (Capacity) Act 2015 is a complicated piece of law.
- Article 4 (General Obligations) CRPD requires States Parties to provide accessible information to persons with disabilities.



- Information on the 2015 Act needs to be made accessible so that people can understand it and access the supports provided.



# References



# References



- Assisted Decision-Making (Capacity) Act 2015
- “Consultation Paper on Law and the Elderly” Law Reform Commission (23) 2003; “Consultation Paper on Vulnerable Adults and the Law: Capacity” Law Reform Commission (37) 2005 & “Report Vulnerable Adults and the Law” Law Reform Commission (83) 2006.
- ‘Assisted Decision-Making (Capacity) Bill 2013: Comments from of the College of Psychiatrists of Ireland’ (Dublin: College of Psychiatrists of Ireland, November 2013).
- ‘IHRC Observations on the Assisted Decision-Making (Capacity) Bill 2013’ (Dublin: Irish Human Rights Commission, March 2014).
- Series ‘Legal capacity and participation in litigation: Recent developments in the European Court of Human Rights’ (*European Yearbook of Disability Law*: 2015).





# References

- Morrissey 'The United Nations Convention on the Rights of Persons with Disabilities: A New Approach to Decision-Making in Mental Health Law' (European Journal of Health Law: 2012, 19(5) pages 423 – 440).
- Keys 'Legal Capacity Law Reform in Europe: An Urgent Challenge' (*European Yearbook of Disability Law*: 2009, pages 61-91).
- Kelly 'The Assisted Decision-Making (Capacity) Bill 2013: Content, commentary, controversy' (*Irish Journal of Medical Science*: 2014).
- O'Mahony (2015) 'Equal Recognition Before the Law: Legal Capacity as a Gatekeeper Right for Older Persons'. (*The Irish Community Development Law Journal*, 4 (1), 22-35).
- Melvyn Colin Freeman, Kavitha Kolappa, Jose Miguel Caldas de Almeida, Arthur Kleinman, Nino Makhashvili, Sifi so Phakathi, Benedetto Saraceno, Graham Thornicroft 'Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities' (*Lancet Psychiatry*, 2015).
- Flynn & Arstein-Kerslake 'The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?' (*Berkeley Journal of International Law*: 32(1), 2014, 124).



# References



- 'General Comment No. 1: Equal Recognition Before the Law (article 12)' (Geneva: UN Committee on the Rights of Persons with Disabilities, 11 April, 2014). Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>
- 'Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities' (Geneva: UN Committee on the Rights of Persons with Disabilities, September 2015). Available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>
- 'The protection of persons with mental illness and the improvement of mental health care' (aka the MI Principles) (United Nations: A/RES/46/119, 1991).
- 'Recommendation Rec(1999)4 on Principles Concerning the Legal Protection of Incapable Adults' (Council of Europe: Adopted by the Committee of Ministers on 23 February 1999).