



Balancing autonomy and protection: A qualitative analysis of court hearings dealing with protective measures



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ABSTRACT

Respect for individual autonomy is at the core of the Convention on the Rights of Persons with Disabilities (CRPD). However, the need to protect persons with disabilities, especially those with cognitive impairments and psychosocial conditions, from outright exploitation, violence and abuse is explicitly provided for in article 16. Legal authorities still decide on a daily basis upon the institution of measures, which aim to protect vulnerable persons and unavoidably impact on the autonomy of persons concerned, known as guardianship, curatorship or administration. Observations of court hearings, interviews with judges and analysis of written materials from the cantons of Geneva and Vaud in Switzerland as well as from Belgium – which all have differently composed authorities – were carried out in order to identify what influences authorities in decision-making processes regarding protective measures, and to explore how autonomy and protection can be balanced. We suggest pragmatic considerations that should not be ignored when trying to reach a balance between autonomy and protection from abuse, in line with the CRPD.

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1. Introduction¹

The United Nations Convention on the Rights of Persons with Disabilities (CRPD)² has shifted the ground under the familiar legal and philosophical debate over the proper balance between respecting the autonomy of all persons and protecting people with compromised capacity against abuse. This abstract debate is made concrete on a daily basis when legal authorities decide whether to institute measures such as guardianship, curatorship or administration to protect persons with cognitive impairments or psychosocial conditions. The objective of this paper is to report on a preliminary study, based on observations of court hearings, interviews with judges and analyses of written materials from two cantons in Switzerland and courts in Brussels, Belgium. We argue, both in terms of the results of these empirical studies, and on the basis of intuitive and standard procedural measures designed to protect the autonomy of persons engaged in these legal actions, that it may be possible to achieve the delicate balance between protections and respect for autonomy – in light of the mandate of Articles 16 and 12 of the CRPD. We offer some pragmatic recommendations as a first step to reforming procedures to achieve this balance. Although our research is preliminary, we believe it essential to explore the actual views of judges within these legal contexts in order, first to give an informed judgment of what facts are and which are not relevant to the balancing of autonomy and protection, and secondly to begin the larger task of providing empirical support for the effectiveness of any recommended reforms.

Our study, it must be emphasized, is both highly focused and preliminary. The question of balancing protection and respect for autonomy is affected by many different and interrelated issues, as well as legal and procedural concerns. Fundamentally, the debate depends on what the ethical and political value of autonomy means and entails in practice, and what ‘protection’ means – again, both in theory and in practice. Neither of these immense debates are considered here; instead we rely on the intuitive notion of autonomy as the right to make and put into effect decisions for oneself, and protection as the effective avoidance of unjustified harm. The debate also depends on the extensive literature on the history, nature and effectiveness of legal protective measures, the impact of European law and CRPD mandates on this debate, as well as the interconnections between Articles 12 and 16 and the rest of the CRPD. None of these substantial topics and issues can be addressed here, although each in different ways has an undeniable impact on how effective our recommendations would be in practice.

2. Background

Persons with disabilities, especially women and girls, are often exposed to a greater risk of unjustified harm (Council of Europe, 2003; CRPD, preamble q). Harm against persons with disabilities may take different forms including physical, sexual, psychological or financial abuse (Council of Europe, 2003). As persons with cognitive impairments or psychosocial conditions might require varying levels of assistance with decision-making, they may particularly be perceived as easy targets of physical – such as interventions which violate the integrity of the person – or financial abuse (Council of Europe, 2003).

The need to protect persons with disabilities, including those with cognitive impairments or psychosocial conditions, from exploitation, violence and abuse is explicitly recognized by article 16 of the United Nations Convention on the Rights of Persons with Disabilities.

Article 16.1 sets out an obligation on States Parties to take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home. It further specifies measures to be implemented by States Parties to prevent exploitation, violence and abuse (paragraphs 2 and 3), as well as actions to redress from, and strengthen legal protection against, all forms of exploitation, violence and abuse (paragraphs 4 and 5).

Currently, countries continue to give competence to legal authorities to appoint guardians, also called curators or administrators, with the aim to protect adults against abuse and neglect (*Conseil Fédéral Suisse, 2016; UN, 2013*). Guardians, curators or administrators are commonly referred to as ‘protective measures’ according to the wordings of the national laws.³ Through court hearings, legal authorities decide upon the necessity to appoint a guardian as well as the extent of the tasks of the appointed guardian. Moreover, these legal authorities are often also competent to overview the tasks of guardians and ensure the absence of abuse on behalf of appointed guardians. Authorities also need to safeguard the rights of individuals against abuse in day-to-day dealings while providing protection.

The protection offered by guardianship and its compliance with the Convention on the Rights of Persons with Disabilities is however highly debated. A first major critique is that guardianship generally allows for intervention in financial, health and social domains in an adult's life, which can lead to an overly paternalistic approach of undermining individual autonomy (Bach & Kerzner, 2010). Autonomy has been granted increased importance in recent decades as reflected in article 3a of the Convention that establishes “respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons” as one of the guiding principles of the Convention. Respect for the individual autonomy of persons with disabilities has been interpreted to mean that “persons with disabilities have, on an equal basis with others, reasonable life choices, are subject to minimum interference in their private life and can make their own decisions, with adequate support where required” (UN, 2010). As mentioned, for our limited purposes here, autonomy can be intuitively understood as the right to make and put into effect decisions about oneself.

Article 12 of the CRPD underlines the importance of individual autonomy by guaranteeing a right to equal recognition before the law, which means that persons with disabilities are recognized to have the capacity to be both holder of rights and duties as well as to act upon these rights (International Disability Alliance, 2008). Or in other words to have “legal standing” in the sense of being viewed as a person before the law, as well as “legal agency” or the ability to act within the framework of the legal system (McSherry, 2012). Legal capacity is the basis on which respect for one's will is grounded (Quinn, 2010; Wildeman, 2013) and persons need to be supported instead of substituted in the exercise of their legal capacity, as provided for in article 12.3 of the CRPD. The right to support in the exercise of legal capacity refers both to informal and formal support arrangements, of varying types and intensity, which respect the rights, will and preferences of persons with disabilities (United Nations Committee on the Rights of Persons with Disabilities, 2014). The persons concerned may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy, or assistance with communication (United Nations Committee on the Rights of Persons with Disabilities, 2014). On the contrary, substitute decision-making underpins guardianship laws, with guardians and administrators being appointed, after removal of a person's legal capacity, to make decisions in the ‘best interests’ of

¹ This paper forms part of a special edition on Article 16 of the United Nations Convention on the Rights of Persons with Disabilities. The full contents of this special edition may be found at <http://www.journals.elsevier.com/international-journal-of-law-and-psychiatry/>.

² United Nations Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3, entered into force 3 May 2008 (hereafter the CRPD or the Convention).

³ Belgium, Law of 17 March 2013 amending the regulation of legal incapacity and introducing a new protection status that is consistent with human dignity (Loi du 17 mars 2013 réformant les régimes d'incapacité et instaurant un nouveau statut de protection conforme à la dignité humaine); Switzerland, Law of 19 December 2008 reforming the legal protection of adults (Loi du 19 Décembre 2008 réformant le droit de protection de l'adulte) (Translation by first author).

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