



Legal capacity of persons with disabilities in Ethiopia: The need to reform existing legal frameworks



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ABSTRACT

The Convention on the Rights of Persons with Disabilities (CRPD) prohibited deprivation legal capacity of persons with disability based on assessment of mental capacity. The assertion is that, persons with disabilities shall exercise their legal capacity in all aspects of life without any restrictions that are based on mental incapacity (such as, unsoundness of mind, deficit in mental capacity, dotage, etc. This approach signifies a shift from substituted decision making, where another person act on behalf of persons with mental disabilities, to supported decision making where the person with mental disability is assisted in decision making. The rationale for the move lies on the recognition that the right to legal capacity embodies the inherent meaning of what it meant to be human. Without legal capacity a person cannot exercise all other rights and entitlements. Accordingly, States parties to CRPD are required to reform domestic legislations that are based on substituted decision making model and recognize full legal capacity of persons with disabilities in line with supported decision making model. As a Sate party to CRPD, Ethiopia assumed the same obligation. Nonetheless, in its initial report to the Committee on CRPD, the country denies existence of legislation that restricts legal capacity on the grounds of mental incapacity. This research found out that there are restrictions imposed on legal capacity of persons with disabilities on the basis of mental incapacity/disability. The research analyzed the approach employed to restrict legal capacity under the existing legal frameworks of Ethiopia vis-à-vis supported decision-making regime under CRPD. The research is doctrinal and, as such, limited to content analysis of general and specific legal capacity laws of the country (such as, marriage, divorce, will, work and employment, political participation, access to justice and others).

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1. Introduction

Legal capacity is fundamental attribute of personhood that is inextricably linked to the recognition of a person before the law. The Convention on the Rights of Persons with Disabilities (CRPD) incorporated Legal capacity as one of the cardinal human rights that is indispensable to respect inherent dignity and autonomy of persons with disabilities and ensure full and effective inclusion of persons with disabilities in society. The relevant provision of CRPD, Article 12 paragraph 2, reads that:

“States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.” (emphasis added)

Basically, the provision above sets States obligation to recognize the right to legal capacity and define the intrinsic non-discrimination aspect of the right. But, it does not precisely point out what it meant by legal capacity or its contents.

According to the Committee on the Convention on the Rights of Persons with Disability (Committee on CRPD) interpretation, legal capacity means:

“... the ability [capacity] to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). (emphasis added)

For the Committee on CRPD, Legal Capacity has two components; namely, *legal standing and legal agency*. Legal standing entitles persons with disabilities to be holders of rights and get ‘full protection of his or her rights by the legal system’. Legal agency, on the other hand, empowers the person ‘to engage in transactions and create, modify or end legal relationships’. Both components need to be respected, protected and fulfilled to enjoy the right to legal capacity in its full sense.¹

¹ Committee on CRPD, General Comment No.1, Article 12: Equal Recognition before the Law, CRPD/C/GC/1

Literarily, the underlined word above, i.e., ‘ability/capacity’, refers to an individual’s *mental state or physical fitness or legal power* to perform.² In this sense, an individual will be considered capable if s/he has any of the elements in specific circumstance, unless the subject matter otherwise require. Typical example of the latter is the way ‘legal capacity to act (i.e., legal power)’ has traditionally been understood in many legal systems as if it is inseparable with mental state (i.e., mental capacity). That is to say, legal capacity to act or legal power is often set to presuppose individual’s (sound) mental state (though this is often presumed). Then, enjoying full legal capacity is conditioned on mental capacity. Conversely, mental incapacity excludes individual from enjoying the legal capacity. This is the traditional approach, as narrated in detail subsequently, where the legal capacity of person with disability is restricted based on mental incapacity.

On the other hand, there is dynamic shift in understanding the relationship between legal capacity and mental capacity since the adoption of the CRPD. The CRPD pursue human rights based approach that categorically ban any limitations imposed on persons with disability exclusively based on disability. The basis for this is the provision cited above, i.e., Article 12 of the CRPD. The Committee on CRPD also underlined the disparity. For the Committee, mental capacity and legal capacity are separate and unrelated, and any restriction on legal capacity on the basis of mental capacity negates the principle of equality, equal recognition before the law and non-discrimination.³

According to the Committee on CRPD, the right to legal capacity is ‘indispensable for the exercise of all civil, political, economic, social and cultural rights’.⁴ Particularly, the essentiality of the right lies on the fact that it is the foundation for the recognition of the inherent dignity, individual autonomy, independence, full and effective participation in society and acceptance of persons with disabilities as part of human diversity. In other words, the right embodies the inherent meaning of what it meant to be human; without it persons with disabilities cannot exercise all other rights and entitlements.⁵ Following this assertion, the Committee urges States parties to change legislations in par with the CRPD recognizing full enjoyment and exercise of legal capacity of persons with disabilities.⁶

In its initial report to the Committee on CRPD, Ethiopia admit that, though equality before the law has been constitutionally guaranteed for all and no exception is allowed on any ground including persons with disabilities, legal capacity of persons with mental disability will be restricted – on the grounds of mental disability – to protect their own interest.⁷ Meanwhile, the report contends that there is no legislation in the country that restricts legal capacity on the grounds of disability.⁸ In general, the report maintains that the laws of the country are in par with CRPD concerning legal capacity of person with disabilities. Unlike the assertion, this research points out that both the general and specific legal frameworks in the country limit legal capacity on the basis of mental disability.

The research is purely doctrinal and, as such, limited to content analysis of general and specific legal capacity laws of Ethiopia (such as, marriage, divorce, will, work and employment, political participation, access to justice and others) vis-à-vis international human rights standards, particularly the CRPD. The paper begins with discussion of traditional and contemporary approached to legal capacity determination. Then, general

legal and specific legal frameworks related to the theme are appraised. Finally, the paper sketches out supported decision making model as the way forward.

2. Legal capacity approaches

2.1. Traditional approach

Though there are diverse and long-established approaches that are used to attribute legal incapacity, usually three main regimes are used in most jurisdictions: namely, status, outcome and functional approaches.⁹ Status approach is a neuro-scientific approach that exclusively considers mental health problems or impairments as the basis to assess mental state and legal capacity. Accordingly, based on medical assessment of mental condition, a person with a specific type(s) of mental disorder or mental health problem is forbidden from engaging in specific juridical act(s).¹⁰ What matters most is the existence of specific mental health problem. Despite risks attached with uncertainties and imprecision in the mental disorder diagnosis process, disempowerment of persons with mental disabilities for their impairment, is typical charity model that characterizes persons with disabilities as incapable of controlling their life and interest. This put the approach in absolute contradiction with the human rights model the CRPD pursue.

The second one is outcome approach. Unlike status approach, outcome approach focus on supposed soundness, logicity or reasonableness of decisions individuals with mental disorders make.¹¹ Here, in addition to specific mental disorder, possible effect of leaving decision making to an individual with such disorder will be assessed. Most often, the assessment is made comparing particular decision made by an impaired person with expected decision that is thought to be acceptable and has positive outcome.¹² Typical standard that is often used while examining capacity in ‘outcome approach’ is circumstances in which a person with alleged mental disorder refuses medical treatment. The standard is that a reasonable person with sound mental state will not refuse such treatment knowing the consequences. A refusal by a person whose mental capacity is in doubt constitutes negative outcome and this is construed as against the person’s best interest; hence, the person’s legal capacity will be removed and he/she will be put under the substituted decision-making regime. Generally, if such comparison show negative outcome of the decision made by an individual with mental impairment, his/her legal capacity will be restricted.

At the outset, outcome approach is subject to the same sort of criticism as the status approach. Because, in this case as well, mental impairment is the primary and ultimate justification for denying legal capacity. In addition, the assumption underlying functional approach is discriminatory. Whereas possibility of making unsound decision which is likely to affect personal interests is not specific to persons with disabilities, the labeling and denial of legal capacity are used only for persons with disabilities. For instance, under Article XXII, paragraph 6, of the Constitution of Hungary, a person loses his or her right to vote if a court finds that he or she lacks the capacity to vote. Courts in Hungary are supposed to reach at such decision through an individualized assessment of the voting capacity of specific individuals with disabilities. The legitimacy of such restriction is based on the assumption that persons with mental impairment are not fit to formulate a rationale and valid political opinion owing to the disability they sustain. In 2010, the name of six persons who were suffering from ‘intellectual’ disability and were placed under partial and general guardianship was removed from the electoral register

² Webster’s Dictionary of English, 2012 (emphasis mine)

³ Committee on CRPD, General Comment No.1, cited above at note 1, para.8

⁴ Ibid

⁵ Ibid; see also Bach M. and Kerzner L., “A New Paradigm for Protecting Autonomy and the Right to Legal Capacity”, Prepared for the Law Commission of Ontario, (2010), [Available at: www.lco-cdo.org], p.7; and European Commission for Human Rights Issue Paper, “Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities”, (2012), [Available at: <https://www.escri-net.org>], p.9.

⁶ Committee on CRPD, General Comment No.1, cited above at note 1, para.50

⁷ CRPD Consideration of Reports Submitted by State parties under article 35 of the Convention, Initial Report of Ethiopia, CRPD/C/ETH/1. Received on 8 January 2013, para.58

⁸ Id, para.54

⁹ Committee on CRPD, General Comment No.1, cited above at note 3, para.15; and Bach M. and Kerzner L, cited above at note 4, pp.15–20.

¹⁰ European Commission for Human Rights, cited above at note 5, p.13.

¹¹ Ibid

¹² Ibid, p.13

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