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Challenges of regulatory rights of half-capacitated persons: A sociological perspective on the French Civil Code reform☆

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ABSTRACT

Democratic societies are based on the principle of equal legal capacity of all citizens to decide and act for themselves in all areas of social life. This "socio-civil capacity", which may involve both material property of an individual, as well as private life in matters ranging from health to personal relationships, is recognized by the law (both codified law and common law). These rights guarantee the autonomy and freedom of individuals in the name of respect for human dignity. Civil capacity of a person is legally diminished because his or her "natural" abilities, capacity, or competence are reduced. Recent social changes have lead to increased uses of legal measures of protection. The reasons for these changes are complex and they are accompanied by legislative reforms that modify the rights of half-capacitated persons. In this article, we examine certain issues of civil capacity rights based on the French example. We start present a perspective of the historical definition and practice of these rights as well as their democratization.

Democratic societies are based on the principle of equal legal capacity of all citizens to decide and act for themselves in all areas of civil and social life. This "socio-civil capacity", which may involve both material property of an individual, as well as private life in matters ranging from health to personal relationships, is recognized by the law (both codified law and common law) and outlined in Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). These rights guarantee the autonomy and freedom of individuals in the name of respect for human dignity. The principle is reinforced by a number of welfare laws that seek to empower personal capacity, particularly in health and welfare areas. At the same time, civil or common laws provide protective measures[1] allowing a person to decide and act in the name of those legally recognized as being unable to act or make decisions for themselves. Civil capacity of a person is legally diminished because his or her "natural" abilities, capacity, or competence are reduced. Civil capacity is then fragmented between the remaining capacities of the person, and the powers that are given to third parties. We could thus say that these persons are half-capacitated.[2] The legal structures of these measures are complex; they can raise issues concerning legal status, legal proceedings, or medical-administrative decisions.

Recent social changes have lead to increased uses of legal measures of protection. For example, in France, until 1968, legal cases involving half-capacitated individuals were rare, not exceeding a few dozen cases. Such trials, mandating measures of guardianship or trusteeship, concern 800,000 people today. In England, the Court of Protection estimates that the formalization of protective measures affects more than 2 million people deemed "vulnerable."

The reasons for these changes are complex (Eyraud & Henckes, 2013). Measures of protection concern various categories: people with major psychiatric disorders (Kelly, 2006), elderly persons who are heavily dependent or suffering from Alzheimer's disease, people with extreme disability, or individuals disconnected from society. The practice of protective measures in an increasingly frequent manner reveals a general trend in mental health policy, whether it involves care of the dependent elderly, examining the role of families, or discussing social policy concerning the disabled or individuals living in extreme poverty.

These social changes are accompanied by legislative reforms that modify the rights of the half-capacitated persons. If the dynamics of legal recomposition are complex, it is worth noting that many countries have enacted laws specifically outlining the organization of rights of the half-capable, with highly variable perimeters, depending on the different national contexts. In England, for example, the *Mental Capacity Act* is more focused on a situational organization of protection; the law defines a common procedure applicable to all cases involving other persons. The law also specifically describes certain forms of protective rights, such as prohibiting the deprivation of liberty of movement (Bartlett, 2008). In Germany, the 1992 reform created a single protective measure, the "Rechtliche Betreuung," adaptable to multiple situations. Legislative reforms concerning (in)capacitated rights have been passed in most European and North American countries. Reforms have varying perimeters that stem from public contexts of action and

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[1] These measures can be «guardianship», «conservatorship»; they are «tutelle» or «curatelle» in the main codified laws.
[2] To underline this fragmentation of capacities outlined in legal provisions, we refer to the latter as civil half-capacity rights (Eyraud, 2013).

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differing national legal traditions, which in turn have multiple ramifications on the players involved in implementing civil capacity rights and protective measures (Bankman, 1997; Dayton, 2014; Eyraud, 2011).

In this article, we examine certain issues of socio-civil capacity rights based on the French example. We start with a perspective of the historical definition and practice of these rights as well as their democratization.

We then identify three social issues related to the effective implementation of those rights. The first concern involves candidates for protection measures and socio-legal classification of a person's ability. Who needs measures of protection? How does one assess a lack of capacity? How does one measure the need for protection?

The second issue raises questions on how to apply protection. Who should be appointed agent? A family member? A relative? Several people at once? Does the activity need to be professionalized?

The third issue relates to the ownership of those safeguards. How do these measures fit into a person's overall life story?

1. Developments of socio-civil capacity rights in France

1.1. Capacity rights and their protection in the Civil Code

The French Declaration of Human Rights of 1789 and its implementation as a positive law acknowledges that every man has an equal capacity to exercise his rights and act in civil life.

1.1.1. Presumption of capacity and graduation of the measures of protection

Codifying the law in the Civil Code, the legislature has stated in 1804 this presumption of capacity:

> " Civil majority is stated at 21 years. At this age, one is capable of every act of civil life."[3]

At the same time, the legislature has stated, however, that certain categories of people have a reduced capacity: for reasons of age in regard to children, or statutory reasons for women married before the year 1938; due to a status or behavior of those in the early 19th century deemed "demented, fools, madmen, or excessive lunatics"[4] and based on previous court decisions. This reduction of legal capacity doesn't concern all the civil capacity; it just concerns the capacity of exercising this right.

It resulted in a judge giving a mandate to a guardian or a legal body to act in place of these persons. This mandate constitutes a family obligation. At this moment, there is no *parens patriae* provision in the French Civil Code. This mandate authorizes one to act on behalf of the other, considered "incapable" to handle his own interests pertaining to his income, in personal life decisions, aiming to "ease his fate or promote the healing of the person."[5] Different intervention techniques (representation, assistance, control) are proposed, which apply to acts related to "goods" and "the person." A mandate can give those responsible powers of representation. The measures of representation are defined as "tutelle" (guardianship); in a way, they are "all-embracing measures", except the capacity to enjoy rights. A mandate can also give a less restrictive power which is assistance and control. For people with a less diminished capacity, measures of assistance and control are defined as "conseil judiciaire."[6]In a way, civil capacity rights in French Code Civil already allows us to respect the standards of "presumption of capacity", "supported decision-making", or "fluctuating capacity." But the social spirit of these measures of protection are not in compliance with these contemporary standards.

1.1.2. An antiquated law until the 1970s

Until the early 1970s, the judicial branch of civil capacity rights was applied very rarely.

A parliamentary report even describes the rights as being "in full decline, perhaps on the path to non-existence" (Rapport Pleven au nom de la commission des lois, 1967). We can cite at least two reasons for this lack of legal effectiveness. The first is that legal protection primarily intended to address heritage issues, with a complex and costly procedure, meant to apply to citizens with considerable material resources. The second reason relates to the introduction of an additional right which hierarchized differently the principles authorizing intervention on others when the latter was unable to consent (Gotman, 1995). *The Asylum Act of 1838* provided care for people considered insane in the proceedings, which gave the doctor and the administration the power to manage the therapeutic treatment and management of their property (Castel, 1977; Fenell, 1996; Shorter, 1997). This situation then becomes a medico-administrative decision, not a judicial one. It regulates decisions on patients' liberty of movement, provides assistance measures for the poor, and is a great quantitative success, even if it quickly becomes the object of criticism (Goffman, 1961, Foucault, 1962).

1.2. The rise of measures of protection (1968–2007): democratization or "tutellarization?"

The civil rights of the half-capacitated and the law of June 30, 1838 were revised in the late 1960s in the dynamic of shifts in perception regarding the ill, the elderly, or the disabled.

1.2.1. The Act of January 3, 1968

Facing socio-demographic changes (an aging population...), supporters of the reform now wish to democratize access to legal protection and respond to criticism of the specific rules related to psychiatric interventions on others (Eyraud & Henckes, 2013). The law of January 3, 1968 will only tackle the first objective; the reform of hospitalization without consent, what lawyers called at the moment the protection of the person, will be postponed.[7] This reform of the civil capacity rights organizes a simplified access to protective measures: a judge of proximity, a guardianship judge, is entrusted with the examination of protection demands, simplified mandates making it possible to avoid the difficulty of organizing a family council to establish a measure. A legal provision establishes also the possibility to mandate the State, a kind of *parens patriae*, and not a member of the family, to exercise the mandate. But the protection is still an obligation of the family.

1.2.2. The social success of the measures of protection and the reluctance of the officials

From 1970, the number of yearly measures proposed rapidly increases. The generalization of benefits for people with disabilities helped create new public awareness of the measures of protection.[8] Besides family requests, "psychiatric" procedure access, "social welfare" and geriatrics become organized to protect the ill, those in precarious situations, or the aging (Bucher-Thizon et al., 1987).

If these protective measures constitute a family obligation, they cannot satisfy in many situations: many half-capacitated people have no family or are in bad relationships with the members of their family. Legally, the judge can delegate the protection to a third party (an individual, a legal entity, or the State). The administrative framework of this delegation is organized progressively. The "multiplication and division" of provisions for civil capacity rights (Geffroy & Bellec, 1975), still favored by the organization of state custody in 1975 and state

[3] Code civil « Napoleon », Article 489.
[4] Code civil « Napoleon », Article 489.
[5] Code civil « Napoleon », Article 510.
[6] These are referred to as "curatelle," according to the reform of January 3, 1968.
[7] The reform of the hospitalisation without consent will be passed in 1990.
[8] This generalization of benefits has been passed by the Act of June 30, 1975. The implementation of this law has firstly leaded to a lot of « representative or substitutive payee measures » which became progressively measures of civil protection.