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Research Paper

Removing obstacles to equal recognition for persons with intellectual disability: Taking exception to the way things are

Supprimer les obstacles à la reconnaissance égale pour les personnes ayant un handicap mental: n'être pas d'accord avec le statu quo

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ABSTRACT

Article 12 of the Convention on the Rights of Persons with Disabilities challenges the misconception that persons with intellectual disability, among others, are not capable to take decisions for themselves. This paper first considers the right to equal recognition before the law within the light of the General Comment on Article 12 issued by the Committee on the Rights of Persons with Disabilities which emphasises the need to move away completely from substitute decision-making and to promote supported decision-making. The importance of Article 12 within the context of the Convention as a whole is also considered, together with the limited extent to which supported decision-making has been implemented. The paper argues that, with the exception of some jurisdictions, substitute decision-making is still seen as the best way to respond to the support needs of people with intellectual disability. While there are plenty of examples of supported decision-making practices being used in the daily lives of people with intellectual disability, these remain the exception. Crucially, decisions made in this way are not legally valid. What is needed therefore is a recognition

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that different people can take decisions using different methods, with or without support, and for these methods to become legally recognised.

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R É S U M É

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L'article 12 de la Convention relative aux droits des personnes handicapées conteste l'idée fautive selon laquelle les personnes ayant un handicap mental, entre autres, ne sont pas capables de prendre des décisions pour elles-mêmes. Tout d'abord, cet article propose d'étudier le droit à une reconnaissance juridique égale dans le cadre de l'Observation générale sur l'article 12 publiée par le Comité des Droits des Personnes Handicapées. Celui-ci souligne la nécessité de renoncer aux dispositifs de décisions substitutives et de promouvoir des dispositifs d'aide à la décision. L'importance de l'article 12 dans le contexte de la Convention dans son ensemble est également analysée au regard de la mise en œuvre limitée des mesures d'aide à la décision. L'article montre que, à l'exception de certaines juridictions, la prise de décisions substitutives est toujours considérée comme la meilleure façon de répondre aux besoins de soutien des personnes ayant un handicap mental. Bien qu'il existe de nombreux exemples montrant que des pratiques d'aide à la décision sont utilisées dans la vie quotidienne des personnes ayant un handicap mental, ces pratiques restent l'exception. Fondamentalement, les décisions prises de cette manière ne sont pas juridiquement valables. Il apparaît donc nécessaire de reconnaître que différentes personnes peuvent prendre des décisions en utilisant différentes méthodes, avec ou sans soutien, de telle sorte que celles-ci deviennent légalement reconnues.

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1. Introduction

The difference between Idiots and mad Men [is] that mad Men put wrong Ideas together, and so make wrong Propositions, but argue and reason right from them: but Idiots make very few or no Propositions, but argue and reason scare at all.

John Locke

This 17th century quotation from John Locke's *Essay Concerning Human Understanding* may seem quaint, at best, to our 21st century minds. However, while the use of terms like 'idiots' and 'mad Men' in philosophical arguments and the practice of capitalising common nouns in English are things of the past, the idea expressed by Locke, especially in relation to 'Idiots' scarcely being able to argue and reason at all, is still very much alive in the present.

This idea stands in sharp contrast to the proposition found in Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) (United Nations, 2006) that 'all persons with disabilities have equal recognition before the law'. The CRPD does not make any distinction between one person with disability and another and therefore assumes that this right belongs to all disabled people, regardless of the nature and severity of their impairment. However, the universal applicability of this right has not been met with universal acceptance, and even less with universal application. In fact, the right of people with intellectual disability to be recognised as equal persons before the law is the subject of many debates, including in much of the literature cited in this paper. The discussion often centres on

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