

CRPD legal capacity – from standards to implementation

Tina Minkowitz

Constitutional moment

- Drafting and negotiations process brought together states and civil society, led by DPOs, with aim of creating international standards necessary to eliminate barriers and remedy injustices in all areas of life
- Joint reflection, co-creation – needs from lived experience transformed into international law with states' political will

Continued: Constitutional moment

- Implementation is more difficult when the standards reverse legal doctrine that is steeped in discrimination – but it is progressing
- Highlight reforms in Latin America, especially Peru and Colombia (may be enacted by time of conference)

Core standards

- Right to equal legal capacity (agency and standing)
- Right to access support in exercising legal capacity
- Support must respect person's will and preferences (right to exercise agency about support, and in all matters while receiving support)

Continued: Core standards

- Safeguards uphold person's will and preferences, and prevent abuse
- Reforms are carried out in all areas of law (health, property, civil and criminal legal proceedings, etc.)

Implementation 1

- Inclusive design of legal capacity
 - Formal equality; accessibility and accommodation in expression of will
 - Support available to everyone, not only PWD

Continued: Implementation 1

- Decisive role of person's agency in arranging support
 - Designation by person
 - Opportunity to explore needs and design support ('support to seek support')
 - Judicial/third-party request only if unable to determine will, using 'best interpretation'
 - No obligation to accept support, or to use it if you have designated a supporter

Implementation 2

- Nature of support
 - Right to direct supporter (similar to personal assistant)
 - Not protection of the person, rather accountability to the person served

Continued: Implementation 2

- Relationship between safeguards, support and legal capacity
 - Safeguards on functioning of support
 - Safeguards that apply to everyone – writing, signature, etc., notary's ascertaining of intent
 - Safeguards as a component of support, even subject to person's own will, are problematic – binds the person's future will in relation to herself, contrary to premise of legal capacity at all times

Implementation 3

- Universal legal capacity; pay attention to marginalized groups and areas of life
 - Eliminate 'discernment' criteria (functional approach contrary to GC1)
 - Drug users; coma (use 'best interpretation'); prodigality (discriminatory impact?); civil consequence of crime (re-consider)
 - Health care, including emergencies

Continued: Implementation 3

- Universal legal capacity; pay attention to marginalized groups and areas of life
 - Mental health – repeal all involuntary measures, respond as ‘personal/social crisis’ not ‘medical emergency’
 - Sexuality and reproductive rights
 - Criminal justice system – right to participate, accommodations and support; eliminate declarations of incapacity to be held responsible

Implementation 4

- Overview and general character of legislation
 - Standpoint of person who seeks elimination of barriers to exercise of legal capacity, as subject of the law (avoid perspectives that problematize the exercise of capacity by PWD treated as an object of the law)
 - Cooperation to implement person's will and preferences (avoid paternalistic approaches that assign duties of protection to the supporter)

Clarification of 'hard issues' 1

- 'Best interpretation of will and preferences' is used only when despite significant effort not feasible to obtain expression of will
 - Approximation of will, through evidence
 - Advance directive/designation of future support is determinative in this instance
 - Explicitly distinguished from 'best interest' which is not to be used for adults

Clarification of 'hard issues' 2a

- Mental health crisis situations
 - De-medicalize
 - Decision-making support to deal with personal/social crisis
 - Support for practical matters, safety and well-being according to will and preferences
 - Conflict resolution based on free and informed consent of all parties; non-discriminatory police and justice system (de-linked from support)

Clarification of 'hard issues' 2b

- Mental health crisis situations
 - Mental health services are one way of receiving support; not definitive or essential for each person
 - This approach situates mental health crisis fully within social model of disability

Conclusions

- Huge achievements since we started work on CRPD in 2002, adoption in 2006, GC1 in 2014 and Guidelines on Article 14 in 2015
- Human Rights Council, OHCHR, Working Group on Arbitrary Detention, Special Rapporteurs on Rights of PWD and on Health, World Health Organization – all uphold CRPD standards on legal capacity

Continued: Conclusions

- Many states are working to comply – a few legislations now comply with core principles of Article 12 in key distinction between support and substitution – need attention also to implementation and training
- Elimination of coercion in mental health settings still biggest challenge – intersection of repression and paternalism – needs urgent work

Presenter resources

- tminkowitz@earthlink.net; minkowitz@chrusp.org
- www.chrusp.org
- <https://ssrn.com/author=1348856>
- <https://uio.academia.edu/TinaMinkowitz>
- <http://absoluteprohibition.org>
- <https://www.madinamerica.com/author/tminkowitz/>