

Legal capacity of persons with intellectual disabilities



Equality Bodies tackling discrimination
against persons with intellectual disabilities

Zagreb, 9-10 March 2017

Martha Stickings

Key points

- CRPD reconceives the notion of legal capacity
 - Legal capacity as a discrimination issue
- Legal capacity cuts across many other convention rights e.g. access to justice, private and family life, political participation
- There is a significant discrepancy between CRPD standards and their implementation
- A major shift is underway in national legislation on legal capacity

Practical implications of deprivation of legal capacity

- Sense of powerlessness
- Experiences characterised by a lack of explanation or opportunity to challenge the process
- Very few challenged the decision to deprive them of their legal capacity

“My mum is my guardian and I can’t say ‘no’ to her.”
(Woman with intellectual disabilities, 27, United Kingdom)

Article 12: core principles

- Right to recognition before the law
- Legal capacity on an equal basis with others
- Obligation to provide support to exercise legal capacity
- Article 12 of the CRPD does not explicitly set out a prohibition of restrictions of legal capacity

Article 12: CRPD Committee interpretation

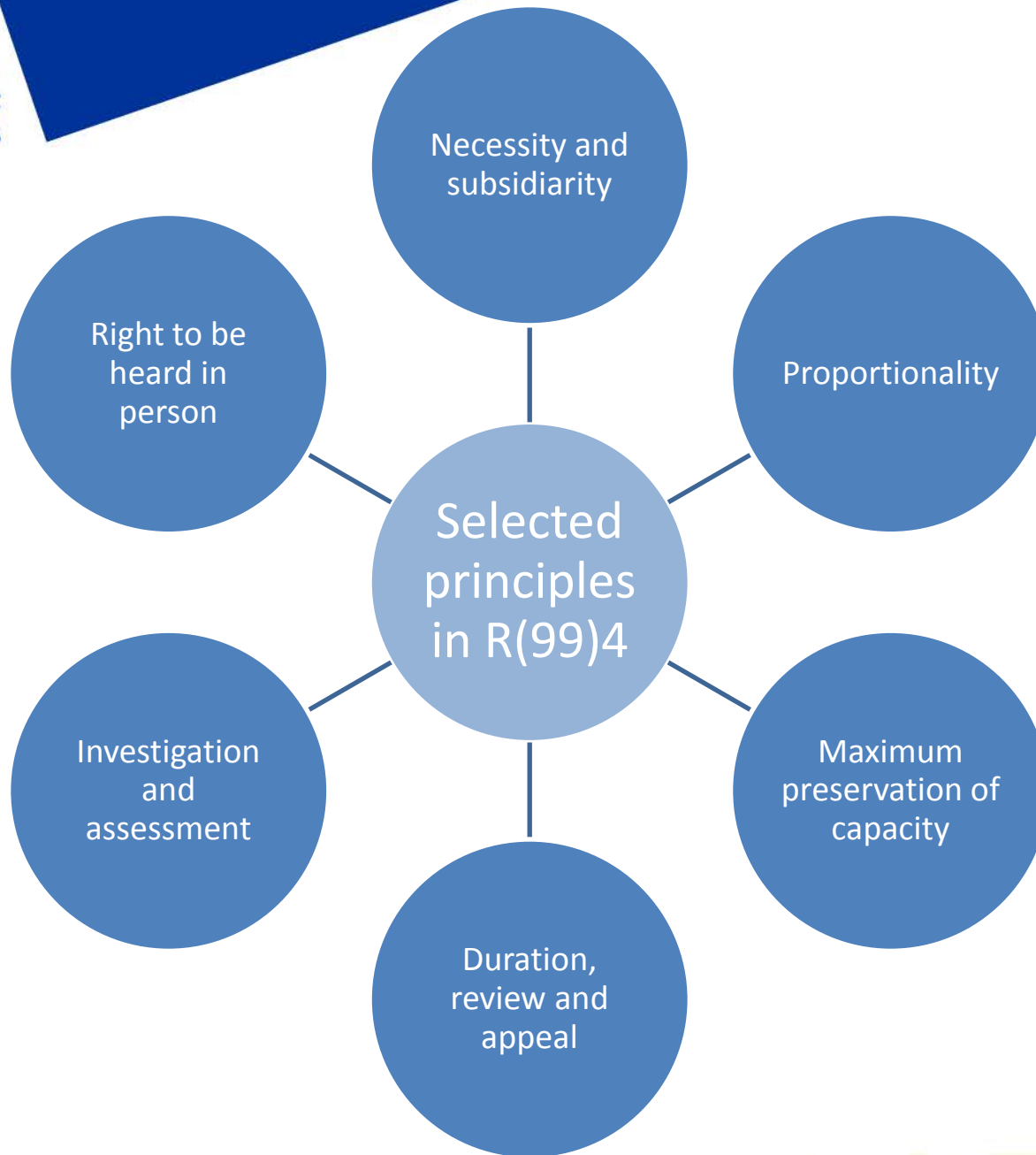
- In its concluding observations, the CRPD Committee has repeatedly called for states to replace substituted with support-decision making. States parties must:
“take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making”
- General Comment 1 links deprivation of legal capacity to equality and non-discrimination:
“States parties must abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect.”

Council of Europe: case law

- Legal capacity and the right to a fair trial
 - Right of the person to be heard
 - Role of the judge
 - Procedural safeguards
 - Right to access justice
- Legal capacity and the right to respect for private and family life, including under circumstances of Art 8(2)
 - Deprivation of legal capacity may represent an ‘interference’ with this right
 - Disability alone does not justify legal incapacitation
 - Measures restricting legal capacity must be proportionate to the ‘legitimate aims’ describe in Art 8(2)

Legal capacity and guardianship: safeguards

- Recommendation R(99)4 sets out the main procedural processes and criteria involved in decision-making on the legal capacity of persons with disabilities and the roles of different actors in the proceedings
- It predates the CRPD and should therefore be reassessed, but sets out important principles and safeguards



EU Member States' legislation: degrees of incapacity

- Guardianship can be applied in almost all EU Member States
- Two typical models of legal capacity deprivation
- Three EU Member States only have plenary guardianship
- Two EU Member States have abolished their guardianship systems

EU Member States' legislation: criteria

- Nearly all EU Member States require that an intellectual disability or mental health problem be coupled with a second criterion linked to the person's 'inability' to manage their affairs
- Judgment on loss of legal capacity and adoption of protective measure
- Different approaches to designating those who may apply for an individual to be placed under guardianship

EU Member States' legislation: guardianship

- A wide variety of individuals and institutions can become guardians
- Many EU Member States' national legislation stipulates that the principle of proportionality should govern the guardian's scope of power
- Legislation in most EU Member States obliges the guardian to consider the person's wishes when taking decisions about his or her life

EU Member States' legislation: review and appeal

- In the majority of EU Member States a guardianship measure is in principle instituted for an unlimited period
- The person under guardianship, as well as other persons 'involved' in the procedure can appeal the deprivation of legal capacity in many EU Member States
- In a few EU Member States the person may not actively participate in the proceedings that could affect his or her legal capacity

Moving from substituted to supported decision-making

- Link to EU and national non-discrimination law
- Involvement of persons with disabilities and DPOs
- Development of supported decision-making models

Legal reforms in EU Member States

- Despite tensions in the interpretation of Article 12 of the CRPD, legal capacity is one of the areas seeing the most changes in national legislation
- Recent reforms in BE, CZ, DE, HR, HU, LT, LV, MT, SI
- Proposed reforms in BG, IE, FI, PI

Building supported decision-making regimes

- General Comment 1 gives guidance on key features of supported decision-making regimes:
 - Give primary to a person’s will and preferences and respect human rights norms
 - Provide protection for all rights, including related to autonomy, and freedom from abuse and ill-treatment
 - Should not over-regulate the lives of persons with disabilities
- States must establish a broad range for support to exercise legal capacity



Making supported decision-making reality

- Providing supported decision-making: Sweden's 'Personal Ombudsman'
- Provide information to exercise legal rights: Independent mental health/ mental capacity advocate: United Kingdom
- Legislating for supported decision-making: Ireland's Assisted Decision-making (capacity) Bill 2013

Questions for discussion: round 1

- What is your experience of working on legal capacity?
- What challenges have you faced in working on legal capacity?

Questions for discussion: round 2

- How have you dealt with legal capacity in your work monitoring implementation of the CRPD?
- How was legal capacity addressed in the review of your country's CRPD implementation by the CRPD Committee?
- What role can Equality Bodies play in promoting supported decision-making systems?

For more information

disability@fra.europa.eu

Download the report at:
<http://fra.europa.eu/en/theme/people-disabilities/publications>

fra.europa.eu

