

How can we promote the effective implementation of Legal Capacity as outlined in Article 12 of the UN CRPD in LMICs?

The question and the problem

The Convention on the Rights of Persons with Disabilities is valued as one of the most revolutionary human rights legal instruments. The CRPD follows decades of work by the United Nations to change attitudes and approaches towards persons with disabilities, from viewing persons with disabilities as “objects” towards viewing persons with disabilities as “subjects” with rights. The development of the CRPD involved close consultation and active participation of persons with disabilities and their allies, which resulted in an advanced and innovative human rights treaty. Article 12 in the CRPD focussed on legal capacity and challenged the very idea of what it means to be a person: to have rights and to be able to exercise those rights. However, doctrine remains uncertain about the real consequences of the implementation of Article 12 in the CRPD. Most of these discussions have been conducted by Global North scholars on their practices and policies. Policies and practices from the Global South are rarely included in these discussions. However, countries in the Global South have started Reforms (radical legislative changes) on the matter: comprehensive reforms (on several aspects of life) or specific reforms (on certain issues, like mental health). It is necessary to take into account their experiences and discussions in order to implement correctly Article 12 CRPD, having in mind their socio-economic context and the realities of their legal systems.

Recommendations

- Recommendation #1: Promote law reforms that recognize and regulate the legal capacity of persons with disabilities, in accordance with the “standards” of the CRPD
- Recommendation #2: Train public officers in the use of CRPD “standards” or guidelines
- Recommendation #3: Provide alternative support approaches that engage with social services and community mental health services
- Recommendation #4: Monitor and report on the experiences of support and implementation promoted by state funded initiatives and civil society funded initiatives, irrespective of their size and scope
- Recommendation #5: Monitor and report on the implementation of the reforms
- Recommendation #6: Raise awareness about the importance of legal capacity with different key actors for the Reform

“[T]here is dire need of expertise on legal capacity, and need for the expertise to seep into the various arms of government.

[Arstein-Kerslake & Kamundia, 2017]

Challenges

Challenge #1: Article 12 CRPD and its concepts are still debated and controversial.

- Understanding Article 12 CRPD can be complex to understand for individuals not familiar with legal language. Neither international human rights bodies nor scholars seem to have a common and clear understanding of what it means despite its attempted interpretation in General Comment 1 of the CRPD Committee. For some, it means that there can be no limits to legal capacity related to disability. Others argue that while disability is a forbidden ground for limiting legal capacity, it can be done for other reasons that may be related to disability in some occasions like functionality. Finally, a third group argues for limitations that are disability-neutral: risk, for example.
- Different views have been proposed concerning the central question posed by Article 12: does it exclude any kind of substitute decision-making? While various have given an affirmative answer to this question - that Article 12 calls for a complete abolition of substitute decision-making regimes, others maintain that substitute decision-making can still be authorized in some cases and subject to certain conditions. This means that reforms may be hindered in discussions about how to better understand the guidelines of Article 12. It is important to arrive to a consensus on the matter in order to properly advance in the reforms.

Challenge #2: Reforms for legal capacity do not engage a wide variety of stakeholders, and instead tend to reinforce existing powers structures

- Consultation with organizations of persons with disabilities is a CRPD obligation under article 4.3. It has to do with participation as a core human rights principle, also recognized in other international and regional human rights instruments. However, psychologists, psychiatrists, judges, notaries, service providers and organization of relatives of persons with disabilities may also participate in consultations. They may be reluctant to change the status quo. Autonomy of persons with disabilities may not be their final goal, so changes in the legal system could create enemies to the Reforms. Even disability groups do not completely agree on what legal capacity implies in the different spheres of life.
- In Law Reform processes, the voices of health professionals and relatives of persons with disabilities are often prioritized over the ones of persons with disabilities.
- Reforms usually rely on new concepts, like support (which is an institute aimed at helping persons with disabilities or any type of limitation in the exercise of their civil capacity) or relational autonomy (which refers that autonomy is made in interdependence). Private Law scholars may reject these notions since their idea of legal capacity is linked to rationality and autonomy (understood as exclusively by an isolated "self-government" without any external aid). This change of paradigm may be rejected since it goes against the very foundations of several legal concepts.
- Lack of resources and lack of expertise are some of the barriers found for training and awareness raising. However, these two actions are of the utmost importance in order to create the necessary consensus for a reform.

Challenge #3: Limited expertise on the right to legal capacity

- There are very few trained specialists on the right to legal capacity. Very few Global South universities include any training in disability rights, let alone legal capacity. Several of the experts in legal capacity received training in Global North universities.
- Additionally, there are only a few experiences of supported decision making in LMIC contexts. These experiences train both persons with disabilities and their supports to help them to identify barriers to legal capacity and how to overcome them. However, these experiences are usually not monitored or evaluated. They are also usually small in scale, and last at most a couple of years. This may make it difficult to convince people who are sceptical about reform e.g. public officers who may feel that there is no sufficient evidence for the reform.

Challenge #4: Inter-sectoral changes are needed in legislation

- Reforms in legal capacity are not restricted to mental health and impact on different aspects and situations. Legal capacity includes capacity and rights in the area of mental health, medical decisions, marriage and divorce, adoption, parenting, work contracts, banking issues, testaments, sexual consent and even civil and criminal responsibility. The relevant professionals in these different areas are usually unaware of the CRPD. Therefore, arriving to a consensus in all these topics can be challenging and time-consuming, making the process of reforms long-winded. For example, Peru took six years for the Reform.

How did we find answers

We conducted a review of reviews, examining systematic, narrative, and other types of review evidence on the topic of legal capacity and the implementation of Article 12 UN CRPD. All recommendations are based on reviews of literatures from low- and middle-income countries, as well as some reviews of literature from high-income countries where the recommendations made were transferable to low and middle-resource settings. This evidence note is based on the findings of 25 reviews: 18 of low- and middle-income country evidence, 6 reviews which covered literature from a range of settings, and 1 review concerning evidence from high-income countries. 5 single studies which included analysis of data from LMICs were also included.

Evidence-informed Recommendations and Actions

Key Recommendations	Actions
Promote reforms that recognize and regulate the legal capacity of persons with disabilities	<ul style="list-style-type: none">- Start Law Reforms through participatory processes- Engage with organizations of persons with disabilities about their needs regarding legal capacity- If necessary, to create momentum, start dialogues, inquiries or reports about the deprivation of legal capacity of persons with disabilities and how it affects other human rights.
Train public officers in the use of CRPD standards	<ul style="list-style-type: none">- Train judges on the use of CRPD standards, to allow them to use them when needed. Workshops on the matter would be ideal and they should be mandatory for judges in family issues.- Train public officers in legal capacity standards to identify gaps of implementation on the matter, with clear guidelines on how to approach and attend persons with disabilities and their supports.
Provide different support alternatives that engage with social services and community mental health services	<ul style="list-style-type: none">- Implement a twin-track approach to public policies. Every public policy guideline should have in mind legal capacity of persons with disabilities. And States should also have specialized offices for attention of persons with disabilities.- Eliminate the requirement for guardianship from any social service. If consensus is not possible, restrict guardianship to more severe cases and monitor the activities of guardians in relation to the will and preferences of the person with disabilities.- Engage mental health services with other social services: cash transfers, work training, education. Social services should empower persons with disabilities and help them become autonomous through work, education and support.
Monitor and report on the experiences of support, no matter their size and scope.	<ul style="list-style-type: none">- Create evidence of how pilots on legal capacity or supported decision-making work in the field.- Global North-South and South-South partnership and funding could be of special utility. These projects should provide publications in indexed journals and in handbook formats.
Monitor and report on the implementation of the Reforms	<ul style="list-style-type: none">- Create evidence of how public policies on legal capacity or supported decision-making work in the field. Monitoring tasks should measure how support services improve autonomy, quality of life, happiness and even income in a person with disabilities.- Identify costs of the implementation of the reform
Raise awareness about the importance of legal capacity with different key actors for the Reform	<ul style="list-style-type: none">- Train civil society leaders on the importance of legal capacity of persons with disabilities. For this, create safe and reliable spaces for consultation with organizations of persons with disabilities. Consultation does not end with one meeting; it is a long process of a two-way exchange of knowledge, experiences, interests and concerns, and back-and-forth feedback.

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- *Prioritize the needs and preferences of organizations of persons with disabilities. While other organizations are important, the voice of persons with disabilities should be a leading one in the Reform processes.*
 - *Create targeted campaigns for every key actor on the importance of legal capacity for persons with disabilities. Consider including families and communities as some of the relevant key actors in LMIC, since families are a critical support – and also a significant source of violation. In particular, the de facto guardianship and informal substituted decision-making is usually perpetrated by families.*
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Policy priorities

Prioritise public officers training and awareness-raising to foster respect for the rights, dignity, autonomy and needs of persons with disabilities in order to combat harmful practices relating to decision-making. Government actors must be held accountable, monitoring and reporting on the implementation of the Reforms (for example, through independent monitoring bodies).

Accountability is very important. Several Reforms and attempts to Reform rely on Ombudsperson's Offices reports and NGO documents that document abuses in, for example, mental health services or guardianship processes. At the state action level, support alternatives can be offered as a complement to formal alternatives, through social services and community mental health services so that service users and their families have access to support networks; persons with disabilities must be involved in the design and implementation of services.

Conclusion

Many key public actors are dissuaded from promoting the legal capacity of persons with disabilities due to the inaccessibility of evidence and knowledge around what works to promote Reform in this area. However, many groups in LMICs have tried to engage with the mandate of Article 12 CRPD.

Nevertheless, it is important to say that there is a need to strengthen the evidence on what works for support and implementation of reform to address the knowledge gap that fuels this inaction. Much more research is needed on the matter. However, it is safe to say that there are some lessons to be made and some obstacles to be avoided. Current and past experiences need to be monitored and reported in order to provide evidence for future reforms.

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GAPS & RESEARCH NEEDS

Even though there are several reforms of legal capacity implemented, there are few studies about their outcomes. This is particularly relevant regarding public officers.

Another important gap has to do with budget allocations. Even though limited financial resources are seen as a problem, there is little to no data on the cost of implementing legal capacity reform for persons with psychosocial disabilities.

Also, more research is needed to clarify how legal capacity is striped off through informal substituted decision-making regimes and de facto guardianship in families of persons with disabilities. This is often the prevailing situation in many LMIC countries where formal guardianship is not commonly practiced.

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