

# Legal Capacity

Tina Minkowitz

CRPD course sp 2017

© Tina Minkowitz 2017



# Overview

- Approaching legal capacity from survivor perspective
- Legal capacity vs mental capacity
- Elements of Article 12 – universal capacity, respect for will and preferences, right to support; intersections with other rights
- Free and informed consent
- Personhood from survivor perspective



# Legal capacity as interface with state

- Do you have legal capacity? (What is it?)
- Do you take for granted that you have legal capacity?
- Do you experience yourself as exercising free will?
- What might affect your experience of legal capacity?



# Legal capacity vs mental capacity

- [GC1](#) paragraphs 13-15
- Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.... Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.



# Legal capacity as universal adult right

- [Article 12.2](#), compare [Article 7.3](#)
- [GC1](#), paras. 5-9, 12-15, 19, 25; 36 (children)
  - No deprivation of legal capacity based on impairment
  - Three models of deprivation of legal capacity, all prohibited
  - Right to exercise legal capacity and decision-making independent from right to support



# Respect for autonomy, will and preferences

- [Article 12.4](#)
- [GC1](#), paragraphs 18, 19, 21, 26-28, 42, 52
  - Respect for decision-making at all times, including in crisis situations
  - Abolish all substitute decision-making, replace by support that respects autonomy, will and preferences
  - Best interpretation replaces best interest standard when after significant effort not feasible to determine will and preferences



# Right to accommodations and support

- [Article 12.3 and 12.4](#), [Article 7.3](#)
- [GC1](#), paragraphs 16-19, 20-22, 29, 30, 41, 42, 45, 52
  - Wide range of support and accommodations, formal and informal support
  - Advance directives?
  - Features of supported decision-making system, and safeguards to prevent abuse
- Is availability of support in exercise of legal capacity appealing to you? Any concerns?



# Specific applications and intersections

- [GC1](#), paragraphs 31-49, 50-52
  - Restrictions not discriminatory, e.g. in case of bankruptcy – problems?
  - Women and girls
  - Legal proceedings
  - Nationality
  - Living arrangements
  - Privacy
  - Political participation

– ....





# Free and informed consent

- [GC1](#), paragraphs 8, 40-42
- [Article 25\(d\)](#)
- Content of right to free and informed consent
  - Legal capacity vs mental capacity
  - Obligations of health and medical personnel
  - Abolition of forced treatment – ‘ongoing violation found in mental health laws throughout the globe’
  - Detention in institutions ‘against their will or with the consent of a substitute decision-maker’



# Paradigm of personhood

- Links with certain ideas from [IPS framework](#)
- Rights and responsibilities
  - Mutuality
  - Civil and criminal responsibility
- Discernment and power
- Incommensurability of human person – autonomy/integrity/dignity
- Support that respects autonomy, will and preferences – connection and worldview



# Law reform initiatives

- [India](#) – arts 12-15 – support as access to justice, limited guardianship = co-decision-making according to will of PwD
- [Costa Rica](#) – arts 2, 5-11, 12-15 ‘safeguard’ vs support, take account of will/preferences/capacities, no substituted consent
- [Peru](#) – arts 564-569 – right to designate support, accessibility, advance directives, exceptional procedure/ person can refuse

