

Supported Decision-Making for Persons with Mental and/or Intellectual Disabilities: An Examination of Ethiopia's Legal and Institutional Framework in light of the CRPD

Yilkal Hassabie⁷⁵

Abstract

This article unpacks the concept of supported decision making and show models of support practices that could be customized in Ethiopia. Supported decision making is one of the rights of persons with disabilities recognized under Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD). Elaborating on the concept of supported decision making, General Comment 1 on the CRPD clarifies the right to legal capacity of persons with disabilities. First, it succinctly separates mental capacity from legal capacity and makes the latter absolute right not to be impaired by the earlier. Second, it identifies two steps in the full exercise of the right to legal capacity: recognition before the law on an equal basis and legal agency. Third, it confirmed Persons with disabilities must be provided with support (formal or informal) to enable them to fully exercise their right to legal capacity. However, the CRPD does not specify what types of support States should provide. Hence, States are developing their own supported decision-making system, such as the ombudsman in Sweden, enduring power of attorney and supportive guardians and administrators in Australia. To the contrary, Ethiopia, as it could be understood from its initial report to the CRPD committee, fails to properly understand the concept of supported decision-making and to move forward in legal and policy measures. Therefore, this article, by conducting desktop review, presents foreign experiences of supported decision-making that Ethiopian government could take lesson from.

Keywords: *Legal Capacity, Mental and Intellectual Disability, Substituted Decision Making, Supported Decision Making*

Introduction

There is no internationally agreeable definition for the term legal capacity (Series and Nilsson 2018:349). The Ethiopian civil code under Article 192 defines capacity as capability to perform all acts of civil life; there is however no clear definition of the term civil life. The black's law

⁷⁵ Yilkal Hassabie Wudneh is a lecturer of Law at Debre Berhan University and a PhD candidate at the Center for Human Rights, Addis Ababa University. He has LLB from Addis Ababa University (2006), LLM from Ethiopian Civil Service University (2011) and LLM from Syracuse University (2017). The author can be reached at yillikal2009@gmail.com.

dictionary defines civil action, the term that is synonym with civil life, as an action brought to enforce, redress or protect private or civil right (Garner 2009) including all juridical and non-juridical acts. The term legal capacity, therefore, can refer to “*a person's power or possibility to act within the framework of the legal system*” (CECHR 2012:10). It encompasses a legal concept to have rights and obligations, to make binding decisions and have them respected, facilitate personal freedom and protect from unwanted interventions (Ibid).

In general, the concept of legal capacity has two elements; the legal standing in the sense of being viewed as a person before the law and the legal agency, sometimes called active legal capacity (McSherry 2012). The second leg of the definition, legal agency, signifies the ability of a person to act within the framework of the legal system. With this, the concept of legal capacity is intimately connected with autonomy (Series and Nilsson 2018:349). It signifies the possibility to enjoy one’s own affair with full consent without the need to have a representative who act on his/her behalf.

It was not an easy task to clearly incorporate the concept of legal capacity in the United Nations’ Convention on the Rights of Persons with Disabilities (CRPD), an international human rights instrument adopted in the 21st century for the protection of the rights of persons with disabilities. During the drafting process of the CRPD, the concept of legal capacity was raised to be an underlying element of Article 12 and was the center of debate mainly by non governmental organizations. While States, such as India, and the chair of the *Ad Hoc* Committee for the preparation of the CRPD mentioned guardianship through which persons with mental and/or intellectual disabilities could make decisions, international disability alliance and inclusion international proposed for equal recognition of persons with disabilities before the law emphasizing the importance of not differentiating legal status based on actual or perceived disability (Series and Nilsson 2018:344). The *Ad Hoc* Committee disagreed mainly on the meaning of the term legal capacity claiming that while the ‘capacity to hold and bear right’ could not be the ‘capacity to act’, the latter can be limited by law (Ibid). One of the debating issues was on the need for Article 12 of the CRPD to explicitly incorporate the term ‘capacity to act’.⁷⁶ In this debate, in one of the meetings, the chair noted that:

A fundamental issue in Article 12 is finding a balance between a clear assertion that persons with disabilities have the same right to recognition as persons before the law and legal capacity as everyone else and recognition of the fact that there are circumstances in which persons

⁷⁶ See the daily summary of the discussion at the seventh session of the Ad Hoc Committee, Related to Article 12 Equal Recognition as a Person Before the Law (18 January 2006). Available at <https://www.un.org/esa/socdev/enable/rights/ahc7sum18jan.htm>.

with disabilities require support in exercising legal capacity and capacity to act.⁷⁷

The International Disability Caucus (IDC) gave an opinion that persons with disabilities have not been recognized as 'persons' before the law and "*legal capacity is only a shell in the absence of capacity to act*" (Ibid). The core of this debate revolved on whether substituted decision making shall continue or not. The firm position of the inclusion international and IDC was that substituted decision making or guardianship, even as a last resort, should be over and the shift should be towards supported decision making (Ibid).

At the end, the CRPD recognized equal recognition of persons with disabilities before the law.⁷⁸ Article 12(2) of the CRPD also incorporated, within the concept of legal capacity, the power to act under the laws with specific reference to persons with disabilities. The concept of 'legal capacity' within this document "*consists of two integral components: the capacity to hold a right and the capacity to act and exercise the right, including legal capacity to sue, based on such rights*".⁷⁹ Although this provision does not use the term 'legal capacity to act' (Robert 2012), it adopts the right of persons with disabilities to legal capacity including the power to act with it.⁸⁰ CRPD's General Comment No. 1 also explicitly state the concept of legal capacity to include both the holder of the right and actor under the laws.⁸¹ Meanwhile, Article 12(3) of the CRPD provides that "*State parties shall take appropriate measures to provide access by Persons with disabilities to the support they may require in exercising their legal capacity*".

Ethiopia signed the CRPD on the 30th of March 2007 and ratified it on 7th July, 2010 by proclamation no. 676/2010.⁸² Ethiopia accordingly had made its initial treaty-specific report on the implementation of the CRPD in accordance with Article 35 of the convention. The treaty-specific report partly details what Ethiopia has implemented to comply with the CRPD. Therefore, this article, from the treaty-specific report made by Ethiopia

⁷⁷ The daily summary of discussion at the seventh session of the Ad Hoc Committee, Related to Article 12 Equal Recognition as a Person Before the Law (18 January 2006). See the statement by the chair. Available at <https://www.un.org/esa/socdev/enable/rights/ahc7sum18jan.htm>.

⁷⁸ See Convention on the Rights of Persons with Disabilities and Optional Protocol, 13 December 2006, Article 12(1).

⁷⁹ Legal Opinion on Article 12 of the CRPD, June 21, 2008. Available at <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/legal-opinion-LegalOpinion-Art12-FINAL.pdf>

⁸⁰ Article 12(3) of the Convention on the Rights of Persons with Disabilities and Optional Protocol (2006) reads as "States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."

⁸¹ See the UNCRPD Committee CRPD General Comment No. 1: Article 12 (Equal recognition before the law) 11 April 2014 Para. 12.

⁸² See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en and proclamation no. 676/2010 of the Federal Democratic Republic of Ethiopia.

on Article 12 of the CRPD, analyzes the position of the Ethiopian government on supported decision-making.

Understanding Mental and Intellectual Disabilities

Disability and impairment are an evolving concept and does not have one definition.⁸³ Article 1 of the CRPD identifies four categories of impairments; physical, mental, intellectual and sensory. Mental disability, also called psychosocial disability, is associated with the disfunctioning of the mental part or disorder related to mental health. These may include depression, bipolar disorder, schizophrenia and other psychoses, dementia, and developmental disorders including autism (WHO 2021). On the other hand, intellectual disability, otherwise known as cognitive disability, is associated with the reduced ability of intellectual functioning, mostly during the developmental period of an individual that adversely affects the learning capability of a child.⁸⁴ In one or another, these two types of disabilities affect the decision-making of a person.

Substituted Vs. Supported Decision-Making

A distinction between substituted and supported decision-making systems lies on the power of the third party in making decisions on behalf of a person with disability or supporting them to make decisions respectively. If the third party makes the decision on behalf of a person with mental and/or intellectual disability, it is substituted decision making while if the decision of a person with mental disability is facilitated or supported by the third party, it is called supported decision-making. It can be summarized in the following statement; *“the difference between supported and substitute decision-making is that, in a supported situation, the person with a disability is at the center of the discourse”* (Series and Nilsson 2018:345).

The Shift to Supported Decision-making

The CRPD requires State parties to investigate their laws and make a shift from an age-old guardianship system to supported decision-making approach in recognition to the right to legal capacity of persons with

⁸³ The CRPD, instead of defining the term persons with disabilities, under Article 1, indicates what is included as ‘persons with disabilities’. Paragraph (e) of the preamble of the CRPD also clearly reads as *“disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”*

⁸⁴ Office of Special Program U.S. Department of Education, Cognitive Disability Resources. Available at <https://www.ocecd.org/CognitiveDisabilityResources.aspx>.

intellectual or mental disabilities.⁸⁵ In this, the first measure would be to identify the laws that enforce the guardianship regime. The CRPD Committee, in its concluding observations to Ethiopia's initial report, has identified few provisions of Ethiopian laws that do not comply with Article 12 of the CRPD.⁸⁶ These are the Civil Code (Chapters 3 and 4, Articles 339-388, 1728(3)) and Commercial Code (Article 740). The major concern of the CRPD committee in its concluding observation was the position of the civil code towards 'insane' and 'infirm' persons. The CRPD committee expressed its concern with the statement that runs as:

those provisions restrict the right of persons with psychosocial disabilities and intellectual disabilities to the full enjoyment and exercise of their rights, including the right to marry, to act as witness and to vote, and parental rights and, for blind, deaf and deaf-blind persons, the right to carry out banking transactions.⁸⁷

Examining the provisions of the civil code, the general rule is *"every physical person is capable of performing all the acts of civil life unless he is declared incapable by the law and this presumption is taken by law unless the one alleging the disability/incapability/proves otherwise"*.⁸⁸ The term 'civil life' refers to both juridical and non-juridical acts including all the civil, political, economic, social and cultural rights (Mohammed 2017). To this general rule, however, there are two exceptions based on 'insanity' and 'infirmity'.

Under chapter 3 of the Civil Code, there are two situations that remove the legal capacity of a person under the concept of insanity. The first is notorious insanity when (1) individuals are kept in an institution or hospital or nursing home because of insanity⁸⁹ and/or (2) the liberty of a person is limited due to mental conditions or kept at home by the family or persons living in a rural community of less than 2000 inhabitants.⁹⁰ This category, according to the civil code, is *"broad and may include large number of people with mental impairment, particularly, given the lack of adequate mental health facilities in Ethiopia"*.⁹¹ In both instances of notorious insanity, with proof of either of the two facts, there will not exist legal capacity. This is a status approach that depends exclusively on mental impairment.⁹² The legal effect of notorious insanity is that any juridical act performed by notoriously insane person may be impugned by the

⁸⁵ See CRPD Article 12; see also UNCRPD Committee General Comment No. 1, paras. 3 and 7.

⁸⁶ Concluding observation on the initial report of the Ethiopian government, CRPD committee, para. 26.

⁸⁷ CRPD Committee Concluding Observations, Para. 25.

⁸⁸ Civil Code of the Empire of Ethiopia, Proclamation No. 165/1960, Art. 192 and 196.

⁸⁹ Civil Code, Article 341.

⁹⁰ Civil Code, Article 342.

⁹¹ Ibid.

⁹² Ibid.

request of the person or by his/her representatives or heirs.⁹³ In such a case, the act will not be automatically void but anyone of the parties mentioned above may request invalidation of the act.⁹⁴ As a result, no one will be tempted to have transactions with a person with mental and/or intellectual disability for fear of invalidation of the act.

The second situation is judicial interdiction to which an application may be made by the insane person, the spouse, relative or public prosecutor.⁹⁵ The court pronounces the interdiction of the insane person if the measure is necessary and by seeing the person whose interdiction is applied for unless the in-person appearance of the individual is impossible.⁹⁶ In this situation, even though it is not proved that a person was notoriously insane, the judicial interdiction puts the person under the protection of the law. As a result, the judicially interdicted person will be treated as a minor for all administrative matters of personal and property affairs, and in all cases the court shall assign a guardian and tutor.⁹⁷ The guardianship is presumed to be plenary guardianship, though the court may permit the judicially interdicted person to perform certain acts by him(her)self.⁹⁸

Once the person is judicially interdicted, he/she loses the power to act by him(her)self and the court assigned guardian and tutor continue to act on his/her behalf. Nonetheless, the Civil Code has tried to put some protection mechanisms against the interest of the judicially interdicted. These include (1) the family council,⁹⁹ (2) any member of the family council by appealing to the family council against the decisions of the guardian¹⁰⁰ and (3) the court.¹⁰¹ There are also instances whereby the Civil Code recognizes the need to hear the consent of the judicially interdicted person. For instance, the consent of both the interdicted and the guardian is required for divorce.¹⁰² The court may also decide, during the pronouncement of the interdiction, that the tutor may not perform certain acts, that it determines, without the concurrence of the interdicted person.¹⁰³ There are also certain acts, such as family matters, the court allow persons with mental and/or intellectual disabilities to perform by themselves.¹⁰⁴

⁹³ Civil Code, Article 343(1).

⁹⁴ See Civil Code, Article 344(2). Invalidation on the ground of insanity is assimilated with invalidation on the ground of error pursuant to Articles 1696-1703.

⁹⁵ Civil Code, Articles 351 and 353(1).

⁹⁶ See Civil Code, Article 354.

⁹⁷ See Civil Code, Articles 358-359.

⁹⁸ Civil Code, Article 371(2).

⁹⁹ Civil Code, Article 360.

¹⁰⁰ Civil Code Article 364.

¹⁰¹ For instance, the Civil Code, Article 368(3) puts that the court may invalidate, in whole or in part, the will made by interdicted person.

¹⁰² Civil Code, Art. 370(1).

¹⁰³ Civil Code, Article 371(3).

¹⁰⁴ See the Revised Family Code, Articles 15, 34, 43, 175, and 243.

Pursuant to the Revised Family Code of the Federal Democratic Republic of Ethiopia (FDRE), judicially interdicted persons cannot marry without the authorization of the court.¹⁰⁵ If the judicially interdicted person contracts marriage without the authorization of the court, his/her guardian may apply for the dissolution of the marriage.¹⁰⁶ A contract of marriage made to limit the pecuniary/personal effect of marriage by the judicially interdicted person is also of no effect unless approved by the court;¹⁰⁷ and an action to disown a child by judicially interdicted person requires permission of the court and may also be performed by the guardian.¹⁰⁸ Thus, in these instances, the court may authorize or approve the acts of the judicially interdicted person. Enacting family law is within the jurisdiction of each Regional State in the federal structure. However, an assessment of the family laws of the constituent Regional States of Ethiopia shows that the laws are almost a replica of the 2000 Federal Revised Family Code.¹⁰⁹ Therefore, it is possible to conclude that the rights of persons with intellectual or mental disabilities in family matters are the same all over the country.

However, none of the protection mechanisms discussed above and the authorization by a court to do certain acts equate with the notion of supported decision-making. The requirement of consent of the interdicted person for certain acts does not make it part of the supported decision-making system. Consent from the tutor that the court may put as a requirement during the pronouncement of the interdiction on certain acts also indicate that the consent of the tutor is equally relevant with the consent of the judicially interdicted person. The authorization by the court for the judicially interdicted person to do certain acts also puts the legal capacity of the person at the discretion of the court. Hence, it is possible to conclude that the Civil Code is far from the new supported decision-making approach of the CRPD.

In general, therefore, the CRPD committee seems right in observing that the Civil Code provisions under chapter three (Articles 339-379) contradict with Article 12 of the CRPD. Nonetheless, it is unclear why the CRPD included chapter 4 (Articles 380-388) of the Civil Code on persons interdicted by law, among cited provisions in the concluding observation document, in the list of articles that are against the CRPD. These articles are all about legal interdiction, instead of judicial interdiction, that are not related with persons with intellectual or mental disabilities. Legal

¹⁰⁵ The Revised Family Code, Article 15(1).

¹⁰⁶ The Revised Family Code, Article 34(1).

¹⁰⁷ The Revised Family Code, Article 43(1).

¹⁰⁸ The Revised Family Code, Article 175.

¹⁰⁹ See Amhara National Regional Family Code Proclamation No. 79/2003, Articles 26, 45, 54 (1), 186, and 254; Tigray Regional State Revised Family Code Proclamation No. 116/2007, Arts. 22 (1), 49(1), 61(1), and 206; Southern Nations Nationalities and Peoples Regional State Family Proclamation No. 75/2004, Articles 25, 43, 52, 190, 258 (1). All the above provisions are direct copies of their federal companion provisions in terms of limiting the legal personality of the judicially interdicted persons in the family life.

interdiction in these articles addresses limitation imposed on legally interdicted persons regarding enjoyment of legal personality because of their criminal liability.¹¹⁰

In addition to the general rule that takes away the legal capacity of persons with mental and/or intellectual disabilities and irrespective of the discretion of courts to allow the interdicted person to perform certain acts, there are also specific laws that completely prohibit judicially interdicted persons to do certain acts.¹¹¹ Mental condition is, for that matter, one source of the general disabilities (incapacities) to perform all acts of civil life.¹¹² Here, it must be noted that the Civil Code uses the terms disability and capacity synonymously while the term disability in the CRPD shall mean the interaction between persons with impairment and the barriers resulting in the lack of equal opportunity.¹¹³ It follows that judicially interdicted persons may not conclude any sort of contract.¹¹⁴ Moreover, in commercial transactions, judicially interdicted persons may not bind themselves by commercial instruments such as bill of exchanges, cheques, promissory notes and others.¹¹⁵ In the same token, the criminal law of Ethiopia takes away the legal capacity of persons with mental and/or intellectual disabilities to defend criminal cases established against them.¹¹⁶ In such instances, the court orders treatment or protection of the so called ‘irresponsible person’ pursuant to Articles 129-131.¹¹⁷

Existing laws of Ethiopia adopt guardianship and conflate legal capacity and mental capacity¹¹⁸ and restricts the legal capacity of persons with mental and/or intellectual disabilities on a basis of status approach. The initial report of Ethiopia to the CRPD committee also confirmed that it has not yet placed supported decision-making system. The initial report reads as “*the restriction of legal capacity on the ground of mental disability is*

¹¹⁰ See Civil Code, Articles 380-388.

¹¹¹ See the Civil Code, Article 368 that prohibits judicially interdicted persons from making wills. The FDRE Revised Family Code Proclamation No. 213/2000, Article 243 does not allow judicially interdicted persons to be guardian for minors. The Ethiopian Electoral, Political Parties Registration and Election’s Code of Conduct Proclamation No. 1162/2019, Article 18(3)(a), indicates a person who is proved to be incapable of making effective decision by an authorized body or sufficient evidence due to insanity is not legible to register as elector; Article 31(1)(f) further prohibits same person to register as a candidate.

¹¹² Civil Code, Articles 192 and 193.

¹¹³ See the UNCRPD, Article 1. This article identifies persons with disabilities as they include “*those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*”

¹¹⁴ Civil Code, Article 1678(a).

¹¹⁵ Commercial Code of the Empire of Ethiopia Proclamation No. 166/1960, Articles 733 and 741.

¹¹⁶ See the Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No. 414/2004, Article 48.

¹¹⁷ Criminal Code, Article 48(3).

¹¹⁸ UNCRPD General Comment No. 1, para. 15 clarified that persons with cognitive or psychosocial disabilities shall not be discriminately denied of their legal personality because of the assessment of the inner workings of the human mind (emphasis added).

to protect the interest of such a person".¹¹⁹ With this statement, the initial report of Ethiopia acknowledges the restriction of the legal capacity of persons with mental and/or intellectual disabilities is in the best interest of the individual. Had Ethiopia believed in the guardianship regime to best protect the interest of persons with disabilities compared to supported decision-making system, it would have made reservations on Article 12.¹²⁰

Again, the 2012–2021 National Plan of Action of Persons with Disabilities of Ethiopia (hereinafter referred as NPA) does not have any mention of supported decision-making as well.¹²¹ Of course, the NPA, under priority two entitled health and medical treatment, cites Article 25(d), which calls governments to take measure that:

require health professionals to provide care of the same quality to Persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of Persons with disabilities through training and the promulgation of ethical standards for public and private health care.¹²²

The health care service is one of the areas whereby persons with mental and intellectual disabilities are denied of their legal capacity. Health institutions admit persons with mental and intellectual disabilities without free and informed consent and upon the request of their guardians or appropriate authorities.¹²³ Therefore, the recitation of Article 25(d) by the NPA is much appreciated in recognizing free and informed consent of persons with mental and/or intellectual disabilities in health institutions. Unfortunately, however, none of the outputs or activities listed under the priority on health and medical treatment explicitly show how to realize free and informed consent by health

¹¹⁹ Implementation of the UN Convention on the Rights of Persons with Disabilities, treaty-specific initial report of the Ethiopian government, UN Secretary General, (2012), para. 54.

¹²⁰ For instance, Egypt has already declared that it interprets Article 12(2) to have given only the capacity to have the right for persons with intellectual or cognitive disabilities at the time of signing the CRPD. Thus, Egypt may not be bound by the convention to provide support to enable persons with intellectual or cognitive disabilities to independently exercise their capacity to act. Available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&clang=en

¹²¹ The 13 action priorities of the NPA are (1) public awareness, (2) health and medical treatment, (3) HIV/AIDS and persons with disabilities, (4) education and training, (5) employment and work, (6) social protection, (7) living environment, (8) culture, sport and recreation, (9) full participation of women with disability, (10) self-representation through DPOs, (11) research and information, (12) human resource development, and (13) international cooperation. See the 2012–2021 National Plan of Action of Persons with Disabilities, P. 13-57.

¹²² The National Plan of Action of Persons with Disabilities, P. 18.

¹²³ For instance, the court may send him to the treatment or special protection center if a person with mental and/or intellectual disability is found to have committed a criminal act pursuant to Articles 48(2)(3) and 129-131.

institutions.¹²⁴ Other than mere duplication of Article 25(d) of the CRPD on free and informed consent, the NPA did not give sufficient attention to the supported decision-making system to ensure the legal capacity of persons with mental and/or intellectual disabilities. Consequently, given the fact that the right to legal capacity is inextricably linked to other basic human rights,¹²⁵ the NPA should have included, within its priorities, the right to legal agency of persons with disabilities in general and persons with intellectual or mental disabilities in particular.

The National Mental Health Strategy of Ethiopia also mentions protection of human rights of people with mental illnesses. Under the heading of human rights and the 'mentally ill', the strategy pledged to apply the rights enshrined in the CRPD including the right to equality before the law.¹²⁶ To ensure the protection of human rights of persons with 'mental illness', the strategy promised the enactment of a specific legislation for the protection of persons with 'mental disorders'. However, the promised legislation is not yet proclaimed. In the same way, the revision of the Civil Code, which had been said to be in process in the State's initial report to the CRPD Committee nine years ago, has not yet come true.¹²⁷ Nonetheless, the CRPD is quite clear that:

State parties must review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences.¹²⁸

In fact, developing supported decision-making alternatives while maintaining guardianship laws does not also comply with the obligations in Article 12 of the CRPD.¹²⁹ Therefore, Ethiopia shall come up with a new supported decision-making legislation by obviating guardianship laws.

¹²⁴ See National Plan of Action of Persons with Disabilities, P. 19-21. The only activities that may have relevance to this end are those mentioned under 2.14 and 2.15 that require disability awareness to be part of the curriculum of relevant universities and training centers and courses and training to be given to the health professionals on disability issues.

¹²⁵ UNCRPD Committee General Comment No. 1, para. 31 et seq.

¹²⁶ National Mental Health Strategy, Federal Democratic Republic of Ethiopia, Federal Ministry of Health, 2012/2013 and 2015/2016. Available at <http://www.centreforglobalmentalhealth.org/sites/www.centreforglobalmentalhealth.org/files/uploads/documents/ETHIOP~2.pdf>

¹²⁷ Treaty-specific initial report of Ethiopia to the UNCRPD Committee, supra note 27, para. 58. The initial report recognized some derogatory terms and provisions in relation to the signature of the visually-impaired in the civil code calling for revision.

¹²⁸ UNCRPD Committee General Comment No. 1, para. 26

¹²⁹ UNCRPD Committee General Comment No. 1, para. 28

Provision of Support for Persons with Intellectual and/or Mental Disabilities

Obviating guardianship laws and legislating supported decision-making system make persons with intellectual or mental disabilities holder of the right to legal capacity but does not render them legal agency. That means, such a system may equally recognize persons with mental and/or intellectual disabilities before the law. Yet it does not ensure that they can effectively act upon it. Rather, there shall exist a system where persons with intellectual or mental disabilities could get support to recompense their disabilities.¹³⁰ This system “*must be able to encompass the supports and reasonable accommodations to which a person deserves in the decision-making process*” (Bach and Kerzner 2010). Provision of support for persons with disabilities to enable them to fully exercise the right to legal capacity is thus an obligation of State parties to the CRPD.¹³¹ So, the focus of this section would be to discuss what Ethiopia could do in the establishment of such a system.

Models of Supported Decision-Making System

The mode of support that State parties provide for persons with disabilities in general and for persons with intellectual or mental disabilities in particular vary based on the nature and severity of the disability.¹³² The support may also vary based on the type of decision to be made.¹³³ The support could be informal with no legal enforceability or formal having legal force (Nina et al. 2012). As a result, a given State party is supposed to select models and customize them into its own contexts.

Currently, there is no one model of support for persons with intellectual or mental disabilities to enable them make decisions. Rather countries have developed and adopted multiple types of support practices.¹³⁴ The Swedish Personal Ombudsman is a new social profession model that is adopted by many European countries such as Norway, Finland and Czech Republic, to provide support for individuals with severe intellectual or mental disabilities.¹³⁵ In this model, the Personal Ombudsman meet and communicate persons with mental and/or intellectual disabilities to gain their trust.¹³⁶ The overall process is informal, flexibly operated by professionals, as the formal way of approaching these persons may let

¹³⁰ CRPD, Article 12(3)

¹³¹ UNCRPD Committee General Comment No. 1, para. 16.

¹³² See UNCRPD Committee General Comment No. 1, para. 17.

¹³³ Everyone has the Right to Make Choices, how does Supported Decision-Making work? Available at http://www.supporteddecisionmaking.org/choices_brochure.

¹³⁴ See e.g.: representative agreement act, R.S.B.C. 1996, c. 405, British Colombia available at http://www.bclaws.ca/Recon/document/ID/freeside/00_96405_01 See also 13 various support practices identified by Inclusion Europe, available at <http://www.right-to-decide.eu/support-types/>

¹³⁵ Available at <https://zeroproject.org/policy/sweden-2/>

¹³⁶ Ibid.

them go back of the system.¹³⁷ While 310 Personal Ombudsmen provided support to more than 6,000 individuals in 2014, a study in Sweden reported that “*individuals with disabilities who are supported by a Personal Ombudsman require less care and that their psychosocial situation improves*”.¹³⁸

Another model is developed by the office of public advocate called Powers of Attorney in Australia to enable persons with intellectual or mental disabilities get the necessary support or representation to make decisions.¹³⁹ It has two types of support models. The first one is called an enduring power of attorney whereby a person attaining majority age can appoint an individual, before sustaining mental and/or intellectual disability, to make decisions on personal matters.¹⁴⁰ It gives leverage for everyone to decide the attorney before losing decision-making capacity. The second is supportive guardians and supportive administrators.¹⁴¹ In this mode, the Victorian Civil and Administrative Tribunal (VICAT) appoints a supportive guardian or supportive administrator when it finds the person in question can make decisions but sometimes needs support.¹⁴² The power of the supportive guardian or supportive administrator is defined by the VICAT and will have responsibilities under guardianship and administration act 2019.¹⁴³ Among others, the supportive guardian or supportive administrator remains responsible to act honestly, diligently and in good faith; to exercise reasonable skill and care; to discuss anything about a supported decision with the person in a way they can understand and that will assist them to make the decision; participate in decisions affecting their interest and develop their decision-making capacity.¹⁴⁴ In addition, many projects are running in Australia and the United States to identify the best support practice and promote the right to supported decision-making of persons with intellectual or mental disabilities (Anna et al. 2017).

Ethiopia, thus, can take lessons from such practices and adapt to its socio-economic realities. To do so, it is encouraged to develop projects, which undertake research on existing practices of guardian/ward relationships and the way forward to supported decision-making. The main objective of such projects should be to identify the best model(s) of supported decision-

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Available at <http://www.publicadvocate.vic.gov.au/power-of-attorney>. There are two types of powers of attorney as enduring powers of attorney and supportive powers of attorney to get persons with cognitive or psychosocial disabilities represented if they are unable to make their own decisions about matters and/or need support to make decisions.

¹⁴⁰ Office of the Public Advocate, Making an Enduring Power of Attorney. Available at <https://www.publicadvocate.vic.gov.au/your-rights/enduring-power-of-attorney/making-a-power-of-attorney>

¹⁴¹ See Information for Supportive Guardians and Supportive Administrators. Available at <https://www.publicadvocate.vic.gov.au/guardianship-and-administration/vcat-appointed-guardians-and-administrators/information-for-supportive-guardians-and-supportive-administrators>

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

making and to study the mechanisms for its implementation. To accomplish such purpose, examining legal frameworks and institutional structures of Ethiopia can be a starting point to identify best practices from other jurisdictions. For instance, one of the duties of the Federal Attorney General is to represent persons with disabilities who are unable to institute and pursue their civil suits before the federal courts.¹⁴⁵ Thus, it might be possible to research on whether this duty of the Federal Attorney General could be transformed into ‘an enduring powers of attorney’ as practiced in Australia or ‘representation agreement’ in British Columbia, Canada.

On the other hand, the Ministry of Labor and Social Affairs has duties to ensure that persons with disabilities are benefiting from equal opportunities and full participation and to provide the necessary services.¹⁴⁶ The Disability Affairs Directorate within the ministry, however, did not include the provision of support for persons with disabilities as one of the functions of the Directorate except for conducting awareness raising activities and ensuring disability inclusion in other ministries.¹⁴⁷ Nonetheless, the directorate, working with social workers, can provide support for persons with intellectual or mental disabilities like the Swedish Personal Ombudsman.

Another opportunity can be enhancing the role of the court, stipulated under Article 371 of the Civil Code, that makes the person with mental and/or intellectual disability at the center of the decision-making process. The court can restrict the mandates of the tutor to be concurrent with the consent of the judicially interdicted person on certain acts. This provision, therefore, may be easily revised in such a way that the consent of the judicially interdicted person will be prioritized and facilitated by the tutor in all acts in the same way ‘supportive guardianship or supportive administrators’ does in Australia.

Underlying Principles in the Selection and Application of Models of Supported Decision-Making

State parties shall observe safeguarding measures to comply with Article 12 of the CRPD in choosing appropriate and effective model of supported decision-making system.¹⁴⁸ In all cases, at the center of adhering to supported decision-making, the prime purpose must be respecting the will and preference of a person with intellectual or mental disability.¹⁴⁹ To

¹⁴⁵ The Federal Attorney General Establishment Proclamation No. 943/2016 Article 6(4)(e) lists persons whom the Federal Attorney General may represent as ‘women, children, disabled and the elderly’. More importantly, the Federal Attorney General has also duties to design strategies for free legal aid and to follow up implementation of international and regional human rights treaties ratified by Ethiopia.

¹⁴⁶ See Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 1097/2018, Article 29(11).

¹⁴⁷ Ibid.

¹⁴⁸ CRPD, Article 12(4).

¹⁴⁹ UNCRPD Committee General Comment No. 1, para. 20.

extract the will and preference of persons with intellectual or mental disabilities, the mode of support may have to include some minor accommodations and strong formal measures (Flynn and Anna 2014).¹⁵⁰ In general, at its core, supported decision-making is about taking the time to listen and communicate. This gives direction that any model of supported decision-making, which State parties adopt to comply with Article 12 of the CRPD, should be tailored to the specific needs of individuals with intellectual or mental disabilities to provide them with appropriate means of communication.

Yet, determining the will and preference of an adult might be difficult in some severe and complex disabilities even after the necessary support is given (Vivienne 2011).¹⁵¹ This is why some States have reservations on Article 12 of the CRPD upon ratification.¹⁵² Under such circumstances, however, the “*best interpretation of will and preferences*” must replace the “*best interests determinations.*”¹⁵³ This implies, “*supports for exercising legal capacity would be offered to the individual, but not imposed*” (Flynn and Anna 2014:129). More eloquently, the quality of interaction between the supporter and the supported should be free from any sign of fear, aggression, threat, deception or manipulation.¹⁵⁴

Conclusion

Ethiopia is one of the first signatory States that ratified the CRPD without reservation. Ethiopia thus has an obligation to comply with Article 12 of the CRPD to shift from guardianship to supported decision-making for people with disabilities. However, the Ethiopian government initial treaty-specific report on the implementation of Article 12 of the CRPD reveals that it lacks clear understanding of what the right to legal capacity for persons with intellectual or mental disabilities mean. The initial report rather shows that Ethiopia believes in protecting interests of persons with

¹⁵⁰ Minor accommodations may include accessible information, giving additional time to make a decision, and the like whereas robust formal measure include nominating supporter or facilitator to assist the person with cognitive or psychosocial disability in the process of decision-making.

¹⁵¹ In some circumstances, it may appear that an individual lacks the capacity necessary to make certain choices, particularly those that are complex and/or give rise to potentially grave outcomes. The Mental Capacity Act 2005 of U.K. is a legal framework applicable in such doubting circumstances.

¹⁵² The United Mexican State emphasized that in case of conflict between the CRPD and national legislations, the one which accords the greatest legal protection shall apply. Available at http://www.bayefsky.com/html/mexico_t2_disability.php. Canada’s reservation reads as “Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law.” Available at http://www.bayefsky.com/html/canada_t2_disability.php In addition, Estonia, France and Poland have entered a declaration to Article 12 of the CRPD. Available at <http://fra.europa.eu/en/publication/2014/indicators-right-political-participation-people-disabilities/art-12-CRPD>.

¹⁵³ UNCRPD General Comment No. 1, para. 21.

¹⁵⁴ UNCRPD General Comment No. 1, para. 22.

mental and/or intellectual disabilities through substituted decision-making. There is however no practical move available to ensure supported decision-making. Therefore, it is recommended for a new and holistic movement to legislate mental health law in line with supported decision-making. It needs also to study model(s) of support practices and apply the one that best serves the needs of persons with mental and/or intellectual disabilities in the country.

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