

THE IMPLICATIONS OF ARTICLE 12 OF THE CONVENTION ON THE RIGHT OF PERSONS WITH DISABILITIES FOR THE LEGAL CAPACITY OF PERSONS WITH PSYCHOSOCIAL AND INTELLECTUAL DISABILITIES IN ETHIOPIA

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Summary

Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD) requires state parties to recognise the right to legal capacity of persons with disabilities in its fullest sense. Historically, persons with disabilities have been denied their right to legal capacity. Various states at different times declared persons with psychosocial disabilities, intellectual disabilities, communicative barriers, and in some cases, physical disabilities as legally incapable.¹ As a result, the fate of persons with disabilities has been decided either by their relatives or formally appointed guardians. This is the lived reality of persons with intellectual and psychosocial disabilities in many countries including Ethiopia even after the CRPD came into force. This article scrutinises the implications of article 12 of the CRPD for the right to legal capacity of persons with intellectual and psychosocial disabilities in Ethiopia.

1 Introduction

Making decisions about one's own affairs is central to a person's autonomy and is at the core of personhood.² It is a vital component that enables an individual to have a say over his/her life and take part in society.³ Legal

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1 W Holness 'Equal recognition and legal capacity for persons with disabilities: Incorporating the principle of proportionality' (2014) 30 *South African Journal on Human Rights: Disability* 313-314.

2 S Pathare & LS Shields 'Supported decision-making for persons with mental illness: A review' (2012) 34 *Public Health Reviews* 1.

3 Pathare & Shields (n 2 above).

capacity is the concept that refers to power of persons to make legally recognised decisions. Without legal capacity, an individual is not considered as a person in the eyes of the law.⁴ Hence his/her decisions have no legal effect. Consequently, a person who is stripped of legal capacity cannot perform day to day activities like opening and maintaining a bank account, buying or selling property, renting accommodation, and so forth.

In many states, persons with disabilities particularly persons with psychosocial and intellectual disabilities have been denied legal capacity.⁵ Recently, the United Nations Convention on the Rights of Persons with Disabilities (CRPD) has introduced a new paradigm by fully recognising the right to legal capacity of persons with disabilities. The CRPD requires states parties to recognise persons with disabilities' right to enjoy legal capacity on an equal basis with others in all aspects of life.⁶

Although Ethiopia signed the CRPD on 30 March 2007 and ratified it on 7 July 2010,⁷ it did not adopt legal reforms to recognise the right to legal capacity of persons with disabilities. As a result, persons with disabilities (particularly persons with intellectual and psychosocial disabilities) are denied their right to legal capacity. This article examines how the right to legal capacity of persons with intellectual and psychosocial disabilities is addressed under the Ethiopian legal system. It discusses the implications of article 12 of the CRPD for the right to legal capacity of persons with psychosocial disabilities⁸ and persons with intellectual disabilities⁹ in Ethiopia. It commences by shedding light on how legal capacity is understood in the context of human rights. It then discusses the right to legal capacity of persons with disabilities, in particular persons with intellectual and psychosocial disabilities as envisaged by the CRPD. After discussing the right to legal capacity of persons with intellectual and

4 European Commissioner for Human Rights 'Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities' (2012) https://www.coe.int/t/commissioner/source/.../IP_LegalCapacity_GBR.pdf (accessed 21 March 2015).

5 CRPD Committee General Comment 1: Article 12: Equal recognition before the law (2014) UN Doc CRPD/C/GC/1 dated 19 May 2014 paras 7 and 9.

6 Art 12(2) of the CRPD.

7 See art 3 of the CRPD Ratification Proclamation, Proclamation No 676/2010.

8 Persons with psychosocial disabilities are: Persons who define themselves as: users or consumers of mental health services; survivors of psychiatry; people who experience mood swings, fear, voices or visions; mad; people experiencing mental health problems, issues or crises. See World Network of Users and Survivors of Psychiatry 'Psychosocial disability' (2012) http://www.wnusp.net/documents/2012/Psychosocial_disability.docx (accessed 20 August 2015).

9 Intellectual disability, also known as developmental delay or mental retardation, can be understood as a disability characterised by significant limitations in both intellectual functioning and in adaptive behaviour, which covers many everyday social and practical skills and originates at birth or before the age of 18. See M Bach & L Kerzner 'A new paradigm for protecting autonomy and the right to legal capacity' (2010) 15-16 <http://www.lco-cdo.org/disabilities/bach-kerzner.pdf> (accessed 5 June 2015).

psychosocial disabilities under the Ethiopian legal system, the article ends with a conclusion and recommendations.

2 Understanding legal capacity in the context of human rights

Legal capacity is the concept that refers to a person's power to act within the framework of a legal system.¹⁰ According to the UN Office of High Commissioner for Human Rights (OHCHR), 'legal capacity' is defined as:¹¹ 'The capacity and power to exercise rights and undertake obligations by way of one's own conduct, ie without assistance of representation by a third party.'

According to the Committee on the Rights of Persons with Disabilities (CRPD Committee), 'legal capacity' is 'the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency)'.¹² In the words of the Centre for Disability Law and Policy (CDLP), 'legal capacity' is an 'individuals' right to make decisions – big and small – for him/her self and have those decisions respected'.¹³ As it can be deduced from the above definitions, 'legal capacity' is the legally recognised power of individuals to make decisions about their own affairs and engage in day-to-day activities.

Legal capacity facilitates personal freedom by allowing persons to manage their own property, family, and other individual affairs. According to Quinn, the exercise of legal capacity serves as both a sword and a shield. Used as a sword, it reflects an individual's right to make decisions for himself/herself and to have those decisions respected by others.¹⁴ Used as a shield, legal capacity is the power of the individual to protect himself/herself from other persons' unnecessary intervention.¹⁵

10 See European Commissioner for Human Rights (n 4 above).

11 See OHCHR *Background conference document on legal capacity* para 24 <http://www.un.org/esa/socdev/enable/rights/.../ahc6ohchrlegalcap.doc> (accessed 22 March 2015).

12 CRPD Committee (n 5 above) para 13.

13 Centre for Disability Law & Policy (CDLP), NIU Galway *Submission on legal capacity to the Oireachtas Committee on Justice, Defence & Equality* 9 http://www.nuigalway.ie/cdlp/documents/cdlp-submissionon-legalcapacitythe-oireachtascommitteeonjustice-defenceandequality_.pdf (accessed 20 August 2015).

14 G Quinn 'Rethinking personhood: New directions in legal capacity law & policy' (2011) 7-10 http://www.cic.arts.ubc.ca/files/.../Gerard_Quinn_s_Keynote_-_April_29_2011.pdf (accessed 30 June 2015).

15 Quinn (n 14 above).

History reveals that denying persons with disabilities legal capacity is a phenomenon that has been around for a long time. For instance, under the law of ancient Rome, both mental and physical impairments such as blindness and muteness resulted in denial of active legal capacity.¹⁶ The trend of depriving persons with disabilities of legal capacity has also continued under modern law, especially for persons with psychosocial and intellectual disabilities.¹⁷ Various approaches have been adopted to assess capacity of persons with disabilities to confer legal capacity. The widely recognised approaches to legal capacity are highlighted below as follows.

2.1 The status approach

The 'status approach' assesses a person's capacity based on disability instead of person's capacity in relation to a particular decision taken at a particular time.¹⁸ It assumes that a person lacks legal capacity if he/she has a disability.¹⁹

This approach is flawed since it determines an individual's capacity to make decisions simply on the basis of a medical diagnosis. It has also faced serious criticism and has been rejected in many jurisdictions on the ground that it perpetuates the existing stereotyping against persons with intellectual and psychosocial disabilities.²⁰

2.2 The outcome approach

The 'outcome approach' assesses the consequences of the individual's decision to confer legal capacity.²¹ It is based on the belief that individuals should lose legal capacity if they make unreasonable decisions.²² In other words, a person who makes a decision that reflects values which are not acceptable in society or which rejects accepted values is likely to be denied legal capacity.²³

16 I Hoffman & G Könczei 'Legal regulations relating to the passive and active legal capacity of persons with intellectual and psychosocial disabilities in light of the Convention on the Rights of Persons with Disabilities and the impending reform of the Hungarian Civil Code' (2010) 33 *Journal of Loyola of Los Angeles International and Comparative Law Review* 153.

17 CRPD Committee (n 5 above) paras 7 and 9.

18 *Accessed on April 29, 2011.pdf* (CRPD Committee (n 5 above) para 15; Ireland: The Law Reform Commission 'Consultation paper on vulnerable adults and the law: Capacity' (2005) 45 www.lawreform.ie/_.../Consultation%20Paper%20on%20Capacity.pdf (accessed 27 August 2015).

19 CDLP (n 13 above) 10; A Dhanda 'Legal capacity in the disability rights convention: Stranglehold of the past or lodestar for the future?' (2007) 34 *Syracuse Journal of International Law & Commerce Syracuse University* 429-431.

20 Ireland: The Law Reform Commission (n 18 above).

21 CRPD Committee (n 5 above) para 15; Ireland the Law Reform Commission (n 18 above) 48.

22 CDLP (n 13 above) 10.

23 Ireland: The Law Reform Commission (n 18 above).

The fallacious nature of this approach lies in the fact that the concept of ‘reasonableness’ is vague and subjective. Even if the individual may benefit from what he/she decided, the individual loses his/her legal capacity according to this approach for the mere fact that the decision of the individual is not accepted by other persons or the society.²⁴

2.3 The functional approach

The ‘functional approach’ also known as the ‘continuum’ approach looks at both mental impairment and a test whether the individual can understand the nature and consequences of his/her decision to confer legal capacity.²⁵ Unlike the status approach and the outcome approach, the functional approach presumes that a person has capacity unless proven otherwise.²⁶ This approach recognises that if a person lacks legal capacity in relation to one decision, it does not necessarily mean that he/she lacks legal capacity in relation to all decisions.²⁷ Consequently, under this approach individuals’ capacity is assessed on a case-by-case basis.

The discriminatory nature of this approach lies in the fact that it takes the presence of impairment or disability as a threshold condition and only persons with such conditions run the risk of losing their legal capacity.²⁸ This approach also has the potential of denying persons with disabilities legal capacity based on equivocal assessment of mental capacity.²⁹

2.4 The universal approach

The ‘universal approach’ is a very recent approach hailed by disability-right activists. It views legal capacity as a universal human attribute, which is possessed by all persons.³⁰ Unlike the above three approaches, this approach separates legal capacity from mental capacity. It regards legal capacity as a social and legal status that stands irrespective of an individual’s particular mental capacity and that does not reflect an individual’s ability to make decisions.³¹

24 Mental Disability Advocacy Center (MDAC) ‘Legal capacity in Europe: A call to action to governments and the EU’ (2013) 19 http://www.mdac.info/sites/mdac.info/files/legal_capacity_in_europe.pdf (accessed 17 March 2015).

25 MDAC (n 24 above); CRPD Committee (n 5 above) para 15; European Commissioner for Human Rights (n 4 above) 15; Dhanda (n 19 above).

26 CDLP (n 22 above).

27 Ireland: The Law Reform Commission (n 18 above) 49.

28 CRPD Committee (n 5 above) para 14.

29 As above.

30 M Browning et al ‘Supported decision making: Understanding how its conceptual link to legal capacity is influencing the development of practice’ (2014) 1 *Journal of Research and Practice in Intellectual and Developmental Disabilities* 34 38-39 http://www.supporteddecisionmaking.org/sites/default/.../browning_et_al_2014.pdf (accessed 30 August 2015).

31 Browning et al (n 30 above).

According to the universal approach, legal capacity is understood as a tool that reflects an individual's right to make decisions and have those decisions respected.³² Viewing legal capacity from the human-rights perspective, the universal approach would hope to counter the prevalent underestimation of abilities of persons with psychosocial, intellectual and other cognitive disabilities.³³

3 The right to legal capacity of persons with intellectual and psychosocial disabilities as envisaged by the CRPD

Although the right to recognition as a person before the law is guaranteed by the Universal Declaration of Human Rights (Universal Declaration) and the International Covenant on Civil and Political Rights (ICCPR) to all persons,³⁴ these human-right instruments did not explicitly recognise the right to legal capacity. The CRPD is the first of its kind to recognise the right to legal capacity of persons with disabilities. Article 12 of the CRPD is perhaps the most revolutionary provision of the CRPD. It has introduced a paradigm shift by recognising the right to legal capacity of persons with disabilities in the fullest sense.

Article 12(1) of the CRPD provides that: 'States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.' Article 12(2) of the CRPD provides that: 'States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.'³⁵ Although the CRPD does not define the concept of legal capacity, the CRPD Committee in its general comment 1 focussing on article 12 has given a detailed explanation in this regard.

As per the interpretation of the Committee, legal capacity as enshrined in the CRPD encompasses two strands of capacities.³⁶ The first capacity is a person's capacity to be a holder of rights. This component of legal capacity entitles a person to full protection of his or her rights by the legal

32 L Kerzner 'Paving the way to full realization of the CRPD's rights to legal capacity and supported decision-making: A Canadian perspective' (2011) 8-9 http://www.supporteddecisionmaking.org/.../paving_the_way_for_crpd_canada.pdf (accessed 4 October 2015).

33 Browning et al (n 30 above).

34 See art 6 of the Universal Declaration and art 16 of the ICCPR.

35 Similarly, art 8 of the Protocol to the African Charter on Human and Peoples' Right on the Rights of Persons with Disabilities fully recognises the right to legal capacity of persons with disabilities and equal recognition before the law. Article 8(1) of this Protocol reads: 'Every person with a disability has the right to legal capacity.' Article 8(2) also provides: 'States Parties shall recognise that persons with disabilities are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.'

36 CRPD Committee (n 5 above) paras 12 and 14.

system.³⁷ Accordingly, having a birth certificate, seeking medical assistance, registering to be on the electoral roll or applying for a passport are some of the rights that flow from this strand of legal capacity. The second component of legal capacity is the capacity to act under the law. This aspect of legal capacity recognises a person as an agent with the power to enter into, modify or end juridical acts such as contracts and marriage among others.³⁸ It deals with exercising rights or entitlements. In many states, persons with intellectual and psychosocial disabilities are denied this component of legal capacity.³⁹ For operative legal capacity to exist, both components of legal capacity should be respected for individuals.⁴⁰ The CRPD Committee accentuated that legal capacity is an inherent right of persons. It vividly underscored that all people, including persons with disabilities, have legal standing and legal agency simply by virtue of being human.⁴¹

Traditionally, legal capacity is linked with mental capacity. In many jurisdictions including Ethiopia, individuals enjoy legal capacity as long as they are deemed to be mentally capable. The CRPD is a ground-breaking Convention in that it dissects the concept of legal capacity from mental capacity. As the CRPD Committee noted, legal capacity is all about ability to hold rights and duties as well as to exercise those rights and duties,⁴² whereas mental capacity refers to decision-making skills of a person.⁴³ Having noted that mental capacity naturally differs from one person to another and may even be different for a given individual depending on environmental, social and other factors, the Committee underscored that perceived or actual deficits in mental capacity should not be used as justification for denying legal capacity.⁴⁴ By adopting this approach, the Committee endorsed the universal approach to legal capacity which values notions of dignity and equality on which the CRPD is founded. This necessitates that state parties to the CRPD replace traditional approaches to legal capacity with the universal approach to legal capacity.

4 Right to access support to exercise legal capacity

One of the main criteria used to deprive persons with intellectual and psychosocial disabilities of the right to legal capacity is that a person should understand the nature and consequences of his/her decisions, understand all available options in any particular situation, and voluntarily

37 As above.

38 As above.

39 CRPD Committee (n 5 above) para 14.

40 CRPD Committee (n 5 above) paras 12 and 14.

41 As above.

42 CRPD Committee (n 5 above) para 13.

43 CRPD Committee (n 5 above) para 14.

44 As above.

make and communicate a clear choice.⁴⁵ This criterion is shaped by the medical model of disability.

The medical model of disability considers disability as a health problem. It perceives disability as an illness which is intrinsic to the individual.⁴⁶ Consequently, it assumes that both problems and solutions of disability lie within people with disabilities themselves rather than within society.⁴⁷ This model of disability has faced serious criticism on the ground that it results in a disabling culture that perpetuates negative attitudes and discriminatory practices which eventually result in exclusion of persons with disabilities.⁴⁸

Conversely, the social model of disability attributes the cause of disability in the social environment and views disability as a social construct.⁴⁹ Proponents of this model consider disability as a form of oppression, whereby social structures and practices are viewed as disabling, rather than the individual being seen as disabled.⁵⁰ This model radically shifts the focus from cure, treatment, care and protection to acceptance of impairment as a positive aspect of human diversity as well as to the problematisation and rejection of a social norm that results in exclusion.⁵¹

On the other hand, the human-rights model of disability approaches disability from the point of view of human rights. It focuses on the inherent dignity of the human being and considers the person's medical characteristics only if necessary.⁵² It puts the person at the centre in all decisions affecting him/her.⁵³ According to this model, the problem of disability stems from a lack of responsiveness by the state to the difference

45 M Bach 'The right to legal capacity under the UN Convention on the Rights of Persons with Disabilities: Key concepts and directions from law reform' (2009) <https://irisinstitute.files.wordpress.com/.../the-right-to-legal-capacity-unde...> (accessed 20 August 2015).

46 G Quinn et al *The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 14-15; M Kemple et al 'Shaping disability rights through shaping the disability movement' (2011) 3 *Journal of Human Right Practice* 356-358; M Retief & R Letšosa 'Models of disability: A brief overview' (2018) 74 *HTS Teologiese Studies/Theological Studies* <https://www.ajol.info/index.php/hts/article/view/177914/167285> (accessed 15 September 2019). See also Disabled World 'Definitions of the models of disability' <https://www.disabled-world.com/definitions/disability-models.php> (accessed 16 September 2019).

47 Kemple et al (n 46 above); Disabled World (n 46 above); Quinn et al (n 46 above); Retief and Letšosa (n 46 above).

48 T Degener 'A human rights model of disability' (2014) 3-5 https://www.researchgate.net/publication/283713863_A_human_rights_model_of_disability/link/5644463208aef646e6ca7886/download (accessed 15 September 2019).

49 Disabled World (n 46 above); Quinn et al (n 46 above); Retief and Letšosa (n 46 above); Kemple et al (n 46 above).

50 Kemple et al (n 46 above); Retief and Letšosa (n 46 above); Quinn et al (n 46 above); Disabled World (n 46 above).

51 T Degener 'Disability in a human rights context' (2016) *Laws* 5 <https://www.mdpi.com/2075-471X/5/3/35/htm> (accessed 8 October 2019).

52 Degener (n 48 above) 6- 7; Quinn et al (n 46 above).

53 Degener (n 52 above); Quinn et al (n 46 above).

that disability represents.⁵⁴ Consequently, proponents of this model insist that the state has the responsibility to tackle social barriers to ensure full respect for the dignity and equal rights of all persons.⁵⁵

Unlike the medical model of disability, the human-rights and social models of disability played a significant role in shaping the CRPD.⁵⁶ Each provision of the CRPD reflects either of the two or both models. This is especially the case for article 12 of the CRPD. Article 12 on the one hand recognises the right to legal capacity of persons with disabilities from a human-rights point of view. On the other hand, considering environmental and social barriers persons with disabilities, in particular persons with intellectual and psychosocial disabilities may face, it obliges state parties to provide persons with disabilities with support they need to exercise legal capacity.⁵⁷ Consequently, states can no more deny persons with disabilities legal capacity on the ground that they cannot understand the consequence of their decisions or cannot communicate their decisions. Rather, they should provide support to enable them to exercise their legal capacity. This implies that Ethiopia, as a state party to the CRPD, has to remove substitute decision-making and put in place mechanisms to provide persons with intellectual and psychosocial disabilities with support that enables them to exercise their legal capacity.

The CRPD does not provide the form and type of support needed for persons with disabilities to exercise their legal capacity. However, the CRPD Committee elucidated that ‘support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making’.⁵⁸

Supported decision-making is a process of decision-making that is directed by an individual and also involves persons who can assist him/her with full respect of the individual’s autonomy.⁵⁹ Under the system of supported decision-making, a person who cannot make decisions under normal circumstances may be able to make his/her own decisions with the help of other persons and exercise legal capacity.⁶⁰

The support envisaged by the CRPD refers to the provision of any type of assistance to persons with disabilities that helps them make decisions, express their will, or communicate their personal identity to potential

54 As above.

55 Degener (n 52 above).

56 As above.

57 Art 12(3) of the CRPD.

58 CRPD Committee (n 5 above) para 17.

59 Kerzner (n 32 above).

60 United Nations *From exclusion to equality – Realizing the rights of persons with disabilities* (2007) <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex> (accessed 22 June 2015); R Dinerstein ‘Supported decision making for people with intellectual disability: An alternative to guardianship’ (2014) 2 <http://www.rwjms.rutgers.edu/boggscenter/dd.../DinersteinAMpacket4-4-14.pdf> (accessed 1 October 2015).

parties to a legal arrangement.⁶¹ It encompasses informal and formal support arrangements of different types and intensity.⁶² Informal assistance of family and friends in making daily decisions, individualised plain language assistance, assisted/adaptive communication and visual aids are some forms of support that can enhance exercise of legal capacity.⁶³

To date, there is no a single model of supported decision-making system in the world. Different models of supported decision-making are practiced in various states. In this regard, the Swedish practice is one of the notable supported decision-making models.

The Swedish supported decision-making is known as the ‘personligt ombud’ (personal ombudsman) support model. It is a system by which an individual who seeks support to exercise legal capacity is assisted by a personal ombudsman (PO/ombudsman).⁶⁴ A personal ombudsman is a professional (most of the time a person who has a social work or legal background) who works for the individual taking into consideration the will and preferences of the individual as opposed to perceived best interests.⁶⁵ The personal ombudsman in no case has a link with entities like psychiatrist, social services, any other authority, with the client’s relatives or any other person in his/her surroundings.⁶⁶ All municipalities run their own personal ombudsman system which is also linked to the national programme.⁶⁷ While POs are funded by municipalities, they are usually hired through NGOs in order to minimise potential conflicts of interest which may arise especially when individuals want to make a complaint against the municipality.⁶⁸ In this system clients control all the information provided to the personal ombudsman, and confidentiality is of a paramount importance.⁶⁹ The ombudsman is required to return all personal documents to the client or destroy it in the client’s presence when the relationship between a client and personal ombudsman comes to an end.⁷⁰ Building a relationship of trust with the client and identifying the client’s needs may be time-taking, but the ombudsman should be patient,

61 Bach (n 45 above) 12.

62 CRPD Committee (n 5 above) para 17.

63 Bach (n 45 above) 12.

64 CDLP (n 13 above) appendix 3.

65 CDLP (n 13 above) appendix 3; M Jespersen ‘A service which offers supported self-decision making for persons with severe psychosocial disability’ <https://europe.ohchr.org/EN/Stories/Documents/MathsJespersen.pdf> (accessed 10 September 2019).

66 CDLP (n 13 above) appendix 3; Jespersen (n 65 above)

67 As above.

68 As above.

69 CDLP (n 13 above) appendix 3; Jespersen (n 65 above); L Salzman ‘Guardianship for persons with mental illness – A legal and appropriate alternative?’ (2011) 4 *Saint Louis University Journal of Health Law and Policy* 306-310 http://supporteddecisionmaking.org/sites/default/files/guardianship_for_persons_with_mi.pdf (accessed 14 October 2015).

70 CDLP (n 13 above) appendix 3; Jespersen (n 65 above); Salzman (n 69 above).

even in the situation his/her client's life is chaotic.⁷¹ This type of support has been successful in helping even persons with severe mental/intellectual impairment. Absence of bureaucratic procedure to get a personal ombudsman, flexibility of an ombudsman's working hours, the readiness of an ombudsman to support the client in a number of matters are some of the characteristics that contributed to the success of the personal ombudsman model of supported decision-making system.⁷²

This is a typical model of supported decision-making that empowers persons with intellectual and psychosocial disabilities by respecting their will and preferences and providing the support needed irrespective of their mental capacity. The Swedish experience is an indication of the possibility of realising the right to legal capacity of persons with intellectual and psychosocial disabilities using the system of supported decision-making. This model of supported decision-making not only enhances the decision-making capacity of persons with intellectual and psychosocial disabilities, but also reduces the numbers of inpatient hospital stays, which in turn reduces state expenditure in mental health.⁷³

Article 12(4) of the CRPD requires state parties to ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse. As the CRPD Committee noted, the primary purpose of the safeguards should be to ensure the respect of the person's rights, will and preferences.⁷⁴ If it is not possible to determine the will and preferences of an individual despite a significant attempt, the Committee stipulated that the principle of 'best interpretation of will and preferences' should be applied instead of the principle of 'best interests'.⁷⁵ The Committee rejected the principle of 'best interests' on the ground that this principle is not a safeguard which complies with article 12 in relation to adults.⁷⁶ However, in real life it may not always be possible to determine the will and preferences of persons. Even in the presence of support, persons with severe impairment in some circumstances may not be able to express their will and preferences. It may also not be possible to infer their will and preferences from their previous actions or by asking their affiliates. The Committee did not explain what should be done in such circumstances. The question that begs to be answered in relation to the Committee's interpretation of article 12 is whether support envisaged by article 12 of the CRPD is the perfect solution to enable persons with disabilities, particularly persons with severe impairment, to exercise their legal capacity in all circumstances. Studies show that decision-making capacity differs among persons with disabilities

71 CDLP (n 13 above) appendix 3; Jespersen (n 65 above); Salzman (n 69 above).

72 As above.

73 CDLP (n 13 above) appendix 3.

74 CRPD Committee (n 5 above) para 20.

75 CRPD Committee (n 5 above) para 21.

76 As above.

depending on severity of impairment.⁷⁷ However, it seems clear that there are some situations such as a state of coma or case of a non-verbal profound intellectual disability where individuals cannot make decisions or communicate their decisions even in the presence of support.⁷⁸ If this is the case, at least some persons with disabilities may run the risk of abuse in situations when their will and preferences cannot be determined. Another concern is that the Committee's General Comment is silent on safeguards that should be taken during the transition from a system of substitute decision-making to a supported decision-making system. As per interpretation of the Committee, regimes permitting substitute decision-making cannot continue in parallel with the gradual implementation of new supported decision-making models even if these systems have not been fully developed. However, a newly adopted supported decision-making system may not adequately address the needs of persons with intellectual and psychosocial disabilities and may have adverse effects for the rights of these persons especially if it fails to work effectively as intended. In the absence of a gap-filling tool in these circumstances, persons with intellectual and psychosocial disabilities may run the risk of a violation of their rights.

Although Article 12(4) seems to allow room for substituted decision-making, at least where it is necessary to prevent 'abuse' and where it is 'proportional and tailored to the person's circumstances', the CRPD Committee underlined that article 12 of the CRPD does not leave any room for substitute decision-making. Given the abovementioned potential problems that may arise in exercising legal capacity in the framework of supported decision-making, absolute rejection of the principle of 'best interests' may hinder protection of rights of persons with disabilities. As state parties have an obligation to respect the right to legal capacity, they also have an obligation to protect other rights of persons with disabilities. Arguably, considering respect for legal capacity as being absolute and not considering the best interests of the person in some cases leads to inconsistency with other provisions of the CRPD. A good example is a situation where a person with severe impairment in need of serious medical treatment could not decide on medical treatment even in the presence of support as a result of diminished mental capacity. Obviously, states' failure to provide treatment in such serious conditions would be in conflict with article 25 of the CRPD which requires states parties to recognise persons with disabilities' right to the enjoyment of the highest attainable standard of health without discrimination on the basis of

77 K Villar 'Should supported decision-making replace substituted decision-making? The Convention on the Rights of Persons with Disabilities and coercive treatment under Queensland's Mental Health Act 2000' (2015) 4 *Journal of Laws MDPI* 193 <http://www.mdpi.com/2075-471X/4/2/173/notes> (accessed 20 October 2015).

78 G Szmukler et al 'Mental health law and the UN Convention on the rights of persons with disabilities' (2014) 37 *International Journal of Law and Psychiatry* 245 252 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4024199/> (accessed 13 September 2019); Villar (n 77 above).

disability and article 10 of the CRPD which requires state parties to take all necessary measures to ensure effective enjoyment of the right to life by persons with disabilities, especially if life of such persons is jeopardised owing to lack of medical treatment.⁷⁹ Similarly, the states' failure to take necessary measures to ensure the protection and safety of persons with severe impairment in situations of risk, when such person could not give his/her consent to emergency measures even in the presence of support would be in conflict with the states' obligation to take measures to ensure the protection and safety of persons with disabilities in situations of risk.⁸⁰ Given the fact that addressing the abovementioned and other similar cases requires considering the best interests of the person, it would be difficult for state parties to harmonise the Committee's interpretation with their obligations arising from other provisions of the CRPD.

Moreover, since article 12 does not leave any room for substitute decision-making it is not clear from a reading of the provision whether this interpretation may be welcomed by the state parties. Even before the Committee's controversial interpretation of article 12, a number of state parties including Australia,⁸¹ Canada,⁸² Estonia, Ireland and Egypt have

79 In this regard, Dawson noted that: Involuntary psychiatric treatment, for instance, could both limit a person's autonomy and promote their social inclusion, health and standard of living. Would it therefore violate or promote the person's rights under the Convention as a whole? In many legal systems, a key concept in settling the balance between these competing imperatives or rights is that of capacity (or competence) on the part of the person to take the necessary action or make the relevant decision. If they have the capacity to decide on their own need for treatment, for example, it would usually violate their right to autonomy and integrity to impose treatment without their consent, even if the treatment proposed would assist their health or promote their social inclusion. The balance between those different interests would be for them to decide. If they lacked the capacity to make the relevant decision, on the other hand, the state would have the power (and often the duty) to intervene, to promote their positive entitlements, even if that might require their involuntary treatment. See J Dawson 'A realistic approach to assessing mental health laws' compliance with the UNCRPD' (2015) 40 *International Journal of Law and Psychiatry* 70 <http://dx.doi.org/10.1016/j.ijlp.2015.04.003> (accessed 14 September 2019).

80 Art 11 of the CRPD.

81 Australia also noted in its Initial Report to the CRPD Committee that: 'Australia strongly supports the right of persons with disabilities to legal capacity. In some cases, persons with cognitive or decision-making disabilities may require support in exercising that capacity. In Australia, substituted decision-making will only be used as a measure of last resort where such arrangements are considered necessary, and are subject to safeguards in accordance with article 12(4).' See Australia's Initial Report under the Convention on the Rights of Persons with Disabilities (3 December 2010) para 55 <https://www2.ohchr.org › CRPD › futuresession › CRPD.C.AUS.1-ENG.doc> (accessed 11 November 2019).

82 Canada also noted in its report that: 'Canada strongly supports the equal recognition of persons with disabilities as persons before the law. As with other members of society, a determination of incapacity should only be based on evidence of the individual's actual decision-making ability, rather than on the existence of a disability. Anyone who requires support in exercising their legal capacity should have access to the support required to do so, subject to appropriate regulation and safeguards. Canada's interpretative declaration and reservations in relation to Article 12 set out Canada's understanding of its obligations under the article. All P/Ts have in place laws related to substitute and/or supported decision-making with safeguards to protect against abuse.' See Canada's Initial Report to the CRPD Committee CRPD/C/CAN/1 (7 July 2015) paras 33 and 34.

already entered declarations and reservations in relation to article 12 of the CRPD, foreseeing the potential difficulties that may arise from interpretation of this article.⁸³ Reports of many state parties on the same subject also imply that the state parties' understanding of article 12(4) is not consistent with interpretation of the CRPD Committee.⁸⁴

In a nutshell, although the interpretation by the Committee can play a great role in abolishing entrenched substitute decision-making systems, it may also have unintended adverse effects for persons with disabilities in some circumstances.

5 The right to legal capacity of persons with psychosocial and intellectual disabilities under the Ethiopian legal system

5.1 The right to legal capacity of persons with intellectual and psychosocial disabilities under the Constitution

The Constitution of the Federal Democratic Republic of Ethiopia (hereinafter the FDRE Constitution) allocated one-third of its provisions to a bill of rights. The FDRE Constitution under its third chapter has enshrined many of the rights recognised under the Universal Declaration; ICCPR; International Covenant on Economic, Social and Cultural Rights; and other human-rights treaties. Yet, it did not explicitly incorporate the right to legal capacity. However, some provisions of the Constitution can be interpreted to include this right. Article 24(3) of the FDRE Constitution stipulates that: 'Everyone has the right to recognition everywhere as a person'. Article 25 of the FDRE Constitution also provides that:⁸⁵

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status.

From the above provision, it can be deduced that the right to equality before the law and equal protection before the law have been incorporated in the Constitution. Furthermore, the Constitution prohibits discrimination based on the abovementioned and other unstated grounds.

83 All reservations and declarations to the CRPD are available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4#EndDec (accessed 11 September 2019).

84 See for instance State party reports of Sweden, CRPD/C/SWE/1 (18 September 2012) paras 137, 140; Denmark: CRPD/C/DNK/1 (7 May 2013) paras 129-132; New Zealand: CRPD/C/NZL/1 (1 October 2013) paras 67-69, 83-89.

85 Art 25 of the 1995 FDRE Constitution.

Nonetheless, the Constitution does not provide disability as one of prohibited grounds of discrimination.

For various reasons, persons with disabilities face discrimination for the mere fact that they have a disability.⁸⁶ Explicitly identifying disability as one of prohibited grounds of discrimination is one way of ensuring visibility of persons with disabilities. Failure to provide disability as one of the prohibited grounds of discrimination in the Constitution has negative implications for subsidiary legislation and policies adopted by the state. Consequently, the fact that the FDRE Constitution did not recognise disability as one of prohibited grounds of discrimination has adverse implications for the protection and promotion of the rights of persons with disabilities in Ethiopia. In this regard, disability-right activists and advocates in Ethiopia have to put pressure on the Government of Ethiopia so that the Constitution is amended in a way that explicitly recognises disability as a prohibited ground of discrimination as this has direct relevance for the realisation of rights of persons with disabilities in Ethiopia.

Notwithstanding this, the above provisions of the FDRE Constitution can be interpreted to protect the right to legal capacity of persons with disabilities, particularly persons with intellectual and psychosocial disabilities. The phrase 'other status' which concludes the list of prohibited grounds of discrimination provided under article 25 indicates that the list is not exhaustive. As the purpose of this provision of the Constitution is to ensure equal protection of individuals rights and prohibition of discrimination, other grounds on which persons face discrimination like disability can be covered by the phrase 'other status'.⁸⁷ In the case *Wesen v Amhara National Regional State Justice Professional Training and Legal Research Institute*, the House of the Federation⁸⁸ implied disability as one of prohibited grounds of discrimination recognised by article 25 of the FDRE Constitution. The House of the Federation held that the practice prohibiting visually impaired persons from being recruited to serve as a judge amounts to discrimination on the ground of disability and contravenes inter alia, article 25 of the Constitution.⁸⁹

86 A Lawson 'The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn?' (2007) 34 *Syracuse Journal of International Law & Commerce* 563-565; UN (n 73? above) 1.

87 In one of its notable decisions, the African Commission on Human and Peoples' Rights (the African Commission) interpreted the phrase 'other status' to cover disability and held that the practice of detaining persons regarded as mentally ill indefinitely and without due process constitutes discrimination on the ground of disability and is in violation of article 2 of the African Charter on Human and Peoples' Rights which prohibits discrimination on different grounds. See *Purohit v The Gambia* (2003) AHRLR 96 (ACHPR 2003) paras 54 and 85.

88 The House of the Federation is the only organ with a mandate of interpreting the Constitution in Ethiopia. See art 62(1) of the FDRE Constitution.

89 See decision of the House of the Federation (2 September 2016) on Application No 019/08 paras 20-23.

Pursuant to article 13(2) of the FDRE Constitution, the fundamental rights and freedoms guaranteed by the Constitution should be interpreted in a manner conforming to the principles of the UDHR and other international instruments adopted by Ethiopia. Among international instruments ratified by Ethiopia, the Convention on the Rights of the Child (CRC)⁹⁰ and CRPD explicitly prohibit discrimination on the ground of disability. Therefore, article 25 should be construed to prohibit discrimination on the ground of disability so that it conforms to the above international conventions. As it will be discussed in the following sections, under the Ethiopian legal system, persons with intellectual and psychosocial disabilities are denied legal capacity on the basis of assessment of mental capacity. Seen in the light of the CRPD, this amounts to discrimination against persons with intellectual and psychosocial disabilities on the ground of disability.

Moreover, as noted by the CRPD Committee, the right to equal recognition before the law implies existence of the right to legal capacity.⁹¹ Law that does not guarantee legal capacity for everyone cannot ensure equal recognition of persons. Hence the right to be recognised as a person enshrined under article 24 of the FDRE Constitution should be construed to imply the right to legal capacity. Based on the above premises, it can be concluded that the right to legal capacity of persons with intellectual and psychosocial disabilities is implicitly guaranteed by the FDRE Constitution.

In addition to the above points, the FDRE Constitution also has a unique feature that enhances protection and promotion of individuals' rights. According to article 9(4) of the FDRE Constitution, international treaties ratified by Ethiopia are an integral part of the law of Ethiopia. In other words, human-right instruments like the CRPD that Ethiopia ratified are considered as one of the laws enacted by Ethiopia.⁹² This approach in the Constitution is helpful to ensure the right to legal capacity of persons with intellectual and psychosocial disabilities.⁹³

In general, the FDRE Constitution does not explicitly address the issue of legal capacity of all persons directly. Had this right been explicitly incorporated in the Constitution, persons at risk of losing this right such as persons with intellectual and psychosocial disabilities could have a better chance to have their rights protected. However, if the Bill of Rights in the Constitution is interpreted in line with international human-rights

90 See Art 2(1) of CRC.

91 CRPD Committee (n 5 above) para 8.

92 S Yeshanew 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (2008) 8 *African Journal of Human Right Law* 285.

93 Although the author does not delve into discussion of The monist-dualist divide as it is beyond the scope of this article, he believes that the fact that international treaties ratified by Ethiopia are an integral part of the law of Ethiopia is clearly discerned from the wording of article 9(4) of the Constitution and is beyond controversy.

instruments to which Ethiopia is a party as envisaged by the FDRE Constitution, the Constitution can effectively be used to protect the right to legal capacity of persons with intellectual and psychosocial disabilities.

5.2 The right to legal capacity of persons with intellectual and psychosocial disabilities under the 1960 Ethiopian Civil Code

The Ethiopian Civil Code has been at the very core of the Ethiopian civil law for more than half a century. It incorporates many legal concepts and institutions of continental European law, amongst others, legal person, family, succession, goods, property, literary and artistic ownership, tort, agency, contract and arbitration.⁹⁴ It is the only Code in Ethiopia that regulates legal personality. The first book of the Civil Code contains the law of persons. The first article of the Code stipulates how legal personality is gained under the Ethiopian legal system. It provides: ‘The human person is the subject of rights from its birth to its death.’⁹⁵ From this provision, it can be inferred that everyone is recognised as a person under the Ethiopian legal system as soon as he/she is born. As noted by Vanderlinden, under the Ethiopian legal system birth is sufficient to confer legal personality.⁹⁶ Consequently, irrespective of disability, persons with disabilities including persons with intellectual and psychosocial disabilities are recognised as persons before Ethiopian law.

With regard to legal capacity, the Ethiopian Civil Code uses the term ‘capacity’ instead of ‘legal capacity’. Although the term ‘capacity’ may refer to either mental capacity or legal capacity depending on the context used,⁹⁷ in the Ethiopian legal system it refers to legal capacity rather than mental capacity. This can be inferred from a reading of article 192 of the Civil Code that provides the rule of legal capacity. This article reads: ‘Every physical person is capable of performing all the acts of civil life unless he is declared incapable by the law.’⁹⁸ According to this provision, every person has capacity to perform any civil act unless he/she is declared incapable by the law. Capacity in this sense is different from mental capacity in that it can be conferred or taken away by the law depending on circumstances. In this respect, the Code provides that incapacity may result from factors like age or mental condition of persons or sentences

94 L Haile ‘A critical analysis of Ethiopian Civil Code: In the light of the core features of Continental European Codification’ unpublished LLM thesis, University of London, 2012 5 http://sas-space.sas.ac.uk/.../1/Liku_Worku_Haile_LLM_ALS_Dissertation.pdf (accessed 30 August 2015).

95 Art 1 of the 1960 Ethiopian Civil Code.

96 J Vanderlinden *Commentaries upon the Ethiopian Civil Code the Law of Physical Persons (Art 1-393)* (1969) 9.

97 For instance, in Canadian legal system, the term ‘capacity’ is generally used to refer the cognitive requisites considered necessary for individuals to be recognised as able to exercise legal capacity. See Back & Kerzner (n 9 above) 16.

98 Art 192 of the Ethiopian Civil Code.

passed on them.⁹⁹ Consequently, under the Ethiopian legal system, regardless of mental capacity one can be incapacitated. Although the Civil Code uses the term ‘capacity’, for the sake of consistency and to avoid confusion, the term ‘legal capacity’ will be used throughout this article.

As it can be discerned from a reading of article 192 of the Civil Code, legal capacity is a rule under the Ethiopian legal system. In other words, everyone is presumed to have legal capacity save in the exceptions. As persons are entitled to their rights the moment they come into existence, they are also capable of exercising their rights.¹⁰⁰ Hence legal capacity is gained at birth unless it is lost in accordance with the law. From the approach taken by the Civil Code, it can be discerned that the Ethiopian Civil Code does not recognise a universal legal capacity as it leaves room where legal capacity of individuals can be stripped by law. This approach of the Ethiopian Civil Code is in stark contradiction with the article 12 of the CRPD which calls for a universal approach to legal capacity. As mentioned elsewhere in this article, the CRPD Committee has plainly underscored the fact that the CRPD leaves no room where legal capacity is lost as a matter of law.

As provided under article 193 of the Civil Code, mental condition is one of the exceptional grounds on which a person can be declared legally incapable. Persons with intellectual and psychosocial disabilities are directly affected by this exception. In the eyes of the Civil Code, persons with intellectual and psychosocial disabilities are regarded as insane. The consequence of insanity is either limited or loss of legal capacity. Article 339 of the Civil Code defines insane person as follows:¹⁰¹

[An] [i]nsane person is one who, as a consequence of his being insufficiently developed or as a consequence of a mental disease or of his senility, is not capable to understand the importance of his actions.

Pursuant to the above article, two cumulative conditions should be present for a person to be considered as insane. First, there should be either insufficient development of the individual¹⁰² or mental disease. While insufficient development is an indication of intellectual impairment,¹⁰³ long lasting mental disease is an indication of mental impairment. Second, the person should be in a condition that he/she cannot understand the consequence/importance of his/her decision due to insufficient development or mental disease. Therefore, the law assesses ability to

99 Art 193 of the Ethiopian Civil Code.

100 Vanderlinden (n 96 above) 59-60.

101 Art 339(1) of the Ethiopian Civil Code.

102 As Vanderlinden noted, insufficient development in context of art 339(1) refers to mental development than physical development. See Vanderlinden (n 96 above) 64-65.

103 Intellectual disability is characterised by diminished cognitive and adaptive development. See Disabled World ‘Cognitive disability: Information on intellectual disabilities’ <http://www.disabled-world.com/disability/types/cognitive/> (accessed 11 October 2015).

understand the importance of one's action by taking impairment as a threshold. Considering the fact that mental/intellectual impairment and a person's inability to understand the importance of his/her actions are elements of the definition of insanity, it can be said on the face value that the Ethiopian legal system follows the functional approach to legal capacity to deny or limit the legal capacity of persons with intellectual and psychosocial disabilities. However, strictly speaking, this is not the case for the reason elaborated below.

Under the Civil Code, there are three different statuses of insanity. The Code adopts different approaches to legal capacity depending on the status of insanity. The first status of insanity is known as notorious insanity. As per the Civil Code, a person is considered to be notoriously insane if he becomes an inmate of a hospital or an institution for insane persons or of a nursing home by reason of his mental condition.¹⁰⁴ Besides, pursuant to article 341(2) of the Civil Code, in a town or rural community of less than 2000 inhabitants, the person is considered to be notoriously insane if the family of that person keep a watch on him and his liberty of moving is restricted by the society as a result of his mental condition.

Persons vilified as notoriously insane have limited legal capacity. The law presumes that the consent of such person is affected by defect which brings about its nullity unless proven otherwise.¹⁰⁵ As a result, juridical acts performed by such persons are subject to invalidation if requested by themselves, their heirs and their representatives.¹⁰⁶ Here it should be emphasised that once individuals are labelled as notoriously insane, they are considered as not understanding the importance of their actions. Although the law refers to elements of a functional approach to legal capacity such as understanding the importance of one's actions, unlike legal systems that follow the functional approach to legal capacity, the Ethiopian Civil Code does not provide grounds on which actual ability of individuals is assessed on a case-by-case basis. Instead, it presumes that notoriously insane persons do not understand the importance of their actions. Consequently, the law assesses capacity based on disability instead of a person's capacity in relation to a particular decision taken at a particular time. Therefore, the Civil Code in actual sense follows the status approach to legal capacity as opposed to the functional approach in this regard.

The second status of insanity is referred by the Code as persons whose insanity is not notorious.¹⁰⁷ In principle, persons who are not notoriously insane are legally capable.¹⁰⁸ Thus juridical acts performed by persons

104 Art 341 of the Ethiopian Civil Code.

105 Art 344 of the Ethiopian Civil Code.

106 Art 343 and 344 of the Ethiopian Civil Code.

107 Art 347 of the Ethiopian Civil Code.

108 See arts 347-349 of the Ethiopian Civil Code.

who are not notoriously insane are not invalidated on the grounds of insanity unless they requested invalidation by proving that at the time of performance of such acts they were not in a condition to give consent free from defects.¹⁰⁹ In this respect, the law provides a possibility by which capacity of individuals can be assessed on a case-by-case basis at the request of the person. The legal capacity of an individual can be restricted only if it can be proved that his/her decision is affected by his/her disability. Hence, the Code employs the functional approach to legal capacity with regard to persons whose insanity is not notorious.

The third status of insanity is judicial interdiction. Under the Civil Code, persons with severe intellectual/mental impairment are declared as judicially interdicted persons.¹¹⁰ Once they are declared as a judicially interdicted person, they will be legally incapable. As a result, the law that applies to minors is applicable to judicially interdicted persons with respect to their person and property.¹¹¹ Consequently, the court appoints a guardian and tutor for judicially interdicted persons.¹¹² A very disappointing side of this law is the fact that persons with intellectual and psychosocial disabilities can be declared as judicially interdicted persons as a result of the application of third persons like heirs, relatives and the public prosecutor.¹¹³ Like notoriously insane persons, persons with intellectual and psychosocial disabilities declared as judicially interdicted are presumed to be incapable of understanding the importance of their actions. The law does not provide a mechanism by which their capacity is assessed in relation to particular action at a particular time. Therefore, strictly speaking, the Code follows the status approach to legal capacity in relation to persons declared as judicially interdicted.

In the Initial state party Report Ethiopia submitted to the CRPD Committee on the implementation of CRPD, the Government of Ethiopia noted:

Legal capacity has nothing to do with disability except in the case of mental disabilities. The restriction of legal capacity on the ground of mental disability is to protect the interest of such a person.¹¹⁴

The Government of Ethiopia is of the view that in order to protect the interest of persons with intellectual and psychosocial disabilities, the right to legal capacity of these persons should be restricted. The CRPD Committee stood against Ethiopia's stand by expressing its concern about situation of persons with intellectual and psychosocial disabilities in

109 Art 347 of the Ethiopian Civil Code.

110 Art 351 of the Ethiopian Civil Code.

111 Art 358 of the Ethiopian Civil Code.

112 Art 359 of the Ethiopian Civil Code.

113 Art 353 of the Ethiopian Civil Code.

114 See Ethiopia's Initial State party Report to CRPD Committee para 58 <https://www.refworld.org/publisher,CRPD,,ETH,57aae13b4,0.html> (accessed 6 October 2019).

Ethiopia in its Concluding Observations on the Initial Report of Ethiopia as follows:¹¹⁵

The Committee is concerned that the legislative provisions of the Civil Code contradict article 12 of the Convention, in particular articles 339-388 and 1728 in chapter 3 ('Insane persons and infirm persons') and chapter 4 (Judicial interdiction), and article 740 of the Commercial Code. 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.

Accordingly, the Committee's recommendation to Ethiopia reads:¹¹⁶

The Committee recommends that the state party repeal the legislative provisions that are non-compliant with article 12 of the Convention, in particular those provisions of the Civil Code (chaps. 3 and 4, arts. 339-388 and 1728) and Commercial Code (art. 740) and all forms of substituted decision-making. It also recommends that the state party explicitly recognize in law the full legal capacity of persons with disabilities with respect to all rights, including the right to marry, to enter into a contract, to vote, to own property, to a family, to carry out banking transactions and to have access to justice, in line with the Committee's general comment No. 1 (2014) on equal recognition before the law.

Although the CRPD Committee properly addressed the right to legal capacity of persons with intellectual and psychosocial disabilities in its Concluding Observations, it failed to directly comment on the erroneous submission of the Ethiopian Government that claims restriction of legal capacity on the ground of mental disability is necessary to protect the interests of persons with mental disabilities. The Committee should have in plain language communicated to the Ethiopian Government that restricting legal capacity of persons on the basis of mental disability is no longer considered as protecting the interests of these persons.

In a nutshell, although the Ethiopian Civil Code recognises the right to legal personality of persons with intellectual and psychosocial disabilities, it restricts the right to legal capacity of persons with intellectual and psychosocial disabilities on the basis of disability. The Ethiopian Civil Code follows traditional approaches to legal capacity that have been rejected by the CRPD. Moreover, it conceptualises disability as a factor embedded in the personality of an individual. Only individual's

115 See Concluding Observation on the Ethiopia's Initial State Party Report on the Implementation of CRPD, CRPD Committee (4 November 2016) UN Doc CRPD/C/ETH/CO/1 (2016) para 25 <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsp2gZdYXWBKA18z%2FSv%2F6lkjIDqI9zs5hd5%2BUAXK5vbPAJ7j6jyrAv5vGf3%2BKDAISC4bHZ89os5fSRy3geaPEuCRLunudv%2BuislMknxs7omG> (accessed 1 September 2019).

116 CRPD Committee (n 115 above) para 26.

impairments such as insufficient development (intellectual impairment, mental disease (mental condition)) are considered by the Civil Code as causes of disability. The Code disregards physical/environmental barriers like societal bias, oppression and discrimination that place persons with intellectual and psychosocial disabilities in a situation in which they cannot understand the importance of their actions. This indicates that the Code follows the medical model of disability which has been rejected by the CRPD.

5.3 The right to legal capacity of persons with intellectual and psychosocial disabilities under the Ethiopian family law

Since Ethiopia has a federal state structure, there is no single family law that applies throughout the country. The Federal Government has a Federal Family Code. Regional states also have their own respective family codes that apply in their jurisdictions. In the interest of time and space, in this discussion a reference will be made only to the Ethiopian Federal Family Code with a focus on the right to establish a family as well as other related issues as all family codes are on the same page on the subject under discussion.

5.3.1 *The right to establish a family*

Persons with disabilities' right to establish a family has been recognised by the CRPD. The CRPD requires states parties to take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships.¹¹⁷ To the contrary, the Ethiopian Revised Federal Family Code (RFFC) has a provision that undermines the right to marriage of persons with intellectual and psychosocial disabilities. This code provides that 'any person who is judicially interdicted shall not conclude marriage unless authorized, for that purpose, by the court.'¹¹⁸ The above provision of the Family Code leaves the right to marriage of judicially interdicted persons at the discretion of court. As per article 34(1) of the same Code, if a judicially interdicted person concludes a marriage without the prior authorisation of the court, the dissolution of such marriage may be requested from the court by either the judicially interdicted person himself or his guardian. The fact that the guardian is allowed to request dissolution of the marriage of a judicially interdicted person is a typical case of encroaching on a person's private life.

Moreover, the contract of marriage entered into by a judicially interdicted person does not have effect unless it is approved by the

117 Art 23(1) of the CRPD.

118 Art 15(1) of the 2002 Ethiopian Revised Federal Family Code (RFC).

court.¹¹⁹ Under the Ethiopian legal system, a contract of marriage is a very personal contract that is concluded by spouses following the conclusion of marriage to determine the pecuniary effect of a marriage and other related issues like consequences of dissolution of marriage. In this regard, persons with intellectual and psychosocial disabilities who are declared as judicially interdicted person have partial legal capacity. Aside from judicially interdicted persons, the law allows everyone to enter into such contracts without court intervention. Therefore, the law discriminates against persons with intellectual and psychosocial disabilities in this regard.

Another area where the legal capacity of persons with intellectual and psychosocial disabilities is restricted is in relation to parenthood. Persons with disabilities have the right to have children and to act as guardians for their children.¹²⁰ The CRPD obliges states parties to ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, adoption of children or similar institutions.¹²¹ However, the Ethiopian family law highly restricts legal capacity of persons with intellectual and psychosocial disabilities who are declared as judicially interdicted persons. Article 175(1) of the RFFC provides that a judicially interdicted person may institute an action to disown¹²² a child with the permission of the court. As it can be grasped from the above provision, unlike other persons, judicially interdicted persons cannot institute action to disown without permission of the court. If the court refused to permit this, the person retains paternity of the child even if he is not the real father of the child. When the law gives discretion to the court on these issues, it does not lay down grounds of giving permission or denying permission. At the end of the day, this is decided by the judge. In addition, the law allows a guardian of a judicially interdicted person to institute action of disowning in the name of such person.¹²³ This provision also has negative implications for persons with psychosocial and intellectual disabilities especially if the guardian institutes an action of disowning without taking in to account the will of the person.

The worst scenario that needs discussion in relation to legal capacity of persons with intellectual and psychosocial disabilities is the issue of guardianship and parenting. Under the Ethiopian family law, the father and the mother are jointly guardians and tutors of their minor children as long as their marriage subsists.¹²⁴ However, this is not the case for persons

119 Art 43(1) of the RFC.

120 Art 23(1) of the CRPD.

121 Art 23(2) of the CRPD.

122 Disowning under the Ethiopian legal system refers to an action by which the paternal filiation of a child is contested by the person to whom the law attributes the paternity of a child and is totally different from other civil actions like adoption. See arts167-179 of the RFFC.

123 Art 175(2) of the RFC.

124 Art 219 of the RFC.

with intellectual and psychosocial disabilities. The law prohibits judicially interdicted persons from serving as a guardian or tutor of their children.¹²⁵ In this respect, the family law discriminates against persons with intellectual and psychosocial disabilities.

In general, under the Ethiopian family law the legal capacity of persons with intellectual and psychosocial disabilities is not recognised as envisaged by the CRPD. The family law either restricts or denies legal capacity of persons with intellectual and psychosocial disabilities (particularly those labelled as judicially interdicted persons) as the case may be.

5.4 The right to legal capacity of persons with intellectual and psychosocial disabilities under Ethiopian electoral law

Not only civil rights, but also political rights of persons with intellectual and psychosocial disabilities are restricted if their right to legal capacity is not respected. One of the distinguishing features of democracy is the presence of universal adult suffrage without discrimination.¹²⁶ However, in Ethiopia persons whose legal capacity is restricted on the basis of mental capacity are deprived of the right to vote. Under the Ethiopian electoral law, a person should be eligible in order to vote. One of criteria of eligibility is having required mental capacity to understand the electoral process. Pursuant to article 18 of the recently adopted Ethiopian Electoral and Political Parties Proclamation, 'a person who is proved to be incapable of making decision due to mental disorder as confirmed by the relevant authority or sufficient evidence' cannot be registered to vote.¹²⁷ Accordingly, the Ethiopian electoral law denies persons with intellectual and psychosocial disabilities labelled as judicially interdicted persons and notoriously insane persons the right to vote.¹²⁸ Although the main legislation governing election in Ethiopia has recently been amended, a directive for its implementation is yet to be adopted. However, even if the new directive is adopted, the stand of the new directive will not be different from the above mentioned directive since the newly adopted Ethiopian electoral law followed the same approach with its predecessor regarding voting rights of persons with intellectual and psychosocial disabilities.

In a similar vein, persons with intellectual and psychosocial disabilities are deprived of the right to be elected under Ethiopian electoral law. In this regard, the Ethiopian Electoral and Political Parties Proclamation

125 Art 243(1) of the RFC.

126 The FDRE Constitution also recognises this under its art 38(1)(B).

127 See art 18(3)(A) of The Ethiopian Electoral and Political Parties Proclamation, Proclamation No 1162/2019.

128 Art 20(3) of the Directive for Registration of Voters prohibits notoriously insane persons from voting. See the National Electoral Board of Ethiopia, Directive for the Registration of Electors No 2/2009 (as amended).

stipulates that a person who is declared by an authorised body to be incapable of making effective decisions due to insanity is not eligible for candidature.¹²⁹ As aforementioned, in the eyes of the Civil Code, persons with intellectual and psychosocial disabilities are regarded as insane. Therefore, in the actual sense, it is persons with intellectual and psychosocial disabilities who are declared to be incapable of making effective decisions and run the risk of losing the right to stand as a candidate for election.

Accordingly, under the Ethiopian electoral law, the right to legal capacity of persons with intellectual and psychosocial disabilities has not been recognised. Persons with intellectual and psychosocial disabilities should not be denied any of their rights categorically for the mere fact they are declared judicially interdicted or considered to be notoriously insane. While interpreting the right to political participation enshrined under article 13(1) of the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights accentuated that this right can only be denied based on objective and reasonable criteria established by law and questioning the mental ability of mentally disabled patients to make informed choices in relation to their civic duties and obligations cannot be regarded as objective bases to exclude mentally disabled persons from political participation.¹³⁰

Ethiopia's Initial state party Report to the CRPD Committee is silent on the right to political participation of persons with intellectual and psychosocial disabilities. However, in its Concluding Observations on the Initial Report of Ethiopia, the CRPD Committee has expressed its concern on this issue as follows:¹³¹

The Committee is concerned that restriction to the right to vote of 'notoriously insane persons' is possible under law. It is further concerned that support to exercise the right to vote by persons with disabilities is not guaranteed in law and in practice.

On this note, the Committee recommended that Ethiopia should:¹³²

Take all legislative and other measures to guarantee political rights of persons with disabilities, in particular persons with psychosocial or intellectual disabilities, including by removing any restrictions on the exercise of political rights, in law or in practice.

As aforementioned, under Ethiopian electoral law, persons with intellectual and psychosocial disabilities labelled as judicially interdicted

129 See Art 31(1)(e) of the Ethiopian Electoral and Political Parties Proclamation, Proclamation No 1162/2019.

130 See *Purohit* (n 87 above) paras 75 and 76.

131 CRPD Committee (n 115 above).

132 CRPD Committee (n 115 above) para 64.

and notoriously insane persons are denied the right to vote. The fact that there is actual restriction of voting rights of persons with intellectual and psychosocial disabilities in Ethiopia is clearly discerned from a reading of the provisions of the Ethiopian Electoral Law. Given this fact, the CRPD Committee does not seem to fully appreciate the lived reality of persons with intellectual and psychosocial disabilities in Ethiopia when it views restriction of voting rights of these groups of persons as a possibility as opposed to a lived reality. Furthermore, the CRPD Committee failed to recognise the fact that persons with intellectual and psychosocial disabilities in Ethiopia are denied not only voting rights, but also the right to stand for election which is an indispensable strand of the right to political participation. The fact that the Committee noted that the support to exercise the right to vote by persons with disabilities is not guaranteed in law and in practice in Ethiopia is notable, as lack of support to exercise legal capacity is one of the main factors contributing to a violation of the rights of persons with intellectual and psychosocial disabilities in Ethiopia. The newly adopted Ethiopian electoral law could have changed the status quo by recognising the right of persons with intellectual and psychosocial disabilities to vote and stand for election had it considered the recommendations of the CRPD Committee. It is very regrettable that Ethiopia turned a deaf ear to the recommendations forwarded by the CRPD Committee. From the foregoing, it can be safely concluded that the Ethiopian electoral law is in stark contradiction with article 12 of the CRPD.

5.5 The need to recognise the right to legal capacity of persons with intellectual and psychosocial disabilities in Ethiopia

Ethiopia has to recognise the right to legal capacity of persons with intellectual and psychosocial disabilities at least for the following two principal reasons:

5.5.1 Inadequacy of the guardianship system to address the needs of persons with intellectual and psychosocial disabilities

The substitute decision making retained under the Ethiopian legal system does not cater for the rights of persons with intellectual and psychosocial disabilities. Although the primary aim of guardianship laws is protection of property interests of persons with impaired capacity such as persons with intellectual and psychosocial disabilities,¹³³ these laws have the effect of undermining the rights of persons with intellectual and psychosocial disabilities. Stripping persons of legal capacity on the ground of mental

133 S Burningham 'Developments in Canadian adult guardianship and co-decision-making law' (2009) 119 <https://ojs.library.dal.ca/djls/article/view/4173> (accessed 11 September 2015).

capacity and placing them under control of other persons is a violation that brings social and legal harm to individuals.

When individuals lack the legal capacity to act, they are not only robbed of their right to equal recognition before the law, they are also robbed of their ability to defend and enjoy other human rights.¹³⁴

Furthermore, a person who is stripped of legal capacity is no longer addressed as a person in his/her own right.¹³⁵ As a result, their moral and legal status is more likely to be diminished in the eyes of those in close personal relationships, caregivers, community members, as well as public institutions.¹³⁶ This in turn perpetuates stereotyping, objectification, negative attitudes and other forms of exclusion which people with disabilities disproportionately face and increases powerlessness and vulnerability to abuse, neglect and exploitation.¹³⁷ By limiting an individual's right to make decisions, guardianship takes away an individual's ability to make vital personal decisions.¹³⁸ It also removes individuals from a multitude of interactions involved in decision making and eventually segregates them from a number of significant aspects of social, economic, as well as political life.¹³⁹ In addition, the guardianship system also has the effect of isolating individuals by explicitly depriving them of their right to make certain social decisions like establishing family.¹⁴⁰ By excluding persons with intellectual and psychosocial disabilities from the decision-making process, guardianship exacerbates their marginalisation and isolation from mainstream society.¹⁴¹ It also curtails individuals' opportunities to test their abilities by taking away their power to manage their own affairs.¹⁴² Lack of decision-making power may lead to a further decline in the individual's capabilities and competence to act in the world.¹⁴³ Allowing persons with intellectual and psychosocial disabilities to retain legal capacity and providing them with support to help them exercise their right if necessary does not only respect their dignity and autonomy, but also enables them to remain actively engaged in the full range of life activities and maximise their decision-making capacity.

As aforementioned, the CRPD Committee has recommended that Ethiopia repeal all forms of substituted decision-making and explicitly recognise in law the full legal capacity of persons with disabilities with

134 UN (n 60 above) 89-90.

135 Bach & Kerzner (n 9 above) 8-11.

136 As above.

137 As above (n 135 above).

138 Salzman (n 69 above) 289-291.

139 As above.

140 Salzman (n 69 above) 289-291; MDAC (n 24 above) 10-16.

141 S Then 'Evolution and innovation in guardianship laws: Assisted decision-making' (2013) 35 *Sydney Law Review* 139-140 http://sydney.edu.au/law/slr/slr_35/slr35_1/06_Then.pdf (accessed 28 August 2015).

142 Then (n 141 above).

143 As above.

respect to all rights.¹⁴⁴ In another note, recognising that the provision of support is not effectively available in Ethiopia to ensure the exercise of legal capacity of persons with disabilities on an equal basis with others, the Committee recommended that Ethiopia should ensure the provision of support in order for persons with disabilities to be able to exercise their legal capacity.¹⁴⁵ The Committee further recommended that Ethiopia develop and implement supported decision-making models that respect the autonomy, will and preferences of the person.¹⁴⁶

Therefore, Ethiopia should recognise the right to legal capacity of persons with intellectual and psychosocial disabilities and replace the system of substitute decision-making with the supported decision-making system in order to ensure full enjoyment of rights of persons with intellectual and psychosocial disabilities.

5.5.2 *Obligations under international law*

As a state party to the CRPD, Ethiopia has the obligation to implement rights of persons with intellectual and psychosocial disabilities guaranteed by the CRPD. One of the underlying principles of the CRPD is the respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons.¹⁴⁷ The CRPD further prohibits all forms of discrimination on the basis of disability. According to the CRPD, discrimination on the basis of disability means:¹⁴⁸

Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

Accordingly, state parties should eliminate any action that discriminates against persons with disabilities in effect. The Convention prohibits both *de jure* and *de facto* discrimination.¹⁴⁹ Denying persons with intellectual and psychosocial disabilities their right to legal capacity based on their degree of impairment by virtue of law is a typical example of *de jure* discrimination on the basis of disability.¹⁵⁰ The CRPD also requires state parties to adopt appropriate legislative, administrative and other measures that enhance

144 CRPD Committee (n 115 above) para 26.

145 CRPD Committee (n 115 above) paras 27 and 28.

146 CRPD Committee (n 115 above) para 28.

147 See para (N) of the Preamble and art 3(A) of the CRPD.

148 See art 2 of the CRPD.

149 UN *The Convention on the Rights of Persons with Disabilities training guide* Professional Training Series No 19, 81 https://www.ohchr.org/Documents/Publications/CRPD_TrainingGuide_PTS19_EN%20Accessible.pdf (accessed 17 October 2015).

150 UN (n 149 above).

implementation of the rights guaranteed by the Convention.¹⁵¹ State parties should further take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that directly or indirectly discriminate against persons with disabilities.¹⁵² As discussed in previous sections, article 12 of the CRPD requires state parties to recognise the right to legal capacity of persons with disabilities in its fullest sense. To comply with this provision of the Convention, Ethiopia should recognise the right to legal capacity of persons with intellectual and psychosocial disabilities under her legal system.

With regard to obligations emanating from international treaties, the principle of *pacta sunt servanda* dictates that treaties wilfully entered into should be implemented in good faith.¹⁵³ As Mr Briggs, delegate of USA, during the UN Conference on the Law of Treaty underscored:¹⁵⁴

The *pacta sunt servanda* rule had come down through the ages as a self-evident truth. Both comparative law and the history of legal systems showed that it had gained universal acceptance; it had been found to be a legal necessity. The principle had been a basic rule of international law from its earliest origins, and was the foundation-stone of further progress and development.

Obviously, the principle of *pacta sunt servanda* in the law of treaties has been part of customary-international law since time immemorial. Thus, the fact that Ethiopia denies the right to legal capacity of persons with intellectual and psychosocial disabilities that has been recognised under the CRPD is against customary-international law since she ratified the Convention with full understanding of the rights enshrined therein.

6 Conclusion and recommendations

With the introduction of the CRPD, the right to legal capacity of persons with disabilities, including persons with intellectual and psychosocial disabilities has been recognised under international human-rights law. Ethiopia as a state party to the CRPD has to respect the right to legal capacity of persons with intellectual and psychosocial disabilities. Article 12 of the CRPD guarantees both capacity to be a holder of rights and capacity to exercise those rights for persons with disabilities. It also guarantees the right to access support needed to exercise legal capacity.

151 Art 4(A) of the CRPD.

152 Art 4(B) of the CRPD.

153 T Bulto 'The monist-dualist divide and the supremacy clause: Revisiting the status of human rights treaties in Ethiopia' (2009) 23 *Journal of Ethiopian Law* 135. Art 26 of the Vienna Convention on the Law of Treaties also reads: '[E]very treaty in force is binding upon the parties to it and must be performed by them in good faith.'

154 The extract from the Official Records of the United Nations Conference on the Law of Treaties para 65 http://www.legal.un.org/diplomaticconferences/...1969/.../a_conf_39_c1_sr29.pdf (accessed 20 October 2015).

This implies that the system of substitute decision-making should be replaced by the supported decision-making system.

It has been nine years since Ethiopia ratified the CRPD. However, the right to legal capacity of persons with disabilities has not been recognised under the Ethiopian legal system in its fullest sense. Capacity to act on one's rights, the key element of legal capacity is restricted or denied in the case of persons with intellectual and psychosocial disabilities depending on the degree of impairment. In this respect, there is stark incompatibility between Ethiopian laws like the Civil Code, the Family law, and the Electoral law on one hand and the CRPD on the other hand. As a result, the system of substitute decision-making is retained under the Ethiopian legal system. Despite the fact that the CRPD is part of Ethiopian laws pursuant to the FDRE Constitution, the right to legal capacity of persons with intellectual and psychosocial disabilities is far from realisation in Ethiopia owing to the absence of legislative, judicial, as well as administrative framework that gives effect to the rights guaranteed by the CRPD.

Be that as it may, Ethiopia has to recognise the right to legal capacity of persons with intellectual and psychosocial disabilities since it has an international obligation to do so. Furthermore, the system of substitute decision-making retained under the Ethiopian legal system no longer serves the interests of persons with intellectual and psychosocial disabilities. Instead, it perpetuates existing stereotyping and invisibility of persons with intellectual and psychosocial disabilities. The Ethiopian legal system should discard the medical model of disability and conceptualise disability from the perspective of human-rights and social models of disability. The term 'insane', which the law uses to refer to persons with intellectual and psychosocial disabilities, is a derogatory term that perpetuates discrimination and stereotyping against persons with intellectual and psychosocial disabilities. In addition, it is an outdated term that does not go in line with the modern understanding of disability. The law formalises existing discrimination and marginalisation when it employs this terminology to refer to persons with intellectual and psychosocial disabilities.

Ethiopia should additionally introduce the system of supported decision-making to enable persons with intellectual and psychosocial disabilities to exercise their legal capacity. The author is of the view that the Swedish supported decision-making model is worth considering to realise the right to legal capacity of persons with intellectual and psychosocial disabilities in Ethiopia. This model of supported decision-making can easily make the support needed to exercise legal capacity accessible freely or at affordable price. Lack of resources and expertise can be a potential challenge to introduce this model of supported decision-making.

Strengthening international cooperation to mobilise the required resource, empowering disabled peoples' organisations and encouraging participation of domestic as well as international civil societies can help to tackle challenges of resources that may arise in this respect. It should also be noted that an effective supported decision-making system cannot fully develop overnight. Although the CRPD Committee emphasised that the safeguard envisaged by the CRPD should not in any case amount to substitute decision-making, considering unintended consequences that this interpretation may have, the author believes that the legal system that employs a system of supported decision-making as a rule and a system of substitute decision-making in very exceptional circumstances can better advance the rights of persons with intellectual and psychosocial disabilities. However, this can be the case only if there is a stringent safeguarding mechanism that prevents unwarranted use of exceptional grounds leading to retaining the substitute decision-making system.

Based on the above premises, the author recommends the following to implement the right to legal capacity of persons with intellectual and psychosocial disabilities in Ethiopia:

- a) The right to legal capacity of persons with intellectual and psychosocial disabilities should be recognised unequivocally under the Ethiopian legal system. In this regard, the Ethiopian Civil Code should be amended in a way that reflects the social and human-right models of disability. Derogatory terms like 'insane' should not have a place in the Ethiopian legal system. The family law and the electoral law should also be amended to recognise the legal capacity of persons with intellectual and psychosocial disabilities.
- b) For persons in need of support to exercise their legal capacity, the support needed should be available. The substitute decision-making should be abolished and replaced with the supported decision-making system. For this to happen, Ethiopia has to enact legislation establishing the supported decision-making system as the current substitute decision-making regime does not have room for this system.
- c) In the situation persons with intellectual and psychosocial disabilities could not make decisions even with the presence of support, priority should be given to their will and preferences.
- d) In exceptional circumstances where identifying their will and preferences is not possible after employing the principle of the best interpretation of will and preferences, as a matter of necessity substituted decision-making should come in to play as a last resort. The substituted decision-making should not, however, take the form of guardianship. Rather, there should be the system of prior representation that allows persons with intellectual and psychosocial disabilities to represent a person who makes decisions on their behalf in situations in which they could not make decisions even with the presence of support. The representation agreement should be deposited in the public registry.

- e) There should be robust safeguarding mechanisms that protect persons with intellectual and psychosocial disabilities from abuse especially in exceptional situations where substitute decision-making applies. This can for instance be placing activities of the support provider under the supervision of courts. The law should also provide mechanisms by which persons with intellectual and psychosocial disabilities can make complaints against support providers in cases of abuse and disagreement.
- f) If substitute decision-making is a must, the functional approach to legal capacity should be employed to assess capacity. This approach is preferable since it has an element of periodic review of assessment of capacity and individual capacity is assessed on case-by-case basis.