



Panel 1: Need of Support and Legal Capacity

Cheolung Je, South Korea; Daniel Rosch, Switzerland; Moderator: Peter Winterstein, Germany

Introduction:

Peter Winterstein, Germany; Translation from German: Ekpenyong Ani

In Panel No. 1, various models of legal systems regarding the (legal) need of support for persons with disabilities will be presented and discussed. Special focus shall be given to the question of legal capacity and capacity to consent.

For the protection against harm for self and others, based on Roman Law (e.g. cura furiosi and cura prodigi), many European laws had provided that a mentally ill person would be placed under the care of in most cases the nearest male relative, his/her “guardian”. The legal consequence would usually be that the protected person had no or only very limited legal capacity.

Article 12 UN CRPD obliges States parties to award persons with disabilities legal capacity on an equal basis with others in all areas of life.

State parties are obliged to provide persons with disabilities with appropriate support measures to help them overcome obstacles in exercising their legal capacity (Art. 12, section 3 UN CRPD).

The UN CRPD does not specify the measures that are to be taken, therefore informal and formal forms are conceivable.

The UN CRPD also requires that the rights of persons concerned are protected (e.g. Art. 12, section 4, Art. 16, Art. 17).

Particularly in a modern society with many and varied forms of communication and global economic possibilities, is it still necessary to provide for restrictions and supervision of the legal capacity of persons with disabilities?

Should there be various stages of protective measures, depending for example on the degree of disability, the complexity of a contract or certain living situations?

What forms of support do the different legal systems provide for and can we possibly learn from each other?

South Korean point of view:

Cheolung Je, South Korea

Persons with impairments to decision making ability caused by dementia, developmental disabilities and mental illness and so on have been legally and actually in a worse condition in terms of exercising their legal capacity. When they were under guardianship, they used to be totally or partially deprived of legal capacity: the contracts they made were voidable by guardians, the marriage they would enter should be consented to by guardians, and their right to vote was not

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acknowledged. Even though they were not denied legal capacity, few reasonable accommodation adjusted to their individual needs and situation used to be provided for in relation to contracts and other juridical actions. Such a social environment was more or less common to many countries. The best solution for those persons can be to support and assist them to properly exercise their legal capacity as much as possible (reasonable accommodation) and to have substituted decision makings take place as a last resort. However, the reality may be difficult to realize such an ideal model, and a better solution can be different from country to country. My presentation deals with what works as obstacles to a supported decision making system, what shall be pursued as a strategy to realize a supported decision making system and how the traditional legal and social environment plays role toward a supported decision making system, in Korea.

Swiss point of view:

Daniel Rosch, Switzerland; Translation from German: Ekpenyong Ani

The revised Swiss law for the protection of adults focuses on personalized needs with due regard to subsidiarity and the principle of proportionality, on so-called customized measures. The aim of administrative measures is to support and preserve self-determination whenever possible (Art. 388 ZGB/Swiss Civil Code). Consequently, particular attention is paid to avoiding restrictions of legal capacity (see country report Switzerland). The point of departure is *mental capability*. When a person is mentally capable and an adult he/she has legal capacity and can actively establish rights and obligations, he/she has transactional capacity and the capacity to act in court proceedings. Under certain circumstances mental capability is also sufficient (e.g. capacity for delict liability, personal rights). Psychological disorders or mental disabilities do not per se mean someone is not mentally capable. *Mentally incapable persons* may possibly need support to enable them to take part in everyday (legal) transactions and/or social life. Here the legal protection of adults makes participation in (legal) transactions possible. *Mentally capable persons* may potentially need measures for the legal protection of adults to protect them due to a state of weakness (e.g. mental disability, psychological disorder), as far as another person therefore cannot adequately manage relevant affairs for them.

With regard to the legal authority and depending on the personalized order, “Beistände” (different types of assistants/supporters/guardians) *can*

- support, if the person concerned gives consent (no restriction of legal and transactional capacity),
- represent, without legal and transactional capacity being restricted,
- represent with restriction of legal and/or transactional capacity or
- participate (restriction of legal and/or transactional capacity of mentally capable persons; no rights of legal representation for the assistant/supporter)

My input presents the need for support in relation to the types of assistance regarding the question of transactional and legal capacity as well as capacity for delict liability, attempting to point to ways in which there are still possibilities for exercising legal capacity and/or self-determination despite measures being implemented.

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