



Panel 2: Support and Representation

Gavin Davidson, Northern Ireland; Uwe Harm, Germany; Fumie Suga, Japan; Moderator: Benoît Eyraud, France

Northern Irish point of view:

Gavin Davidson, Northern Ireland

The Mental Capacity Act Northern Ireland 2016

Context

In Northern Ireland the current legal framework for substitute decision making consists of the Mental Health (Northern Ireland) Order 1986 and the common law which protects people from liability if, when they intervene, they do so on the reasonable belief that the person 'lacks capacity' and the intervention is in the person's 'best interests'. The Mental Health (Northern Ireland) Order 1986 is a conventional mental health law in which the criteria for compulsory intervention, in other words substitute decision making is mental disorder and risk¹.

The Bamford Review of this legal framework identified that the mental health law was out-dated, as it was mainly focused on hospital care, and that there was a need for a clearer legal framework for decision making when a person was unable to make a decision. In most jurisdictions a separate mental capacity based law is developed in parallel with the mental health law but the Review concluded that "having one law for decisions about physical illness and another for mental illness is anomalous, confusing and unjust' and so "...the Review considers that Northern Ireland should take steps to avoid the discrimination, confusion and gaps created by separately devising two separate statutory approaches, but should rather look to creating a comprehensive legislative framework which would be truly principles-based and non-discriminatory."²

The Mental Capacity Act Northern Ireland 2016, which is intended to also replace the current mental health law, became statute law in May 2016 although may not be fully implemented for another 3-5 years. It creates a number of key principles including the presumption of capacity and the support principle in Section 1(4) which states that "The person is not to be treated as unable to make a decision for himself or herself about the matter unless all practicable help and support to enable the person to make a decision about the matter have been given without success". There are a wide range of approaches possible within 'all practicable help and support' and how this is operationalised may be the crucial factor in how well the new law complies with the range of relevant human rights standards.

¹Article 4.(2) An application for assessment may be made in respect of a patient on the grounds that:
(a) he is suffering from mental disorder of a nature or degree which warrants his detention in a hospital for assessment (or for assessment followed by medical treatment); and
(b) failure to so detain him would create a substantial likelihood of serious physical harm to himself or to other persons.

² Bamford Review of Mental Health and Learning Disability (2007). A Comprehensive Legislative Framework. Belfast: Bamford Review. Page 36.

What is meant by support?

In the new Act there is some further detail about what is meant by support. In Section 5 it sets out a number of steps which must be taken. These include: the provision of all information relevant to the decision in the most appropriate way; ensuring the timing and context of the decision making process is the most supportive; ensuring people who might be likely to help support the person are involved; and ensuring there is consideration of the 'reasonably foreseeable consequences of' both making a decision and not making a decision. More detail of the range of supports that will be required in this process will be provided in the Codes of Practice but the inclusion of format, timing, context and involvement suggest that this should involve a comprehensive approach.

What will this involve in practice?

The relevant research literature on support is still developing but already there are some clear messages about what is effective. The need for training, especially for staff, on their legal requirements as well as best practice has been repeatedly identified. The need for and effectiveness of a wide range of supports has also been established including appropriate information, person-centred planning, advocacy and supportive networks³. Some of the complexities have also been highlighted including that sometimes people may prefer not to be involved in the decision-making process⁴ and that the line between support and coercion may be a fine one⁵.

Will this be compliant with Article 12?

This support principle, along with the end of a separate discriminatory mental health law, have the potential to respond positively to UNCRPD including Article 12. Perhaps unfortunately, the debate about Article 12 seems to have focused on what is perhaps a basic difference in meaning or interpretation of certain phrases, most obviously substitute decision making. There are very few people who still hold either that global substitute decision making frameworks (where the person is not involved in any way in any decisions) are appropriate or, at the other end of the spectrum, that it is never appropriate for someone else to make a decision (even when the person, with all possible support, is unable to do so). To frame everything, including situations when another person is making the decision even if based on the best estimate of will and preferences, as a supported decision also seems to stretch the meaning of support too far. Nonetheless, there is a large grey area in between the extreme positions and how effectively the support principle is implemented will perhaps determine where the NI Act is on that continuum.

What are the provisions for representation?

In terms of representation, the new Act also introduces a number of different new roles which are relevant but the support principle remains in place regardless. If the proposed intervention is serious then the person's nominated person must be involved. If the intervention requires authorisation by a

³ Davidson, G., Kelly, B., Macdonald, G., Rizzo, M., Lombard, L., Abogunrin, O., Clift-Matthews, V. and Martin, A. (2015). Supported decision making: a review of the international literature. *International Journal of Law and Psychiatry*, 38, 61-67. 10.1016/j.ijlp.2015.01.008

⁴ Ekdahl, A.W., Andersson, L., & Friedrichsen, M. (2010). "They do what they think is the best for me". *Frail elderly patients' preferences for participation in their care during hospitalization. Patient Education and Counseling*, 80(2), 233-240.

⁵ Kohn, N.A., Blumenthal, J.A., and Campbell, A.T. (2012) Supported decision-making: A viable alternative to guardianship. *Penn State Law Review*, 117, 1111.

panel, such as those involving deprivation of liberty, then an independent mental capacity advocate must be appointed. A new enduring power of attorney is introduced to extend the current lasting power of attorney to other areas of decision-making. Finally the Act covers the powers of the High Court to appoint deputies, essentially substitute decision makers, but who will still have to make decisions within the principles of the Act and with the additional safeguards it will introduce.

German point of view:

Uwe Harm, Germany; Translation from German: Ekpenyong Ani

According to the German Association for Betreuung (Betreuungsgerichtstag), the German law of “Betreuung” is compatible with the UN Convention on the Rights of Persons with Disabilities. However, there are two areas and issues that are being publicly discussed and give rise to misunderstandings:

1. How should the “exercise of legal capacity” be understood?
2. Are some of the key legal terms used in the German law of “Betreuung” well chosen or do they to some extent cause misunderstandings in the international discussion and in practice?

How should the term “exercise of legal capacity” in Article 12 of the UN Convention on the Rights of Persons with Disabilities be understood?

Article 12 is essentially about support in “exercising legal capacity” and not about “legal capacity” itself, for instance in the sense of it being reduced or impaired. The “exercise” of “legal capacity” refers to the relationship to third parties – between the person with disabilities and his or her required contractual partners, in other words: it concerns the “conduct of one’s own affairs” (according to the definition in the law of “Betreuung”).

Support according to the UN CRPD is therefore the assistance needed to help provide the legal effect of a self-determined declaration of one’s will towards a third party. According to the wording of the UN CRPD, this support does not refer to the internal relationship. However, one must concur especially with *Lachwitz*, who notes that supported decision-making – therefore assistance in the internal relationship – is in many cases an essential prerequisite.

This brief remark is meant to explain the need to differentiate between an internal relationship and a relationship to third parties where support is concerned. This also makes clear that in the relationship to third parties, if this poses a problem for the person with disabilities, power of representation is required to provide legal effect. Persons who have a legal representative assigned to them in Germany are largely not capable of representing their autonomy to the outside world and therefore need an assistant to support their affairs with power of representation.

Ambiguous legal terms in the German law of “Betreuung”

This brings me to the first problematic term. The German law of “Betreuung” uses the term “legal representation” for the power of representation. Until 1992, this term represented a system of external determination also for adults, and it currently still does for under-age persons and other special cases of representation. Although the German law of “Betreuung” has adopted this term, the benchmark for exercise is not external determination but self-determination. The UN Committee has

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therefore offered criticism of the German law of “Betreuung” and – mistakenly – recognized it as a system of external determination. In an essay regarding this I have therefore suggested replacing the term “legal representation” by “assignment” and – court-facilitated – “mandating” of a supporter (= Betreuer).

In my opinion, another problematic term is the description “best interest of the person concerned”. Although § 1901 BGB (German Civil Code) lays down that “best interest” primarily includes a self-determined organization of one’s life, but allows for a certain tension in the assessment of the objective best interest. Here, too, the term “best interest” is already allocated to objective criteria, therefore easily giving rise to misunderstandings, and in practice also leading to assessments that could ultimately result in external determination as well. Therefore I had suggested deleting this term from the law and instead to use the term “danger”, so as to be able to intervene with legal protection solely in such cases.

Summary

Support and representation is not a contradiction. In many situations, persons with disabilities need an assistant to communicate their will to the outside world to bring about legal effect. The power of representation in the German law of “Betreuung” is not an instrument of external determination but must respect the priority of self-determination. Protective external determination is only conceivable as a last resort, needing to be reviewed and approved by the court separately.

Japanese point of view (also see file “Japan”):

Fumie Suga, Japan

Taking Vulnerable People more seriously as Potentially Active Consumers.

In my paper I will try to draw a big picture of bridging the two areas of law; the Adult Guardianship Law and Consumer Law, for the purpose of establishing “inclusive environment” for vulnerable people. This is because, I believe a crucial aspect of leading a social life is making contracts in order to design one’s own life and realizing one’s own desires, whether they seem minor decisions to others or not.

Moreover, in this attempt, I aim to create a space for vulnerable people to be more visible in the market as active consumers, while realizing that sometimes this potential might not be fulfilled without “appropriate measures” to ensure that all persons with disabilities can exercise all the rights including consumer rights, as the concluding observations on the initial report of the EU (issued by the CRPD Committee on 4 September 2015) rightly pointed it out.

These arguments will also lead us to depart from the platform where we have depended too much on the claim (often by the family members or their attorneys) that “the person lacked, or, must have lacked mental capacity when he/she made such an unconscionable contract, so it should be invalid”. Such a claim seems to bring about an easy solution, releasing the individual from contractual obligation, but it entails a significant dilemma. I.e. every person should be presumed to have legal capacity.

Therefore, the time has come for us to address Consumer Law Reform from the perspective of the CRPD in our own countries!

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