**Constitutional Court of the Republic of Indonesia, Judicial Review No: 93/PUU-XX/2022**

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**1. Guardianship as a form of Civil Death.**

One of the first things one learns at law school is that because we are humans we have human rights. However, legal history is full of examples of humans being treated as if they didn’t exist, as if their lives were less worthy, as if they were not persons. Writing over two centuries ago, the great English legal historian Sir William Blackstone, insisted, for example, that upon marriage, women suffer ‘civil death.’ By this he meant that women were treated as ‘objects’ and not as ‘subjects’ in their own right.

This history of law reform in the past few centuries everywhere in the world is one of restoring personhood - and the full legal indicia of personhood - to all human beings regardless of their difference. However, the one area where the objectification of some humans still happens is in the field of disability. At some moment in time – probably associated with the Enlightenment – the view took hold that one’s cognitive capacity determined one’s status as a person. This was strange since it did not correspond to any previous historical idea of who counted as a person. And it is doubly strange as contemporary science vividly demonstrates that cognition is but one aspect of personhood and not necessarily the most vitally determinative one.

This is important since recognition as a person with full legal capacity is a portal to exercise autonomy and all other rights. It assumes moral agency over one’s own life – a right to exercise voice, choice and control, to be heard, to be listened to and to have one’s wishes respected by others.

In many jurisdictions, and perhaps because of the lingering historical impact of the Enlightenment, a person’s legal capacity to act can be restricted based on impairment, mental capacity or cognitive abilities. Those deemed to lack legal capacity to act are often placed under partial or full guardianship where a substitute decision-maker is appointed to act on their behalf and the individual is thereby restricted in the exercise of their civil rights. This is is a form of ’civil death.’ Since the presence or absence of a minimum level of cognitive ability has traditionally been deemed the essence of legal capacity or incapacity, the relevant test isusually a medical one. Once placed under guardianship, an individual can remain thereunder for indefinite periods (so-called plenary guardianship) and sometimes for the rest of their lives.

‘Civil death’ means just that. A person who is declared legally incompetent typically cannot marry, cannot found a family, cannot freely associate with others, cannot hold property or manage finances, cannot impart informed consent for a medical procedure. What’s more, they are typically denied the right to vote – a right that would enable them to influence the laws that place them under guardianship. Nor do they typically have full standing to ventilate claims before the courts on their own behalf.

Many legal systems in the past did not entirely extinguish the rights of personhood of such persons – it transferred the exercise of these rights to third parties (substitute decision-makers) and placed those parties under an obligation to only act in the ‘best’ interests’ of the person concerned. These arrangements have never been satisfactory – and even if they were, the State typically lacks the means to police how those powers are used/abused.

**2. Two waves of a Human Rights Response to guardianship.**

Generally speaking, the problematical nature of extinguishing personhood and transferring personhood rights to third parties was first acknowledged as problematical in the mid 1990s.

The first wave of human rights-based law reform – spearheaded by a famous Recommendation of the Committee of Ministers of the Council of Europe in 1999 – focused on two goals: (1) substantially reducing the material scope for the imposition of guardianship to ensure it applied only where objectively justified and (2) insisting on a form of ‘due process’ to allow the individual concerned to be directly involved in any relevant judicial or other proceedings. That is, there was no deep questioning of the very foundation of legal incapacity.

Prior to the drafting of the UN CRPD in 2006 there was much expectation that the convention would simply project the approach of the Council of Europe onto the global stage – reducing the scope for guardianship to the absolute minimum and insisting on due process. Instead, the drafters did something quite different – and directly challenged the traditional foundations of legal incapacity. The reason was simple. Why draft a treaty that deals with symptoms (discrimination) of a much deeper problem – lack of recognition as a person. That is to say, why deal only with the symptoms and not the cause (invisibility as a person). That is why the ‘personhood’ provisions of the convention (Article 12 on legal capacity and Article 19 on the right to live independently) became so central. Indeed, Article 12 has been described as the very ‘object and purpose of the convention’ – removing the cloak of invisibility and insisting on personhood regardless of disability.

Three features of the Article 12 approach are particularly notable.

First of all, and against the tide of legal history, Article 12 insists on a ‘universal’ theory of legal capacity. Decoded, what this really means is that cognitive ability should no longer be considered a vitally determinative aspect or true test of legal capacity. The interesting thing about this is that this move coincides with what science is telling us today about how humans make decisions. The landmark World Bank Report of 2015 on ***Mind, Society and Behaviour*** drew together scientific insights from many domains like neuroscience, psychology and medicine to show that human decision-making only rests on cognitive ability to a very small extent. Indeed, it insists that most human decision making is either automatic or social in nature. In other words, the old insistence on cognitive ability as the essence of what it means to be a person and to be afforded moral space to make one’s own decisions is not evidence-based. There is therefore, a nice symmetry between the new normative directions of Article 12 with what science is telling us about how humans actually make decisions.

Secondly, the concept of ‘supported decision making’ made famous by Article 12 is really the new centre of gravity of law reform worldwide. A few basic points. This idea fits well with science and especially the idea that decision making is or can be social. Our personhood is naturally shared as it is experienced individually. We rely on each other for cues and supports. Most of us have rich layers of social capital in our lives that we can take for granted. But persons with disabilities may not. Therefore, an insistence on ‘supported decision making’ as an alternative to guardianship makes sense and is viable. And a focus on ‘supported decision making’ forces us to focus on how to reach those who were previously considered unreachable. Under guardianship regimes there was/is no incentive to do so. Now, because of the emphasis on supported decision-making, there is a flowering of new tools of discovery to uncloak the person behind the mask of disability. New canons for interpreting informal communication are developing around the world.

Third, the new foundations to personhood and legal capacity in Article 12 are powerfully reinforced by Article 5 (equality) of the CRPD. Article 5 adds to the analysis in both a negative sense and a positive sense.

From the negative perspective, Article 5 prohibits unequal treatment. Traditional jural approaches to equality means that if a difference is considered material then it might be invoked to justify differential treatment. It was simply assumed in the past that a difference in cognitive capacity was enough of a material difference to justify the imposition of legal incapacity. Yet that view is no longer even scientifically tenable. Therefore, laws or policies or practices that remove legal capacity based on an assessment of cognitive ability are *per se* discriminatory in nature.

From a more positive perspective, Article 5 (equality) stems from what one eminent judge on the European Court of Human Rights (Oddny Arnardottor of Iceland) calls ‘multidimensional disadvantage equality.’ What she has in mind is a web of positive obligations to systematically undo the accumulated effects of disadvantages from the past. In other words, Article 5 would strongly support the concept of ‘supported decision making’ even if it weren’t obvious on the face of Article 12. The UN CRPD Committee frames its theory of equality in Article 5 as ‘inclusive equality’ as if to underscore this point.

**3. Global Law Reform Trends.**

Rather than endorsing a mechanism that restricts legal capacity and heightens the risk for exploitation, there is a real opportunity to eliminate guardianship, and associated human rights violations, and opt to enable legal capacity through supported decision-making measures. Contrary to substitute decision-making regimes, under a supported decision-making arrangement, legal capacity is never removed or restricted; a supporter cannot be appointed by a third party against the will of the individual concerned; and support must be provided based on the will and preferences of the individual (Report of Special Rapporteur on the rights of persons with disabilities, [A/HRC/37/56](https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F37%2F56&Language=E&DeviceType=Desktop&LangRequested=False), para. 27). Moreover, supported decision-making and other forms of support contribute to forging an inclusive and participatory society where diversity does not divide but strengthens cohesion and solidarity.

Countries around the world are making progress through the courts and through legal reform of civil codes and related legislation to embrace universal legal capacity. For example, in the last seven years, Costa Rica (2016), Peru (2018), Colombia (2019) and Spain (2021) have abolished guardianship and replaced it with supported decision-making mechanisms. Courts are also reviewing the constitutionality of guardianship.

The Committee on the Rights of Persons with Disabilities made a recommendation to Indonesia in its review in August 2022. Related to legal capacity, the CRPD Committee stated:

“The Committee is concerned that under national legislation, people can be deemed as lacking competence, in particular persons with psychosocial disabilities and persons with intellectual disabilities, and be placed under conservatorship.

The Committee recommends that, in line with its general comment No. 1 (2014) on equal recognition before the law, the State party review Law No. 18 of 2014, on mental health, **articles 433** **and 434 of the Civil Code**, the Criminal Code and article 32 of Law No. 8 of 2016, with a view to harmonizing them with the Convention to guarantee the right of all persons with disabilities to equal recognition before the law and to establish supported decision-making mechanisms in all areas of life.”[[1]](#footnote-1)

The present judicial review poses as an opportunity for the Constitutional Court to make a finding that aligns with the Constitution, the CRPD and international human rights law. It is an opportunity to abolish an outdated regime that constitutes discrimination and proliferates human rights violations, and to introduce supported decision-making as a rights-based mechanism that recognizes and accepts the diverse and interdependent nature of the human experience. Above all, it is an opportunity to affirm the exercise and enjoyment of the rights by persons with disabilities and ensure their inclusion and participation in society on an equal basis with others.

**4. What this Court can and cannot do.**

The separation of powers implicit in any constitutional order places metes and bound on what a constitutional court can do. At a minimum, a court can declare any law that restricts legal capacity on a finding of a lack of cognitive ability to make decisions to be violation of the norm of equality (failing to treat equals, equally). Additionally, if there is jurisprudence on personhood in the constitution – a constitutional court might well reach the conclusion that this core norm has been breached by said law.

A court is not called upon to have all the answers and to set out in detail what any new law should contain – beyond the obvious which is to replace guardianship with a regime of supported decision making. Mostly that is for the Executive. However, the Executive branch now has many comparative law reform models to work with.

There is no lack of precedent on the world stage. In 2014, the Constitutional Court of Georgia abolished the existing system of guardianship in the country and introduced a new – supported decision-making model that led to amendments to over 200 laws to bring legislation in line with the CRPD.[[2]](#footnote-2)

In 2018, the Constitutional Chamber of the Supreme Court of Justice in Costa Rica adopted a resolution confirming the constitutionality of the legal capacity reform; i.e. Law no 9379 for the promotion of the personal autonomy of persons with disabilities that abolished all forms of guardianship.[[3]](#footnote-3)

In 2019, the Supreme Court of Mexico declared unconstitutional Articles 24 and 450 of section II of the Civil Code as incompatible with the CRPD and that it is unconstitutional to deny and/or limit the legal capacity and decision-making of persons with disabilities. [[4]](#footnote-4)

In 2021, the Constitutional Court of Colombia confirmed the constitutionality of the legal capacity reform, i.e. Law no 1996 of 2019 recognising the legal capacity of persons with disabilities.[[5]](#footnote-5)

If the court were to make the relevant declaration then this would enrich and stimulate the democratic process to intentionally search for a model that would work in Indonesia and that would serve to end ‘civil death’ for all. In so doing, your Honourable court would be in good company.

1. CRPD Committee, Concluding Observations on Indonesia, [CRPD/C/IDN/CO/1](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FIDN%2FCO%2F1&Lang=en), 12 October 2022 [↑](#footnote-ref-1)
2. Constitutional Court of Georgia, [N2/4/532,533](https://matsne.gov.ge/ka/document/view/2549051)*, Citizens of Georgia – Irakli Kemokelidze and Davit Kharadze v. Parliament of Georgia*, 8 October 2014 [↑](#footnote-ref-2)
3. Constitutional Chamber of the Supreme Court of Justice of Costa Rica, [Resolution no 09857 – 2018](https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-750943),20 June 2018 [↑](#footnote-ref-3)
4. First Chamber of the Supreme Court of Mexico, [Decision no 1368/2015](https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=190473), 13 March 2019 [↑](#footnote-ref-4)
5. Constitutional Court of Colombian, [Judgment no C-025/21](https://www.corteconstitucional.gov.co/Relatoria/2021/C-025-21.htm#:~:text=Para%20el%20actor%20la%20interdicción,personas%20en%20situación%20de%20discapacidad), 25 February 2021 [↑](#footnote-ref-5)