

Islamic Perspectives on Legal Capacity in Healthcare for People with Disabilities

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Introduction

Legal capacity - The recognition of legal capacity allows an individual access to make fundamental decisions, such as where to reside and what kind of medical care to receive. Without this recognition, a person is relegated to the status of an object rather than an independent human being, subject of rights (Quinn et al., 2002).

The CRPD indicates a revolution regarding the perception of legal capacity and disability through the paradigm shift from Medical Model to the Social/ Human rights model.

Previous Medical Model

- Persons with psychological disabilities are affected by denial of legal capacity and substitute decision making, often carried out through guardianship.
- Once decision-making capability is considered impaired, guardian takes decisions on behalf of the *incapacitated person in his/her best interest*.

Current Social/ Human rights model

- Views disabled people as right holders and fully fledged members of the society.
- Places emphasis on the interaction between individuals and society barriers that prevents persons with disabilities from exercising their legal capacity (O' Mahony 2012).

Human rights model promotes supported decision-making over previously practiced substituted decision-making, with the intent to ensure that people with disabilities can exercise their legal capacity and to remedy unequal treatment of people with disabilities.

- **Legal capacity in Islamic tradition-** Islamic countries draw distinction between legal capacity for rights, and legal capacity to act.
- Legal capacity for rights is interpreted as the fitness of a person to be subject of legal relations, and thus refers to an individual's status within a given legal system.
- Legal capacity to act recognizes the person as an agent with the power to engage in transactions and create, modify or end legal relationships. It is thought that legal capacity to act requires the possession of mental decrement.

Background

- Legal capacity is highlighted in the Article 12 of CRPD entitled "**Equal recognition before the law**", which includes the following:
 - State parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law (12.1)
 - States parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspect of life (12.2)
 - State parties shall have the obligation to provide persons with disabilities the access to support in exercising their legal capacity (12.3)
- During the negotiation of the CRPD, Islamic countries promoted a footnote in Article 12.2 limiting the meaning of legal capacity in Arabic, to capacity of rights, rather than capacity to act". This proposal was considered an attempt to make substantive changes in the content of the Article 12, disguised as a linguistic issue. The 8th Ad Hoc Committee deleted the footnote.
- Article 12.2 *includes both* capacity for rights and the capacity to act. Article 12 is closely connected with Article 14 – the ban of deprivation of liberty on the basis of disability, Article 17 – the protection of physical and mental integrity, and Article 25- the principle of free and informed consent of the person concerned for health care (Committee on the Rights of Persons with Disabilities, 2014 and 2015).

Present day scenario

- Islamic perspectives on legal capacity for people with psychological disabilities are still inspired by the medical model :
 - Most domestic legislations specifically allow for the denial of legal capacity of people with a mental health disorder (McSherry & Weller, 2010).
 - Substituted decision-making is the general rule and supported decision-making is not yet universally adopted, although it is possible in some cases.
- Involuntary hospitalization and Involuntary medical treatment of people with psycho-social issues are still accepted practices.
- **This contradicts the CRPD.**

Observations/Issues

- Adopting the substituted decision-making system has anti-therapeutic effects.
- Individuals tend to gradually lose their functional ability to exercise rights and they can hardly recover their decision-making capacities under the guardianship system.
- In practice – most cases of incapacitation result in plenary guardianship, which eventually mean that the person in question will be denied the legal capacity in all areas of life.
- The Sharia'h compliant Civil Code of Qatar allows people with physical and sensory disabilities the possibility of having a judicial assistant (Article 127).

PRACTICE IN QATAR

- Persons with psycho-social disabilities may be deprived of legal capacity.
- Involuntarily hospitalized patients in Qatar, are admitted to a medical facility after securing the approval of relatives.
- The culture encourages interdependence, rather than the independence, of individual family members, who internalize a group rather than an individual decision-making process.
- In 2016, a law on Mental Health was approved. It regulates – for the first time – involuntary hospitalization and forced medical treatment in Qatar.
- In our view, for Qatar to become fully CRPD compliant, efforts need to be made to extend supported decision-making through the Sharia'h compliant Civil Code (Article 127) to people with intellectual and psycho-social disabilities

BIBLIOGRAPHY

- McSherry, Bernadette, and Penelope Weller, eds. *Rethinking rights-based mental health laws*. Bloomsbury Publishing, 2010.
- O'Mahony, Charles. "Legal capacity and detention: implications of the UN disability convention for the inspection standards of human rights monitoring bodies." *The International Journal of Human Rights* 16.6 (2012): 883-901.
- Quinn, Gerard, et al. "Human rights and disability." *Derechos Humanos y Discapacidad*, HR/PUB/02/1, United Nations (2002).