

BOOK REVIEW

**MICHAEL ASHLEY STEIN, FARAAZ MAHOMED, VIKRAM
PATEL & CHARLENE SUNKEL *MENTAL
HEALTH, LEGAL CAPACITY, AND HUMAN RIGHTS (2021)***

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1 Introduction

BOOK REVIEW

Mental health, legal capacity, and human rights (2021) edited by Michael Ashley Stein, Faraaz Mahomed, Vikram Patel, and Charlene Sunkel examines legal capacity from the perspective of both Global North and Global South countries. The book thoroughly analyses some of the practices that lead to the infringement of the right to legal capacity and the progresses that have been made in various countries in advancing legal capacity. It proposes reform. Although the book only addresses psychosocial disabilities, it is also relevant to intellectual disabilities.

The book reads as a conversation among 26 scholars of disability rights on the feasibility of making the right to legal capacity under article 12 of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD)¹ a reality for persons with psychosocial disabilities. This review will not refer to all the contributors but will highlight their main perspectives on disability laws during the pre-CRPD era, post-CRPD era, and reforms to ensuring legal capacity. Drawing on insights from these perspectives, the authors envision the adoption of the human rights

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1 UN General Assembly, Convention on the Rights of Persons with Disabilities (2007) UN Doc A/RES/61/106 (24 January 2007).

approach to disability in order to ensure the right to legal capacity for persons with psychosocial disabilities. The human rights model emphasises pragmatic reforms geared towards participation of persons with psychosocial disabilities and practical realisation of the CRPD while considering the different social, cultural, and economic contexts that exist between different states.

The book is divided into four sections and organised into 26 chapters. The introductory² section is the opening chapter which is written by the editors and serves as an elegant and stimulating tour d'horizon of the debate that is to follow. The introduction discusses three models of disability - the biomedical, social, and the human rights model. The first³ section discusses the concept of legal capacity in which the contributors argue for its universality despite opposition from states. This section challenges the biomedical model of disability while calling for a shift to the human rights model which emphasises legal standing and agency as opposed to institutionalisation, treatment, and isolation. Alicia Yamin argues that the right to health and legal capacity are interdependent and indivisible. Focusing on mental health, Benjamin Barsky, Julie Hannah, and Dainius Puras offer pragmatic reforms on the use of non-coercive human rights models of ensuring the health and caring for persons with psychosocial disabilities during the COVID-19 pandemic. Examples of such methods include offering care through videoconferencing, internet forums, phone applications, text messaging, and emails. Promotion of the dignity and humanity of persons with psychosocial disabilities forms part of Tina Minkowitz's contribution towards the interdependence of article 12 of the CRPD and the right to health. The author advocates for non-discriminatory community-based support mechanisms to care instead of forced interventions that leads to psychiatric violence.

Apart from article 12, the book also considers the CRPD Committee's General Comment 1⁴ and the different approaches towards the interpretation of legal capacity. One approach is the absolutist approach to legal capacity. This approach advocates for the reduction and potential abolition of coercive mental health practices and substituted decision-making laws. A counter-approach is the fusion of the absolutist with the non-absolutist approach to legal capacity which allows for both the use of supported and substituted decision-making and involuntary commitment in exceptional circumstances. The detention should be reasonable and proportionate to the circumstances or stipulated in the law such as in the Mental Capacity Act 2016 of Northern Ireland.⁵ A further approach

2 MA Stein et al (eds) *Mental health, legal capacity, and human rights* (2021) 1-16.

3 Stein et al (n 2) 17-55.

4 CRPD Committee, General Comment 1: Article 12: Equal recognition before the law (2014) UN Doc CRPD/C/GC/1 dated 19 May 2014.

5 G Lynch, C Taggart & P Campbell 'Mental Capacity Act (Northern Ireland) 2016' (2017) 41 *BjPsych Bulletin* 353.

focuses on a holistic view to incapacity which extends beyond mental health laws. This approach argues that the concept of incapacity is not limited to mental health laws and should be extended to all laws that have incorporated the binary notions of capacity and incapacity.

In the second section,⁶ legal and policy reforms domesticating article 12 of the CRPD are examined more closely. This section shows how supported decision-making is gaining traction in various parts of the world. Alberto Vasquez shares the Peruvian experience and advancement towards the realisation of the right to legal capacity and the barriers impeding its implementation within Peru's national legal framework. Some of the reforms that have been undertaken in Peru include repealing of all restrictions on legal capacity and the abolition of disability-related guardianship laws.

Unlike Peru, many other countries have not been able to achieve any meaningful reforms on legal capacity and substituted decision-making. Writing about Canada, Faisal Bhaba offers insights on the country's efforts to implement supported decision-making procedures and realise article 12 of the CRPD. Lack of uniformity between federal laws and provincial laws has been cited as one of the challenges affecting the realisation of article 12 of the CRPD in Canada. However, in India the situation is different as stated by Pathare and Kapoor. India's domestic legal capacity law ensures uniformity because it extends to both Central and State governments. Law reform in India has not adopted the absolutist approach to legal capacity. It allows clinicians to assess a patient's capacity for purposes of mental health and treatment. Supported decision-making is also provided for, such as through advance directives which allow a person to plan in advance in case they are not able to express their will and preferences in future. Provisions are also made for nominated representatives.

The book highlights reform efforts that are taking place in Africa where the majority of mental health laws still bear the mark of colonialism and continue to legislate involuntary treatment and institutionalisation of persons with psychosocial disabilities. To give an example, Kenya's Mental Health Care Act of 1986.⁷ Kenya is in the process of reforming its legal capacity laws through the Mental Health Amendment Bill.⁸ However, although the Bill has not been enacted, it contains provisions on

6 Stein et al (n 2) 124-212.

7 DM Ndeti, J Muthike, & ES Nandoya 'Kenya's mental health law' (2017) 14 *BPpsych International* 96.

8 The Mental Health (Amendment) Bill (2020) <http://www.parliament.go.ke/sites/default/files/2021-03/The%20Mental%20Health%20%28Amendment%29%20Bill%202020.pdf> (accessed 2 October 2021).

involuntary admissions of persons with psychosocial disabilities. In Zambia, reforms on legal capacity have been minimal.⁹ Persons with mental illness are barred from enjoying legal capacity and prevented from performing functions that require legal capacity. In Ghana, legal capacity may be limited under the law.¹⁰ Ghana's legal system allows for appointment of guardians in certain instances, for instance to manage a person's finances. Involuntary interventions are allowed but with certain procedural safeguards. This section is of particular interest because it allows readers to compare what is contained in the CRPD and what is practiced in reality. Key to this section is its emphasis on accompanying reform efforts with financial resources. A result-based budgeting programme that allows for a sustained increase in resources has proved to be effective in realising the legal capacity of persons with psychosocial disabilities in Peru, for example the education results-based financing.¹¹

Piers Gooding, Bhargavi Davar, Michelle Funk, Joel Corcoran, Cindy Hermasma, Steven Manning and Ulrike Jarkestig Berggren discuss the practice of supported decision-making in the context of non-coercive mental healthcare in section three of the book.¹² They offer innovative interventions in ensuring that persons with psychosocial disabilities are able to participate effectively in decision-making processes. Community oriented methods such as the circle of care model in India, the use of personal ombudsman in Sweden, Finland's open dialogue model, United States' lay support and social networks model, and the clubhouse model are approaches geared towards supporting decision-making abilities of persons with psychosocial disabilities and combating social isolation. The contributors also highlight the importance of conducting more research and training for instance, the World Health Organisation's Quality Rights e-training model, in order to combat stigma and remove barriers that limit the promotion and implementation of the right to legal capacity.¹³

The fourth section of the book¹⁴ deals with the lived experiences of persons with psychosocial disabilities. These experiences relate to coercion

9 A Raw 'You only have rights if you are a person: How Zambia is legislating away the rights of persons with psychosocial disabilities' (June 2019) <https://africanlii.org/article/20190620/you-only-have-rights-if-you-are-person-how-zambia-legislating-away-rights-persons> (accessed 2 October 2021).

10 Human Rights Watch 'Like a death sentence: Abuses against persons with mental disabilities in Ghana' (2 October 2012) <https://www.hrw.org/report/2012/10/02/death-sentence/abuses-against-persons-mental-disabilities-ghana> (accessed 2 October 2021).

11 The World Bank 'Results-based financing in education: Peru's incentive program and "performance commitments"' (1 February 2021) <https://www.worldbank.org/en/news/feature/2021/02/01/results-based-financing-in-education-peru-incentive-program-and-performance-commitments> (accessed 2 October 2021).

12 Stein et al (n 2) 213-287.

13 World Health Organisation 'QualityRights materials for training, guidance and transformation' <https://www.who.int/publications/i/item/who-qualityrights-guidance-and-training-tools> (12 November 2019) (accessed 2 October 2021).

14 Stein et al (n 2) 288-412.

in mental health institutions and the importance of peer support systems. Advocacy is suggested as one of the ways of ensuring the capacity of persons with psychosocial disabilities. The importance of collective lived experience is highlighted in the United States of America, Denmark, Kenya, Greece, Canada, Cameroon, Japan and India. It reveals the challenges states parties are facing in the implementation of article 12 of the CRPD. Lack of procedural justice is highlighted as the main challenge facing persons with psychosocial disabilities right to legal capacity. Collective lived experiences also measure the effectiveness of states implementation frameworks and the different supported decision-making models. The aim of this section is to raise awareness and encourage practical reforms to coercion and involuntary admission into mental health institutions.

Mental health, legal capacity, and human rights clearly tackles legal capacity from different perspectives. The strength of this book is that it provides for ways of ensuring incremental change in the implementation process of article 12 of the CRPD depending on the circumstances of a particular state. It provides innovative methods of supporting persons with mental disabilities and ensuring their legal capacity which may eventually lead to the elimination of guardianship laws and reduce disability related discrimination. The book has the potential of serving as a primer for anyone new to disability issues and the CRPD. There is no doubt that the CRPD is gradually reforming the legal landscape of legal capacity and supported decision-making. What is clear is that there is no one-size-fits-all approach on the nature of the reforms that should be undertaken. Emphasis should be placed on the different social and economic context of different states.