

CONTENTS

<i>Foreword</i>	v
<i>Acknowledgements</i>	vii
<i>List of Cases</i>	xv
<i>List of Contributors</i>	xxi

Legal Capacity, Disability and Human Rights: Introduction

Michael BACH and Nicolás ESPEJO-YAKSIC.....	1
1. Historical Perspective and Theoretical Frames.....	2
2. Law Reform: National and Regional Perspectives	5
3. Legal Issues and Persistent Challenges	9

PART I. HISTORICAL PERSPECTIVES AND THEORETICAL FRAMES

A Historical Review of Legal Capacity

Javier BARRIENTOS GRANDON.....	15
1. <i>Status</i> as a Key to the Culture of <i>Ius Commune</i> : Without <i>Status</i> , there is No Person.....	15
2. <i>Capax</i> : A Particular Aptitude in the Culture of <i>Ius Commune</i>	25
3. <i>Capacitas</i> and its Generalisation Linked to the Construction of the Category of Subject of Law	28

Respect for the Will of the Person

Wayne MARTIN	31
1. An Ancient Law Reform and its Ontology	32
2. A Legally Primitive Notion	35
3. <i>Furiosi voluntas nulla est</i>	39
4. Will and Law Reform	43

Disability and Intersectionality: The Construction of Vulnerability in Sexual and Reproductive Matters

Constanza LÓPEZ RADRIGÁN	49
1. Introduction	49
2. Intersectional Violence and Discrimination.....	52

3. Legal Capacity and Construction of Vulnerability.....	56
4. Conclusions.....	61

Losing Legal Capacity and Power Over Personal Life: The “Decision-Making Capability” Alternative

Michael BACH	65
1. Introduction	65
2. Legal Capacity: Mainstream Approaches and Critique.....	66
3. Reformulating the Principle of “Respect for Autonomy” for an Inclusive Approach to Legal Capacity	70
4. The “Decision-Making Capability” Alternative: Key Concepts	74
5. Implications for Further Research and Development	83
6. Summary and Conclusion.....	86

Legal Capacity, Vulnerability and the Idea of “Person”

Nicolás ESPEJO-YAKSIC	89
1. Introduction	89
2. Capability for Decision-Making: Article 12 of the UNCRPD	90
3. Justice and Legal Capacity.....	92
4. Vulnerability, Relational Autonomy and Legal Capacity.....	97
5. Conclusions.....	105

PART II. LAW REFORM: COUNTRY AND REGIONAL PERSPECTIVES

Emerging Judicial Precedents Related to Legal Capacity in Latin American High Courts

Agustina PALACIOS.....	109
1. Introduction	110
2. Legal Capacity in Court Precedents: Making the Path as We Walk.....	110
3. Conclusions.....	127

Legal Capacity Regime Reforms in Costa Rica, Peru and Colombia: A Comparative and Critical Analysis

Alberto VÁSQUEZ, Federico ISAZA and Andrea PARRA	131
1. Introduction	132
2. Article 12 of the CRPD and its Impact in Latin America.....	132
3. Challenges of Reform on Legal Capacity in Latin America	149

A Critical Review of Legal Capacity Reform in the U.S.

Kristin Booth GLEN	153
--------------------------	-----

1. Introduction	154
2. Context.....	155
3. The Rise of Supported Decision-Making.....	158
4. Critiques of Existing Statutes	170
5. Supported Decision-Making New York (SDMNY): A Successful Empirical Model Advancing the Right of Legal Capacity.....	173
6. Challenges and Barriers to Advancing Legal Capacity through SDM	174
7. The Future of an Equal Right to Exercise Legal Capacity in the U.S.	175

A Critical Review of Legal Capacity Reforms in the African Region

Dianah MsIPA 177

1. Introduction	177
2. Legal Capacity and the Role of Support.....	179
3. The Right to Legal Capacity in Kenya, Zambia, and South Africa.	181
4. Reviewing the Reforms in Kenya, Zambia, and South Africa	185
5. Conclusion.....	197

Changing the Paradigm of Substituted Decision-Making in Bulgaria: The Tipping Point

Nadia SHABANI and Marieta DIMITROVA 199

1. The Bulgarian Concept of Supported Decision-Making.....	200
2. Changes in Jurisprudence and the Practice of the Courts	207
3. Changes in the “Social Laws” which Introduce Supported Decision-Making	210
4. Lessons Learnt and Main Conclusions for the Way Forward.....	215
5. Conclusion.....	218

Evaluating the Induction of Article 12 Jurisprudence in Indian Law: Is Half a Loaf Better?

Amita DHANDA 221

1. Introduction	221
2. Indian Laws and Legal Capacity.....	222
3. Reforming Legal Capacity	225
4. Legal Capacity and the Courts: <i>Suchita Srivastav v Chandigarh Administration</i>	233
5. So what is the Verdict?.....	235

Legal Capacity in China's Mainland

Huang Yi and Chen Bo 237

1. Introduction	237
2. Status of the Convention at Domestic Level in China's Mainland	238
3. Legal Capacity and Adult Guardianship	239
4. Legal Capacity and Mental Health Law.....	247
5. Conclusion.....	252

Lessons from a Reformist Path to Supported Decision-Making in Australia

Piers GOODING and Terry CARNEY	255
--------------------------------------	-----

1. Background: Australia and Human Rights	257
2. Legal Developments	263
3. Discussion	270
4. Conclusion.....	274

Mental Capacity in Hong Kong: Inconsistencies, Uncertainties, and the Need for Reform

Urania CHIU and Pok Yin S. CHOW	277
---------------------------------------	-----

1. Introduction	277
2. The Development of Mental Capacity Law in Hong Kong	278
3. The Definitions of Mental (In)Capacity in Hong Kong Law	281
4. Consent to Medical Treatment (Other than for Mental Disorder)	285
5. Guardianship and Management of Property by the Court.....	288
6. Decision-Making in Cases of Future Incapacity.....	293
7. Conclusion.....	297

PART III. LEGAL QUESTIONS, PERSISTENT CHALLENGES

Informed Consent and Support for Decision-Making: A Critical Review of Legal Reforms in Latin America

Pablo MARSHALL	301
----------------------	-----

1. Introduction	301
2. Capacity in Informed Consent	304
3. Supports for Informed Consent	307
4. Informed Consent and Reforms to Legal Capacity in Latin America.....	312
5. Conclusions	317

Contractual Capacity of Persons with a Disability in the Spanish Civil Code

Maria Paz GARCIA RUBIO	319
------------------------------	-----

1. Contractual Capacity in the Spanish Civil Code	319
2. Contractual Capacity of Persons with Disability under the "LAPD"	322

3. The Annulment Action	330
4. Limitations to the Power to Annul and Restitution.....	330

**Safeguards for the Exercise of Legal Capacity by Persons with Disabilities:
A Form of Justified Paternalism**

Renato Antonio CONSTANTINO CAYCHO and Renata Anahí BREGAGLIO LAZARTE	333
1. Introduction	334
2. Starting Point: Disability as a Vulnerability	335
3. Safeguards in Conjunction with the Vulnerability of a Person with a Disability.....	341
4. Conclusion: Safeguards, a Form of Justified Paternalism	351

**Legal Capacity in Canada: An Equality Rights Analysis in Light of the
Canadian Charter of Rights and Freedoms and the Convention
on the Rights of Persons with Disabilities**

Lana KERZNER.....	353
1. Introduction	354
2. The Prevailing Test of Capacity in Canada's Laws: The Cognitive “Understand and Appreciate” Test	356
3. An Inclusive Approach to Legal Capacity: Decision-Making Capability.....	357
4. Implementation of Article 12 in Canada: Relevance of the Canadian Charter of Rights and Freedoms.....	358
5. An Examination of the Cognitive Test of Capacity against the Equality Right in the Canadian Charter of Rights and Freedoms	359
6. The CRPD’s Approach to Equality in the Exercise of Legal Capacity: Putting the s. 15 Analysis in Perspective.....	366
7. Limitation of Rights: Can Discriminatory Legal Capacity Tests be Saved as a Justifiable Violation of Charter Rights under s. 1 of the Charter?.....	368
8. Conclusion.....	372
<i>Index.....</i>	375