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Guardianship as a barrier to social inclusion

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Outline

- What is social inclusion?
 - In general
 - For people with disabilities (CRPD)
- What is guardianship?
 - What is wrong with guardianship?
- What is the way out?
 - Supported decision-making
 - Legal capacity as an entitlement not an attribute (CRPD)

What is social inclusion?

In general:

'The development of capacity and opportunity to play a full role, not only in economic terms, but also in social, psychological and political terms.'
(EU Social Fund)

'An inclusive society must be based on respect for all human rights and fundamental freedoms, cultural and religious diversity, social justice and the special needs of vulnerable and disadvantaged groups, democratic participation and the rule of law.' (UN Social Development Summit, 1995)

Aspects of social inclusion

- Grounded in real life experiences, does not stigmatise;
- Creates expectations for fundamental change at multiple levels of society, from public attitudes to policies to service delivery practices;
- Promotes a multi-dimensional analysis of the causes of inequities;
- Validates individuals' or groups' choices about how and on whose terms to be included.
(Laidlaw Foundation, Canada)

What is social inclusion? For persons with disabilities

CRPD deals with social inclusion in several articles.

Preamble: e, m, n, o, w

Article 3 (General Principles): The principles of the present Convention shall be:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

...

(c) Full and effective participation and inclusion in society

What is social inclusion? For persons with disabilities

Article 12 (Equal recognition before the law)

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

...

What is social inclusion? For persons with disabilities

Article 19 (Living independently and being included in the community)

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

What is social inclusion? For persons with disabilities

- (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

What is guardianship?

MDAC defines 'guardianship' as a legal relationship established by a court process between an adult who is deemed to lack the requisite legal capacity to make personal decisions and the person appointed to make decisions on that adult's behalf.

What is guardianship?

- Guardianship is based on the outdated medical model of disability, placing the „problem” in the individual;
- Instead of eliminating barriers and providing support for those who find difficult to make decisions without support, guardianship create further legal barriers;
- Results in “civil death”.

What is guardianship?

Deprivation of legal capacity hinders the enjoyment of virtually all rights, including:

- The right to marry;
- The right to vote;
- The right to decide where and with whom to live;
- The right to make a will;
- The right to work;
- The right to access courts;
- The right to property

What is wrong with guardianship?

- Some shocking figures:
 - In Hungary (population cca 10 million) there are 66,000 adults under guardianship, deprived of their right to exercise their legal capacity. They are not entitled to decide on where and with whom to live, to make contracts, to vote, etc.
 - In British Columbia (population cca 5 million) about 2,000 persons are under guardianship

What is wrong with guardianship?

- Apply the effectiveness-necessity-proportionality test to guardianship!
 - Effective? If the purpose is protection of the person, then partially yes. It is though clearly ineffective to protect and promote rights of persons. Abuses are prevalent.
 - Necessary? Certainly there are persons who find difficult to make own decisions without support. But, arguably there are less intrusive alternatives (see comparison btw Hungary and British Columbia)
 - Proportionate? Arguably not: civil death is hardly proportionate to the protection provided even if abuses are not considered.

What is wrong with guardianship?

- Guardianship (substituted decision-making) arguably FAILS the effectiveness-necessity-proportionality test.

What is wrong with guardianship?

- CRPD 12 (4) excerpt: [S]uch safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence
 - IF guardianship respects the rights, will and preferences than deprivation of legal capacity is NOT necessary

What is wrong with guardianship?

CRPD Art. 24 (Education) (1)

- (a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
- (b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
- (c) Enabling persons with disabilities to participate effectively in a free society.

***Substituted decision-making is contrary to all these!
Development requires exercise of rights NOT
deprivation!***

What is wrong with guardianship?

CRPD Art. 26 (Habilitation and rehabilitation) (1)
States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.

Substituted decision-making does not promote, rather hinder this!

What is wrong with guardianship?

“ Imagine if someone else was making decisions for you. They could decide to take you away, lock you up, not listen to you, give you medication, block you from doing your work and living your life with your body and mind the way they are.

WOULD YOU WANT THIS TO HAPPEN TO YOU

- Wouldn't you have the feeling that you have lost your dignity and want it back? Wouldn't you feel your integrity has been violated? Wouldn't you want to have support in making decisions without being taken over and to ask for help without being seen any the less for it? Wouldn't you want to maintain your inherent dignity and be supported to make your decisions? Wouldn't you want to retain your integrity and continue to be you?

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The principles established in this Convention are universal and will apply to all human beings, as much to you as to me.

What is wrong with guardianship?

Let us make a Convention for a world where we can all grow and develop with mutual support.

IMAGINE A CONVENTION FOR ALL.
(IDC Newspaper special edition)

What needs to be done to comply with CRPD?

- Legally recognise both independent and interdependent (supported) decision-making
- Abolish plenary guardianship as clearly contradictory to CRPD
- Shift partial guardianship to supported decision-making
- Encourage (also financially) families, religious bodies and NGOs to implement supported decision-making