

# Denial of Legal Capacity as a Barrier to Inclusive Employment

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**Abstract:** This article explores the commonly overlooked interlinkage between two often discussed topics of disability law and policy worldwide: legal capacity and inclusive employment. The article undertakes case studies in three countries, which represent three regions of the world, highlighting how a denial of legal capacity amounts to a barrier in employment. In this context, the article employs examples of obtaining, maintaining and terminating employment and suggests that enhanced collaboration between the services of supported decision-making and supported employment would help in the search for a solution. The research intends to initiate further discussion of this overlooked issue by providing an initial oversight and by listening to the voices of persons with disabilities affected by this problem.

**Keywords:** legal capacity; supported employment; UNCRPD; supported decision-making

## 1. Introduction

Persons with disabilities have historically faced multiple barriers when trying to obtain employment, an issue which has been extensively discussed in research (World Health Organization, 2011). One aspect usually not discussed by literature is that of the impact of a restriction of legal capacity on access to employment. Therefore, the guiding questions of this article are: Does the restriction of legal capacity amount to a barrier for persons with intellectual or psychosocial disabilities in the open labour market? If so, what is a possible solution?

When entering into an employment contract, the person may be doubted and assumed to be unable to sign the contract or understand its full implications, for example the potential loss of welfare benefits and stress at the workplace. Carrying out job duties refers to the fact that employees have to set actions that legally bind their employers, for instance a cashier taking money and handing over products. Finally, persons with intellectual and psychosocial disabilities may make ‘premature’ decisions, which lead to discussions over their best interest. This is in contrast with the situation that an employer terminates the employment contract as a result of his or her disability, which would be forbidden under anti-discrimination legislation (Waddington, 1996). This article explores some of

the legal and social obstacles to employment created by the assumption that employees with disabilities lack legal capacity, the agency to act and stand up for themselves. The consequences include exploitation, inaccessibility of job vacancies and legal uncertainty amongst others.

We argue that instead of denying legal capacity, these cases could be resolved by applying a combined system of supported decision-making and supported employment which follows the concept of ‘place, train and maintain,’ giving priority to finding a job that fulfils the criteria and wishes of the person and then focuses on maintaining employment (Jahoda et al, 2008).

The study consists of three main parts. The first part includes the sections of research methods, the theoretical background and the legal framework of the Convention on the Rights of Persons with Disabilities (hereinafter CRPD). The second part presents and analyses the collected reports and interviews. Finally, we suggest a first set of approaches that would potentially help resolve the problems identified.

With regards to terminology, we use the language of the CRPD as a starting point, which only refers to ‘mental, intellectual or sensory impairments’ in the Article 1 of the CRPD. Therefore, we do not distinguish between cognitive and intellectual impairments. Since the adoption of the CRPD, the word ‘mental’ has however often been replaced with the word ‘psychosocial’ (CRPD Committee, 2014), which was therefore chosen in this context.

## **2. Research Methods**

This article uses several types of factual matrices in order to get a fuller initial picture of the problem discussed. First of all, we conducted qualitative interviews, both with an individual and a focus group, to collect data about the Austrian and Kenyan cases in order to identify their employment-related difficulties. Subsequently, we collected text and report-based inputs from Austria and China as a further evidence. The authors chose thematic analysis (Braun, and Clarke, 2006) to analyse the collected data, drawing upon the identified shared problems.

This research is based on interviews with persons with disabilities, following the principle of “Nothing about us without us.” The research gathers data on the topic which has not been extensively researched yet. We considered other available sources, for instance, a court ruling and job advertisements. The interviewees were ultimately chosen after lengthy discussions of the topic with other researchers and people working in the field, choosing participants based on stories that can provide a broader spectrum of the issue. We recruited all of the interviewees through personal contacts to ensure compliance with the human rights approach to disability and on the basis of their experiences in regard to the topic and their willingness to participate in this research. We did not adopt specific inclusion or exclusion criteria. Formal ethical approval for this research was not deemed necessary by the research institution or the participating organisations. We complied with all standards as set out by the organisations and national laws.

Austria is a small highly developed Western European country. It is a welfare state with a generally high standard of living and a predominantly formal, market-based economy. Administration can be considered effective and the rule of law applies in all areas, rural and urban alike (CIA World Factbook, 2018). It has been rated as a high social progress country based on the Social Progress Index (Social Progress Index, 2017).

Kenya is an East African country with a growing middle class, however there are big differences within the population. Corruption and weak governance slow down the overall improvement of quality of living and social protection. The informal economy is still providing a living for large parts of the population (CIA World Factbook, 2018). The Social Progress Index ranks Kenya in 95<sup>th</sup> position worldwide and 'low social progress' (Social Progress Index, 2017).

China is an East Asian country with a population of 1.4 billion. It has a growing but unevenly distributed economy and social development levels among its different regions (CIA World Factbook, 2018). The Social Progress Index situates it as a 'lower middle progress' state (Social Progress Index, 2017).

The limitations of this research are twofold: lack of representation due to the small number of participants (seven interviewees in two countries), as well as limited literature in the analysis and discussion. This article however only aims to raise the issue and provide some initial ideas for solutions. It is not claiming representativeness; therefore, it is sufficient to provide evidence of the existence of the problem. On the other hand, the lack of literature on the implication of legal capacity in employment indicates the necessity of this research.

### **3. Theoretical Background**

The perceived need for regulating legal capacity and introducing forms of substituted decision-making can be found at the core of our private law systems, based on the principles of private autonomy, legal certainty and equal bargaining powers.

Habermas (1995) describes how every society is guided by certain visions, in other words, values, and how those ideas are incorporated into the legal system. Private law systems are built on the idea of autonomous individuals – the legal subjects – entering into various agreements, for example employment contracts. Those contracts are regulated by a society's idea of social justice. Questions of distribution of wealth, power and opportunities have led to an understanding of the status of legal subjects being not just negative, but including active duties. Private law systems are based on the realization that legal freedom is meaningless without actual freedom. It therefore accepts private autonomy trade-offs in favour of the welfare state to enable, if possible, everyone to participate as autonomous legal subjects of an equal standing. Habermas concludes that the goal of a legal system is to secure the private and the public autonomy of all citizens at the same time (Habermas, 1995).

Koziol and Welser (2006) describe the function of private law to resolve conflicts of interests according to general, pre-determined and (ideally) just rules, so as to ensure society's faith in the rule of law and the actions of others. They can therefore rely on the other party of a contract being bound by said contract, if they have expressed their will to enter into the agreement and can form such a will. This system is based on the idea of private autonomy, which means self-determination to decide whether to enter into a contract or not. This self-determination is however in reality often restricted by one's knowledge or predicaments. In such cases the law acknowledges a need for protection of the weaker party, which can take many forms in private law, such as regulations of terms and conditions or the right to challenge a usurious deal. This need for protection has to be balanced against the other party's interest to be protected in their reliance on the validity of the agreement based on the general principles of the law. Balancing these two interests is the reason why, in some cases, the protection of legitimate expectation prevails over the interest of declaring an agreement void based on a lack of will to enter into an agreement or a lack of legal capacity. This can, however, only happen if there is at least a minimum amount of self-determination. If this minimum is denied in the specific case, the power imbalances are understood as too grave and the person lacking legal capacity has to be protected by the legal system (Koziol, Welser, 2006).

An often-discussed example of this protection is the guardianship for adults with intellectual and psychosocial disabilities. Once put under full or partial guardianship, decisions in their lives are being made by their guardians. In the language of the CRPD, these groups of persons are under substituted decision-making arrangements and their legal capacities are limited or denied. Their decisions about employment, which are the subject of this article, are also impacted by the guardianship system and the ideas behind it (EU Agency for Fundamental Rights, 2013).

Guardianship is generally defined as a 'fiduciary relationship between a guardian and a ward or other incapacitated person, whereby the guardian assumes the power to make decisions about the ward's person or property' because the ward is considered 'incapable of caring for himself or herself'. (Black's Law Dictionary, 2009 775-776). Whereas the proceedings of imposing guardianship and criteria of determining mental capacity (as a basis of depriving legal capacity) have evolved along the history (Bach, Kerzner, 2010), the very nature of guardianship has arguably remained unchanged: the state intervenes in the private lives of people considered 'incapable of caring for himself or herself' by providing benevolent care (Hommel et al, 1990).

While most of the literature primarily discusses guardianship as this formal and institutional aspect, persons with disabilities in some regions of the world experience primarily what is referred to as 'informal guardianship,' exercised by parents or other members of the community on a de facto basis, without any official legal authorization. Considering that the social network of most persons with disabilities, especially in rural areas, is small, they fall easily victim to over-protection and isolation (Kenya National Commission on Human Rights, 2016; MDAC 2014).

Notwithstanding the benevolent purpose, it has been gradually acknowledged that the imposition of guardianship and depriving people of their right to make decisions for themselves because of paternalistic considerations is a human rights violation, and that substituted decision-making arrangements should be replaced by supported decision-making measures (CRPD Committee, 2014). The philosophy of supported decision-making is to assist and support the person concerned in reaching their own informed decision, in contrast with the substituted decision-making in which decisions are made on the person's behalf usually on the basis of 'best interest' of the person (CRPD Committee, 2014). There are heated debates whether it is possible and desirable to abolish substituted decision-making in all cases overall (De Bhailis, Flynn, 2017). The focus of this article, however, is only to reveal how limitations of legal capacity can hinder employment opportunities of persons with intellectual and psychosocial disabilities.

#### **4. The Applicable Law**

##### **4.1. International Law**

Since 2008 the United Nations Convention on the Rights of Persons with Disabilities provides a binding source of international law and human rights for its state parties. It does not include any new human rights, but rather clarifies how the existing framework has to be implemented in order to realize those rights in a meaningful way for persons with disabilities (Kayess, French, 2008). For this research two articles are of especial importance, namely Article 12 on legal capacity and Article 27 on employment.

Article 12 requires State Parties to 'recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'. (Art 12 (2)). It is interpreted by the CRPD Committee as containing both the capacity to have rights and the capacity to exercise rights. This means that a person with a disability should not only be considered a subject of rights in the eyes of law, but he or she should also be able to make legally valid decisions, for example entering into an employment contract. If a person needs support to exercise his or her legal capacity, the State is obliged to provide access to such support, usually in the form of supported decision-making arrangements (CRPD Committee, 2014). Article 12(4) further provides procedural safeguards to the operation of decision-making support, ensuring the persons with disabilities are free from abuse or undue influence.

Article 27 requires from the state parties to ensure that persons with disabilities enjoy equal access to all aspects of employment, ranging from hiring someone to promotions and terminations. Employment within the open labour market has to be promoted in all its forms, covering the private and the public sector equally, as well as self-employment. Support has to be given where necessary and non-discrimination has to be ensured (Article 27 CRPD). Schulze (2010, 150) describes Article 27 as being primarily about issues of accessibility and non-discrimination. We can summarize the

problem discussed in this article under those headings as well, seeing how a lack of legal capacity can lead to the person not being able to enter into employment or not being able to carry out their duties, which might subsequently lead to an unwanted termination of the contract, thereby constituting a lack of access to employment. Seeing how these rules apply only to persons with disabilities, we might also argue that the rules are being applied in a discriminatory manner. Article 27 lit (h) lists affirmative action as one of the means to promote equal employment opportunities in the private sector. The authors argue that supported employment, aiming to provide the necessary supports for persons with disabilities in order to enable them to obtain or maintain work, is to be understood as one form of affirmative action, and is thereby captured under this provision.

In addition to the above two specific provisions, reasonable accommodation is a critical concept adopted by the CRPD and highly relevant to this study. Reasonable accommodation is defined in Article 2, meaning ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’. States Parties of the CRPD are obliged to ‘take all appropriate steps to ensure that reasonable accommodation is provided’ (Article 5), whilst denial of reasonable accommodation constitutes discrimination on the basis of disability (Article 2). As will be suggested below, if reasonable accommodation is provided in the decision-making at workplace, denial of legal capacity could be avoided in many cases.

#### 4.2. Domestic Laws

The Austrian Constitution prohibits discrimination on the grounds of disability (Article 7 B-VG), a rule which is further implemented by the Disability Employment Act, which also sets out a quota that employers have to meet, regulates protection of dismissal and reasonable accommodation amongst other things. The Directive Accompanying Assistance by the Ministry of of Employment, Social Affairs and Consumer Protection from 2011 sets out the overarching rules applying to supported employment services at a federal level. It includes a clarification that the supports are of a psychosocial nature and include working with the person’s environment and not just on directly employment-related issues (Pöschko, Meusburger, 2012). Austria has furthermore amended its legal capacity law recently, further promoting supported decision making and prohibiting plenary guardianship, but still leaving room for substituted decision making (Hofmayer, Ladstätter, 2017). The Austrian case studies in the following section will show how overlooked side-effects of a complex legal system lead to obstacles in obtaining employment.

The Constitution of the People’s Republic of China provides in Article 45(3) that ‘[t]he state and society help make arrangements for the work, livelihood and education of the blind, deafmutes and other handicapped citizens.’ China also enacted the Law on the Protection of Disabled Persons, newly amended in 2018, explicitly prohibiting discrimination on the basis of disability (Article 3)

and further provides '[t]he state shall ensure disabled persons' right to work' (Article 30). Given these general protections, the CRPD Committee expressed its doubt to the effectiveness in its Concluding Observations to China's initial report on the implementation of the CRPD (CRPD Committee's Concluding Observations to China's State Report 2012). Adult guardianship system is provided in the General Principles of Civil Law (1986), in which substituted decision-making is explicitly endorsed while no supported decision-making arrangement is provided. Job coaching and work assistance is offered in some cases on a pilot-project basis but no legal or regulatory framework exist yet.

The Kenyan Constitution of 2010 prohibits discrimination on the grounds of disability in its Article 27 and also allows for affirmative action. Article 54 on persons with disabilities establishes the right to "reasonable access to all places, public transport and information," which can be seen as a first codification of reasonable accommodation, yet only covers physical access. The Persons with Disabilities Act 2003 provides further rights for persons with disabilities, including the right to reasonable accommodation in employment (Section 15(5)) and sets out a 5% employment quota for both the public and the private sector. As part of the interviews carried out, support staff told the authors that the job coaching schemes available are usually based on private sector initiatives or the work of organizations for persons with disabilities, and are neither receiving specific funding nor covered by regulations. However, as the next section will show, the informal economy and family-run businesses still provide for a large amount of work and many persons with disabilities therefore remain outside the coverage of the protection provided by the legal system. It will also show that informal guardianship poses a challenge for safeguarding the respect of legal capacity.

## **5. Factual Matrices: Examples from Austria, China and Kenya**

### **5.1. Austria**

Mr. Maxl (name changed based at interviewee's request) was interviewed via phone. He was specifically asked for an interview based on recommendations about his story which not only shows the shortcomings of the legal system, but also how solutions can be found. Mr. Maxl, in his thirties, had been working in a sheltered workshop since he left school and is under guardianship for several matters, including finances, contracts and interaction with public bodies. This guardianship had been upheld without any substantial revision for over ten years. He is living independently with his girlfriend. Mr. Maxl wants to work in the open labour market and earn a salary. With the help of work assistance, he passed a course to become a security guard and was subsequently offered a job as a security guard in a parking lot. This job would include handing out tickets, therefore acting as an agent for his employer, binding customers as third parties. Even if the guardian had signed the employment contract, his employer was worried that Mr. Maxl would still not be able to carry out this duty on the job because the guardianship could render all legal acts set via private parties

voidable. The employer therefore decided to await a change of the range of the guardianship. The guardian opposed the employment as such, thinking that the loss of benefits would not be in Mr. Maxl's best interests. After almost a year (and a change of guardian) the court agreed to reduce the guardianship to only financial matters and Mr. Maxl was therefore able to start his job.

A similar case, but concerning the public sector, was covered by the media (BIZEPS, 25 May 2016), as it was taken up by the Austrian Ombudsman and subsequently led to an amendment of the Austrian Public Contractual Employee Act, which had explicitly stated that full legal capacity is necessary in order to be allowed to work in the public sector. Ms. Mahrer had been working in a military canteen as part of an employment hiring scheme and was subsequently offered a permanent contract. Only then did the problem arise that she would need full legal capacity. Ms. Mahrer's employer did not accept the situation and contacted the Ombudsman who managed to successfully advocate for her rights. What these two cases show is that this legal problem might be more widespread than initially assumed, seeing how in both cases it was only discussed because of supportive future employers. What we do not know is the number of similar unrecorded cases.

## 5.2. China

The Supreme People's Court of China published 'Ten Typical Cases on the Protection of Rights and Interests of Persons with Disabilities' in 2016. The case below was included as one of the ten typical scenarios which the Court believed worth promoting among all Chinese courts in addressing cases involving persons with disabilities.

Ms. Kong, born in 1977, has an intellectual disability which was assessed in 2009 as Class 1, the severest category. Ms. Kong entered into an employment contract in December 2011. The contract period was two years and would have expired on 30 November 2013. On 15 July 2013, Ms. Kong signed her resignation application, and on this basis the company terminated the employment contract within the same month. Ms. Kong's mother and agent ad litem, Ms. Jiang, brought a lawsuit on her behalf against the Company in front of the district court in 2014, claiming compensation of 29600 RMB (approximately £ 3,400) for the illegal termination of the employment contract. The indictment claimed that (a) the resignation application was signed without a comprehensive understanding of the nature of the document; and (b) because the plaintiff has an intellectual disability, the resignation application Ms. Kong signed was invalid without the approval of Ms. Kong's guardian; whilst the court considered the initial employment contract valid because the guardian did not object.

The court held that because the actions are complicated and have significant impact on her personal interests, like 'signing the employment contract and resignation application,' Kong could not have proper understanding and judgement or foresee the consequences of her actions; and, therefore, those important decisions should be represented or approved by her mother. Since Ms. Kong's mother did not approve her action of signing the resignation application, the court held that



the resignation was invalid by law and the employment contract should continue to perform until its expiry date. The court ruled that the company had to pay Ms. Kong 4,200 RMB (approximately £ 480) for the termination of the employment contract.

In addition to this case, we also found that it is a common requirement for persons with disabilities to have full legal capacity to ensure employment in both public and private sectors in China. For example, all the people who seek to become civil servants need to pass a physical examination as a precondition, and the standards for the examination explicitly disqualify people with a history of mental illness, among some other 'neurotic conditions' (The Temporary General Standards of Physical Examinations in Recruiting Civil Servants in China, Article 11). In regard to private sectors, it is quite common for employers in China to require job applicants to have full legal capacity. For example, a bank in China requires job applicants to 'have full legal capacity, be physically healthy, and free from bad habits' (in the Chinese context 'bad habits' usually refers to issues like substance abuse).

### 5.3. Kenya

Six Kenyan self-advocates with intellectual disabilities from Nairobi were interviewed as a focus group via a Skype video call in the presence of an interpreter who is a support person of the group. A variety of stories and problems were shared. Not all of the experiences are directly based on a formal denial of legal capacity, but the personal stories are still relevant in a sense that they illustrate an attitudinal barrier to employment, often based on presumptions of the person's decision-making abilities. The effects of this attitudinal barrier may be particularly critical in countries where informal economy provides most employment opportunities and formal access to legal remedies is unavailable.

Two female participants had been working for the same salon. They had been put in contact with the salon via a supported employment project however they encountered numerous problems that led to them quitting the job, including:

- The salary they were paid turned out much lower than what had been agreed upon before they took up the work.
- They were given more work than they could cope with.
- They had to work till late in the evening, with the employer abusing the fact that they had problems telling the time and leading to them having to go home alone in the dark.

Another interviewee told us how he would always get blamed if something, including money went missing, until he could not take it anymore. When he told his boss that he would terminate the employment relationship, his boss's wife misappropriated some of the business's funds and blamed him for stealing the money. His family supported him in leaving this job.

Family was mentioned as the source of work by two participants, highlighting problems of being paid less than other employees. This was justified by the family members with the fact that

they were given shelter, food and clothes instead. However, they ignored the fact that the employee was still receiving less than others, not more than pocket money, and that payment in kind was not the person's choice. Here family provided both care and work, based on informal arrangements which were mainly one-sidedly determined by the employer.

Finally, one participant told us how he was offered a job, but his sister told him he should not accept the offer as he was lacking the necessary tools and the job was far from home. He ended up following her advice which was influenced by her personal interest.

## **6. Analysis and Discussion**

This section will discuss systematic issues deducted from the matrices presented in the article. In order to facilitate future discourse and change we have grouped the issues by theme, highlighting the problems arising from a denial of legal capacity over the course of an employment relationship from the beginning till the end. It became clear that none of the issues are restricted to one jurisdiction, thereby showing the need for international discussion and analysis to start coordinated action and development of toolkits.

Another point that has to be mentioned before going into the details, is that in each of the countries we found that the barriers were not only created by the respective legislations themselves, but also by the assumptions of what the laws do or do not allow. In the Austrian case for instance it was the employer who wanted a maximum of legal certainty. Important at this stage is to understand how the legal and social barriers interrelate in the case of denial of legal capacity and access to employment.

### **6.1. Entering into Employment**

Several concerns have to be addressed when discussing the barriers persons with disabilities face when entering into employment, such as the loss of disability benefits (for instance Stapleton et al, 2006)– see the Austrian case of Mr. Maxl – or the job requirements being perceived as too strenuous (undue pressure to make a decision, opposed to Article 12(4) CRPD, instead of asking for reasonable accommodation as set out by Article 27 CRPD), as in one of the Kenyan cases. Those concerns are usually raised by formal or informal guardians and persons of trust and will be discussed more broadly under the heading of best interests.

Another barrier that was identified in both Chinese and Austrian cases is that of the requirement of (full) legal capacity to be eligible for a job opening in the first place. The Chinese job advertisements collected for this study directly exclude persons without full legal capacity from entering employment, reflecting the widespread employment discrimination against persons with disabilities in China. However, as the CRPD Committee observes, China has not developed a clear

definition of discrimination on the basis of disability within its legal system to address this problem (CRPD Committee's Concluding Observations to China's State Report 2012).

Ms. Mahrer's case showed how the discriminatory provision in the Act regulating job requirements for the public sector, almost stopped her from getting the job which she had effectively already been doing for several months and thereby proven herself capable of fulfilling. The broad requirement of full legal capacity had nothing to do with the requirements of her specific job. What became clear from her case (alongside Mr Maxl's) was that it was only thanks to the special engagement and the successful advocacy work of her support workers and the interest of the Ombudsman that she could obtain the job in the end. Only years later was the systemic issue resolved by deleting the discriminatory norm from the law (Vertragsbedienstetengesetz, 2012). What we will never know is how many other people were affected by this law and silently gave up. Furthermore, we have shown with a Chinese example that job opportunities are at times openly advertised with such discriminatory criteria. These cases can be arguably summarized as constituting direct violations of Article 5 on non-discrimination on the basis of disability, Article 12 on legal capacity, and Article 27 on employment.

The final question that remains and which has to be researched in the future is how many job vacancies are not explicitly but effectively based on a requirement of legal capacity.

## 6.2. Job Maintenance: Carrying out Duties on the Job

As mentioned in the introduction and shown by Mr Maxl's case, an employee has to set legally binding acts for their employer on numerous occasions. Mr Maxl's employer was therefore understandably concerned about the lack of legal capacity regarding private legal relationships. § 1018 Austrian Civil Code requires that in order to make a representation valid, the agent (an employee in this context) must at least have partial legal capacity. For example, an employee whose legal capacity in financial matters is restricted could still act for a contract with a consumer on behalf of the employer. This lowered requirement is generally considered as justified because the legal consequences will affect the employer, who chose their representative and had full legal capacity in doing so (Perner, Spitzer, Kodek, 2012; Koziol, Welser, 2006). Strictly speaking Mr Maxl would therefore have been able to carry out his duties on the job under the old guardianship ruling as it was never a plenary one (however the change regarding contracts was still necessary as the guardian opposed the employment relationship generally). It would nevertheless still have given space to concerns such as a subsequent change to a plenary denial of legal capacity, which would theoretically give room to customers trying to declare the tickets they had received null and void. In terms of legal certainty for the employer, it is therefore necessary to have Mr Maxl's legal capacity regarding contracts clarified.

What we can clearly see from this brief overview of the legislative background to Mr Maxl's case is how highly complex the legal regulation of this question is. It can therefore easily confuse

potential employers and scare them away, fearing legal disputes with their customers who might try to exploit the disability of the employee. If the employers do not have the legal knowledge or the necessary advice at hand, we can assume that such concerns may encourage them to select a person with an undisputed legal capacity instead. The legislative situation as it is therefore amounts to a barrier from employment. Consequently, this would equal a violation of Article 27 (b) of the CRPD (right to work on equal basis with others). Instead we argue that the provision of support in the decision-making process while carrying out duties on the job has to be ensured as a form of reasonable accommodation in the workplaces as required in paragraph (i) of the same article.

The experiences of the Kenyan women working at the salon showed how their disability and the perceived lack of legal capacity were used against them as means to undermine the negotiated terms of the contract. The women were made to stay long after the official end of their shifts and paid less than initially agreed. We can conceptualize this behaviour by their employer not only as a form of exploitation, but also as the employer trying to abuse the women's perceived lack of legal agencies by effectively unilaterally amending the conditions of the employment contract. The women's young age and inexperience to the labour market in addition to their disabilities made them easy targets. Despite their protests and the attempted interventions of support persons, the conditions did not improve until they decided to quit their jobs. The system thereby failed to ensure their job maintenance by supporting them against their employer who held more bargaining power than them. While the law would provide protection in some cases, the persons affected were probably not aware of the legal remedies and did not have the contacts and means to enforce their rights. We argue therefore that these cases show a combination of social and legal barriers preventing the individuals from enforcing their labour rights, amounting also to a lack of access to justice.

### 6.3. Terminating the Employment Contract

Considering the difficulties of persons presumed to lack legal capacity in entering and maintaining employment, the benevolent intention of guardianship and the philosophy behind it, as discussed in the section on the theoretical background, are evident in the case of Ms. Kong. In order to justify the small amount of compensation, the court based its ruling on Ms. Kong's lack of legal capacity in terminating the employment contract. Without discussing the legal and technical details of Chinese law, a similar result and legal reasoning would have been possible, without denying Ms. Kong's overall legal capacity, as Ms. Kong claimed that she was told to sign a blank resignation sheet, therefore rendering the resignation invalid. Although, the court found a legal ground supporting the claim of compensation in this case, giving it the impression of a favourable outcome, the legal reasoning adopted may pose a negative effect to Ms. Kong's future efforts in seeking employment: a potential employer may have reasonable concerns about the legal effect of other contracts signed by Ms. Kong. The fact that this case has been promoted as one of the typical cases

on disability rights protections by the Supreme People's Court of China may amplify this concern, reinforcing the impression that hiring persons with intellectual and psychosocial disabilities associates more legal uncertainties. This will impact the right of the opportunity to gain a living by work freely chosen, as provided in CRPD Article 27 – Ms. Kong might have accepted the job in the past but it was not the occupation of her free choice anymore.

Moving beyond this individual case, it is worth considering how to reconcile the benevolent intention and the respect for the legal capacity of persons with intellectual and psychosocial disabilities in the context of terminating employment. As an initial proposal for further studies and pilot practices, we argue for a shift to supported decision-making rather than a substituted decision maker. When the person enters employment, the person concerned, the employer and the supporter may have a meeting to talk about the person's needs for accommodations etc. Acknowledging that some persons with intellectual or psychosocial disabilities may have emotional issues, employers are encouraged not to immediately accept an expression of will that has a significantly negative impact on the person concerned, like resignation from the job, but instead to first contact the supporter and tell the person that they will do so. The supporter's role is then to work with the person concerned to deliver a genuine will and decision. In this framework, the role of the supporter in assisting the decision-making should be recognised by the employer, serving the benevolent intention of protecting persons with intellectual or psychosocial disabilities from hasty terminations of employment. In the meantime, the person could exercise his or her full legal capacity with support.

#### 6.4. Overarching Issues

We have found that certain issues exist across continents and potentially within all three aspects of legal capacity and employment. They are therefore discussed in this section to highlight their overall implications.

##### 6.4.1. Best interests

The issue of 'best interests' is one of the often-discussed problems when it comes to regulations of legal capacity. The CRPD requires a move away from this concept, which looks at what outcome or decision one would objectively consider beneficial for someone – a reasonable average person in this situation – towards realizing the 'will and preferences' of the individual. Will and preference refer hereby to the subjective, individual choices and tastes of the specific person in question (CRPD Committee, 2014).

If we look at the case of Mr. Maxl and the case of Ms. Kong, we will find that both of them include references to what was considered in their best interests. Interestingly, they were not both favouring the same outcome (being in employment or being out of employment) but rather a continuation of the status quo. In Mr. Maxl's case the guardian explicitly clarified that he feared that Mr. Maxl might not be able to remain in employment in the long-run and considered it against

his duties as a guardian to support Mr. Maxl taking up the job, as he was risking losing his disability benefits. While we do not know the reason behind Ms. Kong's mother opposing her terminating the contract, we can assume that the loss of the salary was a big factor. Therefore, what both cases probably had in common was the understanding of ensuring a continued guaranteed income as being in the person's best interests, at the cost of their personal wishes and preferences. Apart from the requirement of supported decision-making and therefore working with the person, so as to enable them to make their own decisions (e.g. Bach, Kerzner, 2010), there is more to an employment decision than the financial aspect. Research identifies multiple advantages of employment, such as contributing to society, gaining respect, finding something meaningful to do and belonging to a group, a social network (Schultz, 2000). It is therefore hard, if not impossible to even determine what the objective best interests in Mr. Maxl's case would have been. His will and preference were however clear, he himself had acted to find a job, as he sought the aforementioned sense of belonging, contributing and meaningful work.

As for Ms. Kong we do not know enough details about her motivation to terminate the job. While – as has been discussed in the previous section – she might have acted on the spur of the moment and maybe regretted the decision later on, we cannot know for certain. Maybe she wanted to find a new job with conditions that suited her better, maybe she needed time to figure things out in her life, the options are numerous. Usually reactions to someone quitting their job range from concern to being supportive of the decision, where a job negatively impacted the person's quality of living. The same has to be done in a case like Ms. Kong's. It is the role of supported decision-making to discuss the options with her and support her to achieve the outcome she desires. There is not and cannot be a one-size-fits-all best interest solution.

#### 6.4.2 Abuse of perceived lack of legal capacity

An issue that came up in several of the Kenyan contributions was that of their family members and/or employers using the perceived lack of capacity for their own purposes. The most obvious example is that of the young man who decided to quit his job and was then blamed for the missing money which had really been misappropriated by one of the owners. Other examples are the one-sided change of the stipulated rules of the employment contract by the salon owner or being paid a much lower salary by the mother because she provided care for her disabled daughter.

What these examples have in common is the relative powerlessness of employees with disabilities. They seem to be viewed as not capable of standing up for themselves, and therefore as easy targets for undermining the labour regulations without any consequences. Furthermore, they are seen as easy targets for blame in respect of any mistakes within the business, as people would not persecute the person with a disability due to their lack of legal capacity and would also not question the explanation and look for the actual culprit. This lack of protection from abuse is a sign

of a lack of safeguards ensuring the correct implementation of supported decision making, as required by Article 12(4) CRPD.

In this context it becomes clear that supported employment approaches such as mentoring or a job coach are needed to ensure that employees with disabilities are not being exploited and discriminated, but treated equally as any other employees.

#### 6.4.3 Multiple roles of the family

The cases have shown the different roles family members have. We have seen family members acting as guardians, care takers, support persons and employers, sometimes taking on more than one role at the same time. The case of the Kenyan girl who was working for her mother at the market, receiving only a little pocket money, shelter, food and clothes is one such example. By providing a home the mother was her care taker, by having her work for her the employer, and by deciding on how to use the salary and in which ways to pay her as her guardian. This multiplicity of roles potentially leads to recurring situations of conflicts of interests for the mother, having to balance her own interests as an entrepreneur having to sustain her business, with those of a mother trying to protect her daughter. Questions of supported decision-making are likely to be neglected in such situations and power imbalances make it hard to resolve disagreements between the mother, as the guardian and main care giver, and her daughter. This problem is further exacerbated by the high informality of both the employment and guardianship setting. There will be no written employment contract nor an official guardianship document which one can refer to as binding rules. It would therefore have needed an external person, respected by both parties, to support the young girl in resolving the multiple issues with her mother, without destroying the family bonds. Such projects have been started in Nairobi and the interviewees of this research can now access this support.

Ms. Kong's case also shows how the mother acts as her guardian. While we can assume that her mother meant well, potentially trying to ensure a continued secured living for her daughter, she clearly had a different understanding of what was good for her daughter from Ms. Kong herself. Being both a mother and a guardian, we can assume that she also feared that a loss of income and financial autonomy of her daughter would mean that she would have to step up and take responsibility to support Ms. Kong and was concerned about who would take care of her daughter if she was one day not able to support her anymore. Again, we can see a conflict of interest between what is good for the mother and what the daughter wants.

Finally, family can of course be a source of great help and provide the support needed to exercise one's right to make decisions, as in the case of the young man who decided to leave his job, where he got blamed for others' wrong-doings. He had consulted with his family who supported him in leaving this stressful job behind. He therefore got not only the assistance needed for making his own decision, but also the reassurance of the family members as carers to be there for him when he needed them.

We can therefore summarize that family members have to take on many different roles in the context of work and legal capacity, sometimes several at once, which can lead to conflicts of interests, that could be resolved by taking some of that responsibility off their shoulders by providing an external support person for the person with the disability, who can fulfil the role of person of trust without having to consider their own interests. Family is a source of strength and support and we should ensure that it can fulfil this role to its maximum. Family members' multiple role complicates the application of the safeguards over supports in decision-making, as required in Article 12(4), seeing how the person affected might give priority to an intact family life.

## **7. Suggested Solutions**

As mentioned before, this article aims only to provide an initial overview of the problem of denial of legal capacity being a barrier to employment for persons with disabilities. Similar limitations apply to the suggested solutions to this problem. They can only highlight some commonalities found within the cases and link them to existing best practices and research in the field of legal capacity and inclusive employment respectively. To develop and implement more detailed solutions, both international and domestic approaches will have to be developed to address and resolve the problems. Initial actions and toolkits by the international and regional organizations can help raise the needed awareness at national levels but – as will be shown in this section – legislative changes and support projects will have to be implemented at national level.

### **7.1. Amend laws to remove all existing legal capacity related obstacles for persons with disabilities trying to access employment**

Since the law creates obstacles for persons with disabilities in the workplace, the foremost solution is to amend the law, thereby removing the legal barriers. In our analysis of the implications of legal capacity in employment, we found explicit eligibility criteria of legal capacity in seeking and maintaining employment. As discussed in the previous sections, the employers adopted this requirement of legal capacity for two primary concerns. Under some of the jurisdictions considered in this article and beyond, if the person's legal capacity is in question, the legal effects of the contract between the employer and employee become uncertain and possibly subject to the approval of the guardian or - if there was no guardianship ruling at the time - potentially void and non-enforceable; secondly the contract between the employer, represented by the employee with disabilities, and the customer may also increase legal risks for the employer.

We argue that these legal barriers must and can be removed. In entering and terminating employment, supported decision-making arrangements should replace substituted decision-making arrangements, acknowledging supporters' roles while restoring the centrality of persons with disabilities in the decision-making. Therefore, even if with intensive support, the legal validity of



the employment contract should not rely on the guardian's approval. It does not need to either, since the benevolent intention has been addressed in an alternative fashion.

Considering the general obligation of non-discrimination, job advertisements should not contain a criterion that is not required by the post. In regard to the legal issue of representation within employment, which may be argued as a reason why legal capacity is required in certain posts, we believe there is room both in law and practice to clarify that legal capacity must not be a barrier to employment. The employment contract should form a clear legal basis for the scope within which the employee can represent the employer in interacting with third parties. Therefore, an employer may consider whether a job applicant can fulfil the job duties in an individualised fashion, rather than referring to the vague and broad label of 'lacking legal capacity' in general. However, it is also the reality that employers are deterred from hiring persons with intellectual or psychosocial disabilities due to the perceived lack of legal capacity and hence, the assumption of legal uncertainties which is often shared and/or abused by potential customers. To solve this practical problem, we believe more awareness raising and supported employment practices should be put in place.

## 7.2. Acknowledge the role of supported employment in the context of legal capacity and employment

As briefly explained in the theoretical part of this article, supported employment focuses on placing persons with disabilities in jobs and work environments according to their will and preferences. As part of their task of securing a job, the work assistant (the person helping in finding a job) has to assist the person with the employment contract in accordance with the labour law. Job coaches provide on-and-off-the-job support as the final stage of supported employment, mediating between employer, mentor and employee where necessary, while intervening as little as possible, so as not to disturb the work setting and network. They work in whatever area is necessary to help maintain the job, which can be specific professional skills or generic social skills (EUSE, 2010). We argue that this role can include supported decision-making tasks on the job where needed. Regarding the field of carrying out duties on the job by representing the company, it has been established in this article that a different standard has to be applied than for other contracts, since the legal consequences bind the employer, not the person with the disability. It is therefore sufficient if the job coach and/or mentor train the person on the job in a way that they can carry out the necessary steps according to the required standards. As for any issues arising regarding the employment situation itself, the job coach is the person most familiar with the employment specifics and therefore suited to support the employee in their decision-making. They have the knowledge of the level of job satisfaction, stress and the specific job-related wishes of the person to explain the implications of potential changes and advise the person where needed and wished.

To strengthen, officialise and acknowledge the role of job coaches in the context of supported decision-making, we therefore suggest the following initial steps to be taken:

- Explicitly clarify by law/regulation that supported decision-making falls within the scope of supported employment: Job coaches, like any other social service, are bound by specific regulations outlining their competences and their limits. In order to ensure legal certainty for them while performing their job, but also to answer potential concerns by employers, judges or third parties, it is advisable to clarify in the respective supported-decision making and/or supported employment regulations the role of work assistants and job coaches in the context of legal capacity and employment as experts, potential persons of trust and support for the employee with a disability.
- Provide training, information and funding: The specifics of legal capacity and employment law are usually not part of a job coaches' core education and training. It will therefore prove necessary to design and provide some applied training on these topics together with toolkits for future reference. While not every job coach on the team will have to become an expert on this topic, it is advisable to have at least one or two staff members trained on these aspects to help their colleagues where needed. This way job coaches can fulfil their roles professionally and efficiently, gaining also the trust of the employers. This trust is needed to ensure job coaches are notified about potentially arising problems in due time.
- This added role of the job coaches might in some national contexts fall under a different ministerial and budgetary competency (e.g. supported employment falling under Labour and Social Affairs while Supported Decision-Making falls under Justice). This must not lead to a lack of resources or a duplication of services and has to be dealt with by coordination and clear funding, training and supervision agreements.

### 7.3. Extend support to informal, non-regulated settings

#### 7.3.1. Multiple roles of carers

As has been discussed, carers and especially family members might have to take on multiple, at times conflicting, roles. The World Report on Disability has put some focus on what they refer to as 'informal', in other words, non-state-based, non-institutionalized, care settings. It highlights the restrictions such care settings can put on both the carer and the person cared for in regard to time, opportunities and finances (World Health Organization, 2011). In addition to this we have highlighted the tension that might arise within the family setting, based on power imbalances and diverging interests having to be resolved in a very intimate context. A support worker for the person with a disability, acting as their person of trust and assisting them in accessing services and expressing their will and preferences to family members and others, could in many cases resolve

such conflicts. In the context of this research, this can be a work assistant, job coach or a general social worker who initiates the contact to employment specific support. The need for such a support is even greater where the person with a disability is working in a family-run business, so as to resolve labour related conflicts of interest or to stop them from arising in the first place. Support services have to be provided in rural and urban environments alike.

### 7.3.2. Informal Economy

The first two areas of suggestions apply primarily to regulated, formal work settings. However, we must not forget that in some countries a large part of the population works self-employed in what is usually referred to as the ‘informal economy’, defined as ‘the unregulated part of a country’s economy. It includes small-scale agriculture, petty trading, home-based enterprises, small businesses employing a few workers, and other similar activities’. (World Health Organization, 2011 260). We acknowledge the problems posed by the informal economy, such as lack of protection due to it being situated outside of the field of labour law and its negative impacts on the states’ economies (standards not being adhered to, tax evasion), and therefore the need to promote alternatives via micro-financing and official self-employment (ibid; International Labour Organization, 2013). On the other hand we understand that at this specific moment in time informal work might be the only option for some persons with disabilities. We therefore see it as the role of the job coach to support the will and preference of the person to earn a living by ensuring the best employment conditions and respect for their inherent dignity and legal capacity by extending their support to informal work settings instead of leaving the person in a support vacuum. This will need a clarification of the regulations applying to work coaches that if this is the lived reality and preference of the individual they are supporting, that they are legally allowed to work within such a setting (while trying to find formal alternatives to this setting).

### 7.4. Work with employers and trade unions to combat stereotypes and provide information

Being overlooked by academia and advocacy so far, the implications of legal capacity in employment also require intensive awareness raising and collaborations with all stakeholders including employer associations and trade unions.

Article 8 CRPD obliges States Parties to adopt ‘immediate, effective and appropriate measures’ to promote awareness, including the awareness of the capabilities and contribution of persons with disabilities, throughout society, ‘to foster respect for the rights and dignity’, and ‘to combat stereotypes, prejudices and harmful practices relating to persons with disabilities’. In the context of this article, we believe it is crucial to provide accessible information on the legal capacity law and available supports in exercising legal capacity to persons with disabilities and all family members, DPOs, NGOs or service providers working with them. Among employers, on the other hand, it is equally important to promote the awareness of both the legal obligation and the practical feasibility

of providing reasonable accommodations in the workplace for persons with legal capacity in question (Lawson, 2008).

Other important stakeholders are trade unions, from which persons with disabilities are usually excluded. Against this background, efforts have been made to explore the potential of trade unions in the employment of persons with disabilities (Lurie, 2017). For example, surveying trade unions' role of mobilising workers and promoting decent work, the ILO states in its report on disability and trade union that 'disability issues do not have to be "extra" activities for trade unions to be addressed secondarily. They are at the core of trade unions' mission of representing all workers and fighting for rights and against social exclusion. Working on disability and engaging persons with disabilities gives unions the chance to widen their membership, create new types of partnerships with a wide range of stakeholders, and improve the workplace for all workers. These activities are at the heart of achieving social justice' (2017, 6).

Therefore, we believe a helpful initial step - where unions exist and reach the majority of the working population - could be setting up a collaboration mechanism for disabled employee or job seekers, trade unions, employers and DPOs or NGOs working in this field to share information, exchange experience, and design pilot projects of bridging supported decision-making and supported employment as argued in this article.

## **8. Conclusions**

It has been shown that legal systems are based on a concept of private autonomy, of freedoms being balanced by the need to ensure that such autonomy is exercised freely and is meaningful. Restrictions of legal capacity, in interaction with social barriers such as exploitation and assumed weaknesses of persons with disabilities, both in formal and informal settings, stop them from accessing employment on an equal basis with others from the moment of entering into a contract until the moment of termination. Those issues are often backed by the law which tries to resolve potential conflicts of interests between employers, employees with disabilities and third parties. Building on the increased use of both supported employment and supported decision-making the authors have pointed out the potential to resolve such situations in a way that is compliant with the principle of respecting the will and preference of the employee with a disability while also protecting the interests of the enterprise. To implement the necessary supports it will need a combination of amendments of exclusionary laws, ensuring full and meaningful support by work assistance and job coaches and awareness raising in the wider employment sector.

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