

Legal capacity of people with autism

While the UN Convention outlines the legal rights of all people with disabilities, what happens when a person with low-functioning autism is not able to exercise these rights because they cannot speak, understand or communicate at the level required to discuss rights and legal matters? Lawyer, Evelyne Friedel, explains.

It is well known that autism covers a wide spectrum. This means that autism can affect individuals who are severely intellectually impaired as well as those who have an above average IQ level. Irrespective of their level of ability, all people with autism have the same rights and these rights must be applied and adhered to, effectively.

It is crucial to take into account the level of a person's impairment when legal rights, legal representation and assistance are at stake.

Legal rights, legal representation and assistance are notions to be understood and interpreted in light of Article 12 of the UN Convention on the Rights of Persons with Disabilities. Article 12 of the UN Convention reaffirms **equal recognition before the law** for all people with disabilities and underlines that they have an inalienable right to exercise their **legal capacity on an equal basis with others**.

The UN Convention adds that people with disabilities who need assistance in taking decisions shall be provided with a system of supported decision-making. The concept of supported decision-making is new to most jurisdictions, and should lead to the reform of guardianship systems.





Article 12 of the UN Convention on the Rights of Persons with Disabilities:

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.**
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for **appropriate and effective safeguards** to prevent abuse in accordance with international human rights law. Such 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, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

1 - Equal recognition before the law and legal capacity

In accordance with the notion of 'equal recognition before the law', people with disabilities, including autism, have their status recognised in the legal order like all citizens. The notion of equal recognition enables them to hold, exercise and benefit from, equal and inalienable rights; irrespective of the nature and degree of their disability.

'Legal capacity' is a stronger notion, meaning that people with autism can not only effectively exercise and benefit from their rights, but also have the capacity to act.

2 - Support in exercising legal capacity

People with disabilities – autism in particular – might need support for exercising their legal capacity. To ensure the effectiveness of rights and the ability to exercise legal capacity, the UN Convention provides that people with disabilities have the right to receive support.

However, **maintaining the full legal capacity of an individual with a disability must always be at the centre** of the process when someone is supporting a person with a disability to make a decision or is delegated to make a decision on behalf of a person with a disability. Therefore, and in light of the UN Convention, due diligence must be applied in order to act in the best interests of the supported person.

Supported decision-making must always start from the **presumption of full and equal legal capacity** of people with disabilities, including those with severe and profound levels of disability.

The **concept of incapacity must be rejected**, and the degree of assistance must be tailored to the needs and abilities of a person, bearing in mind also that the degree of support required can vary from one situation to another for the same person. The assistance or support measures provided must be proportional to the degree of disability, and respect the right to self-determination as much as possible.

The role of a support person may vary from providing assistance with day-to-day matters with legal implications to support in formal legal representation. The specific support tasks totally depend on the wishes and the needs of the person with a disability.

A higher level of support may be needed for some adults with autism and severe intellectual disabilities who are unable to evaluate the consequences and implications of some of their actions (or inactions). Even



when an individual requires a high level of support in most, or all, areas of life including support in decision-making, States must take appropriate measures to ensure that the legal capacity of the individual is nevertheless enjoyed on an equal basis with others.

Regarding people with autism, the support in exercising legal capacity must not only be based on a personal knowledge of the individual, but also on the **knowledge of alternative and augmentative communication methods**.

The ability of some people with severe or profound disabilities to receive, process and send normal communication signals, like language or gestures for example, may be very limited or virtually absent. Some people with autism use verbal language in a non-functional way or need communication devices or specific techniques to relay their wishes.

In such contexts, States should recognise that all forms of communication are valid and the way people communicate should not be a reason to question their decision-making ability. States should therefore promote model projects and research into how supported decision-making can be implemented for people with severe disabilities and/or complex needs, such as people with autism.

3 - Selection of support people and prevention of conflicts

Support people should be **selected by the individual with a disability or his/her family, whenever possible**. It might be an advantage if the support person has known the individual personally for a significant period of time. In any case, the person with a disability should have the possibility to build a relationship of trust with his/her support person.

There should also be the possibility to assign several support people to one individual, particularly for people with severe and profound intellectual disabilities where a group of support people who know the individual in different capacities may better match all the support needs of a person.

In order to avoid conflicts of interest between a person with autism and their supporter, support people should never be linked to a psychiatric facility, governmental authority or a service provider on whom the person with a disability is dependent for some other purpose (for example, housing, education or health services).

In case any conflict arises, and to ensure accountability of support people, administrative procedures that are easily accessible for the supported person and their family should exist or be established.

4 - Appropriate and effective safeguards

The UN Convention requires that **appropriate and effective safeguards be put in place to prevent exploitation and abuse in the exercise of legal capacity** by people with disabilities. This is particularly necessary for people with autism who need a high level of support in all areas of life and require such safeguards at all times.

The UN Convention adds that safeguards should be **proportional and tailored to the person's circumstances**. This means that safeguards must be higher for people with a more severe degree of disability or with high support needs, such as many people with autism. Safeguards must also be higher when major decisions regarding the life of the person are being made.

Safeguards might include: a procedure for careful assessment of the actual need for support, periodical re-examination of the support measures adopted and a mechanism for people with disabilities or their family members to make an appeal to change a decision that has been made. The safeguards must be separate from

the support mechanisms, as they should protect the person with a disability from any exploitation or abuse by supporters.

In addition, while maintaining their right to take decisions, **people with disabilities should also be protected from personal harm**. People with disabilities may take decisions which are not in their best interest, for example, giving money to others for unjustified reasons, purchasing goods that they cannot afford, or resigning from his/her employment. Support people therefore have a duty to inform the supported individual by all possible and appropriate means about the consequences of any important decision. States should also permit the cancellation of contracts in cases where a person was intentionally exploited or abused.

5 - Other mainstream mechanisms

Allowing the cancellation of contracts in cases where a person was exploited or abused means that the supported decision-making system is not the sole measure to be put in place to protect people with disabilities.

Mainstream mechanisms such as consumer protection and information, rights of medical patients, and rights of employees, **should also be made more accessible and inclusive**.

States should ensure that these existing legal mechanisms for protecting citizens' rights in various areas of life are accessible to people with disabilities, accommodate their needs and take their interests into account.

