

ACCA

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Mental disorders and legal capacity...
Are we ready for a real change?

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INTRODUCTION. A (very) brief history of legal incapacity

Rome

- Law of the Twelve Tables (450 bc) : curator for the *furiosus*
- Praetorian Law : extensions in the interest of the incapable

M Ages

- Mechanisms of incapacity similar to Roman ones
nb incapacity rules not much needed, due to social context

Civ Code

- 1804 : incapacity linked to pseudo-diagnoses
- 1991 : voorlopig bewind over de goederen / administration provisoire des biens
- 2013 (i.f. 2014) : incapacity rules reboot : rechterlijke bescherming / protection judiciaire

Convention for the Rights of People with Disabilities¹, art. 12

“(…) 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**”

➔ **National interpretation²** : new regime (i.f. 2014) of legal incapacity complies because (among others)

- it is tailor-made: degree of legal (in)capacity depends on health state
- the mechanism of *assistance* is preferred to the one of *representation*

¹United Nations Convention for the Rights of Persons with Disabilities (CRPD), 2006

²Committee on the Rights of Persons with Disabilities, “Replies by Belgium to the list of issues”, 5.8.2014.

General comment No. 1¹

or how the committee advocates a very different interpretation of article 12

“Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society” (...) “Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity” (p. 3)



Legal capacity, including capacity to exercise one’s rights by oneself, **can never be limited** and especially not **on the basis of an assessment of mental capacity**

¹United Nations Committee on the Rights of Persons with Disabilities, “General comment No. 1, Article 12: Equal recognition before the law”, 2014

General comment No. 1

or how the committee advocates a very different interpretation of article 12

“States parties must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect” (...) “Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making” (p. 4)



Support provided **cannot limit legal capacity**
by appointment of **substitute decision-makers**

General comment No. 1

or how the committee advocates a very different interpretation of article 12



Plea for **universal legal capacity with support** (if accepted)



- Reason for support is not mental (in)capacity
- Support is not a measure of legal incapacity

Issues

- What should be the trigger for support?
- What support could we provide that does not affect legal capacity?
// What is the essence of a measure of legal incapacity?

General comment No. 1

An interpretation deserving reflection

- We are slowly on the way...
- Legitimacy of GC No. 1 is no issue

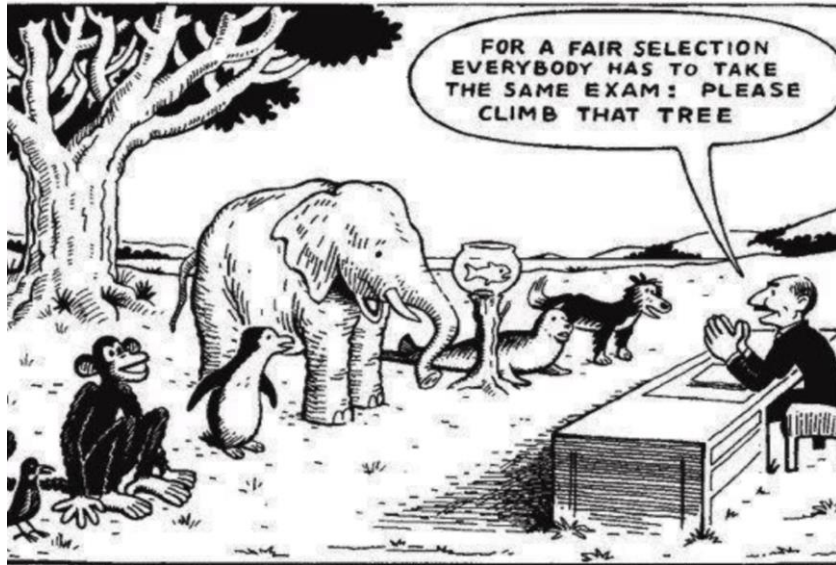
CONCLUSION. Article 12 as a chance to challenge...

... our long lasting legal culture of representation...

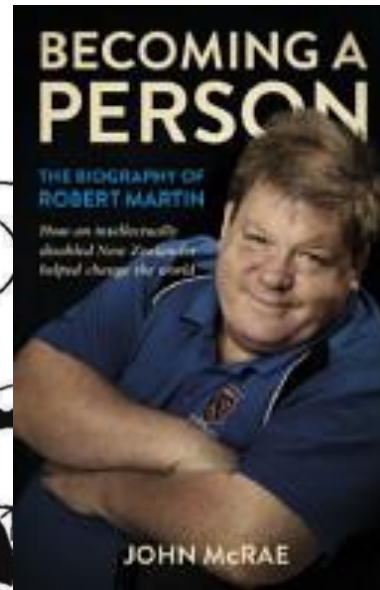
... our vision about mental disorders and mental abilities...

... our ways to enhance citizenship of all people...

... By valuing the voices of those who (have) suffer(ed)



March 22, 2016 by Evan :
<https://motiveinmotion.com/why-i-dropped-out-of-college/education-flaws/>



Luckily he has dementia so he's got some imaginary friends coming in to look after him.

Dank u !

Merci !

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Some references

United Nations Convention on the Rights of Persons with Disabilities, signed in New York December 13, 2006 and approved by national law of May 13, 2009

United Nations Committee on the Rights of Persons with Disabilities, “General comment No. 1, Article 12: Equal recognition before the law”, 2014

UN High Commissioner for Human Rights, « Mental Health and human rights, Report of the United Nations High Commissioner for Human Rights », 2017, <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session34/Pages/ListReports.aspx>

T. VAN HALTEREN, *La protection des personnes majeures vulnérables et mineures : redéfinition du concept de capacité juridique au regard de celui du discernement* (Unpublished doctoral dissertation), 2018, Université libre de Bruxelles, Faculté de Droit et de Criminologie, Bruxelles.

M. JESPERSON, « PO-Skåne – a concrete example of supported decision-making », *Presentation at the OHCHR Symposium on the Human Rights of Persons with Psychosocial Disabilities*, Brussel, 17 October 2014, www.europe.ohchr.org