

Right to decide and political life

How (the denial of) **legal capacity** impacts **citizenship**

As a part of our 5Es

(Empower, **Elect**, Educate, Employ, End segregation)

Inclusion Europe releases every year a paper on the

right to make decisions

focusing on the topic of the year; especially on the

consequences when this right is taken away. These papers also highlight good practices present in Inclusion Europe network.



Empower 2018: the paper was looking at the way the right to make decision was crucial to ensure one's self-determination.

Elect 2019: we look at the **right to make decision and how it reflects in political life.**

Inclusion Europe


European movement of people with intellectual disabilities and their families

Avenue des Arts 3, 1210 Brussels, Belgium

+32 25 02 28 15

secretariat@inclusion-europe.org

www.inclusion-europe.eu

 @InclusionEurope

 @InclusionEurope

 youtube.com/InclusionEurope



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Legal capacity and citizenship

The recognition of citizenship is closely linked to the recognition of legal capacity. In both cases, an individual is recognised as a holder of rights and duties. This recognition is essential as it allows someone to legitimately take an active part in shaping the community through discussions, protests, elections; in other words, the very heart of democracy.

The deprivation of someone's ability to make decisions that affect him or her also deprive them from having a say in more collective decisions. The situation of people with intellectual disabilities living in segregated and isolated settings, deprived of their right to decide for themselves and participate in the community is particularly degrading.

The CRPD Committee pointed out this interdependency between legal capacity and participation: "Equal recognition before the law is a prerequisite for direct and effective consultations and the involvement of persons with disabilities in the development and implementation of legislation and policies to implement the Convention." The Committee, while recognising this fundamental link, states that it should not prevent people from participating and recommends that "the lack of compliance with article 12 should, under no circumstances, preclude the inclusive implementation of articles 4 (3) and 33 (3). Laws and policies should be amended to address this barrier to participation based on the denial of legal capacity."¹

¹ General Comment n°7, CRPD Committee, para 79

The Committee urged the States to “Repeal all laws, including those denying legal capacity, that prevent any person with disabilities, regardless of type of impairment, from being closely consulted with and actively involved”.²

There are consequences for the deprivation of legal capacity on participation at the individual level (1) but also at the collective level (2).

1. Individual participation

Right to vote and stand for election

The general lack of political participation can be explained by the deprivation of a fundamental right: the right to vote and to stand for elections. Without political participation, people with disabilities will not have someone to represent them. Moreover, without elected representatives, people with disabilities will not be represented and included in debates and are therefore excluded from participating in the community.

Member States that do not permit people with disabilities to vote and stand for elections, as required by the Convention, prevent meaningful participation and representation of people with disabilities in debates and/or decision-making. Legal restrictions on the right of persons with disabilities to vote or to be elected to office prevents them from electing representatives that will advocate for their rights and interests. The Council of Europe Commissioner for Human Rights,

² General Comment n°7, CRPD Committee, para 94 a).

intervening before the Europe Court for Human Rights criticising the tests imposed on people under guardianship aiming to assess their ability to vote. She stated that “In a modern democracy no one needs to justify why they vote for a particular party or candidate”.³

Progress has been made in the European Union (EU) where, since the last elections in 2014, six Member States have completely abolished restrictions on the right to vote for people deprived of their legal capacity - France, Germany, Spain, Denmark, Ireland and Slovakia. The recent changes of legislation in France, Spain, Germany and Denmark resulted in allowing around 500,000 people with disabilities to vote.⁴ However, a report from the European Economic and Social Committee highlights that still 800,000 people are deprived from their right to vote. As the EU Fundamental Rights Agency (FRA) pointed out, only 12 EU Member States do not restrict voting rights for people under guardianship.⁵

If there has been important progress related to the right to vote, the right to stand for elections have not been explicitly targeted by the recent aforementioned reforms. More people under guardianship will be systematically deprived from this right.⁶ The right to stand for elections is also of paramount importance as it

³ [Third party intervention by the Council of Europe Commissioner for Human Rights](#), CommDH(2018)16, 9 July 2018

⁴ While figures are not discussed for Germany (80.000), Spain (100.000), Denmark (1.900), figures for France are not clear. While FRA reports (n21) indicates 65.000 people, 310.000 was the figure highlighted by the [French Inter-ministerial Committee for Disability](#), p 32.

⁵ [Who will \(not\) get to vote in the 2019 European Parliament elections?](#), EU Fundamental Rights agency, 2019.

⁶ For instance, in France, the article L200 of the Electoral Code not allowing people under all type of guardianship was not changed in parallel of the reform on the right to vote.

goes beyond political elections and affects elections in other organisations recognised by the law such as Disabled People Organisations (DPOs).

For testimonies and good practices on this topic see appendix.

Civic duties (polling stations staff, juror)

If the guardianship mechanism can deprive people of their rights, it can also deprive them from their duties.

Questions were asked to the European Commission regarding the ability for a person who does not exercise full voting rights to sit as a juror.⁷ While this reflection targets foreigners without full citizenship not allowed to vote, it is important to have this discussion when it comes to people under guardianship deprived (or not) of their right to vote.

In several countries, legislation through eligibility criteria or ineligibility criteria will exclude people under guardianship. For instance, in Belgium, people have to “be registered as voters” “enjoy their civil and politic rights”; “can read and write”.⁸ In France, “people under partial or plenary guardianship or those placed in an “institution for alienated” are declared incapable of serving in a jury.⁹

⁷ [Written question](#), 5 June 2007

⁸ Belgium law, more information [here](#).

⁹ French Code of Penal Procedure, [article 256, 8°](#).

In Ireland, persons with a mental illness or a mental disability are ineligible to stand for jury if they are “resident in hospital or other similar institution or who regularly attend for treatment by a medical practitioner”.¹⁰

This exclusion from jury service affects many people with disabilities and goes beyond people deprived of their legal capacity.¹¹

Some countries like the UK changed their legislation to allow people with “mental health condition” to serve on a jury.¹²

The denial of both electoral rights and jury duties show how disability often serve as an excuse to deny citizenship rights but also duties to people with disabilities. Therefore, they cannot claim for their rights nor be held accountable for not fulfilling their duties. This double exclusion results in a deprivation of people with disabilities from their chance to belong in the community.

General participation: Joining political parties, trade unions

As the CRPD Committee highlighted in the General Comment on participation, States have a duty to ensure that people with disabilities “can exercise their right to be consulted and not deterred from involvement by others.”¹³ This implies

¹⁰ [Eligibility criteria for jury service](#), Courts service.

¹¹ Articles can found about complaints from people with physical disabilities excluded from their jury duty.

See for instance: “[Jury service: Many with disability would like to do their civic duty](#)”, The Irish Times, 4 February 2019.

¹² Mental Health (Discrimination) Act, 2013

¹³ General Comment n°7, CRPD Committee, para 52

awareness raising actions towards service providers, public employees and sometimes families on the right of people to participate in public and political life. It also implies that mechanisms prevent conflict of interest of representatives of organisations of persons with disabilities or other stakeholders that would be detrimental to the “autonomy, will and preferences of persons with disabilities”.¹⁴

In practice, this would mean that a person living in an institution and/or under guardianship should not be deprived from his/her right to participate in discussions and in making decisions.

Regarding membership to political parties, whilst people with disabilities are more likely be members of political parties, many of the activities that these parties organise are inaccessible. Especially for persons with intellectual disabilities, there is a lack of accessible campaign material, e.g. party manifestos in assessable formats. It will hinder the ability to make decisions and participate based on information one’s would receive.

The same applies to participation in Trade Unions, while they are representing workers in their actions, the lack of inclusiveness will not enable them to fully represent workers with intellectual disabilities working on the general labour market. For those working in special sectors, we can question the lack or the inexistence of trade unions.

¹⁴ General Comment n°7, CRPD Committee, para 52

2. Collective participation

The deprivation of legal capacity does not only affect people with intellectual disabilities at a personal level, but also impacts their ability to create other organisations of self-advocates and therefore, enjoy their right to assembly.¹⁵

Right to Assembly

People with intellectual disabilities who create self-advocacy organisations face one legal barrier and one financial barrier.

The legal barrier is constituted by the impossibility for people deprived of their legal capacity to create with others a representative entity such as a self-advocacy organisation. This means that self-advocacy organisations cannot be created independently by persons with intellectual disabilities without the external action of families, service providers etc. Therefore, it will not have a legal recognition (or legal standing) from the State.

In practice, it means that most of the self-advocacy organisations exist through other organisations, such as a parental organisation but do not have self-autonomy.

The financial barrier means that without a legal recognition, these organisations and their members cannot have control over their own money. This means that they cannot apply for call for projects, they cannot open their own bank account

¹⁵ For more information, look at Inclusion Europe submission on CRPD General Comment n°7
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and therefore are limited in fundraising actions. Without an equal access to funding, both the independence and sustainability of these organisations cannot be guaranteed.

Similarly to individuals, self-advocacy organisations deprived of their legal capacity are limited in accessing the normal range of rights and services that can be accessed by others.

Participation and support of self-advocates organisations

Both the legal and the financial elements are key to ensure both the independence and the sustainability of the self-advocacy movement. The CRPD Committee in this way recommends that States “create an enabling environment for the establishment and functioning of organizations of persons with disabilities, by adopting a policy framework favorable to their establishment and sustained operation”¹⁶. More precisely, the Committee further targets “independence and autonomy from the State, the establishment, implementation of and access to adequate funding mechanisms including funding and international cooperation and the provision of support.”¹⁷

For testimonies and good practices on this topic see appendix.

¹⁶ General Comment n°7, CRPD Committee, para 94 b)

¹⁷ General Comment n°7, CRPD Committee, para 94 b)

Background: the right to make decisions

Making decisions

The United Nations Convention on the Rights of Persons with Disabilities says that countries must respect everyone's right to make decisions, including people with disabilities.

The right to make decisions is an important gateway to access many other rights:

- the right to choose where and who you live with
- the right to vote and be elected
- to make healthcare decisions
- the right to marry and have a family¹⁸
- to have a bank account
- control your own money and property¹⁹

What does it mean to have your legal capacity denied?

Some laws and policies prevent people with disabilities from making their own decisions. These can be referred to as curatorship or guardianship, which may have varying levels of restrictions. They may prevent someone from making

¹⁸ General comment n°1, CRPD Committee, para 8

¹⁹ Inclusion Europe, 'Easy-to-Read Definitions: Legal Capacity' (please see [here](#))

decisions for themselves and appoint someone else to make decisions for them, such as:

- Personal decisions, e.g. to choose where they live and with whom they live.
- Medical decisions, e.g. to make decisions about healthcare
- Financial decisions, e.g. to control their property

Guardianship and substituted decision-making can never be a good system regardless of the degree of the guardianship and the level of support needs.

Supported decision-making

Supported decision-making is the support someone receives to make their own decisions. There are many types of supported decision-making, such as:

- **Supported decision-making agreements:** they are agreements that do not require a judge to select someone to help you make decisions.
- **Co-decision-making:** they are when you choose someone who will make decisions with you. To be a real form of support, people must be able to choose voluntarily who helps them make decisions and to change their minds whenever they want.

- **Peer support:** people provide knowledge, experience, emotional, social or practical help to each other.²⁰
- **Independent advocates:** independent advocates support a person to make decisions and talk to all the other people involved.
- **Advance directives:** when you write down what you want to happen in the future so others can see what your choices are. In many countries the law says other people are not always obliged to follow your choices.²¹

What is Legal Capacity?

“Legal capacity is the ability to hold rights and duties (legal standing) and exercise those rights and duties (legal agency).”²²

Legal capacity is the right to exercise legal rights and to make decisions that can be legally binding.²³ It is the right to make decisions and to have those decisions respected by the law and other people. It is also the right to make mistakes, to learn from them and flourish like everyone else.

²⁰ Look at Inclusion Europe project [TOPSIDE](#) on peer support.

²¹ General Assembly, ‘Report of the Special Rapporteur on the rights of persons with disabilities’ A/HRC/37/56 (12 December 2017), 7 and Easy-to-Read version, at 21.

²² See n (4), 3.

²³ General Assembly, Report of the Special Rapporteur on the Rights of Persons with Disabilities A/HRC/37/56 (12 December 2017) 14.

All persons have the right to recognition of their legal capacity.²⁴ The United Nations Convention on the Rights of Persons with Disabilities reaffirmed that regardless of the need of support to exercise their legal capacity, people should not be denied the right to get support in decision-making.²⁵

Recognition of legal capacity is important to access many other rights, including:

- Managing, owning or inheriting property²⁶
- Accessing to financial resources, including loans and mortgages²⁷
- Having a birth certificate and passport
- Making medical decisions²⁸
- Living independently²⁹
- Choosing where or with whom to live³⁰
- Getting married and starting a family³¹
- Having access to justice³²
- Voting or standing for elections³³

²⁴ See n (4), 3.

²⁵ See n (4), 7.

²⁶ See n (4), 7.

²⁷ See n (4) 3.

²⁸ See n (4) 3.

²⁹ See n (4), 9 and 11.

³⁰ See n (4), 12.

³¹ See n (4), 8.

³² See n (4), 10.

³³ See n (4), 12.

Testimonies and good practices

Mi Voto Cuenta, Plena Inclusion, Spain

Plena Inclusion led a campaign in Spain called Mi Voto Cuenta (My Vote Counts). The objective was to talk with politicians, encouraging them to raise awareness on the importance of the right to vote. As a part of the campaign, meetings were organised with political parties, civil servants to share ideas, support families and volunteers. Plena Inclusion through this campaign also published papers on what self-advocates wanted for the elections, their opinions. A form was created to get feedback from people with intellectual disabilities' experiences in voting. More info [here](#) and [here](#) (in Spanish)

Sami Helle, Finland

Sami Helle is not only a famous musician in Finland who played in different music bands, he also got involved in politics. He ran for the municipal elections in 2017 and unfortunately did not get elected. However, as he said he "learned how the political system works". He also regularly speaks in public to raise awareness on the right of people with disabilities. For example, he talked about public procurement in Finland, in a Finnish TV show and how it is a threat to human rights. He is also the founder of Me Itse ry (We for ourselves) association which is a non-profit self-advocacy group that counts over a thousand members with intellectual disabilities. The group is active in local and national level politics and organises activities and training around Finland. More [here](#).

Sara Pickard, England

Sara Pickard works for Inclusion Europe's member Mencap and delivered training to young people with learning disabilities in schools and colleges throughout Wales through two major projects. She has been involved with the European Platform of Self-advocates for a long time as well. She was elected in 2015 as a councillor in Wales and became the first councillor in her area with down syndrome. More info [here](#).

Angela Covadonga Bachiller, Spain,

Angela Covadonga Bachiller became in 2013 the Spain's first ever town councillor with down syndrome. She decided to get involved in politics and participated in Valladolid's May 2011 electoral campaign. She highlighted the blatant discrimination faced by young people of the same age and in the same conditions aren't entitled to vote. More info [here](#)

Testimonies

People deprived of their right to vote

"It feels like we are not as important as others. I feel like a secondary citizen." A self-advocate, deprived of his right to vote, Hungary

The journey of people trying to regain their voting rights

"At the time I was in a home for young people. The judge asked me questions about day-to-day politics which I did not know how to answer. I was not so up-to-date in politics at that time. So the judge withdrew my right to vote. Yes, indeed. I spoke to Caroline, my contact at the Foyer de la Fraternité, and she offered to support me in trying to recover my right to vote with the help of my legal representative. This became my personal project as part of my activities at the Foyer. I was really happy to get this right back. I am a citizen, I consider myself able to vote, so I always wanted to vote. Finally, I will be able to do it." Justine Lambole, France

People voting for the first time

"It was a good experience; the polling station was close to my house. Here we vote with voting slips, not with machines. I felt proud to be able to vote. I always was determined to vote. It is the first time that I will vote at the European elections. I still have to decide who to vote for; I am going to inform myself, but I think I will vote for the same party as in the general elections." Cristóbal Otero, Spain.

The importance of voting

"It is important that we are well represented in the EU Parliament" Andreas Zehetner, Austria

"To vote is the duty of every citizen. It's a way to express yourself. We are citizens like everyone else. Voting is important because it can help us make our dreams come true" Dany and Lucette Blanquart, France.

Good practices

Reforms on the right to vote: Denmark, France, Germany, Spain

France, Spain, Germany, Denmark undertook reforms of their systems to enable all people to vote, including those under guardianship who had to go through an assessment with a judge. Regardless of the legislative (France, Spain, Denmark) or judicial (Germany) character of the reform, they all resulted in breaking barriers for nearly 500.000 people across Europe.

Austrian reform on legal capacity

Following an increase in the number of people under guardianship and the concluding observations issued by the CRPD Committee, the Austrian government started to reform the legislation around guardianship. During the two-year process, groups including self-advocates, guardians' associations, service-providers, lawyers were included. Support was provided to find alternatives for the 60,000 people under guardianship. Through the new reform, easy-to-read brochures were also developed.

More info [here](#).

After the capacity, the engagement & ownership: Enable Scotland: Enable the Vote campaign

#ENABLEtheVote, Enable Scotland

Enable Scotland has made it a priority to support people who have learning disabilities to exercise their right to vote, and to do so informed candidates and parties that are up for consideration.

Enable Scotland produced factsheets and held accessible hustings to support people who have learning disabilities in engaging with the issues and casting their vote the way they choose. This includes information in formats which are accessible for people with complex support needs, including sensory impairment, and support for non-verbal individuals to communicate their opinions and their choice of who to vote for.

These campaigns proved highly successful, with 80% of people who have a learning disability who engaged in the #ENABLEtheVote campaign reiterating their wish to vote again in the 2016 Scottish Parliament Election, and in 2017, 91% said they would definitely vote in the local council election. It is significantly higher than the 46.9% of the total electorate who actually voted in the local council elections across Scotland.

More information [here](#)