



Legal capacity of persons with disabilities in Ethiopia: The need to reform existing legal frameworks



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ABSTRACT

The Convention on the Rights of Persons with Disabilities (CRPD) prohibited deprivation legal capacity of persons with disability based on assessment of mental capacity. The assertion is that, persons with disabilities shall exercise their legal capacity in all aspects of life without any restrictions that are based on mental incapacity (such as, unsoundness of mind, deficit in mental capacity, dotage, etc. This approach signifies a shift from substituted decision making, where another person act on behalf of persons with mental disabilities, to supported decision making where the person with mental disability is assisted in decision making. The rationale for the move lies on the recognition that the right to legal capacity embodies the inherent meaning of what it meant to be human. Without legal capacity a person cannot exercise all other rights and entitlements. Accordingly, States parties to CRPD are required to reform domestic legislations that are based on substituted decision making model and recognize full legal capacity of persons with disabilities in line with supported decision making model. As a Sate party to CRPD, Ethiopia assumed the same obligation. Nonetheless, in its initial report to the Committee on CRPD, the country denies existence of legislation that restricts legal capacity on the grounds of mental incapacity. This research found out that there are restrictions imposed on legal capacity of persons with disabilities on the basis of mental incapacity/disability. The research analyzed the approach employed to restrict legal capacity under the existing legal frameworks of Ethiopia vis-à-vis supported decision-making regime under CRPD. The research is doctrinal and, as such, limited to content analysis of general and specific legal capacity laws of the country (such as, marriage, divorce, will, work and employment, political participation, access to justice and others).

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1. Introduction

Legal capacity is fundamental attribute of personhood that is inextricably linked to the recognition of a person before the law. The Convention on the Rights of Persons with Disabilities (CRPD) incorporated Legal capacity as one of the cardinal human rights that is indispensable to respect inherent dignity and autonomy of persons with disabilities and ensure full and effective inclusion of persons with disabilities in society. The relevant provision of CRPD, Article 12 paragraph 2, reads that:

“States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.” (emphasis added)

Basically, the provision above sets States obligation to recognize the right to legal capacity and define the intrinsic non-discrimination aspect of the right. But, it does not precisely point out what it meant by legal capacity or its contents.

According to the Committee on the Convention on the Rights of Persons with Disability (Committee on CRPD) interpretation, legal capacity means:

“... the ability [capacity] to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). (emphasis added)

For the Committee on CRPD, Legal Capacity has two components; namely, *legal standing and legal agency*. Legal standing entitles persons with disabilities to be holders of rights and get ‘full protection of his or her rights by the legal system’. Legal agency, on the other hand, empowers the person ‘to engage in transactions and create, modify or end legal relationships’. Both components need to be respected, protected and fulfilled to enjoy the right to legal capacity in its full sense.¹

¹ Committee on CRPD, General Comment No.1, Article 12: Equal Recognition before the Law, CRPD/C/GC/1

Literarily, the underlined word above, i.e., ‘ability/capacity’, refers to an individual’s *mental state or physical fitness or legal power* to perform.² In this sense, an individual will be considered capable if s/he has any of the elements in specific circumstance, unless the subject matter otherwise require. Typical example of the latter is the way ‘legal capacity to act (i.e., legal power)’ has traditionally been understood in many legal systems as if it is inseparable with mental state (i.e., mental capacity). That is to say, legal capacity to act or legal power is often set to presuppose individual’s (sound) mental state (though this is often presumed). Then, enjoying full legal capacity is conditioned on mental capacity. Conversely, mental incapacity excludes individual from enjoying the legal capacity. This is the traditional approach, as narrated in detail subsequently, where the legal capacity of person with disability is restricted based on mental incapacity.

On the other hand, there is dynamic shift in understanding the relationship between legal capacity and mental capacity since the adoption of the CRPD. The CRPD pursue human rights based approach that categorically ban any limitations imposed on persons with disability exclusively based on disability. The basis for this is the provision cited above, i.e., Article 12 of the CRPD. The Committee on CRPD also underlined the disparity. For the Committee, mental capacity and legal capacity are separate and unrelated, and any restriction on legal capacity on the basis of mental capacity negates the principle of equality, equal recognition before the law and non-discrimination.³

According to the Committee on CRPD, the right to legal capacity is ‘indispensable for the exercise of all civil, political, economic, social and cultural rights’.⁴ Particularly, the essentiality of the right lies on the fact that it is the foundation for the recognition of the inherent dignity, individual autonomy, independence, full and effective participation in society and acceptance of persons with disabilities as part of human diversity. In other words, the right embodies the inherent meaning of what it meant to be human; without it persons with disabilities cannot exercise all other rights and entitlements.⁵ Following this assertion, the Committee urges States parties to change legislations in par with the CRPD recognizing full enjoyment and exercise of legal capacity of persons with disabilities.⁶

In its initial report to the Committee on CRPD, Ethiopia admit that, though equality before the law has been constitutionally guaranteed for all and no exception is allowed on any ground including persons with disabilities, legal capacity of persons with mental disability will be restricted – on the grounds of mental disability – to protect their own interest.⁷ Meanwhile, the report contends that there is no legislation in the country that restricts legal capacity on the grounds of disability.⁸ In general, the report maintains that the laws of the country are in par with CRPD concerning legal capacity of person with disabilities. Unlike the assertion, this research points out that both the general and specific legal frameworks in the country limit legal capacity on the basis of mental disability.

The research is purely doctrinal and, as such, limited to content analysis of general and specific legal capacity laws of Ethiopia (such as, marriage, divorce, will, work and employment, political participation, access to justice and others) vis-à-vis international human rights standards, particularly the CRPD. The paper begins with discussion of traditional and contemporary approached to legal capacity determination. Then, general

legal and specific legal frameworks related to the theme are appraised. Finally, the paper sketches out supported decision making model as the way forward.

2. Legal capacity approaches

2.1. Traditional approach

Though there are diverse and long-established approaches that are used to attribute legal incapacity, usually three main regimes are used in most jurisdictions: namely, status, outcome and functional approaches.⁹ Status approach is a neuro-scientific approach that exclusively considers mental health problems or impairments as the basis to assess mental state and legal capacity. Accordingly, based on medical assessment of mental condition, a person with a specific type(s) of mental disorder or mental health problem is forbidden from engaging in specific juridical act(s).¹⁰ What matters most is the existence of specific mental health problem. Despite risks attached with uncertainties and imprecision in the mental disorder diagnosis process, disempowerment of persons with mental disabilities for their impairment, is typical charity model that characterizes persons with disabilities as incapable of controlling their life and interest. This put the approach in absolute contradiction with the human rights model the CRPD pursue.

The second one is outcome approach. Unlike status approach, outcome approach focus on supposed soundness, logicity or reasonableness of decisions individuals with mental disorders make.¹¹ Here, in addition to specific mental disorder, possible effect of leaving decision making to an individual with such disorder will be assessed. Most often, the assessment is made comparing particular decision made by an impaired person with expected decision that is thought to be acceptable and has positive outcome.¹² Typical standard that is often used while examining capacity in ‘outcome approach’ is circumstances in which a person with alleged mental disorder refuses medical treatment. The standard is that a reasonable person with sound mental state will not refuse such treatment knowing the consequences. A refusal by a person whose mental capacity is in doubt constitutes negative outcome and this is construed as against the person’s best interest; hence, the person’s legal capacity will be removed and he/she will be put under the substituted decision-making regime. Generally, if such comparison show negative outcome of the decision made by an individual with mental impairment, his/her legal capacity will be restricted.

At the outset, outcome approach is subject to the same sort of criticism as the status approach. Because, in this case as well, mental impairment is the primary and ultimate justification for denying legal capacity. In addition, the assumption underlying functional approach is discriminatory. Whereas possibility of making unsound decision which is likely to affect personal interests is not specific to persons with disabilities, the labeling and denial of legal capacity are used only for persons with disabilities. For instance, under Article XXII, paragraph 6, of the Constitution of Hungary, a person loses his or her right to vote if a court finds that he or she lacks the capacity to vote. Courts in Hungary are supposed to reach at such decision through an individualized assessment of the voting capacity of specific individuals with disabilities. The legitimacy of such restriction is based on the assumption that persons with mental impairment are not fit to formulate a rationale and valid political opinion owing to the disability they sustain. In 2010, the name of six persons who were suffering from ‘intellectual’ disability and were placed under partial and general guardianship was removed from the electoral register

² Webster’s Dictionary of English, 2012 (emphasis mine)

³ Committee on CRPD, General Comment No.1, cited above at note 1, para.8

⁴ Ibid

⁵ Ibid; see also Bach M. and Kerzner L., “A New Paradigm for Protecting Autonomy and the Right to Legal Capacity”, Prepared for the Law Commission of Ontario, (2010), [Available at: www.lco-cdo.org], p.7; and European Commission for Human Rights Issue Paper, “Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities”, (2012), [Available at: <https://www.escri-net.org>], p.9.

⁶ Committee on CRPD, General Comment No.1, cited above at note 1, para.50

⁷ CRPD Consideration of Reports Submitted by State parties under article 35 of the Convention, Initial Report of Ethiopia, CRPD/C/ETH/1. Received on 8 January 2013, para.58

⁸ Id, para.54

⁹ Committee on CRPD, General Comment No.1, cited above at note 3, para.15; and Bach M. and Kerzner L, cited above at note 4, pp.15–20.

¹⁰ European Commission for Human Rights, cited above at note 5, p.13.

¹¹ Ibid

¹² Ibid, p.13

pursuant to the provision above which declare that ‘persons placed under total or partial guardianship did not have the right to vote’. Consequently, the persons were unable to participate in Hungarian parliamentary and municipal elections held in 2010; and they brought the case before the Committee on CRPD. In its view the Committee stated that:

“depriving ... [individuals] their right to vote, based on a perceived or actual intellectual disability, [Hungary] has violated its obligation under Article 12 paragraph 2 of the CRPD”.¹³

The rationale for the Committee’s view lies on the justification that the problem to formulate a rationale and valid political opinion is not peculiar to persons with intellectual or other sort of mental disability but, likely to all human persons.

The third one is functional approach which is the latest one introduced in the late 20th century and, still widely applicable in various legal systems.¹⁴ In this case, mental capacity is assessed based on the competence of a person (with mental impairment) to process information and make decision. Most often, the assessment is made based on the person’s capacity to understand, retain and use information in decision making process and communicate final decision by any means.¹⁵ Since making decision with negative outcome has no effect in capacity determination, functional approach relatively recognizes the benefit of doubt of reaching at erroneous decisions by persons with mental disabilities. However, under this approach too, the requirement of ‘mental impairment’ plus other requirements attached to it is generally to assess mental capacity/incapacity based on cognitive tests. This makes functional approach flawed in the eyes of the CRPD which unequivocally prohibit using mental incapacity as a justification for denying legal capacity. Thus, like the outcome approach, functional approach is also denounced as discriminatory for it is unfairly applied to people with disability.¹⁶

Generally, in all the three traditional approaches above, there is possibility for depriving an individual of his/her legal capacity based on mental incapacity. Then, somebody else will substitute and deals with the former’s interests; allegedly in his/her best interest.

2.2. Contemporary (CRPD) approach

The CRPD unconditionally delegitimize restrictions to the right to legal capacity on the grounds of mental capacity and, in contrast, accords complete legal capacity for persons with mental disability – whether severe or milder.¹⁷ Besides the assertion earlier, i.e., substituted decision making is discriminatory and contrary to CRPD, there are three additional arguments this section espouse for validating complete legal capacity for persons with mental disability.

First, legal capacity is basically intended to ensure that a person is considered as subject of the law; not as an object whatsoever the justification is. History tells us that individuals or groups are stripped off their legal capacity and autonomy, and inherent human dignity based on the ‘perceived characteristics of inferiority’ attached to them. Among others, these include, women, slaves and minorities.¹⁸ However,

¹³ Committee on CRPD, Communication No.4/2011, *Zsolt Bujdosó, et al. Vs Hungary*, CRPD/C/10/D/4/2011, para.9.5.

¹⁴ Flynn E. and Arstein-Kerslake A., “The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?”, *Berkeley Journal of International Law*, Vol.32, Issue 1, (2014), [Available at: <http://scholarship.law.berkeley.edu/bjil/vol32/iss1/4>], p. 127.

¹⁵ *Ibid.*

¹⁶ Committee on CRPD General Comment No.1, cited above at note 1, paras.15.

¹⁷ Article 12 para.2 of the Convention on the Rights of Persons with Disabilities (CRPD) states that:

“States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life” (*emphasis added*).

As will be discussed later, the *travaux préparatoires* leaves no doubt that the term ‘legal capacity’ as used in the Convention refers to the right to possess and exercise legal capacity in all aspects of life without any form of guardianship or substituted decision making. Schulze M., “Understanding the UN Convention on the Rights of Persons with Disabilities”, 3rd Ed., 2010, pp.86–93.

¹⁸ Committee on CRPD General Comment No.1, cited above at note 1, para.8.

after long period of struggle, such groups’ right to equality before the law [legal capacity] has got legal recognition in international laws and most national legal frameworks. However, as Flynn and Arstein-Kerslake put forth, [at international level] mental disability/incapacity is the only “remaining characteristic upon which contemporary society is willing to justify stripping legal capacity from a person”.¹⁹ Similarly, the Committee on CRPD stated that ‘persons with disabilities as the [only] remaining group whose legal capacity is most commonly denied in legal systems worldwide’.²⁰ However, unlike their assertion, in almost all legal systems throughout the world, a person’s legal capacity will also be limited as a consequence of a criminal sentence passed on him.

Nonetheless, the teleological perspective above explains that legal capacity is an inherent right that underpins the enjoyment of all other rights of persons with disabilities. The phrase ‘legal capacity ... in all aspects of life’ under Article 12 (2) of CRPD depicts the close link the right has with all the substantive provisions guaranteed under the Convention. As the Committee on CRPD assert, without respect for the right to legal capacity (including the ability to exercise rights), one cannot exercise his civil, political, economic, social and cultural rights.²¹ The Committee strongly avowed that:

“Recognition of legal capacity is inextricably linked to the enjoyment of many other human rights provided for in the Convention on the Rights of Persons with Disabilities, including, but not limited to, the right to access justice (art. 13); the right to be free from involuntary detention in a mental health facility and not to be forced to undergo mental health treatment (art. 14); the right to respect for one’s physical and mental integrity (art. 17); the right to liberty of movement and nationality (art. 18); the right to choose where and with whom to live (art. 19); the right to freedom of expression (art. 21); the right to marry and found a family (art. 23); the right to consent to medical treatment (art. 25); and the right to vote and stand for election (art. 29).”

Secondly, analysis of the *travaux préparatoires* of the CRPD inform that Article 12 paragraph 2 of CRPD is meant to cover both strands of legal capacity (i.e., legal standing and legal agency) and, that the capacity to act is not subject to limitation on any ground whatsoever – including mental incapacity. In this regard, initial draft proposal of Article 12 made by Canada had stated that:

“States Parties shall recognize that, in civil matters, adults persons with disabilities have a legal capacity ... equal to that of other adult persons and shall accord them equal opportunities to exercise that capacity. In particular, they shall recognize that adult persons with disabilities have equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.”²² (*emphasis added*)

After this proposal, debate was held on whether the above draft provision implies some sort of limitations on capacity to act and any form of guardianship. Though there were delegates who argued in favor of maintaining some sort of guardianship model (at least in extreme cases), other delegates reasoned that such limitation would defeat the object and purpose of the Convention.²³ In an attempt to resolve the debate, the chairman of the drafting committee, H.E. Ambassador MacKay, reminded State parties injustices guardianship or substituted decision making regime has caused on persons with disabilities and suggested that:

¹⁹ Flynn E. and Arstein-Kerslake A., cited above at note 14, p.125.

²⁰ Committee on CRPD General Comment No.3, cited above at note 1, para.8.

²¹ Committee on CRPD General Comment No.1, cited above at note 1, paras.31.

²² Schulze M, cited above at note 19, p.87.

²³ *Ibid.*

“[Legal capacity includes] (a) the possession of legal capacity by all persons, and (b) the exercise of that capacity, which may require the provision of assistance in some circumstances.”²⁴

Eventually, chairman’s suggestion has got support and the provision is amended to take its current shape.²⁵ Thus, historical account as well informs that the right to ‘legal capacity’ as included in the draft provision above as well as in the final Article 12 of the CRPD does not support ‘stripping off capacity to act’ and putting limitation on legal capacity based on mental capacity assessments.

The last argument is anchored in the interpretation the Committee on CRPD has made on Article 12 of CRPD. Basically, the Committee rejects the traditional link drawn between legal capacity and mental capacity, and asserts the distinction between the two concepts. For the Committee, legal capacity is objective and “it is the key to accessing meaningful participation in society” for all people, including persons with disabilities.²⁶ Whereas, mental capacity is not an objective element; rather, it “refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given persons depending on many factors, including environment and social factors.”²⁷ Thus, the two concepts are distinct; and neither can be used as the basis to restrict the other. The Committee clearly stated that:

“[under Article 12 of the CRPD]... ‘unsoundness of mind’ and other discriminatory labels are not legitimate reasons for the denial of legal capacity (both legal standing and legal agency)... [and] perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.”²⁸ (emphasis added)

The underlined verb in the Committee’s statement unequivocally prohibits removing legal capacity based on alleged or real mental disability. And, it does prohibit even in extreme cases where a person’s decision making ability is evidently worsened. For the Committee, there is no exception that could be drawn from Article 12 of the CRPD whatever the level of impairment is. Rather, for persons with mild mental disabilities as well as extreme cases where a person’s decision making is evidently worsened, the CRPD devised ‘supported decision making regime’ where a person with mental disability will be provided with all appropriate and effective support that enable him to exercise his legal capacity.²⁹

3. Legal capacity of persons with disabilities in Ethiopia

3.1. General legal frameworks

Historical account of laws of the country as well as legislations currently in force reveal that Ethiopia allow limitation of legal capacity of persons with mental incapacity primarily on the basis of mental impairment. For instance, the old law book of the country, the *Fetha Nagast* – Ethiopian Law Coded since the middle of 15th Century, recognized mental disability as a ground for declaring legal incapacity. Relevant part of the law book read that:

“... [Guardianship is necessary] for the one who is unable to distinguish in his mind that which is suitable for the perfection of [his] nature and good for his will ... either because of an evil spirit which seduces him – this is the mad person – or because his brain is wrecked by disease – this is the feeble minded person ... or because his [mental] condition becomes more feeble than previously by nature, because of the use made of his brain – this is the case [of

any man] when he grows old and approaches 100 years of age.”³⁰

The above provision recognize three mental health impairments that will result in legal incapacity and necessitate guardianship; namely, madness (because of evil spirit), feeble mind (because of brain disease) and dotage (consequence of old age). In all the three cases, unsound mind is the primary factor for legal incapacity. Then, the person’s legal capacity will be deprived and h/se cannot engage in juridical acts. Such person will be put under guardianship – typical functional approach.

Coming to legislations currently in force, one first finds the Civil Code of Ethiopia. The Code incorporates both general and specific rules on (legal) capacity of physical persons in general and on persons with disabilities in particular. Specific standards concern different issues such as, marriage, divorce, adoption, will, contract, and other juridical acts – these will be considered later.

The Civil Code’s general rule is that:

“All physical persons have the capacity to perform ‘acts of civil life’ unless declared incapable by law.”³¹

This provision entails presumption of legal capacity of a person to enjoy all civil life aspects until he/she is declared incapable. Though the Code does not define what acts of civil life constitute, it is broad and includes both juridical and non-juridical acts in the exercise of civil, political, economic, social and cultural rights.³² Then, as a component of the exception, the Code explicitly declares [impaired] ‘mental condition’ as one ground that will result in general incapacity – i.e., incapacity to perform acts of civil life due to deprivation of legal capacity.³³ This generally covers persons whom the Code referred as ‘insane persons’ – based on mental disease, insufficient mental development or senility.³⁴ Also, the Code envisages situations where physical condition/disability may lead to (legal) incapacity. The latter group refers to ‘infirm persons’ which includes “deaf-mute, blind and other persons” who, owing to permanent infirmity, are allowed to invoke in their favor the law that is proclaimed for those who are insane.³⁵ Let us consider these two legal regimes in turn.

3.1.1. Insane persons

The Civil Code defines an insane person as:

“... one who, as a consequence of his being insufficiently developed or as a consequence of a mental disease or his senility, is not capable to understand the importance of his actions.”³⁶

Clearly, it is the mental constitution of a person that leads to an insanity conclusion. But, two elements are necessary to establish insanity: unsound mind or mental impairment (due to insufficient mental development, mental disease or dotage) and consequent decision making deficiency. These cumulative requirements must exist concurrently.³⁷ The second element clearly informs that the Code employs ‘functional approach’ to test decision making skills and determination of legal capacity.

³⁰ Paulos Tzadua, H. Scholler, “The *Fetha Nagast*”, Faculty of Law, HSIU, (1968), Part-Two, Chapter XXXII.

³¹ Articles 192 and 196 of the Civil Code of the Empire Ethiopia, Proclamation No.165/1960.

³² As Elias N. noted, deprivation of exercise of capacity in exceptional cases is not even ‘absolute’. That is to say, a person declared incapable will not be prohibited from exercising all of his/her civil life aspects. Rather, only ‘juridical acts that entail legal consequences’ are prohibited. See Elias N., “Ethiopian Law of Persons: Notes and Materials”, 2007, p.152.

³³ Article 193 of the Civil Code of Ethiopia.

³⁴ Id, Article 339.

³⁵ Id, Article 340.

³⁶ Id, Article 339 (1).

³⁷ Vanderlinden J, “The Law of Physical Persons: Commentaries upon the Ethiopian Civil Code”, 1969, p.71.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Committee on CRPD General Comment No.1, cited above at note 3, paras.13.

²⁷ Ibid.

²⁸ Id, para.13.

²⁹ CRPD, Article 12 para.3.

Then, the Code recognizes two schemes regarding how legal capacity is going to be removed due to insanity: one for notoriously insane and the other for insane persons who are not notorious. Notorious insanity, in turn, can be established in two factual circumstances. The first is when a person is an “inmate of a hospital or of an institution for insane persons or of a nursing home” due to his mental condition.³⁸ In such cases, legal capacity deprivation lasts only for the time such person remains in the institutions.³⁹ Secondly, in a community where there are less than two thousand inhabitants, notorious insanity of a person is presumed if “the family of that person, or those with whom he lives, keep over him a watch” because of his mental condition and consequently, the persons liberty of movement is restricted.⁴⁰ This category is broad and may include large number of people with mental impairment - particularly, given the lack of adequate mental health facilities in Ethiopia.

In both the first and the second cases above, the Code presume a person notoriously insane and permits removing legal capacity⁴¹ simply based on mental impairment of a person – for which he is either admitted to an institution (medical model) or a watch is kept over him. This is typical ‘status approach’ that depend exclusively on mental impairment. This makes the approach Civil Code opted contradictory to the CRPD human rights based model.

Legal incapacity of notoriously insane persons exists only during the period he/se stay in an institution or within the community as defined above. In all other cases, the person’s insanity is presumed not notorious.⁴² In other words, an insane person whose insanity is not notorious - for it does not satisfy the factual circumstances above - is not prohibited to perform juridical acts or juridical acts performed are not subject to outright invalidation unless he/she is judicially interdicted.⁴³

Judicial interdiction is the other scheme the Civil Code recognizes for deprivation of legal capacity of persons with mental impairments. Juridical interdiction is pronounced by courts when application for interdiction is made by the insane, his spouse, by close relatives or by the public prosecutor.⁴⁴ Substantively, the court has to check that the requirements for insanity as required by the Code exist⁴⁵ and test out the necessity of interdiction (i.e., whether the health or interest of insane person, or interest of his presumptive heirs require⁴⁶). Procedurally, before interdiction, the court has to see the person whose interdiction is applied for unless this is not possible.⁴⁷ If impossible, the court may proceed to his examination by delegate.⁴⁸ If these requirements are met, the court will enter judgment of interdiction which ultimately restricts the person with disability from performing juridical acts.⁴⁹

After the court pronounces interdiction, the Code further requires judgment of interdiction to be registered in the court registry (by the registrar) and publicity of interdiction in the court and place where the interdiction is made, respectively.⁵⁰ It is the obligation of the guardian to provide to the registrar necessary information for registry and publicity, and ensure that the interdicted person lives in the place where his disability has been publicized.⁵¹ In case the interdicted person

³⁸ Article 341 of the Civil Code of Ethiopia.

³⁹ Ibid.

⁴⁰ Id, Article 342.

⁴¹ Articles 343–350 of the Civil Code clearly stated that juridical acts of notoriously insane persons are subject to nullity either by the person himself or his heirs or representatives.

⁴² As Vanderlinden explained in his Commentaries, “notoriety is essentially a matter of fact ... [and] it is also meant to be a temporary character of insanity as it only lasts as long as the factual conditions leading too notoriety exist.” In other words, this means that a person is notoriously insane only when he is in institutions defined under Article 341 or community as defined under Article 342. Vanderlinden J, cited above at note 37, p.72.

⁴³ Articles 347 and 351 of the Civil Code of Ethiopia.

⁴⁴ Id, Article 353.

⁴⁵ Id, Article 339.

⁴⁶ Id, Article 351 (1) and (2), and Article 354.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Id, Article 358 cum Article 199.

⁵⁰ Id, Article 352, 356 and 357.

⁵¹ Id, Article 362.

changes residence, the publicity required has to be made in the new residence.⁵² Nonetheless, failure to meet these conditions – either registry or publicity – does not validate juridical acts performed by the person with disability. It does not change the legal incapacity. Rather, the juridical act will be nullified and, mutatis mutandis, the registrar or the guardian will bear the liability for damage caused to third parties.⁵³

3.1.2. Infirm persons

Unlike insanity which is based on mental constitution of a person, infirmity is grounded principally on physical condition. For the Civil Code, infirm persons include:

“[those who] ... are not capable to take care of themselves or to administer their property as a consequence of permanent physical impairments they sustain.”⁵⁴

The Code recognizes all permanent physical impairments including, deaf-mute⁵⁵ and blind as situations that, along with the requirement of inability to take care of oneself or administer once property, may lead to the legal incapacity of a person with such disability. However, infirmity brings about legal incapacity if and only if the person with infirmity appeals to the protection provided for insane persons. This tends to imply that the procedure is *voluntary*; that does not automatically result in deprivation legal capacity.⁵⁶ Though this presumption might work for cases concerning infirm persons whose infirmity is not apparent, it does not necessary hold for apparently infirm persons.

Closer look at the provisions of the Civil Code, however, suggest that there will be situation where infirmity may be considered ‘apparent’, and will automatically entitle the person himself, his representatives or heirs to challenge validity of juridical acts performed by apparently infirm person.⁵⁷ The relevant provision of the Civil Code here is Article 343; and it reads as follows:

Article 343 – Juridical acts of notoriously insane person. – 1. Principle

1. *Juridical acts performed by a person at the time and in a place in which his state of insanity was notorious, may be impugned by that person, his representatives or by his heirs.*
2. *The same shall apply to juridical acts performed by a person where the infirmity which renders such person unfit to take care of himself and to administer his property is apparent.*

The second paragraph explicitly affirms (by reference to the protection accorded to notoriously insane persons in the first paragraph) that in so far as the infirmity of the person is noticeable at the time when h/she perform juridical act, such act is subject to invalidity. The law considers that consent of apparently infirm persons (in the same way as notoriously insane persons) is deemed to be affected by a defect which brings about nullity of juridical acts.⁵⁸ The message behind this (particularly, to third parties) is that apparently infirm persons practically lack full legal capacity – which they will latter (legally) invoke in their favor to annul juridical acts they entered in to. Eventually, this has no positive element in it; but, constitutes *constructively* taking away legal capacity of apparently infirm persons.

Generally, the Civil Code presumes an infirm person as incapable exclusively based on the permanent physical impairment which

⁵² Ibid.

⁵³ Id, Articles 374 and 376.

⁵⁴ Id, Article 340.

⁵⁵ Article 340 of the Amharic version of the Civil Code separately treats mute and deaf persons unlike the English version that require a person to be deaf-mute or deaf-and-dumb (simultaneously).

⁵⁶ Both Vanderlinden and Elias argue that while insanity entails automatic protection by the law, the same is not true for infirm persons - the later “benefit” only when he/she demands it. Vanderlinden based his argument on the phrase “may invoke” which Article 340 of the Civil Code used in defining apparently infirm persons. See Vanderlinden J, cited above at note 37, pp.71–72 and Elias N., cited above at note 32, p.154.

⁵⁷ Article 343 (2) cum 343 (1) of the Civil Code of Ethiopia.

⁵⁸ Id, Article 343 (2) cum 343 (1) and 344.

makes the person unable to take care of himself or to administer his/her property. This is just equating disability to functional limitations. Whether the removal of legal capacity is voluntary or constructive, the approach here does not go along with the contemporary human rights based approach. According to the 'social model of disability', which the CRPD endorsed, disability result from the interaction of "impairments and attitudinal and environmental barriers that hinder full and effective participation in society on an equal basis with others".⁵⁹ Among others, this prohibits defining persons with disabilities or limiting equal enjoyment of their rights on the basis of list of impairments or functional tests as the Civil Code does.⁶⁰

3.2. Specific legal frameworks

It has been stated earlier that, in principle, presumption of legal incapacity in specific factual situations or judicial declaration of the same (under the Civil Code) entails legal incapacity of the person with disability. Nonetheless, as Elias rightly pointed out, "the deprivation of exercise of rights is not absolute".⁶¹ In other words, in spite of the general legal incapacity, there are still acts of civil life which can be performed by persons with disability either because such acts are presumed unaffected by the incapacity or the law empowers courts to authorize the incapacitated person to do such acts.⁶² It is beyond the scope of this research to explore all those acts of civil life unaffected by incapacity. Rather, this section examines, as a showcase, just few of restrictions under existing laws of Ethiopia. Accordingly, issue concerning family law, employment law, political rights (the right to vote), access to justice and capacity to enter into contracts in general are dealt below.

3.2.1. Capacity to conclude contracts

One area of law where legal capacity of persons with mental health disabilities is limited is in relation to their capacity to give informed consent and thereby conclude a valid contract. The deprivation exists in many jurisdictions and, in Ethiopia too, the general law of contract (under the Civil Code of Ethiopia) threat persons with mental disability as incompetent to give valid consent that is binding. It is important to mention at this point that Ethiopian laws of contract involve both the general rules applicable to any contracts regardless of the nature and the parties thereto and special rules applicable only to specific types of obligations such as, sale, mortgage, donation, insurance, banking, agency, etc. Nonetheless, in both cases a contract is valid only if "the parties are capable of contracting."⁶³ Conversely, this entails invalidation of contracts made by incapable persons.

Though Civil Code's general contract section do not provide person who are regarded as incapable to conclude contract, evidently, it is referring to notoriously insane, apparently infirm and judicially interdicted persons who are generally declared incapable of undertaking juridical acts. Similarly, in specific types of contracts such as, agency,⁶⁴ sale,⁶⁵ donation,⁶⁶ pledge,⁶⁷ mortgage,⁶⁸ insurance,⁶⁹ banking transactions,⁷⁰ etc. the capacity of a person is essential validity requirement, particularly when these transactions arise from the acts of the parties. Lack of capacity (related to unsound mind of one of the parties) does not, however, result in automatic invalidation of contracts. Rather, the laws almost invariably

confer the authority to impugn validity of the act only on the incapable party, his legal representatives or heirs.⁷¹

Basically, the laws are so promulgated with the purpose of protecting the rights of persons with disabilities, heirs or other's (such as, offspring's) interest. Nonetheless, for all of the persons, the ground to appeal against juridical acts undertaken by the person with disability is that the consent of the latter is affected by his incapacity. In the same way as the general rules discussed above in relation with apparently infirm persons, the law here as well characterizes persons with disabilities as incapable of giving full and free consent valid before the law.⁷² Not only the capacity to give free and full consent, the Civil Code also compromises the capacity of persons with disabilities (specifically, blind persons) to affix their handwritten signature (including thumb-mark) in a written contract and thereby endorse the terms of contract. Unique to persons with disabilities, signatures or thumb-mark need approval by notary, registrar or judges. If this formality requirement is not met, the contract will be invalidated. Regrettably, the Federal Supreme Court Cassation Division narrated this provision as special protection the law accord to safeguard the interest of persons with disabilities; confirmation of paternalistic approach the law pursue.⁷³

Perceptibly, on the basis of the above legal and judicial background, third parties dealing persons with disabilities have good ground treat the latter as incapable of carrying on juridical acts. Again, this amounts to constructive removal of legal capacity of persons with disabilities to enter in to valid contractual relations.

3.2.2. Legal capacity in family issues

Family law is broad legal regime that includes all bodies of law dealing with family relations such as, marriage (including divorce), family and property management, child custody, wills, and others as they relate to families.⁷⁴ In the same order, this section looks in to specific laws of Ethiopia.

3.2.2.1. *Marriage*. On legal capacity to marry, the law is two pronged; one for notoriously insane or apparently infirm persons and the other for persons whose insanity is not notorious or whose infirmity is not apparent. The first group *may not* conclude valid marriage for the law explicitly declares that the consent of such persons is defective,⁷⁵ and marriage concluded as a result of error in consent is invalid.⁷⁶ In case such person concluded marriage, the person himself, his representatives or his heirs can impugn the marriage.⁷⁷ The law also recognized 'error on the state of (mental) health of one of the spouses' as fundamental error which the other spouse can invoke for dissolution of marriage. Fundamental error is defined Federal Revised Family Code as "error on the state of health of the spouse who is affected by disease that does not heal or that can be genetically transmitted to descendants".⁷⁸ In such cases, the other spouse can invoke for dissolution of marriage. This obviously includes mental impairments which may or may not be apparent during the time of conclusion of marriage. Though the law here is regulating impairments discovered latter (i.e. after conclusion of marriage), it will also be applied for notorious insanity in situations where the notoriety does not exist due to failure to meet factual situations. In any case, recognizing notorious insanity or

⁵⁹ OHCHR, "Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors", 2010, p.15.

⁶⁰ *Ibid.*

⁶¹ Elias N., cited above at note 32, p.142.

⁶² *Ibid.*

⁶³ Article 1678(a) of the Civil Code of Ethiopia.

⁶⁴ *Id.*, Article 2199.

⁶⁵ *Id.*, Article 2266.

⁶⁶ *Id.*, Article 2437.

⁶⁷ *Id.*, Article 2825.

⁶⁸ *Id.*, Article 3045.

⁶⁹ Article 654 of Commercial Code of the Empire of Ethiopia, Proclamation No.166/1960

⁷⁰ *Id.*, Article 896.

⁷¹ Article 343 of the Civil Code of Ethiopia.

⁷² *Id.*, Article 1728.

⁷³ *W/Jo Etenesh Kasa Vs. Haji Jemal Yimam*, Cassation File No.83674, Federal Supreme Court Cassation Decisions, Vol.15, Pp.65–68.

⁷⁴ Black's Law Dictionary, 8th ed. (2004), p.1804.

⁷⁵ Article 344 (1) of the Civil Code of Ethiopia states that:

"Unless the contrary is proved, the consent of ... [notoriously insane or apparently infirm] person shall be deemed to be affected by a defect which brings about its nullity." (emphasis added)

⁷⁶ Articles 6 and 13 (1) of the Revised Family Code of the Federal Democratic Republic of Ethiopia (Federal Revised Family Code), Proclamation No.213/2000. Federal Negarit Gazeta Extraordinary Issue, 2000, 1.

⁷⁷ Article 343 (1) cum 344 of the Civil Code of Ethiopia.

⁷⁸ *Id.*, Article 13 (3) (b).

apparent infirmity as a ground for dissolution of marriage is clear case deprivation of legal capacity.

Persons whose insanity is not notorious or whose infirmity is not apparent are, in principle, not prohibited from concluding valid marriage. Neither the person himself nor his heirs or representatives can demand annulment of marriage concluded on the ground that such person do not have legal capacity to give a consent free from defect.⁷⁹ Exceptionally, if the person is judicially interdicted, the validity of marriage concluded rests upon prior authorization of court.⁸⁰ If the marriage is concluded without authorization, the guardian or public prosecutor may request dissolution within six months after the date they came to know the existence of the marriage.⁸¹ Compared to notoriously insane and apparently infirm persons, the law here is relatively flexible. Because, it does not out rightly restrict the right of insane or infirm persons to marry – even if they are judicially interdicted.

Nonetheless, in light of Article 12 and 23 of the CRPD which clearly establish the right to legal capacity of persons with disabilities in all aspects of life, including marriage – based on free and full consent, the restrictions set out under the family laws of Ethiopia fall short of international standard. It does not also go along with the Constitution of Ethiopia which recognizes the right to marry and found a family for all who have attained marriageable age and without distinction based on a person's status – which in effect includes persons with disabilities.⁸²

3.2.2.2. Divorce.

The stance of the law is no different in relation to divorce. The laws of Ethiopia adhere to the principle of 'divorce for no cause',⁸³ and it is only courts that are authorized to declare the dissolution of marriage whether it is divorce by mutual consent or by individual petition.⁸⁴ Divorce by mutual agreement essentially requires free consent and expression of true intention of the parties which shall be expressed (to the court) in writing.⁸⁵ Inherently, this excludes notoriously insane, apparently infirm or judicially interdicted persons since their legal capacity is generally limited based on factual or legal grounds.

While the Revised Family Code is totally silent on the matter, the Civil Code at least provides the procedure for judicially interdicted persons. Accordingly, the consent of both the interdicted person and his guardian is necessary for divorce or to end an irregular union.⁸⁶ Still, both codes are silent on 'what would happen if the guardian does not consent to; nor do the codes provide what to do in the cases of notoriously insane or apparently infirm persons. Expectedly, however, the procedures for judicially interdicted persons might be used here as well - after securing judicial interdiction for notoriously insane or apparently infirm person.

3.2.2.3. Family management.

In principle, the Revised Family Code recognizes equal rights of spouses in family management.⁸⁷ Likewise, spouses have equal right to manage (individually) their respective personal property and jointly

⁷⁹ Articles 347, 348 and 349 of the Civil Code of Ethiopia.

⁸⁰ Articles 15 of Federal Revised Family Code.

⁸¹ Id, Articles 18 (d) and Article 34.

⁸² The Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), Articles 25 and 34.

⁸³ That is to say, at least the parties are not required to disclose causes for separation; see Article 77 (3) and 81 (2) of the Federal Revised Family Code.

⁸⁴ Id, Article 76.

⁸⁵ Id, Article 77 (1).

⁸⁶ Id, Article 370 (1). In a case between *W/O Askale Ashne vs Ato Tamrat Tesfaye*, the Federal Supreme Court Cassation Bench held that that in cases where divorce is declared based on the petition of a guardian representing judicially interdicted person, it is necessary to secure the consent of the later and ensure such declarations take in to account the rights and vested interest - will and preference - of judicially interdicted person. See *W/O Askale Ashne vs Ato Tamrat Tesfaye*, Cassation File No.103781, Federal Supreme Court Cassation Decisions, Vol.17, pp.41–42.

⁸⁷ Article 50 (1) of the Federal Revised Family Code.

manage common properties.⁸⁸ Not only this, spouses can freely delegate (by agreement) their authority to the other spouse in case the latter is unable to administer personal or common property.⁸⁹ Agreement evidently presupposes legal capacity to express free and full consent, and entering in to binding act. The question then is what would happen to the spouse whom the law attributes general legal incapacity owing to insanity or infirmity and where there is no advance agreement (such as, contract of marriage) about family and property management?

The law clearly states that 'where one of the spouses is *under disability or declared incapable*, the other spouse alone shall carry out the duties (in respect to family management) and administer (common) properties'.⁹⁰ For personal property management, since legal capacity of notoriously insane, apparently infirm or judicially interdicted persons is striped off, the law appoints tutor.⁹¹ In this case too, the other spouse may be appointed as a tutor.⁹² Overall, notwithstanding the mutual obligation to respect, support and assistance required between spouses and that spouses may discharge their obligations in the best interest of one another and the family in general, it remains that, spouses under disability (notoriously insane and apparently infirm persons) or declared incapable (judicially interdicted persons) do not have legal capacity to manage their family or properties during marriage. Neither have they the right to be appointed as guardian or tutor of their child.⁹³

3.2.2.4. Adoption.

Adoption is a contract that creates artificial filiation between a person and a child who are not in fact parent and child. It is a legal procedure that is basically meant to "assure an otherwise parentless child a stable, secure and loving home".⁹⁴ Thus, essentially, adoption provides a caring environment for children who will otherwise live without parents or in a less-conducive environment. Incidentally, adoption also helps those who want a child to have one and create family.⁹⁵

Under the law of Ethiopia, adoption is created when an agreement (contract) is made between the adopter and the guardian of the adopted child.⁹⁶ Then, adoption agreement has to be approved before court to have legal effect.⁹⁷ Obviously, as a binding contract, parties to the agreement need to have capacity to enter in to such juridical act. In this respect, the law does not expressly preclude persons under disability or declared incapable.

Nonetheless, given the general incapacity of at least notoriously insane, apparently infirm or judicially interdicted persons, it is unlikely that they will conclude a valid contract of adoption. Let alone concluding contract, the law even does not allow parent(s) of the adopted child to express their consent to the adoption if incapable.⁹⁸ This strengthen the assertion that persons under disability or declared incapable do not have legal capacity to adopt; neither to manifest their will for or against adoption of their own children. Exceptionally, juridically interdicted persons may undertake such juridical acts if the court (during or after interdiction) authorized the interdicted person to conclude adoption contract.⁹⁹

3.2.2.5. Will.

Though will is a unilateral juridical act that is strictly personal to the testator, the law requires the person making the will to have mental capacity that is sufficient to express her/his intention. Specifically, the law

⁸⁸ Id, Articles 59 and 66.

⁸⁹ Id, Articles 61 and 66 (1).

⁹⁰ Ibid.

⁹¹ Article 358 of the Civil Code of Ethiopia.

⁹² Id, Article 359.

⁹³ Article 243 of the Federal Revised Family Code.

⁹⁴ Stark B., "International Family Law: An Introduction", 2005, P.53.

⁹⁵ Ibid.

⁹⁶ Article 190 of the Federal Revised Family Code.

⁹⁷ Ibid.

⁹⁸ Id, Article 191 (2).

⁹⁹ Article 371 of the Civil Code of Ethiopia.

regards notoriously insane persons as lacking the requisite state of mental health to make valid will unless it is proved that the person was not notoriously insane at the time of making the will.¹⁰⁰ The principle of corresponding references of legal restrictions to juridical acts of apparently infirm persons makes the latter as well incapable to make valid will.¹⁰¹ Despite the fact that three kinds of wills (i.e., public, holographic and oral wills) recognized under the laws of Ethiopia and specific objective formalities are attached to each one of them,¹⁰² the law does not want to leave any room where will of notoriously insane or apparently infirm persons will be validated if the requirements are met. Thus, lack of insanity is set as one essential (absolute) condition for validity of wills.

On the other hand, the law recognizes exceptional situations where judicially interdicted persons may make valid will; in principle, interdicted persons as well cannot make will after interdiction.¹⁰³ That is to say that, basically the will is invalid but if court believes that the contents of the will were not influenced by the state of health of the testator, it may validate - in whole or in part - the will.¹⁰⁴ Even so, the court can validate the will only up to a value of ten thousand Ethiopian Birr and such amount shall not exceed one fourth of the succession.¹⁰⁵ In light of these conditions, it can be said that the law is hardly better off than the one set for notoriously insane or apparently infirm persons.

3.2.2.6. Admission to employment.

Work and employment are areas where persons with disabilities are subjected to variety of obstructing conditions such as, discrimination, prejudice, physical barriers and other obstructing circumstances. It is in recognition of this that the CRPD explicitly requires State parties to create equality of opportunity and prohibit discrimination on the basis of disability.¹⁰⁶ CRPD states that:

“States parties... [shall take appropriate steps] to prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;”¹⁰⁷

Along with CRPD's unequivocal recognition of the right to enjoy legal capacity in all aspects of life, it is going to be violation of international human rights law if persons with disabilities' right to legal capacity is restricted and thus, they cannot make a valid contract of employment or work. This clearly shows that CRPD does not tolerate any prohibitory criteria on the basis of disability.

Coming to Ethiopia, Proclamation No.568/2008 concerning 'The Right to Employment of Persons with Disability' (the Proclamation) is the latest one that provides general norms that are applicable across the board - both in private and public employment relations.¹⁰⁸ Basically, the Proclamation has important provisions that guarantee equality of opportunity, prohibit discrimination, and condemn prejudices and stereotypes during recruitment, promotion, training, transfer and other conditions of work.¹⁰⁹ Nonetheless, unlike the unconditional recognition of legal capacity under the CRPD, Ethiopian Persons with

Disabilities” Proclamation recognize exceptional circumstances where differential treatment based on disability may not constitute discrimination. Saying “any law, practice, custom, attitude or other discriminatory situation that impair the equal opportunities of employment of disabled persons is illegal”, the law recognizes an exception where “exclusions dictated by the nature of the work may not be regarded as discrimination”.¹¹⁰

It is incontestable that there would be works the inherent nature of which may necessitate setting criteria that will practically prohibit persons with disabilities from competing for or holding the post. For instance it is implausible to hire a person with mental health problem as bus driver or pilot. In light of this, the exception the law made makes sense. The problem with the provision above is that, based on the formulation of the provision, one can possibly argue that the issue of determining works which warrant exclusion might also depend on the discretion of employers. Because, ‘nature of work’ can be determined based on objective grounds (i.e., intrinsic nature of the work - like the driver or pilot example) or on subjective grounds (i.e., based on the exigency of employer). The later will open leeway for the employer to exclude person with mental health disabilities and justify the act on the above legal ground. And, this practically restricts the right to legal capacity of persons with mental impairment for it is likely that employer may doubt their real potential.

Generally, the problem with the Proclamation is not recognition of works which persons with disabilities are unlikely to assume owing to the ‘nature of the work’ vis-à-vis their specific disability. Rather, besides the general challenging practical situation on the ground, the exception is framed imprecisely and do not put in place appropriate mechanism that will likely safeguard abuse of the provision by employers. The problem would be mitigated had the law was framed as ‘exclusions dictated by the inherent nature of the work’; this at least do not leave an option for the employer to use subjective circumstances as a ground for prohibiting persons with mental impairments from recruitment, promotion or other conditions of work.

3.2.3. Consent for medical treatment

The CRPWD recognizes that:

“... persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability”¹¹¹

This paragraph covers all health related issues of persons with disabilities, i.e., equal entitlement to a system of health protection without discrimination on the basis of disability. This being the general protection for all persons with disabilities, there is additional aspect of the right and which is of particular importance to persons with mental health disabilities. This element of the right to health is often referred as ‘freedoms’ and the guaranteees therein includes: “the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation”.¹¹² This dimension of the right to health is essential for persons with disabilities as its components are directly related to legal capacity.

Building upon the assertion above, the Committee on CRPD affirmed in one of its general comments that denial of legal capacity of a person on the basis of disability, then - ignoring the choices or decisions s/he has made, and latter, substituting third parties to make decisions on his/her behalf constitute violation of Article 12 of the CRPD.¹¹³ The connotation generally is that all persons with mental disabilities “must be

¹⁰⁰ Id, Article 863.

¹⁰¹ Id, Article 343 (2).

¹⁰² Id, Articles 880–897.

¹⁰³ Id, Article 368 (1); In a case between *Haile Simuga vs Selamawit Tekola*, the Federal Supreme Court Cassation Bench affirmed that a visually impaired person who is not legally interdicted can make a valid will and the impairment alone cannot be a ground for invalidation of will. The court asserted that no additional validity conditions (other than one set for all) are attached to infirm persons. See *Haile Simuga vs Selamawit Tekola*, Cassation File No.50971, Federal Supreme Court Cassation Decisions, Vol.11, pp.62–65.

¹⁰⁴ Id, 862.

¹⁰⁵ Ibid.

¹⁰⁶ Article 27 (1) (a) of CRPD.

¹⁰⁷ CRPD, Article 27 (1).

¹⁰⁸ Article 2 (3) of “Right to Employment of Persons with Disability Proclamation No.568/2008”, Federal Negarit Gazeta, 14th Year, No.20.

¹⁰⁹ Id, Article 5.

¹¹⁰ Ibid.

¹¹¹ CRPD, Article 25.

¹¹² Committee on Economic, Social and Cultural Rights, General Comment No.14: The Right to the Highest Attainable Standard of Health, 2000, para.8.

¹¹³ Committee on CRPD, General Comment No.3. Article 6: Women and Girls with Disabilities, CRPD/C/GC/3, 2016, para.44.

able to exercise their legal capacity” in any health related decision making, including decision on: admission to psychiatric facilities; detention in institutions; sterilization, surgery or other treatments; reproductive rights, etc.¹¹⁴ Providing support in decision making process, which in no way takes away the decision making power and substitute others, is possible.¹¹⁵

In stark contrast to the other matters looked at earlier, when it comes to health, Ethiopia has not yet managed to adopt a specific mental health legislation that comprehensively deal with health issues, particularly concerning persons with mental health disability. There is also no mental health policy. Recently, the country has adopted ‘National Mental Health Strategy 2012/13–2015/16’ that is supposed to “address the mental health needs through quality, culturally competent, evidence-based, equitable and cost-effective care”.¹¹⁶ The Strategy had pledged that:

“... all persons with mental illness will enjoy the full range of human rights on an equal basis with others. No one will be discriminated on the ground of mental illness and disability”¹¹⁷

As part of fulfilling this pledge, the Strategy had listed down almost all rights of persons with disabilities guaranteed under the CRPD, including the right to equal recognition before the law, and assures that such rights will be fully enforced for persons with mental illness.¹¹⁸ For this purpose, the Federal Ministry of Health was required to develop policies, procedures and specific legislations that address challenges related to access to care services, involuntary admission or treatment practices; seclusion and restraint of patients; consent for admission and/or treatment; rights of family and caregivers, respect and dignity, and discrimination of persons with mental health disability.¹¹⁹

Nonetheless, the Strategy phased out while there is hardly any evidence that suggest that any of the documents above are adopted or actions articulated under the Strategy are implemented. Rather, as empirical researches undertaken in the major psychiatric facilities in the country assert, the practice of arbitrary admission and treatment, and seclusion and restraint of persons with mental health disability without their consent (often based on the consent of family members or other companions) persist. Not only in psychiatric facilities, generally, in most health services, the decision making capacity of persons with mental health disabilities is ignored and almost all the decisions are made by substituted third parties such as, family members, guardians or other escorts – thus violating the right to legal capacity of persons with disabilities.

3.2.4. Access to justice

The right to access to justice is one of the core elements that ensure enforcement of rights of persons with disabilities to be recognized as a person before the law. In particular, the right guarantee forum where a person with disability exercise his/her legal capacity without discrimination and claim his/her rights and obligations before the law. This is better explained by the Committee on CRPD as follows:

“In order to seek enforcement of their rights and obligations on an equal basis with others, persons with disabilities must be recognized as persons before the law with equal standing in courts and tribunals”¹²⁰ (emphasis added)

The underlined phrase point out that the core of protection in relation to the right to access to justice lies in equal recognition of standing, i.e., “the right to make a legal claim or seek judicial enforcement of a

right or duty”.¹²¹ Accordingly, any restriction that is based on disability and that limit person with disabilities’ legal capacity to bring a claim or defend claims against them constitutes violation of the guarantee under Article 12 of CRPD. Though ‘standing’ constitute the core of access to justice discourse in relation to persons with disability, additionally, participation as lawyers, judges, jurors or other officials in the justice system is also protected under the same legal regime.¹²²

In Ethiopia, the right to access to justice is a constitutionally entrenched right where everyone is entitled to bring any justiciable matter to competent bodies with judicial power and obtain remedy thereon.¹²³ This general and all inclusive constitutional principle is implemented by particular law, in this case, the Civil Procedure Code.¹²⁴ The later, however, provides that only persons capable under the law can become party to a suit – both as a plaintiff as well as defendant.¹²⁵ Then, the Civil Procedure Code restricts the capacity of persons with disabilities legal standing right stating that:

“A person under disability may sue or be sued through his legal representative”¹²⁶

Undoubtedly, legal capacity here is going to be made on the basis of general rules on capacity discussed earlier; which explicitly excludes insane persons and judicially interdicted infirm persons. The law takes away their rights and hand it over to a substitute - legal representative. Then, Article 34 (2) of the Civil Procedure Code states that:

“Where a person under disability is not represented by his legal representative, the proceeding shall be stayed until a legal representative is appointed in accordance with the relevant provision of the Civil Code”.

Thus, in case the person with disability is not yet represented, the Code order halting the proceeding until legal representative is appointed. Remember, the law here is not talking about ordinary representation by a lawyer who will be authorized to act on behalf of a party to a suit. Persons with disability cannot appoint a lawyer; they might be already stripped off their power to enter in to such juridical act. Rather, the law is referring to appointment of a tutor – who will act on behalf of the person with disability or appoint a lawyer.

As the Committee on CRPD rightly pointed out, right to access to justice is broad and includes the roles of persons with disabilities in the justice system as judges, prosecutors, lawyers, witnesses, etc. For the Committee any legal framework or practical situation that imposes limitations on persons with disabilities and excludes them from such specific roles constitutes violation of the right to legal capacity.

In this respect, there is no clear legal standard in Ethiopia that prohibits persons with disabilities in relation with the roles stated. However, as the recent decision by the Ethiopian House of Federation suggest, there are customary practices that ban persons with disabilities (specifically, visually impaired) from being judges or other legal officers on the grounds of physical limitations.¹²⁷ The House ruled such exclusion as unconstitutional and against persons with disabilities right to equality and equality of employment.

3.2.5. Political participation (the right to vote)

The right to vote is one of the fundamental human rights recognized in most international and regional human rights laws as the core of democratic government and among the essential elements that ensure

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Federal Democratic Republic of Ethiopia Ministry of Health, “National Mental Health Strategy 2012/13–2015/16”.

¹¹⁷ Id, p.30.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Black’s Law Dictionary, 8th Ed., 2004.

¹²² Ortoleva S., “Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System”, *ILSA Journal of International and Comparative Law*, Vol.17, 2011, Pp.282–317.

¹²³ Article 37 of the FDRE Constitution.

¹²⁴ Civil Procedure Code of the Empire of Ethiopia of 1965.

¹²⁵ Id, Article 33 (1).

¹²⁶ Id, Article 34 (1).

¹²⁷ “Ethiopia: House of Federation Rules Out Discrimination”, *Addis Fortune News*, Addis Ababa, 15 November 2016 [Vol 17, No 863].

citizens participation in public and political life.¹²⁸ Likewise, Article 29 of the CRPD in clear terms recognizes and protects persons with disabilities right to participate in political and public life within their country. The CRPD guarantee is that:

“States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to ... ensure that [they] can effectively and fully participate in political and public life ... directly or through freely chosen representatives, including the right and opportunity... to vote and be elected ...”¹²⁹ (emphasis added)

At the core of the guarantee here are the right to vote and to be elected, and the right to have access to public services.¹³⁰ However, political and public life also include participation in public administration and the formulation and implementation of policy, plan, programme or project that directly or indirectly affect the life of persons with disabilities. The right to form and join trade unions or association is also interpreted as one essential component of political participation right.¹³¹ The point remains that; persons with disabilities shall enjoy these entitlements on equal basis with others without discrimination, particularly based on their status.

Though there is no ambiguity on the general framework, there are, however, differing understanding of the ‘non-discrimination’ element in relation with the right to vote and to be elected. For instance, in its interpretation of Article 25 of ICCPR (on the right to participate in public affairs and the right to vote), HRC reasoned that “the exercise of the rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable”.¹³² Then, the HRC points out “established mental incapacity” as typical instance for “denying a person the right to vote or to hold office”.¹³³ Nationally as well, most jurisdictions deprive a person of his right to vote if the person has ‘unsound mind’.¹³⁴ The restriction range from outright exclusion based on the mental disability the person has or for which is under guardianship (i.e., status approach) to full participation based on assessment of individual’s voting capacity (i.e., functional approach).¹³⁵

In Ethiopia too, persons who are proved to have mental incapacity are denied the right to vote and to be elected. The Electoral Proclamation of the country states that a person shall not be legible for registration of electors if s/he is “*proved to be incapable of making decision due to mental disorder*”.¹³⁶ The law is not, however, clear on who or which organ will ‘prove’ mental incapacity and the basis for such decision. Nor does the law indicate the rationale for such exclusion. Unlike the Electoral Proclamation which set blanket ban on all persons with mental disorder, directive issued by the National Electoral Board of Ethiopia limit the restriction only for persons who are notoriously insane – though the latter is simply established based on presumptions of factual circumstances.¹³⁷

Experiences in other jurisdictions, however, indicate that such decisions are often made by courts and the restriction is grounded on ‘protecting the integrity of political system from individuals who are unable to formulate a valid political opinion’.¹³⁸ In the case of Ethiopia, Directive issued by the National Electoral Board limited the scope of application of the restriction stated above under the Electoral Proclamation to ‘*a person who is notoriously insane*’.¹³⁹ This may indicate that mental incapacity decision is going to be made by electoral officers, on the basis of factual circumstances only (i.e., either because the person stay in an institution for mentally disabled or s/he lives in a community where there are less than two thousand inhabitants the and family of that person, or those with whom he lives, keep over him a watch). Thus, the exclusion is direct and outright if the factual circumstances are there; and does not involve assessment by any independent organ.

The point is that, whosoever decides the matter, if the assessment is done only on persons with mental disabilities, it is typical instance of functional approach which is discriminatory – for the inability to make a valid political opinion is not limited to persons with disability. Thus, the stance of the HRC as well as national laws restriction of the right to vote based on a person’s decision making ability is against the right to equal recognition of persons with disabilities as recognized under CRPD. Mental incapacity can no more be considered as an objective and reasonable ground to limit the exercise of the right to vote or generally, to participate in political and public life. The Committee on CRPD clearly stated in its General Comment that:

“a person’s decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote, the right to stand for election and the right to serve as a member of a jury.”¹⁴⁰

Similarly, in its recent jurisprudence, the Committee on CRPD confirmed its assertion above holding that:

“... an exclusion of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability...”¹⁴¹

In light of the Committee on CRPD jurisprudence, it is easy to observe that the electoral laws of Ethiopia which restrict exercising the right to vote on the ground of ‘proven mental disorder’ violates the rights of persons with disabilities to enjoy legal capacity on an equal basis with others in all aspects of life – including political life, which encompasses the right to vote.

4. Conclusion: Way forward

Analysis above clearly shows that the general as well as specific (civil) legal frameworks of Ethiopia somehow restrict the rights of persons with mental disability to exercise their legal capacity in different civil life aspects. The laws make decisions made by persons with mental or physical disabilities void or voidable (particularly, regarding notoriously insane, apparently infirm or judicially interdicted persons) and provide the substitution of guardians or tutors for decision making as a way out.

Nonetheless, as the Committee on CRPD noted in its general comment, substituted decision making model is a clear case violation of different rights of persons with disabilities; namely, “respect for inherent dignity, individual autonomy, independence, non-discrimination, full and effective participation and inclusion in society, equality of opportunity,

¹²⁸ See for instance, Articles 20 and 21 of UDHR; Article 25 of ICCPR; Articles 7 and 8 of CEDAW; Article 5 of Convention on Elimination of Racial Discrimination; Article 13 of the ACHPR; and Article 9 of Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

¹²⁹ CRPD, Article 29 (a).

¹³⁰ HRC, General Comment No.25: Article 25 (Participation in Public Affairs and the Right to Vote), 1996, para.1.

¹³¹ Schulze M., cited above at note 17, p.164.

¹³² HRC, General Comment No.25, cited above at note 130, para.4.

¹³³ Ibid; it is important to mention here that the opinion of the HRC is made in the 1990s, i.e. way before the adoption of CRPD in 2006; yet, the argument has served as the basis for most national jurisdictions to restrict voting right to persons with disabilities based on mental incapacity decision.

¹³⁴ Combrinck H., “Everybody Counts: The Right to Vote of Persons with Psychosocial Disabilities in South Africa”, in African Disability Rights Yearbook, 2004, Vol.2, pp.75–100.

¹³⁵ Ibid.

¹³⁶ The restriction is set only for electors; and there is no similar restriction concerning registration of candidates. See Electoral Law of Ethiopia Amendment Proclamation No.532/2007, Federal Negarit Gazeta, 13th Year, No.55, Article 33 (3).

¹³⁷ Electoral Board of Ethiopia, Directive for the Registration of Electors, Directive No. 2/2009 (as amended), Article 20 (3).

¹³⁸ CRPD, Communication No.4/2011, *Zsolt Bujdosó, et al. Vs Hungary*, cited above at note 13, para.5.7.

¹³⁹ Directive No.2/2009, Cited above at note 137.

¹⁴⁰ Committee on CRPD General Comment No.1, cited above at note 1, paras.48–49.

¹⁴¹ CRPD, Communication No.4/2011, *Zsolt Bujdosó, et al. Vs Hungary*, cited above at note 13, para.9.4.

accessibility, etc.”¹⁴² Thus, as a state party to the CRPD, the first measure Ethiopia is required to take is to adapt its laws to human rights-based model of disability; specifically, the country is required to shift its laws from substituted decision-making paradigm to supported decision making.¹⁴³ It follows that, the above discussed legal frameworks that are based on substituted decision making need to be abolished and replaced with legal frameworks that fully recognized persons with disabilities' right to legal capacity in all aspects of life. Fully, in a sense, the laws need to accept and uphold legal capacity – both legal standing and legal agency – of persons with disabilities.

As it was pointed out earlier in this article, there is no condition that can be used to draw exception to full legal capacity regime. That is to say, notwithstanding the degree of mental impairment, the person with disability has to be recognized as having legal capacity in all aspects of life on equal basis without discrimination of any kind. Nature of disablement is, however, essential element in determining the nature of assistance and support that has to be provided for persons with disability and enable the later exercise legal capacity fully and effectively.

Support and assistance, i.e., supported/assisted decision making model, in essence is intended to assist persons with disability in decision and enable the later exercise his/her legal capacity in a way that meets his/her rights, interest, will and preference. As the Committee on CRPD maintain, support and assistance should never amount to substituted decision making; but, the type and intensity should vary depending up on the different nature and degree of disablement and taking in to account subjective need, will, preference, interest and right of the recipient.¹⁴⁴ Ethiopia has the obligation take all appropriate support measures that: provide effective safeguard against abuse, conflict of interest and undue influence; are tailored to the degree of disablement, personal circumstances, rights, will and preferences of the person; and review the aptness of the measures on regular basis.

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¹⁴² Committee on CRPD General Comment No.1, cited above at note 1, para.4.

¹⁴³ Id, para.3

¹⁴⁴ Id, para.17