



Legal capacity is necessary for ensuring that all persons are able to participate equally in society. Yet, discriminatory laws frequently deny women with disabilities, who comprise nearly one-fifth of all women,¹ their right to legal capacity under substituted decision-making regimes, such as guardianship, conservatorship, and health laws that permit forced treatment.² Women with disabilities who marry are at even greater risk of losing their right to legal capacity.³ The denial of legal capacity gives rise to numerous other violations of fundamental rights for women with disabilities, including their rights to marry and found a family; make autonomous and voluntary decisions about their sexual and reproductive health; give or withhold consent to intimate relationships; seek accountability for various forms of abuse through the justice system; and participate in all other daily aspects of civil, political, cultural, economic, and social life.⁴

Key Concepts Defined⁵

Legal Capacity: “[T]he ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency).”⁶ Legal standing entitles a person to the full protection of his or her rights by the legal system and protects these rights from state interference. Legal agency is a person’s ability to engage in transactions and create, modify, or end legal relationships.

Mental Capacity: The decision-making skills of a person, which naturally vary among persons and may depend on a number of factors, including social and political contexts.

Many states conflate legal capacity and mental capacity, but they are distinct concepts. The conflation of these terms is significant for women with disabilities; where a woman is considered to have impaired decision-making skills, particularly because of an intellectual or psychosocial disability, she is more likely to have her legal capacity removed.

Substituted Decision-Making: Systems that designate someone other than the individual with a disability to make legally binding decisions about her or his life, such as guardianship or conservatorship regimes.

Supported Decision-Making: Mechanisms that provide various support options to facilitate an individual’s ability to make her or his own decisions about life and to ensure that decision-making is guided by that individual’s wills and preferences, rather than what is perceived to be in her or his best interest.

Violations of the Right to Legal Capacity

Laws and Policies that Deny Legal Capacity

- National laws, policies, and plans often do not recognize women with disabilities as equal rights holders under the law. For instance, laws may statutorily deny women with disabilities—particularly those with cognitive or psychosocial disabilities—the ability to engage in consensual sex.
- Laws may restrict women with disabilities from forming legal relationships by limiting their abilities to enter legal contracts, including marriage, employment, or real estate contracts.
- Legal frameworks often promote substitute decision-making regimes in cases where women with disabilities are considered to have impaired decision-making skills. These regimes (1) deny women with disabilities legal agency; (2) allow someone other than the woman herself to appoint the substitute decision-maker, including against her will; and (3) reject the will and preferences of the woman in favor of a “best interests” standard.⁷

Barriers to Exercising Bodily Autonomy

- Health care providers often lack necessary training to explain health options available to women with disabilities in a manner they can understand. Lack of access to information in a form and format that they can understand infringes the ability of women with disabilities to make autonomous and informed decisions about their health and facilitates substitute decision-making.
- Women with disabilities are frequently subjected to sexual and reproductive health procedures without their consent, including forced sterilization, forced abortion, and forced contraception, due to misconceptions that they are asexual or incapable of making informed decision about their health and bodies.
- Women with psychosocial disabilities are frequently subjected to forced psychiatric treatment, often by court order or at the discretion of a substitute decision-maker or a health care provider.

Barriers to Legal Recognition Before the Courts

- Beliefs that women with disabilities are unreliable or incompetent witnesses can restrict their ability to initiate legal proceedings, testify in court, or move a complaint through the justice system.⁸
- Under substitute decision-making regimes, caregivers and family members can act as gatekeepers to women's access to justice because they hold the sole power to initiate legal or judicial proceedings.
- Women with disabilities experience heightened rates of forced institutionalization compared to men with disabilities⁹ and women without disabilities,¹⁰ and women who have been institutionalized seldom have the legal right to challenge their institutionalization.¹¹

Barriers to Entering Legal Relationships

- Women with disabilities face constraints on their rights to enter legal contracts—including marriage and employment contracts.¹²
- Women with disabilities are often unable to decide where and with whom to live. Instead, substitute decision-makers can consent to the placement of women with disabilities in institutional settings even when women with disabilities have expressed their will to live independently.¹³
- Women with disabilities are often restricted from administering and owning property and conducting financial affairs, including accessing bank loans, mortgages, and other forms of financial credit.
- Restrictions on legal capacity undermine women with disabilities' engagement in civil and political life, including their rights to vote in elections, hold public office, and serve as a member in a jury.

The Right to Legal Capacity

A range of fundamental rights protected in a number of international and regional human rights treaties, including the Convention on the Rights of Persons with Disabilities (CRPD), the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women underpin the right of women with disabilities to exercise legal capacity. These include the rights to:

- **Equal recognition before the law and access to justice**¹⁴
- **Equality and non-discrimination**¹⁵
- **Accessibility**¹⁶
- **Effective remedy**¹⁷
- **Consent to marriage and equal rights within marriage**¹⁸
- **Freedom from harmful practices**¹⁹
- **Independent living and inclusion in the community**²⁰
- **Freedom from torture or cruel, inhuman, or degrading treatment or punishment**²¹
- **Bodily integrity and security of the person**²²
- **Equal and effective participation in all legal proceedings**²³

In addition to recognizing these rights, international human rights law specifies that there are no circumstances under which a person may be deprived of her right to recognition before the law or in which this right may be limited.²⁴

State Obligations with Respect to Legal Capacity

States have specific obligations under international law to respect, protect, and fulfill women with disabilities' right to legal capacity.

States must:

Respect: This obligation requires states—including state actors acting in their official capacity—to refrain from any action that restricts the legal capacity of women with disabilities on an unequal basis with men and persons without disabilities.

Protect: This obligation requires states to ensure private actors do not interfere with the legal capacity of women with disabilities. States should, for instance, establish mechanisms for women with disabilities to challenge actions that interfere with their exercise of legal capacity.

Fulfill: This obligation requires states to take all necessary measures to ensure that women with disabilities have the right to exercise legal capacity in all aspects of their lives. This includes, for instance, providing reasonable accommodations where necessary and appropriate for women with disabilities in their exercise of legal capacity.

States Obligations to Promote Supported Decision-Making

The Committee on the Rights of Persons with Disabilities has further explained that states have an obligation to abolish substituted decision-making regimes in all forms and replace them with supported decision-making alternatives. Supported decision-making regimes must include the following characteristics to meet human rights standards:²⁵

Available to all. This requires states to provide training to legal and medical service providers on the supported decision making to ensure that all women with disabilities, including those with high levels of support needs, have access to supportive decision-making.

Based on the will and preferences of the individual. This requires states to institute advanced planning mechanisms to allow women with disabilities to identify their preferences in advance of a time when they are unable to communicate their will to others; where it is not practicable to determine the will and preferences, decisions should be based on a “best interpretation of will and preferences” rather than a “best interest” standard.

Not hindered by mode of communication. This requires states to ensure access to materials in various accessible formats, as well as interpreters, adequate technology, and other communication devices, so that women with disabilities can appropriately express their will and preferences.

Legally recognized support persons are available and accessible. This requires states to facilitate the formal establishment of a support person, including in isolated settings. States should also ensure that both women with disabilities—as well as third parties—have effective, timely, and holistic mechanisms through which to challenge actions taken by a support person that do not align with the supported person’s will and preferences.

Affordable. This requires states to ensure that support is available at a nominal or no cost to women with disabilities.

Not used to limit other fundamental rights. States cannot use the need for support in decision-making as a justification for limiting other fundamental rights, such as voting rights, reproductive rights, parental rights, or rights to marry.

Voluntary. This requires states to ensure that women with disabilities can refuse support or terminate or change the support relationship at any time.

Safeguarded from interference. This requires states to establish protective measures to ensure that the supported person’s legal capacity is respected, for instance, by providing training to ensure that supportive decision-making is free from conflicts of interest and undue influence.

Not dependent upon mental capacity assessments. This requires states to ensure that persons with disabilities can elect to use supportive decision-making without requiring mental capacity assessments, which can perpetuate misconceptions about the decision-making capacities of women with psychosocial disabilities.

Realizing the Right to Legal Capacity

- Women with disabilities must be recognized as equal rights holders under the law and their decisions must be legally recognized. This includes decisions about their health, legal and personal relationships, and participation in all aspects of social, cultural, economic, and political life.
- Women with disabilities must not be subjected to forced medical and reproductive health treatments. Women who experience such violations should have access to safe reporting mechanisms and effective remedies.
- Women with disabilities must not be subjected to forced institutionalization. Women who have been institutionalized must have access to effective legal channels through which to challenge their institutionalization and to report—and seek remedies for—any violations committed against them while institutionalized.
- Women with disabilities must have access to information about their fundamental rights, including their right to making informed decisions about their bodies, health, and participation in all aspects of social, political, cultural, and economic life. All information must be made available in alternative and accessible formats.
- Justice and healthcare facilities, detention centers, schools, job centers, and all other institutions, should be maintained, funded, and accessible to women with disabilities, including those in rural areas. Moreover, these facilities should be equipped to provide reasonable accommodations to women with disabilities.

Good Practice Example: Colombia

The Colombian congress recently (2019) passed a law to protect legal capacity of adult persons with disabilities. Specifically, the law aims to establish specific measures to guarantee the full legal capacity of adult persons with disabilities and to provide them with the supports necessary to exercise such legal capacity. The law establishes safeguards to ensure that priority is given to the will and preferences of the person who may require support in making legal decisions. Notably, the law indicates that it should be interpreted in a manner consistent with the CRPD.²⁶

- 1 World Health Organization (WHO) & World Bank, World Report on Disability 28 (2011).
- 2 Committee on the Rights of Persons with Disabilities (CRPD Committee), *General Comment No. 12: Equal Recognition before the Law*, ¶ 7, U.N. Doc. CRPD/C/GC/1 (2014).
- 3 CRPD Committee, *General Comment No. 12*, ¶ 8.
- 4 CRPD Committee, *General Comment No. 12*, ¶ 8.
- 5 CRPD Committee, *General Comment No. 12*, ¶¶ 12-15, 17, 27.
- 6 CRPD Committee, *General Comment No. 12*, ¶ 12.
- 7 CRPD Committee, *General Comment No. 12*, ¶ 27.
- 8 U.S. Dep't of Justice, *Gender biased policing, Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence 7* (2016)
- 9 Commission on Human Rights, *Women and adequate housing: Study by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari*, ¶ 64, U.N. Doc. E/CN.4/2005/43 (2005), http://www.un.org/womenwatch/enable/E-CN4-2005-43_Housing.pdf.
- 10 UN DESA, *Women and Girls with Disabilities*, <https://www.un.org/development/desa/disabilities/issues/women-and-girls-with-disabilities.html>.
- 11 See, e.g., CRPD Committee, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities*, ¶ 20 (Sept. 2015).
- 12 CRPD Committee, *General Comment No. 12*, ¶ 14, U.N. Doc. CRPD/C/GC/1 (2014).
- 13 CRPD Committee, *General Comment No. 12*, ¶ 46, U.N. Doc. CRPD/C/GC/1 (2014).
- 14 International Covenant on Civil and Political Rights (ICCPR), Art. 26; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Art. 15; Convention on the Rights of Persons with Disabilities (CRPD), Arts. 12, 13; African Charter on Human and People's Rights (Banjul Charter), Art. 3; American Convention on Human Rights (American Convention), Art. 3.
- 15 ICCPR, Art. 2; International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 2; CRPD, Arts. 5-7; CEDAW, Arts. 1, 3; Convention on the Rights of the Child (CRC), Arts. 2, 5; Banjul Charter, Arts. 2-3; Maputo Protocol, Art. 8; American Convention, Arts. 1, 24; European Convention on Human Rights (ECHR), Art. 14.
- 16 CRPD, Art. 9; Maputo Protocol, Art. 14.
- 17 ICCPR, Art. 2; American Convention, Art. 8; ECHR, Arts. 13, 41.
- 18 ICCPR, Art. 23; ICESCR, Art. 10(1); CEDAW, Art. 16; CRPD, Art. 23(1); Maputo Protocol, Art. 6; American Convention, Art. 17.
- 19 CRPD, Arts. 6, 8(1)(b); CEDAW, Arts. 2, 5; CRC, Art. 24; Maputo Protocol, Art. 5.
- 20 CRPD, Art. 19.
- 21 ICCPR, Art. 7; Convention against Torture, Arts. 2, 16; CRPD, Art. 15; CRC, Art. 37; Banjul Charter, Art. 5; American Convention, Art. 5; ECHR, Art. 3.
- 22 ICCPR, Arts. 9, 17; CRPD, Arts. 14, 22-23; CRC, Art. 16; African Charter, Art. 6; Maputo Protocol, Arts. 4, 14; American Convention, Arts. 7, 11; ECHR, Arts. 5, 8.
- 23 ICCPR, Art. 14 (2)(f); ECHR, Art. 6(e); CRPD, Art. 13; African Disability Protocol, Art. 13.
- 24 CRPD Committee, *General Comment No. 12*, ¶ 1.
- 25 CRPD Committee, *General Comment No. 12*, ¶ 29.
- 26 Congreso De La Republica De Colombia, *Ley N° 1996 por medio de la cual se establece el régimen para el ejercicio de la capacidad legal de las personas con discapacidad mayores de edad* [Law No. 1996 by which it establishes a regime for the exercise of legal capacity of adult persons with disabilities], Aug. 26, 2019 (Col.).

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Women Enabled International advances human rights at the intersection of gender and disability to: respond to the lived experiences of women and girls with disabilities; promote inclusion and participation; and achieve transformative equality. Women Enabled International envisions a world where women and girls with disabilities claim human rights, act in solidarity and lead self-determined lives.