

Legal capacity

Executive summary

One of the most debated issues during the fifth session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (24 January to 4 February 2005) was the concept of 'legal capacity' in the chapeau of draft Article 9(2) and its relationship (and possible overlapping) with the 'right to recognition everywhere as a person before the law' set out in draft Article 9(1).

This background paper provides an overview of the way in which the terms 'recognition everywhere as a person before the law' and 'legal capacity' are used in existing human rights law treaties and in selected domestic legal systems, and seeks to assess the relationship – and possible overlapping – between these two terms and such other terms such as 'legal personality', 'juridical capacity' and 'capacity to act'.

The paper concludes that the two terms 'recognition as a person before the law' and 'legal capacity' are distinct. The 'capacity to be a person before the law' endows the individual with the right to have their status and capacity recognised in the legal order. The concept of 'legal capacity' is a wider concept that logically presupposes the capability to be a potential holder of rights and obligations, but also entails the capacity to exercise these rights and to undertake these duties by way of one's own conduct.

I. Introduction

1. At its fifth session, held in New York from 24 January to 4 February 2005, the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (hereinafter, the Ad Hoc Committee) held informal discussions on several draft Articles of the proposed new treaty, with the aim of clearing up as many of the issues concerning the draft articles as possible.

2. One of the most debated issues during the fifth session of the Ad Hoc Committee was the concept of ‘legal capacity’ in the chapeau of draft Article 9(2) and its relationship (and possible overlapping) with the ‘right to recognition everywhere as a person before the law’ set out in draft Article 9(1). Draft Article 9, as drafted by the facilitator, currently reads as follows:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as a person before the law.
2. States Parties shall recognize that persons with disabilities have [legal capacity] on an equal basis with others in all fields and shall ensure, to the extent possible, that where support is required to exercise [that capacity] [the capacity to act]: (*Omissis*)

In his report to the Ad Hoc Committee, the Coordinator noted that while paragraph 1 of draft Article 9 as developed by the facilitator attracted general support among delegates, there was “no general agreement on the wording of the chapeau of the second paragraph, including the meaning of ‘legal capacity’”.¹ The Coordinator proposed that the wording of this provision be considered intersessionally by interested delegations.

3. This paper provides an overview of the way in which the terms ‘recognition everywhere as a person before the law’ and ‘legal capacity’ are used in existing human rights law treaties and in selected legal systems. Its aim is to analyse the

¹ Report of the Coordinator to the fifth session of the Ad Hoc Committee, in Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its fifth session, A/59/360, Annex II, paras. 17-18.

relationship – and possible overlapping – between these two terms and such other terms as ‘legal personality’, ‘juridical capacity’ and ‘capacity to act’.

4. The paper consists of two parts. The first part reviews the content and the negotiating history of Article 16 of the International Covenant of Civil and Political Rights (ICCPR) and Article 15(2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which are the models used in the drafting of paragraphs 1 and 2 of draft Article 9. The second part undertakes a comparative analysis of the way in which the terms ‘legal personality’, ‘legal capacity’ and ‘capacity to act’ are used in the legal systems of selected civil-law and common-law countries: France, Spain and the United Kingdom.

II. International law

(a) The right to recognition everywhere as a person before the law

5. Draft Article 9(1) of the proposed disability convention proposes a language very similar to that of Article 16 of the ICCPR, according to which

Everyone shall have the right to recognition everywhere as a person before the law.²

At the regional level, this right is included in Article 3 of the American Convention on Human Rights (ACHR)³ and in Article 5 of the African Charter on Human and Peoples’ Rights (ACHPR).⁴ This right has not been included in the European Convention on Human Rights (ECHR) since, in the opinion of the Committee of

² The formulation of Article 16 ICCPR corresponds nearly literally to that of Article 6 of the Universal Declaration of Human Rights (UDHR):

Everyone has the right to recognition everywhere as a person before the law.

For an analysis of this provision, see M. Bogdan, *Article 6*, in A. Eide (Ed.), *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press, 1993, pp. 111 ff.

³ Article 3 (Right to Juridical Personality):

Every person has the right to recognition as a person before the law.

⁴ Article 5:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status (...).

Experts of the Council of Europe, “it was unnecessary and could be deduced from other articles in the Convention”.⁵

6. Article 16 of the ICCPR guarantees to all human beings the basic human right to be recognised as a person before the law (*personnalité juridique* in French; *personalidad jurídica* in Spanish).⁶ Pursuant to this provision, the individual is endowed with the ‘capacity to be a person before the law’, i.e. to be recognised as a potential bearer of legal rights and obligations. Legal personality is a crucial aspect of freedom, as

[i]t distinguishes one man from others and permits him to assert his essential dignity *erga omnes*. It concentrates the attention of the legal order upon each human being. It gives to the essential dignity of the human being reality in law. Without it, man would not be truly free, for he would be subject to injustice and injury without legal remedy.⁷

The recognition of legal personality also represents a necessary pre-condition for the enjoyment and actual exercise of all other individual rights: in his commentary to the ICCPR, Nowak notes that

[w]ithout this right, the individual could be degraded to a mere legal object, where he or she would no longer be a person in the legal sense and thus be deprived of all other rights, including the right to life.⁸

Under Roman law, for example, slaves were stripped of all legal rights, and degraded to “outlawed” legal objects on which the owner had a *jus vitae ac necis* (power of life and death).⁹ As the recognition of legal personality represents a *sine qua non* to all other rights of individuals, this right is included in the list of civil and political rights that cannot be derogated in time of public emergencies threatening the life of a nation (Article 4(2) of the ICCPR).

⁵ See M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition, N.P. Engel Publisher, 2005, p. 369.

⁶ The French text states that

Chacun a droit à la reconnaissance en tous lieux de sa personnalité juridique.

In Spanish, the Article reads as follows:

Todo ser humano tiene derecho, en todas partes, al reconocimiento de su personalidad jurídica.

⁷ F. Volio, *Legal Personality, Privacy, and the Family*, in L. Henkin (Ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, 1981, p. 186.

⁸ M. Nowak, *op. cit.*, p. 369.

⁹ For examples of deprivation of legal personality in modern times, see M. Nowak, *ibid.*, and S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd edition, Oxford University Press, 2004, p. 299.

7. According to Article 16 of the ICCPR, ‘everyone’ – women and men, children of both sexes, citizens, foreigners and stateless persons – have the right to have their status and capacity recognised in the legal order. Each of this is a ‘person’, with status and capacity in the legal order; each has rights and assumes obligations. In principle, the capacity of human beings to be persons before the law begins with birth and terminates with death.¹⁰ Another important term in Article 16 is ‘recognition’. As Volio notes, the term was used to reinforce the right set out in this provision by stressing that the right should be ‘recognised’ as a fundamental human right rather than ‘conceded’ by virtue of the covenant.¹¹ The use of the term ‘everywhere’ was also the subject of debate. During the negotiating process, a British motion to strike the word ‘everywhere’ on the assumption that the territorial scope of application had already been defined in Article 2(1) was defeated since the term had already been included in Article 6 of the Universal Declaration. According to Volio, the inclusion of this term means that

a State party cannot deny the right of ‘personhood’ under Article 16 even to persons not subject to its jurisdiction. (...) In affirming this right ‘everywhere’, the draftsmen desired to emphasise that this fundamental right must be fully and effectively monitored by all States parties to the Covenant.¹²

8. So far, Article 16 has played a very limited role in the case law of the Human Rights Committee (HRC) under the first Optional Protocol, a situation which is not likely to change in the future.¹³ Nonetheless, it is generally recognised that the right to

¹⁰ Nowak observes that the duty set forth in Article 24(2) ICCPR to register every child immediately after birth plays an essential role in the recognition and protection of legal personality (M. Nowak, *op. cit.*, p. 372).

¹¹ F. Volio, *op. cit.*, p. 188.

¹² F. Volio, *op. cit.*, p. 189. According to Nowak, the use of the term ‘everywhere’ “does not permit the conclusion that by way of Article 16 the States parties assumed obligations regarding international co-operation going beyond the territorial scope of application set out in Article 2(1) (M. Nowak, *op. cit.*, p. 371).

¹³ For an analysis of the jurisprudence of the Human Rights Committee under this provision, see S. Joseph, J. Schultz and M. Castan, *op. cit.*, pp. 300 ff. and M. Novak, *op. cit.*, pp. 373 ff. Several reasons have been adduced to explain the lack of jurisprudence under this provision. Some commentators note that Article 16 is limited in scope, and the right it establishes overlaps with other rights that have been more prevalent in the case law of the HRC, such as freedom from discrimination (Articles 2, 3 and 26) or the right to a fair trial (Article 14). Other commentators suggest that the silence of the HRC could even indicate that this right is no longer breached on a common basis, though they recognise that “that may be wishful thinking” (S. Joseph, J. Schultz and M. Castan, *op. cit.*, p. 302).

be recognised as a person before the law is an important guarantee of human dignity.

As Nowak points out, Article 16

is a constituent part of the Covenant and thus to be taken into consideration in the *systematic interpretation* of all other provisions. This means that all Covenant rights are available to human beings as of the point at which their capacity to be a person before the law begins.¹⁴

In its General Comment No. 28 (2000), the Human Rights Committee stated that

[t]he right of everyone under article 16 to be recognized everywhere as a person before the law is particularly pertinent for women, who often see it curtailed by reason of sex or marital status. This right implies (...) that women may not be treated as objects to be given, together with the property of the deceased husband, to his family. States must provide information on laws or practices that prevent women from being treated or from functioning as full legal persons and the measures taken to eradicate laws or practices that allow such treatment.¹⁵

Article 16 also gives rise to *autonomous rights* that do not necessarily flow from other provisions. For example, the penalty of “civil death” provided for in earlier legal systems, which used to deprive individuals of their capacity to be a person before the law and degraded them to “outlawed” legal objects,

would in and of itself hardly represent a violation of any provision other than Article 16.¹⁶

9. It is not clear from the absolute language used in Article 16 whether the *capacity to be a person before the law* includes the *capacity to act*, i.e. the capability to engage in a particular undertaking or transaction (for example to enter into a binding contract, to inherit and to sue or be sued), to maintain a particular status or relationship with another individual (e.g. to adopt a child or to marry and found a family), and in general to establish rights and duties by way of one’s own conduct.

¹⁴ M. Nowak, *op. cit.*, p. 372.

¹⁵ Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (article 3)*, CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 19.

On the issue of violations of Article 16 based on sex and marital status, see Human Rights Committee, *Avellanal v Peru*, Communication No. 202/86, CCPR/C/34/D/202/1986, 31 October 1988. In this case, the author complained about a judgement of the Supreme Court, which reverted a previous judgement in her favour on the procedural ground that the author was not entitled to sue because, according to Article 168 of the Peruvian Civil Code, when a woman is married only the husband is entitled to represent matrimonial property before the Courts. The author claimed that the above facts breached, *inter alia*, her right to be recognised as a person before the law. The Human Rights Committee found the case admissible under Article 16, but inexplicably ignored this article in its merits decision. On the merits, it found breaches of Articles 3, 14(1) and 26 of the ICCPR.

¹⁶ M. Nowak, *op. cit.*, p. 373.

10. The general rule of interpretation of treaty provisions is codified in Article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT),¹⁷ the first paragraph of which states that a treaty shall be interpreted

in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The ordinary meaning of the term is usually ascertained by referring to the dictionary and to the context in which the term is used. Pursuant to Article 31(2) of the VCLT, the term ‘context’ covers, in addition to the text of the treaty itself, its preamble and annexes, and any agreement or instrument related to the treaty and drawn up in connection with its conclusion. According to paragraph 4, a special meaning may only be given to a term “if it is established that the parties so intended”.

11. The interpretative criteria set out in this provision do not prove particularly useful in clarifying the meaning of Article 16. The *bona fides* principle is not a specific rule of interpretation, but rather a general principle of law calling for a non-arbitrary interpretation of treaties. Reference to the ordinary meaning of the terms ‘person’¹⁸ and ‘legal personality’¹⁹ (used in the French and Spanish texts) does not shed any light on as to whether the recognition everywhere as a person before the law includes the capacity to act or not. Similarly, a teleological interpretation of Article 16 in the light of the ‘object and purpose’ of the treaty – i.e. in accordance with the aim

¹⁷ The Vienna Convention on the Law of Treaties was opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties, and entered into force on 27 January 1980, in accordance with article 84(1). The rules of interpretation of international treaties, set forth in Articles 31-32 of the Convention, are commonly regarded as reflecting customary international law.

¹⁸ According to the Black’s Law Dictionary, so far as legal theory is concerned, a ‘person’ is any being whom the law regards as capable of rights and duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance...

(Black’s Law Dictionary, 7th edition, edited by Bryan A. Garner, West Group, 1999, p. 1162).

¹⁹ The Black’s Law Dictionary defines ‘personality’ as

[t]he legal status of one regarded by the law as a person; the legal conception by which the law regards a human being or an artificial entity as a person – also termed *legal personality*.

‘Legal personality’ is in turn referred to as

the particular device by which the law creates or recognises units to which it ascribes certain powers and capacities.

(Black’s Law Dictionary, 7th edition, edited by Bryan A. Garner, West Group, 1999, p. 1163).

to ensure the recognition of the inherent dignity and of the equal and inalienable rights set out in the Covenant – also leads to ambiguous conclusions.

12. When the interpretation based on the intention of the parties as expressed in the text leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 provides that recourse may be had to

supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion (...).

Furthermore, such recourse may be had to verify or confirm a meaning that emerges as a result of the textual approach.

13. An analysis of the *travaux préparatoires* of the International Covenant on Civil and Political Rights leaves no doubt that Article 16 only covers the capacity to be a person before the law, and not also the capacity to act.²⁰ The initial draft of this provision provided that

1. No person shall be deprived of his juridical personality.
2. No person shall be restricted in the exercise of his civil rights save in the case of:
 - (a) minors;
 - (b) persons of unsound mind; and
 - (c) persons convicted of crime for which such restriction is provided by law.

There was general agreement that

Article 16 sought to ensure that each person would be a subject rather than an object of law, but did not attempt to address the question of person's capacity to act (...).²¹

Since agreement could not be reached on the specific limitation provisions in paragraph 2, a U.K. amendment to delete this paragraph was adopted as a pragmatic solution. Subsequently, the Commission acknowledged the text of the draft Article was not sufficiently clear and precise, particularly since that the expression 'deprivation of juridical personality' did not have a well-defined meaning in some

²⁰ M. J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, Martinus Nijhoff, 1987, pp. 335 ff. See also M. Nowak, *op. cit.*, p. 370; F. Volio, *op. cit.*, p. 187; and S. Joseph, J. Schultz and M. Castan, *op. cit.*, p. 299.

²¹ F. Volio, *ibid.*

systems of law, and decided to adopt a formulation based on Article 6 of the Universal Declaration of Human Rights.²²

14. The confusion concerning the interpretation of Article 16 ICCPR is related to the fact that the expression ‘recognition as a person before the law’ in Article 6 of the Universal Declaration has originally been interpreted in a broad sense, i.e. as “recognition of the legal status of every individual and of his capacity to exercise rights and enter into contractual obligations”.²³ Nonetheless, the discussion on Article 16 at the fifteen session of the Third Committee of the General Assembly (1960) leaves no doubt about the content of this provision. The Committee recognised that there was some discussion concerning the distinction between being a person before the law and having legal capacity to act, and noted the existence of a general agreement that Article 16

was intended to ensure that every person would be a subject, and not an object, of the law; but (...) it was not intended to deal with the question of a person’s legal capacity to act, which might be restricted for such [various] reasons...²⁴

15. This interpretation is also confirmed by the widespread limitations existing in all legal systems with regard to the legal capacity of certain groups of individuals, e.g. children or juveniles, which do not in and of itself constitute a violation of Article 16.²⁵

(b) The concept of legal capacity

16. The chapeau of draft Article 9(2) of the proposed new convention on the rights and dignity of persons with disabilities contains a wording similar to that used in the second paragraph of Article 15 of the CEDAW. Article 15 of the CEDAW reads as follows:

²² In his Commentary to the ICCPR, Nowak observes that the terms ‘judicial personality’ or ‘juridical personality’ “in fact corresponded better to the French expression *reconnaissance de sa personnalité juridique*, along which the English formulation was oriented” (M. Nowak, *op. cit.*, p. 371).

²³ A/2929, Ch. VI, para. 97.

²⁴ A/4625, para. 25.

²⁵ See also *infra*, Part III.

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

17. Article 15 aims at ensuring women's legal autonomy. It confirms women's equality with men before the law and additionally requires States parties to guarantee women equal rights with men in areas of civil law where women have traditionally been discriminated against (for example, property law or inheritance law).²⁶ In General Recommendation No. 21 on the equality in marriage and family relations (1994), the Committee on the Elimination of Discrimination against Women (CEDAW Committee) noted that

[w]hen a woman cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband's or a male relative's concurrence or guarantee, she is denied legal autonomy. Any such restriction prevents her from holding property as the sole owner and precludes her from the legal management of her own business or from entering into any other form of contract.²⁷

The CEDAW Committee concluded that

[w]hen countries limit a woman's legal capacity by their laws, or permit individuals or institutions to do the same, they are denying women their rights to be equal with men and restricting women's ability to provide for themselves and their dependents.²⁸

Therefore, Article 15 requires States parties to repeal or amend any laws or instruments which have the effect of restricting women's legal capacity, and to take all appropriate measures – including legislation – to ensure women full equality in the field of civil law.²⁹

²⁶ For additional examples of gender-based discrimination in the field of civil law, see Office of the High Commissioner for Human Rights, *Fact Sheet No. 22, Discrimination against Women: The Convention and the Committee*, Geneva, 1994, p. 28.

²⁷ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 21: Equality in marriage and family relations*, A/49/38, 1994, para. 7.

²⁸ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 21, cit.*, para. 8.

²⁹ Office of the High Commissioner for Human Rights, *Fact Sheet No. 22, cit.*, p. 28.

18. Article 15(2) of the CEDAW guarantees women equal ‘legal capacity’ with men and the same opportunities to ‘exercise that capacity’. This provision – which finds its corollary in the principle of autonomy or self-determination, according to which each individual is presumed to be able to make life choices and act independently on the basis of his or her conscience³⁰ – does not provide a definition of ‘legal capacity’ (*capacité juridique* in French; *capacidad jurídica* in Spanish), nor is a definition contained elsewhere in CEDAW or in other international and regional human rights instruments. The question then arises as to the relationship between the legal capacity, on the one hand, and the concepts of the capacity to be a person before the law and capacity to act, on the other.

19. An interpretation of Article 15 of the CEDAW in accordance with the rules of interpretation codified in the 1969 Vienna Convention on the Law of Treaties (VCLT) helps to clarify the scope of this provision.³¹ As we have seen, the ordinary meaning of a term can first be ascertained by reference to the dictionary. The Webster’s New Millennium Dictionary of English defines ‘legal capacity’ as

a person’s capability and power under law to engage in a particular undertaking or transaction or to maintain a particular status or relationship with another.³²

By referring to the capability to carry out a particular action or to be part of a particular legal relationship, this definition seems to suggest that the term ‘legal capacity’ has elements in common with the ‘capacity to act’, intended as the capacity to perform acts with legal effects. This interpretation is reinforced by an analysis of the way the equivalent term for ‘legal capacity’ is used in other legal systems.³³

20. An analysis of the context in which the term ‘legal capacity’ is used provides additional elements in favour of this interpretation. References to ‘civil matters’ in the first sentence of Article 15(2) and to specific areas of civil law in which women have traditionally been discriminated against in the second sentence can only be explained

³⁰ G. Quinn and T. Degener, *Human rights and disability: the current use and future potential of United Nations human rights instruments in the context of disability*, HR/PUB/02/1, United Nations, New York and Geneva, 2002, p. 10.

³¹ See *supra*, footnote 17.

³² Webster’s New Millennium Dictionary of English, Preview Edition, Lexico Publishing Group, 2003-2005, available at www.dictionary.com

³³ For an analysis of the way the term is used in the French and Spanish systems see *infra*, Part III.

by referring to the capacity to act. If the term ‘legal capacity’ was to be intended as a synonym of ‘capacity to be a person before the law’, the meaning of the second part of this sentence (“...and the same opportunities to exercise that capacity”) would become unreasonable, since personhood is to be intended as a quality inherent to human beings. The use of the verb ‘exercise’ also logically presupposes an action rather than the acquisition of a status (recognition as a person before the law). Finally, the use of the demonstrative adjective ‘that’ in the first sentence (“States parties shall accord to women... the same opportunities to exercise *that* capacity”) clarifies that the capacity referred to in the second part is nothing but women’s equal capacity to act in the field of civil law.

21. This interpretation of the term ‘legal capacity’ as encompassing the capacity to act is also supported by an analysis of this provision in conjunction with the whole text of Article 15 and in the light of the ‘object and purpose’ of the treaty (systematic interpretation). Article 15(1) aims at guaranteeing women’s equality with men before the law. This principle – expressed in general terms in Article 26 of the ICCPR³⁴ – logically presupposes an equal right of women to be recognised as ‘persons’ before the law, an interpretation which is also supported by an analysis of the *travaux préparatoires*. It seems therefore reasonable to interpret the first paragraph as a restatement of the general principle of equality, and the following paragraphs as a specific application of this general principle in the fields where women are most likely to be discriminated against: conclusion of contracts and administration of property (paragraphs 2 and 3), access to justice (paragraph 2) and freedom of movement, including the freedom to decide where to fix their residence and domicile (paragraph 4).

23. As we have seen, Article 32 of the VCLT provides that

[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31...

³⁴ Article 26:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The drafting history of Article 15(2) of the CEDAW confirms that the term ‘legal capacity’ has to be read as referring to the capacity to act.³⁵ During the negotiations, several delegations supported the inclusion in the draft convention of the principles covered by Article 6(1) of the Declaration on the Elimination of Discrimination against Women (DEDAW),³⁶ which states that

[a]ll appropriate measures, particularly legislative measures, shall be taken to ensure to women, married or unmarried, equal rights with men in the field of civil law, and in particular:

- (a) The right to acquire, administer, enjoy, dispose of and inherit property, including property acquired during marriage;
- (b) The right to equality in legal capacity and the exercise thereof;
- (c) The same rights as men with regard to the law on the movement of persons.

In particular, the Swedish delegation acknowledged that while Article 16 of the ICCPR adequately covered the right of women to be recognised as persons before the law, it

did not guarantee women the right to perform legally binding acts on the same terms as men.³⁷

Therefore, Sweden suggested that a specific provision guaranteeing the right of women to deal with their own concerns – such as administering their own property, to accept rights and responsibilities and to make decisions affecting them personally – be included in the draft convention. Belgium proposed combining its text for paragraph 2 with a text proposed by Sweden. The resulting paragraph, as amended orally by the United Kingdom to include mention of “the same opportunities to exercise that capacity”, was adopted unanimously.³⁸

24. Legal capacity may hence be defined as the capacity and power to exercise rights and undertake obligations by way of one’s own conduct, i.e. without assistance of representation by a third party. This concept logically presupposes the capability to be a potential holder of rights and obligations (static element), and entails the capacity to exercise these rights and to undertake these duties to create, modify or extinguish legal relationships (dynamic element).

³⁵ For an analysis of the *travaux préparatoires* of this convention, see L. A. Rehof, *Guide to the “Travaux Préparatoires” of the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, Martinus Nijhoff, 1993.

³⁶ General Assembly resolution 2263(XXII) of 7 November 1967.

³⁷ L. A. Rehof, *op. cit.*, p. 163.

³⁸ See UN Doc. E/CN.6/SR.650, paras. 28-29, 32-33 and 37.

25. Unlike the capacity to be a person before the law – which belongs to all human beings since the moment of birth and is lost only with death – the actual exercise of the capacity to act is subject to the possession of such additional requirements as minimum age and the capacity to understand the meaning of one’s actions and their consequences. It is therefore acquired at the achievement of major age and may also require additional requirements, which vary according to the act performed (matrimonial capacity, capacity to own and administer property, contractual capacity, capacity to bring claims before courts, capacity for tortious liability, etc.). Moreover, the capacity to act – which is presumed in adult persons – can be limited or restricted when individuals become unable to protect their own interests. In these cases, the person remains the holder of substantive rights (e.g. the right to property or the right to inherit), but cannot exercise them (e.g. sell his/her property or accept an inheritance) without the assistance of a third party appointed in accordance with the procedural safeguards established by law.

III. Comparative law

26. During informal discussions on the chapeau of Article 9(2) of the draft disability convention, some delegations expressed their concern over the use of the term ‘legal capacity’.³⁹ This term seemed to have a different legal meaning in their native languages; therefore, it was suggested that “if this wording needed to be used, it should be translated into native languages and interpreted accordingly”. Other delegations noted that the term ‘capacity to act’ – currently in square brackets in the text – was not used in other core human rights treaties, and in particular in Article 15(2) of the CEDAW, and suggested using a language similar to that used in this Convention.⁴⁰

³⁹ Report of the Coordinator to the fifth session of the Ad Hoc Committee, in Annex II to the Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its fifth session, A/59/360, paras. 17-18.

⁴⁰ *Ibid.*

27. In this section, we will carry out a comparative analysis of the way in which the terms ‘legal personality’, ‘legal capacity’ and ‘capacity to act’ are used in the legal systems of different civil-law and common-law countries. As a methodological tool to analyse the convergences and divergences between the legal systems of different jurisdictions, comparative law provides a useful means to enhance the understanding of the international legal order and its relationship to other legal systems.⁴¹ In particular, comparative law can according to some scholars be used as an interpretative tool to confirm the meaning of a term used in an international instrument, provided that the result corresponds with the object and purpose of the treaty.⁴²

(a) The French legal system

28. In French civil law, legal personality (*personnalité juridique*) is defined as *l’aptitude à être titulaire de droits et d’obligations*.⁴³

The *personnalité juridique* is not attributed by the State; rather, it is a status which is acquired at the moment of birth, and ends with the death of the person.⁴⁴ The acquisition of the legal personality confers:

- *des éléments d’identification :*
 - *un état*
 - *un nom*
 - *un domicile*
 - *une nationalité*
- *un patrimoine : ensemble de biens et d’obligations ayant une valeur pécuniaire*
- *une capacité :*
 - *à être titulaire de droits : capacité de jouissance*
 - *à exercer ces droits : capacité d’exercice*.⁴⁵

⁴¹ W. E. Butler, *Comparative Law and International Law*, in R. Bernhardt (Ed.), *Encyclopedia of Public International Law*, Volume I, North-Holland, 1992, p. 700.

⁴² G. Ress, *Interpretation*, in B. Simma (Ed.), *The Charter of the United Nations: a Commentary*, Oxford University Press, 1995, p. 31.

⁴³ B. Hess-Fallon and A.M. Simon, *Droit Civil*, 4^e édition, Sirey, 1997, p. 73. See also the definition provided in the *Lexiques des Termes Juridiques*, 14^e édition, Dalloz, 2003:

Aptitude à être sujet de droit qui est reconnue sans distinction à tous les êtres humaines (personnes physiques) et, sous certaines conditions, aux personnes morales.

⁴⁴ Cfr. Article 16 of the French Civil Code:

La loi assure la primauté de la personne, interdit toute atteinte à la dignité de celle-ci et garantit le respect de l’être humain dès le commencement de sa vie.

29. Thus, the *personnalité juridique* constitutes a pre-condition for the acquisition of legal capacity (*capacité juridique*), defined in French civil law as

*l'aptitude à devenir sujet de droits ou d'obligations et à exercer ou remplir par soi-même ces droits et obligations.*⁴⁶

In the concept of *capacité* two separate aspects can be identified: a *capacité de jouissance*, i.e. the capacity to be a potential bearer of rights, and a *capacité d'exercice*, which is the capacity to exercise these rights.

The capacity to act necessarily presupposes the capacity to be holder of rights:

*car pour pouvoir exercer un droit, il faut d'abord en avoir la jouissance.*⁴⁷

On the other hand,

*l'inverse n'est pas vrai : on peut avoir la jouissance d'un droit sans pouvoir l'exercer.*⁴⁸

30. The *capacité de jouissance* belongs to all individuals and cannot be excluded or restricted:

*Dans le droit français contemporain, il n'existe plus d'incapacité générale de jouissance. On a fait très justement remarquer que frapper un individu d'une telle incapacité, c'était le priver de la personnalité juridique.*⁴⁹

The capacity to act, on the other hand, presupposes additional elements (such as the major age⁵⁰ and the ability to understand one's actions and their consequences⁵¹), and can thus be excluded (*incapacité générale d'exercice*) or limited (*incapacité spéciale d'exercice*). For example, while it is undeniable that a child can be owner, creditor or

⁴⁵ A. Weill and F. Terré, 'État et Capacité des Personnes', in *Droit civil : les personnes, la famille, les incapacités*, 5^e édition, Dalloz, 1993, para. 225. See also B. Hess-Fallon and A.M. Simon, *op. cit.*, p. 86.

⁴⁶ A. Weill and F. Terré, 'État et Capacité des Personnes', in *Droit civil : les personnes, la famille, les incapacités*, 5^e édition, Dalloz, 1993, para. 225. See also B. Hess-Fallon and A.M. Simon, *op. cit.*, p. 86.

⁴⁷ A. Weill and F. Terré, *État et Capacité des Personnes, cit.*, para. 234.

⁴⁸ *Ibid.*

⁴⁹ A. Weill and F. Terré, *État et Capacité des Personnes, cit.*, para. 236.

⁵⁰ Article 488(1) of the French Civil Code:

La majorité est fixée à dix-huit ans accomplis ; à cet âge, on est capable de tous les actes de la vie civile.

⁵¹ Article 489(1) of the French Civil Code:

Pour faire un acte valable, il faut être sain d'esprit.

debtor, it is also true that he/she cannot validly sell his/her property, receive a payment or pay: he/she does not have the capacity to act.⁵²

(b) The Spanish legal system

31. As in the French legal system, the concept of *capacidad jurídica* in Spanish law is closely linked to the concept of legal personality (*personalidad jurídica*).⁵³ As Díez Picazo noted

*la capacidad jurídica es un atributo o una cualidad esencial e inmediata de la persona, (...) una consecuencia inmediata e ineludible de la personalidad. Por ello, toda persona, por el hecho de serlo posee capacidad jurídica.*⁵⁴

The legal personality can thus be regarded as

*el antecedente de la capacidad. (...) Toda la vida jurídica de una persona consiste en las manifestaciones de la personalidad que se aplican a una materia concreta. Así lo reconocía el art. 32 CC, para el cual la capacidad era una de las manifestaciones de la personalidad, la cualidad de la persona de ser titular de una potestad que le permite actuar en el mundo jurídico.*⁵⁵

32. As a consequence of the legal personality, the *capacidad jurídica* can be defined as

*la aptitud e idoneidad de un sujeto para ser titular de derechos y obligaciones, y, en general, de relaciones jurídicas.*⁵⁶

The concept of legal capacity

*presupone una actitud estática del sujeto, que por el solo hecho de ser persona y por su dignidad de tal, el ordenamiento jurídico le invista de una amplia capacidad jurídica, tanto en la esfera personal, como en la familiar o patrimonial.*⁵⁷

⁵² A. Weill and F. Terré, *État et Capacité des Personnes*, *cit.*, para. 234.

⁵³ See Articles 29 and 32 of the Spanish Civil Code.

⁵⁴ L. Díez Picazo, *Lecciones de Derecho Civil*, Tomo I, 1967, p. 83. See also J. Puig Brutau, *Fundamentos de Derecho Civil*, Tomo I, vol. I, 1979, p. 259.

⁵⁵ See M. A. Del Arco Torres and M. Pons Gonzalez, 'Personalidad', in *Diccionario de Derecho Civil*, Tomo Segundo (H-Z), Editorial Aranzadi, 1984, p. 349.

⁵⁶ See M. A. Del Arco Torres and M. Pons Gonzalez, 'Capacidad jurídica', in *Diccionario de Derecho Civil*, Tomo Primero (A-G), Editorial Aranzadi, 1984, p. 196.

⁵⁷ J. Puig Brutau, *op. cit.*, p. 259.

The *capacidad jurídica* should not be confused with the *capacidad de obrar* or *capacidad de ejercicio*, intended as

*la aptitud de poner en movimiento por sí mismo los poderes y facultades que surjan de los derechos o la cumplir por sí mismo con sus deberes jurídicos.*⁵⁸

As Sáinz Moreno has observed

*[b]asta que una criatura sea hombre para que esté en el mundo del Derecho y tenga derechos y deberes. Basta que un hombre esté maduro para que sea capaz de obligaciones y responsabilidades.*⁵⁹

The *capacidad jurídica* can be regarded as a legal qualification which is inherent in the person, and represents a corollary of his/her autonomy and dignity. The *capacidad de obrar* presupposes that the person possesses some additional requirements – *in primis* the majority of age⁶⁰ – without which his/her legal acts cannot be considered as valid for the law.⁶¹ As De Angel Yáñez has put it,

*la capacidad de obrar alude a la aptitud de la persona para realizar actos jurídicos de manera directa y válida. Dicho de otro modo, la capacidad de obrar es una cualidad que se predica respecto de la persona cuando ésta es hábil para ejercitar por sí misma sus propios derechos y, en general, para desenvolverse con autonomía en la vida jurídica.*⁶²

33. Unlike the *capacidad jurídica*, the capacity to act can be subject to limitations. Thus, it is possible to distinguish between a *capacidad de obrar plena* (which is the norm)⁶³ and a *capacidad de obrar limitada o restringida*. The former is to be intended as

⁵⁸ M. A. Del Arco Torres and M. Pons Gonzalez, ‘*Capacidad de obrar*’, in *Diccionario de Derecho Civil*, Tomo Primero (A-G), Editorial Aranzadi, 1984, p. 198.

⁵⁹ J. Sáinz Moreno, *Esquema de las ciencias del Derecho Positivo*, Tats-Paru, 1977, p. 49.

⁶⁰ Article 315 of the Spanish Civil Code:

La mayor edad empieza a los dieciocho años cumplidos...

⁶¹ Pursuant to Article 322 of the Spanish Civil Code,

El mayor de edad es capaz para todos los actos de la vida civil, salvo las excepciones establecidas en casos especiales por este Código.

⁶² R. De Angel Yáñez, *Introducción al estudio del Derecho*, 2^a ed., 1979, p. 246.

⁶³ See Article 199 of the Spanish Civil Code, which reads as follows:

Nadie puede ser declarado incapaz, sino por sentencia judicial en virtud de las causas establecidas en la Ley.

*la capacidad de realizar por sí mismo todo acto que interese a la esfera jurídica del sujeto. Se adquiere al llegar a la mayoría d'edad, y comprende también la plena capacidad de disponer.*⁶⁴

In comparison with the full capacity, the *capacidad de obrar limitada o restringida* is

*una capacidad que, respecto de la anterior, no es plena (...) ya que ciertos actos no pueden ser realizados sino con la asistencia de otras personas .*⁶⁵

(c) The common law system

34. In jurisdictions based on the common law, legal personality refers abstractly to the general ability of a particular subject to be the object of legal obligations. Thus, all human beings have legal personality as natural persons. Corporations and other forms of associations have, by contrast, legal personality by virtue of being juridical persons. The existence of legal personality of itself says nothing as to the extent of rights and obligations of the persons in question, whether natural or legal, but simply goes to the ability in principle of the subject to be the object of legally-defined relationships.

35. Legal capacity defines the relevant legal relationships more specifically, and is generally taken to mean the ability of a person, whether natural or legal, to undertake particular legal acts, including vindication of rights or commitment to obligations. The scope of legal capacity in a particular circumstance can depend on both the nature of the legal personality involved - that is, natural or juridical person - and the subject matter of the context concerned. This scope is defined by common law, statute law or both, depending on the field involved.

36. Typically, the legal capacities of corporations are set out in comprehensive statutory codes, that draw upon earlier common law experience, and themselves evolve according to judicial interpretation. The legal capacities of natural persons for their part vary according to context. Human rights statutes (whether in constitutional or standard form) extend certain rights and remedies to all individuals. In other fields

⁶⁴ D. Barbero, *Sistema del Derecho Privado*, Vol. I, Ediciones Jurídicas Europa América, 1967, p. 199.

⁶⁵ *Ibid.* For an analysis and consequences of limitations to the capacity to act, see the Spanish Civil Code, *Título IX. De la incapacitación*, Articles 199-214.

of law, statutes confer differing legal powers on certain groups of persons alone, and in differing degrees. Thus, rights to vote, to join the army, to drink alcohol and to marry are commonly set at various ages by relevant statutes. In the criminal context, a combination of statutory and/or common law commonly defines the extent to which minors, mentally ill and others have the capacity to be subjects of criminal proceedings and to be held legally responsible. Rights may be variously accorded to mental health patients on the basis of the individual's capacity to understand and respond to particular situations. Legal capacity in other situations has been more heavily defined by the common law. Thus, for example, in England, the ability of a child to consent to medical treatment was held by the House of Lords to be a case-by-case function of the child's ability to understand the treatment and its implications and thus to provide an informed consent.

IV. Conclusions

37. The analysis of the content and the negotiating history of Article 16 of the ICCPR and Article 15(2) of the CEDAW, as well as the comparative evaluation of the way in which the terms 'recognition as a person before the law' and 'legal capacity' (or their equivalents) are used in different legal systems, show that the two terms are distinct. The 'right to recognition everywhere as a person before the law' endows the individual with the capacity to be recognised as a person in the legal order, and is thus a necessary pre-requisite to all other rights. The concept of 'legal capacity' is a wider concept that logically presupposes the capability to be a potential holder of rights and obligations (static element), but also entails the capacity to exercise these rights and to undertake these duties by way of one's own conduct, i.e. without assistance of representation by a third party (dynamic element). Thus, legal capacity includes the 'capacity to act', intended as the capacity and power to engage in a particular undertaking or transaction, to maintain a particular status or relationship with another individual, and more in general to create, modify or extinguish legal relationships.

38. The 'capacity to be a person before the law' belongs to all human beings since the moment of birth and is lost only with death. As it constitutes a necessary precondition for the enjoyment and exercise of other individual rights, it cannot be subject to any limitation by the State. The exercise of legal capacity, on the other hand,

depends on the possession of additional requirements such as minimum age and the capacity to understand the meaning of one's actions and their consequences. It is therefore normally acquired at the achievement of major age and may also require additional requirements, which vary according to the act performed (matrimonial capacity, capacity to own and administer property, contractual capacity, capacity to bring claims before courts, capacity for tortious liability, etc.). Moreover, the capacity to act – which is presumed in adult persons – can be limited or restricted when individuals are or become unable to act independently to protect their own interests. In these cases, the person remains the holder of substantive rights (e.g. the right to property or the right to inherit), but cannot exercise them (e.g. sell his/her property or accept an inheritance) without the assistance of a third party appointed in accordance with the procedural safeguards established by law.