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The Right to Decision-Making for Persons with Mental Disabilities in Uganda

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Abstract

State laws have in many instances constituted a hindrance to the enjoyment of rights of persons with disabilities, notable being the right to decision-making for persons with mental disabilities. Properly interpreted, the United Nations Conventions on the Rights of Persons with Disabilities (UNCRPD) condemns the withdrawal of legal capacity merely based on disability. Not surprisingly, current discussions are inclined towards supported decision-making as opposed to substituted decision-making in as far as the rights of persons with mental disabilities are concerned. Regrettably, despite States' cognisance of current international human rights standards and developments on issues of decision-making, the national laws of a number of States remain a huge disappointment to these developments. With Uganda being one of the first African countries to have ratified the UNCRPD, it could be reasonable to assume that this state is fully committed to breathing life to the values of the UNCRPD in as far as decision-making for persons with mental disabilities is concerned. But is this the case? In this article, we examine the legislative framework of Uganda with a view to assessing whether it advances the decision-making rights of persons with mental disabilities. We examine Uganda's recently enacted Mental Health Act of 2018 to evaluate whether it addresses the gaps that have existed in Uganda's legal regime for decades on issues of decision-making. The UNCRPD is used as a lens through which Uganda's legislative framework is assessed.

Keywords: mental disability; decision-making; supported decision-making; substituted decision-making; Uganda; Mental Health Act; human rights.

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1 BACKGROUND

This article engages with the right to decision-making for persons with mental disabilities in Uganda. The assessment of law, policies and practices is conducted in light of the UNCRPD. Mental disability, if not checked, promises to be the next global pandemic.[1] Nearly twenty percent of Uganda's population of 34 million "have some degree of mental illness or mental disorder"[2] and constitute one of Uganda's most vulnerable groups of people.[3] Although the government has identified mental health as a constituent of its National Minimum Care Package,[4] there remains an assumption that persons with mental disability have diminished autonomy. Consequently, they suffer the wrath of society's stigma and prejudice and are often isolated from "participating in the affairs of the mainstream society".[5] This has ramifications for their personhood as far as self-determination in personal affairs and equal recognition of human dignity are concerned.[6] We are of the view that decision-making is one of the critical areas where persons with mental disabilities are prejudiced.

Decision-making is as critical to legal capacity as mental health is to the right to health. But unlike the right to health which is entrenched in several national and international legal frameworks, decision-making for persons with mental disabilities in Uganda remains, at best, a neglected aspect of legal capacity. Going by the view that mental-health disabilities represent a conglomerate of political, environmental, social, physical, cultural, legal, and other factors,[7] it follows that the attitudes towards legal capacity – and by extension – decision-making, are informed by factors within and outside the law. Earlier human rights movements viewed mental disability as being synonymous with mental incapacity. They fronted the idea that persons with mental disability should have guardians to make decisions on their behalf. In this respect, the Universal Declaration of Human Rights (Universal Declaration)[8] expressed the need for a "qualified guardian" to cater to the wellbeing, interests and needs of a person with mental disability. Guardianship and related approaches are what is now known as substituted decision-making in mental health circles.[9] They are so called for their tendency to take over decision-making hence the term "substitution".

In tandem with a pro-human rights approach, substituted decision-making has since been rejected citing its intrusion, lack of clarity, wide margin of discretion,[10] and general tendency to erode personhood of a person without a system in place for checks and balances. In its place, supported decision-making has been heralded by the international community and indeed concretised by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Effectively, persons with mental disabilities are recognised in their capacity as "active subjects of [human] rights and not passive objects of social care",[11] putting them at the centre of decision-making.

In 2008, Uganda was one of the first African countries to ratify the UNCRPD.[12] It has

1 World Health Organisation *Mental Health and Development: Targeting People with Mental Health Disabilities as a Vulnerable Group* (2010) https://www.who.int/mental_health/policy/mhtargeting/en/ 10 (accessed 28-07-2021); Tucci and Moukuddam "We the Hollow Men: The Worldwide Epidemic of Mental Illness, Psychiatric and Behavioural Emergencies, and its Impact on Patients and Providers" 2017 *Journal of Emergencies, Trauma and Shock* 1–3.

2 Kagolo "32 Psychiatrics for 34 Million Ugandans" *New Vision* (Kampala) 12 May 2012 https://www.newvision.co.ug/new_vision/news/1301588/psychiatrics-34-million-ugandans (accessed 28-04-2021).

3 Kigozi "Integrating Mental Health into Primary Healthcare: Uganda's Experience." 2007 *South African Psychiatry Review* 17–19; Twinomugisha *Fundamentals of Health Law in Uganda* (2015) 118.

4 Kigozi, Ssebunnya *et al* "An Overview of Uganda's Mental Healthcare System: Results from an Assessment using the World Health Organisation's Assessment Instrument for Mental Health Systems (WHO-AIMS)" 2010 *International Journal of Mental Health Systems* 3.

5 Twinomugisha *Health Law in Uganda* 118.

6 Woodin "Issues in Human Rights Protection of Intellectually Disabled Persons" 2013 *Disability & Society* 737.

7 Twinomugisha *Health Law in Uganda* 120.

8 Universal Declaration of Human Rights, 1948, para 5.

9 Richardson "Mental Disabilities and the Law: From Substitute to Supported Decision-Making" 2012 *Current Legal Problems* 337.

10 Nyombi and Mulimira "Mental Health Laws in Uganda: A Critical Review (Part 1)" 2011 *Social Science Research Network* 5, https://papers.ssrn.com/abstract=1967749 (accessed 28-07-2021) .

11 *Ibid.*

12 United Nations Treaty Collection https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4 (accessed 28 July 2021. See also United Nations High Commissioner for Human Rights "Committee on the Rights of Persons with Disabilities", https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx (accessed 28-07-2021).

also signed and ratified the International Covenant on Economic Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR)[13] and the African Charter on Human and Peoples' Rights (ACHPR).[14] Although not yet ratified, the "Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa" has recently been adopted. Uganda's 1995 Constitution mandates the parliament to make laws to govern ratification of international instruments.[15] Mental health in Uganda had, for 54 years, been principally governed by the Mental Treatment Act (MTA) of 1964. In December 2018, the parliament of Uganda passed the Mental Health Act (MHA) of 2018, putting an end to the decade-long struggle to amend the archaic law.[16]The MHA will be employed side by side with the Persons with Disabilities Act (2019) and the National Disability Policy (2006).[17]

Whenever a person is adjudged to be of "unsound mind", certain laws are invoked to confiscate his autonomy and subject it to the decision of a certain person(s).[18] Although the nomenclature varies, the concept of a next friend, guardian *ad litem* in litigious matters, or a manager in estate planning all point towards substitution of decision-making capacity.[19] Should the decision-making capacity of a person with mental disability, by default, be diminished irrespective of the prevailing circumstances? This is a valid concern especially when judicial pronouncement of unsound mind becomes the only determinant for the loss of decision-making autonomy. Paternalistically,[20] it has been argued that substituted decision-making is necessary for the protection of persons with mental disabilities.[21] States believe that it is their duty to protect the person and property of persons who they consider unable to manage their own affairs.[22] Describing it as a double-edged sword, Karp and Wood have argued that substituted decision-making can inversely be used to undermine fundamental human rights creating leeway for abuse.[23]

Uganda's MTA detailed the process of medical examination, adjudgment of unsound mind and other procedures which will be discussed in further detail at a later stage in this article. What must be noted at this stage though, is that these procedures advanced the role of medical workers, vesting in them a wide discretion to make decisions regarding the treatment and rehabilitation of persons with mental disabilities. The MTA was not only flawed, but very poorly implemented.[24] With a new law, one cannot help but ask: Is the MHA adequate to check the wide discretion originally enjoyed by medical workers and other third parties in the decision-making process? Indeed, the MHA of 2018 provides for a person's consent to treatment and admission. In that respect however, does it ensure that a person is supported in making that decision to consent? Still, how does the MHA reconcile the apparent contradiction between itself and other legislation governing non-treatment related aspects such as estate planning?[25]

The MTA and other laws in Uganda like the Marriage Act, Divorce Act, Succession Act, and the Administration of Estates of Persons of Unsound Mind Act advanced the role of medical workers and other third parties. They exercised their discretion to decide treatment,

13 Ratified on 21 June, 1995 https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx (accessed 07-04-2021).

14 Ratified on May 27, 1986 https://www.achpr.org/ratificationtable?id=49 (accessed 07-04- 2021).

15 The Constitution of the Republic of Uganda 1995, 123(2).

16 Oliver talks "Uganda's mental health system and the rule of no law" http://www.mdac.info/en/olivertalks/2014/04/07/ugandas-mental-health-system-and-rule-no-law (accessed 18-07-2021)

17 Ministry of Health 'National Health Policy'.

18 General Comment 1 on Article 12 United Nations Convention on the Rights of Persons with Disabilities 2014 (General Comment 1).

19 Mental Disability Advocacy Centre and Mental Health Uganda. 2014. "Psychiatric Hospitals in Uganda. A Human Rights Investigation" http://www.mdac.org/sites/mdac.info/files/psychiatric_hospitals_in_uganda_human_rights_investigation.pdf (accessed 28-07-2021).

20 McSherry "Decision-making, Legal Capacity and Neuroscience: Implications for Mental Health Laws" 2015 *Laws* 126.

21 Disability Rights Pennsylvania 2013 "Consent, Capacity and Substitute Decision-making" 9 https://www.disabilityrightspa.org/wpcontent/uploads/2018/04/CompleteGuideCapacityConsentSubDecMakingFEB2018.pdf (accessed 28-07-2021).

22 Salzman "Guardianship for Persons with Mental Illness —A Legal and Appropriate Alternative?" Presentation at the annual meeting of the Association of American Law Schools panel: New perspectives on guardianship: guardianship and mental illness (2011) 286 https://www.slu.edu/law/academics/journals/health-law-policy/pdfs/issues/v4-i2/salzman_article.pdf (accessed 28-07-2021).

23 Karp and Wood "Guardianship Monitoring: A National Survey of Court Practices." 2007 *Stetson Law Review* 147.

24 Kigozi *Int'l J of Mental Health* 36.

25 The Administration of Estates of Persons of Unsound Minds Act, Cap155.

rehabilitation, and other aspects of the personal lives of persons with mental disabilities. The MTA failed to achieve its aims as the procedures prescribed thereunder, for instance, for admission were rarely, if ever, followed. The Act's flaws and poor implementation occasioned a lacuna in the practice of decision-making in Uganda. Many individuals, despite international legal, policy and practical advancements, remained spectators as pertinent aspects of their lives unfolded before their eyes, with no capability of directing the course of their own lives. Towards the end of 2018, the MHA came to life. In this article, we deliberate on whether this Act will help or hinder the spirit espoused by the UNCRPD in as far as decision-making is concerned.

Following this background, the notions of mental capacity, mental disability, substituted and supported decision-making are defined and conceptualised. An understanding of these notions will help set the tone for the discussion that forms the crux of this article which is whether this Act will help or hinder the spirit espoused by the UNCRPD in as far as decision-making is concerned. Subsequent to the conceptualisation of these key notions, the article engages with the models influencing disability discourses, after which, it examines international law and jurisprudence on the concept of decision-making. These established international principles are henceforth applied to Uganda's legislation before and after enactment of the MHA of 2018. The developments of the MHA of 2018 are compared to similar legislation in Argentina, Ireland and Peru to examine the extent to which they can be relied on to advance international standards on decision-making for persons with mental disabilities. A conclusion is ultimately drawn that, although the MHA has been enacted in an era where international human rights standards demand that due regard be accorded to support decision-making, the Act falls short.

2 DEFINITIONS AND CONCEPTUALISATION

Efforts towards precise, and exhaustive, definitions of mental disorder or illness are often fruitless owing to its fluid boundaries.[26] Relevant international instruments such as the UNCRPD have opted, instead, to define characteristics of disability, admitting that disability is an evolving concept.[27] The definition has predominantly been premised on diagnostic criteria and features. Despite the fact that these criteria continue to be developed, they still fall short of addressing the diverse conditions of persons with mental disabilities. These diagnostic and classification criteria notably include the tenth revision of World Health Organisation's International Classification of Diseases, classification of behavioural disorders,[28] and the Diagnostic and Statistical Manual of Mental Disorders (DSM–5) formulated by the American Psychiatric Association.[29] Indeed, according to Uganda's MHA of 2018,

> mental illness' means a diagnosis of a mental health condition in terms of accepted diagnostic criteria made by a mental health practitioner or medical practitioner authorized to make such diagnosis; mental health conditions include but are not limited to depression, bipolar, anxiety disorders, schizophrenia and addictive behaviour due to alcohol/substance abuse among others.[30]

The way we define disability ultimately shapes how the wider society interacts with persons with disabilities.[31] Mental health has rightfully been described as a "pendulum swinging between two opposing schools of thought" – medical and social.[32] Offshoots of these models have been found in theories such as the affirmation[33] and resistance theories.[34] Under the medical model, a model preoccupied with a person's deficit, disability is just another illness with a

26 Stein, Phillips *et al* "What is a Mental/Psychiatric Disorder?" 2010 *Psychological Medicine* 1760.
27 United Nations Convention on the Rights of Persons with Disabilities 2006 (UNCRPD 2006) Preamble, para 5.
28 World Health Organization *International Classification of Diseases: Classification of Behavioural Disorders* (2010) https://www.who.int/classifications/icd/icdonlineversions/en/ (accessed 28-07-2021)
29 American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders (DSM–5)* (2013) https://www.psychiatry.org/psychiatrists/practice/dsm (accessed date?)
30 Mental Health Act 2018 (MHA 2018) s 2.
31 Haegele and Hodge "Disability Discourse: Overview and Critiques of the Medical and Social Models" 2016 *Quest* 196.
32 Gostin "Contemporary Social Historical Perspectives of Mental Health Reform" 1983 *Journal of Law and Society* 51.
33 Swain and French "Towards an Affirmation Model of Disability" 2000 *Disability & Society* 569.
34 Gabel and Peters "Presage of a Paradigm Shift? Beyond the Social Model of Disability Toward Resistance Theories of Disability." 2004 *Disability & Society* 585.

"physical cause and an identifiable course".[35] One is therefore disabled to the extent that one is incapable of functioning like a "so-called normal person".[36] Interventions under this model therefore aim at correcting the illness. Persons with disabilities are placed under the care of medical personnel who believe they have the "mandate" to "cure" persons with disabilities.[37] Take away illness and treatment and many medical professionals would be unable to discuss mental disability.[38] This model has been sharply criticised for undermining the role played by sociocultural, physical, or political factors in the participation of persons with disabilities[39] as well as emphasising the patriarchal position assumed by medical professionals in treatment and rehabilitation.[40]

The social model of disability emerged, in part, as a response to these criticisms. It regards disability as the disadvantage that is occasioned to a person with an impairment in an indifferent community.[41] It thus weighs impairment on one hand against society's approach on the other.[42] Impairment, under this model, is not inherently disabling. Rather, disability grows out of exclusion and intolerance which results in a constrained ability to participate in the community.[43] The social model thus calls for the correction of the society through the demolition and reconstruction of societal attitudes and deliberate political action ensuring that possession of an impairment does not result in a disability.[44] More than a century after its inception, the social model of disability is still undergoing theoretical development. The oppressed minority theory, independent living theory, discrimination theory as well as the rights-based approach are some of its sprouting theories. This article is influenced by the social model of disability, and specifically the rights-based approach.

3 INTERNATIONAL LEGAL AND POLICY FRAMEWORK ON DECISION-MAKING FOR PERSONS WITH MENTAL DISABILITIES

To get a firm grip on this article's context of decision-making, we revisit the international legal and policy framework within which it is situated to appraise its theoretical and doctrinal development. To satisfactorily traverse this territory, this section discusses three major sub-topics: legal capacity; mental capacity; and decision-making. While relying on international law and policy, we consider it necessary at this point to briefly consider the status and application of international law in Uganda. Uganda is a dualist country where international law can only be applied following the ratification and domestication of the same.[45] International treaties, once domesticated, become applicable laws and in that respect are subordinate to the Constitution.[46] Notwithstanding, under the Vienna Convention on the Law of Treaties,[47] Uganda is proscribed from invoking its domestic laws as validation for its failure to meet its international treaty obligations. Quite often, judicial interpretation of domestic law in Uganda has been influenced by international law.

Whilst it is undoubtedly applicable in Uganda, some courts have illustrated reluctance to critically engage with international law. Of interest is the case of *Kasozi and Others v Attorney General and Others*[48] where the petitioners alleged that election procedures for special groups resulted in disenfranchisement and violation of legal capacity of persons with mental disabilities. The court, on being asked to pronounce itself on whether the provisions of the Parliamentary Elections Act violated Articles 3(a), (b), (c) and (e); 4; 5; 12 and 29 of the UNCRPD,

35 Horwitz and Scheid *A Handbook for the Study of Mental Health: Social Contexts, Theories and Systems* (1999) 12. (Number provided)
36 Haegele and Hodge "Disability Discourse" 195.
37 Reid-Cunningham "Anthropological Theories of Disability" 2009 *Journal of Human Behaviour in the Social Environment* 104.
38 *Ibid.*
39 Haegele and Hodge "Disability Discourse" 195.
40 Haegele and Hodge "Disability Discourse" 196.
41 Haegele and Hodge "Disability Discourse" 197.
42 Harpur "Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities" 2012 *Disability & Society* 4.
43 Haegele and Hodge "Disability Discourse" 198.
44 *Ibid.*
45 Kabumba "The Application of International Law in the Ugandan Judicial System: A Critical Enquiry" in Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 84.
46 The Constitution of the Republic of Uganda 1995, art 2(2).
47 Vienna Convention on the Law of Treaties, 1969 (VCLT 1969) Art 27.
48 *Kasozi v Attorney General* (Constitutional Petition-2010/37) [2015] UGSC 4 (29 September 2015).

summarily responded thus: "… we have already considered and determined whether or not these provisions contravene the Constitution of Uganda. That is the extent of our mandate or jurisdiction."[49] There is more to be said about judicial attitude towards application of international laws in contentious matters such as this. However, we restrict ourselves to the applicability of international laws and that, we have found in the affirmative.

3 1 Understanding the Notion of Legal Capacity Prior to the Enactment of the UNCRPD

The first human rights documents recorded legal capacity in the form of "recognition before the law". The Universal Declaration is explicit when, in Article 6, it states that: "[e]veryone has the right to recognition everywhere as a person before the law." Therefore, every person enjoys the right to stand up and be counted as a subject of the law. The Universal Declaration, although technically not a treaty, has attained the status of international customary law,[50] and by that virtue, binds all states. The ICCPR, which Uganda ratified in June 1995,[51] recognises legal capacity in similar terms.[52] Beyond that, Article 4(2)[53] of the ICCPR entrenches the right to legal capacity as an absolute right from which no derogation whatsoever is permitted. Uganda ratified the ACHPR in May 1986.[54] In Article 5, it states that: "[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status." Evidently, the ACHPR directly links recognition before the law to inherent dignity.

Legal capacity, in the foregoing instruments, refers only to the capacity of a person to have rights and obligations under the law. It does not encapsulate the personal capacity of an individual to exercise these rights. Legal capacity, as will be discussed in this article, envisages the possession of the right as well as the personal capacity to exercise it.

Although the right to have legal capacity was "absolute" under the Universal Declaration and ICCPR, the right to personally exercise that legal capacity could be limited on several accounts.[55] Its enjoyment was, in fact, conditioned upon the fulfilment – by a person – of certain laws and procedures. One such limitation, the subject of this article, was mental capacity. Whenever a person was devoid of mental capacity, his/her capacity to exercise his/her rights could be legally revoked under domestic law – and it usually was. Perhaps, Mirfin-Veitch and Richardson better capture the inherent distinction occasioned by the law when they summarise it thus: "[y]ou cannot have your decision-making capacity taken away, but you can have your capacity to make decisions taken away, if we understand 'capacity to make decisions' here to mean the right to make them."[56]

The procedure in Uganda, involved medical examination of a person to ascertain his/her mental capacity.[57] A medical officer's finding of mental incapacity was concretised through a judicial officer's adjudgment of "unsound mind". The direct consequence was the denial of capacity to personally exercise one's rights by reason of one's mental incapacity. Possession of mental capacity therefore became the yardstick upon which the exercise of legal capacity was measured.[58] This binary approach[59] viewed capacity and incapacity as two equal, but opposite forces, incapable of co-existence.

49 *Kasozi v Attorney General*, 86.
50 Brown *The Universal Declaration of Human Rights in the 21st Century, a Living Document in a Changing World* (2016) 14–18.
51 United Nations Human Rights Office of the High Commissioner UN treaty body database 2019 https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=182&Lang=EN (accessed 28-07-2021)
52 International Covenant on Civil and Political Rights (ICCPR) 1966, Art 16.
53 ICCPR, art 4(2). This provision states that derogation from the right to equal recognition from the law cannot be accepted even in times of public emergency.
54 African Commission on Human and People's Rights website https://www.achpr.org/ratificationtable?id=49
55 McSherry "Legal Capacity and Neuroscience" 127.
56 Mirfin-Veitch and Richardson "Exploring Article 12 of the United Nations Convention on the Rights of Persons with Disabilities: An Integrative Literature Review" 2017 12.
57 Mental Treatment Act 1964 (MTA 1964) s 4(1).
58 Mirfin-Veitch and Richardson "Exploring Article 12" 13.
59 Allen and Tulich "I Want to Go Home Now: Restraint Decisions for Dementia Patients in Western Australia" 2015 *Law in Context* 1–23.

3 2 Locating Mental Capacity within the Expanded Meaning of Legal Capacity

In September 2008, Uganda ratified the UNCRPD. In Article 12(1), the treaty "reaffirms the right of persons with disabilities to have equal recognition before the law". Legal capacity under this treaty takes on an expanded interpretation which we will explore in accordance with the State Parties' obligation under the VCLT to implement treaties in good faith and in accordance with their object and purpose.[60] The purpose of the UNCRPD is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[61] Although the UNCRPD does not specifically define the term "disabilities"[62] in its Preamble, it recognises,

> … that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.[63]

Nonetheless, the UNCRPD describes persons with disabilities in such a way as to consciously include persons with mental disabilities.[64] In its description,

> [persons with disabilities] include those who have long-term physical, *mental, intellectual* or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others (emphasis ours).[65]

It is conclusively deduced that mental, intellectual and psychosocial disabilities are encompassed within the general disabilities in the UNCRPD. For ease of convenience however, we adopt "mental disability or disabilities" as an all-encompassing term in this article.

We now proceed to interpret legal capacity under the UNCRPD. Article 12(2) obliges "states parties [to] recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life." Drawing inspiration from the Convention on Elimination of all forms of Discrimination Against Women (CEDAW), Article 12(2) views legal capacity as a concept within which two distinct aspects co-exist: the possession of rights and obligations pertaining to them on one hand, as well as the exercise of that capacity in all aspects; civil, criminal or even public, on the other.[66] The UNCRPD did away with the conditionalities and contingencies that came with the exercise of legal capacity. Disability alone can no longer justify withdrawal of legal capacity, and neither can the exclusive absence of disability found the basis for exercise of legal capacity.[67] To hold otherwise would amount to unfair discrimination based on disability.

The exercise of legal capacity goes beyond simple consent in simple matters. Under Article 12(2), it extends to cover informed consent in "all aspects of their lives". Article 12(5) accentuates that "the equal right [and capacity] includes the right to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit."[68] Legal capacity therefore covers even the conventional would-be difficult decisions.[69] In the next section, we examine the implication of the extended meaning of legal capacity for decision-making by persons with mental disabilities.

60 VCLT 1969, art 31(1).
61 UNCRPD 2006, art 1.
62 UNCRPD 2006, art 2.
63 UNCRPD 2006, Preamble para 5.
64 Bartlett "The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law" 2012 *The Modern Law Review* 752–778.
65 UNCRPD 2006, art 1(2).
66 International Disability Alliance "Legal Opinion on Article 12 of the CRPD" 2008, 4 https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/legal-opinion-LegalOpinion-Art12-FINAL.pdf (accessed 28-07-2021) ; General Comment 1, para 11; Series and Nilsson *Article 12 CRPD: Equal Recognition Before the Law in the UN Convention on the Rights of Persons with Disabilities: A Commentary* (2018) 4.
67 Martinez-Pujalte "Legal Capacity and Supported Decision-making: Lessons from Some Recent Legal Reforms" 2019 *Laws* 4.
68 UNCRPD 2006, art 12(5).
69 Martinez-Pujalte *Laws* 7.

3 3 Decision-making as an Integral Aspect of the Exercise of Legal Capacity

The making of decisions is one of the most outstanding attributes of exercising legal capacity, so much so, that as illustrated above, legal capacity was previously equated to mental capacity. Mental capacity, according to the Committee on the Rights of Persons with Disabilities (the Committee) "refers to the decision-making skills of a person."[70] The UNCRPD recognises that making of decisions may in some instances be limited or made more difficult because of mental disability. Article 12(2) however, does not condition the exercise of legal capacity on the possession of mental capacity. Instead, the UNCRPD introduces Article 12(3) under which the mental capacity to make decisions is examined second to the recognition of legal capacity. Mental capacity is thus relegated to a secondary level where support in decision-making should consequently be offered to a person according to the extent of their mental (in)capacity. Article 12(3) is the backbone of the principle of supported decision-making from which the present article derives its narrative. Article 12(3) provides that: "States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."

Article 12(3) is what has come to be referred to as a "central paradigm shift"[71] because it brings to an end the distinction between mental and legal capacity and recognises that although mental capacity may at times oscillate, legal capacity is a constant.[72] The UNCRPD's position therefore is that in those times when mental capacity fluctuates, corresponding support must be given to a person to exercise his/her legal capacity in accordance to his/her individual will and preference.[73] Providing decision-making support to a person fosters exercise of autonomy[74] and this, is the "universal" or "rights-based approach" to legal capacity.[75]

Without exaggeration, the paradigm shift in Article 12 of the UNCRPD is revolutionary[76] and has already been the force behind legislative reform in numerous countries,[77] including Argentina,[78] Ireland,[79] and Peru[80] as will be discussed later in this article. We now turn to discuss how supported decision-making interacts with older forms of decision-making.

3 4 The Shift from Substituted Decision-making to Supported Decision-making

The tolerance of guardianship and other forms of substituted decision-making was, in part, attributed to the lacuna in the international law. As Kerzner puts it, "the ability to make one's own decisions based on personal values and in the context of meaningful choices is a defining feature of what it means to be a person and a full citizen."[81] Because of the nature of their disability, the group more likely to feel the impact of substituted decision-making are persons with mental, cognitive or psychosocial disabilities.[82] Substituted decision-making is incompatible with the UNCRPD for three major reasons: it removes a person's legal agency; it is not limited by the person's will; and it does not capitalise on the wishes and desires of a person. Consequently, decisions are made in what is presumed to be a person's best interest even though he/she openly objects.[83]

Article 12(3) was drafted in such a way as to exclude all other interpretations that lend

70 General Comment 1, para 12.
71 Schulze "Understanding the UN Convention on the Rights of Persons with Disabilities: A Handbook on the Human Rights of Persons with Disabilities" 2009 https://asksource.info/resources/understanding-un-convention-rights-persons-disabilities-a-handbook-human-rights-persons (accessed 28-07-2021).
72 Mirfin-Veitch and Richardson "Exploring Article 12" 16.
73 *Ibid.*
74 Morrissey "The United Nations Convention on the Rights of Persons with Disabilities: A New Approach to Decision-making in Mental Health Law" (2012) *European Journal of Health Law* 429; General Comment 1, para 15.
75 Mirfin-Veitch and Richardson "Exploring Article 12" 16.
76 Martinez-Pujalte *Laws* 3.
77 Kanter and Tolub "The Fight for Personhood, Legal Capacity and Legal Recognition under Law for People with Disabilities in Israel and Beyond" 2017 *Cardozo Law Review* 560.
78 Civil and Commercial Code of Argentina 2015, arts 22 and 23.
79 Assisted Decision-Making (Capacity) Act 2015.
80 Civil Code and Civil Procedure Code 2018.
81 Bach and Kerzner "A New Paradigm for Protecting Autonomy and the Right to Legal Capacity" 2010, 42 https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities-commissioned-paper-bach-kerzner.pdf
82 General Comment 1, para 9.
83 Mirfin-Veitch and Richardson "Exploring Article 12" 8.

credence to substituted decision-making in all its forms.[84] In essence, it reproaches legal interventions that limit that capacity and enjoins states to evolve their centuries-old traditional legal institutions[85] to put in place measures for support. States are further mandated to facilitate persons with mental disabilities in establishing their own support system and generally train that support to ensure competence.[86]

Although the nature of support is not stipulated by the UNCRPD, The Committee recognises that support may be formal or informal.[87] One or more people may be appointed for single or multiple decisions concerning past, current and future occurrences. It may be offered through "peer support, advocacy, help with communication, and even the deferral of decisions to a trusted person."[88] Series and Nilsson[89] argue that supported decision-making is not what Article 12(3) of the UNCRPD provides for. They argue that it requires that persons with disabilities are *facilitated with supports* to make decisions and that these supports can adopt various forms including supported decision-making, co-decision-making, and facilitated decision-making among others. However, the premise of this research is starting a conversation on alternatives to substituted decision-making and assessing Uganda's stand in this regard. Therefore, although it uses the term "supported decision-making", the article does not bind itself to the strict definition espoused by Series and Nilsson. It merely adopts the term for ease of reference. In this article therefore, supported decision-making refers to a mechanism through which a person with mental disability remains the primary decision-maker whilst he/she appoints another person or people to advise him/her on relevant aspects, sometimes also explaining the person's words in order to communicate his/her will and preference.[90]

3 5 "Will and Preference" of Persons with Mental Disabilities as a Central Concern to Support Mechanisms

Article 12(4) employs safeguards to ensure that Article 12(3) is implemented in a satisfactory manner,[91] ensuring that persons with mental disabilities enjoy the highest quality of support.[92] Effectively, it elevates the "will and preference" of a person with mental disability over and above the "best interest" principle. To illustrate this, if, in accordance with the will and preference of a person with mental disability, a proxy or substitute is appointed, it would not translate into substituted decision-making. It would be a form of support known as facilitated decision-making.[93] Of course, circumstances arise where it is either impossible or impracticable to ascertain the "will and preference" of an individual. In these instances, the Committee has advised that the "best interpretation of the will and preference"[94] of the person should be used instead. Supported decision-making is therefore an acknowledgment that individuals think and communicate in various ways outside the confined perception of the medical model.[95]

4 UGANDA'S LEGAL FRAMEWORK ON DECISION-MAKING PRIOR TO THE MENTAL HEALTH ACT of 2018

As it is unfeasible to exhaust all legislation having a bearing on mental health in Uganda, we have randomly selected a few laws and although they do not primarily regulate persons with disabilities, they contain provisions that directly impact on decision-making. The point, therefore, is not to exhaust all the laws, but to critically engage with the selected ones for purposes of demonstrating the little to no cognizance accorded to international human rights

84 Schulze "Understanding the UN Convention" 64.
85 Martinez-Pujalte *Laws* 60.
86 Martinez-Pujalte *Laws* 4.
87 General Comment 1, para 15.
88 Craigie "A Fine Balance: Reconsidering Patient Autonomy in Light of the UN Convention on the Rights of Persons with Disabilities" 2015 *Bioethics* 401.
89 Series and Nilsson *Article 12 CRPD* 25.
90 Inter Parliamentary Union *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities* 2007 https://www.refworld.org/docid/49fab8192.html (accessed 28-07-2021).
91 Morrissey *European Journal of Health Law* 429.
92 Glass "Redefining Definitions and Devising Instruments: Two Decades of Assessing Mental Incompetence" 1997 *International Journal of Psychiatry and the Law* 12.
93 Flynn and Arstein-Kerslake "Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity" 2014 *International Journal of Law in Context* 82.
94 General Comment 1, para 21.
95 Morrissey *European Journal of Health Law* 431.

standards on decision-making. Although most of the laws we discuss here were enacted before the promulgation of the Constitution and have since not been amended, they should nonetheless be interpreted in conformity with the Constitution.[96]

Uganda admits that there are certain provisions within its legislation which are discriminatory in so far as they diminish legal capacity of persons with disabilities, including mental disabilities.[97] Uganda has even expressed regret that certain laws prevent persons with mental disabilities from taking part in the everyday running of affairs of the community. In its initial report to the Committee, Uganda specifically highlights disqualification from election to political positions[98] and appointment to administrative boards.[99] The Committee expressly condemned restriction of legal capacity based on mental impairment in the above laws.[100]

4 1 Constitutional Protection of Persons with Disabilities

Article 20(1) of the 1995 Constitution of Uganda states that the rights contained in the bill of rights are inherent in nature and not as a show of Uganda's benevolence. As such, legal agency should flow from the inherent right to recognition as a person, and not any other extraneous factors. Uganda's laws contravene Article 20 of the Constitution to the extent to which they assume the authority to withdraw legal capacity. Article 21(1) recognises equality of individuals in political, economic, social, cultural and all other aspects of life, before and under the law. Specifically, the Constitution[101] prohibits unfair discrimination founded on disability. In the case of *Centre for Health Human Rights and Development (CEHURD) and Iga Daniel vs Attorney General* (2015), the petitioners challenged the presumption of criminality, indefinite detention after acquittal and the failure to provide safeguards for involuntary treatment and admission under sections 45(5) and 86(2) of the Trial on Indictment Act (TIA). The Court, referring to the UNCRPD found that the provisions of the TIA were in contravention to Article 21 of the Constitution to the extent that they provided a separate procedure for trial and detention based on a suspect's mental disability. This case speaks directly to legislation that provides a separate standard for persons with mental disabilities much to their detriment.

4 2 Mental Treatment Act of 1964

In 1964, the Mental Treatment Act (MTA) was enacted to revise the 1935 Mental Treatment Ordinance.[102] The MTA regulated the management of hospitals in Uganda and, until December 2018, was the principle legislation regulating the treatment and care of persons with mental disabilities. Under the MTA's elaborate procedure for adjudgment of unsound mind, any concerned person suspecting that another had a mental illness could apply to a magistrate to make a finding of unsound mind.[103] The magistrate would then cause a medical officer to conduct an inquiry into the state of mind of the suspected person[104] and make an attendant report of his/her findings.[105] The magistrate, if satisfied by the medical report, proceeded to make a ruling of unsound mind.

From this moment onwards, the nature and course of treatment and admission[106] of a person of unsound mind was at the discretion of medical officers acting under the law. Regrettably, and against the spirit of the UNCRPD, the Act did not permit persons with mental disabilities to participate in deciding their treatment and admission.[107] Ssebunnya and others[108] have sharply criticised the restriction, and in some instances total disregard, of the right of persons with

96 1995 Constitution, art 247.
97 Uganda's initial report to the United Nations Committee on Persons with Disabilities 2013, 23.
98 1995 Constitution, 80(2); Presidential Elections Act 2005, s 4(4) (a).
99 Land Act 1998, s 57(2) (b).
100 United Nations Committee on the Rights of Persons with Disabilities 2016, para 22.
101 1995 Constitution, art 21(2).
102 Mental Disability Advocacy Centre and Mental Health Uganda "Psychiatric Hospitals in Uganda. A Human Rights Investigation" 2014 http://www.mdac.org/sites/mdac.info/files/psychiatric_hospitals_in_uganda_human_rights_investigation.pdf 12.
103 MTA 1964, s 4.
104 MTA 1964, s 3(3).
105 MTA1964, s 4(1).
106 MTA1964, s 5(1).
107 General Comment, para 41; Equal Opportunities Commission and United Nations Human Rights, Office of the High Commissioner 2018, 24.
108 Ssebunnya, Ndyanabangi and Kigozi "Mental Health Law Reforms in Uganda: Lessons Learnt" 2014 *International Psychiatry* 12.

disabilities to participate in decision-making. In stark contrast, the Act empowered relatives and friends to advise on the admission of persons with mental disabilities in mental facilities. Regarding property, the Act empowered a guardian to exercise control on behalf of a person with mental disability.

Reference is made to the procedure above because it illustrates the unbalanced role of third parties[109] and highlights the undue bias adopted by the Act in favour of the medical necessity. Furthermore, most of the laws that restrict the exercise of decision-making capacity are triggered by adjudgment of unsound mind. The offending laws frequently define a person of unsound mind as a person adjudged to be of unsound mind under section 4 of the MTA.[110] Some of the following laws summarily exclude persons with mental disabilities from exercising legal capacity. When not excluded, persons with mental disabilities are substituted by third parties who make decisions and act on their behalf. The spill-over character of the law effectively cripples persons with mental disabilities as will be illustrated by the following laws.

4 3 Administration of Estates of Persons of Unsound Mind Act

This Act regulates a court's appointment of a manager of the estate of a person of unsound mind.[111] This procedure is questionable in so far as the court appoints, removes and replaces, on its volition, a manager of the estate of a person with unsound mind. It is worth noting that nowhere in the procedure is a person with mental disabilities consulted for his/her opinion on the appointment. Perhaps even more upsetting is that the desire/willingness of the prospective manager is considered, at the expense of the will of the person whose estate is subject to management. Conversely, the court fixes fees to be paid from the estate of the person with unsound mind for the manager on whose appointment he/she was not consulted.[112]

Additionally, a manager appointed under this law enjoys both general and special powers which, as far as in the Court's opinion, are necessary for the management of that estate.[113] The extent of the manager's power is also determined by the nature of the property in so far as it constitutes real or other property.[114] The legislation attempts to limit the manager's powers by requiring the court's permission prior to the purchase[115] mortgage, sell, gift, lease for a period exceeding five years, or in any other way deal with immovable property.[116] In addition, the manager is precluded from investing funds in an investment in which the manager has interest.

There are two important points to consider here. First, the opinion, will and preference of a person with disability is no longer important, or at the least, referred to. The manager enjoys absolute power to deal with the immovable property, subject in some instances to the intervention of the court. The management of movable property is subject only to the manager's wishes. It is especially vital to consider that some movable property like company shares, stockholding, and government bonds can be highly valuable. To leave management of such property to the absolute discretion of third parties would occasion equal or even further financial loss. Second, the safeguards provided under this law do not meet the threshold under Article 12(4) of the UNCRPD. Even though the law is meant to protect the best interests of the person with "unsound mind",[117] it, in fact, simply diminishes his/her capacity, vanquishes his/her station in the handling of his/her affairs and substitutes it with the "satisfaction of the court".

The court's influence is so far reaching that it can sell or in any other way deal with the estate of the person with "unsound mind"[118] for the purposes of "paying personal debts, costs of any court procedures, as well as expenditures incurred for his/her personal or family's benefit."[119] This provision illustrates the need to offer support to persons with mental disabilities in making

109 Initiative for Social and Economic Rights "Analysis of the Mental Health Bill, 2014: Submission to the Health Committee of the Parliament of Uganda" 2018, 24 https://iser-uganda.org/images/downloads/ISER_Analysis_of_the_Mental_Health_Bill_2014.pdf (accessed 28-07-2021) .
110 For instance, the Administration of Estates of Persons of Unsound Minds Act Cap155, s 1(c).
111 The Administration of Estates of Persons of Unsound Minds Act Cap155, s 3(b).
112 The Administration of Estates of Persons of Unsound Minds Act Cap155, s 4(2).
113 The Administration of Estates of Persons of Unsound Minds Act Cap155, s 4(1).
114 The Administration of Estates of Persons of Unsound Minds Act Cap155, s 4(1)(a).
115 The Administration of Estates of Persons of Unsound Minds Act Cap155, s 4(1)(b).
116 The Administration of Estates of Persons of Unsound Minds Act Cap155, s 4(1)(a).
117 The Administration of Estates of Persons of Unsound Minds Act Cap155, s 9(1).
118 The Administration of Estates of Persons of Unsound Minds Act Cap155, s 9(1).
119 The Administration of Estates of Persons of Unsound Minds Act Cap155, s 9(1) 9 a-f.

advance plans about their financial and other obligations. Further, it illustrates the heavy influence of the "best interest principle" as it purports to operate for the benefit of the person with mental disability. Best interest has been criticised as the spirit embodying guardianship and other substituted decision-making. We do not purport to suggest that "will and preference" and "best interest" are mutually exclusive. In fact, the two principles can reinforce each other, but only where will and preference of a person is reflected in his best interest and vice versa. However, when they operate in contrast, the Committee has emphasised that the will and preference or, by extension, the best interpretation of will and preference must override the best interest.[120]

Evidently, this Act was enacted for the sole purpose of facilitating substitution of legal capacity. In section 12, it states that an appointed manager acts "in the name and on behalf of a person of unsound mind" and that the manager's actions "shall be as valid and effectual in all respects as if they had been executed by the person of unsound mind while he or she was of sound mind."[121] This provision does not only reinforce the decision-making power of the substitute; it vividly illustrates the effectual erasure of the person with mental disability, placing in his/her shoes another person. By necessitating the appointment of a manager to make decisions in the same way a person with metal disabilities would, if he/she had the mental capacity, the Act illustrates Uganda's equation of mental capacity to legal capacity. Effectively, the legal capacity of a person found to be of unsound mind seizes to exist in the exact moment that his/her mental capacity is found to be diminished.

4 4 Contracts Act of 2010

When it addresses the capacity to contract, the Contracts Act provides that a person can only enter into a contract if he/she is of sound mind.[122] By implication, persons of unsound mind are prohibited from undertaking contractual obligations. A person is of sound mind if "that person is capable of understanding the contract and of forming a rational judgment as to its effect upon his or her interests."[123] Sections 12(2) and (3) are an exception and they state that a person who is usually of unsound mind can enter into a contract during periods when he/she is of sound mind. Regardless, this provision does not remove the requirement for the soundness of mind at the very moment when a person enters into a contract. The Equal Opportunities Commission has challenged the practicality of this section because it is built on a biased perception that persons with mental disabilities are incapable of entering into contracts.[124]

4 5 Succession Act, Cap 162

The Succession Act states that only persons of sound mind can make wills.[125] Like the Contracts Act, section 26(4) permits a person who is usually of unsound mind to make a will during periods when he/she is of sound mind. Section 36(3) recognises that persons who are "deaf or dumb or blind" can make wills if they are aware of what they are doing. It appears that the Succession Act requires that a person who makes a will must be able to comprehend what he does.[126] This understanding strengthens the role of mental capacity as a pre-condition for the exercise of legal capacity in the making of wills. This is especially true considering section 36(3) where persons with physical disability are not precluded from making wills. The Act disregards alternatives such as supported decision-making that can enable persons with mental disabilities to make wills.

4 6 Marriage and Divorce Laws

The Customary (Marriage) Registration Act of 1973 requires consent of parents in some instances for example when a party intending to get married is younger than twenty-one years

120 General Comment 1 on Article 12 United Nations Convention on the Rights of Persons with Disabilities 2014, para 21.
121 The Administration of Estates of Persons of Unsound Minds Act Cap 155, s 12.
122 The Contracts Act 2010, s 11(1)(b).
123 The Contracts Act 2010, s 12(1).
124 Equal Opportunities Commission and United Nations Human Rights, Office of the High Commissioner "The Rights of Persons with Disabilities in Uganda: An Assessment of Selected National Laws in Relation to the Convention on the Rights of Persons with Disabilities" 2018, 23.
125 Succession Act Cap 162, s 36(1).
126 Succession Act Cap 162, s 36(5).

of age.[127] However, under section 32, diminished mental capacity is evoked as a bar to consent. A similar provision is to be found in section 17 of the Marriage Act. Although soundness of mind is not a prerequisite, a marriage is void if either of the parties to it is a person of unsound mind.[128] Likewise, section 12(1)(c) of the Divorce Act prescribes a decree of nullity if either party to the marriage "was a lunatic or idiot at the time of the marriage." Read jointly, these laws impose a requirement for soundness of mind at the time of marriage denying legal recognition to marriages of persons with mental disabilities.[129]

4 7 Civil Procedure

Order XXXII, Rule 15 of the Civil Procedure Rules[130] provides that in all civil matters, the rules apply to persons of unsound mind in the same way as they apply to children. In their application to children, the rules require that suits by a minor are instituted in his/her name by a "next friend",[131] failure of which the court is empowered to strike the suit off its record.[132] Similarly, the rules require appointment of a guardian ***ad litem***[133] as a minor's representative for purposes of defending a suit. The equation of persons with mental disabilities to children in the rules is a spectacle. It is nonetheless a reoccurring phenomenon[134] which speaks to the attitude with which Uganda's civil procedure rules approach legal capacity.

4 8 Penal Code Act, Cap 120

Section 10 of the Penal Code Act presumes soundness of mind in all criminal matters. Applying a functionality test, section 11 obliges a court to examine whether the disease or infirmity of mind affected the mind so much so that it was impossible for a person to know that what he/she was doing was criminal. Where it is so found, a person will not be criminally liable. A pertinent question to ponder on is why a similar approach is not adopted in the determination of legal capacity in other laws to assess whether a person can form the intention to, for instance, contract a marriage. Flowing from that, a person must be offered the requisite support to make the decision to exercise his/her legal capacity. By suggesting this, we do not equate mental capacity to legal capacity. We merely re-echo that the fluctuation of mental capacity should not culminate in the total erasure of legal capacity.

5 DECISION-MAKING UNDER UGANDA'S MENTAL HEALTH ACT of 2018

After nearly a decade, the highly anticipated Mental Health Act (MHA) was enacted by the Parliament of Uganda in 2018. In this section, we critically engage with the provisions of the MHA, scoring them against standards established in international law and policy as previously discussed. General cosmetic enhancements are apparent on the face of the Act, for instance when it refers to "person[s] with mental illness" as opposed to persons of unsound mind. However, as will soon be observed, the adoption of the term "mental illness" sets the tone for the medical approach that reverberates throughout the legislation. The ensuing discussion is not reflective of all the developments brought by the MHA. We restrict ourselves, in scope, to the present topic.

127 This provision should be understood to have been modified by Article 31 of the 1995 Constitution which puts the majority age at eighteen years.
128 Customary Marriage (Registration) Act 1973, s 11(1)(c); The Marriage Act, Cap 251.
129 Equal Opportunities Commission and United Nations Human Rights, Office of the High Commissioner, 28.
130 Civil Procedure Rules Statutory Instrument 71-1 of 2014 (CP Rules).
131 CP Rules, order 32(1).
132 CP Rules, order 32(2).
133 CP Rules, order 32(3).
134 See also Land Act 1998, s 57(2)(b).

5 1 Treatment and Admission of Persons with Mental Disabilities

There are four different admission and treatment criteria under the MHA; emergency, assisted, voluntary, and involuntary. Emergency admission and treatment is pursued when, because of illness, a person with mental disability risks harming himself/herself or somebody else.[135] It also arises where there is a risk of financial, property, reputational or personal relationship damage.[136] Emergency treatment is therefore issued in the best interest to save life or prevent the deterioration of the condition.[137] In a rather unfortunate turn of events, the MHA has reinstated emergency treatment as was in the Uganda Lunacy Act of 1939. The Act requires immediate return to voluntary admission when the conditions warranting emergency have receded, but this is inconsequential because in the material moment of emergency, the default position is to diminish decision-making capacity.

Under voluntary treatment and admission, a voluntary patient's consent, pursuant to a comprehensible explanation of the medical procedure,[138] is required before administration of treatment.[139] Consent may be obtained from a representative if a person with mental disability is incapable of consenting. The MHA directs mental health practitioners to immediately cease treatment upon withdrawal of consent.[140] This would be an outstanding development if the Act did not immediately follow to undermine the withdrawal. Sections 44(3) and (4) permit a mental health practitioner to disregard the withdrawal of consent and proceed with treatment of the person, now as an involuntary patient.

Involuntary admission and treatment are invoked where a person with mental disability is momentarily incapable of expressing his willingness to consent.[141] Upon request for involuntary treatment and admission,[142] an officer in charge of a mental health unit must conduct a medical inquiry to ascertain if the person has a mental illness warranting involuntary admission. Consent will be required if the involuntary patient has capacity to do so.[143] Treatment will be administered notwithstanding lack of consent if the mental health practitioner deems it fit.[144] It would appear that involuntary admission is a re-embodiment of the admission procedure that was in sections 4 and 5 of the MTA of 1964.

The MHA neglected to define what it meant by an involuntary patient's incapacity to consent. Regarding a voluntary patient however, he/she is capable of validly consenting where he/she understands the matters requiring his/her consent, as well as the requirements and implication of consenting.[145] We deduce from this definition that the term "incapable of consenting" synonymously refers to the inability to express one's decision. Effectively therefore, the MHA discriminates between voluntary and involuntary patients based on their mental (in)capacity. It requires consent only from patients who already have the mental capacity to do so. Bach and Kerzner criticise this approach emphasising that the question should no longer be whether a person has capacity[146]. Rather, it should be what support can be given to a person who undoubtedly has capacity. The fact that a person requires support in making and communicating decisions is no longer a legally acceptable basis for questioning his/her legal capacity.[147] If a system of supported decision-making had been established by the Act, involuntary admission would have been rendered nugatory.

Assisted admission and treatment occurs where, because of mental illness, it is feared that delayed intervention will result in death, irreversible harm or serious injury to a person with mental disability.[148] The consent of a relative or other concerned party is required before admission.[149] A person who recovers the ability to consent and expresses willingness so to

135 MHA 2018, s 22(1)(a).
136 MHA 2018, s 22(1)(b).
137 MHA 2018, s 23(10).
138 MHA 2018, s 42(4).
139 MHA 2018, s 29(5).
140 MHA 2018, s 43(1) and (2).
141 MHA 2018, s 24(1).
142 MHA 2018, s 24(3)(a) and (b).
143 MHA Act 2018, s 45(1).
144 MHA 2018, s 45(2).
145 MHA 2018, s 42(9).
146 Bach and Kerzner, 58.
147 General Comment 1, para 29.
148 MHA 2018, s 30(1)(b).
149 MHA 2018, s 30(2).

do will be handled as a voluntary patient.[150] However, if after recovering capacity to consent, a person with mental disability is unwilling to consent, he/she will be forcefully dealt with as an involuntary patient.[151] Notwithstanding, the relative or concerned person who sought admission of a person can similarly request his/her discharge.[152]

5 2 Human Rights of Persons with Mental Disabilities

The MHA introduces, for the first time, a chapter on the general protection of the rights. This is a novel and welcome innovation as it addresses persons who have previously been relegated by mainstream disability discourses. The most noteworthy inclusion is section 51(1) which states that the rights recognised by the Act are in addition to those contained in "any other law". The rights in the MHA are thus complimentary to international laws[153] such as the right to equal legal capacity under Article 12 of the UNCRPD. Section 51(2) states that the principal consideration in upholding the rights is the best interest of the person with mental disability.[154]

Under the MHA, legal determination of mental health status can only be invoked when it is necessary for specified proceedings before a court.[155] For instance, if mental health status is requested for divorce proceedings, it cannot be used to challenge validity of a contract. This section restricts indiscriminate adjudgment of unsound mind as it existed throughout the MTA. However, it changes nothing as far as exercise of legal capacity is concerned. If anything, the provision reinforces mental capacity as a prerequisite for decision-making. For example, a result indicating that a person has a mental illness would void a contract because that person lacked capacity to contract under the Contracts Act. Furthermore, the provision breeds uncertainty. Is it the case that legal capacity is presumed in all circumstances where mental health status has not been requested? And if so, how then does the law justify that discriminatory treatment? The MHA does not answer these questions.

5 3 Capacity, Competence and Guardianship under the Act

The MHA commences on a high note stating that, "[a] person with mental illness has the right to enjoy legal capacity on equal basis with others in all aspects of life",[156] and that "[he/she] has the right to manage his/her affairs."[157] This sentiment is short-lived since section (60)3 authorises the board or court to restrict exercise of legal capacity if they perceive a person to be incapable of managing his/her affairs. What then is the relevance of recognising legal capacity at all, if it can be revoked indefinitely? Moreover, the Act makes no mention of legal capacity in other matters such as contracts, marriage, and political participation.[158] Whilst their explicit mention would have had no impact, the total neglect to do so reflects the nonchalance with which the Act regards them.

The MHA permits a person with mental disability to appoint a personal representative to manage his/her affairs. Unfortunately, this is inconsequential for supported decision-making because the personal representative makes decisions on behalf[159] of a person with mental disability and in his/her best interest,[160] not as a reflection of his/her will and preference. Article 12(4) of the UNCRPD mandates states to ensure that a personal representative is restricted to offering support as opposed to taking over decision-making. The MHA also permits a person with mental disabilities to appoint, in advance, a personal representative.[161] Advance planning, as envisioned by the UNCRPD, is a form of support where a person with mental disabilities is accorded an opportunity to state, in advance, his/her "wishes and preferences" which must be abided by in the future.[162] Far from this standard set by the UNCRPD, the appointed person

150 MHA 2018, s 30(5).
151 MHA 2018, s 30(6).
152 MHA 2018, s 31(1)(2) and (3).
153 1995 Constitution, art 45.
154 MHA 2018, s 51(2).
155 MHA 2018, s 55(1) and (4).
156 MHA 2018, s 60(1).
157 MHA 2018, s 60(2).
158 MHA 2018, s 60(6).
159 MHA 2018, s 61(1).
160 MHA 2018, s 61(2) and 62(5).
161 MHA 2018, s 61(3).
162 General Comment 1, para 18.

under the MHA remains, for all intents and purposes, a substitute decision-maker.[163]

Article 61 of the Act allows a person with disabilities to appoint a personal representative to manage his/her affairs, but this is as far as it goes. Although at first blush it appears progressive, a further reading reveals that this provision does not establish support for decision-making. Rather, what the law does is reinvent substitution of decision-making, this time giving the person with mental disability the first option to choose his/her substitute. Beyond personal appointment, the representative remains, for lack of a more suitable word, a guardian, making decisions on behalf of the person with mental disabilities. In its report to the Committee, Uganda undertook to establish mechanisms of support in exercise of legal capacity in what at the time was the Mental Health Bill, 2014.[164] It is absurd that the MHA snubbed this commitment, feigning recognition of legal capacity.

The court is enjoined to appoint a personal representative as a guardian whenever a person with mental disability does not do so.[165] The term "personal representative" is used in the MHA to replace the term "manager" under the Administration of Estates of Persons of Unsound Mind Act. What remains constant though, is his/her role in managing the estate of a person with mental disability[166] and his/her categorisation as a substitute under the international law on decision-making. Maintaining substituted decision-making under the guise of a personal representative, by whatever means appointed, indicates the MHA's failure to reasonably accommodate persons with mental disabilities.[167] A person resumes management of his/her estate when he/she regains the capability of managing his/her affairs.[168] In short, under the MHA, a person who recovers his/her mental capacity, automatically regains his/her legal capacity and decision-making capacity.

5 4 General Overview of the Act

Previously we have discussed specific provisions of the MHA based on their significance for supported decision-making. In the next section, we highlight general recurrent undertones.

Throughout the MHA, a raging conflict between human rights and medical necessity is apparent.[169] The physical delineation of the two approaches in separate sections within the Act is testament to this. Both approaches standing parallel, the Act is evidence of a compromise that was never reached. It is a balancing act poorly orchestrated, the result of which is an uneasy settlement. The conflict boils over for instance in sections 43(1) and (2) where a mental health practitioner is required to promptly cease treatment when a voluntary patient withdraws consent. Yet, the immediately following section 43(3) empowers a mental health practitioner to disregard the withdrawal and continue treatment if he thinks it fit. Section 43(3), like many others, is at complete cross-purposes with section 20(2) of the Act which prohibits treatment without prior informed consent. The MHA has given undue attention to erecting a legal and regulatory framework within which medical officers and other third parties can be justified in taking decisions on behalf of persons with mental disabilities. A law that focuses on the medical approach to the exclusion of all other variables is not an efficient intervention to tackle disability as explained by Twinomugisha.[170]

The concept of consent under the MHA is nothing short of a mirage. It is rendered meaningless because if not given, consent will be forced. The law states that a patient's failure to resist treatment does not amount to consent.[171] In contrast, treatment can be forced on a person who expressly indicates an unwillingness to consent. By empowering substitute decision-makers to consent to treatment on behalf of persons with mental disabilities, the MHA continues to promote discrimination[172] although the Committee has prohibited the

163 Initiative for Social and Economic Rights "Analysis of the Mental Health Bill, 2014: Submission to the Health Committee of the Parliament of Uganda" 2018, 9–11 https://iser-uganda.org/images/downloads/ISER_Analysis_of_the_Mental_Health_Bill_2014.pdf (accessed 28-07-2021).
164 Uganda's initial report to the United Nations Committee on Persons with Disabilities 2013, para 109.
165 MHA 2018, s 62(1).
166 MHA 2018, s 62(2) and 63.
167 General Comment 1, para 22.
168 MHA 2018, s 62(6).
169 Initiative for Social and Economic Rights, 3–4.
170 Twinomugisha *Health Law in Uganda* 122.
171 MHA 2018, s 42(12).
172 McSherry "Legal Capacity and Neuroscience" 129.

same.[173] Individual autonomy of persons with mental disabilities must be respected except in a life-threatening crisis.[174] Unnecessary justifications such as "for their care and treatment", and the "likelihood of causing danger to oneself or another" are unjustified to warrant substitution of decision-making.[175] Respecting the right to decision-making entails not just "simple and uncontentious" decisions but also "risky and self-defeating choices".[176]

The MHA adopts the default approach of invalidating legal capacity. It thereafter repeatedly attempts to remedy the harm by employing one or another form of substituted decision-making. Throughout the Act, notions synonymous with substituted decision-making such as "best interest", "guardianship", "representative" and "on the behalf of" are re-echoed. The term "rights" in the MHA is used solely at the convenience of the law. This is implied in the way the MHA casually gives protection with the proverbial one hand, and withdraws with the other, allowing a wide latitude for administration of treatment without consent, or notwithstanding the withdrawal of consent. This is unconscionable owing to the tendency for ambiguities in the law to be manipulated to the detriment of vulnerable persons.

"Best interest" is no doubt a noble cause when pursuing rights of the most vulnerable sections of the community. However, for legal capacity, the "will and preference" of a person with mental disabilities should be the sole consideration. Decision-making based on what is objectively presumed to be the "best interest" of a person with mental disabilities is characteristic of substituted decision-making[177] and poses a danger to exercise of legal capacity by persons with mental disabilities.

The Mental Health Bill, 2014 had envisioned an Act "in line with International Human Rights Conventions and Standards."[178] In its list of issues arising from Uganda's initial report, the Committee asked Uganda to update it on whether the Mental Health Bill provided for a system of supported decision-making for persons with mental disabilities.[179] Because this was answered in the negative, the Committee, in its concluding observations in 2016, recommended elimination of all forms of substituted decision-making, formal or informal. It also recommended replacing substituted decision-making with systems for support in decision-making in accordance with Article 12 of the UNCRPD and the General Comment.[180] It is thus incomprehensible why two years later in passing the MHA, this recommendation was wholesomely overlooked, undermining the social model of disability that informs the requirement for support under the UNCRPD.[181]

5 5 Application of the MHA to Related Laws

The Act neither abolishes substituted decision-making nor institutes structures for support in decision-making.[182] Apart from the MTA of 1964 and Administration of Estates of Persons of Unsound Mind Act, which the MHA repeals,[183] all other laws remain unwavering in their restriction of the exercise of legal capacity and promotion of disability-based discrimination.[184] Resultantly, the enjoyment of several other human rights such as the right to access justice, right to freedom of expression, the right to marry and found a family, the right to own and manage property and the right to make a will and benefit from the same, and the right to enter into a contract is hindered.[185] Staverta and McGregor[186] propose that the right to equal legal capacity must be approached holistically, bearing in mind all other rights in order to gradually move away from compulsion and substitution to autonomy and support.

173 General Comment 1, para 41.
174 United Nations Human Rights Council 'Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' (2013).
175 Equal Opportunities Commission and United Nations Human Rights, Office of the High Commissioner, 27.
176 McSherry "Legal Capacity and Neuroscience" 132.
177 General Comment 1, para 23.
178 Mental Health Bill 2014, memorandum, long title and clause 3(d).
179 Committee on the Rights of Persons with Disabilities 2015, para 9.
180 CRPD concluding observations 2016, para 23(a).
181 Craigie *Bioethics* 411.
182 General Comment 1, para 24.
183 MHA 2018, s 77.
184 Committee on the Rights of Persons with Disabilities, para 3.
185 General Comment 1, para 27.
186 Staverta and McGregor 'Domestic legislation and international human rights standards: the case of mental health and incapacity' (2018) 22 *The International Journal of Human Rights* 76..

6 A GLIMPSE AT OTHER RECENT LEGISLATIVE ENACTMENTS: ANY LESSONS FOR UGANDA?

The foregoing, however absurd, is Uganda's current legal position on legal capacity and decision-making. In the next section, although by no means exhaustively, we discuss the most recent legislative reforms on decision-making for persons with mental disabilities in Argentina (2014), Ireland (2015) and Peru (2018). We owe our focus on these jurisdictions to their proximity to the MHA in terms of period of enactment. The Peruvian law, for example, was enacted three months shy of Uganda's MHA. We only hoped that this comparison will better illustrate the ineptness of the MHA.

6 1 Argentina – The Civil and Criminal Code (2014)

This law expressly recognises that legal capacity includes capacity to exercise a right.[187] Restriction of legal capacity can only be pursued if the person has an "addiction or a permanent or prolonged mental disorder" and his full exercise of legal capacity poses a risk to him/her or his/her property.[188] In all other scenarios, the law maintains presumption of legal capacity.[189] Capacity, under this Act, is restricted only long enough to allow the court to establish necessary supports.[190] In its ruling, a court must direct the nature, scope and extent of the support to be offered. The code also guarantees safeguards to ensure that the court ruling promotes personal autonomy[191] for instance by granting a person with mental disabilities *locus* in the court proceedings.[192] The concerned person can thus request specific support measures and safeguards what he/she desires.[193] Judges are obliged to primarily consider the individual abilities, aptitudes and needs of a person.[194] The elasticity reflected by the Code's support system as well as its responsiveness to and suitability for individual requirements is commendable.

6 2 Ireland – Assisted Decision-Making Act (2015)

Where a court categorises a person as lacking capacity, the court may direct him/her to adopt one of three support mechanisms; assisted decision-making, co-decision-making, and enduring powers of attorney.[195] A "decision-making assistance agreement" envisions the appointment of an assistant(s) to offer personal or property related support in decision-making.[196] As opposed to deciding on his/her behalf, an assistant's role is limited to obtaining relevant information, advising the person, ascertaining his/her will and preference and assisting in making and communicating the decision.[197] Alternatively, through a "co-decision-making agreement", a person with mental disabilities may jointly make decisions with a relative, friend or any trusted person he/she appoints.[198] A co-decision-maker's decisions are void to the extent that they do not reflect joint consent. Still, a person with mental disability may appoint an attorney in advance to act on his/her behalf in relation to predetermined aspects of his/her life when he/she no longer has the capacity to decide.[199] The Irish law provides various alternatives to substitution and adopts the will and preference of a person with mental disabilities as the primary consideration in decision-making.

187 The Civil and Criminal Code 2014 (CCC 2014), arts 22 and 23.
188 CCC 2014, art 38.
189 CCC 2014, art 38.
190 Martinez-Pujalte *Laws* 7.
191 CCC 2014, arts 31–40
192 CCC 2014, art 31(e).
193 CCC 2014, art 36.
194 CCC 2014, art 36.
195 Assisted Decision-Making Act (ADM Act) 2015, s 37.
196 ADM Act 2015, s 10.
197 ADM Act 2015, s 14.
198 ADM Act 2015, s 17.
199 ADM Act 2015, s 59.

6 3 Peru – Civil Code and Civil Procedure Code (2018).

The Peruvian law is by far the most compliant of the recent legal developments. It defines supports as,

> forms of assistance freely chosen by a person of age to facilitate the exercise of their rights, including support in communication or in understanding legal acts and their effects, and the manifestation and interpretation of the will of the supported person rights, including support in communication or in understanding legal acts and their effects, and the manifestation and interpretation of the will of the supported person.[200]

The law permits any person with mental disabilities to put in place supports he/she considers necessary and appropriate in his/her circumstances for the exercise of legal capacity. Unless preferred by the person with mental disabilities, supports under the Code are not representative in character.[201] To interpret the best will and preference of a person, the code draws attention to "his/her life story, previous declarations of will in similar contexts, information that his/her trusted persons may have, and other relevant considerations which are appropriate for the particular case.".I[202] The Peruvian Code merits acclamation as the first domestic legislation to substantially comply with the UNCRPD.[203] By completely eliminating restriction of legal capacity on the basis of mental disability, it truly and effectively recognises legal capacity for all on an equal basis.[204]

7 CONCLUSION

Owing to the indivisibility and interdependence of all human rights,[205] the ability to personally make decisions is intricately allied with the enjoyment of all other human rights in the UNCRPD[206] As such, domestic legislation on decision-making plays a major role in the enjoyment of all other human rights for persons with mental disabilities. International law prescribes that equal participation in all aspects of life is an inherent, non-derogable right, the exercise of which should never be premised upon mental capacity. However, as illustrated, Uganda is still behind its counterparts in embracing these principles. The MHA is a hindrance to the spirit espoused by the UNCRPD, putting its principles in disrepute. For example, it used to be that the practice of forced treatment was engaged in erratically, as an abuse of discretion. Under the MHA of 2018, the same practice now enjoys the backing of law. At the same time, the right of persons with mental disabilities to make decisions regarding their lives remains in abeyance, in search of validation.

200 Civil Code and Civil Procedure Code 2018.
201 Martinez-Pujalte *Laws* 16.
202 Civil Code and Civil Procedure Code 2018, art 65(9).
203 Martinez-Pujalte *Laws* 3.
204 UNCRPD 2006, art 12(1).
205 United Nations Vienna Declaration and Programme of Action 1993, para 1.
206 General Comment 1, para 27.