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# **Supported Decision-Making in Swedish Law – Is the »Good Man« a Good or Bad Guy in Light of the CRPD?**

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Martin Zinkler, Candelaria Mahlke, Rolf Marschner (Hg.)  
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## Meet the »good man« of Sweden

Sweden abolished the concept of guardianship for adults in 1989, replacing it with a system of judicial appointment of two types of legal representatives for adults who require support or assistance to protect their rights and interests, due to disability or illness. Directly translated into English, these representatives are formally called a ›good man‹ (*god man*) and an ›administrator‹ (*förvaltare*). The appointment of a good man – who may be a woman, though the wording may suggest otherwise – is the less intrusive of these two forms of representation (*ställföreträdarskap*).

Conceptually, the good man and administrator differ in significant respects in relation to each individual's self-determination and consent. A court generally requires the consent of the person in need of help before appointing a good man, who, in turn, needs consent from the person represented to take legal actions in his or her name. In contrast, consent is not required for the appointment of an administrator, who acts in that role on a person's behalf without the person's consent in each instance. Such an appointment, however, is limited to cases necessary to prevent represented persons from taking legal actions that might harm their own interests.

A second difference between these two kinds of legal representation concerns the legal consequences of the appointment for the person in need of help. The formal legal capacity of the person represented remains unaffected during the appointment of a good man. At least theoretically, the person represented can still generally act under the law without the consent of the good man. In practice however, the person might still be practically unable to make decisions and effectively might, therefore, be denied legal capacity in regards to specific legal actions. If an administrator is appointed, the person represented is fully deprived of his or her formal legal power to act under the law in all issues and situations covered by the decision to appoint an administrator. Thus, it is very important that the administrator's mandate is carefully specified. Certain kinds of legal actions, however, can never be lawfully taken by a legal

representative in the represented person's name, such as voting in public elections, consenting to medical treatment or marriage, or signing a will (FRIDSTRÖM MONTÓYA 2017 and 2015; ODLÖW 2005)

Compared to legal guardians in other nations, the Swedish good man and administrator are rare species in the taxonomy of substituted and supported decision-making. As described in this article, the Swedish concept of the »good man« is an important innovation as a less intrusive version of legal representation for persons with disabilities, but its current formation and implementation raise important questions of whether Swedish law complies with Article 12 of the CRPD, which Sweden ratified in 2008. Put simply, Sweden's obligations to adhere to the CRPD thus also raise an important overarching question: Is the good man a »good guy« or »bad guy« in the CRPD universe?

## Swedish Law, Legal Capacity and CRPD Article 12

Legal capacity has long been an elusive and complex concept in Swedish law. For example, in Swedish law, there is no concept of »legal insanity« for persons who have committed a crime under the influence of a disease or a psychiatric disorder (LERNSTEDT, 1996/97; BENNET & RADOVIC 2016). One could say that the Swedish tradition is to not judge persons »unfit« as legal agents, but instead to consider the legal implications of the agent's personal abilities at a specific point in time, such as when deciding what punishment is suitable for a committed crime or if a contract is void because one of the parties entered the contract under the influence of a psychiatric disorder.

The peculiar nature of the concept of legal capacity in Swedish law is reflected in the way that it has different meanings in different contexts – for instance, sometimes referring to legal power, legal competence, or legal capability (SPAAR 1994). This, of course, stands in sharp contrast with the way legal capacity is narrowly defined in the CRPD, where legal capacity is grounded in the distinction from mental capacity. The CRPD Committee has underscored this separation of legal and mental capacity in its General Comment (GC) regarding article 12 (CRPD/C/GC/1, paras. 13 and 15), which provides that legal capacity is a crucial

part of a person's right to equality before the law and shall be understood in the following way:

- » Legal capacity includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships. « (CRPD/C/GC/1, para. 12)

Indeed, in its own general wording, the CRPD itself demands that everyone shall be recognized and protected both as legal persons with the ability to have rights and as agents with the ability to act on these rights. A condition or a disability that makes it difficult for someone to be an agent under the law must never be the reason for denying a person his or her legal capacity. Such practices, in fact, constitute discrimination under the CRPD (CRPD/C/GC/1, para. 15).

The lack of recognition of this conceptualisation of legal capacity might explain why the Swedish Government concluded that no regulatory changes were needed regarding 'good men' and administrators when Sweden ratified the CRPD (prop. 2008/09:150). Indeed, much of the significance of the CRPD appears lost in translation in Sweden, as the Swedish Government's legal documents supporting the ratification of the CRPD translated »legal capacity« into »*rättskapacitet*«. In Swedish law, however, *rättskapacitet* only refers to the standing of a legal person with the ability to have rights and duties, not the person's capacity to act under the law and thereby »enjoy legal capacity on an equal basis with others in all aspects of life« (FRIDSTRÖM MONTROYA 2015). In the Swedish government's defence, it must be pointed out that the GC regarding article 12 was issued a number of years after the CRPD was ratified. However, the difference between the two strands of legal capacity – to have standing as both a person and an agent under the law – has not been formally recognised in Sweden since then. This ongoing conflict of meanings is surprising given that article 12 makes clear in the first two paragraphs that State parties shall not only recognize that persons with disabilities are persons under the law (para. 1), but also that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life (para. 2).

When it comes to the status of agents under the law, different areas of Swedish law operate with different concepts (e.g. *rättshandlingsförmåga*,

*processbehörighet*). These concepts refer to a judgement as to whether individuals have the formal legal power or authority to take certain legal actions (*behörighet*) and the actual ability to be agents for themselves. For instance, children lack both the formal and personal abilities required for »*rättshandlingsförmåga*«, but with growing age and maturity, depending on the legal action or decision, they usually, gradually gain both the formal and personal ability to be recognized as actors under the law (FRIDSTRÖM MONTROYA 2017). In some cases, however, even adults might be found to lack the actual abilities required to »engage in or create, modify, or end a specific legal relationship« because they are perceived to lack the ability to understand or to make informed decisions. This means that individuals' specific abilities may have implications for their standing as legal agents in the sense that their legal capacity might be denied based on their mental impairments. However, in Sweden, this is always a judgment made in reference to a specific legal action, such that a person can never be declared to lack capacity overall. In short there are no categorical judicial decisions of incapacity in Swedish law.

## The Concept of Good Man – For Whom and With What Legal Consequences?

The complexity of the Swedish concept of the »good man« derives from the circumstances under which a good man can be appointed, as well as the scope of the good man's legal assignment and its consequences for the person represented. The rules regarding the appointment of a good man are found in the Children and Parents Code (1949: 381) (CPC), chapter 11, § 4. Given the fact that good men are appointed for adults, this is in itself something worth noting. These rules were historically placed in this particular Code because guardianship for children and adults constituted a singular concept. Guardianship for an adult was, thus, conceived as a family matter, as guardianship for many years was a duty of a family member that the court found suitable. That is not the case anymore, but the current rules are still found in the CPC. It could, thus, be argued that the rules would be better placed somewhere else in the legal system (ODLÖW 2005).

According to CPC chapter 11, § 4, a good man can be appointed by a civil court if a person needs help to safeguard his or her rights, manage his or her assets, or care for himself or herself, due to illness, mental disorder, frailty, or similar conditions, but only if a good man is needed. The court thus must address two questions prior to the appointment – (1) whether the person's condition warrants the kind of help that a good man can offer but also (2) whether a good man is necessary to provide the help needed. This latter assessment means that other forms of assistance, such as a power of attorney, must be deemed insufficient, because the person's condition is too severe to either issue a power of attorney that is legally binding or to instruct the person with the power of attorney to act (NJA 2015 s 851). The same rule also states that a good man must not be appointed unless the person in need of help consents to the appointment, though consent can be waived if the person's condition prevents the court from finding out his or her views.

As explained previously, an appointment of a good man has no effects on the represented person's formal legal capacity, even though the good man has the authority to represent that person in legal matters. For example, the person represented still has the formal legal power and authority to enter into contracts, apply for benefits, and appeal to courts without assistance. However, in practice, a person in need of a good man often has difficulties acting according to the law in many cases because of a lack of decision-making skills required to make legally binding decisions. This means that the person's legal capacity is restricted in some way after all – not due to the appointment of a good man, but due to his or her disabilities.

According to CPC chapter 11, § 5, a good man only has legal authority to take legal actions on behalf a person who consents to each action taken. This main rule, however, has two important exceptions. Consent is not needed if the person lacks the ability to consent or if the legal action in question concerns daily life issues. In the latter situation, consent is presumed – unless the person represented has declared otherwise to the third party before the good man took legal actions with those parties in the represented person's name. These two exceptions create a grey area where the limits of a good man's authority are unclear in taking legal actions on behalf of the represented person. Especially troublesome is the fact that there are no guidelines for deciding when someone shall be deemed to lack the ability to consent. Moreover, it can be difficult

to draw a clear line in matters regarding the capacity to handle issues of daily life and legal issues.

Regarding the legal assignment for a good man, CPC chapter 12, § 2 provides that a good man's duty, in accordance with the appointment, is to safeguard the rights of the persons represented, manage the persons' assets, and ensure that the persons receive care or are able to care for themselves. This is a very broad assignment, open to various interpretations. The good man has almost unlimited authority to act on behalf of a person represented in the same way that a guardian has for a child (FRIDSTRÖM MONTÓYA 2015). However, in the same rule it is also stated that a good man (as well as an administrator) cannot represent the person in strictly personal matters, such as entering marriage, confirming parenthood, or signing a will.

When performing the assignment, the rule in CPC chapter 12, § 3 is that a good man shall carefully fulfil the duties that follow from the assignment and thereby »always act in the way that is in the best interest of the person represented«. This rule makes the concept of good man clearly questionable from the viewpoint of the CRPD, among others, as addressed in further detail below.

## Is the ›Good Man‹ a Good or Bad Guy in Light of the CRPD?

Regarding article 12 and equality before the law, the CRPD Committee is clear: practices falling within the category of substituted decision-making are to be abolished and replaced with supported decision-making, whereas all practices aiming to help someone to make decisions shall be based on a »will and preferences« paradigm, instead of a »best interest« paradigm. The CRPD Committee has found that the exact scope of the obligations of States under article 12 of the Convention has often been misunderstood, as »there has been a general failure to understand that the human-rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making« (CRPD/C/GC/1 para. 3).

Under the CRPD, support in the exercise of legal capacity must respect the rights, will, and preferences of the person with disabilities. The

Committee has explained that fulfilment of article 12, para. 3, recognizes that States parties

- » have an obligation to provide persons with disabilities with access to support in the exercise of their legal capacity. States parties must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to support necessary to enable them to make decisions that have legal effect. « (CRPD/C/GC/1 para. 16)

This raises the question as to what can be said about the Swedish concept of the ›good man‹. Is the good man ›a good guy‹ or ›a bad guy‹, in light of the CRPD?

On the ›good‹ side, it can be noted that the appointment of a good man has no restrictive effects on the formal legal capacity of the person represented, given that the person's legal capacity is formally left intact. The law also requires that consent is presumptively needed for a court to appoint a good man – given that the person in need of a good man has the ability to consent. Moreover, once appointed, the good man must have consent from the person represented in order to take binding legal actions in his or her name. This means that nothing legally prohibits a good man from seeking the will and preferences of the person represented before any legal action in the represented person's name is to be taken in each and every instance. Probably, many good men do so in practice. But there are also no legal consequences when the good man fails to seek the will and preferences of the person represented in individual cases or transactions, nor do such consequences lie when the good man fails to strive to fully effectuate the will or preferences of the represented person. Thus, because the CRPD also prohibits the deprivation of legal capacity »in respect of a single decision« (GC para. 27), the Swedish system of administering the ›good man‹ is not in compliance with the CRPD, not only in practice, but because it also formally permits a good man to be appointed in some cases without consent. Indeed, on the bad side is the fact that a represented person's consent is not generally required when a good man takes legal action on behalf of a person who is considered to lack the ability to consent. This rule is troublesome in several ways. First, it is unclear who is to be the judge of the ability to consent: Is it the ›good man‹ who has been appointed? Or is it a court, which depends on someone to actually bring a case of lack

of consent to it, where a medical expert or even a third party, guarding his or her own interests in a legal relationship with a person, may argue that the person concerned lacks the ability to consent? Second, there are no guidelines whatsoever for decisions regarding whether someone lacks the ability to consent. These problems are compounded by the aforementioned lack of clear legal consequences in cases where the good man fails to strive to ascertains the represented person's will or preferences to guarantee that the person's will and preferences can be effectuated. In sum, one can say that the concept of the »good man« is clearly not in compliance with the supported decision-making paradigm.

If the concept of the good man could be reshaped to the requirements of article 12, the innovative traits of the »good man« could be fully realized and yield brighter prospects for supported decision-making in Sweden. Recent developments in Sweden, in fact, offer hope for such reform. In December 2017, the Swedish National Audit Office (*Riksrevisionen*) released a highly critical report of the supervision of the system of legal representation through good men and administrators. The system, they pointed out, cannot guarantee the rule of law for one of society's most vulnerable groups. Following this harsh critique, the Swedish Government started in Juli 2019 a public investigation of the rules regarding legal representation for persons with disabilities. While the results of this investigation is not yet known, it is a welcome development, since it opens up for scrutinizing the compliance of the Swedish legal system with the CRPD article 12. At present, however, the answer to the question of whether the good man is a good or bad guy in light of the CRPD must be that »he« seems to be like the most of us – often good and bad, or at least somewhere in between from case to case.

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