

# The Question of Capacity in Legal Discourse

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# Overview of lecture

- What is meant by legal capacity?
- The connection between legal capacity and personhood
- Historical evolution of personhood in western law
- Possession of reason deemed essential for legal capacity
- Gender, Race, Caste, Disability seen to negate presence of reason
- Denial on grounds of gender, race, caste seen as discrimination
- How denial addressed for persons with disabilities
- Current situation with regard to disability
- Relevance of these developments to rights of non human animals

# Meaning of Legal Capacity

- The right to have rights
- The freedom to make decisions which were recognized as legally binding by the law

# Connection of legal Capacity and Personhood

- These two freedoms : to have rights and to act were only conferred on those persons who were recognized as persons before the law
- Only if you were a subject and not an object in the law, you possessed legal capacity
- Who were seen as subjects in law?

# Historical Evolution of Legal Capacity in Western Law

- Roscoe Pound in his treatise on Persons in his Jurisprudence Volumes narrates the evolution of personhood
- How the individuals on whom personhood was conferred changed according to the times. So only owners of slaves and not slaves who enjoyed legal personhood.
- Only the patria potestas was a person before the law and had legal capacity; not even the eldest son enjoyed legal personhood.
- Then all adult males were recognized as legal persons possessed of legal capacity

# Possession of Reason essential to Legal Capacity

- Till this point persons recognised as persons acted according to divine dictates or community compulsions
- With the enlightenment the individual was recognized as an autonomous being
- And the basis of that recognition was the ability to reason. Only if you were a rational being could possess legal capacity

# Gender, Race, Caste, Disability seen to negate presence of reason

- Women
- Persons of colour
- Persons belonging to particular castes
- And persons with physical, mental, intellectual and sensory impairments were presumed to not possess reason and hence denied legal capacity

# Denial on grounds of gender, race, caste seen as discrimination

- Once the discourse of universal human rights was inaugurated all humans were presumed to possess reason
- Yet the exclusions on grounds of gender, race caste had to be explicitly prohibited
- And the denial viewed as discrimination before the exclusion was ousted from the letter of the law even if the deprivation in practice remains an ongoing battle.



# How denial addressed for persons with disabilities?

- Roscoe Pound in his analysis categorized exclusions **other than disability** as arising from particular kinds of socio-economic arrangements
- He acknowledged the deprivation imposed by these arrangements and documented how as socio-economic structures altered these exclusions also fell away
- The exclusion of persons with disability he saw as protective
- And therefore found its continuance as unproblematic
- First Declarations only spoke about as normal a life as possible
- This exclusion came to be problematised when persons with disabilities started to question it

# Current situation with regard to disability

- The Declarations were primarily about a right to protection
- The Equalization Rules at least spoke about the right to participation
- Art 12 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) recognized the legal capacity of all persons with disabilities.
- This capacity included both the right to have rights and the freedoms to act
- An obligation to provide support was placed on State Parties .
- Conditions laid down on the manner in which the support should be given
- The realization of legal capacity in fact especially for persons with psychosocial and intellectual disabilities remains an uphill task

# Relevance of these developments to rights of non human animals

- As you seek recognition for the rights of non-human animals – is it worth it to go the personhood –legal capacity route?
- Or should other pathways be explored?
- Mutual Vulnerabilities specially in the wake of climate change could be one way to go forward
- Inter-species solidarity is another possibility