

Norms and Implementation of CRPD Article 12

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On October 21, 2009, the Committee on the Rights of Persons with Disabilities held a Day of General Discussion on Article 12, focusing both on clarifying the norms and on exploring challenges to implementation. This article is based on my presentation there, with some later additions.

I. What are the norms of Article 12 to be incorporated into domestic law?

1. Legal capacity in Article 12 includes the capacity to act. This is evident from the prior treatment of legal capacity in international law and in domestic legal systems.²
2. Functional diversity in relation to decision-making does not justify excluding any person from the right to make decisions in his or her own life, or participating on an equal basis in collective decision-making. Functional diversity means the whole spectrum of ways that human beings make decisions, including people with intellectual, cognitive and psychosocial disabilities. It can include limitations in abilities and needing support to take part meaningfully in decision-making. Autonomy is a right of all people that cannot be limited because of difference in abilities.³ Incorporation of Article 12 begins with formal equality in having and exercising legal capacity.
3. Functional diversity requires supportive measures in relation to the exercise of legal capacity, based on the principles of inclusive design, accessibility,

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² OHCHR Background conference document on Legal Capacity, prepared for the 6th Ad Hoc Committee meeting, available at:

<http://www.un.org/esa/socdev/enable/rights/ahc6documents.htm>.

³ CRPD Article 12.2 (recognition that people with disabilities have legal capacity on an equal basis with others); OHCHR Thematic Study on Legal Measures Necessary for Ratification and Implementation of the CRPD paragraphs 43-47; Special Rapporteur on Torture Interim Report UN Doc. A/63/175, paragraphs 44, 50, 69 and 73.

reasonable accommodation and positive measures to ensure de facto equality.⁴

The use of these principles in developing supportive measures is based on an equality and non-discrimination model. Understanding support to exercise legal capacity as part of the right to equality and non-discrimination helps us to place autonomy first and avoid paternalism.

4. Legal capacity implies responsibility for one's decisions. This includes responsibility for complying with obligations undertaken voluntarily or imposed by society. Fairness in determining liability for breaches of obligations needs to be based on the principles of inclusive design, accessibility, reasonable accommodation and positive measures. Responsibility includes both criminal and civil liabilities.
5. Safeguards to prevent abuse of supportive measures must similarly be based on the principles mentioned. Supportive measures are aimed at facilitating expression of the person's own true and free will. The safeguards are aimed at protecting and ensuring this expression.
6. Supportive measures are feasible as an approach to all situations. The distinction between supportive measures and substituted decision-making in extreme situations such as unconsciousness or coma, is that the obligation remains to attempt communication and be prepared to follow indications of the person's current will.
7. Children have an evolving legal capacity and have the right to be provided with age- and disability-appropriate supports to participate in decision-making.⁵
8. Certain articles of the CRPD provide more detailed obligations in relation to particular areas of life where legal capacity is exercised. Article 12 paragraph 5 addresses financial matters. Article 13 addresses accommodations needed in all types of legal proceedings. Article 18 addresses liberty of movement. Article 19 addresses the right to choose where and with whom to live. Article 23 addresses marriage and parenting rights and obligations. Article 25 addresses health care decisions, requiring free and informed consent. Article 27 includes the right to

⁴ See CRPD Articles 2, 4, 5 and 9.

⁵ See CRPD Articles 3(g) and 7.3, Convention on the Rights of the Child Article 12.

- work freely chosen or accepted. Article 29 guarantees the right to vote and provides for accessibility measures.
9. Other articles of the CRPD are complementary to the obligation to provide access to support. In some situations, support of different kinds may also help with the exercise of legal capacity. Articles 19, 24, 26, 27 and 30 addresses aspects of support as well as individual development, which facilitate individual autonomy and self-determination.

II. What are the challenges to incorporation?

1. The challenges can be grouped as political, technical, practical and philosophical.
2. Political challenges reflect the need for a consensus around the new paradigm, and an understanding of what it means. They include the need to move past disbelief and misconceptions about the lives and dignity of people with disabilities, rooted in the old paradigm (disability as an individual defect needing charitable care or medical supervision). They also include the need to recognize people with disabilities as protagonists for our own rights and advancement, as recognized in the slogan “Nothing about us without us.”
3. Technical challenges reflect the need to change legal concepts and doctrine in order to incorporate the new paradigm into domestic law. For example, traditional views on “competence” as an element of valid consent are not compatible with the CRPD insistence on legal capacity as a universal right; similarly the CRPD requires re-thinking of criminal law doctrine holding that people with certain kinds of disabilities are exempt from criminal liability.
4. Practical challenges are those involved in creating good supportive measures and ensuring that they are available to all who need them. They include: fostering the capability to create relationships that support autonomy of people with disabilities within families and communities; developing personal assistance-type services to provide support for those who may not have “natural supports” in their lives or who prefer arm’s-length assistance; providing training and resources to ensure that doctors’ offices, banks, lawyers’ offices, courtrooms, and other places where

legal acts and transactions take place are able to make the exercise of legal capacity in their fields accessible and accommodating to the needs of people with disabilities.

5. Practical challenges also reflect the need to apply the new paradigm in transformative ways to all relevant situations, for example, to transform mental health services from a paternalistic and coercive model to one that respects freedom, dignity and autonomy. One way this can be done is by using a trauma-informed approach, which has been described as follows:

A trauma-informed approach is based on the recognition that many behaviors and responses (often seen as symptoms) expressed by [people with psychosocial disabilities] are directly related to traumatic experiences that often cause mental health, substance abuse, and physical concerns. For many [people with psychosocial disabilities], systems of care perpetuate traumatic experiences through invasive, coercive, or forced treatment that causes or exacerbates feelings of threat, a lack of safety, violation, shame, and powerlessness. Unlike traditional mental health services, trauma-informed care recognizes trauma as a central issue. Incorporating trauma-informed values and services is key to improving program efficacy and supporting the healing process.⁶

6. In addition, non-violent and non-discriminatory law enforcement and conflict resolution processes need to replace the use of mental health services to remove people from their homes and communities in response to disputes with others. While this more properly belongs to Article 14, it is part of the transformative paradigm of legal capacity as autonomy and entitlement to support that respects autonomy, applied to mental health services.
7. Philosophical challenges allow us to continue questioning the right balance and relationship between autonomy and support. When does support become a euphemism for control? Is it ever justified to reach out and do more for a person than she has explicitly authorized? How can we know if we are doing the right

⁶ Brochure of the National Center for Trauma-Informed Care, U.S. Center for Mental Health Services, http://www.samhsa.gov/nctic/docs/NCTIC_Brochure.pdf.

thing? (The interface between technical and philosophical challenges has to be resolved as well, for example, by not creating legal mechanisms to override a person's will and allowing any arrangements that permit others to make decisions for us to exist only so long as they operate by mutual consent.)

III. How can some of the challenges be addressed by applying formal equality and the principles of inclusive design, accessibility, reasonable accommodation and positive measures to ensure de facto equality, to legal capacity?

Formal equality: Laws authorizing guardianship and substituted decision-making against a person's will, declaring unequal legal capacity, or authorizing any forced or coercive measures against people with disabilities beyond those applicable to the general population, must be repealed.

Inclusive design: Normative standards must be designed inclusively so as to be relevant to persons with disabilities as well as others who might benefit from them. This applies in particular to laws aimed at protecting the weaker party to a transaction and preventing abuse, in such areas as financial and property matters, health care decisions, and the professional responsibility of attorneys and others. For example, consumer protection laws and laws on free and informed consent in health care should be reviewed to determine how well they protect the rights of persons with disabilities in those transactions, and revised to strengthen the guarantees generally or make them more relevant to persons with disabilities, as needed. Inclusive design also applies to laws dealing with the determination of liability and imposition of penalties. In the criminal context, this means working with a restorative justice model to eliminate punitive responses while abolishing disability-based excuses from responsibility.

Inclusive design is also relevant to positive support measures. Persons who do not read and write, immigrants, and others who are disadvantaged by existing measures for exercising legal capacity may benefit from support programs created by and for persons with disabilities.

Accessibility: Accessible communication is the first step in supporting the exercise of legal capacity by persons with disabilities. This means ascertaining and using the means, modes and formats of communication preferred by the individual. Certain standardized measures (for example, Braille format materials) should be made regularly available in medical clinics and hospitals, professional offices, courts and police stations, banks, etc., as determined in accordance with Article 9, with the participation of relevant sectors of the disability community. Standardized measures, however, do not completely fulfill this obligation. Particularly in relation to legal capacity, individualized means, modes and formats of communication may be needed. This calls for the development of specialists including members of the disability community, who are skilled in communicating with persons with different types of disabilities.

Accessible communication is also relevant to safeguards. In determining whether any support measure meets the needs of a person with a disability, it is necessary to communicate with that person. Failure of communication is mutual and cannot be blamed on the person with a disability.

Reasonable accommodation: Reasonable accommodation is a principle that requires modification of environments and procedures when needed in a particular case to achieve equality in the enjoyment of human rights. This principle allows for flexibility in applying normative standards that may not fit a particular individual even though they may be inclusive of many others. In relation to legal capacity, this might mean extending deadlines or ignoring non-normative interpretation of rules related to a particular transaction, when necessary in the interest of justice.

Positive measures to achieve de facto equality: Support measures consisting of ongoing relationships with one or more persons functioning as a support network are central to Article 12. Support can be designed to meet the particular needs of the person concerned, whether that is to have information explained, to discuss the pros and cons of a decision, to vent emotions, to be helped to leave a situation and postpone the decision, to work

together on filling out forms, to understand nonverbal responses and interpret them to others, etc. Support networks can be drawn from family members, friends and community, peer support groups or paid workers who function under a personal assistance model (the user of services is entitled to direct the assistant). Support networks can be involved regularly and intensively, or used on an interim basis as needed.

IV. Conclusion

Article 12 is the heart of the Convention. If we can work out the challenges, we will transform society profoundly, to make it more inclusive not only in physical space (including people with disabilities in all places and environments) but in social relationships and interactions. The process of implementation cannot be rushed but it also cannot be delayed. People with psychosocial disabilities need to be involved in the implementation, since otherwise it might miss important aspects of life or important values relevant in the domestic context. Where strong organizations of people with psychosocial disabilities do not exist, or where they do not have a good knowledge of the CRPD, capacity building needs to be an early part of the implementation process. People should be made aware that Article 12 does not take away any support that an individual may count on, including medical services that a person wants to continue using. On the contrary, it represents an expansion of possibility that should allow all people with disabilities to make the maximum use of resources available in society for personal development and contribution to the collective good.