

**Legal Opinion on Article 12 of the CRPD**

June 21, 2008

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Several questions are raised around Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD). Some of these questions which are common across jurisdictions and have been raised in different parts of the world are as follows: how has legal capacity been constructed in the CRPD? Does it include both the capacity to have rights and the capacity to act? If yes then has this legal capacity been extended to all persons with disabilities or have certain persons been excluded? If not, will it be permissible for a State to enter reservations on those parts of the article which guarantee universal legal capacity?

In order to facilitate State understanding of their obligations under the CRPD generally and article 12 more particularly we are setting down the following legal opinion.

### **Construction of Legal Capacity**

Legal capacity consists of two integral components: the capacity to hold a right and the capacity to act and exercise the right, including legal capacity to sue, based on such rights. Both these elements are integral to the concept of legal capacity hence recognition to the legal capacity of any group or individual mandates recognition of both these elements. It has been found that denial of legal capacity to any individual or group has also meant negation of both the right to personhood and the capacity to act. On the study of municipal legislations, it has also been found that whenever such discriminatory laws have been challenged, they have been at first replaced by legislations which accord symbolic recognition to the rights of the excluded group, thus whilst the capacity to hold rights is recognized, the capacity to exercise those rights continues to be denied.

In comparison international human rights law, which has often been adopted to counter discriminatory municipal legislations, constructs legal capacity to include both the elements of identity and agency. Article 15 of the Convention on the Elimination of Discrimination of Women is a case in point.

Article 1 of the UN Convention on the Rights of Persons with Disabilities states that the purpose of the Convention is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities .....” This purpose has to be furthered by all the provisions of the CRPD including the article on legal capacity. And the text of article 12 would need to be read informed by this objective.

### **Identity and Agency**

By paragraph (1) of Article 12 State Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. This paragraph of article 12 addresses the identity requirement of legal capacity and recognizes the personhood of persons with disabilities.

Paragraph 2 of article 12 provides that “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.” A non-disabled citizen who owns real estate, or a car, a horse or a book is entitled to sell the house, to hire the car, gift the horse or lend the book. All these and similar dispositions as an owner are a part of his or her legal capacity. Paragraph (2) by extending the same rights to persons with disabilities fulfils the agency requirement of legal capacity. The non negotiable nature of this commitment is evidenced by the inclusion of individual autonomy, non discrimination and equality of opportunity in the list of General Principles which the States are under an obligation to uphold. This obligation would require that the States both refrain from actions that undermine the principles and initiate efforts which would promote them.

That paragraph (2) of article 12 provides for the agency requirement of legal capacity is further borne out by the remaining paragraphs of article 12. Thus paragraph (3) of art 12 requires States Parties to “take appropriate measure to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. Article 12

(4) concerns itself with the need to guard against the abuse of such support and does so by making provision for appropriate and effective safeguards. Article 12 (5) explicitly mentions that persons with disabilities should be able to inherit, manage financial affairs and own property. Thus both on a purposive and a textual interpretation of article 12 it can be concluded that legal capacity in the CRPD has been constructed like CEDAW to include both the capacity for rights and the capacity to act.

### **Universal Legal Capacity**

On the question whether the CRPD guarantees legal capacity to all persons with disabilities it would be necessary to note that a definition of disability has not been incorporated in art 2 of CRPD. However an inclusive definition finds place in article 1. Such definition includes persons who have long-term physical, mental, intellectual or sensory impairments. Evidently the CRPD has employed the strategy of explicitly naming certain groups in the definition in order to highlight their higher discrimination and the greater need for strategies of empowerment. If national legislations and state practices are examined, it is found that it is these groups of persons with disabilities who are denied legal capacity. The deliberations surrounding the Convention show that the need for a separate Convention for persons with disabilities was felt because the extant human rights Conventions were not disability inclusive and could not provide the requisite justification to challenge exclusionary national laws. In the face of this overarching commitment to the goal of inclusion in the Convention, it is logical to conclude that article 12 would have been drafted in consonance with this larger objective of the CRPD.

We find upon examination of the preparatory papers, that the adoption of the paradigm of universal legal capacity was questioned because it was feared that it did not adequately address the concerns of persons with high support needs. It was due to this apprehension that paragraph (3) placed an obligation on State Parties to make provision for support and paragraph (4) was drafted to encompass a range of safeguards against abuse of support. Persons with high support needs may have been one group of persons who could have

been denied full personhood and legal capacity, if the provision for support had not been made in article 12. However the combined reading of the definition of disability and the duty to provide support leads to the conclusion that article 12 has been formulated to bring within its aegis all persons with disabilities. This support could be of personal assistants or peers or may even be just a written declaration of the preferences of the person with disability. What the Convention requires is that the support should be based on trust, be provided with respect and not against the will of the person with disabilities.

### **Reservations**

The last question we were required to address was whether states could enter reservations against article 12?

Article 46 of the CRPD and article 14, paragraph 1 of the Optional Protocol to the Convention, do not permit reservations that are incompatible with the object and purpose of the CRPD. Equality and non discrimination along with respect for dignity, individual autonomy and freedom to make one's own choices have been recognized as the general principles of CRPD. The general principles were included to render the object and purpose of the Convention explicit. A reservation on article 12 is antithetical to each of these principles and hence not permissible by article 46 of the Convention.

Further if a reservation is entered to either circumscribe the meaning of legal capacity or to limit the persons with disabilities included under the provision the limitation will not be confined to article 12 alone but will also extend to the other rights guaranteed under CRPD be it: the right to education or the right to work or freedom of speech and expression or political participation. Such a consequence would be destructive of both the letter and spirit of the CRPD and hence unimaginable.

The CRPD by devising the supported decision making model of legal capacity has made an innovative effort to recognise the aspirations of all persons with disabilities; we have issued this legal opinion in order to assist informed understanding of this innovation.

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Argentina:

Santos Cifuentes  
Estudio Jurídico Cifuentes y Asociados  
Ex Profesor Titular de Derecho Civil, Facultad de Derecho, Universidad de Buenos Aires  
Académico de Número de la Academia Nacional de Derecho y Ciencias Sociales Ciudad de Buenos Aires  
Argentina

Christian Courtis  
School of Law/Facultad de Derecho  
University of Buenos Aires/Universidad de Buenos Aires  
Buenos Aires  
Argentina (on leave)

Currently:  
Legal Officer for Economic, Social and Cultural Rights/Director del Programa sobre Derechos Economicos, Sociales y Culturales  
International Commission of Jurists/Comision Internacional de Juristas  
Geneva/Ginebra  
Switzerland/Suiza

Agustina Palacios  
Directora de la Dirección de lucha contra la Discriminación y la promoción de Derechos Humanos, Mar del Plata, Argentina  
Profesora de la Facultad de Derecho de la Universidad Nacional de Mar del Plata, Argentina  
Coordinadora de la Sección Discapacidad de la Cátedra de Igualdad y No Discriminación "Norberto Bobbio"  
Instituto de Derechos Humanos "Bartolomé de las Casas"  
Universidad Carlos III de Madrid  
Mar del Plata  
Argentina

Australia:

Duncan Chappell  
Professor of Law  
University of Wollongong  
New South Wales  
Australia

Bernadette McSherry  
Australian Research Council Federation Fellow  
Rethinking Mental Health Laws Project  
Faculty of Law  
Monash University  
Clayton  
Australia

Brazil:

Ana Paula Crosara de Resende  
CVI-BRASIL Conselho Nacional dos Centros de Vida Independente  
APARU - Associação dos Paraplégicos de Uberlândia  
Instituto dos Advogados de Minas Gerais Seção Uberlândia  
Advocacia Catani e Crosara  
Uberlândia - MG  
Brasil

Patrícia Garcia Coelho Catani  
Advocacia Catani e Crosara  
Uberlândia - MG  
Brasil

Chile:

María Soledad Cisternas Reyes  
Directora del Programa Jurídico sobre Discapacidad  
Facultad de Derecho  
Universidad Diego Portales  
Santiago  
Chile

Costa Rica:

Rodrigo Jiménez  
Professor  
University of Costa Rica  
Master Degree in Disabilities Studies  
San Jose  
Costa Rica

Denmark:

Holger Kallehauge  
Ex High Court Judge and Deputy Parliamentary Ombudsman  
Fhv. Landsdommer

Frederiksberg  
Denmark

India:

Amita Dhanda  
Professor of Law  
NALSAR University of Law  
Hyderabad  
India

Ireland:

Gerard Quinn  
Main Statutory Chair in Law  
National University of Ireland  
Galway  
Ireland

Japan:

Yoshikazu Ikehara  
Tokyo Advocacy Law Office  
Hongo Bunkyo-ku  
Tokyo  
Japan

Makoto Iwai  
Yuri Sogo Law Office  
Shinbashi Minato-ku  
Tokyo  
Japan

Hirobumi Uchida  
Professor, Department of Private and Criminal Law  
Kyusyu University  
Hakozaki, Higashi-ku  
Fukuoka  
Japan

Mitsuhide Yahiro  
Nishijin Kyodo Law Office  
Nishijin Sawara-ku  
Fukuoka  
Japan

Mexico:

Santiago Corcuera Cabezut  
Consejero de la Comisión de Derechos Humanos del Distrito Federal  
Maestro (Master Degree, LLM) en Derechos Humanos  
Miembro del Comité de la Convención Internacional para la Protección de Todas las Personas contra Desapariciones Forzadas de Naciones Unidas  
México, D.F.  
México

Carlos Ríos Espinosa  
Consejero de la Comisión de Derechos Humanos del Distrito Federal  
Maestro (Master Degree) y Profesor del CIDE Centro de Investigación y Docencia Económica  
México, D.F.  
México

Netherlands:

Lisa Waddington  
Extraordinary Professor in European Disability Law  
Faculty of Law  
Maastricht University  
Maastricht  
The Netherlands

New Zealand:

Susan Jane (aka Huhana) Hickey  
Auckland Disability Law  
Mangere Community Law Centre  
Auckland  
New Zealand

Nicaragua:

Carlos Emilio Lopez  
Ex-Procurador de los Derechos de la Niñez  
Profesor Universitario en Universidades Públicas y Privadas en las facultades de sociología y derecho; Universidad Centroamericana, Univalle, Paulo Freire y Escuela Judicial de la Corte Suprema De Justicia  
Managua  
Nicaragua

Peru:

Juan Vicente Ugarte del Pino  
Presidente de la Excelentísima Corte Suprema de Justicia de Perú (1987)  
Magistrado del Tribunal de Justicia de Acuerdo a Cartagena  
Miembro Correspondiente de la Real Academia de Ciencias Morales y Políticas –  
España (1988)  
Presidente del Curatorium de Doctores del Perú  
Vicepresidente del Instituto de Derecho Indiano y de Estudios Clásicos  
Director de la Sociedad Peruana de Historia  
Director del Instituto Peruano de Historia del Derecho  
Lima  
Perú

United Kingdom:

Peter Bartlett  
Nottingham Healthcare NHS Trust Professor of Mental Health Law  
Faculty of Social Sciences, Law and Education  
University Park  
Nottingham  
United Kingdom

United States of America:

Robert Dinerstein  
Professor of Law  
American University  
Washington College of Law  
Washington, D.C.  
USA

Arlene S. Kanter  
Professor of Law  
Meredith Professor of Teaching Excellence  
Director, Disability Law and Policy Program  
Co-Director, Center on Human Policy, Law, and Disability Studies  
Syracuse University  
Syracuse, New York  
USA

Tina Minkowitz  
Attorney  
Center for the Human Rights of Users and Survivors of Psychiatry  
Chestertown, New York  
USA

Michael L. Perlin  
Director, International Mental Disability Law Reform Project  
Director, Online Mental Disability Law Program  
New York Law School  
New York, New York  
USA

Stephen A. Rosenbaum  
Lecturer in Law, University of California, Berkeley  
Lecturer in Law, Stanford University  
Staff Attorney, Disability Rights California dba Protection & Advocacy  
Inc.  
Oakland, California  
USA

Susan Stefan  
Center for Public Representation  
Newton, Massachusetts  
USA

Michael Stein  
Executive Director, Harvard Project on Disability  
Harvard Law School  
Cambridge, Massachusetts  
USA

Michael Waterstone  
Professor of Law  
Loyola Law School  
Los Angeles, California  
USA