



Convention on the Rights of Persons with Disabilities

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Summary record of the 6th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 21 October 2009, at 3 p.m.

Chairperson: Ms. Yang Jia (Vice-Chairperson)
later: Mr. Al-Tarawneh

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The meeting was called to order at 3.10 p.m.

Day of general discussion on article 12 (continued)

1. **The Chairperson** said that working group 2 would be discussing the practical measures necessary to implement the obligation to promote the right to equal recognition before the law. The group would focus on, inter alia, the challenge of incorporating that right in the law and of implementing the obligations arising under article 12, including the obligation to provide persons with disabilities with access to the support that they might require in exercising their legal capacity and to ensure the right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans and other forms of financial credit. It would also examine the role of an independent and impartial review authority under article 12, paragraph 4, and other possible safeguards.
2. **Ms. Cisternas Reyes** said that human rights must be enjoyed by all, including persons with disabilities. That principle was enshrined in the declaration adopted by the Committee at its first session, entitled “Committee on the Rights of Persons with Disabilities: Looking forward” (CRPD/C/1/2, Annex VI). The Committee recognized the importance of supporting persons with disabilities and changing the ways in which they were supported and had called on civil society to participate in the process of change that it had launched. The hallmark of the Committee’s work was solidarity. In examining article 12, it sought to identify the universal principles underpinning human rights. While drawing particular attention to articles 11, 12 and 13, she stressed the need to take into account economic, social and cultural rights, which must also be enjoyed by persons with disabilities. The achievement of the full enjoyment of the rights of persons with disabilities, in all aspects of their lives, would serve to enhance recognition of the rights of all persons.
3. **Ms. Al Suwaidi**, Rapporteur, said that the current meeting would contribute greatly to the promotion of the rights of persons with disabilities. What she learned from interacting with participants would help her to assist persons with disabilities in Qatar more effectively. She would be trying to convince her Government to apply the provisions of the Convention to the letter.
4. **Mr. Könzei**, Rapporteur, said that he wished to highlight two aspects of the statement made by Ms. Dhanda, the keynote speaker at the previous meeting. Firstly, he welcomed the progress made on a new handbook on article 12, which would help to clear up some of the misunderstandings generated by the *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*. Secondly, the keynote speaker’s statement had stressed the importance of listening. His role as a Rapporteur was to listen to civil society and the States parties to the Convention, regardless of whether they had objections or reservations to article 12.
5. **Mr. Deutsch** (Advocacy France), speaking on behalf of Disabled Peoples’ International (DPI), said that publicity campaigns and education programmes should be conducted to change the hearts and minds of people with respect to the rights of persons with disabilities. The prison system should be reformed to ensure that, when persons with disabilities were deprived of their liberty, they were not denied the right of access to appropriate support and health care. Guardianship measures must be repealed. The United Nations should urge States to take steps to amend existing laws on guardianship and to allow persons with disabilities to choose one or more persons whom they trusted to provide them with the support that they required. Special laws concerning persons with disabilities must also be abolished, as they were discriminatory. Lastly, States should be called on to establish a national mechanism to support and monitor the implementation of the Convention.

6. Advocacy France, an association of users of mental health care, had actively campaigned for the ratification of the Convention and for amending legislation on guardianship, in accordance with article 12. It also sought to ensure that French law was consistent with the Convention, particularly the law on guardianship. Currently, persons with disabilities must request the authorization of their guardians to get married. Advocacy France encouraged persons with psychological and psychosocial disabilities to speak on their own behalf and campaigned to make sure that their voices were heard.
7. Despite progress towards the recognition of a place in society for users of mental health care, as evidenced by the law of 11 February 2005, which recognized psychological disability, attitudes towards persons with such disabilities remained discriminatory. Taboos must be broken with respect to persons with psychological disabilities, just as they had been broken for persons with cancer or HIV/AIDS. There could be no health without mental health. Persons with psychosocial disabilities should have the right to participate in social life and decision-making, a right recognized for all persons with disabilities. While the right might be recognized, the necessary legal provisions were not yet in place. Furthermore, while it was possible to assess the need for a ramp for persons with reduced mobility, for example, it was more difficult to evaluate the measures needed to accommodate persons experiencing anxiety.
8. Persons with psychological disabilities were particularly vulnerable in matters concerning fundamental rights such as the right to decent living conditions, work and education. Young persons with mental health problems increasingly ended up on the streets. They should be afforded the opportunity to work and working conditions should be flexible. Persons in need of care should not be likened to criminals and their right to privacy violated. Community outpatient centres and crisis centres must be developed. There were genuine means of bringing society together in solidarity. Progress could be made towards greater humanity, responsibility and respect for differences.
9. **Ms. Minkowitz** (Center for the Human Rights of Users and Survivors of Psychiatry, World Network of Users and Survivors of Psychiatry) commended a Costa Rican law reform project concerning legal capacity to the Committee and the Office of the United Nations High Commissioner for Human Rights. She recalled that universal legal capacity should be understood as the equal right to make decisions. Support must be made available to persons with disabilities to facilitate their decision-making. Such support was not a restriction of legal capacity. Legal capacity implied responsibility for decisions taken. Children had an evolving legal capacity and rights associated therewith.
10. Furthermore, there was a clear distinction between the model of supportive measures for persons with disabilities and the old model of substituted decision-making.
11. Supportive measures were needed even when a person did not seem to be communicating, for example if they were in a coma. Some communication was always possible, as it was a two-way process, not a personal ability.
12. There should be laws protecting the exercise of legal capacity for everyone, including persons with disabilities. In a financial transaction, for example, it was not just persons with disabilities who might be taken advantage of, but also persons who were unused to such transactions, or who were illiterate, or foreign to a country. Laws should be framed in such a way as not to focus specifically on persons with disabilities, as such an approach tended to be paternalistic and overprotective and restricted individuals' rights of self-determination.
13. Accessible communication, as protected by articles 9 and 21 of the Convention, was an important factor in situations where free and informed consent was required. Accessible communication with persons with intellectual and psychosocial disabilities could mean having a non-threatening manner, giving very clear information and not using jargon, and

allowing the person concerned to ask questions. Accepting the person's chosen means, modes and formats of communication was also important.

14. Reasonable accommodation, as defined in article 2 of the Convention, was another way to support the exercise of legal capacity. It could mean modifying the rules for minor infractions if a person understood those rules in an unorthodox way. That did not imply taking a paternalistic approach because of their disability, it meant trying to understand what accommodations needed to be made for them so that they could enjoy and exercise their rights on an equal basis with others.

15. Support networks should be made available to people with and without disabilities, and could be formal or informal. The level of formality could be decided in the context of safeguards.

16. She read out five recommendations suggested for adoption by the Committee.

17. First, no person should be prohibited from exercising legal capacity based on a disability.

18. Second, disability-neutral measures should be available to protect against harsh, abusive and unfair consequences of an exercise of legal capacity. Such measures should be designed so as to be relevant to persons with disabilities as well as others.

19. Third, compulsory medical treatment of an intrusive and irreversible nature, that was without a therapeutic purpose or was aimed at correcting or alleviating a disability, might constitute torture or ill-treatment, and any laws permitting such treatment to be administered without the consent of persons with disabilities must be abolished.

20. Fourth, support for the exercise of legal capacity included accessible communication, informal support provided naturally by family and friends, and intentional creation of supported decision-making relationships and networks. All supporters had an obligation to respect the person's rights, will and preferences and to be free from conflicts of interest and undue influence.

21. Fifth, safeguards to prevent the abuse of support must be aimed at providing remedies against abuse, ensuring that support was adequate to meet the person's needs, and protecting the exercise of individual autonomy. Safeguards might be incorporated into the design of support, and might also consist of formal registration and legal accountability of supporters. Persons with disabilities using support should have the option of having different levels of safeguards applied, so that the safeguards did not restrict their legal capacity.

22. **Mr. Bach** (Inclusion International) said that legal capacity was a very practical issue – it concerned the right to make health-care, property and personal life decisions. If people did not have legal capacity, they would not be able to enjoy many of the rights that were supposedly protected in the Convention. One task in terms of law and policy reform was to decide how to ensure that people's right to legal capacity and to exercise legal capacity was provided in theory and in practice.

23. The State protected the right of individuals to make decisions about their life, for example about health care. It also imposed a legal requirement on physicians to obtain informed consent from individuals before treating them. Similarly, financial institutions could only enter into financial agreements with a person who had the requisite contractual capacity. The State also provided a regulatory framework that established obligations for contractual capacity within the community, for example in employment and housing.

24. The Convention was concerned with giving people the decision-making status they required to participate in the community. Participation in the community could only take place if individuals had the right to make the necessary decisions about the form of their

participation. The law provided, for the most part, that they could make those decisions autonomously, but there were many examples of such autonomy being systematically denied, particularly to persons with psychosocial and intellectual disabilities, whose decisions were taken for them by a guardian or substitute. That had been recognized as a fundamental violation of a person's right to make their own decisions.

25. Article 12 introduced the duty to accommodate. Not recognizing that someone needed plain-language assistance in order to protect their autonomous participation in the community was often a reason for shifting to substitute decision-making. Physicians or dentists, for example, could need training to understand different forms of communication, and that should be provided.

26. The overall provision of assistance to decision-making could be called "assisted decision-making", and that could involve training for physicians, a communication device for patients, or the use of plain language to guide interaction. Very clear guidelines on accommodating someone's right to autonomous decision-making needed to be drawn up as part of law reform work.

27. Individuals who had been institutionalized, who were unable to communicate in a way that a physician could understand, or who did not have people they trusted around them, still had a right to make decisions, and physicians and other actors also had a duty to obtain informed consent from them. Supported decision-making should be provided in those cases, so that their participation in the community was mediated by a network of people that they had appointed themselves, and with whom they had a fiduciary relationship of responsibility.

28. Supported decision-making, through networks appointed by the persons concerned, was an alternative to giving informed consent autonomously, but it was important not to impose such networks or representation on them. If they wished to participate in the community autonomously, their right to do so must be protected.

29. A massive reform of substitute decision-making was required. In that context, and in implementing article 12, efforts should focus on building the infrastructure and the funding framework for supported decision-making. All that many people with intellectual and psychosocial disabilities required was individualized assistance in order to be understood when they entered into legal contracts.

30. To put supported decision-making into practice, the State must first recognize the individual's right to support and advocacy and provide for a process in which individuals, not the court, could appoint representatives to assist them in their decision-making. One of the ways of doing that was to lower the threshold of capacity for making such appointments. There were legislative examples of the obligation to demonstrate that someone did not have the capacity to make such appointments being imposed on physicians or the court. The State also needed to establish a system for recognizing and giving status to the representative network and providing resources to the community in order for those networks to be built.

31. Secondly, depending on the legal system, legal recognition of the network might be necessary. Monitoring of the network was also needed because of the potential for conflict between people competing to provide support.

32. Thirdly, the State would continue to protect physicians, landlords and employers and would require them to obtain informed consent or contractual capacity, as appropriate. However, laws were also needed that imposed on those parties the duty to accommodate different forms of communication and expression, and the State also needed to fund the community's capacity to provide support and advocacy and a range of options for persons with disabilities.

33. The final outcome would be the establishment of a network that would listen, advise, help and represent the person concerned and connect them to the community. Supported decision-making networks should be seen as just one component of an assisted decision-making infrastructure. Individuals must have the right to accommodation for autonomous decisions, as recognized in article 12 of the Convention. However, it would be difficult to define the trigger threshold for the duty to accommodate for supported decision-making.

34. **The Chairperson** said that the effective implementation of article 12 was extremely important. Efforts were being made throughout the world to that end. China, for example, which had 83 million persons with disabilities, had held a Disability Day in 2008, which had been accompanied by the launch of a campaign to establish legal aid centres for disabled persons.

35. **Ms. Olivera West** (Mexico) said that she would be grateful if the Committee could give some examples of the kind of safeguards that should be put into place, and in what areas, in order to prevent abuse. She also wished to know how the Committee understood the principle of proportionality, under article 12, paragraph 4, which required safeguards to be proportional to the degree to which such measures affected the person's rights and interests. If the Committee decided to draw up a general comment on article 12, she hoped that that comment would take account of the problems and challenges encountered by States parties, as described in their reports.

36. **Ms. Cisternas Reyes** recalled that the general principles set out under article 3 of the Convention underpinned all work to protect the rights of persons with disabilities. Some examples of the safeguards necessary to prevent abuse were described in article 12, and included regular review by a competent, independent and impartial authority or judicial body of the measures taken to ensure that the exercise of legal capacity respected the rights, will and preferences of the person.

37. As could be seen from article 12, paragraph 4, the safeguards applied to all areas of the exercise of human rights. For example, in the area of access to justice, covered in article 13, there were certain kinds of safeguards that could come into play, such as the participation of public defenders and free legal aid for persons with disabilities, and other measures such as appropriate training for those working in the field of administration of justice, including police and prison staff. Similarly, relevant safeguards would need to be applied to protect the interests of children with disabilities, as covered in article 7 of the Convention.

38. The necessary safeguards applied across the board, to all the fields covered by the various articles of the Convention. They were all governed by the general principles of the Convention, as set out in article 3, and by the overarching principle that the persons themselves must agree to any measures taken.

39. With regard to the issue of proportionality, it was clear that not everything could be regulated by law. In that regard, the work of awareness-raising described in article 8 of the Convention was particularly important, in order to combat stereotypes, prejudices and harmful practices relating to persons with disabilities. It was necessary to train those working with persons with disabilities to ensure that all measures taken in respect of a particular person took account of their individual situation and particular needs, in accordance with the principle of proportionality.

40. Proportionality had to be ensured on a case-by-case basis, in accordance with the general principles of the Convention and the relevant provisions of law. The requirement to promote appropriate training for those working in the field of administration of justice, contained in article 13 of the Convention, was particularly relevant in that regard. It was not only a matter of the legislation in a particular country, but of how individual judges interpreted that legislation. Judges therefore needed to be trained to apply the principle of proportionality, and to ensure that the rights, will and preferences of the person with

disabilities were a key factor in any measures relating to the exercise of his or her legal capacity.

41. With regard to the drafting of a general comment, she agreed that detailed analysis of the State party reports and NGO reports received from civil society would enable the Committee's work in that regard to be as relevant, accurate, and substantive as possible.

42. **Ms. Hausner** (Austrian Monitoring Committee) said that one of the core principles of the Austrian Monitoring Committee's work was the need for persons with disabilities to be enabled to participate in all aspects of decision-making across all spheres of life. In other words, "nothing about us without us" or, in the context of equal recognition before the law, "nothing about me without me".

43. In her view, governments had an obligation to ensure that persons with disabilities and their representative organizations were involved and closely consulted in the development and implementation of legislation and policies aimed at implementing the Convention, as provided in article 4, paragraph 3. The nature and fundamental importance of meaningful implementation of equal recognition before the law required the obligation to involve organizations for persons with disabilities to be effectively realized, in order to ensure their participation in discussions and deliberations on equal recognition before the law.

44. An excellent starting point for discussions on equal recognition before the law was the notion of independent living, for it exemplified the wide array of issues to be taken into account and addressed when discussing such recognition and putting the obligation into practice.

45. Taking into account the manifold aspects of independent living, all of which centred on ensuring that individuals could make and enact their choices in all areas of life, the underlying concept provided a good basis for equal recognition before the law. In particular, it ensured that the linkage between the support envisioned in article 12 of the Convention and the personal assistance services foreseen in article 19 were strengthened and utilized. It was of paramount importance that experience with personal assistance systems, including all relevant stakeholders, should inform the debate on support systems to enable the exercise of legal capacity.

46. The focus on independent living also highlighted two other very important elements: the emphasis on the social model, concerning interaction between persons with disabilities and attitudinal, environmental and other barriers; and the important task of raising awareness of the factors that led to the exclusion of persons with disabilities.

47. The Austrian Civil Code, which was based on a model of substitute decision-making, drew a distinction between legal capacity and the capacity to act. While every person had legal capacity, there was the possibility of limiting the capacity to act. Consequently, guardianship was foreseen for those persons whose "reason" was deemed to require support from a third person. That support was provided through the system of guardianship enshrined in the Austrian Guardianship Act.

48. An overhaul of the Austrian Guardianship Act in 2007 had increased the subsidiary nature of guardianship and emphasized the support to be provided for the individual. The amendment had also increased the leeway available to judges — who appointed guardians — to limit the areas in which a guardian could intervene in the decision-making process. There was clearly a need to bring the current approach, based as it was on the model of substitute decision-making, into line with the Convention. The Monitoring Committee would spare no effort to ensure compliance with that instrument, not least in the area of equal recognition before the law, in line with the concept of independent living.

49. **Ms. Castro-Girona Martinez** (International Union of Notaries) recalled that Roman law had greatly influenced European and Latin American legislation, and the premise that a person either had, or lacked, legal capacity stemmed from that 2,000-year-

old perspective. It was time to overcome that prejudice. The issue was not, from a lawyer's point of view, whether a person was "capable", but whether he or she was capable of performing a particular action, which depended on many factors.

50. It was popularly assumed that the Civil Code system in Spain was a protection-based system. That was often not the case. Under the Spanish system, when the parent of a person with mental disabilities died, for example, that person was deemed to lack legal capacity. It was tantamount to the individual's "civil death". The person was prevented from exercising any right, and a tutor or guardian was appointed to act in his or her place. Under that system, persons with disabilities were often uprooted from small towns, where they perhaps enjoyed a certain level of integration and protection, to institutions located in cities, for example, for the sake of the appointed guardian's convenience. In her view, that system could not be said to be one based on protection.

51. The Spanish Civil Code, like other continental systems, was focused on the economic regulation of property, and was based on fear and abuse. Half a century earlier, people with disabilities had simply not survived, which meant that no regulatory system had been developed in order to ensure that they were supported. Hence, the existing system was one of substitute decision-making.

52. With the entry into force of the Convention in 2008, and the introduction of positive law into many continental systems, the situation was beginning to change. Rulings had been handed down in Argentina declaring procedures of substitute decision-making for persons with disabilities to be unconstitutional. It was therefore essential to implement the Convention in practice, and to that end lawyers and judges had to be properly trained.

53. It should also be borne in mind that there was not one uniform type of support system, but plural systems and plural measures. Just as physical ramps were required for persons with disabilities, there was a need for many different types of "legal ramps" – in other words, various mechanisms enabling persons with disabilities to exercise their rights and their legal capacity.

54. **Ms. Richardson** (New Zealand) said that her country attached great importance to the rights of persons with disabilities and had a vibrant civil society sector working in that field. Article 12 was the cornerstone of the Convention, and New Zealand had made appropriate amendments to its national legislation in advance of ratification. The country's domestic law now included a presumption of competence, which meant that persons with disabilities were presumed to be capable of managing their own affairs unless proven otherwise, and any automatic assumption that certain individuals did not have legal capacity was unacceptable. The legal capacity of persons with disabilities was in no way diminished if they required supports in order to exercise that capacity.

55. Despite the fact that many legislative issues had been resolved, the practical implementation of the Convention posed a number of challenges. For example, in principle, sign language was accepted as an official means of communication in New Zealand's courts, but in practice there was a shortage of sign language interpreters.

56. Her country looked forward to continued cooperation with the Committee and all stakeholders in order to achieve the objectives of the Convention.

57. **Mr. Lewis** (Mental Disability Advocacy Centre), said that reservations and interpretative declarations by States parties were a barrier to global implementation of the Convention. Egypt, for example, had entered an interpretative declaration stating that it recognized that persons with disabilities had rights, but did not recognize their capacity to exercise those rights. Egypt's position seriously undermined article 12, which was generally held to be integral to the purpose of the Convention. He asked whether, in the Committee's view, Egypt's interpretation of article 12 constituted a hidden reservation. He also asked what action was being taken by the Committee with respect to reservations and declarations

under article 12 and other articles, and what action it recommended to be taken by a State party which disagreed with another State party's reservation or declaration.

58. **Ms. Cisternas Reyes** said that the Convention stated clearly that reservations incompatible with the purpose of the Convention were unacceptable. The Committee had discussed at length the integral nature of article 12 and, in that context, attached great importance to the definition of discrimination on the basis of disability contained in article 2, which prohibited any distinction, exclusion or restriction on the basis of disability which had the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of all human rights. Declarations or reservations of the type entered by Egypt and other States parties could jeopardize the enjoyment of rights by disabled persons, but sovereign States were perfectly entitled to enter reservations. States parties needed to be made aware that it would be relatively simple to bring their legislation into line with the provisions of the Convention. Fortunately, the reporting process would give States parties an opportunity to reconsider reservations and declarations that ran counter to the purpose of the Convention. The Committee intended to prepare a general comment on the matter; civil society, meanwhile, needed to consider ways in which it could make a difference on a day-to-day basis.

59. With regard to the issue of disagreement between States parties on reservations and declarations, she said that the Conference of States Parties and other forums provided an opportunity for dialogue and debate on such matters. The Human Rights Council could also play a positive role in addressing the issue of legal capacity.

60. **Ms. Al Suwaidi** said that, during the process of ratification, the majority of delegations present had been delegations of technical experts. However, that had not been the case for Egypt, whose delegation had perhaps failed to grasp some of the intricacies of the technical provisions of the Convention. She recalled that many other delegations had entered reservations at the time of ratification.

61. **Ms. Cisternas Reyes** said that interpretative declarations and reservations were based on the application of the *pro homine* principle, which had been the subject of extensive philosophical, legal and sociological debate. It was vital for States parties entering reservations to reassess the implications of the *pro homine* principle in the light of article 12 and recognize that denial of the legal capacity of persons with disabilities on the pretext of protection was a distortion of that principle.

62. **The Chairperson** said that the day of general discussion had been extremely informative. It was encouraging to see that all parties concerned were genuinely listening to one another. She thanked all the participants for their input.

The meeting was suspended at 4.50 p.m. and resumed at 5.50 p.m.

63. *Mr. Al-Tarawneh took the Chair.*

64. **The Chairperson** said the Committee's first day of general discussion had provided considerable food for thought with regard to the content and scope of article 12. The Committee would take account of the recommendations made, particularly those relating to the need for a general comment on article 12 and to the issue of legal capacity.

65. In 2010, the Committee would begin its consideration of States parties' reports. To that end, it was finalizing its working methods and reporting guidelines. Following consideration of the reports, the Committee would make practical recommendations for implementation. In fulfilling its mandate, the Committee continued to welcome the numerous contributions made by non-governmental organizations (NGOs) that had worked to ensure the greater visibility of the Convention and its implementation at the national level.

66. The entry into force of the Convention had been a milestone in the field of human rights. The Committee would strive to monitor the Convention's implementation and

interpret its provisions constructively in order to improve the lives of all persons with disabilities.

67. **Mr. Trommel** (International Disability Alliance (IDA)) said that the Committee should pay close attention to the issue of reservations and declarations entered by States parties under article 12.

68. **The Chairperson**, in closing the session, thanked all participants. The day of general discussion represented a step forward in achieving equal recognition before the law of persons with disabilities, and two particularly significant points had been emphasized: the importance of listening carefully to persons with disabilities in the supported decision-making process, and the potential impact on the implementation of the Convention of discrepancies between a country's civil code and its constitution.

69. The support of civil society and academia was crucial in maintaining the momentum and balanced approach required to achieve the Convention's objectives. With regard to the application of article 12, the Committee would now begin to assist individual countries in finding the best means of implementation. In promoting equality and justice for persons with disabilities, article 12 upheld the ideals of the Universal Declaration of Human Rights.

The meeting rose at 6 p.m.