



Convention on the Rights of Persons with Disabilities

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Second session

Summary record of the 5th meeting

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Chairperson: Mr. Al-Tarawneh

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The meeting was called to order at 10.30 a.m.

Day of general discussion on article 12

1. **The Chairperson** said that the general discussion on article 12 of the Convention, relating to equal recognition before the law, should contribute to finding a proper balance between protecting the right of individuals to make decisions concerning themselves and assisting those who were unable to make decisions concerning themselves without support, particularly certain persons with disabilities. Persons with disabilities were discriminated against in all spheres of life, but there was a reluctance, all around the world, to modify debilitating institutional practices, such as inequality before the law. Article 12 guaranteed legal recognition to all persons, in all their interactions with the law, and its full import thus resided in the reaffirmation that persons with disabilities had the right to recognition as persons before the law, and thus to hold rights (legal personality) and to assert their rights (legal capacity) – two notions that were interdependent.

2. The Committee on the Rights of Persons with Disabilities called on States parties to take appropriate measures to help those persons whose disabilities prevented them from exercising their legal capacity on their own. In the case of supported decision-making, courts should ensure that intermediaries acted solely in the interests of those receiving assistance and that no personal or financial conflicts of interest existed. Courts should also ensure that those receiving assistance understood to the fullest extent possible the legal process and its consequences. That meant regulating the action of intermediaries and providing them with training. One of the most difficult situations imaginable was that of a person whose mental disability was so profound that it was impossible to determine his or her wishes directly. Questions then arose concerning the extent of intermediaries' authority and autonomy and how to regulate the different situations that might arise. That called for professionalism and understanding. The initial premise should be full recognition of the potential of persons with disabilities to express their wishes, although provision should be made for cases where it was impossible to determine an individual's wishes clearly.

3. At the same time, a procedure should be established for cases where there was a true loss of individual volition. In certain cases, corrective measures such as placement in an institution or prison would be detrimental to a person with mental disabilities, where care provided by professional caregivers and rehabilitation specialists would be more appropriate. When trying a person deemed to be a danger to others, courts should ensure that any measures taken to prevent that person from harming others took account of his or her mental disability. In the case of persons likely to harm themselves, support should be provided by highly qualified professionals who showed respect for the individual's wishes, but at the same time sought to protect the individual from self-harm by taking account of their particular disability.

4. States should also be mindful of declarations they made upon becoming signatories to the Convention. The United Kingdom, for example, had declared that any disability by its very nature made an individual unfit for any form of military service, but that ran counter to equality of treatment and equality in employment.

5. The rights of persons with disabilities had been enunciated in instruments other than the Convention on the Rights of Persons with Disabilities, but the aim of the Convention was to enable such persons to exercise those rights fully and it was therefore the Committee's task to ensure that courts, when dealing with cases involving persons whose capacity to act on their own was in doubt, should proceed with caution and discernment and assess the subjective elements rather than follow procedure blindly. In those cases, the Convention could offer valuable guidance.

6. **Mr. Salama** (Chief, Human Rights Treaties Division, Office of the United Nations High Commissioner for Human Rights) welcomed the diversity of participants taking part in the general discussion on article 12, which offered persons with disabilities the prospect of equal recognition before the law. The guarantee of a fair trial, in the language or mode of communication most suited to the person with disabilities, was a strong foundation on which the Committee could base its work. One of the key issues raised by article 12 was the choice between supported decision-making and substituted decision-making when the person concerned had a mental disability; there was also the question of what the most appropriate measure was for each situation (guardianship, ombudsman or other relevant services), something which article 12 did not specify. As a first step, supported decisions made before courts should be recognized and standards of accountability developed for those in the support role. When it had signed the Convention, Australia had indicated that it recognized both types of decision-making before the courts, depending on the situation. However, that raised the question of how to strike a balance between capacity to act and the real situation of persons with severe forms of mental disability.

7. Equal recognition before the law also raised the issue of absence of criminal responsibility by reason of insanity, which led to persons with specific types of disabilities being fully exonerated by the courts. There were those who argued that that type of defence should be abolished in light of the capacity to act, but that would not solve the problem of cases where the perpetrator of a crime had really suffered intellectual impairment, since what constituted loss of faculties would still have to be determined.

8. Full and complete implementation of article 12 would require awareness-raising and education campaigns to ensure that both those working with persons with disabilities and the public at large fully understood the notion of equality before the law. That, in turn, would lead to better dissemination of laws and norms and accelerate changes in attitudes. In States that had not yet become signatories to the Convention and its Optional Protocol, civil society should encourage the authorities to adopt those instruments, by, for example, arguing that the articles in the Convention were innovative and unique, particularly in the areas of supported decision-making, self-determination, and augmentative and alternative communication. Communities should come together to foster inclusive and supporting environments for members who required assistance, without stigmatizing them or using mental illness to exclude and isolate. Inclusion and integration were the fundamental principles of article 12.

9. **Ms. Dhanda** (Consultant to the Office of the United Nations High Commissioner for Human Rights) welcomed the fact that the Committee had chosen to devote its first general discussion to article 12, a key article of the Convention in that it established the principle of full legal capacity for all, including persons with intellectual or psychosocial disabilities, and the right to supported decision-making, thereby breaking with the traditional conception of disability. The Convention, which had been prepared with significant contributions from persons with intellectual or psychosocial disabilities, made it possible to think of disability in terms of a person's interaction with a given environment and social obstacles, thereby breaking with the model which had previously prevailed, in which disability had been seen from the perspective of an individual's specific characteristics.

10. Exclusion was due to mental barriers more than real physical barriers. Unfortunately prejudices, stereotypes, mentalities and attitudes were deep-rooted and it was therefore vital that all stakeholders involved in the discussion — persons with disabilities themselves, organizations, federations and associations representing them, Committee members and States parties — should all listen to one another, understand each other's aspirations, questions, apprehensions and opinions, and share knowledge, skills and experiences to

learn from one another with a view to implementing policy changes and ensuring that the rights of persons with disabilities enshrined in the Convention were fully realized.

11. She said that she was working on an OHCHR handbook on legal capacity that would clarify the concept, highlight discrimination inherent in existing legislation and facilitate planning of necessary legislative and policy reforms. She emphasized the participative and inclusive nature of the process, of which the day of general discussion was an integral part.

12. Two legislative reform initiatives were particularly relevant to the subject of legal capacity. India was currently working to bring its main legislative text on disability (the National Trust Act) into line with the Convention, especially with regard to the support that persons with disabilities, particularly those with an intellectual disability, might need in order to exercise their legal capacity. An extensive consultation process undertaken with civil society in different regions of the country had revealed that many people were completely unaware of the practical implications of the recognition of legal capacity for all or of State obligations in that area and that they tended to confuse the notions of “supported” and “substituted” decision-making. Given the scale of the task, the decision had been taken to begin by revising the National Trust Act, focusing on benefits and other social welfare measures that persons with disabilities should receive, and at the same time to reflect on the specific support that persons with disabilities might need. Initial fears, particularly those of parents of children with mental disabilities, had gradually been dispelled and the link between the provisions of article 12 and other rights enshrined in the Convention had become clearer. The idea of supporting persons with disabilities in exercising their legal capacity was gaining ground among both families and national authorities. The Supreme Court had recently started handing down judgements which tended towards the empowerment of persons with disabilities. It considered, for example, that the mere fact that a person had an intellectual disability was not reason enough for dispensing with his or her consent and taking decisions on his or her behalf, particularly regarding abortion. Lastly, in the light of article 12, India was reviewing its mental health legislation, which was based on the premise that persons with intellectual disabilities were lacking in legal capacity and dangerous and could not therefore take decisions on their own regarding not only medical treatment but also civil rights.

13. In Hungary, which had a Romano-Germanic legal system, disability law reform was a mainstream process and changes required to implement article 12 were seen as an integral part of Civil Code reform. Persons with disabilities and organizations of persons with disabilities, with the support of legal experts and technocrats, had spearheaded the campaign. Civil Code reform would lead to the abolition of systems of plenary guardianship and plenary limited guardianship, as well as recognition of the principles of supported decision-making and the full capacity of persons with disabilities to manage their affairs on their own or with the support of an assistant.

14. In conclusion, all human beings needed support to a greater or lesser extent and nobody in society was truly independent. Dialogue was the key to making article 12 a reality, particularly its provisions for supported decision-making.

The meeting was suspended at 11.30 a.m. and resumed at 11.50 a.m.

Working Group I: The legal contents of the right to equal recognition before the law

15. **Mr. Chowdhury** (Chairperson of Working Group I), opening the debate, pointed out that 650 million people in the world, 80 per cent of them in developing countries, lived with a disability and were exploited, victims of discrimination and deprived of their fundamental rights. Sight-impaired since the age of 7 years, he had himself been denied his rights on two occasions, having been refused entry to the teaching profession and later the legal profession on account of his disability, even though he had obtained the required

qualifications. Those two setbacks had led him to dedicate himself to the cause of human rights and, in particular, to take part in preparing the text of the Convention.

16. **Mr. Torres Correa** (Resource person of Working Group I) welcomed the opportunity the day of general discussion provided to share different opinions and to benefit from the participation of non-governmental organizations and their analysis of the situation.

17. **Ms. Maina** (Vice-Chair, Committee on the Rights of Persons with Disabilities, and Rapporteur of Working Group I) stressed that the Committee's first general discussion, on article 12 which lay at the heart of the Convention, was of great importance, especially for persons with mental or psychosocial disabilities, who faced major difficulties in accessing justice.

18. **Mr. McCallum** (Rapporteur of Working Group I), a jurist by profession, said that major legislative reform was required regarding the legal capacity of persons with disabilities, especially in the field of mental health and guardianship. He was counting on the general discussion to encourage the Committee to address those questions and to work towards such reform.

19. **Mr. Gombos** (Mental Disability Advocacy Centre) said that he was also speaking on behalf of the Hungarian Association for Persons with Intellectual Disability and as a person with a psychosocial disability. Reform of the Hungarian Civil Code had been on the agenda even before the Convention on the Rights of Persons with Disabilities had been adopted and the new Civil Code contained provisions on legal capacity. Following ratification of the Convention by Hungary and its subsequent entry into force, it had been necessary to review legislation on guardianship. At that time, no international forum had been in a position to assist Hungary in the matter and it had been impossible to rely on case law. Consequently, it had been necessary to approach civil society and organizations which had taken part in negotiations on the Convention at the international level or had been active in that area at the regional and national levels. He invited participants to refer to the text prepared by the coalition of NGOs he represented, which was available on the Committee website and which included a comparative study of existing regulations on legal capacity in Hungary and the proposed new regulations, which should be adopted once remaining obstacles had been overcome.

20. The concept of legal capacity was part of a complex, multidimensional framework which was influenced by prejudices shared by lawmakers, governments and civil society, who were not necessarily aware of the Convention, or of article 12 or its implications. It was therefore essential to educate, teach, share and negotiate in order to dispel any ambiguity regarding the text of the Convention. In order for the Convention to be successfully implemented, its two dimensions — both as a human rights instrument and as a tool for development — should be taken into account simultaneously and thereby reinforce each other. Lastly, he reminded Committee members that they were in a position to act decisively for the well-being of persons with disabilities, but it was vital that they should make use of the knowledge and skills made available to them by civil society.

21. **Ms. Minkowitz** (Center for the Human Rights of Users and Survivors of Psychiatry) said that supported legal capacity raised the issue of determining who was responsible for deciding on the need for support. In the case of persons with a severe intellectual disability, the person called upon to make such a decision might also need support.

22. With supported decision-making, everyone, with or without disabilities, was able to exercise their legal capacity and to make decisions concerning themselves. However, that raised the issue of assumption of responsibility. The right to make decisions and responsibility for those decisions were indivisible and any decision-making process had to include an acceptance of the consequences, both by the person who made the decision and by his or her immediate family and friends. The issue of the legal capacity of children,

recognized in article 7, paragraph 3, of the Convention also arose, and children with disabilities should not be considered any less mature on account of their disabilities.

23. **Mr. Weab** (Australian Federation of Disability Organisations) noted with concern that the notions of being a danger to others or to oneself were still used to justify making decisions on behalf of others, particularly in the field of psychiatry. While measures such as involuntary treatment or hospitalization might seem necessary in certain rare and extreme cases, great caution should be exercised when considering their basis, and the notion of dangerousness, an essential feature of the old paradigm, should not be invoked.

24. Turning to the question of suicide, he pointed out that measures to protect persons at risk of self-harm had not been proven to be effective and might even contribute to suicide. The question had not been studied scientifically but those sorts of measures which violated fundamental human rights could only cause suffering. Involuntary treatment was quite simply a form of aggression and could never be a real means of assisting those who were already in a state of psychological distress.

25. **Mr. Bach** (Inclusion International) said that the implementation of the new paradigm enshrined in the Convention presupposed questioning the reasons given hitherto to justify the decision to deprive some persons with disabilities of their legal capacity. Traditionally, legal capacity was defined as the capacity of a person to establish legal relationships with others and to make decisions which were respected and implemented on that basis. That definition was based on the premise that individuals had certain capacities, including the capability to understand the nature and consequences of their decisions and to communicate those decisions. Such an approach discriminated against persons with intellectual or psychosocial disabilities.

26. In contract law, the key criterion was mutual intention. The definition of legal capacity could be broadened on the basis of that concept. It was possible to express an intention, wish or resolve by non-conventional means. What was important was to ensure that persons with disabilities could receive the support they needed from those able to translate their form of language, verbal or otherwise, and to communicate their intention.

27. The question of legal capacity was also related to the concept of personal identity, which was itself often defined on the basis of reductive criteria, which presupposed a constant mental state and the ability to rationalize one's life and actions. In fact, personal identity was primarily a question of being seen as coherent by others. For persons with disabilities, that could mean having someone close who was able to narrate their life in a way that made sense to others.

28. Once those criteria were accepted, the different forms of assistance or support that were required to enable persons with disabilities to exercise their legal capacity had to be defined, and it had to be decided who determined the sort of assistance required and how and at what level it should be provided.

29. **Mr. Deutsch** (Disabled Peoples International) expressed regret that some countries, after signing the Convention, had taken no legislative measures to incorporate the new paradigm. He hoped that the silence and inaction of lawmakers would be short-lived.

30. **Mr. Trömel** (International Disability Alliance) pointed out that implementing article 12 would require amendments to the civil code or sometimes even the constitution of States parties, which would inevitably take time. The scale of the task was clear from the fact that legal experts themselves, who were well placed to understand article 12, still considered involuntary treatment as acceptable and compatible with the Convention.

31. Identifying specific groups as being in need of particular solutions could turn out to be a step backwards. If the Committee used categories, it should take particular care to

ensure that proposed solutions came within the framework of supported decision-making and not substituted decision-making.

32. There was also a risk that States might make interpretative declarations regarding article 12 when ratifying the Convention, which would in effect be reservations and would compromise implementation of that key article. As the Office of the High Commissioner had recommended in its thematic study, lack of criminal responsibility by reason of mental disorder should be replaced in legal systems by a more neutral provision which applied to all and which made no reference to the concept of disability. With respect to the notion of being a danger to others, the question was whether it was really possible to assess such a risk, and it was therefore preferable to avoid using that criterion so as not to perpetuate the old paradigm or encourage excessive use of methods based on it.

33. **Mr. Hzassat** (Jordan) asked how the Committee was intending to help States parties implement article 12. In particular, he wished to know whether the Committee was planning to prepare a general comment on the topic, which would take into account the different legal, political and social systems of States parties.

34. **Mr. McCallum** (Rapporteur of Working Group I) said that it was still too soon for the Committee to be able to prepare a general comment on article 12, but that article should indeed be the first to be interpreted by the Committee. He suggested placing the matter on the agenda of the next session.

35. **Mr. Chowdhury** (Chairperson of Working Group I) expressed the hope that States parties would soon take the measures required to incorporate the provisions of article 12 into their legislation. India, a developing country, had taken the lead. Persons with disabilities, through their commitment to overcome differences and barriers, affirmed both their membership of the human family and their right to live in dignity and equality. Their struggle also involved preventing conflicts and combating poverty, famine and malnutrition, which were also causes of disabilities. Both for their sake and for the sake of the hope and values they represented, the Committee should move forward.

The meeting rose at 12.55 p.m.