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Author(s)	de Bhailís, Clíona; Flynn, Eilionóir
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Recognising Legal Capacity: Commentary & Analysis of Article 12 CRPD

Abstract

This article aims to summarise the current understanding and literature around Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD). It provides a brief history of the key terms associated with the right to equal recognition before the law and encompasses both academic writing in this area and General Comment No. 1 from the Committee on the Rights of Persons with Disabilities. The content is intended to provide readers of the special issue with a general understanding of developments surrounding Article 12 so they can fully engage with the other articles within the special issue and with the content of the VOICES project as a whole.

Authors Contact Details

Clíona de Bhailís,
Centre for Disability Law and Policy, NUI Galway.
cliona.debhailis@nuigalway.ie
+353 (0)91494272

Dr. Eilionóir Flynn
Centre for Disability Law and Policy, NUI Galway.
eilionoir.flynn@nuigalway.ie
+353 (0)91494010

Recognising Legal Capacity: Commentary & Analysis of Article 12 CRPD*

Introduction

The right to equal recognition before the law is a key concept in international human rights law. It encompasses both the ability to be the holder of rights (including legal standing) and the ability to be an actor in law (legal agency). The Voices of Individuals: Collectively Exploring Self-determination (VOICES) project aims to reform the law in relation to legal capacity for persons with disabilities following the enactment of Convention on the Rights of Persons with Disabilities (CRPD). This article aims to summarise the current state of the art surrounding Article 12 of the CRPD and to provide readers of the special issue with a general understanding of the main concepts so they can fully engage with the other articles and with the content of the VOICES project as a whole.

Firstly, this article will summarise the history of the right to equal recognition before the law to place recent developments in context, before clarifying some key terms that appear across the literature in this area. We then examine Article 12 and General Comment No. 1 from the Committee on the Rights of Persons with Disabilities (2014) and their impact on the right to equal recognition before the law for persons with disabilities. Finally, we examine the state of the art following these developments

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exploring some of the main criticisms of Article 12 and the General Comment and the responses by leading scholars in the field of legal capacity, equality and disability.

Equal Recognition Before the Law

The right to equal recognition before the law was first codified in international law by Article 6 of the Universal Declaration of Human Rights (UDHR) in 1949. The Declaration was not a legally binding document; however, over the years its principles have come to be regarded as customary norms in international law (Haleem 1988). Since then the right has been featured in three international human rights treaties adopted by the United Nations.

Article 16 of the the International Covenant on Civil and Political Rights (ICCPR) adopted in 1966 contains the earliest expression of the right to equal recognition before the law in a legally binding treaty. The wording of the provision echoes that of the UDHR and an analysis of the treaty negotiations suggests a focus on legal standing over legal agency (Gooding *et al* 2015). Following the ICCPR in 1979 Article 15 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) set out the right to equal recognition encompassing both legal standing and legal agency. However, from 1979 until the adoption of the CRPD in 2006, no explicit reference to the right to equal recognition before the law is made in any subsequent UN human rights treaty.

The CRPD, adopted in 2006, was hailed as the single most exciting development in the disability field in decades (Quinn 2009). Although adopted in 2006 it only came into force in May 2008 and like many human rights treaties had been subject to years

of drafting and negotiation (Tromel 2009). Persons with disabilities and their representative organisations played a central role throughout drafting and adoption, as is reflected in International Disability Caucus' (2006) motto of 'nothing about us without us'. The overarching ideal behind the Convention is one of equality (Quinn, 2009) and this is evident in Article 1 which states that it aims to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities'. The CRPD has been identified as a catalyst for change, marking the paradigm shift from viewing persons with disabilities as objects of charity and medical treatment to identifying them as subjects with legal rights (Arbour 2006). The CRPD only reformulates existing rights in the context of persons with disabilities and does not create any new rights (Kayess and French 2008) as required by the mandate from the General Assembly under which the text was developed. However, there has been an on-going debate in the literature following the Convention as to whether this ideal was realised or whether the Convention did in fact create new rights for persons with disabilities (Mégret, 2008).

The monitoring provisions for the CRPD, set out under Articles 31 to 40, combine the traditional treaty monitoring body, found in other UN Human Rights treaties, with a Conference of State Parties and independent national mechanisms. The Committee on the Rights of Persons with Disabilities is established at the UN level as the monitoring body that oversees the implementation of the Convention. It is tasked with producing concluding observations and general comments on how to interpret the articles of the Convention. The Optional Protocol, when ratified, enables the UN Committee to receive both individual and group petitions or complaints from within States.

Article 12 builds on existing international provisions to apply the right to equal recognition before the law to persons with disabilities. It is comprised of five paragraphs, and is modelled on the previous treaties to set out a right to legal capacity on an equal basis with others for persons with disabilities. The right to legal capacity it articulates encompasses both legal standing and legal agency.¹ As noted above, persons with disabilities and their representative organisations played a key role in drafting the CRPD and, in particular, Article 12. For example, the World Network of Users and Survivors of Psychiatry drafted key demands to put before the Working Group that would draft the treaty text, including equal recognition before the law for persons with disabilities (Minkowitz 2013). At this early stage of drafting and negotiations, equal recognition before the law was found under Article 9 (Working Group to the Ad Hoc Committee 2004). It was even then, a very contentious issue and although many of the main points advanced by disabled peoples organisation's (DPO) were included in the Working Group text it was subject to dissenting opinions in the footnotes.

In 1999 many DPO's grouped together to form the International Disability Alliance (IDA) which was instrumental in the establishment of the International Disability Caucus (IDC) at the first Ad Hoc Committee meeting in 2002.² The IDC was open to persons with disabilities, disabled people's organisations and other allies (Trömel 2009). This allowed persons with disabilities and their representative organisations to have their voices heard at a UN level and have a significant input into the negotiations. From this, fundamental concepts were inserted or retained within the final text. These include the key language changes that included a strong statement that persons with

¹ For more detail on the norms on which Article 12 is based see Minkowitz (2010).

² For a more detailed review of the role of WNUSP and other organisations in the drafting of the CRPD see Minkowitz (2013).

disabilities have the right to legal capacity on an equal basis with others and a positive framing of the right to support to exercise legal capacity (International Disability Caucus 2005). In particular, the representative organisations of persons with disabilities worked to ensure that no legitimation of the concept of substituted decision making was included in the final text (Ad Hoc Committee 2006a). These developments can be tracked using the convention archives, clearly illustrating the development of Article 12, and what the IDC achieved with the support of some States Parties.³

The final text of Article 12 reads as follows:

Article 12 - Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity

³ To access all the documents which form part of the negotiation archive see United Nations, Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, available at <<https://www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html>> (accessed 23 November 2016).

Article 12 (continued)

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

This first paragraph in the final text of the Convention builds on the provisions of the ICCPR and reaffirms the right of persons with disabilities to be recognised as persons before the law.

The second paragraph, modelled on provisions found in CEDAW, outlines a right to legal capacity for persons with disabilities on an equal basis with others. As in CEDAW, this encompasses being both a holder of rights and an actor in law and both of these elements must be recognised for the right to legal capacity to be fulfilled (Committee on the Rights of Persons with Disabilities, 2014). However, during the final session of the Ad Hoc Committee the right was subject to a footnote, stating that, in certain languages, the term legal capacity referred only to being the holder in rights

and not an actor in law. After much debate this footnote was removed at the final meeting (Ad Hoc Committee 2006b) and the final text is as shown above.

Article 12 paragraph 3 places an obligation on states to provide supports to enable persons with disabilities to exercise legal capacity. Paragraph 4 requires States Parties to create safeguards to ensure that persons with disabilities can exercise their legal capacity. In the seventh session of the Ad Hoc Committee the IDC (2006) in conjunction with a group of States submitted changes which sought to ensure that allowing safeguards would not amount to allowing substituted decision making or guardianship. Some of the change in language suggested can be seen in the final text of the paragraph, above. The UN Committee on the Rights of Persons with Disabilities (2014) has subsequently clarified in the General Comment that all regimes of substituted decision making must be abolished. Finally, the fifth paragraph seeks to ensure access to property and equal rights regarding financial affairs for persons with disabilities, traditionally, areas in which persons with disabilities were treated less favourably by the law.

As with all international human rights treaties, the CRPD is a statement of general principles that does not define key terms or delve into the practicalities of how to achieve the rights it sets out. The ‘paradigm shift’ and increased understanding of Article 12 can be tracked in the literature published following the negotiation of the CRPD. Much of which published immediately after the CRPD was adopted focused on interpreting the text and analysing its practical implications, with many authors looking to the drafting process for guidance (Minkowitz 2010; Dhanda 2006-2007; Quinn 2009; Kayess & French 2008; Mc Sherry 2012; Kanter 2014). It was only after

the Committee published its concluding observations to States that focus shifted to how the law reform process might work in practice⁴ and to the resulting domestic law reform processes.⁵ Unfortunately, a detailed discussion of this is not within the scope of this article. Most recently, after the publication of the General Comment which clarified key issues regarding the realization of Article 12 literature criticising the Committee's interpretation of Article 12 began to emerge, as did further clarification by activists and human rights scholars on what exactly Article 12 means for persons with disabilities (Dawson 2015; Gooding 2015; Browning *et al* 2014).

Distinguishing Legal Capacity and Mental Capacity

It is important to distinguish the concept of 'legal capacity' from 'mental capacity'. Legal capacity is a concept contained within the broad heading of equal recognition before the law. It has been defined as the right to be recognised as a person before the law and therefore, to have one's decisions legally recognised (Flynn & Arstein Kerslake A 2014). As set out above, equal recognition as a person before the law encompasses two distinct concepts – legal standing, that a person is the holder of rights and legal agency, that a person is an actor in law (McSherry 2012). As a holder of rights a person is entitled to full protection of her rights by the legal system. As an actor in law a person has the power to create, modify or end legal relationships and make decisions which must be legally recognised (Committee on the Rights of Persons with Disabilities 2014). Some commentators characterise this in terms of passive capacity and active capacity (Hoffman & Köncei 2011) .

⁴ For further discussions on how the law reform process might work in practice see for example, Minkowitz; Flynn and Arstein-Kerslake (2014).

⁵ For examples see discussions on the domestic law reform processes in South Africa, Ireland, Canada and Australia respectively - Holness (2014), Healy (2015), Bach and Kerzner (2010) and McSherry and Wilson (2015).

In contrast, mental capacity is used to refer to a combination of cognitive ability, impairment and a person's extent of understanding of the consequences of their actions. Mental capacity is used in many States as a means to assess and deny legal capacity. A common example of this would be legislation which establishes a test of mental capacity as the threshold for carrying out certain legally binding decisions, such as decisions about consent to medical treatment, decisions involving the sale or purchase of assets, and decisions about where and with whom to live.⁶

Article 12 of the CRPD, has been identified as the catalyst for change in this area (Arstein-Kerslake & Flynn 2016) , recognising that the different ways in which people make decisions and different levels of cognitive ability should not be used as a means to assess and deny legal capacity (Minkowitz 2010). The paradigm shift, set out above, can only truly be put in context however, by reflecting briefly on the evolution of legal norms concerning legal capacity generally.

The Denial of Legal Capacity

Historically, legal capacity was granted or denied based on various characteristics as either society or the law dictated. This is illustrated by two well-known examples of deprivations of legal capacity. Blackstone (1979) noted that women in marriage were seen as suffering a 'civil death' as they were denied their legal capacity when their legal identity was incorporated into their husband's. In the U.S., slaves were also denied their legal capacity or personhood because the law saw them as only three fifths of a person.⁷

⁶ See for example, Mental Capacity Act 2005 (England and Wales), s3.

⁷ The United States Constitution, Article 1, Section 2, Paragraph 3; The House Joint Resolution proposing the 13th amendment to the Constitution, January 31, 1865; Enrolled Acts and Resolutions of

Disability is one of the only remaining characteristics under which society and the law justifies denying an individual her legal capacity on an equal basis with others. This disproportionately affects people with intellectual or psycho-social disabilities due to the view that legal capacity is often assessed based on a level of cognitive ability and understanding consequences known as mental capacity, as outlined above.⁸

Three methods of assessment are primarily used to determine if someone should be denied her legal capacity –status, outcome or the functional test (Dhanda 2006-2007). These methods have been extensively discussed elsewhere therefore, only a brief outline is set out below. In a status approach, incapacity is presumed from a medical diagnosis or labelling of an individual as a person with a disability (Flynn & Arstein-Kerslake B 2014). This approach fails to look past the impairment or diagnosis before denying an individual the right to be seen as person before the law. It ignores an individual’s actual decision-making skills, and a life-changing denial of legal capacity is made solely based on stereotypes (Council of Europe, Commissioner for Human Rights 2012).

The outcome approach, assesses decisions made by the person with a disability to determine whether they were ‘good’ decisions (Council of Europe, Commissioner for Human Rights 2012). For example, in the case of an individual in psychiatric treatment. If the individual asks to discontinue their treatment her legal capacity is questioned although her capacity to consent to treatment initially was not at issue

Congress, 1789-1999; General Records of the United States Government; Record Group 11; National Archives.

⁸ For a discussion on how legal capacity affects people with a psychosocial disability in particular, see Minkowitz (2014).

(Dhanda 2006-2007). This test also clearly holds persons with disabilities to a higher standard in decision making than the rest of the population.

The functional approach, used in many countries⁹ typically assesses whether the person with an ‘impairment or disturbance in the functioning of the mind or brain’¹⁰ understands the decision and all the reasonably foreseeable consequences of the decision. Legislation based on the functional approach typically requires that the person must be able to use, weigh and retain the information necessary to make the decision, to understand the consequences of their decision, and to communicate her decision to others.¹¹ Again however, a person’s decisions would generally not be subject to such scrutiny but for her status or diagnosis and therefore, many commentators believe that all three tests are discriminatory (Minkowitz; Dhanda 2006-2007). Others argue that if the functional test is set out using language that is facially neutral and without expressly referring to ‘disability’ or ‘impairment’, this does not amount to disability discrimination (Australian Law Reform Commission 2014). The UN Committee on the Rights of Persons with Disabilities takes the position that any test amounts to indirect discrimination when it disproportionately affects people with cognitive disabilities (Committee on the Rights of Persons with Disabilities 2014).

In many jurisdictions, following the denial of legal capacity a person will be subject to some form of substituted decision making. Typically, a third party, often known as a guardian, is appointed to make legally relevant decisions on the person’s behalf

⁹ See for example the Mental Capacity Act 2005 (England and Wales), in Ireland as recommended in Law Reform Commission, *Vulnerable Adults and the Law* (LRC 83-2006) and in the Mental Health Care Act (South Africa), s32.

¹⁰ See for example Mental Capacity Act 2005, s2 (England and Wales).

¹¹ Mental Capacity Act 2005 (England and Wales).

(Keys 2009). An individual under plenary or full guardianship cannot make any decisions of legal significance on her own behalf. Other variations known as limited or partial guardianship allow the individual to make some limited decisions, however, the individual's rights are still severely curtailed. Either way, the guardian or third party is generally charged with acting in the individual's 'best interests' and the individual generally has little or no input into what decisions are made. The third party may be a family member or a trusted individual but, this is frequently not the case with lawyers and civil servants, who have no relationship with the individual, also appointed in some countries.¹²

An emerging body of literature reveals varied ways in which legal capacity is denied even without substituted decision-making regimes or adult guardianship. An individual can also be denied her legal capacity by her family or carer in the private sphere (Arstein-Kerslake & Flynn 2017), through involuntary treatment such as forced psychiatry or other forced medical interventions (Minkowitz 2006-2007) and through the legal system where a person is found to lack the necessary legal capacity to take a case in court¹³, is seen as 'incompetent' to testify, or found not guilty by reason of insanity (Minkowitz 2014).

¹² See for example Mental Disability Advocacy Center's (2007a) & (2007b) research.

¹³ In some jurisdictions, a person who is not subject to formal guardianship can still be deprived of their capacity to instruct a lawyer or take a case to court on the basis that they are of 'unsound mind' and therefore must act via their litigation or next friend. For a detailed discussion on legal capacity and participation in litigation see Series (2015).

Interpreting the Scope of Article 12: General Comment No. 1

The General Comment on Article 12 is the first of its kind for the CRPD.¹⁴ It sets out to provide interpretative guidance on the theory behind this highly contentious¹⁵ but equally important article. Some would argue that this is exactly why Article 12 needed to be the subject of the Committee's first general comment (Arstein-Kerslake & Flynn 2016). The General Comment covers normative content and gives practical direction on how the Article should be implemented. It draws on guidance and interpretation previously provided by both the Office of the High Commissioner on Human Rights and DPO's.¹⁶ Arstein - Kerslake and Flynn (2016) describe it as a roadmap for legal capacity law reform, clearly stating that a person cannot be denied her right to recognition as a person before the law based on an assessment of mental capacity, and that instead people should be supported to exercise their legal capacity (Committee on the Rights of Persons with Disabilities, 2014). On this basis, the General Comment calls for an overhaul of all existing laws in the area of legal capacity. This has led to arguments that its content is impractical and radical (University of Cambridge, Cambridge Intellectual & Developmental Disabilities Research Group

¹⁴ For more information on the General Comment and its drafting process see Arstein-Kerslake and Flynn (2016).

¹⁵ The controversial nature of Article 12 can be observed by the number of reservations, understandings and declarations lodged, available at <
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en> (accessed 16 October 2015).

¹⁶ See IDA CRPD Forum (2008), IDA Legal Opinion on Article 12 (signed by over 30 international experts, 2009), IDA submission to CRPD Committee on Functional Capacity (June 2010), all available at <http://www.internationaldisabilityalliance.org/en/ida-position-papers-and-statements>. See also OHCHR, Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities (A/HRC/10/48, 26 January 2009), available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf>. For more detail on the role played by users and survivors of psychiatry in particular in the development of the theory and practical implementation of Article 12, see Tina Minkowitz, 'Creativity and Survivor Knowledge in International Human Rights Law' available at http://www.academia.edu/19170626/Creativity_and_survivor_knowledge_in_international_human_rights_law; and Tina Minkowitz, 'CRPD Advocacy by the World Network of Users and Survivors of Psychiatry: The Emergence of a User/Survivor Perspective in Human Rights' available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326668.

2014) while others, including the contributors to this special issue, believe that it is a long overdue as a call for equality for persons with disabilities (World Network of Users and Survivors of Psychiatry & the Center for the Human Rights Users and Survivors of Psychiatry 2014).

Substituted and Supported Decision Making

First, it was important for the General Comment to clarify and resolve issues surrounding the key terms associated with Article 12. The term ‘support to exercise legal capacity’ is actually contained in the text of Article 12. The terms ‘supported decision-making regime’ and ‘supported decision-making arrangement’ were first introduced in the General Comment. This change in language can be viewed as an effort to reconcile the terms used in the text of the Convention with the terms used by the Committee when delivering its concluding observations, which typically used the term ‘supported decision-making’.

The General Comment provides an open-ended conceptualisation of support to exercise legal capacity recognising that this is a broad term and a rapidly changing area of law. Forms of support can be formal or informal (Flynn & Arstein-Kerslake 2014b) and all supports must respect the rights and will and preferences of the individuals but cannot amount to substituted decision making (Committee on the Rights of Persons with Disabilities 2014). The General Comment also recognises that the types of support required will differ based on individual needs and that some people may not wish to exercise their right to support. All forms of support must be based on the individual’s will and preferences as distinct from the ‘best interests’ model discussed above. Support also includes using non traditional communication

methods to allow people to convey their will and preferences (Committee on the Rights of Persons with Disabilities 2014). One concrete example regarding supporting a person decide where to live is that a supporter would gather information regarding options and discuss the options before the individual would make the final choice. The supporter might also help them communicate their decision to a third party. This is distinct from the concept of the right to reasonable accommodation in the exercise of legal capacity which the General Comment clarifies as being separate from, and complementary to, the right to support.

At this point it is important to clarify that every time a person is supported to make a decision this will not amount to support to exercise legal capacity, just as every action does not amount to an exercise of legal capacity (Arstein-Kerslake & Flynn 2017). For example, if a person is supported to decide what to wear this is not support to exercise legal capacity as generally this decision does not have legal consequences. Also while there are many different definitions and variations of support an individual can always choose not to be supported when exercising their legal capacity. Many forms of support existed before the enactment Article 12 and therefore the concept of support is not a new one but one highlighted by the CRPD.¹⁷ One of the most common terms, ‘supported decision making’, used by the CRPD Committee, is described in the General Comment as just one form of support to exercise legal capacity. It can be defined as an arrangement ‘where one or more people assist another to make a decision and communicate it to others’ (Series 2015). This kind of support can be provided in many contexts, including those in which decisions do not affect legal consequences, or create, alter or extinguish legal relationships (Arstein-

¹⁷ For further reading and examples of support, see Gordon (2000), Gold (1994) and Herr (2003).

Kerslake & Flynn 2017). *Support to exercise legal capacity*, however, will always result in a decision that has legal consequences (Arstein-Kerslake & Flynn 2017).

Another significant definition in the General Comment was substituted decision making. This term was used by the Committee in its concluding observations to States and was something governments were urged to replace but it was never defined. The General Comment states that a substituted decision making regime violates human rights norms when:

1. a person has her legal capacity removed, even for a single decision,
and
2. where a substituted decision maker is appointed by a third party against the person's will
or
3. where decisions made by this appointee are supposed to be based on the person's 'best interests'. (Committee on the Rights of Persons with Disabilities 2014).

It has been noted however, that such definition does not conform to common language understanding because it does not cover every situation where a person makes a decision on behalf of another, for example in the case of powers of attorney (Flynn & Arstein-Kerslake 2017).

States Obligations

After describing the normative content of Article 12 the General Comment considers States Obligations, giving practical guidance on how to achieve them. Three core obligations have been identified – 1. to abolish substituted decision making regimes, 2.

to make mechanisms available to support persons with disabilities to exercise their legal capacity and 3. to create safeguards around exercising legal capacity which are based on respect for the rights, will and preferences of the individual.

A vital clarification for states beginning the law reform process has been that they are only obliged to abolish substituted decision making regimes that meet the definition above. Situations where someone is appointed a decision maker as a last resort because an individual's will and preferences are not known or where a person chooses to give a trusted supporter decision making powers in certain areas of their lives are still permitted under Article 12. However, it is insufficient to graft supported decision making regimes on to existing substituted decision making regimes, as in British Columbia¹⁸ and Sweden,¹⁹ the General Comment requires instead that such substituted decision making regimes must be abolished. When creating supported decision making regimes States must ensure that autonomy and personal choice are the core values of their systems. This principle includes the notion that supported decision making cannot be a compulsory requirement nor can it be based on assessments of mental capacity. All legal capacity law reform processes must be "deliberate, well planned and include the consultation and meaningful participation of people with disabilities and their organisations" (Committee on the Rights of Persons with Disabilities 2014, para 30).

Finally, the General Comment considers paragraph four's requirement that States Parties create safeguards to ensure people can exercise their legal capacity. The

¹⁸ The Adult Guardianship Act 1996 retains substituted decision making while the Representation Agreement Act 1993 allows for supported with decision making.

¹⁹ Although Sweden's Personal Ombuds system is seen as a good example of support, Sweden maintains two forms of substituted decision making.

primary function of such safeguards is to ensure that the individual's will and preferences are respected and that they protect the individual from abuse (Committee on the Rights of Persons with Disabilities 2014). The safeguards must be proportional and tailored to the person's circumstances²⁰ and as with all aspects of Article 12, must be applied to persons with disabilities on an equal basis with others. This prevents persons with disabilities having their legal capacity restricted to safeguard their interests as has happened previously. It marks a shift from the paternalistic safeguards of the past. It states that the 'best interests' principle does not comply with Article 12 (Committee on the Rights of Persons with Disabilities 2014, para 36)²¹ and therefore, that many existing safeguards are no longer appropriate. An example of a safeguard that will be required is "a mechanism for third parties to challenge the action of a support person if they believe that the support person is not acting based on the will and preferences of the person concerned." (Committee on the Rights of Persons with Disabilities 2014, para 29(d)).

In the wake of the General Comment: Conflicting Interpretations

Following the publication of the General Comment, the focus of the literature surrounding Article 12 progressed from interpreting the text to either plotting its practical implementation or criticising the Committee's interpretations and providing alternatives. One of the main criticisms originally made in many of the submissions on the Draft General Comment, was that never allowing mental capacity to lead to a denial of legal capacity is both impractical and unrealistic.²² Ward (2015) relies on the

²⁰ For a more detailed discussion of this requirement see Holness (2014).

²¹ The 'best interests' principle still applies to children.

²² For example, see Law Society of Scotland (2013), submission to the CRPD Committee on the Draft General Comment on Article 12 CRPD (November 2013)

concept of “factual incapacity” to argue that, in some circumstances, no matter how much support is provided to a person, it will remain impossible to determine what decision the person wishes to make. This argument appears to ignore the Committee’s delineation of a ‘best interpretation’ framework to guide decision-making where after all efforts to support a person, their will and preferences remain unknown.

A well known psychiatrist, John Dawson (2015), argues that mental capacity is often used to define the line between two conflicting state obligations – respecting individual autonomy and protecting vulnerable individuals. He believes that determinations of mental capacity are necessary so that the State knows when it can intervene. As discussed in Flynn and Arstein-Kerslake (2017), it should be possible for the state to develop a disability-neutral basis for intervention to protect the human rights of people at risk of abuse, exploitation, violence or neglect, without using discriminatory tests of mental capacity.

Dawson (2015) further argues that many aspects of the legal system require assessments of the inner workings of the mind and that most sophisticated legal systems would be impoverished without them. Such provisions include the concept of intention or ‘mens rea’ in criminal law and defences such as diminished responsibility. Professor Michael Perlin (2015) also follows this path arguing that interpretations of the General Comment which call for the abolition of the insanity defence and findings of incompetency are incompatible with the rest of the CRPD, violating an individual’s right to a fair trial and the possibility of torture in prison.

<<http://www.ohchr.org/Documents/HRBodies/CRPD/GC/LawSocietyOfScotlandArt12.doc>> (accessed 29 October 2015)

The Committee's interpretation of Article 12 views disability-specific criminal provisions including the insanity defence and unfitness to plead as incompatible with the guarantee of universal legal capacity. The discriminatory nature of such criminal provisions has also been pointed out by leading activists and scholars in the field (Minkowitz 2014) who argue that 'intention' or 'mens rea' in the criminal law is in fact recognition of an individual as a legal actor with legal responsibility and can be applied equally to people with and without disabilities. This concept of 'on an equal basis' is central to the interpretation found in the General Comment and relied upon by those who favour it. They argue that legal capacity can be denied based on a range of factors as long as it is on an equal basis between persons with and without disabilities. This argument is explored further with regard to both state intervention (Flynn & Arstein-Kerslake 2017) and consent (Brosnan & Flynn 2017) respectively in other articles within this special issue.

Conflicting Views on Hard Cases

Article 12 sets out to create a system in which everyone is guaranteed their right to legal capacity recognising that some people desire support to exercise legal capacity and to express their will and preferences (Committee on the Rights of Persons with Disabilities 2014). However, not everyone agrees with some commentators arguing that the position set out in the General Comment threatens other rights contained in the CRPD. These critiques often focus on the need to act in emergency situations and when informed consent cannot be received from the individual. For example, Freeman et al (2015) argue that "several fundamental rights, such as the enjoyment of the highest attainable standard of health, access to justice, the right to liberty, and

even the right to life, might instead be violated and subject to unintended consequences” as a result of the right to legal capacity found in Article 12. This is ironic given that the denial of legal capacity often leads to an individual being deprived of her liberty and subject to involuntary treatment. They suggest that in such circumstances legal capacity cannot be absolute, and that some form of substituted decision making must be allowed. Others argue for some form of substituted decision making to be provided where an individual has profound or multiple disabilities as they believe that it is not realistic for these individuals to be supported to exercise their legal capacity (Browning *et al* 2014). However, some of these commentators (Browning *et al* 2014) still accept some elements of the support paradigm and that some individuals can and should be supported to make decisions. They simply do not agree that support is a viable option for everyone or that substituted decision making, as defined in the General Comment, should be abolished.

Those in favour of Article 12 have also considered these possibilities and acknowledge that in some limited situations an individual may be appointed to discover or interpret a person’s will and preferences (Quinn 2010). If the person’s will and preferences remain unknown after significant efforts to discover them have been made, and it is urgent that a decision must be made (for example, consent or refusal of life-saving surgery); then Arstein-Kerslake and Flynn (2016) agree that an external decision-maker can be appointed. In their view, such an appointment must be made either with the person’s consent, or, if no communication is possible to achieve consent, only be made if there is no evidence of objection from the person. The role of an external decision-maker in this context is simply to arrive at the best interpretation possible of that individual’s will and preferences, from all information

available about the person, including from trusted individuals in her life. This ‘best interpretation’ can then form the basis for a decision to be made, in situations where the individual’s true will and preferences remain unknown.

Inevitably, the decisions in these so-called ‘hard cases’ will be, as the name suggests, difficult ones to make. However as commentators note, they were also difficult decisions under existing substituted decision making regimes and the support paradigm and approach in the General Comment is more rights protective in nature (Arstein-Kerslake & Flynn 2016). It reflects the presumption that it is almost always possible to come to some level of understanding of a person’s values, beliefs and views, and that the person’s values, beliefs and views ultimately underpin their will and preferences. This is key to the support process whose final aim is to arrive at a decision with the individual based on their will and preferences, ensuring that the individual is as informed as possible throughout the process. In contrast, the substituted decision making model ends with an outside decision maker imposing a decision on an individual based on a labelling of incapacity, typically without the individual’s input and based on an objective view of what is in their best interests.

The General Comment addresses and provides interpretive guidance on provisions relating to these so-called ‘hard cases’. It states that when a person’s will and preferences cannot be ascertained, for example, in the case of a coma patient, the ‘best interpretation’ of that person’s will and preferences should be used to make a decision. This however, does not address all situations. Other scenarios which represent hard cases include where a person’s will and preferences are clear but dangerous and when an individual is communicating conflicting will and preferences. Although the

General Comment does not address these situations explicitly, Arstein-Kerslake and Flynn (2016) have developed an approach to these cases that can be used based on the principles found in the General Comment.

In the first situation, where a person expresses will and preferences which would lead to serious harm to others or to self-harm, they argue that a support person is not obliged to do something which would leave her open to civil or criminal liability. In such circumstances, it is also necessary to note that states will have different standards for when it is necessary to intervene, as discussed by Flynn and Arstein Kerslake (2017) in greater detail. The general rule should be that as long as these interventions are applied on an equal basis, and do not constitute direct or indirect discrimination against people with disabilities, there is no conflict with Article 12 (Arstein-Kerslake & Flynn 2016). Undoubtedly, in practice existing facially neutral regimes will need to be strictly monitored to ensure that they do not indirectly discriminate against persons with disabilities.

In the second situation, where a person's will and preferences are clear but conflicting, the example of a person with tooth decay who does not want to go to the dentist but clearly wants to be free from pain is often used (Arstein-Kerslake & Flynn 2016). In this instance the 'will', is used to describe a person's long term vision of what could be a good life for her, in this example, to be free from pain. 'Preferences' on the other hand, describe the person's likes and dislikes or prioritisation of options, in this example, the wish not to go to the dentist. Here, the first step for a supporter would be to resolve the conflict by discussing the situation with the individual using all forms of communication available and including the individual's other trusted supporters.

Where this does not lead to a clear decision after every attempt has been made to reconcile the conflicting will and preferences a supporter must turn to an external decision maker for the ‘best interpretation’ of a person’s will and preferences. However, if a person takes a course of action which poses a risk of grave and imminent harm to her life, health or safety, also considered in Flynn and Arstein-Kerslake (2017), a state actor may be permitted to intervene – as long as these interventions are made on an equal basis for persons with and without disabilities. As previously argued by Gooding and Flynn (2015), a reformulation of the doctrine of necessity might also permit some forms of intervention on an equal basis for people with and without disabilities in these cases. There are however, limits as described by Flynn and Arstein Kerslake (2017) and intervention should not take the form of forced treatment. Rather it must respect the totality of the individual’s human rights, including the right to healthcare based on informed consent.

Other frequently heard arguments against the support paradigm are based on possibility for manipulation and undue influence. Ward (2011) argues that the inept drafting of Article 12 leaves persons with disabilities with a confusing definition of capacity, open to manipulation by supporters. He believes that any decision reached through supported decision making should come with ‘flashing amber lights’ to alert others that this may be a decision reached as a result of undue influence, and that it may be simply the views of the supporter masquerading as the views of the individual. This is, of course, a risk for people relying on supported decision making. However, as Gooding (2015) notes in his response to these criticisms, we should remember that everyone is subject to influence, manipulation and subtle coercion by those close to them. Series (2015b) notes modern feminist thought’s recognition that all of our acts,

decisions, values and beliefs are profoundly influenced by our relationships. Therefore, as Gooding (2015) suggests, we should not subject persons with disabilities to a higher level of state intrusion solely on this basis. The General Comment also recognises that people relying on support from others to make decisions may be more susceptible to influence or manipulation. The safeguards within Article 12(4) require measures to prevent abuse, but also ensure they respect the rights, will and preferences of a person and are free from conflict of interest and undue influence. This area is not yet entirely clear, but it appears that persons with disabilities must be allowed the ‘dignity of risk’ (Gooding 2013) in this regard on an equal basis with others.

Progressive Realisation vs Immediate Effect

As one of the civil and political rights found within the CRPD, the right to equal recognition before the law is subject to immediate realisation²³ (McSherry & Wilson 2015). The General Comment has clarified that this means states must immediately take steps to realise the rights found in Article 12 and must ensure these deliberate steps are achieved with the meaningful participation of persons with disabilities (Committee on the Rights of Persons with Disabilities 2014). Given the level of changes that would be required in many legal systems to ensure compliance, and the lack of interpretive guidance available to states until recently, some submissions on the Draft General Comment argued that the Committee should have opted for a

²³ A State’s obligation to give rights immediate effect or immediate realisation is used in contrast to an obligation to progressively realize rights. Progressive realisation has been defined by the Office of the High Commissioner for Human Rights (2016) as the obligation to take appropriate measures towards the full realization of economic, social and cultural rights to the maximum of their available resources. However, the obligation to give rights immediate effect applies irrespective of resources.

progressive realisation approach²⁴ that would allow states to phase out non-compliant legislation over time. Some commentators propose that policymakers should proceed cautiously while developing appropriate systems of support and ensure that all the necessary research and pilot programmes are complete before enactment (Carney & Beaupart 2013). This approach is not without its flaws, as progressive realisation, Bartlett (2014) notes, often becomes a validation for a State's failure to act. While the Committee's position on this issue may seem radical to some, it is clearly in keeping with international human rights norms on the immediate effect of civil and political rights.²⁵

Conclusion

Article 12 of the CRPD guarantees the right to equal recognition before the law for persons with disabilities. This guarantee includes both legal standing and legal agency and places an obligation on States provide the supports and safeguards necessary to make this right meaningful. Although it is still unclear how States will deal with the 'hard cases' in domestic legislation, promising practices of support are evolving and there is an increased understanding and engagement with the concepts within Article 12. This article, has endeavoured to support this development by introducing readers to Article 12 and its impact on the lives of persons with disabilities. This article, and the content of this special issue as a whole, attempts to build on existing literature which provides a defence to many of the criticisms of the General Comment, and in doing so, explores how Article 12 can be practically implemented in domestic

²⁴ For example, see Canadian Association for Community Living, submission to the CRPD Committee on the Draft General Comment on Article 12 CRPD (26 February 2014) <http://www.ohchr.org/Documents/HRBodies/CRPD/GC/CanadianAssociationCommunityLiving_Ar12.doc> (accessed 29 October 2015).

²⁵ For more information on the human rights norms and immediate realisation of civil and political rights see Steiner, Alston and Goodman (2008).

legislation. It is hoped that the content of this volume will aid respondents in the VOICES project to develop grounded recommendations for reform and will also provide a starting point for further discussion and positive engagement of a wider audience with the literature surrounding Article 12.

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