

THE RIGHT TO EFFECTIVE JUDICIAL PROTECTION AND DISABILITY: THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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I.INTRODUCTION: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

On 13 December 2006, the General Assembly of the United Nations adopted the Convention on the Rights of Persons with Disabilities (CRPD) and an associated Optional Protocol. It is the first comprehensive human rights treaty of the 21st century and is the first human rights convention to be open for signature by regional integration organizations.

The Convention entered into force on 3 May, 2008. The formulation of the CRPD has been hailed as a great landmark in the struggle to reframe the needs and concerns of persons with disability in terms of human rights. The CRPD is regarded as having finally empowered the world's largest minority to claim their rights - approximately, 10 % of population is disabled-, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection.

The Convention is intended as a human rights instrument with an explicit, social development dimension. It adopts a broad categorization of persons with disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms.

It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.

Precisely, the Convention marks a '**paradigm shift**' in attitudes and approaches to persons with disabilities. A paradigm shift, basically, is a change from one way of thinking to another. It's a revolution, a transformation, a sort of metamorphosis. Although it was first used in a scientific context, since the 1960s, the concept of a paradigm shift has also been used in numerous non-scientific contexts to describe a profound change in a fundamental model or perception of events.

The movement from viewing persons with disabilities as 'objects' of charity, medical treatment and social protection towards viewing persons with disabilities as 'subjects' with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society is the base of the so-called paradigm shift, which emblematic conception is contained in Article 12 of the Convention.

Both the Philippines and Spain have ratified the Convention on April 15th, 2008 and April 21st 2008 respectively. It seems a long time ago, but both still have a long way before the provisions of the Convention are being applied fully.

The Convention contains two articles directly connected with judicial effective protection, one more than the other, but on the other hand, one cannot be understood without the other. Both articles are Article 12 –Equal recognition before the law- and Article 13 –access to justice-

As a scholar in Procedural Law, my contribution to the International Scientific Congress on Private Law of the Philippines and Spain aims to enshrine the relevant importance of both provisions that guarantee effective judicial protection for persons with disabilities in order to analyze, subsequently, the implementation of them in Spanish legislation. As the Convention itself remarks, the judicial protection shall be offered by the States to all persons with disabilities, no matter in which position regarding justice they would find themselves. That is, persons with disability may need access as a direct or indirect participant in the proceedings; they may need access to justice to seek the necessary supports in order to exercise their legal capacity or they may need access to justice in equal conditions when they are a witness, a victim, an accused, or even a defendant or a plaintiff in civil proceedings.

II. ARTICLE 12: UNDERSTANDING LEGAL CAPACITY AND ITS SUPPORTS.-

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.*
- 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.

As said before, the equal recognition of persons with disabilities before law, implies a very important step towards the fully integration of these persons in society. Article 12 recognize legal capacity to all persons, regardless their physical or mental state. Legal capacity is the recognition of an individual as a rights holder and legal agent on an equal basis with others. It is the recognition of the individual's relationship with the state as an active subject. It also allows individuals to create and extinguish legal relationships between themselves. Those relationships have the potential to affect the individual's position before the law and the position of others before the law. A person who has her legal capacity recognized can participate in the creation and extinction of such relationships. An individual whose legal capacity is not recognized, has no power within these relationships¹.

Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights. It acquires a special significance for persons with disabilities when they have to make crucial decisions regarding their health, education and work. The denial of legal capacity to persons with disabilities has, in many cases, led to the deprivation of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty².

Despite its importance, Article 12 was one of the most hotly contested articles to be considered during the treaty deliberation process³. The core decision related to it concerned whether it was necessary to make a distinction between legal capacity for rights and the legal capacity to act, as, for example, it is regulated in Spanish civil law, where the traditional distinction has been always between legal capacity as the capacity to hold rights and the capacity of act as the capacity to exercise one's rights. In the end, the decision leant towards the recognition to all persons of their legal capacity to the fullest extent. That means, therefore, in first place, a whole major change in understanding ancestral concepts in civil law. Where the Convention establishes legal

¹ Anna Arstein-Kerslake & Eilionóir Flynn (2016) The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law, *The International Journal of Human Rights*, 20:4, p. 474.

² Committee on the Rights of Persons with Disabilities. Eleventh session 31 March–11 April 2014. General comment No. 1 (2014). Article 12: Equal recognition before the law, p.2.

³ DINERSTEIN, R. D. "Implementing legal capacity under article 12 of the UN Convention on the Rights of Persons with disabilities: The difficult road from guardianship to supported decision-making", *Human Rights Brief*, Volume 19, Issue 2, 2012, p. 1.

capacity to everyone, includes, not only the capacity to have rights but also the capacity to exercise those rights.

This recognition means that we have to consider how to address the circumstances of individuals with disabilities who may not be able to exercise their legal capacity without some kind of assistance or intervention⁴, something that article 12, paragraph 3 solves with the required support to help those people with disabilities in exercising their rights. But this idea implies another major change in understanding that support in exercising persons with disabilities' rights.

What has been happening so far? For instance, in Europe, a large number of Europeans with intellectual and/or psychosocial disabilities are deprived of their legal capacity and put under some form of guardianship. Two main guardianship models are common practice: plenary and partial guardianship. Persons under partial guardianship keep the main bulk of their civil rights but certain capacities are transferred to a legal representative, most commonly the power to manage financial affairs. Those under full or plenary guardianship, on the other hand, lose all or almost all of their civil rights. The involvement of the guardian is then necessary to make legally effective decisions in most areas of life. Although partial guardianship is the preferred option between the two, also such systems tend to 'spill over' into other areas. While providing protection against some types of abuse, experience shows that guardianship systems can end up facilitating abuse from guardians and third parties. Examples include guardians putting their client in a hospital or a social care home against the individuals' will, economic maladministration and other types of abuse and neglect. Processes leading to the deprivation of legal capacity and the appointment of legal representatives are also seriously flawed. Incapacitation procedures take place behind the individuals' back. Even where the national law provides the right to be notified and to be present and heard in court, such a requirement is often complemented by a frequently applied possibility to go ahead without the individual if his/her participation in court is deemed detrimental to his/her health. Lack of free and effective legal representation during judicial proceedings is another problem, severely curtailing the individuals' possibilities to challenge. Lastly, control mechanisms and review procedures fail to monitor the guardian's actions and omissions properly. Guardians are often expected to provide annual activity reports to the municipality or other supervisory authority⁵.

The paradigm shift comes, therefore, in terms of changing the idea of guardianship or substituted decision-making by a supported decision-making. As ARSTEIN KERLAKE and FLYNN⁶ states, this revolutionary change in legal capacity law, leads to a system that respects the right of all individuals to decision-making support, regardless of disability or decision-making ability.

Implementing Article 12 means that if an individual is having difficulty making a decision or communicating a decision, the answer is not to deny legal capacity to the individual,

⁴ DINERSTEIN, *op.cit.*, p. 1.

⁵ "Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities". Issue Paper published by the Council of Europe Commissioner for Human Rights. April 2012, p. 14.

⁶ ARSTEIN KERSLAKE, A. and FLYNN, E. *Op.cit.*, p. 475.

it is instead to provide access to support for the exercise of legal capacity , which will vary greatly depending on the individual and the specific situation.

The exact meaning of supported decision-making is not answered by Article 12. And that is because the answer is a flexible one. The Committee on the Rights with Persons with Disabilities, which published an official document relate to a General comment on Article 12 of the CRPD, considers that “support” is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity⁷. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication. Support to persons with disabilities in the exercise of their legal capacity might include measures relating to universal design and accessibility — for example, requiring private and public actors, such as banks and financial institutions, to provide information in an understandable format or to provide professional sign language interpretation — in order to enable persons with disabilities to perform the legal acts required to open a bank account, conclude contracts or conduct other social transactions. Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences. For many persons with disabilities, the ability to plan in advance is an important form of support, whereby they can state their will and preferences which should be followed at a time when they may not be in a position to communicate their wishes to others. All persons with disabilities have the right to engage in advance planning and should be given the opportunity to do so on an equal basis with others.

The other question that arises the matter are the ways to implement the supported decision-making; that is, in which ways the support has to be assigned.

The State has an obligation to provide, as said in Article 12, paragraph 3, the appropriate measures to facilitate the creation of the support under legal recognition⁸. Each State can regulate their forms to access to a supported decision-making. This means the support may come in an informal way or may be provided through a more-robusted state-operated structure. There are, however, advantages and disadvantages for both systems. Informal support may not have sufficient safeguarding processes built in to protect the rights, will and preferences of the individuals using the support, but has the benefit that the providers of this support are more likely to know the person well and to be in the person’s life for a long time. Formal support structures may be subject to greater safeguards and a guarantee of “independence” but they run a serious risk of becoming over professionalised, creating another intrusion in the lives of people with

⁷ Committee on the Rights of Persons with Disabilities. Eleventh session 31 March–11 April 2014. General comment No. 1 (2014). Article 12: Equal recognition before the law, p.6.

⁸ Committee on the Rights of Persons with Disabilities. *Op.cit.*, p.7.

disabilities, and potentially creating an additional barrier for the individual to overcome before her decision-making is recognised⁹.

In this sense, Article 12, paragraph 4, regulates the safeguards that are to be observed. According with this provision, regardless the support comes in a formal or informal way, something is clear; States shall ensure that safeguards are provided in order to protect the individual with disability. Specifically, they shall ensure that the measures to implement the supported decision-making have to be controlled by a competent, independent and impartial authority or judicial body. At a first glance it may look like a fossil from the old paradigm, where substituted decision-making was the main rule. However, safeguards will be necessary in the new paradigm as well. Replacing guardianship with support systems will transfer power back to the individual, but it does not eliminate all risks of manipulation and abuse. There may still be persons whose decisions and choices we cannot understand today, despite efforts to support the individual coupled with adjustment efforts from third parties. In such cases we may have to resort to 'best interests' reasoning trying our best to find out what the person would have wanted, if we had been able to understand him or her¹⁰.

In Spain, however, the only competent to provide those measures has to be a judicial body, who will be in charge of taking the decisions concerning the supported decision-making system.

That judicial body will take into account the rest of the provisions contained in Article 12, which can be resumed in the very important expression, "*tailored to the person's circumstances*".

III.- ARTICLE 13: ACCESS TO JUSTICE

Article 13. Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 13 states the right of persons with disabilities to access justice on equal basis with others. To be fully included in society, people with disabilities need access to justice. This has been a relatively underexplored aspect of the Convention, despite its importance. Article 13 is, then, closely linked to article 12, as full legal capacity is a

⁹ ARSTEIN KERSLAKE, A. and FLYNN, E. *Op.cit.*, p. 476.

¹⁰ NILSSON, A. "Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities" Issue Paper published by the Council of Europe Commissioner for Human Rights. April 2012, p. 22-23.

prerequisite for any access to justice. Moreover, the ability to access justice is of critical importance in the enjoyment of all other human rights. For example, a person with a disability who feels that she or he has been denied the right to work may wish to turn to the justice system to seek a remedy. However, if the justice system fails to accommodate their physical, communication, or other disability-related needs, and/or expressly discriminates against her or him, then clearly denial of access to the justice system also results in denial of protection of the right to work.

Before entering into the analysis of the provision, we have to clearly understand what the meaning of access to justice is.

The term “access to justice”, as Flynn points out¹¹ is generally used to refer to access to the legal system and immediately brings to minds rights to due process and legal representation, which is a far too narrow interpretation. But Article 13 refers, for the first time in international normative, not only the possibility of an “effective remedy” but a broader definition meaning the possibility for an individual to *participate* in proceedings before courts in an equal manner to the rest of persons without any disability. The provision is, then, quite ambitious and it can refer to many situations in which a person with disability may potentially need to accede justice.

In the first place, access to justice has to be guaranteed in the cases that the individual with disability has to seek court assistance to declare the supported required to make her decisions. We are talking about the proceedings to establish the supports needed to exercise legal capacity.

In the second place, the individual with disability may need access to justice when participating in civil or criminal proceedings, bringing a claim to court. Specially delicate is the situation when the individual with disability is the victim of a crime. States have to reassure the equal treatment brings the necessity of accommodation of proceedings. This position includes the possibility of the individual with a disability of being a witness in proceedings.

In the third place, the individual with a disability may need equal access to justice when being accused of a crime. The re-accommodation of procedure rules confirms what is so-called “due process”.

Once we have established the different situations in which the individual with disability may need access to justice, the next step is to break down article 13 into different components:

-A right to receive procedural accommodations to facilitate access to justice

The provision admonishes the States to assure changes in two ways: changes in the proceedings in order to facilitate understanding of them for intellectual disabled people, and accommodations to any kind of disabilities, as eliminating communicating barriers or architectural barriers, for example, the use of sign language interpreters,

¹¹ FLYNN, E. *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities*. Routledge, 2015.p. 15.

communications assistants as well as devices, utilizing experts to enhance the communication as well as advice on the implications of the disability on the process. Article 13 expands the equal treatment, not only for trials, but all kinds of proceedings, such as the preliminary stages of court proceedings.

Let's set an example. A person with a disability who has been the victim of a crime may wish to report the crime to the police and press charges against the offender. However, if he or she is denied physical access to the police station, clear communication with the police, or access to information that is understandable, then that person may not be able fully to exercise her or his rights as a victim. These examples demonstrate that human rights are indivisible, interdependent, and interconnected. The enjoyment of other human rights can also positively or negatively impact the ability of people with disabilities to enjoy access to justice. For example, the accessibility of transportation may determine whether or not a person with a disability is able to travel to a police station, courthouse, or other place where justice is administered. Similarly, a person with a disability who has had access to a quality education will be better able to understand and use the justice system, but if she or he has been denied the right to education, then participation in the justice system may be difficult or impossible.. As long as they face barriers to their participation in the justice system, they will be unable to assume their full responsibilities as members of society or their rights. For this reason it is important that barriers be removed so that people with disabilities can enjoy the equal opportunity to perform their duties as witnesses, jurors, lawyers, judges, arbitrators, and other participants in the administration of justice.

-A right to legal aid?

As Degener¹² points out, it is sad knowledge that access to justice in most countries is usually available to those who have financial, political or cultural power, whereas minorities or other groups experiencing discrimination and subordination are excluded from it. The paradox that those most in need for access to justice are the least likely to receive it remains one of the most compelling human rights issues of the 21st century. But article 13 does not remark precisely in any paragraph the obligation for the States to provide legal aid for persons with disabilities. Does this mean that the provision excludes this fundamental right to ensure access to justice?

If Article 13 of the CRPD is to have any meaning, then it follows that the Convention requires States to provide legal aid to people with disabilities who cannot access private legal assistance and that, at a minimum, legal aid should be available for cases involving breaches of the human rights referred to in the treaty¹³. It is left to the States' national law to regulate the access to that right.

-An obligation to provide training to those working in the administration of justice

¹² DEGENER, T. Foreword to the book *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities*. Routledge, 2015.

¹³ GIBSON, F. "Article 13 of the Convention on the Rights of Persons with Disabilities— A Right to Legal Aid?" 15 *Australian Journal of Human Rights*, 123, 2010, p. 132.

This is a new provision in international texts regulating person with disabilities' rights. But it is fundamental to understand an effective access to justice. If we want to eliminate barriers that could be a hazard for the person with disability, one of the main points lays in the people who work in the system. Their collaboration is fundamental to eliminate those barriers, and their collaboration is only possible if they are enough trained to understand what the barriers are and how to eliminate them.

- IV. IMPLEMENTATION MEASURES REQUIRED IN SPANISH LEGISLATION.-

Having stated the importance of article 12 and 13 of the Convention in order to assure an effective judicial protection, it is time to take a look on how the EU and precisely, Spain, are trying to implement those provisions.

Several steps need to be taken to bring European systems relating to legal capacity in line with the European Convention and the CRPD¹⁴.

Firstly, mechanisms providing for full incapacitation and plenary guardianship must be abolished and the assumption of legal capacity extended to persons with disabilities. Having an intellectual and/or psychosocial disability cannot be a reason for not benefitting from the presumption of capacity.

Secondly, we need to review and reform discriminatory legislation depriving persons with disabilities of other human rights (such as their rights to a fair trial, to vote and to property)

for reasons linked to disability or impairment.

Thirdly, governmental and local authorities, courts, health care and other service providers have to make their services more accessible to persons with disabilities. Reasonable accommodation to persons with disabilities trying to access their services is the minimum. This includes the provision of information in plain language and the acceptance of a support person communicating the will of the individual concerned.

Regarding Spanish measures, we have to recognize the efforts of legislators in trying to adapt legislation to the Convention, but there are lights and shadows that we will remark here.

One of the major changes which is being made gradually lays onto the language. Spanish legislation has made an effort to change the vocabulary on disability. We used to have a vocabulary that certainly was not according the new paradigm of legal capacity. Now, all terms related to disability and legal capacity have changed to implement article 12. For example, the term "incapacitado" –without capacity- , has now changed to "con capacidad modificada"- with modified capacity-

But although changes in vocabulary are necessary to start assuming the paradigm shift in this matter, it is not the only thing to be changed.

The States' compromise of changing the substituted decision-making for a supported decision-making has not been assumed by Spain yet. We still have civil law regulating the ancient forms of total or partial guardianship. And although there are voices who

¹⁴ NILSSON, A. *Op.cit.* p. 31.

claim that the judiciary is not yet prepared to grasp the paradigm shift¹⁵, we have to disagree. Spanish judiciary is trying to do its best and, without having the legislation improved according to the CRPD, most of their rulings are based on the supported decision-making system. The Government has promised hundred times that the substantive law will be changed, and so the procedural law. But the bills remain in the politician's drawers.

Besides the changes in substantive law, we need also some changes in the proceedings concerning the capacity of the individual with disability; that is, the proceedings where the judge will decide the best way to support the decision-making of the person with disability. The whole proceedings must be changed in order to facilitate access to justice. We need specialized judges all over the country, easy proceedings, not intimidating ones, and free legal aid. People with disability that would require a supported decision-making system, either for one particular case or more permanently are now reluctant to bring the "claim" –it would be necessary not to call it a claim- before the courts because they think their capacity is going to be removed fully in an adversarial proceeding. And that is not effective judicial protection for them.

Despite the lack of changes in civil proceedings, there have been changes in other areas of Spanish law, such as criminal procedural law. The most important measures come in the hand of the protection of the person with disability when being a victim of a crime. The main reason for those changes is the obligation which comes from Europe in the form of a Directive, precisely Directive 2012/29/UE, October, 25th, 2012 establishing minimum standards on the rights, support and protection of victims of crime, which we have transposed in our Act 4/2015, April 27th, on Crime's victim Statute. We have now a wide coverage on what are called victims with specific protection needs, category in which shall be included persons with disabilities.

The victim's protection comes in terms of avoiding secondary and repeat victimization, protecting from intimidation and from retaliation, including against the risk of emotional or psychological harm, much more if we are talking of victims with disability considered as a victim with specific protection needs –it is necessary and individual assessment to be categorized as such, because it is not the same an intellectual disability than a physical one-

Nevertheless, Spanish Victims' Act extends almost the whole the protection required in the Directive for victims with specific protection needs to all victims.

Among those measures we can highlight the following:

During criminal investigations:

¹⁵ QUINN, G. CONCEPT PAPER 'Personhood & Legal Capacity.Perspectives on the Paradigm Shift of Article 12 CRPD.' HPOD Conference. Harvard Law School.20 February, 2010.

- (a) interviews with the victim have to be carried out in premises designed or adapted for that purpose;
- (b) interviews with the victim have to be carried out by or through professionals trained for that purpose;
- (c) all interviews with the victim have to be conducted by the same persons unless this is contrary to the good administration of justice;
- (d) all interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, have to be conducted by a person of the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced.

During court proceedings

- (a) measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology; it goes, even, beyond this point. The giving of evidence could be the interview taken at the stage of criminal proceedings and played during court proceedings.
- (b) measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;
- (c) measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and
- (d) measures allowing a hearing to take place without the presence of the public.

Victims with specific protection needs have the right to legal aid, for the sake of a legislative reform in this area that assures this right to victims with intellectual disability in the cases of being abused or mistreated.

Also in this area, as article 13 establishes in paragraph 2, Spanish Victim's Statute Act regulates the necessary training of all practitioners, including judges, prosecutors, lawyers and office workers.

CONCLUSION

The road map for the equality treatment in law for people with disability is designed. It will take time and budget to adjust but there is not turning back. As we stated before, it seems a long time ago where the countries started to sign the CRPD, but the reality is that, as Professor Theresa Degener, Vice-President of the UN CRPD Committee has explained, no country has fully adhered to the commitments laid out by Article 12, so yet there is a long way to go. We have to work together towards the

reality of recognition of legal capacity and access to justice to all persons with disabilities.