



Nefndasvið Alþingis
Austurstræti 8-12
150 Reykjavík

Reykjavík 13. maí 2015

Umsögn Öryrkjabandalags Íslands um frumvarp til laga um breytingar á lögræðislögum, nr. 71, 28. maí 1997, með síðari breytingum. 687. mál.

Öryrkjabandalag Íslands (ÖBÍ) sendi þann 11. mars 2015 athugasemdir við drög að frumvarpi þessu til innanríkisráðuneytisins. Eftirfarandi er viðbót við þær athugasemdir.

Með frumvarpi þessu er stigið skref til að færa íslenskt lagaumhverfi nær því sem fullgilding samnings Sameinuðu þjóðanna um réttindi fatlaðs fólks (SRFF) krefst. Hér er um viðamikið og viðkvæmt mál að ræða og teljum við að ein vika sé knappur tími til að skila inn umsögn um svo flókið álitaefni eins og lögræðissvipting og nauðung er. Frumvarpið býður upp á ýmsar nýjungar sem eru til bóta miðað við núverandi lög, þar má nefna sem dæmi að horfið er frá ótímabundinni lögræðissviptingu, einnig að boðið verður upp á ráðgjöf og stuðning við nauðungarvistaðan einstakling og nánustu aðstandendur hans í kjölfar nauðungarvistunar. Þá er til sóma að í frumvarpinu er kveðið á um skráningu og eftirlit með störfum lögráðamanna.

Markmið lögræðislaga ætti að vera að fækka lögræðissviptingum, nauðungarvistunum og þvinguðum meðferðum en við teljum að því markmiði sé ekki náð með þessum lögum, enn eru gefnar rúmar heimildir fyrir þessum atriðum sem mætti koma í veg fyrir með róttækari breytingum á lögunum. Við viljum einnig benda á að aðstæður við slík inngrip hafa oft meiri langtímaáhrif á sjúklinginn en geðsjúkdómurinn sjálfur.

Samningur Sameinuðu þjóðanna um réttindi fatlaðs fólks

Við teljum að víðtækari breytinga hefði verið þörf til að innleiða 12. gr. SRFF inn í lögin, en mörg lönd hafa átt í erfiðleikum með það. Má þar benda til Finna sem ætluðu að fullgilda samninginn nú á vorþingi en hættu við þar sem í ljós kom að innleiðing 12. gr. var ekki fullnægjandi. Þeir stefna að því að fullgilda SRFF í haust og verður Ísland þá eitt þriggja Evrópuríkja sem á eftir að fullgilda samninginn. Nefnd Sameinuðu þjóðanna um réttindi fatlaðs fólks sem hefur eftirlit með

framkvæmd ríkja á samningnum sá ástæðu til að gefa út almennar athugasemdir um 12. gr. SRFF 11. apríl 2014 (sjá fylgiskjal). Í athugasemdum kemur fram að fram hafi komið almennur misskilningur hjá aðildarríkjum SRFF um hvernig innleiða eigi 12. gr. samningsins. Lögð er áhersla á frelsi fatlaðs fólks til að taka ákvarðanir og aðgengi þess að þeim stuðningi sem það telur sig þurfa á að halda.

Bestu starfsvenjur

Viðfangsefni ML ritgerðar Helgu Baldvinsdóttur Bjargardóttur var „...að skoða lögræðismál fatlaðs fólks og rétt þess til að njóta lögformlegs hæfis síns eins og það er verndað í 12. gr. SRFF.“ Í kafla um dæmi um bestu starfsvenjur bendir hún til Svíþjóðar og Kanada og segir eftirfarandi:

Við innleiðingu 12. gr. SRFF hefur aðallega verið litið til Svíþjóðar og Kanada varðandi útfærslu á kerfi þar sem aðstoð er veitt við beitingu lögformlegs hæfis án þess að fatlað fólk glati um hæfi sínu eða ákörðunarvaldið sé fært yfir til einhvers annars. Í báðum löndum voru þessi kerfi þróuð í nánu samstarfi stjórnvalda og hagsmunasamtaka fatlaðs fólks. Í Svíþjóð var kerfi persónulegra umboðsmanna (s. Personleg ombud) komið á laggirnar til að mæta þörfum einstaklinga með geðraskanir. Kanadíska kerfið um talsmannasamninga (e. Representation agreement) er hins vegar sprottið frá hreyfingu fólks með þroskahömlun.

(Helga Baldvinsdóttir Bjargardóttir, 2014, bls. 46)

Til athugunar

Við teljum að taka ætti mið af bestu starfsvenjum og líta til Svíþjóðar og Kanada varðandi uppbyggingu kerfis sem á að koma í veg fyrir lögræðissviptingu, nauðungarvistun og þvingaðar meðferðir. Nánari upplýsingar um uppbyggingu kerfanna má finna í ritgerð Helgu.

Í athugasemdum við lagafrumvarpið koma fram ýmsar tillögur um hvernig bæta megi framkvæmd nauðungarinnlagna sem okkur finnst að athuga mætti betur. Þar má nefna að sjúkraflutningamenn komi að flutningi einstaklinga á sjúkrahús í stað lögreglu. Einnig er nefnt að unnt væri að þróa framkvæmdina með þeim hætti að til staðar væri bráðateymi sem samsett væri af sérfræðingum sem gæti leitt til þess að ekki væri þörf á nauðungarvistun.

Félagsþjónusta sveitarfélaga hefur í auknum mæli tekið að sér að fara fram á nauðungarvistun einstaklinga. Við teljum það spor í framfararátt en bendum jafnframt á nauðsyn þess að sú þjónusta sé í boði allan sólahringinn, um helgar og á hátíðisdögum. Aðstandendur verða einnig að fá upplýsingar og fræðslu um þennan möguleika.

Í frumvarpinu eru lagðar til ýmsar breytingar til bóta hvað varðar lögræðissviptingar, nauðungarvistanir og þvingaðar meðferðir. Gera þarf ráð fyrir nægjanlegu fjármagni í verkefnin til framtíðar þannig að markmiði laganna verði náð.

Að lokum

Við teljum að þar sem hér er um mjög viðkvæmt og viðamikilið frumvarp að ræða sé heppilegra að afgreiðslu frumvarpsins verði frestað og tíminn notaður til að vinna það áfram, með hagsmunasemtökum, til að gera það ennþá betra. Geðhjálp sem er aðildarfélag ÖBÍ sendi einnig inn umsögn sem við styðjum.

Ekkert um okkur án okkar.

Með vinsemd og virðingu,



Ellen Calmon,
formaður Öryrkjabandalags Íslands

Fylgiskjöl:

- Athugasemdir Öryrkjabandalags Íslands við drög að frumvarpi um breytingu á lögræðislögum, 11. mars 2015.
- Almennar athugasemdir, frá nefnd Sameinuðu þjóðanna um réttindi fatlaðs fólks sem hefur eftirlit með framkvæmd ríkja á samningnum, um 12. Gr. SRFF 11. apríl 2014.
- ML ritgerð Helgu Baldvinsdóttur Bjargardóttur, Frá forræði til sjálfræðis: Ný nálgun á lögræði fatlaðs fólks, 2014.

Innanríkisráðuneytið
Sölvhólsgrötu 7
101 Reykjavík.



Reykjavík, 11. mars 2015.

Efni: Athugasemdir Öryrkjabandalags Íslands (ÖBÍ) við frumvarp til laga um breytingu á lögræðislögum, nr. 71 28. maí 1997, með síðari breytingum (frumvarpið).

Eftirfarandi eru athugasemdir ÖBÍ við frumvarpið. Í upphafi verða settar fram almennar athugasemdir en í kjölfarið sérgreindar eftir þeim greinum frumvarpsins sem ÖBÍ telur ástæðu til að fjalla um:

Almennar athugasemdir.

Almennt verður að ganga út frá því að frelsis- og réttindasvipting séu neyðarúrræði þegar öll önnur úrræði hafa verið fullreynd. Þá er að sama skapi nauðsynlegt að gæta réttinda frelsissviptra einstaklinga í hvívetna. Af lestri frumvarpsins, einkum athugasemdum með því, virðist sem framangreind sjónarmið hafi verið frumvarpshöfundum ofarlega í huga og ÖBÍ fagnar því. Aftur á móti mætti sjálfur lagatextinn, sem lagður er til í frumvarpinu, almennt bera þess meiri merki. Þannig mættu atriði sem stuðla eiga að framangreindum markmiðum koma skýrar fram og vera afdráttarlausari. Þá leggst ÖBÍ gegn þeim tillögum sem lúta sérstaklega að því að lengja þann tíma sem frelsissvipta megi fólk án aðkomu dómstóla.

Einstaklingar sem óumdeilanlega eru ekki færir um að ráða málefnum sínum.

Hvorki í núgildandi lögræðislögum né í frumvarpinu er með fullnægjandi hætti tekið á stöðu þeirra sem eru fyrirsjáanlega ekki færir um að ráða sínum málefnum. Þrátt fyrir áður nefnd megin sjónarmið, um að leitast skuli við að einstaklingar ráði sem oftast sínum málefnum, er ljóst að sumir fullorðnir einstaklingar eru óumdeilanlega ekki færir um að ráða málefnum sínum. Er hér t.d. átt við þá sem verja lífi sínu á heilbrigðisstofnunum. Málefni og réttarstaða þessa hóps hefur lengi verið óljós.

Með frumvarpinu þyrfti að taka á málefnum þessa hóps með heildstæðum hætti og gera ráð fyrir skýru fyrirkomulagi hvað varðar ákvarðanatöku fyrir hönd þessara einstaklinga. Þyrfti m.a. að fjalla um það hver skuli gæta að því að til staðar sé einhver sem fer með lögráð þessa fólks, en eins og áður segir er það óljóst í dag. Taka þyrfti sérstaka afstöðu til þess hvernig fer þegar börn, sem búa á heilbrigðisstofnun ásamt öðrum stofnunum og munu fyrirsjáanlega aldrei geta ráðið

málefnum sínum, hætta að vera ólögráða fyrir æsku sakir. Reynslan hefur sýnt að þessir einstaklingar eiga á hættu að „gleymast“ hvað varðar lögræði og heimild annarra til að fara með mál þeirra er óljós. Þá þyrfti að mæla fyrir um samspil lögráðamanna og lækna eða annarra forsvarsmanna þeirra heilbrigðisstofnana þar sem fólkið býr. Einnig þyrfti að koma til móts við slík tilvik nú þegar lagt er til að meginregla laganna verði tímabundin lögræðissvipting og ótímabundin svipting afnumin.

Í frumvarpinu er lagt til að felldur verði niður d-liður 4. gr. laganna en hann fjallar að einhverju marki um þau tilvik þar sem einstaklingar eru ófærir um að ráða málefnum sínum.

Hlutverk dómstóla.

Frelsissskerðing er alvarlegt inngrip í líf hvernar manneskju. Af þeim sökum er skýrt kveðið á um það í 67. gr. stjórnarskrárinnar að frelissvipting skuli ekki fara fram nema samkvæmt heimild í lögum. Í 3. mgr. 67. gr. stjórnarskrárinnar er að finna meginreglur um réttindi þeirra sem frelissviptir hafa verið. Þótt ákvæðið beinist að þeim sem hafa verið handteknir vegna gruns um refsiverða háttsemi er rétt að líta til þeirra sjónarmiða þegar mælt er fyrir um réttindi annarra sem sæta frelisssskerðingu.

Er hér fyrst og fremst bent á mikilvægi þess að dómstólar komi að ákvörðun um frelissviptingu og að frelissvipting án aðkomu dómstóla séu undantekningar sem eigi að standa eins stutt yfir og mögulegt er. Í frumvarpinu eru lagðar til rýmri heimildir fyrir frelissviptingu án aðkomu dómstóla og leggst ÖBÍ gegn þeim. Telur ÖBÍ rétt að ákvarðanir um frelissviptingu skuli að meginreglu til teknar af dómstólum en ekki læknum, sýslumönnum eða ráðherra.

Hafa skal til hliðsjónar þær reglur sem gilda um frelissviptingar samkvæmt stjórnarskránni þannig að málefni slíks einstaklings skuli án undandráttar leiða fyrir dómara. Leggur ÖBÍ þannig til að í engu tilviki verði maður frelissviptur lengur en 48 klukkustundir án þess að dómari taki ákvörðun um framhald frelisssskerðingarinnar. Dómari skal eins og mögulegt er, fá fram sjónarmið þess frelissvipta og í öllum tilvikum talsmanns hans. Verður ekki séð að nein sjónarmið réttlæti að bíða lengur með að bera slík mál undir dómara enda eiga öll gögn að geta verið tiltæk á framangreindum tíma. Telji t.d. læknir ástæðu til nauðungarvistunar getur hann útskýrt þær ástæður fyrir dómara innan 48 klukkustunda frá upphafi nauðungarvistunar.

Persónulegur talsmaður frelisssskertra einstaklinga.

Með hliðsjón af þeim grundvallarsjónarmiðum að veita eigi einstaklingum aðstoð við að taka sjálfstæðar ákvarðanir, frekar en að fela ákvörðunarvald öðrum, telur ÖBÍ að ganga mætti lengra með frumvarpinu. Þannig mætti í fleiri tilvikum leggja áherslu á að einstaklingur njóti aðstoðar persónulegs talsmanns samkvæmt lögum nr. 88/2011, um réttindagæslu fyrir fatlað fólk, og jafnvel sérstaks lögráðamanns skv. 53. gr. lögræðislaga. Einstaklingar fái þannig frekar og oftar stuðning við ákvarðanatöku í stað þess að vald um þeirra málefni verði falið öðrum.

1. gr.

Ákvæði 1. gr. frumvarpsins lýtur að 4. gr. núgildandi laga. Í frumvarpinu eru gerðar orðalagsbreytingar til samræmis við þá meginstefnu að lögræðissviptingu verði ekki beitt nema þegar brýna nauðsyn beri til og ljóst sé að önnur úrræði nýtist ekki einstaklingum til að ráða ráðum sínum. ÖBÍ er sammála framangreindu en telur að ganga mætti enn lengra þannig að textinn endurspegli betur þessi sjónarmið. Þannig mætti koma skýrar fram hversu mikilvægt samspil er á milli ákvæða lögræðislaga og laga nr. 88/2011, um réttindagæslu fyrir fatlað fólk. Í fyrsta málslið 4. gr. ætti þannig að koma fram skýr tilvísun til laga um réttindagæslu fyrir fatlað fólk og/eða aðstoðar persónulegs talsmanns samkvæmt IV. kafla þeirra laga. Þvert á það sem segir í athugasemdum með 1. gr. frumvarpsins ætti þannig gera það að meginreglu laganna að almennt sé forsenda lögræðissviptingar að önnur úrræði, þ.á m. aðstoð persónulegs talsmanns hafi verið fullreynd.

Framangreindu til frekari stuðnings er bent á meðfylgjandi umfjöllun nefndar Sameinuðu þjóðanna um réttindi fatlaðs fólks frá 11. apríl 2014.

2. gr.

Ákvæði 2. gr. frumvarpsins lýtur að 5. gr. núgildandi laga. Í frumvarpinu er ekki mælt fyrir um hámark tímabundinnar lögræðissviptingar. Með hliðsjón af markmiði laganna væri eðlilegt að hér væri mælt fyrir um slíkt hámark, t.d. tvö ár til samræmis við 24. gr. frumvarpsins.

6. gr.

Ákvæði 6. gr. frumvarpsins lýtur að 19. gr. núgildandi laga. Hér gerir ÖBÍ tillögu um Í frumvarpinu er lögð til lenging á hámarkstímabili nauðungarvistunar, á grundvelli ákvörðunar læknis, um einn sólarhring, þ.e. úr tveimur sólarhringum í þrjá. Eins og áður hefur komið fram verðu ekki séð að nauðsyn sé á þessari breytingu og er hún í andstöðu við þau sjónarmið sem þróast hafa í íslenskri réttarframkvæmd um frelsissviptingar án aðkomu dómstóla.

13. gr.

Ákvæði 13. gr. frumvarpsins lýtur að 26. gr. núgildandi laga. Hér gerir ÖBÍ tillögu um að bætt verði við e. lið 1. mgr. 26. gr. frumvarpsins. ÖBÍ telur að það samrýmist varla tilgangi og ástæðum nauðungarvistunar að láta við það sitja að kynna nauðungarvistuðum manni þau úrræði sem honum standa til boða. Í mörgum tilvikum er hinn nauðungarvistaði ekki í ástandi til að meðtaka slíkar upplýsingar eða ófær um að taka ákvarðanir um réttindi sín til með þeim úrræðum sem honum standa til boða samkvæmt lögnum.

Er því lagt til að hér verði bætt við skyldur vakthafandi læknis þannig að hann skuli skrá (i) hvenær haft var samband við ráðgjafa og/eða persónulegan talsmann skv. 2. mgr. 27. gr. laganna og (ii) hvenær ráðgjafa/persónulegum talsmanni voru tilkynnt þau réttarúrræði sem fram koma í e.lið. Í samræmi við framangreint er gert ráð fyrir breytingum á 27. gr.

14. gr.

Ákvæði 14. gr. frumvarpsins lýtur að 27. gr. núgildandi laga. Hér gerir ÖBÍ tillögu um afdráttarlausara orðalag:

Í fyrsta lagi er lagt til að upphaf 1. mgr. 27. gr. verði svohljóðandi:

„Nauðungarvistaður maður skal njóta ráðgjafar...“.

Tilgangurinn er að í öllum tilvikum sé gætt að þessum grundvallarréttindum nauðungarvistaðs manns. Í frumvarpinu virðist stefnt að sama markmiði en lagt er til afdráttarlausara orðalag 1. mgr. að þessu leyti. Í orðalaginu felst einnig að frumkvæðið að því að bjóða og útvega slíka ráðgjöf og stuðning er ekki á hendi þess nauðungarvistaða heldur þess sem ábyrgð ber á honum.

Í öðru lagi er lagt til að 1. málsl. 2. mgr. 27. gr. verði svohljóðandi:

„Vakthafandi læknir skal hafa samband við ráðgjafann svo fljótt sem verða má, en í síðasta lagi innan 8 klukkustunda frá upphafi nauðungarvistunar, og tilkynna honum um nauðungarvistunina.“

Tilgangurinn er að hámarkstími verði settur í stað þess að eingöngu sé hið loðna orðalag „svo fljótt sem verða má“. Meginreglan verður ávallt sú að lækni ber að hafa samband mun fyrr en 8 klukkustundir verði algert hámark sem einungis eigi við þegar ekki er hægt að ná í ráðgjafann fyrr, t.d. þegar nauðungarvistun hefst um nótt.

15. gr.

Ákvæði 15. gr. frumvarpsins lýtur að 28. gr. núgildandi laga. Hér gerir ÖBÍ tillögu um að þvinguð lyfjagjöf eða þvinguð meðferð sé tafarlaust tilkynnt ráðgjafa skv. 27. gr. laganna og persónulegum talsmanni.

16. gr.

Ákvæði 16. gr. frumvarpsins lýtur að 29. gr. núgildandi laga. Hér gerir ÖBÍ tillögu um að heimild til allt að 21 dags nauðungarvistunar án aðkomu dómstóla verði felld niður. Þessi ákvæði laganna eru ekki í samræmi við grundvallarréttindi þeirra sem hafa verið frelsissviptir. Lagt er til að ákvarðanir um lengri nauðungarvistanir en 48 klukkustundir verði teknar af dómstólum, sbr. fyrri umfjöllun.

17. gr.

Ákvæði 16. gr. frumvarpsins lýtur að nýrri grein, 29. gr. a í lögunum. Hér gerir ÖBÍ tillögu um að dómstólar komi fyrr að málum (þ.e. innan 48 klukkustunda) og einstaklingar verði ekki nauðungarvistaðir í allt að 21 dag áður en mál koma fyrir dómstóla. Með sama rökstuðningi leggst ÖBÍ gegn tillögu að 4. mgr. 29. gr. a. sem mælir fyrir um jafnvel enn lengri nauðungarvistun án ákvörðunar dómara.

Verði ekki fallist á framangreint leggur ÖBÍ til breytingar á 30. gr. þannig að heimild til málskots nái einnig til 29. gr. a. og að tilvísun til þess ákvæðis verði bætt við 30. gr. Þá leggur ÖBÍ einnig til að orðalag 3. mgr. 30. gr. verði mildað og tekið verði út skilyrðið um að krafa skuli vera skrifleg. Eðli þessara mála leiðir til þess að

nægjanlegt ætti að vera að beina kröfu til dómstólsins. Form kröfu, sem vissulega er komin fram, á ekki að hindra framgang slíks máls.

Ekkert um okkur án okkar.

Með vinsemd og virðingu,



Ellen Calmon,
formaður ÖBÍ



Convention on the Rights of Persons with Disabilities

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VERSION**

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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

I. Introduction

1. Equality before the law is a basic general principle of human rights protection and is indispensable for the exercise of other human rights. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights specifically guarantee the right to equality before the law. Article 12 of the Convention on the Rights of Persons with Disabilities further describes the content of this civil right and focuses on the areas in which people with disabilities have traditionally been denied the right. Article 12 does not set out additional rights for people with disabilities; it simply describes the specific elements that State parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

2. Given the importance of this article, the Committee facilitated interactive fora for discussions on legal capacity. From the very useful exchange on the provisions of article 12 by experts, State parties, disabled persons' organizations, non-governmental organizations, treaty monitoring bodies, national human rights institutions and United Nations agencies, the Committee found it imperative to provide further guidance in a general comment.

3. Based on the initial reports of the different State parties that it has reviewed so far, the Committee observes that there is a general misunderstanding of the exact scope of the obligations of State parties under article 12 of the Convention. Indeed, there has been a general failure to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making. The aim of the present general comment is to explore the general obligations deriving from the different components of article 12.

4. The present general comment reflects an interpretation of article 12 which is premised on the general principles of the Convention, as outlined in article 3, namely, respect for inherent dignity, individual autonomy — including the freedom to make one's own choices —, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; and respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

5. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities each specify that the right to equal recognition before the law is operative “everywhere.” In other words, there are no circumstances permissible under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited. This is reinforced by article 4, paragraph 2, of the International Covenant on Civil and Political Rights, which states that no derogation from this right is permissible even in times of public emergency. Although an equivalent prohibition on derogation from the right to equal recognition before the law is not specified in the Convention on the Rights of Persons with Disabilities, the provision in the International Covenant covers such protection by virtue of article 4, paragraph 4, of the Convention, which states that the provisions of the Convention on the Rights of Persons with Disabilities do not derogate from existing international law.

6. The right to equality before the law is also reflected in other core international and regional human rights treaties. Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women guarantees women’s equality before the law and requires the recognition of women’s legal capacity on an equal basis with men, including with regard to concluding contracts, administering property and exercising their rights in the justice system. Article 3 of the African Charter on Human and Peoples’ Rights provides for the right of every person to be equal before the law and to enjoy equal protection of the law. Article 3 of the American Convention on Human Rights enshrines the right to juridical personality and the right of every person to recognition as a person before the law.

7. State parties must holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others. Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.

8. Article 12 of the Convention affirms that all persons with disabilities have full legal capacity. Legal capacity has been prejudicially denied to many groups throughout history, including women (particularly upon marriage) and ethnic minorities. However, persons with disabilities remain the group whose legal capacity is most commonly denied in legal systems worldwide. The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. 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 fundamental 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 liberty.)

9. All persons with disabilities, including those with physical, mental, intellectual or sensory impairments, can be affected by denial of legal capacity and substitute decision-making. However, persons with cognitive or psychosocial disabilities have been, and still are, disproportionately affected by substitute decision-making regimes and denial of legal capacity. The Committee reaffirms that a person’s status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12. All

practices that in purpose or effect violate article 12 must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.

9bis. This General Comment is focused primarily on the normative content of Article 12 and the State obligations that emerge. The Committee will continue to do work in this area and provide further in-depth description of the rights and obligations in Article 12 with its future concluding observations, general comments, and other work

II. Normative content of article 12

Article 12, paragraph 1

10. Article 12, paragraph 1, reaffirms the right of persons with disabilities to be recognized as persons before the law. This guarantees that every human being is respected as a person possessing legal personality, which is a prerequisite for the recognition of a person's legal capacity.

Article 12, paragraph 2

11. Article 12, paragraph 2, recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all areas of life. Legal capacity includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles the person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes person as an agent with the power to engage in transactions and in general to create, modify or end legal relationships. The right to recognition as a legal agent is provided for in article 12, paragraph 5, of the Convention, which outlines the duty of State parties to "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".

12. Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. In the past, legal instruments such as the UDHR (Article 6), the ICCPR (Article 16), and CEDAW (Article 15) did not specify the distinction between mental and legal capacity. The CRPD (Article 12) now makes it clear that 'unsoundness of mind' and other discriminatory labels are not legitimate reasons for the denial of legal capacity (legal standing and legal agency). Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.

12bis. Legal capacity is an inherent right accorded to all people including persons with disabilities. As noted, it consists of two strands. The first is the legal standing to have rights, to be recognized as a legal person before the law. This may include, for example, having a birth certificate, seek medical assistance, register to be on the electoral role, or applying for a passport. The second is the legal agency to act on those rights, and to have those actions recognized by the law. It is this component that is frequently denied or diminished for persons with disabilities. For example, laws may allow persons with disabilities to own property, but do not always respect the actions of people in terms of buying and selling property. Legal capacity means that all people, including persons with

disabilities, have legal standing and legal agency simply by virtue of being human. Therefore, both these strands of legal capacity must be recognized for the right to legal capacity for persons with disabilities to be fulfilled; they cannot be separated.

The concept of mental capacity is highly controversial in and of itself. It is not, as it is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity.

13. In most of the State party reports that the Committee has examined so far, the concepts of mental and legal capacity have been conflated so that where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed. This is decided simply on the basis of the diagnosis of an impairment (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person's decision-making skills are considered to be deficient (functional approach). The functional approach attempts to assess mental capacity and deny legal capacity accordingly. (Often based on whether an individual can understand the nature and consequences of a decision and/or whether she/he can use or weigh the relevant information.) This functional approach is flawed for two key reasons. The first is that it is discriminatorily applied to people with disabilities. The second is that it presumes to be able to accurately assess the inner-workings of the human mind and to then deny a core human right – the right to equal recognition before the law – when an individual does not pass the assessment. In all these approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but rather requires that support be provided in the exercise of legal capacity.

Article 12, paragraph 3

14. Article 12, paragraph 3, recognizes that state parties have an obligation to provide access to support in the exercise of their legal capacity. State parties must refrain from denying persons with disabilities their legal capacity, and instead must provide persons with disabilities access to the support that may be necessary to enable them to make decisions that have legal effect.

15. Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making. Article 12, paragraph 3, does not specify what form the support should take. "Support" is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity. 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, —such as requiring private and public actors such as banks and financial institutions to provide understandable information or the provision of 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. A choice of various forms of advance planning mechanisms can be provided by State parties to accommodate various preferences, but all options should be non-discriminatory. Support should be provided to the individual where desired to complete an advance planning process. The point at which an advance directive enters into force (and ceases to have effect) should be decided by the person in the text of the directive and should not be based on an assessment that the person lacks mental capacity.

16. The type and intensity of support to be provided will vary significantly from one person to another due to the diversity of persons with disabilities. This is in accordance with article 3 (d), which sets out “respect for difference and acceptance of persons with disabilities as part of human diversity and humanity” as a general principle of the Convention. At all times, including during crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected.

17. Some persons with disabilities only seek recognition of their right to legal capacity on an equal basis with others further to in Article 12, paragraph 2, and may not wish to exercise their right to support as provided for in article 12, paragraph 3.

Article 12, paragraph 4

18. Article 12, paragraph 4, outlines the safeguards that must be present in a system of support in the exercise of legal capacity. Article 12, paragraph 4, must be read in conjunction with the rest of article 12 and the whole Convention. It requires State parties to create appropriate and effective safeguards for the exercise of legal capacity. The primary purpose of these safeguards must be to ensure the respect of the person’s rights, will and preferences. In order to accomplish this, the safeguards must provide protection from abuse on an equal basis with others.

18bis Where, after significant efforts have been made, it is not practicable to determine the will and preference of an individual, ‘best interpretation of will and preference’ must replace ‘best interests’ determinations. This respects the rights, will and preferences of the individual, according to Article 12 (4). The ‘best interests’ principle is not a safeguard which complies with article 12 in relation to adults. The ‘will and preference’ paradigm must replace the ‘best interests’ paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.

18ter All people risk being subject to ‘undue influence’ yet this may be exacerbated for those who rely on the supports of others to make decisions. Undue influence is characterized where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation. Safeguards for the exercise legal capacity must include protection against undue influence – however the protection must also respect the rights, will and preferences of the person, including the right to take risks and make mistakes.

Article 12, paragraph 5

19. Article 12, paragraph 5, requires that State parties take measures — including legislative, administrative, judicial and other practical measures — to ensure the rights of persons with disabilities with respect to financial and economic affairs, on an equal basis with others. Access to finance and property has traditionally been denied to persons with disabilities based on the medical model of disability. This approach of denying persons

with disabilities legal capacity for financial matters must be replaced with support to exercise legal capacity, in accordance with article 12, paragraph 3. In the same way as gender may not be used as the basis for discrimination in the areas of finance and property,¹ neither may disability.

III. Obligations of State parties

20. State parties have an obligation to respect, protect and fulfil the right of persons with all disabilities to equal recognition before the law. In this regard, State parties should refrain from any action that deprives persons with disabilities of the right to equal recognition before the law. State parties should take action to prevent non-State actors and private persons from interfering in the ability of persons with disabilities to realize and enjoy their human rights, including the right to legal capacity. One of the aims of support in the exercise of legal capacity is to build the confidence and skills of persons with disabilities so that they can exercise their legal capacity with less support in the future if they so wish. State parties have an obligation to provide training for persons receiving support so that they can decide when less support is needed or when they no longer require support in the exercise of their legal capacity.

21. In order to fully recognize “universal legal capacity”, whereby all persons (regardless of disability or decision-making skills) inherently possess legal capacity, State parties must abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect.²

22. In its concluding observations relating to article 12, the Committee on the Rights of Persons with Disabilities has repeatedly stated that the State parties concerned must “review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person’s autonomy, will and preferences”.

23. Substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where (i) legal capacity is removed from a person, even if this is just in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will or (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences.

24. State parties’ obligation to replace substitute decision-making regimes by supported decision-making requires both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives. The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention.

25. A supported decision-making regime comprises various support options which give primacy to a person’s will and preferences and respect human rights norms. It should provide protection for all rights, including those related to autonomy (right to legal capacity, right to equal recognition before the law, right to choose where to live, etc.) and rights related to freedom from abuse and ill-treatment (right to life, right to physical

¹ See Convention on the Elimination of All Forms of Discrimination against Women, art. 13 (b).

² See Convention on the Rights of Persons with Disabilities, art. 2, in conjunction with art. 5.

integrity, etc.). Furthermore, systems of supported decision-making should not over-regulate the lives of persons with disabilities. While supported decision-making regimes can take many forms, they should all incorporate certain key provisions to ensure compliance with article 12 of the Convention, including the following:

(a) Supported decision-making must be available to all. A person's level of support needs (especially where these are high) should not be a barrier to obtaining support in decision-making;

(b) All forms of support in the exercise of legal capacity (including more intensive forms of support) must be based on the will and preference of the person, not on what is perceived as being in his or her objective best interests;

(c) A person's mode of communication must not be a barrier to obtaining support in decision-making, even where this communication is non-conventional, or understood by very few people;

(d) Legal recognition of the support person(s) formally chosen by a person must be available and accessible, and the State has an obligation to facilitate the creation of support, particularly for people who are isolated and may not have access to naturally occurring supports in the community. This must include a mechanism for third parties to verify the identity of a support person as well as 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 preference of the person concerned;

(e) In order to comply with the requirement set out in article 12, paragraph 3, of the Convention that State parties must take measures to "provide access" to the support required, State parties must ensure that support is available at nominal or no cost to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of legal capacity;

(f) Support in decision-making must not be used as justification for limiting other fundamental rights of persons with disabilities, especially the right to vote, the right to marry (or establish a civil partnership) and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty;

(g) The person must have the right to refuse support and terminate or change the support relationship at any time;

(h) Safeguards must be set up for all processes relating to legal capacity and support in exercising legal capacity. The goal of safeguards is to ensure that the person's will and preferences are respected.

(i) The provision of support to exercise legal capacity should not hinge on mental capacity assessments; new, non-discriminatory indicators of support needs are required in the provision of support to exercise legal capacity.

26. The right to equality before the law has long been recognized as a civil and political right, with roots in the International Covenant on Civil and Political Rights. Civil and political rights attach at the moment of ratification and State parties are required to take steps to immediately realize these rights. As such, the rights provided for in article 12 apply at the moment of ratification and are subject to immediate realization. The state obligation to provide access to support for the exercise of legal capacity in Article 12(3) is a state obligation required for the fulfilment of the civil and political right to equal recognition before the law. Progressive realization (art. 4, para. 2) does not apply to article 12. Upon ratification, State parties must immediately begin to take steps towards the realization of the rights in article 12. These steps must be deliberate, well-planned, and include the

consultation and meaningful participation of people with disabilities and their organizations.

IV. Relationship with other provisions of the Convention

27. Recognition of legal capacity is inextricably linked to the enjoyment of many other human rights provided for in the Convention on the Rights of Persons with Disabilities, including, but not limited to, the right to access justice (art. 13), the right to be free from involuntary detention in a mental health facility and not to be forced to undergo mental health treatment (art. 14), the right to respect for one's physical and mental integrity (art. 17), the right to liberty of movement and nationality (art. 18), the right to choose where and with whom to live (art. 19), the right to freedom of expression (art. 21), the right to marry and found a family (art. 23), the right to consent to medical treatment (art. 25), and the right to vote and stand for election (art. 29). Without recognition of the person as a person before the law, the ability to assert, exercise and enforce these rights, and many other rights provided for in the Convention, is significantly compromised.

Article 5: Equality and non-discrimination

28. To achieve equal recognition before the law, legal capacity must not be denied discriminatorily. Article 5 of the Convention guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability. Discrimination on the basis of disability is defined in article 2 of the Convention as "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms". Denial of legal capacity having the purpose or effect of interfering with the right of persons with disabilities to equal recognition before the law is a violation of articles 5 and 12 of the Convention. Indeed, a State has the ability to restrict the legal capacity of a person based on certain circumstances, such as bankruptcy or criminal conviction. However, the right to equal recognition before the law and freedom from discrimination requires that when the State denies legal capacity, it must be on the same basis for all persons. Denial of legal capacity must not be based on a personal trait such as gender, race, or disability, or have the purpose or effect of treating such persons differently.

29. Freedom from discrimination in the recognition of legal capacity restores autonomy and respects the human dignity of the person in accordance with the principles enshrined in article 3 (a) of the Convention. Freedom to make one's own choices most often requires legal capacity. Independence and autonomy include the power to have one's decisions legally respected. The need for support and reasonable accommodation in making decisions shall not be used to question a person's legal capacity. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity (art. 3 (d)) is incompatible with granting legal capacity on an assimilationist basis.

30. Non-discrimination includes the right to reasonable accommodation in the exercise of legal capacity (art. 5, para. 3). Reasonable accommodation is defined in article 2 of the Convention as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms". The right to reasonable accommodation in the exercise of legal capacity is separate from and complementary to the right to support in the exercise of legal capacity. State parties are required to make any modifications or adjustments to allow persons with disabilities to exercise their legal capacity, unless it is a disproportionate or

undue burden. Such modifications or adjustments may include, but are not limited to, access to essential buildings such as courts, banks, social benefit offices, voting venues; accessible information regarding decisions which have legal effect; and personal assistance. The right to support in the exercise of legal capacity shall not be limited by the claim of disproportionate or undue burden. The State has an absolute obligation to provide access to support in the exercise of legal capacity.

Article 6: Women with disabilities

31. Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women provides for women's legal capacity on an equal basis with men, thereby acknowledging that recognition of legal capacity is integral to equal recognition before the law: "State parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals" (para. 2). This provision applies to all women, including women with disabilities. The Convention on the Rights of Persons with Disabilities recognizes that women with disabilities may be subject to multiple and intersectional forms of discrimination based on gender and disability. For example, women with disabilities are subjected to high rates of forced sterilization, and are often denied control of their reproductive health and decision-making, the assumption being that they are not capable of consenting to sex. Certain jurisdictions also have higher rates of imposing substitute decision-makers on women than on men. Therefore, it is particularly important to reaffirm that the legal capacity of women with disabilities should be recognized on an equal basis with others.

Article 7: Children with disabilities

32. While article 12 of the Convention protects equality before the law for all persons, regardless of age, article 7 of the Convention recognizes the developing capacities of children and requires that "in all actions concerning children with disabilities, the best interests of the child [...] be a primary consideration" (para. 2) and that "their views [be] given due weight in accordance with their age and maturity" (para. 3). To comply with article 12, State parties must examine their laws to ensure that the will and preferences of children with disabilities are respected on an equal basis with other children.

Article 9: Accessibility

33. The rights provided for in article 12 are closely tied to the state obligations relating to accessibility (art. 9) because the right to equal recognition before the law is necessary to enable persons with disabilities to live independently and participate fully in all aspects of life. Article 9 demands the identification and elimination of barriers to facilities or services open or provided to the public.

Lack of accessibility of information and communication, and inaccessible services may constitute barriers to the realization of legal capacity for some persons with disabilities in practice. Therefore state parties must make all procedures for the exercise of legal capacities and all information and communication pertaining to it fully accessible. State parties must review their laws and practices to ensure that the right to legal capacity and accessibility are being realized.

Article 13: Access to justice

34. State parties have an obligation to ensure that persons with disabilities have access to justice on an equal basis with others. The recognition of the right to legal capacity is essential for access to justice in many respects. In order to seek enforcement of their rights and obligations on an equal basis with others, persons with disabilities must be recognized as persons before the law with equal standing in courts and tribunals. State parties must also ensure that persons with disabilities have access to legal representation on an equal basis with others. This has been identified as a problem in many jurisdictions and must be remedied — including by ensuring that persons who experience interference with their right to legal capacity have the opportunity to challenge such interference (on their own behalf or with legal representation) and to defend their rights in court. Persons with disabilities have often been excluded from key roles in the justice system as lawyers, judges, witnesses or members of a jury.

35. Police officers, social workers, and other first responders must be trained to recognize persons with disabilities as full persons before the law and to give the same weight to complaints and statements from persons with disabilities as they would give to non-disabled persons. This entails training and awareness-raising in these important professions. Persons with disabilities must also be granted legal capacity to testify on an equal basis with others. Article 12 of the Convention guarantees support in the exercise of legal capacity, including the capacity to testify in judicial, administrative and other legal proceedings. Such support could take various forms, including recognition of diverse communication methods, allowing video testimony in certain situations, procedural accommodation, the provision of professional sign language interpretation and other assistive methods. The judiciary must also be trained and made aware of their obligation to respect the legal capacity of persons with disabilities, including legal agency and standing.

Articles 14 and 25: Liberty, security and consent

36. Respecting the right to legal capacity of persons with disabilities on an equal basis includes respecting the right of persons with disabilities to liberty and security of the person. The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention. State parties must refrain from such practices and establish a mechanism to review cases whereby persons with disabilities have been placed in a residential setting without their specific consent.

37. The right to enjoyment of the highest attainable standard of health (art. 25) includes the right to health care on the basis of free and informed consent. State parties have an obligation to require all health and medical professionals (including psychiatric professionals) to obtain the free and informed consent of persons with disabilities prior to any treatment. In conjunction with the right to legal capacity on an equal basis with others, State parties have an obligation not to permit substitute decision-makers to provide consent on behalf of persons with disabilities. All health and medical personnel should ensure appropriate consultation that directly engages the person with disabilities. They should also ensure, to the best of their ability, that assistants or support persons do not substitute or have undue influence over the decisions of persons with disabilities.

Articles 15, 16 and 17: Respect for personal integrity and freedom from torture, violence, exploitation and abuse

38. As has been stated in several concluding observations, forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law and an infringement of the rights to personal integrity (art. 17), freedom from torture (art. 15), and freedom from violence, exploitation and abuse (art. 16). This practice denies the legal capacity of a person to choose medical treatment and is therefore a violation of article 12 of the Convention. State Parties must, instead, respect the legal capacity of persons with disabilities to make decisions at all times, including in crisis situations, ensure that accurate and accessible information is provided about service options and that non-medical approaches are made available, and provide access to independent support. State parties have an obligation to provide access to support for decisions regarding psychiatric and other medical treatment. Forced treatment is a particular problem for persons with psychosocial, intellectual and other cognitive disabilities. State parties must abolish policies and legislative provisions that allow or perpetrate forced treatment, as it is an ongoing violation found in mental health laws across the globe, despite empirical evidence indicating its lack of effectiveness and the views of people using mental health systems who have experienced deep pain and trauma as a result of forced treatment. The Committee recommends that State parties ensure that decisions relating to a person's physical or mental integrity can only be taken with the free and informed consent of the person concerned.

Article 18: Nationality

39. Persons with disabilities have the right to a name and registration of their birth as part of the right to recognition everywhere as a person before the law (art. 18, para. 2). State parties must take the necessary measures to ensure that children with disabilities are registered at birth. This right is provided for in the Convention on the Rights of the Child (art. 7); however, children with disabilities are disproportionately likely not to be registered as compared with other children. This denies them citizenship, often also denies them access to health care and education, and can even lead to their death. Since there is no official record of their existence, their death may occur with relative impunity.

Article 19: Living independently and being included in the community

40. To fully realize the rights provided for in article 12, it is imperative that persons with disabilities have opportunities to develop and express their will and preferences, in order to exercise their legal capacity on an equal basis with others. This means that persons with disabilities must have the opportunity to live independently in the community and to make choices and to have control over their everyday lives, on an equal basis with others, as provided for in article 19.

41. Interpreting article 12, paragraph 3, in the light of the right to live in the community (art. 19) means that support in the exercise of legal capacity should be provided using a community-based approach. State parties must recognize that communities are assets and partners in the process of learning what types of support are needed in the exercise of legal capacity, including raising awareness about different support options. State parties must recognize the social networks and naturally occurring community supports (including friends, family and schools) of persons with disabilities as key to supported decision-making. This is consistent with the Convention's emphasis on the full inclusion and participation of persons with disabilities in the community.

42. The segregation of persons with disabilities in institutions continues to be a pervasive and insidious problem that violates a number of the rights guaranteed under the Convention. The problem is exacerbated by the widespread denial of legal capacity to persons with disabilities, which allows others to consent to their placement in institutional settings. The directors of institutions are also commonly vested with the legal capacity of the persons residing therein. This places all power and control over the person in the hands of the institution. In order to comply with the Convention and respect the human rights of persons with disabilities, deinstitutionalization must be achieved and legal capacity must be restored to all persons with disabilities, who must be able to choose where and with whom to live (art. 19). A person's choice of where and with whom to live should not affect his or her right to access support in the exercise of his or her legal capacity.

Article 22: Privacy

43. Substitute decision-making regimes, in addition to being incompatible with article 12 of the Convention, also potentially violate the right to privacy of persons with disabilities, as substitute decision-makers usually gain access to a wide range of personal and other information regarding the person. In establishing supported decision-making systems, State parties must ensure that those providing support in the exercise of legal capacity fully respect the right to privacy of persons with disabilities.

Article 29: Political participation

44. Denial or restriction of legal capacity has been used to deny political participation, especially the right to vote, for certain persons with disabilities. In order to fully realize the equal recognition of legal capacity in all aspects of life, it is important to recognize the legal capacity of persons with disabilities in public and political life (art. 29). This means that a person's decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote, the right to stand for election and the right to serve as a member of a jury.

45. State parties have an obligation to protect and promote the right of persons with disabilities to access the support of their choice in voting by secret ballot, and to participate in all elections and referenda without discrimination. The Committee further recommends that State parties guarantee the right of persons with disabilities to stand for elections, to effectively hold office and to perform all public functions at all levels of government, with reasonable accommodation and support, where desired, in the exercise of their legal capacity.

V. Implementation at the national level

46. In the light of the normative content and obligations outlined above, State parties should take the following steps to ensure the full implementation of article 12 of the Convention on the Rights of Persons with Disabilities:

(a) Recognize persons with disabilities as persons before the law, having legal personality and legal capacity in all aspects of life, on an equal basis with others. This requires the abolition of substitute decision-making regimes and mechanisms that deny legal capacity which discriminate in purpose or effect against persons with disabilities. It is recommended that State Parties create statutory language protecting the right to legal capacity on an equal basis for all;

(b) Establish, recognize and provide persons with disabilities with access to a broad range of supports in the exercise of their legal capacity. Safeguards for these supports must be premised on respect for the rights, will and preferences of persons with disabilities. The supports should meet the criteria set out in paragraph 25 above on the obligations of State parties to comply with article 12, paragraph 3, of the Convention;

(c) Closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations, in the development and implementation of legislation, policies and other decision-making processes give effect to article 12.

47. The Committee encourages State parties to undertake or devote resources to the research and development of best practices respecting the right to equal recognition of the legal capacity of persons with disabilities and support in the exercise of legal capacity.

48. State Parties are encouraged to develop effective mechanisms to combat both formal and informal substitute decision-making. To this end, the Committee urges State parties to ensure that persons with disabilities have the opportunity to make meaningful choices in their lives and develop their personalities, to support the exercise of their legal capacity. This includes, but is not limited to: opportunities to build social networks; opportunities to work and earn a living on an equal basis with others; multiple choices for place of residence in the community; and inclusion in education at all levels.
