



“Economic, social and cultural human rights for persons with cognitive disabilities”

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# Convention on the Rights of Persons with Disabilities

## 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.

# Committee on the Rights of Persons with Disabilities, General Comment no.1 (2014)

- “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*.” (para 17)
- “..an interpretation of article 12 which is premised on the general principles ...as outlined in article 3, namely, respect for the inherent dignity, *individual autonomy* — including the freedom to make one’s own choices —....” (para 4)
- “Article 12 of the Convention on the Rights of Persons with Disabilities further describes the content of *this civil right*...” (para 1)
- “Legal capacity is indispensable for the exercise of civil, political, *economic, social and cultural rights*...” (para 8)

# Civil and political versus Economic, social and cultural human rights – an overview

- Universal Declaration of Human Rights 1948
- International Covenant on Civil and Political Rights, 1976 (entered into force)
- International Covenant on Economic, social and cultural rights, 1976 (“
- Civil and political rights – e.g. Right to non-discrimination, right to life, right to freedom from torture, right to liberty and security, freedom of speech etc
- Economic, social and cultural rights – e.g. – right to education, right to health, right to work, right to adequate standard of living and social protection
- Civil/political - immediately realisable, negative obligations, “cost free”, justiciable?
- Economic/social - progressively realisable (maximum available resources), positive obligations, resource intensive, non-justiciable?

# Persons with disability, and socio-economic disadvantage

Fulfilment of the right to health...

*“...can facilitate the advancement of other key rights, such as the right to life (CRPD, Art 10), protecting the integrity of the person (CRPD, Art 17), and the right of persons with disability to an adequate standard of living and social protection (CRPD, Art 28)”*

Brolan et al, 2011

“...All human rights are universal, indivisible and interdependent and interrelated” – the Vienna Declaration, World Conference on Human Rights, 1993

- Civil, political, economic, social and cultural rights are of equal importance to one another, that is without any hierarchy
- The realisation of one right or rights may be dependent on the realisation of another right or rights
- Rights are interrelated in that they overlap and share common content and are subject to similar and interrelated institutional arrangements

# The CRPD and the “indivisibility, interdependence and interrelatedness” of human rights

- “Reaffirming *the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination,*”  
Preamble
- Both civil and political and economic, social and cultural rights included in the one convention, e.g. the right to non-discrimination (art 5), right to life (art 6), freedom from torture (art 15), freedom of expression (art 19), recognition before the law (art 12); living independently and being included in the community (art 19), right to work (art 27), right to social protection (art 8), right to health (art 25)
- Negative/positive obligations and CP/ESCR within the same articles e.g. Freedom of expression requires provision of accessible information (art 19)
- Optional protocol includes right to individual and group petition

# The CRPD, equality and indivisibility

- Article 5 – equality and non-discrimination; art 2 definition of “discrimination”
- Article 12 – right to enjoy legal capacity “on an equal basis with others”
- Other rights in the CRPD are circumscribed by an emphasis on equality – e.g. article 25 “Health” – must provide “..the same range, quality and standard....as provided to other persons....”
- Formal inequality versus structural inequality
- Direct discrimination versus indirect discrimination
- Links between reasonable accommodation, the right to support in article 12(3) and the requirement for the fulfilment of social and economic rights



# Article 12, indivisibility, interdependence and interrelatedness

- UN Disability Committee – article 12 is a civil and political right and immediately realisable
- Terry Carney, 2015
  - – “arguably” the right in article 12(3) to supports is a socio-economic right subject to progressive realisation, requiring intense resources;
  - Article 12(2) right to make decisions is dependent on fulfilment of 12(3) provision of support
- Eva Feder -Kittay 2015
  - Art 12(3) as socio-economic right but linked with right to reasonable accommodation (art 5(3) - a civil and political right)

# Substitute decision making – to uphold the wide gamut of human rights

- a key aspect of the indivisibility concept as it applies to article 12 is that for individuals who have severe and profound cognitive disability, substitute decision making can ensure that they have access to fulfilment of economic, social and cultural rights which will enable them, through the assistance of a surrogate decision maker, to enjoy participation in civil society and their inherent right to dignity.
- Claiming rights – not “accepting/taking” welfare
  - Guardianship should never be conceived as a social right – has been used as a tool for abuse as well as for upholding rights
  - But for those with severe and profound cognitive disabilities it can be an important vehicle or tool through which human rights can be claimed by and for those adults.

# Conclusion/summary

- Article 12(3) requires realisation of economic, social and cultural rights for individuals with cognitive disability to achieve autonomous decision making capability as required by article 12(2)
- Further, even for those individuals who have immediate decision making ability with existing available supports the rhetoric of choice and freedom to decide is hollow if such individuals do not have a range of service options before them to meet their needs
- The subordination of economic, social and cultural rights inherent in the UN Disability Committee's privileging of article 12 is intended as a correction to the welfarism of the past, but the application of the principle of indivisibility, allows for individuals to claim socio-economic goods and services as rights
- Substitute decision making can be a tool through which economic, social and cultural rights can be claimed with and for those with severe and profound cognitive disability, to ultimately ensure the provision of the full gamut of human rights and fundamental freedoms.

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