

A Caregiver view about Committee Draft General comment on Article 12 CRPD

I.- Introduction.-

The Committee clearly wants State Parties to shift from a **Substitute decision-making** Legal System to a **Supported decision-making** model.

The Committee reports discriminations of Persons with Disabilities in certain countries where they could be denied their right to legal capacity due to this disability, which surely is true.

The matter is that the Committee links those violations with a Guardianship legal system and, condemns States Parties whose Legal Systems provide protection to persons with Disabilities under Laws that incardinate Substitute decision-making as legal concept.

The Committee also states that **practises like guardianship/conservatorship “need to be abolished”** to ensure the full legal capacity of persons with disabilities on equal basis with others.

Is that a right interpretation according to legal skills?

Here is where I think the Committee is not right, as much as I know about Spanish Legal System and some other Western Continental Europe and Latin America countries whose roots come from historical Roman Institutions.

II.- Fundamental Rights interpretation according to legal skills.-

I apologize for referring to Spanish Legal System, but I understand the interpretation legal skills are valid, and, can be compared to any other legal system.

Full legal capacity of people with disabilities is guaranteed by our Legal System in any case.

The Spanish Constitutional Court invoking the European Court of Human Rights (ECHR) doctrine about article 14 of the European Convention for protection of human rights and fundamental freedoms has declared that the equality principle before the law does not mean an equal treatment for all the cases without taking account special circumstances that deserve different legal focusing.

The Constitutional Court doctrine about article 14 of the Spanish Constitution- that recognizes **the equality of Spanish people before the law**- establishes limits to public authorities in order to respect this fundamental right, but allows to introduce differences by a law when situations require it, under the condition that difference had justification, were reasonable according to believes generally accepted, and the consequences were not out of proportion. Our Constitutional Court established (STC 200/2001 on equality right before the law) that the equality principle does not always imply equal legal regulation for everyone regardless any different circumstances with legal weight. What the equality principle requires is that same fact situations have same legal consequences.

Spain ratified the Convention for the Rights of Persons with Disability in 2008, and according to our Constitution, International Treaties once ratified by our country get the same value as our Laws.

However some lobbies arose in our society which pressed towards abolition of legal guardianship and any kind of protection safeguards held in our Legal System in benefit of people with disabilities.

The noise done by some lobbyist about the incarnation of the CRPD to our Legal System made a real mess in the jurisprudence of our national Courts.

There was such confusion that our Supreme Court had to state in a Sentence (29th April 2009) that our Legal System is not in contradiction with the CRPD:

“To deprive a person from the exercise of some of their rights when the person is unable to govern by themselves *is not a violation of the principle of equality before the law* consecrated by the article 14 of Spanish Constitution. This is not exclusion but a *protection legal system* to support people with disabilities developed according to article 49 of Spanish Constitution. The adoption of different measures to adapt the exercise of rights is justified in the cases of persons with a lack of willing and understanding. So, (Spanish) Civil Code does not violate the Convention, nevertheless the Highest Court propose:

1º) There should be taken into account that the person deprived of their capacity to exercise some of their rights always continues being **the holder of their fundamental rights**.

2º) A measure of depriving someone from their capacity to exercise some of their rights **never could be interpreted as discrimination**, because the situation which deserves protection has special characteristics. We are talking to protect a singular person whose lack of willing and understanding hinders her to govern by herself.”

A previous Sentence of our Highest Court (16th September 1999) to CRPD had already stated:

*“When a judge sentence implies to deprive a person of their capacity to act, as much as is unable to govern by themselves regarding their personal care and assets, is prioritizing the **principle of their legal protection** as a faithful representation of the **principle of person dignity**”.*

It seems like the Committee manages a different legal concept of legal capacity/capacity to act:

*“Legal capacity includes both **the capacity to be a holder of rights** and **an actor under the law**. Legal capacity to be a holder of rights entitles the individual to the full protection of her rights by the legal system. **Legal capacity to act under the law recognizes the individual as an agent who can perform acts with legal effect.**” The right to recognition as a legal agent is also reflected in Article 12(5) CRPD, which*

outlines the duty of states 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”

The Committee with a very poor legal technical identifies the “capacity to act under the law” with the recognition of the individual as “legal agent” (concept which nobody knows what means in a legal system). Then, it feels the need to explain that being a “legal agent” is to be the holder of the list of rights (scarcely described by the Convention this time) in Article 12.5 CRPD.

Our Law vests legal capacity to any person by the fact of the birth and, even before the birth the law recognizes them rights when are positive to them.

In Spain - and in most of the countries which law comes from the Romans- **legal capacity** means that since the individual is born he/she can own and inherit properties and all other assets and all the rights that the Committee comments (CRPD Article 12 .5) plus all other civil rights that the text of CRPD forgets to enumerate.

Of course, while a person has not the age of majority (18 years) is represented by their parents (or a legal representative if they lack) but they act on their behalf. Nevertheless, minor persons always hold their rights and assets.

The persons with any kind of disabilities have exactly the same rights and obligations as any other person since they are born.

However, sometimes, their capacity to exercise rights could be restricted after their age of majority through a legal procedure by a judge sentence just to protect the exercise of their rights and assets when it has been established the fact that a person cannot act them by themselves during the procedure. In these cases, whether a representative (“legal guardian”) is appointed to act on their behalf or, a “conservator” has to give the required support to act in each situation, the person continues being full holder of their rights, and, in both cases the action of the supporter is under the limits stated in the Sentence. Anyway, the supporter has to ask for judge authorisation when the law establishes it.

Nobody denies legal capacity to any person in Spain by the fact of being a person with disability. Only when a Court Sentence establishes that a singular person is unable to exercise some rights by herself, the person could be deprived of her ability to exercise those rights in order to provide them legal protection. Anyway, the individual is the holder of all their civil rights and assets.

I am referring to Spanish Constitution and its Constitutional doctrine to let you understand the way Fundamental Rights (equality before the law is one of them) are interpreted:

1°.- Spanish Constitution invokes (art 10) Universal Declaration of Humans Rights and International Treaties and says that its interpretation has to be done according to UDHR, what means that our Constitutional Court doctrine is according to UDHR.

2°.- Spanish Constitution (art.49) obliges public authorities to develop a policy of prevention, treatment, rehabilitation and integration about people with disabilities, to

provide them special care, and *to protect them specially in the enjoyment of their Fundamental Rights*.

3°.As stated above, Article 14 of S.C. (*equality before the law*) means that same fact situations have same legal consequences. Discrimination before the law and arbitrary are forbidden. Nevertheless, special circumstances deserve different legal focusing.

Article 14 of S.C. (*equality before the law*) is intimate linked to article 9 of S.C., where the Supreme Law entitle public authorities to promote the conditions to ensure freedom and equality of individuals *to be real and effective*

4°.- As declared by Spanish Constitutional Court in a consolidated jurisprudence, “*there are no absolute fundamental rights*; law can establish *limits* to fundamental rights to protect *other constitutional rights*, or, some *other rights under the Constitution protection*”. The condition is that those limits were necessary, proportioned, and respectful with the essential core of the fundamental right. Those limits can restrict the fundamental right itself, or, the way the right is exercised. In the second case (*where we are*), the exercise of the right is ruled by ordinary lawmaker according to the empowerment established by the Constitution (article 53.1).

5°.- Spanish Parliament has to provide previous approval to ratify an International Treaty when this treaty requires modifying some internal laws (as happened when Spain ratified CRPD). However, there is a limit: when the Treaty implies to modify the Constitution itself, then our Parliament would be obliged approving the Constitution modification first (which never has happened so far).

If the Committee is asking going further the CRPD legal text, Spanish Authorities should consider whether this interpretation is within our Constitution.

III.-FUTUPEMA position before CRPD.-

From FUTUPEMA we always have believed that our Legal System is according to CRPD. Furthermore, as our lawmaker had assumed that a new law project should be discussed in our Parliament to adapt the procedure of modification of individuals capacity to act to CRPD (final article 1st of Law 1/2009/29th March) and, as we were asked for our view, we produced a document (enclosed) where we made some suggestions about possible improvements on our Legal System addressed to Justice Department (November 2011)

In sum the proposals were:

- 1) **Previous assessment:** A previous and compulsory assessment should be done about the reasons to start a procedure to modify the capacity to act of a person based not only on medical reports but on social reports too, where it should be pointed out the incidence of the mental health troubles of a person in their autonomy and aspects of person´s daily life.

Some requirements must exist:

- A real and objective cause.
- Risk to suffer abuse from third people, lack of family support, risk of social exclusion, risk for themselves, ...
- Benefits for the person in order to get or improve their psychosocial rehabilitation and personal autonomy.

The individual should be informed about who (physical person or entity) is going to be their supporter (Legal Guardian/Conservator), the consequences of the procedure and Court sentence and the target to get a support to protect their rights.

2) **Proportion of the support/ adjustment to the protection needed/ respect to autonomy.**

- The measures of support adopted by the sentence should be in **proportion** to the needs of each person. According to our Legal System the measures will be defined in two possible levels:
 - **Minimal support: Conservatorship.** The Conservator should support the person only regarding the acts or contracts established in the sentence.
 - **Maximum support: Guardianship.** The Legal Guardian should support the person in making decisions in the areas detailed in the sentence, although sometimes the Legal Guardian should substitute decision-making of the person through their legal representation.
- The sentence should state which are **the areas** where the person's protection necessities should imply an **adjustment** of their capacity to act in order to guarantee the capacity to act modification will be only the strictly necessary measures **that require their protection**:
 - Daily life activities
 - Economical and legal abilities
 - Self care ability
 - Car drive capacity
 - Weapons manage capacity
 - Legal procedures ability
 - Capacity to assume acts and contracts.
 - Etc...
- The measures of support and protection established by the sentence should **respect** as much as possible **the desires and preferences of the person** whose capacity to act is being modified.

3) **Periodical revision**

The measures relating the exercise of capacity to act of a person adopted by a Judge Sentence should be **subject to a deadline**, as required by the Convention. Once the deadline is reached **a review by a judge** should be compulsory. Then the judge will determine whether the measures are renewed for another period, or, are removed, or, modified.

Anyway, the judge should hear at this time, both, the person and the supporter.

4) **New technical jargon**

It does not make sense to translate into English some legal Spanish terms which we had been proposing to be modified since 2000 in order to be more respectful with persons with MHP during legal procedures regarding capacity to act.

The matter is that these terms come from XIX century, and can be pejorative or implies a prejudice to disable people.

So we thought the adaptation of some laws to the Convention is a great opportunity to modify terminology.

5) Procedure aspects

Some suggestions were done to Justice Ministry regarding improvements on procedures in order to safeguard the rights and to make these procedures easier for persons with disabilities:

- Persons under legal support **should be heard at any Court proceeding** to ask them and to know their will and preferences.
- **To walk out on formalities** as Court gown, formal treatments, witness stand, and substitute them for a closeness and friendship climate.
- To modify procedures to make them **non-litigious**, but with the **support of Public Prosecutor** to warrant the rights of people with disabilities.
- The defense of persons with disabilities rights should be warranted anyway by a **qualified lawyer**.
- To develop regulation on legal concepts existing in our Legal System, like **“Fact guardian”**, whose role showed to be very useful in family environmental.
- To set up **specialized Courts and Public Prosecutors** in any big town of the country to deal with modification of capacity to act procedures exclusively.

IV.- The Committee purposes.-

The Committee wants to knock down the tutelary institution that comes from Roman Republican, previous to Roman Emporium, and which makes part intrinsically of the Countries Law which received the influence of Justinian “Corpus Juris Civilis” through Bologna University at the end of Middle Age and over the next few centuries. The wisdom of 25 centuries is threatened to be demolished.

I wonder why. They do not want to understand that the fundamental right of equality before the Law does not mean equal regulation or, equal rights exercise regardless the singular circumstances of each person.

The Committee, following an intellectual lobbyist movement which preceded and followed the CRPD signature by State Parties, tries to implement further legal concepts than CRPD text establishes.

“It doesn’t matter the consequences, the important thing are the ideas, and if reality is against the ideas, we should do without reality “(as it is suppose Lenin said)

The Committee does not like legal protection institutions like Guardianship or Conservatorship and claim them to be abolished with an emotional and no rational willing, but it ignore the needs of protection of a quite important cluster of people with severe mental health disorder who are truly unable to manage by themselves. It simply claims the abolition of protection as if the law repeal could abolish the schizophrenia and some other severe psychotic troubles.

The Committee tells us what should not be done, but, leaves in the hands of the States Parties how to solve the problem of protecting the live, the health and the asset of a considerable amount of people who are unable to govern by themselves. Persons that, whether their temporary mental situation is hindering them to be able to make a decision with full volition or, due to their deterioration after years without any care, need that others act on their behalf in their interest (sometimes vital interest), in our opinion.

I wonder how they went about to become Committee members. I do not think they reached such position due to their deep knowledge in Law skills.

I wonder whether the 18 experts who belong to the Committee have ever seen a person with severe mental health disorders, if they have lived together with one of them, if they know something about how their mind can be misted up sometimes, or, if they have felt the desperation of their families when they are impotent to get help from the Mental Health Care Network or, the Authorities in extreme situations.

They ignore the reality of a cluster of people with very harsh existence, the same people whose Human Rights they are supposed to advocate.

Forgive me, but they seem to me: “virginal and naïve”.

The justification of the General Comment uses fine words with impressive sound impossible to disagree. It repeats ad nauseam the need to ensure equality before the law of persons with disability, which everybody agrees.

But those well intentioned wishes are ignoring the reality of some persons who are going to be damaged in their persons or assets if nobody prevents it.

Where we disagree is in **the way to ensure real and effective rights protection** of people with disability.

The Roman Tutelary institution focused its protection to the assets of the pupil (whether they were “impuber”, “prodigus” or, “furious”).

We cannot forget that money is the engine of the world, and each family knows that when they died their children with MHP are going to make a better living if they are able to leave them assets enough as to ensure them housing, and a way of living.

I cannot say what Psychiatricians call the symptoms of a person who spend money compulsively (the Romans called them “prodigus” = spendthrift). Other persons with MHP are so needed of love and affection that, as a consequence, they are easy prey for unscrupulous fraudsters.

That has been the real case of Obdulio recently discussed before our Supreme Court (17th July 2012), a person with MHP who owned a huge amount of assets inherited from his parents after their death, and lived alone with the care of a cleaning woman- Purificación-. The Bank where Obdulio had important deposits of money reported big transfers to Purificación’s account, and the Public Prosecutor started a modification capacity to act procedure to protect him. A few days before beginning the procedure, Obdulio appointed Purificación as Legal Guardian- in a public document vested before a Notary- in the case he were deprived of his capacity to act regarding assets administration. The Below Courts established he should be under Public Legal Guardianship regarding his assets administration.

The previous sentences from below Courts were appealed before the Supreme Court by Obdulio’s Lawyer.

Obdulio’s Lawyer alleged the modification of the capacity to act of Obdulio appointing him a Public Legal Guardian to act on his behalf regarding his assets administration was against article 12 of CRPD.

Spanish Supreme Court refused the arguments of Obdulio’s Lawyer, saying that according to the text of article 12 of CRPD “*States Parties shall take **appropriate measures** to provide access by persons with disabilities to **the support** they may require in exercising their legal capacity*”, which means they can be put under a system of protection or support precisely to protect their rights.

Obdulio’s Lawyer claimed in addition that article 12 CRPD had been violated because it had not been respected the willing and preferences of the disable person appointing Purificación as his Legal Guardian in the case he were deprived of his capacity to act regarding assets administration stated in a public document.

The Supreme Court established that in the Legal Systems- as the Spanish one- where the appointment of a future Legal Guardian is allowed, **the Judge is not bound by this willing when it were inconvenient to the person** whose capacity to act is restricted, taking account the interest of the person to protect.

Thanks God!!!

But, have you wondered what had happened if the Bank would not have reported the situation to the authorities?

How many cases like this will never be reported?

What should be done by an appointed legal supporter when the willing of the person under protection manages to a decision that is clearly going to damage their interest?

Should the supporter respect his/her pupil willing? Could the supporter go to the judge or any other authority to hinder such a bad deal?

If a judge or any other authority makes a decision on the interest of the persons who is going to be cheated against his/her willing, is the judge producing a substituted decision instead of a supported decision?

According to the Committee, **such “practices need to be abolished to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others”**. (Justification of the General Comment. Point 7).

The same case would be if the supporter tries to convince his/her that the proposal is a very bad deal, but then the pupil thinks that his/her “new friend” is truly given his/her affection and the asset value does not matter, so, the individual decides that he/she no longer requires support for the exercise of his/her legal capacity.

According to the Committee Draft of General Comment (Point 20/ Obligations of States.): **“States Parties are obliged to provide training for those receiving support so that the individual can decide when to reduce support, or when they no longer require support for the exercise of legal capacity”**.

Another question is: Would the supporter have got any responsibility in this case? According to the current Law in Spain, of course the legal guardian has responsibility by acts or contracts approved by him that damage his pupil’s assets. However, if we introduced a law which allows the pupil to fire the supporter at any moment, it would be very harsh thinking about to claim him/her any legal responsibility.

Of course, there is no doubt that Spanish Civil Code provides the Court the legal support to modify the capacity to act of a person when is unable to exercise it by themselves allowing to **appoint someone who substitutes them** in the areas where they cannot act by themselves.

We showed above that according to generally accepted legal skills our Legal System is not contrary to CRPD.

In my honest opinion, as a qualified lawyer and as a relative of a person with MHP, the only way to guaranty the real and effective protection of the rights of a person with MHP in the situations when they are not able to govern by themselves is through a legal procedure where a judge, after having listened and studied medical and social reports and some other evidences, produces a sentence which modifies the capacity to act in the areas needed and provides a legal representative (supporter) who can support the person capacity to act in those areas, or, who must substitutes them when the person is unable to do it by themselves.

This is the view of Manantial Foundation Board of Trustees, and this is the point of view of all the Guardianship Foundations (10) associated in FUTUPEMA.

But, before finishing, I would like to add that Lobbyist groups which made more noise in Spain about the CRPD incardination in our Legal System, as CERMI and Aequitas

Foundation, signed a proposal to modify Civil Code and Civil Procedure Law (June 2012), after lots of discussions within the Royal Board of Trustees for Disability in Spain, where we can read:

“CAPÍTULO IV.- **Del apoyo intenso.**

SECCIÓN PRIMERA.

Artículo 225.-

Cuando sea estrictamente necesario para proteger los intereses de la persona que no pueda ejercer su capacidad jurídica mediante otro tipo de apoyos, la autoridad judicial establecerá en interés de aquélla, un apoyo intenso que determinará su representación. La persona física o jurídica designada por el juez para prestar este apoyo representará los intereses de la persona asistida en los supuestos concretos que determine la resolución judicial que lo establezca. La resolución judicial deberá precisar los términos en los que se llevará a cabo la representación, adoptando las salvaguardas que estime precisas para garantizar que tal desempeño no suponga la suplantación de la voluntad de la persona, le cause perjuicio, o sea condicionado mediante influencia indebida.

Este apoyo intenso deberá ser excepcional y preferiblemente respecto de actos o negocios jurídicos concretos y puntuales.

Para los actos y derechos personalísimos será necesaria resolución independiente y específica.”

It deserves to be translated the first paragraph. My translation could be, more or less:

“**Intense Support:**

When it was strictly necessary to protect the interests of a person who cannot act their legal capacity through any other kind of support, the judge will establish in their benefit an “**intense support**” which will determine their **representation**.

It has to be highlighted the last paragraph (yellow):

The proposal admits the possibility that the judge establishes by a specific sentence **the representation** of the person even for the called “**intensely personal**” acts and rights.

They went further than we would have gone.

Francisco Sardina Ventosa.

President of the Board
Manantial Foundation
Madrid, December 2013.