

On being recognised as persons before the law

Vickie Gauci and Anne-Marie Callus Sunday, 12 October 2014,

By their very nature, human rights belong to all humans and are all necessary for people to be able to develop well and live with dignity, both individually and collectively. None of them are more important than others and none are dispensable. These rights of course also belong to all disabled people, and the United Nations Convention on the Rights of Persons with Disabilities (CRPD) establishes what disabled people need to enjoy their rights.

Even if the CRPD is the longest human rights treaty, one would be hard-pressed to find any of its articles that can be jettisoned. They are all essential to ensure respect for disabled people's human rights. However, some articles *can* be seen as being key to the enjoyment of the other rights. One of them is Article 12, that deals with disabled people's right 'to recognition everywhere as persons before the law' and the right to 'enjoy legal capacity on an equal basis with others in all aspects of life', in line with the Universal Declaration of Human Rights. Simply put, this means that disabled people have the right to make their own choices and decisions about their own lives. This leads to the autonomy and independence of disabled people, which is important enough to be recognised in the Preamble to the CRPD itself.

The importance of Article 12 is quite possibly matched by the difficulties encountered in implementing the requirements of this Article fully for all disabled people. The CRPD recognises in Article 12 that some disabled people need support to be able to exercise their legal capacity. This applies especially to some persons with intellectual disability and some with mental health issues. Article 12 requires that measures that are put in place to support disabled people's decision making include safeguards against abuse, respect 'the rights, will and preferences of the person', and be proportional to the person's needs.

The key to implementing this Article is the enactment of supported decision-making legislation. Support in decision-making can, and indeed very often is, provided informally every day. Is there anyone, disabled or not, who always takes all decisions on their own, without consulting or seeking advice from someone else? The answer very probably is 'no' and the same goes for most disabled people who seek and are given advice informally by people who are close to them. But sometimes there need to be formal arrangements for supported decision-making in order to ensure that disabled people's rights and welfare are truly being safeguarded. In supported decision-making legislation, a person or group of

persons are formally appointed to provide the disabled person with the support they need in areas of life in which they have been assessed as needing this support.

There are some jurisdictions that have enacted such legislation, most notably Victoria in Australia and British Columbia in Canada. A form of substitute decision-making is reserved for exceptional cases, such as people with profound intellectual disability and complex dependency needs. In the vast majority of countries that have ratified the CRPD, supported decision-making laws are mostly conspicuous by their absence.

In Malta, the guardianship legislation that was approved by the House of Representatives in December 2012 removed the interdiction and incapacitation, which completely took away disabled people's legal capacity, to a softer type of substitute decision-making. The fact that there is now a Guardianship Board discussing and deciding together, and that the Board have to meet the person on whose behalf an application for a guardianship order has been requested, are both encouraging improvements. As for guardians, they are obliged by law to respect the will of disabled persons, consult with them and support them to exercise their legal capacity, participate in the community and develop their skills, and provide them with the assistive means necessary for them to do all this. Guardians are thus obliged to use the least restrictive means.

However, they are to meet these obligations to the maximum extent possible. And that is the crux of the matter. Who is going to decide what is possible for a disabled person to do unsupported, what they need support in, and where the guardian needs to intervene and take decisions on behalf of the person? More importantly, what criteria will be used for these judgements?

While these are complex issues that vary from one person to another, there are principles that should be applied each and every time these judgements need to be made by the Guardianship Board and by guardians themselves. First of all, one must keep in mind that Article 12 is part of the CRPD whose purpose is 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities'. Secondly, Article 12 recognises each and every disabled person's capacity to take decisions. Disabled people should therefore never be placed in a position where they have to prove their capacity. They should not be submitted to tests and assessments to prove their capacity that no one else has to go through. And they should not be automatically placed under the guardianship of their parents the moment they turn 18. The onus should be on others to prove incapacity in specific situations. Thirdly, being able to take decisions and make choices does not mean always taking wise decisions and making the right choices. If all those of us who ever made an unwise decision or took a wrong choice were placed under a guardianship order, the Board would have a flood of applications and would be hard-pressed to find people who

can actually act as guardians! Fourthly, a difficulty in making a decision in one area of life or in a specific circumstance does not translate into a general lack of capacity. Not being able to manage one's finances unsupported does not translate into an inability to enter a contract of employment, get married, or vote. Finally, judgements should be made on the basis of individual disabled people's ability to take a decision in specific circumstances, not on the basis of their condition. To take just two examples, no two people with Down's syndrome or with schizophrenia are the same. Most will be able to exercise their legal capacity with some or no support in most areas of life. On the other hand, a person with profound intellectual disability and complex dependency needs will probably need substitute decision-making in all but the most basic decisions.

It is people who experience mental disabilities, such as intellectual disability or mental illnesses, who are most likely to be referred to the Guardianship Board. This is because they are the ones who are most likely to experience difficulty in taking decisions unsupported on everyday matters, and the ones who are most vulnerable to abuse from others. Even if we do not yet have a supported decision-making law, we can work towards it by ensuring that the implementation of the guardianship legislation weighs on the side of enabling the most vulnerable disabled people to enjoy their rights rather than having them taken away, and on ensuring that the necessary support infrastructure is put in place to provide them with the enabling support they need to truly be equal persons before the law.