

Mandate of the the Special Rapporteur on the rights of persons with disabilities

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the rights of persons with disabilities, pursuant to Human Rights Council resolution 35/6.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning Bill PL 11091/2018 (hereinafter "the Bill") which amends the Statute of Persons with Disabilities as well as provisions in the Civil Code and Code of Civil Procedures. The Bill was introduced on 29 November 2018. It was approved by the Commission for People with Disabilities at the House of Representatives in Brazil on 14 August 2019. The Bill is currently pending review by the Commission of Justice and Constitutional Issues.

The Bill introduces progress in terms of the rights of persons with disabilities. However, several aspects of the bill could be further improved, in particular on the issue of universal recognition of the right to legal capacity, in order to comply with your Excellency's Government's obligations under the UN Convention on the Rights of Persons with Disabilities (CRPD), ratified by Brazil on 1 August 2008.

Within the framework of my mandate, it is essential to support any legal reform that advances the rights of persons with disabilities. In this context, in 2017 I published a thematic study on the right of persons with disabilities to equal recognition before the law (A/HRC/37/56), which provides guidance to States on the process of legislative reform on legal capacity.

I welcome the opportunity to submit my observations on the Bill in light of international human rights standards on the rights of persons with disabilities, and I stand ready to engage further with your Excellency's Government on this matter.

Article 12 of the CRPD states that all persons with disabilities have the right to equal recognition as a person before the law and to exercise their legal capacity on an equal basis with others. Article 12 reaffirms that persons with disabilities have the right to recognition of their legal personality (paragraph 1), and recognizes that persons with disabilities have legal capacity on an equal basis with others in all aspects of life (paragraph 2). It also establishes the obligation of States to provide persons with disabilities with access to the support necessary for the exercise of legal capacity (para. 3), and describes the safeguards that a support system for the exercise of legal capacity must have (para. 4). Finally, Article 12 requires States to guarantee the rights of persons with disabilities on an equal basis with others with respect to financial and economic matters (para. 5).

Historically, however, persons with disabilities, particularly those with intellectual, cognitive or psychosocial disabilities, have been denied their legal capacity, restricting the exercise of their rights, such as voting, the right to marry and form a family, reproductive rights, parental authority, the right to decide where and with whom to live, to consent to medical treatment or surgery, and the right to liberty.

In this regard, the Committee on the Rights of Persons with Disabilities (hereinafter, "the CRPD Committee") has urged States Parties to prohibit any form of disability regime based on impairment or decision-making skills, as these are discriminatory criteria that are often used to deny the legal capacity of persons with disabilities.

In view of the foregoing, the Bill constitutes an important step towards eliminating all forms of discrimination in the enjoyment and exercise of legal capacity by persons with disabilities in Brazil.

However, I would like to identify some challenges that I believe must be overcome in order to ensure that the proposal is fully in line with international standards.

Limitations to legal capacity

According to the proposed amendment to the Civil Code, Article 1783 A, in order to request supported decision-making, a person with an intellectual, mental or "serious" disability must be able "express his or her will through any means". If a court determines that a person is unable to "express his or her will through any means", the request for decision-making support will be denied. As a result, the Bill will exclude certain persons from receiving supported decision making and by extension represent a violation of their right to legal capacity on an equal basis.

The CRPD Committee has recognized that there are situations in which, even after significant efforts, it is not practicable to determine the will and preferences of an individual. Nevertheless, the response should not be to exclude such individuals from the process which would imply a lack of recognition of their legal capacity. Instead, a procedure should be proposed that is designed to make the best interpretation of the will and preferences of the person. As noted by the Special Rapporteur, the "best interpretation of the will and preference" standard is to be applied as a last resort in situations where it is otherwise not possible to determine the will and preferences. The Special Rapporteur highlights that this process should include consideration of the previously manifested preferences, values, attitudes, narratives and actions, inclusive of verbal or non-verbal communication, of the person concerned.

In Peru, for example, the reform of the Civil Code ensures that a person requesting supported decision-making is provided support based on the best interpretation of his or her will and preferences. It establishes that in cases where an adult person with a disability is unable to express his or her will, after considerable reasonable efforts made to that effect, including the provision of reasonable accommodation, a judge can appoint

one or more judicial supporters. The appointed supported must have a close relationship to the supported person, stemming from trust, friendship or kinship, for example. Specific measures are to be taken to determine the best interpretation possible of the person's will and preferences according to his or her life trajectory.

It is furthermore important that the legal framework recognize that the ability to communicate with a person can depend on a variety of factors that cannot be predefined with exact precision in law. In addition, the ability to communicate with a person about his or her will and preferences can change over time.

Continuation of guardianship system

The Bill continues the current model for persons categorized as “unable to express his or her will through any means” subjecting them to the legal mechanism of guardianship (“curatela”). This is a form of substitute decision making which is at odds with the guarantee of full legal capacity for persons with disabilities. As provided for by art. 12 of the CRPD, all forms of substitute decision-making is prohibited. I have in earlier reports reaffirmed that the denial of and restrictions to the legal capacity of persons with disabilities are grave and pervade all aspects of life. Persons with disabilities under guardianship, for example, lose their capacity to exercise all or almost all of their rights and have no control over decisions related to their lives, from entering into contracts to choosing where and with whom to live (A/HRC/37/57). As noted by both the CRPD Committee and this mandate, States must abolish and prohibit all regimes of substituted decision-making. According to the Committee on the Rights of Persons with Disabilities, these regimes can be defined as systems where legal capacity is removed from a person (even if limited to a single decision) and a substitute decision maker appointed by a third party takes decisions based on what he or she considers is in the best interests of the person concerned, even if that goes against the will of the latter. They include plenary and partial guardianship, judicial interdiction, curatorship, conservatorship and mental health laws that allow involuntary treatment and commitment. All forms of substitute decision-making are prohibited under the Convention, including those based on the assessment of mental capacity skills (A/HRC/37/57).

The Bill provides for curatorship/guardianship for decisions related to property or business transactions. Article 12(5) of the CRPD specifically requires States to ensure the rights of persons with disabilities with respect to financial and economic affairs, on an equal basis with others, and therefore specifically precludes substitute-decision making also in this area.

The recognition of universal legal capacity for all persons with disabilities strongly influences the exercise of all other human rights and fundamental freedoms. For example, the person under guardianship would not have access to justice. They would not be able to access the judicial system, because they do not have the right to initiate a lawsuit without the intervention of the curator/guardian, who in any case would only be able to represent an individual on matters related to property or business transactions.

I therefore urge that the reform ensures a full revocation of the guardianship model and instead creates procedures, including for people with high support needs, to access supported decision-making for all types of decisions. This includes the creation and implementation of procedures designed to make the best interpretation of the will and preferences of the person.

Procedure for the appointment of supported decision-making

Some aspect of the proposed judicial procedure for providing supported decision-making and determining supporters provided for by the Bill raise concerns about their compatibility with respect for full legal capacity.

It is worth underlining that supported decision-making is an instrument for persons with disabilities to exercise their legal capacity and not a safeguard based on an assumption that people with disabilities are vulnerable (Civil Code, art.4, III; and Civil Procedure Code, art. 747).

In a supported decision-making system it is essential to include safeguards to prevent abuse, undue influence or conflict of interest. It is furthermore fundamental that safeguards do not amount to a limitation of the legal capacity of individuals. Such safeguards should focus on whether the supporter is providing support in line with the will and preferences of the person concerned. The CRPD Committee has also highlighted that “systems of supported decision-making should not overregulate the lives of persons with disabilities” (General Comment No.1, para. 29).

I am concerned that some of the safeguards introduced in the proposed judicial procedure to appoint supporters overreach and are not justified as necessary to protect against abuse, including:

- The “biopsychosocial assessment” of the person with a disability to determine their decision-making capacity
- The vagueness of the “fitness” test for individuals selected to serve as supporters;
- The requirement of two supporters;
- The mandatory participation of supporters for certain decisions to be considered legally valid

The proposed procedure for granting supported decision-making requires that the person requesting support undergo a biopsychosocial assessment apparently to determine their decision-making capacity, before supporters may be appointed (Civil Procedure Code, article 748-A-1). Such an approach is based on a presumption that assesses the decision-making capacity of individuals and is therefore not compatible with the CRPD. Under the CRPD, the main purpose of evaluations and assessments should be to determine the form of support that the person may need to exercise legal capacity, not to determine the capacity of individuals as such.

Regarding the “fitness” determination of supporters, I would like to highlight that supporters should not be imposed upon a person requesting support (CRPD Committee, General Comment No.1). On the contrary, the person requesting support should be the one to choose their supporters. The amendments require that the “competency” of supporters be determined before a judge will appoint them, although the criteria and procedure for determining competency of supporters are unclear. Under the Bill, the judge presiding over the procedure is authorized to call individuals, such as relatives or close persons to hear their opinions on the fitness of the supporters selected by the persons requesting support, and may preclude supporter based on the opinions received. While I understand that this procedure is intended as a safeguard, I believe it may disproportionately restrict the right of persons with disabilities to choose their own supported decision-maker.

A more appropriate safeguard against undue influence and conflict of interest in supported-decision making could exist in a different form, such as judicial review that regularly evaluates whether the supporter is acting in accordance with the will and preferences of the person concerned or to determine the existence of a conflict of interest.

The Bill could also include a provision that would ensure that anyone may challenge an individual’s supporter when there is an indication that the supporter is not acting in accordance with the will and preferences of the person concerned.

The Bill furthermore requires a judge to recognize two supporters for any person requesting supported decision making (Civil Procedure Code, art. 748-A-2-II). The Bill then requires that both supporters be involved in any decision for which the person requests support, as part of the agreement required between the person requesting support and the supporters. The Bill requires that both supporters be involved in any decision for which the person requests support. The Bill provides no explanation why this requirement is necessary. Instead, the Bill should be modified to enable individuals to decide on the numbers of supporters.

Furthermore, the Bill requires that the person requesting support and the supporters enter into an agreement specifying at least one category of decisions subject to support. Once a person is in the supported decision-making system, the legal validity of at least one category of his or her decisions will be dependent on the supporters. Such a requirement is incompatible with the obligations under the CRPD. The exercise of legal capacity cannot be conditioned to the consent or confirmation of the supporter. I would urge the Bill to include a provision that allows the person who requested support to expressly waive the right to have the supporter participate in any particular decision. This would ensure the agreement does not restrict legal capacity of a person requesting support.

Lack of provisions for persons currently under guardianship

The Bill lacks specificity about how to restore legal capacity of persons with disabilities who are currently under guardianship. According to data made available to me, this includes people placed under guardianship for many years, some of them in institutional settings. The Bill does not contain any provisions for support and community-based services targeted towards people currently under guardianship for the period after they regain their legal capacity. It is worth bearing in mind, that some of these individuals may not have their own resources or other forms of support. Services can include, for example, lawyers, social workers, life-skill classes and coaches, health services etc. designed specifically to support individuals in decision-making and independent living.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful to receive any additional information and/or comment you may have on the above-mentioned Bill, in particular on steps taken or to be taken to ensure its compatibility with obligations under the CRPD.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website¹ within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Catalina Devandas-Aguilar
Special Rapporteur on the rights of persons with disabilities

¹ <https://spcommreports.ohchr.org/>