Editorial

Should Substituted Decision-making Be Abolished?

1 Introduction

On 19 May 2014 the United Nations Committee on the Rights of Persons with Disabilities (“the Committee”) published its first General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities (“CRPD”).1 Until now, health lawyers have not paid much attention to this comment, unjustly, because the implications of this Comment are far-reaching, in particular for issues of legal capacity, including mental capacity, and representation in health care.

Article 12 CRPD recognizes and expands the right to equality before the law of persons with disabilities. The Committee is the twelve-member independent monitoring body of the CRPD and pre-eminently qualified to give an authoritative interpretation of the treaty text. According to the Committee, “there is a general misunderstanding of the exact scope of the obligations of States Parties under Article 12 of the Convention”. The Committee holds that States Parties are under the obligation to abolish substituted decision-making regimes and to develop supported decision-making alternatives. “The development of supported decision-making systems in parallel with the maintenance of substitute decision-making is not sufficiently to comply with Article 12 of the Convention”.

I do not consider the position taken by the Committee to be the right course to follow. Firstly, in Section 2, I will elaborate on the content of Article 12 CRPD, the interpretation of this Article as set out in General Comment no. 1 and the consequences of this approach for the concept of legal capacity and the current arrangements for substituted decision-making. Then, in Section 3, I will

comment on the Committee’s point of view, in Section 4 followed by some concluding remarks.

2 Article 12 CRPD and General Comment No. 1 (2014)

The purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity, as Article 1 CRPD puts it. Disabilities include long-term physical, mental, intellectual and sensory impairments. The Convention, which entered into force in 2008 and is currently ratified by 151 States Parties, represents a paradigm shift in the treatment of people with disabilities, who rather than being considered as the objects of rights, charity or medical interventions should be seen as the subjects of rights. There is also an Optional Protocol to the CRPD that allows individuals and groups of individuals to complain to the Committee about alleged violations of one of more of the Convention rights.

Article 12 CRPD opens with the reaffirmation that persons with disabilities have the right to recognition everywhere as persons before the law (par. 1). States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life (par. 2). They also have to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity (par. 3). 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 (…) (par. 4). (…).

According to the Committee, Article 12 CRPD affirms that all persons with disabilities have full legal capacity. In its view legal capacity consists of two strands. The first is the capacity of being a holder of rights. This refers to the legal standing to hold rights and to be recognized as a legal person before the law. The second is the legal agency to act on those rights and to have those actions recognized by law. Both strands must be recognized for the right to legal capacity to be fulfilled. That means that all forms of denial of legal capacity that are discriminatory on the basis of disability in purpose or effect, must be abolished, including removing legal capacity based on the fact that a person cannot (sufficiently) understand the nature and consequences of a decision and/or that a person cannot weigh or use the relevant information (lack of mental capacity). Therefore, States Parties have to abolish substitute decision-making regimes and to develop supported decision-making alternatives.