

**Expert Opinion Submitted to the
Ontario Law Commission
on its Interim Report on Legal Capacity, Decision making and Guardianship
by Professor Arlene S. Kanter
Bond, Schoeneck and King Distinguished Professor of Law
Laura J. and L. Douglas Meredith Professor of Teaching Excellence
Syracuse University College of Law**

Introduction

On October 15, 2015, the Ontario Law Commission published its Interim Report on Legal Capacity, Decision-making and Guardianship. I am submitting this Expert Opinion at the request of the Coalition on Alternatives to Guardianship. The Coalition sought my Expert Opinion on the international law obligations and interpretations of Article 12 of the Convention on the Rights of People with Disabilities (CRPD) as well as the international legal implications of the analysis and recommendations presented in the Law Commission's Interim Report. This Expert Opinion is organized according to the questions posed to me by Coalition.

I have drafted this Expert Opinion based on my experience, expertise, and comparative legal research in disability law, international human rights law, and, in particular the CRPD. I have not seen nor had access to the Coalition's Brief to the Law Commission, so as to ensure the level of objectivity required of an expert legal opinion.

I have devoted my nearly four decade-long career to scholarship, teaching and advocacy in the area of international and comparative disability law and policy. A CV is attached for your information. In 2001-06, I was invited to participate in the drafting of the CRPD at the UN, including Article 12. Since then I have worked with governments and civil society organizations in more than a dozen countries on implementation of the CRPD, including legislative reform specifically related to Articles 12. My recent book, *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS* (Routledge 2015) provides an overview of the development of disability law prior to the CRPD as well as in depth analysis of several articles of the CRPD and their potential for promoting greater equality, access and inclusion of people with disabilities in societies throughout the world. I discuss the history and implications of Article 12 in Chapter 7 (pages 235-291).

Summary of Expert Legal Opinion

In 2006, the UN adopted the Convention on the Rights of People with Disabilities. Four years later, Canada ratified the CRPD, with a Declaration and Reservation limiting the scope of Article 12. In October 2015, the Law Commission of Ontario issued its Interim Report on Legal Capacity, Decision-Making and Guardianship. Based on Canada's Declaration and Reservations, this Interim Report takes the position that Article 12 does not prohibit denial of legal capacity based on a cognitive and functional approach nor does it prohibit substituted decision-making, despite the authoritative interpretation of the CRPD Committee to the contrary. According to the Interim Report, Ontario may continue its substituted-decision making regime which prevents people with certain disabilities from making decisions on their own or with others based on their own will and preferences. The analysis of the Law Commission's Interim Report appears contrary to the language and overall purpose of the CRPD by discriminating against people on the basis of their cognitive or functional ability; it also runs

counter to well established principles of international law by rejecting the CRPD Committee's authoritative interpretation of Article 12.

1. What is the history and intent of the right to Equal Recognition before the Law contained in Article 12 of the CRPD?

Background

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.”¹ It does so by prohibiting discrimination against people with disabilities in all aspects of life, including their right to enjoy equal recognition before the law on an equal basis with other people without disabilities, as provided in Article 12.

Article 12, like all articles in the CRPD, applies to all people with disabilities including those “who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”² No exception is provided for people who can not communicate, need help in making decisions, or those who have significant intellectual or cognitive impairments. Under Article 12, all people with disabilities, regardless of the existence or severity of their particular impairment, are entitled to legal capacity as well as the opportunity to exercise their legal capacity on an equal basis with people without disabilities.

The Right to Equal Recognition Before the Law Prior to the CRPD

Prior to the CRPD, the right to equal recognition before the law was included in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). Article 4(2) of the ICCPR even goes so far as to state that there may be no derogation of the right to equal recognition before the law, even in times of public emergency. The right to equal recognition under law is also included in Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women, Article 3 of the African Charter on Human and Peoples' Rights, and Article 3 of the American Convention on Human Rights.

Despite these international pronouncements, prior to the CRPD, people with disabilities, particularly people with mental disabilities, had been routinely denied equal recognition before the law. With the adoption of the CRPD, however, legal distinctions based on unwarranted assumptions about a person's abilities is now prohibited. As such, Article 12 creates a new approach to decision-making and confers upon all people with disabilities the right to legal capacity as well as their right to exercise their legal capacity, with or without assistance.

The Drafting History of Article 12

Article 12 was not drafted without controversy. Although Article 12 was eventually approved by consensus, the history of the drafting process of Article 12 reflected deep divisions among countries regarding the very nature of human rights, generally, and legal capacity, in particular.³ On one hand,

¹ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106, art. 1 (Dec. 13, 2006) [hereinafter CRPD].

² *Id.*

³ See Background conference document prepared by the Office of the United Nations High Commissioner for Human Rights, © Arlene S. Kanter, Syracuse NY March 2016. Please do not distribute or reproduce without permission.

some countries and organizations went on record contending that all people with disabilities have legal capacity and must be presumed to be legally competent. To them, legal capacity is a universal human right that must be protected unequivocally. However, even those countries and others who viewed legal capacity as a universal human right did not deny variations among people with disabilities and the need for assistance to help some people make and carry out certain decisions. Indeed, “just as there are great differences among people without disabilities in their decision-making abilities, so too are there differences among people with disabilities.”⁴

On the other hand, a minority of countries expressed an opposing view, arguing that legal capacity is not a universal right but rather one to which only competent people (as defined in their countries) are entitled. According to this view, states should be free to decide who is entitled to legal capacity and who is not. The Ad Hoc Committee rejected this minority view and in Article 12 makes clear that the right to legal capacity applies to all people with disabilities.⁵

The final version of Article 12, therefore, recognizes that while people have different needs and abilities, as well as different preferences regarding their support needs, their right to legal capacity is universal. This reading of Article 12 is supported by Article 2, which requires reasonable accommodations to be provided to ensure “to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”⁶ Such reasonable accommodations include the support envisioned in Article 12(3).

Paragraph 3 of Article 12 was included to address the support needs of people who may not be able to make all decisions on their own. It provides that “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”⁷ Although paragraph 12(3) does not refer specifically to the term “supported decision-making,” its intent is to replace substituted decision-making with a new supported decision-making model.

The drafters of the CRPD also included Article 12(4) to ensure safeguards against abuse of support. Article 12(4) reads as follows:⁸

State 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 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 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.

Rights: Legal Capacity, available at <http://www.un.org/esa/socdev/enable/rights/ahc6documents.htm>.

⁴ Amita Dhanda, “Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?”, 34 *Syracuse J. Int’l. L. & Com.* 429, 457 (2007).

⁵ Arlene S. Kanter, *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS* 258 (2015).

⁶ CRPD, *supra* note 1, art. 2.

⁷ CRPD, *supra* note 1, art. 12.

⁸ *Id.*

This Section was added specifically to protect people with disabilities who have high support needs, such as those unable to communicate verbally or who are lacking in certain cognitive or functional abilities. Such people often are denied full personhood and legal capacity in many countries, and would have continued to be denied legal capacity had Article 12 not included the right to support and safeguards against abuse contained in Article 12 (3) and (4). Indeed, the duty to provide support to enable even the most significantly impaired people their right to exercise legal capacity, together with the definition of disability that includes people with all types of disabilities, confirms that Article 12 was intended to confer legal capacity on all persons with disabilities, and without exceptions.

Accordingly, the final version of Article 12, entitled “*Equal recognition before the law*,” guarantees that *all* persons with disabilities enjoy not only the right to legal capacity but also the right to exercise their legal capacity on an equal basis with others without disabilities. As such, Article 12 challenges long-standing parentalistic laws and policies that had deprived people with disabilities throughout the world of their right to make and exercise decisions that people who are not labeled as disabled are free to make every day. By ensuring the right of legal capacity to all people, with all types of disabilities, the drafting committee has made clear that disability may never be a legitimate reason to deny that person equal recognition before the law under international law.

In contrast to the conclusion we may draw from the drafting history of the CRPD, the Law Commission of Ontario has proposed limiting legal capacity to those who satisfy a cognitive or functional test. However, if the CRPD were intended to limit Article 12 in this way, then the Ad Hoc Committee on the CRPD would have included such language in the final version of Article 12. The Committee was not opposed to adding limiting language, as it did in other sections of the CRPD, such as in Article 2 and Article 5, which limit accommodations to those that are “reasonable.” No such limiting language is included in Article 12. Therefore, the Law Commission’s effort to limit the applicability to Article 12 only to those who satisfy a cognitive or functional test appears contrary to both the drafting history and language of Article 12.

2. What is the role of Canada’s Declaration and Reservation on Article 12 with respect to law reform on legal capacity?

Upon ratifying the CRPD, Canada adopted the following Declaration and Reservation on Article 12:

Canada recognises that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its understanding that Article 12 permits supplied and substitute decision-making arrangements in appropriate circumstances and in accordance with the law. To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards. With respect to Article 12 (4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal....

The Law Commission has based its analysis on Canada’s Declaration and Reservation, as well as its rejection of the CRPD Committee’s General Comment on Article 12. As the Interim Report states:

Both Canada’s Declaration and Reservation and the General Comment provide important insights into potential interpretations of Article 12 of the CRPD, which Canada has committed itself to implement. Given the nature of the LCO’s role and mandate, neither the General Comment nor the Declaration and Reservation limits the LCO’s potential recommendations,

although they certainly inform them. It is the responsibility of the LCO to make recommendations that are at minimum consistent with Canada's international commitments. Given the non-binding nature of a General Comment and the existence of Canada's Declaration and Reservation, Canada is not clearly bound to carry out the program of reform set out in the General Comment. However, the LCO may certainly recommend that the government take steps beyond minimum compliance with its obligations. This does not mean that the LCO accepts the interpretation given Article 12 by the General Comment. It is the responsibility of the LCO to carefully review available research and the results of public consultations, and to make recommendations for law reform based on that review: it is then the role of government to evaluate the LCO's analysis and recommendations and to take such steps as it believes appropriate."⁹

Canada, like any country, is free to adopt reservations, understandings and declarations to any treaty it ratifies.¹⁰ But according to well established principles of international law, such reservations, understandings and declarations may not violate "the object and purpose of a treaty."¹¹ The CRPD Committee has issued its interpretation of Article 12 in General Comment, which contradicts Canada's Declaration and Reservation on Article 12. Therefore, as a matter of international law, Canada's Declaration and Reservation may no longer provide a legitimate justification for the Law Commission's recommendations, particularly insofar as they contradict the CRPD Committee's interpretation of Article 12.

The prohibition against Reservations, Understandings and Declaration, or "RUDS" which contradict the object and purpose of a treaty was established in 1969, with the adoption of the UN Vienna Convention on the Law of Treaties.¹² Canada ratified the Vienna Convention in 1970. By its terms, the Vienna Convention, limits the scope of Reservations, Understandings and Declaration, or "RUDS," as they are known. Article 2(1) (d) of the Vienna Convention defines a reservation as a "unilateral statement" made by a State when ratifying a treaty "whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State."¹³ Article 19 of the Vienna Convention further prohibits any reservation that is "incompatible with the object and purpose of the treaty."¹⁴ Thus the Vienna Convention makes clear that RUDS may not be used to undermine the force

⁹ *Interim Report of the Law Commission of Ontario on Decision-Making and Guardianship*, at 60 (Oct. 15, 2015), available at <http://www.lco-cdo.org/capacity-guardianship-interim-report.pdf> [hereinafter Interim Report].

¹⁰ The International Court of Justice addressed the question of the effect of reservations to a multilateral human rights treaty in its 1951 Advisory Opinion on Reservations to the Genocide Convention (Advisory Opinion, 1951 I.C.J. 15). In this opinion, it rejected the argument that any State is entitled to become a party to a treaty while also making any reservation it chooses by virtue of its sovereignty. As the Opinion continued, "It is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of the State in making the reservation on accession as well as its appraisal by a State in objecting to a reservation." See Restatement (Third) FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) at § 313, *quoted in* Philip Alston and Ryan Goodman, *INTERNATIONAL HUMAN RIGHTS 1080-1082* (2012).

¹¹ For a discussion of the effect of reservations on treaties, see generally Philip Alston and Ryan Goodman, *supra* note 10, at 1080-1087; see also Anthony Aust, *MODERN TREATY LAW AND PRACTICE*, 3d ed. (2013); see also Richard Gardiner, *TREATY INTERPRETATION*, 2d ed. (2015).

¹² Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

¹³ *Id.* at art. 2(1)(d).

¹⁴ VIENNA CONVENTION ON THE LAW OF TREATIES, *supra* note 12.

© Arlene S. Kanter, Syracuse NY March 2016. Please do not distribute or reproduce without permission.

and effect of any particular article in a human rights treaty.¹⁵ As explained in the highly regarded International Law Commission's *Guide to Practice on Reservations to Treaties*, "[a] reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the *raison d'être* of the treaty."¹⁶ Another way to think about the compatibility of RUDS with the purpose of the treaty, such as Canada's reservation with respect to Article 12, is whether or not the reservation contemplates enduring inconsistency between state law or practice and the obligations of the treaty. If it does, then the reservation is considered incompatible with the treaty's object and purpose.¹⁷

Even if one assumes that Canada's Declaration and Reservation on Article 12 is not a reservation *per se*, but instead an interpretive declaration, the effect is the same. Although the Vienna Convention does not define interpretive declaration and nor is the law and practice of making interpretive declarations as developed as the law on reservations, the aim of the interpretive declarations must not be to undermine the purpose of the treaty. Instead, the aim of an interpretive declaration is to "influence the interpretation to be given to provisions of a treaty when they come to be applied."¹⁸ In this case, regardless of whether Canada issued its Declaration and Reservation on Article 12 as either a Reservation or an Interpretive Declaration, so long as its intent is to continue the use of substituted decision-making, it may be interpreted as inconsistent with the language and intent of Article 12 as well as the CRPD Committee's subsequent General Comment on Article 12.

Moreover, the CRPD specifically incorporates Article 2.1 of the Vienna Convention in Article 46, which prohibits reservations that are incompatible with the object and purpose of the CRPD.¹⁹ As stated above, 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." This purpose is furthered by all the provisions of the CRPD, including Article

¹⁵ *Id.* As explained in the International Law Commission's *Guide to Practice on Reservations to Treaties*, "[a] reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the *raison d'être* of the treaty." International Law Commission, *Guide to Practice on Reservations to Treaties*, 63d Sess. A/66/10 (2011) s. 3.1.5; see also Advisory Opinion on Reservations of the Genocide Convention, Advisory Opinion, 1951, I.C.J. 15 ("It is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation").

¹⁶ INTERNATIONAL LAW COMMISSION, *supra* note 15.

¹⁷ See Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 648 (1990).

¹⁸ For a comprehensive discussion of treaty interpretation, and a discussion of the relationship between reservations and interpretive declarations, see Richard K. Gardiner, *supra* note 11, at 87-89.

¹⁹ United Nations Convention on the Rights of Persons with Disabilities, Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, G.A. Res. 56/168, U.N. Doc. A/56/583/Add.2 (Dec. 21, 2001), art. 46, available at <http://www.un.org/disabilities/convention/conventionfull.shtml> (*quoting*, "1. Reservations incompatible with the object and purpose of the present Convention shall not be permitted. 2. Reservations may be withdrawn at any time."); see also *id.* art. 14 (referring to the Optional Protocol section of the CRPD). This language has become the norm for human rights treaties. See e.g. Convention on the Elimination of All Forms of Discrimination Against Women 1979, 1249 U.N.T.S. 13 (No. 20378), art. 28; The Convention on the Rights of the Child 1989, 1577 U.N.T.S. 3 (No. 27531), art. 51(2).

© Arlene S. Kanter, Syracuse NY March 2016. Please do not distribute or reproduce without permission.

12. Further, equality and nondiscrimination, together with respect for dignity, individual autonomy and freedom to make one's own choices are all included in the general principles of CRPD, specifically to render the object and purpose of the Convention explicit. Canada's reservation on Article 12 appears antithetical to these general principles and may therefore be considered incompatible with Article 46 of the CRPD.

Other countries, too, have adopted RUDS with respect to Article 12. But in response to these various RUDS, some countries noted their objections, as is also their right under international law.²⁰ Mexico, one of the original sponsors of the CRPD, has objected specifically to reservations and declarations on Article 12, declaring that they are "incompatible with the object and purpose of that instrument. Mexico went on to say that...the claim that domestic laws take precedence over the provisions of treaties that are in force for the Parties is therefore inadmissible."²¹ The Law Commission's view that Canada's Declaration and Reservation on Article justifies its recommendation denying legal capacity to people with certain intellectual and functional abilities may be considered invalid as violative of the "object and purpose" of Article 12, if not contrary to the overall nondiscrimination mandate of the CRPD.

While it is true that the Law Commission's Interim Report does not require substituted decision making for all persons with intellectual disabilities, it nonetheless continues the use of substituted decision-making "in appropriate circumstances and in accordance with the law."²² The Commission apparently believes that because Article 12 does not ban substituted decision making altogether, it is free to decide when and to whom it may authorize the use of substituted decision-making in its jurisdiction. However, Canada's own Declaration and Reservation seems to belie the Commission's position. The fact that Canada (and other countries) felt a need to submit a RUD on Article 12 supports the view that Article 12 is so clear in prohibiting substituted decision-making that without a RUD, Canada would have been forced to change its laws. Arguably, if Article 12 had been less clear regarding its intent to put all people with disabilities on equal footing with respect to legal capacity and to ban substituted decision-making, Canada, as well as other countries may not have felt compelled to explain their position in a Reservation and Declaration on Article 12. Thus contrary to the view of the Law Commission, Canada's Declaration and Reservation on Article 12 does not provide a legitimate justification to continue the use of substituted decision-making.

3. How has Article 12 been interpreted in international law and related sources?

Not only is it doubtful that Canada's Declaration and Reservation provides a legitimate basis for the Recommendations of the Law Commission's Interim Report, but the Law Commissions' rejection of the CRPD Committee's General Comment on Article 12 is also inappropriate.

In 2014, the CRPD Committee issued General Comment 1, entitled *Equal Recognition of the Law*. The Committee issued this General Comment in response to questions that arose with respect to Article 12 both in the drafting process, and in the RUDS, following the CRPD's adoption. During the drafting

²⁰ See Richard K. Gardiner, *supra* note 11, at 92-93; Anthony Aust, *supra* note 11, at 118-26; 137-39.

²¹ See Objection of Mexico, Oct. 22, 2010, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en.

²² Nicholas Caivano, *Conceptualizing Capacity: Interpreting Canada's Qualified Ratification of Article 12 of the UN Disability Rights Convention*, 4 U. W. Ontario J.L. Studies 3, 10 (2014), available at <http://ir.lib.uwo.ca/uwojls/vol4/iss1/3>.

process, some countries sought to dispute the mandate of Article 12 by proposing a footnote to Article 12 restricting the meaning of legal capacity in three of the six official UN languages. This proposed footnote read, “[i]n Arabic, Chinese and Russian, the term ‘legal capacity’ refers to ‘legal capacity for rights,’ rather than ‘legal capacity to act.’”²³ The intent of this footnote was to remove from the CRPD’s protection people with certain disabilities who were considered (by some countries) as not qualified to exercise their legal rights on an equal basis with people without disabilities.²⁴

Opposition to the proposed footnote mounted at the final meeting of the Ad Hoc Committee. After several hours, the Ad Hoc Committee firmly rejected the proposed footnote, and without a vote.²⁵ The controversial footnote was removed from the final draft of the CRPD, well before it reached the floor of the General Assembly on December 13, 2006.²⁶ The result of the Ad Hoc Committee’s decision to reject the proposed footnote is clear: by extending the right to equal recognition before the law to all people with disabilities, Article 12 ensures the right of all people with disabilities to legal capacity irrespective of their particular diagnosis, intellectual or functional ability, or where in the world they reside.

Nevertheless, even after the CRPD was adopted, Article 12 continued to be subject to various interpretations. In response to what appeared to be confusion about the meaning and scope of Article 12, the CRPD Committee issued General Comment 1, entitled *Equal Recognition before the Law*. The Committee sought to finally put to rest any lingering questions about Article 12. Accordingly, in the General Comment, the CRPD Committee makes clear that the CRPD prohibits all types of discrimination against people with disabilities, including different treatment with respect to legal capacity. Article 12 ensures the right of all people with all types of disabilities to equal recognition under law, which means an end to distinctions based on one’s functioning or intellectual ability as well as an end to substituted decision-making regimes based on such differences.

While it is true that the CRPD Committee’s General Comment is not binding *per se*, it is considered authoritative under international law. The purpose of a General Comment is to give meaning to the abstract rights included in treaties and to clarify the duties of States Parties as well as to identify approaches to implement treaty provisions.²⁷ Therefore, the Law Commission’s decision to disregard the CRPD Committee’s interpretation of Article 12 disappointing.

In the Interim Report, the Law Commission writes that it considered and rejected the approach proposed in the *General Comment*, in which all individuals retain at all times legal capacity to make decisions. The Report goes on to state that “[g]iven the non-binding nature of a *General Comment* and the existence of Canada’s *Declaration and Reservation*, Canada is not clearly bound to carry out the program of reform set out in the *General Comment*.”²⁸

²³ See Arlene S. Kanter, *supra* note 5, at 251-258 (discussion of the drafting process that lead to Article 12).

²⁴ *Id.* at 252.

²⁵ *Id.* at 256.

²⁶ See Press Conference, United Nations, Press Conference on Convention Concerning Rights of Disabled Persons (Dec. 13, 2006), available at http://www.un.org/News/briefings/docs//2006/061213_Disabilities.doc.htm.

²⁷ See CRPD, *General Comments, Article 12: Equal recognition before the law*, 11th Sess. U.N. Doc. CRPD/C/GC/1 (May 19, 2014), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement> [hereinafter *General Comments*].

²⁸ INTERIM REPORT, *supra* note 9, at 60 (also stating: “[b]oth Canada’s *Declaration and Reservation* and the *General Comment* provide important insights into potential interpretations of Article 12 of the © Arlene S. Kanter, Syracuse NY March 2016. Please do not distribute or reproduce without permission.

However, in the General Comment, the CRPD Committee clarifies that although Article 12 does not mention supported decision making by name, the intent of Article 12 is to ensure legal capacity for all people with disabilities and to end the use of substituted decision-making. Paragraph 7 of the General Comment specifically makes this point:

Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.”²⁹

Further, in Paragraph 25 of the General Comment, the CRPD Committee writes as follows:

“In order to fully recognize “universal legal capacity”, whereby all persons, regardless of disability or decision-making skills, inherently possess legal capacity, States parties must abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect.”³⁰

Based on these statements, there can no longer be any doubt that Article 12 prohibits the type of substituted decision-making regime proposed in the Law Commission’s Interim Report.

The CRPD Committee’s General Comment also sets forth specific criteria for evaluating the progress of States Parties in their implementation of the rights included in the CRPD. For example, in Paragraph 28, the Committee includes the obligations of States Parties with respect to new supported decision making regimes. Such supported decision-making regimes must now include the following characteristics:

- a. Supported decision-making must be available to all. A person’s level of support needs, especially where these are high, should not be a barrier to obtaining support in decision-making;
- b. All forms of support in the exercise of legal capacity, including more intensive forms of support, must be based on the will and preference of the person, not on what is perceived as being in his or her objective best interests;

CRPD, which Canada has committed itself to implement. Given the nature of the LCO’s role and mandate, neither the General Comment nor the Declaration and Reservation limits the LCO’s potential recommendations, although they certainly inform them. It is the responsibility of the LCO to make recommendations that are at minimum consistent with Canada’s international commitments. Given the non-binding nature of a General Comment and the existence of Canada’s Declaration and Reservation, Canada is not clearly bound to carry out the program of reform set out in the General Comment. However, the LCO may certainly recommend that the government take steps beyond minimum compliance with its obligations. This does not mean that the LCO accepts the interpretation given Article 12 by the General Comment. It is the responsibility of the LCO to carefully review available research and the results of public consultations, and to make recommendations for law reform based on that review: it is then the role of government to evaluate the LCO’s analysis and recommendations and to take such steps as it believes appropriate.”).

²⁹ GENERAL COMMENTS, *supra* note 27, para. 7.

³⁰ GENERAL COMMENTS, *supra* note 27, para. 25.

- c. A person's mode of communication must not be a barrier to obtaining support in decision-making, even where this communication is non-conventional, or understood by very few people;
- d. Legal recognition of the support person(s) formally chosen by a person must be available and accessible, and States have an obligation to facilitate the creation of support, particularly for people who are isolated and may not have access to naturally occurring support in the community. This must include a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge the action of a support person if they believe that the support person is not acting in accordance with the will and preferences of the person concerned;
- e. In order to comply with the requirement, set out in article 12, paragraph 3, of the Convention, for States parties to take measures to "provide access" to the support required, States parties must ensure that support is available at nominal or no cost to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of legal capacity;
- f. Support in decision-making must not be used as justification for limiting other fundamental rights of persons with disabilities, especially the right to vote, the right to marry, or establish a civil partnership, and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty;
- g. The person must have the right to refuse support and terminate or change the support relationship at any time;
- h. Safeguards must be set up for all processes relating to legal capacity and support in exercising legal capacity. The goal of safeguards is to ensure that the person's will and preferences are respected.
- i. The provision of support to exercise legal capacity should not hinge on mental capacity assessments; new, non-discriminatory indicators of support needs are required in the provision of support to exercise legal capacity.

It is this list of characteristics that the CRPD Committee will now use to evaluate each country's report with respect to its compliance with Article 12. Yet in its Interim Report, the Law Commission rejects the Committee's interpretation of Article 12. Although Canada is free to adopt declarations and reservations, once the CRPD Committee issued its interpretation of Article 12, the Law Commission was advised to avoid using Canada's declaration and reservation as a basis to disregard the CRPD Committee's interpretation of Article 12.³¹

Moreover, if the Law Commission was not sure about the authoritative nature of the CRPD Committee's interpretation of Article 12, a review of the CRPD Committee's Concluding Observations should have put to rest any such doubt. Each and every concluding observation filed by the CRPD Committee in response to country reports on Article 12 unequivocally call for an end to the type of substituted decision-making regimes that the Law Commission is now recommending in its Interim Report.

For example, the CRPD Committee's response to the country reports filed by Spain and Tunisia support a reading of Article 12 as abolishing guardianships. In its Concluding Observations submitted in response to Spain's report, the CRPD Committee requests in paragraph 11, the following: "Please

³¹ The highly authoritative nature of the General Comment is supported by the fact that it is the result of a comprehensive participatory process including interest groups of different regions and cultures as well as non-governmental organizations. See Nisuke Ando, *General Comments/Recommendations*, MAX PLANCK INST. FOR COMP. PUB. L. & INT'L L. (2010), http://ilmc.univie.ac.at/uploads/media/general_comments_recommendations_empil.pdf.

provide information on the measures planned or taken to replace substitute decision-making (guardianship) with supported decision-making in the exercise of legal capacity, in accordance with article 12 of the Convention.”³² Similarly, in response to Tunisia’s country report, the CRPD Committee requests in paragraph 23, the State to “review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making.”³³ Despite the Law Commission’s effort to create doubt about the scope and meaning of Article 12, there is nothing ambiguous about the CRPD Committee’s intent to require State Parties to repeal laws based on substituted decision making as incompatible with the object and purpose of the CRPD.

4. Is the cognitive and functional approach set out in the Recommendation #3 of the Law Commission’s Interim Report consistent with Article 12?

The cognitive and functional approach to legal capacity adopted by the Law Commission is not consistent with Article 12. The Law Commission writes that the cognitive and functional approach “emphasizes the ability to make a specific decision or type of decision at a particular time, evaluating the abilities of the individual to understand, retain and evaluate information relevant to a decision.”³⁴ This view is belied not only by the CRPD Committee’s interpretation of Article 12 but also by the purpose and language of the CRPD itself as well as recent international developments.

It is beyond dispute that the CRPD applies to all people with disabilities and prohibits any and all sorts of discrimination based on disability. Both the Ad Hoc Committee that drafted the CRPD as well as the CRPD Committee’s interpretation of Article 12 in its General Comment, recognize that even individuals with significantly impaired decision-making abilities have the right to freely seek and receive supports to help them in decision-making. Yet the Law Commission seems to reject this approach.

The Interim Report’s Recommendation #3 conditions the right to equal recognition of the law upon the lack of a cognitive or intellectual impairment. Conditioning the exercise of such an important right as equal recognition of the law on the lack of an impairments is discrimination on its face and undermines the very purpose of the CRPD. As such, Recommendation #3 runs counter to the very essence of the prohibition of discrimination found in Article 2 of the CRPD. Indeed as the CRPD Committee’s General Comment recognizes, an individual’s status as a person with a disability or the existence of an impairment may not be the basis for denial of legal capacity under Article 12.

Moreover, in the section of the General Comment entitled the Obligations of States Parties, the CRPD Committee affirms States Parties’ obligations not only to refrain from actions that deprive people with disabilities of their equal recognition before the law but also their affirmative obligation to ensure “universal legal capacity” for all people with disabilities, regardless of their disability or

³² CRPD, Sept. 19-23, 2011, Concluding Observations in Response to Spain’s Report, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=361&Lang=en; see also Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding Observations: Spain*, 6th Sess. U.N. Doc. CRPD/C/ESP/CO/1 (Oct. 19, 2011), available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhslxq2MuIDp%2fqMKQ6SGOn0%2fNZ5trZrfgNmKdTjE%2fScMKF96xMrtyzhDx7aguCpqdK4xQVGCY502yRGHBFyeVZXNyDyVAuXWX8uweN1J3Pv65K>.

³³ *Id.*

³⁴ INTERIM REPORT, *supra* note 9, at 55.

© Arlene S. Kanter, Syracuse NY March 2016. Please do not distribute or reproduce without permission.

decision-making skills.³⁵ Such universal legal capacity necessarily requires the repeal of facially discriminatory policies as violative of Article 12, including those contained in Recommendation #3, which permit the imposition of substituted decision-making or functional tests of mental capacity as a basis for the denial of legal capacity. Arguably, no document of a UN Committee has ever been as unequivocal as this General Comment on the need for countries to change current laws and practices that deprive people with disabilities of their opportunity for equal treatment under law. Yet the Law Commission ignores such legal precedent by adopting a cognitive and functional approach to legal capacity. The Commission's position is contrary to reports, case law, and research in this area that now reject the cognitive and functional approach in favor of universal legal capacity. Although resources that reject the Commission's position were available for review by the Law Commission, they are not cited in their Interim Report.

For example, in 2013, the Mental Disability Advocacy Center issued a report on Article 12, entitled *Legal Capacity: A Call to Action to Governments and to the EU*.³⁶ This report provides a comprehensive review of the many problems with guardianship in several European countries, as well as an overview of the legal capacity cases decided by the ECtHR.³⁷ As such, it provides a useful roadmap on how to transform now-invalid substituted decision-making regimes with supported decision-making.

Similarly, in 2010, the European Foundation Center issued a comprehensive report on the CRPD, entitled *Study on Challenges and Good Practices in the Implementation of the UN Convention on the Rights of Persons with Disabilities*.³⁸ This report also suggests repealing current legal regimes that deny persons with disabilities legal capacity and calls for the creation of systems that support people with disabilities in making their own decisions.³⁹

In 2012, Commissioner Thomas Hammarberg himself published a paper on the right to legal capacity, entitled "*Who Gets to Decide?*"⁴⁰ In this paper, Commissioner Hammarberg interprets Article 12 to require States Parties to "abolish mechanisms providing for full incapacitation and plenary guardianship."⁴¹ He goes on to write that "reforming current mechanisms for legal capacity is one of the most significant human rights issues in Europe today."⁴² In addition, he recommends that States Parties develop supported decision-making systems and "establish robust safeguards" that ensure the provision of support services to individuals, based on their preference.⁴³ Only then, in his view, will people with disabilities worldwide enjoy the right to fundamental freedoms and human rights. The Commissioner concludes his report with a call for "no less than a radical overhaul of present

³⁵ GENERAL COMMENTS, *supra* note 27, para. 25.

³⁶ *End Civil Death – A Call to Action on the Right to Legal Capacity in Europe*, MDAC (Nov. 5, 2013), available at <http://mdac.info/en/news/end-civil-death-call-action-right-legal-capacity-europe>.

³⁷ *Id.*

³⁸ European Foundation Centre (EFC), VC/2008/1214 STUDY ON CHALLENGES AND GOOD PRACTICES IN THE IMPLEMENTATION OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (Brussels: EFC 2010), available at <http://www.inclusive-education.org/system/files/publications-documents/European%20Foundation%20Centre%20Report%20good%20practices%20UNCRCRD.pdf>.

³⁹ *Id.*

⁴⁰ Thomas Hammarberg, *Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*, CommDH/Issue Paper 2 (2012).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

policies.”⁴⁴ The right to legal capacity, he concludes, is “not about being able to do everything on your own, but about having control of your life and the possibility to make decisions and have them respected by others.”⁴⁵

Another report which compares the legal capacity laws of nine countries in the European Union was released in 2013 by the European Union Agency for Fundamental Rights.⁴⁶ This report concludes that States Parties should “replace decision making by others on behalf of people with disabilities with decision making by people with disabilities guided by others. This change is necessary, according to the report, in order to respect the autonomy, will, and preferences of people with disabilities.”⁴⁷

Moreover, the Law Commission’s argument that Article 25’s inclusion of the requirement of informed consent supports rather than rejects substituted decision-making is also not persuasive. By reading Article 25 (which requires informed consent) in conjunction with Article 12 affirms that the consent of third parties is not considered an appropriate substitute for consent of the person with a disability, who at all times must enjoy the right to exercise legal capacity, and with support, if needed, according to his or her own will and preferences. Indeed, as I have written elsewhere, because reference to substitute decision-making was included in earlier drafts of Article 12 but not in the final draft of Article 12, it is clear that the Ad Hoc Committee may have considered but then rejected the continued use of substituted decision making in Article 12.⁴⁸

In sum, the Law Commission’s Recommendation #3 that legal capacity must be based on a functional and cognitive approach is not consistent with the language and intent of the CRPD, its drafting history, or recent international reports.

5. Does international law support the Law Commission’s analysis in the Interim Report that the provisions in Article 12 are subject to the principle of progressive realization?

According to the Law Commission, the rights provided under Article 12 are subject to progressive realization. This view is contrary to well established principles of international law.

On page 149 of the Interim Report, the Law Commission writes as follows:

...the LCO is particularly concerned by the stance taken in the *General Comment* that these rights are not subject to progressive realization, but are those of immediate implementation. It is essential to progress towards greater dignity and autonomy for persons affected by this area of the law, but it is also essential to do so in a way that seeks to build on evidence, realistically and practically addresses the difficulties, takes into account the diversity of needs and circumstances of those affected, and proceeds with reasonable caution so as not to inadvertently result in greater harm than benefit.

The LCO therefore believes a “progressive realization” approach to reform in this area, which adopts the approach underlying Article 12, aims to better promote and protect the

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ European Union Agency for Fundamental Rights, *Legal Capacity of Persons with Intellectual Disabilities and Persons with Mental Health Problems* (2013), available at <http://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf>.

⁴⁷ *Id.*

⁴⁸ Arlene S. Kanter, *supra* note 5, at 263-265.

© Arlene S. Kanter, Syracuse NY March 2016. Please do not distribute or reproduce without permission.

Framework principles, and seeks to implement them by building on existing good practices, providing new options with carefully considered safeguards, and evaluating the evidence on which reform is based, is appropriate.⁴⁹

It is well established that the concept of progressive realization in international law applies to social, economic and cultural rights and not civil or political rights. As Article 2.1 of the International Covenant on Social, Economic and Cultural Rights (ICESCR) states,

Each state party to the present Covenant undertakes to take steps individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means including in particular the adoption of legislative measures.⁵⁰

This phrase, "to the maximum of available resources with a view to achieving progressively the full realization of the rights," was included in the Covenant to recognize differences among countries in the nature and extent of economic, social and cultural policies, programs and services.⁵¹

By contrast, the International Covenant on Civil and Political Rights (ICCPR), specifically does not include the option of progressive realization. Civil and political rights, as opposed to social, economic and cultural rights must be effectuated immediately. Thus unlike the State's obligations to enforce rights under the ICESCR progressively, the ICCPR requires States Parties to refrain immediately from interfering with the political and civil rights of its citizens.⁵² The reason for this difference is that the

⁴⁹ INTERIM REPORT, *supra* note 9, at 149.

⁵⁰ International Covenant on Economic, Social and Cultural Rights, art. 2.1, Dec. 16 1966, 993 U.N.T.S. 3 (or G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (Dec. 16, 1966)) [hereinafter ICESCR].

⁵¹ *Id.* The Limburg Principles state that "the economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures." The Limburg Principles go on to explain that the "obligation of progressive realization exists independently of the increase in resources" and therefore applies in all countries, regardless of the level of economic development. (General Comment No. 1 (1989), Committee on Economic, Social and Cultural Rights in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Document, HRI/Gen./1/Rev.1, July 1994).

⁵² See Dominic McGoldrick, THE HUMAN RIGHTS COMMITTEE 2 (1991). Citing the history of the drafting of the ICCPR, McGoldrick describes the importance of the immediate realization of civil and political right in this way: "There were marked differences of opinion during the drafting on the matter of the obligations that would be incurred by a State Party to the ICCPR. Some representatives argued that the obligations under the ICCPR were absolute and immediate and that, therefore, a State could only become a party to the ICCPR after, or simultaneously with, taking the necessary measures to secure those rights.... If there were disparities between the Covenant and national law, they would best be met by reservations... Against this view it was argued that the prior adoption of the necessary measures in domestic law was not required under international law.... Proposals to provide that the necessary measures be taken within a specified time limit or within a reasonable time were rejected as was a suggestion that each State fix its own time limits in its instrument of ratification.... The notion of implementation at the earliest possible moment was implicit in Article 2 as a whole. Moreover, the reporting requirement in article 49 (later article 40) would indeed service as an effective curb on undue

© Arlene S. Kanter, Syracuse NY March 2016. Please do not distribute or reproduce without permission.

rights contained in the ICCPR are seen as such basic human rights that there can be no excuse for delaying their immediate protection.

One such basic human right included in the ICCPR is the right to equal recognition under law. Article 16 of the ICCPR specifically provides: “Everyone shall have the right to recognition everywhere as a person before the law.”⁵³ It is no accident that this same language is included in the CRPD. When the CRPD was drafted, the Ad Hoc Committee intended to apply existing human rights laws to people with disabilities. The right to equal recognition of the law is an example of such a right. As such, Article 12, like Article 16, is not subject to progressive realization but must be implemented immediately. The CRPD Committee affirmed the inapplicability of the principle of progressive realization to Article 12 when it stated unequivocally:

[T]he rights provided for in article 12 apply at the moment of ratification and are subject to immediate realization. The State’s obligation, as provided in article 12, paragraph 3, to provide access to support in the exercise of legal capacity is an obligation for the fulfilment of the civil and political right to equality before the law. “Progressive realization” (art. 4, para. 2) does not apply to the provisions of article 12. Upon ratifying the Convention, States parties must immediately begin taking steps towards the realization of the rights provided for in article 12. Those steps must be deliberate, well-planned and include consultation with and meaningful participation of people with disabilities and their organizations.”⁵⁴

In contrast to these well-established principles of international law that require the right to equal recognition of the law to be implemented immediately, the Law Commission recommends delaying implementation of Article 12 until it has an ability to assess the reforms underway. Not only does this view challenge well established principles of international law, but it also contradicts the process of legislative reform. While there is always a role for research and pilot projects in the process of legislative reform, waiting for the results of such projects is not a sufficient justification to delay compliance with Article 12. In fact, if the Law Commission wishes to review examples of how decision-making laws and policies may work without substituted decision-making, they may look nearby to British Columbia. The British Columbia law authorizing representation agreements is highly regarded internationally and one which I often cite as an example of a law that goes further in complying with Article 12 than other guardianship laws in the US or other countries.⁵⁵

Similarly, the Law Commission may look to the 2004 Montreal Declaration on Intellectual Disabilities, the first international document to call for supported decision-making, as an alternative to substituted decision-making for people with intellectual disabilities.⁵⁶ The Montreal Declaration acknowledges the tendency of governments to declare people incompetent and to appoint guardians to make decisions for them. For this reason, the Montreal Declaration rejects the use of guardians for people who are

delay.”); see *also* International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

⁵³ ICCPR, *supra* note 52, art. 16.

⁵⁴ GENERAL COMMENTS, *supra* note 27.

⁵⁵ Arlene S. Kanter, *supra* note 5, at 270.

⁵⁶ The Montreal Declaration on Intellectual Disabilities, Pan-American Health Organization and World Health Organization, Montreal, Canada (adopted Oct. 6, 2004); see *also* Robert D. Dinerstein, *Implementing Legal Capacity under Article 12 of the UN Convention of Human Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 2 HUM. RTS. BRIEF 1 (2012).

© Arlene S. Kanter, Syracuse NY March 2016. Please do not distribute or reproduce without permission.

deemed lacking in capacity owing to their intellectual disability. Instead, the Montreal Declaration addresses the needs of people who are considered “lacking capacity” not through laws that substitute a guardian’s decision for the decision of the individual (as the LCO is recommending in its Interim Report), but with a new model of supported decision-making. This new model recognizes that all people have the right to make decisions and choices about their own lives, while also acknowledging that, at times, people with intellectual disabilities, just like anyone else, may seek and need help from family and friends in making their decisions. It is this model of supported decision-making that is envisioned by Article 12 of the CRPD.

Other countries, too, have begun to review and rewrite their laws to introduce supported decision-making to replace substituted decision making regimes. For example, in Bulgaria, the Ministry of Justice, has recently offered a draft comprehensive bill titled, “Persons and Support Measures Act,” that includes a statutory provision for supported decision making for people with profound cognitive disabilities, as well as a provision for court orders for “facilitated decision making,” to apply in situations when an adult cannot be understood, or where being directed by the adult’s will and preferences would place the person or public at fundamental risk.⁵⁷ While the Bulgarian Bill has not yet been adopted, its presentation by the Ministry of Justice signals significant institutional support for what would constitute statutory provisions that are consistent with the CRPD and the General Comment. Other countries such as Ireland, Argentina, Columbia, Peru, Spain, India and Israel also are considering new laws which will replace substituted decision-making regimes with supported decision making. And, none of these legislative reforms are being delayed, pending the results of additional research or pilot projects.

In fact, none of the many jurisdictions that are working to revise their domestic laws to conform to Article 12 seem to be conditioning their law reform efforts on the type of additional information that the Law Commission seems to be seeking. Indeed, as we look back at major legislative reforms in Canada (and in the US) during the 1980s and 1990s, we see that successful completion of certain research or pilot projects, were never a prerequisite to legislative action. Instead, what has triggered most legislative reform in the area of disability law throughout the world has been successful advocacy by parents and people with disabilities, themselves, in collaboration with other advocates and legislators. Further, when the fundamental human right of equal recognition under law is at stake, such as in this case, there can be no justification for delaying its implementation.

An example in the United States may be instructive. In *Olmstead v L.C.*,⁵⁸ the state had argued that the named plaintiffs should not be released into the community until the state could decide the “appropriate course... [with] respect to the States’ historical role as the dominant authority responsible for providing services to individuals with disabilities.”⁵⁹ The majority of the Supreme Court justices rejected the State’s call to delay relief in this case and instead ordered the immediate release of the plaintiffs in order to ensure their right to be free from discrimination under the Americans with Disabilities Act.⁶⁰ People with disabilities who are currently denied legal capacity in Ontario based on

⁵⁷ For a series of commentaries, published in English by the Bulgarian Centre for Not-for-profit Law, see *Sufficiency of Law, Deficiency of Rights, Sofia 2015*, BULGARIAN CENTER FOR NOT-FOR-PROFIT LAW (last visited Mar. 2, 2016), <http://bcnl.org/en/articles/1584-sufficiency-of-law-deficiency-of-rights-sofia-2015.html>.

⁵⁸ *Olmstead v. L.C.*, 527 U.S. 581 (1999).

⁵⁹ *Id.*

⁶⁰ *Id.*; see Arlene S. Kanter, *There's No Place Like Home: The Right to Live in the Community for People with Disabilities, Under International Law and the Domestic Law*, 45 ISRAEL L. REV. 181 (2012); see © Arlene S. Kanter, Syracuse NY March 2016. Please do not distribute or reproduce without permission.

their functional or cognitive ability should similarly be accorded their right to equal recognition of the law without further delay.

Concluding Remarks: Article 12 and The Right to Equal Recognition Before the Law Since the Adoption of the CRPD

Since the adoption of the CRPD, many jurisdictions have begun evaluating their domestic laws in relation to the CRPD, generally, and Article 12's call for an end to substituted decision-making, in particular. The Law Commission of Ontario is now engaging in such a consultative process. However, as I have explained in this Expert Opinion, the Commission's Interim Report on Article 12 seems at odds with international law as well as international developments with respect to the object and purpose of the CRPD.

While it is true that Article 12 does not mention supported decision-making specifically, the language and purpose of Article 12 comports with the goal of supported decision-making. Supported decision-making is a mechanism to ensure that all people have the right to make decisions and choices about their own lives and to secure assistance in that process, if needed. As such, Article 12 represents an important breakthrough in international law by advancing the self-determination and equality rights of people with all types of disabilities.⁶¹ People with intellectual disabilities and people who, for other reasons, may be considered unable to care for themselves, are particularly vulnerable to being identified as legally incompetent and incapable. Difficulties in learning or even different ways of communicating often lead others to conclude that a person does not have the intellectual or functional capacity to be fully recognized as a person at law. This situation is the result of deep-rooted and often mistaken assumptions that certain levels of intellectual and communicative capacity are essential prerequisites of personhood. Article 12 was drafted specifically to counter this view.

Article 12 recognizes that some people with disabilities, on a temporary or permanent basis, may need assistance, support, and accommodations. But it also clarifies for the first time in international law that the need for assistance, support or accommodations is never a justification for depriving the person of his or her fundamental human rights. Under Article 12, no person may lose his or her right to legal capacity simply because the person is labeled as disabled. This view reflects the CRPD's commitment to the principle that persons with disabilities are holders of rights and not objects of others' protection. It also furthers the CRPD's commitment to the principle of nondiscrimination.

The Law Commission of Ontario has expressed its view that substituted decision-making is here to stay because there will always be a group of people who will be considered by society and policymakers as "too disabled" to make decisions for themselves. However, this view runs counter to the overall purpose of the CRPD, which now requires States Parties, including Canada, to rethink their role as *parens patriae*, and to review, and repeal, as needed, those laws and policies that deprive people with disabilities of their chance to exercise their own decision-making abilities. In order to fully comply with the object and purpose of the CRPD, the Law Commission should reconsider its recommendations in light of well-established principles of international law, the CRPD Committee's authoritative interpretation of Article 12, as well as recent international developments.

also The Americans with Disabilities at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities, 63 *DRAKE L. REV.* 819 (2015).

⁶¹ See Arlene S. Kanter, *supra* note 5, at 291-303.

