

Eric Namungalu

Syracuse University, USA

enamunga@syr.edu

ORCID ID: <https://orcid.org/0000-0002-3863-3810>

Dealing With Legal Capacity and Its Related Challenges in Uganda

Abstract: The paper deals with the concept of legal capacity as advanced in the United Nations Convention on the Rights of Persons with Disabilities (CRPD) within the context of Uganda as a State party. The paper takes the format of analyzing what Uganda has done to comply with the Concluding Observations of the Committee on the Rights of Persons with Disabilities in as far as they relate to the subject of legal capacity and access to justice within Uganda. The paper examines the practical challenges, legal, societal and cultural that affect the country's ability to comply with Article 12. Within the paper, it is emphasized that Article 13 is important in creating a mechanism under which Article 12 is realized especially in the case of Uganda. The Paper briefly examines what can be done to ensure that Uganda better complies with Article 12 of the CRPD.

Keywords: Convention on the Rights of Persons with Disabilities, persons with disabilities, access to justice,

Over the last seventy years, disability around the world has evolved from curse, through being considered an aspect to charity, a medical condition that must be cured, to its current status as a social issue. The case is no different for the East African State of Uganda. For this country numbering about 41 million people, 14% of whom are regarded as being disabled, the very aspect of extending equal recognition to persons with disabilities within the law and practice of the country, remains a challenge.

Article 16 of the ICCPR¹ provides for the recognition of everyone everywhere on earth as a person before the law. This Article builds upon Articles 6 and 7 of the

1 International Covenant on Civil and Political Rights; Uganda ratified the Covenant together with its optional protocol in 1995. The Country was last reviewed by the Human Rights Committee in 2003.

UDHR². Nearly seventy years after this international pronouncement, the right to full recognition before the law remains a dream for persons with disabilities especially those with mental disabilities. Despite, the successful enactment of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), particularly Article 12, equal recognition before the law remains unattained for many persons with disabilities. In this paper we briefly explore why successful implementation of legal capacity for all persons with disabilities in Uganda remains a challenge.

In April 2016, the Committee on the Rights of Persons with Disabilities (Committee)³ considered the country report submitted by the Republic of Uganda. Uganda ratified the CRPD and its Optional protocol on the 25th of September 2008 without any reservations. The government of Uganda submitted its initial report in 2012 and came up for review in 2016. Within its Concluding Observations, the Committee made several recommendations to the Ugandan government. Amongst these is the repeal and elimination of legislation and practices that allow for deprivation of legal capacity on the basis of disability, and to adopt measures that prohibit deprivation of legal capacity on a customary basis. The Committee also called for the adoption of measures to ensure that all persons with disabilities have access to justice including the establishment of free legal aid for persons with disabilities.

Legal capacity and access to justice as principles within the CRPD are permanently intertwined. Legal capacity is captured under Article 12 of the Convention whereas access to justice is under Article 13. Article 12 of the Convention captures the two core prongs of legal capacity as, the enjoyment of inherent rights and the capacity to exercise or act on the said rights. In his paper on legal capacity within the CRPD, Professor Robert D. Dinerstein outlines the two prongs as stated above.⁴ He further notes that whereas prong one is rarely contested, States and other duty bearers have continuously found it hard to comply with prong two. The reason for this is because unlike prong one which has over the course of nearly seventy years of the human rights regime become accepted, prong two is fundamentally revolutionary because it moves disability away from the medical model for which it was long associated to the social model. Other disability scholars have noted that this definition of equal protection under the CRPD was probably the most contested during the Convention's drafting process. This probably explains why State compliance with Article 12 has remained most problematic. However, for several States the entire Article 12 has remained a difficult one to comply with. This is because it calls for a fundamental

2 Universal Declaration of Human Rights; The Country accepts to be bound by the principles of the Declaration by virtue of its United Nations membership and the fact that it has ratified all the core human rights Treaties that operationalize the Declaration.

3 The Treaty body created by the CRPD.

4 R.D. Dinerstein, Implementing Legal Capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making, 19 Hum. Rights. Brief 8 (2012).

shift which is not only legislative but societal and behavioral. Article 13 is of extreme relevance to Article 12 because it creates a basis upon which Article 12, particularly prong two can be enforced, especially in circumstances where State compliance is less than what is desired. Access to justice and due process are the cornerstone of human rights because they ensure that no one suffers a wrong without recourse to redress.

The Committee's recommendations to Uganda were based on a range of concerns as will briefly be discussed. The most worrying trend in Uganda is the continued failure to amend legislation to comply with equal recognition before the law. Although the country retains several institutions such as the Uganda Law Reform Commission, First Parliamentary Counsel and Parliament's Department of Legal and Legislative Services, whose roles include the amendment of legislation to comply with International laws and obligations, the process remains extremely slow.

To date, disability as a crosscutting development issue is yet to be prioritized by the government. Whereas issues of gender have rightly been prioritized by the government through constant amendment and the introduction of a gender and equity certificate, the same cannot be said of disability. Efforts to pass a more progressive, all-encompassing and implementable Disability Act have stalled. The Parliament of the Republic of Uganda should be credited for enacting the Persons with Disabilities Act of 2006. However, because it was enacted as a Private members Bill, it become clear almost immediately that the law was inapplicable due to the absence of clearly defined State duties and sanctions for the breach of its provisions. Eight years after efforts to amend the current Act commenced, it remains on our Statute books even though there is unanimous agreement that the government has failed to and will not be able to implement its provisions.

In the particular case of legal capacity, its full enjoyment by persons with disabilities remains constrained by the Mental Treatment Act of 1964 which relies on the medical model that emphasizes institutionalization and substituted decision making as opposed to supported decision making which Article 12 of the CRPD promotes.⁵ Other laws include the Evidence Act⁶, Criminal Procedure Act⁷ which amongst a range of restrictions limit evidence by persons with mental disabilities as opposed to subjecting it to veracity impeachment as the standard would be for any evidence.

Under the Civil Procedure Rules of Uganda, persons with mental disabilities (termed "persons of unsound mind" under the Rules) are permitted to file suits

5 Mental Treatment Act, Chapter 279, Laws of Uganda; The law provides for the adjudgment of a person as one with mental illness, his treatment within a psychiatric hospital and the management of the various psychiatric hospital. It emphasizes treatment and doesn't leave room for supported decision making and voluntary rehabilitation.

6 Evidence Act, Chapter 6, Laws of Uganda.

7 Criminal Procedure Code Act, Chapter 116, Laws of Uganda.

through a “next friend” and defend themselves through a “guardian *ad litem*”.⁸ Not only is the reference to persons with disabilities derogatory here and under several other Statutes, but the actual provisions limit legal capacity as will be observed. These provisions apply to minors and persons adjudged or found to have mental disabilities equally. That in of itself is a clear indication of the model of substituted decision making which although acceptable for minors should never be wholly applied for persons with mental disabilities. The Rules make no reference to periods of lucidity and are unreceptive of the fact that several people with mental disabilities are capable of acute decision making with or without support as maybe required. If this law is to follow Article 12 of the CRPD, it should emphasize decision making by the person with mental disabilities whose decisions can only be deferred to another for a limited period of time, and with the limitation of following the most discernable of wishes by the former.

The “Administration of Estates of Persons of Unsound Mind Act” is another curious piece of legislation.⁹ Section 2 of the Act provides for the appointment of administrators of property owned by people who have been found to have mental disabilities or have been incarcerated under the Trial on Indictments Act provisions as shall be discussed below. The entire law substitutes the persons decisions for those of an appointed Administrator (decision maker) whose stated roles under section 4 is to the estate and not the owner of the estate. This Act makes for the clearest example of substituted decision making within the laws of Uganda. Fortunately, a new Mental Health Bill that provides for more involvement by a person who is subject to it and provides for other rehabilitative modes of service is before Parliament. There hope is that the law will be passed sooner rather than later.

Both pieces of legislation as noted in the previous two paragraphs do not lend themselves to the standards established under Article 12(4) of the CRPD. The continued presence of these kinds of laws on our Statute books undermines the objectives of the CRPD and, particularly, Article 12 in its totality.

It is common practice for actors within the Justice, Law and Order Sector (JLOS) of Uganda to deny persons with disabilities simple procedural rights like giving testimony, standing surety and appearing as assessors. This is particularly common for people with mental disabilities, the blind and the deaf. These violations are not based on law and normally remain unreported because JLOS reports are designed to collect information from duty bearers and active clients within the said institutions. On most occasions the reasons are not based on failure to fulfill the ordinary requirements but on an errant presumption based upon disability and the unconscious treatment of persons with disabilities as less than human. This procedural denial or failure to act on one’s rights is a direct violation of Article 12 of the CRPD.

8 Civil Procedure Rules, Statutory Instrument 71-1, Laws of Uganda, Order XXXII (1).

9 The Administration of Estates of Persons of Unsound Mind, Chapter 155, Laws of Uganda.

The good news is that recent trends have suggested a progressiveness by the Judiciary. In the two landmark decisions of CEHURD & Iga Daniel versus Attorney General,¹⁰ and Eric Bushoborozi versus Uganda,¹¹ Courts have struck down archaic provisions of the law. In those decisions, judges struck down or modified sections 45(5) and 82(6) of the Trial on Indictments Act (TIA) that negated the rights of persons with mental disabilities from enjoying equal recognition before the law. The laws relied upon a medical model to disability that presupposed that any sign or history of mental disability regardless of current lucidity meant that such a suspect could not go through a full trial but would indefinitely become incarcerated as a “guest of the State” until evidence was produced to the contrary before the Minister of Justice to his satisfaction.

The case of Busoborozi was a high court matter where the applicant had killed his son after a period of having suffered from mental illness in 2002. He was acquitted under section 48 of the TIA on grounds of insanity but was promptly sent for institutionalized treatment and eventual incarceration under the above provisions. Nine years later, he filed an application challenging his detention and the powers of the Minister in the local high court circuit. The judge ruled in his favor and held the said powers of the Minister as being extra judicial.

The CEHURD case was a petition before the Constitutional Court of Uganda challenging a range of laws that discriminate against persons with disabilities through action and language. The Court struck down sections 45(5) and 82(6) of the TIA for being inconsistent with the Constitution of the Republic of Uganda. Following this decision, all courts are bound not to follow the said provisions and must proceed with execution of their roles through judicious discretion.

Although under the provisions that were struck down, the person with mental disability remained accused and not convicted, he or she was subject to forced institutionalization and treatment at a psychiatric hospital for a long period of time. Such a person could only be reproduced for their trial upon an order of the national Minister of Justice, satisfying that he or she was fine now and fit to stand trial or be released if already acquitted. Subjecting this simple procedure in of itself to the powerful Minister made it seem as though having a mental disability was a crime. As if this procedure was not bad enough, some persons with mental disabilities remained institutionalized or incarcerated for up to seventeen years without being found guilty by a Court of law. This kind of positive development and progressive thinking by judges is a signal towards the diverse mechanisms that can be deployed in the presence of a system that seems inherently sluggish to the adoption of change.

10 CEHURD & Iga Daniel versus Attorney General, Constitutional Petition no. 64 of 2011 <https://www.cehurd.org/wp-content/uploads/2015/11/constitutional-petition-64.pdf>.

11 Eric Bushoborozi versus Uganda, HCT-01-CV-MC-0011 OF 2015 <https://www.ulii.org/ug/judgment/high-court-criminal-division/2015/14>.

Although issues of legal capacity continue to take the focus of the law and rightly so, other factors like custom, social and economic standing contribute to the actual failure to implement Article 12 of the CRPD. This is a point that was noted by the Committee when they called on the State to adopt measures that prohibit deprivation of legal capacity on a customary basis. The author has worked in rural areas and seen firsthand how arbitrary methods against persons with disabilities can be used to restrict the right to be heard, the right to inheritance of land and sexual rights. These kinds of denials and restrictions are informed by nothing other than ones' disability which is a direct denial of legal capacity under Article 12. The reasoning behind such behavior is normally simplistic and discriminatory. Reasons are normally as flimsy as inability to work the land, inability to coherently communicate or the attempt to avoid the passing on of "undesirable" traits of disability. This is still common despite the fact that in cases such as those of land, Article 12 provides that a person with a disability should be supported to fully utilize this kind of resource. This kind of reasoning which is common amongst some but not all communities and is not limited to particular regions or groups is many times even more troubling than actual legislation that is inconsistent with the letter and spirit of Article 12. The fact that its spread out over different areas, manifests itself in distinct traditional and customary practices and affects persons with disabilities in divergent ways, makes its prohibition extremely challenging for the government. Every community requires initiatives that are tailored towards its own challenges to enable the people therein understand that persons with disabilities are indeed equal to everyone else before and beyond the law, have the same rights that the community guarantees to all its members and must be allowed and supported to exercise those rights for their own and the betterment of that community.

Whereas States must take measures to guarantee legal capacity to all persons with disabilities through the full implementation of Article 12, the rights of all these people to enforce their human rights as envisaged can only be possible with the enforcement and realization of the related Article 13 on access to justice. The same concern was noted by the Committee when they recommended the establishment of free legal aid services for persons with disabilities.

Despite commendable attempts to provide free legal aid to persons with disabilities by local disabled people's organizations with support from likeminded peers around the World, these efforts are insufficient due to the high costs involved and the enormous demand. The government has over the last five years been drawing up a policy on legal aid, but this has yet to become a reality. It is therefore imperative that Disabled People's Organizations within Uganda continue to work with and demand from all private legal aid service providers specialized services that will suit the needs of persons with disabilities until the government can fulfil its mandate. They must also continue to work with all legal aid service providers to demand that the government establishes legal aid services, especially for marginalized groups like

persons with disabilities. Without robust access to justice for persons with disabilities they cannot realize and enforce the legal capacity guaranteed to them under Article 12 of the CRPD.

Finally, it should be noted that Article 12 of the CRPD is not a standalone within the Convention. In fact, it permeates the entire CRPD, is probably the most revolutionary provision therein and creates a bedrock upon which almost all the other rights must be realized. Therefore, a failure to guarantee and enforce legal capacity affects the way persons with disabilities enjoy the other rights. In Uganda's case, the biggest impact of the failure to accord equal treatment to persons with disabilities can be seen from education, health, employment and beyond. In the education sector, the provision of support services continues to be a problem especially for children with learning disabilities in both specialized and integrated schools. This failure to promote supported decision making from an early age starts a chain reaction of limitation of legal capacity that shall continue well into ones' adult life. The same is true of the health sector. As alluded to earlier in this paper, the medical model of disability continues in use not just within the Mental Treatment Act of 1964 but generally. This means that the practice of substituted decision making on behalf of persons with disabilities is common especially by their relatives.

It is therefore of great importance that legal capacity under Article 12 is not misconstrued as is common to refer to only persons with mental disabilities. The letter of the law tells us that it clearly refers to all persons with disabilities, and in the case of Uganda, the challenges experienced in realizing it maybe more common but certainly not limited to persons with mental disabilities. As a State party, Uganda must start to walk the talk and implement Articles 12 and 13 in their entirety if all the rights guaranteed to persons with disabilities under the CRPD are to be realized. A comprehensive review of incompliant laws is overdue, efforts to sensitize the public on improper practices that limit legal capacity must be scaled up and the government together with all other legal aid service providers must extend specialized services to persons with disabilities.

BIBLIOGRAPHY

CEHURD & Iga Daniel versus Attorney General, Constitutional Petition Number 64 of 2011.

Civil Procedure Rules, Statutory Instrument 71-1, Laws of Uganda; The Rules operationalize the Civil Procedure Act of Uganda by governing the procedure of instituting and handling civil claims.

Criminal Procedure Code Act, Chapter 116, Laws of Uganda; The law governs the proceedings of criminal trials before any Court within the jurisdiction of Uganda.

Dinerstein R.D., Implementing Legal Capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making, 19 Hum. Rights. Brief 8 (2012); The paper evaluates the meaning of legal capacity under the CRPD, especially in as far as it moves disability away from the medical model to the social model.

Eric Bushoborozi versus Uganda HCT-01-CV-MC-0011 OF 2015 <https://www.ulii.org/ug/judgment/high-court-criminal-division/2015/14>; The case interrogated the powers of the Minister of justice in making orders that affect accused persons appearing before Court. It found them to be an infringement on the autonomy and discretion of Court.

Evidence Act, Chapter 6, Laws of Uganda; The law regulated the reception, handling and weight given to evidence in criminal and civil proceedings within the jurisdiction of Uganda.

<https://www.cehurd.org/wp-content/uploads/2015/11/constitutional-petition-64.pdf>; The case dealt with the capacity to stand trial by persons with mental disabilities, derogatory language within the laws of Uganda and the powers of Court to make orders without interference.

International Covenant on Civil and Political Rights; Uganda ratified the Covenant together with its optional protocol in 1995. The Country was last reviewed by the Human Rights Committee in 2003.

Kanter A.S., *The Promise and Challenge of the United Nations Convention on the rights of Persons with Disabilities*, 34 *Syracuse J. Int'l L. & Com.* 287 (2007) Provided by: Syracuse University College of Law Library; The paper highlights the fundamental developments ushered in by the CRPD, one of which is the recognition of legal capacity

Mental Treatment Act, Chapter 279, Laws of Uganda; The law provides for the adjudgment of a person as one with mental illness, his treatment within a psychiatric hospital and the management of the various psychiatric hospital.

The Administration of Estates of Persons of Unsound Mind, Chapter 155, Laws of Uganda.

United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

Universal Declaration of Human Rights; The Country accepts to be bound by the principles of the Declaration by virtue of its United Nations membership and the fact that it has ratified all the core human rights Treaties that operationalize the Declaration.