

Legal Opinion on Norway's Declaration/Reservation to the UN Convention on the Rights of Persons with Disabilities

28 November 2013

Norway ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) on 3 June 2013 and in doing so became the 130th State party to the Convention. Upon ratification Norway entered a "[declaration](#)" which states the following:

Article 12 [right to equal recognition before the law]

Norway recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Norway also recognises its obligations to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. Furthermore, Norway declares its understanding that the Convention allows for the withdrawal of legal capacity or support in exercising legal capacity, and/or compulsory guardianship, in cases where such measures are necessary, as a last resort and subject to safeguards.

Articles 14 and 25 [right to liberty, right to health]

Norway recognises that all persons with disabilities enjoy the right to liberty and security of person, and a right to respect for physical and mental integrity on an equal basis with others. Furthermore, Norway declares its understanding that the Convention allows for compulsory care or treatment of persons, including measures to treat mental illnesses, when circumstances render treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards."

Norway's declaration also affects its interpretation of Article 17 of the CRPD, which declares the right to respect for physical and mental integrity of persons with disabilities on an equal basis with others.

Through its declaration, Norway is confirming to the international community that it will ignore parts of the CRPD and will continue to place people under guardianship. It will also continue to forcibly detain and treat people with mental health issues. This Legal Opinion sets out how Norway's stance is unlawful, and why the new Norwegian Government should withdraw it.

Why has Norway made this statement?

A State which makes a statement on ratifying a treaty does so because they do not like one or more parts of the treaty. So what is it about the CRPD which made Norwegian government specify that it is not going to be bound by some of the provisions?

The UN Committee on the Rights of Persons with Disabilities is the body which the treaty establishes to interpret the text. The CRPD Committee has already made it clear in its examination of treaty compliance by seven States that under Articles 12, 14, 17 and 25 (the provisions which Norway does not like), States must:

- i. “review the laws allowing for guardianship and trusteeship”¹ and “repeal the laws, policies and practices which permit guardianship and trusteeship for adults”²;
- ii. Provide “recognition [of] all persons’ legal capacity and [their] right to exercise it”³;
- iii. “Take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making”⁴ and recognise “all persons’ legal capacity and the right to exercise it”⁵;
- iv. “Repeal provisions that authorise involuntary internment linked to an apparent or diagnosed disability”⁶ and that “laws permitting involuntary treatment and confinement, including upon the authorisation of third party decision-makers such as family members or guardians are repealed”⁷;
- v. “Adopt measures to ensure that health care services, including all mental health care services, are based on the free and informed consent of the person concerned”⁸; and
- vi. “Develop a wide range of community-based services and supports that respond to needs expressed by persons with disabilities, and [which] respect the person’s autonomy, choices, dignity and privacy, including peer support and other alternatives to the medical model of mental health.”⁹

It is the role of States to ensure that these statements of principle are made operational. The field of legal capacity contains no easy solutions. But by entering a statement, Norway has signalled that it wants no place at the table when these issues are discussed.

It is disappointing also, given that Norway is home to some of the most innovative research on reducing the use of coercion in psychiatry. The Government of Norway acknowledges that the use of coercion and

¹ United Nations Committee on the Rights of Persons with Disabilities. 5th Session. *Tunisia – Concluding Observations of the Committee on the Rights of Persons with Disabilities*. 13 May 2011, at para 23; the same wording can also be found here: United Nations Committee on the Rights of Persons with Disabilities. 7th Session. *Peru – Concluding Observations of the Committee on the Rights of Persons with Disabilities*. (CRPD/C/PER/CO/1). 9 May 2012, at para. 25

² United Nations Committee on the Rights of Persons with Disabilities. 8th Session. *Concluding Observations on the initial report of China, adopted by the Committee at its eighth session (17-28 September 2012)*. (CRPD/C/CHN/CO/1), 15 October 2012, at para. 22.

³ *Ibid.*, at para 22. A similar statement on the recognition of the legal capacity of persons with disabilities was also made in: United Nations Committee on the Rights of Persons with Disabilities. 8th Session. *Concluding observations on the initial periodic report of Hungary, adopted by the Committee at its eighth session (17-28 September 2012)*. (CRPD/C/HUN/CO/1). 22 October 2012 at para. 26.

⁴ UNCRPD. *Tunisia – Concluding Observations, supra*. note 1 at para. 23. Similar wording can also be found in: UNCRPD. *Peru – Concluding Observations, supra* note 1 at para. 25; also at: UNCRPD. *Concluding Observations on the initial report of China, supra* note 2 at para. 22; and further at: UNCRPD. *Concluding Observations on the initial periodic report of Hungary, supra* note 3 at para. 26.

⁵ UNCRPD. *Concluding Observations on the initial report of China, supra* note 2.

⁶ United Nations Committee on the Rights of Persons with Disabilities. 6th Session. *Spain – Concluding observations of the Committee on the Rights of Persons with Disabilities*. (CRPD/C/ESP/CO/1). 19 October 2011, at para. 36.

⁷ UNCRPD. *Concluding Observations on the initial report of China, supra* note 2 at para. 23.

⁸ UNCRPD. *Concluding Observations on the initial periodic report of Hungary, supra* note 3 at para. 28. A similar recommendation can be found in UNCRPD. *Concluding Observations on the initial Report of China, supra* note 2 at para. 23.

⁹ UNCRPD. *Concluding Observations on the initial report of China, supra* note 2 at para. 23.



compulsory detention has been too high in recent years.¹⁰ This, in turn, has led to important studies such as those led by [Tonje Lossius Husum](#) at the University of Oslo examining the reasons for the use of coercion and the attitudes of staff, and giving rise to impressive projects aimed at reducing the usage of coercion.¹¹ Recent years have seen impressive changes to management processes at the Oslo University Hospital to include psychiatric patients in decision-making about their treatment,¹² and the piloting of projects such as the Breakthrough Series by the Norwegian Medical Association in developing user-guided alternatives to coercion.¹³ Norway has a lot to offer other States.

How is the declaration a reservation in disguise?

Rules about treaties are set out in the [Vienna Convention on the Law of Treaties](#). This Convention does not mention the word “declaration”, which is the word which Norway uses to describe its statement which we set out above. The Vienna Convention does, however, regulate the use of reservations. A reservation is defined in Article 2 of the Vienna Convention to be a “unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.

Norway has named its statement a “declaration”. The Vienna Convention clarifies that whatever name a State ascribes to a statement, it can be a reservation. In this case, Norway is seeking to exclude/modify the legal effect of provisions set out in Articles 12, 14, 17 and 25 of the CRPD in their application to Norway. Therefore Norway’s declaration constitutes a reservation.

Now that we have established that we are dealing with a reservation, what are the rules in international law about reservations?

Article 19 of the Vienna Convention sets out how that States can enter reservations when they ratify a treaty. It also clarifies that it is unlawful for a State to enter a reservation if that reservation “is prohibited by that treaty” (Article 19(a)) or “is incompatible with the object and purpose of the treaty” (Article 19(c) of the Vienna Convention). The CRPD itself sets out that, “[r]eservations incompatible with the object and purpose of the present Convention shall not be permitted (Article 46(1) of the CRPD). It also says that, “[r]eservations may be withdrawn at any time (Article 46(2) of the CRPD).

How is Norway’s reservation incompatible with the “object and purpose” of the CRPD?

Article 1 of the CRPD states the following:

“The purpose of the present Convention 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.”

¹⁰ Norwegian Ministry of Health and Care Services, *Mental Health Services in Norway*, Norwegian Ministry of Health and Care (Oslo), 2005, at p.16. <http://www.regjeringen.no/upload/kilde/hod/red/2005/0011/ddd/pdfv/233840-mentalhealthweb.pdf>.

¹¹ Husum, TL, et al., *Staff attitudes and thoughts about the use of coercion in acute psychiatric wards*, (2011).

¹² Aastorp, H., *Cutting back on coercion*, Science Nordic, <http://scienordic.com/cutting-back-coercion/>, 2011.

¹³ *Ibid.*



The opening Article draws on the universality and indivisibility of human rights, whilst recognising the need to “set out a code of implementation”¹⁴ to ensure the realisation of these rights for persons with disabilities in particular. The final paragraph of the Preamble to the Convention explains that there is a need to redress “the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries.”¹⁵

Rather than creating new human rights for persons with disabilities, the Convention shifts focus from treating persons with disabilities as people needing protection, restriction, provision and restraint, to being full members of their communities.¹⁶ As the then UN High Commissioner for Human Rights pointed out prior to the drafting of the Convention:

“The existing human rights system was meant to promote and protect the rights of persons with disabilities, but the existing standards and mechanisms have in fact failed to provide adequate protection for the specific cases of persons with disabilities.”¹⁷

In this context, Norway’s reservation attempts to maintain an unjust and outdated system of guardianship and forced treatment of persons with disabilities. The reservation fundamentally undercuts the purpose of the Convention. It has been strongly argued that the right to legal capacity contained in Article 12 of the Convention “enshrines the central paradigm shift”,¹⁸ referred to above, recognising that persons with disabilities have the capacity to have rights. Indeed, Article 12 confirms not only the right to recognition before the law but the right to legal capacity.¹⁹

A system of guardianship allows for decision-making rights to be stripped from a person with a disability because of that person’s disability.

Norway’s reservation in respect of Articles 14 and 25 is also incompatible with the purpose of the Convention. The right to liberty and security of person contained in Article 14 of the CRPD guarantees the right to protection from arbitrary detention. The right is guaranteed across the corpus of international human rights law including, Article 3 of the Universal Declaration of Human Rights, Article 5 of the European Convention on Human Rights and Article 6 of the Charter of the European Union. Article 14 of the CRPD, however, clarifies in the context of disability that, “the existence of a disability shall in no case justify a deprivation of liberty.” Yet, Norway’s reservation will have the effect of allowing the liberty of persons with disabilities to be restricted on the basis of their disability, and thus directly conflicts with the purpose of the CRPD.

¹⁴ Don MacKay, Chair of the committee that negotiated the treaty, cited in: GLADNET, *United Nations Convention on the Rights of Persons with Disabilities*, <http://www.ilr.cornell.edu/edi/gladnet/unconvention.cfm>, 2005.

¹⁵ CRPD, Preamble, para. (y).

¹⁶ See, for example: United Nations, *Convention on the Rights of Persons with Disabilities: Questions and Answers*, <http://www.un.org/disabilities/convention/questions.shtml>.

¹⁷ Louise Arbour, UN High Commissioner for Human Rights, cited in: *supra* note 14.

¹⁸ Schulze, M., *Understanding the UN Convention on the Rights of Persons with Disabilities: A Handbook on the Human Rights of Persons with Disabilities*, Handicap International, 2010 at p. 86.

¹⁹ “the two terms ‘recognition as a person before the law’ and ‘legal capacity’ are distinct. The ‘capacity to be a person before the law’ endows the individual with the right to have their status and capacity recognised in the legal order. The concept of ‘legal capacity’ is a wider concept that logically presupposes the capability to be a potential holder of rights and obligations, but also entails the capacity to exercise these rights and to undertake these duties by way of one’s own conduct.” Taken from Office of the UN High Commissioner for Human Rights, *Background Document: Legal Capacity*, Office of UNHCHR, 2004, available online at: <http://www.un.org/esa/socdev/enable/rights/ahc6documents.htm>.

Norway's interpretation of Article 25 (the right to health) similarly conflicts with the purpose of the CRPD. By arguing that the Article allows for compulsory psychiatric treatment on the basis of someone's disability, the principle of voluntariness and consent guaranteed by the Convention are rendered meaningless. The combined effect of Norway's reservations to Articles 14 and 25 allow for the continuance of a regime of forced treatment and detention on the basis of disability. This will particularly affect people with intellectual or psychosocial disabilities who will continue to be forcibly subjected to medical procedures in circumstances where their refusal to consent is overridden.

Norway's reservation undermines the object and purpose of the CRPD. It leaves people with disabilities without legal recourse in cases where their Convention rights have been violated. The reservation calls into question Norway's commitment to the Convention and to truly ensuring that persons with disabilities have their inherent dignity recognised as full citizens and bearers of human rights.

What are the consequences of the reservation?

In 2010, the last year for which official data is available, Norway recorded 54,424 hospital discharges of people with "mental or behavioural disorders",²⁰ with a rate of 1,113 discharges per 100,000 population.²¹ These figures represent a dramatic rise from the position ten years prior, when the total number of hospital discharges was 33,847 at a rate of 757 discharges per 100,000 population.²²

Official national data on compulsory admissions to psychiatric institutions in Norway are not available, a data gap recognised by the Government in its most recent report to the UN Committee against Torture.²³ Various sources suggest that there are significant regional variations in the use of compulsory admission in Norway.²⁴ The lack of information extends to the monitoring of coercion in psychiatric care, only being monitored in patients' medical records and without being collated nationally,²⁵ despite repeated commitments by Norway to reduce the incidence of coercion in psychiatric health care.

The lack of data extends to the use and monitoring of guardianship. Whilst this appears to be due to separate regional administration of guardianship offices,²⁶ the situation is clearly unsatisfactory, making it impossible to present a national picture of the extent of the usage of guardianship.

In 2008, the World Health Organization European Region published a comparative study on the policies and practices of mental health provision across Europe. The report found that "Norway uses more force (exercises more coercion) than many other European countries and that it has more beds per 1000

²⁰ WHO Regional Office for Europe, *European Health for All Database*, WHO (Copenhagen), 2010.

²¹ *Ibid.*

²² *Supra.* Note 20: 2000.

²³ Government of Norway. *Norway – Combined sixth and seventh reports of States parties due in 2011, submitted in response to the list of issues (CAT/C/NOR/Q/7) transmitted to the State party pursuant to the optional reporting procedure (A/62/44, paras. 23 and 24)*. (CAT/C/NOR/6-7). 30 January 2012, at para. 214.

²⁴ Husum, T., et al., *Analysis of compulsion in the mental health system*, SINTEF, 2005, as cited in: WSO, et al., *Joint Submission on Norway by We Shall Overcome (WSO), the World Network of Users and Survivors of Psychiatry (WNUSP), the European Network of (Ex-)Users and Survivors of Psychiatry (ENUSP) and the International Disability Alliance (IDA)*, 49th Session of the Committee Against Torture, WSO, 2012, at p. 5.

²⁵ *Supra.* note 23.

²⁶ See, for example: Alzheimer Europe, *Legal capacity and proxy decision-making*, Alzheimer Europe, <http://www.alzheimer-europe.org/Policy-in-Practice2/Country-comparisons/Legal-capacity-and-proxy-decision-making>, 2012.



inhabitants than many other countries."²⁷ Norway's Ministry of Health and Care Services participated in this study.

The lack of national data, the increasing use of compulsory admission for psychiatric treatment, and the high levels of coercion in psychiatric institutions all present serious challenges to implementing the CRPD in Norway. By making a reservation to the CRPD in respect of these issues, the Government is signalling its unwillingness to give proper effect to the Convention. The result of this is that people with disabilities will continue to experience human rights violations in the health system, and they will be prevented from seeking redress through the justice system.

The potential consequences of the reservation are more wide-ranging than just in Norway. The reservation is also likely to have an impact on how other countries will interpret the CRPD and will provide justification for a broad range of human rights violations including:

- i. People being stripped of their right to make decisions in their own lives [Article 12 – right to legal capacity, CRPD];
- ii. People are legally unable to challenge any restriction of their decision-making rights without the agreement of their guardians who may well want that person to be prevented from making decisions about their own lives [Article 12, CRPD – right to legal capacity];
- iii. People are forcibly taken to psychiatric hospitals, locked up, and medicated in situations where they are actively refusing treatment [Article 14, CRPD – right to liberty and security of person];
- iv. Instead of being provided supports, people with disabilities will be denied the opportunity to consent to medical interventions [Article 25, CRPD – right to health], to manage their own finances and property, to marry [Article 12, CRPD – right to legal capacity], whilst also denying them the right to vote [Article 29, CRPD – right to vote] and enter contracts,²⁸

The reservation sends the wrong signal to the Norwegian public about the position of people with disabilities in society, relying on an outdated and discredited medical model of disability rather than a commitment to their human rights as full members of a modern and vibrant society. Internationally, Norway has a well-deserved reputation for promoting and protecting human rights throughout the world. The reservation to the CRPD conflicts with this tradition and brings into question Norway's commitment to applying internationally-agreed human rights standards at home.

What can be done?

The Mental Disability Advocacy Center calls on the new Norwegian Government to withdraw the reservation entered by the previous government. It is allowed to do this under Article 46 of the CRPD.

MDAC further calls on Norway to collect and make available detailed statistics on the use of involuntary medical treatment, involuntary admission into institutions for psychiatric treatment, the use of coercion within psychiatric institutions, and numbers of people placed under guardianship, in compliance with its data collection obligations under Article 31 of the CRPD.

²⁷ Hansen, GV., et al., *Norway, Mental Health and the WHO*, European Commission (KNOW and POL), undated, at p.15. <http://www.knowandpol.eu/IMG/pdf/o31.who.norway.pdf>.

²⁸ *Supra*. note 26.

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