

COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES

Spain attracts criticism for restricting individuals' legal capacity



Photo: Caitlin Margaret Kelly

The Committee questioned Spain's electoral law, which permits a judge to deprive an individual of his or her right to vote.

The Committee on the Rights of Persons with Disabilities (the Committee) met for its 6th session from 19 to 23 September 2011, to review Spain and to adopt the list of issues on Peru. It had been envisaged to also adopt the list of issues on China, however this was postponed as the translation of the State report had not been finalised. Key themes of Spain's review included the role of the *Convention on the Rights of Persons with Disabilities* (the Convention) in the national legal framework, the restricted legal capacity of persons with disabilities, and the issue of reasonable accommodation.

The Committee opened the session with a call to States, disabled persons' organisations (DPOs), and NGOs to lobby in support of the Committee's request to the General Assembly to expand its sessions from one week to three weeks biannually. The Committee faces an increasing backlog of work; there are currently 16 reports¹ pending examination and another 48 initial reports are overdue. The one-week biannually allocated to the Committee is insufficient to examine initial reports, and also to deal with subsequent periodic reports from States. In order for the mechanism to work sustainably and credibly, it is clear that more time and resources are urgently needed for the proper fulfilment of the Committee's mandate. Currently, the Committee is the treaty body with the least time for sessions,² and yet it has an ever-expanding number of States Parties to the Convention (106 States as of 25 October 2011). By comparison, the Committee on Migrant Workers meets three weeks per year, with 45 States Parties to the *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. Other treaty bodies meet from eight to 15 weeks to examine up to 24 State reports per year plus individual communications.³ The General Assembly will be considering the Committee's request and should make a decision before the end of the year.

SECOND DIALOGUE

The overarching challenge of time and resources did not affect the Committee's focus and impetus in engaging in its second dialogue with a State. The discussion between the Committee and the Spanish delegation was rich. Country rapporteur, Mr Torres Correa (Ecuador) opened the questions with a brief overview of gaps where further information was required.

These included information on:

- disaggregated data on persons with disabilities, including children and their families, living in poverty
- assistance available to live independently, and assistance for persons with disabilities in prison
- specific programmes targeting women with disabilities
- inclusion of children with disabilities in the national action plan on children

1 By the end of the 6th session, the following State reports had been submitted to the Committee: Argentina, Australia, Austria, Azerbaijan, Belgium, China, Costa Rica, Ecuador, El Salvador, Germany, Hungary, Mexico, Paraguay, Peru, Republic of Korea, and Sweden.

2 The Sub-Committee on the Prevention of Torture also meets for one week biannually, however it does not have the same traditional functions as treaty bodies, such as examining State reports.

3 The Committee on the Elimination of Discrimination against Women meets for 15 weeks per year (including working groups on the pre-session and Optional Protocol); the Committee on the Rights of the Child meets 12 weeks per year (including for pre-sessional working groups); the Human Rights Committee meets for nine weeks per year; the Committee on Economic, Social and Cultural Rights, Committee on the Elimination of Racial Discrimination, and Committee against Torture each meet for eight weeks per year (the Committee against Torture was granted an extra week per session by the General Assembly for years 2011 and 2012).

- the criteria for identifying and assessing a person with disabilities for the purposes of access to social services
- accessibility measures for persons with disabilities in their homes, and access to recreation in their communities
- establishment of quality health services
- training for public sector workers on disability issues.

A common theme of the dialogue was the status of the Convention within the national legal framework. While it was frequently repeated by the delegation that fundamental rights and freedoms must be interpreted in light of internationally ratified treaties (by virtue of Article 10(2) of the Spanish Constitution), contradictory practices were identified by the Committee. For example, the delegation claimed that European Union (EU) directives prevent Spain from excluding private companies from public procurement tenders, even if quotas established in Spanish law for the employment of persons with disabilities are not respected by those companies.⁴ Mr Torres Correa and Mr Langvad said EU directives could not serve to absolve the State of its obligations under the Convention, and that Spain should go beyond the minimum requirements of EU directives to ensure it promotes and protects the rights of persons with disabilities.

Mr Gombos and Ms Maina posed several questions regarding the legal capacity of persons with disabilities, asking the delegation to explain how the current Spanish system of guardianship and trusteeship complies with the Convention's provision on equal recognition before the law.⁵ The delegation explained that the Spanish Supreme Court had issued an opinion on the matter in 2009, which deemed the Spanish mechanism to be one of protection of persons with disabilities, and regardless of its name – guardianship or assistance – it was in compliance with the Convention. The Supreme Court had concluded that the Spanish model was in compliance with the Convention, because a court must undertake an assessment of an individual's legal capacity in order to ensure proportionate assistance. Members of the Committee challenged this view, which contradicts the Convention's provision that all persons with disabilities enjoy legal capacity on an equal basis with others.

The Committee was assertive in its questioning of practices that apply to persons with disabilities who have had their legal capacity restricted, namely involuntary sterilisation and the denial of the right to vote. Ms Theresia Degener and Ms Fatiha Hadj Salah argued that the clause in the Spanish Criminal Code permitting forced sterilisation violates articles 12 and 17 on the right to physical and mental integrity. In response, the delegation claimed that involuntary sterilisation

was prohibited by the law, except for persons with severe psychosocial disorders who are legally incapacitated, in accordance with judicial safeguards, and that this had been confirmed by a Constitutional Court decision in 1994.⁶

Similarly, Committee members⁷ were vocal in questioning of Spain's electoral law, which permits a judge to deprive an individual of his or her right to vote. Mr Langvad enquired about the aim of this denial – whether it was to protect persons with disabilities or to protect society. He also reminded the delegation that the essence of the right to vote is that one's vote cannot be questioned. In response to the delegation's claim that the deprivation of the right to vote occurs only exceptionally, Mr Gombos referred to a recent case in Spain in which the right to vote of a woman with disabilities was reinstated by a court. He observed that the high profile nature of the case confirmed that such restorative action by the courts is exceptional, while deprivation of the right to vote remains standard practice. He also questioned the grounds on which a court could deny someone of his or her right to vote, in particular what type of evidence could be presented to support such a judgment.

CONCLUDING OBSERVATIONS⁸

Reasonable accommodation⁹ was a major theme in the Committee's recommendations. Despite its explicit incorporation into Spanish law, the Committee found the denial of reasonable accommodation was not systematically recognised as discrimination in practice. The Committee observed that the decision to provide reasonable accommodation was made conditional upon the severity of a person's disability. It also observed that there was a general lack of understanding of the concept of reasonable accommodation by public and private actors, including what constitutes 'accommodation' and what can be considered 'reasonable'. Consequently, the Committee said, Spain fails to respect several provisions under the Convention including the prohibition of discrimination,¹⁰ the right to education,¹¹ and the right to live in the community.¹² The Committee recommended that reasonable accommodation be provided regardless of the level

4 It must be noted that the EU directives in question (Directive 2004/18/EC on the coordination of procedures for the award of public contracts, and Directive 2004/17/EC relating to energy, water and transport) prescribe that companies can be excluded from public tenders on the basis of non-compliance with social legislation, including quotas for the employment of persons with disabilities (Recital 33 and articles 26 and 27, Recital 44 and articles 38 and 39 respectively).

5 Article 12 of the Convention.

6 Ruling 215/1994.

7 Ms Theresia Degener, Mr Stig Langvad, Mr Gábor Gombos, and Ms Maria Soledad Cisternas.

8 To read the Concluding Observations on Spain, visit <http://bit.ly/fyK4zi>.

9 Article 2 of the Convention provides that 'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.' Often confused with accessibility measures, reasonable accommodation is distinct because it applies in isolation to a particular case or a particular individual, whereas accessibility measures consist of adjustments and modifications that can be of benefit beyond an individualised instance. Additionally, whereas accessibility is subject to progressive realisation, reasonable accommodation is immediately applicable.

10 CRPD/C/ESP/CO/1. Para 20.

11 Ibid. Para 44.

12 Ibid. Para 40.

of disability, and that guidance, awareness raising, and training be provided to public sector personnel to ensure understanding of the concept of reasonable accommodation.

Other significant recommendations included:

- That the State abolish the disability-based distinction in law that permits abortion to be conducted beyond 14 weeks where there is a risk of serious anomalies in the foetus and when an extremely serious and incurable illness is detected in the foetus.¹³
- That the State abolish the administration of medical treatment without the full and informed consent of the individual concerned, including the sterilisation of persons whose legal capacity is not recognised.¹⁴
- That the State allocate the necessary funding to enable persons with disabilities to better integrate in their communities, enjoy the freedom to choose their residence on an equal basis with others, and access a full range of in-home, residential and other community services for daily living, including personal assistance. The provision of the latter should be based on individual need and not reserved for a certain class of disability, nor restricted for certain purposes (such as only education and work).¹⁵ This was the first time the Committee has included a recommendation concerning the right to live in the community.
- That all legislation be reviewed to ensure that all persons with disabilities regardless of their impairment, legal status, or place of residence have a right to vote. In particular, it should not be possible for a judge to strip an individual of his or her right to vote even on a case-by-case basis.¹⁶

A manifest weakness of the Concluding Observations relates to the recommendation on the right to education, and in particular, the references to 'special school' and 'special classes', which do not figure anywhere in the text of the Convention. In Spain, whilst there is a positive trend of inclusion in education, decisions on placement of children with disabilities into special schools or special classes are often taken by the school authorities. These decisions are often unilateral, without genuine consultation with the child or his or her parents, and currently parents have no mechanism to challenge the decisions. The Committee's recommendations to ensure consultation with parents and the possibility of an appeal against such decisions fall short of guaranteeing the implementation of the right to inclusive education for all children as enshrined in Article 24. On the contrary, these recommendations risk clouding the central focus of this provision, i.e. inclusion.¹⁷

CIVIL SOCIETY PARTICIPATION

There was strong civil society input to the Committee's work on Spain and Peru, with the participation of two representatives

13 CRPD/C/ESP/CO/1. Paras 17-18.

14 Ibid. Para 38.

15 Ibid. Paras 39-42.

16 Ibid. Para 48.

17 Ibid. Para 44(b), (d).

from each of the respective national DPO coalitions – Comité Español de Representantes de Personas con Discapacidad (CERMI)¹⁸ for Spain and Confederación Nacional de Personas con Discapacidad del Perú (CONFENADIP)¹⁹ for Peru. The Committee had a private briefing from CERMI on Spain the day before the dialogue. It became clear during the dialogue with Spain that the Committee had greatly benefited from this exchange and the several written submissions. These included the CERMI parallel report, its specific submission on the list of issues, and its responses to the list of issues submitted for comparison with the Government's replies. With respect to Peru, the International Disability Alliance (IDA) hosted a side event at which CONFENADIP and Human Rights Watch presented their main concerns with respect to the implementation of the Convention to date. The theme of the right to vote emerged prominently, given the sweeping removal from the electoral registry of 20,000 Peruvian citizens with intellectual disabilities.²⁰

To read the Concluding Observations on Spain, the list of issues on Peru,²¹ and the submissions made by CERMI, CONFENADIP and others, visit <http://bit.ly/fyK4zi>.

NEXT SESSION

The 7th session of the Committee will be held in April 2011. The duration is yet to be determined pending the decision of the General Assembly. The Committee envisages holding a dialogue with Peru, and adopting lists of issues on China, Hungary, Argentina, and possibly Paraguay. Ms Degener and Mr Hyung Shik Kim are co-rapporteurs for China and Mr Rios Espinosa for Peru. Mr Tatic, Ms Pelaez, and Ms Quan Chang were named rapporteurs for Hungary, Argentina, and Paraguay respectively.

Information on the IDA

The International Disability Alliance (IDA) is the network of global and regional organisations of persons with disabilities (DPOs), currently comprising eight global and four regional DPOs. With member organisations around the world, IDA represents the more than one billion people worldwide living with a disability. For more information on IDA and its activities visit www.internationaldisabilityalliance.org. ■

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18 CERMI is the umbrella group of Spanish organisations of persons with disabilities.

19 CONFENADIP, benefited from support from the Disability Rights Fund for its engagement with the Committee.

20 Since the 6th session, the Peruvian Government has reinstated the electors to the registry, thanks to the active advocacy of DPOs and NGOs.

21 The list of issues adopted with respect to Peru had not been made public at the time of writing.