



# Urgently awaiting implementation: The right to be free from exploitation, violence and abuse in Article 16 of the Convention on the Rights of Persons with Disabilities (CRPD)☆



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## ABSTRACT

The Convention on the Rights of Persons with Disabilities (CRPD) enshrines the freedom from exploitation, violence and abuse, a provision, which has hitherto received little attention. Exploring the contents of Article 16, this paper seeks to unpack both the potential for violence prevention as well as the implementation challenges. It situates violence protection within related treaty provisions and touches on specific challenges in institutional care as well as the private realm.

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## 1. Introduction

[F]or 650 million persons around the world living with disabilities, today promises to be the dawn of a new era – an era in which disabled people will no longer have to endure the discriminatory practices and attitudes that have been permitted to prevail for all too long.<sup>1</sup>

If the above statement of former United Nations Secretary General Kofi Annan appears naively optimistic, it nonetheless pulls into frame the fundamental unfairness intended to be addressed by the United

Nations Convention on the Rights of Persons with Disabilities (hereinafter the 'CRPD'). There can be no doubt that in a history of injustice stretching back centuries, people with disabilities have not enjoyed equally in the benefits of society. That injustice applies at least as much to people with mental disabilities<sup>2</sup> as to people with other disabilities. Key markers of this injustice are well known. People with disabilities have been physically removed from society, through the use of institutions. They have been economically excluded from society, through systems of employment that place them at a severe disadvantage in their participation in labour markets. They have been politically disadvantaged, most obviously through prohibitions on their right to vote. Most significantly for the present paper, they have been subject to financial, mental, emotional, physical and sexual abuse, in the home, in the community, and in institutional settings.

While the difficulties in implementation are not to be underestimated, the CRPD offers a renewed opportunity to address those injustices. It should not be dismissed lightly as the treaty offers the best chance for at least a generation for a real, lasting and beneficial change in the lives of persons with disabilities.

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<sup>1</sup> Statement of Kofi Annan, at that time United Nations Secretary-General, on the occasion of the passage of the UN Convention on the Rights of Persons with Disabilities, 13 December 2006. Full text available at <http://www.un.org/News/Press/docs/2006/sghsm10797.doc.htm>, accessed 05.05.16. Annan's figure referred only to adults, and more recent studies have shown a higher prevalence. In 2011 a joint World Bank and World Health Organization report stated that roughly 15% of the world's population live with a disability – that is one billion: World Health Organization and World Bank (2011) *World Disability Report* Geneva: WHO, (Chapter 2, esp. at p. 29); [http://www.whqlibdoc.who.int/publications/2011/9789240685215\\_eng.pdf](http://www.whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf) Accessed 04.10.16.

<sup>2</sup> In this paper, 'mental disability' is taken to include learning disabilities, psycho-social disabilities (including 'mental health problems'), and mental disabilities associated with old age such as dementia.

In the eleven years since it was passed by the General Assembly, most of the discussion of the CRPD and mental disability has focused primarily on the right to equal recognition before the law (Article 12)<sup>3</sup>. To a lesser degree, the rights to liberty (Article 14)<sup>4</sup> and, as regards compulsory psychiatric treatment, to freedom from inhuman or degrading treatment or punishment (Article 15)<sup>5</sup> have also received some attention, but the right to freedom from exploitation, violence and abuse (Article 16) has received relatively little scrutiny or academic discussion. This is surprising not merely because the exploitation, violence and abuse of persons with mental disabilities are and have for so long been a significant element of the injustice faced by persons with mental disabilities, although as will be discussed below, that is clearly the case. It is also surprising because the conservative arguments relating to Articles 12 and 14 have tended to state expressly or by implication that the changes proposed by the Committee on the Rights of Persons with Disabilities (hereinafter the 'CRPD Committee') and those of like mind may leave persons with mental disabilities more prone to exploitation, violence and abuse.<sup>6</sup> If that is their argument, why not cite Article 16 in support, as the protection or paternalism these critics propose seems at first blush consistent with the wording of the Article? Insofar as it would appear to support these more conservative arguments against key readings of the CRPD, does it somehow stand by itself, outside the overall CRPD ethos of empowerment of persons with disabilities? And if not, what exactly does it mean?

This paper is intended to address those questions. Far from viewing Article 16 as a separate and inconsistent element of the convention, this paper argues that it is to be interpreted consistently with the remainder of the CRPD. The CRPD is a complex document, creating concrete duties on the part of States Parties to improve the lives of persons with disabilities. At its core is the principle of nondiscrimination, with its requirement for reasonable accommodation, the obligation on states to make extra efforts to realize the rights of persons with disabilities. It is not a simplistically libertarian document, and the rights of persons with disabilities created by it are a great deal more than the simply negative right to be left alone. It also includes the rights to services, for example, and the right to social integration. For these rights to be beneficial, they must be enjoyed free from exploitation, violence and abuse, and Article 16 must therefore be interpreted as an integral part of this broader package. Far from being outside the ethos of the CRPD, it is a vital prerequisite to attaining the objectives of the Convention.

<sup>3</sup> See, e.g., Dhanda (2006-7); Bach and Kerzner (2010); Glen (2012); Flynn and Arstein-Kerslake (2014); Series (2015). This theme is also the subject of the first general comment of the CRPD Committee: see Committee on the Rights of Persons with Disabilities. General comment No. 1 (2014) Article 12: Equal recognition before the law, CRPD/C/GC/1, discussed, e.g., in Freeman et al. (2015) and Gooding (2015).

<sup>4</sup> See Committee on the Rights of Persons with Disabilities, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities, Adopted during the Committee's 14th session, held in September 2015; <http://www.ohchr.org/Documents/HRBodies/CRPD/GC/GuidelinesArticle14.doc>, 22.10.16; UN High Commissioner for Human Rights, *Annual Report*, A/HRC/10/48 (26 January 2009) at para 48; and, e.g., Minkowitz (2010); Slobogán (2015).

<sup>5</sup> See Special Rapporteur on Torture (Juan E Méndez), Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Human Rights Council, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013), and responses to that report in *Centre for Human Rights and Humanitarian Law* (2014). See also for example Weller (2011); and Minkowitz (2007-7).

<sup>6</sup> In the academic literature, see, e.g., Freeman et al. (2015), supra note 4; Dawson (2015); Appelbaum (2016); Pozón (2015). See also *Bundesverfassungsgericht, Beschluss (des ersten Senats) vom 26. Juli 2016 - 1 BvL 8/15* (a decision of the German Constitutional Court), and a considerable number of the briefs submitted to the CRPD Committee in response to the consultation regarding the GC1, e.g., those submitted by C Harper, Government of Denmark, Essex Autonomy Project, J Stalvert, Law Society of Scotland, Government of Norway, the Swedish National Association for Persons with Intellectual Disability, Riksförbundet för Social och Mental Hälsa, STEP (Society of Trust and Estate Practitioners), Swedish Disability Federation, and the Cambridge Intellectual and Developmental Disabilities Research Group (University of Cambridge). None of these sources refers to Article 16.

## 2. The extent and prevalence of violence, exploitation, and abuse of people with mental disabilities

Most any discussion of violence and abuse faces stone-walling due to a complicated and inconsistent web of stereotypes, social constructs and taboos. Sometimes, violence against persons with mental disabilities is perceived as particularly offensive to social sensibilities: the vulnerability of the victim is perceived to be greater because of his or her disability, making the crime all the more egregious. While it is certainly the case that persons with disabilities may have particular needs for protection flowing from their disabilities – that is in part the need for the CRPD and Article 16, after all – this trope of vulnerability has also long been a key element in the disempowerment of persons with disabilities. Its consequences are particularly corrosive in the present context, as such disempowerment may result in a complaint by the person with disabilities regarding violence being viewed as unreliable or warranting a less robust response from law enforcement and similar agencies. That may be because the account is viewed as untrustworthy (either by the law enforcement agency or the court) or because involvement in a prosecution is perceived as too stressful for the person with disabilities. If the perceived vulnerability of the victim makes the violence appear more offensive, it would also appear that it undercuts the credibility of the victim and results in fewer prosecutions or meaningful interventions to protect the individual and punish wrongdoers.<sup>7</sup>

The situation is further complicated when the violence or abuse occurs within the family unit, or in the context of institutional care. This is partly because such abuse tends to occur out of the public eye, in traditionally private spaces: here, as in other areas, domestic abuse and institutional abuse often goes unpunished. Difficulties in gathering evidence add to the problem: if anyone recognizes abuse within the family setting, the witnesses of the abuse are often other family members, who may be hesitant to raise alarms against their kin. In institutional settings, social and administrative pressures are such that staff members are often hesitant to whistle blow. Further, violence and abuse in care-related settings falls squarely into the complicated social construction of the intricacies of caring for persons with disabilities. Such care is largely framed through a welfareist prism, and the well-meaning bent of that perception often gets in the way of seeing potential abuse, or encourages the excusing of it when it is seen to occur: it is perceived as unthinkable that a family member or similar carer is abusing a person with disabilities, and the abuse is therefore not identified, not challenged, or is excused.<sup>8</sup>

At the same time, the perceived vulnerability of person with disabilities means that issues of protection are never far from the policy agenda: persons with disabilities are seen to need the protective role of the state, whether they want it or not and imposed by force, if necessary. Ironically, this protective role can involve the removal of the individual into settings where there are serious risks of abuse, such as, in many countries, institutional care.<sup>9</sup> The result is an uneasy contradiction. The paternalist welfareism of the traditional approach to persons with disabilities both results in an attitude to care where abuse is not seen or is excused, and also the introduction of intrusive and compulsory state mechanisms to 'protect' the individual. Persons with disabilities can thus end up doubly disempowered, a result that is in direct opposition to the objectives of the CRPD overall.

The terms violence, exploitation and abuse are simultaneously strong and meaningful as well as obscure and situational. Trying to do the concepts justice, let alone circle their playing out in real life is

<sup>7</sup> See, for example, *Dordevic v Croatia*, Application no. 41526/10, judgment 24 October 2012 (ECHR); *Independent Police Complaints Commission (England and Wales)* (2011). For an academic discussion of police and court responses, see Macdonald (2015).

<sup>8</sup> See, e.g., discussion in Radford, Harne, and Trotter (2006); Roulstone, Thomas, and Balderston (2011).

<sup>9</sup> For a fuller discussion of these points, see Edwards (2014).

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