



## **Statement of Expert Testimony on the topic of Legal Capacity and Guardianship of persons with disabilities, before the Hon. Constitutional Court of Indonesia.**

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### *1. Felicitation to the Honourable Court*

TCI heartily congratulates the Indonesian Constitutional Court for hearing the petition by Indonesian Mental Health Association on the constitutional validity of Guardianship. It is a great honour and privilege to be present here as an Expert Witness. Thank you for permitting me to present before Your Honourable Court today, the 12<sup>th</sup> of January, 2023. May this New Year show a ray of hope and liberation of all persons with disabilities, who have been legally shackled in legal incapacity laws around the world.

### *2. About TCI - Global*

Transforming Communities for Inclusion [TCI] – Global, is a global organization representing persons with psychosocial disabilities around the world. We are a membership based global organization, with national focal points and leadership in over 45 countries. We have the strongest presence in the Asia Pacific regions. We are 10 years old as a network, however, several of our lead members have been advocating for our human rights since decades. We support the development of capacity for policy influencing at the national level, by start up and capacity building of organizations of persons with psychosocial disabilities (OPDs) and strengthening existing OPDs.

Our area of expertise and experience is on the Convention on the Rights of persons with disabilities, particularly Article 19 of the CRPD, that is, the right to live independently and to be included in the communities. We have intensive exchanges among the membership, and also with various stakeholders, including, governments, policy makers, technical support agencies, donors serving international aid initiatives, national human rights institutions, INGOs, women's rights organizations, United Nations bodies, academic and research institutions and finally, a variety of legislative and judicial organizations at the national, subregional and regional levels.

### *3. 'Nothing about us without us'*

We are *the* representative voice of persons with psychosocial disabilities. We bring the key message, that 'We are persons first' and that our personhood must be recognized in all laws, policies, programs and practices. Under 'psychosocial disabilities', TCI includes those who are persons with mental health conditions, neurodiverse persons, autistic persons, persons with learning disabilities, users and survivors of psychiatry and many diverse groups and persons who are excluded from society due to

being a ‘lunatic’, ‘of unsound mind’, ‘simple minded’, ‘mad’ person, ‘of infirm body and mind’, etc. These groups of persons with disabilities who have been humiliated, shamed, brutalized, historically neglected and discriminated against, continue to face threat to life and liberty and are more often stripped of all their rights by incapacity laws, which has been called ‘civil death’.

#### 4. *History of incapacity laws*

Policy makers and governments may assume that guardianship, legal incapacity and mental health laws to deprive persons of their capacity and liberty are ‘modern’ laws. Governments may assume that for a country to be ‘modern’, such laws must exist. However, we must take a contextual and a historical perspective. We must situate the beginning of these laws within the context of their times centuries ago. In history, provisions on the denial or restriction on legal capacity of these groups of people are over two centuries old in many countries. These legal provisions are a derivative of the colonial histories of a particular country. The Asia Pacific regions were subject to colonialism by different countries, including the English, French, Spanish, Dutch and other. India, Malaysia, Singapore, Fiji Islands and other commonwealth nations inherited these laws from the British. Philippines obtained incapacity provisions in their Civil code from the Spanish; and Laos, Vietnam and Cambodia – from the French. There is a diversity of legal frameworks, therefore, in the Asia Pacific region left behind by the colonizers. They are not universal, but are contextual to the function and political intentions of the colonizers<sup>1</sup>.

However, as national priorities were defined post Independence, in many countries of these regions, these laws and provisions did not receive much attention for consideration and repeal. A few, which were abundantly discriminatory and attracted public anger, such as the ‘Lepers’ Act’ (1898), were repealed in some countries. Many provisions are only a kind of ‘legal dirt’ gathered in history, not used much, amended or refreshed, but just being there in the law books. In India, for example, over 200 provisions of legal incapacity of persons of ‘unsound mind’ are found in all classes of law (family, civil, martial, business, taxation, criminal, etc.)<sup>2</sup>. Fortunately, many of the provisions are in disuse. Some provisions, such as guardianship, which may be of functional value to protect some groups of persons, were more resourced within the scope of law making and jurisprudence. Family law provisions of incapacity, divorce and / or guardianship (for example, taking custody of children or filing for divorce) is also a functional and discriminatory provision, ousting out women as a holder of human rights, more widely used<sup>3</sup>.

There are also countries (Japan, Thailand, Bhutan, Nepal, etc.) which were not colonized by any foreign country in the last 2 centuries. They do have some derivative laws drawn from other countries, on their way to ‘modernization’. For example, while Philippines did not have an incapacity provision for annulment of marriage, the Supreme Court, as a way to legally allow divorce, has interpreted a discriminatory ‘psychological incapacity’ provision in 2021<sup>4</sup> into the Family Code. In Nepal, incapacity to contract, among several new legal features in the Contract law, was brought in as late as 2000 and

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<sup>1</sup> Colonization internal to the regions was also not uncommon, e.g. Vietnam occupation of Timor Leste, or the brief interlude of the Japanese in Indonesia, adding to the legal cacophony.

<sup>2</sup> Davar, B.V. (2015). ‘Legal Capacity and Civil Political Rights of persons with psychosocial disabilities’. In Hans, A. [Ed.] *Disability, gender and the trajectories of Power*. New Delhi: Sage Publications.

<sup>3</sup> Dhanda, A. (2000). *Legal order: Mental disorder*. New Delhi: Sage Publications.

<sup>4</sup> <https://www.loc.gov/item/global-legal-monitor/2021-05-28/philippines-supreme-court-rules-on-psychological-incapacity-as-a-ground-for-nullity-of-marriage/>

has become entrenched in law by 2019<sup>5</sup>. The involuntary commitment provisions for Thailand came as late as 2008 for the first time through the promulgation of a new mental health act.

It is also to be noted that, some groups were the victims of such provisions, including women, persons with disabilities, elderly, the 'vagrant', 'insane', 'idiots', 'feeble minded', 'simple minded', 'insolvent', 'leprosy cured', 'criminal tribe', those accused of a crime, etc. In historical times, these groups were socially deviant and considered for deprivation of liberty. Through the lapse of time into modernity, these groups became medicalized, as groups identified with a finding of a disability.

In the context of this history of discrimination against some populations, the Indonesian law does not have an overarching incapacity legacy; and the provisions on guardianship were derived from the Dutch dating back to 1800s. A recent study in Indonesia found that formal guardianship has rarely been used over the last decades. However, there is a concern about 'informal guardianship' and public attitudes to take away the decision making capacity of persons seen socially as incapable. While family members do step in with their own interests to remove the capacity of persons, however, family members are often the most credible support system<sup>6</sup>.

This one-of-its-kind report gives confidence to Indonesia that, moving from plenary guardianship to supported decision making will not be so difficult and that it should be done. Only a handful of persons have actually used, or have abused, the plenary guardianship method. Indeed, as experiences worldwide show, the chances of abusing the plenary guardianship is higher than any use thereof.

##### 5. *In the here and now - Guaranteeing legal capacity in international law*

TCI pleads before the Honourable Court that, practices such as denial of legal capacity, guardianship, forcible commitment into an institution for the 'insane', removing the decision-making powers of a person based on disability and such practices are *not* medical practices. They are social practices that have been given policy power over the centuries and have become old, die-hard habits. Like all bad habits, these are also expensive for governments to uphold. Worldwide, governments with these age-old bad policy habits are struggling to change it. They aspire to restore the voice of persons with disabilities at the center of policy change. TCI has been one of the lead voices in showing the way forwards.

We plead that the Court consider the history of international human rights law and jurisprudence, on de-colonizing our disability policies in the Asia Pacific region and throwing new light on community support and care.

The Right to equal recognition before the law (Article 12), provided for in the Convention on the Rights of persons with Disabilities (CRPD) follows an existing human rights trajectory in international law. Article 6 of the Universal Declaration of Human Rights states that 'Everyone has the right to recognition everywhere as a person before the law'. This is echoed in the International Covenant for Civil Political Rights and the Convention to the Elimination of All Forms of Discrimination against Women (CEDAW), Article 15. The CEDAW committee has recognized since long that legal capacity restrictions and denials affect women disproportionately, including women with disabilities. The committee has given

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<sup>5</sup> Satya Narayan Kalika (2020). An Analysis of Major Provisions of Nepalese Law of Contract (Part-V of Muluki Civil Code, 2074). In *Management Dynamics*. 23(1). DOI: <https://doi.org/10.3126/md.v23i1.35570>

<sup>6</sup> Albert Wirya, Yosua Octavian, Hisyam Ikhtiar, Ricky Gunawan, Jamie Walvisch, Piers Gooding (2020). *Assessing Indonesian Guardianship Laws. Protecting the rights of people with psychosocial disabilities*. Jakarta: Lembaga Bantuan Hukum Masyarakat.

guidance on the repeal of laws that deny legal capacity specifically naming women with intellectual and psychosocial disabilities<sup>7,8</sup> and has also spoken against institutionalization.

Other UN human rights mechanisms, such as the OHCHR resolutions on Mental Health and Human Rights, reports by the Special Rapporteur (Disabilities), the SR for the Convention on Torture, the SR for Violence against women and the SR for the Highest Standard of Health and wellbeing, have all given their consistent finding regarding the denials placed by legal incapacity provisions found in law, in multiple contexts, often naming health care systems as perpetrators of human rights violations, even addressing some violations, including institutionalization, under the rubric of ‘cruel, inhuman, torturous treatments’.

The recent ‘UN Guidelines on De-institutionalization, including during emergencies’ adopted in September 2022, has clarified that ‘Institutionalization ... involves de facto denial of the legal capacity of persons with disabilities, in breach of article 12’<sup>9</sup>. Interagency reports under the UN Disability Inclusion Strategy have considered the issue of legal barriers to informed consent, especially in the context of sexual health and reproductive rights. Indeed, there are echoes within various UN human rights mechanisms in dismantling the legal incapacity provisions, including those associated with guardianship and institutionalization.

#### 6. *Guardianship and a moral awkwardness for Asian cultures*

TCI measures all policy interventions in terms of whether or not they advance the moral value and the practice of disability inclusion and living life in the communities. The necessity and efficacy of any law is to be measured against morality. Law and morality cannot be at the opposite ends of policy choices. They have to have a common middle ground. Morality is contextual to the cultural context of peoples, their belief systems and how people exchange, socially interconnect and come together as social units.

Asian cultures have a strong community identity, over and above their personal, or even family identities. As mentioned earlier, the formal guardianship law in Indonesia has rarely ever been used over the decades of its existence: Is this law acceptable to Indonesian families and communities, is a question worthy of scrutiny by the Honourable Court.

TCI advocates for community inclusion, the idea that communities must be empowered to support everyone, leaving no one behind. The role of the government is to strengthen the support systems, but not to weaken them. TCI has argued that the guardianship law, like other incapacity laws, weaken the social fabric, by bringing an interest politics within the family. This is especially the case where finances, pension, property, bank accounts, children, inheritance, etc. are involved, of the person whose capacity is being challenged.

Any such disqualifying law, where the life and choices of one person, is allowed to be taken over by other persons in the immediate family and community, leads to conflict. Day to day decision making even on small matters becomes a battlefield for family and community members. As a court is involved in the final arbitration, family matters are handed over to the state party. Asian cultures value family honour a lot. To live in situation of daily legal conflict, spilling into family affairs, is usually not a very welcome scenario for Asians, where not only the dignity of individuals, but the dignity of families are at risk, and honour is threatened. Especially in low and middle income countries, where TCI mainly

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<sup>7</sup> CEDAW/C/KEN/CO/8 Concluding Observations of the CEDAW Committee on the 8<sup>th</sup> Periodic Report of Kenya, 2017.

<sup>8</sup> CEDAW/C/INDIA/CO/4-5 Concluding Observations of the CEDAW Committee on the combined 4<sup>th</sup> and 5<sup>th</sup> Periodic Reports of India, 2014.

<sup>9</sup> CRPD/C/5 ‘UN Guidelines on De-institutionalization, including during emergencies’. Geneva.

works, the costs of upholding legal framework on Guardianship brings great hardships. The family would rather spend on support systems, how to prepare the person for daily living, request a neighbour in return for an offer of food, etc. rather than run to the court every now and then. As Wirya et al.'s (2020) report shows, the most dismal feature of formal guardianship in Indonesia is the failure of procedural safeguards, as families rarely return to review or restore capacity. Neither they have the time nor the resources to pursue such legal battles.

Guardianship, as found worldwide, has not protected anyone, but rather, has been used to remove all resources and powers of a person, ultimately rendering them 'civil dead'. This is as good as 'legal shackling', over and above the physical shackling that persons with psychosocial disabilities are subjected to. In international and domestic laws today, the personhood of animals and other life forms are being subject of legal review. It is a sad moral state of affairs that we debate now on the 'personhood' of a select group of human beings.

Inclusion, awareness on inclusion, building capacity of communities for inclusion, are some of the visionary strategies TCI, among others, have documented and are proposing, as solutions to supported decision making. When communities come together to support persons with disabilities, families are empowered economically and socially, it becomes a positive reservoir for the whole community, built on a network of support. Such programs, if established, give evidence to the idea that, normally, in every human society, everyone needs support, including persons with disabilities. Examples of such communities exist around the world, including the Asia Pacific regions<sup>10</sup>, where building support through immediate and distant relationships of kinship, social services and informal circles of care helps in supported decision making.

## 7. In conclusion

In conclusion, TCI, in our humble submission to the Honourable Constitutional Court of Indonesia, on the subject of guardianship, recommends that,

- I. There should be no constitutional barriers to recognize persons with psychosocial disabilities as persons *before* (holders of rights) and (as actors) *under* the law.
- II. Guardianship is not in compliance with any international law, and as a signatory to the CRPD, CEDAW, CAT, CRC, etc. needs to be abolished.
- III. Practically, for Indonesia, since formal guardianship has hardly ever been used, and when used by a small number of people it has led to disqualification of personhood and all human rights, the Honourable Court should consider repeal of this provision in law.
- IV. Any allied laws leading to cancelling decision-making rights of persons with disabilities (e.g. involuntary commitment procedures in mental health laws) should be repealed.
- V. As new measures to supported decision making, the Honourable Court could consider common law mechanisms such as any provision pertaining to power of attorney for a limited period, law pertaining to agreements between association of persons, a registry of support network agreements, etc.
- VI. However, while such legal procedures may be far removed from lives of socially disadvantaged persons with disabilities, any legal provision, such as social protection or housing provision, should support the right to live independently in the communities.

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<sup>10</sup> TCI (2022). 'Positionality paper on Community Inclusion'. TCI, Geneva.

- VII. Informal practices of family members and communities to mimic legal guardianship may be addressed by a widespread awareness campaign, with the partnership of OPDs, on persons with all disabilities being recognized as 'persons' and being included in the communities. Such programs as those that exist in the Asia Pacific region may be piloted in Indonesia.
- VIII. The government should support pilot programs on enabling inclusive communities, by taking international or domestic expertise. TCI is able to co-operate in such initiatives for transforming communities towards inclusion of persons with psychosocial disabilities.

TCI thanks the Honourable Court of Indonesia for this opportunity to present our considered views on guardianship. Thank you!

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