



The UN Convention on the Rights of Persons with Disabilities: ‘Rights, will and preferences’ in relation to mental health disabilities



George Szmukler

Institute of Psychiatry, Psychology and Neuroscience, King's College London, UK

ARTICLE INFO

Article history:

Received 18 November 2016
 Received in revised form 25 April 2017
 Accepted 5 June 2017
 Available online 21 June 2017

Keywords:

CRPD
 Will and preferences
 Advance directives
 Involuntary treatment

ABSTRACT

The UN Convention on the Rights of Persons with Disabilities spells out in the most up-to-date and specific manner the rights of persons with disabilities. In doing so the Convention presents serious challenges to many conventional practices in respect of people with disabilities, especially those with mental health disabilities. According to a number of authorities, most notably the UN Committee on the Rights of Persons with Disabilities, ‘substitute decision-making’ is not consistent with the Convention. ‘Respect for the rights, will and preferences’ is to be regarded as the touchstone for compliance with the Convention. However ‘will and preferences’ is nowhere defined. This paper examines the meaning of these terms, and draws attention to instances where a contemporaneous ‘preference’ may be at variance with a person’s ‘will’. In such cases, it is argued, that ‘substitute decision-making’ – or giving effect to the person’s ‘will’ – may be justified.

Crown Copyright © 2017 Published by Elsevier Ltd. All rights reserved.

Contents

1. The Convention	90
2. The CRPD, detention and involuntary treatment	91
2.1. A legal meaning of the ‘will’?	92
3. How can the challenges of the Convention be met?	92
4. ‘Respect for rights, will and preferences’	93
4.1. A case example.	93
5. Some implications for practice	94
5.1. ‘Interpreting’ a person’s ‘will’ and ‘preferences’	94
5.2. Changes in beliefs and values (the ‘will’)	95
5.3. When the ‘will’ might not be privileged.	95
5.4. When one cannot be sure about the ‘will’	96
6. Meaning of ‘respect’	96
7. Conclusions.	96
Acknowledgements	96
References.	96

The Convention on the Rights of Persons with Disabilities (CRPD) adopted by the United Nations in 2006 (United Nations, 2006) spells out in the most up-to-date and tailored manner the rights of persons with disabilities. In doing so the Convention presents serious challenges to many conventional practices in respect of people with disabilities, especially those with mental health disabilities. One that is far-reaching is involuntary or non-consensual treatment. Whether this

can ever be justified within the terms of the Convention is the subject of this paper.

1. The Convention

The overall purpose of the Convention, stated in Article 1, 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.

E-mail address: george.szmukler@kcl.ac.uk.

The elimination of discrimination by ensuring that rights may be enjoyed 'on an equal basis with others' is a fundamental aim. Among the principles are: respect for the inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; and equality of opportunity. Their relevance to the standing of persons with mental health disabilities is clear.

The CRPD characterizes 'disability' as follows:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others (Article 1).

This is not an exhaustive definition. However, it is accepted by almost all authorities that persons with a mental disorder which is long-term and which is likely to result in the person being treated within the mental health system are to be included as potentially having a 'disability'. Disabilities associated with 'serious' mental illnesses – for example, a psychosis, bipolar illness, severe depression, or autism are sometimes termed 'psychosocial' disabilities.

The model of disability evident in the characterization quoted above is called a 'social model'. In this interactional model, it is the level of accommodation made by a society that determines the degree to which an impairment becomes a disability.

As of July 2015 Convention had been signed by 159 State parties, ratified by 156, with 92 signatories to the Optional Protocol. By signing the Convention State parties indicate their intention to take steps to be bound by the treaty at a later date. Signing also creates an obligation to refrain from acts that would defeat the object and purpose of the treaty. The next step is 'ratification'. Ratification signals the willingness of the state to undertake the legal rights and obligations contained in the Convention.

The Convention establishes the UN Committee on the Rights of Persons with Disabilities (CRPD Committee), to which signatory State parties are to report periodically about their progress in its implementation. The Committee in turn publishes its observations and recommendations (called 'Concluding Observations') concerning this progress. The Convention requires governments to ensure that representatives of civil society, in particular persons with disabilities, are fully involved in this monitoring. State parties signing an 'Optional Protocol' recognize the competence of the Committee to examine alleged violations of the Convention from individuals when local processes have become exhausted.

Depending on the jurisdiction, the Convention may or may not be automatically incorporated into national or domestic law upon its ratification. In many common law countries (like the United Kingdom) it is incorporated into domestic law only when directly legislated.

2. The CRPD, detention and involuntary treatment

The position of people with mental illness or disabilities will be radically transformed if the rights spelt out in the Convention are to be put into practice. There is, in addition, a significant challenge to justifications for detention and treatment without consent or against the objection of the person.

The CRPD Committee, charged with issuing authoritative interpretations of key articles in the Convention, has done so for Article 12, *General Comment on Article 12: Equal recognition before the law* (United Nations Committee on the Rights of Persons with Disabilities, 2014a).¹ This pivotal Article states that all persons enjoy 'legal capacity' in all aspects of

life on an 'equal basis with others'. Article 12(3) also recognises the obligation of states to ensure access to the supports a person may require to exercise 'legal capacity'. The Committee maintains that the right to 'legal capacity' encompasses both the ability to 'hold rights and duties (legal standing) and to exercise those rights and duties (legal agency)'. 'Legal capacity' is taken to mean the legal recognition of a range of acts such as the right to vote, to enter into contracts, to write a will, to marry, and so on.

Contrary to the virtually universal provisions in mental health and capacity law, the Committee states that the existence of an impairment (including a physical, mental, sensory or psychosocial impairment) must never be grounds for denying legal capacity and the imposition of 'substitute decision-making'.²

36. Respecting the right to legal capacity of persons with disabilities on an equal basis includes respecting the right of persons with disabilities to liberty and security of the person. The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention.

The Committee insists that the preservation of 'legal capacity' means that we 'must respect the rights, will and preferences of persons with disabilities'. Interventions should never amount to 'substitute decision-making'. The Committee takes the view that all persons retain 'legal capacity' and that with the right level of support people with disabilities will be able to express their 'will and preferences'. The General Comment interpretation makes it clear that 'legal capacity' and 'mental capacity' are to be seen as distinct concepts. The former is a legal concept, the latter a psychological one. The Committee rejects impaired 'mental capacity' as a basis for denial of legal capacity and rejects 'best interests', as it is conceptualized by the Committee, as a basis for substitute decision-making.

The Committee's view on 'substitute decision-making' is further emphasized in its *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: the right to liberty and security of persons with disabilities* (United Nations Committee on the Rights of Persons with Disabilities, 2015).

III. The absolute prohibition of detention on the basis of impairment

6. There are still practices in which States parties allow for the deprivation of liberty on the grounds of actual or perceived impairment. In this regard the Committee has established that article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment. However, legislation of several States parties, including mental health laws, still provide instances in which persons may be detained on the grounds of their actual or perceived impairment, provided there are other reasons for their detention, including that they are deemed dangerous to themselves or others. This practice is incompatible with article 14; it is discriminatory in nature and amounts to arbitrary deprivation of liberty.

¹ The Committee's interpretations are considered to be 'authoritative' but not 'legally binding'. See Martin et al. (2015) for further details. The General Comment on Article 12 has been criticized by, for example, Dawson (2015) and Freeman, Kolappa, de Almeida, et al. (2015).

² The Committee defines 'substitute decision-making' as follows: '(i) capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective 'best interests' of the person concerned, as opposed to being based on the person's own will and preferences'. It is still possible under these terms for a person to be appointed to take decisions for another person. Examples might be where a person appoints another person to take a decision based on the appointer's will and preferences, or where a person's will and preferences is unascertainable, a decision should be based on the 'best interpretation' of the person's will and preferences, using whatever information about the person is available.

Download English Version:

<https://daneshyari.com/en/article/6462981>

Download Persian Version:

<https://daneshyari.com/article/6462981>

[Daneshyari.com](https://daneshyari.com)