



Against a singular understanding of legal capacity: Criminal responsibility and the Convention on the Rights of Persons with Disabilities

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ARTICLE INFO

Available online 18 May 2015

Keywords:

United Nations Convention on the Rights of Persons with Disabilities
Legal capacity
Criminal responsibility
Autonomy
Value neutrality

ABSTRACT

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) is being used to argue for wider recognition of the legal capacity of people with mental disabilities. This raises a question about the implications of the Convention for attributions of criminal responsibility. The present paper works towards an answer by analysing the relationship between legal capacity in relation to personal decisions and criminal acts. Its central argument is that because moral and political considerations play an essential role in setting the relevant standards, legal capacity in the context of personal decisions and criminal acts should not be thought of as two sides of the same coin. The implications of particular moral or political norms are likely to be different in these two legal contexts, and this may justify asymmetries in the relevant standards for legal capacity. However, the analysis highlights a fundamental question about how much weight moral or political considerations should be given in setting these standards, and this is used to frame a challenge to those calling for significantly wider recognition of the legal capacity of people with mental disabilities on the basis of the Convention.

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1. Introduction

Developments in international law in connection with the United Nations Convention on the Rights of Persons with Disabilities (CRPD) have called for wider recognition of the legal capacity of people with mental disabilities. Standard interpretations of the concept “legal capacity” hold that it refers to being a duty bearer as well as a rights holder, encompassing recognition before the law in a broad sense. In keeping with this interpretation, the call for wider legal recognition has been said to apply not only in the context of personal decisions but also in the context of responsibility for criminal acts. This line of thinking assumes that these two kinds of legal capacity are two sides of the same coin: that a need for wider recognition in the personal sphere automatically means that there is a need for wider recognition in the criminal sphere.

It is argued here that this assumption should be resisted. The essential role played by moral and political norms in shaping the relevant standards provides a reason against thinking of legal capacity as a single attribution across legal contexts. Particular moral or political considerations may have different implications in different parts of the law, and this seems likely to justify asymmetries in standards for legal capacity across one legal system. In establishing the implications of the Convention for criminal responsibility one crucial question therefore concerns the implications of the evaluative commitments underlying the CRPD in this particular legal context.

A further, more fundamental question concerns how much of a role moral and political norms should be given in setting any standard for legal capacity. The relevance of such considerations for questions of legal capacity is an underlying theme that runs through the paper. It is used, ultimately, to frame a challenge to those endorsing “strong” interpretations of the Convention, which call for significantly wider recognition of the legal capacity of people with mental disabilities.

2. Article 12 and legal capacity

Recent developments in international human rights law have called into question the legitimacy of the current link between mental and legal capacity.¹ At the centre of these developments, Article 12 of the CRPD requires that legal capacity should not be limited on the basis of mental disability: persons with mental disabilities, including mental disorders, must be recognized as persons before the law on an equal basis to others and must be supported in the exercise of their legal capacity.²

The crucial aspect of Article 12, where much of the academic discussion so far has focused, concerns legal capacity in the sense of the right to make one's own personal decisions. While Article 12 has been interpreted in stronger and weaker ways, it is generally understood

¹ As described by the Committee on the Rights of Persons with Disabilities, “Legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency)” (2014, para. 13).

² The United Nations Convention on the Rights of Persons with Disabilities was adopted by the UN General Assembly in December 2006 and came into force in May 2008; *ibid.*, para. 25.

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that the Convention requires states to recognize the legal capacity of people with mental disabilities more widely than is currently the case.³ Strong interpretations suggest that Article 12 leaves very limited room for restricting legal capacity on the basis of mental incapacity.⁴ Michael Bach and Lana Kerzner have proposed that the mental requirement for the right to self-determination in one's private affairs should be an ability to express an intention (Bach, 2009; Bach & Kerzner, 2010).⁵ Weaker interpretations hold that the CRPD requires a shift to at least some extent from substituted to supported decisions (Richardson, 2012; Slobogin, 2015).⁶ Therefore, to a lesser or greater degree most interpretations understand the Convention as requiring a lowering of current mental thresholds for legal capacity in the personal sphere, to enable this shift to occur.⁷

However, such calls have been understood to also apply in criminal law, raising a question about the implications of the CRPD for defences that are based on mental incapacities.⁸ Criminal law operates on a presumption that the capacity for crime is present, but this can be displaced if the defendant is under a certain age; or if they meet the requirements of a mental incapacity based-defence (Loughnan, 2011; Peay, 2011a, p. 3). The broad thrust of interpretations of Article 12 can be characterized as the idea that, like everyone else, people with mental disabilities should be free to make their own mistakes, which should be recognized as such; and this idea could plausibly be applied to questions of criminal responsibility.⁹ In 2009 the United Nations High Commissioner reported

³ Peter Bartlett writes that, "To what extent the concept of mental capacity can still be used" is an "open question" in the interpretation of the Convention (Bartlett, 2012, pp. 761–762).

Wayne Martin and colleagues argue that the functional test of the Mental Capacity Act 2005 in England and Wales, as written rather than as applied in practice, is compatible with the CRPD. However, they note that this interpretation is explicitly rejected by the CRPD Committee (Martin, Michalowski, Jütten, & Burch, 2014).

⁴ For example, the CRPD Committee's General Comment on Article 12 states: "Article 12 of the Convention affirms that all persons with disabilities have full legal capacity." (para. 8) "Under Article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity." Committee on the Rights of Persons with Disabilities (2014, para. 13).

A discussion paper by Lucy Series and colleagues explains that, "The aim of the GC in this area is to ensure that legal capacity is de-coupled from prejudicial perceptions of an individual's 'mental capacity.' It seeks to ensure that regardless of an individual's level of decision-making skills, she or he is still respected as a person before the law and a legal agent. If intervention in legal decision-making does occur, it must be based on factors that all individuals could be subject to, not merely people who have a cognitive disability or are perceived as lacking decision-making skills." (Series, Arstein-Kerslake, Gooding, & Flynn, 2005, p. 5) For a critique of such interpretations see John Dawson's contribution to this journal issue (Dawson, 2015).

⁵ This is a much less demanding standard than those currently used in many jurisdictions, which require abilities to do with understanding, appreciating, using and weighing relevant information. Commenting on such "functional" tests, Bach and Kerzner write, "To make recognition of legal capacity dependent on a particular set of decision-making skills, as most current capacity assessments do, is to import ableist assumptions about what the demonstration of decision-making ability entails." (Bach & Kerzner, 2010, p. 66).

⁶ In this journal issue, Christopher Slobogin discusses his "basic rationality and basic self-regard" test which in his view constitutes a "narrow definition of competency" (Slobogin, 2015, p. 40). However, he recognizes that this may not be considered compatible with the CRPD on certain interpretations.

Also in this journal issue, Bernadette McSherry and Kay Wilson argue for a moderate position, calling for a shift of focus from negative rights to positive rights and the provision of support mechanisms: "the CRPD highlights that there may be a midway point between involuntary treatment on the one hand and no treatment at all on the other" (McSherry & Wilson, 2015, p. 68).

⁷ The exception would be interpretations that resist any shift from substituted to supported decision-making beyond cases where support enables the person with a disability to satisfy an existing mental capacity requirement.

⁸ Michael Bach writes that having legal capacity includes being "held legally responsible and liable for one's actions in contract, tort, property and criminal law"; that is "to be one to whom legal responsibilities attach." (Bach, 2009, p. 3).

A further issue not addressed in this paper concerns unfitness to plead. For an in depth discussion in the context of Australian commonwealth law see: Australian Law Reform Commission (2014). See Jill Peay's contribution to this journal issue for an English Law perspective (Peay, 2015).

⁹ Throughout the paper I am using the phrase "recognition as a legal agent" to refer to both elements of legal capacity as described by the Committee on the Rights of Persons with Disabilities (2014). See footnote 1.

that the CRPD requires replacing criminal defences that are based on "mental or intellectual disability" with "disability-neutral" doctrines (2009, para. 47), and this has been taken to indicate that defences such as insanity and diminished responsibility may be in violation of the Convention (Bartlett, 2012; Flynn & Arstein-Kerslake, 2014; Slobogin, 2015).¹⁰

The central aim of this paper is to address a theoretical question about the relationship between legal capacity in these two contexts, in order to address a practical question about the implications of the CRPD for law concerning criminal responsibility. The paper begins by outlining the moral arguments that are given within the CRPD literature, for wider recognition of legal capacity in the personal sphere; and considering whether these *prima facie* apply in questions of criminal responsibility. The arguments present in the literature roughly fall into three categories that I will refer to as "personhood", "growth and flourishing" and "limited understanding" arguments, which will be discussed in turn.

3. Personhood arguments

Prominent among the reasons that are given for wider recognition of legal capacity in the personal sphere is the idea that restricting legal capacity on the basis of mental incapacity involves a failure to properly recognize the individual as a human being (Flynn & Arstein-Kerslake, 2014).¹¹ It is argued that people with mental disabilities must be seen as moral subjects rather than as objects to be cared for—that they should be attributed full moral agency rather than being seen as passive recipients of care.¹² And the importance of this kind of recognition is often justified with reference to the idea that this is essential for meaningful participation in society.¹³

Independent of the CRPD, Martha Nussbaum has made the case for there being a vital link between civil rights and the recognition of people with mental disabilities as citizens with equal human dignity (Nussbaum, 2009). However, as Nussbaum points out, different civil rights seem connected to the notion of equal human dignity to varying

¹⁰ For an examination of this question in the context of English law see: Peay (2015). Peay notes that on issues of mental capacity in criminal law the CRPD and the European Convention on Human Rights (ECHR) are driving in opposing directions. She argues that—apparently mindful of the ECHR—the Law Commission's recent recommendation that mental capacity be adopted as the concept underpinning the insanity defence, would "[arguably offer] more protection from criminal liability to those with a disability; but it would arguably also bring the law into greater conflict with the CRPD." (p. 26).

Also in this journal issue, Alec Buchanan critiques the Law Commission's recommendation for a mental capacity-based insanity defence: (Buchanan, 2015)

Bach and Kerzner recommend that, "legal responsibility can only be diminished where a person lacked the requisite decision-making capability when carrying out actions which are now the focus of civil or criminal proceedings. Decision-making capability would then have three main components: a) decision-making abilities that meet the minimum threshold as defined above; b) needed decision-making supports ...; and c) reasonable accommodation on the part of others in the decision-making process (i.e. the goods and services)." (Bach & Kerzner, 2010, p. 71).

However, Bach elsewhere suggests that incapacity-based criminal defences are not problematic in the way that incapacity-based standards used to override the right to make one's own choices are: "one of the 'bases' on which non-disabled 'others' enjoy legal capacity, is precisely their right to invoke incapacity, as temporary or as long term as it might be, as a defence in contract, tort and criminal law. It would be difficult to argue that this right to invoke incapacity, as a basis on which 'non-disabled others' exercise legal capacity, is a violation of Article 12. Such a defence is foundational to contract, tort and criminal law." (Bach, 2009, p. 5).

¹¹ From the Committee on the Rights of Persons with Disabilities: "Legal capacity means that all people, including persons with disabilities, have legal standing and legal agency simply by virtue of being human" (2014, para. 12).

¹² For example: "persons with disabilities are 'subjects' and not 'objects'—sentient beings like all others deserving equal respect and equal enjoyment of their rights." (Quinn, 2010).

¹³ Again from the Committee on the Rights of Persons with Disabilities: "[Legal capacity] is the key to accessing meaningful participation in society." (2014, para. 13).

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