



## Relationships, autonomy and legal capacity: Mental capacity and support paradigms



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### ABSTRACT

Within law and legal scholarship there are different models of legal personality and legal capacity. The most well known of these emphasises individual rationality, and is distilled into the medico-legal concept of 'mental capacity'. In connection with the UN Convention on the Rights of Persons with Disabilities (CRPD) a new approach to legal personality is being developed, emphasising relationships of support and recognition of universal legal capacity. Recent scholarship on both 'mental capacity' and CRPD approaches to legal capacity has drawn from feminist writings on relational autonomy. In this paper, I use this scholarship on relational autonomy to explore the differences between these approaches to legal capacity. I argue that the approach connected with the CRPD offers a refreshing take on the importance of relationships of support in exercising legal capacity. However, despite their pronounced differences, especially in relation to the legitimacy of coercion, there are remarkable similarities in the underlying challenges for each approach: the extent to which others can 'know' our authentic and autonomous selves, and the inextricable relationships of power that all forms of legal capacity are embedded within.

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### 1. Introduction

Law and legal scholarship recognises a diverse family of legal practices concerned with the concepts of 'legal personality' and 'legal capacity', which govern whether and how different entities may enjoy legal rights and duties (Tur, 1987). Naffine (2003) describes how different models of legal personality and legal capacity hinge on different metaphysical prerequisites, and have different normative implications for the kinds of rights and duties different legal entities may enjoy and how they may exercise them. In its barest sense, legal personality is simply a functional placeholder that could be occupied by *any* entity that bears some kind of right or duty. Human rights approaches connect legal personality to any *human*, regardless of their individual capacities. The most prized form of legal personality is termed the 'responsible subject' by Naffine (p. 362–364) – the "classic contractor" who is "rational and therefore responsible", can sue and be sued, can be held liable for his actions, and is considered autonomous.

This 'responsible subject' is distilled into the medico-legal concept of 'mental capacity', which refers to the ability to make a particular decision; and in those areas where a person is found to lack 'mental capacity' third parties may make decisions on their behalf in their best interests.

The Mental Capacity Act 2005 (MCA) of England and Wales is a well-known example of a mental capacity law.<sup>1</sup> Whilst this approach was itself considered visionary only a decade or so ago, it is now being challenged by an emerging new model of legal personality and legal capacity, connected with Article 12 of the United Nations (2006) Convention on the Rights of Persons with Disabilities (CRPD). In its more radical form, this model entirely divorces legal capacity from 'mental capacity' approaches. It is grounded in the social model of disability, which views disability as resulting from the interaction between a person's individual make-up (including any 'impairment' they may have) with their social environment. The social model emphasises addressing barriers and environmental adaptations, rather than 'fixing' or 'curing' individuals (Oliver, 1996; Shakespeare, 2013).

This new approach treats a person's agency as shaped or even constituted by their environment and relationships with others. Instead of casting 'mental incapacity' as an individual deficit, resulting in a loss of legal capacity, it calls for the provision of whatever support is necessary to ensure that disabled people are able to exercise full legal capacity on an equal basis with others, and addressing discriminatory attitudes and barriers that might limit the recognition and exercise of legal capacity by disabled persons. This approach to legal personality is sometimes known as the 'support paradigm', or a paradigm of 'universal legal capacity'. The United Nations Committee on the Rights of Persons with

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<sup>1</sup> This approach can also be found in several human rights instruments from the 1990s (e.g. Council of Europe Committee of Ministers, 1999; United Nations, 1991), and in many other national laws.

*Disabilities* (2014) endorsed this approach in its General Comment on Article 12 CRPD. The General Comment maintains that Article 12 prohibits the imposition of 'substitute decisions' on people with disabilities, requiring instead that they are given access to the support they need to exercise their legal capacity in accordance with their will and preferences. There is growing concern that the MCA contravenes Article 12 CRPD (Bartlett, 2012a; Martin, 2014; Richardson, 2013).

In order to unpack the emergence of this new paradigm of legal personality and legal capacity, this paper contrasts the metaphysical foundations and normative implications of 'mental capacity' and 'support paradigm' approaches, using case studies to illustrate their differences. It draws from relational theories of autonomy, which are increasingly invoked within the developing literature on each approach. By examining each approach through the lens of relational autonomy (RA), it becomes apparent that they have importantly different metaphysical underpinnings, which have implications for how they translate into legal frameworks and everyday life. Laws like the MCA are primarily based on the idea that mental capacity is the property of an individual, and this approach struggles to produce clear and consistent principles for accommodating the influences of others – both positive and negative – on decision making. Mental capacity approaches emphasise the importance of interventions that can enhance individual decision making, but these interventions, which ostensibly aim to promote autonomy, can be remarkably coercive. This is an important difference from 'support paradigm' approaches.

The support paradigm literature offers a new take on the importance of autonomy over and within relationships; a perspective that is often neglected in the literature on the MCA. However, its emphasis on *consensual* support raises difficult questions about how this approach can manage situations of risk where a person rejects support, or situations of exploitation, abuse and undue influence by supporters. Responses in the literature to these 'hard cases' are discussed.

Both approaches are concerned with the boundaries of personhood, and responsibility for, and ownership of, decisions. Despite their pronounced differences, especially in relation to the legitimacy of coercion, there are remarkable similarities in the underlying challenges for each approach: the extent to which others can 'know' our authentic and autonomous selves, and the inextricable relationships of power that all forms of legal capacity are embedded within. This paper does not aim to resolve all the complex questions raised by these approaches to legal capacity; rather it hopes to promote further reflection on their metaphysical foundations and normative implications.

## 2. Theories of relational autonomy

According to contemporary feminist thought, for better or worse, our acts and decisions, values and beliefs, and our very identities are profoundly influenced by our relationships with others. This idea sits in tension with liberal philosophies that idealise moral and political subjects as self-sufficient and independent of others' influence; subjects who are considered 'autonomous'. This feminist intuition has inspired a diverse family of critiques that argue that autonomy itself has social and relational dimensions. These theories of autonomy have had a profound impact on the new approaches to legal personality and legal capacity that provide the focus for this paper.

Beyond agreement that autonomy is valuable, but cannot be divorced from relational and social conditions, RA approaches are very diverse (Mackenzie & Stoljar, 2000; Stoljar, 2013). Causal accounts emphasise the importance of external causal conditions, such as relationships with parents, teachers and friends, that provide the necessary 'support and guidance' for the development of autonomy (Nedelsky, 1989, p. 12). Others, like Oshana (2006), go further, and argue that social and relational conditions are *constitutive* of autonomy; regardless of a person's individual make-up, they are not autonomous unless certain social and relational conditions are satisfied. Oshana's constitutive account is more tolerant of non-consensual interventions to 'rescue'

individuals from oppressive social circumstances, even if they themselves have chosen to live in such circumstances. For this reason it has attracted criticism by scholars who prefer models of autonomy that place a greater emphasis on *individual* capacities for reasoning and reflection (Christman, 2004; Holroyd, 2009;).

RA approaches can also encompass symbolic critiques of Western culture's idealisation of a 'masculine' ideal of autonomy – atomistic, self-sufficient, rational and unemotional (Brown, 2002; Code, 1991; Mackenzie & Stoljar, 2000; Scott, 1996). Much of the 'support paradigm' scholarship could be viewed as engaging in a similar symbolic critique (e.g. Quinn & Arstein-Kerslake, 2012). 'Ethic of care' approaches, that emphasise the value of relationships of care and interdependency, are also sometimes connected with RA (Mackenzie & Stoljar, 2000: 8–10; Herring, 2013a: 72). However, some disability scholars have criticised the "ethic of care" as being insufficiently attentive to rights and power relations within relationships of care (Herring, 2013a; Shakespeare, 2013). Tensions between 'ethic of care' and 'rights based' approaches to support can be discerned in the mental capacity and support paradigm literature.

Theories of autonomy have an important influence on models of legal personality. Individual liberal models are most obviously associated with Naffine's 'responsible subject', but RA approaches are increasingly invoked in connection with both 'mental capacity' and 'support paradigm' approaches to legal capacity. Because of their diverse metaphysical, ethical and political underpinnings, RA approaches can be used to advocate for very different positions. This is reflected in the very different ways they are used in the literature on legal personality and capacity: on the one hand, RA approaches are being used to rehabilitate mental capacity models, and on the other they are being used to reject them altogether. Legal scholars should exercise caution when praying in aid 'relational' approaches; because of their diversity it is far from self-evident how these should translate into legal frameworks or everyday life.

## 3. Mental capacity and relational autonomy

Although 'mental capacity' is not synonymous with moral and political philosophies of autonomy (Owen, Freyenhagen, Richardson, & Hotopf, 2009), in many respects its legal functions are closely analogous. Christman and Anderson (2005, p.3) describe liberal understandings of autonomy as meaning that freedom and responsibility flow from a person satisfying competence and authenticity requirements. Mental capacity law is structured similarly: a person is accorded legal rights and responsibilities only insofar as they are found to be competent and their decisions are authentically theirs. However, an examination of the MCA's case law reveals that the courts struggle to reconcile the influence of relationships to competence and authenticity requirements connected with mental capacity, resulting in complex and sometimes contradictory rulings.

### 3.1. Value neutral or substantive autonomy?

Under the MCA, a person is considered unable to make a decision if they are unable to understand, retain, or use or weigh the relevant information – including about the reasonably foreseeable consequences – or to communicate their decision.<sup>2</sup> This 'functional' approach was preferred to tests based on the outcome of a decision<sup>3</sup> (Law Commission, 1991), and the MCA cautions that a person is not to be regarded as 'incapable' merely because they make an unwise decision.<sup>4</sup> This resembles a procedural 'value neutral' approach to autonomy, rather than

<sup>2</sup> s3(1) MCA. Please note, that a person who is 'unable to make a decision' is only regarded as lacking mental capacity if certain causal conditions contained within s2(1) MCA are also satisfied; this is discussed below.

<sup>3</sup> Outcome tests might, for example, consider the 'reasonableness' of a decision.

<sup>4</sup> s1(4) MCA.

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