

Legal Capacity from a Psychosocial Disability Perspective: A Discussion Paper

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Abstract: This discussion paper addresses the problematic nature of legal capacity as it affects people with psychosocial disabilities and others, focusing in particular on issues of vulnerability and responsibility. It concludes with a project concept that would be tailored to explore these issues.

I. Legal capacity as problematic concept

1. Legal capacity as we know it is a problematic concept. It is a representation of the person as an actor within a legal system, a sort of avatar in the virtual reality of law. The legal system is not neutral; it is ordered and inherited, and bears the stamp of traditional hierarchies, values and privileges. It is currently bounded by age and disability, and was historically also bounded by gender, position within the patriarchal family and household, and ethnically defined citizenship status. Legal capacity in the U.S. is primarily an age-privileged status from which disability can be a disqualification. It is an institution that maintains itself with shifting personnel defined by reaching the age of adulthood and not being excluded based on disability; at the other end of the lifespan the intersection of age and disability makes many of us vulnerable to exclusion as well as extra scrutiny and mistrust. Women and girls, people from less privileged economic and social positions, and people from racialized or cultural minority groups, indigenous people, and migrants may feel themselves to be cautious “guests” as actors within a legal system rather than self-confident operators who take it for granted and use it as a naturalized right.
2. Therefore, in seeking equality for persons with disabilities before and under the law, it is necessarily not only to equalize the formal recognition of legal capacity and to use affirmative measures to equalize opportunities. We need to re-make legal capacity as a vehicle for the kinds of social, economic and civil relationships we want to create: what balance between self-reliance and obligations of interdependence, competition and cooperation, egalitarianism and maintenance of traditional roles of any kind? These are long-term questions that can only be answered in practice but can be posed as a way of at least bracketing the assumptions built into current thinking about legal capacity and acknowledging that a person’s relationship to legal capacity may be problematized because of issues relating to access to power, rather than by any inherent limitations in the person her/himself.
3. Legal capacity has also stood in for our gendered, age-bound and racialized assumptions about freedom, autonomy, and mastery of one’s fate. This causes problems both by idealizing the normative exercise of legal capacity, so that people whose exercise of legal capacity comes under scrutiny are expected to

demonstrate worldly success on pain of having another person take charge of their lives, and by ignoring the ways in which material conditions and resources, including social capital – education, reputation, networks of power and influence – as well as economic resources either confer or constrain effective freedom and autonomy, so that support in the exercise of legal capacity as a vehicle for self-determination can be made to bear too much weight or else its value will be limited to privileged groups and classes. Amartya Sen's capabilities framework (see http://en.wikipedia.org/wiki/Capabilities_approach) could be used to take account of these factors, but unfortunately that framework has been misused in discussions of legal capacity to maintain paternalism in the guise of substantive equality. This is due, I believe, to the absence of such theorizing being done from a first-person perspective by persons with disabilities seeking solutions for their own satisfying exercise of legal capacity (theorizing which itself can be done with the assistance of supporters who are responsive to the individual's autonomy, will and preferences, when such mediating support is needed to relate with the person's environment).

II. Vulnerability and responsibility

4. The dual concerns that arise in discussions about legal capacity and psychosocial disability relate to vulnerability and responsibility. These concerns are expressed by people with psychosocial disabilities about their own situation, as well as by others involved. We need to deal with questions of how an inclusive system of legal capacity can address these concerns, and what if any are the roles to be played by support and safeguards, as well as the nature of autonomy and consent when a person wants to deal proactively with potential future vulnerabilities (i.e. advance directives and powers of attorney).
5. Vulnerability pertains to both insecurity and to openness to new experience. Crises of self are not merely distressing; they can be valuable opportunities that push us to go beyond old assumptions and habits. In attempting to protect oneself or another person from risks we can inadvertently do more harm than good – not only the deprivation of opportunities for growth but also the harm done to the personality by such deprivation, which can lead to destructive consequences. In addition some such attempts are seriously destructive in themselves, such as psychiatric kidnapping and torture, i.e. involuntary commitment and forced treatment with drugs or electroshock (and other invasive procedures). Not everyone who has been committed or forcibly treated feels harmed by it, and some defend the practice. Yet it is undeniably a violation of mental and physical integrity that discriminates based on disability: the disability motivates the procedure itself and the disrespect for the person's autonomy and will. For this reason, and because such treatments are highly risky with often irreversible effects including brain damage, as well as causing many people to experience profound suffering from the alterations to consciousness, memory and personality, international law recognizes forced psychiatric interventions as amounting to torture or ill-treatment. In working towards inclusive legal capacity,

we need to take account of many facets of vulnerability, its pros and cons and the potential for counterproductive results from protective measures.

6. Responsibility pertains to both self and others; honoring one's values and personal commitments, and meeting one's social and legal obligations or facing the consequences imposed for breach of such obligations. In the first sense (honoring one's values and commitments) responsibility is a lifelong struggle; we are accountable to our own conscience, which can be aided by the mirror of trusted others such as friends, family, spiritual advisers or community elders. In the second sense, responsibility is judged externally irrespective of one's own values, which may run counter to those of the community or the law. The two aspects of responsibility intermingle but in a pluralistic society with a state-based legal system it is helpful to distinguish them to avoid idealizing responsibility and thus holding persons with disabilities to an unfair standard.
7. Criminal responsibility, for which punishment is imposed, requires a showing of culpable mental state, but this is judged objectively with respect to legal norms and not the person's own sense of right and wrong. Yet we have added beyond the notion of culpable mental state, a sense that it is unfair to impose punishment on someone who is less capable than others of conforming to the requirements of law, for reasons related to disability. This has to do with punishment being an imposition of suffering seen as morally justified, and persons with disabilities, particularly those with psychosocial and intellectual disabilities, being seen as less than moral equals with other persons. If it were a question of actual impossibility of conforming to the law such that there remains no desire to blame the individual – as would be the case for example, when a wheelchair user fails to meet a legal obligation to rescue someone from drowning – excuse from criminal responsibility would not be problematic. Yet it is rarely the case when someone is excused from punishment based on psychosocial or intellectual disability that there is an actual impossibility for which the person is released from social blame. Thus, instead of being consoled for the trauma of having been blamelessly involved in a situation that harmed others, they are condemned under the law – not as immoral but as persons incapable of being treated as moral subjects. In both attitude and consequences, they are in fact both punished and subjected to longer term control measures due to a perception that punishment cannot effect deterrence; these measures feature prominently the use of psychiatric interventions that are nonconsensual either outright or by virtue of incentivized compliance, amounting to torture and ill-treatment.

III. Redesign of legal capacity, and interim steps

8. I have written elsewhere about a need to redesign legal capacity based on principles of equality: formal equality; universal design of the legal system and of all measures relating to the exercise of legal capacity, including protocols for performing legal acts, support arrangements, and standards for adjudicating individual responsibility; accessibility measures to take into account needs

identified by various constituencies including diverse sectors of persons with disabilities; accommodation as the ability to be flexible in particular cases to ensure the equal enjoyment of legal capacity; and proactively facilitating the creation of support arrangements as a positive measure that may be needed to ensure de facto equality (Norms and Implementation of CRPD Article 12, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2037452). The balance between such measures depends in part on the extent of redesign that may be feasible at a given time, and choices to be made about how best to move society and culture to a new understanding of legal capacity.

9. Although we participated in the creation of the support model and its distinction from substitute decision-making, many users and survivors of psychiatry and people with psychosocial disabilities are uncomfortable with creation of legal mechanisms for support. We know that legal mechanisms can and will be used to take control of a person's destiny contrary to his/her own will and desires. At the same time, some of us have been grateful that someone else took over at certain times, even when it was against the person's own will – although we might not have been pleased with the totality of consequences and outcomes. The mechanism of crisis planning and advance directives/powers of attorney allows some of us to feel more secure about proactively facing a challenging situation before it comes. This is not entirely satisfactory as a solution, however. It begs the question of what is to be done in the case where a person has not planned ahead, and more importantly, leaves intact the notion of incapacity and erasure of agency during a crisis. Many of us who have gone through crises involving an altered state of consciousness were intensely aware of our own subjectivity and agency in those moments, and were also aware that others misunderstood us and that responses of containment and control made us feel more frightened and escalated the crisis – that is, intensified both the negative aspects of an altered state of consciousness, and the destructive aspects of the interactions with and around us during that time. For these reasons, it may be most helpful to create a project that will allow us to explore what the support model has to offer in a crisis situation, both with and without the use of crisis planning, and the value of legal mechanisms for support arrangements as compared with informal supports for the exercise of legal capacity and decision-making.
10. Such a project could directly investigate the challenges that would exist to implementation of universal legal capacity, with an emphasis on situations that are now being dealt with under mental health laws. It would need to provide for the legal right to make one's own decisions and not be forced into compliance with treatment or hospitalization or with any other regime that restricts personal autonomy. Support would be characterized as a fiduciary/advocacy relationship and would be provided by mutual agreement or as a public service. Feedback mechanisms as well as training could be built in to explore the potential for abuse in the support context and ways to guard against it. In addition to support for decision-making, the project would be designed to explore the changes that are needed in the social and economic environment to improve satisfaction with the

exercise of legal capacity, as well as law and policy changes in related areas, including the use of non-discriminatory dispute resolution. Even in a highly charged political environment, such a project could demonstrate the new values in practice and shift public discourse on psychosocial disability towards inclusion and non-violence.

11. In parallel, or in support of such a project, a study group could be convened to read key background documents on legal capacity and explore other possible steps, such as creation of a model law. This work would be established based on premises relevant from a psychosocial disability perspective including the premise of universal legal capacity.
12. In publicizing this discussion paper and project concept, it is the author's intention to invite collaboration as well as conceptual feedback. Interested parties can contact the author at minkowitz@chrusp.org.