

Rethinking Criminal Responsibility From a Critical Disability Perspective: the Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond⁺

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Abstract: Viewed from a critical disability perspective, criminal responsibility requires both formal and substantive equality. This article examines criminal responsibility using provisions of the Convention on the Rights on Persons with Disabilities on equal recognition before the law, access to justice, liberty and security of the person, and equality and non-discrimination. In light of the CRPD, declarations of unfitness to plead, the negation of criminal responsibility based on disability or alleged incapacity, as well as commitment to psychiatric institutions in either a civil or criminal context, are discriminatory measures contrary to the rights of persons with disabilities, and must be abolished. Beyond abolition, which will achieve formal equality, this article proposes an inclusively designed framework that may meet the need for substantive equality between persons with disabilities and others in the adjudication of criminal responsibility.

Introduction

This article explores the question of criminal responsibility from a critical disability perspective based on the Convention on the Rights of Persons with Disabilities (CRPD).

It views all measures by which a person is treated unequally in legal proceedings or in the

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adjudication of responsibility, including the insanity defence, unfitness to plead and incompetence to stand trial, as well as the disposition to forensic psychiatric institutions, as inherently suspect and discriminatory based on disability. Therefore it is necessary to abolish these measures in order to comply with the equality and non-discrimination obligations under various provisions of the CRPD. Beyond abolition of discriminatory measures so as to achieve formal equality, we must also explore whether anything more is required to do justice to substantive equality towards persons with disabilities facing criminal proceedings. The paper makes a proposal that synthesises some of the principles and values that might be addressed if we ultimately consider that it is a good idea to give some benefit of the doubt to people who committed crimes while in a state of altered reality or extreme distress, in a unitary conceptual and doctrinal framework that treats all our mental states as a continuum and does not utilise the concept of mental capacity or treat disability as a category giving rise to separate legal rules.

The section following this introduction presents the context for the paper, in terms of questions that arise under the CRPD and other international standards, followed by a discussion of the critical disability perspective in relation to some aspects of debate on the insanity defence. The next section introduces the CRPD and proceeds to consider criminal responsibility and related issues in light of the CRPD's normative standards on legal capacity and equal recognition before the law, access to justice, liberty and security of the person, and equality and non-discrimination. Under the discussion of equality and non-discrimination, a proposal is advanced to synthesise the implications of the arguments advanced throughout the paper for an alternative in doctrine and practice. This is followed by a section that reflects further on the merits of the proposal, situates

the proposal in the context of the rights of defendants, and further situates the proposal in the context of the peer movement of people with psychosocial disabilities and users and survivors of psychiatry, before proceeding to a conclusion.

Criminal responsibility and related issues in the context of the CRPD and other international standards

The Convention on the Rights of Persons with Disabilities (CRPD)¹ has opened up debate on insanity acquittals and unfitness to plead in the context of international human rights law. The CRPD, based in a critical disability perspective and in the lived experience of people with disabilities, has introduced a paradigm shift into areas of law that had been thought settled.

Acquittal of a criminal offense based on an adjudication of mental incapacity, or declaration that a person cannot be held criminally accountable on account of disability or of mental incapacity, is problematic in light of the recognition that persons with disabilities are equal to others before and under the law.² There is furthermore an inconsistency between such acquittal or declaration and the obligation to recognise that persons with disabilities enjoy legal capacity on an equal basis with others,³ and in particular with the severing of the concept of mental capacity from legal capacity as

¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 5.1.

³ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12.2.

explained by the Committee on the Rights of Persons with Disabilities in its General Comment No. 1.⁴

In most cases, insanity acquittals and declarations of unfitness to plead result not in release from custody and supervision but in transfer to the forensic mental health system, which, like its civil counterpart, is characterised by indefinite detention according to the judgment of medical professionals and by the administration of mind-altering drugs and other psychiatric interventions as a security measure and as non-consensual treatment. Mental health detention and involuntary treatment of any kind, whether civil or criminal, is contrary to the normative framework of the CRPD (see discussion below on access to justice and liberty and security of the person).

The CRPD thus opposes provisions in the Standard Minimum Rules for the Treatment of Prisoners,⁵ a non-binding declaration that has been widely used as an international normative standard for prison management and policy. Rule 82 provides that “persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.” The disability community and the Special Rapporteur on Torture have urged deletion of this rule, in the context of a revision process that is ongoing under the auspices of the United Nations Commission on Crime and Criminal Justice.⁶

⁴ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014).

⁵ *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc A/CONF/6/C.1/L.1 (30 August 1955), ESC res 663C, 24th sess, UN ESCOR Supp No 1, UN Doc E/3048 (31 July 1957), amended ESC res 2076, 62nd sess, UN ESCOR Supp No 1, UN Doc E/5988 (13 May 1977).

⁶ See Committee on the Rights of Persons with Disabilities, *Observations on the Standard Minimum Rules on the Rights of Persons with Disabilities*, UN Doc

Criminal responsibility itself, separate from the question of disposition to the custody of forensic psychiatric institutions, has not been easily resolved under the CRPD, because of concerns about substantive as well as formal equality, and a desire to not impose greater burdens on defendants with disabilities than may exist now if they can be acquitted for reasons related to the disability. Nevertheless, the CRPD Committee has recently articulated the standard that declarations of unfitness to plead violate Article 14 on the equal right to liberty and security of the person (see discussion below on liberty and security of the person). This article examines the relevance of provisions of the CRPD to criminal responsibility and related issues, and explores the possibility of an inclusive alternative to the discriminatory doctrines of the insanity defence and unfitness to plead.

A critical disability perspective on the debate about criminal responsibility

In the course of writing this article I was asked to engage with academic debate as background for my discussion of criminal responsibility under the CRPD. For this purpose I have explored some of the writing available in a US context about the insanity defence, which can be seen as emblematic of debate on criminal responsibility as it applies to people with disabilities.

The insanity defence is a legal rule that treats persons differentially based on disability. For this reason, not only the doctrine itself but also arguments pro and con need to be considered from a critical disability perspective. A full treatment of the debate is beyond the scope of this article, but I will address a few key points.

UNODC/CCPCJ/EG.6/2014/INF/4 (29 November 2013); Juan E Méndez, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/68/295 (9 August 2013); World Network of Users and Survivors of Psychiatry (2011).

A critical disability perspective requires us to refrain from setting persons with disabilities outside the social order and instead to devise an inclusive social order. This is a thoroughgoing and multi-levelled obligation (emanating from the CRPD as a matter of international law, and philosophically from the principles of democracy, equality and consent of the governed), and cannot be met by changes in language or by attempts to camouflage an exclusionary purpose and effect.⁷

In an inclusive social order, we would not set people aside for scrutiny based on their unusual perceptions and beliefs, nor would we deem rationality to be the talisman of our social or legal norms and relations, contrary to assumptions that underlie the insanity defence according to some of its supporters.⁸ The law may proceed using the tools of reason, but it does not need to valorise reason or rationality as a supreme human function.⁹ The critique of such valorisation is familiar to the disability movement, but in general it is articulated with reference to cognition and reasoning abilities rather than discernment, or exercise of judgment.¹⁰

The argument of Stephen Morse and Morris Hoffman is illustrative of the appeal to rationality in the sense of discernment that underlies the insanity defence.¹¹ Their argument rests on a concept of the “potentially rational” actor as the only fit subject for moral judgment and punishment. In their view, a person should not be held responsible who is incapable of making a rational choice about how to interact with the world. Yet they accept that the law can judge someone to be incapable and impose an alternatively

⁷ *CRPD* arts 2, 3(c), (d) and (e), 4.1 entire and especially (f), 4.3, 5, 12.1, 12.2, 19.

⁸ Cf. Morse and Hoffman (2008).

⁹ See, e.g., Quinn with Arnstein-Kerslake (2013).

¹⁰ Minkowitz (2014b).

¹¹ See Morse and Hoffman (2008).

stigmatizing status and consequences. It is not therefore a stance of deference to diversity, or refraining from judgment in a situation that is acknowledged to be beyond anyone's control (such as an accident). Rather in the case of the insanity defence, the law presumes to exercise meta-judgment – judgment that the person is or is not a fit candidate for judgment as a moral equal – that is overlaid on the judgment about the act itself constituting a crime for which criminal responsibility would ordinarily lie if not for the negation of the person as a moral actor.

As a hierarchical system in which criminal defendants interact at their own peril, there is little if any scope for the law to interact inter-subjectively with the person to seek common ground. Such interaction is potentially a way to alternatively conceptualise, and democratise, the relation of the law to individuals, especially individuals with disabilities. Democratizing the relation of the law to individuals, deconstructing and dismantling the meta-judgments that exclude any person from equal recognition as a person before the law, has been a background principle of the collective work of the disability community on transforming legal capacity, and draws on a feminist perspective and values as well as a principle of full inclusion and participation of people with disabilities.

Restorative justice approaches allow theoretically for inter-subjective engagement of a defendant with any victimised person(s) and the community, typically in a circle process that allows all to be heard and participate in conceiving and agreeing to an outcome.¹² While restorative justice can be characterised as seeking healing for all concerned, it is a social and interpersonal healing and as such differs from a therapeutic intervention on the defendant, and for this reason should be distinguished from

¹² Pranis (2003).

therapeutic jurisprudence.¹³ The latter has been rightly criticised for approaching the legal rights of people with psychosocial disabilities, who are routinely subjected to therapeutic interventions against their will (which violates their human rights), as another variety of therapy to be imposed on the person without his or her free and informed consent.¹⁴ The use of a therapeutic standard rather than an ordinary human rights analysis to assess conditions in psychiatric institutions has been condemned by the Special Rapporteur on Torture as an obstacle to the prevention of torture and ill-treatment.¹⁵

Below in the context of the right to equality and non-discrimination, I propose an inclusive framework for taking greater account of subjectivity in the adjudication of criminal responsibility. This framework remains within the punishment system but has elements of restorative justice and can be adapted to restorative processes. I have situated it within the punishment system in order to directly confront the ways in which that system is made to reinforce legal and social exclusion of people with disabilities and the exclusion of people with disabilities is made to legitimise the act of punishment.

My argument is similar in many respects to the integrationist approach to abolition of the insanity defence put forward by Christopher Slobogin.¹⁶ Slobogin critiques the insanity defence as being both too broad and too narrow, and demonstrates

¹³ As an example of the therapeutic jurisprudence approach, see Perlin (date unknown).

¹⁴ Personal communication with NY Mental Hygiene Legal Service Attorney Kim Darrow circa 2002.

¹⁵ See Manfred Nowak, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/63/175 (28 July 2008) para 49; Juan E Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/22/53 (1 February 2013) paras 22, 31-35.

¹⁶ Slobogin (2000).

the value of utilizing generally-applicable defences of justification, excuse and failure of proof (i.e. absence of mens rea) to take account of situations involving people with disabilities.¹⁷ He builds on the American Law Institute's Model Penal Code, which takes account of the actor's subjective perceptions and beliefs and thus opens the door to accommodating the subjective realities of persons with disabilities who are now, at least theoretically, set outside the bounds of criminal adjudication and placed instead in the realm of insanity.¹⁸ I agree with Slobogin's premise and argue further that disability non-discrimination may require the acceptance of subjectivised defences, even if this is not already a feature of a particular penal code.

Slobogin observes that non-discrimination is one of the benefits of abolishing the insanity defence, and his method of argument invokes non-discrimination by comparing cases that are treated under insanity with similar situations that are treated under ordinary, non-stigmatizing defences such as failure of proof, duress and self-defence. In a subsequent paper, he also finds support for his proposal in the CRPD, as interpreted by the Office of the High Commissioner for Human Rights.¹⁹ However, he falters when it comes to accepting the risk that individuals may be acquitted because they satisfy the criteria for a defence under his proposal, while remaining predisposed to commit criminal acts.²⁰ Instead of subjecting the question of risk to an inclusive analysis as he does with the insanity defence – surely there are many individuals without disabilities who are acquitted of notorious crimes and are still feared by their communities – he endorses a

¹⁷ See Loewy (2009).

¹⁸ American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments)*(1962) arts 2 and 3.

¹⁹ Slobogin (2010).

²⁰ Ibid.

schema for psychiatric preventive detention along with non-penal security measures to be imposed on other defined categories of individuals who are deemed “undeterrable” – people who have infectious or contagious diseases, and “enemy combatants.” Slobogin argues that the inclusion of these two other categories along with a subset of people with disabilities in a regime of targeted preventive detention makes it non-discriminatory. This is nonsense as there remains an obvious discriminatory purpose and effect against people with psychosocial disabilities; furthermore, the CRPD prohibits all detention based in whole or in part on psychosocial disability and all detention in a mental health facility (see below discussion of access to justice and liberty and security of the person).

The work of Victoria Nourse bears only a tangential relationship to disability issues, but her relational and structural approach to criminal law can be useful in considering how the law might adapt itself to more meaningful inclusion of people with disabilities as actors in all potential roles. In her discussion of defences of justification and excuse, she asks what relation the defendant has created between him/herself and the victim, what relation the defendant has created between him/herself and the state, and whether the state should affirm or reject those relations.²¹ Nourse uncritically adopts a status-based approach to justification of the insanity defence; she maintains that it is justified on citizenship grounds because “insane persons” are not proper subjects for the relations created by criminal adjudication. But a relational approach to theorizing the adjudication of criminal cases is appealing to a critical disability perspective, since work on legal capacity from this perspective is based in part on a relational understanding of

²¹ Nourse (2003).

the exercise of autonomy in legal acts and in everyday life.²² In particular, the use of support and accommodations, designed to facilitate respect for individual autonomy, will and preferences, creates equal opportunities for people with disabilities to enter into legal relations from which they might otherwise be excluded. Attention to the relational aspect of law may be of use in theorising a disability-inclusive approach to criminal law and process, both narrowly as support and accommodation in criminal proceedings, and more broadly in the substantive doctrine of criminal liability.

Both Nourse and William Stuntz raise issues with respect to subjectivised defences from gender and race perspectives that are equally relevant to disability, which should be taken into account in considering the introduction of subjectivised defences for any purpose. Nourse argues that subjectivised defences of excuse (such as the so-called battered women's defence) focus too narrowly on problematizing the defendant's state of mind when objective circumstances should be better understood to make out a more direct claim of justification. William J. Stuntz, on the other hand, makes a case that allowing locally selected juries to consider a broader concept of mens rea would result in greater substantive justice for African American defendants and communities.²³ These arguments suggest that mainstreaming within existing doctrine should be preferred and that any innovation should be broadly defined, and accompanied by democratizing procedural innovations aimed at achieving a "jury of one's peers," rather than drawing attention to differences by means of doctrine defined for a marginalised population,

²² See for example IDA CRPD Forum, 'Principles for the Implementation of CRPD Article 12,' <<http://www.internationaldisabilityalliance.org/en/ida-position-papers-and-statements>>, and Minkowitz (2006).

²³ Stuntz (2008).

which may inadvertently increase discrimination and negative outcomes. It remains to be seen whether my proposal can meet these challenges.

A critical disability perspective sets out axiomatic principles that take us away from debates about the pros and cons of including people with disabilities as legal subjects on an equal basis with others in the context of criminal adjudication, and allows us to move on to considering the technical and practical aspects of full inclusion. We turn now to an analysis of criminal responsibility and related issues under the CRPD, which serves both as the reference point for key elements of a critical disability perspective and as a set of binding obligations in international human rights law.

Criminal responsibility and related issues under the CRPD

Introduction to the CRPD

The Convention on the Rights of Persons with Disabilities is a core thematic human rights treaty of the United Nations, and as such represents the highest and most specific international law dealing with the rights of persons with disabilities. It supersedes earlier non-binding declarations, and provides authoritative guidance for the application of other treaties without discrimination based on disability.²⁴

The CRPD was adopted by the UN General Assembly in 2006, and entered into force in 2008 with the required number of ratifications. It was drafted and negotiated with an extremely high level of civil society participation, in particular by organisations of people with disabilities, and people with disabilities were also included as expert advisers on many government delegations. A common estimate is that civil society

²⁴ Manfred Nowak, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/63/175 (28 July 2008) para 44.

drafted 80 per cent of the Convention. This participation was highly diverse and well organised, with representation from every region of the world and all sectors of the disability community that either were self-organised at the global level or claimed an independent voice in the course of the CRPD negotiations. The International Disability Caucus brought together disabled people's organisations (DPOs) and allies under DPO leadership, with a principle of following the lead of particular constituencies with respect to their own human rights. I served as the chief representative of the World Network of Users and Survivors of Psychiatry in the CRPD drafting and negotiations, and served both on the IDC steering committee and on a drafting group comprising twenty-seven government delegations, twelve DPOs and one National Human Rights Institution that met in January 2004 to produce a draft text.

The participatory drafting and negotiation process left its mark on the treaty and on the traditions surrounding it in two respects: a legacy requiring participatory process and recognition of the expertise of people with disabilities, and the creation of standards that go beyond current practice and require all countries to make substantial changes in law and policy.²⁵ Article 4.3 creates an obligation on governments (and by extension, on inter-governmental processes), to closely consult with people with disabilities, including children with disabilities, through their representative organisations on the implementation of the treaty and the development of any other laws or policies that affect them. The expertise provided by people with disabilities to the development of the treaty's normative standards suggests that such consultation is not merely as stakeholders,

²⁵ Minkowitz (2012a).

rather it is both as stakeholders and as subject-matter experts that persons with disabilities play a leading role.

The creation of standards that go beyond current practice and require all countries to make substantial reforms is manifested most clearly in Article 12 on equal recognition before the law, dealing with legal capacity as both capacity to hold rights and capacity to act, that is, to assert rights and to create, modify or extinguish legal relationships.²⁶ The paradigm of legal capacity articulated in Article 12 can be summed up as requiring formal equality plus substantive equality, obligating governments to shift from substitute decision-making regimes to support in the exercise of legal capacity, which respects the person's autonomy, will and preferences. The same paradigm of respect for autonomy plus providing support and accommodation is reflected in Article 19, which guarantees the right to live and be included in the community on an equal basis with others and prohibits any compulsory living arrangements (such as institutions). Article 14 on liberty and security of the person prohibits deprivation of liberty based on disability; this is authoritatively interpreted to prohibit mental health detention and to require that all mental health services be based on the free and informed consent of the person concerned. Forced psychiatric interventions have been found to violate Articles 12, 14, 15 (freedom from torture and ill-treatment), 17 (integrity of the person) and 25 (right to health).²⁷ Together, these provisions revolutionise international law with respect to

²⁶ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) para 12.

²⁷ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) paras 7, 8, 31, 40-42; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Belgium*, 12th sess, UN Doc CRPD/C/BEL/CO/1 (3 October 2014) paras

people with psychosocial disabilities and require corresponding changes to domestic law and practices.

25-26; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Denmark*, 12th sess, UN Doc CRPD/C/DNK/CO/1 (3 October 2014) paras 36-39; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Ecuador*, 12th sess, UN Doc CRPD/C/ECU/CO/1 (3 October 2014) paras 28, 29(a), (c) and (d); Committee on the Rights of Persons with Disabilities, *Concluding Observations on Korea*, 12th sess, UN Doc CRPD/C/KOR/CO/1 (3 October 2014) paras 25-26, 29-30; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Mexico*, 12th sess, UN Doc CRPD/C/MEX/CO/1 (3 October 2014) paras 29-30; Committee on the Rights of Persons with Disabilities, *Concluding Observations on New Zealand*, 12th sess, UN Doc CRPD/C/NZL/CO/1 (3 October 2014) paras 29-30; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Azerbaijan*, 11th sess, UN Doc CRPD/C/AZE/CO/1 (11 April 2014) paras 28-29; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Costa Rica*, 11th sess, UN Doc CRPD/C/CRI/CO/1 (12 May 2014) paras 33-34; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Sweden*, 11th sess, UN Doc CRPD/C/SWE/CO/1 (11 April 2014) paras 35-40; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Australia*, 10th sess, UN Doc CRPD/C/AUS/CO/1 (4 October 2013) para 34-36; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Austria*, 10th sess, UN Doc CRPD/C/AUT/CO/1 (13 September 2013) paras 29-33; Committee on the Rights of Persons with Disabilities, *Concluding Observations on El Salvador*, 10th sess, UN Doc CRPD/C/SLV/CO/1 (13 September 2013) paras 32-33; *Concluding Observations on Argentina*, 8th sess, UN Doc CRPD/C/ARG/CO/1 (27 September 2012) paras 41-42; Committee on the Rights of Persons with Disabilities, *Concluding Observations on China*, 8th sess, UN Doc CRPD/C/CHN/CO/1 (27 September 2012) para 26, 28; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Hungary*, 8th sess, UN Doc CRPD/C/HUN/CO/1 (27 September 2012) para 28; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Peru*, 7th sess, UN Doc CRPD/C/PER/CO/1 (9 May 2012) para 29-31; Committee on the Rights of Persons with Disabilities, *Concluding observations on Spain*, 6th sess, UN Doc CRPD/C/ESP/CO/1 (2011) para 36; *Concluding Observations on Tunisia*, 5th sess, UN Doc CRPD/C/TUN/CO/1 (29 April 2011) paras 28-29. See Minkowitz (2014a) for an analysis of this jurisprudence through April 2014.

On the characterisation of forced psychiatric interventions as a form of torture and ill-treatment, see also Manfred Nowak, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/63/175 (28 July 2008); Juan E Méndez, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/68/295 (9 August 2013); Minkowitz (2007).

The CRPD provides for the creation of the Committee on the Rights of Persons with Disabilities ('CRPD Committee'), composed of independent experts elected by states parties, which has the authority to review country reports and make recommendations, to adopt General Comments to clarify the normative content and state obligations of the treaty, and to conduct inquiries and issue decisions on individual complaints with respect to countries that have ratified those procedures in the Optional Protocol. The CRPD Committee adopted its first General Comment in April 2014, dealing with Article 12 and establishing definitively the scope and content of the right to legal capacity of persons with disabilities, as well as its relationship with other rights. General Comment No. 1 and the Committee's Concluding Observations will be the primary sources for interpretation of relevant provisions in the discussion to follow, which examines issues related to criminal responsibility under several provisions of the CRPD.

Legal capacity and equal recognition before the law

CRPD Article 12 grounds the right to legal capacity in the universal right to recognition everywhere as a person before the law. Paragraph 1 reaffirms the recognition of legal personhood, and paragraph 2 obligates states to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Paragraph 3 further obligates states to provide access to support needed in the exercise of legal capacity, and paragraph 4 requires them to establish safeguards to prevent abuse in all measures related to the exercise of legal capacity, including to ensure that such measures respect the rights, will and preferences of the person. Paragraph 5 recognises financial

rights on an equal basis, and brings these rights under the overall framework established by the other provisions of Article 12.

Article 12 was the subject of much debate in the drafting and negotiations, and debates did not end with the adoption of the Convention. While there was clear evidence that states had made a choice to adopt a support model of legal capacity, questions remained about whether substitute decision-making was to be prohibited. Early commentators at the United Nations, as well as the monitoring committee of a regional human rights treaty in the Americas, upheld the position of the disability community that Article 12 prohibits substitute decision-making and legal incapacitation.²⁸ The CRPD Committee began to issue Concluding Observations in 2011, urging states to replace substitute decision-making regimes with supported decision-making, which respects the person's autonomy, will and preferences.²⁹ This interpretation was set out definitively in the Committee's first General Comment, issued in April 2014.

²⁸ Manfred Nowak, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/63/175 (28 July 2008) paras 44, 47, 50; Office of the High Commissioner for Human Rights, *Thematic Study on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities*, UN Doc A/HRC/10/48 (26 January 2009) paras 43-46; Committee for the Elimination of All Forms of Discrimination Against Persons with Disabilities, *General Observation of the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities on the need to interpret Article I.2(b) in fine of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities in the context of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities*, OEA/Ser.L/XXIV.3.1, CEDDIS/doc.12(I-E/11) rev.1 (28 April 2011); Santos Cifuentes et al (2008), IDA CRPD Forum (2008a).

²⁹ Concluding Observations under Article 12 prior to the General Comment: Committee on the Rights of Persons with Disabilities, *Concluding Observations on Australia*, 10th sess, UN Doc CRPD/C/AUS/CO/1 (4 October 2013) paras 24-25; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Austria*, 10th sess, UN Doc CRPD/C/AUT/CO/1 (13 September 2013) paras 27-28; Committee on the Rights of Persons with Disabilities, *Concluding Observations on El Salvador*, 10th sess, UN Doc CRPD/C/SLV/CO/1 (13 September 2013) paras 27-28; Committee on the Rights of

CRPD General Comment No. 1 on Article 12 establishes that legal capacity refers to the capacity to act as well as the capacity to be a holder of rights, and that legal capacity is a universal attribute.³⁰ A person's actual or perceived mental capacity or decision-making skill cannot justify the deprivation of legal capacity to make decisions

Persons with Disabilities, *Concluding Observations on Paraguay*, 9th sess, UN Doc CRPD/C/PRY/CO/1 (15 May 2013) paras 29-30; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Argentina*, 8th sess, UN Doc CRPD/C/ARG/CO/1 (27 September 2012) paras 19-22; Committee on the Rights of Persons with Disabilities, *Concluding Observations on China*, 8th sess, UN Doc CRPD/C/CHN/CO/1 (27 September 2012) paras 21-22; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Hungary*, 8th sess, UN Doc CRPD/C/HUN/CO/1 (27 September 2012) paras 25-26; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Peru*, 7th sess, UN Doc CRPD/C/PER/CO/1 (9 May 2012) paras 24-27; Committee on the Rights of Persons with Disabilities, *Concluding observations on Spain*, 6th sess, UN Doc CRPD/C/ESP/CO/1 (2011) paras 33-34; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Tunisia*, 5th sess, UN Doc CRPD/C/TUN/CO/1 (29 April 2011) paras 22-23. After the General Comment: Committee on the Rights of Persons with Disabilities, *Concluding Observations on Belgium*, 12th sess, UN Doc CRPD/C/BEL/CO/1 (3 October 2014) paras 23-24; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Denmark*, 12th sess, UN Doc CRPD/C/DNK/CO/1 (3 October 2014) paras 32-33; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Ecuador*, 12th sess, UN Doc CRPD/C/ECU/CO/1 (3 October 2014) paras 24-25; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Korea*, 12th sess, UN Doc CRPD/C/KOR/CO/1 (3 October 2014) paras 21-22; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Mexico*, 12th sess, UN Doc CRPD/C/MEX/CO/1 (3 October 2014) paras 23-24; Committee on the Rights of Persons with Disabilities, *Concluding Observations on New Zealand*, 12th sess, UN Doc CRPD/C/NZL/CO/1 (3 October 2014) paras 21-22; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Azerbaijan*, 11th sess, UN Doc CRPD/C/AZE/CO/1 (11 April 2014) paras 26-27; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Costa Rica*, 11th sess, UN Doc CRPD/C/CRI/CO/1 (12 May 2014) paras 21-22; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Sweden*, 11th sess, UN Doc CRPD/C/SWE/CO/1 (11 April 2014) paras 33-34.

³⁰ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) paras 8, 25.

that will be recognised as valid by the law,³¹ including in crisis situations.³² The concept of mental capacity itself is highly controversial, and is consistently rejected as a basis for legal distinctions.³³ States parties are obligated to abolish substitute decision-making of any kind, including mental health laws that allow forced treatment, and to institute a regime of supported decision-making as well as systemic measures of accessibility and accommodations in the exercise of legal capacity.³⁴ Substitute decision-making must be abolished, and the standard to be used when it is not possible to be certain of a person's will and preferences is "best interpretation of will and preferences" rather than "best interests."

The General Comment contains only a tangential reference to responsibility, as it relates to the linkage with Article 13 on access to justice: the right to legal capacity implies that persons with disabilities must be recognised as having equal standing in all courts and tribunals to seek enforcement of their rights and obligations on an equal basis with others.³⁵ This implies that persons with disabilities must be recognised as having the capacity to stand trial for an offense rather than being declared unfit to plead or

³¹ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) paras 13-15.

³² Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) para 18.

³³ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) paras 13-15, 17, 29(i).

³⁴ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) paras 7, 17, 26, 28, 29, 31, 40, 42.

³⁵ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) para 38.

incompetent to participate as a defendant in criminal proceedings, and directs also that the determination of liability whether civil or criminal must be made according to standards that treat persons with disabilities as equal to others.

Article 12.2 guarantees the recognition of legal capacity on an equal basis in all aspects of life, and is not limited to civil matters.³⁶ While the CRPD Committee has not yet clarified its views on criminal responsibility under this provision, the Office of the High Commissioner for Human Rights has recommended pursuant to Article 12 that defences based on negation of criminal responsibility because of a mental or intellectual disability be abolished, and replaced by disability-neutral doctrines on the subjective element of the crime that take into account the situation of the individual defendant.³⁷ This supports similar contentions by the World Network of Users and Survivors of Psychiatry and the International Disability Alliance CRPD Forum.³⁸

Conceptually, there is a continuum between criminal responsibility, civil responsibility in tort or in contract, and the assumption of risk inherent in consenting to a medical treatment or to intimate relations. A person who is recognised as having the legal capacity to create, modify or dissolve legal relationships, to enter into transactions, to give or withhold consent, and to generally make decisions about their own person and affairs incurs responsibility in consequence of those decisions. Acts of a legal nature can in many instances be performed by conduct and not only by means of communicative

³⁶ Compare *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 15.

³⁷ Office of the High Commissioner for Human Rights, *Thematic Study on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities*, UN Doc A/HRC/10/48 (26 January 2009) para 47.

³⁸ IDA CRPD Forum (2008a) and (2008b); WNUSP (2011); Hazen and Minkowitz (2012).

assertions. Civil and criminal responsibility can be understood as giving effect to a legal dimension in which our conduct always takes place irrespective of whether any particular person is aware of its existence or affirms it at any moment. If persons with disabilities have the legal capacity to act on an equal basis with others, this capacity extends to all aspects of life where decisions have consequences, and implies as a corollary the legal responsibility for those consequences on an equal basis with others.

We have seen that General Comment No. 1 rejects the attachment of legal or practical consequences to an assessment of mental capacity.³⁹ This reasoning logically precludes the use of mental capacity assessments to negate criminal responsibility. Capacity assessments of any kind give credence to a hierarchy of judgment and meta-judgment that privileges certain subjectivities over others, contributing to the construction of disability as a status of inferiority, contrary to the equal status as persons before the law that is guaranteed in Article 12, paragraph 1.

Furthermore, the General Comment establishes that denials of legal capacity based on a functional approach, as well as those based on status, violate Article 12.⁴⁰ Applying this to criminal responsibility, a functional approach to denial of the capacity to be held criminally responsible (eg based on a factual finding that the defendant lacked some level of decision-making skill at the time the offense was committed) is equally discriminatory as a status-based approach that precludes persons with disabilities from entering a plea and undergoing adjudication of the criminal charges.

³⁹ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) paras 13-15, 17, 29(i).

⁴⁰ See Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) para 15.

For these reasons, declarations of unfitness to plead, and any form of insanity defence, must be viewed as contrary to Article 12.2. How then, might we legitimately take account of diversity that has been labelled as insanity in the context of criminal adjudication?

Article 12.3 has provided for variations in decision-making by requiring states to provide access to support in the exercise of legal capacity. The use of support is meant to be facilitative and cannot in any way restrict or undermine the person's autonomy or freedom on an equal basis with others. It does not appear that there is any similar mechanism by which support can address variations in decision-making with respect to a determination of responsibility. To implicate supporters in responsibility for a person's conduct would either deter individuals from providing support or result in a de facto regime of control imposed on persons with disabilities to avoid creating such liability for supporters. In addition, with respect to duties that are defined by the law and not directly undertaken by the person concerned, it may be impractical or undesirable to seek out support, and individuals should not be penalised for exercising legal capacity without support, as is their right to do under Article 12, paragraph 2.⁴¹

Similarly, the obligations in paragraph 4 to establish safeguards to prevent abuse have no direct relevance to the adjudication of responsibility. General Comment No. 1 interprets paragraph 4 to have the primary aim of ensuring respect for the person's rights, will and preferences, and to that end requiring safeguards for the exercise of legal capacity that protect against abuse of persons with disabilities on an equal basis with

⁴¹ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) para 19.

others. Due process requirements for criminal proceedings could be understood as safeguards to protect against abuse in the form of unfair imposition of penalties, and as such would be covered by paragraph 4 as normative content. However, the CRPD offers no guidance as to the content of such safeguards, which to the extent that they are not specific to persons with disabilities would appear to lie beyond its scope.

Thus, while Article 12 establishes legal capacity in all aspects of life, logically extending to the capacity to be held criminally responsible and the entitlement to have one's criminal liability adjudicated under standards that treat persons with disabilities on an equal basis with others, the question of substantive equality in such adjudication is not well developed. As a practical matter, we need to consider how the recognition of legal capacity to be held criminally liable may require changes to criminal law and procedure beyond abolition of specific defences based on disability or on mental incapacity, if we are to proceed with meaningful reform. Other provisions of the CRPD can be explored for pertinent insights, and ultimately standards will need to be put forward as a matter of international law, with the CRPD as foundation, and in domestic practice.

In summation, a negation of criminal responsibility that is based on insanity or mental incapacity is contrary to Article 12 because it undermines the equal recognition of persons with disabilities before the law as individuals with mutual obligations towards others and an equal right to participate in defining and negotiating those obligations. The support framework, which addresses substantive equality concerns in the affirmative exercise of legal capacity, is suggestive but inconclusive as a possible approach to responsibility. It may be that responsibility is simply a formal consequence of legal capacity and requires no further changes to substantive doctrine, only accommodation

and support to participate effectively in criminal proceedings. However, we can also consider whether there is some analogue to support that would help us to resolve the question of whether and how disability may have any relevance to criminal responsibility, without in any way invoking the concept of mental capacity.⁴² This will be explored further under Article 5 on equality and non-discrimination, considering a holistic perspective of formal plus substantive equality as applied to the right to fairness in determinations of responsibility.

Access to justice

Article 13, paragraph 1, guarantees to persons with disabilities the effective access to justice on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. This clearly applies to the rights of persons with disabilities as criminal defendants.

The Committee on the Rights of Persons with Disabilities has discussed the right to stand trial and to have an inclusive process for the determination of culpability, as well as the impermissibility of psychiatric detention as a security measure related to criminal proceedings, under both Article 13 and Article 14 (on liberty and security of the person). For the purposes of this article, issues related to criminal procedure will be addressed as an aspect of access to justice, and the impermissibility of mental health detention

⁴² See Office of the High Commissioner for Human Rights, *Thematic Study on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities*, UN Doc A/HRC/10/48 (26 January 2009), World Network of Users and Survivors of Psychiatry (2011) and Hazen and Minkowitz (2012).

including forensic detention related to criminal proceedings will be addressed as an aspect of liberty and security of the person.

An obligation to eliminate the practice of deeming a person unfit to plead or to stand trial has been found under both Article 13 and Article 14, being derived from the right to have equal substantive and procedural guarantees in a proceeding related to the deprivation of liberty.⁴³ People with disabilities have the right to go to trial, making use of accommodations and supports they may need to exercise their rights as defendants and to testify as witnesses if they so choose.⁴⁴

Under Article 14, the CRPD Committee has recently urged the elimination of a system known as “inimputabilidad,” common throughout Latin America, which exempts a person from criminal liability without trial and has the consequence of imposing disability-based security measures such as indefinite detention in a psychiatric

⁴³ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) paras 38-39; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Korea*, 12th sess, UN Doc CRPD/C/KOR/CO/1 (3 October 2014) para 28; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Belgium*, 12th sess, UN Doc CRPD/C/BEL/CO/1 (3 October 2014) paras 27-28; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Denmark*, 12th sess, UN Doc CRPD/C/DNK/CO/1 (3 October 2014) paras 34-35; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Mexico*, 12th sess, UN Doc CRPD/C/MEX/CO/1 (3 October 2014) paras 27-28; Committee on the Rights of Persons with Disabilities, *Concluding Observations on New Zealand*, 12th sess, UN Doc CRPD/C/NZL/CO/1 (3 October 2014) paras 33-34; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Costa Rica*, 11th sess, UN Doc CRPD/C/CRI/CO/1 (12 May 2014) paras 27-28; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Australia*, 10th sess, UN Doc CRPD/C/AUS/CO/1 (4 October 2013) para 30. For details of CRPD Article 14.2, see below in discussion of liberty and security of the person.

⁴⁴ Committee on the Rights of Persons with Disabilities, *Concluding Observations on Belgium*, 12th sess, UN Doc CRPD/C/BEL/CO/1 (3 October 2014) paras 27-28.

institution.⁴⁵ The Committee similarly recommended elimination of the Belgian system whereby a person is declared irresponsible for his or her acts and security measures are applied if the person is believed to be “dangerous.” Instead, persons with disabilities who are found responsible for committing a crime should be judged in an ordinary penal process on an equal basis with others.⁴⁶ The system in Denmark whereby a person is “sentenced to treatment” after being found unfit to plead was also found to be incompatible with Article 14.⁴⁷ These are the first clear indications from the treaty body that insanity acquittals are disfavoured and may be incompatible with the CRPD. In condemning systems of unfitness to plead and unfitness to be held criminally liable, the CRPD Committee has taken a position against a status-based approach to unequal treatment with respect to criminal responsibility. The Committee should take a similar position against the functional approach (based on a person’s perceived mental incapacity at a certain time, with respect to a particular decision), which is more characteristic of the insanity defence in civil law countries.⁴⁸

⁴⁵ Committee on the Rights of Persons with Disabilities, *Concluding Observations on Ecuador*, 12th sess, UN Doc CRPD/C/ECU/CO/1 (3 October 2014) paras 28, 29(b); Committee on the Rights of Persons with Disabilities, *Concluding Observations on Mexico*, 12th sess, UN Doc CRPD/C/MEX/CO/1 (3 October 2014) paras 27-28.

⁴⁶ Committee on the Rights of Persons with Disabilities, *Concluding Observations on Belgium*, 12th sess, UN Doc CRPD/C/BEL/CO/1 (3 October 2014) paras 27-28.

⁴⁷ Committee on the Rights of Persons with Disabilities, *Concluding Observations on Denmark*, 12th sess, UN Doc CRPD/C/DNK/CO/1 (3 October 2014) paras 34-35.

⁴⁸ See discussion above on the debate about criminal responsibility. In General Comment No. 1, paragraph 15, the CRPD Committee explained why the functional approach to deprivation of legal capacity, equally with status-based and outcome-based approaches, is contrary to Article 12:

The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able

Diversion from criminal proceedings to mental health commitment regimes or compulsory treatment is incompatible with Article 13, as it violates the obligation to ensure equal substantive and procedural guarantees in the criminal context.⁴⁹

In summation, the right to access to justice (Article 13), as well as the right to equal guarantees in any process that could result in a deprivation of liberty (Article 14), require the same process and the same standards for determining criminal liability of persons with disabilities as others. This entails the elimination of systems by which a person is deemed unfit to plead, exempted from criminal liability, and/or diverted from criminal proceedings to mental health detention or compulsory treatment.

Liberty and security of the person

CRPD Article 14, paragraph 1(b) provides that the existence of a disability shall in no case justify a deprivation of liberty. The Committee on the Rights of Persons with Disabilities interprets this to prohibit all mental health detention, including when such detention is based on a forecast that the person will harm oneself or others, or on a need for care and treatment.⁵⁰ Institutionalisation without the free and informed consent of the person concerned constitutes arbitrary detention.⁵¹

to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law.

⁴⁹ Committee on the Rights of Persons with Disabilities, *Concluding Observations on Belgium*, 12th sess, UN Doc CRPD/C/BEL/CO/1 (3 October 2014) para 29; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Australia*, 10th sess, UN Doc CRPD/C/AUS/CO/1 (4 October 2013) para 29.

⁵⁰ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) paras 31, 40; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Belgium*, 12th sess, UN Doc CRPD/C/BEL/CO/1 (3 October 2014) paras 25-26; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Denmark*, 12th sess, UN Doc CRPD/C/DNK/CO/1 (3 October 2014) paras 36-37;

Article 14, paragraph 2 provides that persons with disabilities who are deprived of their liberty through any process are entitled on an equal basis with others to guarantees in accordance with international human rights law, and must be treated in compliance with the objectives and principles of the CRPD, including by provision of reasonable accommodation.

Committee on the Rights of Persons with Disabilities, *Concluding Observations on Ecuador*, 12th sess, UN Doc CRPD/C/ECU/CO/1 (3 October 2014) paras 28, 29(a), (c) and (d); Committee on the Rights of Persons with Disabilities, *Concluding Observations on Korea*, 12th sess, UN Doc CRPD/C/KOR/CO/1 (3 October 2014) paras 25-26; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Mexico*, 12th sess, UN Doc CRPD/C/MEX/CO/1 (3 October 2014) paras 29-30; Committee on the Rights of Persons with Disabilities, *Concluding Observations on New Zealand*, 12th sess, UN Doc CRPD/C/NZL/CO/1 (3 October 2014) paras 29-30; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Azerbaijan*, 11th sess, UN Doc CRPD/C/AZE/CO/1 (11 April 2014) paras 28-29; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Sweden*, 11th sess, UN Doc CRPD/C/SWE/CO/1 (11 April 2014) paras 35-36; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Australia*, 10th sess, UN Doc CRPD/C/AUS/CO/1 (4 October 2013) para 34; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Austria*, 10th sess, UN Doc CRPD/C/AUT/CO/1 (13 September 2013) paras 29-30; Committee on the Rights of Persons with Disabilities, *Concluding Observations on El Salvador*, 10th sess, UN Doc CRPD/C/SLV/CO/1 (13 September 2013) para 32; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Paraguay*, 9th sess, UN Doc CRPD/C/PRY/CO/1 (15 May 2013) paras 35-36; Committee on the Rights of Persons with Disabilities, *Concluding Observations on China*, 8th sess, UN Doc CRPD/C/CHN/CO/1 (27 September 2012) para 26; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Hungary*, 8th sess, UN Doc CRPD/C/HUN/CO/1 (27 September 2012) para 28; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Peru*, 7th sess, UN Doc CRPD/C/PER/CO/1 (9 May 2012) para 29; Committee on the Rights of Persons with Disabilities, *Concluding observations on Spain*, 6th sess, UN Doc CRPD/C/ESP/CO/1 (2011) para 36; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Tunisia*, 5th sess, UN Doc CRPD/C/TUN/CO/1 (29 April 2011) para 25; Committee on the Rights of Persons with Disabilities, *Statement on article 14 of the Convention on the Rights of Persons with Disabilities*, 12th sess (September 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15183&LangID=E>>.

⁵¹ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) para 40.

The two paragraphs of Article 14 set out complementary standards necessary to ensure the right to liberty and security of the person without discrimination based on disability. Detention that gives legal effect to the existence of a disability constitutes direct, de jure discrimination, because disability is a threshold criterion that qualifies the person for adverse treatment. Mental health detention, which is by definition based on an apparent psychosocial disability or psychiatric diagnosis, alone or in combination with other criteria, can never be disability-neutral, and always violates the first prong of Article 14, the prohibition of disability-based detention. Any other legal scheme for the deprivation of liberty, or particular instance of detention, can be challenged as discriminatory if it has the purpose or effect of treating persons with disabilities unequally, including by denial of reasonable accommodation.⁵² This premise could potentially support the argument that consideration of subjective perceptions and judgment, without incapacity labelling, may be required as a reasonable accommodation for an individual with a disability in penal proceedings (but recall the caveat that mainstreaming, or inclusive design, is a better approach because it avoids singling out people with disabilities because of their perceived differences from others).⁵³

The second prong of Article 14 provides for equal guarantees in those schemes of detention that are legitimately imposed on persons with disabilities. The negotiating history makes clear that Article 14 does not exempt persons with disabilities from general

⁵² CRPD Article 2 defines disability-based discrimination to include the denial of reasonable accommodation, among other forms of discrimination; Article 2 also contains a definition of reasonable accommodation. *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 2.

⁵³ See further discussion below under the heading of equality and non-discrimination.

legislation that authorises deprivation of liberty on non-arbitrary grounds.⁵⁴ This can be theorised simply as a permission carved out for states within the human rights framework to enact schemes of detention according to law so long as they are non-discriminatory and otherwise non-arbitrary, but it also plays a role in confirming the willingness of persons with disabilities to participate in the common framework of governance and accept the same burdens as others as individuals in relation to the state. This should not be conceived as uncritical or one-sided, but rather as an evolving engagement that must be mutually transforming and interrelated with issues of gender, race, colonialism and democracy.

The obligation in Article 14.2 to treat persons with disabilities in compliance with the objectives and principles of the CRPD is a gloss on the right to humane treatment that is guaranteed to persons deprived of their liberty in Article 10 of the International Covenant on Civil and Political Rights. This provision requires that the CRPD should be consulted with respect to any issues that arise concerning the rights of persons with disabilities in detention settings, including provisions that have bearing on specific rights as well as the purpose and principles of the treaty as a whole.

The prohibition of detention based on psychosocial or intellectual disability under Article 14.1, which rules out detention “in any kind of a mental health facility,”⁵⁵ also has implications for the 14.2 obligation of equal treatment in detention settings, and thus prohibits detention in forensic psychiatric institutions and any involuntary placement in a

⁵⁴ See Chair’s concluding remarks in discussion of Article 14.1(b) in *UN Convention on the Rights of People with Disabilities Ad Hoc Committee – Daily Summaries* 8(4) (19 January 2006) <<http://www.un.org/esa/socdev/enable/rights/ahc7sum19jan.htm>>.

⁵⁵ Committee on the Rights of Persons with Disabilities, *Concluding Observations on Austria*, 10th sess, UN Doc CRPD/C/AUT/CO/1 (13 September 2013) para 30.

mental health unit or special needs unit of a prison.⁵⁶ Even though the state may have legitimate grounds for detention that are unrelated to disability, such as arrest or conviction of a crime, the manner in which detention is carried out has to be congruent with its underlying basis and cannot amount to discriminatory forms of control or supervision based on the individual's status as a person with an actual or perceived disability.

The right to security of person includes freedom from non-consensual treatment: Article 14 Concluding Observations commonly include an obligation to “ensure that all health services, including mental health services, are based on the free and informed consent of the person concerned.”⁵⁷ A prohibition of forced mental health interventions

⁵⁶ Mental health commitment and compulsory treatment pursuant to diversion from criminal proceedings is also prohibited under Article 13. Committee on the Rights of Persons with Disabilities, *Concluding Observations on Australia*, 10th sess, UN Doc CRPD/C/AUS/CO/1 (4 October 2013) para 29.

⁵⁷ Committee on the Rights of Persons with Disabilities, *Concluding Observations on Ecuador*, 12th sess, UN Doc CRPD/C/ECU/CO/1 (3 October 2014) para 29(d); Committee on the Rights of Persons with Disabilities, *Concluding Observations on Korea*, 12th sess, UN Doc CRPD/C/KOR/CO/1 (3 October 2014) para 26; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Mexico*, 12th sess, UN Doc CRPD/C/MEX/CO/1 (3 October 2014) para 30(b); Committee on the Rights of Persons with Disabilities, *Concluding Observations on New Zealand*, 12th sess, UN Doc CRPD/C/NZL/CO/1 (3 October 2014) para 30; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Sweden*, 11th sess, UN Doc CRPD/C/SWE/CO/1 (11 April 2014) para 36; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Australia*, 10th sess, UN Doc CRPD/C/AUS/CO/1 (4 October 2013) para 34; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Austria*, 10th sess, UN Doc CRPD/C/AUT/CO/1 (13 September 2013) para 31; Committee on the Rights of Persons with Disabilities, *Concluding Observations on El Salvador*, 10th sess, UN Doc CRPD/C/SLV/CO/1 (13 September 2013) para 32; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Paraguay*, 9th sess, UN Doc CRPD/C/PRY/CO/1 (15 May 2013) paras 35-36; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Hungary*, 8th sess, UN Doc CRPD/C/HUN/CO/1 (27 September 2012) para 28; Committee on the Rights of Persons

has been found also under Articles 12, 15, 17 and 25,⁵⁸ and under international law on the prohibition of torture and ill-treatment.⁵⁹ The right to free and informed consent in mental health and other health care applies fully in jails and prisons, and in services provided to individuals leaving prison.⁶⁰ This means among other things that psychiatric medications must not be used as a form of restraint or behaviour control, and that

with Disabilities, *Concluding observations on Spain*, 6th sess, UN Doc CRPD/C/ESP/CO/1 (2011) para 36.

⁵⁸ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) paras 7, 8, 31, 40-42. Under Article 15: Committee on the Rights of Persons with Disabilities, *Concluding Observations on Denmark*, 12th sess, UN Doc CRPD/C/DNK/CO/1 (3 October 2014) paras 38-39; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Korea*, 12th sess, UN Doc CRPD/C/KOR/CO/1 (3 October 2014) paras 29-30; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Azerbaijan*, 11th sess, UN Doc CRPD/C/AZE/CO/1 (11 April 2014) paras 28-29; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Costa Rica*, 11th sess, UN Doc CRPD/C/CRI/CO/1 (12 May 2014) paras 33-34; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Sweden*, 11th sess, UN Doc CRPD/C/SWE/CO/1 (11 April 2014) paras 37-40; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Australia*, 10th sess, UN Doc CRPD/C/AUS/CO/1 (4 October 2013) paras 35-36; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Austria*, 10th sess, UN Doc CRPD/C/AUT/CO/1 (13 September 2013) paras 32-33; Committee on the Rights of Persons with Disabilities, *Concluding Observations on El Salvador*, 10th sess, UN Doc CRPD/C/SLV/CO/1 (13 September 2013) para 33; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Peru*, 7th sess, UN Doc CRPD/C/PER/CO/1 (9 May 2012) paras 30-31. Under Article 17: Committee on the Rights of Persons with Disabilities, *Concluding Observations on Tunisia*, 5th sess, UN Doc CRPD/C/TUN/CO/1 (29 April 2011) paras 28-29. Under Article 25: Committee on the Rights of Persons with Disabilities, *Concluding Observations on China*, 8th sess, UN Doc CRPD/C/CHN/CO/1 (27 September 2012) para 38; Committee on the Rights of Persons with Disabilities, *Concluding Observations on Argentina*, 8th sess, UN Doc CRPD/C/ARG/CO/1 (27 September 2012) paras 41-42.

⁵⁹ Juan E Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/22/53 (1 February 2013) paras 85(e) and 89(b); Manfred Nowak, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/63/175 (28 July 2008) paras 44, 47, 61-65; see also Minkowitz (2007) and Minkowitz (2014c).

⁶⁰ Committee on the Rights of Persons with Disabilities, *Concluding Observations on Belgium*, 12th sess, UN Doc CRPD/C/BEL/CO/1 (3 October 2014) para 29.

compliance with services cannot be required as a condition of parole, probation or eligibility for any programs available to prisoners. Mental health services in prison, equally with those in the community, should be shifted to emphasise non-medical approaches.⁶¹

The CRPD prohibition of mental health detention related to criminal proceedings is directly opposed to Rule 82 of the Standard Minimum Rules for the Treatment of Prisoners, an outdated document that is currently undergoing revision in a process overseen by the UN Commission on Crime and Criminal Justice. Rule 82 directs that persons who are insane should not be held in a prison and instead should be transferred to mental institutions, and that others who suffer from mental diseases or abnormalities should be observed and treated in specialised institutions under medical management, and during their stay in prison should be placed under the supervision of a medical officer. The revision process has drawn attention to the conflict with CRPD.⁶²

The Special Rapporteur on Torture has proposed to replace Rules 82 and 83 with a provision applicable to all prisoners with disabilities that requires equality and non-discrimination and guarantees specific rights enshrined in the CRPD.⁶³

⁶¹ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) para 42; Committee on the Rights of Persons with Disabilities, *Concluding Observations on China*, 8th sess, UN Doc CRPD/C/CHN/CO/1 (27 September 2012) para 38.

⁶² Committee on the Rights of Persons with Disabilities, *Observations on the Standard Minimum Rules on the Rights of Persons with Disabilities*, UN Doc UNODC/CCPCJ/EG.6/2014/INF/4 (29 November 2013); World Network of Users and Survivors of Psychiatry (2011).

⁶³ Juan E Méndez, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/68/295 (9 August 2013) para 72.

Such a provision should state explicitly that inmates with disabilities are entitled to be eligible for all programmes and services available to others, including voluntary engagement in activities and community release programmes, and to be housed in the general prison population on an equal basis with others without discrimination. It should also provide a clear articulation of certain rights enshrined in the Convention on the Rights of Persons with Disabilities: the duty to provide reasonable accommodation (arts. 5 and 14); the duty to work towards creating an accessible environment (art. 9); the duty to ensure that persons with disabilities have access to all amenities without having to rely on assistance from fellow inmates (e.g., arts. 5, 20 and 28); the duty to respect the choices of persons with disabilities and to establish effective mechanisms to support decision-making in order to enable people with psychosocial or intellectual disabilities to exercise their legal capacity on an equal basis with others (see arts. 12 and 13).

The Special Rapporteur on Torture takes up additional points derived from the CRPD, in particular to introduce the requirement of free and informed consent by the person concerned in medical and health services, and to prohibit the use of restraint as a medical intervention.⁶⁴ He also urges the revised SMR to acknowledge that prisoners do not lose any of their rights or freedoms as a result of being deprived of their liberty.⁶⁵

As a principle of general application, the Rules should explicitly consider all inmates as subjects of rights and duties and not objects of treatment or

⁶⁴ Juan E Méndez, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/68/295 (9 August 2013) paras 54 and 58, respectively.

⁶⁵ Juan E Méndez, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/68/295 (9 August 2013) para 39.

correction.... In this respect, there is a need to revisit the concepts of “rehabilitation” and “re-education”, as well as of “corrective” and “correctional”, among others, in order to protect persons deprived of liberty from arbitrary intervention or treatment that may amount to torture or other ill-treatment.⁶⁶

This criticism of rehabilitative and correctional philosophies of penal detention is congruent with the premise that unwanted therapeutic interventions of any kind violate individual human rights. The power of the state is limited to imposing penalties and does not penetrate into the individual personality; individuals are free to assert their own relationship to the state, its laws and its coercive mechanisms. This is the opposite pole from restorative processes that promote reconciliation through accountability and encourage self-revelation and commitment to personal change in addition to making amends for harm done. Both however share a respect for the agency of criminal defendants, in one case by refraining from intrusion and in the other by constructing a participatory process available to those who agree with the charge and are willing to take responsibility for harm caused to victims and the community.

In summation, Article 14 prohibits all detention based on disability, including detention in any kind of mental health facility, and this includes detention in forensic psychiatric institutions and placement in mental health units within a prison or other detention setting without the free and informed consent of the person concerned. Persons with disabilities are subject to the same regimes of detention as others, and are entitled to equal guarantees in both the proceedings related to such detention and in the detention

⁶⁶ Juan E Méndez, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/68/295 (9 August 2013) para 40.

itself, including by provision of reasonable accommodation. The CRPD objectives and principles must be adhered to in the obligation of humane treatment in detention legitimately applied to persons with disabilities, including a prohibition on non-consensual treatment. The Standard Minimum Rules on the Treatment of Prisoners should be revised to remove provisions that contravene the CRPD and incorporate the right of all prisoners with disabilities to comprehensive guarantees of equality and non-discrimination in detention settings as they are entitled to under CRPD Article 14.

Equality and non-discrimination

Equality and non-discrimination is addressed transversally throughout the CRPD. It is a central element of the CRPD purpose and general obligations (Articles 1 and 4), a general principle (Article 3), and a structural and substantive component of virtually every article dealing with specific rights or undertakings. Elsewhere I have proposed an equality-based framework for legal capacity, arguing that equality is best served by ensuring that the legal system as a whole is friendly to the needs and circumstances of persons with disabilities, and that if necessary, features of that system, including civil and criminal responsibility, are re-designed so that they are equally responsive to the needs and circumstances of persons with disabilities as to others, utilizing the concept of inclusive design that is promoted in CRPD Article 4.⁶⁷ My argument here develops a proposal for inclusive design of criminal responsibility.

⁶⁷ Equality-based framework: Minkowitz (2010); Minkowitz (2012b). CRPD on inclusive design: *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) arts 2, 4.1(f), referring to “universal design” which is an alternate term with the same meaning.

CRPD Article 5 guarantees the right to equal protection before and under the law without discrimination.⁶⁸ This entails state obligations to prohibit discrimination based on disability, to guarantee to persons with disabilities protection against discrimination on all grounds (i.e. both disability-based discrimination and intersectional discrimination), and to ensure that reasonable accommodation is provided.⁶⁹ Measures that are needed to accelerate or achieve de facto equality of persons with disabilities do not constitute discrimination.⁷⁰

Article 2 defines disability-based discrimination as any distinction on the basis of disability that has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of human rights or fundamental freedoms in any field on an equal basis with others; it includes all forms of discrimination, including the denial of reasonable accommodation.

A negation of criminal responsibility based on insanity or mental incapacity discriminates based on disability and impairs the right to equal recognition before the law, as it gives legal effect to mental incapacity and stigmatises the individual concerned and all persons with psychosocial and intellectual disabilities. However, the right to fair adjudication of criminal responsibility on an equal basis with others may also require taking into account how factual circumstances that are conceptualised as disability may be relevant to any of the elements of an offense, including the subjective element of

⁶⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 5.1.

⁶⁹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) arts 5.2 and 5.3.

⁷⁰ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 5.4.

intent. As with other aspects of equal recognition before the law, criminal responsibility should be addressed with both formal and substantive equality measures.

The prejudice that attaches to categorizing disability as an excuse from bad behaviour, along with the prejudice that associates disability with risk, has an impact on people with psychosocial disabilities generally as well as on the rights of individual defendants. The Committee on the Rights of Persons with Disabilities has utilised Article 4 on General Obligations to call for the abolition of a legal standard that resulted in collective harm,⁷¹ and Article 4 can similarly support abolition of standards that negate criminal responsibility based on disability, along with Article 5.

Fleur Beupert and Linda Steele propose alternatively that discrimination be eliminated between acquittals based on mental incapacity and other acquittals.⁷² They argue that acquittals based on mental incapacity should be severed from any association between disability, risk and need for management and should be treated the same as any other acquittal, eliminating the forensic mental health system; civil commitment is also excluded by their argument since it is equally discriminatory under the CRPD and relies on discriminatory perception of risk based on the existence of a disability. This approach counters a significant source of discrimination, but leaves intact the adjudication of mental incapacity, which also discriminates based on disability and has detrimental consequences for the individual and for persons with disabilities collectively.

Nevertheless, it is suggestive of the possibility that there may be a kernel of value that we

⁷¹ Committee on the Rights of Persons with Disabilities, *Concluding observations on Spain*, 6th sess, UN Doc CRPD/C/ESP/CO/1 (2011) paras 17-18, condemning the application of more lenient standards for termination of pregnancy based on prospective disability of the fetus.

⁷² Beupert and Steele (2014).

want to affirm in creating some tolerance for behaviour that is bound up with motivations and perceptions that are conceptualised as psychosocial disability. We need to eliminate both sources of discrimination – the adjudication of mental incapacity, and the imposition of disability-based security measures – and to uphold the collective and individual relations of mutuality between persons with disabilities and others, while exploring this kernel of value.

In particular, we might devise a way to take into account diversity in decision-making, in order to ensure substantive and formal equality in criminal proceedings for persons with disabilities and for others whose decision-making is divergent from an idealised norm. This should be inclusively designed and congruent with a critical disability perspective, and should avoid giving any legal effect to mental capacity as an evaluative concept. Persons with disabilities are entitled to an equal benefit of the substantive and procedural standards established to ensure justice to those accused of a crime, and should not bear the burden of society's demand for preventive detention.

We can begin by ensuring that all elements of an offense as well as all available defences to a conviction are fully inclusive without distinction based on marginalised worldview or divergent decision-making of any person. The subjective element of an offense, to the extent that it takes into account the actual perceptions and worldview of the person at the time of the relevant act or omission, needs to be fully inclusive of persons with disabilities. It may in fact be necessary to ensure equal access to justice for persons with disabilities for such an inquiry to be incorporated transversally, where it may not already be the case. This should be done in an inclusive manner so that persons

with disabilities are not singled out or stigmatised for calling attention to the need for greater substantive fairness in adjudication of a culpable mental state.

Here is an outline of the elements of such a proposal:⁷³

1. As part of a finding of intent, i.e. the subjective element of a criminal offense, the trier of fact would be required to consider the defendant's perceptions, beliefs and worldview with respect to his or her actions that are charged as a criminal offense, to the extent such evidence is available.⁷⁴ This would be an open-ended inquiry

⁷³ This proposal has benefited from discussion with Alberto Vasquez, Chris Hansen, Myra Kovary, Mari Yamamoto, Sarah Knutson and Bhargavi Davar.

⁷⁴ One possible approach is to consider to the benefit of the defendant the question, "What factors may have impacted on the person's decision-making at the time the offense was committed?"

I have gone back and forth between a general framing of subjectivised mens rea as in the main text, and a more explicit invocation of decision-making diversity as presented in this footnote, and have not been able to completely reconcile them. I offer both here for a complete exposition so that readers can struggle with the same questions.

Framing the inquiry in terms of impact on decision-making acknowledges that we are all dealing with environmental stressors, major life crises, passing emotions, and similar factors throughout our lives, and that such factors, irrespective of the person's manner of expression or level of distress, should be considered in a sympathetic light to promote some margin of tolerance for rule-breaking behaviour up to a point that can only be determined in practice by the relevant community. (That determination could be guided by an analogue of the criterion for reasonable accommodation, that a margin of tolerance should not constitute a fundamental alteration of essential aspects of legitimate aims attached to the criminalisation of certain conduct, and it should not impose an undue burden on other members of society.)

There is a disadvantage, however, in that it may encourage us to objectify the person and speculate about his or her decision-making, giving rise to the very prejudice that we seek to avoid. Moreover, it may detract from our efforts to simply tell our stories as stories without categorising them into psychosocial disability or other pigeonholes, and may fail to respect the person's agency in the sense discussed above, in connection with recommendations of the Special Rapporteur on Torture to do away with 'rehabilitative' and 'correctional' concepts in criminal justice.

Ultimately some balance needs to be struck between making explicit an obligation to accommodate decision-making diversity, both related to disability and related to all other social diversity, through tolerance for rule-breaking behaviour, guided by an analogue to the criteria for reasonable accommodation, and creating inclusive practices both in criminal proceedings and in alternatives to such proceedings, that would allow all

into subjective and objective contextualizing factors that can help to make sense of a person's actions, and not an invitation to assess mental capacity. Such an inquiry would not in itself be dispositive of culpability, and would require an exercise of normative judgment as to the defensibility of the person's actions in light of their perceptions and beliefs and in light of their duties toward others. The likelihood of stereotype and prejudice influencing the degree of empathy accorded to individual defendants – including stereotype and prejudice related to decision-making diversity and disability – would need to be addressed with additional evidence, which should be deemed relevant, as well as jury instructions and systemic measures to build the capacity of the judiciary and to raise awareness among the general public.

2. Mental diversity, including unusual mental phenomena or beliefs, would be treated as any other perceptions, beliefs or worldview, and would not imply absence of criminal intent, as this would amount to a stereotyped view of disability as a status that exempts the person from moral and legal accountability. Rather, the aim would be to create a space for more holistic exploration of blameworthiness that is informed by a disability perspective to more closely approximate the goal of being judged by a jury of one's peers. By being incorporated into a finding on the subjective element, there would be no legal or

our stories to be heard while being judged only for how we have intolerably broken legal rules and thereby caused harm, and not for our diversity or distress. A question that directs the trier of fact to consider what factors impacted on the defendant's decision-making, free from psychiatric or psychological diagnosis or examination of any kind, can help to broach the subject but is not entirely satisfactory as an end goal.

- conceptual distinction made with respect to disability or any other marginalised identity; it would only be reflected that the subjective element was not satisfied.
3. The result would be an acquittal if there is a failure of proof of criminal intent or any other element of the crime, or if any affirmative defence is established. There could also be a reduction of the degree of culpability without reference to mental capacity.
 4. Non-discrimination and reasonable accommodation would be applied to all elements of the offense and to any available defences. No distinction would be made based on the form or content of subjective perception or beliefs where such perception or beliefs are relevant to a defence.⁷⁵
 5. There would be no affirmative defence of insanity or mental incapacity, no special treatment of evidence related to situations that are conceptualised as disability, no adjudication of mental incapacity, and no special verdict. There would be no differential treatment of evidence related to the question of factors that affected a person's decision-making. Expert opinions by mental health professionals based on assessment and diagnosis would be disallowed, as such

⁷⁵ For a comprehensive discussion of this approach, see Slobogin (2000) and Slobogin (2010). Sarah Knutson, in a personal communication, suggests the following defences as examples that could address people's subjective realities: automatism (the muscles act without control by the mind or with a lack of consciousness, which might include falling into a dreamlike state); intoxication as a defence to specific intent (which should include prescribed medications and withdrawal effects); mistake of fact (often used in conjunction with another defence, where the mistake led the defendant to believe their actions were justifiable under the second defence); necessity/lesser harm; lawful capacity of office, including civilians whose assistance is requested by a first responder, and "Good Samaritans" who cause injury while attempting to help a person in distress; self-defence; and duress. Some of these defences are already defined with reference to subjective reality; with respect to others, Knutson suggests that reasonable accommodation might be invoked to support the introduction of a person's subjective reality as a factor to be considered.

- evidence reinscribes objectifying relationships between medical and legal professionals and persons with disabilities and, as a further detrimental consequence, tends to generate prejudice rather than genuine empathy.
6. There would be no forensic mental health system or other special security measures following either an acquittal or a conviction. Those who are found guilty would serve their sentence in the ordinary place of detention under the same conditions as others, subject to reasonable accommodation and in compliance with the objectives and principles of the CRPD.
 7. There would be no declaration of unfitness to plead and no assessment that a person is incompetent to be put on trial. Everyone would have the right to participate in his or her own defence without any discrimination based on actual or perceived disability or decision-making skills. Procedural accommodations and support would be provided for all stages of criminal proceedings, including investigative stages.
 8. Alternative dispute resolution mechanisms including those based on restorative principles should be made available subject to the agreement of all concerned. Restorative processes differ from ordinary criminal proceedings in that they aim for reparation and reconciliation between the offender and the community, and can be flexible as to outcome rather than being limited to prison sentences, monetary fines or probation. In a restorative process, it is a given that contextualizing factors will be considered as a way to get to the most complete understanding possible of what needs to be repaired in the lives of the offender, the victim(s), and the community as a whole, and provide for appropriate action to

be taken. Offenders are encouraged both to take responsibility for harm caused to others, and to express their opinions and their needs so that the community can assist them in finding appropriate support and other resources. Restorative principles are congruent with an open-ended exploration that does not focus on disability labels or on the phenomena of altered realities or extreme distress per se but instead allows the person to emerge as a whole individual with multifaceted life experiences, who can contribute positively to the community. It may be necessary to incorporate training from a critical psychosocial disability perspective, such as Intentional Peer Support,⁷⁶ in preparation for restorative processes, so that this natural congruence can be reinforced and explained. In no case should any restorative process arrange for a regime of compliance with mental health services, which would be contrary to human rights obligations.

In summation, the CRPD can support both a formal equality proscription of any regime that negates criminal responsibility based on mental incapacity, and a substantive equality obligation to ensure that diversity in decision-making is accommodated when adjudicating culpability. The distinction appears to lie in that decision-making diversity is horizontal, inter-subjective and value-neutral whereas the concept of mental capacity is evaluative and hierarchical.

Several articles of the CRPD have bearing on criminal responsibility. There is a clear linkage with Article 12, as responsibility is a corollary of legal personality, legal capacity and the exercise of decision-making. Articles 13 and 14 provide alternate grounds in the right to access to justice and the right to liberty and security of the person on an equal

⁷⁶ Intentional Peer Support <<http://www.intentionalpeersupport.org>>.

basis with others. Article 5, which guarantees equal protection and benefit of the law, and Article 4, which requires states to abolish discriminatory laws and practices, can support a transformation of criminal responsibility from an equality and non-discrimination perspective, informed by specific rights guaranteed under other articles.

States should undertake to reform laws and practices related to criminal responsibility to abolish discrimination and create a system that mainstreams the rights of persons with disabilities and does not tolerate any separate or unequal proceedings or security measures. Features of such a system should include:

- Formal equality, with no legal significance given to the concept of mental capacity or evaluation of decision-making skills either with respect to the right to enter a plea and to stand trial, or in the adjudication of culpability.
- Removal of any doctrinal and attitudinal barriers to the utilisation by persons with disabilities of any defences or grounds for negation of criminal responsibility available to the general population.
- Fully inclusive doctrines of criminal intent, allowing the consideration of broadly defined subjective and objective contextualizing factors that may mitigate or negate culpability.
- Consideration given to the toleration of some rule-breaking behaviour using an analogue of criteria for reasonable accommodation.
- Elimination of psychiatric evaluations, forensic psychiatric detention, civil psychiatric detention and any other disability-based security measures or compulsory care or treatment.

- Penalties and other accountability measures that include persons with disabilities on an equal basis with others, and that adhere to the objectives and principles of the CRPD including the provision of reasonable accommodation.
- Ensuring that restorative processes and alternatives to incarceration are designed and function inclusively with respect to persons with disabilities.

Further considerations

Questions can be raised about subjectivised defences from critical race and feminist standpoints as well as from a disability standpoint. An open-ended inquiry as part of the determination of mens rea may simply leave too much room for prejudice of all kinds.⁷⁷ Drawing attention to diversity in decision-making could result in maintaining a de facto insanity defence albeit one resulting in a true acquittal, and any version of subjectivised mens rea could result in the exploitation of common sympathies and biases using racist, sexist and disablist narratives to obtain unfair acquittals as well as unfair convictions.

The inquiry could be accompanied by guidance (eg jury instructions) not only to counter potential bias (as suggested above), but also to ensure that it takes into account not only purely personal factors, but also objective circumstances made visible from the defendant's point of view that, due to common biases, might not be otherwise apparent.⁷⁸ Race, gender, disability, issues of economic and social class, and similar grounds of discrimination could be explicitly taken into account, both as part of any person's lived experience and as an instruction to consider potential inequities from those standpoints when coming to a conclusion about culpability. This approach draws on lessons from

⁷⁷ But see Stuntz (2008) for the view that open-ended mens rea favours racial equity at least when locally chosen juries are the triers of fact.

⁷⁸ See examples given in Nourse (2003).

restorative justice, in particular an invitation to the community to consider objective as well as subjective context for the occurrence of a crime, as worthy of attention and collective action.⁷⁹

The two sections that follow address additional considerations and clarifications about the intent of the proposal.

Resolving doubts in favour of the rights of defendants

The aim is to ensure both formal and substantive equality. There should not be a legal distinction that impacts disproportionately on persons with disabilities or that would discourage anyone from relying on persons with disabilities as counterparties in any transactions or as members of society with duties towards others on an equal basis. In our work on Article 12 generally there has been an insistence on removing from the legal arena any question about the quality of a person's decision-making. It is fair to question whether a proposal to inquire into factors affecting decision-making as a subjectivised aspect of mens rea, irrespective of any precautions, in effect reintroduces mental capacity as an excuse from criminal behaviour, i.e. whether or not it is just another form of the insanity defence rather than an alternative. I believe that it is not; rather, I have used the concept of decision-making diversity in order to highlight the ways in which an inclusive subjectivised mens rea could potentially satisfy legitimate social needs that have been counterproductively expressed until now in the insanity defence.

As discussed above, there is no obvious analogue to supported decision-making in the adjudication of responsibility. It could be said simply that responsibility is a matter of formal equality in the consequence of the exercise of agency on an equal basis with

⁷⁹ McCaslin (2007).

others. This paper proposes that alternatively, inclusive subjectivised mens rea could be such an analogue, as a mirror image of support.

While support for the exercise of legal capacity can socialise the decision-making process to the extent desired by the person concerned, the degree of support always remains subject to an individual's expressed will, and thus individual autonomy is foregrounded despite the socialisation of decision-making. In the case of responsibility, which complements the assertion of will as a social limitation on individual autonomy, the justice system as a representative of society is in control, and not the person concerned. Thus, it may be consistent with the Article 12 paradigm to introduce the particularities of a person's decision-making, not to place any individual in a hierarchy above or below others, but to give them the benefit of any doubt on an equal basis, in order to allow for discrepancies between individuals who are marginalised and the idealised norms by which they would otherwise be judged.

It will require further reflection and development conceptually and practically by the disability community, currently and formerly incarcerated people including those with disabilities, and legal practitioners to determine whether and how some version of subjectivised mens rea is viable to put into practice as a response to concerns for substantive equality.

Psychosocial disability identity and values

This article is grounded in an understanding of psychosocial disability as socially constructed. It may be useful to make explicit how this understanding supports an inclusively designed framework for criminal responsibility.

The kinds of experiences that may be masked in the general term psychosocial disability are multifarious and unique from person to person. I will now step into this article in the first person, and use my own experience as illustrative. In hindsight, the experiential categories that were constellated in a situation that culminated with forced psychiatric intervention included mental diversity (sensory and social sensitivity), trauma and need for healing, spiritual crisis and awakening, and life crisis/transition, in combination with others' failure to empathise and inability to respond constructively. The violent disruption and invasion of my body and consciousness by forced psychiatry was part of the crisis and came to define the crisis in my life story. The concept of psychosocial disability is not one that I choose to identify myself, but I see it as a bracketed space that allows me to identify needs for support, accommodation and protection of the right to equality and non-discrimination if any issues arise related to inter-subjective interactions where micro-diversity may at any time need recognition.

Politically, I identify as a survivor of psychiatry and as such, as a person who was perceived to have a disability and persecuted on that basis. (I use the term persecuted in the sense that I was targeted for adverse treatment amounting to severe human rights violations, based on aspects of myself that I could not change or should not be required to change.) As that experience has had a lifelong, life-shaping impact it is a part of my identity and I consider myself to be a person with disability. Part of the reason I am not personally comfortable with a psychosocial disability identity per se is that it is still a persecuted identity despite the CRPD. I can still be discriminated against under domestic laws anywhere in the world, in much the same way I was over 30 years ago. Another part of the reason is that in my daily life I am not facing significant discrimination or

need for accommodation and support at present. And a third part is that such an identity even without discrimination can become reified and obscure the strands of my personal story or stories (as they evolve through time not only by accretion but also by continual re-imagination), in which case psychosocial disability is no better than the older labels of mental illness or madness (each of which is also still current as a preferred identity of many people).

Much of the work of the peer movement of users and survivors of psychiatry and people with psychosocial disabilities has been to deconstruct and dismantle the negative and objectifying stories told about us by others, and to instead allow our own stories to emerge – whether in private contemplation or in mutual support. It is in this spirit that we advocate the bracketing of the disability or impairment concept with respect to ourselves, to frame it as “actual or perceived” disability, and that we reject the reification of concepts like mental capacity.⁸⁰ My argument and proposal in this article draw on the value of dismantling stories of objectification and allowing personal stories to emerge, bracketing the concept of disability while using it as a reference point for certain kinds of prejudice and discrimination that may prevent certain stories from being fairly received and considered. (At the same time, we need to respect the choice to remain silent, to refuse to explain oneself, especially in the face of official demands to tell an acceptable story or to participate in story-telling at all. Both the psychiatric system and the penal system, especially in its rehabilitative/correctional aspects, enact power over individuals in part by enacting a narrative that insists on the need for explanation of life events in order to prevent future occurrences. This too needs to be challenged.) As discussed

⁸⁰ World Network of Users and Survivors of Psychiatry (2008).

above, the value of stories for doing substantive justice is also congruent with restorative processes. I hope that by mainstreaming the consideration of blameworthiness from an inter-subjective standpoint we can take account of a disability perspective while giving the benefit to all people, as many innovations from a disability perspective have done, from ramps to CART transcription, and as it is also hoped the practice of support in decision-making will do for the affirmative exercise of legal capacity.

Conclusion

A negation of responsibility based on the attribution of mental incapacity is fundamentally flawed. Unfitness to plead, incompetence to stand trial, insanity acquittals, and incarceration in forensic psychiatry as a security or treatment measure, all constitute discrimination based on disability, and violate obligations of formal and substantive equality towards persons with psychosocial disabilities.

This article has proposed an alternative framework for adjudicating criminal culpability that recognises the relevance of both personal and environmental factors that affect a person's decision-making, and that accommodates experiences that have been constructed as psychosocial disability. The proposal is based on full inclusion of such experiences within existing doctrines of mens rea and defences of justification and excuse, and on the claim that substantive equality demands the recognition of some version of subjectivised defences to culpability. It avoids giving legal significance to the concept of mental incapacity and rejects the possibility of any disposition to medical detention or supervision. Persons with disabilities who are convicted through such proceedings would be remanded to the penal system, which must itself be transformed in light of the CRPD, and augmented or replaced by alternative measures of accountability

that also must be fully inclusive of persons with disabilities in design and operation. Such alternatives must not rely on compliance with therapeutic interventions, which is contrary to the CRPD and contrary to the self-determination and personal integrity of any individual.

The likelihood of persistent discrimination based on gender, race and disability remains a caveat that warrants caution in proceeding with any innovation that gives more leeway to inter-subjective considerations in criminal adjudication. Nevertheless it is clear both that criminal intent must be made fully inclusive of people with disabilities, and that some innovation is needed in both process and doctrine, to take account of diversity and combat inequality of all kinds. The concepts and proposal advanced in this article aim to contribute to the legal and social equality of persons with disabilities as persons with rights and duties under the law who have a corresponding stake in governance and citizenship, and also aim to support wider reforms that satisfy our need for meaningful justice and mutual accountability.

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