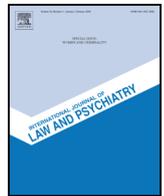




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A realistic approach to assessing mental health laws' compliance with the UNCRPD

John Dawson*

Faculty of Law, University of Otago, Dunedin, New Zealand

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ABSTRACT

This article argues that a more realistic view should be taken of the implications of the Convention on the Rights of Persons with Disabilities for mental health law than the view taken by the UN monitoring committee, in its General Comment on Equal Recognition Before the Law, in 2014. This more realistic interpretation would not forbid reliance on the concept of mental capacity in the law. Nor would it forbid legislation that authorises substitute decision-making or involuntary treatment. Less radical reforms, it is suggested, could promote Convention compliance. These reforms would shift mental health law away from reliance on over-broad concepts like “mental disorder” or “mental disability”, but would still permit use of legal standards that rely on specific impairments in mental function that are relevant to a person's capacity to make particular decisions or perform specific tasks. Strong efforts would be required to promote supported decision-making, and respect advance directives, but substitute decision-making and treatment without consent would be permitted in exceptional circumstances, subject to appropriate safeguards and independent review. Under this interpretation, those measures would not constitute discrimination in the law on the ground of disability, or denial of equal recognition before the law. This approach, it is argued, is more likely to generate positive responses from state parties in terms of law reform.

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1. Introduction

The United Nations Convention on the Rights of Persons with Disabilities¹ (the Convention) undertakes the important and demanding task of promoting the human rights of persons with disabilities throughout the world. One way the Convention might perform this task is by providing state parties with a clear yardstick against which to measure the adequacy of their laws, with an eye to reform. This article argues that the Convention is failing to perform this function adequately, at least with respect to mental health laws. It is failing due to ambiguities and inconsistencies in the Convention's text, and – more importantly – due to the range of questions left begging by a radical interpretation of that text offered by the body that monitors states' compliance with the Convention – the UN Committee on the Rights of Persons with Disabilities (the Committee) – in its General Comment No 1 on Equal Recognition Before the Law (the General Comment), released in mid-2014.

The Convention is open to a range of plausible interpretations that might resolve some of the ambiguities and inconsistencies in its text, but crucial aspects of the interpretation offered by the Committee, in the General Comment, are not at all plausible – for reasons given

below – and there is no evidence that state parties have any intention of following the Committee's more radical suggestions as to what is required in reform of their mental health laws. Several state parties, foreseeing the potential problems, entered reservations, on ratifying the Convention, that rejected in advance aspects of the interpretation later offered by the Committee,² and other state parties, in their periodic reports to the Committee, continue to cite without apparent embarrassment aspects of their mental health laws, as evidence of compliance with the Convention, that are quite incompatible with the Committee's published views.³

This article therefore considers certain weaknesses in the Convention, and especially certain problems with the Committee's interpretation of the Convention published in the General Comment. A case is then made for a more conservative interpretation of what the Convention demands. It is argued that this interpretation – being more realistic and workable – generates more useful standards against which to assess the adequacy of state parties' mental health laws. I concede that this more conservative interpretation contradicts a number of the Committee's arguments in the General Comment, particularly because it would require continued reliance, in the law, on the notion of impairment in specific mental functions. Such reliance would be required

² For the text of all reservations to the Convention, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en accessed 8 August 2014>; see especially the reservations of Australia, Canada and Norway.

³ See, for instance, the country reports of Australia: CRPD/C/AUS/1 (7 June 2012), at paras 76, 96; Sweden, CRPD/C/SWE/1 (18 September 2012), at paras 137, 140; Denmark: CRPD/C/DNK/1 (7 May 2013), at paras 142–147; and New Zealand: CRPD/C/NZL/1 (1 October 2013), at paras 67–69, 83–89.

* Tel.: +64 3 4798909, fax: +64 3 479 8855.

E-mail address: john.dawson@otago.ac.nz.

¹ United Nations Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3, entered into force 3 May 2008 (hereafter the Convention).

when decisions must be made about whether a person's autonomy should be respected, or whether – in contrast – the state is entitled to intervene, in certain circumstances, in a person's life without their consent. In the General Comment, the Committee specifically prohibits use of functional tests of mental capacity in legal contexts, saying that would constitute discrimination against people with disabilities within the law. In contrast, this article argues that functional tests of mental capacity *should* be used in mental health law, and their use would reflect a more balanced interpretation of the Convention as a whole.

The final section of the article uses this more conservative interpretation to assess the degree of compliance with the Convention shown by the current or proposed mental health legislation of four different jurisdictions. The overall purpose is to demonstrate that the approach advocated here constitutes a more useful guide to law reform than the arguments offered by the Committee in the General Comment.

2. The problems with the Convention

The Convention affirms certain central values that must be guaranteed to all persons with disabilities. These values are human dignity and equality, freedom from discrimination, individual autonomy, fair access to resources and support, and full social participation and inclusion. These values underpin the Convention's bold statements of rights, and state parties commit themselves, on ratifying the document, to respect these values in their laws (article 4).

Nevertheless, the Convention presents numerous problems of interpretation. One problem is ambiguity. Another problem is reconciling potential inconsistencies between the different rights affirmed. A third problem is reconciling the general (and strong) terms in which many rights are affirmed, in specific articles of the Convention, with exceptions to those rights listed in subsequent parts of the same article. Many indicators that would usually be present in well-drafted legislation to show how different aspects of a code fit together seem deliberately omitted from the Convention to avoid controversy between those holding incompatible views in the drafting process (Kampf, 2010; Lawson, 2007; Sabatello & Schulze, 2013). That approach has the great disadvantage of failing to clarify central aspects of the Convention's meaning – hence the importance of the interpretation of it offered by the Committee.

2.1. The meaning of discrimination

The first problem with the Convention – that of ambiguity – is particularly significant when it affects the meaning of its central concept, that of “discrimination on the basis of disability”, and its opposite, treating people with disabilities “on an equal basis with others”. A central question, for current purposes, is what constitutes discrimination against persons with mental disabilities *in the law*, or in legal reasoning. In particular, does it constitute discrimination in the application of the law to rely on expert evidence that a person is experiencing abnormal mental functioning – associated with a certain condition, such as severe depression – when a decision must be made about aspects of their legal capacity or their treatment without consent. On one view, such reliance would constitute discrimination against a person on the basis of their disability, because the decision would be based on evidence of abnormal mental function associated with their condition, especially if the decision was considered to have adverse consequences for them. On another view, *failure* to take into account the consequences of the person's condition for their mental functioning would be discrimination, if it led to their being judged – inappropriately – against the standard of a person not so affected, thereby depriving them of some benefit to which they would otherwise be entitled – depriving them of the benefit, for instance, of the insanity defence that would exonerate them of liability for conduct for which they should not be held criminally responsible due to their mental functioning at the time.

So, is it discrimination to *take* into account, or *not take* into account, the effects of a person's condition on their mental functioning when making legal decisions? It might be thought that the answer is that discrimination involves *taking* the matter into account when it would have adverse consequences for the person, and *not taking* it into account when it would deprive the person of some advantage otherwise due. Unfortunately, that approach begs the question of what counts as an advantage or a disadvantage for a person – whether, for instance, providing treatment *without consent* that *improves a person's health* is an advantage or not – the very nub of the controversy. We cannot fix the meaning of discrimination in this way, therefore, because further, controversial judgments of that kind are required. The Convention, in any case, does not resolve the ambiguity in this central concept of discrimination on the ground of disability. This poses a serious barrier to satisfactory interpretation of the text.

2.2. Relations between rights and the mediating role of capacity

A second, related problem concerns internal inconsistency between various rights, particularly between (what are usually called) negative and positive rights, supported by the Convention. The text leaves considerable uncertainty as to the circumstances in which the negative or positive rights of a person should prevail. In particular, when are the negative rights of a person with disabilities – such as their rights to autonomy, physical and mental integrity, and generally to be free of interference by agents of the state – to prevail over their positive entitlements – to full social inclusion and participation, the highest attainable standard of health, and a minimum standard of living – when those rights conflict?

Involuntary psychiatric treatment, for instance, could both limit a person's autonomy and promote their social inclusion, health, and standard of living. Would it therefore violate or promote the person's rights under the Convention as a whole? In many legal systems, a key concept in settling the balance between these competing imperatives or rights is that of capacity (or competence) on the part of the person to take the necessary action or make the relevant decision. If they have the capacity to decide on their own need for treatment, for example, it would usually violate their right to autonomy and integrity to impose treatment without their consent, even if the treatment proposed would assist their health or promote their social inclusion. The balance between those different interests would be for them to decide. If they lacked the capacity to make the relevant decision, on the other hand, the state would have the power (and often the duty) to intervene, to promote their positive entitlements, even if that might require their involuntary treatment.

Assessing capacity is not a purely scientific or technical matter. Evaluative elements intrude, especially when deciding on the level at which a person ought to function to be viewed as having capacity in a certain domain. But the concept of capacity is often used, for want of a better alternative, to define the line between two seemingly incompatible obligations of the state – to respect individual autonomy, and to protect the interests of people who are vulnerable.

Intentionally, it seems, the Convention does not mention this central balancing concept in its text, despite the key role played by the concept of capacity in most jurisdictions' healthcare law. This produces a quandary for the Convention's interpretation. Is a person who would be judged to lack the capacity to make a certain decision still to be viewed as having the right to make it, as an aspect of their autonomy, or has their lack of capacity removed the ground upon which their autonomy stands? Are they no longer free to act in that domain, so their right to certain positive entitlements (to the best attainable standard of health, for instance) kicks in as the dominant aim? The spare text of the Convention does not indicate how to mediate conflicting rights of this kind.

2.3. General rights and particular exceptions

The third difficulty concerns inconsistencies between different propositions within a single article of the Convention – between bold,

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