The Power of Law and the Power of Knowing

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Legal capacity is the law's way of acknowledging someone as person, and recognising the validity of their decisions in law. We say that legal capacity has two elements – legal standing, and legal agency. Legal standing means being recognised as a person before the law – someone the law has to pay attention to, someone who matters to the law. Legal agency is the power to take actions the law must recognise – to enter a contract, make a will, or get married. Historically, many different groups were denied legal capacity, including women (especially upon marriage), slaves, and racial or ethnic minorities. In contemporary societies, one of the only remaining ways in which adults can be denied their legal capacity is in the form of adult guardianship or wardship.

As a general rule in most legal systems, once you become an adult, your legal capacity is fully recognised and you are entitled to make all legally binding decisions for yourself. You decide what contracts you want to make with others, whether or not to get married, whether to rent a house or take out a mortgage, etc. One of the main exceptions to this is where the law deems an adult to lack mental capacity, to be unable to make a decision for herself. This mostly affects disabled people, including people with intellectual disabilities, people who have experience of mental health services, and people with dementia. When this happens, the law denies legal capacity to that person, either in general, or specifically for a particular decision or set of decisions. New thinking in human rights law seeks to change this approach – to move away from denying legal capacity altogether, and instead, to support people to make decisions for themselves; or in very challenging situations where it is impossible to determine the person's wishes, to do our best to interpret what their wishes would be in that situation, and make the decision on that basis.

The UN Convention on the Rights of Persons with Disabilities is a new human rights treaty that seeks to radically change the way we think about capacity in our law. Article 12 of that Convention makes clear that disabled people, including people with dementia, are entitled to enjoy legal capacity on an equal basis with others, and are entitled to support in exercising their legal capacity. The UN Committee on the Rights of Persons with Disabilities which monitors the Convention at the international level, has provided an authoritative interpretation of how the rights in Article 12 can be implemented in practice in General Comment 1. This General Comment makes clear that states need to abolish systems that discriminate against disabled people by denying their legal capacity, including those that purport to assess the individual's mental capacity, and deny legal capacity accordingly. It demonstrates that when the law makes a decision based on the 'best interests' of an adult the result can be infantilising and demoralising. While sceptics argue that this radical approach risks abandoning people to dangerous choices, proponents counter that in fact what we are being asked to do is to go deeper, to reach out more, to be more creative and flexible in how we support one another, and recognise the dignity and autonomy of each human being, no matter how complex their disability may be.

In developing these new ideas about how the law can respond to people using support to make decisions, disabled people, and human rights experts, have worked together to demonstrate how flawed our current systems of adult guardianship or wardship are, and how they do not live up to their promise to protect people. Law likes bright distinctions and clear categories; it thrives on the fiction that we can know with certainty who has capacity for a particular decision at a particular moment in time, and who does not. But research, and life experience, shows us that determinations of capacity are far from certain and objective – they are subjective, and value-laden. So much depends on how, when, where and with whom the person's capacity is assessed. Even under the most supportive conditions, experts may disagree as to whether the person actually understands the 'reasonably foreseeable consequences' of their actions. Given this uncertainty, wouldn't it be better to focus not on some arbitrary distinction between having, and lacking capacity, but on understanding what the person actually wants, and trying to respect that wish as much as possible?

Our current law swoops in at a fixed point in time to determine capacity in a way that can dramatically alter the person's future and life choices – and this does not leave much room for grey areas where the person's wishes are unclear, where the person expresses conflicting preferences or where they are clear in their decision initially but subsequently change their mind. By contrast, laws based on a more supportive framework allow new and different possibilities. When we embrace the grey areas and uncertainty, our work to support people is challenging, but more honest, and more rewarding. Those who are sceptical of laws which recognise this supportive approach are concerned that supporters might exploit or take advantage of the person, but there are many ways to prevent this, and we must also acknowledge that the current systems have never succeeded in preventing exploitation.

We all want those we love to be safe and free from harm. Recognising the role of supporters in law can help to keep people safe – because we know from decades and centuries of legal interventions, that it is people who keep people safe, not the law. The more people that know us well, who understand our wishes, who know us through time and understand the choices and mistakes we've made, and continue to love and respect us, the safer we will be. The more supporters that are involved in the process of interpreting a person's wishes, the harder it is for any one individual to dominate the process or exploit the person. We all try to persuade those we love to make decisions we think will be good for them – but this is not the same as the law granting an individual power over another person to make that decision on their behalf, without their consent. That is not persuasion - it is legally sanctioned coercion. And more than that – it's a burdensome legal responsibility, which many people don't even want to have over those they care about in their lives.

Supporting people, not forcing them into decisions, fits more naturally with the ethics of care. But supporters need a safety net too – somewhere to turn for advice and guidance, to make sure they're not letting their impulse to rescue take precedence over their duty to listen, respect and support. Supporters need to be willing to be transparent and accountable, to share how they arrive at interpretations of the person's wishes, but they also need to be trusted by the legal system to do this vital, and delicate work. For too long, the law has regarded only certain kinds of knowledge as objective, trust-worthy or valuable – medical knowledge, and the knowledge of health and social care professionals in particular. But when it comes to the most personal and intimate decisions of our lives – where and with whom to live, who we allow into our home to support us, what we’re willing to put our bodies through, how we spend our time – who would you trust to know your wishes and respect your decisions?

For me, the Assisted Decision-Making (Capacity) Act has potential to change how the law tackles these challenging questions, because it grants legal recognition to different kinds of support arrangements, including advance planning mechanisms, that allow people to choose who they want to support them, and when and how this will happen. But this Act is also deeply flawed. It is still based on the fiction that we can be sure about an individual’s capacity at a particular moment in time, and grants powers to others to make decisions about our lives, even if we do not want them to, based on a perceived lack of capacity. So we should not be satisfied with this law as it currently stands, but need to push, constantly, for law to continue to evolve, to recognise the complexity of support and decision-making in all of our lives.

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