

Does decision-making capacity
assessment have a future?

Introduction

- Some terms and concepts
- Decision-making capacity assessment
 - How it is standardly presented
- Objections to this usage
 - UNCRPD General Comment on #12 Equality before the law
 - [A] Not possible to assess inner mental processes
 - [B] Applied discriminatorily
- Responses to [A] and [B]
 - Supported decision making
 - Discrimination and difficulty

Some terms and concepts

- Decision-making capacity (DMCapacity) is on a continuum
- Decision-making competence (DMCompetence) is a cut-off (a person either is or is not competent to make a certain decision) along the continuum of DMCapacity
- Decision-making capacity can be assessed on the basis of contributory capacities of
 - Understanding relevant information
 - Appreciating how it applies to oneself
 - Reasoning with the information to reach a choice
 - Communicating the choice (and its basis)
- These also lie along continua

The standard account of the roll of DMC assessment

- An assessment of decision-making competence enables us to draw a line between those who are able to make their own decisions and those who are not
- Where a person is unable to make their own decision, some form of substitute decision making is allowable

Objections to the use of DMC assessment

- UNCRPD

- DMC assessment is discriminatory with respect to legal capacity

- “In all of those approaches [status, outcome, functional], a person’s disability and/or decisionmaking skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 [1-3] does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity”.

- [Committee on the Rights of Persons with Disabilities Eleventh session 31 March–11 April 2014 General comment No. 1 (2014) Article 12: Equal recognition before the law #15]

- DMC assessments do not support autonomy

- Schwan and Fogal & Schwan (another time)

UNCRPD

- Reasoning of Committee on the Rights of Persons with Disabilities in rejecting assessment of DMCapacity
 - [A] #14 ... The concept of mental capacity is highly controversial in and of itself. Mental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity ... #15 it presumes to be able to accurately assess the inner-workings of the human mind
 - [B] #15 it is discriminatorily applied to people with disabilities ... 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.

Potential responses

- To [A]:
 - Is it presented as ‘objective, scientific and naturally occurring phenomenon’ [when it isn’t]
 - My understanding is that it originates mostly in the law [but happy to be corrected]
 - Cf the work of Applebaum and Grisso et al
 - It reflects folk psychological ideas (not ‘objective, scientific ...’)
 - Understanding, appreciation, reasoning ... are all derived from ordinary day-to-day approaches to our psychological lives
 - The notions of ‘will and preferences’ are also folk psychological concepts
 - Note that scientific accounts of decision-making suggest that most reasoning is post-hoc
 - Presumption of the ability to accurately assess the inner-workings of the human mind [when we don’t have this?]
 - We could defend this presumption directly (allowing that these are folk psychological assessments)
 - Most accounts of supported decision-making rely on precisely this ability (e.g. of a support person to know what another person is feeling, thinking, etc. etc.)
 - Note though that the objection may be to who does it ...

Supported decision-making

- Account of supported decision making seems to appeal to the ability to assess the inner workings of the human mind:
 - “[The] minimum threshold of human agency we might characterize as: to act in a way that at least one other person who has personal knowledge of an individual can reasonably ascribe to one’s actions, personal will and/or intentions, memory, coherence through time, and communicative abilities to that effect” [p.66]
 - “...human will - that instinctive and inherently human imperative, that sense of being, that thing that tells us we are here, that we can feel. I honestly don't think it has anything to do with intellect. Ian [Audrey’s profoundly intellectually disabled son] has it! It is what makes him stop, suddenly, and listen to the sounds of the birds or of the wind blowing through the trees.” [p.63]
 - Bach, M., Kerzner, L. 2010 A New Paradigm For Protecting Autonomy And The Right To Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice Commissioned by the Law Commission of Ontario

Supported decision-making

- Any account of supported decision making seems to appeal to the ability to assess the inner workings of the human mind:
 - “[The] minimum threshold of human agency we might characterize as: to act in a way that at least one other person who has personal knowledge of an individual can reasonably ascribe to one’s actions, personal will and/or intentions, memory, coherence through time, and communicative abilities to that effect” [p.66]
 - “...human will - that instinctive and inherently human imperative, that sense of being, that thing that tells us we are here, that we can feel. I honestly don't think it has anything to do with intellect. Ian [Audrey’s profoundly intellectually disabled son] has it! It is what makes him stop, suddenly, and listen to the sounds of the birds or of the wind blowing through the trees.” [p.63]
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Potential responses

- To [B]
 - Discriminatory application [so shouldn't apply it]
 - Possible response
 - The possibility of discriminatory application of some idea shouldn't necessarily prevent its application
 - E.g. 'all football matches should have a qualified referee' – but we discover that this is being discriminatorily applied only to men's matches – this doesn't seem to make the idea a bad one
 - It could be countered that in the case of a judgment that a person lacks DMC, they have been 'disabled' by definition
 - But this seems to imply that there is after all no discrimination against any independently identifiable group

Discrimination and difficulty

- To answer the question whether a person is able to make a decision depends on two things:
 - Inherent difficulty of the decision
 - E.g. how complex the concepts and relationships of ideas and facts are
 - The person's initial capacity to understand these complexities
 - And responses to this

Discrimination and difficulty

- Consider any complex decision that anyone might be faced with, e.g. a financial decision about savings for retirement
- How can we reduce the difficulty inherent in a decision
 - By breaking it down into smaller simpler choices for example
 - By the use of heuristics such as decision-trees
 - By the use of communicative messages which are non-verbal
- How can we increase a person's decision-making capacities in relation to the difficulties of a decision
 - By outsourcing some of the cognitive load e.g. of information gathering and analysing to experts
 - By helping a person develop and understand their own preferences in relation to what is possible

Discrimination and difficulty

- Could the same model be applied in supported decision making?