

Anna Arstein-Kerslake

Legal Capacity & Gender

Realising the Human Right to Legal
Personhood and Agency of Women,
Disabled Women, and Gender Minorities

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Foreword

The concept of legal capacity has long mystified ethicists, lawyers, and policymakers. Legal capacity may have an abstruse and technical quality, but it is in fact central to the way we engage in society. It regulates, for example, who can vote, enter contracts, inherit, marry or form intimate relationships, and make decisions about their own medical treatment. This path-breaking book addresses a long-hidden problem—the way that legal capacity is bestowed and denied according to a person’s status and power. Scholars have paid little attention to the reality that some marginalised groups of people are restricted in how they can participate in political and social communities via denials of legal capacity. Gender plays a critical role in these restrictions.

Here, Anna Arstein-Kerslake builds on her impressive work in the field of human rights and disabilities to investigate a broader field of enquiry. She deftly marshals an extraordinary range of literature in her journey—including philosophical, legal, sociological, and psychological writing—as well as drawing on her own experiences working with civil society and the United Nations. Dr Arstein-Kerslake offers a historical exploration of the allocation and denial of legal capacity and charts the engrained patterns of discrimination that developed. But restrictions on legal capacity are not just a historical relic and Dr Arstein-Kerslake highlights the continuing oppressive treatment of gendered categories of people: women, disabled women, and gender minorities (especially those who resist binary identities).

The book gives a finely grained account of the international jurisprudence on legal capacity. It shows how a right to legal capacity emerged from the right to recognition as a person before the law, first set out in Article 6 of the 1948 Universal Declaration of Human Rights. This right, often overlooked or misunderstood, was elaborated in increasing detail in a series of United Nations treaties, culminating in Article 12 of the 2006 Convention on the Rights of Persons with Disabilities. This provision presents legal capacity as involving both personhood and agency. It guarantees the right to legal capacity ‘on an equal basis with others in all aspects of life’ and obliges states to support persons with disabilities so that they can actually

exercise legal capacity. It also details the need for safeguards to allow the right to be effectively realised.

Dr Arstein-Kerslake guides the reader through the complex debates around, and the politics of, Article 12. Some states have resisted giving the provision its full force, whittling back its scope through ‘interpretative declarations’ made at the time of ratification. Others have struggled to implement the right because of lack of experience or deep-seated beliefs about disability.

Dr Arstein-Kerslake skilfully deploys critical social theory along with legal analysis to illuminate the concept of gender, drawing from feminist, queer, and disability studies literatures. She shows the power of an intersectional analysis to uncover the linkages between legal capacity and privilege. The book traverses images of women’s irrationality, incapacity of persons with disabilities, and the deviance of gender minorities and tracks the tenacity of these views in modern legal systems.

Despite the disturbing picture of gender oppression that emerges from Dr Arstein-Kerslake’s careful research, this book is infused with optimism about the possibility of change. Dr Arstein-Kerslake argues that legal capacity must be available for everyone on the basis of equality. She proposes the notion of a ‘continuum of support’ to respond to people’s differing abilities for decision-making.

This book juggles three significant tasks with aplomb. First, it presents a contextual history of the development of the right to legal capacity. Second, it forges new ground in scholarly terms, highlighting the role that gender plays in the construction of personhood and agency. Third, its clear identification of the paths to secure and sustain the right to legal capacity will be a valuable companion in campaigns for law reform, and for states that wish to deliver on the promise of the CRPD. Dr Arstein-Kerslake identifies striking examples of the right in action from Peru, Ireland, the United Kingdom, and Australia.

Written with clarity and spirit, the book is no dry legal tome. It is engaging and passionate and makes clear the urgency of addressing legal capacity. This rich book will guide, challenge, and inspire in equal measure.

Melbourne Law School, Carlton, VIC,
Australia
October 2020

Hilary Charlesworth

Preface

The right to legal capacity is a new line of scholarly inquiry. It had been largely ignored by academics until the 2006 Convention on the Rights of Persons with Disabilities (CRPD), which provided new detail to the right to legal capacity (Dhanda 2006; Minkowitz 2006; Dinerstein 2011). The author's 2017 book, *Restoring Voice to People with Cognitive Disabilities* (Cambridge University Press), was the first book published on the topic. She has also published numerous journal articles on the subject and has been invited to consult with international and domestic government bodies across the globe (Flynn and Arstein-Kerslake 2014; Arstein-Kerslake 2015, 2019; Arstein-Kerslake and Flynn 2016, 2017; Arstein-Kerslake and Black 2020). Over and over again, she has uncovered denials of the right to legal capacity that are uniquely experienced by women, disabled women, or gender minorities (Arstein-Kerslake 2015, 2019). To date, there has been no significant scholarly work in this area. This book fills that gap.

This book examines this new line of scholarly inquiry, the right to legal capacity, with a focus on the role of gender. It uses human rights law, critical social theory, and selected domestic law and policy to provide an analysis of how gender influences denials of the right to legal capacity and what protections are needed to secure the right. The aim is that the book is both a scholarly analysis and a useful tool for law reform.

The book draws on the research and knowledge the author has gained as a leader in the field of legal capacity rights. It builds on her 2017 book and explores the far-reaching implications of Article 12 of the CRPD. Most jurisdictions are struggling to understand the meaning of Article 12 and to bring their laws into compliance. The author's 2017 book laid out the history, theoretical underpinnings, and legal meaning of the right to legal capacity. This book begins to explore the multitude of practical implications of Article 12 in order to provide guidance for those struggling jurisdictions. It will focus on gender because some of the most significant oppression as a result of denials of legal capacity occur on the basis of gender (Arstein-Kerslake 2019; Cannoot 2019). Women, disabled women, and gender minorities are suffering from historical and modern denials of their legal

agency and personhood—the two components of legal capacity (Devereux 2014). This book reveals these denials and the resulting oppression. It also presents a way forward. Steps towards the realisation of the right to legal capacity can be achieved through law, policy, and practice reform. This book presents examples of good practice in such reform and makes recommendations for further reform to secure the right to legal capacity for women, disabled women, and gender minorities.

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Chapter 1

Right to Legal Capacity: Debates and Legal Argument



1.1 Introduction

The recognition of an individual's legal capacity is the recognition of an individual as a decision-maker. It elevates the individual in the social order. They are recognised as a legal person and a legal actor and they possess the ability to leverage legal relationships and change the legal landscape that they are existing within. Equality requires not only the absence of discrimination but also such means to navigate our complex social world. In this way, the freedom to make decisions and to have those decisions respected is core to equality. Women, disabled women, and gender minorities experience denials of the right to legal capacity at higher rates and in unique ways. These denials are often due to discrimination and they can result in women, disabled women, and gender minorities lacking the tools necessary to wield power and inhabit positions of privilege.

1.1.1 Women, Disabled Women, and Gender Minorities as Minority Groups

Women, disabled women, and gender minorities are discussed, at times, in this book as three separate minority groups. They are minority groups because they experience social marginalisation in various ways as a result of their membership in these groups. These groups are discussed as separate intentionally in order to acknowledge that there are unique experiences of decision-making restrictions that individuals within these groups have experienced that are directly due to their membership in one of these groups. It is also important to acknowledge that many people may be a member of more than one of these groups—as well as other additional groups, such as ethnic or religious minorities. Where possible, I will try to shed light on experiences of people that are subjected to decision-making restrictions and have

intersectional identities across multiple groups, because these experiences are also unique from the experiences of people that only hold membership in one minority group.

Disabled women, in particular, are always both women and disabled women. However, I believe it is important to recognise and discuss the distinction between disabled women and the larger group of women. Disabled women experience marginalisation in a unique way and at a higher rate than non-disabled women. Separating the groups may seem to imply that disabled women are a distinct group from women. However, I discuss the two groups separately to identify the unique experiences that disabled women have, not to signal that disabled women are not an integral and inherent part of the larger minority group of women.

Terminology related to sexual and gender minorities is not consistent in academic literature or elsewhere (Eliason 2014). The term ‘gender minorities’ is used in this book to refer to individuals who experience and/or express gender as non-binary. I have chosen this term and other related terms in an effort to use terminology that is consistent with the queer scholarship and the queer rights movement (Wojcik 1994; Butler 2004; Spade 2009; Rahman 2014; Spade 2015; Altman and Symons 2016; Langlois 2017). As used in this book, the term ‘gender minorities’ includes transgender, intersex, transsexual, and other non-binary people. The term ‘transgender’ is used to refer to people who identify as a different gender from their sex at birth—and those that are gender nonconforming (Currah 2006; Eliason 2014). The term ‘intersex’ is used to refer to individuals who have sex organs that are gender indeterminate (Blizzard 2002; Preves 2003; Harper 2007; Karkazis 2008). The term ‘cisgender’ is used to refer to non-transgender people or individuals who identify with the same gender as their sex at birth (Cava 2016, p. 1). In this book, ‘gender minorities’ is differentiated from ‘sexual minorities.’ Sexual minorities is used, in this book, to refer to those whose sexual preference is other than heterosexual. This book primarily discusses gender minorities, as opposed to sexual minorities, because it focuses on commonalities in experiences of legal capacity barriers and denials on the basis of gender, not sexual preference—although research in this area is also needed.

1.1.2 Social Model and the Term ‘Disabled Women’

I have chosen to use the terms ‘disabled women’ and ‘disabled people’ to acknowledge the social model of disability. The social model of disability theorises that disability is created by an individual’s social environment. As such, many scholars and activists adhering to the social model, prefer the use of terminology that places the word ‘disabled’ first, in acknowledgement that the individual is disabled by the environment (Mallett and Slater 2014; Andrews et al. 2019). According to the social model, an individual with an impairment only becomes disabled when social barriers are erected that prevent the individual from engaging, on an equal basis, in the social and physical world (Oliver 2013; Shakespeare 2016). For example, a woman becomes disabled when she is prevented from attending sexual education courses

because she has a cognitive impairment. That lack of information—or accessible information—can disable the women to the point of placing her in sexually abusive situations because she has not been given the same education as others on the management of sexual relationships. According to the social model, it is this social barrier—the lack of accessible information related to sexual education—that disables the women, not her cognitive impairment. If the woman were to receive the same sexual education information available to others in a format that was accessible to her, she may have the tools necessary to prevent sexual abuse—or, at least, be able to prevent sexual abuse in the same way or to the same capability level as those without cognitive impairment. In this way, it is the social environment that is disabling the individual, not her impairment.

This book uses the social model of disability throughout its analyses (Oliver 2013). It considers an individual as disabled when they are not able to participate in the social and physical world on an equal basis with others. In line with the social model of disability, the discussions within this book assume that social barriers are disabling individuals—as opposed to assuming that an individual is disabled due to their actual or perceived impairment alone (Hughes and Paterson 1997; Traustadóttir 2009). In other words, I place the burden of disabling on an unaccommodating social environment instead of on the individual or their impairment. However, I do not want to give the impression that the embodied experience of the individual is not critical to the experience of disability (Shakespeare 2013). For some, it may be solely the social environment that interacts with their actual or perceived impairment to create barriers to participation, citizenship, and other areas that cause the individual to be disabled. For others, they may have bodily experiences of pain, discomfort, or other physical manifestations of impairment that create barriers to participation, citizenship, and other areas that cause the individual to be disabled—and changes in the social environment may not alleviate the situation. This book does not engage with a full debate or theoretical discussion of the social model—however, I do utilise the social model as a lens through which to examine law, policy, and practice that create barriers to legal capacity for women, disabled women, and gender minorities. In line with the social model, I assume that most of the barriers to legal capacity that women, disabled women, and gender minorities face are due to unaccommodating and prejudicial law, policy, and practice. I also assume that where these aspects of the social environment are reformed appropriately—sometimes necessitating extra measures to support the unique socio-political position of women, disabled women, and gender minorities—these groups would be able to enjoy legal capacity on an equal basis with others.

1.1.3 Neo-liberal Capitalism, Individual Rights, and the Importance of Legal Capacity

Many of our neo-liberal capitalist systems have evolved to increasingly incorporate welfare models and socialist goals which include values of equality and efforts towards achieving some level of wealth distribution. Nonetheless, the position of the individual is primary and the individual's ability to navigate social and legal relationships plays a significant role in determining that individual's position in the social order. For these reasons, the individual's recognition as a decision-maker and their freedom and ability to engage in legal decision-making is core to the individual's success in our neoliberal capitalist systems. It is the recognition of an individual's legal capacity that gives them recognition as a decision-maker and the ability to have their legal decisions respected and enforced.

There are multitudes of critiques of the neo-liberal capitalist system—however, it remains the prevailing social structure that we live within in much of the world. As such, in this book, I am not challenging the neo-liberal capitalist model—instead, I acknowledge the prevalence of the model and the values that it espouses that permeate so much of civilization. One of those values is the importance of the individual in the social order and the importance of individual autonomy and decision-making power in order to achieve success in such a model. It is this importance of the individual that has played a prominent role in the development of individual rights—including human rights law. While I would question many aspects of neo-liberal capitalist theory, the rights of the individual is one aspect of neo-liberal capitalist theory that I believe has—perhaps paradoxically—brought about many positive advances, including the human rights framework. It is important to acknowledge, however, that it is likely that human rights law itself will never have the power to eliminate the inequalities that capitalism creates and perpetuates. What it may do, is create a framework for establishing a bare minimum level of equality that is achievable. This would include equality in the right to decision-making—the right to legal capacity—which, as discussed above, is essential for the individual to have the tools necessary to navigate the neo-liberal capitalist social order and to have a chance at elevating their position within that social order.

1.1.4 Right to Legal Capacity of Women, Disabled Women, and Gender Minorities

Women, disabled women, and gender minorities have suffered denials of their ability to be decision-makers as well as denials of the recognition and enforcement of their decisions. This may be one of the most significant contributory factors in the inequality of individuals within these groups—because, as mentioned above, without the power to make decisions, an individual is significantly disadvantaged in our current neo-liberal capitalist social order. For this reason, this book delves into the