



Papeles el tiempo de los derechos

“On Legal Capacity”

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As is well known, Article 12 of the International Convention on the Rights of Persons with Disabilities recognizes that people with disabilities have the same legal status as everyone else. This implies a fundamental change in the legal treatment of disability; indeed it is a change that may have very important consequences. In order for this to occur certain suppositions, conceptions and institutions that go beyond the field of law will have to be re-examined and modified. In fact, some of these go well beyond the legal field and project themselves into contemporary discourse on ethics.

1.- Where are we now?

1.1.- The role of the human being in ethics and the Law

The idea of capacity is central to ethical and legal discourse and it is used to define human beings. The idea of the subject and the moral agent, like the idea of the subject of law, and that of human dignity, spring from the idea of capacity.

In legal and ethical discourse capacity and disability are conditioned by a series of personal characteristics. Nevertheless, disability is sometimes a situation and not a question of identity. Capacity and disability can sometimes be produced by social structures, circumstances and conditions. This is exactly what is expressed, as regards the treatment of disability, by the so-called social model.

The reference points which determine that which is understood as capacity in the ambits of ethics and the law come from the idea of human dignity as it has been constructed since its modern origin to the present day and which presents itself as an argument which justifies the existence of rights.

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The theory of human rights has been built on a model of the individual principally characterized by his or her capacity to feel and to communicate. This is the model which constitutes what has traditionally been the model of the moral agent, that is to say, the prototype of the subject able to participate in moral discussions.

These attributes present themselves as arguments that support the possibility of speaking of human dignity and justify the existence of rights whose main function is to protect the development of that dignity and those abilities. Rights, therefore, present themselves as mechanisms which protect the exercise of dignity by limiting, restricting and eliminating the barriers the abilities might find in their way.

Human dignity has, thus, been constructed by underlining what we might describe as the abstract dimension of the person, leaving to one side that which is contextual and situated.

Together with the principle of human dignity there also exists another principle which currently predominates in the discourse of rights and from there makes up a significant part of the legal and ethical discourse. I refer to the principle of equality and non-discrimination. Paradoxically, the contemporary interpretation of this right focuses on human beings as being characterized by their differences and attempts to analyze which differences justify different treatment and which do not. It regards unequal treatment based on irrelevant differences as discriminatory, just as it does equal treatment when it ignores relevant differences. The circumstances which are taken into account in this field may be characteristics of people (which may be understood as a focus on identity) or may be situations in which individuals find themselves (which may be understood as a focus on situations).

1.2. Personality, legal capacity and the capacity to act

In the legal field it is common to differentiate between personal status, legal capacity and the capacity to act. The first refers to all people, the second is a consequence of the first and consists of the possibility of being a bearer of rights and subject to obligations and the third relates to the capacity to exercise rights and carry out obligations. So while the first two are possessed by virtue of being a person, the third requires people to possess certain characteristics, or, to put it another way, may be limited by certain circumstances.

In Spanish law limitations on the right to act are based on age and disability. The latter, which is usually considered to be a status under civil law, is defined by Article 200 of the Civil Code which holds that, “Incapacity is caused by those diseases or persistent physical or psychological conditions which impede a person from governing him or herself”. Not being able to govern oneself is usually understood to mean adopting decisions and carrying out actions that are socially damaging and prejudicial to oneself. Limitations on the capacity to act, that is to say, incapacity, may result in the appointment of a legal guardian who acts on behalf of the incapacitated person or an assistant who helps or complements the incapacitated person without substituting for them.

The incapacity regime established by Spanish norms ((Law 13/83 of the 24th of October) is a flexible system which leaves it up to judges to decide on the degree of incapacity in each case and to determine the extent of their need for assistance. In practice, however, two grades of incapacity have been established, one complete, leading to the appointment of a guardian and in which the person is deprived of their capacity to act in all situations, and the other partial, leading to the appointment of an assistant who helps the person with incapacity in all situations. The treatment of capacity and incapacity in our legal system can therefore be seen, in a certain sense, to follow the pattern set out in the previous part of the discussion.

1.3.- The Convention and capacity: the move towards a model of support from a situational perspective.

As was mentioned at the outset, the question of capacity is expressly mentioned in Article 12 of the International Convention on the Rights of Persons with Disabilities. This article is one of the most disputed in the whole convention. The discussions have centered on the meaning and extent of the idea of legal capacity and have given rise to a division between those who see it as part of the capacity to act and those that do not. As well as Article 12, of particular relevance to our concerns here is Article 5 of the Convention, which deals with non-discrimination, and especially its Section 2 which prohibits discrimination based on disability. This section of the convention establishes that persons with disabilities have the same legal capacity as other people and in all aspects of life. It thus establishes - and this reflects the content of discussions previous

to the Convention's approval - what has come to be known in this context as the model of support.

Furthermore, Article 5.2 of the convention states that "States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds." In this article the two focuses to which we allude when we refer equality are present. However, the social model which inspired the international text obliges us to put the accent on the situational perspective.

The move from a substitution model to one of support together with the change of focus from that of identity to that of situation represent the principle challenge of the Convention as they clearly call into question the placing of limits on the legal capacity of people with disability and, indeed, on their incapacitation. The Convention obliges the setting aside of the existing procedures for substitution of will (legal guardianship) and their replacement by mechanisms of support and demands that in all cases these be individual, proportional, and appropriate in duration.

2.- Where should we be heading? A necessary rereading of ethical and legal capacity.

The discourses of rights and human dignity are based on a standard model which I have tried to summarize in the forgoing points but these do not (nor should they) exhaust the idea of the individual or the moral agent. The concept of dignity is a human construction and as such can be changed and opened up to new elements. It is possible to propose another conception of the individual, the moral agent and human dignity without deviating from the modern discourses as long as the following points are kept in mind:

- a) The idea of capacity is gradual and relative.
- b) There is no relationship between talent and dignity. Therefore the idea that more talent (in this case, capacity to reason feel and communicate) means more dignity is not valid.
- c) Capacity or disability can be produced by temporary (and social) circumstances and may evolve and be acquired through processes and methodologies.
- d) The carrying out of a life plan, that is, the achieving of human dignity, the free development of a personality is something which is the responsibility of each individual based on his or her own moral authority. And the development of a dignified human life requires the satisfaction of a series of demands and necessities which are instruments for

achieving it and one of the functions of rights is to permit the equal, independent development of individual autonomy.

e) We need to rid ourselves of certain governing ideas which we project on the concept of a dignified human life and which result in the seeing as undignified of the situation in which certain groups find themselves.

f) Capacity is irredeemably linked to possibility but should not be confused with it. To put it another way, one thing is to be able to reason, feel and communicate and quite another is to have the possibility to reason, feel and communicate. It is important to struggle against that which makes it impossible to do these things regardless of whether it is something “natural” or something we have constructed.

Arising from these points what we must do is seriously question ourselves about the relationship between human dignity and capacity. And if we decide to maintain this relationship it will be necessary to modify - as is advocated by the independent life movement - the terminology which we use to refer to people with disabilities and speak of differently-abled people.

The differently-abled, whether in terms of communication, feelings or reasoning capacity (at the end of the day all humans fall into this category) should be agents in moral discussions. To put it another way, the moral agent is he or she who has, in some way or other, the actual or potential possibility, to a greater or lesser degree, to feel, reason and communicate and to direct these possibilities towards a given life plan.

In the light of the Convention, therefore, it would appear to be opportune to extend the field of mental and intellectual diversity, the same strategy as that employed for physical diversity. The treatment of the latter has been based on the general principle of accessibility and a more specific one of reasonable changes. The reasonable change principle arises in the context of the specific needs of a person with disability, excluded or limited by the inaccessibility of his surroundings or by the imposition of majority frameworks which limit his or her access to a good or service. Here accessibility is the situation aspired to; design for all as a general strategy for achieving it and reasonable changes a strategy at the micro level when design for all has not been able to provide it. A similar scheme could function for legal capacity, like accessibility both an assumption and an aspiration. There may exist situations which require a change (support) for the exercise of this capacity. The necessity to carry out reasonable changes arises, in the sphere of physical disability, because it is not always possible to design all goods and services so that can be used by all. Sometimes there will be people who cannot

use a particular product or service or who will require a special modification or adaptation of the way of carrying out a task or receiving information. Something similar could occur in the case of mental or intellectual capacity where a person might require the support (the change) of someone.

The Convention upholds the model of support rather than that of substitution and establishes that the measures taken based on this model must respect the rights, will and preferences of the people concerned. They must also avoid conflicts of interest, be applied as quickly as possible, be regularly examined by a competent and impartial authority or legal body and be proportional in the degree to which they affect people's rights and interests.

The system should thus be: (i) able to offer the maximum degree of respect for the mentally or intellectually differently-abled person, (ii) be sensitive to the different kinds of specific diversity and circumstances to be found in the case of each individual person, (iii) last the shortest amount of time possible and be periodically re-examined and (iv) cause as little damage as possible to the rights of the person.

The Convention also has a focus on the situation instead of one on identity. This leads to the conclusion that when the support model must be abandoned, for example, because it is impossible to ascertain the will of the person, this must be done because of the specific situation and not because of the disability.