

The CRPD & the Insanity Defence

Bob Fleischner

The insanity defence is controversial

- The jurisprudence relating to the defence has long been “in a state of chaos.”*
- Proponents argue that the defence is fundamentally important to the criminal justice process,
- Critics argue the defence is discriminatory, results in lengthy psychiatric detention and includes the possibility of involuntary treatment.

*Christopher Slobogin, “An End To Insanity: Recasting The Role Of Mental Disability In Criminal Cases,” 86 Virginia Law Review 1199 (2000)

Capacity based laws and the CRPD

- The CRPD is interpreted to forbid laws are based on capacity.
- This includes guardianship, incapacity to plead, and the insanity defence.

Why the CRPD applies to the insanity defence

- The CRPD does not specifically address criminal justice, but...
 - It is based on the social model of disability not a medical model;
 - Article 13 provides for a broad right of access to justice;
 - Article 12 provides that people with disabilities are entitled to equal recognition before the law and requires “that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”;
 - Therefore, the CRPD implies a “prohibition of separate processes for people with disabilities in criminal law.”*

*Piers Gooding and Tova Bennet, “The Abolition of the Insanity Defense in Sweden and the United Nations Convention on the Rights of Persons with Disabilities: Human Rights Brinksmanship or Evidence it does not Work?” 6 *New Criminal Law Review* 21 (2108)

Why the insanity defence violates the CRPD

- The defence is based on a medicalized concept of disability.
- It distinguishes between persons who have capacity and persons that do not, thereby preventing the those “without capacity” from participating equally in the criminal legal process.
 - It prevents persons from proving their innocence
 - It prevents them from confronting witnesses against them
 - It deprives them of defences available to other defendants.
 - It deprives them of procedural guarantees.
- Thus, it creates a two-tiered criminal legal system

Institutionalization also violates the CRPD

- The common outcome of a successful insanity defence is institutionalization in a mental facility or a prison
- The term of confinement is usually indeterminate.
- Article 14 ensures the right to liberty on an equal basis with others.
 - It does not permit persons to be detained on the grounds of their actual or perceived impairment.

What can replace the insanity defence?

- Abolition
 - Sweden
 - Some states in the US
- Universal use of mens rea defence
- Some mixture of models