CHAPTER 1

RATHER BAD THAN MAD? A RECONSIDERATION OF CRIMINAL INCAPACITY AND PSYCHOSOCIAL DISABILITY IN SOUTH AFRICAN LAW IN LIGHT OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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Summary

Article 12(2) of the Convention on the Rights of Persons with Disabilities requires the recognition that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Such acknowledgment implies that state parties to the Convention, including South Africa, will have to reassess their existing legal provisions relating to legal capacity. These legal measures typically include a rule to the effect that where a person accused of a criminal offence lacks criminal capacity as a result of an intellectual or psychosocial disability, he or she cannot be held liable in criminal law (often referred to as the 'insanity defence'). This article examines the potential influence of the recognition of universal legal capacity in the CRPD on the insanity defence, with specific emphasis on the current position in South African law. It commences with an overview of the normative content of article 12 of the CRPD as it relates to the notion of criminal capacity and also considers the interpretations of this provision as proposed by academic commentators. These interpretations may be described as, first, an abolitionist position (calling for both the elimination of the insanity defence and the concomitant mandatory committal of the accused to forensic psychiatric institutions) and, second, an integrationist position (suggesting the development of disability-neutral rules on criminal capacity). A third approach strongly argues in favour of retaining the insanity defence while at the same time reconsidering the institutionalisation of an accused person following an acquittal based on this defence. The present South African legislative dispensation regarding criminal capacity is subsequently examined and measured against the CRPD. The article concludes with a number of observations in view of potential law reform.

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1 Introduction

The guarantee of 'universal legal capacity' in article 12 of the Convention on the Rights of Persons with Disabilities[1] (CRPD) requires state parties to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. In most jurisdictions this implies a far-reaching overhaul of existing laws.[2] South Africa, as party to the Convention,[3] is no exception in this regard.

Certain aspects of universal legal capacity, such as the development of supported decision-making mechanisms[4] in line with article 12(3), already have generated a burgeoning body of literature,[5] especially in light of the interpretive guidelines adopted by the Committee on the Rights of Persons with Disabilities (CRPD Committee). However, one issue that has drawn less attention from academic commentators (and, arguably, from the CRPD Committee itself), is the implications of the CRPD for the concept of 'fitness of an accused[6] person to stand trial' as well as for the so-called 'insanity defence'.[7]

The notion of fitness to stand trial generally refers to the ability of the accused, at the time of the criminal trial, to follow the proceedings, to instruct her legal representative and offer a proper defence.[8] Criminal capacity, on the other hand, relates to the question of whether the accused had the 'mental elements' necessary to be held responsible,[9] such as the ability to appreciate the wrongfulness of her actions at the time of the

1 GA Res A/RES/61/06, adopted on 13 December 2006, entered into force on 3 May 2008.

2 See eg CRPD Committee General Comment 1: Article 12: Equal recognition before the law (2014) UN Doc CRPD/C/GC/1 dated 19 May 2014 para 7.

3 South Africa ratified the CRPD and its Optional Protocol on 3 April 2008 and 3 May 2008, respectively.

4 See sec 2.3.2 below.

5 See eg L Series 'Legal capacity and participation in litigation: Recent developments in the European Court of Human Rights' (2015) 5 *European Yearbook of Disability* 4; AS Kanter *The development of human rights under international law* (2015) 265; P Gooding 'Navigating the "flashing amber lights" of the right to legal capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to major concerns' (2015) 15 *Human Rights Law Review* 67-70; L Series et al 'Legal capacity: A global analysis of reform trends' in P Blanck & E Flynn (eds) *Routledge handbook of disability law and human rights* (2017) 137. This by no means is an exhaustive list.

6 Exact terminological consonance is not readily achieved across jurisdictions. Eg, in South African law the term 'defendant' (used in the US in the context of criminal proceedings) is limited to civil law. 'Accused', therefore, is used here to avoid confusion.

7 As indicated by the phrase itself, this defence usually is associated with psychosocial disability. For an explanation of the term 'psychosocial disability', see World Network of Users and Survivors of Psychiatry *Implementation manual for the United Nations Convention on the Rights of Persons with Disabilities* (2008) 9. With regard to the insanity defence generally, see ML Perlin *A prescription for dignity: Rethinking criminal justice and mental disability law* (2013) 165.

8 E du Toit et al *Commentary on the Criminal Procedure Act* (2017) ch13 8.

9 P Bartlett 'The United Nations Convention on the Rights of Persons with Disabilities and mental health law' (2012) *Modern Law Review* 775.

commission of the offence.[10] Both constructs therefore rely on an assessment of the accused's mental capacity (albeit at different stages).[11]

A further common element is that in many criminal justice systems, upon a finding of unfitness to stand trial or of criminal incapacity, the court must order a special disposition in respect of the accused. This may include detention until the accused is fit to stand trial; indefinite detention (accompanied by involuntary treatment) in a psychiatric hospital; or diversion to mental health care services. The perceived 'dangerousness' of the accused (to herself or others) often provides the rationale for such special measures.

The insanity defence has been called into question for its non-compliance with article 12 of the CRPD, specifically in respect of the disregard of the principle of universal legal capacity. The CRPD Committee further has expressed the view that systems of special disposition, which typically permit the detention of persons with psychosocial disabilities based on their disability, constitute a violation of article 14 of the Convention,[12] which explicitly states that the existence of a disability under no circumstances justifies a deprivation of liberty.[13]

The article accordingly interrogates the implications for the insanity defence[14] of the recognition of universal legal capacity and the prohibition of disability-based deprivations of liberty. It first provides a brief overview of article 12, with reference to the drafting process and the contents of the article. It then more closely examines the notion of 'legal capacity' and also considers the interpretive guidance provided by the CRPD Committee in General Comment 1, adopted in 2014.[15] The article further considers different interpretations of the relevant provisions by selected academic commentators. It next turns to the *status quo* in South Africa in respect of criminal incapacity as a result of psychosocial disability, and attempts to measure the applicable provisions against guidelines provided under the CRPD. Ultimately, the article does not seek to propose definitive solutions, but rather to explore the 'borderlines' around the insanity defence (in Perlin's words),[16] thereby providing a basis for future debate.

10 See discussion in sec 4.2 below.
11 The two concepts may also overlap in instances where the accused lacks both the ability to stand trial and criminal capacity.
12 Art 14 sets out the right to liberty and security of persons with disabilities.
13 Art 14(1)(b).
14 The scope of the article does not permit an in-depth exploration of unfitness to stand trial.
15 CRPD Committee (n 2).
16 Perlin argues that the insanity defence provides insight into perceptions on social, political and behavioural issues that go beyond the question of individual criminal liability. For example, it clarifies views about the relationship between mental health and the law; ML Perlin '"The borderline which separated you from me": The insanity defence, the authoritarian spirit, the fear of faking and the culture of punishment' (1997) 82 *Iowa Law Review* 1377-1378.

2 Article 12 of the Convention on the Rights of Persons with Disabilities

2.1 Background

Article 12 has been described as being 'at the core' of the Convention[17] – an embodiment of the paradigm shift[18] inherent in this document.[19] The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity which must be upheld for persons with disabilities on an equal basis with others.[20]

Not surprisingly, the recognition of legal capacity of persons with disabilities emerged as one of the most controversial areas of debate during the preparatory negotiations of the CRPD.[21] A particularly thorny question was whether the term 'legal capacity' should be understood to include both the capacity to be a holder[22] of rights and the capacity to be an actor under the law.[23] The first component, referred to as 'legal standing',[24] entails being viewed as a person before the law,[25] which in turn entitles the person to full protection of her rights by the legal system.[26] The second component, known as 'legal agency', is the capacity to act on or exercise these rights,[27] which involves the recognition of the person as an agent with the power to engage in transactions and create, modify or

17 Centre for Disability Law and Policy NUI Galway (CDLP) *Submission on legal capacity to the Oireachtas Committee on Justice, Defence and Equality* (2011) 5.
18 See Glen for a discussion on the origin of the term 'paradigm shift'; KB Glen 'Changing paradigms: Mental capacity, legal capacity, guardianship, and beyond' (2012) 44 *Columbia Human Rights Law Review* 96-97.
19 S Trömel 'A personal perspective on the drafting history of the United Nations Convention on the Rights of Persons with Disabilities' in G Quinn, L Waddington & E Flynn (eds) *European yearbook of disability law* (2009) 125.
20 CRPD Committee (n 2) para 8.
21 Trömel (n 19) 126.
22 Eg, the capacity to own property; Council of Europe (COE) Commissioner for Human Rights *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities* (2012) CommDH/IssuePaper (2012) 2 7. See also generally A Dhanda 'Legal capacity in the Disability Rights Convention: Stranglehold of the past or lodestar for the future?' (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 439-440 442-444; RD Dinerstein 'Implementing legal capacity under article 12 of the UN Convention on the Rights of Persons with Disabilities: The difficult road from guardianship to supported decision-making' (2012) 19 *Human Rights Brief* 8.
23 CRPD Committee (n 2) para 12.
24 Also known as 'passive legal capacity'. See C de Bhailís & E Flynn 'Recognising legal capacity: Commentary and analysis of article 12 CRPD' (2017) *International Journal of Law in Context* 10.
25 CRPD Committee (n 2) para 14.
26 As above.
27 Eg, the power to dispose of one's property and claim one's rights before a court; COE Commissioner for Human Rights (n 22) 7. This is also known as 'active legal capacity'.

end legal relationships.[28] It is this latter component that is frequently denied or diminished in the case of persons with disabilities.[29]

Certain delegates to the CRPD negotiations were in favour of a more limited understanding of legal capacity, and attempts accordingly were made to reduce the provisions in article 12 to 'legal standing' only,[30] which would have lowered the standard of human rights protection in the Convention.[31] While the final document as adopted is free of such limitations, it is worth noting that several of the reservations and interpretive declarations subsequently entered by state parties specifically relate to the interpretation of article 12.[32]

Kanter observes that the history of the drafting process reflects fundamental differences about the 'very nature of human rights'.[33] Significantly, the 'battles of meaning'[34] that arose during the negotiations have continued beyond the adoption of the Convention itself and can still be discerned, for example, in responses to General Comment 1 of the CRPD Committee.[35]

2.2 Brief overview of contents

Article 12(1) first reaffirms that all persons with disabilities have the right to 'recognition everywhere as persons before the law'. According to the CRPD Committee, this provision guarantees that every human being is respected as a person possessing legal personality, which is a prerequisite for the recognition of a person's legal capacity.[36] This naturally leads to article 12(2), which states that persons with disabilities enjoy legal capacity on an equal basis with others in all areas of life. The formulation of 'on an equal basis with others', which also appears in several other articles in the

28 J Peay 'Mental incapacity and criminal liability: Redrawing the fault lines?' (2015) *International Journal of Law and Psychiatry* 12.
29 CRPD Committee (n 2) para 14.
30 A Lawson 'The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn?' (2006-2007) 34 *Syracuse Journal of International Law and Commerce* 596.
31 During the negotiations, efforts were accordingly made to qualify the meaning of 'legal capacity' by means of a footnote to the main text. These attempts ultimately proved unsuccessful. For an overview of this history, see Trömel (n 19) 126-128; Lawson (n 30) 595; Kanter (n 5) 251-258; De Bhailís & Flynn (n 24) 9.
32 See eg the declarations and reservations entered by Australia, Venezuela, Canada, Egypt, Estonia and Poland, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&clang=_en (accessed 15 September 2017). Kanter provides a detailed discussion (n 5) 259-263).
33 Kanter (n 5) 257.
34 A Dhanda 'From duality to indivisibility: Mental health care and human rights' (2016) 32 *South African Journal on Human Rights* 438.
35 See also T Minkowitz 'Rethinking criminal responsibility from a critical disability perspective: The abolition of insanity/incapacity acquittals and unfitness to plead, and beyond' (2014) 23 *Griffith Law Review* 443.
36 CRPD Committee (n 2) para 11.

CRPD,[37] indicates that the basis of article 12(2) is to be found in equality and non-discrimination.

The unequivocal point of departure here is that all persons with disabilities have full legal capacity, in the sense of both legal standing and legal agency, on an equal basis with others.[38] Significantly, this premise is neither conditional ('all persons have legal capacity *provided that they have the capacity to* ...') nor presumptive ('*all persons are presumed to have legal capacity until proved otherwise*').[39]

Article 12(3) recognises that state parties have an obligation to provide persons with disabilities with access to support in the exercise of their legal capacity. The approach required in terms of the CRPD is that instead of denying persons with disabilities their legal capacity, states must rather provide access to the support necessary to make decisions that have a legal effect.[40] 'Support' is a broad term encompassing both informal and formal support arrangements, of varying types and intensity.[41]

Article 12(4) provides that 'appropriate and effective safeguards' must be included in systems supporting the exercise of legal capacity.[42] These safeguards must ensure that measures relating to the exercise of legal capacity are proportional and personalised and apply for the shortest time possible. Regular review by a competent, independent and impartial authority or judicial body is also highlighted.

Finally, article 12(5) requires state parties to take all 'appropriate and effective' measures to ensure the rights of persons with disabilities with respect to financial and economic affairs, on an equal basis with others.[43] The traditional denial of legal capacity regarding matters of finance and property must now instead be replaced with support to exercise legal capacity, in accordance with article 12(3).[44]

2.3 Interpretation of article 12: General Comment 1

In 2014 the CRPD Committee adopted a General Comment on article 12, aimed at examining the general obligations arising from the different aspects of this article.[45] Such general comments by treaty-monitoring

37 See *inter alia* arts 1, 2, 7, 9, 10, 13 & 14 of the CRPD.
38 CRPD Committee (n 2) para 14.
39 See H Combrinck 'Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa' (2014) *African Disability Rights Yearbook* 86 (emphasis added).
40 CRPD Committee (n 2) para 16.
41 See CRPD Committee (n 2) para 17 for examples.
42 CRPD Committee (n 2) para 20.
43 CRPD Committee (n 2) para 23.
44 As above.
45 CRPD Committee (n 2) para 3.

bodies are not binding interpretations of the Convention,[46] but are nevertheless considered as particularly persuasive interpretations of international law.

Although the content of General Comment 1 is far-ranging, this section will look at one of the aspects most relevant to criminal incapacity, namely, the de-linking of legal capacity from mental capacity. This becomes especially significant when one notes that the comment itself does not directly address criminal capacity as such.[47]

2.3.1 Separation of legal capacity and mental capacity

According to the CRPD Committee it must be clearly understood that legal capacity and mental capacity are separate concepts.[48] Legal capacity, on the one hand, consists of the ability to hold rights and duties and to exercise those rights and duties. Mental capacity, on the other, refers to decision-making skills, which naturally differ from one person to another, depending on many factors such as environmental and social factors. Mental capacity[49] is not, as is commonly presented, an 'objective, scientific and naturally occurring phenomenon'.[50] Instead, it is dependent on many factors, including social and political contexts.[51]

Article 12 makes it clear that 'unsoundness of mind' and other discriminatory labels are not legitimate reasons for the denial of legal capacity.[52] Under this article perceived or actual deficits in mental capacity may not be employed to justify a negation of legal capacity.[53] The CRPD Committee observed that in most of the state party reports that it had examined, the concepts of mental and legal capacity had been merged so that where a person is considered to have impaired decision-making

46 P Alston 'The historical origins of the concept of "General Comments" in human rights law' in LB de Chazournes & VG Debas (eds) *The international legal system in quest of equity and universality: Liber Amicorum Georges Abi-Saab* (2001) 763 cited in H Steiner et al *International human rights in context* (2007) 873-876. See also ML Perlin '"God said to Abraham/Kill me a son": Why the insanity defence and the incompetency status are compatible with and required by the Convention on the Rights of Persons with Disabilities and basic principles of therapeutic jurisprudence' (2017) 54 *American Criminal Law Review* 479.

47 General Comment 1 indirectly refers to the inter-connection between legal capacity and access to justice (art 13), which entails that in order to enforce their rights and obligations on an equal basis with others, persons with disabilities must be recognised as persons before the law with equal standing in courts and tribunals (para 38).

48 General Comment 1 para 13.

49 De Bhailís & Flynn (n 24) 10 point out that the term 'mental' capacity is used to refer to a 'combination of cognitive ability, impairment and a person's extent of understanding of the consequences of their actions'. An example of the use of mental capacity as a means to assess and deny legal capacity is found in legislation that establishes a test of mental capacity as the necessary precondition for making certain legally-binding decisions, such as decisions about consent to medical treatment.

50 CRPD Committee (n 2) para 14.

51 As above.

52 CRPD Committee (n 2) para 13.

53 As above.

skills (often because of a cognitive or psychosocial disability), his or her legal capacity is removed as a result thereof.[54]

Considering the three established methods for assessment of legal capacity, namely, the status approach,[55] the outcome approach[56] and the functional approach,[57] the Committee points out that all three approaches regard a person's disability and/or decision-making skills as legitimate grounds for denying legal capacity and 'lowering his or her status as a person before the law'.[58] Such discriminatory disavowal of legal capacity is not permitted under article 12.[59] Importantly, the provision of support to exercise legal capacity should not depend on mental capacity assessments. Instead, the Committee recommends that 'new, non-discriminatory indicators of support needs' are necessary.[60]

2.3.2 Responses to General Comment 1: Unfinished business?

The CRPD Committee in General Comment 1 takes a robust and principled stance in respect of contentious areas such as supported decision making and involuntary treatment. For example, it confirms that the human rights-based model of disability demands a shift from the framework of substitute decision making (which includes practices such as guardianship) to one that is based on supported decision making.[61] The Committee accordingly discerns an obligation on state parties to replace substitute decision-making regimes by support for decision making that respects the person's autonomy, will and preferences.[62]

54 CRPD Committee (n 2) para 15.

55 The status approach assumes that a person lacks legal capacity when she is labelled, eg, as having a psychosocial disability (regardless of the person's individual capacities). G Quinn *Personhood and legal capacity: Perspectives on the paradigm shift of article 12 CRPD* (2010) 12; COE Commissioner for Human Rights (n 22) 8.

56 The outcome approach is based on the premise that a person who makes a 'bad' or unreasonable decision (eg, a person with a psychosocial disability refusing treatment) should lose the right to continue making decisions. COE Commissioner for Human Rights (n 22); CDLP (n 17) 10.

57 This involves the consideration of legal capacity on an issue-specific basis. Eg, a person might not be able to make decisions of a financial nature but might be considered to have capacity to consent to an intimate relationship; CDLP (n 17). Legislation based on the functional approach typically requires that the person must be able to use, weigh and retain the information necessary to make the decision, to understand the consequences of their decision and to communicate her decision to others. De Bhailís & Flynn (n 24) 11.

58 CRPD Committee (n 2) para 15.

59 Weller explains that tests for mental capacity offend against the prohibition of indirect discrimination because they will have a disproportionate impact on people with cognitive impairment. P Weller 'Legal capacity and access to justice: The right to participation in the CRPD' (2016) *Laws* 5.

60 CRPD Committee (n 2) para 29(i).

61 The principled approach that systems of substitute decision making should yield to supported decision making can be traced back to the CRPD negotiations: See De Bhailís & Flynn (n 24) 8.

62 CRPD Committee (n 2) paras 26 & 28.

Despite this clear pronouncement, there still appears to be some lingering questions as to whether substitute decision-making systems are permitted under the CRPD. For example, Freeman et al suggest that the 'universal presumption of legal capacity' and the pre-eminence of supported decision making cannot be absolute and that exceptions have to be considered.[63]

Similarly, despite the Committee's clear normative directives, disparate views remain on the permissibility of involuntary treatment. For example, Szmukler et al suggest that 'very few would support the idea that the state never, even as a last resort, has a duty to protect those who are clearly unable to make crucial treatment decisions for themselves'.[64]

General Comment 1 thus exposes the fault lines between those who accept the premise of 'universal legal capacity with support', irrespective of whether the person requires more intensive support,[65] and those who would reserve an exception (albeit limited) in respect of persons who are regarded as unable to act, even with the benefit of support – who are, in the words of Slobogin, 'too impaired to allow them to make a decision'.[66] These tensions and divisions also become apparent when considering criminal capacity and psychosocial disability, as will be shown below.

63 MC Freeman et al 'Reversing hard-won victories in the name of human rights: A critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities' (2015) *The Lancet* 2 (however, see Dhanda's response to Freeman et al (n 34). See also D Bilchitz 'Dignity, fundamental rights and legal capacity: Moving beyond the paradigm set by the General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities' (2016) 32 *South African Journal on Human Rights*; J Dawson 'A realistic approach to assessing mental health laws' compliance with the UNCRPD' (2015) 40 *International Journal of Law and Psychiatry* 70; M Browning, C Bigby & J Douglas 'Supported decision-making: Understanding how its conceptual link to legal capacity is influencing the development of practice' (2014) 1 *Research and Practice in Intellectual and Developmental Disabilities*, cited in De Bhailís and Flynn (n 24) 5, disagreeing that support is a viable option for everyone. They posit that it is not 'realistic' for individuals with profound or multiple disabilities to be supported to exercise their legal capacity.

64 G Szmukler, R Daw & F Callard 'Mental health law and the UN Convention on the Rights of Persons with Disabilities' (2014) 37 *International Journal of Law and Psychiatry* 248 250. (The authors, however, do concede that any criteria for involuntary treatment under the CRPD must be non-discriminatory and 'disability-neutral'.) See also A Plumb 'UN Convention on the Rights of Persons with Disabilities: Out of the frying pan into the fire? Mental health service users and survivors aligning with the disability movement' in H Spandler et al (eds) *Madness, distress and the politics of disablement* (2015) 190.

65 See Preamble to CRPD para (j).

66 C Slobogin 'Eliminating mental disability as a legal criterion in deprivation of liberty cases: The impact of the Convention on the Rights of Persons with Disabilities on the insanity defence, civil commitment, and competency law' (2016) 40 *Law and Psychology Review* 316. Slobogin (301) also disagrees with the CRPD position that even people with very severe impairments should be entitled to make their own decisions.

3 Criminal capacity and the Convention on the Rights of Persons with Disabilities

3.1 Guidance from the CRPD Committee

As explained above, the insanity defence is not directly addressed in General Comment 1 itself. However, the implications of universal legal capacity for this defence were considered as early as 2009 in the thematic report of the Office of the High Commissioner for Human Rights (OHCHR), which states:[67]

> In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability. Instead disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant.

This interpretation subsequently has been developed by the CRPD Committee's adoption in 2015 of guidelines to provide clarification on article 14 of the Convention.[68] These guidelines do not address the recognition (or not) of the insanity defence as such, but do speak to dispositions of detention following an insanity-based acquittal.

The Committee points out that, according to article 14, no exceptions are allowed in terms of which persons may be detained on the grounds of their actual or perceived impairment. The legislation of several state parties still provides for the detention of persons with disabilities on the grounds of their actual or perceived impairment, provided that there are other reasons for their detention, such as the fact that they are deemed dangerous to themselves or others.[69] Such legislative provisions are incompatible with article 14, are discriminatory in nature and amount to an arbitrary deprivation of liberty.[70] This prohibition also holds implications for involuntary treatment in the course of the deprivation of liberty: The Article 14 Guidelines note that treatment should be based on the free and informed consent of the person concerned.[71]

As far as declarations that persons with disabilities are incapable of being found criminally responsible and the concomitant detention of such

67 OHCHR *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities* UN Doc A/HCR/10/48 dated 26 January 2009 para 47.
68 CRPD Committee *Guidelines on article 14 of the CRPD: The right to liberty and security of persons with disabilities* (2015) (Article 14 Guidelines).
69 Article 14 Guidelines (n 68) para 6.
70 As above.
71 Article 14 Guidelines (n 68) paras 11-12.

persons are concerned, the Committee notes that these practices are contrary to article 14, since they deprive the person of the right to due process and safeguards applicable to every accused person.[72] State parties accordingly are enjoined to remove such declarations of criminal incapacity from their criminal justice systems.[73]

The Committee also deals with security measures (such as involuntary treatment in institutions) imposed on persons found not responsible due to criminal incapacity[74] and recommends the elimination of such measures. Similarly, it is concerned about security measures that involve indefinite deprivation of liberty and the absence of regular rights guarantees in the criminal justice system.[75]

When it comes to the deprivation of liberty in criminal proceedings, the Committee recommends that this should apply only as a matter of last resort and when other diversion programmes, including restorative justice, are insufficient to deter future crime.[76] Specifically, diversion programmes must not involve a transfer to mental health commitment regimes or require an individual to participate in mental health services, but should instead be provided on the basis of the individual's free and informed consent.[77]

The Committee's views, as expressed in General Comment 1 and the Article 14 Guidelines, have drawn divergent responses from academic commentators. In the next section the opinions of three authors, canvassing a range of considerations, are examined.[78]

3.2 Interpretation by commentators

3.2.1 The abolitionist position: Elimination of the insanity defence

Minkowitz regards all measures by which persons with disabilities are treated unequally in legal proceedings, including the insanity defence, as well as a disposition to forensic psychiatric institutions, as disability-based discrimination and, accordingly argues for the elimination of such measures.[79]

She first relies on a direct reading of the recognition in article 12(2) of equal legal capacity *in all aspects of life*, which clearly has to include criminal

72 Article 14 Guidelines para 16.
73 As above.
74 Article 14 Guidelines (n 68) para 20.
75 As above.
76 Article 14 Guidelines (n 68) para 21.
77 As above.
78 An extensive examination of the full body of work of these authors is beyond the scope of this article.
79 Minkowitz (n 35) 434.

matters. Furthermore, if persons with disabilities have the legal capacity to act *on an equal basis with others*, this capacity logically extends to all circumstances 'where decisions have consequences', which implies legal responsibility for those consequences on an equal basis with others.[80] She also notes that the rejection by the CRPD Committee in General Comment 1 of attaching legal or practical consequences to the assessment of mental capacity, logically precludes the use of mental capacity assessments to negate criminal responsibility.[81]

A denial of criminal responsibility based on mental incapacity as an evaluative concept constitutes disability-based discrimination and impairs the right to equal recognition before the law by giving legal effect to such incapacity and stigmatising the particular individual as well as all persons with psychosocial and intellectual disabilities.[82]

She finds further support in article 14(1) of the CRPD, which (as noted above) provides that the existence of a disability in in no case may justify a deprivation of liberty. Mental health detention, which by definition is premised on apparent psychosocial disability or a psychiatric diagnosis, can never be disability-neutral and, therefore, always violates article 14(1).[83]

Minkowitz develops a proposal for 'inclusive design of criminal responsibility'.[84] As a starting point the court must, as part of the finding of intent (that is, the subjective element of a criminal offence) consider the perceptions, beliefs and world view of the accused with respect to her actions at the time of the relevant act, to the extent that such evidence is available.[85] However, this does not amount to an assessment of mental capacity, but rather is an 'open-ended inquiry into … contextualising factors that can help to make sense of a person's actions'.[86] If there is a lack of proof of criminal intent or any other element of the crime, the result would be an acquittal or a reduction of the degree of culpability without reference to mental capacity.[87]

In terms of this proposal there would be no insanity defence or concept of mental incapacity.[88] At the same time an acquittal or conviction would not result in detention in a forensic mental health institution or other special security-related measure. If the accused is found guilty, she would serve her sentence in an ordinary place of detention, under the same

80 Minkowitz 445.
81 As above.
82 Minkowitz 455-456.
83 Minkowitz 451.
84 Minkowitz 454.
85 Minkowitz 456.
86 Minkowitz 457.
87 As above.
88 Minkowitz (n 35) 458.

conditions as others, subject to reasonable accommodation and in compliance with the other principles of the CRPD.[89]

3.3.2 The integrationist position: Developing disability-neutral rules

As a response to the 'tough normative and practical questions'[90] presented by the CRPD, Slobogin proposes a three-fold model based on the punitive, preventive and protective approaches to deprivation of liberty.[91] These three approaches can briefly be explained as follows.

The goal of the *punitive* approach, which focuses on culpability, is to punish people for the harm they have caused.[92] The deprivation of individual liberty, therefore, is permitted if the person has caused harm to another person or their property in a culpable manner. The *preventive* approach aims to prevent harm to others and, therefore, focuses on perceived dangerousness.[93] This approach to liberty deprivation is permitted only when the benefits of such deprivation outweigh the harm caused. The goals of the *protective* model include the promotion of autonomy and the protection of dignity through self-determination.[94] Examples are guardianship and hospitalisation of an accused person to 'improve' their ability to participate in the criminal proceedings.[95]

Slobogin then explores how the aims of the CRPD may be accomplished in respect of each model.[96] Regarding punishment he posits that the CRPD Committee's call for elimination of a 'special' defence of insanity is in line with his integrationist approach to criminal law, which holds that persons with psychosocial disabilities may rely on any of the defences that are available to accused persons generally.[97]

Slobogin distinguishes a general trend (in the United States (US) and other countries) towards a more subjective approach to culpability, which entails that the accused's blameworthiness is assessed according to her actual desires and beliefs, rather than with reference to what a reasonable person would have desired or believed.[98] For example, virtually all

89 As above.
90 Slobogin (n 66) 300. Eg, the tensions between the state's obligation to protect individuals from serious harm and the apparent prohibition by the CRPD of measures for preventive detention and treatment of persons with psychosocial disabilities who are perceived to be dangerous; Slobogin (n 66) 299-300.
91 Slobogin (n 66) 301.
92 Slobogin 302.
93 As above.
94 As above.
95 Slobogin (n 66) 303.
96 Due to the specific focus of this article – and Slobogin's own concession that his proposal for protective detention may not be 'entirely consonant with the CRPD' (n 66 319) – the third aspect of protection will not be addressed here.
97 Slobogin (n 66) 304.
98 Slobogin 302.

criminal offences in the Model Penal Code[99] require proof that the accused 'purposefully or knowingly' caused the harmful conduct,[100] which exemplifies this trend towards the subjectification of *mens rea*. The defences of self-defence, provocation and duress likewise are subjectified under the Code; for example, the use of deadly force is permitted where the actor (subjectively) believes that this is immediately necessary to protect herself against unlawful force.[101]

Slobogin explains that granting people with psychosocial disability a 'special defence' stigmatises[102] and marginalises them. The category of 'criminal insanity' also perpetuates the deleterious myth that people with psychosocial disabilities are particularly dangerous or lack self-control. Maintaining that compared to an acquittal by reason of insanity, exoneration on the grounds of lack of intent, self-defence, or duress is far less tainting,[103] he accordingly formulates a 'disability-neutral' defence', which would apply equally to all persons, irrespective of psychosocial disability. One potentially contentious aspect of this defence is that it would not be available where the 'impairments' that led to the accused's erroneous beliefs resulted from the accused's purposeful avoidance of treatment.[104]

In respect of the prevention model, Slobogin reiterates that the detention of persons with psychosocial disabilities on the grounds of 'dangerousness' is viewed as discriminatory and in violation of the prohibition of disability-based deprivation of liberty in terms of the CRPD. The legal basis for such deprivation accordingly must be de-linked from disability and be neutrally defined so as to apply to everyone on an equal basis.[105] He thus argues for a general prohibition of preventive detention or other measures aimed at protecting others. However, this would be subject to one exception, namely, cases where the criminal justice system cannot function as a preventive mechanism because first, it lacks jurisdiction (for example, where the accused has been acquitted or has completed serving her sentence) and, second, because the person is 'truly undeterrable'.[106]

The notion of undeterrability would include two categories of people with psychosocial disabilities: those who cause harm in the delusional belief that they are not committing a crime; and those 'with urges so strong'

99 This Code was promulgated by the American Law Institute in the 1960s and adopted, at least in part, in several US states.
100 Slobogin (n 66) 305. Alternatively, the accused was required to have been reckless with respect to the harmful conduct.
101 Slobogin (n 66) 306.
102 See also Peay (n 28) 27.
103 Slobogin (n 66) 309.
104 Slobogin 306. He explains that this is in line with the well-accepted principle that causing the conditions of one's excuse precludes full exculpation (307).
105 Slobogin (n 66) 310.
106 Slobogin 310-311.

that they tend to commit crime despite a high risk of apprehension and punishment. These two groups are unaware of the possibility of punishment and thus are truly undeterrable.[107] In order to demonstrate that this formulation of undeterrability is disability-neutral, Slobogin identifies two other categories of people that would be regarded as undeterrable, namely, persons with contagious diseases and 'enemy combatants'.[108]

3.3.3 The third position: Retaining the insanity defence

In a strongly-worded article Perlin takes the position that to deprive persons with psychosocial disabilities[109] of the right to plead insanity demeans any notion of dignity.[110] He believes that the insanity defence plays a critical role in a fundamentally-fair criminal justice system; discarding it would violate the most basic principles of due process[111] as well as the fundamental notion that only people who are responsible for their actions should be punished.[112] The exculpation of some individuals based on their mental state is essential to a mature and coherent system of criminal law.[113] Therefore, he is of the opinion that the proposed abolition of this defence is 'wrongheaded, counterproductive and likely a violation of due process'.[114]

In respect of Slobogin's proposals for recasting the insanity defence, Perlin is of the opinion that the revised disability-neutral version still amounts to the insanity defence; it is just not characterised as such.[115] He is also sceptical of the clause providing that the defence should not be available to an accused person who caused her own mental state (for example, by refusal of treatment).[116] He expresses concern that this proviso will be used 'broadly and bluntly' to suppress the right to refuse involuntary administration of antipsychotic medication (which is otherwise protected by the CRPD and domestic law).[117]

Perlin also responds to Minkowitz's position. As a preliminary point he is in agreement with her that the insanity defence, as currently utilised, often is legally and socially stigmatising; that acquittals on the grounds of insanity often do not result in release from custody; and that persons found not guilty by reason of insanity often are held in forensic facilities for far

107 Slobogin 311.
108 As above.
109 Perlin's article refers to 'mental disability'; the context indicates that this denotes psychosocial disability. The latter term is retained here for consistency.
110 Perlin (n 46) 487.
111 Perlin 491.
112 Perlin 494.
113 Perlin 504.
114 Perlin 496.
115 Perlin 499.
116 Perlin 502.
117 As above.

longer than is warranted by the underlying criminal offences with which they were originally charged.[118] However, these realities do not justify the abolition of the insanity defence: The abuses (correctly) listed by Minkowitz are not caused by the defence in itself, but rather by the administration of the system of 'post-insanity-defence-acquittal' case dispositions and institutionalisation; hence, this is where the attention should instead be focused.[119]

For Perlin the major question is what will happen to this 'cadre of defendants' in the absence of an insanity defence. He predicts that the immediate result of the abolition of the insanity defence would be the long-term incarceration of this group in prisons that are known to be dangerous and life-threatening to them.[120]

Ultimately he finds no demand for the abolition of the insanity defence in the CRPD (including article 14).[121] Instead, he believes that when the CRPD is read as a whole (together with other international human rights instruments requiring fair trials), it in fact calls for its retention.

3.3.4 Discussion

Although the views of the three authors as presented here appear to diverge in several respects, at the same time there are significant points of agreement. First, one cannot fault Minkowitz for her reading of articles 12 and 14, as underpinned by General Comment 1 and the Article 14 Guidelines (although Perlin clearly disagrees).

Regarding the disposition of the accused following an acquittal: Again, Minkowitz's view that this should not be followed by detention in a forensic mental health system (or other involuntary measure) is in line with the CRPD Committee's interpretation. However, the notion that persons with psychosocial disabilities who are convicted of criminal offences should serve their sentences under the same conditions as others indeed raises the major concerns pointed out by Perlin. This may well be an instance where formal equality (treating all convicted persons in the same way) may have to yield to considerations of substantive equality that takes account of material differences.

Minkowitz's proposal for inclusive design of criminal responsibility in many respects resembles Slobogin's integrationist approach. The focus on the subjective elements of intent, requiring an assessment of the accused's blameworthiness according to her actual beliefs and desires, rather than a 'reasonable person' standard, combined with a subjective approach to

118 Perlin 504.
119 As above.
120 Perlin (n 46) 505.
121 Perlin 518.

established defences such as self-defence and duress, certainly holds promise for developing a 'disability-neutral defence' that moves away from the insanity defence.[122] Furthermore, the question of whether this defence should be available where the state of mind of the accused is the result of failure to comply with treatment should be resolved. (Perlin's reservations in this regard are well-founded.)

In terms of preventive detention, Slobogin suggests a narrow, disability-neutral allowance, based predominantly on the notion of undeterrability. Apart from any other concerns (such as the construction of 'undeterrability'), the purported neutrality of this proposal is dubious. Although its formulation would also include certain persons without psychosocial disabilities, such as 'enemy combatants', such a measure would disproportionately affect persons with psychosocial disabilities, thus offending against the prohibition of indirect discrimination.[123]

4 South African law

Against this background the following section briefly examines certain aspects of the current South African legal position. First, the general principle regarding legal capacity is set out, followed by the statutory provisions dealing with criminal incapacity based on psychosocial disability. The implementation of section 78 is then briefly considered and, in conclusion, the current position is evaluated against the considerations outlined in section 3 above.

4.1 General principles

In terms of South African law generally, every person above 18 years of age may exercise legal capacity to its fullest extent, which means that she may by herself and without the assistance or consent of any other person exercise all the rights and become subject to all the duties associated with being a 'person'.[124] However, the legal capacity of persons that are 'insane or mentally disordered' is limited.[125] These limitations, as they relate to criminal capacity, are dealt with in section 78 of the Criminal Procedure Act 51 of 1977 (CPA). Section 78 will be examined briefly by looking at the substantive issue of criminal incapacity due to mental illness[126] as well

122 However, difficulties may arise where the offence is framed in terms of negligence.
123 Minkowitz (n 35) 439.
124 See JC Bekker 'The law and older persons' in B Clark *Family law service* (2017); W Holness 'Equal recognition and legal capacity for persons with disabilities: Incorporating the principle of proportionality' (2014) 30 *South African Journal on Human Rights* 332.
125 Terminology in the original text.
126 Due to its use in the CPA, the term 'mental illness' is employed in this section for purposes of clarity. It should, however, be noted that mental illness is not the conceptual equivalent of 'psychosocial disability'.

as the prescribed disposition by the court on finding that the accused lacks criminal capacity.

4.2. Statutory provisions

In South African law the point of departure is that criminal capacity, which is regarded as the basis of (and general precondition for) culpability,[127] may be excluded by a number of grounds, including youthfulness,[128] intoxication and mental illness. In respect of the latter the test to determine the accused's criminal capacity is set out in section 78(1) of the CPA. This section provides that a person committing an offence, while at the time suffering from a 'mental disorder or intellectual disability'[129] which makes her incapable (a) of appreciating the wrongfulness of her act; or (b) of acting in accordance with such an appreciation, will not be 'criminally responsible'.

The defence of criminal incapacity due to mental illness usually is raised on behalf of an accused at the beginning of the trial (at the stage of pleading to the charges). Where incapacity is alleged, the accused must be dealt with in terms of section 79 of the CPA, which regulates the process of inquiry into the accused's (in)capacity and the subsequent process of reporting to the court.[130]

Upon completion of the prescribed inquiry and submission of the experts' reports[131] in terms of section 79, the court must make a finding regarding the accused's criminal capacity.[132] If the court finds that the accused committed the act in question and that she at the time of commission lacked criminal capacity, she must be found not guilty by reason of mental illness.[133] For purposes of the criminal prosecution, the matter ends there: The accused has been found not guilty and cannot again be charged with the same offence. However, this is not the end for the accused: The court must now direct an outcome, depending on the nature of the charges against the accused.

127 Culpability, also sometimes referred to as *mens rea*, means that there must, in the eyes of the law, be grounds for blaming the accused personally for her unlawful conduct; C Snyman *Criminal law* (2014) 156. South African criminal law recognises two forms of culpability, namely, intention and negligence.

128 See sec 7 of the Child Justice Act 75 of 2008.

129 This provision previously referred to 'mental defect'; however, in 2017 the term was replaced by 'intellectual disability'.

130 For purposes of this inquiry, the court may commit the accused to a psychiatric hospital or to any other designated place for a period not exceeding 30 days (sec 79(2)(a)).

131 Sec 79 sets out the composition of the panel that has to conduct the inquiry (which varies based on the seriousness of the offence) and stipulates what must be contained in the report. Where the accused is charged with a more serious offence, the panel must consist of three psychiatrists and the court has the discretion to also appoint a clinical psychologist (sec 79(1)(b)).

132 Sec 78(6).

133 Or intellectual disability, as the case may be (sec 78(6)).

First, if the accused has been charged with murder, culpable homicide, rape or compelled rape,[134] or a charge involving serious violence, or if the court considers it necessary in the public interest, the court may order her detention in a psychiatric hospital.[135] This is subject to the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act (MHCA).[136] The court may alternatively order that the accused be detained in a designated health establishment as if she was an involuntary mental health care user as set out in section 37 of the MHCA;[137] be released with or without conditions; or referred to a children's court, in the case of a child.[138]

Second, where the accused is charged with an offence other than the ones listed above, that is, a less serious offence, the court may order that the accused be detained as an involuntary mental health case user (as above); released with or without conditions; or referred to a children's court.[139]

Importantly, for proceedings in terms of sections 77(1)[140] and 78(2) the court may order that the accused be provided with the services of a legal representative,[141] if the court is of the opinion that substantial injustice would otherwise result.[142]

4.3 Determination of criminal capacity in terms of section 78

In order to establish the criminal capacity of the accused, the court must as a point of departure determine whether the accused had been suffering from a mental illness. If so, the second step is to establish the impact of such mental illness at the time of the commission of the offence. Notably, the CPA does not provide a definition for mental illness (or intellectual

134 As set out in secs 3 & 4 of the Criminal Law (Sexual Offences) Amendment Act 32 of 2007.

135 Sec 78(6)(a)(i)(aa). Alternatively, the court may order temporary detention in a correctional health facility pending the availability of a placement in a psychiatric hospital, if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to herself or to members of the public (sec 78(6)(a)(i)(bb)).

136 Act 17 of 2002. The accused therefore becomes a so-called 'state patient' in terms of MHCA. Among other implications, this means that she may indefinitely be detained in a designated health establishment and may only be discharged (released) from detention by order of a judge in chambers.

137 An 'involuntary mental health care user' in terms of the MHCA is a person incapable of making informed decisions due to her mental health status, who refuses health intervention but requires such services for her own protection or for the protection of others. Sec 37 provides for the periodic review of the mental health status of an involuntary mental health care user, which must include the consideration of whether the mental health care user is likely to inflict serious harm to herself or other people (sec 37(2)(b)).

138 Sec 78(6)(a)(i) of the CPA.

139 Sec 78(6)(a)(ii).

140 Sec 77 deals with the fitness of the accused to stand trial.

141 In terms of sec 22 of the Legal Aid South Africa Act 39 of 2014.

142 Sec 77(1A) of the CPA.

disability). The MHCA, on the other hand, defines 'mental illness' in terms of a positive diagnosis, made by an authorised mental health care practitioner on the basis of accepted diagnostic criteria, of a 'mental health-related illness'.[143] However, this definition is not conclusive in respect of a criminal trial: The fact that the accused has been diagnosed with a mental illness in terms of the MHCA does not mean that he is also 'mentally ill' for purposes of the CPA.[144]

Due to this lack of a definition of 'mental illness' in the CPA, psychiatric evidence is regarded as indispensable in the determination of criminal capacity. This was confirmed in *S v Mabena,*[145] where the Supreme Court of Appeal explained that a lay court cannot diagnose a 'mental illness' without guidance by expert psychiatric witnesses.[146] Having said that, the final decision as to the accused's criminal capacity, including the assessment of the experts' reports and other evidence, lies with the court.[147]

4.4 Evaluation

For purposes of this discussion, it is helpful to return to the two aspects of the insanity defence, namely, the finding of criminal incapacity (and hence acquittal) in respect of the accused due to mental illness, and the subsequent disposition by the court.

In terms of the finding that the accused lacks criminal capacity it should be noted that the grounds for excluding criminal capacity under South African criminal law extend beyond mental illness to also include youthfulness and intoxication. The special measures relating to the inquiry into the accused's criminal capacity as set out in the CPA (namely, the referral for observation and the reports by experts), however, are applicable only to persons with a mental illness. Similarly, the disposition measures following a finding of not guilty by reason of mental illness only operate here. Accordingly, this constitutes differential treatment of accused persons with psychosocial disabilities. However, such differentiation does

143 Sec 1 of the MHCA. This Act also defines 'severe and profound intellectual disability'.
144 J le Roux & GP Stevens 'Pathological criminal incapacity and the conceptual interface between law and medicine' (2012) 25 *South African Journal of Criminal Justice* 50.
145 2007 (1) SACR 482 (SCA) para 16.
146 As above. The Court points out that an inquiry into the mental state of an accused person without such guidance is bound to be 'directionless and futile'. See also *S v Chauke* 2016 (1) SACR 408 (SCA) para 17. Kaliski, however pours cold water on this enthusiasm for assistance from psychiatry in assessing criminal capacity, noting, first, the fluidity of psychiatric diagnoses and, second, his misgivings about an 'appreciation of wrongfulness' as determinant of criminal responsibility; S Kaliski 'Does the insanity defence lead to an abuse of human rights?' (2012) 15 *African Journal of Psychiatry* 85.
147 Du Toit et al (n 8) C13 40.

not in itself necessarily amount to 'unfair discrimination' as understood in South African constitutional jurisprudence.[148]

The measurement against the South African Constitution becomes necessary at this point because of the fact that the CRPD has not yet been formally 'incorporated' into South African law as required in terms of section 231 of the Constitution. However, courts are required to consider the Convention as an interpretive aid when interpreting the Bill of Rights.[149] The judgment of the Constitutional Court in *De Vos NO v Minister of Justice and Constitutional Development*[150] exemplifies such invocation of the CRPD.[151]

In addition to the discrimination-based argument alluded to above, it should be noted that the assessment of criminal incapacity arising from mental illness under section 78 of the CPA in essence is a functional test (resting on proof of incapacity to appreciate the wrongfulness of an act or to act in accordance with such an appreciation). It also amounts to the conflation between legal capacity and mental capacity cautioned against by the CRPD Committee in that the accused person's legal capacity is 'removed' because of a finding that her decision making was impaired at the time of the offence.[152] These considerations further complicate the insanity defence in its current form.

Significantly, in terms of South African criminal law, the test for intention is *subjective*, which means that the accused's individual characteristics, personal beliefs, background and psychological disposition may be taken into account in determining whether or not she had the required intention.[153] Intention, therefore, may be excluded, for example, by so-called 'putative private defence' (where the accused erroneously

148 Sec 9(3) of the Constitution of the Republic of South Africa, 1996 (Constitution) prohibits unfair discrimination based on a number of grounds, including disability. For a discussion of the interpretation of this provision, see generally I Currie & J de Waal *The Bill of Rights handbook* (2013) 215-227.

149 Sec 39(1)(b) Constitution.

150 2015 (2) SACR 217 (CC). This matter dealt with the disposition of two accused persons following a finding of 'unfitness to stand trial' in terms of sec 77(6). The previous version of this subsection, prior to amendment in 2017, allowed the court a narrower range of options for disposition and specifically excluded the release of the accused (with or without conditions). The difficulty that arose here was that the two accused persons were diagnosed with intellectual disabilities, and the expert opinion was that their (in)ability to stand trial would not 'improve' upon detention in a prison or psychiatric hospital. The Constitutional Court ultimately held that the provisions limiting the court's options were inconsistent with art 12 of the Constitution (the right to liberty and security of the person) as read with art 14 of the CRPD. This resulted in the subsequent amendment of the CPA by the Criminal Procedure Amendment Act 4 of 2017.

151 Paras 29-30, 58.

152 See sec 2.3.1 above.

153 The test for negligence, on the other hand, is *objective*: The conduct of the accused is measured by the standard of what a reasonable person in the accused's position would have done under the same circumstances. Negligence usually is regarded as the less serious or blameworthy form of culpability.

believes that an unlawful attack is being directed at her, and she therefore acts to ward off this attack). Since unlawfulness is determined objectively, her defensive act would be unlawful – because in reality there was no attack against her – but her honest mistake as to the existence of an attack may exclude intention.[154]

Such a mistake does not need to be reasonable: The inquiry concerns the accused's 'true state of mind' and her conception of the circumstances, and not whether the reasonable person in the accused's position would have made the same mistake.[155] This subjective construction of intent theoretically opens the door for the consideration of a disability-neutral defence, such as mistake, on the part of the accused, since the source and reasonableness of such mistake would not be at issue.

With regard to the second aspect, namely, disposition of the accused on conclusion of the criminal case, Kaliski points out the anomaly that (former) accused persons committed to the forensic mental health system following an acquittal by reason of mental illness, often face indefinite detention while convicted offenders may serve only a part of their sentence based on remittances for good behaviour and other concessions.[156]

Noting the 'largely failed enterprise of risk assessment', Kaliski also questions the concept of 'dangerousness' associated with mental illness and the assumption that indefinite detention at least addresses the risk of future violence.[157] ('Dangerousness' comes into play in the court's determination of whether detention as a state patient in a psychiatric hospital is required 'in the public interest.'[158])

Were the South African courts to follow the principled view of the CRPD Committee that disability-based detention violates the right to liberty of persons with psychosocial disabilities under article 14, this would cast a dark shadow over the current provisions of section 78(6). It should, however, be noted that a rights violation may be justified under the 'limitations clause' (section 36) of the Constitution, and it is conceivable that a court would weigh up the detainee's right to liberty against the state's duty to protect the public from harm.[159]

154 See *S v De Oliveira* [1993] 2 All SA 415 (A) 419. The court may however consider the reasonableness of the accused's conduct in determining whether she did indeed have an *honest* belief that she was being attacked.

155 As above.

156 Kaliski (n 146) 83.

157 Kaliski 85.

158 The term 'public interest' is not defined in the CPA; however, it is conceivable that the potential 'dangerousness' of the accused would play a role here.

159 It was held in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 57 that the state's duty under sec 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights includes the right of the public to have its safety and

Finally, one aspect that needs further consideration is the provision of support, in terms of article 12(3), where the accused's criminal capacity is at issue (although this arguably relates more to situations where the accused may be unfit to stand trial).[160] Section 77(1B) of the CPA, which permits the court to order the appointment of a legal representative for the accused, is a good starting point. However, at present such appointment is discretionary whereas, it is argued here, it should be mandatory in all cases where the fitness to stand trial or criminal capacity of the accused is in dispute.[161] Other analogies of support may be drawn from the current arrangements regarding the role of a *curator ad litem*.[162]

5 Conclusion

Peay correctly observes that thinking through the implications of the CRPD for criminal liability is not easy.[163] This in part is due to the fact that the CRPD has introduced dramatic changes into areas of law 'that had previously been thought settled'.[164] As outlined above, this certainly includes the insanity defence.

It is encouraging that the South African government has committed itself to a review of civil and criminal legislation, including the inquiry into an accused person's criminal capacity in criminal proceedings, in light of article 12 of the CRPD.[165] It is argued here that close consultation with and the active involvement of persons with disabilities[166] (especially those with psychosocial disabilities and forensic detainees)[167] will be essential in any consideration of law reform measures.

security protected. The court in the De Vos judgment took specific note of this aspect (para 35). At the same time, however, it may be said that persons with disabilities should not bear 'the burden of society's demand for preventive detention'; Minkowitz (n 35) 456.

160 See in this regard Minkowitz (n 35) 446-447.

161 In *S v Matu* 2012 (1) SACR 68 (ECB) para 28 the court noted that where the accused is charged with an offence involving serious violence, and is hence potentially subject to the more restrictive disposition orders required under sec 77(6)(a)(i), 'legal assistance is not only desirable but necessary'. Although the judgment related to unfitness to stand trial, it is argued here that it similarly applies in cases of criminal incapacity based on mental illness.

162 A *curator ad litem* is traditionally appointed by the court to supplement a person's 'lack of capacity to litigate'; South African Law Reform Commission (SALRC) *Discussion Paper 105: Assisted decision-making of adults with impaired decision-making capacity* (2004) 51. For a more detailed discussion of the functions of a *curator ad litem*, see SALRC (above) 102-103.

163 Peay (n 28) 33.

164 Minkowitz (n 35) 435.

165 South Africa *Initial Report to the Committee on the Rights of Persons with Disabilities* (2015) UN Doc CRPD/C/ZAF/1 dated 24 November 2015 para 125. This commitment has been further concretised in the White Paper on the Rights of Persons with Disabilities (2015) 64.

166 As required in terms of art 4(3) of the CRPD.

167 See M Sabatello 'Where have the rights of forensic patients gone?' (2015) *American Society of International Law Proceedings* 78, pointing out the invisibility of 'forensic patients' during the drafting process and subsequent to the adoption of the CRPD.

Petersen expresses doubt as to whether legislatures would ever accept proposals for the complete abolition of the insanity defence[168] and, therefore, cautions that it may be more practical to consider reforms to current defences and to provide stronger safeguards (including more regular reviews of the disability-related detention of accused persons).[169] One has to agree that the abolition of the insanity defence would be hard to 'sell' in the current South African context.[170]

However, this does not obviate the need to develop practicable (and politically-feasible) alternatives to guide incisive domestic law reform.[171] This is especially true in relation to 'an entirely novel approach for which there is often no precedent elsewhere'.[172] Such recommendations are essential in order for the reassurances in the CRPD to ultimately transcend from the aspirational to the tangible.

168 See also Kaliski (n 146) 87.

169 CJ Petersen 'Addressing violations of human rights in forensic psychiatric institutions: Philosophical and strategic debates' (2015) *American Society of International Law Proceedings* 82-83.

170 South African courts may also find certain of the more drastic proposals somewhat startling, such as Minkowitz's suggestion that expert opinions by mental health professionals based on assessment and diagnosis should be disallowed (n 35) 458, especially in light of the strong judicial reliance in South Africa on such expert evidence in the determination of criminal capacity. This of course raises questions around the hegemony of so-called 'scientific' and 'medical knowledge', which cannot be resolved here.

171 O Lewis & A Campbell 'Violence and abuse against people with disabilities: A comparison of the approaches of the European Court of Human Rights and the United Nations Committee on the Rights of Persons with Disabilities' (2017) *International Journal of Law and Psychiatry* 57.

172 Sabatello (n 167) 56.