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What future for the testamentary capacity of people with dementia on both sides of the Channel?

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Introduction

In the context of the current health crisis, testamentary capacity \[1\] should receive priority attention. Indeed, a person's last wishes are the last chance to preserve that person's autonomy and choices. The dignity of the dying naturally calls into question the respect of his or her last wishes \[2\]. However, because of the fragmentation of the disciplinary fields that concern legal capacity and autonomy, the subject of wills is drowned in a sea of concerns. This reminds us that the quest for autonomy and the protection of capacity are notions that concern all segments of a person's life. It is also what explains the existence of several legal regimes that all address capacity in the same legislative system \[3\].

Certainly, legislation on legal capacity is not the same on both sides of the Channel. There is no doubt that the English legislature has preceded its French counterpart on several issues with respect to the legal response to situations of mental disorder \[4\]. However, the requirements imposed by international disability law seem to equate the two regimes.

In this context, the interest of a comparative reflection on the protection of the testamentary capacity of persons with dementia is to highlight a series of hypotheses and even observations. Firstly, the idea that the problems arising from dementia are posed in identical terms on both sides of the Channel, and even everywhere else. The interest is to see whether the solutions are found elsewhere and to reconsider the possibilities. Therefore, secondly, the response of the law to these issues should certainly be contextualised in its own cultural, historical, and even political environment. Thirdly, difficulties in implementing the requirements of international law are common despite the specific developments in each system of protection. This last point is in line with the debate on whether Article 12 of the CRPD \[5\] should remain an ideal towards which states should strive or, on the contrary, a conventional requirement to be met.

The credibility of these findings and the uncomfortable place of testamentary capacity in the quest for greater autonomy for people with dementia become clear when the question is answered: How is the regime for assessing testamentary capacity on both sides of the Channel in light of international disability law? From our perspective, these regimes are unsatisfactory due to procedural flaws (I) and uncertain considering the controversial requirements of the Convention on the Rights of Persons with Disabilities (II).
I- Two unsatisfactory regimes due to procedural flaws.

The modes of assessing testamentary capacity on both sides of the Channel are diametrically opposed as regards the question of what is the appropriate moment from which capacity is determined? In England, the jurisprudential legacy of *Banks v Goodfellow (1870)* retains the very moment of the act to seek mental capacity. For his part, the French judge opts for a time interval during which lucidity must be sought to characterize or not testamentary capacity.

1- Limited evaluation criteria in the specific context of dementia.

The second question answered by the judges is: what are the criteria from which the selected time will be investigated? In other words, what exactly are the exact points that are examined in the process of assessing capacity. The French response is not explicit on this point in that there are no fixed official criteria in French law that allow the judge to assess mental capacity at the time of the act. The fact is that the judge generally relies on the evidence to validate or reject capacity. Therefore, evidence is established by any means. There is no predefined number or type of elements to be communicated. On the other hand, *Banks v Goodfellow [6]* provides more clarity in the way capacity is to be assessed. Indeed, the various criteria that must be met to characterize the capacity that it identifies provide a framework for the assessment process.

With a view to enhancing the effectiveness of this procedure, a golden rule [7] has been drawn up in addition to the Banks criteria. The fundamental interest of this golden rule is to make the judge's assessment criteria compatible with the practices of the professionals who accompany the person at the time of the act. In this sense, the golden rule allows the professionals, accompanying the person at the time of the act, to be able to present evidence that satisfies the level of requirement of the Banks criteria. As a result, as we can see, the procedure for assessing testamentary capacity is more organised and readable on the English side of the Channel. On this side, it is a necessarily multidisciplinary [8] approach which includes the participation of care professionals and the law in each case. This requirement makes the Banks model and the Golden Rule a more secure standard for the interests of the demented person.

However, this model has been criticised because of its longevity. In fact, beyond the fact that the Banks case dates to the 19th century, the problem is that it was modelled on the case of psychiatric disorders and not on dementias such as Alzheimer's disease. This difference in the initial purpose is, according to some authors, an important weakness for which the Banks model should be abandoned or at least reviewed [9].

And this, in view of the growing population of demented people whose wills are evaluated using the Banks model.

In addition, the criterion of proving that the person had the capacity to know the extent of the bequeathed property is considered difficult in the current era due to the complexity of heritage procedures. Although judges are sometimes flexible in how they apply the Banks criteria, the flaws in the complex context of dementia are obvious. For this reason, the scientific literature argues that the Banks criteria and the Golden Rule do not necessarily guarantee that there is mental capacity from a material point of view with respect to the
complexity of dementia [10]. These criteria guarantee a victorious outcome at trial because they are so difficult to challenge. However, dementia is not easy to fit into fixed and simple realities. If these criteria are met, it means that solutions are sought to the procedural difficulties and not to the concrete needs of individuals. Because the Banks standard and the golden rule absolutely guarantee an outcome of the procedure but not a certain correspondence between the judge's decision and the mental capacity at the time of the act.

2- Evaluation methods that reflect a specific vision of dementia?

The English version of the assessment of testamentary capacity appears to be more favourable to a better search for mental capacity in England. For its part, France remains consistent with proof by any means within a lucid interval. Admittedly, it does not lay down detailed criteria, but in the end, it remains consistent in its approach. These two approaches undoubtedly reflect a respective cultural conception of mental health issues. The intention to systematically put the requirement for multidisciplinary competition in the search for capacity into practice (since 19th Century) is a sign of the avant-garde [11] culture in English mental health legislation. France contrasts this idealistic vision with pragmatism and realism. It is difficult to say that it is difficult to establish mental capacity at the time of the act, but can we assume - by presumption - that there is capacity as soon as an interval of lucidity is demonstrated by any means. This French pragmatism and realism seem to catch up with English idealism when we realize that the Banks standard efforts are certainly higher but do not necessarily guarantee a correspondence between the judge's decision and reality. The fact is that dementia is not necessarily a source of mental disability, as judges conceive it. But the problem arises when we know that a dementia-related crisis does not necessarily affect the cognitive faculties useful in carrying out the will. It's one thing to show that there is a cognitive crisis at the time of the act, or in the interim, and another thing to show that it affects the cognitive functions that are useful in making that decision at that particular time [12]. This is the fundamental question of the reliability of cognitive tests and their interpretation in dementia [13].

In addition, a recent decision confirmed that the Mental Capacity Act (2005) is not relevant to issues of mental capacity when death has occurred [14]. In France, the question has not really arisen as to which procedure to use, that of the judge or that provided for by law, it being understood that there is no special framework relating to mental capacity like the Mental Capacity Act (2005). The existence of such a framework is further evidence of greater attention to the situation of people with cognitive impairment.

However, the respective limitations of these systems of protection raise the question of how to take these standards to a higher level, in this case that provided for in Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD).
II- Two regimes for assessing testamentary capacity that are uncertain regarding the requirements of Article 12 of the CRPD.

Marked by a strong desire for social inclusion, the Convention on the Rights of Persons with Disabilities (CRPD) is revolutionary in many ways in international law. People with dementia are covered by this convention under the heading of psychosocial disability. The term psychosocial disability links mental impairments to the social model of disability that permeates the convention. Based on this social model of disability, being psychosocially disabled means having a cognitive impairment that hinders full and effective participation in society [15].

And to achieve this goal of full and effective participation in society, article 12 of the Convention sets out the principle of the enjoyment of legal capacity by persons with disabilities on an equal basis with others. Thus, on this basis, we go from a potential denial of legal capacity to a permanent affirmation of that capacity. Moreover, if legal capacity is no longer lacking in the case of cognitive impairment, its effectiveness remains dependent on the obligation of States to create the appropriate and necessary conditions for decision-making by persons with disabilities [16].

1- How should Article 12 be applied in the field of testamentary capacity?

Applied to the evaluation of testamentary capacity, this conception of legal capacity changes the situation. The provisions of the French civil code relating to the nullity of acts for insanity of mind are very clearly contrary to the convention. Because they make mental and intellectual incapacity the essential basis for the loss of legal capacity. This is contrary to the spirit and letter of Article 12 of the CRPD. This is true for the Banks criteria. There is a significant paradigm shift from a cognitivist and individual approach to a relational and collective approach to capacity and its implementation [17].

Consequently, the assessment of testing capacity, which consists in evaluating the cognitive functions of the person at the time of the act - by any means or by specific criteria - is no longer valid. This assessment operation, which is subject to many uncertainties, is not in line with the new concept of legal capacity recognized for persons with mental disabilities. Thus, on the basis of the obligation of States Parties to create adequate support for the exercise of legal capacity by persons with dementia, it is conceivable that judicial review of the inheritance of a person with dementia could become a review of compliance with decision-making support measures rather than a review of capacity. If the Convention does not influence the regime of judicial review of testamentary acts of persons with dementia in this way, this would violate the principle of equality attached to the recognition of permanent legal capacity for persons with disabilities under Article 12. This means that the legal mechanisms for the assessment of testamentary capacity must necessarily evolve considering the current limitations mentioned above.

It remains to be determined how to implement new criteria for assessing the capacity to test persons with dementia from the perspective of permanent capacity.

In view of all the above, the inadequacy of protecting the decision-making autonomy of people with Alzheimer's disease is no longer in doubt. But the concept of the ability to test
persons with dementia as envisaged by the Convention is not an easy one. What form could the support for decision making with respect to wills take? This is the question that one may ask. This support envisaged to guarantee the exercise of legal capacity must meet a certain number of criteria as provided for in Article 12, paragraph 4 [18]. Difficulties of implementation concern two essential aspects. How can guarantees be provided to prevent abuse of weakness? and how can appropriate and proportional measures be proposed on a case-by-case basis without violating the rights, will and preferences of the person concerned? it being understood that a will is an eminently personal, even intimate act of will. Another major issue remains. To what extent can a person with cognitive impairment be required to comply with support measures for decision-making?

2- To what extent can a person with cognitive impairment be required to comply with support measures for decision-making?

This brings us almost back to the starting point of the temptation to propose substitution measures to people with dementia in the decision-making process [19]. Indeed, the inconsistency [20] of the convention does not make things any easier. It refuses the possibility of a substituted decision on the basis of the best interests of the person, without proposing anything in the event that the alterations of a certain seriousness do not make it possible to know the person's current preferences [21]. French positive law also opposes a maximalist interpretation of Article 12. This position is justified by a distinction between capacity to be a holder of rights and capacity to exercise these rights. According to this interpretation, while legal personality cannot be limited in any way, the exercise of rights may be restricted or limited [22].

Furthermore, the Convention is pushing for an inevitable transformation of the normative framework applicable to the legal acts of persons suffering from dementia. According to Peter Bartlett, it does not provide answers but rather opens the door to new ways of thinking about mental health law [23]. This explains why the assessment of the capacity to test people with dementia raises new questions, some answers to which are currently being constructed. One can cite the recent proposals made in Information Report No. 2075 of the French National Assembly dated 26 June 2019. The commission at the origin of this report recommends the following as part of the assessment of the person's situation: to supervise the medical certificate; to train doctors; to set up a multidisciplinary assessment. While it is true that these recommendations concern the general situation of people with psychosocial disabilities and not inheritance arrangements, it is certain that they will provide the necessary basis for raising the current standards for protecting the ultimate autonomy of people with Alzheimer's and related diseases. These same recommendations have been expressed in the English scientific literature [24], confirming shared aspirations that are becoming more complex considering the requirements of the CRPD.

This raises the question of what the future holds for the testamentary capacity of people with dementia on both sides of the Channel?

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1. Testamentary capacity is the legal term used to describe a person's legal and mental ability to make or alter a valid will. https://www.thegazette.co.uk/all-notices/content/100844, The Gazette Official Public Record.

2. Aoibheann Houston, Mary Donnelly, Shaun T. O’Keeffe argue that there is an obligation to comply with the testamentary provisions on the one hand because of ‘the practice of promise keeping’ (Brecher, 2002) and on the other hand, “and to the harm which the living would suffer if they were unable to dictate how certain matters should”, in Will-making in Irish nursing homes: Staff perspectives on testamentary capacity and undue influence, International Journal of Law and Psychiatry 56 (2018) 50-57.

3. Alex Ruck Keene, general editor, Assessment of Mental Capacity, British Medical Association 2015.


6. Banks v Goodfellow identifies four criteria for mental capacity at the time of the act: 1) Understanding the nature of the act he/she is making a will and its effects; 2) Understanding the extent of the property disposed of; 3) Being able to understand and appreciate the claims to which it is to give effect; 4) and This understanding must not be altered by any disturbance of the mind or delusion. Banks v Goodfellow, L.R. 5 Q.B. 549; 1870.

7. In a judgment in the case of Kenward v Adams (1975), Mr Justice (later Lord) Templeman stated: “In the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest that precautions be taken: [the rule is that] the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and finding,” in Robin Jacoby, Peter Steer, How to assess capacity to make a will, BMJ | 21 July 2007 | Volume 335.

8. Both the Golden Rule and the Banks Criteria call for the intervention of a legal and care professional.


10. Ibid.


13. Ibid.

14. The High Court recently considered testamentary capacity in Raymond Allen James v. Karen James & others [2018] EWHC 43 (Ch). “the Judge held that the test in Banks v Goodfellow was the only test of capacity for retrospectively deciding whether someone had capacity to make a will. There are two different tests for mental capacity in making wills, one for a living person and the other retrospective in relation to a will already made”. Martin Oliver, Testamentary capacity: an update, https://www.wrighthassall.co.uk/knowledge-base/testamentary-capacity-an-update.

15. Article 1.2 of the Convention also goes in this direction by referring to persons with disabilities as "persons with long-term physical, mental, intellectual or sensory impairments whose interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. »

16. Article 12 (3) states that "States Parties shall take appropriate measures to provide persons with disabilities with access to the support they may require to exercise their legal capacity. »

17. This echoes the relational model of autonomy found in Ricoeur's philosophy.

18. "States Parties shall ensure that measures relating to the exercise of legal capacity are accompanied by appropriate and effective safeguards to prevent abuses, in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, wishes and preferences of the person concerned, are free from any conflict of interest and do not give rise to any abuse of influence, are proportionate and appropriate to the situation of the person concerned, apply for the shortest possible period of time and are subject to periodic review by a competent, independent and impartial body or judicial body. These guarantees must also be proportionate to the extent to which the measures facilitating the exercise of legal capacity affect the rights and interests of the data subject. »


21. Ibid.


24. Op. Cit. Kelly Purser, Jane Lonie, “Education for legal and health professionals is needed about the limitations of cognitive screening measures such as the MMSE, but also about the dangers of attempting to assess testamentary capacity without an adequate understanding of not only the interplay between the legal and health professions but also the effects of dementia, as well as the many other mentally disabling conditions, on the cognitive abilities necessary to make a will.”

Further reading.


