

Article 12 CRPD: Equal Recognition before the Law

Authors: Lucy Series, School of Law and Politics, Cardiff University (SeriesL@cardiff.ac.uk), with Anna Nilsson, Department of Law, Lund University (anna.nilsson@jur.lu.se).¹

This is a draft of a chapter that has been accepted for publication by Oxford University Press in the I Bantekas, M Stein and D Anastasiou (eds), *Commentary on UN Convention on the Rights of Persons with Disabilities* (Oxford University Press 2018).² Permission to share this original pre-copied version of the chapter has been granted by OUP under their Policy on Wellcome Trust Funded Chapters. Dr Series is the holder of a Wellcome Trust Society and Ethics Research Fellowship, and would like to acknowledge their generous support which has facilitated the writing of this chapter.

1. States parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Introduction

¹ NB: The commentary on article 12 paragraphs 1-4 were written by Lucy Series. The commentary on article 12 paragraph 5 was written by Anna Nilsson.

² <https://global.oup.com/academic/product/the-un-convention-on-the-rights-of-persons-with-disabilities-9780198810667?cc=gb&lang=en&>

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

The right to equal recognition before the law is concerned with legal personality – the ability to bear rights and duties under law, and legal capacity – whether and how one can exercise, claim or defend those rights, and the assumption of legal liability.

Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD)³ is concerned with how legal systems themselves enable and disable people as legal actors. In the view of the UN Committee on the Rights of Persons with Disabilities ('CRPD Committee') and many of those involved in negotiating article 12, it introduces a new paradigm of 'universal legal capacity', that cannot be limited on grounds of disability or mental incapacity.⁴ The CRPD Committee maintains that this requires the abolition of all forms of substitute decision making. This interpretation of article 12 is contested in the literature, but for many involved in the disability movement, ending guardianship and other forms of substitute decision making is central to wider advocacy goals of ending institutionalisation, forced treatment, and loss of fundamental citizenship rights such as the ability to vote, marry and own property.

The adoption of article 12 has prompted an explosion of literature on the nature of legal personhood, legal capacity and the possibilities (or otherwise) of eradicating substituted decision-making and introducing new frameworks for support for adults with intellectual disabilities, cognitive impairments, psychosocial disabilities and other mental disabilities.⁵ From its inception to the present day it has provoked debate and a degree of controversy. Article 12 has prompted considerable interest in alternatives to guardianship and other substituted decision making frameworks, but to date no state has entirely abolished substitute decision making.

The right to equal recognition before the law has profound implications for a wide range of legal frameworks for states parties to the Convention, including guardianship laws, the insanity defence, civil and criminal trial procedures, electoral law and mental health laws. It touches upon many other articles in the Convention, including those concerning detention (article 14), forced treatment (articles 15, 17 and 25), relationships and reproductive rights (article 23), protection against violence, exploitation and abuse (Article 16), the right to life (article 10), access to justice (article 13), living independently (article 19), and participation in political and public life (article 29).

Many hard questions remain: what values and beliefs inform our views about equality and discrimination in the context of legal capacity? How should the 'hard cases' of risk, undue influence and unclear will and preferences be addressed? How should we address the ongoing uncertainty and discursive struggles over key concepts such as 'substituted decision-making', 'supported decision-making', respect for the 'will and preferences' of the person and 'legal capacity' itself? And how can individual States parties move forward when so many key issues remain open?

³ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

⁴ CRPD Committee, 'General comment No 1 (2014) Article 12: Equal recognition before the law' UN Doc CRPD/C/GC/1 (19 May 2014); Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' (2006-7) 34 *Syracuse Journal of International Law and Commerce* 429; Amita Dhanda, 'Universal Legal Capacity as a Universal Human Right', in Michael Dudley, Derek Silove and Fran Gale (eds) *Mental Health and Human Rights: Vision, praxis, and courage* (OUP 2012); Eilionóir Flynn and Anna Arstein-Kerslake, 'Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity' (2014) 10 *International Journal of Law in Context* 81-104.

⁵ 'Mental disabilities' is the term most frequently used in the literature to refer collectively to persons with intellectual disabilities, psychosocial disabilities, and acquired cognitive impairments such as brain injuries or dementia. However, this terminology is not without controversy, see Helen Spandler, Jill Anderson and Bob Sapey, *Madness, Distress and the Politics of Disablement* (Policy Press 2015).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

Throughout the history of article 12, and its associated literature, the theme of ambiguity recurs. Ambiguity was a necessary cost of unity for the advocacy strategy of disability organisations participating in the negotiations of the Convention, it was the price of agreement amongst states parties when finalising article 12, and it was ambiguity about whether article 12 permitted or prohibited substitute decision making that enabled states parties who could not envisage abolishing systems of guardianship or deprivation of legal capacity to sign up to the Convention. Yet the possibility that article 12 does prohibit substitute decision making and guardianship has created a powerful platform for difficult conversations about the nature and effects of restrictions on legal capacity experienced by disabled people worldwide, challenging the status quo and forcing advocates of guardianship and substitute decision making systems to re-examine assumptions that have been taken for granted.

As States parties engage with article 12, they should not regard it as a technical problem to be solved by legal or other experts. It is fundamental to the spirit of the CRPD that disabled people and representative organisations are involved *at all stages* of its interpretation and implementation.⁶ At each point, the wider politics of representation must be thoughtfully engaged with. There are signs that the views expressed by prominent advocates of universal legal capacity are not shared by all in wider communities of users and survivors of psychiatry and disabled people.⁷ This does not mean these dissenting voices support the values or practices of the 'old paradigm', however. Plumb writes that 'the issue for me is not intervention as such; it is the nature of that intervention and its consequences'.⁸

To disregard this diversity of views amongst those directly affected by substitute decision making regimes, or to dismiss dissenting voices as instances of 'false consciousness', is to replicate at the political level the same patterns of discreditation, stigmatisation and silencing that the CRPD itself aims to combat. Yet, equally there is a danger that without the 'strategic unity' adopted by the disability organisations during the negotiations of article 12, there is the possibility of cherry picking voices that those responsible for implementing the CRPD find the most palatable. The CRPD has created the space for these important conversations, it is up to all of those involved in advocacy, commentary, and implementation to act in good faith and with fair representation for all voices of those directly affected by article 12.

⁶ Art 4(3) CRPD.

⁷ Nev Jones and Mona Shattell, 'Beyond Easy Answers: Facing the Entanglements of Violence and Psychosis' (2014) 35 *Issues in Mental Health Nursing* 809-811; Anne Plumb, 'The Global Politics of Disablement: Assuming Impairment and Erasing Complexity' in Spandler, Anderson and Sapey (n 5Error! Bookmark not defined.), citing Christina Katsakou and others, 'Psychiatric patients' views on why their involuntary hospitalisation was right or wrong: a qualitative study' (2012) 47(7) *Social Psychiatry and Psychiatric Epidemiology* 1169-1179. Some disability rights organisation and users and survivors of psychiatry have argued for the use of functional tests in the mental health context: Elyn Saks, *Refusing Care: Forced Treatment and the Rights of the Mentally Ill* (University of Chicago Press 2002); George Szmukler and Diana Rose, 'Strengthening Self-Determination of Persons with Mental Illness' in J Clausen and N Levy (eds), *Handbook of Neuroethics* (Springer Netherlands 2015); 'Deprivation of Liberty safeguards' (Disability Rights UK 2014) <<http://www.disabilityrightsuk.org/news/2014/october/deprivation-liberty-safeguards>> 1 March 2017; Mental Health Alliance, *A Mental Health Act fit for tomorrow: An agenda for reform* (2017) <<http://www.mentalhealthalliance.org.uk/news/2017-a-mental-health-act-fit-for-tomorrow.html>>; D Bhugra and others, 'The WPA *Lancet Psychiatry* Commission on the Future of Psychiatry', (2017) 4 *Lancet Psychiatry* 10, 775 (see comments of Diana Rose, p 794.

⁸ Plumb, in Spandler, Anderson and Sapey (n 5Error! Bookmark not defined.).

Background and Travaux Préparatoires

Although earlier human rights instruments guaranteed equal recognition before the law and the right to recognition as a person before the law, the use of guardianship continued to be widespread for disabled people⁹. Several non-binding instruments permitted restrictions on legal capacity on disability related grounds and regulated the appointment of third parties (known variously as guardians, curators, deputies, etc.) to make substitute decisions for the person. The approach found in these instruments is sometimes called the 'old paradigm'.¹⁰ They typically emphasise the importance of a 'presumption of capacity', the proportionality of restrictions, and procedural safeguards such as expert evidence, periodic reviews and rights of appeal.

This approach can be found in the United Nations Declaration on the Rights of Mentally Retarded Persons (1971)¹¹, affirmed by the subsequent UN Declaration on the Rights of Disabled Persons (1975)¹². These construct guardianship as a right for 'the mentally retarded person' to protect his well-being and interests. In 1991 the UN General Assembly adopted a resolution on 'The protection of persons with mental illness and the improvement of mental health care',¹³ commonly called the 'MI Principles'. This states that deprivation of legal capacity should only occur after a 'fair hearing by an independent and impartial tribunal' and sets out the relevant due process guarantees. Similar approaches can be found in regional human rights instruments and courts.¹⁴

Critics of the old paradigm describe this as 'an ever more perfect and safeguarded process of loss'¹⁵ and claim that *all* persons, no matter what their impairment, can be supported to exercise legal capacity on an equal basis with others. This 'revolutionary'¹⁶ view was the subject of often heated discussions during the negotiations of article 12, which are recorded in the *travaux préparatoires*¹⁷ and in the accounts of participants.¹⁸

⁹ I recognise that this terminological choice - 'disabled people' - is not without controversy, particularly for those identifying as users and survivors of psychiatry, or preferring person first language (Spandler, Anderson and Bob, n 5 **Error! Bookmark not defined.**). The terminology I have adopted here reflects the theory and terminology of the disabled people's movement in the UK, where this author is based. I have adopted this in preference to 'users and survivors of psychiatry' because the implications of Art 12 are wider reaching than this group, because this article concerns a disability treaty, and because there is no agreed upon terminology that reflects the preferences of all demographics affected by Art 12. I hope readers will understand that this chapter does not seek to impose an identity upon them which they do not claim as theirs.

¹⁰ Kristin Booth Glen, 'Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond' (2012) 44 *Columbia Human Rights Law Review* 93.

¹¹ UNGA Res 2856 (XXVI) (20 December 1971).

¹² UNGA Res 3447 (XXX) (9 December 1975).

¹³ UNGA Res 46/119 (17 December 1991).

¹⁴ Council of Europe Committee of Ministers, 'Recommendation (99) 4 on principles concerning the legal protection of incapable adults' (23 February 1999). Recommendation 99 has strongly influenced the approach of the European Court of Human Rights in its case law on legal capacity and guardianship.

¹⁵ Gerard Quinn 'Liberation, Cloaking Devices and the Law: A Personal Reflection on the Law and Theology of Article 12 of the UN CRPD' (Rights & Enforcement – The Next Steps. BCNL Conference, Sofia, 16 October 2013). <[http://studylib.net/doc/14435705/liberation--cloaking-devices-and-the-law.](http://studylib.net/doc/14435705/liberation--cloaking-devices-and-the-law)> accessed 15 February 2017.

¹⁶ Tina Minkowitz, 'The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from nonconsensual psychiatric interventions' (2006-7) 34 *Syracuse Journal of International Law and Commerce* 405.

¹⁷ 'Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities' (*UN Enable*) <<http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>> accessed 15 February 2017>

¹⁸ Dhanda (n 4); Minkowitz (n 16); Arlene Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Routledge 2015); Marianne Schulze, 'Understanding The UN Convention On The

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

The CRPD was negotiated over eight sessions of an Ad Hoc Committee between 2002 and 2006. There was a very high level of participation of disability organisations in the negotiations, attending and observing formal and informal discussions of the AHC, submitting proposals and making comments at the end of each session (and sometimes even during sessions).

At the first meeting of the Ad Hoc Committee a large group of disabled people's organisations (DPOs) and allied NGOs joined together to form the International Disability Caucus (IDC) to provide a 'representative voice' for disabled people during the Ad Hoc Committee negotiations.¹⁹ The World Network of Users and Survivors of Psychiatry (WNUSP) and Inclusion International, an organisation of people with intellectual disabilities and their families, were particularly prominent in the negotiations of article 12 CRPD.

The involvement of DPOs in the negotiations of the CRPD is central to its 'nothing about us without us' ethos. This ethos is now encoded in article 4(3) CRPD, requiring states parties to 'closely consult with and actively involve persons with disabilities... through their representative organisations' when developing policy or legislation that affects them. This role raises difficult questions about the politics of representation within the disability and user and survivor of psychiatry movements.²⁰ Lord has questioned how representative those NGOs negotiating the Convention were for more 'moderate' user groups and for the Global South.²¹ Some survivor activists have expressed the view that not all views within this community were represented within the advocacy strategy adopted during the negotiations.²² Jones and Kelly raise concerns more generally about 'representational over-reach' within user and survivor movements, highlighting the heterogeneity of this group.²³ One key group directly affected by article 12 – perhaps *the* main group in industrialised countries - is people with dementia, yet their presence in article 12 CRPD negotiations appears to have been limited.²⁴ Lest these concerns should be seen as diminishing the representational legitimacy of the CRPD, however, it should be recalled that it is still regarded as *the* most inclusive human rights treaty drafting process in the UN's history, and a template for future treaty negotiations.²⁵

Reina describes 'Unity' as an essential strategy for the IDC's advocacy: within the IDC opposing positions could be discussed, meanings could be negotiated and some points of view were ultimately

Rights Of Persons With Disabilities' (Handicap International 2010) <<http://incfit.org/node/279>> accessed 15 February 2017; Rosemary Kayess and Philip French 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1-34; Equal Rights Trust, 'Promoting a Paradigm Shift – ERT talks with Gábor Gombos and Gerard Quinn about the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol' (2008) 2 *The Equal Rights Review* 83-96; Maria Reina, 'How the International Disability Caucus worked during negotiations for a UN Human Rights Convention on Disability' (*Global Action on Aging* 2008) <<http://globalag.igc.org/agingwatch/events/CSD/2008/maria.htm>> accessed 15 February 2017.

¹⁹ Reina, *ibid.*

²⁰ On which, see: *Shaping Our Lives, Beyond the usual suspects* (2013) <<http://www.shapingourlives.org.uk/documents/BTUSReport.pdf>>.

²¹ Janet Lord, 'Mirror, Mirror on the Wall: Voice Accountability and NGOs in Human Rights Standard Setting' [2004] *Seton Hall Journal of Diplomacy and International Relations* 93.

²² Plumb, in Spandler, Anderson and Sapey (n 5 **Error! Bookmark not defined.**).

²³ Nev Jones and Timothy Kelly, 'Inconvenient complications: on the heterogeneities of madness and their relationship to disability', in Spandler, Anderson and Sapey (n 5).

²⁴ However, these issues are being revisited as part of the negotiations of a possible UN Convention on the Rights of Older Persons, see Eilionóir Flynn, 'Disability and Ageing: Bridging the Divide? Social Constructions and Human Rights' in Peter Blanck, Eilionóir Flynn and Gerard Quinn (eds) *A Research Companion to Disability Law* (Ashgate 2015).

²⁵ Kanter (n 16).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

'sacrificed', but in front of governments all IDC members supported the position reached. Reina writes that this approach required creativity and 'tolerating Ambiguity... an inevitable consequence of being simultaneously different and unified.'²⁶ Ambiguity is a central theme in the history and literature of article 12. On the one hand, it might be regarded as a shortcoming - ambiguity is rarely a desirable quality in law – yet arguably this very ambiguity has allowed the new paradigm to achieve the prominence it has, from the negotiations, through ratification to the present day.

At the second Ad Hoc Committee meeting in 2003 a working group was established to develop a draft Convention. It comprised representatives from States parties as well as NGOs, and included prominent scholars and activists such as Tina Minkowitz (representing WNUSP), Gerard Quinn (representing Rehabilitation International), and Theresa Degener (representing Germany), who went on to chair the CRPD Committee. Minkowitz recounts that the 'paradigm shift crystallised' during the 2004 working group.²⁷

The working group had at its disposal a number of drafts and proposals for the Convention submitted by various states and NGOs²⁸, illustrating diverse starting points. Proposals by India and the Chair of the Ad Hoc Committee mentioned the use of guardianship. Proposals by the EU and the World Blind Union emphasised rights to self-determination closely connected to legal capacity. The International Disability Alliance (IDA), whose members included WNUSP and Inclusion International, called for 'Recognition as a person before the law'. Separate proposals by WNUSP emphasised the importance of not differentiating legal status 'on account of actual or perceived disability', asserted that 'no person shall be deprived of the legal capacity to assert rights in her or his own behalf', and called for 'a right to be provided with advocacy assistance and other reasonable accommodation with the aim of giving effect to the person's own decisions.' Inclusion International's proposal called for the abolition of 'paternalistic guardianship laws'.

The working group text formed the basis of the negotiations for article 12 (at that time, article 9). The draft required all States parties to 'recognise persons with disabilities as individuals with rights before the law equal to all other persons', an early version of article 12(1). It contained an equality requirement, that states parties 'accept that persons with disabilities have full legal capacity on an equal basis as others', the precursor to article 12(2). It required States parties to ensure access to 'assistance' with understanding, communicating, and expressing 'choices and preferences' and performing various legal acts, a precursor to article 12(3). It also made provision for safeguards for this 'assistance', anticipating article 12(4). However, the draft also stated that 'relevant decisions are taken only in accordance with a procedure established by law and with the application of relevant legal safeguards', with a footnote to this paragraph stating that it should 'apply only in exceptional circumstances, for which legal safeguards must be provided'. The footnote also queried whether this paragraph was sufficiently clear and 'how best to protect persons with disabilities who cannot exercise their legal capacity'. The final paragraphs addressed matters relating to property, credit and financial affairs, which formed the basis of article 12(5).

²⁶ Reina (n 16).

²⁷ Tina Minkowitz, 'CRPD and transformative equality' (2017) 13(1) *International Journal of Law in Context* 77-86.

²⁸ UN Enable, 'Compilation of proposals for elements of a Convention, as of 15 January 2004 (Combining Compilation of proposals for a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, UN Doc A/AC.265/2003/CRP/13 (16-27 June 2003) and the NGO contributions to the elements of a convention, UN Doc A/AC.265/2003/CRP.13/Add.1) (2004). <<http://www.un.org/esa/socdev/enable/rights/comp-element0.htm>> accessed 19 January 2017.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

The records of the Ad Hoc Committee discussions show that early on many participating states expressed confusion or disagreement about the meaning of 'legal capacity'. Some states distinguished between the 'capacity to hold and bear rights' and the 'capacity to act', arguing that whilst the former could not be limited the latter could be. In part this disagreement mirrored different understandings of legal capacity in the various legal systems.²⁹ This distinction was strongly opposed by the IDC, as the 'capacity to act' was deemed vital for self-determination.

An alternative Canadian proposal to the working group text garnered considerable support among participating states. Although it made reference to equality and support principles, it explicitly permitted a 'competent, independent and impartial authority' to 'find a person unable to exercise their legal capacity with support', and to appoint 'a personal representative to exercise the legal capacity on the person's behalf'.³⁰ Contrasting proposals were put forward by the IDC, which outlined key elements of support for the exercise of legal capacity and did not describe any procedure for restricting legal capacity.³¹ The IDC proposal emphasised the importance of trust, and of not imposing support against a person's will. It called for legal standards for support mechanisms, including the obligation to 'respect the will and preferences of the individual concerned', which is reflected in the final text of article 12(4).

Many participating states supported the Canadian proposal, but it was adamantly opposed by many NGOs. At the fifth Ad Hoc Committee in 2005 the Committee explicitly discussed whether the Convention should only permit supported decision-making and prohibit substitute decision-making.³² Whilst many participating States recognised the importance of supported decision-making, they felt the Convention should permit substituted decision-making in exceptional circumstances. The IDC was adamant that the Convention should abolish substituted decision-making, and that it could not coexist alongside supported decision-making. At the seventh session the Ad Hoc Committee chair sought clarification from the IDC as to whether there were not any 'extreme cases' requiring substitute decision-making or guardianship.³³ The IDC's response reveals a distinction between supported and substituted decisions that is central to understanding the support paradigm:

The difference between supported and substitute decision-making is that, in a supported situation, the person with a disability is at the center of the discourse. The premise of supported decision-making is that it ranges from zero to 100 per cent and is a dynamic concept.

Asked by the Chairman whether '100 per cent support' was not in fact substitute decision-making, the IDC representative responded that: '[t]he IDC goal is to not legitimize guardianship; a need for 100 per cent support would become 99 per cent, then 98 per cent, and so on. The IDC's concept of supported

²⁹ Istvan Hoffman and Gyorgi Konczi, 'Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code' (2011) 33 *The Loyola Los Angeles International and Comparative Law Review* 143-172.

³⁰ Proposals submitted at the fourth session of the Ad Hoc Committee. <<http://www.un.org/esa/socdev/enable/rights/ahcstata12fsccomments.htm#canada>> accessed 19 January 2017.

³¹ Proposals submitted at the fourth session of the Ad Hoc Committee. <<http://www.un.org/esa/socdev/enable/rights/ahcstata12fsccomments.htm#idc>> accessed 19 January 2017.

³² *Travaux préparatoires* (25 January 2005) <<http://www.un.org/esa/socdev/enable/rights/ahc5sum25jan.htm>> accessed 19 January 2017.

³³ *Travaux préparatoires* (18 January 2006) <<http://www.un.org/esa/socdev/enable/rights/ahc7sum18jan.htm>> accessed 19 January 2017.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

decision-making was thus far broader than might intuitively be thought; it applied even to circumstances where a person could not express a choice so long as they were 'at the center of the discourse'. This approach will be revisited under article 12(3) and article 12(4) CRPD below.

Towards the final Ad Hoc Committee sessions, a new text bracketed a paragraph allowing for the appointment of a personal representative. Some states sought its inclusion so as to impose safeguards on the use of guardianship, but the IDC insisted that such language be removed as it would simply reinforce 'the traditional abusive systems'.³⁴ Canada's proposal to maintain silence on whether the Convention should permit substituted decision-making received support from the IDC and many states. Some, however, insisted the Convention should permit guardianship and many informal discussions ensued in order to try and break the stalemate. Dhanda recounts that a group of states produced a new text that attempted to combine some of the safeguards for guardianship with those that had been proposed for supported decision-making: 'It was a periscope-like construction of the crucial paragraph so that each person could see what they desired in the paragraph, and thus provide consent to the proposal'.³⁵ This proposed text received the support of the majority of states, ultimately becoming article 12(4).

At the final Ad Hoc Committee meeting in 2006, a footnote appeared in the consensus text stating that 'In Arabic, Chinese and Russian, the term "legal capacity" refers to "legal capacity for rights", rather than "legal capacity to act"'.³⁶ No negotiations or deliberations had discussed this footnote.³⁷ It caused consternation among the DPOs, who viewed legal capacity to act as critical, and amongst 'legal and diplomatic forces' because, Schulze writes, 'A footnote is an unheard of feature in an international agreement of this kind. Allowing it to remain would have created a string of legal complications, the implications of which were inestimable'.³⁸ After heated negotiations, the footnote was removed.

Echoing Reina's observation that ambiguity was necessary to achieve unity for the IDC, the final text of article 12 CRPD remains silent on the pivotal question of whether the Convention permits or prohibits substitute decision-making. Consequently, the *travaux* are a focus of interest for those attempting to resolve legal ambiguities surrounding article 12. Dhanda, a prominent advocate of universal legal capacity and participant in the negotiations, recognises that the text 'does not prohibit substituted decision-making and there is language which could even be used to justify substitution', but argues that it cannot be read divorced from the process of advocacy and negotiation.³⁹ Martin and others, however, highlight the deliberate silence on substitute decision-making and argue that '[n]o state representative addressed this question by saying explicitly that substitute decision-making should be abolished'.⁴⁰ They conclude on the basis of their analysis of the *travaux* that there is no warrant for the conclusion that the framers of the CRPD intended to abolish substitute decision-

³⁴ *Travaux préparatoires* (18 January 2006) <<http://www.un.org/esa/socdev/enable/rights/ahc7sum18jan.htm>> 19 January 2017.

³⁵ Dhanda (2006-7) (n 4) 450.

³⁶ UN Enable, 'Interim report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its eighth session' (1 September 2006) UN Doc A/AC.265/2006/4

³⁷ Schulze (n 16); Dhanda (2006-7) (n 4).

³⁸ Schulze (n 18) 88.

³⁹ Dhanda (2006-7) (n 4) 460-1.

⁴⁰ Wayne Martin and others, 'The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Article. 12 in Capacity/Incapacity Legislation across the UK' (Essex Autonomy Project, University of Essex 2016) 58 < <https://autonomy.essex.ac.uk/resources/three-jurisdictions-report-towards-compliance-crpd-art-12-capacityincapacity-legislation-across-uk/>> accessed 15 February 2017.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

making. This view is not universally shared. Some states did accept the premise of universal legal capacity, without exception,⁴¹ although many more argued for substitute decision-making to be retained. Kanter highlights that many challenged the footnote that would have restricted rights to legal capacity to hold a right, but not to exercise it.⁴² Schulze believes that '[in] the end, the shift from substituted decision-making to supported decision-making was achieved', the result of 'tedious, detailed and sometimes excruciating discussions'.⁴³

Canada, the Netherlands, Australia, Poland, Egypt, Estonia, Singapore and Norway all submitted interpretive declarations when ratifying the CRPD stating that they understand article 12 to permit substitute decision-making, deprivation of legal capacity or guardianship.⁴⁴ In its early concluding observations on the initial reports of States parties to the CRPD, the CRPD Committee called upon states to replace regimes of substitute decision making by supported decision making,⁴⁵ although offered little further detail explaining what this entailed. In 2014 the CRPD Committee adopted General Comment No 1 on article 12 ('General Comment No 1')⁴⁶ to dispel a 'general misunderstanding' of state obligations under article 12 and to emphasise that 'the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making'.⁴⁷ The Committee's interpretation is not unanimously shared,⁴⁸ and has been met with a frosty reception by medical professionals in particular,⁴⁹ who have expressed confusion and concern about the implications of the General Comment.

In the final analysis, much comes down to what 'substituted decision-making', 'supported decision-making' and 'exercising legal capacity' are taken to mean. These should be recognised as terms of art within the literature on universal legal capacity; it should not be assumed that they carry their intuitive or traditional meaning.⁵⁰ Asked about the footnote controversy, the chair of the Ad Hoc Committee stated that 'any nuances in translation would be worked out throughout time and would depend on

⁴¹ At the 4th session of the AHC Mexico and Lebanon argued against surrogate decision-making (26 August 2004) <<http://www.un.org/esa/socdev/enable/rights/ahc4sumart09.htm>> accessed 15 February 2017.

⁴² Kanter (n 16).

⁴³ Schulze (n 18).

⁴⁴ Signatories and ratifications to the CRPD, and reservations and declarations, can be viewed on the UNTS website: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en> accessed 15 February 2017.

⁴⁵ See, for example, CRPD Committee, Concluding Observations on Tunisia, UN Doc CRPD/C/TUN/CO/1 (13 May 2011); Spain, UN Doc CRPD/C/ESP/CO/1 (19 October 2011); Peru, CRPD/C/PER/CO/1 (9 May 2012); China, CRPD/C/CHN/CO/1 (27 September 2012); Argentina, CRPD/C/ARG/CO/1 (8 October 2012); Australia, CRPD/C/AUS/CO/1 (21 October 2013).

⁴⁶ See (n 4).

⁴⁷ General Comment No 1, para 3.

⁴⁸ Martin and others (n 38); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report*, (ALRC Report 124, 2014).

⁴⁹ Melvyn Freeman and others, '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) 2 *Lancet Psychiatry* 844-850; John Dawson 'A realistic approach to assessing mental health laws' compliance with the UNCRPD' (2015) 40 *International Journal of Law and Psychiatry* 70-79; Paul S Appelbaum, 'Protecting the Rights of Persons With Disabilities: An International Convention and Its Problems' (2016) 67 *Law & Psychiatry* 366-368.

⁵⁰ For example, when Martin and others (n 38) argue that Art 12 does not prohibit substitute decision-making, this is based on their 'intuitive' interpretation of 'substitute decision-making' and not necessarily that intended within the General Comment and elsewhere in the literature (at 12 and Appendix C).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

State practice'.⁵¹ The Australian Law Reform Commission recommended withdrawing Australia's interpretive declaration on article 12, as 'driven by conceptual confusion that is impeding reform'.⁵²

Despite ongoing controversies, article 12 has influenced domestic and regional law-making bodies. It has been considered in many rulings of domestic and regional courts⁵³, domestic reforms to legal capacity legislation,⁵⁴ and statements and reports by other agencies and rapporteurs within the UN system, including the World Health Organization.⁵⁵ Regional bodies including the European Union⁵⁶ and the Organization of American States⁵⁷ have reviewed the practices of member states against the standards of article 12.

Commentary on Equal Recognition before the Law

The title of article 12, 'equal recognition before the law', can be found in the text of article 7 of the Universal Declaration of Human Rights (UDHR)⁵⁸ and article 26 of the International Covenant on Civil and Political Rights (ICCPR).⁵⁹ Article 26 ICCPR provides a broad guarantee against discrimination. It identified several groups with protected characteristics at heightened risk of discrimination; disabled people were not on this list. The CRPD can be viewed as rectifying the invisibility of disabled people under earlier human rights instruments.⁶⁰

Para 1

⁵¹ 'Press Conference on Convention Concerning Rights of Disabled Persons' (*United Nations* 13 December 2006) <http://www.un.org/press/en/2006/061213_Disabilities.doc.htm> accessed 15 February 2017.

⁵² Australian Law Reform Commission (n 46) para 2.59.

⁵³ Anna Lawson and Lisa Waddington (eds) *Domestic Interpretation of the UN Convention on the Rights of Persons with Disabilities: A Comparative Analysis*, (OUP 2017).

⁵⁴ For a review of recent developments, see: Robert Dinerstein, 'Emerging international trends for practices in guardianship laws for people with disabilities' (2016) 22 *ILSA Journal of International and Comparative Law* 435-460.

⁵⁵ UNCAT, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' UN Doc A/HRC/22/53 (1 February 2013); UNCAT, 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' UN Doc A/63/175 (28 July 2008); World Health Organization, Office of the High Commissioner for Human Rights and other UN Agencies, *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement* (2014); World Health Organization, *WHO Quality Rights Tool Kit: Assessing and improving quality and human rights in mental health and social care facilities* (WHO 2012).

⁵⁶ European Union Agency for Fundamental Rights (FRA), *Legal capacity of persons with intellectual disabilities and persons with mental health problems* (2013).

⁵⁷ Organization of American States, 'Final Report of the Third Special Meeting of the Committee for the Elimination of All Forms of Discrimination Against Persons with Disabilities (CEDDIS)' (10 January 2014) OEA/Ser.L/XXIV.3.3.

⁵⁸ UNGA Res 217 A(III) (10 December 1948).

⁵⁹ International Covenant on Civil and Political Rights (adopted 6 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁶⁰ Dhanda (2006-7) (n 4); Kanter (n 16).

States parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law

Article 12 CRPD relates to both legal personality and the legal capacity to act. To have legal personality is to be able to bear rights and duties under law.⁶¹ It is intimately connected with philosophies of personhood,⁶² but it is possible to be a natural person (that is, a human) and not be recognised as a legal person, or for non-human entities to be granted legal personality. For example chattel slaves in the USA were not legal persons within the civil law system.⁶³ Meanwhile today, some animals have been recognised as legal persons in some jurisdictions⁶⁴ and Bolivian legislation grants legal personality to 'Mother Earth'.⁶⁵ It is important to recognise that the mere conferral of legal personality does not specify what rights or duties are held, or how they are exercised; this falls within the remit of legal capacity (discussed under article 12(2)).

The first paragraph of article 12 CRPD is based on article 6 UDHR and article 16 ICCPR: 'Everyone has the right to recognition everywhere as a person before the law'. These rights were crafted to address the situation of colonized peoples who had systematically been denied legal personality by colonial regimes.⁶⁶ Article 12(1) CRPD requires states parties to recognise *all* persons with disabilities as legal persons, capable of bearing rights and duties within both civil and criminal justice systems. Kanter writes that 'Any law or practice by which a person with disability is not registered at birth, refused a document of identity or disqualified from inheriting property or otherwise recognized under the law, would be a violation of article 12(1)'.⁶⁷

Para 2

States parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

A person may enjoy legal personality – the status of being a bearer of rights and duties under law – but be unable to exercise legal capacity him or herself because of the operation of guardianship or other laws restricting legal capacity. Legal capacity is an elusive concept, however.

⁶¹ Richard Tur, 'The "person" in law', in Arthur Peacocke and Grant Gillett (eds) *Persons and Personality: A Contemporary Inquiry* (Blackwells 1987).

⁶² Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 *The Modern Law Review* 346-367.

⁶³ Colin Dayan, *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton University Press 2011); Steven Wise, *Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery* (Da Capo Press 2005).

⁶⁴ Steven Wise, *Rattling the Cage: Towards Legal Rights for Animals* (Da Capo Press 2014); Presented by AFADA about the Chimpanzee 'Cecilia' - Non human individual, File no P-72.254/15 before the Third Court of Guarantees in Mendoza, Argentina (3 November 2016), non-official English translation <http://www.nonhumanrightsproject.org/wp-content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf> accessed 15 February 2017.

⁶⁵ *La Ley Marco de la Madre Tierra y Desarrollo Integral para Bien* ("Framework Law of Mother Earth and Integral Development for Living Well", Law 300, passed by Bolivia's Plurinational Legislative Assembly on October 15, 2012);

⁶⁶ Dhanda (2006-7) (n 4).

⁶⁷ Kanter (n 16).

Defining legal capacity

Article 12(2) CRPD is only the second UN human rights treaty to use the term 'legal capacity'. The first was article 15(2) of the UN Convention on the Elimination of Discrimination Against Women (CEDAW)⁶⁸, which provides:

States parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

CEDAW addresses legal capacity because many women have been denied basic rights to own property, access credit, engage in contracts, vote, give witness testimony etc, either at all or without their husband's or male relatives' consent.⁶⁹ In the eighteenth century William Blackstone referred to this phenomenon as 'civil death'.⁷⁰

Legal capacity is intimately connected with autonomy. Quinn describes its significance as 'a sword to enable one to make one's own choices' and 'a shield fending off others' purporting to make decisions for us.⁷¹

The term 'legal capacity' has no internationally agreed upon definition.⁷² It is often described by way of 'canonical examples'⁷³ such as entering into a contract, getting married, voting, giving or refusing consent to medical treatment, etc.⁷⁴ It has a bearing on such diverse matters as instructing legal representatives,⁷⁵ consent to sexual relationships⁷⁶ and state interventions to protect adults at risk of abuse or neglect by others.⁷⁷

Legal capacity may be restricted formally – through an administrative or court declaration of 'incapacity' – or informally, for example through defences that permit acts that would ordinarily be

⁶⁸ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW)

⁶⁹ CEDAW, *General Recommendation No. 21 Equality in marriage and family relations* (13th session 1994).

⁷⁰ William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769 with an Introduction by Stanley N. Katz*, (Blackwells 1979).

⁷¹ Gerard Quinn, 'Legal Capacity Law Reform: The Revolution of the UN Convention on the Rights of Persons with Disability' (*Frontline: the voice of intellectual disability*, issue 83, 2 August 2011) < <http://frontline-ireland.com/legal-capacity-law-reform-the-revolution-of-the-un-convention-on-the-rights-of-persons-with-disability/>> accessed 15 February 2017.

⁷² European Union Agency for Fundamental Rights (n 54) 9.

⁷³ Martin and others (n 40) 7.

⁷⁴ Bernadette McSherry, 'Legal capacity under the Convention on the Rights of Persons with Disabilities' (2012) 20 *Journal of Law and Medicine* 22-27.

⁷⁵ Lucy Series, 'Legal capacity and participation in litigation: Recent developments in the European Court of Human Rights' (2015) 4 *European Yearbook of Disability Law* 103-128.

⁷⁶ Anna Arstein-Kerslake, 'Understanding sex: the right to legal capacity to consent to sex' (2015) 30 *Disability & Society* 1459-1473; Lucy Series, 'The Use of Legal Capacity Legislation to Control the Sexuality of People with Intellectual Disabilities', in Tom Shakespeare (ed.) *Disability Research Today: International Perspectives*, (Routledge 2015) 149 - 165.

⁷⁷ Eilíonóir Flynn and Anna Arstein-Kerslake, 'State Intervention in the Lives of People with Disabilities: The Case for a Disability Neutral Framework' (2017) 13 *International Journal of Law in Context* 1, 39.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

regarded as unlawful violations of bodily integrity or interferences with property.⁷⁸ The CRPD Committee has highlighted that even states, such as Sweden, that have abolished formal declarations of incapacity, forms of substitute decision making may remain.⁷⁹ There may also be *de facto* restrictions on legal capacity whereby, despite the absence of any source of law restricting the legal capacity of disabled people, society functions in such a way that systematically denies them ordinary legal rights to self-determination. In some of its concluding observations on article 12, the CRPD Committee has raised concerns about 'de facto guardianship' through customary practices such as families preventing disabled relatives from making choices about marriage, buying food or renting a house, or inheriting.⁸⁰

A legal opinion on article 12 CRPD, signed by thirty-one legal experts from around the world, defines legal capacity as consisting of 'the capacity to hold a right and the capacity to act and exercise the right, including legal capacity to sue, based on such rights'.⁸¹ General Comment No 1 defines legal capacity as including the capacity to be a 'holder of rights', entitling 'the person to full protection of his or her rights by the legal system', and the capacity to be 'an actor under law', recognised 'as an agent with the power to engage in transactions and in general to create, modify or end legal relationships'.⁸²

Because the concept of legal capacity is so fluid, it is difficult to draw a line around which acts in everyday life constitute possible expressions of legal capacity and thereby what constitutes a restriction on legal capacity. Not all acts and decisions are legal acts. Whether an act constitutes an exercise of legal capacity varies according to custom and jurisdiction. It depends upon both the nature of the act – whether it is legal in character – and the actor, whether they are recognised as having made a legally effective choice or performed a legally effective act, with all the resultant rights and responsibilities this entails.

In cultures where fewer acts and decisions are regulated by law, the barriers to one's decisions being accorded respect and recognition may be informal rather than restrictions on legal capacity *per se*.⁸³ In contrast, the increasing 'juridification'⁸⁴ of everyday life and interpersonal relations in some societies means that legal capacity may be formally engaged even for quite mundane acts and decisions. For example, in England and Wales, capacity laws are regarded as potentially relevant to

⁷⁸ Alex Ruck Keene, 'Powers, defences and the 'need' for judicial sanction' (2016) *Elder Law Journal* 244; Piers Gooding and Eilionóir Flynn, 'Querying the Call to Introduce Mental Capacity Testing to Mental Health Law: Does the Doctrine of Necessity Provide an Alternative?' (2015) 4 *Laws* 245-271.

⁷⁹ CRPD Committee, 'Concluding Observations on Sweden', UN Doc CRPD/C/SWE/CO/1 (12 May 2014) para 33.

⁸⁰ CRPD Committee, 'Concluding Observations on Kenya', UN Doc CRPD/C/KEN/CO/1 (30 September 2015) paras 23 and 24, and Uganda, UN Doc CRPD/C/UGA/CO/1 (12 May 2016) paras 22 and 23.

⁸¹ Santos Cifuentes and others, 'Legal Opinion on Article 12 of the CRPD' (*University of Leeds Disability Studies Group Archives*, 2008) < http://www.leeds.ac.uk/disability-studies/archiveuk/legal%20opinion/LegalOpinion_Art12_FINAL.pdf> accessed 15 February 2017.

⁸² Para 11.

⁸³ For an example of this, see: Elizabeth Kamundia, 'How to implement Article 12 of the Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya: A briefing paper' (The Kenya National Commission on Human Rights and the Open Society Initiative for Eastern Africa, 2013).

⁸⁴ Jürgen Habermas, *The Theory of Communicative Action, Lifeworld and System: A Critique of Functionalist Reason* (Beacon Books 1987).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

everyday decisions such as when a person gets up and what they eat⁸⁵; there has even been litigation over shaving pubic hair.⁸⁶

The tendency to engage rights to defend everyday acts, such as smoking,⁸⁷ or eating unhealthy food⁸⁸ has been criticised as devaluing wider struggles against ‘tyranny, prejudice and oppression’ and expanding the colonisation of life and the social world by law.⁸⁹ Yet most people take for granted the freedom and dignity to make choices in their everyday lives, including poor choices. By contrast, disabled people may have to activate the ‘heavy lifting procedures’ of ‘high duty rights’ simply to enjoy ‘ordinary personal preferences like watching late-night television and waking up late in the morning’⁹⁰, because of the high level of external regulation in their lives.⁹¹

Distinguishing legal capacity and mental capacity

Legal capacity is distinct from mental capacity. Mental capacity concerns an individual’s putative psychological abilities, whereas legal capacity refers to whether a person’s acts and decisions are *treated as* legally effective within a particular legal system. Almost all legal systems couple restrictions on legal capacity to some formulation of mental capacity.⁹² So called ‘status’ approaches restrict legal capacity on a binary categorical status, such as being a detained patient.⁹³ ‘Outcome’ approaches restrict legal capacity on the basis of the outcome of a person’s decision – for example, whether it is deemed ‘unreasonable’. Increasingly popular ‘functional’ approaches to mental capacity instead purport to restrict legal capacity based on the process by which a person makes a decision, rather than the outcome of the decision. The origins of functional approaches lie in psychometric tools for the clinical assessment of competence to give or refuse consent to treatment, and there is an extensive research literature examining their application to different clinical groups.⁹⁴ Functional tests are also sometimes referred to as ‘cognitive’ tests or tests of ‘decision-making capacity’.

⁸⁵ Department for Constitutional Affairs, *Mental Capacity Act Code of Practice* (TSO 2007) 3, paras 1.1, 1.8, 1.8, 3.3, 5.58, 6.1, 4.38, 4.60, 5.27 and 5.60; Law Commission, *Mentally Incapacitated Adults and Decision-Making: An Overview* (Law Com No 119, 1991) para 1.10.

⁸⁶ *A Local Authority v ED & Ors* [2013] EW COP 3069.

⁸⁷ *R (E) v Nottinghamshire Healthcare NHS Trust* [2009] EWCA Civ 795.

⁸⁸ *Lyons v Board of the State Hospital* [2011] ScotCS CSOH_21.

⁸⁹ Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish 2007) p 36.

⁹⁰ Amita Dhanda, ‘Conversations between the proponents of the new paradigm of legal capacity’, (2017) 13 *International Journal of Law in Context* 87, 91.

⁹¹ Eilionóir Flynn and Anna Arstein-Kerslake, ‘The Right to Legal Agency: Domination, Disability, and the Protections of Article 12 of the Convention on the Rights of Persons with Disabilities’, (2017) 13 *International Journal of Law in Context* 1, 22.

⁹² NB: these are not the only restrictions on legal capacity that exist within legal systems. Restrictions on legal capacity often also apply to, *inter alia*, children, prisoners, legal persons that are not natural persons (such as companies), etc.

⁹³ e.g. *Winterwerp v the Netherlands* (App no 6301/73) [1979] 2 EHRR 387.

⁹⁴ Paul S Appelbaum and Thomas Grisso, ‘Assessing patients’ capabilities to consent to treatment’ (1988) 319 *New England Journal of Medicine* 1635-8; Thomas Grisso and Paul S Appelbaum, ‘Comparison of standards for assessing patients’ capacities to make treatment decisions’ (1995) 152 *American Journal of Psychiatry* 1033-1037; Thomas Grisso and Paul S Appelbaum, ‘The MacArthur Study III. Treatment Competence Abilities of Patients to Consent to Psychiatric and Medical Treatments’ (1995) 19 *Law and Human Behaviour* 149.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

The Mental Capacity Act 2005 of England and Wales (MCA) is a widely known and influential example of a functional approach. The MCA defines an inability to make a decision functionally, as being unable:

- a) to understand the information relevant to the decision,
- b) to retain that information,
- c) to use or weigh that information as part of the process of making the decision, or
- d) to communicate his decision (whether by talking, using sign language or any other means).⁹⁵

This functional test, or adapted versions thereof, appear increasingly in legislation around the world.⁹⁶ There have been longstanding calls for a functional test of capacity to be adopted as a threshold criterion for psychiatric detention and forced treatment⁹⁷ and for the 'fusion' of guardianship and civil commitment laws based on this principle. Northern Ireland has recently adopted the world's first example of 'fused' guardianship and mental health legislation based on the functional approach.⁹⁸ Several scholars and law reform bodies maintain that functional tests of mental capacity comply with article 12 CRPD.⁹⁹

Functional approaches to legal capacity are increasingly popular because they are thought to respect autonomy and not to discriminate against disabled people. The autonomy claim is based on the view that functional tests are 'value-neutral' – that they assess the internal processes of decision-making for their 'autonomous' character, rather than assessing the outcome of the decision against the assessor's own values. There is a vigorous philosophical literature interrogating this claim¹⁰⁰ and a

⁹⁵ Mental Capacity Act 2005 s3(2)

⁹⁶ Internationally, the MCA has influenced law reform proposals in: the Republic of Ireland (Assisted Decision-Making (Capacity) Bill 2013); Australia (Victorian Law Reform Commission, 2012; Mental Health Act 2013, Tasmania; Mental Health Act 2014, Western Australia; Australian Law Reform Commission, 2014); Singapore (Mental Capacity Act 2008); and Central and Eastern Europe (Model Act on reasons and procedure for limiting and protection of certain rights and liberties, Serbia, 2013; Natural Persons and Support Measures (Draft) Act, Bulgaria, 2014; Act on Protection of Persons with Mental Disorders 2014, Croatia, 2014).

⁹⁷ Tom Campbell and Chris Heginbotham, *Mental Illness: Prejudice, Discrimination and the Law*, (Dartmouth Publishing Company 1991); John Dawson and George Szmukler, 'Fusion of mental health and incapacity legislation' (2006) 188 *The British Journal of Psychiatry* 504-509; George Szmukler, Rowena Daw and Felicity Callard, 'Mental health law and the UN Convention on the rights of persons with disabilities' (2013) 17 *International Journal of Law and Psychiatry* 245–252; Genevra Richardson, 'Report of the Expert Committee: Review of the Mental Health Act 1983' (Department of Health 1999).

⁹⁸ Mental Capacity Act (Northern Ireland) 2016 SI 2016\18

⁹⁹ Martin and others (n 38); Wayne Martin and others, 'Achieving CRPD compliance: Is the Mental Capacity Act of England and Wales compatible with the UN Convention on the Rights of Persons with Disabilities? If not, what next?' (An Essex Autonomy Project Paper: Report submitted to the Ministry of Justice on 22 September 2014, University of Essex 2014); Szmukler, Daw and Callard (n 95); John Dawson (n 47); Anna Nilsson, 'Objective and Reasonable? Scrutinising Compulsory Mental Health Interventions from a Non-discrimination Perspective' (2014) 14 *Human Rights Law Review* 459-485; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014).

¹⁰⁰ Fabian Freyenhagen and Tom O'Shea, 'Hidden Substance: Mental disorder as a challenge to normatively neutral accounts of autonomy' (2013) 9 *International Journal of Law in Context* 53-70; Natalie Banner, 'Unreasonable reasons: normative judgements in the assessment of mental capacity', (2012) 18 *Journal of Evaluation in Clinical Practice* 1038-1044; Louis Charland, 'Mental Competence and Value: The Problem of Normativity in the Assessment of Decision-Making Capacity', (2001) 8 *Psychiatry, Psychology and Law* 135; Kim Atkins, 'Autonomy and the Subjective Character of Experience' (2000) 17 *Journal of Applied Philosophy* 71-79; Jillian Craigie, 'Capacity, value neutrality and the ability to consider the future' (2013) 9 *International Journal of Law in Context* 4-19; Camillia Kong, 'Case Commentary: Beyond the balancing scales: the importance of prejudice and dialogue in *A Local Authority v E and Others*', (2014) 26 *Child and Family Law Quarterly* 216; Jules Holroyd, 'Clarifying capacity: value and reasons' in Lubomira Radoilska, (ed) *Autonomy and Mental Disorder*, (OUP 2012).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

developing literature on coupling functional capacity assessments to the person's own values.¹⁰¹ Functional tests have also been criticised for neglecting the relational dimensions of mental capacity assessment.¹⁰² Because functional approaches are 'decision specific', it is easier to tailor restrictions on legal capacity to specific areas of concern than traditional criteria for guardianship.

General Comment No. 1 attacks each of these foundational beliefs about functional tests of mental capacity. It is scathing about the presumption that third parties can 'accurately assess the inner-workings of the human mind'.¹⁰³ It asserts that 'mental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon'¹⁰⁴ but is 'is contingent on social and political contexts'.¹⁰⁵ It maintains that because under functional tests 'a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity', they thereby constitute a 'discriminatory denial of legal capacity' and are incompatible with article 12(2) CRPD.¹⁰⁶ The claim is not that mental incapacity does not exist – the General Comment acknowledges variations in decision-making skills across the population.¹⁰⁷ Rather, it maintains that mental incapacity should not form the basis of restrictions on legal capacity. This claim, that functional tests are discriminatory, is pivotal to debates around article 12 CRPD.

Enjoyment of legal capacity 'on an equal basis with others'

Article 12(2) CRPD requires that disabled people enjoy legal capacity *on an equal basis with others*. Yet, equality is a notoriously slippery concept, whose meanings depend on values and policy as much as logic.¹⁰⁸

At a minimum, article 12(2) requires that legal capacity regimes do not discriminate against disabled people. Article 2 CRPD defines 'discrimination on the basis of disability' as:

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

It is clear that this encompasses both direct and indirect forms of discrimination.

¹⁰¹ Natalie Banner and George Szumukler, 'Radical Interpretation' and the Assessment of Decision-Making Capacity' (2013) 30 *Journal of Applied Philosophy* 379.

¹⁰² Lucy Series, 'Relationships, autonomy and legal capacity: Mental capacity and support paradigms' (2015) 40 *International Journal of Law and Psychiatry* 80-91; Susan Stefan, 'Silencing the Different Voice: Competence, Feminist Theory and Law' (1992-1993) 47 *Miami Law Review* 763.

¹⁰³ Para 15.

¹⁰⁴ Para 14.

¹⁰⁵ Para 14.

¹⁰⁶ Para 15.

¹⁰⁷ There is admittedly a tension between this claim of 'natural' variation across the population in paragraph 13 and the later argument in paragraph 15 that mental capacity is not a 'naturally occurring phenomenon'. This tension might be resolved if the former interpretation of 'natural' is read as meaning 'ordinary variation within all humans', and the latter is read as denying that this variation is part of a 'natural kind' but is socially constructed.

¹⁰⁸ Sandra Fredman, *Discrimination law* (2nd ed, Clarendon 2011) 1.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

Direct discrimination occurs where a group with a protected characteristic (such as disability) is explicitly singled out for different treatment that disadvantages members in comparison with others. In many jurisdictions restrictions on legal capacity are explicitly based on a person's disability. This is especially true of 'status' based approaches to legal capacity, but many laws predicated on a functional or outcome approach may also include a diagnostic threshold. For example, under the MCA a person who fails the functional test is only treated as lacking mental capacity if this is caused by 'an impairment or disturbance in the functioning of the mind or brain'.¹⁰⁹ Tellingly, this diagnostic threshold was included because: 'not to have a threshold of mental disorder... places too heavy a burden on the functional test... this test is not easy to define or to apply, particularly as to the degree of incapacity which is required'.¹¹⁰ Although strictly speaking the MCA's diagnostic threshold can apply to conditions that do not constitute a disability,¹¹¹ it is increasingly considered to be a form of direct discrimination because it *explicitly* treats people differently on the basis of cognitive impairments.¹¹²

One option for the achievement of formal equality that has been enthusiastically pursued in connection not only with respect to article 12 CRPD, but also article 14 on liberty and security of the person, is the creation of 'disability-neutral' criteria to replace standards for interventions or practices that restrict legal capacity, which are currently linked to disability. For example, it has been proposed that instead of creating special criminal offences relating to sexual activity with people with mental and intellectual disabilities, a disability-neutral approach to consent should be taken based on a more universal understanding of vulnerability to sexual abuse and sexual violence.¹¹³ Disability neutral doctrines may help to challenge the stigma and 'othering' of disabled people and shift the focus of debates to 'the legitimate reach of the law into the autonomy of all citizens.'¹¹⁴ They force legislators to confront uncomfortable questions about why laws restricting legal capacity are acceptable if imposed on people with mental disabilities but not the general population.¹¹⁵

Yet, disability-neutral doctrines are not a panacea for problems of discrimination. They are difficult to frame and apply in a non-arbitrary fashion, and are associated with risks of political abuse.¹¹⁶ Neither do disability-neutral standards necessarily assist disabled people currently deprived of legal capacity; they may simply widen the net. Paradoxically, this may mean that *more* disabled people are subject to restrictions on legal capacity.¹¹⁷ Some view net widening as positively advantageous, as it means that non-disabled people may 'benefit' from protective interventions.¹¹⁸ Depending on one's

¹⁰⁹ Mental Capacity Act 2005 s2(1)

¹¹⁰ Law Commission, *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction* (Law Com No 128, 1993) para 3.11.

¹¹¹ Szmukler, Daw and Callard (n 95).

¹¹² Flynn and Arstein-Kerslake (n 4); Martin and others (n 38); Martin and others (n 97); Peter Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75 *Modern Law Review* 752-778.

¹¹³ Anna Arstein-Kerslake, 'Understanding sex: the right to legal capacity to consent to sex' (2015) 30 *Disability & Society* 1459-1473; Beverley Clough, 'Vulnerability and capacity to consent to sex – asking the right questions?' (2014) 26 *Child and Family Law Quarterly* 371.

¹¹⁴ Gooding and Flynn, (n 78) 266.

¹¹⁵ Peter Bartlett, 'A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention' (2012) 16 *The International Journal of Human Rights* 831-844; Kanter (n 16).

¹¹⁶ Kanter (n16) 143 – 148; Bartlett, (n 115); Phil Fennell and Urfan Khaliq, 'Conflicting or complementary obligations? The UN Disability Rights Convention, the European Convention on Human Rights and English law' [2011] *European Human Rights Law Review* 662-674.

¹¹⁷ Series (n 100).

¹¹⁸ Jonathan Herring, *Vulnerable Adults and the Law* (OUP 2016) 63.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

perspective, disability-neutral standards might be viewed as levelling up or levelling down to achieve formal equality.

More problematic from an equalities perspective is the potential for disability-neutral laws to be applied in indirectly discriminatory ways.¹¹⁹ Fredman defines indirect discrimination as having three elements: equal treatment, a disproportionately exclusionary impact on those sharing a protected characteristic, and the absence of acceptable justification.¹²⁰ It is based on a comparison between the impact an apparently neutral criterion or practice has on a group with the protected characteristic and a comparator group. This comparison is often made relying upon statistics. For example, the Czech Republic had used IQ tests to determine which children should go to 'special schools'. Statistics demonstrated that these disproportionately impacted on Roma children, and the European Court of Human Rights eventually concurred that this was evidence of indirect discrimination.¹²¹ Fredman also describes an alternative approach from EU law, whereby a statistical demonstration of disproportionate impact may not be necessary if it can be demonstrated that a criterion is 'intrinsically liable' to affect a particular group more than others.¹²²

Several scholars¹²³ argue that functional tests of capacity (decoupled from diagnostic criteria) are a potentially non-discriminatory way of restricting rights to self-determination. For example, Nilsson highlights that 'somatic' states such as pain or fever, which often occur in the absence of disability, may impede decision-making abilities.¹²⁴ Szmukler, Daw and Callard give an example of a person who develops delirium as a result of an adverse reaction to drugs used for heart failure, who may receive treatment without consent on the basis of mental incapacity.¹²⁵ Martin gives the example of 'someone who has had too much to drink on a Saturday night'.¹²⁶ In other words, they invoke a comparator, to make the case that functional tests – because they can be applied to non-disabled persons – are not discriminatory.

The selection of these particular comparators is, however, unlikely to satisfy those making the argument that functional tests have a disparate impact on disabled people. This is because the *kinds* of interferences of concern are not the short term interferences that these examples evoke, rather they are concerned with abolishing the legal basis for measures such as institutionalisation, forced psychiatric treatments, entry into guardianship, involuntary sterilisation, loss of rights to marry and found a family or to engage in sexual relationships.¹²⁷ Adopting fever or concussion etc. as the

¹¹⁹ Gooding and Flynn, (n 78); Anna Nilsson, 'Objective and Reasonable? Scrutinising Compulsory Mental Health Interventions from a Non-discrimination Perspective' (2014) 14 HRLR 459-485; Kanter (n 16); Bartlett (n 115). Both Kanter and Bartlett discuss disability neutral criteria for detention, rather than restrictions on legal capacity.

¹²⁰ Fredman (n 106).

¹²¹ *DH and Others v. The Czech Republic* (App no 57325/00) [2007] ECHR 922. Example cited by Fredman, *ibid*.

¹²² Citing Case C-237/94 *O'Flynn v Adjudication Officer* [1996] 3 CMLR 103, decided by the CJEU.

¹²³ Szmukler, Daw and Callard, (n 95); Dawson (n 47); George Szmukler and Michael Bach, 'Mental health disabilities and human rights protections' (2015) 2 *Global Mental Health*; Martin and others (n 38); Martin and others (n 97); Nilsson (n 97).

¹²⁴ Nilsson, *ibid*.

¹²⁵ Szmukler, Daw and Callard, (n 95).

¹²⁶ Wayne Martin, 'Mental Capacity Law Discussion Paper: Consensus Emerges in Consultation Roundtables: The MCA is Not Compliant with the CRPD' (39 *Essex St Mental Capacity Law Newsletter*, Issue 49, August 2014).

¹²⁷ e.g. Oliver Lewis, 'Advancing legal capacity jurisprudence' [2011] *European Human Rights Law Review* 700-714; Anna Arstein-Kerslake, 'Legal Capacity and Supported Decision-Making: Respecting Rights and Empowering People' in Charles O'Mahony and Gerard Quinn (eds) *The United Nations Convention on the Rights of Persons with Disabilities: Comparative, Regional and Thematic Perspectives* (Intersentia 2016); Robert Dinerstein, 'On Torture, Ill-Treatment and People with Psychosocial and Intellectual Disabilities: Some Thoughts About the

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

comparator misses the wider concerns about the *consequences* of deprivation of legal capacity for disabled people that informed advocacy for article 12. Yet, if these concerns are what prompted the call for universal legal capacity, it is difficult to see what kinds of non-disabled comparator groups would be appropriate, since there are very few instances of these kinds of measures occurring in relation to non-disabled people. Thus the identification of appropriate comparators remains a significant challenge for those arguing that functional tests are not indirectly discriminatory.

The counter-claim that functional tests *are* indirectly discriminatory is made in General Comment No 1 and in several places in the literature, although it is not always easy to discern precisely what *kind* of indirect discrimination is being identified. Some express concern about the targeting of mental capacity assessments at disabled people.¹²⁸ Others highlight the difficulty of disentangling functional incapacity from disability, diagnosis or impairment,¹²⁹ or claim that a person's mental impairment 'plays a major role in the determination' of functional capacity.¹³⁰

Concerns about targeting assessments of mental capacity towards disabled people are likely to be well founded for two key reasons. Firstly, some targeting of tests towards disabled people may undeniably occur because of prejudice. In the UK, some physically disabled people have been prevented from voting because of perceptions that they are 'incompetent'.¹³¹ But even absent such prejudice, the mental capacity of disabled people is disproportionately more likely to be called into question because their choices and actions are simply more visible to third parties who might initiate guardianship or deprivation of legal capacity procedures if they rely upon others for healthcare or support, whereas 'incapable' decisions made by non-disabled people are less likely to be flagged for intervention.

Clearly, the requirement that all adults demonstrate 'mental capacity' for all decisions would be impracticable and hence some targeting would be inevitable for decision-specific approaches. But even if a regime of universal mental capacity assessment did exist in some areas – for example, suppose any person applying for a marriage license or making a will was required to undergo a test of mental capacity – such tests would be inherently liable to identify people with mental disabilities as lacking mental capacity because they were *designed* to pick out specific kinds of cognitive functioning that are found more frequently in particular clinical groups than in the general population.¹³² Proponents of functional tests would no doubt recognise this, thus presumably their defence of the tests as non-discriminatory must rest on justifying their disproportionate impact on disabled people.

Another disability-neutral approach has focused on harm. These approaches tend to respond to the 'troubling moral dilemmas'¹³³ that can arise if the universal legal capacity paradigm prohibits all possible tools for non-consensual intervention. Bach and Kerzner propose a framework for interventions to prevent 'serious adverse effects'.¹³⁴ Gooding and Flynn suggest that the doctrine of

Report of the Special Rapporteur' in *Implementing A Paradigm Shift: Implementing the Convention on the Rights of Persons with Disabilities, in the Context of Mental Disability Law* (Washington College of Law 2014).

¹²⁸ Dhanda (2006-7) (n 4) 445-6. See also General Comment No 1, para 15

¹²⁹ Peter Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and the future of mental health law' (2009) 8 *Psychiatry* 496-498.

¹³⁰ Arstein-Kerslake and Flynn (n 4) 87.

¹³¹ Capability Scotland, Disability Action Northern Ireland and Scope *Polls Apart 2010: Opening elections to disabled people* (2010).

¹³² Appelbaum and Grisso (1988) and Grisso and Appelbaum (1995) (n 92).

¹³³ Piers 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* 45-71.

¹³⁴ Michael Bach and Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Prepared for the Law Commission of Ontario 2010).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

necessity, codified in a non-discriminatory way, could replace mental health laws and identify 'specific thresholds for overriding autonomy in emergency circumstances'.¹³⁵ Flynn and Arstein-Kerslake¹³⁶ propose disability-neutral criteria for state interventions 'based on risk of imminent and serious harm to the individual's life, health or safety'. They argue for a principle of proportionality which would, in their view, permit interventions such as preventing a person from jumping from a high building, but which would not permit forced feeding or forced medication. Minkowitz raises concerns about the absence of a principled distinction in their scheme between those rights to bodily autonomy that are protected and those which are limitable¹³⁷ and Dhanda questions how it differs from the 'old paradigm'.¹³⁸

Harm, or its close relative, risk, is already a criterion, along with diagnosis, of many mental health and guardianship laws, and has come in for fierce criticism for its poor predictive quality and a detrimental impact on relationships between service users and professionals.¹³⁹ The intervention thresholds proposed here appear higher than under most existing mental health and guardianship laws, reflecting the principled approach to the 'dignity of risk' associated with the universal legal capacity paradigm.¹⁴⁰ However, such proposals are likely to be politically controversial for some States parties, as they simultaneously narrow the scope of intervention in situations that some would regard as intolerable and expand the scope of compulsory powers to other populations who might be deemed at risk.

Brosnan and Flynn have attempted to extricate a disability neutral approach to informed consent from functional tests of capacity, influenced by feminist approaches to consent to sex.¹⁴¹ They argue that a valid consent can only be given in the absence of coercion and power imbalances. If these conditions are satisfied, and the person has been provided with appropriate information, then consent is provided by the expression of the person's will and preferences. If the expression of the person's will and preferences is 'clear', then any refusals of treatment should be respected. If it is 'unclear' then a valid 'informed consent' may be inferred based on the 'best interpretation' of the person's will and preferences (a process discussed under article 12(4), below). Brosnan and Flynn do seem to view 'understanding' as an 'essential ingredient' for consent, and suggest that 'misunderstanding' information might invalidate consent. It could be inferred from these premises that a refusal of consent based on a misunderstanding was not a valid refusal, or was 'unclear'. If so their approach does seem to incorporate a minimalist functional test of understanding, in addition to wider relational criteria.

¹³⁵ Piers Gooding and Eilionóir Flynn, 'Querying the Call to Introduce Mental Capacity Testing to Mental Health Law: Does the Doctrine of Necessity Provide an Alternative?' (2015) 4 *Laws* 245-271.

¹³⁶ Eilionóir Flynn and Anna Arstein-Kerslake, 'State Intervention in the Lives of People with Disabilities: The Case for a Disability Neutral Framework' (2017) 13 *International Journal of Law in Context* 39 – 57.

¹³⁷ Minkowitz (n 25).

¹³⁸ Dhanda (2017) (n 88).

¹³⁹ George Szmukler and Nikolas Rose, 'Risk Assessment in Mental Health Care: Values and Costs' (2013) 31 *Behavioral Sciences & the Law* 125-140; Michael Coffey and others, 'Ordinary risks and accepted fictions: how contrasting and competing priorities work in risk assessment and mental health care planning', 20 *Health Expectations* 3, 471–483.

¹⁴⁰ Flynn and Arstein-Kerslake (n 4); Bach and Kerzner (n 132); Piers Gooding, 'Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law' (2012) 5 *Psychiatry, Psychology and Law* 431-451; Bernadette McSherry, 'Mental Health Laws: Where to from here?' (2014) 40 *Monash University Law Review* 175.

¹⁴¹ Liz Brosnan and Eilionóir Flynn, 'Freedom to negotiate: a proposal extricating 'capacity' from 'consent'', (2017) 13 *International Journal of Law in Context* 58-76.

Legal capacity and criminal law

Legal capacity is also relevant to questions of criminal responsibility and criminal trial procedures. The General Comment on article 12 is silent on questions of criminal responsibility. However, in 2009 the Office of the United Nations High Commissioner for Human Rights, stated that article 12 requires the abolition of criminal defences ‘based on the existence of a mental or intellectual disability’ and called for disability neutral doctrines on the subjective element of a crime.¹⁴² More recent concluding observations from the CRPD Committee have recommended, under art 14, that States parties review and amend criminal legislation to eliminate declarations of non-responsibility on grounds of disability.¹⁴³

It might be thought surprising that disability rights advocates would argue for the abolition of insanity defences that many disabled people rely upon in criminal trials, yet arguably it is the logical corollary of the universal legal capacity paradigm. Minkowitz comments that ‘legal capacity entails responsibility for one’s acts and choices’.¹⁴⁴ Reasons for addressing the insanity defence extend beyond formal equality: it is associated with the wider stigma endured by people with mental disabilities¹⁴⁵ and its deployment typically results not in release from detention but diversion into involuntary detention and treatment, aimed at protecting the public and treating the offender. In some cases, this confinement may outlast ordinary penal sentences for the alleged offence. Critics of the insanity defence accordingly question whether it confers benefits upon disabled people.¹⁴⁶

Appelbaum¹⁴⁷ and Perlin¹⁴⁸ have expressed concern that the abolition of the insanity defence would lead to greater numbers of people with mental disabilities being convicted and imprisoned. Prominent user and survivor scholars and activists have also expressed concern. Jones and Shattell argue that proposals to sacrifice the ‘interests of individuals who have committed otherwise criminal acts due to temporarily but profoundly altered beliefs or states for the sake of a generalized and decontextualized “right” to legal capacity’ should be ‘subject to the highest level of critical scrutiny and ethical reflexivity’.¹⁴⁹ Plumb has expressed concerns about a libertarian ethos and “moral distancing” from people who ‘don’t behave well’ during times of great distress or “altered states”’.¹⁵⁰

¹⁴² UN Human Rights Council, ‘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/HRC/10/48 (26 January 2009) para 47.

¹⁴³ CRPD Committee, ‘Concluding Observations on the Plurinational State of Bolivia’ UN Doc CRPD/C/BOL/CO/1 (4 November 2016), paras 35 – 36 and Colombia, UN Doc CRPD/C/COL/CO/1 (30 September 2016) para 38.

¹⁴⁴ Tina Minkowitz, ‘A Response to the Report by Juan E Mendez, Special Rapporteur on Torture, Dealing With Torture in the Context of Healthcare, as it Pertains to Nonconsensual Psychiatric Interventions’, in ‘Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture’s 2013 Thematic Report’ (Washington College of Law, Center for Human Rights & Humanitarian Law: Anti-Torture Initiative, 2014).

¹⁴⁵ Centre for Disability Law & Policy, ‘Submission to the Law Reform Commission on its Fourth Programme of Law Reform’ (NUI Galway 2012).

¹⁴⁶ Dhanda (2006-7) (n 4); Minkowitz (n 142); Tina 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* 434-466.

¹⁴⁷ Paul S Appelbaum, ‘Protecting the Rights of Persons With Disabilities: An International Convention and Its Problems’ (2016) 67 *Law & Psychiatry* 366-368.

¹⁴⁸ Michael 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 Justice’ (NYLS Legal Studies Research Paper, New York Law School 2015).

¹⁴⁹ Jones and Shattell (n 5).

¹⁵⁰ Plumb (n 5).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

Proponents of the abolition of the insanity defence envisage that already existing ‘disability-neutral’ defences such as mistake, necessity, duress or self-defence would be available and adapted to address the specific circumstances of alleged offenders with mental disabilities.¹⁵¹ Bartlett comments that crafting such defences ‘is likely to be a fiercely complex undertaking’.¹⁵² The most considered attention to this question to date is by Minkowitz¹⁵³ and Slobogin¹⁵⁴.

Slobogin argues that as *mens rea* (the mental element of a crime) is increasingly responsive to the situation and subjective experience of alleged offenders, the insanity defence has lost much of its *raison d’être*. Instead, he proposes that by examining the beliefs, emotional state and circumstances of the alleged offender at the time of the crime under existing mainstream defences such as duress or mistake, people with mental disabilities can be availed of defences that take into account their circumstances whilst integrated into the mainstream. However, Slobogin envisages that even those acquitted under these defences might be diverted into psychiatric detention if they are still regarded as dangerous to society. Minkowitz adapts Slobogin’s approach, but rejects his diversion proposals.¹⁵⁵

Peay questions the extent to which apparently disability-neutral defences, such as duress or mistaken beliefs, are truly disability-neutral if they take into consideration beliefs or other elements of *mens rea* that are linked to a person’s mental disorder.¹⁵⁶ Minkowitz addresses this argument head on, maintaining that ‘unusual mental phenomena or beliefs’ should be treated like any other perceptions, beliefs or worldviews and should not imply the absence of criminal intent. Yet other survivor activists are less prepared to draw this equivalence; Anne Plumb comments ‘Most people have some questionable or unusual beliefs but there is something about ours that may make them more problematic.’¹⁵⁷

Perlin writes that proposed adapted mainstream defences *are* the insanity defence, but not so characterized, and to say otherwise is merely ‘semantics’.¹⁵⁸ Yet, ‘semantics’ are important for removing the stigma carried by the insanity defence and a cogent argument for ‘mainstreaming’ the insanity defence. The more serious problems with the proposals are epistemological and consequentialist.

An inquiry into *mens rea* – under the insanity defence or mainstream defences – requires an analysis of the *intentions* of the alleged offender. Yet Dawson¹⁵⁹ highlights that this entails an assessment of the ‘inner-workings of the human mind’ – an undertaking criticised in the General Comment in

¹⁵¹ Dhanda (2006-7) (n 4); Flynn and Arstein-Kerslake (n 4).

¹⁵² Peter Bartlett, ‘Implementing A Paradigm Shift: Implementing the Convention on the Rights of Persons with Disabilities, in the Context of Mental Disability Law’, in ‘Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture’s 2013 Thematic Report’ (Washington College of Law, Center for Human Rights & Humanitarian Law: Anti-Torture Initiative, 2014).

¹⁵³ Minkowitz (n 144).

¹⁵⁴ Christopher Slobogin, ‘An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases’ (2000) 86 *Virginia Law Review* 1199-1247; Christopher 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 Defense, Civil Commitment, and Competency Law’ (Vanderbilt Public Law Research Paper No. 14-23, Vanderbilt University Law School, 2014); Christopher Slobogin, *Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty* (Harvard University Press 2006).

¹⁵⁵ Minkowitz (n 144).

¹⁵⁶ Jill Peay, ‘Mental incapacity and criminal liability: Redrawing the fault lines?’ (2015) 40 *International Journal of Law and Psychiatry* 25–35.

¹⁵⁷ Plumb (n 5).

¹⁵⁸ Perlin (n 146).

¹⁵⁹ Dawson (n 47) 74.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

connection with mental capacity assessments.¹⁶⁰ A 'thin' understanding of intentionality for the purposes of legal capacity, that does not entail understanding the nature of one's acts,¹⁶¹ or which treats altered states simply as unusual beliefs, could have stark consequences for those with conditions that impair understanding. It is hard to see how to avoid this without an analysis of a person's understanding and beliefs, yet such an analysis again takes us back towards elements of the functional test.

The question of diversion also raises intractable problems. Diversion into psychiatric detention and forced treatment is certainly problematic from the perspective of other CRPD rights. Yet without some alternative mechanism for public protection, if it is felt that a person's altered states or limited understanding is likely to lead them to repeat the potentially criminal act, then judges and juries face an invidious choice: to find the individual guilty and imprison them, or to release them back into the community, notwithstanding the danger posed.

Article 12 is also relevant to criminal trial procedures, although in its concluding observations on states parties the CRPD Committee has tended to raise this issue under articles 13 and 14 rather than article 12.¹⁶² In the literature the focus has been on the question of whether a defendant with a mental disability is 'fit to plead', that is, whether they are able to understand and participate in their trial. 'Unfitness to plead' procedures may involve alternative arrangements that are intended to help secure justice both to victims and to defendants unable to participate in their defence. For example, under a 'trial of the facts'¹⁶³ a representative is appointed to defend the accused and make decisions on their behalf, but it can only establish the facts and not guilt because it does not determine *mens rea*.¹⁶⁴ Like the insanity defence, procedures for defendants deemed 'unfit to plead' are often linked to diversion into mental health detention, forced treatment, or community supervision, which have been criticised by disability rights advocates.¹⁶⁵

The Law Commission in England and Wales has proposed an adapted version of the functional test of capacity to assess unfitness to plead in criminal proceedings.¹⁶⁶ In their original proposals the Law Commission argued for a 'diagnostic threshold'. Gooding and O'Mahony commented that this would be likely to violate article 12(2) CRPD, and ironically render the reforms less compliant than the provisions they replaced.¹⁶⁷ At consultation the Commission sought the views of prominent disability

¹⁶⁰ General Comment No. 1, para 15.

¹⁶¹ Arstein-Kerslake and Flynn (n 89) 25.

¹⁶² See, for example, CRPD Committee, 'Concluding Observations on Moldova', UN Doc CRPD/C/MDA/CO/1 (18 May 2017) para 28; 'Concluding Observations on the Plurinational State of Bolivia', UN Doc CRPD/C/BOL/CO/1 (4 November 2016) para 35; on Italy, UN Doc CRPD/C/ITA/CO/1 (1 October 2016) paras 35-36' and on Portugal, UN Doc CRPD/C/PRT/CO/1 (20 May 2016) paras 32 and 33.

¹⁶³ A 'trial of the facts' determines whether or not the alleged act (*actus reus*) took place, but cannot find the defendant guilty as it does not consider *mens rea*.

¹⁶⁴ See, for example, Criminal Procedure (Insanity) Act of 1964 of England and Wales.

¹⁶⁵ Centre for Disability Law & Policy (n 143); Tina Minkowitz (n 144); Piers Gooding and Charles O'Mahony, 'Laws on unfitness to stand trial and the UN Convention on the Rights of Persons with Disabilities: Comparing reform in England, Wales, Northern Ireland and Australia' (2016) 44 *International Journal of Law, Crime and Justice* 122-145; Piers Gooding and others, 'Submission to Senate Community Affairs References Committee inquiry on the indefinite detention of people with cognitive and psychiatric impairment in Australia: Addressing the indefinite detention of people with cognitive and psychiatric impairment due to unfitness to plead laws' (Melbourne Social Equity Institute, University of Melbourne, 21 March 2016).

¹⁶⁶ Law Commission, 'Unfitness to Plead: An Issues Paper' (2014); Law Commission, *Unfitness to Plead* (Volume 1: Report, Law Com No. 364, 2016).

¹⁶⁷ Gooding and O'Mahony (n 163).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

rights experts¹⁶⁸ and – despite opposition from psychiatrists – ultimately decided against including a diagnostic threshold. Yet, in part this decision was based on doubt that diagnostic thresholds made any real difference either way: they had to be so widely drawn to include all possible barriers to participation, and even without a formal threshold, diagnosis could still play a part in assessments.¹⁶⁹

Evaluating equalities and discrimination arguments about legal capacity

The concepts of equality and non-discrimination are central to arguments for the universal legal capacity paradigm. Yet, these cannot be understood in a purely quantitative sense, since as Dawson observes, we cannot fix questions of discrimination without reaching agreement on what constitutes *disadvantage*.¹⁷⁰ It is here, I suggest, that the real heat of debates concerning article 12 of the CRPD lies, rather than in technical questions of statistical comparisons.

An argument that a particular legal capacity regime discriminates against disabled people must make the case that it disadvantages them. The clear premise of the universal legal capacity literature is that deprivation of legal capacity itself is exclusionary and disadvantageous, and results in further disadvantages such as guardianship, forced treatment and institutionalisation. Whilst these views would be shared by many in the disability and user and survivor movements, they are not universally held. Evidence that some regard such interventions as at least sometimes beneficial is widespread. Herring argues that ‘best interests’ safeguarding interventions should apply to non-disabled people as well, because they are beneficial.¹⁷¹ The jurisprudence of the European Court of Human Rights frames life-saving medical treatments against the will of a person who lacks mental capacity as a positive obligation under human rights law.¹⁷² Some argue that guardianship and mental health laws are a critical means of protecting and upholding the rights of people with mental disabilities.¹⁷³

Advocates of the universal legal capacity paradigm do not share these views. This literature highlights the harms of guardianship, institutionalisation and forced treatment,¹⁷⁴ and the existential risks of limiting individuals’ opportunities for self-determination, self-expression and thereby flourishing.¹⁷⁵ Many advocates of universal legal capacity would agree with Glover, that many people ‘would prefer to forgo a great deal of happiness, or risk a fair amount of disaster, to losing control of our lives in this way.’¹⁷⁶ Indeed Minkowitz has stated that she ‘would prefer death to another round of forced psychiatry’.¹⁷⁷ However, some take a more nuanced view. Plumb argues that the disadvantage is not intervention *per se*, but the kinds of intervention represented by forced psychiatric detention and

¹⁶⁸ Including Professor Rosemary Kayess, who was involved in the negotiations of Art 12 CRPD and Professor Anna Lawson.

¹⁶⁹ Law Commission No. 364, Volume 1 (n 164).

¹⁷⁰ Dawson (n 47).

¹⁷¹ Jonathan Herring (n 116).

¹⁷² *Arskaya v Ukraine* (App no 45076/05) [2013] ECHR 1235.

¹⁷³ Adrian Ward, ‘Adults with incapacity: freedom and liberty, rights and status: Part 1’ [2011] *Scots Law Times* 21-25; Nina A Kohn and Jeremy A Blumenthal, ‘A critical assessment of supported decision-making for persons aging with intellectual disabilities’ (2013) 7 *Disability & Health Journal* S40–S43; Freeman and others (n 47); Dawson (n 47).

¹⁷⁴ Minkowitz (n 2); Oliver Lewis (n 125).

¹⁷⁵ Flynn and Arstein-Kerslake (n 4); Bach and Kerzner (n 132); Gerard Quinn and Anna Arstein-Kerslake, ‘Restoring the ‘human’ in ‘human rights’ – personhood and doctrinal innovation in the UN disability convention’ in Conor Gearty and Costas Douzinas, (eds.), *Cambridge Companion to Human Rights Law* (CUP 2012).

¹⁷⁶ Jonathan Glover, *Causing Death and Saving Lives*, (Penguin 1977) 80 – 81.

¹⁷⁷ Minkowitz, in Spandler, Anderson and Sapey (n 3).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

treatments.¹⁷⁸ Evaluations of equality and discrimination claims regarding legal capacity therefor must engage with the diversity of views regarding the outcomes of legal capacity and guardianship regimes.

A secondary question is whether the CRPD permits any justification to outweigh any disadvantage experienced by those deprived of legal capacity. Under the ICCPR 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.¹⁷⁹ Nilsson argues that although the CRPD text itself is silent on justifications, there is support for such a reading of article 2 CRPD in the *travaux*.¹⁸⁰ On this basis, she argues that mental health laws based on functional capacity criteria potentially satisfy these tests. Whether functional tests are 'reasonable' and 'objective' lies beyond the scope of this article, but is an important question for those pursuing these arguments.

Presumably securing other rights within the Convention would potentially be a legitimate aim for an intervention. Proponents of protective interventions are likely to emphasise article 16 (protection from violence, exploitation and abuse), article 25 (health) and article 10 (the right to life). However, this in itself raises a question of how potentially conflicting rights should be balanced, and it is striking in this respect that 'individual autonomy including the freedom to make one's own choices' appears within the CRPD's first general principle, whereas 'protection' is nowhere in that list.¹⁸¹

The CRPD Committee's response to a complaint from five adults with intellectual disabilities who were deprived of the right to vote because they were subject to guardianship is instructive of how it might regard such justifications. It found that the assessment of individuals' capacity to vote was 'discriminatory in nature' and thus not serving a legitimate purpose, nor was it 'proportional to the objective to preserve the integrity of the State party's political system'.¹⁸² The Committee thus did employ the criteria from the ICCPR for evaluating discrimination claims. However, its findings in that case and its wider views expressed in General Comment No 1 indicate that it is unlikely to regard functional tests of capacity as sufficiently objective and reasonable, and unlikely to find measures such as forced treatment or institutionalisation as proportionate to serving any legitimate aims within the CRPD.

Para 3

States parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Article 12(3) forms the foundation of the 'support paradigm' underpinning universal legal capacity. It is based on a radical reimagining of legal personality that moves away from what Naffine calls 'the

¹⁷⁸ Plumb, in Spandler, Anderson and Sapey (n 3 **Error! Bookmark not defined.**).

¹⁷⁹ UNHRCtee, 'General comment No. 18: Non-discrimination' (Adopted at the 37th Session of the UN Human Rights Committee on 10 November 1989).

¹⁸⁰ Nilsson (n 97).

¹⁸¹ Art 3 CRPD.

¹⁸² *Zsolt Bujdosó and five others v. Hungary*, 'Views adopted by the UN Committee for the Rights of Persons with Disabilities on Communication No. 4/2011' (10th session, 2 to 13 September 2013) UN Doc CRPD/C/10/D/4/2011 (20 September 2013).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

classic contractor,¹⁸³ or what Quinn and Arstein-Kerslake¹⁸⁴ call ‘the myth of the masterless man’, towards an interconnected and interdependent vision of humanity.¹⁸⁵ This approach is influenced by social¹⁸⁶ and human rights¹⁸⁷ models of disability, which view disability as arising from an interaction between impairment and social, environmental and other barriers, captured in article 1 CRPD. Yet, this vision is not tightly connected to the concept of impairment; Quinn and Arstein-Kerslake maintain that it is ‘a cosmopolitan theory of justice that happens to be grounded on disability’.¹⁸⁸ It relies on a view that *all decisions* – even those of prime ministers¹⁸⁹ – are connected to a network of supports and influences.

Support for the exercise of legal capacity

Article 12(3) calls for supports for the exercise of legal capacity. At the risk of pedantry, it is important to note that article 12(3) does not itself call for ‘supported decision-making’ – a common gloss put on the support paradigm. The CRPD Committee adopts the terminology ‘supported decision-making regimes’ to include a wide range of supports for the exercise of legal capacity.¹⁹⁰ I take the risk of departing from the Committee’s terminology and distinguish between ‘supports for the exercise of legal capacity’ – a very broad range of supports and adaptations – and ‘supported decision-making’, which is merely one type of support for the exercise of legal capacity, which I consider in more detail below. Like Gooding,¹⁹¹ I feel that some of the controversies over the support paradigm can be traced to confusion generated by the terminology adopted by the Committee, which leads some to the view that all the Convention requires, or permits, is the provision of support to assist individuals make decisions for themselves. In fact the support paradigm is far broader than this.

In the General Comment the Committee has emphasised that “‘Support” is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity’.¹⁹² It lists examples of supports, including measures relating to universal design and accessibility in banks and financial institutions, forms of supported decision making, ‘the development and recognition of diverse, non-conventional methods of communication’ and advance planning instruments.¹⁹³

The General Comment also includes several statements about how the Committee envisages these supports operating. Access to supports, including advance planning instruments and supported decision-making, should be available to all and not conditional upon demonstrating particular abilities

¹⁸³ Naffine (n 60).

¹⁸⁴ Quinn and Arstein-Kerslake (n 173) 37.

¹⁸⁵ *Ibid*, 38.

¹⁸⁶ There are several variants of social models of disability, see Rannveig Traustadóttir, ‘Disability Studies, the Social Model and Legal Developments’ in Oddny M Arnardóttir and Gerrard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009).

¹⁸⁷ Theresia Degener, ‘A New Human Rights Model of Disability’ in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer 2017).

¹⁸⁸ Quinn and Arstein-Kerslake (n 173) 38.

¹⁸⁹ Marianne Schulze, ‘Supported decision-making: for prime ministers only?’ (2014) 27 *Journal of Applied Research in Intellectual Disabilities* 289-290.

¹⁹⁰ General Comment No. 1.

¹⁹¹ Gooding (n 128).

¹⁹² General Comment No 1, para 17.

¹⁹³ General Comment No 1, para 17.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

or ‘mental capacity’.¹⁹⁴ A person must have the right *not* to use support.¹⁹⁵ Supports ‘must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making’.¹⁹⁶ It is not sufficient for states to adopt supported decision-making regimes; in order to comply with article 12 they must also abolish substituted decision-making regimes.¹⁹⁷

Substituted decision-making is defined as any systems whereby: 1) ‘legal capacity is removed from a person’; 2) a substituted decision maker can be ‘appointed’ against the person’s will; or 3) any decision made by a ‘substitute decision maker’ is based on ‘the objective “best interests” of the person rather than their ‘will and preferences’.¹⁹⁸ It is important to note that this definition of substituted decision-making does *not* include all forms of proxy decision-making. The General Comment acknowledges that in some circumstances it is not ‘practicable’ to determine the will and preferences of the person, despite the best efforts being made. In those circumstances, the Committee states that ‘the “best interpretation of will and preferences” must replace “best interests” determinations’.¹⁹⁹ This means that provided the proxy is not appointed against the person’s will, and they bases any decisions on the ‘best interpretation of will and preferences’ rather than a ‘best interests’ standard, it would fall within the support paradigm and not be regarded as a ‘substituted decision’. Within the literature, interpretive approaches to will and preferences that could be used in circumstances where a person is unable to clearly express their will and preferences have come to be known as ‘facilitated decisions’.²⁰⁰

Critics of the universal legal capacity paradigm such as Freeman and others have argued that because of situations such as coma, ‘exceptions have to be considered’ to the prohibition on substitute decision making.²⁰¹ It is unsurprising that critics of the universal legal capacity paradigm struggle to comprehend how it can accommodate such situations, since this possibility is not explicitly stated in the General Comment, which coyly refers only to more ‘intensive’ supports being sometimes necessary.²⁰² However, interpretive approaches such as facilitated decision making are the answer found in the literature to the frequently posed ‘coma question’.

Facilitated decisions do not fall within the technical definition of ‘substitute decisions’ found in the General Comment, although echoing the discussions during the Ad Hoc Committee meetings about situations of “100 per cent support”, some argue that ‘facilitated decisions’ *are* substituted decisions on any intuitive reading.²⁰³ Their categorization as a support is central to the universalist outlook of the support paradigm and the advocacy goal of abolishing systems of guardianship. Nevertheless, this does lead to some tricky mental gymnastics: who is exercising legal capacity in these situations? In a paper on the metaphysics of personhood, Francis and Silvers argue that in situations like these we should view the person making the facilitated decision as a kind of prosthesis, with the person they

¹⁹⁴ General Comment No 1, paras 17 and 29.

¹⁹⁵ General Comment No 1, paras 19 and 29(g).

¹⁹⁶ General Comment No 1, para 17.

¹⁹⁷ General Comment No 1, para 28.

¹⁹⁸ General Comment No 1, para 27. The present version of General Comment No 1 contains a typo; the list should read i), ii) **or** iii), not i), ii) **and** iii). This point is critical as some forms of substituted decision-making do not involve the appointment of a decision maker, see Mental Capacity Act 2005 s5 (England and Wales) and Mental Capacity Act (Northern Ireland) 2016 s 9.

¹⁹⁹ General Comment No 1, para 21.

²⁰⁰ Bach and Kerzner (n 132); Flynn and Arstein-Kerslake (n 4).

²⁰¹ Freeman and others (n 47).

²⁰² General Comment No 1, paras 17, 18 29(b).

²⁰³ See Martin and others (n 38).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

are supporting as actually making the decision.²⁰⁴ Yet, it is unlikely that a person, recovered from any impediment to expressing their will and preferences, would regard the decision as one that they had made (especially if they felt it did not, in fact, reflect their will and preferences). And, as Arstein-Kerslake points out, the supporter is not mechanical and traces of their influence on the decision cannot be erased.²⁰⁵ Legally speaking, making clear that decisions are made by the supporter ensures they are under fiduciary duties towards the person. For this reason, many prefer a clearer recognition that the supporter, and not the person, is making the decision.²⁰⁶

The cost of putting support structures in place is a common concern in the literature.²⁰⁷ The General Comment states that 'State parties must ensure that support is available at nominal or no cost to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of legal capacity'.²⁰⁸ It also states that as supports are for the fulfilment of a civil and political right, they are not subject to progressive realization.²⁰⁹ Although there are examples of supported decision-making schemes that have struggled with limited resources,²¹⁰ others have reduced the costs to the system overall, for example through reducing reliance on emergency welfare and health services.²¹¹ Many schemes simply formalize existing natural support networks.²¹² Systems of substituted decision-making *also* incur costs, and supported decision-making should not be regarded in isolation from these.²¹³

Supported decision-making

²⁰⁴ Lesley Francis and Anita Silvers, 'Thinking about the Good: Reconfiguring Liberal Metaphysics (or not) for People with Cognitive Disabilities' in Eva Feder Kittay and Licia Carlson (eds) *Cognitive Disability and Its Challenge to Moral Philosophy* (John Wiley & Sons 2010).

²⁰⁵ Anna Arstein-Kerslake, 'An empowering dependency: exploring support for the exercise of legal capacity', (2014) 18 *Scandinavian Journal of Disability Research* 77-92.

²⁰⁶ Series (n 100); Booth Glen (n 8); Gooding (n 131); Gerard Quinn 'Personhood and legal capacity: Perspectives on the paradigm shift of Article 12 CRPD' (*Harvard Law School Project on Disability Conference*, 20 February 2010); Mental Disability Advocacy Center, 'Comments on Draft General Comment on Article 12 of the Convention' (2014); Canadian Association for Community Living, 'Comments on Draft General Comment on Article 12 of the Convention' (2014). Comments on the draft General Comment can be found at <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>> accessed 23 February 2017.

²⁰⁷ Gooding (n 131); Gavin Davidson and others, 'An international comparison of legal frameworks for supported and substitute decision-making in mental health services' (2016) 4 *International Journal of Law and Psychiatry* 30 – 40; Terry Carney, 'Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?' (2015) 4 *Laws* 37–59.

²⁰⁸ General Comment No. 1, para 29(e)

²⁰⁹ General Comment No. 1, para 30. Art 4(2) CRPD permits states to realise economic, social and cultural rights progressively, within their available resources. Civil and political rights must be realised immediately.

²¹⁰ Gooding (n 131).

²¹¹ Tommy Engman, Frida Manning and Lena S Ekecrantz, 'A New Profession is Born – Personligt ombud, PO' (Socialstyrelsen, Fhebe Hjälms 2008). <<http://www.personligtombud.se/publikationer/pdf/A%20New%20Profession%20is%20Born.pdf>> accessed 23 February 2017.

²¹² For example: Representation Agreement Act 1995 (British Columbia).

²¹³ Eilionóir Flynn and Anna Arstein-Kerslake (n 4); Gooding (n 131); McSherry (n 138); UN Office of the High Commissioner for Human Rights and Inter-Parliamentary Union, *From Exclusion to Equality: Realizing the rights of persons with disabilities* (Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol 2007) UN Doc HR/PUB/07/6 (2007).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

‘Supported decision-making’ is a subset of supports for the exercise of legal capacity. It involves systems or practices whereby an individual has access to support from one or more trusted persons to assist them in making, expressing or implementing a decision. Supporters might help a person to consider the pros and cons of different options, help them to communicate their decision to others, or even help with its implementation. Critically, under systems of supported decision-making within the support paradigm, the individual exercises choice and control over *who* supports them and *how* they are supported, and they – not the supporter – make the final decision.

Supported decision-making schemes may be formal – underpinned by legislation – or informal, operating without specific legal regulation. The General Comment states that ‘legal recognition of the support person(s) formally chosen by a person must be available and accessible’.²¹⁴ Several jurisdictions have, or are considering, statutory schemes for the appointment and legal recognition of chosen support persons for decision-making.²¹⁵ These schemes provide greater control for the person supporting them, clearer recognition by third parties of the role of the supporter, and tighter regulation of how a person is to be supported, as compared to passively phrased statutory provisions which merely state that a person should not be regarded as lacking mental capacity unless support has been provided.²¹⁶ Formalising support relationships in this way means that procedural safeguards can be built in to protect against abuse, in accordance with article 12(4).²¹⁷ However, the existence of formal support procedures may risk diluting the perceived legitimacy of informal supporters and could also increase the potential for supporters to misrepresent the person. Such dangers would have to be addressed through guidance, education and monitoring.

Several informal supported decision-making schemes have enjoyed considerable success. A pilot scheme in South Australia found that supported decision-making provided a viable alternative to guardianship in many cases.²¹⁸ A ‘personal ombuds’ scheme in Sweden provided support for people who were reluctant to engage with conventional psychiatric and welfare services; this scheme has been so successful that similar models are being set up around the world.²¹⁹ Other examples of non-statutory supported decision-making schemes suggested in the literature include: circles of support,

²¹⁴ General Comment No. 1, para 29(d)

²¹⁵ Dinerstein (n 52); Gooding (n 131); Australian Law Reform Commission (n 46); Law Commission, *Mental Capacity and Deprivation of Liberty: A Consultation Paper* (Law Com No. 222, 2015); Representation Agreement Act 1995 (British Columbia, Canada); decision-making, Support and Protection to Adults Act, 2003 (Yukon, Canada); The Adult Guardianship and Trusteeship Act 2008 (Alberta, Canada); Assisted Decision-Making (Capacity) Act 2015 (Republic of Ireland); Ley 9.379 para la Promoción de la Autonomía Personal de las Personas con Discapacidad ('Law for the Promotion of Personal Autonomy of Persons with Disabilities', Civil Procedure Code No. 9,379, Costa Rica 2016); Capacity and Guardianship (Amendment No. 18) Law, 5776-2016 (Israel); Supported decision-making Agreement Act 2015 (Texas) SB No. 1881 2015; Natural Persons and Support Measures (draft) Act (Bulgaria); The Care and Support (Independent Advocacy Support) (No. 2) Regulations 2014 (England).

²¹⁶ See, for example: Vulnerable Persons Living with a Mental Disability Act 1996 (Manitoba, Canada); Mental Capacity Act 2005 (England and Wales), ss 1(3) and 3(2); Mental Capacity Act (Northern Ireland) 2016, s5; Adults with Incapacity (Scotland) Act 2000 s1(6) and s1(5).

²¹⁷ Barbara Carter and John Chesterman, ‘Supported decision-making: Background and discussion paper’ (Office of the Public Advocate, South Australia 2009).

²¹⁸ Margaret Wallace, ‘Evaluation of the Supported decision-making Project’ (Office of the Public Advocate, South Australia 2012).

²¹⁹ Engman, Manning and Ekecrantz (n 209); *Personligt Ombud*, <<http://www.personligtombud.se>> accessed 23 February 2017.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

joint crisis plans in mental health, Intentional Peer Support, peer advocacy, and even the Finnish Open Dialogue model.²²⁰

Although the General Comment maintains that supported decision-making regimes should accompany the abolition of substituted decision-making systems, in practice existing schemes operate within wider legal frameworks that may still require a demonstration of mental capacity for certain decisions to be legally effective. This raises difficult questions about the assessment of relational dimensions of mental capacity.²²¹

In their literature review on supported decision making, Kohn and Blumenthal highlight a lack of evidence for, *inter alia*, the rate of use of supported decision-making in jurisdictions where it is available, data on the demographics of those making formalised support agreements and of supporters, and the outcomes of supported decision-making schemes.²²² They conclude that it is 'too early to rule out the possibility it may actually disempower individuals with disabilities by facilitating undue influence by their alleged supporters'. A more recent systematic review of the literature by Davidson and others was more generous in its findings.²²³ Taking a broad definition of supported decision-making (for example, including advance crisis planning), they found:

1. Varying levels of interest among potential users of supported decision-making schemes to actively participate in decisions about their care and treatment;
2. Some evidence that use of supported decision-making schemes increased users' decision-making skills, confidence, engagement with community and sense of control over their own lives;
3. Several studies indicated that 'implementing SDM is not a simple process, it takes time and resources and may require a shift in attitudes of some care providers and in some service users themselves';
4. The efficacy of support for decision-making is highly dependent on the way in which supporters listen to people and present choices and information.

Like Kohn and Blumenthal, Davidson concluded that the available evidence on implementation and impact is limited. They comment that 'there are important rights-based, effectiveness and pragmatic arguments for further developing and researching this approach'.²²⁴ The USA-based National Resource Center for Supported decision-making has begun a five year longitudinal project to examine whether there is a causal link between supported decision-making and increased self-determination.²²⁵

Improving the evidence base for supported decision-making is important, not least for ensuring it serves the overarching goals of the CRPD. Yet, there is likewise a dearth of evidence on the operation

²²⁰ European Union Agency for Fundamental Rights (n 54); Gooding (n 138); Advocacy for Inclusion, 'Supported decision-making, Legal Capacity and Guardianship: Implementing Article 12 of the Convention on the Rights of Persons with Disabilities in the Australian Capital Territory' (2012); Eilionóir Flynn and Susan Doyle, 'Ireland's Ratification of the UN Convention on the Rights of Persons with Disabilities: Challenges and Opportunities' (2013) 41 *British Journal of Learning Disabilities* 171-180.

²²¹ Series (n 100).

²²² Nina A Kohn and Jeremy A Blumenthal, 'A critical assessment of supported decision-making for persons aging with intellectual disabilities' (2013) 7 *Disability & Health Journal* S40-S43.

²²³ Davidson and others (n 205).

²²⁴ *Ibid.*

²²⁵ Dinerstein (n 52).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

and effects of substituted decision-making regimes,²²⁶ and we should be cautious of holding supported decision-making schemes to higher empirical standards than substituted decision-making.

Para 4

Article 12(4) calls for safeguards against abuse on measures relating to the exercise of legal capacity but leaves the nature of such ‘measures’ undefined. As discussed above, this paragraph represents an uneasy compromise between those who sought the abolition of substituted decision-making under the CRPD and those who viewed some form of guardianship and restrictions on legal capacity as inevitable, and thereby in need of safeguards. This paragraph has been the focus of considerable scrutiny to resolve these ambiguities.

Respect for the rights, will and preferences of the person

The phrase ‘will and preferences’ in article 12(4) was first proposed by the IDC. It seems reasonable to conclude that their intention was to limit as far as possible the scope for coercive interventions, such as forced psychiatric treatment, psychiatric detention and guardianship. Yet, as Mladenov writes, ‘the letter of the CRPD in itself is not enough to secure its meaning’.²²⁷ The phrase has become the site of hermeneutic struggle, with cracks in its meanings being exploited by those seeking relief from some of the hard cases apparently presented by the universal legal capacity paradigm.

Several proposals for reforms to legal capacity laws in light of article 12 have interpreted this principle to require rebuttable presumptions or hierarchical approaches giving primacy to the will and preferences of the person, but permitting deviations from this in certain circumstances.²²⁸ This is unlikely to go as far as some advocates for universal legal capacity wish.

The CRPD Committee acknowledges that in some circumstances it will not be ‘practicable to determine the will and preferences of an individual’. In such circumstances, the General Comment states that ‘the “best interpretation of will and preferences” must replace the [sic] “best interests” determinations.’²²⁹ This is the approach taken under facilitated decisions, referred to above.

Several commentators have highlighted the potential for a person’s ‘will’ to conflict with their ‘preferences’, or simply to have conflicting ‘will and preferences’.²³⁰ This may have a temporal dimension – a person’s past expressed will and preferences might conflict with present, less clear or stable, expressed will and preferences. There are also situations where a person could be viewed as having conflicting desires in the present. Richardson describes a person with severe anorexia, who does not want to eat, but does wish to live.²³¹ Flynn and Arstein-Kerslake comment that where a

²²⁶ Kohn and Blumenthal (n 220); Gooding (n 131).

²²⁷ Teodor Mladenov, ‘The UN Convention on the rights of persons with disabilities and its interpretation’, (2012) 7 *ALTER - European Journal of Disability Research / Revue Européenne de Recherche sur le Handicap* 69-82.

²²⁸ Martin and others (n 97); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Discussion Paper* (DP 81, 2014).

²²⁹ General Comment No 1, para 21.

²³⁰ Martin and others (n 9) 41; Flynn and Arstein-Kerslake (n 4); Gooding (n 128); Genevra Richardson, ‘Mental Capacity in the Shadow of Suicide’ (2013) 9 *International Journal of Law in Context* 87.

²³¹ Richardson (n 228).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

person is self-harming yet rejects assistance 'a verbal expression in one instance may not necessarily represent the true will and preferences of an individual'.²³²

Szmukler, a psychiatrist and proponent of fusion law, examines the concept of 'will' as it has been considered historically, in philosophy and at law, and argues that the will is 'founded on a person's deeply held, reasonably stable and reasonably coherent personal values', and that this is 'not the same as a desire, inclination, or a currently held 'preference', even a strongly expressed one.'²³³ On this view, Szmukler argues, where a person's will and preferences appear to diverge it is important to identify a person's 'authentic will' through consideration of their past expressed values (written or otherwise). He concludes that interventions that aim 'at facilitating the expression of the person's 'will', his or her deep values and commitments' are compatible with the CRPD and would not constitute a 'substitute decision. A similar approach has recently been taken by the German Constitutional Court, relying upon a distinction in German law between a person's 'natural will' (*natürlichen Willen*) and their 'free will' (freien Willen).²³⁴ The Court held that the Committee's General Comment No 1 did not address the situation where a person was unable to form a 'free will'.

There are therefore a number of circumstances where it is argued either that a person's 'authentic' will is in conflict with their present preferences, or there are competing interpretations of what a person's 'authentic will' consists in. In such circumstances, as Gooding observes, the adjudication of the 'best interpretation of will and preferences' will be fraught,²³⁵ and presents the danger of what Saks refers to as 'choosing selves'.²³⁶ Once it is agreed that a person's presently expressed apparent 'will and preferences' might not be their *authentic* 'will and preferences', this opens up an inquiry into the 'true' or authentic intentions of the person. This at least raises the possibility of questions such as whether the person 'understood' the act or decision, whether they had 'truly' evaluated it against their authentic beliefs and values. In short, it invites an analysis of the person's intentionality that sounds dangerously close to presuming to assess the 'inner-workings of the human mind'²³⁷, and has clear parallels with functional tests of mental capacity. The 'will and preferences' paradigm shifts the focus from quasi-objective standards of rationality towards *authenticity*, but this still offers significant potential for new bases for coercion.

In an effort to restrict the potential for the 'old paradigm' to colonise the will and preferences approach, its proponents have argued for minimalist constructions of intentionality that fix the meaning of will and preferences close to the person's presently expressed views and behaviours. Flynn and Arstein-Kerslake, for instance, propose that 'if in doubt, assume intention in an action, thereby allowing it to potentially be an exercise of legal agency'.²³⁸ Some propose limits on the decisions that could be made using facilitated or interpretive approaches, including sexual consent, decisions with 'irreversible' or 'significant detrimental impact in the long term' on the person's life²³⁹, or decisions

²³² Flynn and Arstein-Kerslake (n 4) 99.

²³³ George Szmukler, 'The UN Convention on the Rights of Persons with Disabilities: 'Rights, will and preferences' in relation to mental health disabilities', (2017) 54 *International Journal of Law and Psychiatry* 90

²³⁴ *Bundesverfassungsgericht, Beschluss (des ersten Senats) vom 26. Juli 2016 – 1 BvL 8/15*. (Order of the First Senate of the Federal Constitutional Court, 26 July 2016). See English language press release <<http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-059.html>> accessed December 2017.

²³⁵ Gooding (n 131).

²³⁶ Elyn Saks, *Refusing Care: Forced Treatment and the Rights of the Mentally Ill* (University of Chicago Press 2002).

²³⁷ General Comment No 1, para 15.

²³⁸ Arstein-Kerslake and Flynn (n 89) 26.

²³⁹ Brosnan and Flynn (n 139) 66.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

that raise particular risks of abuse and exploitation because they so fundamentally affect personal integrity.²⁴⁰ Another approach to shaping when and how interpretive decisions are made regarding the person's will and preferences is to use the law to prescribe *who* is responsible for this interpretation. Brosnan and Flynn write that (outside of emergencies) 'it is particularly important that a supporter, trusted and chosen by the person, undertakes this task' and not a healthcare professional, who would have a 'conflict of interest'.²⁴¹

Conflicts of interest and undue influence

Article 12(4) requires all measures relating to the exercise of legal capacity to have safeguards against 'conflicts of interest' and 'undue influence'. Several authors have expressed concerns about the potential for undue influence and conflicts of interest among supporters,²⁴² although such concerns can also arise within substituted decision-making systems.²⁴³

General Comment No 1 recognises that whilst 'all people risk being subject to "undue influence"', this risk 'may be exacerbated for those who rely on the support of others to make decisions.'²⁴⁴ It defines undue influence 'as occurring, where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation.'²⁴⁵ This formulation of undue influence distinguishes it from mere influence, which is intrinsic to all human relations²⁴⁶ and which Martin and others point out 'might be regarded as positive, beneficial and autonomy-enhancing, and therefore as a necessary feature of any supported decision-making regime'.²⁴⁷ Similarly, Arstein-Kerslake argues that dependency within support relationships can be *empowering*.²⁴⁸

'Undue influence' over decision making implies that a decision is not an *authentic* expression of a person's will and preferences. Some jurisdictions operate disability-neutral equitable doctrines exist to invalidate any exercise of legal capacity subject to undue influence or related equitable concepts such as duress, 'facility, circumvention, lesion' (in Scots law) and 'unconscionable bargain' (in English law).²⁴⁹ Yet for the most part these concepts are deployed in law *by the person* (or others acting on their behalf) as equitable principles to invalidate a legal act that has already taken place; they offer no help in shaping preventive safeguards. Nor would they assist in circumstances where a person does not recognise themselves as acting under undue influence unless there is a means for a third party to act on their behalf and without their consent.

²⁴⁰ Bach and Kerzner (n 132).

²⁴¹ Ibid 65.

²⁴² Adrian Ward, 'Adults with incapacity: freedom and liberty, rights and status: Part 1' [2011] *Scots Law Times* 21-25; Nina A Kohn and Jeremy A Blumenthal, 'A critical assessment of supported decision-making for persons aging with intellectual disabilities' (2013) 7 *Disability & Health Journal* S40-S43; Carter and Chesterman (n 210).

²⁴³ Series (n 100); *Re JW* [2015] EWCOP 82.

²⁴⁴ General Comment No 1, para 22.

²⁴⁵ Ibid. NB: For full disclosure, this phrase appears to have been taken from comments made about the Draft General Comment on Article 12 by the author to the CRPD Committee, <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>> accessed 28 February 2017.

²⁴⁶ Series (n 100).

²⁴⁷ Martin and others (n 38).

²⁴⁸ Arstein-Kerslake (n 203).

²⁴⁹ Martin and others (n 38).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

The General Comment states that there must be safeguards to protect against undue influence, yet these 'must respect the rights, will and preferences of the person, including the right to take risks and make mistakes'.²⁵⁰ The dilemma, however, is that *by definition* where a person is subject to undue influence, the authenticity of any expression of their will is compromised.

Regular review by a competent, independent and impartial authority or judicial body

The requirement for regular review by a competent, independent and impartial authority or judicial body is strongly reminiscent of 'old paradigm' instruments such as the MI Principles. For those who view article 12 as permitting substitute decision making, these represent important procedural safeguards on deprivation of legal capacity and guardianship. As Martin and others argue, this provision is rather more difficult to understand if article 12 is interpreted as prohibiting deprivation of legal capacity and guardianship, the text appears 'to reflect the assumption that at least some measures relating to the exercise of legal capacity might take the form of limitations or constraints'.²⁵¹ Yet as we have seen, some measures envisaged as operating under the support paradigm do bear a striking resemblance to substitute decision making, in particular facilitated decision making, any provisions permitting emergency interventions or other situations where 'the best interpretation of will and preferences' approach is adopted. Given the potential for abuse, or even for serious disagreement, under these mechanisms, it is conceivable that strong safeguards would be required to protect the person's rights.

There has, as yet, been little elaboration of the guarantees that would attend any review by a competent, independent and impartial authority or judicial body in connection with article 12 CRPD. It is not discussed by the CRPD Committee in the General Comment or concluding observations on article 12. Existing jurisprudence on the right to equality before courts and tribunals and to a fair trial under the ICCPR,²⁵² and other regional human rights instruments,²⁵³ provides a useful starting point. However, mainstream human rights approaches to due process guarantees would need to be adapted to take into account the specific requirements for disabled people to enjoy effective access to justice (on which see article 13 CRPD in this volume). They would also need to reconsider litigation procedures in deprivation of legal capacity and guardianship courts which at present frequently involve a litigation guardian who may base their representation on their view of the person's best interests rather than their 'will and preferences'.²⁵⁴

The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests

At present, when most countries provide for deprivation of legal capacity or guardianship in some form, safeguards for such measures typically include the aforementioned court or administrative procedures for the appointment or review of guardians. Many countries also place monitoring requirements upon guardians, requiring them to submit reports about how they are managing the person's affairs to government officials such as a public guardian or public advocate. The frequency of

²⁵⁰ General Comment No 1, para 22.

²⁵¹ Martin and others (n 38).

²⁵² UN HRCtee, 'General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial' UN Doc CCPR/C/GC/32 (23 August 2007).

²⁵³ For a review of fair trial guarantees under the ECHR, see: Dovydas Vitkauskas and Grigoriy Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights* (Council of Europe 2012).

²⁵⁴ Lucy Series (n 73).

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

such reviews and monitoring procedures is usually variable, depending upon whether it is considered likely that the person's circumstances will change and the track record of the guardian in managing the person's affairs.

Court review and monitoring procedures are resource intensive. Often the cost is borne by the person themselves, and they can be experienced as an intrusion on the privacy of the individual and those supporting them. Although vital in many cases for protecting the individual from exploitation and abuse, they also carry risks of over-regulating the lives of those relying support for the exercise of legal capacity. In the event States parties were to move away from systems of guardianship towards the kinds of supports described here, it is likely that resource intensive review procedures such as these would be reserved for frameworks like facilitated decision making, which carry greater risks of abuse.

Of those states that have introduced statutory frameworks for supported decision making, most have preferred to take a lighter touch approach, in recognition that the person enjoys a higher level of autonomy. In British Columbia, for example, some agreements relating to support and representation need not be officially registered, but a person can appoint a trusted third party to monitor the activities of representative.²⁵⁵ In Ireland, new legislation for supported decision-making agreements does not necessarily require them to be registered, but does make provision for official investigations in response to complaints or concerns.²⁵⁶ These may offer more proportionate alternative safeguards for the emerging support paradigm.

Paragraph 5

Introduction

To be in control over one's own financial affairs is important for several reasons. It enables one to cater for his or her basic needs (food, clothes, accommodation, etc.) and to realize one's life projects. With financial means one can *choose* what to eat and wear, and where and with whom to live. One can pursue an education, spoil loved ones, or simply go to the movies. Many of us take these things for granted, but millions of persons with disabilities, in particular persons with intellectual and psychosocial disabilities²⁵⁷ are routinely denied control over their financial affairs.²⁵⁸ To address such injustices, the CRPD asserts that persons with disabilities are *equally* entitled to acquire, own, enjoy, and dispose private property, and obliges states parties to take all appropriate action to ensure these rights in the domestic context. Moreover, states parties must ensure that persons with disabilities have equal access to bank loans and other forms of financial credit. In this part of the analysis of article 12, we will explore what this demand for equal treatment means in light of the preparatory works, available jurisprudence and other sources concerning the proper interpretation of the CRPD.²⁵⁹

Background and Travaux Préparatoires

²⁵⁵ Representation Agreement Act 1996, British Columbia.

²⁵⁶ Assisted Decision-Making (Capacity) Act 2015.

²⁵⁷ In this analysis of Art 12(5) CRPD, this author uses the term "psychosocial" instead of "mental" (the CRPD's term) when discussing persons experiencing long-term mental health problems. "Psychosocial" is the term preferred by persons belonging to this group, and it is increasingly recognized by human rights practitioners and scholars as the proper term to use. See eg the CRPD Committee, 'General Comment No 1 on Art 12: Legal Capacity' UN Doc CRPD/GC/1 (11 April 2014) paras 9, 15 and 42 (hereafter CRPD Committee, General Comment No 1).

²⁵⁸ Dinesh Bhugra et al, 'Right to Property, Inheritance, and Contract and Persons with Mental Illness' (2016) 28 *Int'l Rev Psychiatry* 402. See also Nora Ellen Groce, Jillian London and Michael Ashley Stein, 'Inheritance, Poverty and Disability' (2014) 29 *Disability and Society* 1554 (hereafter Groce, London and Stein, 'Inheritance, Poverty and Disability').

²⁵⁹ Arts 31-32 VCLT..

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

The right to equal enjoyment of property rights was included in the first compilation of proposals for a treaty on the rights of persons with disabilities produced by the Working Group of the Ad Hoc Committee in January 2004.²⁶⁰ Draft article 9 (e) and (f) read:

States Parties shall: [...]

(e) Take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit;

(f) Ensure that persons with disabilities are not arbitrarily deprived of their property.

It is easy to see that this early draft of what later became article 12(5) is almost identical to the final version of the treaty text. In the discussions that followed the first draft, the primary point of controversy concerned the distinction between the right to *own* property and the right to *administer* that property,²⁶¹ and the proper scope of the right to administer property and control one's financial affairs. A number of delegates argued that certain intellectual and psychosocial conditions can have a fundamental impact on personal decision-making skills, which warranted restrictions on the right to manage one's financial affairs.²⁶² Others argued against such restrictions, with representatives from civil society taking the lead. Variations in cognitive skills ought not to affect the right of persons with disabilities to make financial decisions. If people experienced difficulties when making decisions, then such challenges could – and should - be met with voluntary support.²⁶³ This controversy mirrors the general discussion that took place before the Ad Hoc Committee about whether the CRPD should reaffirm that persons with disabilities are not only persons before the law (with rights and duties) but entitled to legal agency (entitled to make legally binding decisions) and whether such legal agency may legitimately be circumscribed under certain circumstances.²⁶⁴ The negotiating parties managed to reach agreement by framing the right to legal agency as an entitlement to be enjoyed “on an equal basis with others”, and by remaining silent on whether it may be circumscribed.²⁶⁵ The precise implications of this compromise is still a matter of legal argumentation and part of an ongoing dialogue between the states parties and the CRPD Committee, and between other stakeholders.²⁶⁶

²⁶⁰ ‘Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities’, Annex 1 to the Report of the Working Group to the Ad Hoc Committee, UN Doc A/AC.265/2004/WG.1 (16 January 2004), article 9 (e) and (f),

²⁶¹ Daily Summaries of the Fifth Session of the Ad Hoc Committee related to article 9 Equal Recognition as a Person Before the Law (25 January 2005), see recorded statements by Argentina, Australia, Canada, Chile, Jordan and the Russian Federation. Available at: <<http://www.un.org/esa/socdev/enable/rights/ahc5sum25jan.htm>> [accessed 6 July 2017] (hereafter Daily Summaries 25 January 2005).

²⁶² Daily Summaries 25 January 2005 (n 22618) see statements by Syria, Libya and Norway.

²⁶³ Daily Summaries of the Seventh Session of the Ad Hoc Committee related to article 12 Equal Recognition as a Person Before the Law (18 January 2006), see statements by International Disability Caucus (IDC), Inclusion International and Mental Disability Rights International. Available at: <<http://www.un.org/esa/socdev/enable/rights/ahc7sum18jan.htm>> [accessed 6 July 2017]

²⁶⁴ For a more comprehensive analysis of this discussion the reader is directed to the general travaux section of Art 12 earlier in this chapter

²⁶⁵ Ibid.

²⁶⁶ The CRPD Committee has expressed its interpretation in its General Comment No. 1 (n 254) and some states parties have expressed their views in the form of interpretative declarations (eg Australia, Canada, Estonia, the Netherlands, Norway, and Poland) and in response to the CRPD Committee's outputs. Full declarations are

The equal right to own and inherit property

The right to own and inherit property is well-established in international human rights law. It is recognized by the UDHR²⁶⁷ and protected under several regional human rights treaties.²⁶⁸ These treaties prohibit arbitrary deprivation of private property. The CERD and CEDAW complement these provisions by specifying that states must ensure that everyone enjoys protection of their property, regardless of race, colour, national or ethnic origin,²⁶⁹ sex or marital status.²⁷⁰ Article 12(5) CRPD adds to these qualifications (and standards) by clarifying that property rights effectively extend to persons with disabilities. The CRPD does not define what constitutes “property” and neither does any other international human rights treaty. A working definition of the term can, however, be gleaned from UN declarations and jurisprudence stemming from human rights courts and tribunals. According to a UN General Assembly resolution, the right to property covers “personal property, including the residence of one’s self and family” and “economically productive property, including property associated with agriculture, commerce and industry”.²⁷¹ The European Court of Human Rights has given the term “possessions” (which is the term for property used in the European Convention of Human Rights (ECHR) an even broader meaning.²⁷² It includes land,²⁷³ physical goods,²⁷⁴ shares of stock,²⁷⁵ business licenses,²⁷⁶ intellectual property (e.g. copyright and patents)²⁷⁷ and, under certain circumstances, welfare benefits (including disability-related ones).²⁷⁸ The Inter-American Court of Human Rights has interpreted “property” in a similarly comprehensive sense.²⁷⁹

Property rights are qualified rights in the sense that they may be limited by domestic legislation if certain criteria are met. Article 12(5) CRPD prohibits *arbitrary* deprivation of property, implying that non-arbitrary deprivation of property can be permissible. The Convention does not, however, provide any further details on what constitutes arbitrary interferences with property rights. The ECHR is more elaborate on this point; it states that no one shall be deprived of his (or her) possessions “except in the public interest and subject to the conditions provided for by law and by the general principles of

available at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en>, and comments from states parties on a draft version of the Committee’s General Comment No. 1 can be accessed at <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>> [accessed 6 July 2017].

²⁶⁷ Art 17 UDHR.

²⁶⁸ Art 14 African Charter on Human and Peoples’ Rights (ACHPR); Art 21 American Convention on Human Rights (ACHR); Art 31 Arab Charter on Human Rights; and Art 1 Optional Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter Protocol 1 to the ECHR).

²⁶⁹ Art 5(d)(v) CERD.

²⁷⁰ Art 16(1)(h) CEDAW.

²⁷¹ UNGA Res 45/98 (14 December 1990) para 3.

²⁷² Eg *Beyeler v Italy* (2000) 33 EHRR 52, para 100 (hereafter *Beyeler v Italy*).

²⁷³ *Belvedere Alberghiera S.r.l v Italy*, App no 31524/96, ECHR 2000-VI, paras 51-52.

²⁷⁴ *Beyeler v Italy* (n 269).

²⁷⁵ *Lithgow and others v the United Kingdom*, (1986) 8 EHRR 329, para 107.

²⁷⁶ *Tre Traktörer Aktiebolag v Sweden* (1989) 13 EHRR 309, para 53.

²⁷⁷ *Anheuser-Busch Inc. v Portugal* (2007) 44 EHRR 42, para 72.

²⁷⁸ *Bélané Nagy v. Hungary*, App no 53080/13 (13 December 2016), para 82-89 (hereafter *Bélané Nagy v. Hungary*).

²⁷⁹ In a case concerning expropriation of land, the Inter-American Court of Human Rights held that the right to property under the American Convention on Human Rights covers “all movables and immovables, and all tangible and intangible assets, as well as any other property susceptible of having value”. *Salvador Chiriboga v Ecuador* (Preliminary Objection and Merits) Series C No 179 (6 May 2008) para 55.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

international law".²⁸⁰ It continues to clarify that states are permitted to maintain legislation that is necessary to ensure payment of taxes and penalties.²⁸¹ The European Court of Human Rights has interpreted this provision to include a requirement of proportionality between the aim(s) behind a restriction on the enjoyment of property and its consequences for those affected by the restriction.²⁸² The absence of such specifications in the CRPD is understandable in view of the purpose of the Convention, which is to ensure the *equal enjoyment* of human rights by persons with disabilities, rather than to delineate the scope and content of these rights in other respects.²⁸³ Moreover, the CRPD's clear intent is not to create any new rights but instead relies to existing rights and definitions, albeit within a disability context.²⁸⁴

To determine whether a particular obstacle to the enjoyment of property violates the CRPD one must consider whether non-disabled persons, in a relevantly similar situation, are subjected to the same constraints. Imagine a domestic statute prescribing that persons who inherit money or property must pay a tax on their inheritance. Contrast this example with a statute that prescribes that daughters are entitled to one-half of a son's share when inheriting their parents, or a domestic practice that excludes persons with disabilities from inheriting land. Whilst all examples involve restrictions on the right to inherit property, the latter two are objectionable in the sense that the first one is not. The last example meets the definition of disability-based discrimination and violates the CRPD, unless one can demonstrate that the practice serves a legitimate aim, is based on objective criteria and is reasonable.²⁸⁵ As described by Groce, London and Stein, inheritance is a critical means of transferring wealth and means to subsistence (eg a plot of land or a sewing machine) between generations; it can provide younger generations with economic independence and help movement out of poverty.²⁸⁶ Such transfers can, however, also give rise to a number of legitimate concerns: Will the inheritor be able to manage the inherited assets? Does he or she need protection to prevent exploitation by third parties?²⁸⁷ The Convention answers such concerns by obliging states to provide protection against exploitation and abuse (article 16) and to ensure access to decision-making support (article 12(3)). Whilst such measures may involve restrictions of the inheritor's legal agency (we attend to this question in the following section), a categorical exclusion of persons with disabilities as potential inheritors cannot be justified under the CRPD or any other source of human rights law.

In addition to ensuring that domestic legislation accords with article 12(5), states parties must combat discriminatory practices between private actors.²⁸⁸ Though we lack systematic studies on the subject, researchers on poverty are routinely apprised of anecdotal stories about how persons with disabilities

²⁸⁰ Art 1 Protocol 1 to the ECHR. The ACHPR, Art 14, and the ACHR, Art 21, embody similar clarifications on the scope of the right to property.

²⁸¹ Art 1 Protocol 1 to the ECHR.

²⁸² See eg *Bélané Nagy v. Hungary* (n 75) para 115.

²⁸³ Art 1 CRPD.

²⁸⁴ Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 HRLR 1, 20.

²⁸⁵ The idea that not all state action that can be subsumed under the definition of discrimination violates the prohibition of discrimination is well established in international human rights law. See eg Jarlath Clifford, 'Equality', in Dinah Shelton (ed.) *The Oxford Handbook on International Human Rights Law* (OUP 2013) 438.

²⁸⁶ Groce, London and Stein 'Inheritance, Poverty and Disability' (n 25855) 1557.

²⁸⁷ *Ibid*, 1564.

²⁸⁸ Arts 4 and 12(5) CRPD. In its concluding observations, the CRPD Committee has expressed its concern over domestic laws and practices that limit persons with disabilities' possibilities to own and inherit property. See eg 'Concluding Observations on the Initial Report of Kenya' UN Doc CRPD/C/KEN/CO/1 (28 August 2015) para 22, and 'Concluding Observations on the Initial Report of Uganda' UN Doc CRPD/C/UGA/CO/1 (18 April 2016) para 22.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

are passed over when land and other family assets are transferred from one generation to the next.²⁸⁹ In this context, the situation of women with disabilities deserves particular attention. Patriarchal systems persist in several states parties restricting women's access to land and family assets.²⁹⁰ In such settings, women with disabilities face discriminatory practices because of their gender *and* impairment.

The equal right to control one's financial affairs

A key facet of the right to property is the right to use one's assets. The right to own or inherit money would lose much of its value if the owner was prevented from using the money to, for example, buy something or take the bus to see a friend. As noted above, much of the discussions during the negotiations of the CRPD concerned the proper scope of the right to control one's financial affairs. The treaty text delineates this scope by reaffirming that persons with disabilities enjoy an "equal right" to control their finances. The precise implications of this obligation are still matters of debate. The CRPD Committee has held that the Convention permits restrictions on legal agency on the basis of bankruptcy or conviction of a criminal offence.²⁹¹ Restrictions cannot, however, be based on personal traits such as gender, race, or disability.²⁹² Few, if any, would dispute that the presence of a certain ethnicity, gender or physical impairment is an insufficient - and in many cases irrelevant - reason to circumscribe a person's right to manage their property. The difficult question is whether the CRPD also prohibits restrictions on the right to administer property that are based on reasons linked to disability and/or impairment. Some persons with cognitive impairments, for example, have difficulties in understanding basic financial concepts (such as quantity, numbers and money) and as a group, persons with intellectual disabilities experience more difficulties than 'the average person' to understand and contemplate about financial choices.²⁹³ Moreover, persons with certain psychosocial conditions can make very poor financial decisions during their active phases and perform on par with others during their inactive phases.²⁹⁴ For these reasons, states have a legitimate interest to prevent financial harms that affect persons with certain disabilities in particular. Such protective measures can take many forms and target different actors. States may, for example, strengthen consumer protection and prohibit certain sales methods or forms of marketing, or develop procedures by which harmful contracts can be cancelled if certain criteria are met.²⁹⁵ Article 12(3) obliges states to ensure access to support.

The typical response to the financial risks discussed here is, however, still some form of guardianship system where guardians are mandated to make financial decisions on behalf of the person concerned.

²⁸⁹Groce, London and Stein 'Inheritance, Poverty and Disability' (n 25855) 1555-1556.

²⁹⁰ Ibid, 1558f. See also CRPD Committee, 'General Comment No 3 on Women and Girls with Disabilities' UN Doc CRPD/GC/3 (26 August 2016) para 51.

²⁹¹ CRPD Committee, General Comment No 1, para 32. As noted by Minkowitz restricting rights on these grounds may, under certain circumstances, violate other human rights treaties. See Tina Minkowitz, 'CRPD and Transformative Equality' (2017) 13 *Int'l J Law Context* 77, 83.

²⁹² CRPD Committee, General Comment No 1, paras 9 and 32.

²⁹³ See eg Paul Willner, Rebecka Baily, Rhonwen Perry and Simon Dymond, 'Evaluation of the Ability of People with Intellectual Disabilities to 'Weigh Up' Information in Two Tests of Financial Reasoning' (2010) 54 *J Intellectual Disability Research* 380.

²⁹⁴ Christopher P. Guzelian, Michael Ashley Stein, and Hagop S Akiskal 'Credit Scores, Lending, and Psychosocial Disability' (2015) 95 *B U Law Rev* 1807, 1824 (hereafter Guzelian, Stein, and Akiskal, 'Credit Scores').

²⁹⁵ Many states parties have consumer and marketing legislation prohibiting misleading advertising, aggressive commercial practices, and unfair contract terms. EU member states, for example, are obliged to prohibit such practices according to the Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/23, articles 5-9.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

Two main guardianship models are common practice: plenary and partial guardianship.²⁹⁶ Persons under plenary guardianship typically lose all or almost all of their capacity to manage their financial affairs. The involvement of a third party – a guardian – is necessary to make legally effective decisions on financial matters. Under partial guardianship the individual retains capacity to make certain financial decisions, typically the capacity to make smaller everyday transactions. The power to make other decisions is transferred to the guardian. Although partial guardianship is less intrusive on the individual's freedom control her assets, such systems tend to 'spill over' into other areas.²⁹⁷ Guardianship systems are problematic for several reasons: they severely restrict individuals' possibilities to enjoy their assets, they prevent financial risk-taking thereby also the possibility to make mistakes and learn from them, they expose persons with disabilities to economic exploitation by unscrupulous guardians, and they reinforce stereotypical images of persons with disabilities as unable to manage their finances.²⁹⁸ The CRPD Committee interprets the CRPD to prohibit all forms of guardianship and substituted decision-making²⁹⁹ that involves overriding an individual's expressed preference. According to the Committee, neither variations in decision-making skills nor risks for financial harm can justify transfer of decision-making power from the person concerned to a third party.³⁰⁰ Most, if not all, states parties take the opposite position and interpret the Convention to permit substituted decision-making under certain circumstances, including at the very least in situations where decision-making ability is lacking and voluntary support is insufficient to prevent actions that entail serious negative consequences for the person concerned.³⁰¹

In the end, the lawfulness of financial guardianship regimes hinges on discrimination analysis. Regimes that aim to target persons with disabilities only as well as regimes which cover a larger group of people but have a disparate impact on persons with disabilities meet the definition of discrimination.³⁰² To comply with the CRPD such regimes must serve legitimate aims and be justified as objective and reasonable.³⁰³ This means that they must pursue aims that are compatible with the object, purpose and provisions of the CRPD, that they must *contribute* to their aims, and that the negative consequences brought about by them must be *reasonable*.³⁰⁴ This weeds out regimes that do not actually provide protection against the financial harms they are set up to prevent. It further disqualifies systems that are over-protective in the sense that they provide for substituted decision-

²⁹⁶ CRPD Committee, General Comment No 1 (n 254) para 27.

²⁹⁷ Guzelian, Stein, and Akiskal, 'Credit Scores' (n 291) 1859. See also Council of Europe Commissioner for Human Rights, 'Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities' (Council of Europe Publisher 2012), 14.

²⁹⁸ Ground-breaking reports on the, at times, devastating effects of guardianship on persons with disabilities' lives have been published by Mental Disability Advocacy Center (MDAC), now Validity. See eg its reports 'Guardianship and Human Rights in Serbia' (2006), Russia (2007), Kyrgyzstan (2007), Hungary (2007), the Czech Republic (2007), and Bulgaria (2007). More recent reports illustrate that problems persists. See 'Legal Capacity in Europe: A Call to Action to Governments and to the EU' (2013). All reports are available at <www.mdac.info> under "Resources" [accessed 6 July 2017]

²⁹⁹ Substituted decision-making is a term that is commonly used by the CRPD Committee (and scholars) to refer to systems where legal capacity is removed from the person concerned without his or her consent, and vested in a third party. See CRPD Committee, General Comment No 1 (n 254) para 27.

³⁰⁰ CRPD Committee, General Comment No 1 (n 254) paras 13-15.

³⁰¹ See n 263.

³⁰² Art 2 CRPD. The definition of discrimination covers all systems that aim to make distinctions on the basis of disability/ impairment and to restrict the rights of persons with disabilities (often referred to as direct discrimination) as well as systems that serve other aims but which have a negative impact on persons with disabilities' enjoyment of rights.

³⁰³ Anna Nilsson, 'Objective and Reasonable? Scrutinising Compulsory Mental Health Interventions from a Non-discrimination Perspective' (2014) 14 HRLR 459, 465-466 (hereafter Nilsson, 'Objective and Reasonable?')

³⁰⁴ *Ibid.*

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

making in situations where the same level of protection can be achieved by voluntary support. The development of support mechanisms to aid people in their decision-making has just begun and there are good reasons to be optimistic about the future. There is a growing body of literature demonstrating that personal support and assistive technology can prevent financial harm just as effectively as substituted decision-making in many situations.³⁰⁵ Having said that, it remains uncertain whether various forms of support and assistive devices can cater for the needs of the entire group of people who are today subjected to some form of substituted decision-making.³⁰⁶ The hard cases involve situations where persons want to make transactions that will impoverish them, or take risks that are likely to lead to such results. It also includes situations where the will of the person concerned cannot be ascertained, either because we fail to understand the person's unique way of communication or because his or her preferences appear conflicting. The person may for example want to spend her income on other things than rent but continue to live in her apartment. If such conflicts cannot be resolved by communication, states parties could respect her wish to not pay rent or vest a third party with the power to disregard that preference and ensure that the landlord is reimbursed for the rental fee. The latter protects the person from losing her apartment but intrudes on her right to legal agency. The former alternative protects her status as a legal actor but includes a risk of homelessness. Which of these alternatives we prefer depends on the values and costs we attach to the interests at stake: the value of being in charge of one's financial affairs and the cost of having one's choices overridden versus the value of keeping one's apartment and the cost/risk of losing it. The Convention offers no clear-cut answer to such matters.³⁰⁷

To determine whether a particular domestic system is reasonable, we need to consider its effects.³⁰⁸ Systems with negative effects for those concerned are unreasonable unless the harms in question are compensated by positive outcomes. There is compelling evidence that systems of guardianship have led to unfathomable human rights abuses.³⁰⁹ They have stripped persons with disabilities of their assets and transferred them to dishonest third parties.³¹⁰ And they have enabled paternalistic guardians to prevent members of this group from pursuing their life projects. Having said that, not all forms of substituted decision-making are equally intrusive on individuals' capacity to manage their affairs, nor do they have equally severe implications on other spheres of life. Many states parties provide for financial guardianship, which can be limited to certain types of decisions or specified parts of the individual's assets (e.g. to selling real estate or spending a particular inheritance).³¹¹ Moreover, the quality of domestic services and of the safeguards in place to prevent abuses varies across

³⁰⁵ *Ex pluribus* Michael Bach and Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Law Commission of Ontario 2010) 72ff, Eilionóir Flynn and Anna Arstein-Kerslake, 'The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?' (2014) 32 *Berkeley J Int'l Law* 124, and Piers Gooding, Anna Arstein-Kerlanke and Eilionóir Flynn, 'Assistive Technology as Support for the Exercise of Legal Capacity' (2015) 29 *Int'l Rev Law, Computers & Technology* 245.

³⁰⁶ Piers 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 *HRLR* 45, 68.

³⁰⁷ Whilst Art 12(5) and 3(a) speak in favour of honouring personal choices, states parties also have an obligation to support independent living and inclusion in society (Art 19 and 3(c))

³⁰⁸ Nilsson, 'Objective and Reasonable?' (n 300) 467f.

³⁰⁹ See n 295

³¹⁰ Cases brought before the European Court of Human Rights provide illustrative examples. See eg *Shtukaturov v Russia*, App no. 44009/05 (27 March 2008), and *Stanev v Bulgaria*, App no. 36760/06 (17 January 2012).

³¹¹ European Union Agency for Fundamental Rights (FRA), 'Legal Capacity of Persons with Intellectual Disabilities and Persons with Mental Health Problems' (2013). At page 31 the report highlights the Dutch system of "protective trust" (bewindvoering) and the Swedish system of "trustee" (förvaltare), both aimed at protecting the property and financial interests of persons in need of assistance to this end.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

jurisdictions. The same can be said about people's experiences of substituted decision-making.³¹² Thus, the precise promise and perils of a particular system depends on "how much" it interferes with the individuals' rights and on "how much" protection it offers when compared to other less restrictive ways to prevent financial harm. Preventive measures can take many forms and affect different actors. States could, for example, prohibit certain forms of marketing that encourages overspending, provide for a system of so-called advanced directives (where individuals set limits for their own spending), or set up systems that allow individuals to cancel harmful contracts under certain conditions.

To guide reasoning about reasonableness, it can be instructive to ask: "would it be reasonable to subject persons *without* disabilities in similar situations to the same restrictions of legal agency?" A state policy may seem reasonable when viewed in isolation. Drawing on the example provided above, it may seem reasonable to prevent persons with intellectual disabilities from spending their income in a way that jeopardises their place of residence. The great value we attach to having a place to live, and the negative effects associated with homelessness could undergird such a claim. It is, however, also possible to argue for the opposite, and say that it is more important to provide people with the opportunity to shape their lives why we should respect financial choices also in situations where such decisions have negative implications for the person concerned.³¹³ Even if both positions were to be compatible with the CRPD, which would imply that states have discretion on this matter, it seems wrong to allow states to deny persons with disabilities the right to manage their financial affairs based on the first claim, and, at the same time, accept that states refrain from imposing similar restrictions on persons *without* disabilities because of the second claim. Presumably, the prohibition of discrimination requires states parties to work out a consistent 'disability-neutral' approach to financial risk-taking.³¹⁴

In addition, we need to be mindful of the specific harms that domestic practices meeting the definition of discrimination can cause to those concerned. This includes disrespect for human dignity, stereotyping, prejudice, and social disadvantage.³¹⁵ The treaty text of the CRPD confirms the relevance of these factors. The preamble to the treaty explains that disability-based discrimination disrespects "the inherent dignity and worth of the human person" and affirms states parties' belief that the treaty, which has equality and non-discrimination as its core value, will "make a significant contribution to redressing the profound social disadvantage" experienced by persons with disabilities.³¹⁶ Just like the CERD and the CEDAW, the CRPD includes specific obligations for states parties by which to combat public prejudice and discrimination from private actors.³¹⁷ The degree to which a particular regime interfere with the dignity of those concerned and contribute to the spread of public prejudice and stereotypic beliefs of persons with disabilities depends on its legal design as well as on other factors.

³¹² Ibid, 44. The report includes interviews with persons who had been subjected to guardianship. Their responses ranged from considering guardianship to be "the worst thing I could imagine" to being a good thing, because "we can discuss everything together, and then we can achieve what we want with a common agreement."

³¹³ Flynn and Arstein-Kerslake argue that persons who are engaging in self-harming behavior and express a wish to stay in the harmful situation deserves to have their will and preference respected. Eilionóir Flynn and Anna Arstein-Kerslake, 'Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity' (2014) 10 *Int'l J Law Context* 81, 99.

³¹⁴ I have developed this argument in previous writings. See Anna Nilsson, *Minding Equality: Compulsory Mental Health Interventions and the CRPD* (PhD Thesis, Lund University 2017) 159ff.

³¹⁵ Different scholars sometimes use slightly different terminology when discussing these phenomena. Sandra Fredman provides a good overview of the debate in her article 'Substantive Equality Revisited' (2016) 14 *ICON* 712, 727.

³¹⁶ CRPD, Preamble (h) and (y).

³¹⁷ Art 4(1)(e) CRPD and Art 8(1)(b), CEDAW, Arts 2(e) and 5, and CERD, Arts 2(1)(d), 4, and 7.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

Domestic practices that target persons with disabilities, in particular, reinforce stereotypical images of persons with disabilities as being unable to take on such tasks. Such regimes arguably interfere more with the dignity of members of this group than do regimes that are addressed towards a larger class of people who, under certain circumstances, are in need of protection against financial harms. To determine the reasonableness of a specific regime, *all* relevant negative effects must be balanced against the positive outcomes of that regime.

Equal access to bank loans, mortgages and financial credit

The credit market is another area where persons with disabilities encounter various barriers. Physical barriers obstructing access to bank offices, cash machines and Internet banking are covered by article 9 CRPD.³¹⁸ Article 12(5) focuses on access to bank loans and other forms of credit, including small loans (microloans) to impoverished borrowers who lack access to other forms of credit.³¹⁹ Empirical research has identified several factors that can obstruct equal access to loans. The credit market is a complex market and it can be difficult to access information about the different credit options available and to evaluate them. A study from Australia suggests that persons with intellectual disabilities fare particularly poorly and – many times – feel that they have little choice but to enter into a contract they do not understand.³²⁰ Other studies illustrate the problems encountered by persons with visual impairments.³²¹ States parties to the CRPD must address such problems by requiring banks to adjust their services to the extent that is reasonable.³²² For example, banks need to provide information about their services in Braille, easy-to-read and other accessible formats and offer personal service to customers who needs such services. Moreover, studies indicate that credit applications from persons with disabilities are at times rejected without individual assessments by financial staff viewing persons with disabilities as economically non-productive and vulnerable to financial exploitation.³²³ Women with disabilities are particularly exposed in this respect.³²⁴ Such practices will often qualify as discrimination and states parties must take appropriate action to eliminate such misconducts.³²⁵

A more complex challenge to achieve equal access to financial credit relates to the fact that certain impairments raise the risk for reckless spending and accumulating debt. Banks (and other creditors) recognize this risk and either reject loan applications from persons with certain disabilities or adjust the terms of the loans accordingly. In discussing the US context, Guzelian et al have outlined a number of ways to mitigate this problem. Financial guardianship is one option. Advance directives and surety (i.e. a public or private actor who commits to cover the debt in case the borrower fails to repay the

³¹⁸ CRPD Committee, *Szilvia Nyusti and Péter Takács*, Communication No 1/2010, 16 April 2013, para 9.2.

³¹⁹ Microloans and microfinancing are typically designed to support entrepreneurship and thereby alleviate poverty.

³²⁰ Susan Hayes and Fiona Martin, 'Consumers with an Intellectual Disability and Carers: Perceptions of Interactions with Banks' (2007) 11 *J Intellectual Disabilities* 9, 9-10.

³²¹ Eg Ephraim L. Nuwagaba and Peter N. Rule, 'An adult learning perspective on disability and microfinance: The case of Katureebe' (2016) 5 *Afr J Disability*.

³²² The prohibition of disability-based discrimination includes an obligation to take reasonable accommodation. Art 2 CRPD.

³²³ See eg Marc Labie, Pierre-Guillaume Méon, Roy Mersland, and Ariane Szafarz, 'Discrimination by Microcredit Officers: Theory and Evidence on Disability in Uganda' (2015) 58 *Q Rev Econ Finance* 44.

³²⁴ Theeraphong Bualar, 'Physically disabled women's creditworthiness in Village Development Fund: Evidence from Thailand' (2011) 21 *Dev Pract* 848.

³²⁵ Art 4(1)(e) CRPD.

Pre-print chapter by Lucy Series (School of Law and Politics, Cardiff University) for *Commentary on UN Disabilities Convention*, in I Bantekas, M Stein, D Anastasiou (Eds), forthcoming for the Oxford University Press in 2018.

debt) are yet other possible alternatives.³²⁶ Each of these alternatives has implications on the individual's possibilities to manage her financial affairs and they generate different levels of financial security for the creditor. As discussed above, guardianship severely restricts the individual's possibilities to decide on financial matters, and even if the presence of a guardian may convince a bank to accept a loan application, the guardian remains in charge of the new funds and decides how the funds or assets may be spent. In so-called advance directives, the individual creates self-imposed limits on her spending with the aim of increasing her ability to repay the credit on time.³²⁷ An advantage with such a system is that the individual remains in control over her financial affairs. How much security advance directives generate for creditors depends on the domestic context. What happens if the individual departs from the directive and stops repaying the creditor? Suretyship means that a third party acts as a guarantor. Such arrangements can theoretically be designed to intrude very little on the borrower's legal agency and, at the same time, satisfy the creditors' interest of financial security. In practice, it will, however, be difficult for many persons with disabilities to find sureties willing to pledge for them under such circumstances. Whether any of the alternatives discussed here are sufficient to ensure equal access in a domestic context can only be determined by discrimination analysis as outlined in the previous section.

³²⁶ Guzelian, Stein, and Akiskal, 'Credit Scores' (n 291) 1858ff

³²⁷ *Ibid*, 1859-62.