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Situating the Right to Enjoy Legal Capacity

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I. INTRODUCTION

THROUGHOUT HISTORY, AND in jurisdictions the world over, disabled people[1] have been routinely denied their rights to make decisions about, and have control over, their own lives. This denial has been especially enduring for people with cognitive and psychosocial disabilities. The traditional Enlightenment-derived normative framework for legal decisions operated on the basis of a simplistic binary distinction based on 'capacity', with decisions for persons found to lack capacity being made by others, generally without reference to the person. Most jurisdictions gave legal effect to this normative framework through substituted decision-making regimes, often implemented through wardship, guardianship or trusteeship laws. The UN Convention on the Rights of Persons with Disabilities (CRPD), adopted in December 2006[2] and in force since May 2008, has provided an international human rights-derived impetus for a shift in how States Parties respond to disability rights, and has sparked innovation in both normative approaches and the legal frameworks that give effect to these.

Of particular importance, and referred to by almost every contribution to this collection, is Article 12 CRPD, which affirms disabled people's rights to equal recognition before the law, including both as full legal persons, and in the enjoyment of legal capacity 'on an equal basis with others in all aspects of life.' The text of Article 12 was contentious during debates leading up to the adoption of the Convention and has remained so ever since.[3] The first General

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[1] Although we recognise that there are debates over whether to use disability-first or person-first language, we generally use the formulation of 'disabled people' in this collection, to signal our engagement with and support of the social model of disability, ie that people with impairments are disabled by the barriers constructed by society.

[2] A/RES/61/106/Annex 1.

[3] A Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar of the Future?' (2006–2007) 34 *Syracuse Journal of International Law & Commerce* 429–62; A Dhanda, 'Conversations between the proponents of the new paradigm of legal capacity' (2017) 13

Comment on the CRPD was issued by the Committee on the Rights of Persons with Disabilities (CommitteeRPD) in 2014 to provide a comprehensive interpretation of the scope of that right.[4] Yet more than a decade after the CRPD came into force, guardianship laws of one form or another continue to be used in almost all jurisdictions, including those that have fully ratified the Convention. More positively, in many legal systems, ratification of the CRPD has led to law reform processes that seek to give greater priority to the will and preferences of disabled people, to recognise a presumption of capacity, and to provide legal mandates for support with decision-making in a range of contexts. Yet the shift to legal frameworks for supporting disabled people to enjoy their legal capacity remains at best only partial. It is not clear that any jurisdiction, as yet, offers a regulatory system which can be considered, both in how it appears in law, and how it is realised in practice, to be fully compliant with the vision of the right to enjoy legal capacity in the CRPD as interpreted by the CommitteeRPD.[5]

There are many reasons for this, including legislative and policy mandates to protect vulnerable people, the challenge of balancing paternalism and empowerment, and the different understandings of supported and substitute decision-making across jurisdictions. Economic factors, and cultural and attitudinal approaches to, and understandings of, disability have also played a role. Designing and implementing a CRPD- and CommitteeRPD-compliant regulatory framework that enables the enjoyment of legal capacity by all on an equal basis are also fraught with conceptual and practical difficulties. These include conceptual tensions around differing understandings of autonomy; tensions between mental capacity and legal capacity; contrasting visions of legal and ethical values surrounding decision-making, support and influence; the place of ideas of equality, justice, fairness and trust; practical challenges of creating non-discriminatory, but effective, safeguards against abuse; and the sometimes tenuous place of international conventions and law reform in social change.

The contributions to this edited volume tackle all of these thorny conceptual and practical problems and more. In this introductory chapter, we seek to provide an overview of the context of the academic debates to which the

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International Journal of Law in Context 87–95; E Flynn and A Arstein-Kerslake, 'The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?' (2014) 32 *Berkeley Journal of International Law* 124–43; E Flynn and A Arstein-Kerslake, 'Legislating personhood: realising the right to support in exercising legal capacity' (2014) 10 *International Journal of Law in Context* 81–104; A Arstein-Kerslake and E Flynn, 'The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law' (2016) 20 *The International Journal of Human Rights* 471–490; A Arstein-Kerslake and E Flynn, '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* 22–38.

[4] Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12: Equal recognition before the law* (April 2014), UN Doc CRPD/C/GC/1.

[5] A good deal is expected from recent reforms in Colombia (Ley 1996 of 2019) and Peru (Legislative Decree No 1384 amending the Civil Code): see A Martinez-Pujalte, 'Legal Capacity and Supported Decision-Making: Lessons from Some Recent Law Reforms' (2019) 8 *Laws* 4, doi:10.3390/laws8010004.

substantive chapters contribute, drawing out the points of tension and convergence in our contributors' ideas. We begin with a discussion of the importance of the right to enjoy legal capacity as a cornerstone of the CRPD, explaining why so much academic attention has been directed at Article 12, perhaps at the expense of substantive discussion of the rest of the Convention. This, in turn, helps to explain why tensions in the way autonomy is understood by different scholars have captured intellectual energy so fully, such that this debate has struggled to move forward. In exploring the tensions in these debates, we offer alternative conceptual framings that we hope will help to provide routes out of this quagmire. In seeking to advance debates, we hope that this collection will help to shift academic discourse on legal capacity towards equality, justice and fairness, whilst also being attentive to the importance of trust, protection and safeguards against abuse. We hope, too, to showcase the contribution of socio-legal methodologies in developing an evidence-base for the enhanced delivery of the right to legal capacity.

II. LEGAL CAPACITY AS A CORNERSTONE OF THE CRPD

Despite the wealth of academic commentary on the right to equal treatment for disabled people, it is vital to remember there is much more to the CRPD than Article 12. Article 12 has, however, been the focus of a great deal of socio-legal academic attention because it acts in many respects as a gatekeeper to so many of the other rights set out in the CRPD. The right to equal recognition before the law seems, at first glance, a merely academic exercise; the idea of legal capacity and the enjoyment of it may appear abstract and removed from everyday life. Yet the historical and continuing exclusion of disabled people rests firmly on a denial of these important foundational rights. For example, the right to liberty and security of the person (Article 14), and the right to live independently and be included in the community (Article 19) are meaningless if your decisions about where and with whom to live are overruled in your 'best interests', or you are deprived of your liberty in a locked care facility for your protection. The right to freedom of expression (Article 21) only has meaning if your will and preferences are respected. The right to the highest attainable standard of health (Article 25) can only be realised if your right to equal treatment before the law is also protected, to ensure that your choices about, consents to and refusals of medical treatment have the same force as those of everyone else. At the same time, delivery on the Article 12 right to equal recognition requires that States Parties engage substantively with the positive rights in the CRPD so as to ensure that Article 12 is made meaningful within a comprehensive human rights framework for disabled people.[6]

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[6] See Doyle Guilloud, Chapter 6.

Rather than this collection, therefore, being one more contribution to the ever-expanding literature on the interpretation/implementation of Article 12 CRPD, we want to show that by looking at the idea of equal enjoyment of legal capacity across a range of theoretical, jurisdictional and practical contexts, we can find ways through the legal, conceptual and implementation challenges. To do so, there are three conceptual threads that sit across the contributions to this collection. First, we need to be attentive to, but not become bogged down in, the challenges posed by the abstract concept of 'autonomy'. Second, we need to focus law reform and implementation debates away from 'decision-making' and the related concept of 'mental capacity' onto legal capacity (the formal ability to hold and exercise rights and duties). Finally, we need to use the full panoply of socio-legal methodologies to interrogate the barriers to and catalysts for social and legal change for disabled people. We introduce each of these in turn.

A. Challenging Traditional Conceptions of Autonomy

Autonomy is a contested concept. The ideal of the lone, self-governing individual is one of the most persistent stereotypes of the neo-liberal, late capitalist state. The idea that people can and do make choices about their lives in a rational, self-interested, and deliberate way belies the everyday experiences of many, if not most, people. Traditional academic debates on autonomy valorise the legal fiction of the autonomous decision-maker; the person who listens to and digests all of the relevant information before making a reasoned, logical, careful decision.[7] Increasingly, however, autonomy scholarship highlights the relational contexts that shape, guide and limit the decisions that people can make. Relational approaches to autonomy challenge the idea of the self-ruling individual and foreground the significance of relationships, social norms and legal rules in the formation of autonomy.[8] On this understanding, respect for autonomy imposes positive obligations to provide support and create structures which enhance and develop each person's decision-making skills and capacities. The requirement in Article 12(3) that States Parties 'take appropriate steps to provide access by persons with disabilities to the support they may require in exercising their legal capacity' is grounded in this vision of autonomy.

Whilst this collection engages with debates about autonomy, and, we hope, takes them another step forward, the contributions here also make the case for engaging with other theoretical approaches, like vulnerability theory,[9] or the capabilities approach.[10] Vulnerability theory reconceptualises the traditional

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[7] See Kong, Chapter 4 for a discussion of some of this literature.

[8] R Harding, *Duties to Care: Dementia, relationality and law* (Cambridge, Cambridge University Press, 2017); see also Donnelly, Chapter 2 and Keeling, Chapter 3 for discussion of this literature.

[9] See Mattsson, Chapter 13.

[10] See Stavert, Chapter 10.

liberal subject to incorporate vulnerability as a fundamental aspect of the human condition, albeit one that is experienced differently by different people at different times.[11] Vulnerability theorists offer various ways to understand and address vulnerability, including identifying the need for structures to enhance resilience and empowerment as well as to protect against exploitation and abuse.[12] The capabilities approach also focuses on structures, in this instance on what is needed for human functioning. Originally conceived as an alternative normative approach to indicators of human development across states,[13] as it has developed, the capabilities approach has come to provide a basis for more wide-ranging understandings of the goal of social justice.[14] In this way, the capabilities approach offers new ways to evaluate states' responsiveness to citizens' needs, including the specific needs of disabled people.[15]

Whether through a more expansive conceptualisation of autonomy or through engagement with alternative theoretical perspectives, the chapters here aim to shift the academic gaze away from individual difficulties with decision-making that disabled people may or may not have, onto the responsibilities of the state to provide the resources, both financial and interpersonal, required to support, and where necessary protect, disabled people.

B. Re-focusing the Debates on Legal Capacity, Rather than Decision-making

Much of the academic debate about legal capacity has cohered around the possibility and limitations of replacing substituted decisions with supported decisions.[16] Here, we seek to broaden that literature, and contribute to the

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[11] M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1–23.

[12] R Goodin, Protecting the Vulnerable: A Re-Analysis of our Social Responsibilities (Chicago IL, University of Chicago Press, 1985); MA Fineman (ed), *Transcending the Boundaries of Law, Generations of Feminism and Legal Theory* (Abingdon, Routledge, 2011); C Mackenzie, W Rogers and S Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford, Oxford University Press, 2013).

[13] A Sen, 'Informational Bases of Alternative Welfare Approaches: Aggregation and Income Distribution' (1974) 3(4) *Journal of Public Economics* 387–403.

[14] M Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice' (2003) 9(2–3) *Feminist Economics* 33–59.

[15] M Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge MA, Belknap Press, 2007).

[16] G Richardson, 'Mental Disabilities and the Law: From Substituted to supported decision-making?' (2012) 65 *Current Legal Problems* 333–54; P Gooding, 'Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law' (2013) 20 *Psychiatry, Psychology and Law* 431–51; K James and L Watts, *Understanding the Lived Experiences of Supported Decision-Making in Canada: Legal Capacity, Decision-Making and Guardianship* (Canadian Centre for Elder Law/Law Commission of Ontario, March 2014); K Del Villar, 'Should Supported Decision-Making Replace Substituted Decision-Making? The Convention on the Rights of Persons with Disabilities and Coercive Treatment under Queensland's Mental Health Act 2000' (2015) 4 *Laws* 173–200; G Davidson and others, 'Supported decision making: a review of the

somewhat smaller (so far) debate that focuses on giving depth to the concept of legal capacity, and how to create systems of law that facilitate appropriate support systems for disabled people to enjoy their legal capacity.[17] In doing so, we discuss a wide range of legal and practical approaches to operationalising support for legal capacity, including formal and informal support schemes from 16 different jurisdictions.[18] These include informal family/carer support, formal and informal forms of advocacy, limited guardianship models, nominated supporters, co-decision-makers, network decision-making, microboards, powers of attorney, and advance decisions. Many of these supports operate alongside contemporary approaches to guardianship and/or enable substitute decisions to be made as a last resort. In prioritising legal capacity, the contributors to this collection primarily focus on the ways that the jurisdiction(s) they explore have legislated for these kinds of frameworks, and the benefits and limitations

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international literature' (2015) 38 *International Journal of Law and Psychiatry* 61–67; T Carney, 'Supporting People with Cognitive Disabilities with Decision-making: Any Australian Law Reform Contributions?' (2015) 2 *Research and Practice in Intellectual and Developmental Disabilities* 6–16; G Davidson and others, 'An international comparison of legal frameworks for supported and substitute decision-making in mental health services' (2016) 44 *International Journal of Law and Psychiatry* 30–40; T Stainton, 'Supported decision-making in Canada: principles, policy, and practice' (2016) 3 *Research and Practice in Intellectual and Developmental Disabilities* 1–11; R Harding, 'Care and relationality: supported decision making under the UN CRPD' in R Harding, R Fletcher and C Beasley (eds), *ReValuing Care in Theory Law and Policy: Cycles and Connections* (London, Routledge, 2017) pp 114–30; R Harding and E Taşcıoğlu, '"That's a bit of a minefield": Supported decision-making in intellectually disabled people's intimate lives' in C Ashford and A Maine (eds), *Research Handbook on Gender, Sexuality and Law* (Cheltenham, Edward Elgar, 2019); R Harding, E Taşcıoğlu and M Furgalska, *Supported Will-Making: A Socio-Legal Study of Experiences, Values and Potential in Supporting Testamentary Capacity* (University of Birmingham, 2019).

[17] Dhanda, 'Legal Capacity in the Disability Rights Convention' (n 3); G Quinn, 'Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD' (HPOD Conference, Harvard Law School, 20 February 2010); O Lewis, 'Advancing legal capacity jurisprudence' (2011) 6 *European Human Rights Law Review* 700–714; K Booth Glen, 'Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond' (2012) 44 *Columbia Human Rights Law Review* 93–169; R Harding, 'Legal constructions of dementia: Discourses of autonomy at the margins of capacity' (2012) 34 *Journal of Social Welfare and Family Law* 425–42; E Flynn, 'Mental (in)capacity or legal capacity: A human rights analysis of the proposed fusion of mental health and mental capacity law in Northern Ireland' (2013) 64 *Northern Ireland Legal Quarterly* 485–505; Flynn and Arstein-Kerslake, 'The Support Model of Legal Capacity' (n 3); Flynn and Arstein-Kerslake, 'Legislating personhood' (n 3); B McSherry and K Wilson, 'The concept of capacity in Australian mental health law reform: Going in the wrong direction?' (2015) 40 *International Journal of Law and Psychiatry* 60–69; A Mäki-Petäjä-Leinonen and K Juva, 'Of Sound Mind? Dementia and Aspects of Assessing Legal Capacity' (2015) 22 *European Journal of Health Law* 13–37; A Arstein-Kerslake, 'An empowering dependency: exploring support for the exercise of legal capacity' (2016) 18 *Scandinavian Journal of Disability Research* 77–92; Dhanda, 'Conversations between the proponents of the new paradigm of legal capacity' (n 3); C De Bhailis and E Flynn, 'Recognising legal capacity: commentary and analysis of Article 12 CRPD' (2017) 13 *International Journal of Law in Context* 6–21; R Harding and E Taşcıoğlu, *Everyday Decisions Project Report: Supporting Legal Capacity through Care, Support and Empowerment* (University of Birmingham, 2017); R Harding and E Taşcıoğlu, 'Supported Decision-Making from Theory to Practice: Implementing the Right to Enjoy Legal Capacity' (2018) 8 *Societies* 25.

[18] These include: Argentina, Australia, British Columbia (Canada), Colombia, Denmark, England & Wales, Finland, India, Ireland, Norway, Ontario (Canada), Peru, Scotland, Spain, Sweden and Turkey.

that flow from these laws, rather than debating whether or not supporting legal capacity is desirable. This reflects a common commitment among many contributors to exploring and expanding what is possible rather than fixating on questions which, for the moment, remain largely theoretical.

In exploring support for legal capacity across the broad range of jurisdictions discussed here, both in the letter of the law and in the ways that law is operationalised in practice, the patterns of implementation of the right to enjoy legal capacity are brought into view. Placing these multiple and sometimes contrasting jurisdictional approaches together in one text enables socio-legal scholars to see how and where patterns of regulation are emerging on a global scale. It also facilitates ongoing multi-level iterative exchanges between states, NGOs and domestic activists and between the CommitteeRPD and States Parties, contributing to a more dynamic 'experimentalist' approach to CRPD implementation.[19]

From the contributions to this volume, it is clear to see that the early focus of the CommitteeRPD on Article 12, legal capacity and support has begun to make a difference in many jurisdictions and may well be beginning to catalyse some of the regulatory innovation that will be necessary to create the new paradigm of disability rights.

C. Capacity, Law Reform and Social Change

Ongoing research into the implementation and effectiveness of the CRPD is embedded in the text of the Convention. Article 31(1) requires States Parties to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the Convention. In thinking through the implications, benefits and limitations of the ways that the right to enjoy legal capacity has been legislated for across the jurisdictions surveyed in this book, the contributions also provide insights, as a collection, into the patterns of disability law reform in the light of the CRPD. We see jurisdictions where engagement with CRPD requirements has been largely formulaic.[20] We also see jurisdictions that have made significant legal changes since ratifying the Convention, but that have yet to produce significant impacts on disabled people's lives.[21] In other jurisdictions, where support for legal capacity was already embedded firmly into legal frameworks, we see the potential limitations of the CommitteeRPD focus on capacity and choice, in creating conditions for (self)neglect.[22] In seeking routes out of these difficult

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[19] G de Búrca, *Reframing Human Rights in a Turbulent Era* (Oxford, Oxford University Press, 2021) 39.

[20] See Taşcıoğlu, Chapter 11.

[21] See, eg, Donnelly, Chapter 2; Flynn, Chapter 7; Pathare and Kapoor, Chapter 8; Mäki-Petäjä-Leinonen, Chapter 12.

[22] See Mattsson, Chapter 13.

dilemmas, some contributions to the collection look to alternative ways of regulating to support those who need more help, through universal approaches to safeguarding,[23] or the expansion of the applicability of common law remedies like undue influence.[24]

Overall, the arguments, contributions and discussions in this book show that the CRPD, the CommitteeRPD's General Comment and even capacity law reform in individual jurisdictions may not be enough to make a difference to disabled people's lives. Instead, law reform agendas need to speak directly to disabled people as well as to the wide range of people whose personal and/or professional lives include disabled people. They need to be backed up with, and responsive to, movements for social change. This is why socio-legal methodologies play a central role. It is only through grounded engagement with law in practice that we can establish what is working and what is not and that we can plot a course to a better future.

III. ABOUT THE BOOK

This book has been concluded in what we hope is the beginning of the end of the Covid-19 pandemic. At this time, we cannot ignore the impact of the pandemic on disabled people. Although we cannot yet (and may never) definitively determine the full impact of the pandemic on disabled people, we have enough data to know that disabled people have disproportionately borne the burden of the pandemic. This is evident in mortality statistics but extends to all aspects of disabled people's lives, including significant reduction in services and support, long periods of isolation and loneliness, and marked decline in the quality of life in institutional settings.[25] It is clear that notwithstanding extensive ratification of the CRPD, there is still a very long way to go to create a society in which the equal right to legal capacity of disabled people is respected. This reinforces the need to find ways to deliver on this right, giving added urgency to this book and to ongoing efforts by activists, law and policy-makers, and scholars across the world.

Finally, before we go on to introduce the contents of the book, we want to provide a quick note about the voices that this book highlights, prioritises and makes visible. Contributors to this collection are all socio-legal and medico-legal academics with an interest in disability law and social justice. These contributors are aware of, and attentive to, the disability rights mantra

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[23] See Lindsey, Chapter 14.

[24] See Hall, Chapter 15.

[25] From the growing literature, see G Quinn, 'Covid-19 and Disability: A War of Two Paradigms' in M Kjaerum, M Davis and A Lyons (eds), *Covid-19 and Human Rights* (London, Routledge, 2021); T Shakespeare, F Ndagire and Q Seketi, 'Triple Jeopardy: Disabled People and the Covid-19 Pandemic' (2021) 397 *The Lancet* 1331.

of 'nothing about us, without us' and we are aware of the lack of explicitly disabled voices in the authorship of this text. Many of the contributors to this collection have personal experience of supporting disabled friends and family members, clients, or patients to navigate and break down the barriers that social and legal constructions of disability have created. Others have personal lived experience of mental ill-health, supporting family members and/or of working within mental health services and tribunals. Yet others have worked with and alongside disability charities, NGOs and people with lived experience, for positive social and legal change. In creating this book, our collective endeavour seeks to push forward debates on disability justice, to create space for thinking differently about capacity law, and to provide foundational concepts and analysis that will help others, both disabled and non-disabled, to further agendas for legal and social change.

A. Part I – Charting the Conceptual Contours of Capacity Law

The first part of this collection focuses on the normative debates that underpin theoretical and practical difficulties and possibilities of making Article 12 rights a reality in disabled people's lives. The CRPD forces us to confront the fact that disabled people, especially those with cognitive and psychosocial disabilities, do not enjoy the rights of citizenship that the rest of us take for granted. While restrictions posed by domestic legislation on disabled people's legal capacity are generally acknowledged, how we make the shift to supported decision-making is not yet clear. Lurking behind this is a set of questions about 'autonomy' and what it means as a philosophical, legal and practical concept. Contributions in this part deal with this question, exploring a wide range of normative implications which arise from supporting legal capacity, and deepening our conceptual language.

In Chapter two, Mary Donnelly opens up the debate with an exploration of formal support relationships, their framing, legal fictions and challenges, through the lens of relational autonomy. Reading Ireland's Assisted Decision-Making (Capacity) Act 2015 (ADMCA) alongside Australian and Ontario Law Commission reports, her discussion uncovers three elements that determine the legal framing of support: entering into a support relationship, temporal and structural contexts where the support unfolds, and the attribution of legal responsibility in the context of high-support situations. Donnelly's discussion demonstrates the importance of the recognition of fictions, especially in high-support situations, as well as the role of relationships in enhancing or diminishing legal capacity. The chapter demonstrates how supporting legal capacity necessitates a responsive state that acknowledges, and responds to, the complex and multifaceted nature of relationships beyond capacity-derived boundaries, to strike the right balance between access to support and need for safeguards against abuse and harm.

The potential of relational approaches to autonomy is also highlighted in Amanda Keeling's contribution in Chapter three. Paying close attention to the differing interpretations of Article 12 by academic commentators and the CommitteeRPD, Keeling examines the different conceptualisations of 'autonomy' underpinning these interpretations and the role that the state should play in responding to that autonomy. Keeling identifies a conceptual incoherence in the CommitteeRPD's General Comment No 1 and its adherence to 'will and preferences' – a conflicting retreat to individualism despite its rejection of such traditional conceptualisations of autonomy. Instead of this thin understanding of autonomy that assumes the need for minimal state intervention for the enhancement of autonomy, Keeling argues for a relational model of autonomy that foregrounds the substantive context of decision-making. Approaching legal capacity as a universal but not an absolute right, the chapter charts a careful path for normative evaluations of 'good' and 'bad' influence in relationships and calls for a more active engagement with duties of states to encourage the former, while preventing the latter, through the development of holistic policies to support legal capacity.

Camillia Kong, in Chapter four, maintains the focus on Article 12's evocative phrase that respect should be accorded to the 'rights, will and preferences' of individuals, and in particular, its interpretation by the CommitteeRPD in General Comment No 1. Kong argues that the normative weight given by the CommitteeRPD to 'will and preferences' rests on an extension of negative liberty to disabled people and presents an incoherent conception of human agency based on Sartrean radical freedom. This vision of radical freedom presupposes that agency can be stripped of its deeper evaluative conditions which qualitatively assess the worth of different options, their motivational sources and surrounding self-narratives. Examining cases of conflicting choices, as well as of egosyntonic self-harming disorders, Kong argues that this vision of human agency is unsustainable for the aim of supporting legal capacity. For her, the significance of supporting legal capacity revolves around evaluating and fulfilling positive obligations to intervene in certain narratives. It is only through normative evaluations of substantive and motivational conditions of agency that conflicting intentions and the impact of self-narratives and behaviours premised on oppressive or neglectful relationalities can be critically assessed and navigated.

In Chapter five, Shaun O'Keeffe shifts our focus from the theoretical implications of Article 12 to the practical level of supporting legal capacity in the context of capacity assessments. Although some recent capacity laws, such as Ireland's ADMCA, endorse supported decision-making and eschew the diagnostic threshold in capacity assessments, a functional test remains central to the process. O'Keeffe's contribution explores the challenges of functional capacity assessments by healthcare professionals. Problems include statutory criteria for mental capacity that do not reflect how people make decisions in real life, difficulties in operationalising poorly defined and arbitrary criteria for decision-making capacity, the potential misuse of non-statutory concepts like 'lack of insight' and 'executive brain dysfunction', and the poor reliability of clinical capacity assessments, contributed to by factors like the arbitrariness of thresholds for capacity and the biases and values of assessors. O'Keeffe suggests some strategies for addressing these serious problems and improving capacity assessments in practice by giving non-cognitive factors adequate weight, challenging the use of non-statutory criteria, standardisation of capacity assessment, and ensuring that procedural safeguards are in place to promote fairness. Importantly, the chapter stresses the critical importance that access to independent advocacy has for those faced with the prospect of a capacity assessment to support them in preparing for the assessment.

In the final chapter of this part, Suzanne Doyle Guilloud considers the normative implications of the CRPD for mental health laws that provide for disability-specific involuntary detention. In Chapter six Doyle Guilloud outlines a CRPD-based approach to the elimination of systems of coercive mental healthcare, addressing the tensions and resistance which have arisen at the state level on the right to liberty, taking Ireland as a case study. Using Deleuze and Guattari's 'rhizome' metaphor, the chapter eloquently demonstrates the dynamic and interconnected nature of the rights to liberty, to universal legal capacity, and other relevant provisions of the CRPD, such as the right to live independently and be included in the community, and the provision of healthcare on the basis of free and informed consent. Doyle Guilloud argues that emphasis on the progressive realisation of these rights may make the rights to universal legal capacity and liberty, as interpreted by the CommitteeRPD, appear more realistic and realisable to policy-makers and legislators.

B. Part II – Reforming Capacity Law: Making, Shaping and Interpreting Legal Frameworks

Part II of this collection looks to the ways that Article 12 and associated ideas have been legislated for in a range of different jurisdictions. Contributors to this part take us on an international journey, reflecting on how recent and contemporary law reform processes in Europe, Asia, the Middle East and South America seek to take account of the right to enjoy legal capacity on an equal basis with others, and evaluate their success thus far. This part of the book begins with a chapter by Eilionóir Flynn, who provides a fascinating reflexive account of her involvement with the ADMCA in Ireland. As academic research funders seek to highlight and encourage attentiveness to the non-academic impacts and effects of scholarship, experiences like those Flynn describes will become ever-more prevalent in academic careers. Yet treading the tightrope between academic contribution and social activism, or between facilitating the voices of others and imposing your own academic conceptual and theoretical viewpoints, always poses challenges. Enabling complex arguments to be heard and acted on by politicians, civil servants and other civil society actors takes a great deal of skill and, as Flynn's tale shows, always has multi-faceted and unpredictable effects. The overall impact of the Irish reforms is yet to be felt, or evaluated, as they should come into full operation around the time this book is published. Flynn's experience, no doubt reflected in the experiences of other disability law scholars, serves, however, both as inspiration and as a handbook on how to engage multiple audiences with important legal and social issues.

In Chapter eight, we look at the implementation challenges of the support-focused Mental Healthcare Act 2017 (MHCA) in India. Soumitra Pathare and Arjun Kapoor show how regulatory reform is dependent on both resource allocation and political will, whilst also demonstrating how positive legislative reform cannot alone solve the problems that stem from diametrically opposed positions on support for the enjoyment of legal capacity. They also demonstrate how a range of legislative interventions, from advance decisions through to nominated representatives can work together to provide a full suite of support frameworks for enabling people to have say in, and control over, the decisions that are made in their lives, irrespective of their impairments. As with the recent reforms in Ireland, the law reform trajectory in India has not completely abandoned the potential for and possibility of substitute decision-making when an individual is unable to choose for themselves, a position which these authors support. This means, of course, that the MHCA 2017 falls short of fully implementing the CommitteeRPD's interpretation of Article 12, but Pathare and Kapoor show how this legislation has paved the way for other, deeper, legal changes that prioritise the will and preferences of the individual, acts as a stepping-stone towards more substantial legal change, and enables the progressive realisation of rights.

Chapter nine takes our focus to Spain, a civil law jurisdiction, where the new legislative framework for disabled people provides significantly more support for the enjoyment of legal capacity than the previous law. Patricia Cuenca Gómez argues that the previous Spanish capacity law was operationalised in an essentially status-based way: people with a diagnosis of a capacity impairment routinely had their capacity to act removed from them. This new law builds on the experience of reform in legally similar jurisdictions (including Peru and Colombia) where universal legal capacity has been recognised and legislated for. Cuenca Gómez argues, however, that the new Spanish framework ultimately falls short of full compliance with the CommitteeRPD's vision of Article 12 as, like in Ireland and India, there continues to be recourse to substitute decision-making as a last resort. Indeed, despite legal scholars, disability activists and law reform committees exploring alternative ways to regulate legal capacity, this fall-back position of guardianship/trusteeship as a decision-making status of last resort remains common. In part, this is because, as Cuenca Gómez argues, even when fully recognising disabled people as both holders and users of legal capacity, there remains a need, recognised by the CommitteeRPD and in the text of Article 12, for safeguards to protect against abuse and harm.

Balancing the need for safeguards with the text and intent of Article 12 is also discussed by Jill Stavert in her contribution (Chapter ten), which reflects on the ongoing process of updating mental health and mental capacity law in Scotland. Ultimately, Stavert argues for a shift in conceptual focus towards the capabilities approach,[26] as a way of moving this debate away from the well-trodden ground of supported or substituted decision-making and towards ensuring that the law enables people to do and be the things they want. In making this shift, Stavert's contribution also reminds us of the important justice implications of treating disabled people differently from non-disabled people, and that finding ways to ensure equal enjoyment of legal capacity must be at the heart of law reform projects in this area.

Finally, in Part II, Ezgi Taşcıoğlu explores the ways that disability law in Turkey has evolved since their ratification of the CRPD. Here, we are reminded that there is often a sizable gap between the law as it is written, and as it is experienced in practice. In the Turkish context, this has translated, argues Taşcıoğlu, into a form of 'regulatory ritualism' where the state claims compliance with its international obligations on paper through the reporting processes, but in reality provides only a performance of disability rights and Convention compliance. Full guardianship of disabled adults remains the norm, as do restrictions on the enjoyment of legal capacity by those with sensory disabilities, and the routine removal of rights of democratic participation from disabled citizens.

These five contributions help us to bring the conceptual debates in Part I of the book into practical view. If we cannot move beyond academic debates about individual vs relational autonomy, or substitute vs supported decision-making, the limitations of pre-CRPD disability and capacity law are remade in law reform processes, even as these seek to engage and comply with the Convention. Leaving aside the technical features of these multiple jurisdictional contexts, we see, through the contributions in this part, the consequences of our failure to envision alternative approaches, where disability rights are supported both in theory and in practice.

C. Part III – Supporting Legal Capacity in Everyday Life: Balancing Empowerment and Safeguards

The final Part of the book further refines our interrogation of support for the enjoyment of legal capacity, through its focus on the realities of support in

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[26] A Sen, *Commodities and Capabilities* (Oxford, Oxford University Press, 1985); MC Nussbaum, 'The Capabilities of People with Cognitive Disabilities' in EF Kittay and L Carlson (eds), *Cognitive Disability and its Challenge to Moral Philosophy* (Oxford, Wiley-Blackwell, 2010); MC Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge MA, Harvard Univesity Press, 2013); S Venkatapuram, 'Mental disability, human rights and the capabilities approach: Searching for the foundations' (2014) 26 *International Review of Psychiatry* 408–14; A Agnello, 'Disability and Justice: The Capabilities Approach in Practice by C Riddle (Lanham MD, Lexington Books, 2014) – Book Review' (2015) 54 *Dialogue: Canadian Philosophical Review* 567–69; R Brunner, 'Disability and justice: the capabilities approach in practice by C Riddle' (2015) 30 *Disability & Society* 310–12.

everyday life. Here too the chapters cover a wide range of jurisdictions, each of which is at a different stage in the transition to delivering supported decision-making. Contributors here use a range of socio-legal methodologies to address the role of supported decision-making in the everyday. Several of the chapters are grounded in empirical research, reflecting the rich body of work which has been emerging in this space since the introduction of the CRPD.

The empirically grounded chapters in this part probe different elements of supported decision-making across several different jurisdictions. In Chapter twelve, Anna Mäki-Petäjä-Leinonen draws on her study of guardianship in Finland to identify dissonances between law and practice. The chapter relies on interviews with public guardians and guardians' secretaries operating in Southern Finland and so the focus is on guardians who have a professional rather than a personal relationship with the person under guardianship. Under Finnish law, the appointment of a guardian does not in itself result in a denial of legal capacity, although provision is made for a formal restriction on the exercise of legal capacity where the person's important interests are found by the court to be endangered. Although formal restrictions are rare in Finland, Mäki-Petäjä-Leinonen shows that in practice guardians have significant powers, especially in respect of financial matters, even where a formal restriction has not been made. Her study uncovers significant differences in practice among guardians in the use of these powers, with some prioritising the client's right of autonomy and others adopting a more protective, even paternalistic, approach. Given that some degree of variation in approach is inevitable, Mäki-Petäjä-Leinonen identifies the need for clear guidance for guardians which prioritises the client's autonomy in line with Finland's commitments under the CRPD.

Chapter fourteen also uses empirical research to interrogate the role of professional supporters, in this case social workers. Jaime Lindsey identifies the untapped potential of social worker support in the operation of the legal framework for adult safeguarding in England and Wales and argues that empowering social workers can help reduce resort to the coercive powers of law. Lindsey identifies the different claims to legitimacy of law and of social work and provides an empirically grounded analysis of the circumstances which lead social workers to seek legal legitimation, usually through an application to the Court of Protection under the Mental Capacity Act 2005. The effect is to diminish the more person-centred and supportive approach which characterises social work. In order to counter this retreat to the law, Lindsey argues that, in a safeguarding context, social workers need to be legislatively empowered to intervene through support. However, she recognises that any such empowerment must be sensitive to the underpinning principle of legitimacy and so she argues that any legislative intervention in this area must be based on five foundational principles, specifically: support; accountability; applicability to all; partnership working; and proportionate harm.

In Chapter sixteen, Rosie Harding goes to the heart of the supported decision-making endeavour, presenting the voices of the people who are most directly affected by supported decision-making. This chapter is informed by interviews with 25 care and support professionals, 19 intellectually disabled people, and six supporters chosen by the disabled participants to help them with participation. Harding's focus reflects the significance of the everyday in the delivery of the equal right to legal capacity. She shows that the complex, stratified approach to support currently operational in England and Wales fails to meet the needs of the people it should serve, for reasons which are conceptual, practical and legal. Harding advocates the legislative introduction of a formal nominated supporter scheme as a way of embedding support and providing an effective alternative to the best interests and substitute decision-making models that permeate current English law.

A recurring insight throughout the chapters in this Part is the difficult balance which needs to be negotiated and re-negotiated between support and safeguarding. The perspectives offered by Titti Mattsson and Margaret Isabel Hall are especially helpful in this regard because they both come from jurisdictions (Sweden and British Columbia respectively) in which supported decision-making regimes are highly advanced. In Chapter thirteen, Titti Mattsson explores the interplay between autonomy, capacity and vulnerability in decision-making in relation to social services for people with dementia in Sweden. This takes place against the backdrop of a general move to home-based care for the elderly which has been happening across all the Nordic states. As Mattsson notes, the Swedish limited guardian model (or *god man*) has long been held out as an exemplar for supported decision-making. However, drawing on a body of empirical work, including some of her own,[27] she shows that operation of this model can make it difficult to deliver a decent standard of living for people with dementia and can result in neglect and sometimes danger. In part, this is due to the quality of the services provided by some limited guardians. However, it also reflects a legal framework that requires that the client's explicit consent must be given for the provision of all services. This creates tension between the individual's right to care and attention when needed and the same person's right to integrity, participation and self-determination in their everyday life. Mattsson draws on vulnerability theory to propose as a solution an institutional framework which addresses the vulnerabilities which are common to all at different stages in our lives.

Margaret Isabel Hall also seeks ways to resolve the tensions between conflicting rights to care/protection and autonomy/self-determination. For Hall, the solution lies in Article 12 of the CRPD, which she argues must be read as an integrated whole, encompassing both support and safeguards, and which she places within the broader context of the Anglo-Canadian common law tradition. Drawing on examples from both the common law and the law of equity,

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[27] T Mattsson and L Giertz, 'Vulnerability, Law, and Dementia: An Interdisciplinary Discussion of Legislation and Practice' (2020) 21 *Theoretical Inquiries in Law* 139–59.

she argues that safeguards to prevent the abuse of legal capacity are an intrinsic part of the general law and that these derive from the law's concern for fairness and not from protective or paternalist underpinnings. On this basis, she advocates new legal responses grounded in fairness which apply to all legal subjects and not just to disabled people, so that all people can exercise legal capacity 'in a way that is consistent with fairness, justice and equity'.

IV. CONCLUDING REMARKS

In summary, then, this collection offers those interested in legal capacity and disability social justice an insight into how the rights contained in the CRPD are being implemented across a wide range of jurisdictions. These diverse chapters provide socio-legal analysis of the theoretical, doctrinal and practical challenges of implementing the 'paradigm shift' in disability rights sought by the CRPD and the CommitteeRPD. Taken together, this collection offers a wide-ranging evaluation of contemporary ideas in realising disability social justice through law reform. It provides readers with micro- and macro-level analyses of how capacity law reform can help to improve the lives of disabled people, especially those with cognitive and psychosocial disabilities. In doing so, we hope it offers routes forward, away from normative debates about whether or not disabled people should be granted their right to enjoy legal capacity, and towards the development and evaluation of concrete proposals that strike an effective balance between empowerment and protection.