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Chapter 2: The Development in International Law of Legal Capacity of People with Mental Disabilities

1. Introduction

Legal capacity, in broad terms, is the law's recognition of the decisions that a person makes. Without legal recognition, a person's decisions have no legal effect or validity. The impact of denying a person their legal capacity therefore has the potential to effect a wide range of areas of legal life – deciding where and with whom to live, property ownership and financial affairs, voting and political office, marriage and parenthood, employment and training, and all sorts of ordinarily routine contractual exchanges such as making a bank deposit or paying a telephone bill. Removing a person's legal capacity may also affect that person's authority to access justice to challenge wrongs, or even have a say in the decisions that are being made on that person's behalf.

The purpose of this extended chapter is to set out how legal capacity has evolved under international law, and has become established as a human right.³³ The scope of this chapter excludes jurisprudence under the European

³³ I wrote much of this chapter – particularly sections 4 and 5 – for a report which was commissioned by the European Union Agency for Fundamental Rights (FRA), to myself and Professor Anna Lawson of the University of Leeds, UK. We submitted our report to FRA in June 2011 and it comprised four sections, two of which I drafted and two which Professor Lawson drafted. I was the main author of the part of the report on which this chapter is built. FRA eventually published parts of the report that we submitted in its July 2013 report 'Legal capacity of persons with intellectual disabilities and persons with mental health problems' but much of our material was edited out. I have

Convention on Human Rights as that is covered elsewhere.³⁴ Also excluded are the Inter-American and African regional human rights systems, for reasons of manageability and because it is the global and European systems which the most material to examine.

Specifically, in section 2, this chapter examines the approach to legal capacity taken by the international community through the prism of the high-water mark, namely the UN Convention on the Rights of Persons with Disabilities (CRPD). The chapter explains some of history of legal capacity and associated concepts. The chapter examines Article 12 of the CRPD in detail, as this is where the Convention sets out its provisions on legal capacity. It examines the controversies of substituted decision-making systems of guardianship (where one person's decision is substituted for another person's) versus supported decision-making, and asks whether systems of substitution can survive in the post-CRPD era. The UN Committee on the Rights of Persons with Disabilities, the committee established under the CRPD with a view to assist States-Parties with the correct implementation of the CRPD, is clearly calling for States to abandon systems of substitution and replace them with systems based on autonomous decision-making, making no distinction for people with various types of disabilities (intellectual disabilities or mental health issues) or the intensity of the impairment. This is set out in section 3(A). The Committee outlines a concept of supported decision-making, a cluster of different things which States are obliged to provide people who need such supports to have their will and preferences respected and acted upon. The clarity of the Committee's recommendations comes under significant scrutiny, as the Committee is one of the key actors to set out guidance for States on how to go about implementing Article 12 of the CRPD. In particular, the fourteen sets of concluding observations that the CRPD Committee has issued thus far are analysed through the lens of legal capacity, as is its first General Comment, which focuses on legal capacity.

significantly added to the scope and depth of the report, including the analysis of the CRPD Committee, the reservations and interpretative declarations, and the European Union. The law is, to the best of my knowledge, correct as at 1 October 2014.

³⁴ Analysis of this jurisprudence is provided in chapters 3, 5 and 6 of this book.

Statements relating to legal capacity from the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights are examined in sections 3(B) and (C) respectively. Perhaps the greatest legal threat to the implementation of Article 12 of the CRPD are the reservations which nine States have entered on Article 12 of the CRPD when ratifying the Convention. Section 3(D) of the chapter examines whether these reservations are unlawful under established public international law.

Section 4 of the chapter sets out the major political statements which have touched on the right to legal capacity for people with disabilities from Council of Europe bodies. This includes the 1999 Recommendation of the Committee of Ministers of the Council of Europe, which represents a high-water mark of the pre-CRPD era. The Council of Europe Commissioner for Human Rights has published several statements on legal capacity, and these are analysed. Section 5 reviews the rather limited attention that the institutions of the European Union have given to legal capacity: on the one hand necessarily limited due to the few competences the EU has in this field, but on the other hand perhaps because the Commission has taken an overly narrow approach to its competencies and at the same time over-promised the actions it can take, as set out in the EU Disability Strategy 2010-2020. The EU Agency for Fundamental Rights was established to monitor EU institutions, and its work on legal capacity is examined in this section too. Section 6 sets out a conclusion which is critical of the overly purist approach of the CRPD Committee, and the normative and human risks of setting too high a watermark for implementation.

2. Conceptual Issues

A. Context and Underlying Principles

Historically there have been two dominant approaches to legal capacity.³⁵ The first, a status-based approach, takes a medical diagnosis of a psychiatric or

³⁵ For more on the approaches, see Dhanda, A. (2007) 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future', 34 *Syracuse J*

cognitive impairment as the basis for removing legal capacity entirely. The second, an outcome-based approach, is based on assessments of the quality of the result of a person's decision and scrutiny of the decision-making process. The approach works backwards from the outcome of the particular decision and, based on outcomes regarded as irrational, inappropriate or otherwise deemed not in the best interests of the person concerned, assumes an underlying inability to make 'good' decisions, judged from the perspective of other people. It thus seeks to prevent what others regard as bad, irrational or incompetent decision outcomes being given effect and seeks to protect the adult in question – and society at large – from the consequences of such decisions.

Parliaments and international policy-makers have, as this chapter sets out, largely rejected these approaches over the last few decades as they have made efforts to recognise the rights of people whose abilities and judgment calls may differ from others. A milestone towards rejecting these approaches in the European region was the adoption in 1999 by the Committee of Ministers of the Council of Europe of Recommendation No. R(99)4 on 'principles concerning the legal protection of incapable adults'.³⁶ This document rejected the former approaches and heralded a third approach that can be labelled the functional approach. In this approach, decision-making ability is assessed along two planes: point in time and type of decision.

With regard to point in time, the functional approach recognises that a person's ability to make decisions can fluctuate throughout life, with many factors having an impact (for example, temporary brain injury following a road traffic accident, drinking too much alcohol, being in a phase of mania. Another example of how capacity can fluctuate is in degenerative disease related to ageing (for example Alzheimer's disease) or unrelated to ageing (for example Parkinson's disease), which pose significant challenges to policy-makers to put in place mechanisms for a person to plan for a future point at

Int'l L & Com, 429, and Keys, M (2009) 'Legal Capacity Law Reform in Europe: An Urgent Challenge', in Quinn, G. and Waddington, L. (eds) *European Yearbook of Disability Law*, Intersentia.

³⁶ Committee of Ministers of the Council of Europe (1999), Recommendation No. R(99)4E on principles concerning the legal protection of incapable adults, adopted on 23 February 1999.

which they may be unable to make autonomous decisions. A person's decision-making ability also depends on the type of decision to be made. A person may be able to understand and manage information relating to a decision about whether to fill a decayed tooth but may not be able to understand or manage information relating to a decision about whether to undergo heart surgery or continue with medication. A person may be able to understand how to buy a loaf of bread, but not how to buy an apartment. The fact that a person needs assistance with some things but not others is, of course, not specific to mental disability, or indeed any type of disability.

A person's ability to make a particular type of decision may not, therefore, influence their ability in other areas. They may, for example, need assistance in healthcare decisions but not need any support in daily living decisions (how to go shopping, which friends to meet etc). Further, a person who currently lacks the ability to make certain types of decision unassisted may over time develop the capacity to do so as they (re)gain the ability to appreciate and understand the possible consequences of those decisions. This might depend on all sorts of factors such as the existence of a circle of friends and trusted individuals, the quality of social support services, the cycle of a mental health problem and the effectiveness of treatment and rehabilitation.

The functional approach differs from the status-based and outcome-based approaches because, unlike them, it does not label a person as wholly incapacitated or incompetent. It recognises the need to establish safeguards to minimise the number of people subject to their decisions being taken by others (known as 'substituted decision-making'); the length of time for which a person is subject to such a measure; and the potential for abuse. Generally, the emphasis is on ensuring that the least restrictive arrangement is put in place.

Domestic laws may not fall neatly into any one of these approaches, and trace elements of paternalism can be found in the functional approach too. As a result of centuries of laws based on paternalism and protectionism (rather than autonomy and support), law oftentimes removes the authority to make particular decisions or whole categories of decisions (e.g. finances or health)

from a person with mental disabilities and grants the power to make these decisions to a substitute decision-maker, often termed a ‘guardian’.³⁷ Guardianship laws assume that the person with disabilities (or society or both) should be protected from the consequences of their bad decisions and the law therefore prevents them from making those decisions by declaring such decisions ‘null and void’ concerned. Protection against bad consequences are far broader than that allowed in Article 16 of the CRPD, which specifies that people with disabilities should be protected against exploitation, violence and abuse. The likely reason for this is that the CRPD rejects the notion that people with disabilities need to be protected from their own decisions: the very first principle of the Convention is ‘[r]espect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons’.³⁸

The status, outcome and functional approaches all rely on the convergence of medicine and law. A psychiatric opinion enables a judge to deprive a person of the authority to make legally-effective decisions, usually having as a consequence that authority is granted to another person with or without the consent of the person concerned. This has led the functional approach to come under increasing scrutiny for at least three reasons, which will be explained in turn.

First, the functional approach embraces the notion of protection (of society, against the person’s decisions deemed bad decisions by others, as noted above), but fails adequately to protect relevant individuals from exploitation, violence and abuse. As noted, Article 16 of the CRPD details the steps that States must take in order to protect people with disabilities from these phenomena. In some instances the guardianship system is mis-used with the very intention of exploiting the ‘protected’ person. This is evidenced by several

³⁷ As noted in chapter 1 of this book, Roman law had two types of guardian: tutors and curators. These terms still exist in some Latin-speaking countries, such as Romania.

³⁸ The CRPD’s principles are examined in more detail in chapter 4 of this book.

reports examining the effectiveness of safeguards,³⁹ and by cases decided by domestic courts and by the European Court of Human Rights.⁴⁰

Second, the functional approach assumes that legal capacity equates to legal independence. This equation is based on the assumption that in order to maintain one's legal capacity, one has to make decisions independently, without any communicational or other supports from other people or through an adapted decision-making process in which, for instance, standard means of presenting information are altered so as to reflect the particular circumstances of the individual in question. Furthermore, the assessment of functional capacity is telescoped into the notion of legal capacity, and its main criterion is the ability of the individual to act as an atomistic being. That is to say, the assessment looks into the person's decision-making ability alone, a falsehood given that most human beings make decisions in cooperation with others, and decisions are often influenced by and dependent on culture, values and social networks.

Third, the functional approach fails to augment a person's ability over time so that substituted decision-making becomes unnecessary. The guardian generally makes decisions based on the 'best interests' approach, without making decisions which build a person's ability over time to make supported or legally independent decisions. Canadian disability rights scholar Michael Bach suggests adapting Amartya Sen's capability approach and using it as a basis for policy development on legal capacity.⁴¹ Bach posits that equality in decision-making requires States to ensure that each person has access to the support they may need to maximise their particular abilities in expressing their will and intent, and to understand and appreciate the nature and

³⁹ See Mental Disability Advocacy Center (2008) *Guardianship and Human Rights in Bulgaria, Guardianship and Human Rights in Czech Republic, and Guardianship and Human Rights in Hungary*.

⁴⁰ The judgment of the European Court of Human Rights in the case of *Stanev v. Bulgaria* (Application No. 36760/06, admissibility decision of June 29, 2010, judgment 17 January 2012) is a good example: see chapter 6 of this book. Also, see *Shtukaturov v. Russia*, Application No. 44009/05, judgment on the merits 27 March 2008, judgment on just satisfaction 4 March 2010; *Salontaji-Drobnjak v. Serbia*, Application No. 36500/05, judgment 13 October 2009, both discussed in chapter 5 of this book.

⁴¹ See, for example, Sen, A (1993) 'Capability and Well-Being' in Nussbaum, M. and Sen, A. (eds) *The Quality of Life*, Oxford Clarendon Press; and Sen, A. (2009) *The Idea of Justice*, Harvard University Press.

consequences of a particular decision.⁴² Such supports may take a variety of forms. For some people it might take the form of information in plain or easy-to-read language. For others it might take the form of a support person communicating a person's decisions to others (e.g. a bank clerk) when those others are not able to understand the supported person's way of communicating. In the healthcare field, supports include technologies and people to help the person understand the relevant information, providing information in various formats, and allowing the person to make an advance directives to set out future intent. Models of supported decision-making are heterogeneous and many are already in operation: an analysis is beyond the scope of this chapter, and book.⁴³

B. Scoping out supported decision-making

Several authors are busy building the philosophical, legal and practical implications of supported decision-making. Michael Bach zeros in on how supports can take place via a network model which encompasses three types of support to which everyone who needs them should have access: (a) Assistance in decision making takes three forms (including communication support perhaps using assistive technologies), interpretation of the person's communication (b) helping the person to express their will and preferences and assert an opinion and (c) helping to communicate the 'personal identity – a person's hopes, expectations, life plan'.⁴⁴

Bach suggests that the CRPD opens up supported decision-making as a 'new alternative in the range of legally authorized decision making statuses',⁴⁵ a

⁴² Bach, M. and Kerzner, L. (2010) *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity*, at <http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner>.

⁴³ Fiona Morrissey, 'The United Nations Convention on the Rights of Persons with Disabilities: A New Approach to Decision-Making in Mental Health Law', *European Journal of Health Law* 19 (2012) 423-440

⁴⁴ Michael Bach, 'Supported Decision Making under Article 12 of the UN Convention on the Rights of Persons with Disabilities: Questions and Challenges', presentation to Conference on Legal Capacity and Supported Decision Making, Parents' Committee of Inclusion Ireland, 3 November, 2007.

⁴⁵ Ibid, p. 17. Bach fleshes this out in the context of Ontario, with Lana Kerzner in 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity', available at <http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner-partII-sectionIII>.

useful addition to the status of legally independent decision-making (the status which houses most people in the world) and substituted decision-making such as guardianship which the international norms are moving away from, as this chapter explains in sections 3 and 4 below. Each would retain a status/category beyond supported decision-making called facilitated decision-making for people whose will and preferences are unknown (and currently unknowable through all the best supports, technologies and effort) receive more intensive supports while their legal capacity remains intact. This formulation has sparked introspection by legal academics in several parts of the world, with one US professor analysing the guardianship laws in various States in that country and concluding that through ‘respecting the individual’s right and ability to make decisions, supported decision making significantly limits the stigmatization and marginalization caused by guardianship, and more fully integrates individuals with psychosocial disabilities into social, political and economic life’.⁴⁶

Some commentators champion a system in which these ‘hard cases’ are rolled into the supported decision-making category.⁴⁷ Some propose one hundred per cent support for people in a coma, a proposition that is ‘stretching fictions beyond the point of credulity’, according to Quinn.⁴⁸ A minority of academic commentators propose that guardianship systems can survive post-CRPD.⁴⁹ It has been pointed out that ‘[e]ven articles that provide extensive discussions of the benefits and potential drawbacks of supported or co-decision-making provide little or no empirical support for their claims’,⁵⁰ a slightly misplaced critique, given that authors in the field are collectively trying to map out a plan

⁴⁶ Leslie Salzman, ‘Guardianship for Persons with Mental Illness - A Legal and Appropriate Alternative?’ 4 St. Louis U. J. Health L. & Pol’y 279 2010-2011, at p. 328.

⁴⁷ See Tina Minkowitz (2006–2007) ‘The United Nations Convention on the Rights of Persons with Disabilities and the Right to Be Free from Nonconsensual Psychiatric Interventions’. *Syracuse Journal of International Law and Commerce* 34: 405; and Eilionoir Flynn and Anna Arstein-Kerslake (2014) ‘Legislating personhood: realising the right to support in exercising legal capacity’ *International Journal of Law in Context*, 10, pp 81-104.

⁴⁸ Gerard Quinn, ‘Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD’, HPOD Conference, Harvard Law School, 20 February 2010.

⁴⁹ Mary Keys, ‘Legal Capacity Law Reform in Europe: An Urgent Challenge’ in Gerard Quinn and Lisa Waddington (eds), *European Yearbook of Disability Law: Volume 1* (Intersentia, Hart Publishing 2009) 71.

⁵⁰ Nina A. Kohn, Jeremy A. Blumenthal, Amy T. Campbell, ‘Supported Decision-Making: A Viable Alternative to Guardianship?’, *Penn State Law Review*, Vol. 117:4, 1111-1157 at 1129.

for the future, and the widely-shared acceptance that this is a new field, so there is inevitably going to be a lack of data in developed and low-income countries.⁵¹

The next section of this chapter sets out how the CRPD frames legal capacity. Some authors claim that the CRPD is ‘instrumental to personhood’⁵² while others use the CRPD to form a “conception of personhood that is divorced from cognition”.⁵³

Over the past five years there has been a growing – albeit tiny – academic literature on what supported decision-making should mean in theory and how it can be rolled out in practice. I would argue that much of this has been prompted by civil society organisations, including the nongovernmental organisation which I direct: in 2006-8 the Mental Disability Advocacy Center carried out desk-based and empirical research into guardianship systems and used a human rights based approach in framing the analysis.⁵⁴ We established that many of these systems did not meet basic norms of international law, and we used the maybe somewhat provocative term ‘civil death’ to describe the status of a person under guardianship in the jurisdictions in question and to emphasise the need to bring about change.⁵⁵ The reports pointed out for the first time that there was a fundamental problem in how the law stripped away people’s rights.⁵⁶ This analysis led to officials from the World Health Organization and others⁵⁷ to call on governments to reform their legal

⁵¹ Soumitra Pathare, Laura S. Shields, ‘Supported Decision-Making for Persons with Mental Illness: A Review’, *Public Health Reviews*, Vol. 34, No 2.

⁵² Quinn (2010) op cit.

⁵³ Eilionoir Flynn and Anna Arstein-Kerslake (2014), op cit.

⁵⁴ Mental Disability Advocacy Center, ‘Guardianship and Human Rights in Russia: Analysis of Guardianship Law and Policy’. MDAC published similar reports with respect to Bulgaria, Czech Republic Georgia, , Hungry, Kyrgyzstan, Russia and Serbia.

⁵⁵ Michael L. Perlin, “Striking for the Guardians and Protectors of the Mind”: The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law’, *Penn State Law Review*, Vol. 117:4, 1159 at p. 1162.

⁵⁶ ‘In parts of Eastern Europe, mentally ill kept under wraps’, article in the *International Herald Tribune*, 22 December 2008: “We call it civil death,” said Victoria Lee of the MDAC. “Once you are under guardianship, that’s it. You basically become a non-person.”

⁵⁷ I was one of the authors.

capacity laws, within a wider analysis of how to reverse the inequalities of people with mental health issues around the world.⁵⁸

Legal capacity was not identified as a topic which needed reforming in the study commissioned by the UN which promoted diplomats to consider negotiating a disability treaty.⁵⁹ That said, co-author of that study Gerard Quinn has been active since 2010 writing about legal capacity. He observes how the text contains a ‘constructive ambiguity’ with regard to how legal capacity should be played out.⁶⁰ The ambiguity is not necessarily a bad thing: it was necessary to enable negotiating States to agree on the text of the treaty: better to have a Convention with some ambiguous parts than to have no Convention at all.

While some authors have unpacked how legal capacity almost repatriates the human into disability rights field,⁶¹ others have zeroed in on how Article 12 contributes to the advancement of moral philosophy by giving an account of the theory of justice. Recognising that ‘some people with cognitive disability may always be dependent on others for the support necessary to make decisions and exercise legal capacity’,⁶² Anna Arstein-Kerslake argues for an inclusive approach to moral philosophy whereby we construct a sort of cognitive prosthesis to decision-making Building on the work of philosophers Anita Silvers and Leslie Pickering Francis, Arstein-Kerslake suggests prosthesis model of supported decision-making which attributes the results of

⁵⁸ Natalie Drew, Michelle Funk, Stephen Tang, Jagannath Lamichhane, Elena Chávez, Sylvester Katontoka, Soumitra Pathare, Oliver Lewis, Lawrence Gostin, Benedetto Saraceno, ‘Human rights violations of people with mental and psychosocial disabilities: an unresolved global crisis’, *The Lancet*, Published online, 17 October 2011, DOI:10.1016/S0140-6736(11)61458-X

⁵⁹ Gerard Quinn and Theresia Degener, *The current use and future potential of United Nations human rights instruments in the context of disability*, UN, 2002.

⁶⁰ Gerard Quinn, ‘Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD’, HPOD Conference, Harvard Law School, 20 February 2010. More on the ambiguity in section 3(A) on the CRPD Committee’s interpretation, in section 3(D) on reservations, and in section 6, the conclusions.

⁶¹ Quinn, G., and A. Arstein-Kerslake (2012) ‘Restoring the ‘Human’ in ‘Human Rights’: Personhood and Doctrinal Innovation in the UN Disability Convention’ in *The Cambridge Companion to Human Rights Law*, C. Gearty and C. Douzinas (eds), 36–55, Cambridge University Press.

⁶² Anna Arstein-Kerslake (2014): ‘An empowering dependency: exploring support for the exercise of legal capacity’, *Scandinavian Journal of Disability Research*, 1-16.

decisions to the person with disabilities in the same way that a gold medal is not awarded to a prosthetic leg but the paralympian who won the race.⁶³

C. Article 12 CRPD: The nature of the obligation

Legal capacity is dealt with in Article 12 of the CRPD, which reads as follows:

Article 12, CRPD

Equal recognition before the law

- 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*
- 2. States Parties shall recognise 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*

⁶³ Arstein-Kerslake (op cit, p. 7) citing Silvers, Anita, and Leslie Pickering Francis. 2009. Thinking about the Good: Reconfiguring Liberal Metaphysics (or not) for People with Cognitive Disabilities' *Metaphilosophy* 40 (3-4): 465-498 at p. 486.

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.

The CRPD Committee has pointed out that many people have historically, and in several countries still are, denied legal capacity – such as people from ethnic minorities, women – but people with disabilities ‘remain the group whose legal capacity is most commonly denied in legal systems worldwide’,⁶⁴ and of these, people with psychosocial disabilities and intellectual disabilities are ‘disproportionately’ so.⁶⁵

To reverse this, Article 12(1) sets out that people with disabilities have a right - to recognition as ‘persons before the law’. This is a passive recognition which establishes identity before the law, but does not speak to agency to exercise legal capacity. The CRPD Committee gives examples of this as “having a birth certificate, seeking medical assistance, registering to be on the electoral role [sic] or applying for a passport”⁶⁶

Article 12(2) requires States to ‘recognise’ that persons with disabilities ‘enjoy legal capacity on an equal basis with others in all aspects of life’. By deploying the word ‘enjoy’, this paragraph confers agency upon those who are identified as rights holders in Article 12(1). The CRPD Committee goes further and says that Article 12(5) confers a ‘right to recognition as a legal agent’,⁶⁷ in that it sets out rights to inheritance (harking back to Roman law considerations), and other financial issues. The interpretations by UN treaty bodies are legally binding on States.

Of note, Article 12(2) provides that the exercise of legal capacity applies ‘in all spheres of life’, not merely in relation to the financial issues set referred to in paragraph 5. ‘All areas of life’ by definition cuts across all other CRPD

⁶⁴ CRPD Committee General Comment No. 1 (2014) on Article 12: Equal recognition before the law, 19 May 2014. (Hereinafter ‘CRPD GC1’), para. 8.

⁶⁵ CRPD GC1, para. 9.

⁶⁶ CRPD GC1, para. 14.

⁶⁷ CRPD GC1, para. 12.

provisions, which must include Articles 13 (accessing courts and non-judicial mechanisms), 25 (healthcare decisions), 23 (deciding about family and relationships), 29 (deciding whom to vote for, and deciding which organisations and political parties to join), 24 (deciding on educational options), 19 (decisions about where and with whom to live, and deciding on which community support services to access), 26 (choosing habitation and rehabilitation services) 27 (employment decisions), 33 (deciding to participate in monitoring CRPD implementation) and 4(3) (deciding whether and how to participate in the development and implementation of legislation and policies affecting people with disabilities).

Article 12(3) sets out that States must ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’ The inclusion of the word ‘may’ indicates that the default position for people with disabilities is the same as for anyone else, namely that autonomy and self-determination are to be protected. Support should not be imposed. In a departure from the functional approach, the measures that States must put in place relate to the exercise – rather than the removal – of legal capacity. In essence the Convention starts from abilities rather than deficits.

As noted in the previous section, the type of support that people may require in exercising their legal capacity will vary from person to person. A person with a degenerative disease of ageing (e.g. Alzheimer’s disease) or a degenerative disease unrelated to ageing (e.g. Parkinson’s disease) may wish to put in place planning documents anticipating future incapacity. Such planning documents may include instructional directives (specifying in a document actions which the person wants or does not want to take place) or proxy directives (specifying a person who will take decisions on behalf of the adult). For a person with a brain injury the support may take the form of assistive communication technology. Advances in neuroscience are opening up innovative ways to enable a person to communicate their will and preferences where none was previously detectable.

For a person with an intellectual disability, the support may be a form of what has become known as supported decision-making. Rather than being a clear-cut model, supported decision-making represents a cluster of various approaches and systems. It might take the form of circles of support that includes life planning and identification of a network of trusted people.⁶⁸ Or the support may be very different. For a person with mental health problems support may be more of a one-to-one approach such as the personal ombudsman system in one part of Sweden.⁶⁹ Creativity seems to be key in identifying the form and style of support which best suits people's needs, as well as in ensuring that the people who are carrying out the support are equipped with the skills in providing information to the particular adult so that they can make decisions and that these can be communicated to other parties.⁷⁰

Article 12(4) of the CRPD sets out safeguards that need to be put in place. One such safeguard is an adult protection system. This should exist not in order to protect against 'bad' decisions (however assessed), but in order to comply with Article 16 of the CRPD. This provision, as noted above, lays down State obligations to guard against all forms of exploitation, violence and abuse.

Another safeguard that needs to be put in place is one which ensures that support persons communicate and interpret decisions rather than impose their own view on the adult. There is some debate, however, as to whether this is tacit acknowledgement of the legitimacy of substituted decision-making or whether the safeguards have reference solely to supported decision-making systems.⁷¹ Some are of the view that Article 12(4) applies to 'substitute decision-making', whilst acknowledging that the number of people subject to such a system and the amount of coercion and abuse within it, should be minimised. An alternative interpretation is that Article 12(4) applies to 'supported decision-making' only and should not be understood to imply the

⁶⁸ See, for example Circles Network, a UK charity, at <http://www.circlesnetwork.org.uk>.

⁶⁹ See the Personal Ombuds scheme in Skåne, Sweden, at <http://www.po-skane.org/ombudsman-for-psychiatric-patients-30.php>.

⁷⁰ The need for training of professionals and staff working with people with disabilities is set out in the General Obligations of the CRPD in Article 4(1)(i). By extension, training should also be provided for support people who may not be professionals or paid staff, as such.

⁷¹ Dhanda, A. (2007) op cit.

need for substitute decision-making.⁷² It is difficult, however, to envisage how a person with disabilities requiring more intensive supports and with nobody in their lives who understands their form of communication or intentions, or a person in a coma who has not established a prior planning/advance directive document, can be supported to make decisions.

3. United Nations

The previous section outlined the nature of the right, and set out the obligations on States to implement Article 12 of the CRPD. This section outlines statements of UN bodies in relation to legal capacity of people with mental disabilities. Prior to the adoption of the CRPD there are several examples of how UN bodies saw the function of guardianship to protect. A 1971 resolution of the UN General Assembly stated that a person with intellectual disabilities has, ‘a right to a qualified guardian when this is required to protect his personal well-being and interests’.⁷³ In 2003 the UN Secretary General said that, ‘[t]he function of guardianship is to protect the individual from any danger which his or her mental conditions may cause’,⁷⁴ Prior to the CRPD, the default at the international policy level statement about anything to do with legal capacity was substituted decision-making, and it was thought that the best way to achieve this was to deprive someone totally or restrict someone partially of their legal capacity. Since the adoption of the CRPD the pendulum has swung significantly, so that there is now much more emphasis on forms of supported decision-making, which the Office of the UN High Commissioner for Human Rights (OHCHR) has described as ‘the

⁷² See UN Office of the High Commissioner for Human Rights (OHCHR), *Thematic study of 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*, A/HRC/10/48 (2009), paras. 44-47. See also UN Committee on the Rights of Persons with Disabilities (2009) *Guidelines on Treaty Specific Document to be Submitted by States Parties under Article 35(1) of the UN Convention on the Rights of Persons with Disabilities*, Geneva, which instructs States to report on ‘[t]he existence of safeguards against abuse of supported decision-making models’ and does not mention substituted decision-making.

⁷³ UN General Assembly (1971) *Declaration on the Rights of Mentally Retarded Persons*, Article 5.

⁷⁴ United Nations Secretary-General (2003), *Progress of efforts to ensure the full recognition and enjoyment of the human rights of persons with disabilities*, 24 July 2003, A/58/181.

process whereby a person with a disability is enabled to make and communicate decisions with respect to personal or legal matters'.⁷⁵ The view of the OHCHR is that Article 12 should impact upon criminal and civil law, pointing out that laws should be repealed which allow for disqualification from running for political positions, participating in juries or as witnesses and the OHCHR also recommends revising criminal laws to ensure that they are disability-neutral.⁷⁶

The OHCHR's view is that legal capacity law review and reform is necessary to provide, amongst other items, 'legal recognition of the right of persons with disabilities to self-determination'.⁷⁷ This sense of reclaiming autonomy was picked up by Manfred Nowak, the then UN Special Rapporteur on Torture who in 2008 wrote a report which explicitly referred to the link between deprivation of legal capacity and the torture and ill-treatment of people with disabilities.⁷⁸ In this report, Nowak directly links legal capacity with the possibility of being subjected to torture, explaining that people with disabilities often find themselves in a position where they are stripped of power and placed under the total control of another person, a situation in which the likelihood of torture and other forms of ill-treatment is increased. The powerlessness may be related to a person's particular disability, but, Nowak notes, 'it is often circumstances external to the individual that render them "powerless". A prime example of such an external circumstance is a system in which one's ability to make decisions recognised by law and to have legal standing is taken away and given to others'.⁷⁹ Nowak goes on to make the point that deprivation of legal capacity is one form of State acquiescence with regard to violence against people with disabilities.⁸⁰

⁷⁵ United Nations Office of the High Commissioner for Human Rights (OHCHR) (2009), *Thematic study of 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*, A/HRC/10/48 (2009), para. 45.

⁷⁶ Ibid, para. 47.

⁷⁷ Ibid, para. 45.

⁷⁸ Nowak, M. (2008) *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/63/175, 28 July 2008.

⁷⁹ Ibid, para. 50

⁸⁰ Ibid, para. 69.

A. Committee on the Rights of Persons with Disabilities

The UN Committee on the Rights of Persons with Disabilities (CRPD Committee) decided during its first session to hold a day of general discussion to take place annually. The purpose of this form of event is ‘to foster a deeper understanding of the contents and implications of the Convention as they relate to specific articles or topics’.⁸¹ The CRPD Committee decided to hold its first day of general discussion on Article 12 of the CRPD, because it had identified the provision as being ‘one of the cardinal rights and principles of the Convention’.⁸² The event took place in October 2009, and the outcome was that the Committee referenced how a general comment would be helpful (it took them over four years to write it).⁸³

Unrelated to the day of general discussion, the CRPD Committee in the same year published its ‘reporting guidelines’. The purpose of this document is to provide assistance as to the format with which States must report ‘on measures taken to give effect to its obligations under the [CRPD] and on the progress made in that regard’, as required two years after ratification and thereafter every four years.⁸⁴ The document contains non-mandatory guidance to States on how they should report on Article 12 implementation.⁸⁵ The guidelines ask States to report on measures taken to ensure that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life, any support available to persons with disabilities to exercise their legal capacity and manage their financial affairs, whether there are safeguards against abuse of supported decision-making models, and what sort of awareness-raising and education campaigns exist in relation to equal recognition of all persons with disabilities before the law. Curiously, States

⁸¹ UN Committee on the Rights of Persons with Disabilities (2009a) *Outline of the Day of General Discussion on Article 12 of the CRPD – The right to equal recognition before the law*, 2nd session, 19 -23 October 2009.

⁸² Ibid.

⁸³ I attended this day. The Committee produced no outcome documents. See <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD2009.aspx> for the background documents, including one from my NGO, the Mental Disability Advocacy Center.

⁸⁴ Article 35(1) and (2) of the CRPD.

⁸⁵ UN Committee on the Rights of Persons with Disabilities (2009) *Guidelines on Treaty Specific Document to be Submitted by States Parties under Article 35(1) of the UN Convention on the Rights of Persons with Disabilities*, Geneva, UN.

need only report on '[w]hether legislation does or does not exist which restricts the full legal capacity on the basis of disability' and about any 'actions being taken towards conformity with article 12 of the Convention', but the CRPD Committee has not asked about the nature and form of such laws which restrict full legal capacity, who and how many people are subject to them, nor the safeguards which are present in such systems to guard against abuse. It seems that the CRPD Committee has focused on gathering information from States about what should be, and has partially neglected to seek information about what is.

The Committee has bemoaned the 'general failure to understand 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.'⁸⁶ It instructs States to 'abolish'⁸⁷ substituted decision-making regimes which defines as a situation in which:

legal capacity is removed from a person, even if this is in respect of a single decision;

a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and

any decision made by a substitute decision-maker is based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences.⁸⁸

The obvious question is what about cases where it is not possible to establish the 'will' of a person? The Committee sheds no light on this, despite being requested to do so by several bodies that sent submissions after the draft general comment was published, and before the deadline for submissions. The most striking comment came from the government of Denmark, which was heavily critical of the CRPD Committee's absolutist stance:

⁸⁶ CRPD GC1, para. 3.

⁸⁷ CRPD GC1.

⁸⁸ CRPD GC1 para. 27.

*If substitute care and treatment decisions are not made for these individuals, they will run the risk of being exploited, neglected, or even left to die. To assume that no one would ever require someone else to make a decision on their behalf would against this background not only be flagrantly wrong but ultimately irresponsible.*⁸⁹

To date, the CRPD Committee has examined fourteen States' compliance with the CRPD.⁹⁰ It has recommended that each government 'replace' substituted decision-making with supported decision-making for persons with disabilities. It has demanded that States provide 'recognition [of] all persons' legal capacity and [their] right to exercise it'.⁹¹

The high-level obligations on States with regard to guardianship are clear. They must

*adopt measures to repeal the laws, policies and practices which permit guardianship and trusteeship for adults and take legislative action to replace regimes of substituted decision-making by supported decision making, which respects the person's autonomy, will and preferences, in the exercise of one's legal capacity in accordance with article 12 of the Convention.*⁹²

⁸⁹ 'Response from the Government of Denmark with regards to Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law', (undated), p. 1. See also, from the same country: the 'Danish Institute for Human Rights questions the reasoning of the Committee for not envisaging any situations where it may be necessary to use some forms of substituted decision-making,' Letter to the CRPD Committee from the Danish Institute for Human Rights, 21 February 2014, p. 2. The Australian Human Rights Commission requested that the general comment 'refer to situations where it is difficult or impossible to determine the will and preference of the person with a disability', 28 February 2014, p. 3. And the Finnish Human Rights Center was of the opinion that, 'there are situations in which [...] support is not sufficient. The Convention cannot, and by the pure text and the general understanding of it, does not totally ban the possibility of substitute decision-making in some, be it limited and clearly specified, cases', letter to the Committee, 21 February 2014, p. 2.

⁹⁰ These are Tunisia and Peru in April 2011, Spain in September 2011, Argentina, China and Hungary in September 2012, Paraguay in April 2013. Austria, Australia and El Salvador in September 2013, Paraguay in 2013 and Azerbaijan, Costa Rica and Sweden in May 2014. For the purposes of simplicity in citing these reports the format 'CRPD on [Country]' will be used.

⁹¹ CRPD on China, para. 22.

⁹² Ibid.

To monitor progress in implementing such a repeal of laws, the Committee also recommends States to establish an ‘independent review mechanism’ to restore the rights of those stripped of their legal capacity.⁹³

The CRPD Committee has begun to flesh out some guiding principles about what supported decision-making should look like in practice. It should be available for everyone, including with high support needs.⁹⁴ It ‘is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity’⁹⁵ should ‘respect the person’s autonomy, will and preferences’⁹⁶ rather than be made on the person’s ‘best interests’.⁹⁷ It should ‘never amount to substitute decision-making’.⁹⁸ It is not good enough to establish supports without abolishing substituted regimes.⁹⁹ A person with alternative communication modes should not be denied supports (although the Committee offers no practical guidance as to how a person’s will should be understood if no-one can understand the person’s communication).¹⁰⁰ The measure should recognise ‘all persons’ legal capacity and right to exercise it; accommodations and access to support where necessary to exercise legal capacity; [and] arrangements for the promotion and establishment of supported decision-making’.¹⁰¹ The nature of the duty is to ‘[e]stablish, recognize and provide’¹⁰² supports at ‘nominal or no cost’.¹⁰³ The Committee offers no hints as to how someone should adjudicate who needs supports and what sorts of those supports should be. The Committee is bereft of guidance beyond saying that ‘mental capacity assessments’ (undefined) should not be used, and that States need to develop ‘new, non-discriminatory indicators of support needs’.¹⁰⁴ The Committee points out how mental capacity ‘is highly controversial’ and cannot be measured objectively, but rather is ‘contingent on

⁹³ CRPD on Paraguay, para. 30.

⁹⁴ CRPD GC1, para. 29(a).

⁹⁵ CRPD GC1, para. 17.

⁹⁶ CRPD on Peru, para. 25; on Austria, para 28; on China, para. 21; and on Azerbaijan, para. 27.

⁹⁷ CRPD GC1, para. 29(b).

⁹⁸ CRPD GC1, para. 17.

⁹⁹ CRPD GC1, para. 28.

¹⁰⁰ CRPD GC1, para. 29(c).

¹⁰¹ CRPD on China, para. 22.

¹⁰² CRPD GC1, para. 50(c).

¹⁰³ CRPD GC1, para. 29(e).

¹⁰⁴ CRPD GC1, para. 29(i).

social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity'.¹⁰⁵

The CRPD does not frame access to supports in Article 12(3) as a right, but an obligation on the State. The Committee seems to reiterate this by clarifying that States have 'an obligation to facilitate the creation of support, particularly for people who are isolated and may not have access to naturally occurring support in the community'.¹⁰⁶ There is considerable theoretical confusion about the nature of the obligation to provide supports. The Committee says that the obligation is 'for the fulfillment of the civil and political right to equal recognition before the law',¹⁰⁷ and therefore progressive realization does not apply: upon ratification States need from one moment to the next to ensure access to supports for all. This seems far-fetched, and may come back to haunt the Committee as they see that no country is able to execute such a societal shift. A wiser response would perhaps have been to say that it is a hybrid right and that there needs to be gradual roll-out of access to supports: States would then have been asked to report on progress year on year and give evidence of the increase of availability.¹⁰⁸

The CRPD Committee praised Austria for a pilot program to replace the guardianship system and the Committee urged the government to 'do more' to make sure that people get are not placed under guardianship and get access to supported decision-making.¹⁰⁹ The advice to 'do more' is non-specific and Austria will comply if it provides access to one more person to supported decision-making.

With regard to consent to medical interventions, the Committee has commented how the ordinary rules of medical law are suspended for people deprived of legal capacity. It interprets article 14 of the CRPD as 'the right to be free from involuntary detention in a mental health facility and not to be forced to undergo mental health treatment'¹¹⁰ With regard to Hungary, the

¹⁰⁵ CRPD GC1, para. 14.

¹⁰⁶ CRPD GC1, para. 29.

¹⁰⁷ CRPD GC1, para. 30.

¹⁰⁸ This line of critique will be expanded in the conclusions of this chapter, section 6 below.

¹⁰⁹ CRPD on Austria, para. 28.

¹¹⁰ CRPD GC1, para. 31.

Committee recommended that the government, ‘adopt measures to ensure that health care services, including all mental health care services, are based on the free and informed consent of the person concerned’.¹¹¹ Commenting on the law in Australia, the Committee found that people’s legal capacity could be restricted not just by detaining them in a psychiatric hospital, but by placing them on community treatment orders, where a person with a diagnosis of a mental health issue can be legally obliged to take psychiatric medication in the community.¹¹² Further, it noted in Spain that law reform needs to happen to ensure that, ‘informed consent of all persons with disabilities is secured on all matters relating to medical treatment, especially the withdrawal of treatment, nutrition or other life support’.¹¹³ In its 2014 observations, it has tightened its wording that governments should guarantee the ‘right to free and informed consent to receive medical treatment’,¹¹⁴ and that the right should be about the authority ‘to give and withdraw informed consent for medical treatment.’¹¹⁵ It noted in Argentina that abortions can be sanctioned by the woman’s guardian, a situation it admonished.¹¹⁶

The CRPD Committee has provided some limited guidance about how States should arrange domestic laws to regulate the losses of rights consequent on denial or restriction of legal capacity. This includes ‘the right to free and informed consent to medical treatment, the right of access to justice, and the rights to vote, to marry and to choose their place of residence’,¹¹⁷ as well as the right to work,¹¹⁸ ‘the right to have a home and found a family’,¹¹⁹ to adopt children,¹²⁰ and to be considered as creditworthy by banks.¹²¹

¹¹¹ CRPD on Hungary, para. 28. The Committee made similar recommendations in its reports on Austria, para. 31, on Spain, para. 36, on Argentina, para. 42, and on Costa Rica, para. 22.

¹¹² CRPD on Australia, para. 34.

¹¹³ CRPD on Spain, para. 30.

¹¹⁴ CRPD on Costa Rica (para. 22) and on

¹¹⁵ CRPD on Sweden, para. 34.

¹¹⁶ CRPD on Argentina, para. 31.

¹¹⁷ CRPD on Paraguay, para. 30; on Austria, para. 28; on Azerbaijan, para. 26 on Costa Rica, para. 22; and on Sweden, para. 34.

¹¹⁸ CRPD on Sweden, para. 34.

¹¹⁹ CRPD on Costa Rica, para. 21.

¹²⁰ CRPD on Azerbaijan, para. 27.

¹²¹ CRPD on Costa Rica, para. 23-4.

Of particular interest with regard to the global jurisprudence on the link between legal capacity and segregation from the community,¹²² the Committee has said strongly that:

*The segregation of persons with disabilities in institutions continues to be a pervasive and insidious problem that violates a number of the rights guaranteed under the Convention. The problem is exacerbated by the widespread denial of legal capacity to persons with disabilities, which allows others to consent to their placement in institutional settings.*¹²³

It has recommended to the Paraguay government to abolish civil commitment in psychiatric hospitals ‘in order to ensure that persons with disabilities who are subject to those procedures are able to fully exercise their legal capacity’.¹²⁴ This decoupling of legal capacity and institutionalisation is a point acknowledged and addressed by the European Court of Human Rights in its judgment on the *Stanev v. Bulgaria* case.¹²⁵ It has further expressed encouragement to States to ‘[d]evelop a wide range of community-based services and supports that respond to needs expressed by persons with disabilities, and [which] respect the person’s autonomy, choices, dignity and privacy, including peer support and other alternatives to the medical model of mental health’.¹²⁶

The CRPD Committee has given consistent guidance about training of stakeholders in the legal capacity field, in particular civil servants, judges, legal professionals and social workers, ‘on the recognition of the legal capacity of persons with disabilities and on mechanisms of supported decision-making’,¹²⁷ adding that this training should be done in ‘consultation and cooperation’ with people with disabilities and their NGOs, echoing the sentiment laid out in Article 4(3) of the Convention, which sets out participation of people with disabilities in policy-making. The Committee has

¹²² A theme explored particularly in chapter 6 of this book.

¹²³ CRPD GC1, para. 46.

¹²⁴ CRPD on Paraguay, para. 36.

¹²⁵ Again, this is analysed in chapter 6 of this book.

¹²⁶ CRPD China, para. 23.

¹²⁷ CRPD GC1 at para. 39, and CRPD Committee on Hungary, para 26; on Spain, para. 34; on Austria, para. 28; and on Tunisia, para. 23.

been specific in its recommendations to some countries – for example Argentina – that the country should organise training for judges ‘on the human rights model of disability’ in order ‘to encourage them to adopt the supported decision-making system instead of granting guardianships or trusteeships’.¹²⁸

The Committee has picked up on some of the civil law consequences of depriving a person of legal capacity. It recommended to the Peruvian government to amend the Act for Foreigners, which prohibits people with intellectual and psycho-social disabilities from citizenship.¹²⁹ Striking at the heart of Article 12(1) of the CRPD which sets out recognition before the law, the CRPD Committee had the opportunity to comment on the phenomenon in Peru whereby ‘a number of persons with disabilities, especially those living in rural areas and in long-term institutional settings, do not have identity cards and, sometimes, have no name’.¹³⁰ As well as giving these identity cards, the government was told to collect accurate data on undocumented people with disabilities.¹³¹ In El Salvador the law prohibits people with restricted legal capacity from working as notaries, something which the Committee noted ‘that the Public Notaries Act limits possibilities for “blind”, “mute” and “deaf” persons and those who “are not in full command of their mental faculties” to work as notaries’, and asked the government to change this system,¹³² adding that reasonable accommodations should be provided to people with disabilities in the workplace, a requirement spelled out in Article 27 of the Convention, on the right to work.

B. Human Rights Committee

One would expect the CRPD Committee to be the most active UN treaty body issuing pronouncements on the legal capacity of people with mental disabilities. But given the stretch of legal capacity into other areas of law, one would expect other treaty bodies also to have dealt with some aspects of the

¹²⁸ CRPD on Argentina, para. 20.

¹²⁹ CRPD on Peru, para. 6.

¹³⁰ Ibid, para. 22.

¹³¹ Ibid, para. 23.

¹³² CRPD on El Salvador, para. 27.

right to legal capacity. The reality is that this subject has largely been absent from the purview of UN human rights treaty bodies other than the CRPD Committee. This section examines the performance of the UN Human Rights Committee, which is the treaty body established under the International Covenant on Civil and Political Rights (ICCPR). It has dealt with legal capacity with regard to three countries.

First, in relation to the Czech Republic in 2007, it noted that the Czech government should ensure that ‘all persons without full legal capacity are placed under guardianship that genuinely represents and defends the wishes and interest of those persons’.¹³³ Second, in its concluding observations on the Russian Federation in 2009, it took the opportunity to lay out its most comprehensive analysis of legal capacity to date.¹³⁴ In this document, the UN Human Rights Committee expressed concern about the lack of adequate safeguards in the guardianship system, the disproportionate nature of restrictions on human rights caused by deprivation of legal capacity, and the number of persons who are subjected to this measure. It placed particular emphasis on the fact that people deprived of legal capacity in Russia do not have legal remedies to challenge violations of their rights, including ill-treatment or abuse by guardians or staff of mental health and social care institutions. The practice of depriving a person of legal capacity on the basis of the mere existence of a psychiatric diagnosis was criticised. Of particular interest is the fact that the UN Human Rights Committee recommended that the Russian government should amend its law and policy so that any measures restricting a person's legal capacity on account of a disability should be necessary, proportionate and based on the person's individual circumstances. It also recommended that such measures should be accompanied by effective procedural safeguards including prompt access to an effective judicial review of guardianship. And third, with regard to Lithuania three years later in 2012.¹³⁵ Similarly, the Committee commented on the lack

¹³³ UN Human Rights Committee, *Concluding Observations: Czech Republic*, 90th session, 9-27 July 2007, CCPR/C/CZE/CO/2, para 14.

¹³⁴ UN Human Rights Committee, *Concluding Observations: Russian Federation*, 97th session, 12-30 October 2009, CCPR/C/RUS/CO/6, para 19.

¹³⁵ UN Human Rights Committee, *Concluding Observations: Lithuania*, 105th session, 9-27 July 2012, CCPR/C/LTU/CO/3, para. 14.

of legal representation in court proceedings where legal capacity was at stake, and the denial of people under guardianship to initiate restoration proceedings. It was also concerned that abortion and sterilisation could be authorised by guardians without reference to the will and preferences of the person concerned.

C. Committee on Economic, Social and Cultural Rights

The UN Human Rights Committee's sister treaty body is the UN Committee on Economic, Social and Cultural Rights (ICESCR Committee). Its mother treaty (the International Covenant on Economic, Social and Cultural Rights) establishes in Article 2(2) an obligation on each State Party 'to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*' [emphasis added]. In 2009 the ICESCR Committee issued a general comment on non-discrimination, which significantly advanced the interface of legal capacity and discrimination.¹³⁶ The general comment includes guidance as to what is meant by 'other status'. It explains that:

[t]he nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of 'other status' is thus needed to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognised grounds in Article 2(2).¹³⁷

The general comment sets out a non-exhaustive list of various other grounds of discrimination which 'could include the denial of a person's legal capacity because he or she is in prison, or is involuntarily interned in a psychiatric

¹³⁶ UN Committee on Economic, Social and Cultural Rights (2009), *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*.

¹³⁷ *Ibid*, para. 27.

institution, or the intersection of two prohibited grounds of discrimination, eg where access to a social service is denied on the basis of sex and disability'.¹³⁸

The ICESCR Committee has also addressed the issue of a person's functionality which, as noted above in the discussion of the functional approach, is a key issue in the right to legal capacity. In its general comment 14 (2000) on the right to health, the ICESCR Committee recommends that States roll out 'physical as well as psychological rehabilitative measures aimed at maintaining the functionality and autonomy of older persons'.¹³⁹ In the light of the CRPD which was adopted six years after general comment 14, it is reasonable to read into the statement an inclusion of social supports which are aimed at maintaining the functioning and autonomy of everyone with disabilities, whether elderly or not.

Five years prior to the non-discrimination general comment, in 1995 the ICESCR Committee adopted a general comment specifically on older people, recommending that States, 'make efforts to promote research on the biological, mental and social aspects of ageing and ways of maintaining functional capacities and preventing and delaying the start of chronic illnesses and disabilities'.¹⁴⁰ For States amending legal capacity laws so as to ensure that people with degenerative diseases (whether age-related or not) can execute planning documents which express their preferences and to which reference might be made at a time when they are no longer able to communicate them, this is sound advice.

D. Reservations and Interpretative Declarations

Several States have entered a reservation or declaration in relation to Article 12 upon signing or ratifying the CRPD. The reason this issue is presented in this chapter is because reservations represent the greatest threat to the global interpretation of Article 12 of the CRPD, and disability rights scholars

¹³⁸ Ibid.

¹³⁹ UN Committee on Economic, Social and Cultural Rights (2000) *General Comment No. 14: The right to the highest attainable standard of health*.

¹⁴⁰ UN Committee on Economic, Social and Cultural Rights (1995) *General Comment 6: The economic, social and cultural rights of older persons*, para. 42.

interested in law in action, unpicking the reservations and critique their legality seems an essential element of any review of the law in this area.

The Vienna Convention on the Law of Treaties defines a reservation as a ‘unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’.¹⁴¹ Modifying the legal effect of Article 12 poses a serious risk to universal implementation of the right to legal capacity across States Parties, and it is therefore worth examining what these statements say and what they might mean.

There are nine significant declarations or reservations that potentially impact on the implementation of Article 12 of the CRPD. They are, in chronological order of the date when the State ratified the Convention: El Salvador (December 2007), Egypt (April 2008), Australia (July 2008), Canada (March 2010), Estonia (May 2012), Poland (September 2012), Norway (June 2013), Kuwait (August 2013), Singapore (August 2013), and Venezuela (September 2013).¹⁴²

El Salvador was among the first countries to sign the Convention, and when it did so it entered a reservation, which it confirmed upon ratification. The reservation sets out El Salvador’s commitment to implementing the Convention, but only ‘to the extent that its provisions do not prejudice or violate the provisions of any of the precepts, principles and norms enshrined in the Constitution of the Republic of El Salvador, particularly in its enumeration of principles.’

This formulation, which essentially states that El Salvadorian law trumps binding international law, has come under fire from several States. In September 2008, Austria entered an objection to El Salvador’s reservation, stating that its ‘general and vague wording [...] raises doubts as to the degree

¹⁴¹ Vienna Convention on the Law of Treaties, 1969, Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

¹⁴² The wording of the reservations and declarations can be found on the UN’s treaty website: www.treaties.un.org. The reservations are not otherwise listed and have no reference numbers.

of commitment assumed by El Salvador in becoming a party to the Convention and is therefore incompatible with international law'. The Netherlands and Sweden entered similar objections in January 2009, Portugal in September 2009, the Czech Republic in November 2009, Germany in January 2010 and Slovakia in September 2010. The CRPD Committee examined El Salvador's compliance with the CRPD in October 2013. Given all the fuss at the diplomatic level, the Committee's commentary on the reservation is surprisingly brief. The Committee simply states that it is 'concerned' about the reservation,¹⁴³ and urges the government to 'expedite the process of withdrawing [it]'.¹⁴⁴

Australia's declaration on Article 12 confirms its 'understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards'. When the CRPD Committee examined Australia's compliance with the CRPD in 2013 it noted that it was 'concerned about the existence of [Australia's] interpretative declarations',¹⁴⁵ and urged the government to 'review' the declarations 'in order to review them'.¹⁴⁶

Similarly to Australia's statement, Canada's 'declaration and reservation' explains that 'Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law.' The Canadian statement then sets out a sort of legal insurance policy in the format of 'if he says y, we will say z':

To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards.

Canada submitted its interpretation upon ratification in March 2010. The CRPD Committee began its examination of State reports under Article 36 of

¹⁴³ CRPD on El Salvador, para. 5.

¹⁴⁴ Ibid, para. 6.

¹⁴⁵ CRPD on Australia, para. 8.

¹⁴⁶ Ibid, para. 9.

the CRPD in April 2011. As will be shown below, the CRPD has been consistently forthright since that time of its interpretation that Article 12 demands a replacement of substitute decision-making regimes. Thus we can assume that Canada's interpretation sprung into effect at that time. Some authors are calling for Canada to withdraw its interpretation.¹⁴⁷

Egypt's 'interpretative declaration' is different from Canada's and Australia's in that it separates out the two elements of the right to legal capacity: namely the capacity to have rights (for example a person's capacity to have the right to vote) versus the capacity to act or perform (continuing the example, actually voting in an election). Egypt confirms its interpretation of Article 12 allows the Egyptian law to prevail, whereby 'persons with disabilities enjoy the capacity to acquire rights and assume legal responsibility ('ahliyyat al-wujub') but not the capacity to perform ('ahliyyat al-'ada')'. The idea that existing domestic law shall prevail is also present in Kuwait's interpretive declaration whereby '[t]he enjoyment of legal capacity shall be subject to the conditions applicable under Kuwaiti law.' Singapore is even more defiant in its reservation, saying that its existing law provides 'an appropriate and effective safeguard, oversight and supervision by competent, independent and impartial authorities or judicial bodies of measures relating to the exercise of legal capacity, upon applications made before them or which they initiate themselves in appropriate cases.' Singapore therefore reserves the right to continue to apply its current legislative framework in lieu of the regular review referred to in Article 12(4) of the Convention.

In Europe, the supremacy of domestic law has also been expressed by two countries. Estonia's reservation interprets Article 12 as a provision which does 'not forbid to restrict a person's active legal capacity, when such need arises from the person's ability to understand and direct his or her actions. In restricting the rights of the persons with restricted active legal capacity the Republic of Estonia acts according to its domestic laws.' In the meantime, Poland's interpretative declaration sets out how the country will implement Article 12 so as to allow 'incapacitation [...] in the manner set forth in the

¹⁴⁷ Nicholas Caivano (2014) 'Conceptualizing Capacity: Interpreting Canada's Qualified Ratification of Article 12 of the UN Disability Rights Convention', 4:1 online: *UWO J Leg Stud* 3.

domestic law' where 'a person suffering from a mental illness, mental disability or other mental disorder is unable to control his or her conduct.' Essentially, all of these interpretations fly in the face of that set forth by the CRPD Committee. Similar to the situation in relation to Australia and El Salvador, the CRPD Committee recommends that the European countries withdraw their reservations and declarations which the Committee considers to be incorrect in law.

In Latin America, Venezuela's declaration is meaningless as it says that Article 12(2) (which sets out the right to legal capacity for everyone in all areas of life) 'mean[s] that in the case of conflict between that paragraph and any provisions in Venezuelan legislation, the provisions that guarantee the greatest legal protection to persons with disabilities, while ensuring their well-being and integral development, without discrimination, shall apply.' This is vacuous as international law is a floor, not a ceiling: if the CRPD's standards are higher than domestic law, then domestic law needs to be amended, and if Venezuela's laws provide more rights than that set out in domestic law, that is a wonderful thing for the people of Venezuela. Of note, Mexico entered a similar reservation when it ratified the CRPD in December 2007 which it withdrew in January 2012.

Norway's declaration is the most sophisticated of all:

Norway recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Norway also recognises its obligations to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. Furthermore, Norway declares its understanding that the Convention allows for the withdrawal of legal capacity or support in exercising legal capacity, and/or compulsory guardianship, in cases where such measures are necessary, as a last resort and subject to safeguards.

A question for the international community is: what status do these declarations have? The definition of a reservation was set out at the beginning of this section, and indeed the CRPD itself sets out that States may enter

reservations, with a warning (restating a principle already established in public international law) that, reservations ‘incompatible with the object and purpose of the present Convention shall not be permitted’.¹⁴⁸ The UN Human Rights Committee has said that ‘[i]t is not always easy to distinguish a reservation from a declaration as to a States’s understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of the State, rather than the form of the instrument.’¹⁴⁹ The Vienna Convention on the Law of Treaties helpfully points out that a reservation need not be called a reservation for the international community to treat it as such. ‘Declarations’ may therefore be treated as reservations if they contain the elements of a reservation, namely that they consist of:

a unilateral statement

however phrased or named

made by a State, when signing, ratifying, accepting, approving or acceding to a treaty

which purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

In its declaration upon ratification, the Norwegian government unilaterally and expressly seeks to exclude or modify the effect of provisions set out in Article 12 of the CRPD. This then meets the Vienna Convention’s definition of a reservation. It then needs to be established whether the reservation is lawful. The Vienna Convention sets out that it is unlawful for a State to enter a reservation if that reservation ‘is prohibited by that treaty’¹⁵⁰ or ‘is incompatible with the object and purpose of the treaty’.¹⁵¹ The stated purpose of the CRPD is set out in Article 1 of the treaty, and it is ‘to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their

¹⁴⁸ Article 46 of the CRPD.

¹⁴⁹ UN Human Rights Committee General Comment No. 24 (52) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

¹⁵⁰ Article 19(a) of the Vienna Convention on the Law on Treaties 1969, *op cit*.

¹⁵¹ *Ibid*, Article 19(c). This is also the wording contained in Article 46 of the CRPD.

inherent dignity.’ Article 12 is generally considered to be at the core of the paradigm shift from the medical (charity) model to the social (human rights) model of disability. It is difficult to see how entering a reservation like Norway’s on Article 12 does not strike at the very heart of the purpose of the Convention.¹⁵² At the time of writing, no State had objected to Norway’s reservation, despite calls from civil society to the Norwegian government to withdraw it.¹⁵³

4. Council of Europe

This chapter has thus far set out the nature of the Article 12 CRPD obligation, examined the interpretation of the CRPD committee and two main UN treaty bodies and has cast doubt on the legality of some reservations entered by some States which have the potential to pull apart the treads of the CRPD tapestry. The chapter changes now zooms into Europe, and the first part of the regional focus examines standards of the Council of Europe. This section is divided into three subsections: (a) statements by the Committee of Ministers, the main political body of the Council of Europe, (b) the Parliamentary Assembly made up of national parliamentarians and (c) the independent office of the Commissioner for Human Rights.

A. Committee of Ministers

As already noted in section 2(A), above, one of the most important documents safeguarding the rights of people deprived or restricted of legal capacity is Recommendation No. R(99)4 of the Committee of Ministers to member states ‘on principles concerning the legal protection of incapable adults’.¹⁵⁴ The Recommendation speaks ‘to the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are incapable of

¹⁵² Mental Disability Advocacy Center, ‘Legal Opinion on Norway’s Declaration/Reservation to the UN Convention on the Rights of Persons with Disabilities’, 28 November 2013.

¹⁵³ Ibid.

¹⁵⁴ Committee of Ministers of the Council of Europe (1999), Recommendation No. R(99)4E on principles concerning the legal protection of incapable adults, adopted on 23 February 1999.

making, in an autonomous way, decisions concerning any or all of their personal or economic affairs, or understanding, expressing or acting upon such decisions, and who consequently cannot protect their interests'.¹⁵⁵ It adopts a functional approach to legal capacity, as explained in section 2(A), above. Notwithstanding its recognition that 'different degrees of incapacity may exist and that incapacity may vary from time to time',¹⁵⁶ the Recommendation rests upon the not unproblematic premise that at any point in time, an adult is either capable or incapable: on or off like a light-switch.

That said, Recommendation No. R(99)4 is a high water-mark in international law. It is the first instrument to grapple with, and set out a radically different legal approach to rights, rejecting the status based and outcome approaches of older texts. It contains some important principles, such as that of flexibility, including measures of protection needing to include 'those which do not restrict the legal capacity of the person concerned',¹⁵⁷ and to 'include those which are limited to one specific act without requiring the appointment of a representative or a representative with continuing powers'.¹⁵⁸

The Recommendation tells States to preserve legal capacity, so that law should 'so far as possible' (no explanation as to why the qualification), 'recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned',¹⁵⁹ a statement which Article 12(2) of the CRPD would frown on. The Recommendation does not go on to define what protection means or who/what is to be protected from whom/what. It does, however, set out an important milestone in the development of legal capacity in international law by cutting the umbilical cord between legal capacity and subsequent losses of rights. No measure should 'automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse

¹⁵⁵ Ibid, Part 1(1).

¹⁵⁶ Ibid, Principle 3(1).

¹⁵⁷ Ibid, Principle 2(4).

¹⁵⁸ Ibid, Principle 2(5).

¹⁵⁹ Ibid, Principle 3(1).

consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so'.¹⁶⁰

Any measure should be necessary,¹⁶¹ proportional to the person's functional capacity,¹⁶² and time-limited¹⁶³ and should promote the adult's 'interests and welfare' (undefined),¹⁶⁴ all important principles for tailoring measures to the needs of the individual. The Recommendation embraces a model of substituted decision-making as necessary, and carried out as humanely as possible with an elaborate set of safeguards. The closest the Recommendation comes to endorsing supported decision-making (it does not use that term), is in describing a person representing or assisting an 'incapable adult,' who should

give [the adult] adequate information, whenever this is possible and appropriate, in particular concerning any major decision affecting him or her, so that he or she may express a view',¹⁶⁵ and that the adult's view on the choice of person to represent or assist him/her 'should be taken into account and, as far as possible, given due respect.¹⁶⁶

Deprivation or restriction of legal capacity can affect someone's health decisions. As the European Court of Human Rights noted in its *Stanev v Bulgaria* judgment,¹⁶⁷ guardians can impose treatment on people living in the community as well.¹⁶⁸ With this in mind, Recommendation R(99)4 contains a section on healthcare interventions, in which it states that when adults are capable of giving free and informed consent to a given intervention in the health field, the intervention may only be carried out with their consent. If an adult is not in fact capable of giving free and informed consent (all of which is

¹⁶⁰ Ibid, Principle 3(2).

¹⁶¹ Ibid, Principle 5.

¹⁶² Ibid, Principle 6.

¹⁶³ Ibid, Principle 8.

¹⁶⁴ Ibid, Principle 8.

¹⁶⁵ Ibid, Principle 9(3).

¹⁶⁶ Ibid, Principle 9(2).

¹⁶⁷ See chapter 6 of this book.

¹⁶⁸ For an examination of disability, legal capacity and healthcare interventions, see chapter 7 of this book.

open to interpretation), ‘the intervention may, nonetheless, be carried out provided that: it is for his or her direct benefit; and authorisation has been given by his or her representative or by an authority or a person or body provided for by law’.¹⁶⁹ Similarly, ‘subject to protective conditions prescribed by law, including supervisory, control and appeal procedures, an adult who has a mental disorder of a serious nature may be subjected, without his or her consent, to an intervention aimed at treating his or her mental disorder only where, without such treatment, serious harm is likely to result to his or her health’.¹⁷⁰ R(99)4’s footprint made it into later documents also.

The Council of Europe Disability Action Plan of 2006 is another Recommendation of the Committee of Ministers and urges Member States ‘to implement the relevant provisions’ of the 1999 Recommendation.¹⁷¹ One of the ‘fundamental principles’ governing the Disability Action Plan is ‘dignity and individual autonomy including the freedom to make one’s own choices’,¹⁷² and ‘Action line number 12’ on ‘legal protection’ requires that ‘[p]eople with disabilities have the right to recognition everywhere as persons before the law. Assistance to exercise legal capacity should’, the Disability Action Plan recommends, be ‘appropriately safeguarded by law’.¹⁷³ It encourages States ‘to provide appropriate assistance to those people who experience difficulty in exercising their legal capacity and ensure that it is commensurate with the required level of support’.¹⁷⁴

Prevention of financial and other abuse against people with mental disabilities is one of the animating concerns underlying legal capacity laws. The Disability Action Plan points out that abuse ‘can occur in institutions or other types of care and situations, including the family environment. It can be inflicted by strangers or persons known to the individual and can take many forms, for

¹⁶⁹ Committee of Ministers of the Council of Europe (1999), Recommendation No. R(99)4E on principles concerning the legal protection of incapable adults, adopted on 23 February 1999, Principle 22 (consent). Principle 23 provides for alternative rules on consent for States unable to accept Principle 22, but on the point which has been mentioned, these alternative rules present no difference with the main rule.

¹⁷⁰ Ibid, Principle 25.

¹⁷¹ Committee of Ministers of the Council of Europe (2006) *Disability Action Plan to promote the rights and participation of people with disabilities in society for 2006-2015*, Recommendation Rec(2006)5, para 3.12.3.x.

¹⁷² Ibid, para. 2.87.

¹⁷³ Ibid, para. 3.12.1.

¹⁷⁴ Ibid, para. 3.12.3.vii.

instance verbal abuse, violent actions, or the refusal to meet basic needs'.¹⁷⁵ In 2005, a year before the CRPD was adopted, the Committee of Ministers took action in this regard by adopting a text specifically on protecting adults and children with disabilities from abuse.¹⁷⁶ The document contains useful guidance on establishing and maintaining adult protection systems.

In 2009 the Committee of Ministers produced another Recommendation setting out very brief guidance to States on how to legislate issues around planning for future incapability.¹⁷⁷ This document describes Recommendation No. R(99)4 as 'a valuable and up-to-date international instrument',¹⁷⁸ but does not give reasons why it endorses the 1999 document rather than the 2006 CRPD which purely in chronological terms is more 'up-to-date'. The 2009 document focuses only on planning documents which dictate what happens when someone lacks functional capacity in the future, and recommends that States adopt legislation to ensure that people can appoint a continuing power of attorney, defined as 'a mandate given by a capable adult with the purpose that it shall remain in force, or enter into force, in the event of the granter's incapacity'.¹⁷⁹ A continuing power of attorney should cover 'economic and financial matters, as well as health, welfare and other personal matters'.¹⁸⁰ The Recommendation also sets out the advantages of making available advance directives, which 'may apply to health, welfare and other personal matters, to economic and financial matters, and to the choice of a guardian, should one be appointed'.¹⁸¹

¹⁷⁵ Ibid, para. 3.13.1.

¹⁷⁶ Committee of Ministers of the Council of Europe (2005) Resolution ResAP(2005)1 on safeguarding adults and children with disabilities against abuse.

¹⁷⁷ Committee of Ministers of the Council of Europe (2009) *Recommendation on monitoring the protection of human rights and dignity of persons with mental disorder*, CM/Rec(2009)3, adopted on 20 May 2009.

¹⁷⁸ Ibid, Preamble.

¹⁷⁹ Ibid, Principle 2.

¹⁸⁰ Ibid, Principle 3.

¹⁸¹ Ibid, Principle 14. The CRPD Committee has said that 'the ability to plan in advance is an important form of support, whereby they can state their will and preferences which should be followed at a time when they may not be in a position to communicate their wishes to others', CRPD GC1, para. 17.

B. Parliamentary Assembly

In January 2009 the Parliamentary Assembly of the Council of Europe (PACE) adopted a Resolution¹⁸² and Recommendation, both entitled ‘Access to rights for people with disabilities and their full and active participation in society.’ Comprised of national level parliamentarians, one expects PACE to be more critical of governance than documents emanating from the Committee of Ministers, a body comprised of the governments of each Member States. Noting that ‘in practice, the access of people with physical or mental disabilities to their rights on an equal basis with those of people without disabilities frequently remains wishful thinking and proves inadequate’,¹⁸³ PACE chose legal capacity as the first substantive disability rights issue to be tackled.¹⁸⁴ It thus provides that States should ‘guarantee that people with disabilities retain and exercise legal capacity on an equal basis with other members of society’.¹⁸⁵

Echoing the spirit and wording of Article 12 of the CRPD, as well as the CRPD Committee’s first concluding observations (on Tunisia – see section 3(A), above), the PACE promotes the move from substituted decision-making towards supported decision-making.¹⁸⁶ It recommends to governments to ensure that people’s rights are ‘not limited or substituted by others, [but] that measures concerning them are individually tailored to their needs and that they may be supported in their decision making by a support person’.¹⁸⁷ The Resolution appeals to governments to legislate so that any restrictions on legal capacity do not affect the right to vote, to draw up a will (these are also mentioned in Committee of Ministers’ Recommendation No. 4 of 1999, as laid out in above) as well as the rights to own property, to work, to a family life, to

¹⁸² Parliamentary Assembly of the Council of Europe (2009) *Access to rights for people with disabilities and their full and active participation in society*, Resolution 1642 (2009), 26 January 2009.

¹⁸³ Ibid, para. 3.

¹⁸⁴ This was partly because of the outreach which the rapporteur conducted to non-governmental organisations, including the Mental Disability Advocacy Center, where the author is employed as Executive Director.

¹⁸⁵ Parliamentary Assembly of the Council of Europe (2009) *Access to rights for people with disabilities and their full and active participation in society*, Resolution 1642 (2009), 26 January 2009, para. 7.

¹⁸⁶ Ibid, para. 7.2.

¹⁸⁷ Ibid, para. 7.1.

marry, to form and join associations, and to bring legal proceedings (these rights are not mentioned in Recommendation No. 4 of 1999). Adopting the language of Article 12(4) of the CRPD, the Resolution finally sets out a range of safeguards such as compulsory periodic reviews of any measures with full participation of the adult in question.¹⁸⁸

C. Commissioner for Human Rights

The Committee of Ministers is the governmental body of the Council of Europe whereas the Parliamentary Assembly is comprised of national level members of parliament who also sit in Strasbourg four times a year. The Commissioner of Human Rights is an independent institution of the Council. The Committee of Ministers draws up a shortlist of candidates based on nominations by States, and from this shortlist the Parliamentary Assembly elects the winner.¹⁸⁹ Thomas Hammarberg was the second Commissioner and served a full term from 2006 to 2012. In October 2008 his office released an Issue Paper on ‘Human Rights and Disability: Equal rights for all’.¹⁹⁰ The paper deals with ‘the right to make decisions’ and starts by setting out the problem as follows:

*The right to decide where we want to reside, how to spend our money, whether and with whom to get married is something many of us take for granted. But for thousands of Europeans placed under guardianship the reality is very different.*¹⁹¹

The paper points out that some systems allow partial guardianship with safeguards and regulations. Citing Recommendation No. R(99)4,¹⁹² (examined in section 4(A), above), Hammarberg highlights the principles of maximum preservation of capacity and respect for choice as far as possible. In

¹⁸⁸ Ibid, para. 7.3.

¹⁸⁹ Council of Europe, Committee of Ministers Resolution (99) 50 on the Council of Europe Commissioner for Human Rights, 7 May 1999.

¹⁹⁰ Thomas Hammarberg (2008) *Human Rights and Disability: Human Rights for All*, CommDH / IssuePaper (2008), 20 October 2008.

¹⁹¹ Ibid, para 5.

¹⁹² Committee of Ministers of the Council of Europe (1999), Recommendation No. R(99)4E on principles concerning the legal protection of incapable adults, adopted on 23 February 1999.

a similar way to the PACE Resolution adopted a year later (examined in section 4(B), above), he develops no-go areas of rights, areas which should remain intact whatever the person's legal status:¹⁹³

Relying on Article 12 of the CRPD, and supported by the principles in Article 3 of the CRPD, Hammarberg observes that '[t]he focus is on enabling people to make and communicate their decisions. This approach of 'supported decision-making' is strongly advocated by the disability movement globally and is founded on the notion that 'everyone can make choices and communicate them to others, while recognising that sometimes this requires support' he notes.¹⁹⁴ Hammarberg makes the important point that independence and autonomy are 'not about being able to do everything on your own, but about having control of your life and the possibility to make decisions and have them respected by others'.¹⁹⁵ In other words, independence is more connected with notions of autonomy and supports than atomism and best interests.

In September 2009 Hammarberg issued a Viewpoint (a shorter document setting out the official view of the Commissioner) on the rights of people with intellectual disabilities.¹⁹⁶ This document stated:

Little is also being done to develop a wise and rights-based approach to the problem of the legal capacity of those with intellectual disabilities. It may be in the nature of this impairment that problems occur in relation to how one represents oneself towards authorities, banks and other such institutions. This, however, is no justification for a policy to routinely incapacitate people with mental disabilities and put them under legal guardianship where they have no say in important decisions affecting their lives.

Another Viewpoint published a week later addresses the removal of decision-making rights of people with disabilities, stating that people with disabilities

¹⁹³ Thomas Hammarberg (2008) *Human Rights and Disability: Human Rights for All*, CommDH / IssuePaper (2008), 20 October 2008, para. 5.1.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Thomas Hammarberg (2009) *A neglected human rights crisis: persons with intellectual disabilities are still stigmatised and excluded*, Viewpoint, 14 September 2009.

‘have been treated as non-persons whose decisions are meaningless’.¹⁹⁷ This Viewpoint was at that time the most developed articulation by a human rights official of the right to legal capacity. Hammarberg notes that the aim of the CRPD is to promote inclusion and full participation in society, and that the aim cannot be achieved ‘[w]hen we deprive some individuals of their right to represent themselves’. He goes on to say that ‘a range of alternatives to guardianship [need] to be provided for adults with disabilities’. The ‘starting point’ for law reform is ‘full legal capacity combined with the right of the individual to seek support.’ As to the availability of supports which States are obliged to ensure:

[s]upported decision-making is a developing field in some Council of Europe member States, and the practice has been embedded for several years in many Canadian provincial laws. What happens in those jurisdictions is that a network of supporters are recognised – but not imposed on the adult – and these supporters provide information and options for the adult to make a decision.

Hammarberg addresses the need to ensure that safeguards are in place ‘in order to prevent abuse’, including ensuring that the ‘will and preferences of the concerned person should be respected and there should be no conflict of interest and undue influence between those supporting the adult, and the adult him- or herself.’ He explains the *Shtukaturou v. Russia* judgment of the ECtHR,¹⁹⁸ observing that the judgment must be interpreted to promote an approach in line with the CRPD, adding that there must be tailor-made responses to the individual’s needs, be ‘genuinely justified’ and flow from ‘rights-based procedures and combined with effective safeguards.’

In October 2010 Hammarberg issued another Viewpoint, explicitly linking legal capacity and ill-treatment, saying that, ‘[p]ersons with disabilities are placed under guardianship and have their legal capacity removed. In a number of cases they are detained, deprived of their liberty - sometimes

¹⁹⁷ Thomas Hammarberg (2009b) *Society has an obligation to support abandoned children and offer them a positive home environment - also when budget resources are limited*, Viewpoint, 28 December 2009.

¹⁹⁸ Chapter 5 of this book elaborates this point.

without these decisions being subjected to judicial review. This is not acceptable'.¹⁹⁹ This statement illustrates how human rights are interrelated and indivisible and directly connect with the right to community living, rights in institutional settings and access to justice.²⁰⁰

In March 2012 Hammarberg published an extended 'issue paper' on legal capacity.²⁰¹ In the paper, Hammarberg endorses the CRPD very strongly, and echoes the calls from the CRPD Committee to 'abolish mechanisms providing for full incapacitation and plenary guardianship', and to review laws to remedy any deprivations of 'human rights in relation to legislation concerning, inter alia, guardianship, voting rights and compulsory psychiatric care and treatment.' Hammarberg calls for an end of 'voluntary' psychiatric placements in circumstances where the guardian 'volunteers' the placement and forced treatment of the person under guardianship. This was the situation dealt with by the European Court of Human Rights in the case of *Shtukaturou v. Russia*.²⁰² He also calls for States to '[d]evelop supported decision-making alternatives for those who want assistance in making decisions or communicating them to others.'²⁰³

5. European Union

The CRPD is the first UN human rights treaty that the European Union has ratified.²⁰⁴ The mapping of issues of legal capacity onto spheres and levels of EU competence poses interesting and difficult questions which do not yet

¹⁹⁹ Thomas Hammarberg (2010) *Country report on Bulgaria*, CommDH(2010)1, 9 February 2010.

²⁰⁰ Chapters 6 and 8 of this book explore these points further.

²⁰¹ Thomas Hammarberg (2012) Issue Paper: 'Who Gets to Decide? Right to legal capacity for persons with psychosocial disabilities and intellectual disabilities'. Strasbourg.

²⁰² See chapter 5 of this book.

²⁰³ All these quotations are from the 'Recommendations' section of the issue paper.

²⁰⁴ Article 44 of the CRPD allows it to be 'regional integration organizations' to ratify. The same article defines the phrase means 'an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by this Convention.' The EU constitutes such an entity with transferred legal competences with respect for example to employment issues which is a right under Article 27 of the Convention, whereas for example, States have not transferred any such competences to the Council of Europe.

appear to have been resolved. The Code of Conduct between EU institutions and Member States setting out internal arrangements for matters relating to the CRPD does not contain information about which CRPD Articles and provisions are matters of exclusive Member State competence; of exclusive EU competence; and of shared competence.²⁰⁵

The denial or restriction of legal capacity has powerful implications for the EU such as citizenship, non-discrimination, consumer protection and free movement. For instance, in many Member States, people whose legal capacity is restricted are prohibited from signing employment contracts and are therefore automatically excluded from the labour market.²⁰⁶ The centrality of the right to legal capacity to the enjoyment of all rights and entitlements, including those conferred by EU citizenship, was acknowledged by the EU Agency for Fundamental Rights in its 2010 report on the participation in political life of people with disabilities.²⁰⁷

Legal capacity has been notably absent from European disability plans. No word about legal capacity or autonomy was contained in the European Commission's Disability Action Plan 2003-2010. The 2004-2005 action plan (focusing on employment),²⁰⁸ the 2006-2007 action plan (focusing on active inclusion),²⁰⁹ and the 2008-2009 action plan (focusing on accessibility),²¹⁰ were all silent on legal capacity. In none of these documents is the link

²⁰⁵ European Council, *Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities*, 2010/C 340/08 , Official Journal C 340 , 15/12/2010 P. 0011 – 0015.

²⁰⁶ See EU Agency for Fundamental Rights, 'Legal capacity of persons with intellectual disabilities and persons with mental health problems', Vienna, July 2013.

²⁰⁷ EU Agency for Fundamental Rights (FRA) (2010a) *The right to political participation of persons with mental health problems and persons with intellectual disabilities*, October 2010.

²⁰⁸ European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Equal Opportunities for people with disabilities: A European Action Plan'*, COM (2003) 650 final.

²⁰⁹ European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Situation of disabled people in the enlarged European Union: The European Action Plan 2006-2007'* COM (2005) 604 final.

²¹⁰ European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: 'Situation of disabled people in the European Union: the European Action Plan 2008-2009'*. Brussels, 26 November 2007 COM(2007) 738 final.

between access to the employment market and the right to legal capacity explicitly recognised, despite the CRPD being adopted in 2006.

Legal capacity was discussed at a ministerial level meeting on 22 May 2008, which was organised by the Slovenian Presidency. Based on the information provided by the Member States and the discussion held by the EU Disability High Level Group (DHLG), the ministers concluded that legal capacity was an issue of common interest on which added European value would be derived from exchange of good practice,²¹¹ but beyond these vague statements no action was felt necessary to be taken.

In its first annual report in 2008 (two years after the CRPD was adopted and two years before the EU ratified it), the DHLG listed legal capacity as a key challenge of implementing the CRPD and attempted to share good practice in this regard. The DHLG reported that in some Member States legal capacity was restricted through guardianship, and that the CRPD required this approach to change to a support-based system, concluding that '[t]his is a complex area of law and requires consultation and reflection'.²¹² An annex to the DHLG's report lists some of the complexities in more detail.²¹³

The DHLG's second annual report, published in 2009, contained achievements and challenges in legal capacity in each of the Member States.²¹⁴ Although this information is helpful, the report suffers from three significant weaknesses. First, the information is self-reported by governments, and there is no process of verification. Second, the information is in different formats per Member State, so some aspects of Article 12 are set out for one State but not others, making comparisons across Member States very challenging.

²¹¹ European Commission, *Second Disability High level Group Report On Implementation of the UN Convention on the Rights of Persons with Disabilities*, June 2009.

²¹² European Commission, *First Disability High level Group Report On Implementation of the UN Convention on the Rights of Persons with Disabilities*, 2008, p. 35.

²¹³ European Commission, *Annex to the First Disability High level Group Report On Implementation of the UN Convention on the Rights of Persons with Disabilities (Note for the Ministerial Meeting of 22 May 2008)*.

²¹⁴ European Commission, *Second Disability High level Group Report On Implementation of the UN Convention on the Rights of Persons with Disabilities*, June 2009.

Third, there is no synthesis or analysis, making it difficult to compare progress or identify emerging good practice.

Legal capacity did not feature at all in the 2010 or 2011 DHLG annual reports,²¹⁵ rendering it impossible to compare progress over time and raising into question the credibility of the European Commission's 2008 declaration that legal capacity constitutes one of the 'challenges that should be considered by each key player involved in the implementation of the UN Convention'.²¹⁶

Then in 2010 the EU published the 'European Disability Strategy 2010-2020'.²¹⁷ It briefly notes in the section on 'Equality' that 'EU action will support and supplement national policies and programmes to promote equality, for instance by promoting the conformity of Member State legislation on legal capacity with the UN Convention'.²¹⁸ The accompanying action plan document contains a specific equality objective of promoting 'exchange of good practices on legal capacity', an objective which was planned to be carried out between 2010 and 2013. No reports exist about whether this actually happened.

The EU's approach to legal capacity is rather minimal.²¹⁹ Many EU treaties contain provisions relevant to the right to legal capacity, and may provide the EU with competency to act.²²⁰ The EU Disability Strategy 2010-2020 lists eight priority areas where the EU plans to take action. As noted, legal capacity is listed only in the section about 'Equality', despite legal capacity having the potential to play an important role in many of the eight priority areas.

²¹⁵ European Commission, *Third Disability High level Group Report On Implementation of the UN Convention on the Rights of Persons with Disabilities*, March 2010.

²¹⁶ European Commission, *First Disability High level Group Report On Implementation of the UN Convention on the Rights of Persons with Disabilities*, 2008, p. 35.

²¹⁷ European Commission, *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, COM(2010)0636 final, para 3.

²¹⁸ Ibid, para 3.

²¹⁹ This section analyzing the responsibility which the European Union has with regards to legal capacity draws heavily on Mental Disability Advocacy Center's 2013 report 'Legal Capacity in Europe: A Call to Action to Governments and to the European Union', of which I was one of the primary authors.

²²⁰ Article 2 of the Treaty on European Union (TEU) establishes that the EU is founded on the values of equality, respect for rights and the rule of law (Consolidated Version of the Treaty on European Union art. 2, 2010 O.J. C 83/01). The right to be equal before the law is in Article 20 of the Charter of Fundamental Rights of the European Union (CFREU).

Three examples suffice. The first is ‘participation’. Under this heading, the Commission promises to, ‘ensure that people with disabilities enjoy all benefits of EU citizenship; remove barriers to equal participation in public life and leisure activities; promote the provision of quality community-based services’.²²¹ The reality is that a person deprived of legal capacity in an EU Member State is legally prohibited from participating in the life of the community as he/she is denied the right to vote in local, national and European parliamentary elections.²²² The EU Agency for Fundamental Rights (FRA) drilled down into this topic in a 2010 report,²²³ drawing attention to the way in which restrictions on legal capacity imposed in many Member States undermine political rights set out in the EU Charter of Fundamental Rights and the TFEU.

Further, EU citizens deprived of their legal capacity are denied freedom of association that prevents them from taking advocacy action to demand their rights.²²⁴ In many countries a person under guardianship is prohibited from joining foundations or political parties. The EU’s goal is to ‘ensure that people with disabilities enjoy all benefits of EU citizenship’, yet there is no evidence yet that it has taken actions to ensure that the goal becomes real for the hundreds of thousands of EU citizens whose legal capacity has been denied or restricted. As the MDAC report points out,²²⁵ participation includes consumer protection: an EU legal competency.²²⁶ The EU institutions have established rules that contribute to the proper functioning of the internal market.²²⁷ EU

²²¹ *Ibid.*

²²² Article 29 of the CRPD sets out the right to vote and stand for election for all people with disabilities. See EU Fundamental Rights Agency (FRA), *The right to political participation of persons with mental health problems and persons with intellectual disabilities*. October 2010.

²²³ EU Agency for Fundamental Rights (FRA) (2010) *The right to political participation of persons with mental health problems and persons with intellectual disabilities*, October 2010. Political rights was also covered in FRA’s 2013 report ‘Legal capacity of persons with intellectual disabilities and persons with mental health problems’.

²²⁴ Article 29 of the CRPD places a positive obligation on States to facilitate access by people with disabilities into civil society organisations.

²²⁵ I was one of the co-authors of this report.

²²⁶ See, for example, Article 169 TFEU; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance.

²²⁷ See Article 1 of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

directives govern contracts ‘for supply of water, gas, electricity or district heating’,²²⁸ promote consumer protection and promote people’s right to information and education.²²⁹ Yet, across the Union, a person restricted of legal capacity is not allowed to enter into contracts, so it is impossible for them to be considered as consumers on an equal basis with others.

The second example is employment, another EU competence and listed as a priority in the EU Disability Strategy. Given the disproportionately high unemployment rates of people with disabilities within EU Member States,²³⁰ the EU Disability Strategy states that the Commission will ‘raise significantly the share of persons with disabilities working in the open labour market’.²³¹ People with disabilities who have their legal capacity denied in EU Member States are prohibited from signing contracts, including employment contracts, as their signatures are invalid under domestic law. In this way, legal capacity laws exacerbate poverty when the policy goal points in the opposite direction.

The European Commission has options open to it in the Treaty of the Functioning of the EU to take measures to ‘encourage cooperation between Member States’,²³² in order to ensure the integration of people excluded from the labour market.²³³ The Employment Framework Directive, which seeks to eliminate discrimination on many grounds including disability in the field of employment and occupation provides another legal basis on which the Commission may take action.²³⁴ Given that it is only people with disability who are deprived of legal capacity, the Commission could arguably view the link between legal capacity and employment as a matter of disability-based discrimination. The European Commission could also support and

²²⁸ *Ibid*, Article 3.

²²⁹ Article 169(1) TFEU.

²³⁰ See the EU’s statistics on unemployment across the Union: http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics.

²³¹ Stefanos Grammenos, *IDEE Indicators of Disability Equality in Europe, ANED 2011 Task 4*, op cit.

²³² Article 153(2)(b) TFEU. Also the European Commission has the basis of the Employment Framework Directive - Directive 2000/78/EC – which seeks to eliminate discrimination on many bases including disability, in the field of employment and occupation. Given that it is only people with disability who are deprived of legal capacity, this can properly be dealt with as a matter of disability-based discrimination.

²³³ Article 153(1)(h) TFEU.

²³⁴ Directive 2000/78/EC.

complement the activities of Member States in ensuring that everyone with disabilities is lawfully enabled to enter into, and be supported in, the open labour market.²³⁵

The third example is health. The EU Disability Strategy obliges the Commission to ‘promote equal access to health services and related facilities’.²³⁶ A person deprived of legal capacity is as a direct consequence denied their right to consent to or refuse medical interventions. This results in unequal access to health services, because at once there is over-treatment (especially in mental health facilities where the guardian consents on the person’s behalf) and under-treatment (where the person’s healthcare for whatever reason is overlooked, or communications are misunderstood).²³⁷

In 2010, as a result of research funded by the European Commission, a consortium managed by the European Foundation Centre published a report on challenges to CRPD implementation. Among other issues, the report listed as a challenge the interpretative declarations or explanatory memorandums that some States have submitted, or may consider submitting, in relation to Article 12 of the CRPD. In separate reports, the consortium provided an overview of Article 12 obligations and practices,²³⁸ and a checklist on how to assess implementation.²³⁹

2010 was a busy year for EU-level pronouncements on disability. A document produced by the Belgian Presidency of the EU in that year stated that as substituted decision-making is not explicitly mentioned in the CRPD and there is no wording which calls on States to abolish it (because, the document speculates, such wording ‘would probably have had a chilling effect on the

²³⁵ Article 153(1)(h) and (j) of the TFEU.

²³⁶ Stefanos Grammenos, *IDEA Indicators of Disability Equality in Europe*, op cit.

²³⁷ For more on the connections between health and disability, see chapter 7 of this book. Much research has been done on this phenomena, particularly in the UK. See for example, Pauline Heslop et al, ‘Confidential Inquiry into premature deaths of people with learning disabilities’, University of Bristol, UK.

²³⁸ UN Office of the High Commissioner for Human Rights (OHCHR) (2008), *Study on challenges and good practices in the implementation of the UN Convention on the Rights of Persons with Disabilities*, VC/2008/1214, Final Report’, p. 90.

²³⁹ European Foundation Centre (2010) *Study on Challenges and Good Practices in the Implementation of the UN Convention on the Rights of Persons with Disabilities*, (VC/2008/1214): Final Report for the DG Employment, Social Affairs and Equal Opportunities of the European Commission, Brussels.

ratification of the CRPD by a large number of States’).²⁴⁰ As much as any government or the EU may wish that they did not have to abolish substituted decision-making, the CRPD Committee’s view is clear on the action they should take, as section 3(A) above sets out.

6. Conclusions

Already in 2009 the OHCHR highlighted the ‘centrality of [Article 12] in the structure of the Convention and its instrumental value in the achievement of numerous other rights’.²⁴¹ Legal capacity should be a ‘priority area for legislative review and reform’ for all countries.²⁴² Since then, many bodies at the UN and European levels have issued authoritative statements. The CRPD Committee decided to hold its first day of general discussion on the conundrums of Article 12, and issued its first general comment on the topic. As this chapter has set out, the Committee has been steadfast in its recommendations to States that they must abolish regimes where decisions are made on behalf of people with mental disabilities to systems wherein laws enable people to access the supports which they may need to exercise their legal capacity which respect their will and preferences.

There is universal agreement at the inter-governmental level both about how legal capacity sits at the core of the paradigm shift which the CRPD seeks to usher in, and also about the need for action at legislative, policy and service delivery levels. The content of the action is, however, a matter of significant contention. At the conceptual level not one ‘model’ is generally agreed on, although Michael Bach’s approach is perhaps the most appealing to policy-makers in that it recognises that there are some people whose will and preferences are impossible to interpret, and for those people decisions (about

²⁴⁰ European Council (2010) Belgian Presidency of the Council of the European Union (2010) *The UN Convention on the Rights of Persons with Disabilities: an Integral and Integrated Approach to the Implementation of Disability Rights*, Background document prepared for the international conference ‘Work Forum for the Implementation of the UN Convention on the Rights of People with Disabilities’, p. 15.

²⁴¹ United Nations Office of the High Commissioner for Human Rights (OHCHR) (2009), *Thematic study of 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*, A/HRC/10/48 (2009), para. 43.

²⁴² *Ibid*, para. 45.

healthcare, daily care and finances at least) do need to be made lawfully by someone else.

The silence on how States are to handle these difficult issues speaks to the nub of what is most striking in the normative statements. There are two main sources of discontent. One is the plethora of reservations and reservations-in-disguise which fourteen States have entered, and which are discussed in section 3(d), above. Another are the submissions from States, national human rights institutions and non-governmental organisations before the deadline at the end of February 2014 in response to the CRPD Committee's draft general comment. The draft is by and large the same as the final general comment adopted in April 2014, raising serious doubts about how many submissions were actually read and translated, let alone whether the questions they raise were discussed.

What is the precise nature of the obligation under Article 12? The most public critic of the CRPD Committee's approach is not an academic commentator or a non-governmental organisation, but the Federal Republic of Germany, whose two-page pithy submission to the CRPD Committee in response to the draft general comment expels all extraneous issues and zeroes in on the key problematic. General comments must not extend the scope of a treaty obligation, so why is it, the German government asks, that 'the Committee itself concedes that its understanding of Article 12 diverges from the understanding common to the Contracting States, as evidenced by all the initial reports of State Parties so far'?²⁴³ Germany observes that the many reservations indicate countries' 'firm intent to retain the necessary options of substitute decision-making'. Given that, 'the Committee's interpretation is not shared by the State Parties in general; not even by a substantial minority, Germany doubts that it is appropriate to call an understanding of Article 12 common to the States Parties a "misunderstanding"'. The authors of the German submission outline how the German government is 'convinced that there are situations in which persons with disabilities simply are not able to make decisions even with the best support available' and that 'the Convention could not and in Germany's

²⁴³ Federal Republic of Germany, 'German Statement on the Draft General Comment on Article 12 CRPD', 20 February 2014.

view does not rule out the possibility of substitute decision-making in some cases.’

Not only States have tried to nudge the Committee to more provide feasible guidance. ‘The abuse of systems of substitute decision-making in practice in most of the world does not [...] remove the real difficulties for a small but significant number of people, where meaningful instructions cannot be obtained,’ said the non-governmental organisation which I direct in its submission.²⁴⁴ These must not have been easy submissions to read for the Committee, but the Committee ignored these warnings about remaining at the high-level of principles and these requests for clarity about the operationalization of Article 12.

Some academic commentators have noted delicately that ‘the distinction between supported and substituted decision-making is not always entirely clear’.²⁴⁵ If the support person takes over the decision of a person whose will and preferences are unknown, the risk is that the person with disabilities gets a substituted decision made for them, a system which the Committee has told States to ‘abolish’. These are normative problems but they raise profound challenges for policy-makers, service providers and families of people with mental disabilities throughout the world on an everyday basis.

This book analyses the potential horrors of substituted decision-making that have become real for many people. The Committee has done these victims of human rights violations a disservice by ignoring the fact that some people require more intense supports. The Committee has ignored the concerns of States and civil society organisations alike and has begun to thrash out a path which States are not willing to follow. It is naïve to think of human rights as solely a normative project where the UN authorities speak and the subservient States act. The architecture of contemporary human rights sets out a framework within which diplomacy is carried out. That means listening to

²⁴⁴ Mental Disability Advocacy Center, ‘Written Comments on draft General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities, submitted to the UN Committee on the Rights of Persons with Disabilities’, 27 February 2014, p. 10.

²⁴⁵ Piers Gooding (2013) ‘Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law’, *Psychiatry, Psychology and Law*, 20:3, 431-451 at 434.

concerns, facilitating differing opinions, interrogating systems which work and those that do not (and investigating why they do not), and on the basis of norms and empirical evidence, persuading people to do things differently.²⁴⁶

The accepted way of thinking and doing in relation to how people with mental disabilities author their own lives, and how others around them interact with their authorship, ought now to change. That the CRPD heralds a ‘paradigm shift’ is a hackneyed phrase whose promise now hangs in the balance, thanks in no small part to the Committee established by the Convention. It is clear that the Committee’s interpretation is gaining little traction with States. It refuses to listen to States’ requests to provide guidance about the difficult cases. It has created a significant risk that States turn their back on the Committee and therefore the Convention itself, that they enter more reservations and reject the human rights-based approach to disability altogether. After flirting with whole-scale reforms, countries may choose to retain laws constructed on the discriminatory scaffold of Roman law.

The CRPD recognises the importance of legal capacity as a human right. However, as demonstrated in this chapter, conceptual and practical hurdles stand in the way from a utopic implementation set out by CRPD Committee. It is therefore important for States to carry out legal changes, to learn from laws and services in other countries, and to bring round the policy table those with most expertise, namely people with mental disabilities themselves.

²⁴⁶ This approach is analysed in chapter 4 of this book.