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The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law

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This article examines General Comment No. 1 on the right to equal recognition before the law adopted by the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee). This general comment deals with the contentious right to legal capacity in Article 12 of the United Nations Convention on the Rights of Persons with Disabilities. There has been much debate about how to secure the right to legal capacity of persons with disabilities while simultaneously providing sufficient protection for other rights, such as the rights to health and freedom from abuse and ill treatment. This article tackles this difficult debate and outlines the solutions proposed in the general comment. It tells the story of the creation of the general comment, based on the authors' experiences supporting the CRPD Committee during its drafting. It concludes that the general comment is a valuable framework for the effective implementation of Article 12.

Keywords: disability; human rights; legal capacity; supported decision-making

I. Introduction

The journey has only just begun towards the realisation of the right of people with disabilities to equal recognition before the law. Before the adoption of the Convention on the Rights of Persons with Disabilities (CRPD) in 2006,[1] there was little, if any, global attention given to the right to legal capacity of persons with disabilities. There are many reasons for this. Paternalism permeated state responses to disability from the early nineteenth century onwards, demonstrated by the prevalence of the medical, charitable and welfare models of disability.[2] Even when the disability rights movement began to emerge in the mid-twentieth century and to challenge these paternalistic models, its early battles tended to focus more on the need to prohibit discrimination on the basis of disability,[3] and to secure socio-economic rights such as the right to an adequate standard of living, the right to work and the right to education.[4]

It is only recently that disability advocates have moved beyond the argument for equal protection of the law (prohibiting discrimination) to the need for equal *recognition* before the law.[5] Equal recognition includes the right to be a full legal person, meaning a rights holder and a legal agent, on an equal basis with others.[6] Where an individual is not recognised as a full person before the law with agency and personhood, she is largely unheard, treated as voiceless, and has little recourse to remedy these wrongs.[7] This may be why this

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right was overlooked in the early years of the disability rights movement – the individuals who were most affected by the denial of this right did not even have their voices heard within the disability movement itself.[8]

The catalyst for change was the negotiation of the CRPD, and in particular, Article 12 on equal recognition before the law.[9] The highly consultative process of drafting the CRPD allowed for these marginalised voices to finally be heard.[10] However, Article 12 is also a uniquely contentious human rights provision. Many have not accepted the rights and obligations under Article 12.[11] Others view it as requiring universal recognition of the right to legal capacity.[12] However, the exact parameters of what a 'universal legal capacity model' would look like in practice are still unclear.

The General Comment (GC) on Article 12, adopted by the United Nations (UN) Committee on the Rights of Persons with Disabilities (CRPD Committee), provides some bridges between these discussions. It states that Article 12 requires recognition of universal legal capacity, but also implies that this does not mean a lesser obligation to 'protect' people with disabilities. It provides the tools to challenge the notion that 'protection' must come in the form of denial of legal agency. Instead, it encourages 'protection' of all human rights and of the individual through empowerment, recognition of decision-making, and support through social connectedness.

In the authors' previous work on this topic, they explored how the universal right to legal capacity in Article 12 might be framed in domestic legislation, through a 'support model' of legal capacity.[13] This work came to the attention of Theresia Degener, Vice Chair of the CRPD Committee, who circulated an early draft of the paper to members of the working group preparing the GC on Article 12. This led to the authors of this article being invited to support the UN Secretariat to the CRPD Committee during its tenth session, and in particular, to support the working group on Article 12. It was a privilege to be part of this unique process – to hear the concerns of committee members and their debates on how the right could best be framed to give concrete guidance to states parties. The final text of the GC provides important clarifications about the nature of 'supported decision-making' and 'substituted decision-making' as well as a roadmap for states parties to ensure compliance with Article 12. However, the GC leaves some questions unanswered. This article further explores how the GC can be applied to domestic law to ensure equal recognition before the law and respect for legal capacity of persons with disabilities on an equal basis with others.

II. The formation of the GC

The GC is the product of significant deliberation by the CRPD Committee. The committee drafted and adopted the GC following many events and consultations on the subject. During its first session, the committee decided to dedicate its 2009 'day of general discussion' to Article 12 and the right to equal recognition before the law. The aim was to provide guidance on the rights and state obligations under Article 12.[14]

A working group on Article 12 was organised within the committee. The membership and leadership of the working group fluctuated from the time of its inception. Initially, Gabor Gombos, the Hungarian delegate, chaired the working group. Mr Gombos is a well-recognised expert on legal capacity law and is a disability rights activist with lived experience of forced psychiatric treatment and detention. Under Mr Gombos' direction the working group made great progress and established strong foundational principles for the GC. At the time of drafting the GC the working group was co-chaired by Theresia Degener (Germany), Vice Chairperson of the Committee, and Edah Maina (Kenya). Its

members were: Maria Cisternas Reyes (Chile), Chairperson of the CRPD Committee; Ronald Mc Callum (Australia), Vice Chairperson of the Committee; Carlos Rios Espinosa (Mexico), Vice Chairperson of the Committee. The working group was tasked with drafting the GC, which would then be put forward for adoption by the committee.

Before the comment was adopted, the committee published a draft version and requested submissions from civil society and state parties. Seventy submissions were received and changes were made to the final GC to incorporate some of the suggestions made.[15] This process was somewhat unconventional for a UN human rights monitoring body whose processes of deliberation are not always as open for public consultation.

Some may argue that a GC on Article 12 was overly ambitious of the CRPD Committee. It is the newest UN human rights monitoring body and this was its first GC. The subject of equal recognition before the law in the context of disability is generally underdeveloped in comparison to other rights[16] and Article 12 was one of the most contentiously negotiated articles in the convention.[17] However, it can also be argued that the contentious nature of Article 12 stimulated a greater need for urgent clarity on the rights and obligations contained within it. In addition, the interpretation of Article 12 has an impact on several, if not all, of the other articles of the CRPD. For example, without the right to legal capacity, it is very difficult to exercise the right to choose a residence (Article 19(a)) or the right to free and informed consent to medical treatments (Article 25(d)). For these reasons, it was essential to have an authoritative interpretation of Article 12 from the committee.

It was important for the committee to use the momentum that was stimulated around the entrance into force of the convention to push forward the conversations around Article 12. The committee had made significant progress with its day of general discussion and the working group headed by Mr Gombos. It risked losing momentum had it not gone ahead with the adoption of the GC at the time that it did. Furthermore, states were actively seeking clarification of what substituted and supported decision-making looked like and were forced to develop their own interpretations, which were not always in line with the principles of Article 12 as viewed by the committee and the wider the disability movement. States were then claiming compliance based on their own interpretations of Article 12.[18] Without the GC, states could continue to claim compliance based on these inaccurate readings.

The GC has the potential to be a positive tool for legislative and social change. It is the first international document that provides detail on the nature and significance of the right to equal recognition before the law for people with disabilities. It finally gives legislators, policymakers and others a concrete document to turn to when undertaking reform.

III. Examining the content of the GC

A. *Introduction*

The GC on Article 12 provides a roadmap for legal capacity law reform and the recognition and development of support for the exercise of legal capacity. Some have argued that the content of the GC is radical and impractical.[19] Others argue that the GC is a long overdue call for equality for people with disabilities.[20] Either way one views the GC, there is no denying that it calls for an overhaul of most of the existing legal capacity law.[21] There is also no denying that it demands equal treatment of persons with disabilities. Those who reject the GC are implicitly accepting that people with disabilities can be denied decision-making power and recognition before the law on a differential basis to those without a disability. This article proposes that the GC be used to combat the inequality

that exists in legal capacity law and as a practical guide to creating law and practice that is non-discriminatory, appropriately protective and works in practice.

The GC is divided into four parts: normative content, state obligations, interrelated articles and requirements for national implementation. This was done deliberately, in order to cover the theory and principles behind the normative content of the article and also to provide guidance on practical implementation of the article. The following two sections will examine both aspects of the GC and attempt to provide further detail.

B. *Normative content*

The first substantive section of the GC covers the 'normative content' of Article 12. This is a common structure for UN general comments.[22] This normative content section lays out the fundamental theory and principles behind the rights in Article 12. This section is followed by a section on 'state obligations' described by Article 12. The distinction between individual rights and state obligations is significant. Individual rights are entitlements that vest with the individual – for example, the right to equal recognition before the law, the right to legal capacity on an equal basis and the right to be recognised as a person before the law. State obligations, on the other hand, are what the state is required to do in order to implement individual rights. A state obligation cannot exist separate from a right.[23] For example, the state obligation to provide support for the exercise of legal capacity stems from the right to legal capacity on an equal basis. This section will explore the GC's description of the normative content of Article 12 and the following section will explore the state obligations required to implement the normative content.

1. *Mental capacity versus legal capacity*

One of the foundational concepts of the GC, and of Article 12, is the distinction between legal and mental capacity.[24] Legal capacity is the recognition of an individual as a rights holder and legal agent on an equal basis with others. It is the recognition of the individual's relationship with the state as an active subject. It also allows individuals to create and extinguish legal relationships between themselves. Those relationships have the potential to affect the individual's position before the law and the position of others before the law. A person who has her legal capacity recognised can participate in the creation and extinction of such relationships. An individual whose legal capacity is not recognised, has no power within these relationships.

Another way to understand legal capacity is as a granting of legal personhood – which incorporates both legal agency and legal standing.[25] Where an individual is recognised as possessing legal capacity, she is recognised as a full legal person with rights and responsibilities equal to other citizens. Where an individual is denied legal capacity to act or hold rights, she is no longer a legal person. She is not entitled to the same rights and responsibilities as other citizens. Instead, she is placed into a different category. This is a category of individuals who are objects instead of subjects. Their decision-making power is not respected; it is other individuals or the state that controls their lives. They exist at the whim of others.

It may be important to note at this point the power dynamics that are occurring between people who possess full legal capacity and those who do not. When an individual loses her status as a person before the law, her power to exercise agency is gone. Her successes and failures become dependent upon those around her who either choose to facilitate a good life for her, or neglect or abuse her. This is more severe in case of the full denial of an

individual's legal capacity, but remains true even in the case of a removal of legal capacity for a single decision. There is a long history of scholarly work documenting the effect of power and control on the lives of individuals.[26] There is not space here to fully explore that field, but it should be noted that theorists have overwhelmingly determined that where relationships of vastly unequal power balances exist, the risk of disempowerment and vulnerability increases dramatically.[27] In this way, denials of legal capacity create uneven power balances that can easily slide into disempowerment, abuse and neglect.

Mental capacity is a completely distinct concept. Mental capacity is an individual's decision-making ability. This can vary based on a number of factors, including: environment, social relationships, educational level, personality, impairment and health, among others. Some people with disabilities may have well-developed decision-making skills and others may not. The same is true for people without disabilities. The same is also true for people with intellectual disabilities, mental health diagnoses, dementia, and other disabilities that affect cognition.

Under the GC, these two concepts are distinct. Legal capacity is a legal recognition. That recognition is not dependent upon the individual's 'mental capacity' – or decision-making ability. According to the GC, the recognition of legal capacity must be given to every individual by virtue of being human.[28] This does not ignore variances in decision-making ability. It simply recognises that regardless of perceived or actual decision-making ability, every individual has a right to be respected as a full person before the law with rights, responsibilities and agency – this is the right to legal capacity on an equal basis.

It is the conflation of these concepts that has led to the widespread denials of legal capacity to individuals with disabilities around the globe. Individuals are judged as lacking mental capacity and therefore their legal agency and legal personhood is removed through the denial of legal capacity. The GC is stating that this is inappropriate and a violation of the human right to equal recognition before the law. Instead, states must recognise that all people have a right to legal capacity on an equal basis. This means that where legal capacity is denied, it must be denied to all on an equal basis, regardless of disability. Furthermore, if an individual is having difficulty making a decision or communicating a decision, the answer is not to deny legal capacity to the individual, it is instead to provide access to support for the exercise of legal capacity – which will vary greatly depending on the individual and the specific situation.[29] This is a groundbreaking distinction that the GC has explicitly made and has the potential to be revolutionary in legal capacity law, leading to a system that respects the right of all individuals to decision-making support, regardless of disability or decision-making ability.

2. *Substituted decision-making*

One of the most important achievements of the GC is the definition of substituted decision-making. Prior to the adoption of the GC, the CRPD Committee had stated in concluding observations to state reports[30] that supported decision-making must replace substituted decision-making regimes.[31] However, it had never defined 'substituted decision-making' or identified which systems fall within that definition. Many states were ready to reform, but did not understand what needed to be reformed.[32] The GC attempted to fill this gap. It has defined impermissible substituted decision-making as systems where:

(i) *capacity is removed* from a person, even if this is in respect of a single decision;
(ii) 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

(iii) 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.

This definition does not, necessarily, comport with everyone's common language use of the term 'substituted decision-making'. It does not include every situation in which one person makes a decision on behalf of another person. For example, the GC definition does not include the granting of powers of attorney and the appointment of other representatives that are agreed to and/or appointed by the individual for decision-making. However, any such system that exists must exist outside the capacity/incapacity paradigm and be otherwise compliant with Article 12.[33] This is quite important to emphasise, and will be discussed further below.[34] The GC is interpreting Article 12 to disallow those systems that meet the criteria listed above.

3. *Support for the exercise of legal capacity*

The committee did not create a rigid definition of support for the exercise of legal capacity in the GC. This is important for several reasons. First, this is a new and quickly evolving field. The text of the GC reflects that the committee recognised that it could not predict at the time of writing the GC exactly what direction the field would go in and what innovations might occur in coming years.[35] For this reason, it provided a broad definition of support to exercise legal capacity, which will allow room for growth.

In addition, the broad definition of support for the exercise of legal capacity reflects an understanding of the many and varied support needs of different individuals. As Australian CRPD Committee member and Emeritus Professor, Ron McCallum, has pointed out several times in public discussions, there may be some people with disabilities who do not want support at all. The main barrier for some may simply be that they are denied their legal capacity. Once the denial is removed, the barrier lifted, those individuals may be able to exercise their legal capacity completely independently.[36] Of course, this is not always the case, which is why Article 12 includes paragraph 3 and the state obligation to provide support.

The GC definition takes pains to include both formal and informal support for the exercise of legal capacity.[37] This means that support may come in the form of informal familial relationships or friends or may be provided through a more robust state-operated structure. Of course, there are pros and cons to both types. Informal support may not have sufficient safeguarding processes built in to protect the rights, will and preferences of the individuals using the support – but has the benefit that the providers of this support are more likely to know the person well and to be in the person's life for a long time. Formal support structures may be subject to greater safeguards and a guarantee of 'independence' but they run a serious risk of becoming over professionalised, creating another intrusion in the lives of people with disabilities, and potentially creating an additional barrier for the individual to overcome before her decision-making is recognised. It is likely that the best system will include room for both informal supports with safeguards and non-invasive formal supports. Although the GC does not dictate that a system must include both forms of support, it leaves plenty of room for that eventuality.

The GC provides more detail on the principles required for the effective implementation of Article 12(3) in its third section on the obligation of state parties. However, in the normative content, it does make clear that all support must be based on the rights, will and preferences of the individual.[38] It also makes it clear that support must be tailored to individual

needs.[39] Limited resources may be one problem that prevents the development of supports for every individual that are completely tailored to their needs. However, it is less resource intensive to, at a minimum, ensure that there are supports available that meet a range of different needs. This will require research into the type of support for the exercise of legal capacity that different individuals would like and how to best achieve that. The text of the GC encourages these developments without mandating exactly what they will look like.

The normative content section of the GC lays out the core theory and principles behind Article 12. These were based on ideas emerging from scholars in the field[40] and from the voices of disabled people's organisations.[41] These ideas challenge the norms that have existed previously in academia, in the medical profession and in disability services. They are demanding that people with disabilities no longer be treated as deserving a different balance between autonomy and paternalism. They demand that wherever the state is allowed to intervene in the lives of people with disabilities, it must be equally able to do so for people without disability – and vice versa, where people without disabilities are free to exercise autonomy, so must people with disabilities be free to exercise their autonomy.

C. *State obligations*

The CRPD imposes obligations on states to respect, protect and fulfil the rights contained in Article 12. The core state obligations set out in the GC are (1) to abolish regimes of substituted decision-making, (2) to make available mechanisms to support persons with disabilities in the exercise of their legal capacity, and (3) to create safeguards for measures relating to the exercise of legal capacity that centre on respect for the rights, will and preferences of the person. These three core obligations are dealt with in turn in the following sub-sections.

1. *Abolishing substituted decision-making regimes*

States are only obliged to dismantle regimes of substituted decision-making which fit the criteria described above. These would commonly include adult guardianship, conservatorship and judicial interdiction, among others. As described above, this obligation to abolish substituted decision-making does not require states to eliminate all decision-making systems which involve the appointment of a person to take a decision for another person. There are some examples of the appointment of outside decision-makers which would not violate this state obligation set out in the GC. For example, where a person chooses to delegate decision-making on a particular issue to a trusted person, whose role is to make the decision based on the appointer's will and preferences. This kind of delegation of decision-making responsibility should be available to persons with disabilities as well as persons without disabilities.

Another possible option for the use of outside decision-makers which would not violate the prohibition on substituted decision-making in the GC would be the appointment of a decision-maker in a situation of last resort, where the individual's will and preferences are unknowable and a decision needs to be made. Where this option is used, the GC makes clear that the outside decision-maker is to make a decision based on their 'best interpretation' of the person's will and preferences at the time the decision is made.[42] In order to formulate the 'best interpretation' possible of the individual's will and preferences, it will be important for the outside decision-maker to attempt all forms of communication

with the individual, and to speak with those close to the individual who can help to interpret communication and provide insight into the individual's will and preferences.

The fact that a person is not expressing will and preferences about a particular decision does not mean that the person is not expressing or communicating any wishes. For example, a person may not be expressing will and preferences about a particular financial or medical decision, but may clearly express will and preferences about who they do and do not trust, which must inform the work of an outside decision-maker in deciding who to speak with to develop the best interpretation possible of the individual's will and preferences. While a person's previously expressed wishes may help to inform the development of the 'best interpretation' of a person's will and preferences, it should also be acknowledged that for all of us, will and preferences change throughout time and generally do not remain static. The establishment of the 'best interpretation' of the person's will and preferences is therefore a difficult task. However, it is the use of this process, with the end goal of respecting will and preferences, that distinguishes this kind of decision-making from the types of substituted decision-making that constitute a violation of Article 12 in accordance with the GC.

The GC clarifies that it is not sufficient to develop supported decision-making systems in parallel with the maintenance of substitute decision-making regimes.[43] This is an important instruction for states parties as they embark on the law reform process. Many jurisdictions have introduced options which can be used by persons with disabilities to receive support in the exercise of legal capacity. However, they are simultaneously retaining denials of legal capacity that discriminate against persons with disabilities, such as adult guardianship and other forms of substituted decision-making. The Canadian province of British Columbia[44] and Sweden are two examples.[45] This does not fulfil the requirements of Article 12.

2. *Developing and recognising supports for the exercise of legal capacity*

As set out in the GC, support for persons with disabilities to exercise their legal capacity can take many forms – but all are based on the core principle of respect for the individual's will and preferences. Some of the parameters for providing support for the exercise of legal capacity stated in the GC include the requirements that a person's communication method, financial resources or support needs should not be barriers to the provision of support. The GC also states that: 'Legal recognition of the support person(s) formally chosen by a person must be available and accessible, and the State has an obligation to facilitate the creation of support, particularly for people who are isolated and may not have access to naturally occurring supports in the community. This must include a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge the action of a support person if they believe that the support person is not acting based on the will and preference of the person concerned.'[46]

The kind of support envisaged in the GC is one which highly values the autonomy and choice of the individual – stating that support can never be imposed and the person must always be free to reject offers of support or to end the support relationship at any time. So-called 'support' measures which could be imposed on a person against her will (for example, based on an assessment of mental capacity) would therefore not meet the criteria for compliance with Article 12. The GC also explicitly states that the provision of support cannot be based on assessments of mental capacity, and that 'new, non-discriminatory indicators of support needs are required in the provision of support to exercise legal capacity'.[47]

The GC states that all legal capacity law reform processes must be 'deliberate, well-planned, and include the consultation and meaningful participation of people with disabilities and their organizations'.[48] While the requirements set out in the GC for establishing supports for the exercise of legal capacity in domestic legal frameworks may seem relatively ambitious and daunting (especially in light of the statement that these rights attach at the moment of ratification), it is anticipated that the committee will take a positive view of good-faith efforts by states parties to bring their laws into compliance with Article 12, especially where those efforts involve the active participation of disabled people's organisations.

Some examples of ongoing law reform processes which have involved high levels of participation of persons with disabilities, and which attempt to move towards the requirements of Article 12 include the draft Persons with Disabilities Bill in India,[49] the development of legal capacity framework in the Canadian province of Newfoundland and Labrador[50] and the Irish Assisted Decision-Making (Capacity) Bill.[51] All of these law reform proposals have worked towards a framework inspired by Article 12, and have involved high levels of participation by persons with disabilities and their representative organisations.

3. *Safeguards to respect rights, will and preferences*

The final component of the state obligations outlined in the GC relates to the safeguards required in new mechanisms that offer support to persons with disabilities in the exercise of their legal capacity. Importantly, the GC specifies that many safeguards currently used in existing substituted decision-making mechanisms such as adult guardianship regimes, are no longer appropriate. It states that 'The "best interests" principle is not a safeguard which complies with article 12 in relation to adults.'[52] Instead, the GC states that 'the goal of safeguards is to ensure that the person's will and preferences are respected'.[53] The GC articulates some core safeguards which will be needed in new mechanisms to support the exercise of legal capacity, such as 'a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge the action of a support person if they believe that the support person is not acting based on the will and preference of the person concerned'.[54] Another important safeguard which respects will and preferences is the fact that the person using support must be free to reject offers of support, and to end the support relationship at any time she chooses.

This requires a radical shift away from paternalistic safeguards currently used in the name of protecting persons with disabilities. Nevertheless, the GC does not permit states to abandon or ignore people with disabilities who may be vulnerable to violence, abuse and exploitation. As will be discussed further below, it explicitly refers to Article 16 of the convention which includes the obligation on states to protect persons with disabilities from violence, exploitation and abuse. The GC simply obliges states not to deny an individual's legal capacity in the name of protecting them against abuse. In addition, in light of the non-discrimination principle articulated in the convention and reiterated in the GC, measures taken by states to protect against violence, exploitation and abuse must apply to both persons with and without disabilities equally. If a state would not restrict the legal capacity of a woman without disabilities who chooses to stay in an abusive domestic relationship, it should also not restrict the legal capacity of a woman with disabilities in these circumstances. Instead, the state's obligation extends to offering practical support to both women with disabilities and women without disabilities – while at the same time respecting the individual's legal agency.

The GC confirms that the right to equal recognition before the law is a civil and political right.[55] This is significant because in international law there are different implementation requirements for civil and political rights than there are for social, economic and cultural rights. Civil and political rights attach to an individual at the moment of ratification. State parties are required to take steps to immediately realise the rights. Social, economic and cultural rights are subject to progressive realisation based on the resources available to the state party and the amount required for implementation. In this way, civil and political rights have more stringent requirements for implementation than social, economic and cultural rights. The GC makes it clear that Article 12 stems from the civil and political right to equal recognition before the law, and therefore all the individual rights and state obligations within Article 12 must be immediately realised. This does not mean that there is an expectation that state parties can snap their fingers and create an Article 12 compliant legal structure overnight. However, it does mean that the committee is expecting all states parties to be able to show that they have taken measureable steps towards the realisation of Article 12. They would also likely require that where state parties have not yet realised Article 12, there is a robust plan for how that will be accomplished in the near future. In line with the spirit of the CRPD, that plan must include significant consultation and participation of people with disabilities. Ideally, the plan should be co-produced by people with disabilities, and more specifically people with cognitive disabilities who have been historically discriminated against in this area.

D. *Relationship between Article 12 and other CRPD articles*

The concept of legal capacity permeates many aspects of the legal system: contract and property law; consent to treatment; consent to sex; and other areas. The GC sought to address how the concept of 'universal legal capacity'[56] can be implemented throughout a state party's legal system as a whole. In the section titled 'Relationship with other provisions of the convention', the GC attempts to give a brief examination of the impact of the right to equal recognition before the law on other rights enumerated in the convention.

The core requirement of Article 12, as discussed above, is the duty to recognise the legal capacity of persons with disabilities on an equal basis with others, and to prevent discriminatory denials of legal capacity on the basis of disability. This is reflected in the first interrelated article discussed in this section of the GC, Article 5 on equality and non-discrimination. Therefore, the key steps for states when considering the requirement of non-discrimination in the recognition of legal capacity across all aspects of a domestic legal framework will be as follows.

The first step is to establish whether the particular issue involves an exercise of legal capacity. Not all decisions involve an exercise of legal capacity. The definition of legal capacity provided in the GC includes issues that involve the exercise of the individual's legal agency (entering, altering or ending legal relationships) and/or the individual's legal personality (the individual as a rights holder). For example, the freedom to choose where and with whom to live (connected to living independently and being included in the community, Article 19 CRPD) may involve an exercise of legal capacity – such as the signing of a tenancy agreement or the purchase of a property. However, a decision to return to live with parents may not involve an exercise of legal capacity – where no legal agency is being exerted in the process of the decision.

In the case of institutionalisation or individuals living in controlled settings, such as group homes, it may actually require an exercise of legal capacity in order to make day-to-day decisions. For example, an individual living in an institution will often have her

daily finances highly regulated. If she does not assert her legal agency and actively seek to control of her own finances, she will likely be subjected to the decisions of the institutional authority. In fact, in many cases, even where individuals are clearly expressing a desire to have more control over their finances in institutional settings, they are denied such control. The individual is exercising her legal capacity when she requests greater control of her finances, and would also be exercising legal capacity in exercising that control if it was granted. Because of the high level of power that institutional authorities have over residents, choices that may not usually constitute an exercise of legal capacity might constitute such an exercise if the individual is forced to exert her legal agency to get her decision recognised and respected.

Once it is clear that the decision involves an exercise of legal capacity, the next step towards achieving compliance with Article 12 is to check whether legal capacity is denied to persons with disabilities on an equal basis with persons who do not have disabilities. In essence, this is a requirement to assess whether denials of legal capacity are discriminatory on the basis of disability in purpose or effect.

The final step in applying the requirements of Article 12 to other areas of law is to check whether the state provides access for persons with disabilities to support in exercising their legal capacity in that specific legal transaction or relationship. As discussed above, the term 'support to exercise legal capacity' is interpreted broadly in the GC. It includes a wide variety of support arrangements, only one of which may be 'supported decision-making' or specific support agreements. So in the context of a tenancy agreement, the support a person requires to exercise legal capacity may simply be to have the implications of the tenancy agreement explained to her in a manner she can understand. If the legal framework does not provide for this kind of support, or does not recognise alternative forms of communication which the person may use, or does not accommodate the use of a support agreement for an individual entering a tenancy arrangement, this may constitute both a form of discrimination on the basis of disability (Article 5 CRPD) as well as a violation of the right to recognition of legal capacity on an equal basis as enshrined in Article 12.

The core interrelated articles connected to Article 12 set out in the GC reference the aspects of domestic legal systems where the most obvious and pervasive violations of legal capacity tend to occur. These include the right to access justice in Article 13 (especially violations of the right to legal capacity relating to legal standing, capacity to instruct a lawyer and provide testimony on an equal basis with others).[57] Other common examples of situations where the right to legal capacity is discriminatorily denied to persons with disabilities listed in this section of the GC include the right to vote and stand for election (Article 29),[58] the right to marry and to found a family (Article 23),[59] and the right to provide informed consent to medical treatment on an equal basis with others (Articles 14, 17 and 25).[60] In essence, this section of the GC serves as a reminder to states parties that in bringing their domestic legal frameworks into conformity with Article 12, much more is required than the reform of adult guardianship and other substituted decision-making mechanisms, although this is of course an important step in the right direction. Since Article 12(2) requires that persons with disabilities enjoy legal capacity on an equal basis with others 'in all aspects of life' this will require reform of many aspects of domestic law (including contract law, criminal law and consent to medical treatment) to ensure full compliance with Article 12.

IV. Common concerns with the GC

The text of the GC is not overly prescriptive. This leaves room for states to create change that is culturally and socially responsive to their context. However, it also leaves many

questions unanswered in terms of the practical implementation of Article 12. The following section attempts to answer some of those questions based on an interpretation of the core concepts in the GC and on the authors' personal and professional experiences in legal capacity reform. The core issues addressed are: respecting will and preferences resulting in serious harm and reconciling conflicting will and preferences.

A. *Addressing the hard cases – 'best interpretation' of will and preferences*

The core guidance provided by the GC regarding the 'hard cases' where will and preferences are unknown is that decisions should be made using the 'best interpretation' of the person's will and preferences.[61] However, this does not fully address all situations where difficulties arise in determining, or realising, an individual's will and preferences. The main types of 'hard cases' that are commonly discussed with regard to legal capacity are cases where an individual's will and preferences are clear – but to support these wishes or respect the individual's autonomy would result in serious harm to the person or to others and cases where an individual's will and preferences are conflicting. The GC does not explicitly address these situations, but it is possible to develop an approach to these issues guided by the principles of the GC.

It should be noted here that there are important practice issues that need to be dealt with in order to ensure that it is the individual's true will and preference that is being acted on. There is a risk that people in positions of power, such as medical professionals and supporters, may profess to be acting on the will and preference of the individual when they are really carrying out their own desires. There is not scope to explore this here, but there is a need for more research and analysis in this area, as well as a great potential to build on the existing wealth of scholarship related to this.[62]

1. *Will and preferences resulting in serious harm*

In a system that prioritises respect for will and preferences, it is possible that a person may express a will and preference to engage in serious self-harm, or harm to others. In fact, expressions of these kinds are not uncommon. Critiques of Article 12 have presented this as a situation where will and preferences cannot be respected.[63] The GC is not prescriptive on this issue – but it does set some interpretative principles that can be useful in this context.

Different legal systems have different standards for how much harm an individual is allowed to engage in before state intervention will occur – and whether intervention is only permissible where harm to others is proposed, as opposed to harm to the individual. As long as these standards are applied in a non-discriminatory way to persons with disabilities, on an equal basis with persons without disabilities, there should be no conflict with Article 12. Support persons are also not obliged to support an exercise of legal capacity that would implicate them in civil or criminal liability at the domestic level. In other words, a support person, or outside decision-maker, does not have to respect a person's will and preferences if to do so would implicate her in a criminal act, or open her to liability for civil negligence. This does not mean that the individual should not be supported to realise her will and preferences. However, it would be legally impractical and impinge on the rights of the supporter if a system were created that forced the supporter to take illegal actions.[64]

It should be emphasised here again that respecting a person's will or preferences in these circumstances should not amount to an abandonment of the individual. Rather, the support

person should explore the reasons behind such will and preferences – as they may be an indication of distress – and should continue to offer various forms of support to the person which remain within the parameters of that state's legal system. It may be that the person's will and preferences do not amount to an unlawful act, but would nonetheless result in serious harm to the person or to others. However, where the person's will and preferences are clear, the GC does not suggest that there is any basis for failure to respect will and preferences in an exercise of legal capacity. This does not mean that no state intervention is permissible under Article 12, but rather that any intervention must be imposed on an equal basis on persons with and without disabilities, and that such interventions should not amount to substituted decision-making.[65]

For example, in a world in which Article 12 is fully implemented into domestic law, state intervention that amounts to a denial of legal capacity to prevent domestic abuse is permissible as long as it applies equally to people with and without a disability. If a supporter thinks that a person's decision to move in with a partner who is suspected of abuse may constitute a risk of harm, it may not always amount to such a serious risk as to warrant an intervention that restricts the exercise of that person's legal capacity. This does not mean that the supporter has no obligation towards the person in these circumstances. They may have a legal obligation to report suspected abuse to the relevant authorities, and to offer additional support to the person so that if necessary the person can leave the relationship. However, according to the GC, if it does amount to such a serious risk that a denial of legal capacity is necessary, the law should allow the state to intervene only if it can do so equally for people with and without disabilities. In other words, the state must take the same approach to legal capacity denials for people with and without disabilities.

States must be extremely cautious in creating law or policy that allows for situations in which legal capacity is denied and the will and preference of an individual will not be respected. This should be permitted only in the rarest situations. It must be done in a way which applies equally to persons with and without disabilities. The level of harm that a state will tolerate before intervening must also be carefully constructed.[66] This may be a complicated process and there will often not be easy or quick solution. Cognitive disability and the social exclusion and discrimination that can accompany it will be complicating factors that must be considered.

Supporting an action which may result in serious harm may make the supporter or outside decision-maker extremely uncomfortable, but this does not equate to a justification for failure to adhere to the supporter's duty to respect will and preferences, if such an action is lawful. Nevertheless, since the person being supported must be able to terminate the support relationship at any time, the same should be said for a supporter who feels they can no longer fulfil their duties towards the person or respect the person's will and preferences. In these circumstances however, the state still has an obligation to ensure that the individual is provided with access to support for the exercise of legal capacity. This may mean facilitating the search for a different support person or the appointment of an outside decision-maker if necessary where the person's will and preferences are not clear or unknown.

2. *Conflicting will and preferences*

The term 'will and preferences' is not defined in the GC or in the convention. However, in general, an individual's 'will' is used to describe the person's long-term vision of what constitutes a 'good life' for them, whereas an individual's 'preferences' tends to refer to likes and dislikes, or ways in which a person prioritises different options available to them. It is

possible to imagine a situation in which a person's will might conflict with their preferences; for example, a person with anorexia may have a will to live, but a preference not to eat; or a person with gum decay may have a will to be free from pain, but a preference not to go to the dentist.

Where this situation arises and the person has not made an advance directive setting out their wishes, or appointed a person to support or assist them in exercising their legal capacity, this may require the appointment of an outside decision-maker to find the 'best interpretation' of the individual's will and preferences.[67] The first step for the outside decision-maker should be to attempt to resolve the conflict the between will and preferences by discussing with the person how they would like to exercise their legal capacity in this situation. This will involve engaging in all forms of communication with the person, and speaking with those the person indicates are trusted supporters to inform the interpretation of the individual's will and preferences. It may happen during this process that the will and preferences of the person become clear. Where the person's will and preferences are clear but constitute a significant risk to the person's life, the process outlined in the previous subsection should be followed. However, if the will and preferences of the person remain unclear following all efforts to discover them, and a decision still needs to be made, the outside decision-maker will have to make a decision informed by the 'best interpretation' of the person's will and preferences they arrive at, given all the information available about the person's wishes.[68]

Decisions in these so-called 'hard cases' will inevitably be difficult ones to make. However, these decisions have also been difficult to make under existing substituted decision-making regimes that apply a 'best interests' test to determine how the decision should be made. The support paradigm, while still facing dilemmas in determining and carrying out an individual's will and preference, is more rights protective and fosters equality.

The GC reflects a presumption that even in the most difficult of circumstances, it is almost always possible to arrive at some understanding of an individual's values, views and beliefs. Human beings often hold contradictory values and beliefs that are difficult to reconcile. Therefore, in situations involving an exercise of legal capacity, where will and preferences are unknowable, the support paradigm in the GC requires that a good faith effort will be made to arrive at the decision which best reflects the individual's wishes. This is what distinguishes the support paradigm of legal capacity from substituted decision-making regimes. The end goal of the support process is not to impose an outside decision which others think is in the person's objective best interests, but to arrive at a decision, as informed as it possibly can be, by the individuals' own will and preferences.

V. Keys to reform – achieving compliance with Article 12

The path to law reform to bring domestic legislative frameworks[69] into conformity with Article 12 CRPD will inevitably be long and complex – but many jurisdictions have demonstrated an intention to engage in law reform and taken the first steps to ensure that their legal capacity laws do not discriminate against persons with disabilities, as discussed above in the section on state obligations. Given the fact that the concept of legal capacity is intertwined in so many aspects of domestic legal systems, the task of commencing reform can seem daunting and overwhelming. However, if the key steps to reform set out in the GC are followed, states can have confidence that they are making good faith efforts to achieve compliance, and such efforts are likely to be looked upon favourably by the UN committee.

These key steps towards reform are reiterated in the final section of the GC on 'implementation at the national level'. The first step is to recognise persons with disabilities

as possessing legal capacity on an equal basis with others in all aspects of life.[70] This requires a review of existing legislative frameworks to determine which aspects of the law are, or have the potential to be, discriminatory on the basis of disability in purpose or effect. Once the relevant laws in need of reform have been identified, and potential for discrimination on the basis of disability is addressed, the next step is to ensure that persons with disabilities have access to the supports they require in exercising legal capacity across various areas of legal decision-making.[71] As discussed throughout this article, these supports can take a wide variety of forms, and their construction and operation will likely vary greatly from one jurisdiction to another, based on a diversity of political, legal, social, economic and cultural systems. However, as a general guideline, systems of support should meet the essential criteria enumerated in paragraph 25 of the GC in order to ensure compliance with Article 12.

The final step in the reform process is to ensure that the will and preference paradigm fully replaces the 'best interests' principle, which guides many existing substituted decision-making regimes. This will require, as described above, detailing how the 'hard cases' are to be addressed, where will and preferences remain unknown after significant efforts to discover these have been made, and an outside decision-maker may be required to make a decision based on the 'best interpretation' of an individual's will and preferences. The GC also makes explicit that in all processes of law and policy reform, states are required to ensure the meaningful participation of persons with disabilities and their representative organisations in the reform process, in keeping with the spirit and purpose of the CRPD as a whole.[72] This requirement is premised on the notion that persons with disabilities are best placed to determine what kind of supports to exercise legal capacity are most appropriate for them and to put forward concrete proposals for how the systems of support they use in their daily lives can best be recognised by the legal system, without further over-regulating the lives of persons with disabilities and those who support them.

VI. Conclusion

Legal capacity reform is an exciting field to be engaged in. It empowers and gives voice to people with disabilities who can finally see in international human rights law that people with disabilities have the right to make decisions and have those decisions respected on an equal basis with others. The significance of this legal change should not be understated. This may be the first time in history that there is an international recognition of the full and inalienable right to legal personhood and agency of people with disabilities. The provision of services to people with disabilities is not recognition of their personhood and agency. Services may be an essential aspect of an individual's life, but they become another system of oppression if they do not respect and uphold the personhood and agency of that individual through the safeguarding of their rights, will and preferences.

Equality is the key to the realisation of the right to legal capacity of people with disabilities. Historically, people with disabilities have been denied legal personhood and agency on a differential basis. This has fostered inequality in legal capacity law that has permeated legal and social systems. The starting point for change is dismantling these unequal systems. It is not recreating structures that perpetuate a different legal status of people with disabilities. Even in the hard cases, legislative response must apply equally to people with and without disabilities.

The GC is a roadmap for this legal and social change. It is not a perfect document, nor could it have been expected to be. It was written at a particular point in time, when global law reform on legal capacity was just beginning. It had to be flexible enough to be

applicable globally, while providing enough guidance to give states direction for reform. However, the core tenants of the GC provide sufficient guidance to states to commence a process of law reform.

The GC is a starting point for a very important conversation that provides the baseline for many other rights. Where an individual is not respected as a person and legal agent, many of their other rights are in jeopardy. For example, the right to health is in jeopardy where a substitute decision-maker makes a medical decision that does not comport with the individual's own desires for her body. Similarly, the right to family life is in jeopardy where an individual is not recognised as having the legal capacity to marry, enter into sexual relationships or parent.

The GC challenges deeply entrenched procedures and philosophies of many professions and legal systems – such as guardianship, psychiatry, fitness to plead procedures, and others. Those working in these areas can view the GC as a new way of conceptualising their work. Even for those who find it difficult to take on board all of the concepts of the GC and of Article 12, it can still be a useful tool for reflection and critical analysis of current systems. The voices of people with disabilities that are present in Article 12 should be listened to carefully. The GC can be used as a framework for these discussions. Its innovations should be acknowledged, its strengths built upon, and its challenges further developed.

Disclosure statement

No potential conflict of interest was reported by the authors.

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before the law and legal capacity. She is also interested in the development of clinical legal education as a tool for social change.

Notes

1. For a discussion of the monitoring innovations in the CRPD and also the missed opportunities, see M.A. Stein and J.E. Lord, 'Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential', *Human Rights Quarterly* 32, no. 3 (2010): 689.
2. See for example L. Barton, 'The Struggle for Citizenship: The Case of Disabled People', *Disability, Handicap & Society* 8, no. 3 (1993): 235.
3. See C. Barnes, *Disabled People in Britain and Discrimination* (London: Burst & Co. 1991). See also G. Quinn, M. McDonagh, and C. Kimber, *Disability Discrimination Law in the United States, Australia and Canada* (Dublin: Oak Tree Press, 1993).
4. See S.R. Bagenstos, *Law and the Contradictions of the Disability Rights Movement* (New Haven: Yale University Press, 2009).
5. For a discussion of the impact of Article 12 on legal capacity law in the United States see K.B. Glen, 'Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond', *Columbia Human Rights Law Review* 44, no. 93 (2012): 123.
6. Office of the United Nations High Commissioner of Human Rights (OHCHR), 'Legal Capacity' (Background Conference Document for the Sixth Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 1–12 August 2005).
7. For a larger discussion of the impact of the denial of the right to equal recognition of the law through the denial of legal capacity see E. Flynn and A. Arstein-Kerslake, 'Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity', *International Journal of Law in Context* 10, no. 1 (2014): 81.
8. A. Dhanda, 'Universal Legal Capacity as a Universal Human Right', in *Mental Health and Human Rights: Vision, Praxis, and Courage*, ed. Michael Dudley, Derrick Silove and Fran Gale (Oxford: Oxford University Press, 2012), 177, 178.
9. For a discussion of the reformulation of human rights in the context of disability, see F. Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?', *Human Rights Quarterly* 30, no. 2 (2006): 494.
10. See R. Kayess and P. French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities', *Human Rights Law Review* 8 (2008): 1.
11. See for example, Cambridge Intellectual & Developmental Disabilities Research Group, Submission on the Draft General Comment on Article 12 of the Convention (January 2014), http://www.ohchr.org/Documents/HRBodies/CRPD/GC/UniversityCambridgeGCArticle12.doc; and The Law Society of Scotland, Submission on the Draft General Comment on Article 12 of the Convention (November 2013), http://www.ohchr.org/Documents/HRBodies/CRPD/GC/LawSocietyOfScotlandArt12.doc.
12. See for example, Dhanda, 'Universal Legal Capacity as a Universal Human Right'.
13. See Flynn and Arstein-Kerslake, 'Legislating Personhood'.
14. For information on the day of general discussion, see the CRPD Committee website: http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD2009.aspx.
15. Not all suggestions from the submissions were incorporated into the final GC, however all submissions were read and considered.
16. A. Arstein-Kerslake, 'A Call to Action: The Realisation of Equal Recognition Under the Law for People with Disabilities in the EU', in *European Yearbook of Disability Law*, ed. L. Waddington, G. Quinn, and E. Flynn (Cambridge: Intersentia, 2014), vol. 5, 75, section 3.2.1.
17. T. Minkowitz, '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 (2006–2007): 405, 411. The controversial nature of Article 12 is also evidenced by the high number of reservations, understandings and declarations that have been lodged on Article 12. A list of them can be found on the UN Enable website: http://www.un.org/disabilities.

18. See, for example, Austria's 2013 State Report that describes least restrictive guardianship when reporting on Article 12, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial Report Submitted under Article 35 of the Convention, Austria*, paragraph 140, UN Doc. CRPD/C/AUT/1 (2 November 2010); and Draft General Comment No. 1 on Article 12 of the Convention on the Rights of Persons with Disabilities – submission by the Norwegian Government (2013), http://www.ohchr.org/Documents/HRBodies/CRPD/GC/Norway_Art12.doc.
19. For example, see The Law Society of Scotland, submission to the CRPD Committee to the Draft General Comment on Article 12 CRPD (November 2013), http://www.ohchr.org/Documents/HRBodies/CRPD/GC/LawSocietyOfScotlandArt12.doc; University of Cambridge, Cambridge Intellectual & Developmental Disabilities Research Group, submission to the CRPD Committee to the Draft General Comment on Article 12 CRPD (31 January 2014), http://www.ohchr.org/Documents/HRBodies/CRPD/GC/UniversityCambridgeGCArticle12.doc; and The Finnish Human Rights Centre, submission to the CRPD Committee to the Draft General Comment on Article 12 CRPD (February 2014), http://www.ohchr.org/Documents/HRBodies/CRPD/GC/NHRIFinlandArt12.doc.
20. For example, see DREAM Training Network, submission to the CRPD Committee to the Draft General Comment on Article 12 CRPD (February 2014), http://www.ohchr.org/Documents/HRBodies/CRPD/GC/DREAMArt12.doc; World Network of Users and Survivors of Psychiatry and the Center for the Human Rights of Users and Survivors of Psychiatry, joint submission to the CRPD Committee to the Draft General Comment on Article 12 CRPD, http://www.ohchr.org/Documents/HRBodies/CRPD/GC/WNUSP-CHRUSP.doc; and Maria Walls, submission to the CRPD Committee to the Draft General Comment on Article 12 CRPD, http://www.ohchr.org/Documents/HRBodies/CRPD/GC/MariaWalls_Art.doc.
21. For example, for an analysis of the England and Wales Mental Capacity Act and its non-compliance with Article 12, see W. Martin, 'Consensus Emerges in Consultation Roundtables: The MCA is Not Compliant with the CRPD' (August 2014) Mental Capacity Law Discussion Paper: CPRD and MCA Compatibility Consultation, Thirty-Nine Essex Street Newsletter; and L. Series, A. Arstein-Kerslake, P. Gooding, and E. Flynn, 'The Mental Capacity Act 2005, the Adults with Incapacity (Scotland) Act 2000 and the Convention on the Rights of Persons with Disabilities: The Basics' (June 2014) Mental Capacity Law Discussion Paper, Thirty-Nine Essex Street Newsletter, http://www.39essex.com/docs/newsletters/crpd_discussion_paper_series_et_al.pdf.
22. See for example, Committee on Economic, Social and Cultural Rights, General Comment 15, The Right to Water (Twenty-Ninth Session, 2003), UN Doc. E/C.12/2002/11 (2002); and Committee on Economic, Social and Cultural Rights, General Comment 13, The Right to Education (Twenty-First Session, 1999), UN Doc. E/C.12/1999/10 (1999).
23. J. Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 2013), 8.
24. For a discussion, see A. Arstein-Kerslake and E. Flynn, 'The Support Model of Legal Capacity: Fact, Fiction or Fantasy?', *Berkeley Journal of International Law* 32, no. 1 (2014): 124, 127–28. The GC discusses this concept under the normative content of Article 12, paragraph 2, which guarantees the right of people with disabilities to legal capacity on an equal basis with others in all areas of life. Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law, paragraphs 12–15, UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session (April 2014).
25. For further discussion, see Flynn and Arstein-Kerslake, 'Legislating Personhood'.
26. See for example, P. Bourdieu, *Language and Symbolic Power* (Cambridge, MA: Harvard University Press, 1993); and M. Foucault, *Discipline & Punish: The Birth of the Prison*, 2nd ed. (New York: Vintage, 1995).
27. For a discussion see J. Sidanius and F. Pratto, *Social Dominance: An Intergroup Theory of Social Hierarchy and Oppression* (Cambridge: Cambridge University Press, 2001).
28. Some may raise arguments of animal personhood, or the right of animals to similarly have legal capacity granted on an equal basis. That is beyond the scope of this article. This article implicitly accepts that the rights of persons and animals are different. It argues instead that all *people* have a right to equal recognition before the law. For a discussion of the legal personhood of animals, see P. Singer, 'Speciesism and Moral Status', *Metaphilosophy* 40, no. 3–4 (2009): 567.

29. Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law.
30. The report that each state party must submit to the Committee on the Rights of Persons with Disabilities every four years which provides an overview of the state of the human rights of persons with disabilities, according to the CRPD, in their jurisdiction. Convention on the Rights of Persons with Disabilities (CRPD), Article 35, 2515 U.N.T.S. 3 (13 December 2006).
31. See, for example Consideration of Reports Submitted by States Parties under Article 35 of the Convention: Concluding Observations, Tunisia, Committee on the Rights of Persons with Disabilities (CRPD), 5th Session, at 4, UN Doc. CRPD/C/TUN/CO/1 (11–15 April 2011); Consideration of Reports Submitted by States Parties under Article 35 of the Convention: Concluding Observations, Spain, Committee on the Rights of Persons with Disabilities (CRPD), 6th Session, at 5, UN Doc. CRPD/C/ESP/CO/1 (19–23 September 2011).
32. See for example Hungary and New Zealand's submission to the draft GC consultation process. Contribution by Hungary, Draft General Comments on Articles 9 and 12 of the Convention on the Rights of Persons with Disabilities, page 2 (21 February 2014); and New Zealand submission on draft general comment on Article 12: Equal recognition before the law, page 3 (11 March 2014).
33. For example, in the case of a power of attorney, in order for it to be compliant with Article 12, according to the GC, the entry into force of such a power should not be contingent on an assessment that the person who granted the power now lacks mental capacity. Instead, an individual should be able to set her own parameters for when a power of attorney enters into force.
34. See below in 'Abolishing substituted decision-making regimes'.
35. Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law, paragraphs 16–17.
36. Ibid., paragraph 19.
37. Ibid., paragraphs 17–18.
38. Ibid., paragraph 17.
39. Ibid., paragraph 18.
40. See for example, A. Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?', *Syracuse Journal of International Law and Commerce* 34, no. 2 (2006–2007): 429; Minkowitz, 'The United Nations Convention on the Rights of Persons with Disabilities'; Flynn and Arstein-Kerslake, 'Legislating Personhood'; and B. McSherry, 'Legal capacity under the Convention on the Rights of Persons with Disabilities', *Journal of law and Medicine* 20, no. 1 (2012): 22.
41. See submissions to the draft general comments from Autistic Minority International, World Network of Users and Survivors of Psychiatry, Sociedad y Discapacidad, http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx.
42. Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law, paragraph 21.
43. Ibid., paragraph 24.
44. The Representation Agreement Act 1993 in British Columbia allows for a representative chosen by the person to support the individual in the exercise of legal capacity, although the Adult Guardianship Act 1996 retains the option of substitute decision-making being imposed on a person who lacks decision-making capability.
45. Sweden's Personal Ombuds system is widely regarded as a good example of supporting individuals with psycho-social disabilities in the exercise of legal capacity. See Swedish National Board of Health and Welfare, 'A New Profession is Born – Personligt ombud, PO', Västra Aros, Västerås, November 2008, 16–17, http://www.personligtombud.se/publikationer/pdf/A%20New%20Proffession%20is%20Born.pdf. However, Sweden maintains two forms of substituted decision-making in its legal framework which violate Article 12 – custodianship and trusteeship. See http://www.international-guardianship.com/pdf/GBC/GBC_Sweden.pdf.
46. Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law, paragraph 25(d).
47. Ibid., paragraph 25(i).
48. Ibid., paragraph 26.
49. Committee Appointed by the Ministry of Society Justice and Empowerment, Government of India, *The Rights of Persons with Disabilities Bill*, Centre for Disability Studies, Nalsar

University of Law (2011), http://socialjustice.nic.in/pdf/report-pwd.pdf. See also the proposed amendments to the National Trust Act, National Trust Act Amendments 2011 (India).
50. See Policy Document Submitted to Justice Aims to Aid People with Intellectual Disabilities, Newfoundland Association of Community Living, http://www.nlacl.ca/news/article/getting-power-make-decisions-policy-document-submi/.
51. Assisted Decision-Making (Capacity) Bill 2013 (Act No. 83/ 2013) § 10 (Ir.), http://www.oireachtas.ie/documents/bills28/bills/2013/8313/b8313d.pdf.
52. Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law, paragraph 21.
53. Ibid., paragraph 25(h).
54. Ibid., paragraph 25(d).
55. Ibid., paragraphs 1 and 30.
56. Ibid., paragraph 8.
57. Ibid., paragraphs 34–5.
58. Ibid., paragraphs 44–5.
59. Ibid., paragraph 27.
60. Ibid., paragraphs 36–8.
61. Ibid., paragraph 21.
62. See for example, Allison B. Seckler, Diane E. Meier, Michael Mulvihill, and Barbara E. Cammer Paris, 'Substituted Judgment: How Accurate Are Proxy Predictions?', *Annals Internal Medicine* 115, no. 2 (1991): 92–98; Louise Harmon, 'Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment', *Yale Law Journal* 100, no. 1 (1990): 1–71; and Alexia M. Torke, G. Caleb Alexander, and John Lantos, 'Substituted Judgment: The Limitations of Autonomy in Surrogate Decision Making', *Journal of General Internal Medicine* 23, no. 9 (2008): 1514–17.
63. See for example, G. Szmukler, R. Daw, and F. Callard, 'Mental Health Law and the UN Convention on the Rights of Persons with Disabilities', *International Journal of Law and Psychiatry* 37, no. 3 (2014): 245.
64. This is a complex issue, particularly in regard to assisted suicide. There is not space in this article to explore it fully. However, there is no indication that Article 12 would require supporters to break existing law in their efforts to provide support.
65. Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law, paragraph 13.
66. For a discussion of this in the mental health context, see Piers Gooding and Eilionóir Flynn, 'Querying the Call to Introduce Mental Capacity Testing to Mental Health Law: Does the Doctrine of Necessity Provide an Alternative?' *Laws* 4 (2015): 245–71.
67. Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law, paragraph 21.
68. Although it is outside the scope of this article, this is an important area for continued research, as discussed above, at footnote 67.
69. For a discussion on the domestic implementation of Article 12 in the United Kingdom, see P. Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law', *Modern Law Review* 75, no. 5 (2012): 752.
70. Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law, paragraph 46(a).
71. Ibid., paragraph 46(b).
72. Ibid., paragraph 46(c).