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CRPD and transformative equality

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Abstract

This reflection responds primarily to the papers on legal agency and state intervention, with brief comments on the two other papers. The concept of transformative equality, developed in jurisprudence under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), can promote a deeper understanding of the rights of persons with disabilities.[1] *In particular, it is useful to address power relations between disabled and non-disabled persons not only with respect to family members and medical professionals, but also in the institutions of law and the state.*

I. State of the literature

As a participant in the development of UN Convention on the Rights of Persons with Disabilities (CRPD) Article 12, I disagree with de Bhailís and Flynn's (2017) presentation of its drafting history.[2] As I have described previously (Minkowitz, 2010), the paradigm shift crystallised in the 2004 Working Group, although it took the remainder of the process to persuade states, while also strengthening the linkage with existing provisions under CEDAW and improving the quality of the legal drafting. The Working Group text included the key elements that were retained in the adopted text of Article 12, in particular equal/full legal capacity, support/assistance in the exercise of capacity and assurance that support would not interfere with legal capacity/respect for the rights, will and preferences of the person. Following the Working Group, and again following the adoption of the CRPD, I judged the resulting texts to sustain a legal argument that would uphold the desired paradigm. Each text had its strengths and weaknesses, and comparison is of value along with position papers and intermediate texts as well as the informal summary of discussions, from a historical point of view; de Bhailís and Flynn (2017) have not undertaken a full historical exposition, nor do I attempt that here.

The World Network of Users and Survivors of Psychiatry and Inclusion International each brought to the 2004 Working Group a concept of full legal capacity and an entitlement to use support, and this was incorporated into the Working Group text. Those organisations continued to lead the work of the International Disability Caucus (IDC), the forum for advocacy by organizations of people with disabilities and supporters in the Convention process, and their representatives were the primary IDC spokespersons on legal capacity throughout the process. The 2005 IDC document cited by de Bhailís and Flynn emphasised its improvement over the Working Group text as part of a persuasive strategy to address states that had reacted negatively to the text

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1 Committee on the Elimination of Discrimination Against Women, General Recommendation No. 25 (2004), paras 7, 8, 10; see also Holtmaat (2013).

2 I represented the World Network of Users and Survivors of Psychiatry throughout the drafting and negotiations, and coordinated the team of WNUSP representatives as it developed. WNUSP is a global democratic organization representing users and survivors of psychiatry, also considered persons with psychosocial disabilities. I served on the 2004 Working Group, in the IDC Steering Committee and as coordinator of IDC input on articles including legal capacity, liberty and freedom from torture and ill-treatment.

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that emerged from the Working Group. Although a few state delegations spoke knowledgeably in favour of the support paradigm in the third Ad Hoc Committee meeting immediately following the Working Group in 2004, the majority, which had not had the benefit of discussions in the Working Group, reacted from the old paradigm and did not view persons with disabilities as having full legal capacity. The two-week Working Group meeting had not been sufficient to persuade all states that attended; however, it was a significant achievement that the body of the text reflected the new paradigm and disagreements were placed in footnotes. The Working Group was a pivotal point for the incorporation of IDC views on legal capacity into the text, which was made possible by the equal participation in the Working Group of twelve IDC members with twenty-seven state delegations and the single national human rights institution. In emphasising the 2005 IDC text, de Bhailís and Flynn repeat the error made by Dhanda (2007), who failed to acknowledge the strategic rather than substantive character of IDC changes from that point onward. The history is significant to an understanding of the key elements of the text from the perspectives of organizations of persons with disabilities (disabled people's organizations, or DPOs) as well as an accurate assessment of DPO contributions on legal capacity and other contested issues.

II. Consent

The paper by Brosnan and Flynn (2017) aims to establish a theoretical approach to consent that is congruent with the universal right of adults to have and exercise legal capacity in their own behalf, as established by CRPD Article 12. They adopt the concept of 'freedom to negotiate' as a way to focus on the circumstances that make it possible for a person to freely consent, rather than on the quality of the actor's understanding and appreciation of relevant information. This is welcome so long as 'negotiation' does not imply compromise, and so long as systemic measures are continually undertaken and revised as needed to equalise power relations beyond what is possible between two individuals, both in the context of heterosexual relations and in medical care. With respect to health care or other expert consultation, the professional has a duty to offer their expert opinion and care, with kindness and respect, and openness to further exploration, irrespective of how the client may respond, and the client has the sole responsibility of deciding whether to accept.

Flynn and Brosnan posit that freedom to refuse is a component of the freedom to negotiate. While I agree, I also consider that it is axiomatic as a foundation and *raison d'être* for the right to consent as well as a conditionality to be applied to the validity of such consent. It is wise to address the right of refusal directly – for example, to establish that consent, in order to be valid, must in addition to other factors be given under legal and factual conditions such that the person has a right to refuse. However, it is also necessary to repeal all legal provisions that authorise coercion in matters of bodily autonomy and other matters as to which consent is required.[3]

This paper is in tension with the one by Flynn and Arstein-Kerslake (2017) on state intervention, which advocates the creation of a legal basis for 'disability-neutral' coercive measures in the case of 'imminent risk to the person's life, health or safety'. In that paper, Flynn and Arstein-Kerslake offer no basis for distinguishing between the kinds of bodily autonomy they view as protected under the doctrine of consent and those they view as limitable. If the right to refuse can be limited by state actors based on risk assessment, consent is a mere formality and it can never be free from undue influence or intimidation.

3 See Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014), para 42, and CRPD Guidelines on Articles 14 (2015), para. 12.

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III. Legal agency

Arstein-Kerslake and Flynn (2017) distinguish between legal agency and decisions not requiring legal agency. To the extent that others do not respect a person's agency, they may be 'forced to exercise legal agency' in order to assert and enforce a decision. Persons with disabilities encounter such disrespect to a greater extent than others; hence they need to exercise legal agency in contexts where others take their freedom for granted.

3.1 Legal agency and ordinary agency

Despite the utility of a distinction between an ordinary exercise of agency and further action to enforce that agency when it is disrespected, I cannot agree with the authors that Article 12 protects the exercise of agency only once it is reasserted after having been contested. This is tantamount to saying that rights only come into existence when the legal system is engaged to defend them. That would appear to confuse legal capacity with access to justice, which is protected under Article 13.

Even though the authors' view of legal agency does not require that rights be formally asserted in court, they set the threshold of an extra step – that of insisting on one's autonomy when it is disrespected by others. This ignores the essence of legal capacity, which is a right to exercise personal autonomy as operationalised through its recognition in legal systems governing private interactions as well as the individual's relations with the state. Both CEDAW and CRPD jurisprudence treat this right as substantive, and not merely an instance of the elimination of de jure discrimination. The CRPD paradigm shift, by removing the last vestiges of state discretion to withhold legal capacity from adults based on assumptions about superiority or inferiority of those concerned, goes further than CEDAW to establish that legal capacity is a substantive right and not merely a right to have the state exercise discretion in a non-arbitrary manner.[4] In addition to dismantling all avenues by which decisional autonomy has been legally denied to persons with disabilities, General Comment No. 1 calls for an end to both formal and informal substituted decision-making.[5] The right to support and accommodation in decision-making further supports a substantive view of Article 12; support is required not as a condition precedent to a claim of legal capacity, but as a means to facilitate its enjoyment.[6]

Beyond the theoretical point that legal capacity is a substantive right and not only a guarantee of the means by which to challenge discrimination, the authors' distinction naturalises the power relations that have traditionally existed between persons with disabilities and non-disabled persons in their environment, including those on whom they rely to meet their basic needs. By their refusal to accord legal status to the obligation placed on those interacting with persons with disabilities to respect their agency, Arstein-Kerslake and Flynn render these acts of discrimination non-justiciable as such. Once the right to legal capacity is recognised under the CRPD, states are obligated under Articles 4(e) and 5.2 to prohibit discrimination by private actors who refuse to respect its exercise by persons with disabilities. As acts of agency exercised between one person and another take place within a legal regulatory environment, including the CRPD as an instrument of international law, all concerned are obligated to respect one another's rights and autonomy, just as they are in the context of sexual relations and health care. This may be addressed through the exercise of legal agency as the authors understand it, but the disrespect for

4 See Minkowitz (2016a). See CEDAW Article 5(a) regarding 'superiority and inferiority'.

5 CRPD GC1, para. 52.

6 CRPD GC1, para. 19.

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personal agency should be justiciable as an act of abuse in addition to the enforcement of substantive rights that have been violated.

3.2 Domination: unconstrained power or structural inequality?

The authors equate the power imbalances between individuals to the state's power over individuals, and views both as legitimate so long as they are not arbitrarily exercised, which is defined as being subject to effective constraint. This is a lot to swallow, to put it bluntly. State power is itself problematic from the point of view of feminism and other standpoints concerned with democratic legitimacy, raising questions as to whether state power is necessary in order for human beings to govern themselves in pluralistic societies.[7] Beyond questions of state legitimacy, hierarchical relations between individuals are per se discriminatory and violate the human rights of those against whom such power is exercised. The authors' discussion of slavery is especially disturbing, as they regard enslavement as problematic only insofar as there is no effective constraint on the power exercised by the enslaver over the enslaved person. Perhaps their intent is descriptive rather than normative, but then it may be tautological; to the extent that power is actually exercised over an individual, it has not been effectively constrained. The authors view the unequal distribution and exercise of power between individuals as capable of being legitimised and ameliorated by procedural safeguards. This is abhorrent, whether in the extreme case of slavery, in heterosexual marriage[8] or in relations between persons with disabilities and those on whom they may depend to meet basic needs. Furthermore, international law recognises that arbitrariness of state power is not limited to the concept of ineffective constraint and includes the violation of fundamental rights and freedoms as well as discrimination, which may be direct, indirect or structural.[9]

The authors assert that domination arises in a context of dependence, which they define as equivalent to a lack of voluntariness in a relationship, or a high exit cost. This definition conflates enforced dependence, mutual interdependence and unequal dependence such that one person has a higher cost than the other to end the relationship. The authors treat all instances of domination as if they begin with dependence, and do not acknowledge that domination can be a cause of dependence as well as an effect, as Manfred Nowak recognised in his seminal report on torture and persons with disabilities:

> 'In a given context, the particular disability of an individual may render him or her more likely to be in a dependant situation and make him or her an easier target of abuse. However, it is often circumstances external to the individual that render them "powerless", such as when one's exercise of decision-making and legal capacity is taken away by discriminatory laws or practices and given to others.'[10]

Arstein-Kerslake and Flynn view legal agency as a means by which persons with disabilities can resist domination by those on whom they depend for basic needs, and/or with whom they live in relations

7 See Pateman (1988), especially pp. 77–114; Heathcote (2012), especially pp. 109–143; and Minkowitz (unpublished). Pateman addresses men's sexual subordination of women, and Heathcote addresses the tensions between women's relationship to self-determination and the right to self-determination as understood in international law.

8 Celina Romany (1993) coined the phrase 'parallel state' to refer to men's legalised abuse of women within marriage, viewing this as an intolerable exercise of domination that could be legitimated by constraint.

9 Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 (2015); see also Human Rights Committee (ICCPR), General Comment No. 35, para. 17; Working Group on Arbitrary Detention, Basic Principles and Guidelines on the Right of Everyone Deprived of Their Liberty to Bring Proceedings Before a Court, A/HRC/30/37, para. 10(b) and (e) and Annex, paras 38, 103–107.

10 Report of the Special Rapporteur on Torture (2008), A/63/175, para. 50.

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of mutual interdependence. It is undeniable that the exercise of agency and assertion of a right to such agency are the first line of self-defence, as against other individuals and state actors. But more is needed, in several respects: to create individual remedies, to ensure that the acts of abuse are defined in law as civil and/or criminal wrongs, and to take programmatic and systemic measures to reduce inequalities of power between persons with disabilities and non-disabled persons.[11]

The authors wish to establish that Article 12 supports acts of resistance by persons with disabilities against institutional structures that exercise dominance over them in matters of everyday life. This is valuable, as it makes visible the lives and agency of individuals living in institutional arrangements, and their agency can lead to greater change. Article 12 does not end with the successful assertion of autonomy in individual cases in situations of structural domination. Together with Article 19, it requires the transformation of living arrangements for persons with disabilities so that they respond directly to individuals' exercise of agency without need for extra work to resist domination. The concept of effective constraint should be replaced by proactive support for resistance to illegitimate power,[12] rights-based legislation to ensure personal autonomy in the context of services and living arrangements[13] and the enactment of regulations and policy to transform the structural characteristics of those services and living arrangements.

IV. State intervention

The paper by Flynn and Arstein-Kerslake (2017) purports to establish a disability-neutral framework for state intervention in the private lives of individuals based on an assessment of 'imminent risk to the person's life, health or safety'. This is a proposal for substituted decision-making based on an assessment that an exercise of agency will be contrary to the individual's best interests in areas of life central to personal well-being. The authors acknowledge that the acts they wish to prevent fall within the exercise of legal capacity, but believe that acts of self-harm in particular can be the target of coercive intervention so long as the criteria are framed without reference to disability or functional assessment.

4.1 Suicide and self-harm

Despite the breadth of their formal criteria, the authors do not actually seek to reach all risks to life, health or safety, nor do they treat all paternalistic interventions to prevent such risks as permissible. They specifically exclude forced psychiatric medication and force-feeding. They exclude the use of coercion to remove an individual from an abusive relationship, but contemplate forced entry into a person's home to investigate potential imminent risk. They also support removal of the person from imminent danger or removal of dangerous objects, 'where a state actor is present during the infliction of self-harm'. This would justify coercive intervention not only in public spaces, but also once the state actor has gained entry to the home. Such interventions are familiar under current law and policy where suicidality and self-harm are treated as predicates for coercive mental health intervention, unless they occur in response to illness or impairment, in which case they can in some jurisdictions be placed under medical auspices as 'assisted suicide'. These issues cannot be rendered 'disability-neutral' by retaining the fear and stigma that have been attached to them by

11 As with sex and gender, the distinction between impairment and disability as material and socially constructed difference may be useful; however, the ephemeral and relational character of psychosocial disability in particular requires more nuanced analysis.

12 Advocacy is a form of support in the exercise of legal capacity; see Jesperson (n.d.).

13 See Disability Integration Act, section 2427, introduced in the US Senate on 18 December 2015, which has not been enacted as of this writing.

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psychiatric labelling while stripping the formal criteria for intervention of any trace of the linkage with disability.

Users and survivors of psychiatry have devoted considerable attention to the development of non-coercive and non-intrusive practices for suicide prevention and for non-judgmental support to persons who self-harm. The 'Alternatives to Suicide' program developed by the Western Mass Recovery Learning Community offers trainings and groups for people dealing with suicidality and self-harm to talk to each other without clinicians present.[14] They do not coercively intervene against anyone, similar to Sarah Knutson, independent host of peer-support teleconferences, who advertises 'no pros [professionals], no cops, no 911 [telephone number for police/first responders]'. For many years, it has been common knowledge that people who self-harm are often dealing with feelings about rape and other acts of violence and abuse, and that self-harm can meet needs for self-care while the person also seeks better options. A mainstream Internet 'Help Guide' warns friends and family members to 'offer support, not ultimatums'.[15] In short, suicidality and self-harm are best prevented by offering support, and support is impeded by coercion, which destroys trust and self-confidence. 'Alternatives to Suicide' and similar support measures for prevention and harm reduction are not libertarian; they are communitarian, built on 'genuine human connection'.[16] The notion of risk is turned on its head when participants in such spaces may find that they are willing to take the risk to live.[17]

Within the category of self-harm that the authors wish to prevent, they do not define 'imminent'. Intrusion into a person's home is not the same as preventing a person from jumping off a bridge or rushing out into traffic. While it may sometimes be welcome to have a close friend or kind stranger tell us with their words or body that our lives matter, this is highly contextual and cannot be a power granted by law to a category of actors. It should be permissible for any person who sees another in immediate danger to attempt rescue, but this should not be an affirmative grant of power to enforce such an attempt against a person who resists. The standard of 'respect for the person's autonomy, will and preferences' and 'best interpretation' when it is not feasible to determine the person's will and preferences after significant effort[18] applies irrespective of an observer's perception of the likely outcome of the person's conduct or the level of risk entailed. No one should be required to witness or participate in another person's act of suicide or self-harm; as emphasised by the 'Alternatives to Suicide' group, the creation of genuine connection takes precedence rather than forcing either person to give way to the other's needs or wishes.

4.2 CRPD prohibition of outcome-based deprivation of legal capacity and application of 'best-interests' principle to adults

CRPD Article 12 prohibits deprivations of legal capacity based on status (disability), outcome (feared consequences of an action) or functional assessment, as these approaches discriminate based on disability and/or decision-making skills.[19] The General Comment explains:

14 Western Mass Recovery Learning Community, Alternatives to Suicide, available at: http://www.westernmassrlc.org/alternatives-to-suicide (accessed 13 December 2016).

15 HelpGuide.org, 'Cutting and Self Harm', available at: http://www.helpguide.org/articles/anxiety/cutting-and-self-harm.htm (accessed 13 December 2016). See also pioneer in the field Ruta Mazelis (2008).

16 Spoken by a presenter in the 'Alternatives to Suicide Peer Support Webinar', archived on the 'Alternatives to Suicide' webpage.

17 *Ibid.*

18 GC1, para. 21; see also Guidelines, para. 23.

19 GC1, para. 15.

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> '[Functional assessment] is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right – the right to equal recognition before the law.'

The outcome-based approach is similarly flawed. Risk assessment is discriminatorily applied to persons with disabilities and entails a negative assessment of the person's decision-making skills with regard to the perception of danger and choice of outcome. Disability-rights scholars have discussed the association between risk and disability in law and public policy, as well as media and societal perceptions.[20] As status-based deprivation of liberty and legal capacity has been called into question, risk assessment has played an increasing role, for example in compulsory hospitalisation based on 'danger to self or others' under mental health laws, or the application of security measures based on a similar standard against persons who are legally incapacitated.

Outcome-based deprivation of legal capacity is often associated with a sense of crisis or emergency ('imminent risk'). Both General Comment No. 1 and the Guidelines on Article 14 take pains to point out that responders must respect 'the individual autonomy and capacity to make decisions of persons with disabilities' 'at all times, including in crisis situations'.[21] The Guidelines call on states parties to 'ensure that support is provided to persons with disabilities, including in emergency and crisis situations' and remind them to 'ensure that persons with disabilities are not denied the right to exercise their legal capacity on the basis of a third party's analysis of their "best interests"'.[22] General Comment No. 1 holds that 'the "best interests" principle is not a safeguard that complies with Article 12 with respect to adults'.[23] Although some states have interpreted 'safeguards' to include substitute decision-making, such reforms do not comply with Article 12, and at least one law-reform project adheres to the 'best-interpretation' approach.[24]

4.3 'Disability-neutral' deprivation of legal capacity

Flynn and Arstein-Kerslake suggest that any deprivation of legal capacity is permissible so long as it does not refer to disability or functional assessment. They rest this position on paragraph 32 of the General Comment, which asserts that Article 12 only prohibits discriminatory deprivations of legal capacity that are 'based on personal traits such as gender, race or disability, or have the purpose or effect of treating the person differently'. Paragraph 32 accepts that 'states have the ability to restrict the legal capacity of a person based on certain circumstances, such as bankruptcy or criminal conviction'. While these restrictions are arguably undesirable and outdated in light of the evolution of international law to understand legal capacity as a fundamental human right, the CRPD Committee defers to the limits of its own mandate by refraining from any progressive interpretation of general international law that is unrelated to disability-based discrimination.[25]

The CRPD Committee had no such need for self-limitation when it pronounced the 'best-interests' principle generally inapplicable to adults, or when it pronounced that both the functional and

20 Beaupert and Steele (2014) and Roex (2016).

21 GC1, paras 18, 42; Guidelines, paras 22–23.

22 Guidelines, para. 23.

23 GC1, para. 21.

24 Minkowitz (2016b).

25 Non-discrimination obligations based on gender and race are already established in international law with respect to legal capacity. The Committee similarly defers to its own limits with respect to the rights of the child.

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outcome-based approaches amount to discriminatory deprivations of legal capacity. The signature characteristic of disability-based discrimination related to legal capacity is paternalistic domination. Resistance to such domination is among the unique contributions of CRPD to the human rights framework as a whole.[26]

In the proposal for state intervention, the domination by social service and health professionals that is resisted in the papers on consent and legal agency can be transformed into a lawful mandate that persons with disabilities would have no right to resist. Flynn and Arstein-Kerslake believe that this is inoffensive so long as the formal criteria do not mention disability. It is absurd to think that persons with disabilities want no more than a cleansing of language while power relations go untransformed and are even intensified.

The purpose and effect of their proposal are to reframe coercive state power that is legislated and applied against 'vulnerable persons' or persons with disabilities in particular, so as to reinstate that power after CRPD-compliant reforms. The authors offer no evidence that their measures are designed to reach behaviour of the general population including those who would not be singled out as 'vulnerable'.[27]

Coercion is not rendered palatable by non-coercive alternatives. The authors do not believe that measures to ascertain a person's will and preferences in order to prevent abuse by others violate Article 12, and I agree so long as the will and preferences of the person are respected at all stages, including the establishment of communication.[28] If positive legislation is required for this purpose, it would be programmatic in nature, and would not convey any mandate to outreach workers to intervene against the person's autonomy, will and preferences.

4.4 Domination as structural discrimination

We return to the concept of domination, which the authors define as the exercise of power without effective constraint. That definition supports the premise of the proposal for coercive state intervention, since the exercise of power is subject to criteria that would presumably be subject to adjudication. This is not satisfying from a point of view in solidarity with persons with disabilities, who fought for Article 12 not to constrain inequalities of power, but to dismantle them. If domination is understood to include structural discrimination, we see that it is exacerbated when the state joins forces with those who are in a dominant position, instead of increasing the power of disadvantaged persons to resist subordination.

CEDAW jurisprudence is of use to understand equality and non-discrimination obligations in conditions of systemic power inequality. The CEDAW Committee has identified three types of obligations: formal equality (equal treatment as a matter of law); substantive equality (measures to equalise the de facto enjoyment of human rights); and transformative equality (measures to remove the causes of inequality).[29] We need formal equality to have equal status as members of society and as legal subjects, and substantive equality to proactively redistribute power and resources. We also need the third form of equality: 'a real transformation of opportunities,

26 Minkowitz (2016a).

27 While I believe that the state cannot legitimately intervene against a person's exercise of autonomy with respect to their own body and life, a measure that was specific as to proscribed acts, regulatory and uniformly enforced would not violate CRPD any more than the deprivation of legal capacity in consequence of bankruptcy or criminal conviction. It is the discretionary power to assess the behaviour and judgment of individuals that is contrary to CRPD.

28 See Jesperson (n.d.), in particular the description of steps in the development of a relation.

29 CEDAW GR 25, paras 7–10.

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institutions and systems so that they are no longer grounded in historically determined [dominant-actor] paradigms of power and life patterns.'[30]

Legal capacity, as the feature of legal systems that recognises individuals as subjects and agents in relation to the state and in relation to one another, has historically been grounded in the contrast between subjects that mutually recognise each other as such and those whom they construct as non-subjects. This distinction both enacts and mystifies domination, paradigmatically as against women and enslaved persons, and against persons with disabilities.[31] The mutual recognition of subjects furthermore legitimises the creation of state power by simultaneously constituting a body that can consent to be governed, and re-constituting the subjects themselves as subordinate to the authority of the state as subjects of state regulation.[32] This complex relationship between presumptive subjects and non-subjects in a legal system, and between legal capacity and the state's claim to democratic legitimacy, may explain the stranglehold that the incapacity paradigm holds on the imagination of lawyers and state actors. As women now have full legal capacity in almost all jurisdictions, and enslavement is universally prohibited, persons with disabilities and children are left to bear the weight of non-subject status, while women and the descendants of enslaved persons continue to experience its systemic influence. Paternalism, rather than being a cause of legal capacity deprivation, is rather its socially constructed effect; the denial of subject status to any human being creates a need for 'effective constraint on the exercise of power' and a motivation to provide care and protection to compensate for enforced dependence. Paternalism is a manifestation of discrimination, against which CEDAW and CRPD are both rightly vigilant.

CRPD is not a libertarian model, as libertarianism falls within the one-sided paradigm of individualism that separates legal subjects from non-subjects or conditional subjects. CRPD splits open the fiction of legal capacity as a socially constructed status, and gives us instead a universal right to recognition of subjecthood. Mutuality of obligations as well as mutuality of respect for autonomy follows from universal mutuality of recognition. This does not mean that everyone is expected to make the same contributions or to have the same needs; the expenditure of effort and care to support those who have the greatest needs is necessary to the well-being of all members of a collective whether at the level of a family, community, nation or global society. The support paradigm of legal capacity is at the global level congruent with inclusive development, which was a motivation and objective of the CRPD intertwined with the promotion and protection of human rights.

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30 *Ibid.*, at para. 10.

31 See Pateman (1988) on the social contract as a continuation of earlier forms of patriarchy.

32 Habermas (1994).

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