Int J Semiot Law (2023) 36:1415–1442
https://doi.org/10.1007/s11196-022-09950-1

Vulnerable Capacity. Notes on a Quiet Legal Revolution

Maria Giulia Bernardini[1]

Accepted: 14 October 2022 / Published online: 5 November 2022

Abstract
The *vulnerability turn* has contributed to the concept of vulnerability becoming an established part of the legal lexicon. By adopting a legal-philosophical perspective, this paper will explore what might be considered the most interesting theoretical outcome of the vulnerability paradigm: the concept of universal legal capacity, enshrined in Article 12 of the *Convention on the Rights of Persons with Disabilities*. The reasoning will focus on two main areas. First, the theoretical background of this reflection will be clarified, by investigating the main arguments of the current debate on vulnerability. Such a reflection will provide the necessary background to explore the relationship between autonomy and vulnerability. The second part of this paper specifically aims to analyse the content and legal implications of Article 12 CRPD. The exegesis of Article 12 will attempt to show that said Article is theoretically founded on the paradigm of vulnerability. Following that, a 'reality test' will give the opportunity to discuss some of the main positions that are present in the existing literature on the topic, with particular attention to the relationship between support and substitution. The expression *vulnerable capacity* has been used in order to emphasise the complex analysis required to adequately address the issue of capacity from a theoretical perspective. It will be argued that legal capacity can be considered vulnerable because it characterises a (universally) vulnerable subject.

Keywords Universal legal capacity · Vulnerable subject · Legal subject · CRPD · Capacity · Incapacity

1 Introduction

The *vulnerability turn* ([1] p. 241) has contributed to the concept of vulnerability becoming an established part of the legal lexicon, where the interest in the notion is still growing, ranging across the different fields of law. By adopting a legal-philosophical perspective, this paper will explore what might be considered the most

✉ Maria Giulia Bernardini
mariagiulia.bernardini@unife.it

[1] Department of Law, University of Ferrara, Ferrara, Italy

interesting theoretical outcome of the vulnerability paradigm: the concept of universal legal capacity, enshrined in Article 12 of the *Convention on the Rights of Persons with Disabilities* (hereinafter CRPD).

Unlike in other contexts, in the Italian legal culture, the innovative scope of this concept still has not been fully understood, mainly for two reasons: the scant attention paid to capacity as a relevant notion in general theory, and the too-specific nature of disability law studies.

The situation, however, is constantly evolving. As this paper will try to demonstrate, the critical potential that must be acknowledged to the notion of universal legal capacity (elaborated from the point of view of some non-paradigmatic subjects) might produce a significant transformation in both the theory of law and legal practice, where it is necessary to ensure that the formal recognition of rights does not remain only 'in books'. The most relevant aspects of this process will be highlighted.

The present reasoning will focus on two main areas. First, the theoretical background of this reflection will be clarified, by investigating the main arguments of the current debate on vulnerability. Since these aspects are well-known – especially thanks to the extraordinary diffusion of Martha Fineman's vulnerability theory – some of the criticism that has been raised within the European debate (with special attention to the Italian context) will be analysed, in order to point out analogies and differences with the American debate on the matter.

Such a reflection will provide the necessary background to explore another major theme in feminist (legal) theory: the relationship between autonomy and vulnerability. The radical change in perspective produced on a theoretical level by the debate on vulnerability and relational autonomy seems to have created the cultural terrain for the profound legal transformation that has led to the concept of legal capacity becoming a universal/inclusive notion. When reconstructing the debate, in which political and legal philosophy end up converging, the American context will mainly be mentioned, as it has proven to be an undisputed point of reference for Italian scholars.

The second part of this paper specifically aims to analyse the content and legal implications of Article 12 CRPD. As it has already been pointed out, the reasons for the interest in this paradigm are manifold, ranging from theory to legal practice. On the one hand, they unhinge the dichotomies on which modern law is based (such as those concerning capacity/incapacity and vulnerability/invulnerability). On the other hand, they open up a 'space of presence' for persons with disabilities (and not only), allowing them to be recognised as proper legal subjects. The exegesis of Article 12 will attempt to show that said Article is theoretically founded on the paradigm of vulnerability. Following that, a 'reality test' will give the opportunity to discuss some of the main positions that are present in the existing literature on the topic, with particular attention to the relationship between support and substitution.

Elsewhere [2], the expression *vulnerable capacity* has been used in order to emphasise the complex analysis required to adequately address the issue of capacity from a theoretical perspective. It will be argued that legal capacity can be considered vulnerable by following two different paths. Firstly, by using metonymy: capacity is vulnerable because it characterises a (universally) vulnerable subject. Secondly,

capacity can be considered vulnerable due to it being always liable to being limited and restricted (i.e. 'vulnerated'), especially when reference is made to persons depicted as (particularly) 'vulnerable', or being in a 'vulnerable condition', according to the approach that is preferred today. Although the second meaning of 'vulnerable capacity' raises urgent issues that need to be addressed (especially in relation to cases of intersectional discrimination, such as those concerning migrants with disabilities, women with disabilities or dependent elderly people), due to space constraints, this paper will focus only on the first meaning of the concept, i.e. the capacity of the vulnerable subject.

1.1 Vulnerability in Current Times

Over the past few years, in line with a broader trend, the western legal-philosophical reflection has tried to define the meaning of vulnerability.

Such an issue has proven to be difficult to resolve, for at least two reasons. The first one is the undeniable semantic richness of the term, which has led to it being associated with multiple – sometimes even contradictory – meanings, so much as it is reasonable to include it among the most contested contemporary legal concepts, together with dignity, equality and autonomy. Not only is vulnerability currently used in relation to markedly different sources and situations, but it is also ascribed to several subjects, from the environment (including the IT one) to things, from countries to institutions and people, with them being interrelated or independent from one another. Adopting a sceptical approach, one may even argue that vulnerability has become a kind of contemporary buzzword [3].

Furthermore, the definition issue is difficult to solve due to the little attention paid to the individual's vulnerability in the Western modern political and legal-philosophical reflection, which has long been characterised by a deep-rooted tendency to keep vulnerability in the background. This trend is in turn a consequence of the wider adherence to the individualistic ontology that has long defined the liberal tradition and that is still present nowadays, although somewhat 'reframed' in neoliberal terms.[1]

Historically, the need to establish what Martha Fineman successfully called the "autonomy myth" [4] *required* the person's exposure to injury (i.e. their vulnerability) to remain latent, despite being crucial, in order to ensure the success of what has been known as the liberal model of subjectivity. Not coincidentally, modern legal and political philosophy welcomed an image of the subject with precise, although usually implicit, features: an autonomous, self-sufficient, free, and independent individual who established preferentially symmetrical and competitive relationships. Not by chance, the contract underlay both the foundation of the modern State and the exchanges regulating intersubjective relations. It also was an apparently 'dispassionate' individual, despite being actually moved by acquisitive and identity-based passions, rather than emotions [5]6. This subject had normative power, which was

[1] While in the Eighteenth century liberalism became the advocate of a logic based on rights and freedoms, tolerance and legality as limits to power, neoliberalism – despite maintaining the same lexicon – aimed at overcoming those limits ([8] p. 8).

the parameter to aspire to in order to achieve full recognition and inclusion: to be considered 'real' subjects – people with equal rights and duties before the law – individuals had to show the above-mentioned characteristics.

One of the almost inevitable side-effects of this conception was a downgrading of vulnerability, given its inextricable association with a condition of deficiency, which characterised (only) dependent subjects, deemed incapable of caring for themselves. In the liberal thought, vulnerability was mostly related to weakness and fragility, frequently ending up describing the condition of specific (groups of) individuals. The more vulnerable they were, the further away from the norm they were, and hence the more protection they needed.

The recent, widespread *rediscovery* of vulnerability has completely reframed the debate, to the point that current times might be considered the *age of vulnerability*. The *vulnerability turn* has led to vulnerability becoming decoupled from exclusive susceptibility to injury, harm or misfortune, evolving into a *productive* concept. A number of scholars have started to explore its undeniable semantic richness, generally showing genuine confidence in its high transformative potential and capacity to build a new cultural, social, political and legal order. To that aim, particular attention is currently being paid to the subject's vulnerability, intended as a criticism to both liberal ontology and the (neo) liberal legal and political paradigm.

As it has been extensively observed, acknowledging universal vulnerability does not mean affirming that everyone is vulnerable in the same way: although all the people are inescapably open to the world, every individual can experience that openness differently, being exposed to particular cultural, social, political and environmental forces. Suffice it to say that one's social and geographical background impact their access to various resources, thus influencing their degree of vulnerability. In essence, "[u]ndeniably universal, human vulnerability is also particular: it is experienced uniquely by each of us" ([7] p. 10). As Judith Butler has pointed out, 'precariousness' and 'precarity' are closely intertwined. On one hand, due to our bodily and fleshy nature, we are all (universally) vulnerable to violence, injury and care (here, vulnerability reveals its profound ambiguity: it may lead to care and compassion, but also to abuse and violence). On the other hand, we are always exposed to differential power distribution; in this politically induced condition, certain populations or social groups suffer from failing networks of socio-economic support, becoming increasingly confronted with the risk of injury, violence and death [9].

The dialectics between universal and particular vulnerability has been the object of deep and complex analysis in various fields, including the legal one [10]. In the following paragraphs, some of the main criticism that has been raised in the European legal debate will be recalled, with specific attention to the Italian context, where the reflection on vulnerability is particularly lively [11]12, 13. As it will be seen, some of the arguments echo those characterising the American debate, while others seem to show greater originality.

In Europe, two different approaches to vulnerability may be identified. Some legal scholars look with curiosity and confidence at a concept that, especially following the recent process of 'resemantization', remains unexplored in its specifically legal implications, as the recent debates in various fields of law have revealed [13]14, 15).

Since these positions generally adhere to Fineman's theory (or are consonant with it), this aspect of the debate will not be analysed further.

Despite not denying the transformative importance of the *vulnerability turn*, other scholars remark the need to be cautious with regard to certain aspects, the most important two of which will now be mentioned. The first concerns the possible side-effects of the increasing appeal to vulnerability that is shaping legal practice. The second, generally remarked by feminist legal philosophers (see [16] 8 17) concerns what could be *lost in translation* when applying a theory conceived to remedy the shortcomings of the American legal context to the European one, like Fineman's vulnerability theory.

In relation to the first point, raised also within the American debate on vulnerability [18], the main criticism is directed to the notions of 'vulnerable group(s)' and 'vulnerable individual(s)', which are still the most widespread in legal practice, although the tendency to refer to a 'condition of vulnerability' of the person is now growing, as the jurisprudence of the European Court of Human Rights (ECtHR) has shown [19].

According to the taxonomy proposed by Mackenzie, Rogers and Dodds [20] (p. 7–10), such criticism is directed to the relational/particular notion of vulnerability. In this regard, legal scholars tend to remark how, since the identification of vulnerable individuals or groups is generally carried out to justify a treatment which is derogatory compared to the usual (i.e. *normal*) one, *special protection* may end up having discriminatory effects, as it generally takes the form of a paternalistic intervention restricting individual agency. Not coincidentally, the exercise of a choice often ends up *excluding* the presence of a condition of vulnerability.

A paradox thus arises: those who need special protection are given attention by the State (which is the positive side of the paradox), but they are generally exposed to severe limitations of their legal capacity that may even result in it being denied. This is clearly the negative side of the paradox, as a limitation of legal capacity means that those who are deemed as vulnerable are not recognised as proper legal subjects. In this way, the *normativity* of the legal subject is uncovered.

As it can be easily noticed, criticism shows how vulnerability may lend itself to maintaining legal hierarchies rather than overcoming them as promised. When this happens, vulnerability proves to be one of the strategies through which the *status quo* is maintained, instead of becoming a tool for reforming the existing order. For this reason, it has been argued that the practical outcomes of at least *certain uses of* vulnerability (not to say the entire concept of vulnerability itself) require a critical examination, aimed at preventing discrimination practices against those who are considered vulnerable.

The second criticism concerns the relationship between vulnerability and equality. Although this tension is disputed also in the American legal context [20], the specificity of the European debate seems to offer new insights for discussion. This is also due to the particular attention paid to the risks arising from the lack of contextualization of Martha Fineman's proposal, which may be said to have been adopted uncritically.

As it is well known, the American legal philosopher formulated her vulnerability theory in order to remedy the inability of the American legal system (and of the

American legal culture) to ensure the protection of social rights, thus fostering the principle of substantive equality, whose meaning and place in the legal hierarchy remain deeply contested. In Fineman's perspective, the recognition of both a shared condition of vulnerability and particular forms of vulnerability might reshape the relationship between citizens and the State, in order for the latter to take positive measures and introduce social welfare programmes.

Without disregarding the (theoretical and practical) importance of this work, some scholars ([16]8) have observed that the specificity of the European legal context raises issues about the establishment of this paradigm.

First, most continental European States are well acquainted with the principle of substantive equality, which is firmly established in their *material* and often even *formal*[2] Constitutions. Thus, it must be ensured that reference to vulnerability does not lead to *weakening*, rather than strengthening, the protection that is already present thanks to the equality paradigm, according to Fineman's original proposal.

On closer inspection, such a possibility is far from being theoretical. The current practical impossibility to draw a clear distinction between the various sources of vulnerability, distinguishing those related to individual specificity from the ones caused by, or linked to, inequalities, raises a significant legal issue that still has not been resolved satisfactorily: that of differentiating legal interventions aimed at tackling vulnerability (which are required in the first case) from those attempting to remove circumstances of disadvantage related to a condition of vulnerability (necessary in the second one). For this reason, reference to the 'lexicon of equality', i.e. to concepts that already have a clear legal meaning and are present in legal practice ('difference', 'discrimination' and 'inequality'), seems to be preferred, since this enables to identify adequate legal strategies more clearly.

Arguing for the effectiveness of an (already existing) equality paradigm where formal and substantive equality are closely and necessarily intertwined, this line of criticism raises a further critical point. While the equality paradigm benefits from the reference to a precise standard to be respected (i.e. fundamental rights), in the case of vulnerability any 'anchorage' seems somehow to be lost or, at least, remains unexpressed. Hence, this circumstance reinforces scepticism over the promises of the vulnerability paradigm, leading to prefer the reassuring and more definite categories of the equality one.

By focusing on the centrality of the principle of both formal and substantive equality, these criticisms certainly hit the mark. However, they seem to go too far in assuming that, at least in Fineman's work, equality and (universal and relational) vulnerability are mutually exclusive. Conversely, the 'vulnerability turn' may be interpreted as vulnerability and equality being *closely intertwined*, thus rejecting any paradigm that advocates the hierarchisation of the two terms or the exclusion of one

[2] This is the case of the Italian legal system, where Art. 3 states that: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic and social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country." (The Senate of the Italian Republic, Constitution of the Italian Republic, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).

in favour of the other. Therefore, at least in relation to this aspect, the scepticism over vulnerability may be considered excessive.

Nonetheless, a critical point remains. The *symbolic advantages* of the vulnerability paradigm seem to be clear, in terms of both the legal visibility of invisible and undervalued subjects and their legal recognition. However, it seems difficult to understand what *practical advantages* vulnerability might bring within legal systems, including most European ones, that *already* include – possibly in their Constitutions – the principle of formal and substantive equality. In other words, how does the vulnerability paradigm work with the equality one, how does it effectively raise the existing standards of protection of rights and how does it offer a more effective protection (to those who are deemed as vulnerable)?

This aspect is related to the one concerning the role of the State in protecting the individual's rights and fulfilling their needs: the promotion of substantive equality is inextricably tied to social rights and requires the recognition of an active role of the State (which, in Fineman's words, has to be *responsive*). Although the advantages of Fineman's theory are clear, the well-known theoretical differences between Europe and the United States that have emerged historically, and which derive primarily from different ideologies (in the broadest sense of the term), cannot be overlooked.[3]

Contrary to what happens in the US context, most European States are *already responsive*, not least because of the above-mentioned constitutional nature of the principle of formal and substantive equality. In this case, it is not so much a matter of fostering the *establishment* of a strong Welfare State model, as that has generally long occurred, in various forms ([21]22). The real problem is rather that of *relaunching its effectiveness*, overcoming the crisis it has experienced for decades, mainly due to a 'neo-liberal drift' which has led to detrimental consequences. Processes such as the retrenchment of the Welfare State, the dismantling of social programs, the privatisation of public assets and services and the expansion of the market and voluntary sector to take over many State functions – all attributable to neo-liberalism – are having dramatic repercussions on the protection of individual rights and on the relationship between the state and citizens [23].

Most of the outcomes of the neo-liberal management have been particularly evident during the recent pandemic crisis. Not coincidentally, over the past few months, *care* (which is closely related to vulnerability) has been brought back to the centre of legal and political debate(s), due to its transformative power. Likewise, there has been a growing interest in state remodelling, which might help to cope with new political and social dynamics. In relation to the latter point, not only has the Welfare State been considered the framework for 'caring democracies', but these have also been regarded as a constructive agenda where different models of welfare state play an active role in safeguarding the conditions for a decent and fulfilling life [24]25, 26, 27. The anthropological paradigm shift that the theory of vulnerability and the ethics of care (together with the criticism of the Capitalocene) have long been calling for has thus clearly revealed its salience.

[3] However, it should also be admitted that this theoretical difference is counterbalanced by a progressive convergence with public policies, so that, even as a result of globalisation, the distance between the two realities is more blurred than it appears *prima facie*.

Finally, the perplexities of the European legal doctrine concerning the relational or group-specific notion of vulnerability seem to be even more insidious. As it has been previously observed, when resorting to the semantics of vulnerability, those who belong (or are – more problematically – *presumed* to belong) to 'vulnerable groups' become visible, their visibility being an important precondition for their full recognition as equals. Nevertheless, this visibility generally occurs within an unchanged cultural and legal framework where the conceptual distinction between the (implicitly) strong subject and the weak, fragile and vulnerable ones, which characterised liberalism, remains unchallenged. Therefore, in this state of things being recognised as vulnerable usually implies having only certain, limited entitlements. Furthermore, referring to vulnerability can also result in the identification of hierarchies even *within* the different groups of vulnerable subjects. This might lead to either the enhanced legal protection only of those who are *the most vulnerable among the vulnerable* (such as in emergency situations) or to their invisibility and inadequate protection. For all these reasons, the particular/relational conception of vulnerability reveals some difficulties which may suggest abandoning the concept and perhaps returning to the (sole) equality paradigm.

In the light of what has been observed, it seems that these (discriminatory) approaches to the concept of vulnerability should be considered more carefully than hitherto. However, since this is a problem related to the *use* of the concept and not to the concept itself, we believe that within legal practice it is possible to implement corrective measures (which still largely need to be identified) and that there is no need to draw such sweeping conclusions regarding the abandoning of the concept. Rather, it might be more fruitful to explore other aspects of the vulnerability paradigm. In our opinion, the most promising and innovative characteristic of the vulnerability paradigm might be found in one aspect which is becoming increasingly important in the international debate, despite being rarely the object of Italian legal analyses: the attitude to reframe legal capacity inclusively, by referring to universal legal capacity.

1.2 Legal Capacity and Vulnerability: *Uneasy Encounters*

As it has been previously mentioned, the relationship between legal capacity and vulnerability is currently undergoing a radical transformation, which might have an increasing impact on legal theory and practice. This transformation should in turn be ascribed to the relationship between autonomy and vulnerability, since autonomy is the (legal-) philosophical reference for legal capacity.

Feminist theory has thoroughly investigated how classical liberalism has long considered vulnerability – intimately connected with dependence – to be *the very opposite* of individual autonomy, analysing the liberal attempts to put it aside by relegating it to the rank of the implicit, of presupposition, of something to be removed. This tendency is easily explained by the importance that, in the history of philosophy, the liberal thought has attributed to autonomy, owing to its connection with

the right to make decisions for oneself. Although over time many interpretations of autonomy have been proposed,[4] it has usually been considered as

"[acting] as a sword to enable one to make one's own choices (e.g., where to live, with whom to live) and have those choices respected by others. It also acts as a shield fending off others when they purport to make decisions for us – even when well intentioned." [29]

For the purposes of this reflection, referring to autonomy contributes to both identifying the features of the individual that classical liberalism considers a real subject and setting the normative ideal to strive for. Simplifying a centuries-old debate, it can be argued that classical liberalism considers people to be autonomous when they sustain themselves and pursue their interests without having to depend on other people, unless via contractual relations based on mutual advantage [30]. Rationality, independence, self-interest, objectivity, assertiveness, self-sufficiency and self-possession end up being possible characteristics of an impossible subject [31] (i.e. a myth) that, over time, has revealed its anthropological features and deployed its regulatory power. As critical theory has widely shown, the further one moves away from the norm, the less one is recognised as an (autonomous) subject, being rather considered vulnerable. As a consequence of being qualified as vulnerable, denial of agency, disempowerment and paternalism are thus fully allowed (if not required).

The same tension between autonomy and vulnerability can be identified also in relation to the concept of the liberal *legal* subject. Developed in the second half of the nineteenth century, it remained almost unchanged for a few decades, until the crisis of the liberal subject of law was shown by critical theory. Today, the concept of the liberal legal subject is no longer regarded as universal and is undergoing a deep transformation of scope and meaning. At times, it is 'fragmented' into multiple identities, according to a process aimed at guaranteeing its greater inclusiveness; at times, it is even said to 'disappear'. Finally, sometimes its abandonment is proposed, following approaches that go from a focus on the 'common goods' instead to the subject of law to the possibility of theorising a 'non-subject' as the apex of the criticism of identity-politics, according to French Theory.

What such approaches have in common is the criticism of the false neutrality of the subject of law [32], which aims at giving visibility to those who do not fit in the norm and are therefore considered vulnerable, outliers, non-paradigmatic. In the wake of the convergence of the Lockean and Kantian thoughts, in the legal field, the paradigmatic subject is only the autonomous individual, the rational and independent legal subject who can freely act in the legal domain, relying on the non-interference of the State. By contrast, Western legal systems have been not only allowed, but even *required* to interfere in the personal sphere of vulnerable persons, given

[4] In this regard, Gerald Dworkin ([28] p. 54–55) has observed that "[autonomy] is used sometimes as an equivalent of liberty (positive or negative in Berlin's terminology), sometimes as equivalent to self-rule or sovereignty, sometimes as identical with freedom of the will. It is equated with dignity, integrity, individuality, independence, responsibility, and self-knowledge. It is identified with qualities of self-assertion, with critical reflection, with freedom from obligation, with absence of external causation, with knowledge of one's own interests. It is related to actions, to beliefs, to reasons for acting, to rules, to the will of other persons, to thoughts and to principles."

their duty to protect them from the unwanted and/or negative consequences arising from the performance of legally relevant acts.

One of the key strategies adopted to achieve such an aim has been the limitation of the vulnerable person's legal capacity, to the point of it being denied to the individual. Historically, capacity has worked as a tool through which legal hierarchies have been created among subjects, according to their (in)capacity to fit into the paradigm of the liberal subject. By reflecting the socially existing hierarchies, the legal ones ended up transposing existing power relations into the legal context. After all, if no legally relevant activities were carried out, law would be pretty much indifferent towards vulnerability: unlike what happened with other legal concepts, such as that of the owner or the creditor, the vulnerable subject has not been considered theoretically until the vulnerability turn.

For the most part, these are well-known notions that belong to the history of the legal thought. However, mentioning them does not seem to be useless when considering that the aforementioned approach still appears to be the most widespread, as the introduction of Western Constitutions contributed to only partially changing the situation. On the one hand, it is true that, nowadays, individuals who are in a vulnerable condition have gained visibility, being the main recipients of the removal of obstacles that might prevent their full flourishing (cf., e.g., the principle of formal and substantive equality enshrined in Art. 3 of the Italian Constitution). On the other hand, the paternalistic approach to vulnerable persons has remained nearly unquestioned until recently, when a different approach to vulnerability has matured following the *vulnerability turn*.

Even in the ongoing process aimed at questioning what can be considered an anthropological model for recognition as equals and for inclusion, the philosophical, political and legal reflections have proceeded following a very similar path, both in the American and continental European contexts.

On the theoretical level, things began to change in the 1980s, with the introduction of the concept of 'relational autonomy', which resonated with, and stemmed from, the literature on the ethics of care, and it is now commonly considered an umbrella term encompassing various approaches [33–35]. Its emphasis on relationality and interdependence in decision-making and agency, coupled with a criticism of abstraction and rationality, has facilitated the development of alternative concepts of autonomy, frequently characterised by a minimalist account of understanding and considered a gradual achievement to be fostered by guaranteeing the conditions of its exercise, rather than an 'inherent characteristic' to be respected and defended from interference. These conditions consist primarily in networks of beneficial relations with others, aimed at fostering autonomy and protecting against abuse that may be detrimental to the individual's autonomy.

Although the various theories of relational autonomy may differ, they all describe autonomy as an individual condition which results from the material, social, and relational circumstances a person experiences. Considering autonomy a relational, social or intersubjective phenomenon means regarding it as being "ineluctably entwined" ([36] p. 135) with (some kinds of) vulnerability, with the presence of the latter being vital in – and often ineradicable from – specific social practices and interpersonal relationships.

The transformative understanding of vulnerability proposed by vulnerability theory can be considered another attempt to reframe the relationship between autonomy and vulnerability in a non-binary and non-mutually exclusive way. The point is controversial, at least in relation to the work of Martha Fineman, whose fierce criticism of the 'autonomy myth' has led some commentators to assume that she had rejected the concept of autonomy in its entirety [20]. If this interpretation of the feminist philosopher's reflection was well-founded, then it would be difficult not to regard the relationship between vulnerability and autonomy as a mutually exclusive one even within vulnerability theory. However, when focusing on the constructivist approach to autonomy adopted therein, it is easy to understand how she leaves open the possibility of reconciling the two terms by interpreting autonomy as an aspiration that has to be "cultivated by a society that pays attention to the need of its members, the operation of institutions, and the implications of human fragility and vulnerability" ([37] p. 260). Thus, autonomous actions are possible if the conditions for their exercise are created and guaranteed (by responsive social and institutional contexts). The same idea is shared by other scholars in the field, who equally consider vulnerability and autonomy strongly intertwined. The reason for that is twofold. Firstly, vulnerability constitutively contributes to autonomy, as agency is dependent on mutual recognition and participation in autonomy-oriented social practices that are contingent on the co-participants' attribution of competence to one another. Secondly, social and political arrangements can either facilitate richer forms of autonomy or generate higher levels of vulnerability, thus exacerbating it [36]. For the purposes of this reflection, it will not be necessary to explore the debate on the point further. Conversely, analysing some of its consequences on legal theory and practice would prove extremely useful.

Fostered especially (although not exclusively[5]) by the vulnerability turn, the reformulation of the dialectic between vulnerability and autonomy – coupled with that between vulnerability and capacity – is still challenging for the current Western legal systems. This is true for a number of reasons, including the establishment or strengthening of the Welfare State and the related reformulation of the perceived hierarchies between civil and social rights, or the analysis of the exclusionary, discriminatory and oppressive effects produced by the mythical and mythologised liberal subject. Other reasons still need to be widely discussed, such as the insufficient traditional legal categories and the possibility of reframing them or creating new ones.

The point is particularly clear in relation to legal capacity, as the debate on the Convention on the Rights of Persons with Disabilities (CRPD) has revealed. Legal scholars studying disability increasingly agree on considering the CRPD incompatible with the traditional image of the liberal subject and, conversely, regard it as

[5] On this point, one has to mention at least some of the most innovative attempts to investigate the concrete legal application of relational autonomy that have offered new insights into the latter. See, in particular, some of the attempts to apply Jennifer Nedelsky's theory [38] to family law [39] and to the rights of persons with dementia [40].

being based on the vulnerability paradigm [41] 42, 43.[6] This belief stems primarily from the analysis of one of the key principles on which the Convention is based, that of 'universal legal capacity' (Art. 12). As it will be explained in the following paragraphs, by welcoming the 'support paradigm' (Art. 12(3)), universal legal capacity challenges the capacity/incapacity dichotomy, thus revealing how the theoretical debates (especially that concerning vulnerability, but also the one focused on relational autonomy) may impact the framing of legal concepts, raising various relevant issues. Therefore, a more thorough analysis of universal legal capacity seems to be appropriate.

1.3 Universal Legal Capacity: Pride and Prejudice

The disability law doctrine regards universal legal capacity as the core of the CRPD, the lynchpin of the recognition of the human rights and subjectivity of persons with disabilities. Not coincidentally, interest in Art. 12 CRPD (where the principle is enshrined) is growing, so much so that universal legal capacity is now an autonomous area of scholarly inquiry, particularly among disability rights scholars and activists [45]. With the entry into force of the CRPD, persons with disabilities have moved (echoing bell hooks' words [46]) "from the margins to the center" of the legal discourse, becoming subjects of law, rather than its objects. The CRPD is unanimously considered one of the most relevant outcomes of the struggle for rights of persons with disabilities, due to the socio-constructivist concept of disability embraced therein.[7]

By stating the fundamental right of persons with disabilities to make their own decisions on all aspects of their lives (i.e. by affirming their right to be equal before the law), universal legal capacity is significant in overtly challenging the *medical model* of disability. Never explicitly theorised – even within Disability Studies, so much that Tom Shakespeare and other prominent scholars refer to it as a "straw man" created by its opponents [49] – and no longer hegemonic, the *medical model* still produces relevant discriminatory effects, by presenting disability as a pure medical condition to be cured and by seeing persons with disabilities as unavoidably "unfortunate, useless, different, oppressed and sick" ([50], p. 146).

In the legal sphere, the medical model has long remained almost unchallenged, justifying the presence and the legitimacy of *de jure* presumptions concerning the incompetency of persons with disabilities and, in turn, allowing for the presence of laws, policies and practices where their incapacity was considered the (unquestioned) norm. In this respect, one may think of full guardianship, compulsory

[6] Among the first attempts to apply Fineman's vulnerability theory to (American) disability law, see Ani Satz's [44], whose work focuses on antidiscrimination law.

[7] The extent to which the CRPD reflects any particular model of disability is debated [47] [48]. Some scholars think the CRPD is influenced by the social model of disability, others have focused on the biopsychosocial one, others believe that the Convention has led to the human rights model of disability receiving legal recognition. Finally, some commentators argue complex constructions, where the above-mentioned models are combined with each other or with Nussbaum's capabilities approach.

treatments, and the categorical attribution of a disability status based on impairment diagnosis or individual functioning alone [51].

With the entry into force of the CRPD and the subsequent legal development of the socio-constructivist concept of disability accepted therein, the situation has radically changed, at least theoretically. Presumptions of competency and legal capacity have become a matter of human rights law, along with the right to support, required by the concept of legal capacity as reframed in Art. 12 [52]52.

This principle is likely to have significant legal outcomes, some of which are already being produced. For instance, States Parties are required to adopt a disability-neutral approach to disability, which means that persons with disabilities must not be discriminated against by resorting to legal capacity, and the latter should not be conflated with the mental one. On this basis, guardianship and mental health laws allowing for forced treatment have to be abolished, with substitute decision-making *always* being discouraged.

In some legal systems, the debate on such aspects has been raging for decades. In Italy, the call for ending full guardianship in favour of a less intrusive restriction of the individual's legal capacity dates back at least to the 1980s, when jurists began to invoke 'another law' [54] for persons with cognitive disabilities ('the mentally ill', to use an expression that was common at the time). The entry into force of the CRPD has shed new light on the various debates concerning legal capacity, resulting in the renewal of existing ones and opening up a series of issues to be discussed. Reference can be made once more to the Italian legal system, where a process of profound reorganisation is currently underway, following the entry into force of Law 227/2021, which delegates the Government to amend the current legislation on disability, in light of the principles enshrined in the CRPD.

In this regard, significant theoretical and interpretative problems have been raised by what we consider a 'thick interpretation' of universal legal capacity adopted by the CRPD Committee in its *General Comment No. 1* (GC1) – which is likely to reflect the position of most disability activists, given their large presence in the Committee. Such problems will be discussed after having clarified another key aspect regarding Art. 12, namely the concept of personhood it is based upon. In this way, the relevance of the vulnerability paradigm will become particularly evident, thus justifying our previous statement.

1.4 Questioning the Liberal Legal Subject: Exegesis of a Paradigm

Art. 12 is one of the most contested articles of the CRPD [55]. Its ambiguity, unanimously acknowledged in the literature associated to the article, may even be considered necessary, as some scholars [56]56 have argued:

> "a necessary cost of unity for the advocacy strategy of disability organisations participating in the negotiations of the Convention, it was the price of agreement amongst states parties when finalising article 12, and it was ambiguity about whether article 12 permitted or prohibited substitute decision making that enabled states parties who could not envisage abolishing systems of guardianship or deprivation of legal capacity to sign up to the Convention".

The wording of the article and, above all, the radical interpretation provided by the CRPD Committee in GC1 gave rise to an intense debate, which focused primarily on the need to identify the (possible) residual spaces of operation of substitute decision making. These aspects will be better explored later on. Firstly, the structure of Art. 12 will be analysed, as it is progressively affecting the 'crumbling' of the liberal paradigm underlying the legal subject.

In the first two paragraphs, Art. 12 embraces, with reference to disability, the undisputed heritage of international human rights law: equal recognition as persons before the law (legal personality) and no discrimination regarding legal capacity.

The principle of full legal capacity was originally stated in relation to a specific group of 'vulnerable subjects' as early as 1979, in the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). Both the CEDAW and the CRPD aim to challenge the existing legal presumptions of incompetence concerning individuals presumed vulnerable, thus revealing the symbolic importance of such an approach before focusing on the technical one.

In the CEDAW, the explicit recognition of women's legal capacity was established to challenge a legal and social order where women were almost invisible, due to stereotypes relating to their irrationality, inferiority and lack of autonomy. By unveiling the purely cultural nature of stereotypes affecting women's (in)capacity, the CEDAW thus exposed their all-pervasive exclusion, shared and perpetrated by both society and the law, with the aim of contrasting it and obtaining a more inclusive social and legal order [45, 57].

A similar approach has been adopted in relation to other vulnerable (groups of) persons, namely those who have received international recognition and protection under the process of specification of human rights that started with the entry into force of the *Universal Declaration of Human Rights* in 1948. The international Conventions following the 1948 Declaration aimed at giving legal visibility to otherwise invisible subjects.

This process, which has in turn facilitated the transition from a generic 'man', the "man as man" [59], to the specific human being, considered in his/her singular nature, to a plurality of legal subjects, has shown how individual differences require not only equal treatment and protection, but also the recognition of various specificities. This has had a significant impact on the relationship between stereotypes, rationality and capacity, progressively leading to the overcoming of the prejudices against the rationality of vulnerable subjects (who were considered to be irrational or less rational than liberal, rational subjects), which used to result in systemic exclusion, discrimination and oppression. Nowadays, such stereotypes are usually recognised as having purely cultural origins (although on a cultural level much remains to be done to eradicate them completely) and do not justify any limitation of legal capacity.

The same still has not happened with disability, due to the situation appearing to be much more complicated because of the presence of an impairment that, despite being socially constructed, *may have* (but does *not* have *necessarily)* some consequences on the individual's rationality, even when it is not considered against

high-demanding standards, like Henry Frankfurt's second-order volition,[8] but only in terms of a person's will and preferences.

Over time, this fact – together with the presence of stereotypes concerning the natural incapacity of persons with disabilities – has led to the maintenance of formal and informal mechanisms of incapacitation, which have not been questioned until very recently.

The CRPD is of paramount importance in counteracting this tendency, bridging a gap in international human rights law by calling for a *neutral appreciation* of the legal significance given to disability. The call for neutrality has been made both in relation to the specific issue of capacity [61] and, more generally, to draw attention to the need to limit the possibility of interfering in the lives of persons with disabilities [62].

In light of what has been observed so far, one might be sceptical of the revolution of Copernican proportions brought about by the CRPD, since the different paragraphs of Art. 12 reiterate formulas that have already been used in international human rights law. In the current "age of rights" [59]62, where new "frontiers of justice" [64] are constantly reached and crossed, the CRPD may be said to be in line with the other international Conventions, naming 'new' subjects who should be deemed worthy of equal concern and respect and, for this reason, should be made visible through and by law.

On closer inspection, however, such a view seems a little too restrictive. By requiring that people *with all kinds of disabilities* have to be recognised as holders of legal capacity on an equal basis with others, the Convention broadens the range of legal subjects while challenging the existing stereotypes against persons with disabilities. It departs from the 'classical' liberal ontology, moving towards a "sui generis approach to legal subjectivity" ([65] p. 85) which – although alternative explanations are also possible – we believe fits well with the vulnerability paradigm.

The shift is clear if we consider the field of legal philosophy: within liberalism, persons with any kind of disability have been all that a legal subject could not be. Historically, the presumption of non-rationality – which originally applied not only to cognitive but also to physical disability – has been a *necessary exception* to the principle of equality, which has proved to be particularly powerful when considering persons with disabilities. The liberal legal-philosophical tradition underlying the construction of the legal subject has tended to lump the various existential conditions together as a justifying basis for the derogatory regime regarding the application of the principle of justice, given the alleged inability, in all the cases, to meet the requirements of liberal anthropology.[9]

From Locke to Rawls, just to name some of the most famous representatives of liberalism, it is easy to understand how rationality, independence, autonomy and

[8] According to Frankfurt [60], individuals not only have first-order desires, but they also possess the additional capacity to form second-order ones (which are expressive of rational capacity) through reflection on first-order desires. Although Frankfurt's theory has been criticised over time, it gives an effective account of the individual's free will, possessed only by strongly rational people, who are able to reflect critically on their desires.

[9] Persons with disabilities were considered recipients of charity and therefore excluded from the application of the principles of justice (which only applied to the able-bodied persons).

productivity have characterised the (construction of the) liberal subject. Not surprisingly, the most prominent contemporary liberal theories aimed at recognising person with disabilities as full human beings, including Martha Nussbaum's capabilities approach [64]65 and Eva Kittay's ethics of care [67]67, tend to enrich the liberal reflection by giving new value to relations and vulnerability, thus departing from the image of the 'classical' liberal subject.

In the legal field, the same objective is entrusted – more or less consciously – to the CRPD, with the first two paragraphs of Art. 12 describing persons with disabilities as proper legal subjects, while paragraph 3 serves as the legal basis of that 'support paradigm' that is fundamental for universal legal capacity. Under this paragraph, States Parties are required to take (with the limits set out in paragraph 4) all appropriate measures to *support* a person in making their own decisions, with the aim of promoting consistency with their wishes and values.[10] These decisions can be of personal or financial nature: according to paragraph 5, the legal capacity of persons with disabilities extends also to fields such as ownership and financial management.

The image of a person with disabilities who is to be *presumed* capable and who is able to act autonomously thanks to supportive relationships (even when disposing of their assets) is clearly at odds with that of the 'classical' subject of law, who is entrenched in their 'inner citadel'. This is all the truer when considering that a person with disabilities has to be recognised as a legal actor also in relation to property and financial rights, as provided for in paragraph 5. It seems necessary to remark this point because, although to date the disability law doctrine has not thoroughly analysed it, such recognition can be interpreted as one of the most direct attacks on the traditional, liberal concept of legal subject, since the instruments of incapacitation with patrimonial function were the first to be adopted, in order to sanction the legal irrelevance of persons with disabilities (mainly with regard to legal transactions).

As it has been repeatedly observed, while Article 12 CRPD does not seem to be compatible with the model of the classical liberal subject, it perfectly fits with the image of the vulnerable one, whose decision-making capacity and legal agency are nurtured by supportive relations (despite being still threatened by coercion and undue influence). The support paradigm thus reveals the close relationship between universal legal capacity and the vulnerable subject, to the point that capacity itself can be considered vulnerable.

In this regard, it should be pointed out that the theoretical importance of Art. 12 is much greater than generally observed. Although universal legal capacity is usually considered an emerging concept aimed at transforming the way in which the law responds to cognitive and intellectual disabilities [69] (and also to the psychosocial ones), the scope of application of Art. 12 seems much wider, for at least two reasons. First, the non-discrimination provision of Art. 12 requires to take universal legal capacity seriously, which means that legal actors are not required to develop a different way to answer questions on legal capacity when dealing with people with disabilities, but to "look to how these problems arise, and may be addressed, in

[10] Supported decision-making is an umbrella term for processes of formal or informal nature, aimed at assisting a person in taking their own decisions or acting according to them.

decision-making for anyone" ([70], p. 62). In light of this, it is not the particular vulnerability of persons with disabilities that comes to the fore, but rather – again – the shared, universal one. In this sense, the principle of universal legal capacity applies to both people with and without disabilities.

Furthermore, by relying on vulnerable subjectivity and on a conception of legal agency characterised by a gradual and relational nature (thanks to the support paradigm), Art. 12 unhinges the dichotomies on which modern law is based, such as capacity/incapacity, vulnerability/invulnerability, autonomy/paternalism, empowerment/protection [71], which are closely intertwined with each other. This shows how this is not only a 'disability matter', but a wider theoretical one. Not coincidentally, supported decision-making is rapidly emerging as a major topic of conversation in law reform circles and disability rights activism, since it represents the new legal standard for reforms on legal capacity [72]72. The following paragraphs will discuss some of the most relevant points of the current debate.

1.5 Universal Legal Capacity and the 'Reality Test'

Legal capacity is a controversial expression, as it has no internationally agreed upon definition and is a fluid concept, which makes it difficult to understand what restrictions to individual agency can be said to be legitimate. Art. 12 CRPD makes the issue even more complex.

In GC1, a soft law instrument, the CRPD Committee has defined legal capacity as including both the capacity to be a holder of rights (legal standing) and the capacity to be an actor under the law, namely an agent with the power to create, modify or end legal relationships (legal agency), thus rejecting the possibility of unconditionally recognising only the legal standing of persons with disabilities. As the *travaux préparatoires* of the CRPD have revealed, the opportunity to offer equal recognition only to legal standing was one of the positions already in the field during the negotiations, when many States parties adopted such a conservative and defensive approach, which anyway is reflected in the application of reservations, in the adoption of declarations, and in some 'ambiguous translations'[11] aimed at undermining the 'transformative power' of Art. 12.

By affirming that legal capacity should not be limited on the basis of mental disability, Art.12 requires States to reform national guardianship and mental health laws that are not compliant with the support paradigm. The most significant effects of universal legal capacity concern persons with cognitive and psychosocial disabilities, since they are among those who, to date, have been most discriminated against (also) in relation to the recognition and exercise of their capacity, due to their lack of correspondence to the liberal subject. By recognising

[11] The latter is the case of the Italian legal system, where the heading of Art. 12 CRPD was translated into 'capacità giuridica' (which is equivalent to 'legal standing'). Although the legal doctrine has affirmed that 'capacità giuridica' has to be interpreted as 'capacità d'agire' ('legal agency') [74], it is difficult not to suspect that the choice of terminology was by no means accidental, but rather aimed at 'downplaying' the revolutionary scope of Art. 12 and facilitating its transposition, given the presence of guardianship institutions based on substitute decision-making (which, by the way, was censured in 2016 by the CRPD Committee itself).

their legal capacity under the equality principle, the CRPD seems to open up new 'spaces of possibility' for them.

The width of such space, however, is the subject of a lively debate. One of the most controversial aspects to understand is whether substitution is allowed, albeit residually. While Art. 12 is (perhaps not voluntarily, but no less ambiguously) silent on the point, in GC1 the CRPD Committee states that support in the exercise of legal capacity should *never* amount to substitute decision-making (paragraph 17), thus embracing what can be considered a thick interpretation of Art. 12.

This statement is generally coupled with the warning not to conflate concepts of legal and mental capacity (paragraphs 12–13), the latter considered not as an objective, scientific and naturally occurring phenomenon, but as one highly dependent on social and political contexts, characterised by power imbalances. Under Art. 12 CRPD, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.

The Committee's position has been considered in literature as a basis for a direct claim for a repeal of substitute decision-making, the abolishment of conventional mental health laws allowing for indefinite restriction of liberty, coercion and compulsory treatments, and a repeal of the reliance on the concept of mental capacity in the law [60, 75].

Nevertheless, while sharing the need to prevent any discrimination against the capacity of a person with disabilities and the necessity to facilitate the transition towards the support paradigm, it is being increasingly observed how, when subjected to a 'reality test', the Committee's interpretation reveals itself almost impossible to implement and is inadequate to deal with the complexity of the issue at stake. From this perspective, the matter does not revolve just around making the paradigm shift real (by making universal legal capacity effective), but also around the assessment of the practical feasibility of theoretical legal solutions.

The residual admissibility of substitution becomes relevant especially when 'hard cases' arise, i.e. when it is impossible to understand and ascertain what the 'will and preferences' of a person are. In these circumstances, speaking of support seems to imply the need to resort to fiction, since in practice the decision is taken *for* – rather than *by* – the person.

In the face of such criticism, it has been replied that 100% support is provided by resorting to substitute judgement. According to that, the preferences of a person are reconstructed by looking at those previously expressed, which become the guiding criterion for a decision that is made by others. In short, the previous expression of one's preferences is considered sufficient to remain within the scope of applicability of the support. Conversely, the principle of best interests should always be rejected, due to it failing to respect the person's 'will and preferences': heterodetermination is likely to result in paternalism and in the person becoming irrelevant. Finally, when the 'will and preferences' of the person cannot be ascertained despite all the available efforts, the best interpretation of what they would be likely to be should be given.

On this point, the following can be observed. First, in the literal wording of Art. 12, there is nothing to suggest that, once it has been established that it is impossible to use the instrument of support in a specific case (therefore, considering support to

be the rule and abandoning any presumptive mechanism), substitution is completely inadmissible. On the contrary, when a person is unable to express their preferences, the article allows for the possibility of understanding them based on the will previously expressed, *opening up* (rather than closing down) the possibility of a substitution, even though bound to the respect for the person's will and preferences.

The second observation can be summarised as follows: what kinds of best interests are to be considered? In the debate that has developed in common law countries, there has long been an opposition between best interest and substitute judgement [76]. The first one is deemed fully incompatible with Art. 12 for the above-mentioned reasons, while the second one – despite its name, which evokes heterodetermination – is legitimate within the boundaries of Art. 12, due to it being linked to the previously expressed 'will and preferences' [77]. The two positions do not generally seem to be compatible: the discrimination historically suffered by people with disabilities in relation to this issue makes that perfectly understandable. However, this interpretation of best interest is not the only existing one: in many countries, it tends to be anchored to the individual's 'will and preferences', becoming a *subjective* best interest. An example of this approach is provided by the position expressed by the Italian Supreme Court of Cassation in the Englaro case.[12] The judge argued that, when assessing the best interests of a patient who is naturally incapable because of their unconsciousness, the guardian must not decide *for* the person, but *with* them, thus reconstructing their will based on previously expressed preferences.

Having to be ascertained by making reference to concrete circumstances, the subjective best interest principle cannot be considered paternalistic. Its pragmatic aspect makes it a flexible criterion: thanks to the reference to the individual's 'will and preferences' (rather than superior or supreme interests), the original indeterminacy of the (subjective) best interest principle gains greater concreteness, and the person's subjectivity is recognised. In this perspective, priority should not be given to the clinical aspect, but to personal and biographical characteristics, in relation to which the role of friends and family is also valued (according to the relational and 'supportive' concept that characterises Art. 12 and to the challenges it poses [78]).

When it has concretely been ascertained that, even with reasonable arrangements, the person cannot decide by themselves,

> "[…] then even 'allowing' [her] to make 'her own decision with support' is in itself a decision made for that person by someone else. Whether one appeals to a best interpretation of 'will and preference' or of 'best interests,' it is a basic fact that either way someone else and not the principal is proposing, adopting, and using the rule of interpretation" [79, p. 164].

Furthermore, there may also be circumstances in which the person's will and preferences cannot be ascertained, despite the best efforts: for instance, when the person

[12] Ruling no. 21748 of 2007. Eluana Englaro was a 38-year-old woman who had been in a permanent vegetative state for 17 years, until her father (appointed as guardian) was authorised by a judge to allow the removal of her feeding tube. The request aimed at the cessation of care was made in accordance with the wishes of the young woman, expressed to her parents and friends (living wills were only regulated in the Italian legal system by Law 219/2017).

cannot temporarily articulate and communicate, and it is impossible to understand their will and preferences even by referring to other indicators (e.g. the values to which they have appealed to, eventually supported, to lead their own life). In these cases, it has been observed ([70], p. 62) that metaphysical and epistemological problems arise:

> "what is it for a good to be a good of a person and not simply a good for a person? How can we ascertain what is a good for a person who cannot articulate?"

From a legal point of view, the residual applicability of the objective best interest principle should be acknowledged, as the only other possible alternative seems to show that it is impossible to decide, with all the problematic consequences that such a position entails. These are particularly evident in the healthcare sphere.

A further problem revolves around whether guardians should make a decision focusing on the fact that a person might harm themselves, while being in a state of temporarily impaired capacity.

Answering this question seems to be an important aspect of the reality test. In these cases, the thick approach seems to reveal how, in practice, substitution may be inescapable also for those who radically oppose it. On closer inspection, when a person engages in self-destructive behaviour and refuses support, the possibility or even the necessity of going against their will is allowed also by the proponents of a thick interpretation of Art. 12. Some of them permit facilitators to intervene when a person "can no longer express his will and/or intentions in ways that would direct reasonable consequential action" ([51], p. 144). Others appeal to the individual's "real preferences" and to their "authentic will"([55], p. 369–370). While these concepts are characterised by a certain stability over time and, as such, should be respected, when stability is absent – like when mental alteration occurs – it might be justified to go against the individual's actual will, by appealing to authenticity.

But how can the reference to 'authentic will', defined as such not by the person themselves but by others, practically lead to the *overcoming* of the substitution mechanism and of the related paternalistic approach? Why by not recognising that, without prejudice to the use of support as a rule, are there cases in which, if we aim to protect the individual, it is necessary to resort to the best interest principle (although in these circumstances it seems complex even to distinguish between objective or subjective best interests)?

In this regard, once interference is permitted, it will be necessary to understand whether this applies as a general principle or whether relevant interests must be selected. In short, is only self-harm or also the others' physical integrity relevant? And are financial interests also included?

The 'reality test' urges us to critically reflect on some risks related to the implementation of the universal capacity paradigm, such as undue influence, exploitation and conflict of interests, as stated in Art. 12(4) CRPD and increasingly discussed by the doctrine [80]69]. An irenic view of the supporting relationship should be abandoned, thus recognising that the support person might not foster the autonomy of the person with disabilities, but rather endanger it. Adequate safeguards, aimed at preventing such cases and remedying the ones already occurred, have to be provided.

It should also be stressed that the legal recognition of this relation implies admitting that (at least) two subjects are part of it: the person with disabilities and the one who supports them. Under Art. 12, if the former is finally recognised as a subject of law, the same should also apply to the latter, who in turn should not be reduced to the status of an object being at the full disposal of the person with disabilities (such a possibility cannot be excluded, given that literature usually focuses on the supported person). Unless betraying the principle of each person's right to equal concern and respect, the recognition of the right to support cannot result in the reversal of the asymmetrical relationship repeatedly denounced by the disability law doctrine, which would value the role of the person with disabilities ending up almost annihilating the subjectivity of the individual who performs the function referred to in Art. 12(3) CRPD. For this reason, we have some reservations about describing the support person using expressions such as a "prosthesis for thinking" ([81], p. 485). While this phrase aims at fostering the allocation of the responsibility of the functions to the agent performing them (i.e. to the individual with disabilities), it might also overshadow the subjectivity of the support person.

This, in turn, leads to the responsibility issue: recognised as being capable of deciding and acting according to their will and preferences, the person with disabilities should also be considered responsible for their own legally relevant actions.

For the proponents of a thick interpretation of Art. 12, this principle applies to both civil and criminal law, meaning that persons with disabilities should be held fully responsible. As it has been – critically – observed [81, p. 6],

> "this line of thinking assumes that these two kinds of legal capacity are two sides of the same coin."

However, it seems that the issues raised in the two areas are significantly different, and the point should be problematised [82]. Although it is still necessary not to underestimate the risks involved in expanding a subject's sphere of responsibility, implementing universal legal capacity in civil law seems possible without excessive complications. This point will be discussed later on, by considering the 'permeability' of Art. 12 in the Italian legal system. A few aspects concerning criminal law will now be addressed, as things seem much more complicated in that field. To this aim, reference will be made to the lively Anglo-American debate. Conversely, most Italian legal scholars are not interested in legal capacity and the few who do deal with it generally do not make reference to the CRPD and its Art. 12, although following the ratification of the CRPD addressing this issue seems unavoidable (an exception to that is [83]). They agree on the need to unhinge the mechanistic connection between insanity, non-imputability and social dangerousness. As far as imputability is concerned, the only element of convergence is the refusal to consider medical assessment as the sole criterion for ascertaining the individual's capacity (while there are various theories regarding the criteria to be used to ascertain imputability). This leads in turn to an increase in the number of the cases in which a person can be declared not imputable, going beyond the traditional reference to infirmity and expanding the range of persons who can be considered *not responsible*, in light of the specific circumstances of the case.

Our reconstruction of the Anglo-American debate on this point seems to show that the direction taken by the Italian debate on legal capacity might not be shared by the proponents of a thick interpretation of Art. 12, as they raise questions about the implication of the CRPD for defence strategies based on mental incapacity (primarily, insanity defence) and for the competency status, arguing that they should be abolished [61, 83]. They might be institutions contrary to the principle of equality whose presence in the legal system might prevent the recognition of persons with (especially psychosocial) disabilities as moral and legal agents. The relevant matter, here, is the recognition of criminal *responsibility* of persons with disabilities.

However, there is a growing number of scholars who, while being sensitive to the 'shift' occurred with the CRPD, consider insanity defence and incompetency status compatible with the Convention [85, 85], a position that seems to be in line with that expressed by the CRPD Committee in GC1.

If the abolitionist position merely states that a person's disability should not necessarily matter when establishing individual liability (for instance, in cases in which a kleptomaniac commits murder or when there is the need to avoid resorting to any automatism in assessing the applicability of the justification of putative self-defence to a person with a paranoid syndrome), its non-discriminatory effort seems to be clear. However, when it goes so far as to state that no reference should be made to mental capacity, this position seems to prove too strict, at least for two reasons. First, given that establishing the subjective element of the offence is necessary for ascertaining criminal responsibility, reliance (also) on mental capacity seems unavoidable. Furthermore, it is not clear how the punishment of people who should be diverted out of the criminal justice system may contribute to the recognition of their subjectivity, nor how supported decision-making should operate in this context.

Likewise, with regard to competency, the advantages of the abolitionist approach do not appear to be totally clear. This institution has a guarantee function: it is aimed at ensuring the participation in the trial only of those persons who are able to understand its meaning and exercise their right to defence. Once acknowledged this point, it is not easy to understand where its discriminatory nature lies. If the problem is related to the criteria used to ascertain competency, which are too anchored to cognitivist standards, then the issue concerns the formulation of the criteria – which should be compliant with the CRPD – rather than the legitimacy of the institution.

Conversely, in relation to civil law, the transformative potential of universal legal capacity is much more significant, as the worldwide debate on Art. 12 has revealed [87, 87]. This is a lively field, where scholars are increasingly committed to investigating the legal implications of Art. 12 not only in relation to persons with disabilities, but also to the elderly (especially the dependent ones), thus confirming the wider theoretical importance of the concept in question [43, 88].

Their inquiry is often part of a path (to overcoming incapacitation) taken by many States even before the CRPD came into force. This is the case of the Italian legal system, where in 2004 support administration entered into force alongside traditional incapacitation instruments, with the aim of abandoning the categorical concept anchored to the person's status of incapacity and fostering the individual's self-determination.

Although in a manner deemed insufficient by the CRPD Committee, which in 2016, in its Concluding Observations on the report submitted by Italy, expressed

concerns "that substitute decision-making continues to be practiced" not only through full guardianship, but also through the ways support administration works in practice, this legal institution has profoundly innovated the Italian legal system. It has broken the logic of substitute-decision making which is still typical of full guardianship, bringing to the forefront the relationship between the person providing support and the recipient, and the latter's legal capacity.

Over the years, thanks to judicial activism aimed at fostering the individual's capacity for self-determination to the highest possible degree, the range of acts that a person subject to a support administration can validly perform has gradually increased, up to including very personal acts, such as marriage (even against the support person's will) or donation.[13]

This is a very interesting point: since in the Italian legal system very personal acts require full capacity to act, allowing a person under support administration to validly perform such acts means at least two things. Firstly, that the person is no longer considered to be incapable, but *capable of acting* (contrary to an incapacitating culture that is still widespread in Italy). Secondly, in this framework, the relationship of support is not intended as a limitation of personal autonomy, but rather as a way to make its exercise possible (in consonance with the approach fostered by the CRPD).

Following this trend, recently even a person under full guardianship (i.e. totally deprived of legal capacity) has been judicially allowed to express their consent to their own adoption[14] through their guardian.[15] In this way, the overcoming of the rigid distinction between capacity and incapacity is thus further undermined: very personal acts can be performed not only by persons who are under support administration (who therefore retain, albeit partially, their legal capacity), but also by the ones who are under full guardianship, i.e. completely deprived of their legal capacity. This aim has been achieved by referring to Art. 12 CRPD as an interpretative parameter. The judge has indeed remarked the need to overcome the dichotomy between capacity and incapacity and pointed out the necessity of implementing the support paradigm.

This is an element of profound novelty within the Italian legal culture, which however is still struggling to understand the transformative scope of the CRPD and to abandon old patterns of incapacitation.

2 Conclusions

Legal capacity has an absolute centrality for full legal recognition and access – if not to the legal sphere, at least – to most of the individual's rights. Not coincidentally, critical theory has long remarked how, in the construction of the modern subject of law and throughout *its* history, legal capacity has had a fundamental role in distinguishing

[13] Cf. Supreme Court of Cassation, 1st Civil Section, order no. 12460/2018. See also Italian Constitutional Court judgement no. 114/2019 and 144/2019.

[14] Under Art. 296 of the Italian Civil Code, personal consent is a necessary prerequisite for adoption. In order to give valid consent, it is necessary for the person to have full capacity to act (which is clearly lacking in case of full guardianship).

[15] Supreme Court of Cassation, 1st Civil Section, order no. 2462/2022.

who could properly be considered a subject of law and who could not, thus working as an exclusionary device.[16] This reflection is particularly important for studies on vulnerability, since, throughout legal history, those who were deemed vulnerable were almost inescapably – either totally or partially – deprived of legal capacity.

Although nowadays the recourse to *de jure* mechanisms of incapacitation is very narrow and tends to be considered discriminatory, the disavowal of capacity is still very frequent: it lurks in the survival of institutions inspired by an incapacitating view of certain subjectivities, as well as in legal practice. In relation to disability, the non-consensual sterilisation of women with disabilities and the non-consensual admission of dependent elderly people into long-term care facilities may be recalled.

However, Art. 12 shows that another story can be told. It is a kind of visionary story, which requires us to recognise that what we perceive as the immutability of legal categories may be attributable to our failure to imagine viable alternatives. By enshrining the development of a normative model of legal agency that cannot be traced back to Cartesian philosophy, the one traditionally presupposed by legal culture, Art. 12 goes in the direction of overcoming some of the most relevant dichotomies on which modern law is still based, starting from that between capacity and incapacity. The development of the paradigm of universal legal capacity results in this dichotomy losing its *raison d'être*, while multiple 'grey zones' are opened up, intended as 'spaces for action' for persons who used to be considered incapable under old incapacitating patterns. The intertwining between capacity and vulnerability is not merely an inclusive expansion of already consolidated legal schemes but imposes a significant legal transformation, where capacity is the new universal norm. This circumstance calls for a reflection on a non-idealistic notion of legal capacity (and, in particular, of legal agency), together with a discussion of the various controversial normative aspects that need to be faced. It requires a radical change of perspective, i.e. the awareness that the universalist perspective on capacity outlined in Art. 12 inevitably impacts all the people, and not only people with disabilities. After all, we are all vulnerable (and capable) subjects (of law).

Funding Open access funding provided by Università degli Studi di Ferrara within the CRUI-CARE Agreement.

Declarations

Conflict of interest No conflict of interests directly or indirectly related to the work submitted.

[16] In this paper, reference has mainly been made to feminist theory. However, despite following a different path, disability studies might have led to similar outcomes.

References

1. Burgorgue-Larsen, Laurence. 2014. La vulnérabilité saisie par la philosophie, le sociologie et le droit. De la nécessité d'un dialogue interdisciplinaire. In *La vulnérabilité saisie par les juges en Europe*, Ed. by Laurence Burgorgue-Larsen. Paris: Pedone: 237–243.
2. Bernardini, Maria Giulia. 2021. *La capacità vulnerabile*. Napoli: Jovene.
3. Heikkilä, Mikaela, Hisayo Katsui, and Maija Mustaniemi-Laakso. 2020. Disability and vulnerability: A human rights reading of the responsive State. *The International Journal of Human Rights*. https://doi.org/10.1080/13642987.2020.1715948.
4. Fineman, Martha A. 2004. *The autonomy myth. A theory of dependency*. New York: The New Press.
5. Pulcini, Elena. 2012. *The individual without passions. Modern individualism and the loss of the social bond*. Lanham: Lexington Books.
6. Pulcini, Elena. 2020. *Tra cura e giustizia. Le passioni come risorsa sociale*. Milano: Bollati Boringhieri.
7. Fineman, Martha A. 2008. The vulnerable subject: Anchoring equality in the human condition. *Yale Journal of Law & Feminism* 20: 1–23.
8. Giolo, Orsetta. 2020. *Il diritto neoliberale*. Napoli: Jovene.
9. Butler, Judith. 2009. *Frames of war. When is life grievable?* New York: Verso.
10. Badford, Daniel, and Jonathan Herring, eds. 2020. *Embracing vulnerability. The challenges and implications for law*. London: Routledge.
11. Giolo, Orsetta, and Baldassare Pastore, Eds. 2018. *Vulnerabilità. Analisi multidisciplinare di un concetto*. Roma: Carocci.
12. Longo, Mariano, and Vincenzo Lorubbio. 2021. Vulnerabilità, rischio e diritti umani tra riflessione sociologica e diritto internazionale. *Rivista trimestrale di scienza dell'amministrazione*. https://doi.org/10.32049/RTSA.2021.3.09
13. Pastore, Baldassare. 2021. *Semantica della vulnerabilità, soggetto, cultura giuridica*. Torino: Giappichelli.
14. Ippolito, Francesca. 2020. *Understanding vulnerability in international human rights law*. Napoli: Editoriale Scientifica.
15. Macioce, Fabio. 2022. *The politics of vulnerable groups. Implications for philosophy, law, and political theory*. London: Palgrave Macmillan.
16. Taramundi, Morondo, Dolores. 2016. Un nuevo paradigma para la igualdad? La vulnerabilidad entre condición humana y situación de indefensión. *Cuadernos Electronicós de Filosofía del Derecho* 34: 205–221.
17. Timmer, Alexandra, Moritz Baumgärtel, Louis Kotzé, and Lieneke Slingenberg. 2021. The potential and pitfalls of the vulnerability concept for human rights. *Netherlands Quarterly of Human Rights* 39 (3): 190–197. https://doi.org/10.1177/09240519211048009.
18. Cole, Alyson. 2016. All of us are vulnerable, but some are more vulnerable than others: the political ambiguity of vulnerability studies, an ambivalent critique. *Critical Horizons* 17 (2): 260–277. https://doi.org/10.1080/14409917.2016.1153896.
19. Kim, So Yeon. 2021. Les vulnérables: Evaluating the vulnerability criterion in Article 14 cases by the European Court of Human Rights. *Legal Studies.* 41 (4): 617–632. https://doi.org/10.1017/lst.2021.21.
20. Mackenzie, Catriona, Wendy Rogers, and Susan Dodds. 2014. Introduction: What is vulnerability, and why does it matter for moral theory?. In *Vulnerability: new essays in ethics and feminist philosophy*, Edited by Catriona Mackenzie, Wendy Rogers, and Susan Dodds. Oxford-New York: OUP: 1–29. DOI:https://doi.org/10.1093/acprof:oso/9780199316649.003.0001.
21. Abrahamson, Peter. 2012. European Welfare States: neoliberal retrenchment, developmental reinforcement or plural evolutions. In *Developmental Politics in Transition. International Political Economy Series*, Ed. by Chang Kyung-Sup, Ben Fine, Linda Weiss. London: Palgrave Macmillan. https://doi.org/10.1057/9781137028303_6.
22. Pestieau, Pierre, and Mathieu Lefebvre. 2018. *The welfare state in Europe: Economic and social perspectives*. Oxford-New York: OUP. https://doi.org/10.1093/oso/9780198817055.003.0012.
23. Becker, Ulrich, and Anastasia Poulou, Eds. 2021. European welfare state constitutions after the financial crisis. Oxford-New York: OUP. https://doi.org/10.1093/oso/9780198851776.001.0001.
24. Tronto, Joan. 2013. *Caring democracy: Markets, equality and justice*. New York: NUP.

25. Urban, Petr, and Liza Ward, eds. 2020. *Care ethics, democratic citizenship and the State*. Palgrave: MacMillan.
26. The Care Collective. 2020. *The care manifesto. The politics of interdependence*. New York: Verso.
27. Andolfi, Ferruccio, and Thomas Casadei, Eds. 2022. Prendersi cura. Monographic issue of *La società degli individui* 73. Milano: Franco Angeli.
28. Dworkin, Gerald. 1989. The Concept of Autonomy. In *The inner citadel: Essays on individual autonomy*, Ed. by John Christman. New York: Oxford University Press: 54–62.
29. Quinn, Gerard. 2011. Legal capacity law reform: The revolution of the UN Convention on the rights of persons with disability. *Frontline: the voice of intellectual disability* 83, 2 August 2011, http://frontline-ireland.com/legal-capacity-law-reform-the-revolution-of-the-un-convention-on-the-rights-of-persons-with-disability/.
30. Christman, John. 2020. Autonomy in moral and political philosophy. In *The Stanford Encyclopedia of Philosophy*, Ed. by Edward N. Zalta. https://plato.stanford.edu/archives/fall2020/entries/autonomy-moral/.
31. Amato, Salvatore. 1990. Il soggetto e il soggetto di diritto. Torino: Giappichelli.
32. Naffine, Ngaire. 2003. Who are law's persons? From Cheshire cats to responsible subjects. *Modern Law Review* 66 (3): 346–367. https://doi.org/10.1111/1468-2230.6603002.
33. Mackenzie, Catriona, and Natalie Stoljar, Eds. 2000. *Relational autonomy. Feminist perspectives on autonomy, agency and the social self*. Oxford-New York: OUP.
34. Christman, John. 2004. Relational autonomy, liberal individualism, and the social constitution of selves. *Philosophical Studies* 117: 143–164.
35. Childress, James F., and Michael Quante. 2022. *Thick (concepts of) autonomy*. Cham: Springer.
36. Anderson, Joel. 2014. Autonomy and Vulnerability Entwined. In *Vulnerability: new essays in ethics and feminist philosophy*, Ed. By Catriona Mackenzie, Wendy Rogers, and Susan Dodds. Oxford-New York: OUP: 134–161. DOI: https://doi.org/10.1093/acprof:oso/9780199316649.003.0006.
37. Fineman, Martha A. 2010. The vulnerable subject and the responsive State. *Emory Law Journal* 60: 151–275.
38. Nedelsky, Jennifer. 2012. *Laws relations: A relational theory of Self, autonomy, and law*. Oxford-New York: Oxford University Press.
39. Herring, Jonathan. 2014. *Relational autonomy and family law*. Cham: Springer.
40. Harding, Rosie. 2017. *Duties to care: Dementia, relationality, and law*. Cambridge, UK: Cambridge University Press.
41. Bernardini, Maria Giulia. 2016. *Disabilità, giustizia, diritto. Itinerari tra filosofia del diritto e* disability studies. Torino: Giappichelli.
42. Celik, Elif. 2017. The role of CRPD in rethinking the subject of human rights. *The International Journal of Human Rights* 21 (7): 933–955. https://doi.org/10.1080/13642987.2017.1313236.
43. Mattsson, Titti, and Lottie Giertz. 2019. Vulnerability, law, and dementia: An interdisciplinary discussion of legislation and practice. *Theoretical Inquiries in Law* 21: 139–159. https://doi.org/10.1515/til-2020-0007.
44. Satz, Ani B. 2008. Disability, vulnerability, and the limits of antidiscrimination. *Washington Law Review* 83: 513–568.
45. Arstein-Kerslake Anna. 2021. *Legal capacity and gender. Realizing the human right to legal personhood and agency of women, disabled women, and gender minorities*. Cham: Springer.
46. Hooks, Bell. 1984. *Feminist theory: From the margin to the center*. Boston: South End Press.
47. Series, Lucy. 2020. Disability and human rights. In *The Routledge handbook of disability studies*, 2nd ed., edited by Nick Watson and Simo Vehmas, 72–88. London and New York: Routledge. https://www.taylorfrancis.com/chapters/oa-edit/https://doi.org/10.4324/9780429430817-6/disability-human-rights-lucy-series.
48. Degener, Theresia. 2016. Disability in a human rights context. *Laws* 5 (3): 35. https://doi.org/10.3390/laws5030035.
49. Hogan, Andrew J. 2019. Moving away from the 'medical model': The development and revision of the World health organization's classification of disability. *Bulletin of the History of Medicine* 93 (2): 241–269. https://doi.org/10.1353/bhm.2019.0028.
50. Hunt, Paul. 1966. A critical condition. In *Stigma: The experience of disability*, Ed. by Paul Hunt. London: Geoffrey Chapman, reprinted at https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/Hunt-a-critical-condition.pdf.

51. Bach, Michael, and Lana Kerzner. *A new paradigm for protecting autonomy and the right to legal capacity*. Ontario: Law Commission of Ontario, 2010. http://www.lcocdo.org/en/disabilities-call-for-papers-bach-kerzner.
52. Kanter, Arlene S. 2015. *The development of disability rights under international law: From charity to human rights*. New York: Routledge.
53. Waddington, Lisa, and Mark Priestley. 2021. A human rights approach to disability assessment. *Journal of International and Comparative Social Policy* 37 (1): 1–15. https://doi.org/10.1017/ics2020.21.
54. Cendon, Paolo, ed. 1988. *Un altro diritto per i malati di mente*. Napoli: Edizioni Scientifiche Italiane.
55. Dhanda, Amita. 2017. Conversations between the proponents of the new paradigm of legal capacity. *International Journal of Law in Context* 13 (1): 87–95.
56. Series, Lucy, Anna Nilsson. 2018. Equal recognition before the law. In *The UN Convention on the rights of persons with disabilities. A commentary*, Edited by Ilias Bantekas, Michael A. Stein, and Dimitris Anastasiou. Oxford: OUP: 339–382.
57. Dinerstein, Robert D. 2012. Implementing legal capacity under Article 12 of the UN Convention on the rights of persons with disabilities: The difficult road from guardianship to supported decision-making. *Human Rights Brief* 19 (2): 8–12.
58. Arstein-Kerslake Anna. 2017. *Restoring voice to people with cognitive disabilities*. *Realizing the right to equal recognition before the law.* Cambridge: Cambridge University Press.
59. Bobbio, Norberto. 1995 (1990). *The age of rights*. Cambridge: Polity Press.
60. Frankfurt, Harry. 1987. *The importance of what we care about*. Cambridge: Cambridge University Press.
61. Minkowitz, Tina. 2014. Rethinking criminal responsibility from a critical disability perspective: The abolition of insanity/incapacity acquittals and unfitness to plead, and beyond. *Griffith Law Review* 23 (3): 434–466. DOI/https://doi.org/10.1080/10383441.2014.1013177.
62. Flynn, Eilionóir, and Anna Arstein-Keslake. 2017. State intervention in the lives of people with disabilities: The case for a disability-neutral framework. *International Journal of Law in Context* 13 (1): 39–57.
63. Henkin, Louis. 1990. *The age of rights*. New York: Columbia University Press.
64. Nussbaum, Martha C. 2006. *Frontiers of justice: Disability, nationality, species membership*. Cambridge (Mass.): Harvard University Press. https://doi.org/10.2307/j.ctv1c7zftw.
65. Series, Lucy. 2015. Relationships, autonomy and legal capacity: Mental capacity and support paradigms. *International Journal of Law and Psychiatry* 40: 80–91. https://doi.org/10.1016/j.ijlp.2015.04.010.
66. Nussbaum, Martha C. 2000. *Women and human development: The capabilities approach*. Cambridge New York: Cambridge University Press.
67. Kittay, Eva F. 1999. *Love's labor. Essays on women, equality and dependency*. New York: Routledge.
68. Kittay, Eva F. 2021. Why human difference is critical to a conception of moral standing: An argument for the sufficiency of being human for full moral status. *The Journal of Philosophy of Disability* 1: 79–103. https://doi.org/10.5840/jpd20211199.
69. Kohn, Nina A. 2021. Legislating supported decision-making. *Harvard Journal on Legislation* 58 (2): 313–356.
70. Francis, Leslie. 2021. Supported decision-making: The CRPD, non-discrimination, and strategies for recognizing persons' choices about their good. *The Journal of Philosophy of Disability* 1: 57–77. https://doi.org/10.5840/jpd20211198.
71. Clough, Beverly. 2017. Disability and vulnerability: Challenging the capacity/incapacity binary. *Social Policy and Society* 16 (3): 469–481. https://doi.org/10.1017/S1474746417000069.
72. Martinez-Pujalte, Antonio. 2019. Legal capacity and supported decision-making: Lessons from some recent legal reforms. *Laws* 8 (4). https://doi.org/10.3390/laws8010004.
73. Flynn, Eilionóir, Anna Arstein-Kerslake, Clíona de Bhailís, and Maria Laura Serra, eds. 2020. *Global perspectives on legal capacity reform: Our voices, our stories*. New York: Routledge.
74. Cera, Rachele, and Valentina Della Fina. 2019. *Valutazione della conformità della normativa italiana all'articolo 12 della Convenzione delle Nazioni Unite sui diritti delle persone con disabilità (CRPD)*, Report by the Institute for international legal studies (ISGI) of the National Council Research Council of Italy (CNR), Roma. http://www.anffas.net/dld/files/RAPPORTO%20ISGI.pdf.

75. Minkowitz, Tina. 2011. Why Mental Health Laws Contravene the CRPD-An Application of Article 14 with Implications for the Obligations of States Parties, 15, https://doi.org/10.2139/ssrn.1928600.
76. Phillips, John, and David Wendler. 2015. Clarifying substituted judgement: The endorsed life approach. *Journal of medical ethics* 41 (9): 723–730. https://doi.org/10.1136/medethics-2013-101852.
77. Szmukler, George. 2019. 'Capacity', 'best interests', 'will and preferences' and the UN Convention on the rights of persons with disabilities. *World Psychiatry* 18 (1): 34–41. https://doi.org/10.1002/wps.20584.
78. Herring, Jonathan. 2013. Forging a relational approach: Best interest or human rights? *Medical Law International* 13 (1): 32–54. https://doi.org/10.1177/0968533213486542.
79. Craigie, Jillian, Michael Bach, Sándor Gurbai, Arlene Kanter, Scott Y.H.. Kim, Oliver Lewis, and Graham Morgan. 2019. Legal capacity, mental capacity and supported decision-making: Report from a panel event. *International journal of law and psychiatry* 62: 160–168. https://doi.org/10.1016/j.ijlp.2018.09.006.
80. Craigie, Jillian. 2021. Conceptualising 'undue influence' in decision-making support for people with mental disabilities. *Medical Law Review* 29 (1): 48–79. https://doi.org/10.1093/medlaw/fwaa041.
81. Silvers, Anita, and Leslie P. Francis. 2009. Thinking about the good: Reconfiguring liberal metaphysics (or not) for people with cognitive disabilities. *Metaphilosophy* 40 (3): 475–498.
82. Craigie, Jillian. 2015. Against a singular understanding of legal capacity: Criminal responsibility and the convention on the rights of persons with disabilities. *International Journal of Law and Psychiatry* 40: 6–14. https://doi.org/10.1016/j.ijlp.2015.04.002.
83. Dodaro, Giandomenico. 2020. L'attribuzione di capacità come pratica di riconoscimento della persona con disabilità quale "soggetto di diritto penale." *Diritto & Questioni pubbliche* 1: 63–87.
84. Slobogin, Christopher. 2015. Eliminating mental disability as a legal criterion in deprivation of liberty cases: The impact of the Convention on the Rights of Persons with Disabilities on the insanity defense, civil commitment, and competency law. *International Journal of Law and Psychiatry* 40: 36–42.
85. Perlin, Michael L. 2017. God said to Abraham/Kill me a son: Why the insanity defense and the incopetency status are compatible with and required by the Convention on the rights of persons with disabilities and basic principles of therapeutic jurisprudence. *American Criminal Law Review* 54: 477.
86. Gooding, Piers, and Tova Bennet. 2018. The abolition of the insanity defense in Sweden and the Convention on the rights of persons with disabilities: Human rights brinksmanship or evidence it won't work? *Criminal Law Review* 21 (1): 141–169. https://doi.org/10.1525/nclr.2018.21.1.141.
87. Hall, Margaret Isabel. 2012. Mental capacity in the (civil) law: Capacity, autonomy and vulnerability. *McGill Law Journal* 58: 61–94.
88. Constantino Caycho, Renato Antonio. 2020. The flag of imagination: Peru's new reform on legal capacity for persons with intellectual and psychosocial disabilities and the need for new understandings in private law. *Human Rights Journal* 14: 155–180. https://doi.org/10.17561/tahrj.v14.5482.
89. Dabove, María Isolina. 2018. Autonomy and vulnerability of elderly people: Emblematic judicial responses. *Revista de Derecho Privado* 34: 53–85.