

2023

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### Recommended Citation

Ilias Bantekas, *Mental and Intellectual Capacity and Contractual Freedom: Assistive Decision-Making Matters.*, 21 Seattle J. Soc. Just. 569 (2023).

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol21/iss2/14>

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# Mental and Intellectual Capacity and Contractual Freedom: Assistive Decision-Making Matters

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Ilias Bantekas\*

## ABSTRACT

Despite the advent of the U.N. Convention on the Rights of Persons with Disabilities (CRPD) in 2006, and the replacement of the medical model of disability with the social model of disability therein, the issue of capacity in contract law has remained largely unchanged. Legal capacity and the capacity to contract in most liberal states continues to dictate how persons with mental and intellectual disabilities are subject to substitute decision-making arrangements whereby their own personal will is extinguished in favor of that of their guardian. This is in violation of assistive decision-making arrangements endorsed and cemented by the CRPD, which allows disabled persons not only to achieve full legal personality and contractual autonomy, but also to realize their right to personal liberty and dignity.

## I. INTRODUCTION

An agreement becomes binding (and thus transformed into a contract) when an offer is met with unequivocal acceptance subject to the parties' common intention to be bound by the agreement.<sup>1</sup> Other legal systems require additional criteria, as is the case under English common law.<sup>2</sup> It is equally required that the underlying transaction, or subject matter of the agreement,

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<sup>1</sup> *Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>2</sup> Barbara Lisa, *Consideration Considered: How English Law Identifies Valid Contracts*, 1 COMMON L. REV. 14 (2001).

be lawful or consistent with public policy.<sup>3</sup> For the purposes of this article, an additional element is universally mandated: that the parties to a contract possess sufficient capacity under the law.<sup>4</sup>

“Capacity” is generally distinguished from “competence,” with the latter referring to the authority of a person to have legal standing in court proceedings;<sup>5</sup> however, this article argues that there is no real problem where capacity and competence are conflated. Given our definition of a contract as entailing an offer, an acceptance, and a common intention to be bound to the mutually agreed terms, it is obvious that the capacity of both offeror and offeree must be determined at the time of the contract’s formation.<sup>6</sup> One’s contractual capacity, at least under the law, is not compromised by intellectual disability alone.<sup>7</sup> Incapacity may be associated with a person’s age, level of maturity, sex, or by authority of an officer or agent of the principal.<sup>8</sup> It should be stressed that not all legal systems recognize that women possess full contractual capacity in all legal systems.<sup>9</sup> Most private law codifications, even those of liberal and industrialised states, assume that a person “in a state of pathological disturbance” is incapable of forming a contract because such state prevents the exercise of free will, unless such

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<sup>3</sup> *Contract*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>4</sup> *Capacity to Contract*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>5</sup> Litigation capacity was governed by the rule set out in the case of *Masterman-Lister v. Brutton & Co* [2003] EWCA Civ 70, 1 WLR 1511, which he summarised as being “whether the party legal proceedings is capable of understanding with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require the issues on which his consent or decision was likely to be necessary in the course of those proceedings.”

<sup>6</sup> JAN SMITS, *CONTRACT LAW: A COMPARATIVE INTRODUCTION* 91 (2d ed., Edward Elgar, 2017).

<sup>7</sup> Piers Gooding, *Navigating the ‘Flashing Amber Lights’ of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns*, 15 HUM. RTS. L. REV. 1, 45–71 (2015).

<sup>8</sup> SMITS, *supra* note 6, at 253.

<sup>9</sup> Mahdi Zahraa, *The Legal Capacity of Women in Islamic Law*, 11 ARAB L.Q. 245, 262 (1996).

state is only temporary.<sup>10</sup> It is generally assumed that the cognitive skills associated with contractual capacity encompass the ability to make an offer or acceptance as a sufficient understanding of the gravity of common intention that render agreements binding. In reality, however, in most lay transactions there is only a tangential appreciation of the implication of one's offer or acceptance, unless preceded by significant planning.

While the literature on the capacity of persons with neurodivergence and those with intellectual disabilities is vast, the bulk of this literature is focused on how such persons are allowed to make life decisions. For example, whether they can make decisions free of any external direction using substitute decision-making or via the assistance of a third person.<sup>11</sup> Literature on the actual impact of mental and intellectual disability legislation on contractual capacity is scarce. Indeed, despite the importance of capacity in the law of contracts, contract law textbooks without exception treat this issue pedantically, cursorily, and without any real attempt to situate contractual incapacity (and the restrictions on the freedom to contract) in contemporary human rights law.<sup>12</sup>

It is the premise of this article that the regulation of capacity for persons with neurodivergent and intellectual disabilities to enter contracts should be substantially distinguished from the regulation of other activities pertinent to such persons. First, the law of contracts, including contracts of adhesion, has a variety of safeguards in place to protect the integrity of parties subject to exploitation by their more powerful counterparts.<sup>13</sup> Second, it is usually

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<sup>10</sup> Geschäftsunfähigkeit [BGB] [Civil Code] [Incapacity to Contract], § 104, [2] (Ger.).

<sup>11</sup> See Nandivi Devi et al., *Moving Towards Substituted or Supported Decision-Making? Article 12 of the Convention on the Rights of Persons with Disabilities*, 5 ALTER 249 (2011) (arguing that Article 12 CRPD should be construed as requiring states to enforce a supportive decision-making model to their capacity laws).

<sup>12</sup> See e.g., SMITS, *supra* note 6; EWAN MCKENDRICK, *CONTRACT LAW: TEXT, CASES, AND MATERIALS* (7th ed., 2014).

<sup>13</sup> These include: implied good faith; *contra preferentum* rule; general consumer protection and limitation of unfair dealing; interests of justice; prohibition of any undue restriction of financial freedom and others.

forgotten that contracting is an intrinsic facet of everyone's daily life, from possessing and using a mobile phone, to buying groceries at supermarkets. It is difficult to accurately draw a line determining which of these are significant. While taking out a loan from a bank incurs long-term financial consequences, the freedom to purchase food, clothes, and theatre tickets of one's choice are fundamental to one's wellbeing and happiness, even if less financially important than a bank loan. Lastly, there is evidence to suggest that freedom to contract possesses an educational and healing dimension for persons with neurodivergent, mental and intellectual disabilities.<sup>14</sup> Learning from mistakes will lead to better choices in the future for persons with intellectual disabilities and ultimately enhance their autonomy, whereas removal of such contractual autonomy will effectively diminish autonomy in all other aspects of life.

## II. DISABILITY RIGHTS

Mental and intellectual impairments, which hinder a person's ability to understand or appreciate the nature of a contractual relationship, are the very heart of disability law and raise questions about the right to enter into contracts in the first place. Given the misplaced conceptions of disability in contract law, at least as portrayed in contract law textbooks, it is perhaps wise to offer a brief foray into the socio-legal contours of disability. From a legal viewpoint, article 1(2) of the UN Convention on the Rights of Persons with Disabilities (CRPD), defines persons with disabilities as including: those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.<sup>15</sup>

This definition is in stark contrast to the traditional understanding of disability through the existence of an impairment, whether physical, sensory,

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<sup>14</sup> Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN. STATE L. REV. 1111, 1127 (2013).

<sup>15</sup> 2515 U.N.T.S. 3.

intellectual, or mental.<sup>16</sup> Such a perception of disability is clearly predicated on a medical observation, with its emphasis on impairment.<sup>17</sup> This medical approach to disability was dominant until recently and is still espoused in several countries,<sup>18</sup> despite the advent of the CRPD in 2006, which dismisses it altogether. The dismissal of the medical model is very much implicit by the adoption of the social model throughout the CRPD, but especially article 1(2) thereof. The medical model of disability focuses exclusively on “within-individual” (biological, physical, and psychological) factors that constitute an impairment.<sup>19</sup> However, a thorough understanding of disability involves a systemic understanding at both an individual and social level, which goes beyond the sub-individual level. Reducing disability to impairment (loss or diminution of anatomical structure, physiological function, or function of the mental-nervous system) leaves aside the complete experience of disabled people such as their engagement in social activities, their social roles, their social relationships, as well as their struggle with transforming disability services into a disability-friendly world.<sup>20</sup> This represents a more general

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<sup>16</sup> See Case C-355/11, *HK Danmark v. Dansk almennyttigt Boligselskab*, 2013 E.C.R. 00000 (CJEU held that the concept of “disability” must be interpreted in view of 2515 U.N.T.S. art. 1(2)).

<sup>17</sup> See Simo Vehmas, *Dimensions of Disability*, 13 *CAMBRIDGE Q. OF HEALTHCARE ETHICS* 34, 36 (2004); see Theresia Degener, *Disability in a Human Rights Context*, 5 *LAWS* 1, 5–8 (2016).

<sup>18</sup> See Mohammed H Marishet, *Legal Capacity of Persons with Disabilities in Ethiopia: The Need to Reform Existing Legal Frameworks*, 55 *INT’L J. PSYCH. & L.* 8 (2017) (arguing that despite Ethiopia ratifying the CRPD, it continues to restrict legal capacity in contracts, wills, political participation and access to justice to persons with intellectual disabilities, thus effectively applying a medical model of disability).

<sup>19</sup> See MICHAEL OLIVER, *UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE* 1–11 (1996); see MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT* 50–62 (1990); see also Dimitris Anastasiou et al., *A Social Constructionist Approach to Disability: Implications for Special Education*, 77 *COUNCIL FOR EXCEPTIONAL CHILDREN* 3, 367–84; Dimitris Anastasiou & James M. Kauffman, *The Social Model of Disability: Dichotomy between Impairment and Disability*, 38 *J. MED. & PHIL.* 4, 441 (2013); TOM SHAKESPEARE, *DISABILITY RIGHTS AND WRONGS REVISITED* (2nd ed. 2013).

<sup>20</sup> Peter Townsend, *Elderly People with Disabilities*, in *DISABILITY IN BRITAIN A MANIFESTO OF RIGHTS* 91–118, (Peter Townsend & Alan Walker, eds. 1981).

view than social constructionism.<sup>21</sup> In the medical model, individuals are viewed as merely a body part or function, and this can lead to objectification. This can devalue persons with disabilities and may also involve paternalism.<sup>22</sup> Furthermore, applying a medical perspective to any undesirable phenomenon can lead to broader undue medicalization.<sup>23</sup>

A great deal of problems people with disabilities—especially those with body-related disabilities (including physical and sensory disabilities)—encounter are generated by the environment, social attitudes, and prejudices rather than by their physical limitations.<sup>24</sup> The CRPD rests on several pillars, some of which are unique to human rights treaty-making. First, the CRPD contains a universal introduction of a social or human rights model of disability, in which the focus is on the creation of enabling environments.<sup>25</sup> Second, the CRPD recognises disability rights not as new rights, but as existing rights adapted and adjusted to create enabling environments.<sup>26</sup> Third, and in order to realize the first and second pillars, the CRPD emphasises that disabled persons must enjoy unlimited accessibility.<sup>27</sup> Accessibility, both

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<sup>21</sup> Social constructionism rests on the idea that notions and knowledge is given expression only because of human intellectual intervention, absent which it would never really exist. A typical example is the notion of states and statehood. See PETER L. BERGEN & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (2011). Berger and Luckmann lay emphasis on the role of typification and other constitutional processes like meaning and knowledge in order to demonstrate that social construction is achieved neither by meaning nor consciousness, but through social processes, actions and institutions.

<sup>22</sup> Janet E. Lord, *International Humanitarian Law and Disability: Paternalism, Protection or Rights?*, in *DISABILITY, HUMAN RIGHTS AND THE LIMITS OF HUMANITARIANISM* 155 (Michael Gill & Cathy Schlund-Vials eds., 2014); John Wyatt, *Medical Paternalism and the Fetus*, 27 *J. MED. ETHICS* 15 (2001); see John-Stewart Gordon, *Is Inclusive Education a Human Right?*, *J. L. MED. & ETHICS* 755 (2013) (who notes that “it seems highly paternalistic to make inclusive education mandatory if parents and their impaired children agree that a homogenous educational setting would be more beneficial”).

<sup>23</sup> Townsend, *supra* note 20, at 91–96.

<sup>24</sup> SHAKESPEARE, *supra* note 8, at 31–41.

<sup>25</sup> 2515 U.N.T.S. Preamble (c), (e), (v).

<sup>26</sup> *Id.*

<sup>27</sup> 2515 U.N.T.S. art. 9.

physical and virtual in public and private spaces is enshrined in article 9 of the CRPD and is integral to *de facto* equality and the pursuit of independent living, among others.<sup>28</sup> In fact, with a goal of streamlining accessibility into all walks of life, article 4(1)(f) obliges states to construct, design, and adapt all objects, services, materials, and buildings on the basis of a universal design.<sup>29</sup> Article 2 defines universal design as “the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design. ‘Universal design’ shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.”<sup>30</sup> Finally, it is not only imperative that disabled persons are not discriminated against non-disabled persons, but also that they enjoy *de facto* equality against non-disabled persons as well as equality of opportunity.<sup>31</sup>

### III. AGE OF MAJORITY AND DISCRETION

Several legal systems, as well as classic Islamic law,<sup>32</sup> distinguish between the age of majority (*bulūgh*) and the age of discretion (*rushd*) or maturity.

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<sup>28</sup> *Id.*

<sup>29</sup> 2515 U.N.T.S. art. 4(1)(f).

<sup>30</sup> 2515 U.N.T.S. art. 2(5).

<sup>31</sup> 2515 U.N.T.S. art. 5.

<sup>32</sup> The *Sharia* consists of the *Quran* and those portions of the *sunna* (which itself consists of the deeds and sayings of Prophet Mohamed) that are not only deemed authoritative but also interpretative of the *Quran*. The *Sharia* is the primary source (*asl*), but there are several secondary sources, which, however, cannot under any circumstances fall foul of the *Sharia*. Islamic law is distinct, albeit complementary to the *Sharia*. Out of the 6,239 verses of the *Quran*, only 190 specifically address what we might call legal issues. It is these legal verses that comprise Islamic law, although these cannot artificially be divorced from the other religious verses in the *Quran*. Islamic scholarship has developed methodologies of *Quranic* interpretation known as *ilm usūl al-fiqh* (methodology of theological science) and *fiqh* (theological science), on the basis of which Islamic jurists aim to achieve *maqāsid al-sharia* (goals of the *Sharia*), as well as *siyāsāt al-sharia* (policy of the *Sharia*). The development of *fiqh* has allowed a non-static and contextual interpretation of the *Sharia*, even in respect of otherwise controversial issues. See Eleni Polymenopoulou et al., *The Protection of Cultural Heritage and Cultural Rights under Islamic Law*, 36 EMORY INT'L L. REV. 743 (2022); Ilias Bantekas, *Transnational Islamic*

Although Islamic law did not set out a precise age of majority, in the vast majority of jurisdictions with a majority Muslim population, the statutory age of majority is eighteen years, irrespective of sex.<sup>33</sup> Article 49(1) of the Qatari Civil Code (Qatari CC), for example, stipulates that a person, who has attained the age of majority and who has possession of their mental faculties, enjoys full legal personality to contract in their own name and perform legal acts.<sup>34</sup> The age of discretion is generally perceived as the milestone in a minor's life whereby some degree of maturity has been achieved.<sup>35</sup> As a result, the minor is no longer considered worthy of full protection (i.e., guardianship) and can enter certain contracts in their own name.<sup>36</sup> In respect to particular contracts, classic Islamic law combines the minor's age with their discretion and discernment.<sup>37</sup> Neither maturity nor discretion are defined by age. For example, article 50(1) of the Qatari CC clarifies that lack of discretion may also arise by reason of "imbecility (*al-ma'tūh*) or insanity,"<sup>38</sup> in which case the person is considered incompetent to exercise their civil rights, including the absolute freedom to contract. This is not the

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*Finance Disputes: Towards a Convergence with English Contract Law and International Arbitration*, 12 J. INT'L DISP. SETTLEMENT 1 (2021).

<sup>33</sup> CIVIL CODE art. 49(2) (Qatar).

<sup>34</sup> Article 17 of the Qatari Commercial Law (CL) equally provides that freedom to trade is available for those reaching the age of majority. The age of majority is of seminal importance in Islamic law as it represents the dawn of full capacity. See WAHBA AL-ZUHAYLĪ, FINANCIAL TRANSACTIONS IN ISLAMIC JURISPRUDENCE 352 (translated by Mahmoud Al. El-Gamal, Dar al-Fikr, 2003). But there exist significant differences concerning the age of puberty. See NAWAWĪ, YAHYĀ IBN SHARAF ET AL., SHARḤ AL-MUHADHDHAB LIL-SHRĀZĪ 360ff (Dār Iḥyā' al-Turāth al-'Arabī, 2001).

<sup>35</sup> See ISHITA PANDE, SEX LAW AND THE POLITICS OF AGE: CHILD MARRIAGE IN INDIA 19811937 (2020) 257 (who argues that there was no fixed age of discretion in classic Islamic law, at least as administered by Sharia courts during colonial times, unlike its codification in modern statutes in Muslim majority states).

<sup>36</sup> *Id.* at 265–70.

<sup>37</sup> This distinction has its origin in Islamic law. The Malikīs and Ḥanafīs set out two types of development in the life of a minor, namely: non-discerning (*ghayr mumayyiz*) and discerning (*mumayyiz*). The Hanbalīs argued that even in respect of a discerning minor, its transactions were valid if authorised by its guardian (*wali*). See AL-ZUHAYLĪ, *supra* note 29, at 358.

<sup>38</sup> CIVIL CODE art. 50(1) (Qatar).

same as mental incapacity. Article 51 of the Qatari CC, as is the case with all Gulf Cooperation Council (GCC) civil codes, further limits the capacity to contract by stating that persons attaining discretion but not majority, as well as persons who have achieved majority but are “prodigal or negligent,” lack capacity.<sup>39</sup> Undoubtedly, the latter limitation (i.e., prodigality (*safah*) and negligence) can be abused and does not sit well with western notions of contractual freedom.

#### IV. CAPACITY TO CONTRACT

For the purposes of this article, legal capacity may be defined as possessing sufficient authority under the law to enter a contract with another person. Such capacity exists equally in respect of other actions associated with personal autonomy, such as the right to marry and found a family.<sup>40</sup> Incapacity is one of the few exceptions to contractual freedom and constitutes a mechanism through which the law intervenes in the formation of contracts.<sup>41</sup> Similar exceptional mechanisms include terms implied by law or fact, public policy, and force majeure, among others.<sup>42</sup> A legal opinion on article 12 of the CRPD, offered by the EU’s Fundamental Rights Agency, defines legal capacity as consisting of “the capacity to hold a right and the capacity to act and exercise the right, including legal capacity to sue, based on such rights.”<sup>43</sup> General Comment Number 1 defines legal capacity as

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<sup>39</sup> On the capacity of the discerning minor, see ILIAS BANTEKAS & JONATHAN ERCANBRACK ET AL., *ISLAMIC CONTRACT LAW* (2023).

<sup>40</sup> Bernadette McSherry, *Legal Capacity Under the Convention on the Rights of Persons with Disabilities*, 20 J. L. & MED. 22, 23 (2012); Lucy Series, *Legal Capacity and participation in litigation: recent developments in the European Court of Human Rights*, 5 EUR. Y.B. DISABILITY L. 103, 106 (2014).

<sup>41</sup> NEIL H. ANDREWS, *CONTRACT RULES: DECODING ENGLISH CONTRACT LAW* (1st ed., 2016).

<sup>42</sup> *Force Majeure*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>43</sup> Santos Cifuentes et al., *Convention on the Rts. of Pers. with Disabilities, Legal Opinion on Article 12 of The CRPD* (June 21, 2008), <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/legal-opinion-LegalOpinion-Art12-FINAL.pdf> [<https://perma.cc/M8FR-KC97>].

including the capacity to be a “holder of rights,” entitling “the person to full protection of his or her rights by the legal system,” and the capacity to be “an actor under law,” recognised “as an agent with the power to engage in transactions and in general to create, modify or end legal relationships.”<sup>44</sup>

English courts have been at pains to define mental capacity, rather than incapacity, to understand a proposed transaction, whether offer or acceptance, with the requisite intent to be bound.<sup>45</sup> A person thus possesses said mental capacity when they “recognise the issues that need to be considered to obtain, receive, understand, and retain relevant information and weigh it in order to reach a decision.”<sup>46</sup> This line of thinking is routine in common law jurisdictions.<sup>47</sup> Some of the case law emphasizes that in order to be able to make a decision, “a person must not only be able to understand the information relevant to making it but also be able to weigh that information in the balance to arrive at a choice.”<sup>48</sup> Moreover, capacity is issue specific and is to be assessed by reference to a particular decision or activity in question.<sup>49</sup> A person may well have sufficient capacity for one type of

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<sup>44</sup> Comm. on Rts. of Pers. with Disabilities, Equal Recognition Before the Law, Gen. Comment No. 1, Art. 12, U.N. Doc. CRPD/C/GV/1 (May 19, 2014); ILIAS BANTEKAS ET AL., THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 339 (2018).

<sup>45</sup> See, e.g., THE LAW COMMISSION, REPORT ON MENTAL INCAPACITY 29 (Law Com. No. 231, 1995), <https://www.lawcom.gov.uk/app/uploads/2015/04/lc231.pdf> [<https://perma.cc/PZ7W-84U4>].

<sup>46</sup> *Fehily v. Atkinson* [2016] EWHC 3069, [78] (appeal taken from the Ipswich County Court); see also *Masterman-Lister v. Jewell* [2002] EWCA (Civ) 1889, [26] (appeal taken from Queen’s Bench Division) (although this case dealt with the claimant’s capacity to litigate).

<sup>47</sup> See *KR v. MR* [2004] 2 NZLR 847, [51] (where it was held that factors relevant to capacity are the ability to: communicate choice; understand the relevant information; manipulate the information and appreciate the situation and its consequences).

<sup>48</sup> *R. v. Cooper* [2009] 1 WLR 1786 (which concerned capacity for sexual activities); see also *In re K* [1988] Ch 310, 313 (Hoffmann, J. emphasized that “capacity to perform a juristic act exists when the person who purported to do the act had at the time the mental capacity, with the assistance of such explanation as he may have been given, to understand the nature and effect of that particular transaction”).

<sup>49</sup> *Haworth v. Cartmel* [2011] EWHC 36 (Ch) (Eng.), (holding that “the question of capacity is issue and situation specific . . . the capacity issues that arise in this case are whether the applicant has proved that she did not have capacity to respond to the Statutory

decision but not another.<sup>50</sup> The level of understanding is crucial here. The courts have emphasized that the appropriate test is not about what understanding the person actually has (subjective), but “what understanding they would be capable of having if given the advice and assistance that they need.”<sup>51</sup>

This level of understanding is conterminous with the “nature of the transaction.” In *In the Estate of Park*, Lord Justice Singleton stated, “The question, I think, is this: Was the deceased on the morning of May 30, 1949, capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it?”<sup>52</sup> The “nature of the contract” essentially entails understanding the responsibilities attached to the contract with respect to the understanding of the impugned party in question.<sup>53</sup> In *Gibbons v. Wright*, the court held:

The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation.<sup>54</sup>

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Demand . . . to respond to the Petition . . . and to decide whether to defend the bankruptcy proceedings either herself or by asking or instructing someone else to do so on her behalf”).

<sup>50</sup> *Fehily v. Atkinson*, EWHC 3069, [79]; *Masterman-Lister v. Jewell* [2002] EWCA Civ 1889, [27] [62] (appeal taken from QBD); *Dunhill v. Burgin* [2014] 1 WLR 933, [13].

<sup>51</sup> *Fehily v. Atkinson*, EWHC 3069, [85].

<sup>52</sup> In the *Estate of Park* [1954] P 112, [127]. In the case at hand, a probate dispute, Singleton, L.J., went on to say, “To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage.”

<sup>53</sup> See *Gibbons v. Wright* [1954] 91 CLR 423 (an Australian case, which iterated that “the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained”).

<sup>54</sup> *Id.* at [437].

As explained, a person with neurodivergent, mental or intellectual disabilities may understand some aspects of their contract, but not others. In such circumstances, it is up to the court to decide whether the parts understood suffice to salvage the contract as a whole.<sup>55</sup> In *Fehily v. Atkinson*, the court made it clear that capacity exists if the person understands the “key features” of a transaction, as opposed to its ancillary counterparts.<sup>56</sup> In order to possess requisite mental capacity to contract, a person must be capable of understanding the “nature of the transaction,” the “nature and effect of that particular transaction,” or the “nature of the contract.”<sup>57</sup> This means that the person must have the ability to absorb, retain, understand, process, and weigh information about the key features and effects of the proposed transaction, and any alternatives, if explained to the person in broad terms and simple language.<sup>58</sup> The only question is whether the person “had the ability to understand the transaction, not whether they actually understood the nature of the transaction.”<sup>59</sup> The fact that a person needs help in understanding the transaction does not prevent them from having the capacity to understand it.<sup>60</sup> Such understanding need not exist at all times, but may just as well be time-specific, as people’s capacity varies.<sup>61</sup>

Although this line of case law is progressive in contrast to case law of the past, it hardly moves away from substitute decision-making. Disability scholars view these tests as holding “persons with disabilities to a higher standard in decision-making than the rest of the population.”<sup>62</sup> There is also

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<sup>55</sup> *Manches v. Trimborn* [1946] 174 LT 344, [345] (Eng.).

<sup>56</sup> *Fehily v. Atkinson*, EWHC 3069, [101].

<sup>57</sup> *Id.* at [99].

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at [81]; *In re Smith (Deceased)*; *Kicks v. Leigh* [2014] EWHC 3926 (Ch), [2015] 4 All ER 329 [27].

<sup>60</sup> *Fehily v. Atkinson*, EWHC 3069, [82].

<sup>61</sup> *Id.* at [80]; *see also* *Haworth v. Cartmel* [2011] EWHC 36 (Ch), [43] [55] (holding that capacity to respond to a statutory demand, bankruptcy petition, and bankruptcy proceedings is issue and situation specific).

<sup>62</sup> Cliona de Bhailís & Eilionóir Flynn, *Recognising Legal Capacity: Commentary and Analysis of Article 12 CRPD*, 13 INT’L J. OF L. IN CONTEXT 12, 20 (2017).

a strong belief among disability scholars that determinations of capacity are largely discriminatory.<sup>63</sup>

*A. Validity of Contracts Entered into by a Person Lacking Mental Capacity*

Contracts with subject matter that is unlawful, against public policy, or lacking capacity with respect to at least one party, are deemed void *ab initio* (from the outset) in the vast majority of legal systems.<sup>64</sup> This is generally a sensible rule, but conflating an unlawful act with capacity is far from wise. The law should never tolerate an unlawful act, but it can, under certain circumstances, justify the lack of capacity if the outcome of the contract is in the interest of the party who lacked capacity.<sup>65</sup> Voiding all contracts on the basis of a general rule seems unjust,<sup>66</sup> especially for people with neurodivergent, mental or intellectual disability.<sup>67</sup> Under English law, a contract entered into for consideration by a person without the mental capacity to understand the transaction is not void.<sup>68</sup> It is valid and binding unless the other contracting party was aware of the incapacity (or ought to have been aware), in which case the contract is voidable, and the incapacitated person has the right to rescind the contract.<sup>69</sup> The good faith of

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<sup>63</sup> See Piers Gooding & Eilionóir Flynn, *Querying the Call to Introduce Mental Capacity Testing to Mental Health Law: Does the Doctrine of Necessity Provide an Alternative?*, 4 LAWS 245 (2015).

<sup>64</sup> See Bürgerlichen Gesetzbuches [BGB] [Civil Code] § 105, [https://www.gesetze-im-internet.de/englisch\\_bgb/](https://www.gesetze-im-internet.de/englisch_bgb/) [<https://perma.cc/6KHD-V6GQ>] (Ger.); Code Civil [C. civ.] [Civil Code] art. 1148 (Fr.); Art 1:381 BW (Neth.).

<sup>65</sup> SMITS, *supra* note 6, at 97.

<sup>66</sup> Cf. English Mental Capacity Act 2005, § 7 (UK), <https://www.legislation.gov.uk/ukpga/2005/9/section/7> [<https://perma.cc/VD9Q-9PVR>] (“If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them.”).

<sup>67</sup> See Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93 (2012).

<sup>68</sup> *Fehily v. Atkinson*, EWHC 3069, [199]; see also *Imperial Loan Co. v. Stone* [1892] 1 QB 599 (India).

<sup>69</sup> See *Imperial Loan Co. v. Stone* [1892] 1 QB 599 (India); see also *Hart v. O’Connor* [1985] AC 1000; see also *Fehily v. Atkinson* [2016] EWHC 3069, [119].

the capable party is crucial for the validity of a contract with a person otherwise deemed incapable only in some common law jurisdictions.<sup>70</sup> Civil law jurisdictions generally refuse to cure the defect based on good faith.<sup>71</sup> Such jurisdictions typically accept that otherwise invalid contracts, by reason of a party's incapacity, can only be cured if the contract related to an "everyday transaction."<sup>72</sup>

In the GCC, lack of capacity renders the contract void in roughly the same terms as those in common law jurisdictions. Article 118(1) of the Qatari CC, for example, suggests that persons suffering from insanity (*junūn*) and imbecility, as well as prodigality (*safah*) and inattentiveness, lack contractual freedom altogether.<sup>73</sup> In fact, the courts are under an obligation to interdict (*hajr*) such persons, and the pertinent judgments must be recorded in special registers.<sup>74</sup> Although insanity is not defined,<sup>75</sup> Article 119 of the Qatari CC defines the effects of insanity as:

A person suffering from insanity and dementia, who has been interdicted on this basis by the courts, lacks the competence to enter

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<sup>70</sup> Hart v. O'Connor [1985] 1 NZLR 159 (N.Z.). This is an important case for English law and other common law jurisdictions because it was appealed to the Privy Council, which ultimately had the final word. The Privy Council overturned the judgment referred to it by holding that the test of unfair bargain was immaterial in determining whether the contract was void. Therefore, because the other party did not know of the unsoundness of mind, and there was no equitable fraud, the contract was upheld.

<sup>71</sup> SMITS, *supra* note 6, at 99.

<sup>72</sup> Bürgerlichen Gesetzbuches [BGB] [Civil Code] § 105a, [https://www.gesetze-im-internet.de/englisch\\_bgb/](https://www.gesetze-im-internet.de/englisch_bgb/) [<https://perma.cc/6KHD-V6GQ>] (Ger.).

<sup>73</sup> Abd al-Karīm Zīdān, *Wajīz fī Uṣūl al-Fiqh* (Mu'assasat Qurṭuba, n.d). This rather outdated (and offensive) characterization is a remnant of classic Islamic law; it refers to a person who by reason of intellectual defects a person's decision-making ability is crucially undermined; *see also* BANTEKAS & ERCANBRACK ET AL., *supra* note 32, at 104.

<sup>74</sup> The Court of Appeal in Case 94/2008 made it clear that unless a person has been interdicted by the courts under Art 118 CC, judgments restricting contractual or other freedom produce no legal consequence. Such *hajr* is reflected in various sources, including Art 957 Majallah [the 19th century Ottoman codification of Islamic private law], which stipulates that 'minors, lunatics and imbeciles are ipso facto interdicted'. For a more comprehensive discussion, *see* BANTEKAS & ERCANBRACK ET AL., *supra* note 32.

<sup>75</sup> As already stated, mental incapacity is referred to in Art 52 CC as possessing no, or defective, capacity.

into contracts. Any contract entered into after the interdiction is null and void. Where the contract was entered prior to the judicial interdiction, it shall only be null and void if the other party was aware of the condition, or if it was a matter of common knowledge.<sup>76</sup>

### *B. Restrictions on the Capacity to Contract*

Where a person's mental or intellectual capacity is assessed and the requisite test of understanding the nature of the transaction disfavors an order of unlimited contractual capacity, one of two general types of guardianship are available to the courts: plenary and partial.<sup>77</sup> The former allows the courts to confer all authority in respect of the applicant's financial and contractual affairs to a third person (the guardian), whereas partial incapacity allows the applicant to undertake everyday transactions only.<sup>78</sup> Capacity-related statutes in the common law world typically set out a number of principles in addition to the person's best interests, in order to justify the function of plenary guardianship.<sup>79</sup> These include principles such as a presumption of capacity unless established otherwise or that a person should not be treated as incapacitated simply because of poor judgment in decision making. These principles apply to plenary restrictions on the capacity to contract.<sup>80</sup>

In 2013 the EU's Fundamental Rights Agency (FRA) published a report on capacity and guardianship schemes operating in the private laws of EU Member States.<sup>81</sup> The findings of the FRA legal analysis show that most EU

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<sup>76</sup> CIVIL CODE art. 119 (Qatar).

<sup>77</sup> Christopher P. Guzelian et al., *Credit Scores, Lending, and Psychosocial Disability*, 95 B.U. L. REV. 1807, 1824 (2015).

<sup>78</sup> *Id.* at 1858.

<sup>79</sup> English Mental Capacity Act 2005, § 1(5) (UK), <https://www.legislation.gov.uk/ukpga/2005/9/part/1/crossheading/the-principles> [<https://perma.cc/ST4V-8YP6>].

<sup>80</sup> See English Mental Capacity Act 2005, § 18(1)(f) (UK), <https://www.legislation.gov.uk/ukpga/2005/9/section/18> [<https://perma.cc/H8LE-SRE4>].

<sup>81</sup> *Legal Capacity of Persons with Intellectual Disabilities and Persons with Mental Health Problems*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS., 30 (2013), <https://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf> [<https://perma.cc/E2YW-CS4V>].

Member States adopted varying degrees of legal capacity restriction, with the aim of adjusting assistance to individual needs in a proportionate manner.<sup>82</sup> Some national laws provide alternatives to plenary and partial guardianship by establishing other support mechanisms.<sup>83</sup> A small group of states do not distinguish between various forms of deprivation of legal capacity and instead opt for only full or plenary guardianship, as is the case with Cyprus and Ireland.<sup>84</sup> Finally, two EU Member States, Germany and Sweden, have abolished their guardianship systems as a protective measure and have put other less intrusive forms in place.<sup>85</sup> Sweden replaced guardianship with two alternative measures of assistance: where assistance is deemed required on account of a person's mental incapacity, the courts may appoint a mentor (*god man*) or trustee (*förvaltare*).<sup>86</sup> A curator offers assistance without limiting the individual's legal capacity to act. Conversely, the appointment of a trustee is made where the person is deemed incapable of taking care of their assets and their contractual capacity is deprived.<sup>87</sup>

A law adopted in France in 2007 retained (but simplified) the three existing forms of substitute or assistive decision making: judicial protection, with respect to temporary protection or representation for specified acts; curatorship, with respect to partial incapacity; and tutorship, with respect to full and universal incapacity.<sup>88</sup> The 2007 law further added the *mandat de protection future* (mandate for future protection).<sup>89</sup> This allows persons not under tutorship, who suffer from some form of incapacity, to appoint in

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<sup>82</sup> *Id.*

<sup>83</sup> *See id.* for specific examples.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 31.

<sup>87</sup> Sweden, Code on Parenthood and Guardianship (SFS: 1949:381), Chapter 11, Art. 7.

<sup>88</sup> Loi 2007-308 du 5 mars 2007 portant réforme de la protection juridique des majeurs [Law 2007-308 of March 5, 2007 on Reforming the Legal Protection of Adults] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 5, 2007.

<sup>89</sup> *Id.* at § 45(3), Act No. 2007-3008 of March 5.

advance of a civil action a person or persons of their choice.<sup>90</sup> This might well be a preemptive action for situations such as where a person has been diagnosed with a mental illness or a degenerative disease that has yet to reach its peak. In addition, Ordinance No. 2015-1288 of October 15, 2015, created an additional system, known as *habilitation familiale* (family empowerment), with the aim of simplifying the process by which a family member can represent a person lacking capacity.<sup>91</sup>

To aid this process and offer specialist knowledge in dealing with questions of capacity, several states have set up specialized judicial chambers. The English Mental Capacity Act of 2005, for example, provides for a specialist Court of Protection,<sup>92</sup> as well as the office of the Public Guardian.<sup>93</sup> Germany introduced the institution of *Betreuung*, which encompasses the appointment of a custodian (*Betreuer*) by the court to assist or substitute the person in essential transactions.<sup>94</sup>

## V. CONCLUSION

It is not always clear why the very states that spearheaded the CRPD persist with private laws that violate the very essence of legal capacity and freedom of contract.<sup>95</sup> While most other laws, particularly those of public nature, seem to comply with the dictates of fundamental disability rights and offer substantial accommodations, there is still resistance to move away from the medical and towards the social model in the sphere of contractual

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<sup>90</sup> *Id.* at § 7, Act No. 2007-3008 of March 5.

<sup>91</sup> *See generally* Code civil [C. civ.] [Civil Code] art. 425–427 (Fr.).

<sup>92</sup> English Mental Capacity Act 2005, § 45–56 (UK).

<sup>93</sup> English Mental Capacity Act 2005, § 57–60 (UK); *see* Alex Ruck Keene et al., *Taking Capacity Seriously? Ten Years of Mental Capacity Disputes Before England's Court of Protection*, 62 INT'L J. OF L. AND PSYCH. 56 (2019).

<sup>94</sup> *See* Bürgerlichen Gesetzbuches [BGB] [Civil Code], § 1896, [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p6423](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p6423) [<https://perma.cc/H9UX-TVZZ>].

<sup>95</sup> *See* Ilias Bantekas, *Reservations to the Disabilities Convention: Peer Engagement and the Value of a Clear Treaty Object and Purpose*, 33 N.Y. INT'L L. REV. 61 (2020) (demonstrating that reservations to the CRPD concerned issues other than legal capacity, at least as regards private law and contractual capacity).

transactions.<sup>96</sup> Indeed, a major point of the law of contracts has traditionally been predicated on the notion that some persons do not and should not possess full legal capacity to enter into contracts, on the basis of their mental or intellectual ability to understand the nature of the underlying transaction. As a result, it is feared that such persons risk being manipulated by their counterparts or fail to bargain in a manner that preserves their best interests.

However, these arguments are unconvincing. First, there are sufficient safeguards in place to avert the likelihood of manipulation, whether by reference to consumer laws, other private laws predicated on the notion of good faith, or the underlying grounds for the voidability of contracts. Secondly, there are no guarantees that the person exercising substitute decision-making on behalf of a mentally or intellectually disabled person has the latter's best interests in mind. This is especially true where the disabled person has challenged the guardian's appointment, or the latter was appointed by the courts.

On the contrary, assistive decision-making not only enhances personal liberty and capacity (as well as dignity), but moreover ensures that the will of the disabled person is reflected in the transaction. One should not forget that one key element of a contract is the common will of the parties to be bound.<sup>97</sup> Where a disabled person's will be wholly replaced by a substitute will, the common intention is lost along with one's liberty and capacity. It is high time that liberal states undertake an overhaul of their contract laws and ensure that they are consistent with the CRPD and specifically article 12.<sup>98</sup> Private laws are the cornerstone of modern liberal states, and in turn, liberal

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<sup>96</sup> At the time of writing, a Taskforce of the International Chamber of Commerce (ICC) was contemplating on the intersection between disability and arbitration, given that disability has been ignored from this private realm of dispute resolution. See Ilias Bantekas, *Disability and Transnational Arbitration: Human Rights Linkages and Reasonable Accommodation*, 14 WM. & MARY BUS. L. REV. (forthcoming 2023).

<sup>97</sup> Bob A. Hepple, *Intention to Create Legal Relations*, [1970] 28 CLJ 122; see also Jack Beatson et al., ANSON'S LAW OF CONTRACT 73–77 (30th ed. 2010).

<sup>98</sup> See Eliza Varney, *The UN Convention on the Rights of Persons with Disabilities and English Contract Law: A Tale of Unfinished Bridges?*, 31 KINGS L. J. 1 (2020).

states are founded on the ideas of personal liberty and autonomy. If the two are divorced, the entire structure of liberalism is at stake. It is hoped that this short article will serve as the impetus for appropriate reform.

