



## **The right to legal agency: domination, disability and the protections of Article 12 of the Convention on the Rights of Persons with Disabilities**

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## **The Right to Legal Agency: Domination, Disability, and the Protections of Article 12 of the Convention on the Rights of Persons with Disabilities**

### **Abstract**

Article 12 of the Convention on the Rights of Persons with Disabilities has created a revolution in legal capacity law reform. It protects the right to exercise legal agency for people with disabilities with more clarity than any prior human rights instrument. This article explores what constitutes an exercise of legal agency and what exactly Article 12 protects. It proposes a definition of legal agency and applies it to the lived experience of cognitive disability. It also uses a republican theory of domination to argue that people with cognitive disabilities who are experiencing domination are forced to assert legal agency in even daily decision-making because of the high level of external regulation of their lives and the ever-present threat of others substituting their decision-making. It identifies Article 12 as a tool for protecting such exertions of legal agency and curtailing relationships of domination.

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# **The Right to Legal Agency: Domination, Disability, and the Protections of Article 12 of the Convention on the Rights of Persons with Disabilities\***

## **Introduction**

People with disabilities have repeatedly demanded that their decisions be respected on an equal basis with others.<sup>1</sup> They have been denied decision-making rights because of an inaccessible society. Social structures are unwilling to accommodate different communication methods and different methods of cognitive functioning. This occurs in public settings, such as courtrooms and the consumer marketplace, and in more private settings, such as family and residential settings. Due to these barriers, and others, people with disabilities are often dependent on others for daily needs and engagement with the community. Where this dependence exists, the risk of domination also exists. In a relationship of domination an individual's decision-making is even further marginalised.

Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) provides more robust protection for the decision-making rights of people with disabilities than any other human rights instrument to date. It protects all exercises of legal capacity. People with disabilities who had experienced denials of legal capacity instigated the creation of Article 12 with the aim to end discriminatory decision-

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\* The development of the ideas in this article was a collaborative effort and could not have been achieved without the valuable insights and feedback of many other scholars in this field. We wish to particularly acknowledge the comments of Tina Minkowitz, Elizabeth Kamundia, Piers Gooding, Michelle Browning, Alex Ruck-Keene, Kristijan Gordan, Mirriam Nthenge, Theresia Degener, and Lucy Series for their comments on earlier versions of this paper. Alberto Vasquez, Sarah Hofmayer, Charlotte May Simera, Liz Brosnan and John Danaher also gave valuable feedback at a roundtable discussion on a very early draft of this paper. Any errors or inaccuracies are the sole responsibility of the authors.

<sup>1</sup> See, for example, *Human Rights Position Paper of the World Network of Users and Survivors of Psychiatry* (Vancouver 2001); and *Independent but not Alone: A Global Report on the Right to Decide* (2014) Inclusion International.

making denial (Kayess & French 2008; Dhanda 2006-2007). Such discriminatory treatment includes: people with psycho-social disabilities being subjected to forced treatment (Committee on the Rights of Persons with Disabilities 2014, para. 40), detention and various other denials of their decision-making (Minkowitz 2006-2007); and people with intellectual and other cognitive disabilities experiencing similar decision-making denials in daily decisions as well as on a larger scale through guardianship and other forms of formal legal denunciation of their decision-making.

In this article, we use the term ‘legal capacity’ to mean the overarching right which encompasses both the ability to be a person before the law and an actor in law (Committee on the Rights of Persons with Disabilities 2014, para 12). We use the term ‘legal agency’ to refer to specific instances in which an individual is exercising legal capacity. We are exploring the meaning of ‘legal agency’ in order to discover what decisions can be protected by Article 12. We are also exploring repressive settings in which people with disabilities are prevented from making daily decisions. We argue that in these circumstances, people with disabilities are often forced to exercise legal agency to get their decisions enforced, including for decisions that may not have amounted to exercises of legal agency on their own. We use republican theories of ‘domination’ to argue that people with disabilities are disproportionately experiencing relationships of domination in which they must exert their legal agency to get their decisions enforced against the dominant power. We also find that the recognition of an individual’s legal agency may be the most powerful tool for combating such dominance.

## **Background**

Article 12 requires that the right to legal capacity be equally recognised for people with decision-making impairments as for others (Committee on the Rights of Persons with Disabilities 2014, para 9). This includes the right to exercise legal capacity – or legal agency. Many legal scholars have written about when to recognise an individual’s legal agency (Lo 1990; Nicholson, Cutter & Hotopf 2008; Owen *et al* 2009). Much of this work has been based on the premise that certain people with cognitive disabilities are not able to exercise legal agency. For example, Rawls’ (2009) theory of justice takes the position that individuals who lack certain moral powers (a sense of justice and a conception of the good) cannot be conceived as participating actors in the social contract. Nussbaum claims that individuals with significant cognitive impairments will not be able to achieve certain central human capabilities and cannot therefore exercise legal agency, but should be placed under adult guardianship (Nussbaum 2006). A significant amount of case law and legislation has also developed on the subject of legal agency, which primarily focuses on developing a test for determining when an individual is not exercising legal agency because he or she is perceived to lack the relevant mental capabilities (Brammer 2012). This paper will not further explore theories of human or moral agency which set a high cognitive threshold for the exercise of legal agency – as these run counter to our goal of conceptualising legal agency and its exercise in a manner which is inclusive of people who are perceived to have significant cognitive impairments.

Very little scholarship has engaged with the question of how to recognise and provide protection for legal agency without setting a threshold for cognitive capability.<sup>2</sup>

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<sup>2</sup> Dhanda (2006-2007) suggests that one way forward is to recognise that legal capacity (including the agency to be an actor before the law) is a universal human attribute. However, while she deems all human persons to be legal agents, she does not consider when an individual’s action or omission constitutes an exercise of legal agency.

Similarly, little attention has been given to the question of what constitutes an exercise of legal agency. This may have been overlooked because, until Article 12, there was only limited discussion of protection for the right to legal agency, particularly for people with cognitive disabilities. Now, scholarship on the subject is developing rapidly<sup>3</sup> and many states are beginning to reform their laws in an attempt to provide human rights compliant legislation that protects this right. However, the parameters of the right are still murky and a clear definition of what constitutes an exercise of legal agency has not yet been established (Office of the High Commissioner of Human Rights 2005). The Committee on the Rights of Persons with Disabilities (CRPD Committee), the UN body responsible for monitoring the treaty at an international level, have not addressed the issue in their Concluding Observations on States Parties Reports<sup>4</sup> or in General Comment 1 on the Right to Equal Recognition Before the Law (Article 12) (Committee on the Rights of Persons with Disabilities 2014).

Partly because of this lack of clarity, there has been confusion about what is protected by Article 12 when it states that people with disabilities have a right to legal capacity on an equal basis with others. In this article, we endeavor to provide some clarity on what constitutes an exercise of legal capacity – legal agency – in order to create a clear delineation of what is protected by Article 12. In much of the literature to date, an exercise of legal capacity is described as undertaking acts which have legal consequences or effects – such as concluding or dissolving a marriage or civil

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<sup>3</sup> For example see Dhanda (2006-2007); Quinn (2009); Series (2015); Gooding (2015) and Flynn Arstein-Kerslake (2015).

<sup>4</sup> For access to the latest concluding observations on state party reports, see [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5) (accessed 29 October 2015).

partnership, selling or buying property, consenting to or refusing medical treatment, etc.<sup>5</sup>

However, not every decision or action of an individual is an exercise of legal agency that is protected by Article 12. Where an individual's decision-making does not amount to an exercise of legal capacity and so does not attract protection under Article 12 CRPD, it may well engage other human rights – including the rights to privacy, free expression, to live independently and to be included in the community. These rights are protected by the CRPD as well as other human rights conventions, and domestic rights instruments. For example, Article 19 CRPD guarantees the right to choose where and with whom to live. A decision to remain living at home with one's parents might be an exercise of the right to choose where and with whom to live under Article 19, but where it does not result in any legal consequences (e.g. where the individual does not enter a tenancy agreement with her parents), then it may not be an exercise of legal capacity, and would therefore not be protected by Article 12.

We wish to provide clarity on what constitutes an exercise of legal agency – and therefore what Article 12 protects – because we are concerned that people with disabilities are exercising legal agency in unconventional ways that are not being recognised or actively protected by Article 12. Common exercises of legal agency include: signing contracts, voting, getting married (McSherry 2012), and other similar acts which have clear legal implications. People with disabilities, of course, exercise legal agency in all of these common forms. However, people with disabilities commonly experience high levels of external regulation of their lives that may also

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<sup>5</sup> For an overview of the evolution of the term 'legal capacity' and its meaning, see Dhanda (2007).

precipitate exercises of legal agency in interactions which such regulation occurs. This regulation may be in the form of institutional living, or oppression in the private sphere (including in family life). Other articles of the CRPD, including Articles 5 and 19 address the need to remove discrimination in the private sphere and to abolish institutional living arrangements for people with disabilities. However, in this article, we define legal agency in order to explore whether there are particular ways in which people with disabilities are exercising legal agency in such highly regulated settings, while recognising that forced segregation of people with disabilities must end. We argue that it is possible to exercise legal agency in these settings and therefore that particular attention should be paid to Article 12 in this context. This is explored through case studies later in the article.

In particular, in the informal sphere of familial relationships and services for daily decision-making, it remains to be seen how Article 12 applies because many of the decisions made in this sphere do not appear to have legal consequences or rise to the level of an exertion of legal agency. However, for many people with cognitive disabilities, some of the most damaging decision-making denials occur within these informal spheres. For example, individuals are often not allowed to make decisions about their daily activities (Topor *et al* 2016), such as who to spend time with and when to eat. While these decisions may seem minute in isolation, they are intricately tied to our personhood and the construction of our individual personalities. In this article we endeavor to identify where legal agency is being exercised in these spheres, and where we can then apply the protections of Article 12. In the current context, where people with cognitive disabilities have too often been denied the opportunity to



exercise legal agency, we argue for recognising a broad range of actions as exercises of legal agency.<sup>6</sup>

### **Defining ‘Legal agency’**

As described above, legal capacity has two elements, the recognition of the person as a holder of rights and an actor before the law. Historically, legal agency has often been recognised or denied based on an individual’s inherent characteristics – for example, as a woman, a slave, a member of a lower caste, or a racial minority. While the core justification for the removal of legal capacity in these situations was the individual’s status, these approaches were often rationalised by reference to the inherently inferior intellect of individuals with these identities.<sup>7</sup> However, from the 19<sup>th</sup> century onwards, there is evidence of a move to evaluate legal agency separately from legal standing (Rehbinder 1970-1971). This separation of legal agency from legal standing established the primacy of cognition and rationality as inherent characteristics necessary to grant legal agency to a particular individual. However, the focus on rationality and cognition as criteria for recognising legal standing has continued to discriminate against people with cognitive disabilities, who are often regarded as lacking the necessary rationality or cognitive functioning needed to exercise legal agency.

Legal standing is required for legal agency. An individual cannot exercise legal agency without first being recognised as a person before the law. Absent an existing

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<sup>6</sup> This may include daily decisions made within a family or in a segregated residential setting. We are cognisant of the need to protect familial and private realms from arbitrary state intervention; and of the reality that the lives of many people with cognitive disabilities are already over-regulated. Our aim is to develop a definition of legal agency that can be applied in familial and private realms to provide protection for the legal capacity of individuals with cognitive disabilities and not compromise the sanctity of such realms.

<sup>7</sup> For more discussion on the mistaken belief in differential intelligence on the basis of sex, which was historically used to justify denials of legal agency to women, see Shields (1982).

clear definition of legal agency in the context of the right to legal capacity, we have developed the following definition based on our understanding of the intention of the drafters of Article 12 and its interaction with domestic legal systems. We argue that legal agency could be defined as:

*an action or inaction that the individual intended and which has legal consequences; or creates, modifies, or extinguishes a legal relationship.*<sup>8</sup>

We believe that there must be some element of intention in an exercise of legal agency based on the body of literature on moral agency (Taylor 2005) and the importance of intention as a component of human personhood. However, we take the approach that the level of intention required to constitute an exercise of legal agency is not cognitively onerous – and that all human persons are capable of forming intentions.<sup>9</sup> Many moral philosophers have considered the question of whether people with cognitive disabilities should be viewed as moral agents and subsequently whether we can ascribe moral agency and intention to their actions (Kittay & Carlson 2010). As we have written about previously, we consider that all human persons possess both moral agency and legal agency – with the potential to express their intentions and exercise legal agency – regardless of how significant or complex a disability they may have (Flynn & Arstein-Kerslake 2014). We also think that intention should be considered an important part of legal agency because as a legal

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<sup>8</sup> Acts may have legal consequences without creating a legal relationship – for example, the commission of an assault has a legal consequence without resulting in the creation of a legal relationship between the parties.

<sup>9</sup> We recognise that the existence of ‘intention’ as a criteria for exercising legal agency could be interpreted in a paternalistic manner to deny legal agency to individuals who appear not to demonstrate a clear intention to act. However, we argue that the ‘intention’ requirement should be a very low threshold which can be reached by any human person. See Audrey Cole (personal communication) cited in Bach and Kerzner (2010) at p. 63.

actor it is when we are intending to act or not act that we are actually expressing our personhood and inner will and preferences.

An individual may be held criminally or civilly responsible for an action or inaction that they did not intend. In this way, a person may not have exercised legal agency and yet may still be held legally responsible (Edwards 1958). However, such responsibility can only exist where the individual is recognised as a legal person, which is the first element of legal capacity in Article 12. For example, a driver that is recognised as a legal person can be held responsible for traffic violations whether or not they intended to commit them or even remembered driving at the time of the alleged offense.<sup>10</sup>

Intention itself is not always easy to define or identify (Bratman 1999; Bratman 1990). Generally, intention is a state of mind that requires planning or deliberation to some degree. There are particular standards of intention that are used in specific areas of the law, such as testamentary intention and intention related to criminal responsibility. There is not space in this article to fully explore the abundance of scholarship on intention<sup>11</sup> or to fully explore how to determine the existence of intention in a particular act. We propose that intention for the purpose of determining the existence of legal agency should be a broad concept. Any indication that there was purpose and deliberation behind a particular action, decision, or omission, should be considered sufficient evidence to ascribe intention.<sup>12</sup> Article 12 is engaged once the

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<sup>10</sup> Hill v. Baxter, [1958] 1 Q.B. 277; [1958] 2 W.L.R. 76; [1958] 1 All E.R. 193, citing in Edwards (1958).

<sup>11</sup> For further reading on intention see for example Anscombe (1957); Bratman (1999); Bratman, (1990); and Cohen and Levesque (1990).

<sup>12</sup> An interesting case for discussion of intention is *United Lincolnshire NHS Trust v N* [2014] EWCOP 16, where a woman said to be in minimally conscious state was repeatedly pulling out her feeding tube.

individual indicates an intention to act where that act has legal consequences. The right to support in the exercise of legal agency then extends further than the physical act the person wishes to undertake (i.e. holding a pen, signing a contract) but the content of that action (i.e. entering a contract).

It will not always be possible to decipher when an individual is acting with intention.<sup>13</sup> It may be particularly difficult where an individual has non-conventional communication methods or very limited communication.<sup>14</sup> If there is doubt about whether or not intention exists in an action taken by a person with a disability, we propose that, for the purposes of Article 12, an assumption is made in favor of finding intention and therefore ascribing legal agency, which triggers the protection of Article 12. This is in line with our previous work in which we have argued that it is more dangerous to deny moral agency to people with disabilities than it is to simply accept that all people have moral agency and to then explore how best to explore the expression of that agency (Flynn and Arstein-Kerslake 2014). Here, we argue that, if in doubt, assume intention in an action, thereby allowing it to potentially be an exercise of legal agency – if it also affects a legal relationship or has legal consequences. This allows for Article 12 to be engaged which also then requires states to provide access to support for the content of the person’s action where legal consequences result from that action.

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Here, we would argue that her actions in repeatedly pulling out her feeding tube should be assumed to be intentional actions. The repeated nature of the action is evidence of this intention. We would then consider the action to be an exercise of legal agency because it also has legal consequences, as it is effectively a refusal of medical treatment. With special thanks to Alexander Ruck Keene for his insight on this issue.

<sup>13</sup> Some of the issues around the interpretation of intention parallel issues of interpretation of will and preference, for information on this, see the companion article in this special issue, de Bhailís and Flynn (2017).

<sup>14</sup> Special thanks to Elizabeth Kamundia for her insights on this issue.

We propose that an exercise of legal agency does not, necessarily, include understanding. The actor must intend for the action or inaction to take place, but the actor does not necessarily have to understand the nature and consequences of the action or inaction. For example, where an individual intends to sign a contract, but does not understand the terms of the contract, she can be viewed as both a legal person and a legal agent. We view her signing of the contract as an exercise of legal agency. However, if mistake or misrepresentation was present when she exercised her legal agency, she may not be bound to adhere to the contract.<sup>15</sup> Since she did not provide free agreement to those terms, no ‘meeting of the minds’ occurred between the contracting parties and it is likely that no binding contract can be enforced (Lehman & Phelps 2005). However, because she is exercising legal agency by signing the contract, the state must provide her with access to support for this decision according to Article 12(3).<sup>16</sup>

### **Decision-Making Barriers that Prompt An Exercise of Legal Agency**

In some cases individuals with disabilities are prevented from making decisions in their daily lives, such as meal choices, scheduling, socialising, and others. Based on our definition of legal agency provided above, these decisions likely are not exercises of legal agency on their own.<sup>17</sup> However, the individual may be forced to assert legal agency in order to have the original decision respected. For example, a person who

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<sup>15</sup> Contract law has always included remedies for individuals who were mistaken or misled as to the terms of the agreement and the recognition of an individual as exercising legal agency in signing the contract does not exclude her from these protections. For more on this subject, see Teubner (2000).

<sup>16</sup> Such support could include assisting the person to understand and abide by the terms of the contract. See Committee on the Rights of Persons with Disabilities, General Comment No.1 – Article 12: Equal Recognition Before the Law (April 2014) UN Doc. No. CRPD/C/GC/1, adopted at the 11<sup>th</sup> Session, para 17. Special thanks to Tina Minkowitz, Kristijan Grdan and Alberto Vasquez for their insight on this issue.

<sup>17</sup> While there is a significant body of literature on how these kinds of actions constitute exercises of moral or human agency, the authors have not encountered any literature which regards such actions as exercises of legal agency, where no legal consequences result from such actions.

wants to go for a walk is not necessarily exercising legal agency in making this decision, but if she encounters barriers because her place of residence imposes a curfew, these barriers can force her to assert her legal agency in order to carry out the action she intends. She may have to challenge the curfew in order to be able to walk where she chooses.

These decision-making barriers can arise in many different settings, however they are particularly likely to arise in institutional settings and other settings that are impermissible under Article 19 of the CRPD (Committee on the Rights of Persons with Disabilities 2014, paras. 44-46).<sup>18</sup> Article 19 illuminates the right to live independently and be included in the community. In particular, it requires that people with disabilities have the right to choose where and with whom they live (Article 19(a)), that there is access to in-home services to support inclusion (Article 19(b)), and that community services be equal available to people with disabilities as they are to others (Article 19(c)).<sup>19</sup> In this section and in the following section, we discuss the exercise of legal agency in such settings. We are engaging in this discussion because the reality is that many people are still living in institutional and other settings that are a violation of Article 19. We believe that it is important to discuss how legal agency is exercised in these settings. This should not undermine an argument for the eradication of all settings that are not compliant with CRPD provisions, and in particular, Article 19.

People with disabilities are experiencing decision-making barriers in institutional and other settings that force the exercise of legal agency where it would not otherwise be

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<sup>18</sup> Special thanks to Tina Minkowitz, Kristijan Grdan and Alberto Vazquez for their insight on this issue.

<sup>19</sup> For further discussion of Article 19 and the right to live independently, see Kanter (2012).

needed. For example, people with disabilities who are reliant upon family and friends in the informal home setting for many daily activities, are vulnerable to those friends and family not respecting their choices with regard to both small and larger decisions – daily meal choices, social interactions, and even residential settings. People with disabilities exercise legal agency in many ways, as do all people, however these decision-making barriers may prompt more frequent exercise of legal agency by people with disabilities. In order to fully consider how our definition of legal agency might apply in such settings, we provide the following examples below.

### **Case Studies of Exercises of Legal Agency**

#### *Case One: Paid Carer in the Home Setting*

Consider a woman with cognitive disability for whom a paid carer provides intimate care. The carer visits the woman's home on a daily basis and supports the person to wash, dress, and use the toilet. The woman makes noises and gestures to communicate but does not use speech or a recognised form of sign language. On one visit, the carer notices that the woman has soiled herself, and starts to undress her to clean her. The woman makes loud noises when the carer removes her clothes, and holds herself rigidly, keeping her knees locked tightly together. The carer continues to speak softly to the woman, explaining that she is going to clean her, and holds the woman to wash her, prising her knees apart to do so.

One of the immediate questions which arises from this scenario is whether the woman provided consent for the carer to clean her. However, that is beyond the scope of this

article.<sup>20</sup> In the context of our discussion of legal agency, the primary issue here is to determine whether the woman's actions constitute an exercise of legal agency in the first place. If they do, then Article 12 protects the content of her actions. This means that she has a right for her actions to be respected as an exercise of her legal capacity and that the state has an obligation to provide support for the exercise of such legal capacity. Practically, this may mean that there is an obligation to discover if her action of locking her knees together is an expression of a particular will or preference – for example, the preference to not be cleaned at that moment by that carer. There would then be an obligation to support her in exercising her legal capacity by acknowledging such preference and assisting her to make the changes necessary to realise that preference – for example, waiting until the woman indicates that she would like to be cleaned, or approaching the task in a different way.

In this example, the actions in question are the noises the woman is making and the way in which she holds her body. Through these actions she may be demonstrating her intention to resist the carer's efforts to clean her and communicating her desire not to be touched by the carer. The woman's actions also have the clear potential to create legal consequences – if she is resisting the carer, and the carer continues to clean her, this might constitute a trespass to the person in tort, or an assault in criminal law.<sup>21</sup> For these reasons, the woman can be considered to be exercising legal agency. An exercise of legal agency is an exercise of legal capacity, which is protected under Article 12. This means that the woman with a disability has the right to be respected as a legal agent and to exercise that legal agency on an equal basis with others.

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<sup>20</sup> For a further discussion of consent, see the companion article in this special edition, Brosnan and Flynn (2017).

<sup>21</sup> The woman's actions in this example give rise to indirect, rather than direct, legal consequences. With thanks to the reviewers for this clarification.



Therefore, in this case, her disability would not be a legitimate basis for denying her legal agency and ignoring her apparent wishes to not be cleaned by the carer. This has significant implications, including a duty for carers in such situations to respect the legal agency of the individual and their expressions arising from such agency. This may mean increased resources spent on training such carers to react differently in such situations, or to hold carers who do not respect the legal agency of people with disabilities legal responsible for such treatment. Of course, there are many issues that are raised by this example, including limited resources for carers, accurate interpretation of non-conventional communication methods, and others. However, we primarily wanted to demonstrate what an exercise of legal agency may look like in such a scenario and begin to discuss the Article 12 implications for that exercise.

#### *Case Two: Group Home Setting*

Consider a man living in a group home with a total of eight residents with cognitive disability and two staff members. There is a specific policy governing how the staff are to design the weekly and daily schedules of the residents. The residents can express their opinions about what the schedule looks like, but the staff make the final decisions. The schedule sets the times at which all residents will get up, wash, eat, attend the local sheltered workshop for people with cognitive disabilities, return to the home, and go to bed. Every Sunday, all residents are taken to a Presbyterian Church around the corner from the home.

Before living in the group home, the man very much enjoyed watching the late night television with his father, who has since passed away. He often slept in late and worked in the afternoons at the local grocery store. He was raised Catholic and

attended mass every Sunday for most of his life. When his father passed away, he had the option of staying in his family home with his sister checking on him in the evenings. However, the man had never lived alone before and was concerned about sleeping in a house alone, cooking by himself, and also feeling lonely. He signed a contract with the group home for his care and living support and began living there.

He left his job at the grocery store, because no one at the group home was available to drive him there. He began waking up early as required by the group home schedule, but missed the late night television that he used to watch with his father. He attended the Presbyterian Church with the other residents of the group home, but was concerned because he could not practice his religion, Catholicism, in the way that he had been taught. After he had been at the group home for a few months, he became unhappy with this new life. He approached the manager of the staff of the group home and raised his concerns. He was very upset and requested that he be able to return to his old job at the grocery store, that he be allowed to stay up later and wake up later, and that he be allowed to walk to his old Catholic Church on Sundays, which was about a 20 minute walk from the home.

The manager listened to his requests and sympathised with his discomfort, but said she could not accommodate his requests, partly because staff were not available to support him to go to a different church and to his former job, and because staying up late would not be fair to the other residents. The man was became more anxious and upset. One day his sister came to visit him and he told her the situation. She said that his concerns were valid and suggested that he speak to the manager again. He spoke to the manager again the next day and got the same response. As a result, the man has

become withdrawn and began to refuse food. When pressed by staff to eat, he says that he will start eating again when he is allowed to return to his former job, attend his own church, and stay up late to watch television.

Choices about when to wake up and when to go to bed would not normally be considered exercises of legal agency. However, the man has not been able to have these choices respected and therefore, he has been forced to undertake an exercise of legal agency – the refusal to eat – in order to have his original preferences to adapt the group home schedule respected. The issue of the practicality of the man's wishes are a separate matter. They highlight the difficulty of respecting choice in an institutional setting such as a group home. The goal of this example was to highlight exactly when an individual in a group home or other institutional setting is exercising legal agency and therefore when they are protected by Article 12. In this case, the man is exercising legal agency, and he is therefore entitled to protection by Article 12. The state has an obligation to recognise that agency on an equal basis with non-disabled people and to provide him support for the exercise of that agency.

### *Case Three: Family Setting*

Consider a man who lives at home with his family. He is twenty-two and has lived at home all of his life with his mother, father and younger brothers. He has a cognitive disability and often experiences social anxiety. He finished primary and secondary schooling, but has never had a paid job. The man stays home and cares for his younger brothers while his parents work. One day, the man inherits a house nearby when his uncle dies. The man decides to leave his parents' house and to live in the house that his uncle has left him. When the man presents his parents with this decision, they are not happy. They express concern about him living on his own. His

parents are concerned that he will not have anyone to protect him from other people when he is living alone in his uncle's house. The man listens to what his family says, and at first feels that they are right. He remains in their house for several more months, caring for his brothers.

A few months later, he begins to feel again that he would like to move out. He would like to find a girlfriend one day and have some independence. However, when he tries to leave his father blocks his exit from the house. The man requests that his father let him go, but he does not. Later that night, the man secretly leaves the house and goes to his uncle's house. When he gets there, he finds that another family is living in the house. Later, he discovers that although the house is in his name, his parents rented the house to this new family without his permission. As he had nowhere else to go, he returned to his parents' house.

The man's decision to leave his parents' house and to live in his uncle's house can be understood as an exercise of legal agency, since taking up residence in his uncle's house indicates his acceptance of the inheritance. This could change many legal rights and responsibilities, including taxes, insurance, and others. As an exercise of legal agency, Article 12 protects this decision and he has a right to equal recognition of this agency. He also has a right to support for the exercise of his agency. His parents have prevented him from exercising his legal agency by attempting to physically block him from leaving the house and by renting out the house on his behalf, without his consent. Under Article 12, the state has an obligation to provide support for this man's exercise of his legal agency. It also has an obligation to provide protection for the recognition of the man as a legal agent. This may mean a mechanism for legal

action against the parents who have physically prevented him from taking an action that is an expression of his legal agency and for the illegal renting of the house that was inherited by the man.

While there are many issues to be addressed here, such as the precise obligations of the state and the exact boundaries of legal agency in intra-familial decision-making, this is intended to provide an example of where legal agency may be occurring in the home and, therefore, where Article 12 may provide protection in this sphere. There are many examples in which intra-familial decisions could not be considered an exercise of legal agency. However, these types of decisions can be instrumental for social inclusion and can be a very important part of a person's life.

### **Relationships of Domination**

Much of the treatment described in the above examples and such experiences of decision-making denial bear striking resemblance to the concept of domination as discussed in republican theory. Domination disrupts political liberty and freedom (Pettit 1997). It erodes the individual's potential to participate in community and public life and carries significant psychological implications.<sup>22</sup> Dependency can breed such domination (Lovett 2010). People with cognitive disabilities are disproportionately subjected to dependency, sometimes due to the cognitive impairment and very often due to institutionalisation and social barriers that do not accommodate variances in cognitive abilities.<sup>23</sup> Republican theory is not typically used as a theoretical framework for disability rights (O'Shea 2015), although some valuable work has been done in the area (Series 2013; O'Shea 2015; De Wispelaere &

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<sup>22</sup> See generally, Tajfel (2010)

<sup>23</sup> For a discussion of dependence, see Kittay (1999). For a discussion of intellectual disability and the social model of disability, see Chappell, Goodley and Lawthom(2001) .

Casassas 2014). However, we have chosen to use it here because of the parallels we have identified between theories of domination and the lived experience of disability<sup>24</sup> and because we are interested in identifying how such political theories can and should be used to analyse the situation of people with disabilities in our legal systems.

It is important to note that in this discussion of dependence and domination, we are not assuming that such relationships must exist or are an inherent part of disability.<sup>25</sup> In fact, elsewhere, Arstein-Kerslake (2014) argues that dependency can be empowering, when certain principles are respected, including equality between the parties and a mutual respect for the moral and legal agency of both parties. The discussion we engage in here, is addressing the role of dependency in relationships of domination, which can happen in the lives of people with or without disability. We are particularly highlighting the lives of people with disability and the situations in which we have identified that may place people with disabilities at particular risk of experiencing domination.

Non-domination has been discussed in republican theory as an essential component of freedom. Theorist Frank Lovett (2010) gives an account of domination that is useful for this analysis in his book, *A General Theory of Domination and Justice*. He focuses on issues of dependency and social justice, which were largely overlooked by other theorists. Lovett (2010) draws on the work of Philip Pettit (1997), who's work, *Republicanism: A Theory of Freedom and Government*, defines political liberty or freedom as non-domination. Lovett defines domination as “a condition suffered by persons or groups whenever they are dependent on a social relationship in which

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<sup>24</sup> These parallels have also been identified by Tom O'Shea (2015).

<sup>25</sup> Special thanks to Tina Minkowitz for her insights on this issue.

some other person or group wields arbitrary powers over them.” (2010, p.20)

Domination requires dependency because without dependency there is nothing holding the individual under the domination, nothing preventing them from escaping the domination (Lovett 2010).

Social justice can minimise domination (Lovett 2010). The right to legal agency in Article 12 of the Convention on the Rights of Persons with Disabilities may be a powerful social justice tool to accomplish this. In recognizing the right of all individuals, regardless of disability, to exercise legal agency, it removes the power from the dominant party and places it back in the hands of the individual. Above, we have explored what an exercise of legal agency is, in order to understand what is protected by Article 12. Here we apply that definition and explore it in the context of relationships of domination.

We argue that when an individual is experiencing domination, they are forced to exert legal agency at a higher rate than people who are not experiencing domination. This is because when an individual is experiencing domination, they may need to exert legal agency to get even minor decisions enforced in the face of the dominating party. If an individual is not experiencing domination they are largely free to make minor decisions without interference. People experiencing domination may be prevented, overtly or insidiously, from engaging or enforcing such decisions. For this reason, when attempting to realise such a decision, the individual under domination may be forced to exert legal agency against the dominating party. People with disabilities

experience domination at disproportionately high rates<sup>26</sup> and therefore may be exerting legal agency, protected by Article 12, at higher rates.

Dependence has been defined in multiple ways. Lovett (2010) follows the tradition of many social theorists and defines dependence broadly as a social relationship that is not voluntary. He articulates the level of dependency as predicated on the overall cost of exiting the social relationship (Lovett 2010). This cost is defined from the subjective point of view of the individual experiencing dependency. In other words, if an individual perceives a great cost in exiting a particular relationship, they may be considered dependent on that relationship, regardless of whether their perception is accurate (Lovett 2010). Eva Kittay (1999) gives a narrower account of dependence that only includes the situation in which one individual depends on another for her basic needs. Kittay (1999) uses this definition specifically in relation to people with disabilities. However, for the purpose of identifying the exercise of legal agency within a relationship of dependence, it may be more useful to use the more expansive definition embraced by Lovett in order to encapsulate dependence beyond basic needs, such as dependence for social inclusion or financial stability.

In Lovett's (2010) definition, power is wielded arbitrarily when it is exercised based on the whim of the person holding the power. This means that the ability to exercise such power is not effectively constrained by external forces; such as rules, procedures, or goals that are commonly known and understood (Lovett 2010). Conversely, where power is effectively constrained by external forces, it is not arbitrary and, therefore, domination is not present. The external force is effective if it

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<sup>26</sup> For a discussion of disability and oppression, see Charlton (1998).



has the actual ability to curtail the power. It is external only when its source is outside the power-wielding actor. For example, in general, the rule of law is considered non-arbitrary as long as it is externally controlled by democracy and effective separation of powers. In this way, it is effectively externally constrained by rules, procedures, or goals that are commonly known to all. In contrast, the power wielded by a master over a slave in American Colonial history was arbitrary. Although the law permitted the wielding of such power, it was such a broad remit that masters generally had very little constraints on how they could exert power over slaves. The few constraints that did exist were ineffective because they were often not enforced (Lovett 2010). Therefore, there were no effective external constraints on the power exerted by the master over the slave and such power was arbitrary.

An examination of mental health law and legal capacity law provides evidence that these forms of rules and procedures are not effective constraints of the power that certain actors hold over people with cognitive disabilities. Tom O'Shea (2015) identifies that one reason for this is that key provisions in such law are commonly either ambiguous or uncodified. This allows actors in power, such as courts, to exploit the legislation to arrive at their pre-desired outcome.

Many people with cognitive disabilities also continue to experience a disproportionate amount of dependence in social relationships. This may be due to the nature of an individual's impairment. However, it is more commonly due to social and structural barriers hindering independence (Shakespeare & Watson 1997; Oliver 2004). People with cognitive disabilities may be dependent upon a paid personal assistant or other

support staff; or may be living in a group home and be dependent upon the staff of the home; or may be dependent upon family, friends and community members.<sup>27</sup>

These are relationships of dependence when the relationship is not voluntary – when, from the perspective of the person with disability, the cost of exiting the relationship is too high. For example, a person who needs a personal assistant to complete daily tasks and interact with the community is not in a relationship of dependence with that personal assistant if the individual knows how to easily get a new personal assistant that can adequately and effectively perform the same level of assistance. However, this relationship could rise to the level dependence quite quickly if the individual finds it very hard to find personal assistants; finds it very hard to train personal assistants in the essential tasks; is only provided funding for hiring a certain person or a certain service provider; or for a variety of other reasons. Importantly, many of these relationships of dependence could be avoided with improvements to service provision and changes in government policy around disability benefits and supports for planning and spending those budgets.

In the example above, assume that an individual using the personal assistant is only permitted to hire from one service provider, due to funding restrictions. She has had terrible experiences in the past of personal assistants being poorly trained and unreliable. On more than one occasion she has feared for her life because of the actions of personal assistants when they were not properly trained in driving and operating wheelchair accessible vehicles and when the personal assistant was supposed to provide support in helping her understand her medications and prescribed

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<sup>27</sup> Special thanks to Elizabeth Kamundia for her insights on this issue.

doses. She currently has a personal assistant from the only service provider that she can get funding for. She is confident that this personal assistant understands her medications, knows how to drive and operate wheelchair accessible vehicles, and can adequately meet her daily needs and support her to engage in the community and in employment. However, she is also aware that this personal assistant is routinely stealing small amounts of money from her and when he gets frustrated or angry, she sometimes fears that he will act aggressively towards her. She has significant fear of exiting this relationship because of financial constraints as well as concerns around finding someone else to adequately provide personal assistance. From her perspective, the cost of exiting this relationship with her personal assistant is too high. Therefore, the relationship is not voluntary. It is a relationship of dependence.

In the above example, the relationship of dependence arises to the level of dominance if the power wielded by the personal assistant is arbitrary. In other words, when the power is not effectively constrained by external forces. This occurs when the power can be exerted largely on the whim of the individual holding the power and is not effectively constrained by external forces such as rules or procedures. One external force that would help constrain the power of the personal assistant would be a choice of service providers. If the individual using the personal assistant was able to simply switch service providers if one was not working out, this would put an onus on the service provide to make sure that they were competing with the other service provider and delivering a quality service according to the needs and desires of their clients. This is an economic model for providing external constraints on power, which does not exist in our example. Another form of effective external constraint may be management techniques within the service provision organisation that ensure that

individuals using their service have control of that service and are free to hire or fire or change their service at any time. Government funding that goes directly to the individual, as opposed to the service provider, may also provide effective constraint – if proper support is provided to the individual to manage and spend the money. Arguably most importantly, community connectedness is an effective external constraint on power because it allows the individual to be closer to external forces that can provide resources to make exit from a dependent relationship possible; such as better access to information as well as police, friends and family.

In the above example of the individual using a personal assistant, assume that none of these external constraints on the power of the personal assistant exist. The personal assistant wields his power largely at his own whim. This makes the power that he holds arbitrary. Some may argue that rules and procedures that exist within the service provider and law that the service provider is obliged to follow amount to effective external constraints and therefore the power is not arbitrary. However, Lovett (2010) highlights that the constraint is only effective if it actually curtails the power. In the example above, although there may have been laws that are meant to constrain the service provider and rules and procedures within the service provider that are meant to constrain the power of the personal assistants whom are employed by them, none of these constraints are actually significantly curtailing the power of the personal assistant. Therefore, the power wielded by the personal assistant is arbitrary and the relationship is one of dominance.

In such a relationship of dominance, the individual subjected to the dominance is likely forced to exert legal agency in order to overcome the power wielded by the

dominant party. In fact, the exercise of legal agency may be the only manner in which to enforce a decision against the dominant party because any other external constraints are not effectively curtailing the power of that party. In the example above, if the individual wants to stop the personal assistant from stealing from her, she may need to exert her legal agency in either threatening to or actually pressing criminal charges against him. This is an exercise of legal agency, consistent with the definition above, if she intends to make such threat or press such charges, which have legal consequences. Acting on these intentions would also engage other human rights, such as the right to access justice in Article 13 CRPD (Committee on the Rights of Persons with Disabilities 2014). However, if her legal agency is not recognised, its exercise and the engagement of other human rights becomes impossible. In this way, the recognition of legal capacity and the freedom to exercise legal agency may be the effective external constraint that can release an individual from a relationship of dominance. Conversely, if the relevant legal capacity law is either sufficiently ambiguous or uncodified, as O'Shea (2015) points out, such law is an ineffective external constraint because it can be manipulated by those in power and the relationship remains one of domination.

The above example is one of a relationship of dominance between two people. It can also occur that there is a relationship of dominance between an individual and a larger group structure;<sup>28</sup> for example, an institutional residential setting. An institution is a structure of dominance if the individual is dependent upon the structure and the power that the structure wields is arbitrary. A relationship of dependence is consistent with

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<sup>28</sup> Lovett (2010) rejects the idea that a structure itself can be in a relationship of domination. Instead he contends that there must always be agents of such a structure which are actually carrying out the domination. He does, however recognise that a group of people could be in a relationship of domination. In this section of the article, we are discussing the institutional group structure as the party exerting domination over the individuals living within that structure.

most institutional structures. It is common that the individual's placement within the institution is not voluntary. Even for individuals who enter voluntarily into institutional settings they are often dependent upon those structures because of an actual or perceived high risk of exit. For example, when the only support services offered for people with disabilities is that of an institutional setting. The choice between no support and life in an institution is usually no choice at all for people with support needs. The power of that institutional structure on the individual is arbitrary if there is no effective external constraint on it. While there may be rules and procedure within the institution and legislation or regulation applicable to the institution, it is possible that the actual power wielded over an individual by that institutional structure is not effectively constrained. First the rules and procedures within the institution are not effectively constrained because they are not external to the structure. The laws and regulations external to the institution are only effective constraints if they actually curtail the power that the institution wields over the individual.

It can be argued that the only effective curtailing of the power of the institution over the individual is an external law or regulation that effectively obliges the institution to respect and uphold the will and preference of the individual, as outlined in Article 12(4). Without such constraint on the power of an institutional structure, the individual's voice is lost and the institution wields power over the individual without limitation based on the desires of that individual. In this way, we argue that the power of an institution is arbitrary where it is not constrained by any obligation to uphold the will and preference of the individuals residing within the institution.

An individual living under the dominance of an institutional structure is likely forced to exert or attempt to exert legal agency for even small daily decisions. This is because of the dominant institutional structure has no obligation to recognise the decision-making of the individual or to realise her will or preferences. For example, in such a setting, where an individual wants to decide herself what time to get up and what to eat, she may be forced to act against the oppressive institutional structure in order to have these wishes realised. She may do this by having another individual outside the institutional structure act on her behalf to negotiate with the institution to arrange such a schedule for her, or she may exhibit behaviors of resistance to demonstrate a desire for change, or she may specifically threaten legal action. All of these actions are those that the individual intended and may have legal consequences, which fits in with the definition of legal agency above. Therefore, the content of these actions are protected by Article 12. In this way, people living under the dominance of an institutional structure are often exerting legal agency even in daily decision-making. This exertion of decision-making power likely does not rise to the level of effectively curtailing dominance because the dominant relationship stays in place beyond that single exertion of legal agency.

O'Shea identifies this domination in daily decision-making as 'micro-domination.' He defines this as, 'the capacity for decisions to be arbitrarily imposed on someone, which, individually, are too minor to be contested in a court or a tribunal, but which cumulatively have a major impact on their life.' (2015, p.4) O'Shea (2015) quotes the following experience of Darby Penny (1994 cited by O'Shea 2015, p.29) in a psychiatric institutional setting:

‘ . . . most of the interference with choice actually occurs in much more mundane, routine, noncrisis kinds of matters. Things like when we eat, when we’re allowed to use the telephone, who we can associate with, and what we do with our time. [ . . . ] I really believe that that’s where the most of us have felt the most intruded upon and where the lack of choice has really been a burden to us over the years.’

O’Shea (2015) also quotes the findings of a recent study on individuals with cognitive disabilities in residential care. It found that residents ‘were dependent on staff for most of their daily needs, and sometimes reported being at the whim of staff moods, behavior, and attitudes. [ . . . ] Support staff had control over every aspect of the lives of participants, and the casual denial of participants’ requests is demonstrative of how little power and control participants sometimes had.’ (Griffith, Hutchinson & Hastings 2013) O’Shea identifies that these ‘micro-dominations’ are not only sources of ongoing fear and servility of people with cognitive disabilities, but they are also evidence of the failure of our society to provide equality before the law for people with cognitive disabilities (2015, 5). As with the examples of domination identified above, these ‘micro-dominations’ similarly may force an exertion of legal agency in order for the individual to overcome the domination and to have her daily decisions respected.

There are two important points in relation to domination and legal agency. The first is that the exercise of legal agency can be an effective tool for curtailing dominant power. However, this can only occur where legal capacity legislation is unambiguous (O’Shea 2015) and codifies the right of people with cognitive disabilities to possess



and exercise legal capacity on an equal basis with others. The second point is that people living within structures or relationships of dominance may be exerting legal agency even in minute daily decision-making, because it is the only manner in which they can exert any decision-making power. People with disabilities are disproportionately experiencing this because they are more likely to be living in institutional settings. However, this may occur in institutional settings or in more informal settings, such as the family home. This means that Article 12 protects even the daily decision-making of people living in structures or relationship of dominance because they are constantly exerting legal agency or attempting to exert such agency. In both areas, the right to legal capacity may be the social justice tool that could be utilised to liberate the individuals from domination.<sup>29</sup>

## **Conclusion**

Legal scholarship is still developing in the area of the right to legal capacity. This article intends to be a contribution to this ongoing conversation. We have proposed a definition of legal agency and provided examples of when legal agency may be exerted in the lived experiences of disability. In doing this, we have outlined when Article 12 can be called on to protect the decision-making rights of people with disabilities. In our discussion of republican theories of domination, we have attempted to provide an analysis of the situation of some people with disabilities based on a theoretical framework that is broadly applicable and widely respected. We have done this to demonstrate the disproportionate amount of oppression that people with disabilities are experiencing and to highlight its commonalities with ‘mainstream’ theories such as republican theories of domination.

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<sup>29</sup> O’Shea’s (2015) work supports this from a philosophical perspective by arguing that ‘the problems of usurpation and deskilling that disability throws into sharp relief might find promising remedies in a participatory republican politics of self-emancipation.’

Our primary concern in this article is to identify when we can rely on the protections of Article 12 to trigger a state obligation to provide access to support for individual decisions. Instinctively, we felt that daily decision-making of people with disabilities living in oppressive settings must be protected by Article 12. While the realisation of Article 19 CRPD would address many of the human rights violations experienced by people in these settings, Article 12 must also be engaged here to ensure that individuals in these settings have access to the support they require to exercise legal agency to give effect to decisions made in these settings. In this article, we have attempted to provide an argument for such protection. We hope that policy-makers, practitioners, and agents of social change can use our argument and our definition of legal agency to better implement Article 12. We welcome a continued discussion in this area as well as any law and policy reform leading to greater protection of the decision-making rights of people with disabilities.

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