

Defining Legal Personhood

1. Introduction

There is a robust line of scholarship related to personhood.¹ However, there is little agreement on the definition of personhood and related concepts—such as *moral* personhood, *legal* personhood, legal capacity, legal standing, and legal agency. Such concepts are often poorly defined and conflated in the literature and in law.² Drawing on the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD), as well as previous scholarship, I will present new working definitions of these concepts in an effort to provide an original contribution that may serve to provide some clarity in the confusing literature that currently exists.

1.1 Legal versus Moral Personhood

Much of the existing philosophical and theoretical scholarship focuses on either legal personhood or moral personhood. While there is often inconsistency in how these terms are used, it is useful to ascribe them general definitions in order to categorise existing literature and to begin to understand modern *legal* personhood. Understanding modern legal personhood is, in turn, important for identifying denials of legal personhood that should be protected by human rights law—which is one of my aims in this book.

We will turn first to moral personhood. It is a more flexible concept than legal personhood because it is purely theoretical. It is also commonly referred to as ‘moral status’—it is the philosophical recognition of an individual or entity as a ‘person’ for the purpose of ascribing moral agency, responsibility, and entitlements.³ In other words, it is an existential—and often intuitive—assignment of

¹ Margaret Jane Davies and Ngaire Naffine, *Are Persons Property? Legal Debates about Property and Personality* (Ashgate 2001); Eva Feder Kittay, ‘At the Margins of Moral Personhood’ (2005) 116 *Ethics* 100; Visa AJ Kurki, *A Theory of Legal Personhood* (OUP 2019); Ngaire Naffine, ‘Who Are Law’s Persons: From Cheshire Cats to Responsible Subjects’ (2003) 66 *Modern Law Review* 346.

² Eilionóir Flynn, ‘Law, Language and Personhood: Disrupting Definitions of Legal Capacity’ (2021) 30 *Griffith Law Review* 374; Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Bloomsbury Publishing 2009).

³ Peter Singer, ‘Speciesism and Moral Status’ (2009) 40 *Metaphilosophy* 567; Mary Anne Warren, *Moral Status: Obligations to Persons and Other Living Things* (OUP 2000).

ethical obligations and rights. Legal personhood, on the other hand, is more rigid because it is the recognition of that status in the law.⁴ It is not theoretical—or we are not defining it as theoretical for our purposes here. It requires an actual legal instrument granting such legal personhood.⁵ Legal personhood and moral personhood intersect, or are related to each other, in that legal mechanisms granting or denying legal personhood often do so in a manner that aligns quite closely with theories of moral personhood.⁶ For example, definitions of moral personhood often exclude disabled people—especially cognitively disabled people. Similarly, disabled people experience, arguably, the highest rate of denials of legal personhood via guardianship laws, interdiction, conservatorship, and other mechanisms that deny legal personhood on the basis of actual or perceived cognitive disability.⁷ In this way, theory related to moral personhood has the power to influence the development and practical application of legal instruments granting or denying legal personhood to various human or non-human entities.

Exploring the practical nature of legal personhood further, we can identify that its function is often to assign personhood to human or non-human entities when it is necessary to recognise them as legal persons with rights and/or responsibilities, whereas discussions and ascriptions of moral personhood are not tied to such necessity. For example, corporations have quite consistently been recognised as legal persons, because it is important to legally recognise both their responsibilities and their rights. When they act negligently, we need a ‘legal person’ to hold responsible. Conversely, economic demands—and the nature of capitalism—have required that corporations have certain rights, in order to allow them to act relatively freely within the marketplace.⁸ Scholars and legal theorists tackling the ascription of moral personhood to corporations are not tethered to such practical concerns—instead they often focus on the exploration of the nature of the corporation and whether an entity without singular cognition or conscience can be theoretically recognised as a moral person.⁹ This flexibility in conceptions of moral personhood is useful in that it allows freedom in the development of such theory without the responsibility to be too concerned with the practical implications of such theory.

⁴ Naffine, *Law's Meaning of Life* (n 2).

⁵ Eilionóir Flynn and Anna Arstein-Kerslake, ‘Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity’ (2014) 10 *International Journal of Law in Context* 81.

⁶ *ibid.*

⁷ Anna Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities* (CUP 2017).

⁸ Margaret M Blair, ‘Corporate Personhood and the Corporate Persona Symposium: In the Boardroom’ (2013) *University of Illinois Law Review* 785; Frederick Green, ‘Corporations as Persons, Citizens, and Possessors of Liberty’ (1945) 94 *University of Pennsylvania Law Review* 202; Michelle Worthington and Peta Spender, ‘Constructing Legal Personhood: Corporate Law’s Legacy’ (2021) 30 *Griffith Law Review* 348.

⁹ Peter A French, ‘The Corporation as a Moral Person’ (1979) 16 *American Philosophical Quarterly* 207; Michael J Phillips, ‘Corporate Moral Personhood and Three Conceptions of the Corporation’ (1992) 2 *Business Ethics Quarterly* 435; Susanna K Ripken, ‘Corporations Are People Too: A Multi-dimensional Approach to the Corporate Personhood Puzzle’ (2009) 15 *Fordham Journal of Corporate & Financial Law* 97.

I engage in this exploration of the distinctions of moral and legal personhood in order to create a foundation on which to move forward with this discussion—in order to firmly establish what *legal* personhood is and when it should be protected by human rights law. Further exploring such distinctions, it is important to note that while this ascription of legal personhood based on practicality and necessity is true in some areas—such as corporate law—there are many cases in which the impetus for the granting or denying of legal personhood seems to be much more related to social bias and the maintenance of power and privilege of certain groups of people—frequently white, able-bodied, cisgender men. Interestingly, this impetus overlaps with the ascription of moral personhood; even from a theoretical perspective, there seems to be a common theme among theorists—they are often keen to recognise moral personhood for those individuals that are similar to themselves and to exclude those that are different. Recognition of moral personhood along these lines, of course, conveniently allows those theorists and their social group to maintain power and privilege via the recognition of their personhood to the exclusion of others.

1.2 Exclusions from Legal and Moral Personhood

Since the earliest written codes of law, scholars and others have been discussing who should and who should not be included as legal persons.¹⁰ Historically, marginalised groups have often been excluded from legal personhood. For example, slaves, racial minorities, and colonised peoples have been excluded from personhood via criminalisation, imprisonment, voting restrictions, and other means, including specific laws that limit personhood for individuals in these groups.¹¹ Women have been excluded from full legal personhood through inheritance restrictions, through coverture laws that extinguish legal personhood upon marriage, and in other ways.¹² Numerous other examples can be found throughout history.

In addition, moral philosophers have long grappled with the concept of moral personhood and have discussed the exclusion of certain groups. For example, in

¹⁰ Davies and Naffine (n 1); David Gindis, 'Legal Personhood and the Firm: Avoiding Anthropomorphism and Equivocation' (2016) 12 *Journal of Institutional Economics* 499.

¹¹ Colin Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton UP 2013); George Pavlich, 'Criminal Justice and Cape Law's Persons' (2014) 23 *Social & Legal Studies* 55.

¹² Mary Beth Combs, 'A Measure of Legal Independence': The 1870 Married Women's Property Act and the Portfolio Allocations of British Wives' (2005) 65 *The Journal of Economic History* 1028; Amy Louise Erickson, 'Coverture and Capitalism' (2005) 59 *History Workshop Journal* 1; Eleanor Flexner and Ellen Frances Fitzpatrick, *Century of Struggle: The Woman's Rights Movement in the United States* (Harvard UP 1996); Ngaire Naffine, 'Women and the Cast of Legal Persons' in Jackie Jones and others (eds), *Gender, Sexualities and Law* (Routledge 2011); Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England* (Princeton UP 1993).

the late 1600s, John Locke influentially theorised that personhood was dependent on memory and 'reflective consciousness'.¹³ Therefore, one could only possess moral personhood—and be held responsible for their actions—if they could remember and reflect on inappropriate or criminal behaviour.¹⁴ In this way, Locke excludes any person with cognitive impairment that may impact reflection or memory. Furthermore, in his work on the 'social contract', he went on to exclude cognitively disabled people in general from societal participation.¹⁵ His work explicitly excludes people with cognitive disability from political participation.¹⁶ With this work, Locke has been credited as instigating a movement in moral philosophy to exclude cognitively disabled people from consideration as moral persons.¹⁷ Following this trend, the well-known liberal political philosopher John Rawls's conception of personhood requires that the individual have two moral powers: (1) the capacity for a sense of justice; and (2) the capacity for a conception of the good.¹⁸ Many have regarded this as an explicit exclusion of cognitively disabled people from moral personhood.¹⁹ For example, philosopher Martha Nussbaum revisited Rawls's theories and concluded that they exclude cognitively disabled people.²⁰ Sophia Wong further explored this line of theory and concluded that it is more morally dangerous to exclude disabled people from moral personhood than it is to include them.²¹ The efforts of scholars examining both moral and legal personhood have often focused on who to exclude from these categories and when to exclude them.

I do not want to dwell too long here on the long-overprivileged theories of predominantly white, able-bodied, cisgender men—and the many commentaries that have emerged regarding those theories. While they are, of course, not without merit, they have, I believe, been given enough attention. In addition, as mentioned previously, they have served to maintain the power and privilege of those similar to them—other white, able-bodied, cisgender men. There is little consideration in

¹³ John Locke, *An Essay Concerning Human Understanding* (Roger Woolhouse ed, Reprint edn, Penguin Classics 1998); Lawrence A Locke, 'Personhood and Moral Responsibility' (1990) 9 *Law and Philosophy* 39.

¹⁴ Locke, 'Personhood and Moral Responsibility' (n 13).

¹⁵ John Locke, *The Works of John Locke* (T Longman, B Law 1794); John Locke, *Locke: Two Treatises of Government* (CUP 1967).

¹⁶ Barbara Arneil, 'Disability, Self Image, and Modern Political Theory' (2009) 37 *Political Theory* 218; Stacy Clifford, 'The Capacity Contract: Locke, Disability, and the Political Exclusion of "Idiot"' (2014) 2 *Politics, Groups, and Identities* 90.

¹⁷ Simon Jarrett, 'The Extinction of Intellectual Disability: An Enlightenment Project from Locke to Freud', in Stan Booth and Chris Mounsey (eds), *Reconsidering Extinction in Terms of the History of Global Bioethics* (Routledge 2021).

¹⁸ John Rawls, *Political Liberalism* (Columbia UP 2005).

¹⁹ Arneil (n 16); Flynn and Arstein-Kerslake (n 5); Christie Hartley, 'Disability and Justice' (2011) 6 *Philosophy Compass* 120; Sophia Isako Wong, 'Duties of Justice to Citizens with Cognitive Disabilities' in Eva Feder Kittay and Licia Carlson (eds), *Cognitive Disability and Its Challenge to Moral Philosophy* (John Wiley & Sons 2010).

²⁰ Hartley (n 19); Martha Craven Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard UP 2006).

²¹ Flynn and Arstein-Kerslake (n 5); Wong (n 19).

their theories of the perspective of those individuals and groups of people experiencing less privilege. The exclusion of disabled people from personhood is just one example; however, other examples abound. They often ignore the interdependencies inherent in our socio-legal world and instead focus their theories of personhood on the illusion of an able-bodied, autonomous, non-pregnant cisgender male deftly moving through the world.²²

Theories related to legal personhood—especially more recent theories—have enjoyed some more diversity in both their content and the theorists developing them. For example, feminist legal theorist Ngaire Naffine has explored various aspects of legal personhood, including its boundaries as well as who law is constructed for and whether there are individuals or groups that should not be considered legal persons.²³ She has also challenged the ability to achieve equal recognition of personhood for men and women within legal structures that were created to prioritise the personhood of men.²⁴ Margaret Davies has similarly contended that gender plays a significant role in the ascription of personhood, often causing personhood to be disproportionately granted to males.²⁵ Richard Tur also discusses the limits of legal personhood and argues for an expansive view of legal personhood.²⁶ These newer, more diverse, and nuanced theories have ushered in a new opportunity to further explore the concept of legal personhood—its power, influence, construction, and development.

1.3 Legal Personhood as Part of the Human Right to Equal Recognition

The concept of equality has long been a focus of legal and socio-legal scholarship. It has many varied constructions, and a multitude of theories have arisen to propose solutions towards the realisation of equality.²⁷ For these reasons, as a preliminary

²² Arneil (n 16); Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities* (n 7); Anna Arstein-Kerslake, *Legal Capacity & Gender: Realising the Human Right to Legal Personhood and Agency of Women, Disabled Women, and Gender Minorities* (Springer 2021); Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (OUP 2000); Naffine, 'Who Are Law's Persons: From Cheshire Cats to Responsible Subjects' (n 1); Naffine, *Law's Meaning of Life* (n 2); Naffine, 'Women and the Cast of Legal Persons' (n 12).

²³ Davies and Naffine (n 1); Ngaire Naffine, 'When Does the Legal Person Die? Jeremy Bentham and the "Auto-Icon"' (2000) 25 *Australian Journal of Legal Philosophy* 79; Naffine, 'Who Are Law's Persons: From Cheshire Cats to Responsible Subjects' (n 1); Naffine, *Law's Meaning of Life* (n 2).

²⁴ Ngaire Naffine, *Criminal Law and the Man Problem* (Bloomsbury Publishing 2019).

²⁵ Margaret Davies, 'Queer Property, Queer Persons: Self-Ownership and Beyond' (1999) 8 *Social & Legal Studies* 327; Davies and Naffine (n 1).

²⁶ Richard Tur, 'The "Person" in Law' in Aurther Peacocke and Grant Gillett (eds), *Persons and Personality: A Contemporary Inquiry* (Basil Blackwell 1987).

²⁷ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard UP 2002); Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1; Thomas Nagel, *Equality and Partiality* (OUP 1995); Nussbaum (n 20); John Rawls, *A Theory of Justice* (Harvard UP 2009); Amartya Kumar Sen, *Inequality Reexamined* (OUP 1992).

matter, it is essential to clarify what I am referring to when I am discussing equality in this book. I am specifically exploring equality in how the law recognises the legal personhood of an individual or group. In other words, I am exploring how the law recognises an individual's legal standing and legal agency—and whether certain individuals or groups of individuals are subjected to unequal or differential recognition of their standing and agency. Where there is evidence that unequal recognition is occurring on the basis of group membership, I will use the human rights framework to challenge whether that is appropriate.

An expansive view of the right to equal recognition before the law may also include how the law recognises non-human entities, such as animals, the environment, corporations, and others. Some scholars have begun to explore this and have developed fruitful arguments—many of them complementary to those that I am developing in this book.²⁸ In this book, however, my focus is on the law's recognition of *human* individuals and groups. I am examining how the law grants and denies legal personhood and agency to human individuals or groups.²⁹ I do think, however, that the arguments that I develop here, in relation to human individuals and groups, may be usefully applied to non-human entities—and I have endeavoured to keep this in mind as I have developed these arguments.

My aim is to build on past scholarship on legal personhood and to explore how a human right to legal personhood can contribute to that scholarship. Ultimately, I aim to construct arguments that will facilitate the use of the human right to legal personhood as a tool to rectify some of the power and privilege imbalances that have been identified by previous scholarship due to the manner in which legal personhood has been historically constructed—especially how it has been historically constructed to exclude certain groups, such as women, disabled people, and others.³⁰ In the first instance, I will provide an examination of existing international law to develop a definition of the human right to legal personhood as part of the human right to equal recognition before the law.

As discussed above, building on the text of CEDAW, the CRPD confirmed that the right to equal recognition before the law includes the right to 'legal capacity'—which I am equating to the right to 'legal personhood' in this book, as discussed in the preface, in order to clearly distinguish the right from the concept of mental capacity. I have made this choice because the concepts of legal capacity and

²⁸ Anna Arstein-Kerslake and others, 'Relational Personhood: A Conception of Legal Personhood with Insights from Disability Rights and Environmental Law' (2021) 30 Griffith Law Review 530; Erin O'Donnell and Julia Talbot-Jones, 'Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India' (2018) 23(1):7 Ecology and Society <<https://www.ecologyandsociety.org/vol23/iss1/art7/>> accessed 8 September 2019; Martuwarra RiverOfLife and others, 'Yoongoorrookoo' (2021) 30 Griffith Law Review 505; Worthington and Spender (n 8).

²⁹ Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities* (n 7); Committee on the Rights of Persons with Disabilities, 'General Comment No 1 Article 12: Equal Recognition Before the Law' (19 May 2014) UN Doc CRPD/C/GC/1; Flynn and Arstein-Kerslake (n 5).

³⁰ Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities* (n 7); Arstein-Kerslake, *Legal Capacity & Gender* (n 22); Flynn and Arstein-Kerslake (n 5); Naffine, *Law's Meaning of Life* (n 2).

mental capacity are all too often conflated. In this book, ‘mental capacity’ will only be used to refer to an entity’s decision-making skills.³¹ ‘Legal capacity’ or ‘legal personhood’, on the other hand, will be used to refer to the law’s recognition of an individual’s legal standing and agency. The term ‘mental capacity’ is only related to legal capacity because an individual’s decision-making skills are relevant to whether they may need support for legal decision-making, which is an exercise of legal agency and a component of legal capacity and legal personhood.³²

1.4 Right to Legal Personhood beyond Gender and Disability

Article 12 of the CRPD provides unprecedented detail to the rights to equal recognition before the law and legal personhood. Many scholars—including me—have begun to explore how this impacts the rights of disabled people.³³ However, these rights apply not only to disabled people but also to all people. This is because, as described above, the rights within the CRPD are merely reiterations of rights that already existed in the ‘International Bill of Rights’—which is made up of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant of Economic, Social and Cultural Rights (ICESCR).³⁴ There are various groups that are experiencing different forms of denials of these rights. However, little attention has been given to how the right to legal personhood, and the broader right to equal recognition before the law, impacts other marginalised groups. This book begins to explore what the rights to equal recognition before the law and legal personhood mean for various marginalised groups and how those groups are experiencing barriers to those rights. It will then explore solutions for breaking down these barriers.

³¹ Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities* (n 7).

³² Anna Arstein-Kerslake and Eilionóir Flynn, ‘The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality before the Law’ (2016) 20 *The International Journal of Human Rights* 471; Committee on the Rights of Persons with Disabilities, ‘General Comment No 1 Article 12: Equal Recognition before the Law’ (n 29); Flynn and Arstein-Kerslake (n 5).

³³ Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities* (n 7); Peter Bartlett, ‘The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law’ (2012) 75 *The Modern Law Review* 752; Eilionóir Flynn and others, *Global Perspectives on Legal Capacity Reform: Our Voices, Our Stories* (Routledge 2018); Flynn and Arstein-Kerslake (n 5); 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’ (2015) 15 *Human Rights Law Review* 45; Bernadette McSherry, ‘Mental Health Laws: Where to from Here’ (2014) 40 *Monash University Law Review* 175; Gerard Quinn and Anna Arstein-Kerslake, ‘Restoring the Human in “Human Rights”: Personhood and Doctrinal Innovation in the UN Disability Convention’ in Connor Gearty and Costas Douzinas, *The Cambridge Companion to Human Rights Law* (CUP 2012).

³⁴ Rosemary Kayess and Phillip French, ‘Out of Darkness into Light: Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8 *Human Rights Law Review* 1.

2. Multiple Constructions of ‘Legal Capacity’ and ‘Legal Personhood’

Before progressing to my substantive arguments related to the right to equal recognition before the law, I would like to provide additional clarity on terminology. The discussion that I am outlining here pertains to my arguments for the choices that I have made regarding terminology. There is vast variation across scholars, disciplines, and jurisdictions regarding most of these terms. I have made my decisions related to terminology based on widespread acceptance of such terms, as well as the clarity and consistency that particular terms could offer, if used in the manner that I am suggesting here.

The concept of legal capacity has been construed in various ways. *Black’s Law Dictionary* defines ‘legal capacity’ as the ‘[l]awful capacity for an entity in its own name to enter into binding contracts, to sue and to be sued.’³⁵ This definition is widely held as correct, which is evidenced in its use across various different legal fields.³⁶ Although it does not explicitly specify it in this definition, in order for the concept of legal capacity to include the recognition of an entity’s ability to enter into binding contracts and to sue and be sued in its own name, it necessarily must include both the recognition of legal standing and legal agency. Legal standing is an entity’s recognition as a holder of rights and responsibilities.³⁷ Legal agency is the recognition of that entity’s freedom to act on those rights and responsibilities—for example, to enter into contracts and to sue and be sued.³⁸ Legal standing is required for such actions to be taken by an entity in its own name. Legal agency is required for the entity’s legal actions themselves to be recognised as valid. If an entity has their legal standing recognised, but not their legal agency, it is recognised as a holder of rights and responsibilities, but any action it takes is not legally valid or enforceable by law. For these reasons, it appears self-evident that legal capacity must include both legal standing and legal agency if it is to include the right for an entity to enter into binding contracts and to sue and to be sued in its own

³⁵ ‘Capacity’ and ‘Legal Entity’ in Bryan A Garner (ed), *Black’s Law Dictionary* (11th edn, Thomson Reuters 2019).

³⁶ Richard A Epstein, ‘Animals as Objects, or Subjects, of Rights’ (2002) John M Olin Program in Law and Economics Working Paper No 171 <<https://papers.ssrn.com/abstract=359240>> accessed 8 September 2019; WM Geldart, ‘Legal Personality’ (1911) 27 *Law Quarterly Review* 90; Abigail Hutchison, ‘The Whanganui River as a Legal Person’ (2014) 39 *Alternative Law Journal* 179.

³⁷ Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities* (n 7); Flynn and Arstein-Kerslake (n 5); Gindis (n 10); Naffine, ‘Who Are Law’s Persons: From Cheshire Cats to Responsible Subjects’ (n 1); Naffine, *Law’s Meaning of Life* (n 2).

³⁸ Anna Arstein-Kerslake and Eilíonóir Flynn, ‘The Right to Legal Agency: Domination, Disability and the Protections of Article 12 of the Convention on the Rights of Persons with Disabilities’ (2017) 13 *International Journal of Law in Context* 22; Bernadette M McSherry, ‘Legal Capacity under the Convention on the Rights of Persons with Disabilities’ (2012) 20 *Journal of Law and Medicine* 22.

name. Importantly, this is consistent with the use of the term 'legal capacity' in both CEDAW and the CRPD.

The term 'legal capacity' is widely used in the legal field; however, beyond the legal field, the concept of 'legal personhood' is more frequently used to refer to an entity's recognition by the state. This use of legal personhood is common in philosophy—as discussed above—as well as in more common parlance. In addition, as also mentioned above, the use of the term 'legal personhood' to refer to an entity's legal standing and agency avoids the conflation of the concepts of legal capacity and mental capacity. For these reasons, I have chosen to primarily use the term 'legal personhood' in this book—when I use the term, I am using it in the same manner that the term 'legal capacity' is used in CEDAW and the CRPD—to encompass both an individual's legal standing and agency.

The use of the term 'legal personhood' in this way is consistent with the definition of the term across many different legal and scholarly platforms. For example, *Black's Law Dictionary* defines 'person' as '[a]n entity ... that is recognized by law as having most of the rights and duties of a human being.'³⁹ Quoting *Jurisprudence* by John Salmond, a legal scholar from New Zealand, it also states, 'So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties.'⁴⁰ It also includes a quote from *English Private Law*, which states, 'The word "person" is now generally used in English to denote a human being, but the word is also used in a technical legal sense, to denote a subject of legal rights and duties.'⁴¹ All three emanations of the definition of 'person' include both standing—to be a subject of rights—and agency—to have duties. This mirrors the definition of 'legal capacity'—discussed above—which also includes both. There are uses of the term 'legal personhood' that differ from this definition.⁴² However, I believe that it is used in this manner consistently enough that it can be equated to the concept of legal capacity for the purposes of examining the right to equal recognition before the law—as I am endeavouring to do in this book.

For the purposes of further clarity, some of the key terms have been succinctly defined in the following table:

³⁹ 'Person' *Black's Law Dictionary* (n 35).

⁴⁰ Nonhuman Rights Project and Spencer Lo, 'What Is a Legal Person? Law Dictionary Corrects Decades-Old Error' (*Nonhuman Rights Project*, 25 June 2019) <<https://www.nonhumanrights.org/blog/legal-person-blacks-law-correction/>> accessed 13 March 2023; Sir John William Salmond, *Jurisprudence: Or, the Theory of the Law* (Stevens and Haynes 1907).

⁴¹ Peter Birks, *English Private Law* (OUP 2000) 142–143.

⁴² Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future Symposium: The United Nations Convention on the Rights of Persons with Disabilities' (2007) 34 *Syracuse Journal of International Law and Commerce* 429.

Term	Definition
Legal capacity	Holder of legal rights and obligations/duties
Legal personhood	Holder of legal rights and obligations/duties
Moral personhood	Holder of <i>ethical</i> rights and obligations/duties
Legal standing	Holder of legal rights
Legal agent	Holder of legal obligations/duties

Below is a further discussion of legal agency and its role as an element of legal personhood and legal capacity.

2.1 Legal Agency

Legal agency has not been given as much scholarly attention as legal personhood; more broadly, however, there is some scholarship related to defining and attributing legal agency. For example, Manfred Rehbinder has discussed the move, from the 19th century onwards, to evaluate legal agency separately from legal status or personhood.⁴³ Previously, an individual’s social status dictated their legal personhood, which also dictated their ability to exercise legal agency. For example, an individual’s status as a woman or slave would dictate their status as a legal person. Legal agency for that class of person would then often be predetermined based on that status. However, from the 19th century onwards, there was a move away from social status being tied to legal personhood and also a move to disentangle legal personhood from legal agency. The result was an evolution towards an emphasis on mental capacity for the exercise of legal agency, as opposed to reliance on social status to dictate personhood and agency.⁴⁴

Based on new conceptions of legal agency arising from human rights law, Eilionóir Flynn and I have also explored the concept of legal agency.⁴⁵ We sought to provide a modern definition of ‘legal agency’ in order to determine when legal capacity is being exercised—and, therefore, when the rights to legal capacity and equal recognition before the law are implicated. We established the following definition of ‘legal agency’:

⁴³ Manfred Rehbinder, ‘Status, Contract, and the Welfare State’ (1970) 23 *Stanford Law Review* 941.
⁴⁴ Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities* (n 7); Arstein-Kerslake and Flynn (n 38); Rehbinder (n 43).
⁴⁵ Arstein-Kerslake and Flynn (n 38).

An action or inaction that the individual intended and which

1. has legal consequences, or
2. creates, modifies, or extinguishes a legal relationship.⁴⁶

We argue that legal agency must include an element of intention. This is in line with moral philosophy on the subject which discusses elements of moral consideration as essential in order to attribute moral agency to an entity.⁴⁷ We also argue that legal agency does not require understanding. An entity can be exercising legal agency without understanding the nature and/or consequences of their action or inaction.⁴⁸

In addition, moral philosophy scholarship on personhood, as discussed above, has delineated the granting of personhood as contingent upon the actual or perceived ability to exercise legal agency—especially when considering the personhood of disabled people. For example, Martha Nussbaum has concluded that people with intellectual disability may be excluded from personhood, as defined by John Rawls, because they may not possess the two required moral powers listed above. She postulates that some people with intellectual disability may not have the required reasonableness to regard others as equal citizens and to engage with others on acceptable terms. In addition, she asserts that some people with intellectual disability may not have the required rationality to determine their own goals and take action to realise those goals.⁴⁹ In essence, Nussbaum is suggesting that some people with intellectual disability are excluded from Rawls's highly influential definition of 'moral personhood' on the basis that some people with intellectual disability are not able to exercise the two moral powers identified by Rawls. The exercise of these moral powers is essentially equivalent to the exercise of legal agency in that they require engagement with other actors as well as taking action to realise personal goals.

As may be evident from the above examples, it is not always easy to disentangle a denial of legal standing from a denial of legal agency—they are often contingent upon one another. For example, the denial of voting rights to women is both a partial denial of legal standing—because it effectively excludes women from being counted as political participants—and a denial of legal agency—because voting is an action that an individual must take and it is only recognised as valid if that individual is recognised as a legal person with legal agency.

Scholarly attention has also been given to the granting or denying of legal capacity, particularly in relation to disabled people. However, relatively little scholarly

⁴⁶ *ibid.*

⁴⁷ James Stacey Taylor, *Personal Autonomy: New Essays on Personal Autonomy and Its Role in Contemporary Moral Philosophy* (CUP 2005).

⁴⁸ Arstein-Kerslake and Flynn (n 38).

⁴⁹ Nussbaum (n 20); Wong (n 19).

attention had been given to the concept of legal capacity as an individual right. This changed during the 2003 and 2004 drafting of the UN CRPD, which included a contentious debate regarding what legal capacity meant.⁵⁰ One of the main tensions arose around whether legal capacity referred simply to legal standing or whether it also included legal agency. Some of these tensions arose due to differences in conceptions of legal capacity and legal personhood in civil law and common law jurisdictions, which will be discussed below. However, some of these tensions also arose out of a desire to maintain laws that deny legal agency to disabled people—such as guardianship, interdiction, conservatorship, unfitness to plead, insanity defences, and others. Some argued that such laws are necessary to protect disabled people. However, such laws are applied to disabled people and, generally, not applied to non-disabled people, which has created a legal regime in which the legal agency of disabled people is pervasively under threat in a way in which it is not for non-disabled people.

Ultimately, during the drafting of the CRPD, it was determined that legal capacity is the law's recognition of an individual, or other entity, as a holder of rights (legal standing) and a legal actor (legal agency).⁵¹ Although this is not explicitly stated in the text of the convention, it is made clear by the specific inclusion of legal personhood (Article 12(1)) and mentions of protections for exercising legal capacity (Article 12(3)) and various types of legal agency, including inheritance and financial interactions (Article 12(5)). These initial tensions during the drafting of the CRPD is one reason why I am endeavouring to be very explicit in this book, and elsewhere in my work, to ensure that it is clear that I am defining 'legal personhood' and 'legal capacity' to include both legal standing and legal agency.

As discussed above and in the preface, the concept of legal capacity has been conflated with the concept of mental capacity.⁵² This is particularly true when the concept of legal capacity is applied to disabled people—especially cognitive disability, including mental health disability, intellectual disability, learning disability, autism, dementia, Alzheimer's, and others. Instead of utilising the definition established above, and widely used throughout the legal field, discussions of legal capacity and disabled people has assumed that the term 'legal capacity' refers to an individual's legal decision-making skills—or mental capacity. Accordingly, laws and practices have developed that delineate a bright line between those who are deemed to have sufficient legal decision-making skills and those who do not. Those who do are considered to have legal capacity, and those who do not are not

⁵⁰ Dhanda (n 42).

⁵¹ Office of the United Nations High Commissioner of Human Rights, 'Legal Capacity', Background Conference Document for the Sixth Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 1–12 August 2005.

⁵² Flynn and Arstein-Kerslake (n 5).

recognised as having legal capacity. This is a different use of the concept of legal capacity than has traditionally been used across legal fields, as discussed above in the terminology section.⁵³

The problem with the conflation of legal capacity and mental capacity is that it risks discriminatorily denying legal capacity to disabled people who have actual or perceived impairments related to decision-making. If the concept of legal capacity, as defined above, is defined to simply be the recognition that an entity—including a human—can enter into binding contracts and sue and be sued, then the actual decision-making skills of that entity or individual becomes an entirely separate issue. When legal capacity is recognised in corporations, animals, and the environment, it is clear that the mental capacity of these entities is a separate issue. Of course, it is an issue that must be addressed in order for the recognition of legal capacity to be meaningful. For example, a river may be recognised as possessing legal capacity; however, it does not have the mental capacity to exercise that legal capacity—the legal agency element of legal capacity. As such, there must be a representative that acts on behalf of the river. It becomes another question as to what principles should guide that representative decision-maker—which will be addressed later in this book. Similarly, when addressing legal capacity in relation to any group of individuals, including individuals with disability, and using the definition of ‘legal capacity’ above, mental capacity—or legal decision-making skills—is an entirely separate issue.

This book uses the definition of ‘legal personhood’ and ‘legal capacity’ that can be found in *Black’s Law Dictionary* and is widely used across legal disciplines.⁵⁴ As discussed above, this construction of legal personhood and legal capacity refers to an entity’s recognition as a holder of rights and legal agent. The concept of mental capacity—or legal decision-making skills—is a wholly separate concept referring to an individual’s decision-making skills and will be discussed as such throughout this book. A more in-depth discussion of the meaning of legal personhood and legal capacity can be found in the following sections—including a discussion of how the meaning of the right to legal personhood is evolving in international human rights law.

2.2 Civil Law Jurisdictions

Civil law jurisdictions have traditionally provided for definitions of ‘legal standing’ and ‘legal agency’ in statutory code—in both public and private law—and they

⁵³ Committee on the Rights of Persons with Disabilities, ‘General Comment No 1 Article 12: Equal Recognition Before the Law’ (n 29); Flynn and Arstein-Kerslake (n 5).

⁵⁴ Blair (n 8); Epstein (n 36); ‘Legal Capacity’ <<https://thelawdictionary.org/legal-capacity/>> accessed 22 July 2019; Office of the United Nations High Commissioner of Human Rights (OHCHR) (n 51).

serve as important aspects of the legal landscape.⁵⁵ Many civil law jurisdictions, such as France and Spain, utilise the concepts of legal personality, legal capacity, legal agency, and legal bearer of rights as separate concepts. Legal personality is acquired at the moment of birth and remains for the duration of the life of an individual. It is a precondition for legal capacity—in other words, an entity must have their legal personality recognised in order to then have their legal capacity recognised. Legal capacity includes the recognition as a bearer of rights as well as a legal agent. Recognition as a bearer of rights is inherent to every individual and cannot be limited. However, recognition as a legal agent requires specific elements, such as majority age⁵⁶ and an understanding of the nature and consequences of legal actions.⁵⁷ Therefore, an individual can have their legal agency limited or denied. In order to be recognised as a legal agent, an entity must first be recognised as a bearer of rights. However, an entity can be recognised as a bearer of rights without also being recognised as a legal agent.⁵⁸ The codified and well-developed literature surrounding these concepts in civil law jurisdictions necessitates a thorough understanding of the right to legal capacity at the international level and a careful incorporation of the right into domestic law in civil law jurisdictions. This is particularly important because of the many different languages of civil law jurisdictions and the variability of legal translations. It may also make it easier to create sweeping change because there are centrally located codified definitions of these concepts.⁵⁹

2.3 Common Law Jurisdictions

In contrast, common law jurisdictions, such as the United Kingdom, Australia, and most of the United States, have disparate definitions of ‘legal standing’ and ‘agency’ that are spread across case law and legislative instruments. They differ across jurisdictions, as well as within various fields of law, such as criminal law, corporate law, and wills, trusts, and estates law. This has caused a lack of consistency in these definitions, and therefore there is no general understanding or definition of legal

⁵⁵ Saru M Matambanadzo, ‘Embodying Vulnerability: A Feminist Theory of the Person’ (2012) *Duke Journal of Gender Law and Policy* 20, 39.

⁵⁶ For example, Article 488(1) of the French Civil Code states, ‘*La majorité est fixée à dix-huit ans accomplis ; à cet âge, on est capable de tous les actes de la vie civile.*’ Article 315 of the Spanish Civil Code states, ‘*La mayor edad empieza a los dieciocho años cumplidos ...*’ Article 322 of the Spanish Civil Code states, ‘*El mayor de edad es capaz para todos los actos de la vida civil, salvo las excepciones establecidas en casos especiales por este Código.*’ As cited in Office of the United Nations High Commissioner of Human Rights (OHCHR) (n 51).

⁵⁷ For example, Article 489(1) of the French Civil Code states, ‘*Pour faire un acte valable, il faut être sain d’esprit.*’ As cited in *ibid*.

⁵⁸ *ibid*.

⁵⁹ For example, the entire civil code of Peru has been modified to comply with Article 12 of the CRPD: Antonio Martínez-Pujalte, ‘Legal Capacity and Supported Decision-Making: Lessons from Some Recent Legal Reforms’ (2019) 8 *Laws* 4.

standing and agency across common law jurisdictions.⁶⁰ This may make it more difficult to establish a uniform definition of ‘legal personhood’ across common law jurisdictions that is consistent with human rights law. However, it may also leave greater flexibility in establishing a definition of legal personhood that is inclusive of all people because there is less structure established around the concept of legal personhood.

3. Legal Personhood and Legal Capacity in International Human Rights Instruments

In international human rights law, the right to legal personhood (or legal capacity) has been tied to the right to equal recognition before the law, as discussed above. Article 12 of the CRPD is the most recent iteration of the right to legal capacity as a part of the right to equal recognition before the law. Prior to that, it was enumerated as a part of equality before the law in Article 15 of the CEDAW. Prior to that, the ICCPR (Article 16) and the UDHR (Article 6) both included articles on the right to equal recognition before the law; however, they gave little detail on the meaning of that right and did not include language on the right to legal capacity. This section will examine the evolution of the right to legal capacity, in detail, as part of the right to equal recognition before the law in international human rights instruments. The aim is to lay out the history and meaning of these rights in order to lay the foundation for applying these rights to law, policy, and practice and analyse where there are barriers to these rights for the various marginalised groups identified in this book.

3.1 Distinguishing Equal Recognition from Equal Protection

At the outset, it is important to distinguish ‘equal recognition before the law’ from ‘equal protection of the law.’ Although the two concepts are closely tied, this book primarily examines equal recognition before the law. This is for several reasons. The first is that while equal protection of the law has been thoroughly explored, equal recognition before the law has received much less attention and the body of literature as well as law, policy, and practice reform relating to equal recognition before the law is much more in its infancy than that of equal protection before the law. This book aims to contribute to building scholarship related to equal recognition before the law in an effort to draw attention to its importance, its power to shape our socio-legal world, and the social justice potential of reform in this area. In addition, this book explores the individual rights and state obligations related to legal standing and

⁶⁰ Matambanadzo (n 55).

legal agency—as part of legal personhood and legal capacity. Equal protection of the law can provide a framework for analysis where legal standing and legal agency have been denied on the basis of membership in a protected class of people, but it does not provide a framework for determining how the law goes about granting or denying standing or agency. An analysis of equal recognition before the law, however, can provide the desired framework for analysis relating to legal standing and agency.

Equal protection of the law is the guarantee that the law will not discriminate based on a protected status and it will provide avenues for justice when an individual is discriminated against on the basis of a protected status.⁶¹ Article 7 of the UDHR states, 'All are ... entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.' Equal protection of the law entails the guarantee of non-discrimination. Significant attention has been paid to non-discrimination and equal protection of the law in scholarly work as well as in law, policy, and practice reform movements.⁶² For example, the 14th Amendment of the US Constitution guarantees equal protection of the law (US Const. amend. XIV § 1); the Equality Act 2010 in the United Kingdom prohibits discrimination (Equality Act 2010, UK Public General Acts 2010 c. 15, part 2); and Articles 14 and 15 of the Constitution of India guarantees equal protection of the law and prohibits discrimination on protected grounds (Constitution of India, 1950, Art. 14 and 15).

Generally, non-discrimination law and the right to equal protection of the law only provide protection where an individual is detrimentally treated differently on the basis of that individual's status as a member of a protected group—such as race, gender, sexual orientation, religion, or disability. What constitutes a protected group differs based on jurisdiction and can be highly controversial and have significant political and social implications.⁶³ Often, if an individual cannot show that they are a member of a protected group, then they are not considered to have been discriminated against, and their right to equal protection of the law is not considered to have been violated. For example, not all jurisdictions include sexual orientation as a protected group of people under non-discrimination law.⁶⁴ In these

⁶¹ Stephanie Farrior (ed), *Equality and Non-discrimination under International Law*, vol 2 (Taylor & Francis 2015); John P Frank and Robert F Munro, 'Original Understanding of Equal Protection of the Laws' (1950) 50 Columbia Law Review 131; Joseph Tussman and Jacobus tenBroek, 'The Equal Protection of the Laws' (1949) 37 California Law Review 341.

⁶² Gordon A Christenson, 'Using Human Rights Law to Inform Due Process and Equal Protection Analyses' (1983) 52 University of Cincinnati Law Review 3; Farrior (n 61); Frank and Munro (n 61); Tussman and tenBroek (n 61); Lisa Waddington, 'Testing the Limits of the EC Treaty Article on Non-discrimination' (1999) 28 Industrial Law Journal 133.

⁶³ Nancy Levit, 'Changing Workforce Demographics and the Future of the Protected Class Approach' (2012) 16 Lewis & Clark Law Review 463; Marcia L McCormick, 'Decoupling Employment Business Law Forum: The Protected-Class Approach to Antidiscrimination Law: Logic, Effects, Reform' (2012) 16 Lewis & Clark Law Review 499.

⁶⁴ Levit (n 63).

jurisdictions, a person likely cannot avail of a right to equal protection of the law or non-discrimination if they are detrimentally treated differently on the basis of sexual orientation. In many jurisdictions, and at the international level, equal protection of law and non-discrimination law is extended to all via a catch-all phrase in the list of protected groups. For example, Article 26 of the ICCPR states, 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' This more expansive approach can allow more room for the application of equal protection rights and non-discrimination law to people who may not fit squarely into a group in the delineated list of protected groups. However, such catch-all phrases are used less frequently than the specifically listed protection groups, suggesting that the law is generally primarily applied in the context of the categorisations overtly identified.⁶⁵

Under the right to equal protection of the law and non-discrimination law, once an individual shows that they are a member of a protected group and that they have been treated detrimentally differently on the basis of that group membership, in most jurisdictions, and at the international level, it must also be shown that the treatment did not have an objective or reasonable justification and the aim of the treatment was not legitimate—or the treatment was not a reasonable means of achieving that aim.⁶⁶ These are often heavy burdens for an individual to prove. As such, they often significantly limit the situations in which the right to equal protection of the law or non-discrimination law can be applied.⁶⁷

The right to equal recognition before the law does not have this same requirement that an individual be from a protected class—at least there has not been a body of work or law that has arisen that would indicate that the right to equal recognition only applies where an individual can show that they are a member of a protected class. Instead, the right to equal recognition, as it is currently developing, appears to apply to all individuals, regardless of membership in protected classes. This may mean that every individual has a right to equal recognition as a legal person regardless of group membership. In other words, by virtue of being a human person, an individual is entitled to recognition before the law on an equal basis with all others. In addition to the potential for this individual focus of the right, there may also be a group element of the right. This is evidenced by

⁶⁵ Rory O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 *Legal Studies* 211.

⁶⁶ BG Ramcharan, 'Equality and Nondiscrimination' in *Equality and Non-Discrimination under International Law*, (Taylor & Francis 2017) 76.

⁶⁷ Oddný Mjöll Arnardóttir, *Equality and Non-discrimination under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2003); Sandra Fredman, 'European Community Discrimination Law: A Critique' (1992) 21 *Industrial Law Journal* 119; Laurence Lustgarten, 'Racial Inequality and the Limits of Law' (1986) 49 *The Modern Law Review* 68.

the inclusion of the right in group-specific treaties, such as the CEDAW and the CRPD. This may mean that an individual must receive equal recognition before the law—and, in addition, the law must provide equal recognition to protected classes of people. Therefore, any individual who is denied legal standing or agency on a differential basis to others can claim a violation of their right to equal recognition before the law. In addition, any individual who is denied legal standing or agency on the basis of their membership in a protected group, such as disability, can also claim a violation of their right to equal recognition before the law.

Under the right to equal recognition before the law, where there has been a denial of legal standing or agency, those denials do not become permissible simply because they were carried out with an objective or reasonable justification or where the aim of the denials was legitimate—or, in other words, where the denials were a reasonable means of achieving the aim. At least, scholarship, law, and jurisprudence surrounding the right to equal recognition before the law has not developed in such a way to require these elements in the same way that they are required under the right to equal protection of the law. The question then emerges whether there is ever a permissible denial of equal recognition before the law. One possibility is that there is not—every human person must always be equally recognised as a legal person. However, this presents a challenge for situations such as where an individual has been convicted of a crime. The criminal justice system limits the legal agency, at a minimum, of individuals convicted of a crime. For example, in some jurisdictions individuals convicted of a crime cannot vote.⁶⁸ This is a limitation on legal agency—therefore, it may be considered a limitation on the right to legal personhood and equal recognition before the law. It also presents challenges for situations in which an individual is unable to exercise legal agency—such as when they are in a coma or otherwise in a state in which they are unable to communicate. If another individual is then appointed to act on the individual's behalf and is ascribed the legal personhood—including legal standing and agency—of that individual, then the individual is likely being denied the right to legal personhood and equal recognition before the law. I will explore these issues more in each chapter. I will identify where the rights to legal personhood and equal recognition before the law may be limited or denied to each marginalised group and explore how that can be rectified and whether there is any circumstance in which the state may be justified in infringing on these rights.

⁶⁸ Cormac Behan, *Citizen Convicts: Prisoners, Politics and the Vote* (Manchester UP, 2016); Aman McLeod, Ismail K White, and Amelia R Gavin, 'The Locked Ballot Box: The Impact of State Criminal Disenfranchisement Laws on African American Voting Behavior and Implications for Reform' (2003) 11 *Virginia Journal of Social Policy & the Law* 66.

3.2 Universal Declaration of Human Rights, Article 6, and Beyond

As mentioned above, the right to equal recognition before the law first appeared in a UN instrument in Article 6 of the 1948 UDHR. Examination of the drafting history indicates that there was controversy over the meaning of the right and whether there are permissible grounds on which to allow derogation from the right—for example, whether specific groups of people were not entitled to the full protection of the right. Initial drafts of Article 6 included language that listed age, mental impairment, or commission of a crime as legitimate bases for the restriction of the right. It read, ‘Everyone has the right to a legal personality. No person shall be restricted in the exercise of his civil rights except under general law based on reasons of age or mental incompetence, or as punishment for a criminal offence, or as otherwise permitted in this bill.’⁶⁹ In a subsequent draft, the text was changed to be much more expansive, including the redaction of the language permitting derogation; it read, ‘Everyone has the right everywhere in the world to recognition as a person before the law and to the enjoyment of fundamental civil rights.’⁷⁰ The final draft of the text appears as follows: ‘Everyone has the right to recognition everywhere as a person before the law’ (UDHR Art. 6). This final text reflects the most universal version. It delineates a right for ‘everyone’ that has no specified limitations on the basis of group membership or otherwise.

Following its appearance in the UDHR, the right to equal recognition was included in the 1966 ICCPR. The ICCPR and the ICESCR were created in order to enshrine the rights established in the UDHR in legally binding international instruments that states parties could ratify and could then be held accountable for upholding the individual rights and state obligations within the instruments. This was essential for the development of the United Nations, including the development of human rights monitoring bodies that could have a legal basis for intervening in domestic issues and making public statements regarding the human rights implications of state’s actions.⁷¹

The right to equal recognition before the law (Article 6 of the UDHR) acquired legally binding status in Article 16 of the ICCPR. The text of Article 16 of the ICCPR is almost identical to Article 6 of the UDHR. It states simply, ‘Everyone shall have

⁶⁹ United Nations Economic and Social Council, ‘Commission on Human Rights, Drafting Committee on an International Bill of Human Rights, First Session Report’ (1 July 1947) UN Doc E/CN.4/21; United Nations Economic and Social Council, ‘Commission on Human Rights, Draft of a Resolution for the General Assembly Submitted by the Representative of India’ (31 January 1947) UN Doc E/CN.4/11.

⁷⁰ United Nations Economic and Social Council, ‘Commission on Human Rights, Report of the Drafting Committee to the Commission on Human Rights’ (21 May 1948) UN Doc E/CN.4/95.

⁷¹ Frans Viljoen, ‘International Human Rights Law: A Short History’ (2012) 12 *Journal of Humanitarian Medicine* 4.

the right to recognition everywhere as a person before the law.’ Neither Article 6 of the UDHR nor Article 16 of the ICCPR provides any additional explanatory text in the articles themselves. The Human Rights Committee, the monitoring body for the ICCPR, has not provided much additional information regarding the interpretation of the right to equal recognition before the law because they have not published a general comment on the article nor has there been any significant use of Article 16 in the Human Rights Committee case law under the first Optional Protocol to the ICCPR.⁷²

The negotiations during the drafting of Article 16 of the ICCPR indicate a hesitance to restrict the right in any way. In both drafting processes, there was some controversy regarding whether the right to equal recognition before the law includes both legal personhood and legal agency. Initially, the article was only intended to guarantee the right to legal personhood—or legal standing—but not the right to legal agency or the ability to be an actor before the law.⁷³ This is evidenced by the preliminary drafting of the article, which explicitly stated that the State is permitted to limit the civil rights of minors, people of ‘unsound mind’, and people convicted of crimes. However, agreement could not be reached on this language, and it was therefore taken out.⁷⁴ This dispute also occurred in the drafting of Article 6 of the UDHR, which took place prior to the drafting of the ICCPR. While this does demonstrate a belief by some that the right can be restricted for certain groups, the fact that it was ultimately decided to remove any limitations on the right indicates an overall acceptance that it is a non-derogable right that applies to all people equally.

In 1979, the Convention on the CEDAW provided further description of the rights to equal recognition before the law and legal capacity. It explicitly attached both personhood and agency. It accomplishes this in Article 15, which guarantees equality before the law for women, requiring the granting of legal capacity (or legal personhood) to women on an equal basis with men and the ‘same opportunities to exercise that capacity’. It also describes the rights to equality in contracting, administering property, and judicial procedures—this makes it clear that the rights include agency as well as standing. It was not until 28 years later, with the adoption of the CRPD, that further description of the rights was provided in a binding human rights instrument. As described above, Article 12 of the CRPD embraced CEDAW’s interpretation by including in the right to legal capacity both the ability to hold rights and the ability to act under the law.

⁷² Sarah Joseph and others, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (OUP 2000); Office of the United Nations High Commissioner of Human Rights (OHCHR) (n 51).

⁷³ Marc J Bossuyt, *Guide to the ‘Travaux Préparatoires’ of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers 1987); Office of the United Nations High Commissioner of Human Rights (OHCHR) (n 51).

⁷⁴ Office of the United Nations High Commissioner of Human Rights (OHCHR) (n 51).

It also places an obligation on States to provide access to support for the exercise of legal capacity, which had never before been enumerated in an international human rights instrument.

3.3 Convention on the Rights of Persons with Disabilities, Article 12

The right to legal capacity (or legal personhood) had not been given significant scholarly or other attention until the 2006 UN CRPD. Article 12 of the CRPD establishes the right to legal capacity as part of the right to equal recognition before the law.⁷⁵ The individual rights and state obligations emanating from Article 12 have been illuminated by the UN Committee on the Rights of Person with Disabilities (CRPD Committee), which is the monitoring body for the CRPD. They wrote their first General Comment on the right to equal recognition before the law in Article 12.⁷⁶ A General Comment from a UN human rights body is an explanation or interpretation of international law in a particular field or area. They are considered to be authoritative interpretations of international law.⁷⁷

The General Comment on the right to equal recognition before the law outlines key areas of life that the right to legal capacity commonly impacts. For example, legal capacity must be recognised in order to vote, marry, contract, inherit, consent to sex, consent to medical treatment, consent to mental health treatment, and any other area of life that requires a legal decision to be made and respected.⁷⁸ Importantly, the General Comment differentiates legal capacity from mental capacity, as discussed above. The General Comment states that, in accordance with Article 12, legal capacity is a right of every individual and should not be denied on the basis of mental capacity.⁷⁹ Instead, legal capacity should be respected in every individual and, where an individual experiences difficulty with mental capacity, the state has an obligation to provide access to support for that individual to utilise their mental capacity to exercise their right to legal capacity. In the narrow range of circumstances where this is not possible,

⁷⁵ Frank and Munro (n 61).

⁷⁶ Arstein-Kerslake and Flynn (n 32); Committee on the Rights of Persons with Disabilities, 'General Comment No 1 Article 12: Equal Recognition Before the Law' (n 29). The author of this article provided support to the CRPD Committee in the drafting and development of General Comment No 1 on the Right to Equal Recognition Before the Law: Arstein-Kerslake and Flynn (n 32).

⁷⁷ Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 905.

⁷⁸ Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities* (n 7); Arstein-Kerslake and Flynn (n 32); Committee on the Rights of Persons with Disabilities, 'General Comment No 1 Article 12: Equal Recognition Before the Law' (n 29); Flynn and Arstein-Kerslake (n 5).

⁷⁹ Committee on the Rights of Persons with Disabilities, 'General Comment No 1 Article 12: Equal Recognition Before the Law' (n 29).

a decision can be made in line with the best interpretation of the individual's will and preferences.⁸⁰

The General Comment on Article 12 also states that the right to legal capacity requires that states move away from substituted decision-making systems and replace them with systems of support. It defines substituted decision-making systems as those in which '(a) legal capacity is removed from a person, even if this is in respect of a single decision; (b) a substitute decision maker can be appointed by someone other than the person concerned, and this can be done against his or her will; or (c) any decision made by a substitute decision maker is based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences.'⁸¹ This has significant implications for many existing areas of the law, including guardianship, mental health, consent, and others.⁸²

In line with the text of Article 12(4), the General Comment explains that systems of support must respect the rights, will, and preferences of the person in a manner that is non-discriminatory.⁸³ This support can come in various different forms, ranging from the provision of accessible information necessary for making a legal decision to the practice of supported decision-making—where one or more individuals provide assistance to an individual in the process of making a legal decision.⁸⁴

There has been resistance to the CRPD Committee's interpretation of Article 12. For example, prior to the creation of the General Comment, some states, including Canada, Norway, and Australia, had lodged reservations to Article

⁸⁰ Arstein-Kerslake and Flynn (n 32); Michael Bach and Lana Kerzner, 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity' (Law Commission of Ontario 2010); Committee on the Rights of Persons with Disabilities, 'General Comment No 1 Article 12: Equal Recognition Before the Law' (n 29); Flynn and Arstein-Kerslake (n 5).

⁸¹ Arstein-Kerslake and Flynn (n 32); Committee on the Rights of Persons with Disabilities, 'General Comment No 1 Article 12: Equal Recognition Before the Law' (n 29); Committee on the Rights of Persons with Disabilities, General Comment No 1 Article 12: Equal Recognition Before the Law—Corrigendum Paragraph 27' (2014) UN Doc CRPD/C/GC/1/CORR.1; Mary Donnelly, 'Best Interests in the Mental Capacity Act: Time to Say Goodbye?' (2016) 24 Medical Law Review 318.

⁸² Anna Arstein-Kerslake, 'Understanding Sex: The Right to Legal Capacity to Consent to Sex' (2015) 30 Disability & Society 1459; Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities* (n 7); Mary Donnelly and Claire Murray, *Ethical and Legal Debates in Irish Healthcare: Confronting Complexities* (OUP 2016); Flynn and Arstein-Kerslake (n 5); Brendan D Kelly, 'Dignity, Human Rights and the Limits of Mental Health Legislation' (2014) 31 Irish Journal of Psychological Medicine 75; Penelope Weller, 'Reconsidering Legal Capacity: Radical Critiques, Governmentality and Dividing Practice' (2014) 23 Griffith Law Review 498.

⁸³ Arstein-Kerslake and Flynn (n 32); Committee on the Rights of Persons with Disabilities, 'General Comment No 1 Article 12: Equal Recognition Before the Law' (n 29); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into 3 May 2008) 2515 UNTS 3.

⁸⁴ Flynn and Arstein-Kerslake (n 5); Joanne Watson, 'Assumptions of Decision-Making Capacity: The Role Supporter Attitudes Play in the Realisation of Article 12 for People with Severe or Profound Intellectual Disability' (2016) 5 Laws 6.

12, articulating their interpretation of Article 12 as permitting legal capacity denial and substituted decision-making in certain circumstances.⁸⁵ The CRPD Committee has stated that these interpretations are inconsistent with the committee's interpretation of Article 12 and with the overall object and purpose of the CRPD.⁸⁶ Importantly, other jurisdictions have gone forward and achieved significant reform in line with the CRPD Committee's interpretation of Article 12.⁸⁷

The arguments for maintaining substituted decision-making systems often centre on the rights to life, health, and other forms of protection for the individual. However, it is commonly only disabled people whose rights to legal capacity and autonomy are believed to be subservient to these other rights that are more focused on protection.⁸⁸ The balance between autonomy and protection will always be a delicate one. However, the right to legal capacity in Article 12 asks that an individual's autonomy—their recognition as a legal person and agent—is respected on an equal basis for people with and without disability.⁸⁹ This appears difficult, if not impossible, to achieve in substituted decision-making systems in which disabled people are disproportionately denied legal capacity in the name of protection.⁹⁰

4. Conclusion

In this book, I have adopted the definition of 'legal capacity' as utilised in CEDAW and the CRPD. I have also made the decision to use the term 'legal personhood' interchangeably with the term 'legal capacity', in order to avoid confusion with the concept of mental capacity. The terms 'legal personhood' and 'legal capacity', as I use them here, encompass the recognition of an individual's legal standing and legal agency. Legal standing is the law's recognition of the individual as a holder of rights and responsibilities. Legal agency

⁸⁵ Bartlett (n 33); Richard W Jr Edwards, 'Reservations to Treaties' (1989) 10 Michigan Journal of International Law 362; Steven J Hoffman, Lathika Sriharan, and Ali Tejpar, 'Is the UN Convention on the Rights of Persons with Disabilities Impacting Mental Health Laws and Policies in High-Income Countries? A Case Study of Implementation in Canada' (2016) 16(1):28 BMC International Health and Human Rights 28 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5105274/>> accessed 1 May 2019; Ronald McCallum, 'The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections' (2010) Sydney Law School Research Paper 10/30 <<https://papers.ssrn.com/abstract=1563883>> accessed 1 May 2019.

⁸⁶ Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Canada' (8 May 2017) UN Doc CRPD/C/CAN/CO/1.

⁸⁷ Martinez-Pujalte (n 59).

⁸⁸ Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities* (n 7).

⁸⁹ Arstein-Kerslake and Flynn (n 32); Committee on the Rights of Persons with Disabilities, 'General Comment No 1 Article 12: Equal Recognition Before the Law' (n 29).

⁹⁰ Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities* (n 7).

is the law's recognition of the individual's freedom to act on those rights and responsibilities and for those actions to be recognised as legally valid. This includes all actions that have legal consequences, such as engaging in, modifying, and terminating legal relationships and legal transactions. It is not dependent upon decision-making skills or mental capacity. Instead, mental capacity is only relevant to legal capacity in that it may influence whether the individual needs support for the exercise of their legal capacity.⁹¹ Throughout this book, this definition of legal capacity (termed 'legal personhood' throughout) will be applied to the situation of various marginalised groups who are experiencing denials of legal capacity. It will explore how and why these denials are occurring, as well as solutions for creating law, policy, and practice that respect the right to legal capacity for all people.

⁹¹ Arstein-Kerslake and Flynn (n 32); Committee on the Rights of Persons with Disabilities, 'General Comment No 1 Article 12: Equal Recognition Before the Law' (n 29).