

Contents

<i>Acknowledgements</i>	page xiii
<i>Table of Cases</i>	xv
<i>Table of Treaties</i>	xvii
<i>List of Abbreviations</i>	xix
1 Introduction and Background	1
1 Article 12 and the Problem of Interpretation	2
1.1 Case Studies	3
1.2 The Problem the Book Is Addressing	6
1.3 An Overview of the Argument	8
2 A Note on Terminology and Concepts	10
2.1 ‘Cognitive Disability’	11
2.2 ‘Impairment’ and ‘Disability’	11
2.3 ‘Legal Capacity’	12
2.4 ‘Decision-Making by a Substitute’	12
2.5 ‘Supported Decision-Making’	13
3 The Convention on the Rights of Persons with Disabilities	14
3.1 Development of Human Rights Instruments for People with Disability	14
3.2 Inclusion of People with Disability in the Development of the CRPD	16
3.3 A Disability-Specific Convention	17
3.4 The Drafting of Article 12: A ‘Flashpoint’	18
4 Research Method and Scope	20
4.1 Doctrinal and Theoretical Analysis and Research	20
4.2 Scope	21
5 The Book’s Structure and Argument	23

6	Why the Book Is Important	28
7	Conclusion: The Significance of the CRPD and Article 12	29
2	Article 12 – Context and Background	32
1	Introduction	32
2	Different ‘Models’ of Disability	34
2.1	Charity Model	34
2.2	Medical Model	36
2.3	Social Model	37
2.4	Beyond the Social Model of Disability	39
3	Decision-Making and People with Cognitive Disability	44
3.1	The Era of Mass Institutionalisation	44
3.2	Legal Capacity Tests	46
3.3	Decision-Making Principles	50
3.4	Supported Decision-Making	52
3.5	Summary and Conclusions	56
4	The CRPD and Article 12 as a ‘Paradigm Shift’ but also a Site of Contest	58
4.1	Arguments That Recognition of Legal Capacity Demands the Abolition of Substitute Decision-Making	59
4.2	Arguments That Recognition of Legal Capacity Allows for Retention of Decision-Making by Substitutes as a Last Resort	65
5	Summary, Commentary and Conclusions	72
3	The Principle of Indivisibility and Article 12	74
1	Introduction	74
2	The History of the Principle of Indivisibility	75
2.1	The Universal Declaration of Human Rights	76
2.2	Indivisibility Invoked on Division of Human Rights into Two Binding Covenants	77
2.3	Increasing References to Indivisibility by UN Institutions from 1970s	78
2.4	Conclusions on Status of Indivisibility as a Human Rights Principle	78
3	What Is Meant by ‘the Principle of Indivisibility’?	79
3.1	Indivisibility as Interdependence between Different Rights	80
3.2	Indivisibility as No Hierarchy between the Two Sets of Rights: Civil-political and Socio-economic	81
3.3	Traditional Demarcations Between the Two Categories of Rights and Challenges to the Hierarchy	83
3.4	Conclusion and Commentary on Definition of Indivisibility	88

Contents

ix

4	Indivisibility, Disability and the CRPD: The Importance of Socio-economic Rights	89
4.1	From Social Policy to Human Rights	89
4.2	The Importance of Indivisibility for Disability	92
4.3	Summary and Conclusions	95
5	Indivisibility in the Text of the CRPD	96
5.1	Rights from Both the ICCPR and the ICESCR and the Right of Communication	97
5.2	Civil–Political and Socio-economic Rights Mixed in the Same Articles	97
5.3	A Mix of State Restraint and State Protection/Support in the Personal Sphere	99
5.4	Indivisible, but Still Visible and <i>Not</i> Totally Entwined or Dissolved into One Another	99
5.5	Summary, Commentary and Conclusions	102
6	Interpreting and Applying Article 12 through the Principle of Indivisibility	102
6.1	Article 12 as a Civil-political Right	103
6.2	Article 12 as a Socio-economic Right	104
6.3	The ‘Chicken and Egg’ or ‘Initiation Problem’	108
6.4	Summary and Conclusions on Article 12 and Indivisibility	108
7	Summary and Conclusions	109
4	Article 12 and Autonomy	112
1	Introduction	112
2	The Traditional Liberal View of Autonomy: ‘To Live One’s Life according to Reasons and Motives That Are Taken as One’s Own’	114
2.1	Autonomy as Rationality	115
2.2	Autonomy as Independence	116
2.3	Autonomy as Non-interference in the Private Sphere	116
2.4	The Case of Alex	117
3	Autonomy as Personhood: But Refashioned by Divorcing Autonomy from Rationality	118
3.1	A Role for Emotions in Decision-Making and Autonomy	118
3.2	Rationality Not Needed for Exercising ‘Mere Choice’ or ‘Preference’	119
3.3	Rationality Not Needed for a Person to Have an ‘Authentic’ Self	121
3.4	Why Autonomy without Rationality Does Not Work as Universal Personhood	122

4	Autonomy as Personhood: But Refashioned as ‘ <i>Interdependence</i> ’ or Relational Autonomy, Relationships of Trust or as Positive and Negative Liberty	123
4.1	Autonomy as Shared Personhood or <i>Interdependence</i>	124
4.2	Relational Autonomy	125
4.3	Autonomy Characterised by Trust, Cooperation and the ‘Cognitive Prosthesis’	126
4.4	Supports as Enabling Positive Liberty/Autonomy	128
4.5	Regulation as ‘Positive Liberty’?	129
4.6	Why Refashioning Autonomy as Interdependence, Relational Autonomy or Relationships of Trust Does Not Work as Universal Personhood	130
4.7	Returning to the Case of Alex	136
4.8	Summary and Conclusions on Refashioning Autonomy to Underpin Universal Legal Capacity and Inclusive Personhood	137
5	Divorcing Autonomy from Personhood: But Still Refashioning Autonomy to Be More Inclusive	139
5.1	Autonomy as Achievement	140
5.2	Autonomy as the Development of Autonomy Competencies	141
5.3	Autonomy Necessitates the Provision of Real Choices and Options	142
5.4	Returning to the Case of Alex	142
5.5	Commentary and Conclusions	143
6	Autonomy and the Indivisibility of Human Rights	143
6.1	Autonomy as the Foundation of Civil-political Rights	144
6.2	Autonomy Competencies and Socio-economic Rights	145
6.3	A Range of Options Requires Fulfilment of a Range of Rights	145
6.4	Disrupting the Boundaries between the Individual and the State: Private and Public Spheres	146
6.5	Indivisibility and the Case of Alex	147
7	Summary and Conclusion	148
5	Article 12 and Dignity	151
1	Introduction	151
2	Dignity in the Text of Human Rights Instruments: An Overview	152
2.1	United Nations and Regional Human Rights Instruments	153
2.2	Dignity in the Text of the CRPD	154
3	Five Proposed Dimensions of Dignity	160
3.1	Dignity as Equal Worth or Value	160

		<i>Contents</i>	xi
	3.2	Dignity as Recognising the Autonomy of Those Who Are Capable of Autonomy	162
	3.3	Dignity as Recognising the Interdependent, Interpersonal and Social Nature of Being Human	166
	3.4	Dignity as Recognising the Embodied Nature of Personhood	174
	3.5	Dignity as Underpinning and Affirming the Indivisibility of Human Rights	176
4		Dignity and the Article 12 Literature	183
	4.1	Article 12 and Autonomy	183
	4.2	Article 12 and Equality	185
	4.3	Article 12: Beyond Autonomy and Equality	185
5		Supported Decision-Making, Decision-Making by Substitutes and Dignity	189
6		Overview and Conclusion	193
6		Article 12 and Equality	196
	1	Introduction	196
	2	Equality and Non-discrimination in Human Rights Law	198
	2.1	Introduction to <i>General Comment No 6</i>	199
	2.2	Key Equality Provisions in the CRPD	200
	2.3	Formal Equality	202
	2.4	Substantive Equality	204
	2.5	Direct and Indirect Discrimination	205
	2.6	Differential Treatment for Substantive Equality	207
	2.7	Analysis and Conclusions	210
	3	Inclusive Equality: An Adaptation of Transformative Equality	211
	3.1	Foundations in ‘Transformative’ Equality: A Four-Dimensional Approach	212
	3.2	Equal to What or with Whom? Equality as an Approximation for Inclusion	213
	3.3	Equality and Indivisibility	214
	3.4	Inclusive Equality, Difference and Models of Disability	217
	3.5	Analysis and Conclusions	219
	4	Discrimination, Equality and Article 12	220
	4.1	The Search for ‘Disability-Neutral’ Criteria	221
	4.2	‘Disability-Neutrality’ Is Not Essential for Equality	224
	5	‘Inclusive Equality’ and the Right to Legal Capacity	227
	5.1	Supported Decision-Making and Inclusive Equality	227
	5.2	Equality, Substitute Decision-Making and Indivisibility	230
	5.3	Case Study: Jess, Decision-Making and Inclusive Equality	232
	6	Conclusion	233

7	Conclusion	236
1	Introduction	236
2	Article 12: A Site of Contention	236
3	A Summary of the Argument	237
3.1	Privileging Autonomy, Civil-political Rights and Article 12	238
3.2	The CRPD and the Principle of Indivisibility	238
3.3	Article 12 and Autonomy	239
3.4	Article 12 and Dignity	241
3.5	Article 12 and Equality	242
4	Implications for Advocacy and Law Reform	244
4.1	‘Choice and Control’ in the Real World	245
4.2	The Right to Legal Capacity as a Right above All Others: Legitimising the Role of the ‘Lazy State’	246
5	Concluding Remarks	248
	<i>References</i>	249
	<i>Index</i>	268