

Forthcoming (2020) in the King's Law Journal

<https://doi.org/10.1080/09615768.2020.1815941>

**The UN Convention on the Rights of Persons with Disabilities and
English Contract Law: A Tale of Unfinished Bridges?**

Eliza Varney

School of Law, Keele University, Keele, United Kingdom

e.varney@keele.ac.uk

ORCID: 0000-0002-0906-9210

The UN Convention on the Rights of Persons with Disabilities and English Contract Law: A Tale of Unfinished Bridges?

Contract law has a multidimensional role permeating the economic and social spheres of life, connecting people in mutual relations. Despite its potential, contract law is largely overlooked by the UN Convention on the Rights of Persons with Disabilities (CRPD). Moreover, contract law is often examined through a unidimensional lens, facilitating transactions between economic actors. English contract law, rooted in the classical pillars of sanctity and freedom of contract, makes no exception. The links between the values pursued by the CRPD and English contract law are akin to unfinished bridges. Yet, the completion of these bridges is imperative, given the likely increase in the number of contracting parties whose capacity to understand the implications of transactions has been affected by mental health conditions such as dementia. Focusing on undue influence and unconscionability, this article searches for a vision of contract law that embraces social values, in particular the CRPD value of respect for human dignity.

Introduction

One of the facets of aging population trends is the likely increase in the number of contracting parties whose capacity to understand the implications of a transaction has been affected by mental health conditions such as dementia.¹ The estimated figure for people living with dementia in the United Kingdom, by 2021, is one million, and people with this condition operating in the contractual sphere are likely to be affected by common symptoms such as difficulty in processing information, communicating, planning and memory loss, as well as by environmental barriers such as insufficient

¹ Jeremy Dixon, Judy Laing and Christine Valentine, 'A Human Rights Approach to Advocacy for People with Dementia: A Review of Current Provision in England and Wales' (2018) *Dementia* 1, 3.

understanding of this condition by other contracting parties (including service providers such as the financial services industry).² Further challenges are likely to be result from a potential rise in social isolation caused by health outbreaks such as COVID-19³ and an increased vulnerability to being pressured to enter into disadvantageous transactions. While, in some cases, people may seek to rely on pathways such as complaints to an Ombudsman⁴ for challenging such transactions, contract law should also provide an effective path to be pursued. Consequently, it is important to have clarity as to when grossly imbalanced contracts would be unenforceable. Perhaps even more significant is to have a clear understanding as to why such contracts would or would not be enforceable, relying on a framework of principles that seek to protect people not only as economic actors, but also as social actors endowed with values such as equality, autonomy and human dignity. When examining these contracts, it is also important to move away from a focus on people's medical conditions and to consider instead the circumstances of the transactions (including factors such as accessible information) and to perceive people as holders of rights, irrespective of whether they are operating in the public or private sphere.⁵

² Eimear O'Brien, 'Are You treating your Vulnerable Customers fairly?' (2017) 6 *Compliance & Risk* 10.

³ Debanjan Banerjee and Mayank Rai, 'Social Isolation in Covid-19: The Impact of Loneliness' (2020) *International Journal of Social Psychiatry* 1.

⁴ Examples include the Financial Ombudsman Service for issues such as consumer insurance and banking.

⁵ Rachel Hurst, 'Disabled People's Organisations and Development: Strategies for Change' in Emma Stone (ed.) *Disability and Development: Learning from Action and Research on Disability in the Majority World* (Leeds: Disability Press 1999).

Whichever area of life we navigate, as people, we never stop being citizens. This term is to be understood not in a narrow sense, confined to nationality, but in a wider sense based on values such as equality, autonomy and human dignity. We are not just economic actors, but also political and social actors.⁶ While this may be more apparent on a vertical axis, in our affiliation with the state, the same is true on a horizontal axis, in our relationships with other private parties. Even in the contractual sphere, where we may appear as economic actors in pursuit of our self-interests, we always remain social and political actors, with the equivalent values that these entail, including fairness-based considerations. Consequently, we should not perceive our contracting world as a single, economic sphere, separated from human rights-based considerations, but as two concentric spheres.

In the inner sphere, we enhance our economic identity, guided by values such as freedom and sanctity of contract, where we expect to have the liberty to choose who we contract with and under which terms, and we understand that once we exercise our choices, we are bound by our bargains.⁷ In doing so, we exercise our individual autonomy to shape our lives.⁸ Provided that we exercise our free will, unaffected by vitiating factors (such as incapacity, duress, undue influence or unconscionability), we may enter into imbalanced transactions and be held to our bargains.⁹

⁶ Thomas Humphrey Marshall, *Citizenship and Social Class, and Other Essays* (Cambridge: Cambridge University Press, 1950), 10-11.

⁷ John Adams and Roger Brownsword, *Understanding Contract Law* (London: Sweet & Maxwell, 5th ed, 2007), 192.

⁸ Gerard Quinn, 'Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD' (HPOD Conference, Harvard, 2010).

⁹ Jonathan Herring, *Vulnerable Adults and the Law* (Oxford: Oxford University Press, 2016), 226.

Yet, circumstances may be such that the transaction is taken out of this inner sphere, into the outer sphere of contractual relations, shaped by public policy concerns and by social values such as fairness-based considerations for the protection of relational autonomy (which recognises our interdependence) and human dignity (which reaffirms our equal worth as human beings).¹⁰ Examples may include grossly asymmetrical contracts where a party (A) lacked the mental capacity to understand the transaction and the other party (B) knew or ought to have known about the incapacity,¹¹ contracts entered into by A under B's undue influence (where A and B were in a relationship of influence and the resulting transaction called for an explanation)¹² or contracts where B knowingly exploited A's weakness, resulting in a disadvantageous transaction for A.¹³ Rather than perceiving such decisions as interference with freedom and sanctity of contract, the decision not to enforce such contracts could be understood as circumstances where the state does not give its agreement to enforce such contracts,¹⁴ because vitiating factors have caused the transaction to step out of the inner sphere characterised by non-interference with the equivalence of exchange.

While international human rights instruments such as the UN Convention on the Rights of Persons with Disabilities (CRPD)¹⁵ are clear as to why everyone has the right to exercise their legal capacity on an equal basis with others, and to enjoy equal

¹⁰ Amita Dhanda, 'Constructing a New Human Rights Lexicon: Convention on the Rights of Persons with Disabilities' (2008) 5 *Sur: International Journal of Human Rights* 43, 49.

¹¹ *Imperial Loan v Stone* [1892] 1 QB 599; *Hart v O'Connor* [1985] AC 1000; *Dunhill v Burgin* [2014] UKSC 18.

¹² *Royal Bank of Scotland Plc v Etridge (No.2)* [2001] UKHL 44.

¹³ *Fry v Lane* (1888) 40 ChD 312.

¹⁴ Seana Shiffrin, 'Paternalism, Unconscionability Doctrine and Accommodation' (2000) 29 *Philosophy and Public Affairs* 205, 227-228.

¹⁵ GA Res 61/611, 13 December 2006, A/61/611, 15 IHRR 255.

protection of values such as autonomy and human dignity, there is less clarity as to how these rights are to be exercised in the contractual sphere, on the connection between concepts such as legal capacity and contractual capacity and on how safeguards from vitiating factors are to operate in practice. On the other hand, domestic frameworks such as English contract law provide clarity on how procedural factors such as freedom from undue influence and unconscionability are to operate in practice, but there is less clarity on why intervention is necessary. It is as if the inner sphere of contract law has been isolated from the outer sphere of social values, with incomplete bridges to connect the two.

English contract law and the CRPD have much to learn from each other and this article aims to explore how to build bridges that would facilitate two-way paths where the CRPD harnesses the potential of contract law to pursue social objectives (which would be in addition to the pursuit of these objectives through other areas of law, including public law) and English contract law assesses the extent to which its doctrines are compatible with CRPD values, including equal respect for autonomy and human dignity. The discussion focuses on the doctrines of undue influence and unconscionability in English contract law in part one, on the provisions on equal recognition before the law under Article 12 CRPD in part two, before suggesting a way forward in part three, exploring its implications for the wider interplay between human rights and private law.

1. Undue Influence and Unconscionability in English Contract Law

When questions are raised regarding the capacity of a party (A) to contract with another (B), the doctrines of undue influence and unconscionability could act both as a prequel and as a sequel to such concerns. Questions regarding A's contractual capacity are

determined with reference to the Mental Capacity Act (MCA) 2005¹⁶ for contracts for necessary goods and services,¹⁷ or the common law for all other contracts.¹⁸ These tests adopt a time and issue specific approach to assess whether A had the mental capacity to enter into the contract. A lacked such capacity if, at the time of entering into the contract, he was unable to make a decision for himself regarding the relevant matter because of ‘an impairment of, or a disturbance in the functioning of the mind or brain’ (the MCA test),¹⁹ or because he was ‘so insane’ that he ‘did not know what he was doing’ (the common law test).²⁰ In assessments where A’s *prima facie* presumption of contractual capacity cannot be rebutted on the basis of incapacity, the doctrines of undue influence and unconscionability could offer a way out of the contract, rendering it voidable. Such relief may be available if A and B are in a relationship of trust and confidence and B took unfair advantage of his influence over A (for undue influence),²¹ or if A’s weakness has been exploited by B (for unconscionability).²² Even if A’s *prima facie* presumption of contractual capacity can be rebutted on the basis of incapacity, a contract where A’s property is not under the court’s control,²³ or where B had no

¹⁶ Mental Capacity Act 2005 (c. 9), ss 2(1) and 3(1).

¹⁷ *ibid*, s 7.

¹⁸ *Imperial Loan* (n 11); *Re Beany* [1978] 1 WLR 770. See Simon Whittaker, ‘Personal Incapacity’ in Hugh Beale and others (eds), *Chitty on Contracts* (London: Sweet and Maxwell, 33rd ed, 2018), 9-089, 9-097, 9-092.

¹⁹ Mental Capacity Act 2005, ss 2(1) and 3(1).

²⁰ *Imperial Loan* (n 11), [601], per Lord Esher.

²¹ *Allcard v Skinner* (1887) 36 ChD 145; *Barclays Bank v O'Brien* [1994] 1 AC 180.

²² *Cresswell v Potter* [1978] 1 WLR 255; *Alec Lobb v Total Oil* [1985] 1 WLR 173.

²³ Mental Capacity Act 2005, ss 2, 3, 15-19 and Part 2. See Whittaker (n 18), 9-092.

knowledge of A's mental incapacity,²⁴ remains valid, unless it could be rendered voidable on the basis of, *inter alia*, undue influence or unconscionability.

Consequently, these doctrines can assist, *inter alia*, in circumstances where A does not meet the MCA or the common law tests for incapacity, but where A is, nevertheless in a vulnerable position of cognitive asymmetry because of a mental health condition such as dementia. Even where A's condition falls within the incapacity test, these doctrines could offer a safety net in protecting A's interests, especially if the knowledge requirement under *Imperial Loan*²⁵ (which enables A to set the contract aside if he can prove both his incapacity and B's knowledge of his condition)²⁶ is interpreted narrowly not to include constructive knowledge based on the circumstances of the transaction.²⁷ This section examines the doctrines of undue influence and unconscionability through the lens of the inner and outer spheres of contractual relations, questioning the extent to which the inner sphere focused on economic values and rooted in the principles of freedom and sanctity of contract is connected to the wider sphere of social values, and the degree of clarity to which English contract law justifies intervention.

Imagine the contractual relation between A and B as a lever on a balance scale, with the parties at each end of the scale, and the state in the middle, as a fulcrum. Rather than visualising these parties in perfect balance, a more accurate representation is to envisage the scales unbalanced. This may be due to differences in the parties'

²⁴ *Imperial Loan* (n 11). See Edwin Peel, *Treitel on the Law of Contract* (London: Sweet and Maxwell, 14th ed, 2015), 12-054.

²⁵ *Imperial Loan* (n 11).

²⁶ *ibid*, 601.

²⁷ Whittaker (n 18), 9-0768.

circumstances, including their access to financial resources and information, affecting their bargaining position.²⁸ As long as A exercises his choices unaffected by incapacity and other vitiating factors such as undue influence or unconscionability, the parties are left to look after their own interests, without questioning the sanctity of the contract, even if this has not resulted in an equivalent exchange.²⁹ The parties are left to operate in the inner, economic sphere of contracting, without interference with their freedom of contract.

There are, however, factors which cause such gross imbalance in A and B's contractual relations, that take their position from the inner, non-interventionist economic sphere, into the outer, interventionist sphere. Undue influence and unconscionability could provide examples of such factors. Common to both doctrines, intervention could be rooted in the presence of a weight pressing A down into a danger zone of gross imbalance (warranting intervention), and the absence of a counter-weight (which would have lifted A back up into the non-interventionist zone, had B acted to redress this imbalance). The first element of this test (the presence of weight pressing A down into a danger zone) combines two factors: A's weak bargaining position (due, *inter alia*, to gross information asymmetry between the parties) and B's unacceptable conduct (such as going ahead with the contract despite having actual or constructive knowledge of A's weakness). The second element of this test (the absence of a counter-weight to lift A out of the danger zone) is based on B's failure to take measures to

²⁸ Michael Trebilcock and Steven Elliott, 'The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements' in Peter Benson (ed), *The Theory of Contract Law: New Essays* (Cambridge: Cambridge University Press, 2001), 62.

²⁹ Adams and Brownsword (n 7), 192.

‘emancipate’ A,³⁰ such as redressing the gross information asymmetry by facilitating A’s access to appropriate independent legal advice.³¹ The focus is not solely on A’s weakness³² or B’s unacceptable conduct,³³ but also on the relationship between the parties and the role of the state in regulating these relations.³⁴ This vision is not confined to individual autonomy but is concerned also with relational autonomy,³⁵ and is not limited to a unilateral vision of contract law restricted to the economic sphere, but focuses on the wider, social sphere, as an integral part of the contracting world.³⁶

Under the current framework on undue influence and unconscionability, the connection between the inner economic sphere and the outer social sphere appears to be insufficiently articulated, with the focus rooted in economic values, on procedural justifications for intervention and a perception of contracting parties as autonomous individuals³⁷ in pursuit of self-interest. If there are any concerns for social values, substantive fairness and relational autonomy, these are disguised as part of the intervention to ensure procedural fairness.³⁸ The trigger for these doctrines is contractual imbalance resulting from the combination of A’s vulnerability (for undue

³⁰ Rick Bigwood, ‘Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation?’ (1995) 16 *Oxford Journal of Legal Studies* 503.

³¹ Trebilcock and Elliott (n 28), 62.

³² Peter Birks and Chin Nyuk Yin, ‘On the Nature of Undue Influence’ in Jack Beatson and Daniel Friedman (ed), *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1997).

³³ Bigwood (n 30).

³⁴ Mindy Chen-Wishart, ‘Undue Influence: Vindicating Relationships of Influence’ (2006) 59 *Current Legal Problems* 321.

³⁵ Herring (n 9).

³⁶ Gunther Teubner, ‘Contracting Worlds: The Many Autonomies of Private Law’ (2000) 9 *Social and Legal Studies* 399, 400-402.

³⁷ Chen-Wishart (n 34), 241.

³⁸ Patrick Atiyah, ‘Contract and Fair Exchange’ (1985) 35 *University of Toronto Law Journal* 1, 9.

influence, this may be due to A's impaired consent resulting from B's influence,³⁹ while for unconscionability, this may result from, *inter alia*, A's mental impairment due to a medical condition)⁴⁰ and B's unacceptable conduct (for undue influence, this may be in the form of overt persuasion or failure to protect from a relationship of influence and a transaction that calls for an explanation,⁴¹ while for unconscionability, this may be due to exploitation of weakness, knowingly taking advantage of A and entering into a transaction disadvantageous for A).⁴² B could then seek to resist such challenges by showing that A exercised his free will when entering into the contract⁴³ (which, for both doctrines, could come into play if B ensured that A received independent legal advice).⁴⁴ Yet, such intervention is seen merely as part of a procedural mechanism confined to the economic domain.

Given its emphasis on procedure, the legal framework attempts to provide clarity on how interference with freedom of contract could be justified in narrow

³⁹ *Etridge* (n 12), [9]. See also *Wright v Carter* [1903] 1 Ch 27; *Bullock v Lloyds Bank* [1955] Ch 317; *O'Sullivan v Management Agency and Music* [1985] QB 428; *CIBC Mortgages v Pitt* [1994] 1 AC 200; See Herring (n 9), 243.

⁴⁰ *Boustany v Pigott* (1995) 69 P & CR 298. See Hugh Beale, 'Duress and Undue Influence' in Hugh Beale and others (eds), *Chitty on Contracts* (London: Sweet and Maxwell, 33rd ed, 2018), 8-134.

⁴¹ *Etridge* (n 12), [6-8]; *Mahoney v Purnell* [1996] 3 All ER 61; *Hammond v Osborn* [2002] EWCA Civ 885. See Beale (n 40), 8-098.

⁴² *Fineland Investments v Pritchard* [2011] EWHC 113. See Gareth Spark, *Vitiating of Contracts: International Contractual Principles and English Law* (Cambridge: Cambridge University Press, 2013), 286.

⁴³ *Inche Noriah v Shaik Allie bin Omar* [1929] AC 127, 135; *Hackett v Crown Prosecution Service* [2011] EWHC 1170. See Beale (n 40), 8-099.

⁴⁴ *Etridge* (n 12), [20]; *Morley v Loughnan* [1893] 1 Ch. 736, 752; *Earl of Aylesford v Morris* (1872-73) LR 8 Ch App 484, 490-491; *Zamet v Hyman* [1961] 1 W.L.R. 1442, 1446. See Beale (n 40), 8-099.

circumstances, but it is less clear why intervention may be necessary. In the case of undue influence, while Birks and Chin advance an approach focused on A's impaired consent (due to 'excessive dependence' on B),⁴⁵ and Bigwood support a focus on B's unacceptable conduct (based on 'transactional neglect' of A's interests),⁴⁶ Chen Wishart rightly challenges one-sided approaches, stressing the need to look at the relationship between both parties and their social context.⁴⁷ Such an approach recognises the interdependence between contracting parties, based on a relational understanding of autonomy.⁴⁸

A focus on individualistic values presents an incomplete, distorted image. It centres only on A or B and overlooks the lever that connects the two (symbolising the inter-relation between contracting parties). It misses out the broader set of values that govern the parties' relationship (such as interdependence)⁴⁹ and the responsibilities associated with these relationships (including the need to perceive contracting parties as 'fellow vulnerable people who need to be looked out for').⁵⁰ It is also unconcerned with who the parties are,⁵¹ and whether their bargaining positions are balanced.⁵² Consequently, this distorts any attempt to achieve an outcome that 'balances' the interests of these parties.

⁴⁵ Birks and Chin (n 32), 67. See *Pesticcio v Huet* [2004] EWCA Civ 372..

⁴⁶ Rick Bigwood, 'Contracts by Unfair Advantage: From Exploitation to Transactional Neglect' (2005) 25 *Oxford Journal of Legal Studies* 65; See *Huguenin v Baseley* (1807) 14 Ves Jr 273; *Tate v Williamson* (1866-67) LR 2 Ch App 55. See Beale (n 40), 8-059, 8-060.

⁴⁷ Chen-Wishart (n 34), 265.

⁴⁸ *ibid*, 242.

⁴⁹ Herring (n 4), 228.

⁵⁰ *ibid*, 258-259.

⁵¹ Adams and Brownsword (n 7), 194.

⁵² Herring (n 9), 228 and 257.

Perhaps most significantly, a narrow approach based on individualistic values and focused only on A or B, not only overlooks the lever in the balancing scale, but also misses out the fulcrum (symbolising the state). This vision of the state as a fulcrum seems appropriate, especially if we consider the etymology of the word, derived from the Latin verb *fulcire*, meaning ‘to prop up’.⁵³ The state plays the role of a central pivot in contractual relations, enforcing or refusing to enforce these relations, as appropriate.⁵⁴ Doctrines such as undue influence and unconscionability could be understood not as instances where the state interferes with the parties’ freedom of contract, but as circumstances where the state refuses to enforce grossly asymmetrical contacts⁵⁵ which have stepped out of the inner, non-interventionist sphere, into a wider sphere shaped by social concerns. Yet, the current framework reflects a narrow perception of the contractual sphere, confined to economic values,⁵⁶ and a unidimensional understanding of the role of contract law limited to enforcing agreements based on procedural considerations.⁵⁷

The focus on procedural factors is rooted in the need to ensure certainty in the contractual sphere.⁵⁸ Despite an apparent advantage of certainty, a focus on procedural factors brings its own challenges. In cases of unconscionability, courts have sought to fit A’s condition within the categories of ‘poverty and ignorance’,⁵⁹ interpreted

⁵³ C Onions (ed), *The Oxford Dictionary of English Etymology* (Oxford: Oxford University Press, 1st ed, 1996).

⁵⁴ Shiffrin (n 14).

⁵⁵ Chen-Wishart (n 34), 251-252.

⁵⁶ Herring (n 9), 252.

⁵⁷ *ibid*, 225.

⁵⁸ Adams and Brownsword (n 7), 189.

⁵⁹ *Fry* (n 13). See *Spark* (n 42), 283-284.

expansively,⁶⁰ rather than conclude that A's vulnerability is due to circumstances that significantly affect his ability to look after his own interests in the transaction (following the approach adopted by the High Court of Australia).⁶¹ Furthermore, when assessing B's unacceptable conduct in cases of unconscionability, a focus on B's 'deliberate' exploitations of A's weakness (rather than on the circumstances of the transaction) appears to allow B to 'take advantage of [A]'s vulnerable state, short of actively manipulating' A.⁶² Concerns can also be raised regarding undue influence, given questions over the circumstances in which B's conduct can be deemed to as 'undue' and the extent to which this may include B's passive unacceptable conduct of going ahead with the transaction despite having knowledge (actual or constructive) of A's vulnerability.⁶³ While procedural factors may appear easier to assess, when compared with substantive considerations, in reality, it is difficult to establish where the line should be drawn in determining whether B's conduct is unconscionable or whether his influence is undue.⁶⁴ This can only be assessed with reference to substantive factors such as the outcome of the transaction,⁶⁵ especially if this resulted into a grossly imbalanced contract.⁶⁶ Yet, under the current frameworks, courts are reluctant to recognise that they give weight to substantive factors when determining whether parties

⁶⁰ *Backhouse v Backhouse* [1978] 1 WLR 243. See Beale (n 40), 8-134.

⁶¹ *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 (HCA), 462. See Spark (n 42), 284.

⁶² Herring (n 9), 251.

⁶³ Beale (n 40), 8-059.

⁶⁴ Jonathan Morgan, *Great Debates in Contract Law* (Basingstoke: Palgrave, 2nd ed, 2015), 214.

⁶⁵ *Credit Lyonnais v Burch* [1997] CLC 95; *Cheese v Thomas* [1994] 1 WLR 129. See Spark (n 42).

⁶⁶ Morgan (n 64), 214.

should be released from their contractual obligations on the basis of undue influence or unconscionability.⁶⁷

In tripartite situations involving a surety, a debtor and a bank, where the bank is fixed with constructive notice of undue influence whenever the surety and the debtor are in a non-commercial relation,⁶⁸ Burns is right to question the scope of this approach, given the lack of clarity in establishing what is a non-commercial relation, and whether this covers the relation between an elderly person with dementia and his employed carer.⁶⁹ Further difficulties are posed by the problematic assumptions that if A was informed by an independent legal adviser, A exercised his free will by going ahead with the transaction.⁷⁰ Yet, courts should not be too quick in deciding that A has been lifted out of the danger zone by the presence of independent legal advice. Such considerations should consider not only the protection of A's economic interests, but also A's social values (including safeguarding A's dignity).

A framework focused on the certainty of rules rather than on the fairness of outcomes and which is unconcerned with whether the parties started from a balanced position, tends to favour the stronger contracting party.⁷¹ A preferable approach is one where both parties are protected and substantive fairness plays a role, without sacrificing certainty or going as far as advancing a general principle of fairness in

⁶⁷ *Burch* (n 65). See *Morgan* (n 64), 213-214.

⁶⁸ *O'Brien* (n 21), 196; *Etridge* (n 12), [87]. See *Beale* (n 40), 8-117.

⁶⁹ Fiona Burns, 'The Elderly and Undue Influence *Inter Vivos*' (2003) 23 *Legal Studies* 251, 277-278.

⁷⁰ Peter Millett, 'Equity's Place in the Law of Commerce', (1998) 114 *Law Quarterly Review* 214, 220.

⁷¹ *Herring* (n 4), 228-229.

English contract law.⁷² Certainty would be endangered by a framework which would allow A to be released from his contractual obligations solely on the basis of substantive fairness. The vision of the balance scales put forward above does not suggest this. Instead, it proposes a model where concerns for the substantive fairness of the transaction are seen as a trigger for raising procedural protections. While this is not a novel suggestion,⁷³ the proposed vision differs from previous discussions by insisting on a wide interpretation of B's constructive knowledge (to include the circumstances of the transaction) which, when combined with A's vulnerability, acts as a weight pushing A down into a danger zone that warrants intervention, and that such intervention should be rooted in social considerations (including the protection of human dignity). Under the current framework, this weight is too narrowly constructed, as it unclear whether it includes B's passive unacceptable conduct to continue the contract with A despite having constructive knowledge (interpreted widely to include the circumstances of the transaction) of A's weakness. The proposed vision also looks at the presence of independent advice as a counterweight that lifts A out of the danger zone, but only if this consistent with social values. Under the current framework, this counter-weight is too broadly constructed, as it does not state explicitly that the independent legal advice must be accessible to A, nor does it give sufficient weight to the parties' circumstances, before concluding that A entered into the transactions with full knowledge of what he agreed to. Any independent advice should be appropriate to A,⁷⁴ and must address any accessibility barriers that may be faced by A (eg if A has a sensory, cognitive or dexterity disability), moving away from a perception of A as a victim (due to his

⁷² *Lloyds Bank v Bundy* [1975] QB 326.

⁷³ Chen-Wishart (n 34), 265.

⁷⁴ Trebilcock and Elliott (n 28), 79.

medical condition), focusing instead on environmental factors (such as access to appropriate information) and on social values such as the equal protection of human dignity.

The role of social values in protecting contracting parties affected by gross asymmetry in their bargaining positions has not been articulated to a desired degree of clarity in English contract law. This is coupled with the reluctance of the courts to recognise overtly that substantive fairness has a role in English contract law. Instead, we are faced with a covert pursuit of substantive fairness, under the guise of procedural fairness.⁷⁵ This is similar to being aware of the desired destination but lacking the courage to forge a clear path to get there. It is akin to an unfinished bridge.

2. The CRPD: An Implicit Role of Contract Law?

The above discussion focused on English Contract Law illustrated a framework beset by two key challenges: it concentrates on the procedure showing how parties may be protected from vitiating factors, but is less clear why intervention may be necessary, and adopts an approach entrenched in economic values, with an insufficiently articulated focus on social considerations. The framework explored in this section is culpable of the exact opposite. While it seeks to substantiate why the interests of vulnerable contracting parties should be protected,⁷⁶ it is less clear on how this should be achieved.

Furthermore, while social values (including equality and the protection of human dignity) are clearly articulated,⁷⁷ references to the economic sphere do not share the same degree of clarity and strength. This section adopts the lens of the inner and outer

⁷⁵ Chen-Wishart (n 34).

⁷⁶ UN Convention on the Rights of Persons with Disabilities, Preamble and Articles 1 and 12.

⁷⁷ *ibid*, Article 3.

spheres of contractual relations, examining the extent to which the social values promoted by the CRPD (associated with the outer sphere) are connected to an inner sphere of economic relations between private parties, as well as the role of the state in facilitating this connection.

The Convention rests on a clear framework of values based on a rights-based approach for understanding vulnerability. As it relies on a predominantly social model of disability,⁷⁸ the CRPD shifts the focus away from the medical condition of individuals, casting light on social barriers that may affect participation for people with disabilities.⁷⁹ In a contractual context, this may include inaccessible information that may place a contracting party with a sensory, cognitive or dexterity disability in an unequal bargaining position of information asymmetry. The CRPD seeks to redress this imbalance by seeking to ensure, *inter alia*, that information is provided to the public in accessible formats,⁸⁰ and that accessibility requirements are considered by private entities offering services to the public.⁸¹ These requirements contribute towards the overall objective of the CRPD to uphold the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities and to promote respect for the inherent dignity of all human beings.⁸²

⁷⁸ *ibid*, Preamble, paragraph (e) and Article 1. See Sarah Fraser Butlin, ‘The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments?’ (2011) 40 *Industrial Law Journal* 428.

⁷⁹ *ibid*, Preamble, paragraph (e) and Article 1. See Michael Oliver, *The Politics of Disablement* (Basingstoke: Palgrave Macmillan, 1990).

⁸⁰ *ibid*, Article 9(1)(b).

⁸¹ *ibid*, Article 9(2)(b).

⁸² *ibid*, Article 1.

The CRPD recognises the inter-relation between people, based on a broad vision of autonomy. It promotes individual autonomy,⁸³ recognising that the equal right to possess and exercising legal capacity is central to the exercise of human agency as a person.⁸⁴ The provisions on equal recognition before the law under Article 12 of the CRPD⁸⁵ act as a ‘sword’ to advance personhood (including entering into legally binding agreements) and as a ‘shield’ against unwanted interference from others.⁸⁶ These provisions also stand as the basis for the enjoyment of other CRPD rights, including the rights to independent living and inclusion.⁸⁷ The Convention recognises a relational vision of autonomy, relying on a broad conception of personhood rooted in autonomy and interdependence.⁸⁸ It facilitates participation and inclusion,⁸⁹ whilst acknowledging the inter-dependence between people and the importance of support in decision-making.⁹⁰ It also recognises that safeguards may be needed (such as protection from undue influence),⁹¹ interpreted in light of the general principles advanced by the CRPD, including the protection of autonomy and human dignity.⁹²

The Convention also recognises that parties exercise their rights within a broad sphere where economic and social values are inter-connected. It reaffirms the

⁸³ *ibid*, Articles 12(1) and (2).

⁸⁴ Michael Bach, ‘The Right to Legal Capacity under the UN Convention on the Rights of Persons with Disabilities: Key Concepts and Directions for Law Reform’, Toronto, (IRIS 2009), 2-3.

⁸⁵ UN Convention on the Rights of Persons with Disabilities, Article 12.

⁸⁶ Quinn (n 8), 10.

⁸⁷ UN Convention on the Rights of Persons with Disabilities, Article 19.

⁸⁸ Dhanda (n 10), 50.

⁸⁹ UN Convention on the Rights of Persons with Disabilities, Article 3(c).

⁹⁰ Dhanda (n 10), 47.

⁹¹ UN Convention on the Rights of Persons with Disabilities, Article 12(4).

⁹² *ibid*, Article 3(a).

‘indivisibility’ of all human rights and fundamental freedoms,⁹³ departing from artificial distinctions between civil and political rights (based on a negative formulation of non-interference) and economic, social and cultural rights (rooted in positive formulations calling for state action), to create hybrid rights.⁹⁴ Citizenship values such as equality and dignity permeate all spheres, including the political, economic and social spheres. The CRPD also recognises that respect for individual autonomy and social inclusion are mutually complementary goals⁹⁵ and that the right to equal ‘enjoyment of legal capacity in all aspects of life’⁹⁶ is to be interpreted within a wider framework of values, which includes the equal respect for human dignity.⁹⁷

The framework advanced by the CRPD is not free from challenges. Unlike the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),⁹⁸ which refers explicitly to the equal right to conclude contracts,⁹⁹ there is no explicit reference to equality in the contractual sphere in the CRPD. Instead, there is an unexplored, implicit reference to such equality for persons with disabilities as part of the provisions on equal recognition before the law.¹⁰⁰ Moreover, while CEDAW calls for both the equal right to exercise legal capacity in concluding contracts, and equal

⁹³ *ibid*, Preamble, paragraph (c).

⁹⁴ Don MacKay, ‘The United Nations Convention on the Rights of Person with Disabilities’ (2007) 34 *Syracuse Journal of International Law and Commerce* 323, 330.

⁹⁵ UN Convention on the Rights of Persons with Disabilities, Articles 3(a) and (c).

⁹⁶ *ibid*, Article 12(2).

⁹⁷ *ibid*, Article 3(a).

⁹⁸ GA Res 34/180, 18 December 1979, A/34/46, 1249 UNTS 13.

⁹⁹ UN Convention on the Elimination of all Forms of Discrimination against Women, Article 15(2).

¹⁰⁰ UN Convention on the Rights of Persons with Disabilities, Article 12.

opportunities to exercise legal capacity,¹⁰¹ cost-related implications may have been at the root of not including explicitly an equivalent provision in the CRPD.

There is also lack of clarity regarding the extent to which the right to exercise legal capacity can be restricted (if at all) and the link between legal capacity, mental capacity and contractual capacity.¹⁰² Any assessment of incapacity must be disentangled from disability, as disability and incapacity must never be conceptually equated.¹⁰³ Any intervention, if it amounts to indirect discrimination on the basis of disability, should be objectively justified only if it meets a three part test.¹⁰⁴ Firstly, such intervention should be permitted only if it pursues a legitimate aim under the Convention.¹⁰⁵ The CRPD aims not only to empower people by promoting their individual autonomy,¹⁰⁶ but also to protect them in situations of risk¹⁰⁷ (including financial risk) and exploitation¹⁰⁸ (including passive exploitation) to safeguard their dignity.¹⁰⁹ This should cover interventions to protect a party (A) who entered into a grossly imbalanced contract while being in a vulnerable position (due to factors such as incapacity, or impaired

¹⁰¹ UN Convention on the Elimination of all Forms of Discrimination against Women, Article 15(2).

¹⁰² Peter Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75 *Modern Law Review* 752.

¹⁰³ Bach (n 84), 21.

¹⁰⁴ Wayne Martin and others, 'Achieving CRPD Compliance. Is the Mental Capacity Act of England and Wales Compatible with the UN Convention on the Rights of Persons with Disabilities? If Not, What Next? An Essex Autonomy Project Position Paper', Report submitted to the UK Ministry of Justice, 22 September 2014, 30.

¹⁰⁵ *ibid.*

¹⁰⁶ UN Convention on the Rights of Persons with Disabilities, Article 3(a).

¹⁰⁷ *ibid.*, Article 11.

¹⁰⁸ *ibid.*, Article 16. See Martin (n 104), 30.

¹⁰⁹ UN Convention on the Rights of Persons with Disabilities, Article 3(a).

consent due to B's undue influence), where B decided to go ahead with the contract despite having (actual or constructive) knowledge of A's condition, and without ensuring that A received appropriate and accessible independent advice regarding the transaction. The second part of the test calls for objective basis for intervention, moving beyond A's medical condition to include environmental factors such as the circumstances of the transaction.¹¹⁰ These should include a grossly imbalanced contract entered into by A without appropriate independent advice. The final part of the test calls for reasonable means to achieve a legitimate aim.¹¹¹ Contract law doctrines such as undue influence and unconscionability, interpreted in light of both economic and social values, could act as a safety net in such circumstances.

Challenges extend beyond the text of the CRPD itself and include the work of the Committee on the Rights of Persons with Disabilities (CRPD Committee). In its General Comment 1 on Article 12,¹¹² the CRPD Committee refers to the equal right to exercise legal capacity by entering into contracts only three times: twice with reference to Article 15 CEDAW,¹¹³ and once with reference to Article 12(3) CRPD when discussing the support to exercise legal capacity.¹¹⁴ As stressed in General Comment 1, such support should include, *inter alia*, universal design and accessibility, requiring public and private actors (including banks and other financial institutions) to provide information in accessible formats, which would enable persons with disabilities to

¹¹⁰ Martin (n 104), 30.

¹¹¹ *ibid.*

¹¹² CRPD Committee, General Comment No. 1: Article 12 (Equal Recognition before the Law), 19 May 2014, UN Doc. CRPD/C/GC/1.

¹¹³ *ibid.*, paragraphs 6 and 35.

¹¹⁴ *ibid.*, paragraph 17.

perform legal acts required to conclude contracts.¹¹⁵ Yet, these issues could have been explored in more depth, with further guidance on how they should operate in practice.

There is also unexplored reference to freedom of contract in the jurisprudence of the CRPD Committee, particularly in *Nyusti and Takács v Hungary*.¹¹⁶ This case concerns parties in asymmetrical positions of bargaining power: party A symbolising customers with visual disabilities, unable to access automatic teller machines (ATMs) which had no Braille markings or audio instructions, with B denoting a bank who insisted that any requirement to make their ATMs accessible would infringe on their freedom of contract, that A entered into the contract of their own free will and with full knowledge that the ATM services would be inaccessible, and that A's dignity was not infringed by the fact that they could not use these services unaided.¹¹⁷ While A perceived their contract as being located within a wider, social sphere, B's perception of the contract was confined to the economic sphere, rooted in a non-interventionist approach. Both the Court of Appeal and the Supreme Court of Hungary agreed with B.¹¹⁸ Having exhausted all domestic remedies, A complained to CRPD Committee. Hungary adopted the view that accessibility obligations are not applicable to private parties such as banks, and do not extend to contractual relations between private parties.¹¹⁹ The CRPD Committee disagreed, stressing that States Parties to the CRPD are under an obligation to take 'all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise'.¹²⁰ Furthermore,

¹¹⁵ *ibid.*

¹¹⁶ *Nyusti and Takács v Hungary*, CRPD/C/9/D/1/2010.

¹¹⁷ *ibid.*, paragraph 2.12.

¹¹⁸ *ibid.*, paragraphs 2.13 and 2.16.

¹¹⁹ *ibid.*, paragraph 9.3.

¹²⁰ *ibid.*, paragraph 9.4; UN Convention on the Rights of Persons with Disabilities, Article 4(1)(e).

States Parties must take appropriate measures to ensure equal access to, *inter alia*, services, identify and eliminate accessibility barriers and develop and implement minimum accessibility standards.¹²¹ In addition, States Parties must ensure that all private entities offering services to the public ‘take into account all aspects of accessibility’¹²² and Hungary was in breach of these obligations.¹²³

This decision recognised that CRPD rights permeate not only the public domain, but also the private realm, and that contractual relations transcend the economic sphere into a wider, social sphere. Implied in this decision is a recognition that when balancing social values (such as human dignity) and economic values (such as freedom of contract), dignity is ranked as a higher value that justifies interference with freedom of contract, and that freedom of contract does not operate in a vacuum but within a wider framework of social values. However, this may only be read between the lines of the CRPD Committee decision and is not stated explicitly. Despite the merits of this decision, it represents a missed opportunity to engage with issues of freedom of contract and to defy an understanding of this principle unconcerned with the parties’ bargaining power (such as the unequal bargaining power of persons with disabilities contracting with the bank on a ‘take it or leave it’ basis). It also constitutes a missed opportunity to challenge a narrow interpretation of freedom of contract as non-intervention by the state in contractual relations, and to promote a positive, wide understanding of this concept where intervention is permitted if required in pursuit of social values (based on a vision

¹²¹ *Nyusti* (n 166), paragraph 9.4; UN Convention on the Rights of Persons with Disabilities, Article 9(2)(a).

¹²² *Nyusti* (n 166), paragraph 9.4; UN Convention on the Rights of Persons with Disabilities, Article 9(2)(b).

¹²³ *Nyusti* (n 166), paragraph 10.

of contract law as having a multidimensional role permeating economic and social spheres).

The CRPD rests on a well-defined framework of values, promoting full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities,¹²⁴ which include the equal right to exercise legal capacity.¹²⁵ The Convention is less clear how the exercise of legal capacity and the potential application of safeguards (such as protection from undue influence)¹²⁶ are to operate in practice.¹²⁷ Coupled with this, is the absence of an explicit reference in the CRPD to equality in the contractual sphere, albeit this is implied on the provisions of equal recognition before the law.¹²⁸ In addition, while the jurisprudence of the CRPD Committee recognised the need to interfere with freedom of contract in pursuit of equality and the protection of dignity, it made no attempt to challenge explicitly a narrow understanding of freedom of contract. It is as if there was no courage to step into the contractual sphere, or to highlight the link between social and economic values in this sphere. This is akin to another unfinished bridge.

3. *Quo vadis?*

When seeking paths that link the economic and social spheres of contract law, a journey mapped within the frameworks of English contract law and the CRPD is bound to encounter incomplete bridges. In the realm of English contract law, the construction

¹²⁴ UN Convention on the Rights of Persons with Disabilities, Article 1.

¹²⁵ *ibid*, Article 12(2).

¹²⁶ *ibid*, Article 12(4).

¹²⁷ Bartlett (n 102).

¹²⁸ UN Convention on the Rights of Persons with Disabilities, Article 12.

starts from strong foundations of principles such as freedom and sanctity of contract, rooted on economic values. Yet, as the journey progresses towards social values, the bridges narrow, the gaps between the boards become further apart, and the journey is shakier. Anyone starting from the realm of the CRPD, attempting a crossing from the strong foundation of social values into the economic sphere is likely to encounter similar difficulties. This vision of incomplete bridges would make any traveller think twice before attempting the crossing. This perspective may account for the lack of courage manifested in English contract law to recognise that substantive fairness does matter, or by the CRPD Committee to articulate that human dignity considerations rank higher than negative interpretations of freedom of contract. To overcome this lack of courage and complete these bridges, it is important to have the destination in sight, to identify the obstacles currently standing in the way and, most of all, to be aware of why action is needed.

In constructing the bridge commencing in the realm of contract law, strong economic foundations connect feebly with social considerations. Yet, it is important to ensure that contract law embraces not only economic values, but also social values. When contemplating Lorenzetti's 14th century allegory of the good government,¹²⁹ we can draw two imaginary axes: a vertical axis representing the relationship between the State and the citizens, and a horizontal axis epitomising the relationship between people, connected through contracts.¹³⁰ A complete vision of contract law should not be confined to the horizontal axis and should acknowledge the vertical axis, including the role of the state and the presence of people not just as economic actors but as citizens.

¹²⁹ A Lorenzetti, *Il Buon Governo*, 1338 painting, Palazzo Pubblico di Siena.

¹³⁰ Teubner (n 36), 400.

Consequently, citizenship values (including the protection of human dignity) should permeate all areas of law, including contract law. Contract law has a multidimensional role which includes the economic and social spheres, reflecting the interdependence between people, bound together through contracts in mutual relations.¹³¹ Regrettably, English contract law reflects a unidimensional role confined to the economic sphere, where individuals are seen as economic actors in pursuit of self-interest¹³² and intervention is rooted in procedural concerns.¹³³ This framework may be clear (to some extent) on how we should address situations where a contracting party's will has been affected by a vitiating factor, but is less clear why such contracts should not be enforced. This may be due to possible concerns not to upset well established principles such as freedom and sanctity of contract, or to endanger certainty.¹³⁴ Yet, freedom and sanctity of contract are not absolute principles¹³⁵ and intervention may be justified in the pursuit of wider social values.¹³⁶ Rather than perceiving the state's refusal to enforce a contract affected by vitiating factors, as 'intervention' with the parties' freedom of contract, a grossly imbalanced transaction should be seen as stepping out of a sphere of non-intervention into a sphere where the state is prepared to intervene to protect social values such as human dignity. Moreover, certainty-related concerns about the pursuit of substantive fairness can be alleviated by a framework that does not allow intervention based on substantive fairness alone, but where substantive fairness is a trigger for

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ Chen-Wishart (n 34).

¹³⁴ Adams and Brownsword (n 7), 189.

¹³⁵ Peter Benson, 'The Unity of Contract Law' in Peter Benson (ed), *The Theory of Contract Law: New Essays*, (Cambridge: Cambridge University Press, 2008), 185.

¹³⁶ Hugh Collins, *The Law of Contract* (Oxford: Oxford University Press, 4th ed, 2003), 4.

investigating the procedural fairness of the transaction. In this framework, a combination of A's vulnerability and B's unacceptable conduct should be seen to act as a weight pushing A into a danger zone located within a sphere rooted in social values, and A could be lifted out of this danger zone only by a counter-weight that addresses not only economic, but also social concerns about A's position. A gross contractual imbalance between the parties would trigger a concern to protect values associated with the vertical axis that symbolises the relationship between individuals and the state, including human dignity. Consequently, courts should not be too quick in concluding that A has been lifted out of this danger zone unless these social considerations are also addressed. For cases where A seeks to rely on doctrines such as undue influence or unconscionability to escape a grossly imbalanced transaction, courts should look, *inter alia*, not only at whether A received legal advice, but also whether the advice was accessible and appropriate to A's circumstances. This would involve a changed perception of A as both an economic and a social actor, requiring an examination of whether the advice provided to A took into account the need to protect not only his financial interests, but also his human dignity.

The task of connecting economic and social values in English contract law would not take us into uncharted territories but would be part of a rebuilding process. As Waddams convincingly reminds us, courts can rely on a general power (inherited from the Court of Chancery) to modify grossly imbalanced contracts.¹³⁷ While this power has been marginalised and confined to a piecemeal approach for intervention¹³⁸ (despite the express provisions of the Judicature Act 1873 that conflicts between law

¹³⁷ Stephen Waddams, *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment* (Cambridge: Cambridge University Press, 2019), 220.

¹³⁸ *ibid*, 4.

and equity should prioritise the latter),¹³⁹ this residual power for intervention has been ‘inherited by the modern court’ and ‘can be revived’, when required.¹⁴⁰ Consequently, Waddams calls for a ‘more fluid interrelation between the idea of enforceability of contracts and the limitations of enforceability’, where contracts are ‘enforceable, unless their enforcement’ is ‘highly unreasonable’.¹⁴¹ The idea of the inner and outer spheres of contract law is compatible with this vision, although the path put forward in this article is one of broadening the current doctrines (such as undue influence and unconscionability) to take account of social factors such as the protection of human dignity, narrowing the gaps between the planks on the bridge. Nevertheless, the perception of this endeavour as a rebuilding process and the knowledge that there is a safety net provided by the general reserve power of the court to intervene into grossly asymmetrical contracts,¹⁴² can provide the courage to move forward.

The endeavour of connecting economic and social values in the contractual realm requires more than one single construction. In fact, there are at least three bridges that require completion.¹⁴³ This discussion has focused on the first bridge, within private law, linking the inner economic sphere of contract law with its outer social sphere. Whilst outside the scope of this discussion, further connections between economic and social values in the contractual sphere can be provided by regulatory provisions (the second bridge), in particular, measures designed to protect parties in

¹³⁹ Supreme Court of Judicature Act 1873 (c. 53), Sections 24-25.

¹⁴⁰ Waddams (n 137), 8, 170 and 220.

¹⁴¹ *ibid*, 221.

¹⁴² *ibid*, 4.

¹⁴³ I am grateful to the anonymous reviewer for the idea of the three bridges.

weaker bargaining positions, such as consumers,¹⁴⁴ while an enhanced perception of contracting parties as citizens can be facilitated by the link between constitutional values and contract law (the third bridge). This latter bridge would be based on a more complex construction, linking English contract law, the Human Rights Act (HRA) 1998,¹⁴⁵ the European Convention on Human Rights (ECHR)¹⁴⁶ and the CRPD. The architectural landscape of these interconnected bridges reveals a project that has already started, but which remains incomplete, being reliant on advancements at both domestic and supranational level.

An extended focus is needed in the realm of the CRPD, as a complete vision of equality legislation should not be confined to the vertical axis (reflecting the relation between the individual and the state), but should also acknowledge the horizontal axis (reflecting the relationship between private parties). Equality objectives should permeate all areas of law, and contract law makes no exception. Perceived from a multidimensional perspective, contract law can bring an important contribution to the pursuit of these objectives, as it sets wider norms of how we should treat each other in our transactions.¹⁴⁷ The CRPD shows us why this is important, but is less clear on how this can be achieved. This may be because the contract sphere is not perceived as a priority, despite the potential of contract law as an important factor in the pursuit of equality objectives in the private sphere. It may also be due to potential concerns

¹⁴⁴ See, for example, the Consumer Rights Act 2015 (c. 15), Part II (in particular ss 61-71) (unfair terms). See Michael Bridge (ed), *Benjamin's Sale of Goods* (10th edn, London: Sweet & Maxwell, 2019), 14-138.

¹⁴⁵ Human Rights Act 1998 (c. 42).

¹⁴⁶ European Convention for the Protection of Fundamental Rights and Freedoms, 4 November 1950, ETS No.005.

¹⁴⁷ Chen-Wishart (n 34).

regarding intervention in the private sphere, illustrated in the more timid language adopted by the CRPD with regards to private actors (who are, for example, expected to ‘take into account’ accessibility requirements when offering services to the public),¹⁴⁸ when compared with States Parties (who are required to ‘take all appropriate measures’ to ensure accessibility).¹⁴⁹ A clear message is needed from the CRPD Committee to articulate the link between Convention values and the contractual sphere, especially as the CRPD constitutes a benchmark in assessing the effectiveness of domestic frameworks in the pursuit of equality objectives.¹⁵⁰ The CRPD has been recognised by the European Court of Human Rights (ECtHR) as providing a ‘universal consensus’ on the protection of persons with disabilities from discrimination.¹⁵¹ The ‘embedding’ of the CRPD in the ECtHR jurisprudence¹⁵² provides an important step in the complex, inter-connected bridge linking (i) the CRPD and the ECHR, (ii) the ECHR and the HRA and (iii) the HRA and English contract law. While the United Kingdom has incorporated the ECHR into domestic law via the HRA, the CRPD, ratified in 2009, has not been incorporated and is of limited direct assistance in domestic courts.¹⁵³

¹⁴⁸ UN Convention on the Rights of Persons with Disabilities, Article 9(2)(b).

¹⁴⁹ *ibid*, Article 9(1).

¹⁵⁰ Lucy Series, ‘Relationships, Autonomy and Legal Capacity: Mental Capacity and Support Paradigms’ (2015) 40 *International Journal of Law and Psychiatry* 80, 87.

¹⁵¹ *Glor v Switzerland* (Application No. 13444/04), 30 April 2009, [53].

¹⁵² *ibid*; *Alajos Kiss v Hungary* (Application No. 38832/06), 20 May 2010, [42], [44]. See Fraser Butlin (n 78), 430-431.

¹⁵³ *R (on the application of NM) v Islington LBC* [2012] EWHC 414, [98]; *R (on the application of MA) v Secretary of State for Work and Pensions* [2013] EWHC 2213, [80]; *Hainsworth v Ministry of Defence* [2014] EWCA Civ 763, [30]; *R. (on the application of Ghulam) v Secretary of State for the Home Department* [2016] EWHC 2639, [327]. See Deniz Canruh, ‘Use of the UNCRPD in Social Security cases before UK Courts and Tribunals’ (2019) 26 *Journal of Social Security Law* 112, 115.

Nevertheless, the relevance of the CRPD values as a benchmark to be pursued, cannot be overlooked,¹⁵⁴ particularly if we consider the influence of the CRPD on the ECtHR¹⁵⁵ and, in turn, the influence of the Strasbourg jurisprudence in interpreting the HRA at domestic level.¹⁵⁶

The transformative potential of the CRPD is one element within a wider process of shaping private law in general, and contract law in particular, under the influence of human rights.¹⁵⁷ Rather than having a direct influence on domestic law, the CRPD is more likely to be relied on to support a particular interpretation of rights under the ECHR,¹⁵⁸ including Article 14 ECHR (prohibition of discrimination), relied on in combination with provisions such as Article 8 ECHR (right to respect for private and family life) or Article 1 (protection of property) of the First Protocol to the ECHR.¹⁵⁹ Whilst more progress could have been achieved in bridging provisions such as Article 1 of the First Protocol to the ECHR with the interpretation of domestic statutes¹⁶⁰ and

¹⁵⁴ *AH v West London Mental Health Trust* [2011] UKUT 74, [16].

¹⁵⁵ *Glor* (n 151); *Kiss* (n 152).

¹⁵⁶ Human Rights Act 1998, ss 3(1) and 4. See Fraser Butlin (n 78), 430.

¹⁵⁷ See, for example, Equality Act 2010 (c. 15), Part 3 (Services and public functions), Sections 28–31.

¹⁵⁸ *AH* (n 154), [16]; *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [40]. See Canruh (n 153), 119.

¹⁵⁹ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Paris, 20 March 1952, Article 1. See Dan Friedmann and Daphne Barak-Erez ‘Introduction’ in Dan Friedmann and Daphne Barak-Erez (eds) *Human Rights in Private Law* (Oxford: Hart, 2001), 157.

¹⁶⁰ *Wilson v First County Trust* [2003] UKHL 40 (with reference to the Consumer Credit Act 1974 (c. 39)). See Roger Brownsword, ‘General Considerations’ in Michael Furmston (ed) *The Law of Contract: Butterworths Common Law Series* (6th edn, London: LexisNexis, 2017), 1.215.

common law doctrines¹⁶¹ in disputes between private parties, this continues to be a realistic endeavour, especially given that courts (as public authorities) must act in a manner compatible with Convention rights,¹⁶² including with regards to dispute between private parties.¹⁶³ However, this bridge is more likely to be built on the basis of an indirect influence of the ECHR (interpreted in light of the CRPD) and the HRA on private law,¹⁶⁴ as a ‘hidden catalyst for change’,¹⁶⁵ providing ‘an explicit tilt towards acceptance of human rights’.¹⁶⁶ A conduit for the influence of human rights on private law (even if indirect), can be provided by reliance on ‘public policy’,¹⁶⁷ which may

¹⁶¹ *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG (The DC Merwestone)* [2016] UKSC 45 (with reference to the common law doctrine of forfeiture). See François du Bois, ‘The Impact of Human Rights on English Contract Law’ in Luca Siliquini-Cinelli and Andrew Hutchison (eds) *The Constitutional Dimension of Contract Law* (New York: Springer, 2017), 19, 23-25.

¹⁶² Human Rights Act 1998, s 6(1).

¹⁶³ *Campbell v Mirror Group Newspapers* [2004] UKHL 22, [132].

¹⁶⁴ François du Bois, ‘Private Law in the Age of Rights’ in Daniel Visser and Elspeth Reid (eds) *Private Law and Human Rights in Scotland and South Africa* (Edinburgh: Edinburgh University Press, 2013), 25.

¹⁶⁵ Hugh Beale and Nicola Pittam, ‘The Impact of the Human Rights Act 1998 on English Tort and Contract Law’ in Dan Friedmann and Daphne Barak-Erez (eds) *Human Rights in Private Law* (Oxford: Hart, 2001), 159.

¹⁶⁶ Roger Brownsword, ‘Freedom of Contract, Human Rights and Human Dignity’ in Dan Friedmann and Daphne Barak-Erez (eds) *Human Rights in Private Law* (Oxford: Hart, 2001), 159.

¹⁶⁷ Aharon Barak, ‘Constitutional Human Rights and Private Law’ in Dan Friedmann and Daphne Barak-Erez (eds) *Human Rights in Private Law* (Oxford: Hart, 2001), 22. For a pre-HRA example of the operation of ‘public policy’, see *Horwood v Millar's Timber & Trading* [1917] 1 KB 305. See Roger Brownsword, *Contract Law: Themes for the Twenty-First Century* (Oxford: Oxford University Press, 2006), 256.

limit freedom of contract in the event of grossly imbalanced agreements,¹⁶⁸ and which may include transactions incompatible with Convention rights.¹⁶⁹

The influence of the CRPD (even via the indirect route provided by the ECHR and the HRA), could challenge negative interpretations of freedom of contract (based on non-intervention) in favour of positive interpretations promoting the protection of human dignity.¹⁷⁰ Although there is no express reference to human dignity in the HRA or the ECHR,¹⁷¹ this concept is part of ‘the infrastructure on which the entire superstructure of human rights is constructed’,¹⁷² including the CRPD,¹⁷³ and has been recognised by the ECtHR to be ‘the very essence of the Convention’.¹⁷⁴ Human dignity is considered to be ‘the resource needed to intensify and broaden the impact’ of human rights in the contractual sphere,¹⁷⁵ although caution must be adopted when interpreting

¹⁶⁸ Waddams (n 137), 6.

¹⁶⁹ Brownsword (n 182), 1.232.

¹⁷⁰ Hugh Collins, ‘The Impact of Human Rights Law on Contract Law in Europe’ Cambridge Legal Studies Research Paper 13/2011.

¹⁷¹ Cf. *European Social Charter (Revised)*, 3 May 1996, ETS No.163, preamble and Article 26; *Convention on Human Rights and Biomedicine*, 4 April 1997, ETS No.164, preamble and Article 1, which include express references to dignity. See Sarah Arduin, ‘Article 3: General Principles’ in Ilias Bantekas, Michael Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford: Oxford University Press, 2018), 3.1.

¹⁷² Brownsword (n 166), 188. See the Universal Declaration of Human Rights, GA Res 217A (III), 10 December 1948, A/810, preamble and Articles 1, 22, 23; International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 16 December 1966, preamble and Article 10; International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 16 December 1966, preamble and Article 13.

¹⁷³ CRPD, preamble (a), (h), (y) and Articles 1, 3(a), 8(1)(a), 16(4), 24(1)(a), 25(d).

¹⁷⁴ *Pretty v The United Kingdom* (Application No. 2346/02), 29 April 2002, [65]. See Arduin (n 171), 3.1.

¹⁷⁵ Brownsword (n 166), 188.

this concept (whether as empowering parties to exercise individual autonomy, or constraining such exercise on the basis of wider social values).¹⁷⁶ Yet, both of these interpretations of human dignity can be accommodated within a vision of contract law based on two concentric spheres, as the empowerment dimension of this concept is manifested in the inner, economic sphere, while its constraint role is relevant in the outer, social sphere. The CRPD provides us with a benchmark to understand autonomy not only as individual, but also as relational, challenging narrow conceptions focused on the pursuit of self-interest in favour of broad interpretations focused on inter-dependence between human beings and the provision of support.¹⁷⁷

English contract law and the CRPD have much to learn from each other on how to address the barriers they encounter in completing the bridges that link economic and social values. English contract law has much to teach the CRPD Committee, including the importance of recognising the power of contract law in shaping how we treat each other.¹⁷⁸ Lessons that English contract law can learn from the CRPD include the fact that social values (such as relational autonomy and human dignity) rank higher than economic concerns (rooted in individualistic perspectives of autonomy). The task to complete the bridges would not be overwhelming. It would not involve a new construction, but building on work already begun (such as ‘the fall’ of negative interpretations of freedom of contract documented by Atiyah decades ago,¹⁷⁹ or the

¹⁷⁶ *ibid*, 183-184; Roger Brownsword, ‘Developing a Modern Understanding of Human Dignity’ in Dieter Grimm, Alexandra Kemmerer, Christoph Mollers (eds), *Human Dignity in Context* (Baden-Baden: Nomos, 2018), 302.

¹⁷⁷ Dhanda (n 10).

¹⁷⁸ Chen-Wishart (n 34).

¹⁷⁹ Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford; Clarendon Press, 1979).

more recent pursuit of fairness values in the Consumer Rights Act 2015).¹⁸⁰ It would require express recognition in English contract law that substantive fairness does matter and an articulation from the CRPD Committee that dignity considerations rank higher than negative interpretations of freedom of contract. Most importantly, the completion of the bridges would require courage.

One path towards succeeding in this endeavour is by embracing the idea of complementarity in contract law. Starting from the premise that a scientific way of thinking can provide us with analogies to address challenges that exist outside the scientific domain, the concept of complementarity enables us to accept the coexistence of ideas that may appear, initially, to be mutually exclusive.¹⁸¹ Just as an electron can behave both as a particle and as a wave,¹⁸² accepting that ‘neither of these descriptions are absolutely right or absolutely wrong’,¹⁸³ we can transpose this concept of complementarity to ideas such as individual and collective rights, accepting that we cannot make one absolute and the other relative,¹⁸⁴ and that we need to acknowledge their coexistence to gain a richer understanding of society.¹⁸⁵

This approach would enable us to see economic and social values in contract law not as antagonistic, but as complementary parts of interconnected spheres of contract law (in the first bridge). It would also allow us to see the role of contract law as being

¹⁸⁰ Consumer Rights Act 2015, Part 2 (Unfair terms).

¹⁸¹ Robert Oppenheimer, ‘Science and the Common Understanding’, The Reith Lectures, BBC Radio 4, 1953; Brian Cox, ‘Robert Oppenheimer’, Reith Revisited, BBC Radio 4, 27 September 2017.

¹⁸² *ibid.* See Niels Bohr, *Atomic Theory and the Description of Nature* (Cambridge: Cambridge University Press, 1934).

¹⁸³ Cox (n 181).

¹⁸⁴ Oppenheimer (n 181).

¹⁸⁵ Cox (n 181).

both about the enforcement of agreements and the protection of contracting parties, including via regulatory means¹⁸⁶ (in the second bridge), with the former focusing on the inner, economic sphere of contract law, and the latter being concerned with the outer, social sphere. Embracing complementarity in contract law would also enable us to see that the concept of human dignity can pursue both empowerment and enforcement objectives¹⁸⁷ (in the third bridge), depending on whether the focus is on the inner or outer spheres of contract law. Crucial in this endeavour is the recognition of the outer, social sphere of contract law, without which we are left facing ‘choppy waters’,¹⁸⁸ with no immediate bridge in sight.

4. Conclusion

This article proposes a model for bridging the economic and social realms of contract law. Starting with a vision of two concentric spheres, the discussion perceives the economic realm as an inner sphere rooted in a non-interventionist approach and on values such as freedom and sanctity of contract, which can accommodate imbalanced transactions, as long as these are entered into by parties exercising their free will, unhindered by vitiating factors. Grossly imbalanced transactions (such as a sale at a significant undervalue or a purchase at an excessively high price, combined with A’s vulnerability and the absence of independent advice) would, however, step outside this inner sphere into the social realm which takes the form of the outer sphere of contractual relations. Rather than focusing solely on the horizontal axis of contractual

¹⁸⁶ Brownsword (n 167), 41

¹⁸⁷ *ibid*, 183.

¹⁸⁸ *ibid*, 199 (with reference to conflicting interpretation of human dignity: ‘if the Human Rights Act ushers in a debate about human dignity and freedom of contract, then we can expect to run into some extremely choppy waters’).

relations between private parties, this sphere engages the vertical axis that governs the relation between individuals and the state. In such circumstances, we need to move beyond a non-interventionist understanding of freedom of contract and consider factors such as the substantive fairness of the transaction and the need for intervention based not just on economic concerns (eg A's significant financial loss) but also social considerations (such as safeguarding A's human dignity). In this vision, the contractual relations between the parties (A and B) is perceived as a lever on a balance scale, with the parties at each end of the scale, and the state in the middle, as a fulcrum. A's weak bargaining position (due, *inter alia*, to gross information asymmetry between the parties) and B's unacceptable conduct (such as going ahead with the contract despite having actual or constructive knowledge of A's weakness) could be perceived as a weight pressing A down into a danger zone of gross imbalance, warranting intervention. Any assessment of whether A is in this danger zone should include social considerations, such as environmental barriers elicited by inaccessible information, and should adopt a wide interpretation of constructive knowledge when looking at B's unacceptable conduct. The contract should be allowed to stand if B can prove that A has been lifted out of this danger zone by a counterweight, assessed by looking at the actions taken by B to redress this imbalance. A could be lifted out of this danger zone only by responding to both economic concerns affecting A (eg did A receive independent legal advice about protecting his interests) and to social considerations (eg was the advice accessible and did it take into account A's position as a social actor and the need to protect his human dignity). While this approach should be supplemented by other measures outside contract law (eg measures to address structural inequalities, such as accessibility barriers faced by people with disabilities in society), this vision

reinforces the fact that contract law has a role to play in the endeavour of bridging social and economic concerns.

Bridges have always been powerful symbols of connectivity, courage and imagination, whether we are evoking with our mind's eye the poignancy of Dickinson's '*I stepped from plank to plank*',¹⁸⁹ or Turner's unfinished canvas *The Thames above Waterloo Bridge*.¹⁹⁰ In the contractual sphere, aging population trends and the consequential increase in the number of people with mental health conditions such as dementia, entering into grossly asymmetrical contracts,¹⁹¹ have reinforced the need for an approach that 'humanises' private law, bridging economic and social values, to respond to these challenges.¹⁹² Rather than a single construction, this may require a network of bridges focused on private law principles (the first bridge), regulation (the second bridge), and the connection between constitutional values and private law, linking the CRPD, the ECHR, the HRA and English contract law (the third bridge). Recognising the outer social sphere of contract law, rooted in the value of human dignity, can act as a keystone holding these constructions together. Contract law can be seen as being concerned with both economic and social values, with both enforcing transactions and protecting vulnerable parties,¹⁹³ and with both individual and relational autonomy. The vision of contract law put forward in this article, based on concentric economic and social spheres, aims to show how these values can be bridged, embracing the idea of complementarity in contract law.¹⁹⁴

¹⁸⁹ Emily Dickinson, 'CXXXVI', *Complete Poems* (Boston: Little, Brown and Co, 1924).

¹⁹⁰ Joseph Turner, *The Thames above Waterloo Bridge*, c. 1830–5 painting, Tate, London.

¹⁹¹ Alzheimer's Society, *Dementia UK: Update*, 2014.

¹⁹² Du Bois (n 167), 35.

¹⁹³ Brownsword (n 167), 41.

¹⁹⁴ Oppenheimer (n 181).

Declaration of interest statement:

There is no potential conflict of interest to report.

References:

AH v West London Mental Health Trust [2011] UKUT 74.

Alajos Kiss v Hungary (Application No. 38832/06), 20 May 2010.

Alec Lobb v Total Oil [1985] 1 WLR 173.

Allcard v Skinner (1887) 36 ChD 145.

Backhouse v Backhouse [1978] 1 WLR 243.

Barclays Bank v O'Brien [1994] 1 AC 180.

Boustany v Pigott (1995) 69 P & CR 298.

Bullock v Lloyds Bank [1955] Ch 317.

Campbell v Mirror Group Newspapers [2004] UKHL 22.

Cheese v Thomas [1994] 1 WLR 129.

CIBC Mortgages v Pitt [1994] 1 AC 200.

Commercial Bank of Australia v Amadio (1983) 151 CLR 447 (HCA).

Credit Lyonnais v Burch [1997] CLC 95.

Cresswell v Potter [1978] 1 WLR 255.

Dunhill v Burgin [2014] UKSC 18.

Earl of Aylesford v Morris (1872-73) LR 8 Ch App 484.

Fineland Investments v Pritchard [2011] EWHC 113.

Fry v Lane (1888) 40 ChD 312.

Glor v Switzerland (Application No. 13444/04), 30 April 2009.

Hackett v Crown Prosecution Service [2011] EWHC 1170.

Hainsworth v Ministry of Defence [2014] EWCA Civ 763.

Hammond v Osborn [2002] EWCA Civ 885.

Hart v O'Connor [1985] AC 1000.

Horwood v Millar's Timber & Trading [1917] 1 KB 305.

Huguenin v Baseley (1807) 14 Ves Jr 273.

Imperial Loan v Stone [1892] 1 QB 599.

Inche Noriah v Shaik Allie bin Omar [1929] AC 127.

Lloyds Bank v Bundy [1975] QB 326.

Mahoney v Purnell [1996] 3 All ER 61.

Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47.

Morley v Loughnan [1893] 1 Ch. 736.

Nyusti and Takács v Hungary, CRPD/C/9/D/1/2010.

O'Sullivan v Management Agency and Music [1985] QB 428.

Pesticcio v Huet [2004] EWCA Civ 372.

Pretty v The United Kingdom (Application no. 2346/02), 29 April 2002.

R. (on the application of Ghulam) v Secretary of State for the Home Department [2016] EWHC 2639.

R (on the application of MA) v Secretary of State for Work and Pensions [2013] EWHC 2213.

R (on the application of NM) v Islington LBC [2012] EWHC 414.

Re Beany [1978] 1 WLR 770.

Royal Bank of Scotland Plc v Etridge (No.2) [2001] UKHL 44.

Tate v Williamson (1866-67) LR 2 Ch App 55.

Versloot Dredging BV v HDI Gerling Industrie Versicherung AG (The DC Merwestone) [2016] UKSC 45.

Wilson v First County Trust [2003] UKHL 40.

Wright v Carter [1903] 1 Ch 27.

Zamet v Hyman [1961] 1 W.L.R. 1442.

Consumer Rights Act 2015 (c. 15).

Convention on Human Rights and Biomedicine, 4 April 1997, ETS No.164.

Equality Act 2010 (c. 15).

European Convention for the Protection of Fundamental Rights and Freedoms, 4 November 1950, ETS No.005.

European Social Charter (Revised), 3 May 1996, ETS No.163.

Human Rights Act 1998 (c. 42).

International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 16 December 1966.

International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 16 December 1966.

Mental Capacity Act 2005 (c. 9).

Supreme Court of Judicature Act 1873 (c. 53).

UN Convention on the Elimination of all Forms of Discrimination against Women, GA Res 34/180, 18 December 1979, A/34/46, 1249 UNTS 13.

UN Convention on the Rights of Persons with Disabilities, GA Res 61/611, 13 December 2006, A/61/611, 15 IHRR 255.

Universal Declaration of Human Rights, GA Res 217A (III), 10 December 1948, A/810.

Adams, John and Roger Brownsword, *Understanding Contract Law* (London: Sweet & Maxwell, 5th ed, 2007).

Arduin, Sarah, 'Article 3: General Principles' in Ilias Bantekas, Michael Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford: Oxford University Press, 2018).

Atiyah, Patrick, 'Contract and Fair Exchange' (1985) 35 *University of Toronto Law Journal* 1.

Atiyah, Patrick, *The Rise and Fall of Freedom of Contract* (Oxford; Clarendon Press, 1979).

Bach, Michael, 'The Right to Legal Capacity under the UN Convention on the Rights of Persons with Disabilities: Key Concepts and Directions for Law Reform', Toronto (IRIS 2009).

Banerjee, Debanjan and Mayank Rai, 'Social Isolation in Covid-19: The Impact of Loneliness' (2020) *International Journal of Social Psychiatry* 1.

Barak, Aharon, 'Constitutional Human Rights and Private Law' in Dan Friedmann and Daphne Barak-Erez (eds) *Human Rights in Private Law* (Oxford: Hart, 2001).

Bartlett, Peter, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75 *Modern Law Review* 752.

Beale, Hugh, 'Duress and Undue Influence' in Hugh Beale and others (eds), *Chitty on Contracts* (London: Sweet and Maxwell, 33rd ed, 2018).

Beale, Hugh and Nicola Pittam, 'The Impact of the Human Rights Act 1998 on English Tort and Contract Law' in Dan Friedmann and Daphne Barak-Erez (eds) *Human Rights in Private Law* (Oxford: Hart, 2001).

Benson, Peter, 'The Unity of Contract Law' in Peter Benson (ed), *The Theory of Contract Law: New Essays* (Cambridge: Cambridge University Press, 2008).

Bigwood, Rick, 'Contracts by Unfair Advantage: From Exploitation to Transactional Neglect' (2005) 25 *Oxford Journal of Legal Studies* 65.

Bigwood, Rick, 'Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?' (1995) 16 *Oxford Journal of Legal Studies* 503.

Birks, Peter and Chin Nyuk Yin, 'On the Nature of Undue Influence' in Jack Beatson and Daniel Friedman (ed), *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1997).

Bridge, Michael (ed), *Benjamin's Sale of Goods* (10th edn, London: Sweet & Maxwell, 2019).

Brownsword, Roger, 'Freedom of Contract, Human Rights and Human Dignity' in Dan Friedmann and Daphne Barak-Erez (eds) *Human Rights in Private Law* (Oxford: Hart, 2001).

Brownsword, Roger, *Contract Law: Themes for the Twenty-First Century* (Oxford: Oxford University Press, 2006).

Brownsword, Roger, 'General Considerations' in Michael Furmston (ed) *The Law of Contract: Butterworths Common Law Series* (6th edn, London: LexisNexis, 2017).

Brownsword, Roger, 'Developing a Modern Understanding of Human Dignity' in Dieter Grimm, Alexandra Kemmerer, Christoph Mollers (eds), *Human Dignity in Context* (Baden-Baden: Nomos, 2018).

Burns, Fiona, 'The Elderly and Undue Influence Inter Vivos' (2003) 23 *Legal Studies* 251.

- Canruh, Deniz, 'Use of the UNCRPD in Social Security cases before UK Courts and Tribunals' (2019) 26 *Journal of Social Security Law* 112.
- Chen-Wishart, Mindy, 'Undue Influence: Vindicating Relationships of Influence' (2006) 59 *Current Legal Problems* 321.
- Collins, Hugh, 'The Impact of Human Rights Law on Contract Law in Europe' Cambridge Legal Studies Research Paper 13/2011.
- Collins, Hugh, *The Law of Contract* (Oxford: Oxford University Press, 4th ed, 2003).
- Cox, Brian, 'Robert Oppenheimer', Reith Revisited, BBC Radio 4, 27 September 2017
- CRPD Committee, General Comment No. 1: Article 12 (Equal Recognition before the Law), 19 May 2014, UN Doc. CRPD/C/GC/1.
- Dhanda, Amita, 'Constructing a New Human Rights Lexicon: Convention on the Rights of Persons with Disabilities' (2008) 5 *Sur: International Journal of Human Rights* 43.
- Dixon, Jeremy, Judy Laing and Christine Valentine, 'A Human Rights Approach to Advocacy for People with Dementia: A Review of Current Provision in England and Wales' (2018) *Dementia* 1.
- Du Bois, François, 'Private Law in the Age of Rights' in Daniel Visser and Elspeth Reid (eds) *Private Law and Human Rights in Scotland and South Africa* (Edinburgh: Edinburgh University Press, 2013).
- Du Bois, François, 'The Impact of Human Rights on English Contract Law' in Luca Siliquini-Cinelli and Andrew Hutchison (eds) *The Constitutional Dimension of Contract Law* (New York: Springer, 2017).
- Fraser Butlin, Sarah, 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments?' (2011) 40 *Industrial Law Journal* 428.
- Friedmann, Dan and Daphne Barak-Erez 'Introduction' in Dan Friedmann and Daphne Barak-Erez (eds) *Human Rights in Private Law* (Oxford: Hart, 2001).

Herring, Jonathan, *Vulnerable Adults and the Law* (Oxford: Oxford University Press, 2016).

Hurst, Rachel, 'Disabled People's Organisations and Development: Strategies for Change' in Emma Stone (ed.) *Disability and Development: Learning from Action and Research on Disability in the Majority World* (Leeds: Disability Press 1999).

MacKay, Don, 'The United Nations Convention on the Rights of Person with Disabilities' (2007) 34 *Syracuse Journal of International Law and Commerce* 323.

Marshall, Thomas Humphrey, *Citizenship and Social Class, and Other Essays* (Cambridge: Cambridge University Press, 1950).

Martin Wayne and others, 'Achieving CRPD Compliance. Is the Mental Capacity Act of England and Wales Compatible with the UN Convention on the Rights of Persons with Disabilities? If Not, What Next? An Essex Autonomy Project Position Paper', Report submitted to the UK Ministry of Justice, 22 September 2014.

Millett, Peter, 'Equity's Place in the Law of Commerce', (1998) 114 *Law Quarterly Review* 214.

Morgan, Jonathan, *Great Debates in Contract Law* (Basingstoke: Palgrave, 2nd ed, 2015).

O'Brien, Eimear, 'Are you treating your Vulnerable Customers Fairly?' (2017) 6 *Compliance & Risk* 10.

Oliver, Michael, *The Politics of Disablement* (Basingstoke: Palgrave Macmillan, 1990).

Oppenheimer, Robert, 'Science and the Common Understanding', The Reith Lectures, BBC Radio 4, 1953.

Peel, Edwin, *Treitel on the Law of Contract* (London: Sweet and Maxwell, 14th ed, 2015).

Quinn, Gerard, 'Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD' (HPOD Conference, Harvard, 2010).

Series, Lucy, 'Relationships, Autonomy and Legal Capacity: Mental Capacity and Support Paradigms' (2015) 40 *International Journal of Law and Psychiatry* 80.

Shiffrin, Seana, 'Paternalism, Unconscionability Doctrine and Accommodation' (2000) 29 *Philosophy and Public Affairs* 205.

Spark, Gareth, *Vitiating of Contracts: International Contractual Principles and English Law* (Cambridge: Cambridge University Press, 2013).

Teubner, Gunther, 'Contracting Worlds: The Many Autonomies of Private Law' (2000) 9 *Social and Legal Studies* 399.

Trebilcock, Michael and Steven Elliott, 'The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements' in Peter Benson (ed), *The Theory of Contract Law: New Essays* (Cambridge: Cambridge University Press, 2001).

Waddams, Stephen, *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment* (Cambridge: Cambridge University Press, 2019).

Whittaker, Simon, 'Personal Incapacity' in Hugh Beale and others (eds), *Chitty on Contracts* (London: Sweet and Maxwell, 33rd ed, 2018).

Word count:

11,354 (including footnotes but excluding references).