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**Beyond Negative Interpretations of Freedom of Contract:**

**The Interplay between Private Law and Human Rights**

**in Light of the UN *Convention on the Rights of Persons with Disabilities***

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*How should the concept of ‘freedom of contract’ be understood in a way that is compatible with the UN Convention on the Rights of Persons with Disabilities (CRPD)? With a focus on English contract law, this discussion challenges negative interpretations of freedom of contract confined to non-intervention by the state and limited to a narrow perception of the public as economic actors in pursuit of self-interest, in favour of positive interpretations which embrace wider social values such as equality and dignity.*

**Introduction**

When, almost a decade ago, the UN Committee on the Rights of Persons with Disabilities (CRPD Committee) reached their decision in *Nyusti v Hungary* (*Nyusti*),[[2]](#footnote-2) they confirmed that the human rights of persons with disabilities to enjoy equal access to services (such as financial services) prevail over the claims of private parties (in this case, a bank), endorsed by the state (Hungary) to resist ‘interference with freedom of contract’.[[3]](#footnote-3) The latter had relied on the problematic view that any requirement to make their automatic teller machines (ATMs) accessible to persons with visual disabilities constituted an infringement of their freedom of contract, and that their customers with visual disabilities, who could not access these services, knew what they agreed to when they entered into the contract with the bank.[[4]](#footnote-4) Despite the merits of the decision in *Nyusti*, which found Hungary to be in breach of their obligations under the UN *Convention on the Rights of Persons with Disabilities* (CRPD)[[5]](#footnote-5) to ensure, *inter alia*, that private parties providing services to the public ‘take into account all aspects of accessibility for persons with disabilities’,[[6]](#footnote-6) the CRPD Committee failed to engage with the wider question of the interplay between human rights and private law, or to challenge such negative interpretations of freedom of contract.

This paper aims to pick up what the CRPD Committee left unaddressed in *Nyusti* and subsequent decisions,[[7]](#footnote-7) as barriers encountered by persons with disabilities in accessing financial services remain prevalent[[8]](#footnote-8) and are likely to increase, given the rise in the number of people with disabilities (including people developing mental health conditions such as dementia).[[9]](#footnote-9) The discussion challenges negative interpretations of freedom of contract confined to non-intervention by the state and limited to a narrow perception of the public as economic actors in pursuit of self-interest, in favour of positive interpretations of this foundational concept which embrace wider social values such as equality and dignity. Part one explores implicit key messages within the framework of the CRPD about the rights of persons with disabilities to equality in the contractual sphere. Aspects of this include: the need to perceive individuals entering the contractual realm as citizens, rather than just consumers, and recognising the primacy of their social values over the economic concerns of market players. Part two assesses whether English contract law meets these implicit benchmarks, assessing the extent to which substantive fairness considerations justify interference with freedom of contract on the basis of vitiating factors such as incapacity, undue influence and unconscionability.

**I. The CRPD: A Benchmark for a Positive Interpretation of Freedom of Contract?**

People with disabilities encounter a wide range of barriers in the contractual sphere, including inaccessible environments, facilities and information, as well as negative attitudes from service providers,[[10]](#footnote-10) as illustrated by the problematic attitude of the private Hungarian bank in *Nyusti.*[[11]](#footnote-11) In seeking to justify its refusal to provide accessible ATMs and enable its customers with visual disabilities to use these facilities independently, the bank stressed that independent use of ATMs would increase banking security risks for these customers, ‘due to their special situation’,[[12]](#footnote-12) reflecting a paternalistic perception of people with disabilities as objects of care, rather than as subjects of rights.[[13]](#footnote-13) Overlooking the security risks faced by anyone who has to rely on others to access their bank account[[14]](#footnote-14) and the infringement on human dignity associated with inaccessible services,[[15]](#footnote-15) the bank insisted that the availability of accessible ATMs would motivate people with visual disabilities to use these facilities ‘without help’, endangering their ‘personal safety’.[[16]](#footnote-16) The bank also approached the issue of equal access to financial services from a solely economic perspective focused on the cost of inclusion (rather than the wider social costs of exclusion),[[17]](#footnote-17) insisting that the provision of accessible ATMs would impose on it ‘an unexpected financial burden’.[[18]](#footnote-18) The bank’s approach was also problematic in their interpretation of freedom of contract based on a negative, non-interventionist approach (rather than a positive approach that justifies intervention to protect social values such as equality and dignity),[[19]](#footnote-19) as it stressed that an obligation to provide accessible services would amount to interference into the parties’ contractual relations and infringe their freedom of contract.[[20]](#footnote-20) Perhaps even more concerning is the positive reception of these arguments in Hungary’s highest courts, as both the Court of Appeal and the Supreme Court agreed with the cost-based vision of accessibility and negative interpretation of freedom of contract put forward by the bank.[[21]](#footnote-21) This position was ultimately challenged before CRPD Committee, which, in a judgement that engaged more with accessibility arguments than with the issue of freedom of contract, found Hungary to be in breach of its obligations to ensure that private entities offering facilities and services open to the public consider all accessibility aspects for persons with disabilities.[[22]](#footnote-22)

*Nyusti* is not an isolated incident. People in several jurisdictions continue to experience barriers in the contractual sphere, due to the failure of service providers to accommodate sensory, mobility and cognitive disabilities, and the ineffectiveness of legal frameworks to address these failures. These barriers have a negative impact on the extent to which people with disabilities can exercise their right to full and equal enjoyment of all human rights and fundamental freedom,[[23]](#footnote-23) including the right to independent living,[[24]](#footnote-24) and to the protection of their human dignity.[[25]](#footnote-25) Service providers continue to use arguments similar to those put forward by the Hungarian bank in *Nyusti*, attempting to resist calls for equality on the basis of paternalistic perceptions of disability, cost-related considerations and negative interpretations of freedom of contract,[[26]](#footnote-26) while state actors appear to be more inclined to listen to industry voices than the views put forward by people with disabilities.[[27]](#footnote-27) This discussion focuses on challenging negative interpretations of freedom of contract and promoting a positive understanding of this concept based on the values promoted by the CRPD.

When examining the CRPD with the contractual sphere in mind, the Convention appears, at first instance, to be relatively silent. There is no equivalent provision to Article 15(2) of the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),[[28]](#footnote-28) which makes explicit reference to the equal right to conclude contracts and the equal right and equal opportunities to exercise legal capacity.[[29]](#footnote-29) While Article 12 CRPD reaffirms the equal right of persons with disabilities to recognition as persons before the law[[30]](#footnote-30) and to enjoy legal capacity ‘in all aspects of life’,[[31]](#footnote-31) there is no explicit call on States Parties to provide persons with disabilities with equal opportunities to exercise legal capacity. There is also no explicit reference to equality in the contractual sphere, although this is implicit in Article 12 CRPD,[[32]](#footnote-32) including in the call on States Parties to take all appropriate measures to ensure the equal right of persons with disabilities to ‘control their own financial affairs’ and ‘have equal access to bank loans, mortgages and other forms of financial credit’.[[33]](#footnote-33) The CRPD acknowledges that some persons with disabilities may require support in exercising legal capacity[[34]](#footnote-34) and that safeguards must be put in place to ensure that ‘measures relating to the exercise of legal capacity’ are, *inter alia*, free of undue influence,[[35]](#footnote-35) although the Convention is unclear on the extent to which the right to exercise legal capacity can be restricted (if at all) and on the link between the concepts of legal, mental and contractual capacity.[[36]](#footnote-36)

The guidance offered by the CRPD Committee on how to interpret the Convention in the contractual sphere is also limited. In its General Comment 1 on Article 12,[[37]](#footnote-37) other than two references to Article 15 CEDAW,[[38]](#footnote-38) the CRPD Committee refers only once to the equal right to exercise legal capacity by entering into contracts. This reference is part of its discussion of Article 12(3) CRPD on the provision support to exercise legal capacity.[[39]](#footnote-39) The Committee calls on public and private actors, including banks and other financial institutions, to provide information in accessible formats in order to enable persons with disabilities to perform legal acts required to conclude contracts,[[40]](#footnote-40) but provides no further guidance on how this should operate in practice. With regards to the concepts of legal and mental capacity, the Committee rightly distinguishes the concept of universal legal capacity (the ability to hold and exercise rights, duties)[[41]](#footnote-41) from mental capacity (the decision-making skills which may be influenced by external factors and vary from person to person).[[42]](#footnote-42) Yet, it insists that legal standing (to hold rights) and legal agency (to exercise rights) cannot be separated[[43]](#footnote-43) and adopts an absolute stance on mental capacity assessments based on functional tests focused on an individual’s ability to, *inter alia*, process information, finding these to be incompatible with Article 12 CRPD.[[44]](#footnote-44) The Committee also fails to consider the issue of contractual capacity involving a party who may act outside a framework of support to enter into a grossly imbalanced transaction to their detriment, whilst lacking the mental capacity to understand the consequences of the transaction. While the starting point should always be a presumption of contractual capacity and a focus on support to exercise capacity[[45]](#footnote-45) (e.g. accessible information, informal or formal support arrangements),[[46]](#footnote-46) the exercise of universal legal capacity could be facilitated by a legal framework where parties can rely, when appropriate, on defences such as contractual incapacity,[[47]](#footnote-47) but where disability and incapacity are never conceptually equated.[[48]](#footnote-48) If an intervention may amount to indirect discrimination on the basis of disability, this should be objectively justified only if it pursues a legitimate aim,[[49]](#footnote-49) such as to protect the dignity[[50]](#footnote-50) of a party (A) in a situation of financial risk,[[51]](#footnote-51) as a result of entering into a grossly asymmetrical contract while being in a vulnerable position (e.g. if their consent was affected by vitiating factors such as incapacity, unconscionability or undue influence), where the other party (B) decided to proceed with the transaction without ensuring that A received appropriate independent legal advice regarding the transaction, despite having (actual or constructive) knowledge of A’s condition.[[52]](#footnote-52) Intervention should also be permitted only on an objective basis that moves beyond A’s medical condition to include environmental factors such as the circumstances of the transaction (e.g. whether A entered into a grossly imbalanced contract in the absence of accessible independent advice) and only if it constitutes a reasonable means to achieve a legitimate aim.[[53]](#footnote-53) Regrettably, the CRPD Committee provided no guidance on how vitiating factors in contract law, such as incapacity, unconscionability and undue influence, could act as a safety net in such circumstances.

The jurisprudence of the CRPD Committee illustrates further missed opportunities to provide guidance on how concepts such as contractual capacity and freedom of contract should be interpreted in light of the Convention. Despite the merits of decision in *Nyusti*,[[54]](#footnote-54) which highlighted States Parties’ obligations to take ‘all appropriate measures’ to eliminate discrimination on the basis of disability by private parties such as banks[[55]](#footnote-55) and ensure that such private parties offering services to the public ‘take into account all aspects of accessibility’,[[56]](#footnote-56) the CRPD Committee failed to engage explicitly with the issue of freedom of contract or to challenge the negative interpretation of this concept put forward by the private bank and endorsed by the State to resist intervention in the pursuit of equality objectives. While the applicants in *Nyusti* did not provide sufficient justifications to enable the CRPD Committee to consider their claim under Article 12(5) CRPD (concerning the equal right of persons with disabilities to control their financial affairs),[[57]](#footnote-57) their ultimately successful claim under Article 9(2)(b) CRPD (concerning States Parties’ obligation to ensure that private bodies offering services to the public, consider all aspects of accessibility)[[58]](#footnote-58) should have provide the Committee with more scope to engage with the wider issue of asymmetrical power in contracts involving individuals and private entities such as banks. The Committee should have challenged a narrow, market individualist[[59]](#footnote-59) understanding of freedom of contract that assumes that parties are free to pursue their own interest in the contractual sphere, placing insufficient weight on the inequality of bargaining power illustrated in the asymmetrical relation between individuals and banks, and on the proliferation of standard form contracts based on a ‘take it or leave it basis’.[[60]](#footnote-60) The CRPD Committee should have also contested negative visions of freedom of contract based on non-intervention by the state, in favour of a positive understanding of this concept where intervention is permitted if required to pursue wider social values such as the protection of equality and dignity.

In the contractual sphere, the CRPD Committee’s decision in *Nyusti*[[61]](#footnote-61)is more significant for what can be read between the lines, rather than for what was stated explicitly. Implicit in this decision is the recognition that Convention rights permeate not just the public domain, but also the private sphere, affecting the contractual relationships between parties. The Committee endorsed, albeit implicitly, the perception that the applicants’ contractual relation with the bank was not confined to the economic sphere (and, therefore, should not be rooted on a non-interventionist stance), but was located within a wider, social sphere, where intervention may be justified in the pursuit of equality objectives. A further significant aspect of the CRPD Committee’s decision in *Nyusti*[[62]](#footnote-62)is the implicit recognition that in a process of balancing dignity and freedom of contract, the protection of human dignity is ranked as a higher value that justifies interference with freedom of contract. The decision also reflects the fact that concepts such as ‘freedom of contract’ do not operate in a vacuum but should, instead, be interpreted within a framework of social values that includes equality and dignity.

The framework of values advanced by the CRPD rests on a rights-based understanding of disability, moving away from a focus on the medical condition of individuals[[63]](#footnote-63) and building on the social model of disability, concerned with addressing the social barriers faced by persons with disabilities when accessing a particular context.[[64]](#footnote-64) In the contractual realm, barriers such as the unavailability of accessible information may lead to asymmetry in the parties’ bargaining positions,[[65]](#footnote-65) while barriers such as inaccessible services and facilities may produce isolation, dependence on others,[[66]](#footnote-66) or lack of confidence to approach service providers or to decline unwanted offers of services.[[67]](#footnote-67) The CRPD recognises the need to adapt society to accommodate the full spectrum of abilities,[[68]](#footnote-68) including in its general principles a call for accessibility,[[69]](#footnote-69) ‘full and effective participation and inclusion in society’[[70]](#footnote-70) and ‘respect for difference and acceptance of persons with disabilities as part of human diversity and humanity’.[[71]](#footnote-71) In addition, the States Parties’ general obligations under the Convention include a call to ‘take all appropriate measures to eliminate discrimination on the basis of disability’ by private enterprises,[[72]](#footnote-72) while the CRPD provisions on accessibility call on States Parties to ensure, *inter alia*, that such requirements are considered by private entities offering services to the public.[[73]](#footnote-73) These obligations contribute towards meeting the Convention’s overall purpose to promote ‘the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities’ and ‘respect for their inherent dignity’,[[74]](#footnote-74) reflecting a perception of persons with disabilities as citizens with full entitlements in society.[[75]](#footnote-75)

In meeting these objectives, an important role can be played by a vision of contract law that perceives people not only as economic actors in pursuit of self-interest, but also as participants in the wider social sphere,[[76]](#footnote-76) and which aims to protect citizenship values such as equality, dignity, autonomy and inclusion.[[77]](#footnote-77) Furthermore, the concept of autonomy should be interpreted broadly to include relational autonomy, recognising our inter-dependence.[[78]](#footnote-78) Based on this perspective, contract law is not confined to a unidimensional role to enable transactions in the economic realm but reflects a multidimensional role that permeates the economic and social spheres, as it facilitates transactions and connects people into mutual relations.[[79]](#footnote-79) In this vision, concepts such as freedom of contract should not be restricted to a narrow, negative interpretation concerned with resisting state intervention, and should, instead, be interpreted broadly to consider social values alongside economic concerns.

**II. English Contract Law: A Framework rooted on a Negative Interpretation of Freedom of Contract?**

The CRPD sparked the need to re-examine legal concepts, including freedom of contract, in light of the values pursued by the Convention.[[80]](#footnote-80) The United Kingdom ratified the CRPD in 2009 and, whilst this instrument has not been incorporated into national law and is of limited direct assistance in domestic courts,[[81]](#footnote-81) its relevance cannot be ignored. Through its ratification, the United Kingdom undertook that ‘wherever possible, its laws will conform to the norms and values’ enshrined in the Convention.[[82]](#footnote-82) This section emphasises that CRPD values could (and should) inform a positive interpretation of the concept of freedom of contract in English contract law.

Freedom of contract is a foundational concept of English contract law, emphasising that parties are free to choose whether to enter into a contract, who to contract with, and under which terms.[[83]](#footnote-83) However, this freedom is not absolute, and courts may decline to enforce contracts affected, *inter alia*, by vitiating factors such as incapacity, unconscionability or undue influence.[[84]](#footnote-84) This may be perceived as ‘interference’ with freedom of contract, leading to questions about the extent to which the state should be allowed to intervene. An interpretation of freedom of contract focused on negative liberty (defined as freedom from state control)[[85]](#footnote-85) would seek to resist such interference, limiting it to procedural factors (e.g. vitiation of consent) and unconcerned with substantive considerations (e.g. whether the parties entered into a grossly asymmetrical contract). This vision is not concerned with who the parties are (e.g. whether there is a gross imbalance in their bargaining power),[[86]](#footnote-86) and reflects a narrow conception of autonomy, perceiving the parties as economic actors in pursuit of their individual interests.[[87]](#footnote-87) An alternative vision of freedom of contract is to focus on positive values such as promoting respect for human dignity, where the state would refuse to enforce transactions that harm such values.[[88]](#footnote-88) This would reflect a broad, relational conception of autonomy, focused on the inter-dependence between human beings,[[89]](#footnote-89) where contract law facilitates transactions that connect people into mutual relations within a wider social sphere.[[90]](#footnote-90)

In English contract law, the prevalent vision appears to be a narrow understanding of freedom of contract, focused on limited intervention confined to procedural grounds and generally unconcerned with imbalance in the contracting parties’ bargaining power. This point will be illustrated with reference to the current legal framework on contractual incapacity (focused on the common law approach), undue influence and unconscionability. Whilst the discussion in the previous section focused on a case involving contracting parties affected by inaccessible services[[91]](#footnote-91) and the present section will look at cases where parties seek to avoid a contract affected by vitiating factors, the common thread of the discussion is the wider question whether the concept of ‘freedom of contract’ can be used to resist interventions in pursuit of substantive fairness and social objectives such as the protection of human dignity.

The doctrines of incapacity, undue influence and unconscionability have the potential to assist vulnerable contracting parties, including parties whose capacity to understand the implications of a transaction has been affected by mental health conditions such as dementia. Whilst English contract law starts from a *prima facie* presumption of contractual capacity for all adults, a party (A) may seek to set aside a contract on grounds of incapacity, with reference to the test under the Mental Capacity Act(MCA) 2005[[92]](#footnote-92) (for contracts for necessary goods and services),[[93]](#footnote-93) or the common law test (for all other contracts).[[94]](#footnote-94) Based on a time and issue specific approach, these tests consider that A lacked the mental capacity to enter into a contract if, at the time of the transaction, he was unable to make a decision for himself regarding the transaction, due to ‘an impairment of, or a disturbance in the functioning of the mind or brain’ (under the MCA 2005 test),[[95]](#footnote-95) or because he was ‘so insane’ that he ‘did not know what he was doing’ (under the common law test).[[96]](#footnote-96) If A is unable to rebut the *prima facie* presumption of contractual capacity under these tests, he may seek to render the transaction voidable by relying on the equitable doctrines of undue influence and unconscionability. This may be the case if his weakness has been exploited by the other contracting party (B) (in the case of unconscionability),[[97]](#footnote-97) or if A and B were in a relationship of trust and confidence and B took unfair advantage of his influence over A (in the case of undue influence).[[98]](#footnote-98) The latter doctrine may also have relevance in tripartite situations where A acts as surety for a debtor in support of the latter’s loan from a bank, and the bank had constructive notice of undue influence, as the surety and the debtor were in a non-commercial relation.[[99]](#footnote-99) The doctrines of unconscionability and undue influence have a role to play even where A’s *prima facie* presumption of contractual capacity can be rebutted under the MCA 2005 or the common law test, as contracts where A’s property is not under the court’s control,[[100]](#footnote-100) or where B had no knowledge of A’s mental incapacity,[[101]](#footnote-101) remain valid, unless they can be rendered voidable on the basis of vitiating factors such as undue influence or unconscionability.

The extent to which these doctrines can assist vulnerable contracting parties can, however, be affected negatively by a range of factors. Firstly, the scope of these doctrines can be confined by a narrow interpretation of their relevant triggers. If A seeks to rely on the incapacity defence for contracts governed by the common law (which are outside the control of the court[[102]](#footnote-102) and do not involve the purchase of necessary goods and services),[[103]](#footnote-103) A needs to show both his mental incapacity and B’s knowledge of his condition.[[104]](#footnote-104) This can be a very high threshold if courts interpret the knowledge requirement to be confined to actual knowledge, or if any acceptance of constructive knowledge in this definition[[105]](#footnote-105) is limited to situations where A’s incapacity is apparent,[[106]](#footnote-106) rather than where B ought to have known about A’s incapacity due to the circumstances of the transaction.[[107]](#footnote-107) Concerns regarding narrow triggers for intervention can be raised also with regards to the doctrines of undue influence and unconscionability. To rely on these doctrines, A needs to show both his vulnerability (e.g. mental impairment resulting from a medical condition, in the case of unconscionability,[[108]](#footnote-108) or impaired consent resulting from B’s pressure, in the case of undue influence)[[109]](#footnote-109) and B’s unacceptable conduct (e.g. overt persuasion or failure to protect from a relationship of influence and a transaction that calls for an explanation for undue influence,[[110]](#footnote-110) or exploitation of weakness, knowingly taking advantage of A to enter into a contract disadvantageous for A, in the case of unconscionability).[[111]](#footnote-111) In cases of unconscionability, a narrow focus on B’s unacceptable conduct confined to ‘deliberate’ exploitations of A’s weakness (rather than on B’s passive unacceptable conduct to proceed with the contract despite the circumstances of the transactions) would appear to allow B to ‘take advantage of [A]’s vulnerable state, short of actively manipulating’ A.[[112]](#footnote-112) Similar concerns could be raised in cases of undue influence, given questions whether the scope of this doctrine includes B’s passive unacceptable conduct to proceed with the transaction despite having knowledge of A’s vulnerability, and whether such knowledge is confined to actual knowledge.[[113]](#footnote-113)

Secondly, the current framework appears focused on limited intervention with the parties’ freedom of contract, confined to procedural grounds. For example, B could seek to resist challenges based on undue influence or unconscionability by stressing that A exercised his free will when entering into the contract[[114]](#footnote-114) (even where this is grossly imbalanced), after having received independent legal advice.[[115]](#footnote-115) This narrow approach is driven by concerns to uphold the security of transactions[[116]](#footnote-116) (making it harder for A to be released from their contractual obligations on the basis of vitiating factors), facilitate commercial convenience[[117]](#footnote-117) (enabling B to point to the independent legal advice received by A) and ensure certainty[[118]](#footnote-118) (as procedural factors appear to be easier to assess than substantive considerations). Nevertheless, this approach risks leaving vulnerable parties with insufficient protection of their economic interests (e.g. as a result of entering into a grossly imbalanced transaction, to their detriment) and social interests (e.g. due to the harm to their human dignity and the wider social implications of allowing such grossly imbalanced contracts with vulnerable parties to be enforceable). Furthermore, insufficient weight is placed on whether the independent legal advice was appropriate and accessible to A,[[119]](#footnote-119) and whether it addressed both economic and social considerations.

Thirdly, the current framework appears to be unconcerned with who the contracting parties are.[[120]](#footnote-120) It seeks to provide a ‘middle course’ that protects the interests of both parties,[[121]](#footnote-121) assuming that they approached the transaction from balanced bargaining positions.[[122]](#footnote-122) Once again, this provides insufficient protection to vulnerable contracting parties. In cases where A seeks to rely on the incapacity defence, the requirement to show B’s knowledge of incapacity as a condition for rendering the contract voidable may protect B’s interests but places insufficient weight on A’s lack of consent,[[123]](#footnote-123) resulting in an imbalanced approach.[[124]](#footnote-124) Similarly, in cases where A seeks to render a contract voidable on grounds of undue influence, any assumption of a balanced bargaining position distorts subsequent assessments of whether access to independent legal advice redressed this alleged balance. Furthermore, attempts to ‘balance’ the interests of parties such as individuals and banks overlook the gross asymmetry in these parties’ bargaining positions and access to resources.[[125]](#footnote-125) Moreover, such approaches neglect the structural inequalities that may affect the contracting parties[[126]](#footnote-126) and the social context within which the transactions take place.[[127]](#footnote-127)

Fourthly, this framework illustrates a narrow conception of autonomy, perceiving contracting parties solely as individuals in pursuit of their self-interests within the economic sphere. It appears to be unconcerned with issues of relational autonomy, which focus on the connection between the parties within a wider social context[[128]](#footnote-128) and on the values that should govern these parties’ relationships, including social values based on interdependence and mutuality.[[129]](#footnote-129) At the root of all these concerns is a narrow interpretation of freedom of contract, where the state can intervene only in narrowly defined circumstances shaped by procedural factors and where contract law has a unidimensional role limited to enforcing agreements.[[130]](#footnote-130) Intervention, when permitted as part of procedural mechanisms, is confined to the economic realm and is not understood to be transcending economic and social spheres. Such a framework overlooks the role of the state as a central pivot in enforcing (or refusing to enforce, where appropriate) the contractual relations between the parties.[[131]](#footnote-131)

There is, however, an alternative vision of freedom of contract and of the state’s role in the contractual sphere. This vision understands the role of contract law as multidimensional, transcending economic and social spheres,[[132]](#footnote-132) and resting on positive values such as the protection of human dignity.[[133]](#footnote-133) Rather than perceiving the protection of vulnerable contracting parties on grounds of incapacity, undue influence or unconscionability, as an ‘interference’ with freedom of contract due to procedural concerns, this could be understood as a circumstance where the state refuses to enforce grossly imbalanced contacts[[134]](#footnote-134) which have stepped out of an inner, non-interventionist sphere of contract law (concerned with economic values), into a wider sphere (shaped by social concerns). We need to start from the premise that we enter into the contractual realm as citizens (a concept to be understood broadly, based on values rather than nationality), with all the economic, political and social values that this concept entails.[[135]](#footnote-135) Consequently, the contractual realm cannot be seen solely as an economic realm. Given the reference in this discussion to the interplay between economic and social concerns in contractual relations, we need to focus on the economic and social dimensions of our contracting world.[[136]](#footnote-136) This contractual realm could be perceived as being based on two concentric spheres: an inner sphere rooted on economic values and an outer sphere shaped by social considerations. The inner economic sphere relies on a non-interventionist approach where parties are free to choose whether to contract, who to contract with and under which terms.[[137]](#footnote-137) Parties may enter into imbalanced transactions and be held to their bargains, provided that these constitute an exercise of their free will, unconstrained by vitiating factors such as incapacity, undue influence or unconscionability.[[138]](#footnote-138) There are, however, circumstances where the transaction steps out of this inner economic sphere into the outer social sphere of contract law. These could include grossly imbalanced contracts where A lacked the mental capacity to understand the transaction and B had knowledge of the incapacity[[139]](#footnote-139) (interpreted broadly to include constructive knowledge based circumstances),[[140]](#footnote-140) or where A entered into the transaction as a result of B’s undue influence[[141]](#footnote-141) or B’s exploitation of A’s weakness[[142]](#footnote-142) (interpreted broadly to include passive unacceptable conduct where B went ahead with the grossly asymmetrical contract despite having actual or constructive knowledge of A’s vulnerability).[[143]](#footnote-143) Such transactions would not be enforced not because the state ‘interfered’ with freedom of contract, but because these have stepped out from the inner economic sphere into the outer social sphere of contract, where the state does not give its agreement to enforce such contracts, due to their harm to values such as human dignity.[[144]](#footnote-144) Under this approach, the contractual relation between A and B could be visualised as a lever on a balance scale, with the parties at each end of the scale and the state can be envisaged in the middle, as the fulcrum. Factors such as incapacity, unconscionability or undue influence could be seen to act as a weight pressing A down into a danger zone of gross imbalance (bringing the transaction within the outer social sphere), and the state could refuse to enforce such a transaction[[145]](#footnote-145) unless B can point towards a counter-weight (such as the presence of appropriate and accessible independent legal advice that addresses both economic and social concerns) [[146]](#footnote-146) to redress any gross imbalance and lift A back into the non-interventionist economic sphere.

This vision would address the challenges highlighted previously with reference to a narrow interpretation of freedom of contract. Firstly, it would rely on a broad interpretation of the relevant triggers for incapacity, unconscionability, undue influence, to include B’s constructive knowledge of A’s incapacity or vulnerability based on the circumstances of the transaction and to also include B’s passive unacceptable conduct by going ahead with a grossly imbalanced transaction despite having such constructive knowledge. Secondly, as a factor for assessing whether B ought to have known about A’s mental incapacity or vulnerability, this framework could consider either procedural factors alone or a combination of substantive and procedural factors (e.g. a grossly imbalanced contract where A received no independent legal advice).[[147]](#footnote-147) Yet, this framework should not go as far as advocating intervention on the basis of substantive factors alone,[[148]](#footnote-148) as the scope of such an assessment would be too uncertain. Instead, concerns for the substantive fairness of the transaction could be seen as a trigger for raising procedural protections. Thirdly, this vision would show concern for who the contracting parties are (e.g. assessing whether any independent legal advice received was appropriate and accessible) and would not assume that parties started from a balanced position, as such assumptions tend to favour the stronger party.[[149]](#footnote-149) Fourthly, by focusing on the relation between the parties and the rules that should govern these relations within a wider social context,[[150]](#footnote-150) this framework would demonstrate concern with issues of relational autonomy, including values such as interdependence and mutuality.[[151]](#footnote-151) Finally, by adopting a broad, positive interpretation of freedom of contract that includes social values, this vision would recognise the inter-connected economic and social spheres of contract law[[152]](#footnote-152) and the contribution that private law can play in securing social objectives such as the protection of equality and human dignity.[[153]](#footnote-153)

**Conclusion**

Measures to protect a party’s dignity in the contractual framework (whether through equality provisions or through refusal to enforce transactions affected by vitiating factors such as incapacity, unconscionability and undue influence) should not be seen as ‘interference’ with freedom of contract. Instead, they should be seen as instances where the transaction between the parties stepped out of an inner, non-interventionist sphere, into a wider sphere of contract law informed by social considerations. As freedom of contract is not absolute, it is important that the boundaries of this concept are shaped by positive values such as the protection of equality and human dignity, reflecting a broad, relational conception of autonomy which recognises the inter-dependence between people and where contract law has a multi-dimensional role that permeates social and economic spheres. Under this approach, contract law is brought closer to the vision of equality advanced by the CRPD, informing our understanding of the correlation between abstract concepts and real people.

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