Access to Justice for People with Disabilities:
A Dispute System Design Approach

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Abstract

People with disabilities encounter pervasive obstacles across various domains of life, including systemic discrimination in education and employment, inaccessible built environments, inadequate health care services, social stigma, limited political representation, and persistent challenges in accessing justice, exercising legal capacity, and maintaining family integrity in child welfare proceedings. The research focuses on this problem of inaccessibility to justice, aiming to develop and provide access to justice in two disability-related socio-legal fields: legal capacity and child welfare. For this purpose, the research innovatively utilizes disability rights and dispute management theories to develop a "Disability-Rights-Based Dispute System Design", tackling material and practical obstacles to disabled people's access to justice.

The first article, "*Designing Access to Justice: A Disability-Rights-Based Dispute System*," [1] presents disabled people's inaccessibility to justice and outlines the suggested solution - the "Disability-Rights-Based Dispute System Design."

"Access to justice" highlights the discrepancy between the principle of equality before the law and the effective enjoyment of rights by individuals from different groups. Its primary contention is that unequal access to the legal system contradicts the principle of equal protection under the law and infringes upon the ability of individuals and groups to exercise their fundamental rights. Consequently, identifying and eliminating barriers obstructing access to the justice system are paramount in achieving equal participation and protection.

One particular group facing obstacles and distinct challenges in accessing justice is people with disabilities. Their discrimination and exclusion are characterized by stigma and social marginalization, pushing them to society's fringes and confining them to secluded institutions. Their exclusion is also manifested in the inaccessibility of places and services, which impedes their participation in private and public activities. The development of "disability rights" is a legal manifestation of the disability social movement, aiming to transform this reality.

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[1] Roni Rothler, *Designing Access to Justice: A Disability-Rights-Based Dispute System*, 29(1) HARV. NEGOT. L. REV. [forthcoming].

However, despite the widespread recognition of disability rights, people with disabilities continue encountering significant hurdles in fully realizing their rights. These obstacles include physical barriers, service inaccessibility, discriminatory conduct, and stigmatization. Remarkably, even within fields explicitly related to disabilities, such as social security benefits, torts, mental health-related issues, psychiatric medical treatment, child welfare, and legal capacity, there remains a dearth of implementation of disability rights principles. This reality portrays the fundamental difficulties of changing traditional legal systems to adhere to the changes entailed in human rights principles.

The research proposes a new approach to address this problem and enhance access to justice for people with disabilities, focusing primarily on *implementing* disability rights. For this purpose, the research suggests employing dispute management mechanisms and specifically adopting the analytical framework of dispute system design (DSD).

DSD seeks to develop and design comprehensive systems for addressing, preventing, and resolving recurring disputes. By adhering to DSD guidelines, designers are encouraged to establish or enhance systems based on six key components: goals, stakeholders, context and culture, process and structure, resources, and successfulness, accountability, and learning.

Building upon DSD's analytical and practical foundations and strong inclination to achieve justice, the research project proposes integrating disability rights principles - such as attention to structural barriers, historical inferiority, equality, universal design, accessibility, support, therapeutic content, interdependence, and disability culture - into DSD's analytical framework. This integration creates a "disability-rights-based DSD" (DR-DSD), which is particularly adequate for re-designing legal frameworks that substantially affect the lives of people with disabilities. Since its structure is founded on the rights they strive to realize and addresses the barriers they encounter, it promises to afford people with disabilities better access to justice.

The second article, "Access to Legal Capacity - A Disability-Rights-Based Design,"[2] is based on this theoretical framework and focuses on one of the pressing issues in the disability rights field: legal capacity. Legal capacity incorporates legal personhood and legal agency to engage in undertakings and transactions and make decisions regarding one's life. It also includes the right to receive the support needed to make those decisions. As such, it provides

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[2] Roni Rothler, *Access to Legal Capacity: A Disability-Rights-Based Design*, 40(1) OHIO ST. J. DISP. RES. (2024).

the infrastructure for other human rights. Nevertheless, legal capacity can be limited or denied based on a perceived lack of decision-making capacity and, consequently, the need to protect the individual or their surroundings using substitute decision-making mechanisms. Such proceedings aimed at the limitation of legal capacity are usually held regarding older people and people with disabilities, mainly intellectual, developmental, cognitive, and psychiatric disabilities. Disability-rights scholars have termed this limitation and denial of legal capacity "civil death", raising substantial concerns regarding their implications on access to justice.

These views and concerns have spurred global and national policy and legislation reforms, stressing the right to legal capacity, supplemented by the right to assistance to realize it. The reform portrays a paradigm shift of a new balance between autonomy and protection, emphasizing disabled people's right to make decisions. It is most prominently manifested in Article 12 of the International Convention on the Rights of Persons with Disabilities (CRPD). However, the reform has drawn substantial controversy regarding its correct application. A current debate focuses on the appropriate design of legal capacity policy, legislation, and tribunals according to the new autonomy-focused paradigm and the adequate tools to balance respecting the individual's will and preferences versus protecting them in the name of their best interests.

The research addresses these implementation problems of the new legal capacity ideals. Within it, I outline the design of the legal capacity policy, legislation, and tribunals, suggesting both general principles and specific structural reforms based on legal capacity ideals, their opposition, and the practical-ideological solution that lies within the DR-DSD framework as it applies specifically to the legal capacity field.

The third article, "Designing Child Welfare Dispute Systems: A Framework For Enhancing Parenthood Disability Rights,"[3] deals with another pressing issue in the lives of people with disabilities - parenthood and child welfare. Child welfare legal proceedings take place when the state intervenes in parent-child relationships, usually based on the children's neglect or abuse. Very similar to legal capacity, the protection-autonomy paradigm dominantly governs the proceedings. Recent research has suggested that the proceedings are often disability-related, based on the prevalence of parents with disabilities (predominantly intellectual and mental disabilities) that are involved in them. This prevalence is linked to the difficulties some parents with disabilities experience that affect their physical, intellectual,

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`[3] Roni Rothler, *Designing Child Welfare Dispute Systems: A Framework for Advancing Parenthood Disability Rights*, 24(2) CONN. PUB. INT. L.J. [forthcoming].

and mental parental capacities. This link between parents with disabilities and inadequate parental capacities is continuously challenged by research that focuses on the positive aspects of “disabled parenting” for both parents and children, as well as research that suggests that other factors (such as socio-economic situation, stigma, fear of asking for help, and lack of social and institutional support) and not the disability per se, are the direct predictors of child neglect.

Article 23 of CRPD addresses this issue, requiring state parties to ensure equality for people with disabilities in family and parenthood. Nevertheless, disability rights are not thoroughly discussed during child welfare socio-legal proceedings. Unlike legal capacity, which has undergone extensive legislation reform, as described above, the link between disability rights and child welfare socio-legal proceedings has not received enough attention and recognition.

The research addresses this issue and presents the main obstacles to addressing disability rights in child welfare proceedings: the first is the standard approach to parenthood as a personal functional task, ignoring its individual growth and relational elements and the systems that affect the child-parent relationship. The second is the adversarial approach to the proceedings, which places parents against their children. These obstacles are paramount when addressing the lack of disability rights implementation in the child welfare field.

Based on these understandings, the research offers to utilize the DR-DSD in child welfare systems and proceedings, addressing the implementation problem of disability rights, focusing on accessibility, interdependence, disability culture, and the importance of support systems. The DR-DSD analysis provides the platform for re-designing child welfare socio-legal proceedings, thoroughly considering disability rights issues while stressing the family’s wellbeing and advancing disabled people’s access to justice in this field. Crucially, the DR-DSD framework's preventive approach aims to proactively address potential conflicts and challenges, potentially reducing the need for judicial interventions and fostering more supportive environments for families navigating the child welfare system.

The three articles present an innovative and comprehensive framework for addressing the challenges faced by people with disabilities within socio-legal systems, thereby promoting their access to justice and full participation in society. They form a research corpus that develops gradually. The first article lays the theoretical and practical foundation of the "disability-rights-based dispute system design." The second and third articles apply and expand this framework in two specific areas - legal capacity and parenthood - demonstrating the potential and challenges in implementing this approach. Each article builds on the insights of its predecessor and deepens the understanding of how these principles can be applied in complex legal and social systems.

The research offers a significant contribution to disability rights and dispute management. It provides practical tools for redesigning systems, not only in the legal field but also in policy, legislation, legal education, and even the creation of new tribunals. Moreover, the proposed design is not limited to courts alone but refers to broader social, institutional, and legal systems.

Unlike standard approaches to law based on **response** to existing problems, the research proposes a **design** approach that seeks to advance accessibility. This approach also serves as an alternative to dispute management methods that focus primarily on relationships and achieving conflict management goals, as it offers a broader perspective on the role of law in promoting the rights of people with disabilities.

This body of work seeks to enhance access to justice for people with disabilities by offering practical, implementable frameworks that integrate disability rights principles into the design of legal and social systems. It advocates for a paradigm shift from medical and individual models of disability towards social and rights-based approaches, emphasizing the full participation and self-determination of people with disabilities. By addressing power imbalances and dismantling systemic barriers, these articles aim to develop more inclusive, equitable, and effective dispute management mechanisms that reflect the diverse needs and experiences of the disability community.

Beyond its immediate focus on disability rights, this research introduces a novel approach to system design that can universally enhance access to justice and improve dispute-resolution mechanisms across various legal and social domains. Therefore, it aims to create more inclusive, equitable, and effective justice systems for all.

The research opens up several avenues for future research. The first examines the model's application in additional areas related to the rights of people with disabilities, such as employment, housing, education, and other socio-legal fields. Another critical research direction stems from laying the groundwork for empirical studies examining the proposed model's effectiveness in practice.

INTRODUCTION

People with disabilities face persistent and systemic barriers to accessing justice,[1] including in exercising legal capacity and maintaining family integrity in child welfare proceedings. Despite significant advancements in disability rights legislation and policy, a substantial gap remains between the ideals of disability rights and their practical implementation in legal and social systems.[2] This dissertation examines these critical issues through three interconnected articles and proposes novel frameworks to address them.

At the heart of these challenges lies a fundamental disconnect between the ideals of disability rights and their practical implementation. The justice system, designed to be a bastion of equality, often presents insurmountable obstacles for people with disabilities. Physical barriers, communication challenges, and inaccessible procedures create a landscape where equal access remains more aspiration than reality. Traditional dispute resolution mechanisms frequently fail to accommodate the diverse needs of individuals with disabilities, inadvertently perpetuating exclusion under the guise of neutrality.[3]

The issue of legal capacity further illuminates the gap between legal rights and reality. Despite international recognition of the right to legal capacity, enshrined in the United Nations Convention on the Rights of Persons with Disabilities (CRPD),[4] many jurisdictions cling to outdated substituted decision-making models. These systems, rooted in paternalistic attitudes, strip individuals of their autonomy, making decisions *for* rather than *with* people with disabilities.[5] While promising, the transition to supported decision-making models has proven to be a complex journey fraught with implementation challenges.[6]

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[1] For comprehensive writing about the general notion of "access to justice," see Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181 (1978).

[2] Sagit Mor, *With Access and Justice for All*, 39 CARDOZO L. REV. 611 (2017).

[3] *Id.*

[4] United Nations Convention on the Rights of People with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 (CRPD).

[5] Anna Arstein-Kerslake & Eilionóir Flynn, *The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law*, 20(4) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 471 (2016).

[6] Robert Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8 (2012).

Perhaps nowhere is the impact of these systemic failures more poignant than in child welfare proceedings. Parents with disabilities face a heightened risk of losing their children, not due to proven inadequacy but often because of deeply ingrained biases and a lack of appropriate support.[7] Child welfare systems, operating on outdated assumptions about parental capacity, frequently fail to provide the accommodations and assistance that could preserve family unity.[8]

Underlying these specific issues is a broader problem of systemic bias and discrimination. Legal and social institutions, shaped by historical perspectives that view disability through a medical or individual lens, struggle to fully embrace the social model of disability, which posits that disability is not inherent to an individual's physical or mental condition but rather arises from societal barriers, prejudices, and environments that fail to accommodate human diversity, thus shifting the focus from "fixing" individuals to transforming society to be more inclusive and accessible for all.[9] This entrenched bias manifests in policies and practices that, perhaps well-intentioned, perpetuate discrimination and exclusion.[10]

The implementation gap between disability rights in theory and practice remains stubbornly wide. While laws and policies increasingly recognize the rights of people with disabilities, many institutions lack adequate mechanisms to translate these principles into tangible changes.[11] This gap is exacerbated by the continued marginalization of disabled voices in the very processes designed to address their needs. The principle of "Nothing About Us Without Us," a cornerstone of the disability rights movement,[12] remains more slogan than practice in many decision-making arenas.

This dissertation proposes a novel approach: the Disability-Rights-Based Dispute System Design (DR-DSD) to address these interconnected challenges. This framework seeks to weave disability rights principles directly into the fabric of legal and social systems. By reimagining how these systems are designed and operated, DR-

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[7] Jasmin E. Harris, *Legal Capacity at a Crossroad: Mental Disability and Family Law*, 57(1) FAM. CT. REV. 15 (2019).

[8] Robyn Powell, *Family Law, Parents with Disabilities, and the Americans with Disabilities Act*, 57(1) FAM. CT. REV. 37 (2019).

[9] MICHAEL J. OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE (1996).

[10] Roni Holler & Yael Ohayon, *Understanding Disability Policy Development: Integrating Social Policy Research with the Disability Studies Perspective*, SOCIAL POLICY & SOCIETY 1 (2022).

[11] Thomas F. Burke & Jeb Barnes, *Layering, Kludgeocracy and Disability Rights: The Limited Influence of the Social Model in American Disability Policy*, 17 SOCIAL POLICY AND SOCIETY 101 (2018)

[12] JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT (1998).

DSD offers a practical tool for bridging the chasm between disability rights ideals and their implementation.

This dissertation applies the innovative Disability-Rights-Based Dispute System Design (DR-DSD) framework to two critical areas where the rights of people with disabilities are often compromised: legal capacity and child welfare proceedings. Through a series of interconnected articles, I demonstrate how this approach can be adapted to address specific challenges in each domain while developing more inclusive, equitable, and effective mechanisms to uphold the rights and dignity of people with disabilities. The work builds progressively, offering novel frameworks to bridge the persistent gap between disability rights ideals and their practical implementation in legal and social systems.

The first article, "Designing Access to Justice: A Disability-Rights-Based Dispute System,"[13] introduces an innovative analytical framework called the "Disability-Rights-Based Dispute System Design" (DR-DSD). This framework aims to integrate disability rights principles into the design of dispute management systems to enhance access to justice for people with disabilities. The second article, "Access to Legal Capacity: A Disability-Rights-Based Design,"[14] applies this DR-DSD approach to legal capacity, proposing ways to realize better the right to legal capacity for people with disabilities. The third article, "Designing Child Welfare Dispute Systems: A Framework for Advancing Parenthood Disability Rights,"[15] extends the DR-DSD model to child welfare proceedings, focusing on upholding the rights of parents with disabilities.

These articles bridge theory and practice in implementing disability rights across critical legal and social domains, offering concrete strategies for redesigning systems and processes to be more responsive to the needs and rights of people with disabilities. While each article has a distinct focus, they are united in their pursuit of enhancing access to justice for people with disabilities through practical, implementable frameworks that integrate disability rights principles into the design of

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[13] Roni Rothler, *Designing Access to Justice: A Disability-Rights-Based Dispute System*, 29(1) HARV. NEGOT. L. REV. [forthcoming].

[14] Roni Rothler, *Access to Legal Capacity: A Disability-Rights-Based Design*, 40(1) OHIO ST. J. DISP. RES. (2025).

[15] Roni Rothler, *Designing Child Welfare Dispute Systems: A Framework for Advancing Parenthood Disability Rights*, 24(2) CONN. PUB. INT. L.J. [forthcoming].

legal and social systems. This body of work advocates for a paradigm shift from medical and individual models of disability towards social and rights-based approaches, emphasizing full participation and self-determination.[16] By addressing power imbalances and dismantling systemic barriers, these articles aim to develop more inclusive, equitable, and effective dispute-management mechanisms that reflect the diverse needs and experiences of the disabled community while offering universal principles that can benefit all dispute-management systems, regardless of their orientation to disability.[17]

In the following sections, I will overview each article's key concepts, arguments, and contributions and discuss how they interconnect to form a cohesive body of work to advance disability justice.

BACKGROUND, CONTEXT, AND A BRIEF OVERVIEW OF THE RESEARCH FIELDS

Before delving into the specifics of each article, it is essential to establish some critical contextual elements that underpin this body of work. The disability rights movement has made significant strides in recent decades, particularly with the advent of the social model of disability and the codification of disability rights in national and international law. The United Nations Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2006, marked a paradigm shift in approaching disability from a human rights perspective.[18]

However, a persistent gap remains between disability rights in theory and practice. People with disabilities continue to encounter pervasive obstacles across various domains of life, including systemic discrimination in education and employment, inaccessible built environments, inadequate health care services, social stigma, limited political representation, and persistent challenges in accessing justice,[19] including exercising their legal capacity[20] and maintaining family integrity in child

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[16] Theresia Degener, Disability in a Human Rights Context, 35(5) LAWS 1 (2016).

[17] Irving K. Zola, Toward the Necessary Universalizing of Disability Policy, 67 THE MILBANK QUARTERLY 401 (1989).

[18] ARLENE KANTER, THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS (2015).

[19] TOM SHAKESPEAR, DISABILITY RIGHTS AND WRONGS REVISITED (2014); EILIONÓIR FLYNN, DISABLED JUSTICE? ACCESS TO JUSTICE AND THE UN CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITIES (2015).

[20] Arstein-Kerslake & Flynn, *supra* note 5.

welfare proceedings.[21] These barriers stem from deeply entrenched social, cultural, and institutional biases, as well as systems and processes that were not designed with disability inclusion in mind.[22]

The articles in this dissertation seek to address this implementation gap by proposing practical frameworks for redesigning systems and processes to realize disability rights principles better. They draw on and synthesize insights from multiple disciplines, including disability studies, dispute management, family law, and social policy. The goal is to move beyond broad policy statements to develop concrete strategies for embedding disability rights into the fabric of legal and social institutions.

This work's fundamental premise is that enhancing access to justice for people with disabilities requires more than removing physical or communication barriers. It necessitates a fundamental rethinking of how systems are designed and operated. This includes examining power dynamics, challenging normative assumptions, and centering the voices and experiences of people with disabilities themselves.[23]

This dissertation proposes a novel approach to addressing these challenges through the Dispute System Design (DSD) lens. DSD emerged from the alternative dispute resolution movement (ADR), which strives to create institutional change in the court system by developing non-legal ways to resolve disputes. DSD is an analytical tool that involves designing processes to help organizations, institutions, states, or individuals better manage, prevent, or resolve a particular or continuous series of conflicts.[24] This dissertation leverages DSD's practical and analytical nature to address the implementation gap in disability rights. It proposes a Disability-Rights-Based Dispute System Design (DR-DSD) framework that integrates disability rights principles directly into the fabric of legal and social systems, offering a concrete mechanism to translate disability rights ideals into tangible, systemic changes.

With this context in mind, I will now provide an overview of each article, highlighting their key arguments, methodologies, and contributions to the field.

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[21] Powell, *supra* note 8.

[22] Oliver, *supra* note 9.

[23] Mor, *supra* note 2.

[24] LISA BLOMGREN AMSLER, JANET J. MARTINEZ & STEPHANIE E. SMITH, DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT (2020); NANCY H. ROGERS, ROBERT C. BORDONE, FRANK E. A. SANDER, & CRAIG A. MCEWEN, DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES (2013);

ARTICLE 1: DESIGNING ACCESS TO JUSTICE: A DISABILITY-RIGHTS-BASED DISPUTE SYSTEM

The first article in this dissertation introduces an innovative framework called the "Disability-Rights-Based Dispute System Design" (DR-DSD), which represents a significant advancement in efforts to enhance access to justice for people with disabilities. This approach builds upon the established field of Dispute System Design (DSD) by explicitly incorporating disability rights principles into the design process of dispute management systems.

The article begins by highlighting the persistent gap between the ideals of disability rights and their practical implementation in justice systems worldwide. Despite the adoption of international conventions like the UN Convention on the Rights of Persons with Disabilities (CRPD) and various national laws aimed at protecting the rights of people with disabilities, many continue to face significant barriers when attempting to access justice. These barriers are not merely physical or communicative but are often deeply embedded in legal systems' structures and processes.[25]

The DR-DSD framework seeks to address this shortcoming by placing disability rights at the center of the design process of disability-related systems. This approach recognizes that proper access to justice for people with disabilities requires more than surface-level accommodations; it necessitates a fundamental rethinking of how dispute management systems are conceptualized and structured.[26]

The article provides a detailed exploration of how disability rights principles can be integrated into each of the six primary components of Dispute System Design: goals, stakeholders, context and culture, process and structure, resources, and successfulness, accountability, and learning.[27] For each component, the article offers theoretical insights and practical strategies for implementation.

In discussing the 'goals' component, for instance, the article emphasizes the importance of explicitly including disability rights objectives in the overall aims of a dispute system. This might involve goals such as ensuring the full and equal

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[25] Kanter, *supra* note 18; Mor, *supra* note 2.
[26] Mor, *supra* note 2.
[27] For a detailed review of DSD's six elements, *see* Amsler et al., *supra* note 24.

participation of people with disabilities, promoting autonomy and self-determination, and challenging ableist assumptions embedded in legal processes.[28]

The 'stakeholders' component is given particular attention, with the article strongly advocating for the active involvement of people with disabilities in all stages of system design and implementation. This aligns with the disability rights principle of "Nothing About Us Without Us," recognizing that the lived experiences of people with disabilities are crucial in creating truly accessible and equitable systems.[29] Another highlighted aspect of 'stakeholders' is *interdependency* in the relations between people with disabilities, family members, and professionals.[30]

When addressing 'context and culture,' the article delves into the importance of understanding and challenging societal attitudes and institutional cultures that may perpetuate discrimination against people with disabilities.[31] It suggests strategies for promoting a rights-based understanding of disability through theories that depict people with disabilities as members of a unique group[32] holding distinct disability-culture aspects.[33]

The 'process and structure' component explores how dispute management processes can be designed to be inherently more accessible and inclusive. The article tackles four related subjects: accessibility,[34] universal design,[35] procedural justice,[36] and the structure of the justice system[37] as central elements of the DR-DSD.

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[28] Gerard Quinn & Anna Arstein-Kerslake, *Restoring the 'Human' in 'Human Rights: Personhood and Doctrinal Innovation in the UN Disability Convention*, *in* THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW 36 (Conor Gearty & Costas Douzinas, eds.); "Levelling the playing field" was suggested by Elizabeth Emens regarding disability rights and the need to accommodate society to promote equality in various fields: Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1310 (2009).

[29] Charlton, *supra* note 12.

[30] Eva Feder Kittay, *The Ethics of Care, Dependency and Disability*, 24(1) RATIO JURIS 49 (2011); Martha Fineman, *Cracking the Foundational Myths. Independence, Autonomy and Self-Sufficiency*, 8(1) Am. U. J. GENDER SOC. POL'Y & L. 13 (2000).

[31] Michael Ashley Stein et al., *Accommodating Every Body*, 81(2) U. CHI. L. REV. 689 (2014)

[32] Adi Goldiner, *Membership rights: The Individual Rights of Group Members*, 32(2) CAN. J.L. & JURIS. 343 (2019).

[33] John Swaine & Sally French, *Towards an Affirmation Model of Disability*, 15(4) DISABILITY & SOCIETY 569 (2000).

[34] Stein et al., *supra* note 31.

[35] MOLLY FOLLETTE STORY, JAMES L. MUELLER & RONALD L. MACE, THE UNIVERSAL DESIGN FILE: DESIGNING FOR PEOPLE OF ALL AGES AND ABILITIES (1998).

[36] Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42(1) LAW & SOC. INQUIRY 195 (2017).

[37] Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATING J. 49 (1994).

In discussing 'resources,' the article acknowledges the potential costs of creating more accessible systems but argues that these are necessary investments in justice rather than optional extras.[38] It explores various funding models and resource allocation strategies that can support DR-DSD implementation, focusing on support and assistance,[39] social and therapeutical resources,[40] therapeutic jurisprudence,[41] and disability-oriented legal education.[42]

Finally, the 'successfulness, accountability, and learning' component emphasizes the importance of ongoing evaluation and improvement of dispute systems. The article proposes metrics for assessing the effectiveness of DR-DSD implementations, focusing on outcomes for people with disabilities.

Throughout the article, real-world examples and case studies illustrate the challenges of creating accessible dispute systems and the potential benefits of the DR-DSD approach. These examples draw from various jurisdictions and types of dispute management processes, demonstrating the framework's broad applicability.

The article posits that the DR-DSD framework offers a promising path for enhancing access to justice for people with disabilities. By systematically integrating disability rights principles into the dispute management systems design, it provides a practical tool for translating the ideals of equality and inclusion into concrete realities.

The article argues that the Disability-Rights-Based Dispute System Design (DR-DSD) framework, while primarily focused on enhancing access to justice for

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[38] Michael Waterstone, *The Costs of Easy Victory*, 57 WM. & MARY L. REV. 587 (2015).

[39] Ciara Brennan et al., *Negotiating Independence, Choice and Autonomy: Experiences of Parents Who Coordinate Personal Assistance on Behalf of Their Adult Son or Daughter*, 31 DISABILITY AND SOCIETY 604 (2016).

[40] Daniel C. Lustig & David R. Strauser, *Causal Relationship Between Poverty and Disability*, 50(4) REHABILITATION COUNSELLING BULLETIN 194 (2007).

[41] BRUCE J. WINICK & DAVID B. WEXLER, JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (2003); Michal Alberstein, *Therapeutic Keys of Law: Reflections on Paradigmatic Shifts and the Limits and Potential of Reform Movements (Book Review: Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts (eds. Bruck J. Winick & David B. Wexler, Carolina Academic Press, Durham, NC 2003),* 39(1) ISRAEL L. REV. 1 (2006); Anna Arstein-Kerslake & Jennifer Black, *Right to Legal Capacity in Therapeutic Jurisprudence: Insights from Critical Disability Theory and the Convention on the Rights of Persons with Disabilities,* 68 INT'L J.L. & PSYCHIATRY 1 (2020).

[42] Flynn, *supra* note 19; Stephanie Ortoleva, *Inaccessible Justice: Human Rights, People with disabilities and the Legal System*, 17(2) ISLA J. Int'l & Comp. L. 281 (2011); Roni Rothler, *Clinical Legal Education and Therapeutic Jurisprudence in the Disability Rights Clinic*, *in* THINKING ABOUT CLINICAL LEGAL EDUCATION: PHILOSOPHICAL AND THEORETICAL PERSPECTIVES (Omar Madhloom & Hugh MacFaul, eds., 2022).

people with disabilities, has far-reaching implications that can benefit all users of dispute management systems. This concept aligns with the principle of universal design, which posits that designs accommodating the broadest range of abilities often result in better systems for everyone.[43] The focus on creating supportive and accessible environments can improve outcomes for all participants in dispute management processes. The article argues that by designing inherently more accommodating systems, DR-DSD can help demystify legal processes and increase public trust in the justice system more broadly.

Furthermore, the article details how disability rights theory offers a valuable contribution to the academic field of dispute system design (DSD) by providing a unique lens through which to examine and enhance dispute management systems. The principles underlying disability rights, such as accessibility, universal design, and "nothing about us without us," can be integrated into DSD's framework to create more inclusive and equitable dispute management processes in all fields and domains.[44] By incorporating these concepts, DSD can better address power imbalances, structural barriers, and the diverse needs of all participants.[45]

Moreover, the disability rights perspective brings to DSD a heightened awareness of systemic inequalities and historical disadvantages.[46] This awareness can help DSD practitioners and scholars to develop more nuanced approaches to justice and fairness in dispute resolution.[47] By considering the social model of disability and the interactional nature of disability experiences, DSD can evolve to create both procedurally fair and substantively just systems. This integration of disability rights principles into DSD has the potential to enhance the field's capacity to address complex

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[43] Story et al., *supra* note 35; Zola, *supra* note 17.

[44] Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. L. L. & GENDER 247 (2006).

[45] Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 Harv. Negot. L. Rev. 51 (2009).

[46] Austin Sarat and Suzan Silbey, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstitution of the Juridical Subject*, 66 Denv. U. L. Rev. 437 (1989); Jacqueline Nolan-Haley, Does ADR's Access to Justice Come at the Expense of Meaningful Consent, 33 OHIO ST. J. ON DISP. RESOL. 373 (2018).

[47] Orna Rabinovich-Einy & Ethan Katsh, *The New New Courts,* 67 AM. U. L. REV. 165 (2017).

ethical and societal issues and promote more inclusive and effective dispute-management processes across various contexts.[48]

The article also engages with potential criticisms and limitations of the DR-DSD approach. It acknowledges that implementing such a comprehensive framework may face resistance due to resource constraints, institutional inertia, or competing priorities. However, it argues that the long-term benefits of creating more accessible and equitable justice systems far outweigh these short-term challenges.

The article sets the stage for the subsequent papers in the dissertation, establishing a theoretical and practical foundation for applying the DR-DSD framework to specific domains of legal capacity and child welfare proceedings. It represents a significant contribution to both disability rights scholarship and the field of dispute system design, offering a novel synthesis that has the potential to drive meaningful change in how justice systems serve people with disabilities.

ARTICLE 2: ACCESS TO LEGAL CAPACITY: A DISABILITY-RIGHTS-BASED DESIGN

The second article, "Access to Legal Capacity: A Disability-Rights-Based Design," builds upon the framework introduced in the first article, applying the Disability-Rights-Based Dispute System Design (DR-DSD) approach to the critical domain of legal capacity. This article addresses one of the most fundamental and contentious issues in disability rights: the right of individuals with disabilities to make decisions about their own lives.[49]

The article begins by outlining the historical context of legal capacity for people with disabilities. For centuries, many jurisdictions have maintained systems of substituted decision-making, such as guardianship or conservatorship, which effectively strip individuals with disabilities of their legal personhood.[50] These systems,

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[48] Carrie Menkel-Meadow, *Are there Systematic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195 (2009).

[49] Anna Arstein-Kerslake and Eilionóir Flynn, *The Right to Legal Agency: Domination, Disability and the Protections of Article 12 of the Convention on the Rights of Persons with Disabilities*, INT'L J.L. CONTEXT 25 (2017).

[50] Quinn & Arstein-Kerslake, *supra* note 28.

rooted in paternalistic attitudes and medical models of disability, have long been criticized by disability rights advocates as violating fundamental human rights.[51]

Adopting the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in 2006,[52] particularly Article 12, marked a paradigm shift in how legal capacity for people with disabilities should be understood and implemented. Article 12 affirms that all persons with disabilities have the right to equal recognition before the law and to exercise legal capacity on an equal basis with others. It calls for a move away from substituted decision-making towards supported decision-making models.[53]

The article delves into the challenges jurisdictions face in implementing supported decision-making systems despite Article 12 of the CRPD mandate.[54] It argues that this implementation gap stems from multiple, interconnected factors: firstly, the article highlights the entrenched nature of substituted decision-making systems in many legal frameworks. Guardianship and similar mechanisms have been the default approach for centuries, deeply embedded in legal codes, institutional practices, and professional training.[55] Dismantling these systems requires legal reform and a fundamental shift in how society conceptualizes decision-making capacity.

Secondly, the article points to widespread misconceptions about the nature of supported decision-making. Many jurisdictions, in attempting to comply with Article 12, have merely rebranded existing substituted decision-making practices as "support" without fundamentally altering the power dynamics or respecting the autonomy of individuals with disabilities.[56] Consequently, the article argues that supported decision-making requires a paradigm shift in understanding autonomy and decision-making capacity.

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[51] Israel Doron, *Elder Guardianship Kaleidoscope - A Comparative Perspective*, 16 INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY 368 (2002).

[52] CRPD, *supra* note 4.

[53] Kristin Booth Glen, *Introducing a "New" Human Right: Learning From Others, Bringing Legal Capacity Home*, 49 COLUM. HUM. RTS. L. REV. 1 (2018).

[54] Faraaz Mahomed et al., *A "Paradigm Shift" in Mental Health Care*, MENTAL HEALTH, LEGAL CAPACITY, AND HUMAN RIGHTS 1 (2021).

[55] Carrie E. Rood, Arlene Kanter, & Julie Causton, *Presumption of Incompetence: The Systematic Assignment of Guardianship Within the Transition process*, 39 RESEARCH AND PRACTICE FOR PERSONS WITH SEVERE DISABILITIES 319 (2015).

[56] Shirli Werner & Roni Holler, *Israeli Social Workers' Recommendations on Guardianship and Supported Decision-Making: Examination of Client and Social Worker Factors*, 92 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 109 (2022).

The article also addresses the practical challenges of implementing supported decision-making systems. These include developing appropriate assessment tools that focus on support needs rather than deficits, creating flexible support mechanisms that adapt to individual needs and preferences, and ensuring that supporters are adequately trained and accountable. Many jurisdictions lack the infrastructure, expertise, or resources to implement these complex systems effectively.[57]

Furthermore, the article discusses the resistance to change from various stakeholders. These include legal professionals accustomed to medical capacity determinations,[58] family members who fear for the safety of their loved ones,[59] and institutions that prioritize risk management over autonomy.[60] Overcoming this resistance requires legal reform, comprehensive education, and cultural change.[61]

The article argues that the DR-DSD framework offers a structured approach to addressing these challenges. By systematically applying disability rights principles to each component of system design, from goal-setting to evaluation, the framework provides a roadmap for creating autonomy-respecting supported decision-making systems. It emphasizes the importance of centering the voices and experiences of people with disabilities throughout the design process,[62] ensuring that reforms are driven by the needs and preferences of those most affected.

Moreover, the article suggests that the DR-DSD approach can help bridge the gap between theory and practice by providing concrete implementation strategies. These include methods for stakeholder engagement, processes for ongoing evaluation

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[57] Carmel Davies et al., *What Are the Mechanisms that Support Healthcare Professionals to Adopt Assisted Decision-Making Practice? A Rapid Realist Review*, 19 BMC HEALTH SERVICES RESEARCH 1 (2019).

[58] Michael Bach & Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Rights to Legal Capacity: Advancing Substitute Equality for Persons with Disabilities Through Law, Policy, and Practice* (LAW COMMISSION OF ONTARIO, 2010).

[59] Christine Bigby et al. *Diversity, Dignity, Equity and Best Practice: a Framework for Supported Decision-Making* (ROYAL COMMISSION INTO VIOLENCE, ABUSE, NEGLECT AND EXPLOITATION OF PEOPLE WITH DISABILITY, 2023).

[60] Anna Arstein-Kerslake & Eilionóir Flynn, *The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law*, 20(4) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 471 (2016).

[61] Rood et al., *supra* note 55.

[62] Amita Dhanda, *Universal Legal Capacity as a Universal Human Right*, in MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 177 (Michael Dudley, Derrick Silove, & Fran Gale, eds., 2012).

and adjustment, and approaches to resource allocation that can make supported decision-making systems sustainable in the long term.

By addressing these multifaceted challenges through the lens of DR-DSD, the article aims to provide a comprehensive framework for moving from the aspirational ideals of Article 12 to practical and effective supported decision-making systems that genuinely respect the autonomy of people with disabilities. The article provides a detailed analysis of how each component of the DR-DSD framework can be applied to redesign legal capacity systems:

In discussing goals, the article emphasizes the need to reframe the objectives of legal capacity systems. Instead of prioritizing protection and risk management, which often leads to overly restrictive practices, the focus should be on maximizing autonomy and self-determination for individuals with disabilities.[63] This shift in goals aligns with the social model of disability and the rights-based approach advocated by the CRPD.[64]

The stakeholders component receives particular attention. The article argues for the central involvement of people with disabilities in designing and implementing legal capacity systems.[65] This goes beyond mere consultation to advocate for leadership roles for individuals with lived experience of legal capacity restrictions. The article also discusses the importance of engaging a wide range of stakeholders, including family members, disability rights organizations, legal professionals, and service providers, while ensuring that the voices of people with disabilities remain central.[66]

In addressing context and culture, the article delves into the deep-seated societal attitudes and institutional cultures perpetuating substituted decision-making practices.[67] It argues that the successful implementation of supported decision-making requires a fundamental shift in how society views the decision-making capabilities of people with disabilities. The article suggests strategies for promoting this cultural shift, including public education campaigns, professional training programs, and legal and medical education reforms.

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[63] Arstein-Kerslake & Flynn, *supra* note 60.
[64] Kanter, *supra* note 18.
[65] Dahnda, *supra* note 62.
[66] Bigby et al., *supra* note 59.
[67] Rood et al., *supra* note 55.

The process and structure component explores how legal capacity assessment and support processes can be redesigned to be more person-centered and empowering. The article proposes flexible, individualized approaches that accommodate decision-making abilities and support needs. It discusses innovative models from multiple jurisdictions, such as representation agreements and circles of support, analyzing their potential and limitations.[68]

In discussing resources, the article acknowledges the significant investment required to transition from substituted to supported decision-making systems. However, it argues that this investment is a legal obligation under the CRPD and a long-term cost-saving measure. The article explores various resource allocation strategies, including redirecting funds currently used for guardianship systems, leveraging community resources, and developing peer support networks.[69]

The successfulness, accountability, and learning component emphasizes the importance of ongoing monitoring and evaluation of legal capacity systems. The article proposes a range of indicators for assessing the effectiveness of supported decision-making implementations related to quality of life and self-determination for people with disabilities.

The article's real-world case studies illustrate the challenges and possibilities of reforming legal capacity systems. These examples draw from jurisdictions that have made significant strides in implementing supported decision-making and those still grappling with entrenched substituted decision-making practices. The article provides a nuanced analysis of these examples, highlighting successful strategies while acknowledging ongoing challenges and areas for improvement.

The article also engages with critical perspectives on supported decision-making, addressing concerns about protection for vulnerable individuals and the practical challenges of implementing support in complex decision-making situations.[70] It argues that these concerns, while valid, can be addressed through careful system

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[68] Shin-Ning Then et al., *Supporting Decision-Making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies – Recommendations, Rationales and Influence*, 61 INT'L J.L. & PSYCHIATRY 64 (2018).

[69] Fauzia Knight et al., *Supported Decision-Making: The Expectations Held by People With Experience of Mental Illness*, 28 QUALITATIVE HEALTH RESEARCH 1002 (2018).

[70] Bach & Kerzner, *supra* note 58.

design and robust safeguards that respect individual autonomy while providing necessary protections.[71]

A key theme throughout the article is the interconnectedness of legal capacity with other areas of life. The article argues that proper legal capacity recognition requires systemic changes beyond the legal system, touching on healthcare, financial services, and social support systems.[72] It proposes strategies for creating more integrated approaches that support the exercise of legal capacity across all aspects of an individual's life, especially in early education.

The article concludes by emphasizing the transformative potential of applying the DR-DSD framework to legal capacity systems. It argues that by reimagining legal capacity through a disability rights lens, we can create systems that comply with international human rights standards and enhance the dignity, autonomy, and quality of life for people with disabilities.

Moreover, the article suggests that legal reforms can potentially drive broader societal changes in understanding decision-making, autonomy, and personhood. These reforms can benefit society by challenging traditional notions of capacity and promoting more nuanced, supportive approaches to decision-making, leading to more inclusive and flexible understandings of legal personhood.

The article significantly contributes to the ongoing global conversation about legal capacity reform, offering theoretical insights and practical strategies for moving from substituted to supported decision-making paradigms. In doing so, it sets the stage for the final paper in the dissertation, demonstrating how the DR-DSD framework can be applied to a specific and critical area of disability rights.

ARTICLE 3: DESIGNING CHILD WELFARE DISPUTE SYSTEMS: A FRAMEWORK FOR ENHANCING PARENTHOOD DISABILITY RIGHTS

The third article, "Designing Child Welfare Dispute Systems: A Comprehensive Framework for Enhancing Parenthood Disability Rights," extends the application of the

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[71] Arstein-Kerslake & Flynn, *supra* note 49.

[72] Moira Jenkins, *Equal Recognition Before the Law: A Call for a Statutory Social Care Advocate for Vulnerable Adults in Integrating Health and Social Care, in* INTEGRATED CARE FOR IRELAND IN AN INTERNATIONAL CONTEXT: CHALLENGES FOR POLICY, INSTITUTIONS AND SPECIFIC SERVICE USER NEEDS (Tom O'Connor ed., 2013).

Disability-Rights-Based Dispute System Design (DR-DSD) framework to the critical domain of child welfare proceedings. This article addresses a pressing issue at the intersection of disability rights and family law: the disproportionate rates at which parents with disabilities face child removal and termination of parental rights.[73]

The article begins by painting a stark picture of the challenges faced by parents with disabilities in child welfare systems. Drawing on extensive research and case studies, it illustrates how deeply ingrained biases, outdated assumptions about parental capacity, and a lack of appropriate support often lead to unjust outcomes for families headed by parents with disabilities.[74] The article argues that despite progress in disability rights in many areas, the realm of parenting remains a domain where discrimination persists, often cloaked in the language of child protection.[75]

A vital premise of the article is that current child welfare systems, in their structure and operation, frequently fail to align with the principles of the UN Convention on the Rights of Persons with Disabilities (CRPD),[76] particularly Article 23, which affirms the rights of people with disabilities to form families and maintain parental relationships. The article contends that this misalignment stems from individual biases and systemic issues in how child welfare processes are designed and implemented.[77]

The article argues that as family and parenthood consist a significant part of most adults' lives, depriving parents with disabilities of their parenthood rights entails broad negative and long-lasting ramifications. It advocates for a more nuanced understanding of parenthood that moves beyond narrow functional definitions to encompass relational and developmental aspects.[78] This redefinition of parenthood aligns with Bronfenbrenner's ecological systems theory, recognizing that child development and family well-being are influenced by multiple interconnected systems,

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[73] Robyn M. Powell, *Family Law, Parents with Disabilities, and the Americans with Disabilities Act*, 57(1) FAM. CT. REV. 37 (2019).

[74] Leslie Francis, *Maintaining the Legal Status of People with Intellectual Disabilities*: The ADA and the CRPD, 57(1) FAM. CT. REV. 21 (2019).

[75] Elizabeth Lightfoot, Katherine Hill & Traci LaLiberte, *The Inclusion of Disability as a Condition for Termination of Parental Rights*, 34 CHILD ABUSE AND NEGLECT, 927 (2010); Hanna Bjorg Sigurjónsdóttir & James G. Rice, *'Evidence' of Neglect as a Form of Structural Violence: Parents with Intellectual Disabilities and Custody Deprivation*, 6(2) SOCIAL INCLUSION, 66 (2018).

[76] CRPD, *supra* note 4.

[77] Jasmin E. Harris, *Legal Capacity at a Crossroad: Mental Disability and Family Law*, 57(1) FAM. CT. REV. 15 (2019).

[78] *Id.*; Francis, *supra* note 74.

from the immediate family environment to broader societal structures.[79] By adopting this ecological perspective, the article argues for child welfare practices considering the full range of supports and interventions available across these systems rather than solely focusing on parental limitations.

The heart of the article lies in its detailed application of the DR-DSD framework to child welfare proceedings. It systematically examines how each component of the framework can be leveraged to create more equitable, supportive systems that uphold the rights of parents with disabilities while still prioritizing child well-being. Notably, the framework encourages a nuanced design for different cases,[80] providing courts diverse dispute management tools[81] and emphasizing preventive measures.[82]

In discussing the 'goals' component, the article advocates for a fundamental shift in how the objectives of child welfare systems are framed. Instead of defaulting to child removal as a primary intervention, it argues for prioritizing family preservation and reunification, with a focus on providing appropriate support to parents with disabilities. This reframing aligns with disability rights principles and emerging best practices in child welfare that recognize the importance of family integrity for child well-being.[83]

The 'stakeholders' component receives extensive attention. The article emphasizes the importance of involving parents with disabilities in every child welfare system design and implementation stage. It argues for moving beyond tokenistic consultation to meaningful co-design processes that center the experiences and perspectives of parents with disabilities.[84] The article also discusses the importance of engaging a wide range of stakeholders, including children,[85] extended family members,

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[79] Uri Bronfenbrenner, Ecology of the Family as a Context for Human Development: Research Perspectives. 22(6) DEVELOPMENTAL PSYCHOLOGY, 723 (1986)

[80] Nofit Amir & Michal Alberstein, *Designing Responsive Legal Systems: A Comparative Study*, 22(2) Pepp. Disp. Res. L.J. 263 (2022).

[81] Hadas Cohen & Michal Alberstein, *Multilevel Access To Justice In A World Of Vanishing Trials: A Conflict Resolution Perspective*, 47(1) FORDHAM URB. L.J. 1 (2019).

[82] Michal Albersetin & Nadad Davidovich, *Intersecting Professions: A Public Health Perspective on Law to Address Health Care Conflicts*, 5 INT'L J. CONFLICT ENGAGEMENT RESOL. 83, 85 (2017).

[83] Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System*, 12 TEMP. POL. & CIV. RTS. L. REV. 273 (2003); Mary Baginsky & Emily Thomas, *Final Report: The Role of Adult Social Care for Parents with Learning Disabilities When Their Children Are no Longer in their Care*, SCHOOL FOR SOCIAL CARE RESEARCH (forthcoming).

[84] Glennon, *supra* note 83.

[85] Tali Gal, *An Ecological Model of Child and Youth Participation*, 79 CHILD. & YOUTH SER. REV. 57 (2017)

disability advocates, child welfare professionals, and legal experts, while ensuring that the voices of parents with disabilities remain central.

In the context of child welfare, the ‘stakeholders' component also entails the crucial aspect of *interdependence*.[86] Interdependence acknowledges that people's perceived independence often results from dependence on others.[87] The argument developed in the article is that in the child welfare context, interdependence has three primary meanings: first, it envisions parents' and children's rights as inseparable and interdependent;[88] second, it recognizes the interdependent relationships parents have with others in the child's ecological systems;[89] and third, it highlights the interdependent relationship between parents and their children, depicting the relationship as mutually beneficial, where both parties provide care and value, challenging the conventional view of parenting as solely a one-way provision of care[90] and allowing for a more inclusive understanding of diverse parenting abilities and styles. This nuanced view of parenting will enable parents with disabilities to openly and legitimately receive aid in their parental roles without jeopardizing their parental status. It also opens the path for broader accommodations and support.

Addressing 'context and culture,' the article delves into the complex historical and social factors that have shaped societal attitudes toward parenting and disability.[91] It examines how the intersection of ableism with other forms of discrimination, such as racism and classism, can compound the challenges faced by parents with disabilities in child welfare systems.[92] The article proposes strategies for promoting cultural change within child welfare institutions, including comprehensive training programs and revision of assessment tools and practices.

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[86] Susan L. Brooks & Ya’ir Ronen, *The Notion of Interdependence and its Implications for Child and Family Policy,* 17 (3/4) JOURNAL OF FEMINIST FAMILY THERAPY 23 (2005).

[87] Eva Feder Kittay, *The Ethics of Care, Dependency and Disability*, 24(1) RATIO JURIS 49, 50 (2011); Martha Fineman, *Cracking the Foundational Myths. Independence, Autonomy and Self-Sufficiency*, 8(1) Am. U. J. GENDER SOC. POL’Y & L. 13, 14 (2000).

[88] Brooks & Ronen, *supra* note 86.

[89] Bronfenbrenner, *supra* note 79.

[90] Robyn M. Powell, *Care Reimagined: Transforming Law by Embracing Interdependence*, 122 Michigan. L. Rev. [forthcoming].

[91] Sasha M. Albert & Robyn M. Powell, *Ableism in the Child Welfare System: Findings from a Qualitative Study*, 46(2) SOC. WORK RSCH. 141 (2022).

[92] Tricia N. Stephens, Colleen Cary Katz, Caterina Pisciotta, & Vicky Lens, *The View from the Other Side: How Parents and their Representatives View Family Court*, 59(3) FAM. CT. REV. 491 (2021).

The 'process and structure' component explores how child welfare procedures can be redesigned to be more accessible, flexible, and supportive of parents with disabilities. The article proposes innovations such as extended timelines for reunification efforts, specialized disability-competent assessment teams, and integrating peer support models into child welfare processes. It also examines how alternative dispute management mechanisms can be adapted to serve better families headed by parents with disabilities.[93]

In discussing 'resources,' the article acknowledges the significant investment required to create inclusive child welfare systems. However, it argues that this investment is not only a moral and legal imperative[94] but also a cost-effective approach in the long term. The article explores various resource allocation strategies, including redirecting funds from out-of-home placements to in-home support services, leveraging community resources, and developing innovative funding models incentivizing family preservation.[95]

The 'successfulness, accountability, and learning' component emphasizes the importance of ongoing evaluation and improvement of child welfare systems. The article proposes indicators for assessing the effectiveness of disability-inclusive child welfare practices, focusing on child safety outcomes and measures of family well-being, parental empowerment, and long-term family stability.

A key theme throughout the article is the interconnectedness of child welfare with other systems and social factors. The article argues that truly equitable child welfare practices require broader societal changes, including improvements in

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[93] Jadi Hall, Joan Pennell, & R. V. Rikard, *Child and Family Team Meetings and Restorative Justice for Foster Youth*, in INTERNATIONAL PERSPECTIVES AND EMPIRICAL FINDINGS ON CHILD PARTICIPATION: FROM SOCIAL EXCLUSION TO CHILD-INCLUSIVE POLICIES 207 (T. Gal, & B. Faedi Duramy (Eds.) 2015); Tali Gal & Dahlia Schilli-Jerichower, *Mainstreaming Therapeutic Jurisprudence in Family Law: The Israeli Child Protection Law as a Case Study*, 55(2) FAM. CT. REV. 177 (2017); Shelley M. Kierstead, *Therapeutic Jurisprudence and Child Protection*, 34 COMP. RES. IN L. & POL. ECON. 33 (2012).

[94] Ravit Alfandari, L*egal Advocacy for Parents in Child Protection: Not a Question of If, But a Question of How*, 49 BRIT. J. SOC. WORK 1601 (2019)

[95] Elizabeth Lightfoot, Traci LaLiberte, & Minhae Cho, *Parental Supports for Parents with Disabilities*, 96(4) CHILD WELFARE 89 (2018); Sharyn DeZelar & Elizabeth Lightfoot, *Parents with Disabilities: A Case Study Exploration of Support Needs and the Potential of a Supportive Intervention*, 100(3) FAMILIES IN SOCIETY 293 (2019); Sharyn DeZelar & Elizabeth Lightfoot, *Enhancing Supports for Parents with Disabilities: a Qualitative Inquiry Into Parent Centered Planning*, 24(4) J. FAM. SOC. WORK 263 (2021); Elizabeth Lightfoot & Sharyn DeZelar, *Parent Centered Planning: A New Model for Working with Parents with Intellectual and Developmental Disabilities*, 114 CHILD. & YOUTH SERVS. REV. (2020).

accessible housing, employment opportunities, healthcare, and social support systems for people with disabilities.[96] It proposes strategies for creating more integrated, holistic approaches that address the root causes of family instability rather than focusing solely on child removal as a solution.

The article also engages with potential criticisms and concerns about its proposed approach. It addresses fears that prioritizing parental rights might compromise child safety, arguing that these concerns often stem from misconceptions about disability rather than evidence-based assessments of risk.[97] The article contends that well-designed support systems can enhance child well-being and parental rights simultaneously.

In its conclusion, the article emphasizes the transformative potential of applying the DR-DSD framework to child welfare systems. It argues that by reimagining child welfare through a disability rights lens, we can create systems that comply with international human rights standards, enhance children's well-being, strengthen families, and promote more inclusive communities.

Moreover, the article suggests that reforms in child welfare practices for parents with disabilities have the potential to drive broader positive changes in child welfare systems for all families. By promoting more flexible, individualized, and supportive approaches to family preservation, these reforms can benefit a wide range of vulnerable families, not just those headed by parents with disabilities.

This final article in the dissertation demonstrates the broad applicability of the DR-DSD framework, showing how it can be adapted to address complex, multifaceted issues at the intersection of disability rights and family law. It represents a significant contribution to ongoing debates about child welfare reform, offering both theoretical insights and practical strategies for creating more just and effective systems that respect the rights and dignity of parents with disabilities while safeguarding the best interests of children.

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[96] Following Bronfenbrenner's ecological approach to children's development (*supra* note 79) and Powell's broad depiction of care in the context of disability, *supra* note 90.

[97] Albert & Powell, *supra* note 91.

ARTICLE 1

DESIGNING ACCESS TO JUSTICE
A DISABILITY-RIGHTS-BASED DISPUTE SYSTEM

Roni Rothler

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DESIGNING ACCESS TO JUSTICE

A DISABILITY-RIGHTS-BASED DISPUTE SYSTEM

*Roni Rothler**

ABSTRACT

The access to justice movement reveals a disparity between equality before the law, the right to justice, and their effective enjoyment by individuals belonging to various groups. One particular group experiencing distinct challenges in accessing justice is people with disabilities.

The article suggests a novel way to address access to justice for people with disabilities through dispute system design (DSD). DSD is an analytical framework to design systems with robust, practical, and equitable dispute management mechanisms aligned with the system's goals and motivated by the aspiration to enhance justice. Given these qualities, the article claims that DSD can provide technical and substantial access to the justice that people with disabilities aspire to.

The article suggests integrating disability theory into DSD to make it more sensitive to disability rights and thus proposes a disability-rights-based DSD. The benefit of the disability-rights-based DSD is twofold. First, it can promote access to justice for people with disabilities and narrow the divide between the ideals of disability rights and their practical realization. This is because the system's underlying structure is based on the rights disabled individuals aspire to attain, aiming to overcome the obstacles they encounter. Moreover, the system is designed with the active involvement of all relevant stakeholders, prioritizing the engagement of people with disabilities.

Second, the article suggests that the disability-rights-based DSD can advance the universal aspiration of DSD to achieve justice not only within disability-related fields but also in other spheres of life and offer other groups in conflict a dispute management system that *addresses previously unaddressed aspects. This is because one of the central goals of DSD is the pursuit of justice. Incorporating a disability-rights interpretation into DSD reinforces DSD's aspiration for justice, as explicit attention is given to issues of scale, distribution, and power imbalances between parties, following disability theory that has developed over the past centuries. This is particularly significant in systems characterized by hierarchies, such as corporations or welfare systems, or systems based on therapeutic aspects, such as those involving patients and healthcare professionals.*

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INTRODUCTION

The access to justice movement highlights the discrepancy between the principle of the rule of law, due process, and equality before the law and the effective enjoyment of those rights by individuals from different groups. Its primary contention is that unequal access to the legal system contradicts the principle of equal protection under the law and infringes upon the ability of individuals and groups to exercise their fundamental rights. Consequently, identifying and eliminating barriers obstructing access to the justice system become paramount in achieving equal participation and protection.[1]

Following the depiction of justice as an inherently changing concept, achieved by pushing back against injustice[2] and arguing for a dynamic conception of access to justice,[3] the meaning of "access to justice" has transformed from a formal state duty to enable people to defend their claims into an approach focusing on the state's obligation to provide an affordable,

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[1] Mauro Cappelletti & Bryant Garth *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 186 (1978) [hereinafter Cappelletti & Garth *The Newest Wave*].

[2] Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115, 124 (2010).

[3] Lydia Nussbaum, *ADR, Dynamic (In)Justice, and Achieving Access: A Foreclosure Crisis Case Study*, 88 Fordham L. Rev. 2337, 2338 (2020).

effective justice system accessible to all.[4] This approach shows that formal access cannot bring just outcomes in a hierarchic system.[5]

One particular group facing obstacles and experiencing distinct challenges in accessing justice is people with disabilities. Their discrimination and exclusion are characterized by stigma and social marginalization, pushing them to society's fringes and confining them to secluded institutions. Their exclusion is also manifested in the inaccessibility of places and services, which impedes their participation in private and public activities. The development of *disability rights* at the national and global levels is a legal manifestation of the disability social movement, aiming to transform this reality.[6]

Despite the widespread recognition of disability rights in national and international laws, people with disabilities continue encountering significant hurdles in fully realizing their rights. These obstacles include physical barriers, service inaccessibility, discriminatory conduct, and stigmatization.[7] Remarkably, even within fields explicitly related to disabilities, such as social security benefits, torts, mental health-related issues, psychiatric medical treatment, child welfare, and legal capacity, there remains a dearth of implementation of disability rights principles.[8]

This phenomenon of disabled people's limited access to justice has attracted scholarly attention, prompting discussions on the disability rights principles that should inform the creation of a genuinely accessible justice system.[9] Social policy aspects that impede the full effectiveness of disability rights were also explored.[10] In this article, a new approach is proposed to address this problem and enhance access to justice for people with disabilities, focusing primarily on the issue of *implementing* the existing rights. For this purpose, the article suggests employing dispute management mechanisms and specifically adopting the analytical framework of *dispute system design* (DSD).

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[4] Cappelletti & Garth explain that "access to justice" focuses on procedural justice, reveals barriers in the legal procedure, and promotes lowering the costs of litigation and legal representation (via state-funded attorneys, NGOs, or legal clinics), shortening the length of the proceedings, and making legal information available and accessible for all (Cappelletti & Garth *The Newest Wave, supra* note 1, at 183-186). Galanter adds a focus on the advantage "repeating players" have in litigation processes: Marc Galanter, *Afterword: Explaining Litigation*, 9(2) LAW SOC. REV. 347, 360-366 (1975) [hereinafter Galanter, *Explaining Litigation*].

[5] Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 FORDHAM URB. L.J. 3, 4 (2010).

[6] Sagit Mor, *With Access and Justice for All*, 39 CARDOZO L. REV. 611, 612-613, 623 (2017).

[7] *See infra* Section I.B.

[8] *See infra* Section I.C.

[9] *See* Mor, *supra* note 6, at 635, 637, 643.

[10] Roni Holler & Yael Ohayon, *Understanding Disability Policy Development : Integrating Social Policy Research with the Disability Studies Perspective*, SOCIAL POLICY & SOCIETY 1, 2 (2022).

DSD emerged from the alternative dispute resolution (ADR) movement, which aimed to effect institutional changes in the court system by handling and resolving disputes in ways that extend beyond legal processes, involving social and therapeutic professionals, or reaching agreements between the parties involved. DSD seeks to develop and design comprehensive systems for addressing, preventing, and resolving recurring disputes rather than focusing solely on resolving specific conflicts. It serves as an analytical and practical tool, entailing the creation of processes to address particular or ongoing series of disputes. By adhering to DSD guidelines, designers are encouraged to establish or enhance systems based on six key components: goals, stakeholders, context and culture, process and structure, resources, and successfulness, accountability, and learning.[11]

Two intertwined DSD traits make it especially suitable to implement disability rights. The first is DSD's central and proclaimed goal to achieve justice within the system.[12] The second is its focus on dispute *processing*[13] to achieve this justice. These traits are especially relevant for the current understanding of access to justice since most legal disputes are not resolved after a full trial but in earlier stages. Therefore, one should address access to justice not only in the courtroom but in various stages of the development of legal conflict resolutions[14] and consider a range of formal and informal conflict resolution processes[15] which can be shaped through DSD.

Building upon the analytical and practical foundations of DSD, its strong inclination to achieve justice, and the depiction of an accessible justice system for people with disabilities in three layers: the courts, the law, and normative justice,[16] this article proposes DSD as a mechanism to enhance the implementation of disability rights in the justice system, shaping and strengthening the *access* to disability *justice*. However, the article suggests not merely employing DSD but improving it by integrating disability rights principles into the analytical framework, thereby creating a "disability-rights-based DSD".

The article posits that such a design holds a dual advantage. The first advantage addresses the problem of existing systems and institutions influencing the lives of people with

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[11] *See generally* LISA BLOMGREN-AMSLER, JANET J. MARTINEZ, & STEPHANIE E. SMITH, DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT (2020).

[12] See infra Sections II.B. and II.C.

[13] *See infra* Section II.B.

[14] Hadas Cohen & Michal Alberstein, *Multilevel Access To Justice In A World Of Vanishing Trials: A Conflict Resolution Perspective*, 47(1) FORDHAM URB. L.J. 1, 14 (2019).

[15] *See* Blomgren-Amsler et al., *supra* note 11, at 112.

[16] *See* Mor, *supra* note 6, at 635, 637, 643.

disabilities, which are embedded with negative and derogatory views of disability. Using DSD's practical and implementation-oriented nature (which I claim is missing from the current legislation, adjudication, and policy regarding the rights of people with disabilities), the disability-rights-based DSD will provide a platform for the practical installment of disability rights within those systems and institutions, one that could fully absorb the theory and life experience of people with disabilities. Since its structure is founded on the rights they strive to realize and addresses the barriers they encounter, it will afford people with disabilities better access to justice.

The second advantage of the disability-right-based DSD contends that integrating disability rights principles into DSD would enrich the general scholarship of DSD and enhance its stated objective of achieving justice in universal contexts. This is primarily due to a central purpose of DSD: the pursuit of justice.[17] Disability rights principles are inherently relevant to justice concerns, such as attention to scale, resource allocation, hierarchies, and power imbalances. Consequently, a disability-rights-based DSD can be applied not only in the context of disability but also in other systems characterized by scales, such as corporations, welfare systems, or therapeutic systems, such as those involving patients and healthcare professionals.

The article's structure is as follows: Part I discusses the lack of access to justice experienced by individuals with disabilities across various legal fields against the backdrop of national and international disability rights legislation. Part II delves into the aspirations of DSD to achieve justice and argues that disability rights scholarship can contribute to its realization. Part III outlines the "disability-rights-based DSD" and presents the design by incorporating disability rights values into the six components of dispute system design: goals, stakeholders, context and culture, process and structure, resources, and successfulness, accountability, and learning. It elucidates how this design is particularly suitable for creating disability-rights-based legislation and legal systems and its potential to impact the design of other systems characterized by hierarchies and its possible shortcomings. The conclusion provides a summary of the discussion presented in the article.

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[17] NANCY H. ROGERS, ROBERT C. BORDONE, FRANK E.A. SANDERS, CRAIG A. MCEWEN, DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES, 201 (2013).

I. DISABILITY AND ACCESS TO JUSTICE: THE IMPLEMENTATION PROBLEM

A. The Social Aspects of Disability and the Role of Disability Rights

People with disabilities experience discrimination and exclusion, which are manifested in two main ways: the first is the inaccessibility of places and services that prevents them from taking part in private and public activities, such as stairs for people who use wheelchairs, movies without subtitles for people with hearing impairments, internet sites that are not adapted for blind people, complex instructions for people with cognitive disabilities, or jobs that require interaction with strangers for people with autism. The second aspect of discrimination is the social marginalization and segregation that results from the typical depiction of disability as a tragedy and a personal limitation. These, in turn, lead to designated institutions such as sheltered factories, special education, secluded living institutions, health professionals' excessive control of disabled people's lives, and legal guardianship. Together, inaccessible environments and secluded establishments push people with disabilities to the border of society, preventing them from meaningful participation.[18]

Alongside disabled people's struggle for equality and inclusion, new social approaches and theoretical models were developed in the second half of the 20th century.[19] Notwithstanding the acknowledgment that people with disabilities are not homogeneous, mutual characteristics underly these social approaches.[20] They all depict disability as a socio-political category resulting from unequal power relations, a product of social construction and interaction, rather than a personal tragedy or medical pathology.[21] They consider the social, cultural, political, economic, legal, and historical forces that have pushed people with disabilities to society's

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[18] Holler & Ohayon, *supra* note 10, at 3.

[19] *See generally*, MICHAEL OLIVER, THE POLITICS OF DISABLEMENT (1990); *See also* Adi Goldiner, *Understanding 'Disability' as a Cluster of Disability Models*, 2 THE JOURNAL OF PHILOSOPHY OF DISABILITY, 28, 29 (2022). Goldiner identifies three pairs of opposed disability models: the first pair – the *social model* and the *medical model*, manifests the debate regarding the cause of the social exclusion; the second pair – the *tragedy model* and the *affirmative model*, manifests the discussion regarding the connection between the organic impairment and life quality; the third pair – the *minority group model* and the *universal model*, represents the dichotomy between disabled and non-disabled people. Goldiner suggests that, albeit the oppositional nature of those pairs, the views associated with each model are compatible and therefore argues that disability might be best understood as clusters of those views.

[20] Holler & Ohayon, *supra* note 10, at 2.

[21] Claire Tregaskis, *Social Model Theory: The Story So Far…*, 17(4) DISABILITY AND SOCIETY, 457, 462 (2002). Tregaskis refers to social model theories as "umbrella terms", sharing the view of disability as socio-political.

margins[22] and reinforced prejudice.[23] Consequently, they emphasize society's duty to eliminate those discriminatory characteristics.[24]

Nevertheless, focusing on disabled people's authentic experiences, researchers have suggested an interactional depiction of disability based on both social and personal traits, stressing the legitimization and mainstreaming of disabled people's life experiences, which often challenge "normality" and social expectations.[25] Consequently, they emphasize the place of people with disabilities in private and public decision-making processes, commonly known as "nothing about us without us".[26]

Principles resulting from these social approaches, such as removing barriers, fixations, and marginalization to form an infrastructure for an equal and inclusive discourse, have impacted the legal realm[27] and have shed light on the pivotal role that the law plays in the social construction of disability.[28]

Through this lens, the law is a mechanism reflecting and perpetuating traditional approaches to disability. This allows attitudes regarding disability and its negatively perceived characteristics to shape the law in many fields (such as social security, legal capacity, torts law, education, health, child welfare, and more), reinforcing disabled people's image as weak, inferior, unfit parents, poor, and unproductive.[29]

On the other hand, the law is also a potential tool to emancipate people with disabilities as an oppressed and excluded group. The search for adequate legal instruments to realize the

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[22] TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS REVISITED (2014) [hereinafter Shakespeare *Disability Rights Revisited*].

[23] For elaboration regarding the principles and historical roots of disability studies and the social approach, *see* Mor, supra note 6, at 621-626.

[24] Theresia Degener, *Disability in a Human Rights Context*, 35(5) LAWS 1, 16 (2016); For a moral-philosophical discussion of society's responsibility to address disability disadvantage as a matter of justice, and the appropriate way of handling this disadvantage by changing social institutions themselves, to better accommodates bodily difference, rather than to normalize bodies to include existing institutions, *see*: Sean Aas, *Disability, Society, and Personal Transformation*, J. MORAL PHILOS. 1, 18 (2020).

[25] Shakespeare *Disability Rights Revisited*, *supra* note 22, at 74-75. The Interactional model views disability as the interaction between intrinsic (such as organic impairment) and extrinsic (such as social barriers and oppression) factors in people's lives.

[26] JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT (1998).

[27] *See generally* Arlene S. Kanter, *The Law: What's Disability Studies Got To Do With It Or An Introduction to Disability Legal Studies*, 42(2) COLUM. HUM. RTS. L. REV. (2011); For a comprehensive history of the disability rights model, *see* Thomas F. Burke, *The Creation of A Litigious Policy: The Americans with Disabilities Act*, *in* LAWYERS, LAWSUITS, AND LEGAL RIGHTS : THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 60, 66 (2002).

[28] Sagit Mor, *Between Charity, Welfare, and Warfare: A disability Degal Studies Analysis of Privilege and Neglect in Israeli Disability Policy*, YALE J.L. & HUMAN. 63, 73–75 (2006).

[29] Arie Rimmerman, Michal Soffer, Dana David, Tsilly Dagan, Roni Rothler & Lior Mishali, *Mapping the Terrain of Disability Legislation: The Case of Israel,* 29(10) DISABILITY AND SOCIETY 46, 49 (2014).

goals of equality, diversity, and social inclusion has led to establishing *disability rights* based on formerly established universal human rights, adjusted and translated into a unique, designated disability discourse and as a potential sphere for emancipation.[30]

The disability rights discourse recognizes people with disabilities as a minority group fighting for their rights and therefore calls for creating and implementing mechanisms that will enable the group to expand its participation in society and, consequently, promote social and conscious change. Its goals are to aid in the critical inspection of the existing norms and regulations and suggest new ways to construct an alternative policy actively.[31]

Moreover, the disability rights discourse sheds light on the historical structuring of the legal subject, which has led to the inferiority of people with disabilities (and especially people with cognitive disabilities) who were (and sometimes still are) perceived as too incompetent to pass the threshold requirements of the rights discourse, such as rationality, autonomy, and independence, and as a consequence, as ineligible to fully participate in civil and social life, and make decisions regarding their personal lives. In this respect, it emphasizes the inherent human quality of people with disabilities, even if they do not adhere to the "normal" standards of participation and productivity.[32] Consequently, the rights discourse aims to remove physical barriers and medical-professional fixations, prejudice, and stereotypes and establish ground rules for an equality-based and inclusive discourse that promotes rights-oriented legislation instead of the existing tendency to rely on medical needs and dependency.[33] Therefore, a primary way to realize disability rights is to remove barriers and promote accessibility and accommodation to places and services to make them available for people with disabilities and thus diminish their segregation.[34]

Two aspects of the intersection of law and disability - the law as a mechanism that reflects and perpetuates the traditional approaches to disability, and the law as a potential tool to

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[30] Kanter, *supra* note 27, at 408, 422, 445, 447; Michael A. Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights,* 58 HASTINGS L. J. 1203, 1209 (2007). For a detailed general analysis of the interaction of law and society, *see* LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE (1975).

[31] Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective,* BEHAVIOURAL SCIENCES & THE LAW 41, 48 (1996).

[32] Martha Nussbaum, *The Capabilities of People with Cognitive Disabilities*, 40(3-4) METAPHILOPHY 331, 335 (2009).

[33] Rimmerman et al., *supra* note 29, at 47-48.

[34] The principles of disability rights are incorporated into national legislation around the globe. In the United States, the main legislative document that reflects disability rights principles is the Americans with Disabilities Act, 1990, 42 U.S.C. § 12102 (ADA). The primary international legal tool reflecting disability rights is the United Nations Convention on the Rights of People with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 (CRPD).

emancipate people with disabilities as an oppressed and excluded group (mainly through the implementation of disability rights), call for a thorough investigation of the meaning of disabled people's access to justice and the concrete ways to achieve such access.

B. People with Disabilities and (In)Access to Justice

Research has revealed that throughout history, people with disabilities have often been denied access to fair and equal treatment before courts and law enforcement officials, prohibiting them from effectively using the justice system and contributing to the administration of justice.[35] Yet, disabled people's in-access to justice is more profound and touches on broader aspects such as access to law, participation in the justice system, lack of legal education and training, and insufficient political participation.[36] Within these are barriers to retaining legal advice, legal information, and legal representation,[37] and obstacles to submitting complaints regarding rights violations.[38] These hindrances accompany the inaccessibility of the physical infrastructure of legal institutes, procedural practices that restrict the use of accessible modes of communication, and procedures that prohibit the effective participation of people with disabilities in court.[39]

On the political level, in recent decades, access to justice and disability rights have been two of the most significant movements in the struggle for social justice. Both are concerned with structural barriers and the lack of access that disadvantaged groups experience in social, political, and legal interactions.[40] Mor explains that "access" is the foundation for disability rights, conceptually and practically. It exposes the exclusion people with disabilities experience when they cannot benefit from services and opportunities available to the public and the vision of inclusion that disability rights promote. Practically, "access" underscores the underlying conditions that allow the implementation and realization of disability rights. Therefore, without a right to access, universal human rights are meaningless for people with disabilities.[41]

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[35] *See generally*, EILIONÓIR FLYNN, DISABLED JUSTICE? ACCESS TO JUSTICE AND THE UN CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITIES (2015); Mor, *supra* note 6; Stephanie Ortoleva, *Inaccessible Justice: Human Rights, People with disabilities and the Legal System*, 17(2) ISLA J. Int'l & Comp. L. 281 (2011).

[36] Flynn, *supra* note 35.

[37] Those are partly due to insufficient disability-rights-oriented training and knowledge amongst professionals such as law enforcement personnel, advocates, and social workers (Flynn, *supra* note 35, at 167).

[38] Flynn, *supra* note 35, at 72.

[39] *Id.* at 167.

[40] Mor, *supra* note 6, at 621.

[41] *Id.* at 626.

Even though other marginalized groups suffer from exclusion and lack of access,[42] only people with disabilities have named and conceptualized access as a right.[43] Consequently, they have developed comprehensive accessibility legislation that rests on a civil rights paradigm and international standards and obligations for accessibility,[44] equal recognition before the law,[45] and access to justice[46] as core principles of the international conventions on the rights of people with disabilities (the CRPD).[47] These turn access to justice, ranging from technical access to the need for structural reform, into a legally-recognized human right.[48]

The need for structural reform adheres with the disability-rights interpretation of access to justice, which reaches far beyond technical access. Mor suggests that meaningful access to justice should focus on three levels: *access to court* (a narrow focus on entry barriers, the denial of access to the legal system through formal, physical, and procedural obstacles),[49] *access to law* (process barriers in access to legal proceedings, such as structural, cultural, and psychological obstacles that may affect one's ability to use the law even in the absence of formal barriers),[50] and *access to justice* (outcome barriers that pertain to the design, content, and the application of the existing legal rules and norms, which are highly affected by social power relations and structural biases).[51] Together, these three levels of discussion reveal a detailed and comprehensive picture of barriers people with disabilities face in their interaction with the legal system and related systems of benefits and support.[52] On all three levels, full implementation of access to justice would be achieved upon the transformation in the way disability is conceptualized, not as a personal tragedy and medical pathology, but according to the understanding that the current social structure and segregation create the marginalization

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[42] Sukhsimranjit Singh, *Access to Justice and Dispute Resolution Across Cultures,* 88(6) FORDHAM L. REV. 2407, 2422 (2020).

[43] Mor, *supra* note 6, at 621.

[44] CRPD, *supra* note 34, Article 9.

[45] *Id.* Article 12.

[46] *Id.* Article 13.

[47] CRPD, *supra* note 34. For a thorough overview of the Convention's drafting process and international implementation, *see* Arlene S. Kanter, *The Promise, and Challenge of the United Nations Convention on the Rights of People with Disabilities*, 34 SYRACUSE J. INT'L L. & COM. 287 (2007). The CRPD promotes equality through non-discrimination and is the first international human rights convention to state that failure to provide reasonable accommodation is an act of discrimination in and of itself. It was also the first convention to acknowledge accessibility and access to justice as internationally recognized rights (*See generally*: HUMAN RIGHTS & DISABILITY ADVOCACY (Maya Sabatello & Marianne Schulze, eds., 2013).

[48] Mor, *supra* note 6, at 617, 620. Mor argues that the article offers a broad and substantive understanding of access to legal proceedings

[49] *Id.* at 631.

[50] *Id.* at 632.

[51] Id. at 633.

[52] *Id.* at 613, 614, 621.

of people with disabilities and reinforce prejudice.[53] The result should be manifested in proceedings that are both universally accessible and, when necessary, individually accommodated.[54]

To conclude, research has revealed that understandings regarding the social aspect of disability, as well as the establishment of a disability rights legal corpus, have yet to lead to comprehensive access to justice for people with disabilities. Meaningful and effective implementation of disability rights should be based upon profound normative changes. Before presenting this article's suggested solution for this implementation problem through the use of DSD, in the next section, I will delve into this gap between disability rights principles and their practical implementation in disability-related legal fields and discuss its implications for disabled people's access to justice.

C. Access to Justice in Disability-Related Legal Fields

As discussed in section I.B. above, people with disabilities face particular barriers in achieving access to justice and realizing disability rights. Interestingly, even in fields that are "disability-related" and involve only, or mainly people with disabilities, there is a lack of implementation of disability rights principles and legislation. This lack has been detected in various legal fields, including social security benefits,[55] torts,[56] mental-health-related issues and psychiatric medical treatment,[57] child welfare,[58] and legal capacity.[59]

The main problem described in the literature is that although these legal fields involve solely, or mainly, people with disabilities, this has not shifted the discourse towards disability

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[53] MICHAEL J. OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE (1996).

[54] Mor, supra note 6, at 640. Universal access follows the "universal design" idea, see *infra* Section III.D.2.

[55] Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42(1) LAW & SOC. INQUIRY 195, 202-203 (2017).

[56] Sagit Mor, Rina B. Pikkel & Havi Inbar Lankry, *Representing Disability in Tort Litigation: An Empirical Analysis of Judicial Discourse (1998-2018)*, LAW & SOC. INQUIRY 1, 9 (2023).

[57] Jasna Russo & Stephanie Wooley, *The Implementation of the Convention on the Rights of People with Disabilities: More Than Just Another Reform of Psychiatry*, 22 HEALTH AND HUMAN RIGHTS 151, 152 (2020) 152.

[58] Elizabeth Lightfoot, Katherine Hill & Traci LaLiberte, *The Inclusion of Disability as a Condition for Termination of Parental Rights*, 34 CHILD ABUSE AND NEGLECT, 927 (2010); Hanna Bjorg Sigurjónsdóttir & James G. Rice, *'Evidence' of Neglect as a Form of Structural Violence: Parents with Intellectual Disabilities and Custody Deprivation*, 6(2) SOCIAL INCLUSION, 66 (2018); Robyn M. Powell & Sasha M. Albert, *Barriers and Facilitators to Compliance with the Americans with Disabilities Act by the Child Welfare System: Insights from Interviews with Disabled Parents, Child Welfare Workers, and Attorneys.* 32 STAN. L. & POL'Y REV. 119, 126 (2021)

[59] Robert Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8 (2012).

rights principles and the access to justice they entail. Instead, to a great extent, these legal fields are still dominated by medical, individual, and tragic approaches.

It may as well be that, ironically, the fact that more people with disabilities are participating in such proceedings has shaped the courts' conduct not towards disability rights principles but rather towards medical and individualistic models. In this respect, those legal fields reflect the same problems manifested in other disability-oriented arenas, like institutional housing, special education, and sheltered employment, in which people with disabilities receive services based on the assumption that they are inherently different and decapacitated.[60]

Therefore, as mentioned in section I.B., meaningful access to justice in these "disability-related" legal fields does not pertain merely to the person's ability to reach the court and to participate in the legal proceedings but rather to a deeper normative and structural change regarding the legal system and its ability to produce just results according to disability rights principles.[61]

The findings that point to the lack of implementation of disability rights in disability-related legal fields, even after the enactment of disability rights legislation, provide several possible explanations. One of them is defined as "layering". Layering happens when new policies are created but do not replace old policies, and instead "pile on top" of them, accumulating "layers of policies".[62] For instance, even the enactment of the Americans with Disabilities Act (the ADA) which created a new policy level based on social models and disability rights, did not have the political power to revise all disability policies in the U.S.[63]

In this respect, it is essential to acknowledge that while the disability rights paradigm challenges many aspects of previous disability policies, it lacks the power of the coalitions that have created and supported previous bio-medical disability policies. Therefore, alongside "rights-based legislation" such as the ADA and the CRPD, other bio-medical disability policies still manifest in disability welfare programs, labor laws, rehabilitation programs, and tax policies, directly affecting both people's lives and resources.[64] This ineffectiveness can explain

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[60] *See infra* Section I.A.

[61] Mor, *supra* note 6, at 643-644.

[62] Thomas F. Burke & Jeb Barnes, *Layering, Kludgeocracy and Disability Rights: The Limited Influence of the Social Model in American Disability Policy*, 17 SOCIAL POLICY AND SOCIETY 101 (2018) and the literature mentioned there.

[63] *Id.* at 108.

[64] *Id.* at 113.

the limited impact social models of disability have on social policies and how disability policies that predated the disability rights movement operate just as they did before.[65]

Another barrier to implementing disability rights principles is the lack of influence of social disability approaches on general social policy research. This is because social policies, primarily based on class, gender, and racial analysis, cannot be assumed to apply to disability policies ‘as is’ and must be understood within the context of the uniqueness of disability as a socio-political category.[66]

Another explanation for the limited implementation of disability rights, which focuses specifically on the ADA, is the claim that the *lack* of social conflict and low public interest surrounding the enactment of the ADA is the reason for its limited ability to make progress and affect public policy.[67] Adding to this explanation are arguments regarding the misinterpretation and misapplication of the ADA and numerous flaws in the law itself, as well as the law's inclination, being enforceable mainly via lawsuit, to put people with disabilities in an adversarial position[68] instead of promoting disability rights policy.

Summing up the relationship between access to justice and disability rights leads to two main conclusions. The first is the understanding that meaningful access to justice and disability rights implementation involves not only legislation but a paradigmatic shift, changing the normative infrastructure of the legal system to make it “disability accessible”. The second conclusion is that special attention should be paid to disability-oriented legal fields, such as legal capacity, entitlement to disability benefits, torts, forced psychiatric medical treatment, child welfare, and other legal areas that directly affect the lives of people with disabilities. Alongside the wide acceptance of disability rights principles and legislation, there is a need to implement practical policies and ensure that these are conducted according to disability rights principles in reality and not only in theory. This will transform the existing rules from limited resources into effective and comprehensive tools for meaningful access to justice. In the following parts of this article (II and III), I will suggest a possible way to achieve this necessary structural and practical reform through the mechanism of dispute system design (DSD) for access provision, mainly through the establishment of a "disability-rights-based DSD."

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[65] *See* Rimmerman et al. *supra* note 29.

[66] Holler & Ohayon, *supra* note 10, at 4.

[67] Michael Waterstone, *The Costs of Easy Victory*, 57 WM. & MARY L. REV. 587, 615 (2015).

[68] MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS (2003).

II. DSD AS ACCESS TO JUSTICE

As elaborated in the previous section, the disability rights discourse is not fully embedded in policies and legislation that dominate the lives of people with disabilities. The mere existence or formal recognition of disability rights principles and legislation is insufficient for implementing disability rights policies in these fields. In this section, I would like to introduce dispute system design (DSD) and point out two possible contributions the connection of DSD and disability rights might generate.

The first is the contribution of DSD to the realization of disability rights, given DSD's practical orientation and the importance it places on justice. Using DSD to design disability-oriented legislation and legal systems might help to solve the implementation problem detailed in section I.C. The second is the contribution of disability rights scholarship to DSD, namely that a disability-rights interpretation of DSD might strengthen DSD's perceived goal to achieve justice. Based on these premises, in the following section (III), I will provide a detailed outline for alleviating the implementation problem of disability rights (detailed in section I) and propose a "disability-rights-based DSD."

A. Dispute System Design (DSD)

A dispute system is the definition of one, often multiple, formal and informal internal processes used to prevent, manage or resolve a stream of disputes connected to an organization or an institution.[69] It emerged from the Alternative Dispute Resolution movement (ADR) and has infiltrated its theory and practice.[70] The ADR was formed in the United States as a social movement around the 1970s, reflecting the rising interest in conflict resolution.[71] ADR divides dispute resolution processes into three channels, according to the parties' interests,[72] rights, or

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[69] Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 126 (2009); The term "dispute system design" was first articulated by Ury, Brett, and Goldberg in the late 1980s (WILLIAM L. URY, GEANNE M. BRETT, & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988)).

[70] CATHY A. CONSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996); Orna Rabinovich-Einy, *Deconstructing Dispute Classification: Avoiding the Shadow of the Law in Dispute System Design in Healthcare,* 12(55) CARDOZO J. OF CONFLICT RESOL. 55, 60 (2010).

[71] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

[72] Ury et al., *supra* note 69, at 3-5, 14; Smith & Martinez, *supra* note 69, at 126; The Interest discourse's most famous model is the integrative negotiation, introduced by Fisher and Ury (ROGER FISHER & WILLIAM URY, GETTING TO YES (1981)).

power,[73] and strives to resolve disputes using various legal and non-legal methods and create an institutional change in the court system.[74]

When dealing with many disputes arising from a massive and complex event or phenomenon, then, rather than handling them as isolated events, organizations could fruitfully develop and design systems for learning from, preventing, and responding to recurring disputes, through *dispute system design*. Accordingly, DSD is the intentional creation of a system to achieve some end or set of goals through a series of coordinated processes for many disputes or potential disputes.[75] It is an analytical tool that involves creating one or multiple dispute resolution processes to help institutions, organizations, states, or individuals better manage, prevent, or resolve a particular or continuous series of conflicts. In practice, DSD uses fundamental dispute resolution processes: negotiation, mediation, arbitration, and adjudication, as well as some variants and hybrids of these processes.[76]

DSD focuses mainly on the interests-discourse and the prevention of disputes, building negotiation pathways, quick and cheap paths of realization of rights, organizing procedures on a cost scale, and forming the optimal environment, resources, incentives, and training. According to DSD, organizations should strive to develop a systematic shift from *reaction* to disputes to the *management* (including the prevention) of disputes in various contexts. Much like the concept of public health, it contends that organizations should promote a "healthy" and preventive mode of conduct instead of focusing on medicating pathologies. DSD promoters suggest that DSD can lower transaction costs, minimize power struggles, increase productivity, and produce higher satisfaction and compliance rates with agreements in various contexts.[77]

DSD's characteristics make it especially helpful in policy-making and implementation. It is often used to facilitate legislative, quasi-legislative, or private policy-making on a given issue, integrate stakeholders' interests or help prevent the emergence of disputes by creating or clarifying rules.[78]

Smith and Martinez[79] suggest three primary goals for DSD: The first, the *analysis* of

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[73] Smith & Martinez, *supra* note 69, at 127.

[74] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165 (2003).

[75] Rogers et al., *supra* note 17, at 4. For a critique of the traditional mediation models (based on ADR) and a call to embrace DSD as a better philosophical framework for mediation, *see* John Lande, *Real Mediation Systems to Help Parties and Mediators Achieve Their Goals*, 24 CARDOZO J. CONFLICT RESOL. 1, 8 (2023).

[76] Smith & Martinez, *supra* note 69, at 126.

[77] Blomgren-Amsler et al., *supra* note 11.

[78] *Id.* at 42.

[79] Smith & Martinez, *supra* note 69, at 124.

systems to understand their evolution, functioning, and impacts; the second, *advisement* on the best process to create the (re)design mechanism for a system; and the third, the *(re)design* of a system itself. Based on this analytic framework for organizing and directing the analysis and design of dispute systems, Blomgren-Amsler et al.[80] propose a focus on six key elements: 1) *Goals*: what do the system's decision-makers seek to accomplish? Which types of conflict does the system wish to address? 2) *Stakeholders*: who are the people or entities involved? What is their relative power? What are their interests, and how are they represented in the system? 3) *Context and Culture*: how does the context of the dispute affect its viability and success? What aspects of culture - organizational, social, national, and economic - affect the system? What are the norms for communication and conflict management? 4) *Processes and Structure*: which processes are used to prevent, manage and resolve the dispute? Are they linked or integrated? What are the incentives and disincentives for using the system? What is the dispute system's interaction with the formal legal system? 5) *Resources*: what financial or human resources support the system? and 6) *Success, Accountability, and Learning:* How transparent is the system? Does the system include monitoring, learning, and evaluating components? Is the system successful? Finally, as Rogers et al. conclude, DSD is practice-oriented. Therefore, the design process should consider the system's implementation from the very start.[81]

Dispute system *designers* are architects of social structures that provide legal, political, economic, and social order. In their practice-oriented book "Designing Systems and Processes for Managing Disputes," Rogers et al. describe the scope of DSD, overreaching much further than mere dispute resolution into multicultural historical disputes in South Africa and Canada, the New York crime-fighting system, and health organizations.[82]

A dispute system designer must understand which stages and types of conflict the system seeks to address and what the system's decision-makers intend to accomplish through the design.[83] Since DSD is interdisciplinary, designers might come from various academic or professional fields, including management, organizational development, social psychology, labor and employment relations, diplomacy, or international development.[84] Being exposed to

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[80] Blomgren-Amsler et al., *supra* note 11, at 24-25.

[81] Rogers et al., *supra* note 17, at 27, 265

[82] *Id.*

[83] Blomgren-Amsler et al., *supra* note 11, at 26.

[84] *Id.* at 25, 61. For elaboration regarding the designer's identity, see chapter 4 of their book. Inter alia, they mention that designers must possess strong interviewing, listening, and communication skills and knowledge of the process options under consideration, including ethical standards and best practices. A designer may need a wide range of specialized knowledge and skills to proceed with all design phases: assessment, design process, design implementation, and evaluation.

the legal outcomes of the existing social structures, *lawyers* frequently find themselves able to initiate and conduct dispute systems design mainly through legislation reform.[85]

Given the implementation problem of disability rights, as described in section I.C., I claim that DSD's policy-oriented and practical characteristics make it especially fit to tackle this issue. Linking DSD and disability rights is almost trivial since the *design* is at the heart of both. Both are concerned with designing or redesigning places, institutions, and systems.[86] Therefore, I suggest using DSD to design disability-oriented legislation and policy reforms. Another main DSD trait that makes it especially fit to address disability rights implementation, given disabled people's problem of access to justice, is the importance DSD places on seeking justice. This justice orientation of DSD and its relevance to disability rights will be discussed now.

B. DSD, ADR, and Access to Justice

To deliver justice is described as one of DSD's core goals,[87] making it especially suitable for design in disability-rights-related systems, not only because of its managerial merits but also because of its value-related merits.

DSD's connection to justice and access to justice must be discussed first through its ADR origin. Traditionally, both access to justice and ADR shared the understanding that the conventional judicial system could not live up to the ideals of "access to justice for all".[88] Accordingly, ADR researchers promoted and described ADR as a means to achieve access to justice.[89] They explained that ADR promises autonomy, self-determination, and empowerment to the parties, along with procedural and administrative reform and greater efficiencies of the courts[90] that should result in greater access of vulnerable groups to the justice system.[91] The

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[85] Rogers et al., *supra* note 17, at 304-305, 309. Alongside "hard" legal reforms, they mention that change can be established without the authorization of the law and without program-specific provisions that contribute to the complexity and might also contribute to the avoidance of participation.

[86] The CRPD, which incorporates all disability rights principles, mentions the word "design" or "designed" eleven times, emphasizing the states' duty to design goods, services, equipment, and facilities that suit disabled people's needs and capabilities (*supra* note 34, at Articles 2, 4, 8, 9, 25 and 26).

[87] Blomgren-Amsler et al., *supra* note 11, at 14.

[88] William Twining, *Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics*, 56 MOD. L. REV. 380 (1993).

[89] Austin Sarat and Suzn Silbey, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstitution of the Juridical Subject*, 66 DENV. U. L. REV. 437, 450-453 (1989); Jaqueline Nolan-Haley, *Mediation, Self-Represented Parties, and Access to Justice: Getting There From Here*, 87 FORDHAM L. REV. ONLINE 78 (2019).

[90] Jaqueline Nolan-Haley, *Achieving Access to Justice Through ADR: Fact or Fiction? Foreword,* 88(6) FORDHAM L. REV. 2111 (2020) [hereinafter *Nolan-Haley, Achieving Access to Justice Through ADR*].

[91] Twining, *supra* note 88; Sart & Silbey, *supra* note 89.

promoters of "access to justice through ADR" didn't focus on the practical, managerial, and functional aspects of ADR but instead on the progressive agenda that offered alternatives to the bureaucratic encumbrance and inefficiencies, high costs,[92] length of the process, and the power disparities between the parties. They claimed that such options would advance access to justice for vulnerable groups.[93] Therefore, many of ADR's early proponents promoted ADR as a means to access justice, citizens' control over decisions affecting their lives, and personal empowerment.[94]

Nevertheless, ADR's goal of promoting justice received substantial and severe criticism.[95] Significantly, concerns were raised regarding ADR's potential to facilitate *injustice* for specific segments of society,[96] fearing that its administrative and settlement-oriented goals would come at the expense of meaningful consent, especially the consent of weak and vulnerable parties.[97] Concerns were also raised regarding the possible outcomes of reaching settlements at the cost of validating rights[98] and the courts' diminishing ability to develop the law through conflicts,[99] create and revise precedents, and declare societal values[100] and social processes.[101]

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[92] Regarding the hope that ADR might lower the cost of litigation and therefore allow access to low-income disputants, *see generally*, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

[93] Sarat & Silbey, *supra* note 89; Mauro Capaletti, *Alternative Dispute Resolution Within the Framework of the Worldwide Access-to-Justice Movement*, 56 MODERN L. REV. 282 (1993).

[94] Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 68 (2009) and the literature mentioned there.

[95] Orna Rabinovich-Einy and Ethan Katsh, *A New Relationship between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution*, 32 OHIO ST. J. ON DISP. RESOL. 695, 696 (2017) [hereinafter Rabinovich-Einy & Katsh*, A New Relationship*]; Cohen, *supra* note 94, at 55, 69.

[96] Nancy A. Welsh, *Bringing Transparency and Accountability (with a Dash of Competition) to Court-Connected Dispute Resolution*, 88(6) FORDHAM L. REV. 2449, 2500 (2020).

[97] Jacqueline Nolan-Haley, *Does ADR's Access to Justice Come at the Expense of Meaningful Consent,* 33 OHIO ST. J. ON DISP. RESOL. 373 (2018).

[98] Laura Nader, *From Legal Process to Mind Processing*, 30 FAM. & CONCILIATION CTS. REV. 468, 468, 472 (1992).

[99] CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT (1985).

[100] Owen M. Fiss, *Against Settlement*, 93 YALE. L. J. 1073 (1984) [hereinafter Fiss, *Against Settlement*]; Orna Rabinovich-Einy & Ethan Katsh, *The New New Courts,* 67 AM. U. L. REV. 165, 179-180 (2017); Sally E. Merry, *Disputing Without Culture: Review Essay on Dispute Resolution*, 100 HARV. L. REV. 2057, 2061-2060 (1987).

[101] JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWERS, 124 (1983). This concern led those who represent people and causes that are in a less powerful societal position to view conflict resolution as means of preventing organizing, a fake show of dialogue, and focusing on the potential for minor concessions rather than on rights, equality, and exploitation (*See* Rogers et al., *supra* note 17, at 115).

To those who believed in the potential of the rights discourse, which is oppositional by nature, to advance society and bring transformation,[102] the pursuit of settlement and harmony posed a danger of conservatism and regression,[103] primarily when power differences between the parties exist.[104] This "transformation of disputes" approach emphasizes that the world we conceptualize is an outcome of social construction that can be changed and designed. Therefore, disputes are essential to human interaction, so dispute *management* should be emphasized rather than its *settlement*.[105]

As ADR means evolved over the years and with the development of technology, including the emergence of ODR (online dispute resolution)[106] and restorative justice, they produced new ideas and dilemmas regarding access to justice.[107] It can be cautiously stated that while ADR may provide remedies for some injustices, it can also introduce new injustices. The context and level of justice of the system in which ADR operates are crucial.[108] Rabinovich-Einy and Katsh offer a combined approach to this dilemma, stressing the importance of striving to allow the pursuit of public goals in dispute resolution without sacrificing the flexibility and efficiency of private dispute resolution.[109] With this in mind, it can be concluded that even though ADR *can* promote access to justice, it is likely to do so only if it is sensitive to social and cultural inequalities.

DSD emerged from ADR and applied many problem-solving techniques to organizations, institutions, and social domains. Given the tension between ADR and access to justice, combined with DSD's focus on interests (rather than power or rights),[110] DSD's ability to protect values[111] and to achieve or enhance justice and access to justice should be carefully examined.[112]

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[102] Richard Delgado, Chris Dunn, Pamela Brown & Helena Lee, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution,* WIS. L. REV. 1359 (1985).

[103] Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

[104] Fiss, *Against Settlement*, *supra* note 100.

[105] Sarat and Silbey, *supra* note 89, at 447-449.

[106] *See, e.g.*, Rabinovich-Einy and Katsh, *A New Relationship*, *supra* note 95, at 695.

[107] *See* Fordham Law Review's volume 88, which is dedicated to issues of ADR and access to justice, following a symposium that was hosted by the Fordham Law Review, Fordham Law School's Conflict Resolution and ADR Program, and the National Center for Access to Justice on November 1, 2019, at Fordham University School of law.

[108] Nolan-Haley*, Achieving Access to Justice Through ADR*, *supra* note 90, at 2117.

[109] Rabinovich-Einy and Katsh, *A New Relationship*, *supra* note 95, at 697.

[110] Amy Cohen describes the argument of DSD's creators, Ury Goldberg and Brett, as one whose principle focuses on interests and design mechanisms to reconcile the disputants' *interests* (Cohen, *supra* note 94, at 61-62).

[111] Cohen, *supra* note 94, at 69.

[112] Specifically, Cohen warns against what she calls the fictitious phenomenon of "equivalence across scale" between disputants, arguing that designers might be tempted to design horizontal dispute processing

DSD researchers wish to overcome these concerns by setting strict ethical rules for designers[113] and characterizing justice as DSD's primary goal, describing its essential role in the design process.[114] They claim that the quality of a dispute system should be judged by its fairness and level of conformity with legal and societal norms, including various dimensions of justice:[115] fairness and equity of the outcomes of the process (distributive and substantive justice), impacts on organizations and organizational values (organizational justice), impacts on communities (transitional, restorative, and communitarian justice) and party voice and control over the process (procedural justice).[116] One main DSD trait that has the potential to enhance procedural justice is the importance of involving stakeholders in the design process.[117] Blomgren-Amsler et al. explain that increased opportunity for voice, and a chance to shape resolutions for the common good based on the participants' lived reality, generally increase satisfaction and the likelihood of successful implementation.[118]

The focus on justice reflects DSD's inclination to *design* and *manage* disputes and not merely to *settle* them, addressing equality, safety, change, public and personal understanding,

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systems that would not provide justice for disputants in situations of power differences in complex realities (Cohen, *supra* note 94, at 69–70).

[113] Designer ethics is described as critical in ensuring the DSD justice component. See Carrie Menkel-Meadow's general ethical guidelines: 'Do not harm'; do not become a tool of the organization or government that ordered the design; make sure that the "end users" of the system have had input in the design ("bottom-up sensitivity"); take responsibility for implementation and evaluation to make sure that the process accomplishes what it was supposed to design; know the participants' legal rights; be sure that the system doesn't systematically discriminate or harm specific individuals; be knowledgeable about the cultures or histories at stake; consider multiple processes for the same DSD, try to serve different individual preferences; ensure that the users understand the process; and be open for revision of the system over time (Carrie Menkel-Meadow, *Are there Systematic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195, 229-230 (2009)). Blomgren-Amsler et al. address similar issues when they describe DSD's guiding principles and when stating that a DSD should be fair and just first and foremost; It should consider efficiency for the institution and participants and engage stakeholders, including users, in design and implementation; It should seek prevention, provide multiple and appropriate interest-based and rights-based process options, and ensure users' flexibility in choice and sequence of process options; it should train and educate system providers, users, and other stakeholders and make the DSD accountable through transparency and evaluation with appropriate concern for privacy to improve its continuously (Blomgren-Amsler et al., *supra* note 11, at 13-14, 93-94).

[114] Blomgren-Amsler et al., *supra* note 11, at 8, 14; Rogers et al., *supra* note 17, at 205; Mariana Hernandez Crespo Gonstead, *Introduction to the Symposium: Leveraging on Disruption: The Potential of Dispute System Design for Justice, Accountability, and Impact in Our Global Economy*, 13 U. ST. THOMAS L.J. 159 (2017).

[115] Smith & Martinez, *supra* note 69, at 128.

[116] Blomgren-Amsler et al., *supra* note 11, at chapters 1 and 5.

[117] *See infra* section III.B.

[118] Procedural justice stresses impartiality, the opportunity to be heard, legal grounds for decisions, the neutrality of the process and decision-makers, the treatment of the participant with dignity and respect, and the trustworthiness of the decision-making authority. Procedural justice also refers to the individual participant's perception of fairness in the rules and procedures used to resolve the conflict. It views satisfaction as a process function, not only the outcome (Blomgren-Amsler et al., *supra* note 11, at 15-17, 40). Research has shown that people involved in legal processes were greatly concerned with procedural justice when evaluating the process as a whole. Being heard, being treated with respect, and working with a trusted and unbiased third party will likely be highly valued by many disputants (Rogers, *supra* note 17, at 23, 26, 75).

personal accountability, and reconciliation. Especially when designing *legal* systems, DSD holds the potential to go beyond resolving disputes to encompass broader goals of economic development, empowerment, and good governance.[119]

Nevertheless, designers, host organizations, and stakeholders often fail to discuss justice explicitly,[120] and researchers have raised concerns regarding achieving justice through DSD, especially when disputes involve human rights and unequal power between the parties, such as disputes between individuals against leaders, institutions, and states.[121] A primary concern is that while using DSD, the goal of concession will over-dominate the rights discourse and result in unjust outcomes, especially when a weak party is involved.[122] Similarly, Amy Cohen is concerned that importing market responses to social conflicts creates social risks that should be identified and addressed and suggests that shifting from ADR to DSD, an "explicit attention to scale can sharpen how we understand questions of power and distribution."[123]

Another important aspect of using DSD in human rights context is the backdrop of a rights-protecting legal system. Without it, the design is unlikely to be successful.[124] Consensual processes can be used when the rule of law exists, but courts or hybrid tribunals are a necessary first step where inequality and lack of rights are prevalent.[125] Accordingly, it is essential to have a robust rights-based adjudication process in the backdrop of the DSD, among other interests-based options.[126]

In conclusion, while there is no doubt that justice is supposed to be one of DSD's goals, the question remains regarding the weight given to justice by the designers when competing with other DSD procedural and administrative components and goals. In the next section, I will

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[119] Rogers, *supra* note17, at 201-202.

[120] Blomgren-Amsler et al., *supra* note 11, at 120.

[121] Andrea Kupfer Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289, 311 (2009).

[122] Such concerns regarding the relevance of applying DSD to human rights issues were also raised regarding transitional justice, which refers to how countries emerging from periods of conflict and repression address large-scale or systematic human rights violations when the "normal" justice system cannot respond adequately (Kupfer Schneider, *supra* note 121).

[123] Cohen, *supra* note 94, at 80.

[124] Kupfer Schneider, *supra* note 121.

[125] One benefit of ADR processes is the ability of participants to design an outcome that meets their interests that a court could not necessarily order. However, they acknowledge that measuring a possible consensual outcome against the alternatives may require parties to understand whether they have a legal claim and, if so, how it would likely resolve in court. Therefore, the designer must consider the role of the law and the lawyers in the DSD process. Accordingly, some DSD models suggest different levels of ensuring that the parties obtain legal knowledge or representation before entering the process (Blomgren-Amsler et al., *supra* note 11 at 93-94).

[126] Jennifer F. Lynch, *Beyond ADR: A System Approach to Conflict Management*, 17 NEGOT. J. 207 (2001).

suggest that the disability rights discourse can enhance and shape this inherent DSD predisposition, strengthening and broadening DSD's possibilities to achieve justice.

C. Using Disability Rights to Enhance Justice through DSD

As mentioned above, DSD is an analytical framework that includes six elements: goals, stakeholders, context and culture, process and structure, resources, and successfulness, accountability and learning. I have claimed that given DSD's practical orientation; it is advisable to employ it when designing disability-related legislation and policy, especially if one applies a disability-rights interpretation to DSD's six elements. Before outlining this "disability-rights-based DSD" in part III of this Article, I wish to suggest that giving a "disability-rights" interpretation to DSD's six elements can enhance DSD's potential to achieve justice not only in disability-related systems but in other systems and designs, especially those that involve hierarchies or past injustice.

Given that disability rights were established to achieve justice, advance equality, diminish hierarchies, and rectify historical injustices, a "disability-rights based DSD" will include core values such as recognizing and removing socially constructed barriers, scales, and segregation; universalism; interdependence; disability culture; and accessibility, as detailed in part III. This disability rights interpretation of DSD can overcome the risks and concerns mentioned in part II.B. above regarding DSD's ability to achieve or enhance justice.

The first is the risk of scaling, or "equivalence across scale", identified by Amy Cohen, the danger of a horizontal design that puts all stakeholders on one level, resulting in efficient but unjust outcomes based on interests and not rights.[127] Principles of disability rights, such as attention to meaningful participation, hierarchies, and a disabling social construction,[128] echo and add to the design principles she suggests to make salient qualitative differences in scale levels among parties to a dispute, for example, by setting forth not only the concrete stakeholders and their interests but the interests and social position of the larger community.

Secondly, considering disability rights can make the designer sensitive to other matters that might impede the system's aspiration to achieve justice. As detailed in part I.A., disability rights are based on social approaches that have shed light on the social and cultural aspects that have contributed to the creation of disability rather than individual traits. Such an

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[127] Cohen, *supra* note 94, at 67-70.

[128] As described in *supra* Section I.A.

understanding will shift the design's focus from the dispute's parties to the existing legal frameworks regarding the rights, duties, and entitlements of the stakeholders; the potential distributive effect of the design; how the design affects the individual's experience as a stakeholder; how background social norms and expectations affect the conflict, the interest, and the negotiation strategies; and how the negotiation might change if legal frameworks, jurisdictional configurations, and social expectations were the sustained objects of change.[129]

As Cohen notes, this systematic engagement with legal, historical, and social factors that contribute to the shaping of both the conflict and the stakeholders is not always feasible or practically desirable by designers, who frequently need to constrict, rather than expand, the conflict's context to help the parties address their most pressing needs. Nevertheless, such an inclination might assist lower-power stakeholders in securing better outcomes.[130] Providing a disability rights interpretation (as outlined further in Section III) will "force" the designer to give considerable weight to these social and historical considerations as an inherent part of the design.

Providing DSD with a disability rights interpretation reflects Susan Sturm's "micro-institutional analysis" writing. This process starts with a particular problem and follows the web of relationships, processes, and structures involved, tracing the roles, strategies, and decisions that influence the situation. It stresses that to understand and address conflicts among individuals fully, one should appreciate social organizations and consider actors not involved in the immediate conflict, broader goals, and values of general concern. In doing so, it uses individual dispute resolution to foster a systemic institutional change.[131]

Finally, as described in Section I.A., disability rights emerged from the understanding that disability is not merely an individual situation that needs to be rehabilitated but a result of social construction and interaction. This understanding provides grounds for continuously striving for social change through enacting and enforcing disability rights. Thus, a profound disability rights interpretation of DSD will strengthen the design's inclination to address higher-level disputes by considering the institutional and social factors surrounding the situation, unveiling historical inequalities and hierarchies, and using every dispute to advance broader justice goals. Hence, a disability-rights-based DSD is not merely an outline of a system

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[129] Cohen, *supra* note 94, at 75-76.

[130] *Id.* at 77.

[131] Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. L. L. & GENDER 247, 272, 287 (2006).

that solves disability-oriented disputes but a pathway to achieve justice in other settings, especially ones that involve hierarchies.

III. DESIGNING A DISABILITY-RIGHTS-ORIENTED DISPUTE SYSTEM

DSD's proposed framework for organizing and guiding the analysis and design of dispute systems focuses on six key elements: the *goals* that motivate the system; the relevant *stakeholders*, the system's *context and structure*; the *processes* and *cultures* that are affiliated with the system; the system's *resources*; and the ways to determine *success, accountability, and learning*.[132]

A "disability-rights" interpretation of these elements lays the foundation for a "disability-rights-based DSD," generating a dual effect. While DSD will provide disability rights with an analytical and value-oriented practical implementation tool, disability rights will shape and enhance DSD's potential to achieve justice.

Consequently, the disability-rights-based DSD holds the potential to tackle the problem mentioned in section I and to strengthen the implementation of disability rights principles within systems, aiming to manage, resolve, or prevent conflicts and to achieve greater access to justice, especially in the context of disability-oriented legal fields, such as social security, torts, psychiatric hospitalization and medication, child welfare, and legal capacity.

A. Goals

Setting the system's goals, including values, outcomes, and priorities, should be determined and articulated at the very outset of the design process. This is crucial for clarifying the system's policy directives and assessing the system's success in achieving these goals at the end of the process.[133]

To set the system's goals, one must first identify the types or categories of conflicts the system wishes to address. Determining the system's goals considers all design stages, such as relations among the different parties; system operation;[134] efficiency and resource saving; substantive outcomes;[135] and operational outcomes.[136] Some of the goals might be

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[132] Blomgren-Amsler et al., *supra* note 11, at 24-25. For elboration *See infra* section II.A.

[133] Blomgren-Amsler et al., *supra* note 11, at 25.

[134] For instance, organizational improvement, enhancing the system's accessibility or decreasing caseload, public recognition versus privacy, public vindications, or precedents.

[135] For instance, seeking justice, safety, anti-violence, property protection, fairness, reconciliation, and the opportunity to be heard.

[136] For instance, enhancing compliance and enhancing the satisfaction of more stakeholders.

contradictory, such as goals of efficiency versus goals of fairness, and therefore the system's designer has to determine priorities. The trade-offs among competing goals may affect the quality of the system.[137]

When designing in "disability-oriented" fields, disability rights should be added to all these considerations as a "meta-goal". This suggestion is rooted in the understanding that the (negative) depiction of disability is primarily a result of social construction and should be altered by adopting a view of disability as social-dependent. As detailed in part I.A., disability rights consist of critically examining existing norms and regulations and establishing new ways of constructing an alternative policy. They do so by unveiling how the law contributes to disabled people's exclusion and oppression, leading to negative social attitudes and segregation. Consequently, they provide grounds for a new and accessible social design that allows for greater participation of people with disabilities in the public sphere. They also call for resource distribution to support this design.[138]

Disability rights also recast traditional depictions of disability: rather than inferiority, disability is seen as enriching the "human" concept, insisting on the capacity of people with disabilities to forge their destinies and legitimizing the formal and informal support they require to participate,[139] to be included in the community, and involved in public policy processes.[140]

Therefore, these broad disability rights aspects should be central to the design. This is particularly important in areas with therapeutic or welfare aspects because those are especially prone to be conducted in the traditional bio-medical approach rather than in light of disability rights values.

Moreover, disability rights as a "meta-goal" will ensure that every dispute provides a lesson and is not merely settled or prevented since the overreaching goal is the advancement of rights. This is imperative, given the existing hierarchies and power disparities between people with disabilities and the people and institutions they typically depend on. In a conflict setting, these hierarchies place people with disabilities in an inferior position. Thus, setting

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[137] Blomgren-Amsler et al., *supra* note 11, at 26-28; Smith & Martinez, *supra* note 69, at 129-130.

[138] Mor, *supra* note 6, at 627-629.

[139] Gerard Queen & Anna Arstein-Kerslake, *Restoring the 'Human' in 'Human Rights: Personhood and Doctrinal Innovation in the UN Disability Convention*, *in* THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW 36, 38 (Conor Gearty & Costas Douzinas, eds.).

[140] *Id.* at 38-39.

disability rights as a primary goal of every dispute system will help to “level the playing field” among the parties.[141]

B. Stakeholders

People will often support what they helped to create.[142] Therefore, stakeholders - individuals, groups, and organizations - that host, use, or are affected by a system[143] are critical in designing and implementing every DSD. They should be identified,[144] and their needs, interests, positions, relationships, power, rights, and resistance to the suggested change should be acknowledged.[145]

Regarding the stakeholders’ relationships, DSD scholars have advised designing systems that enhance relationships and collaboration in the long term.[146] Overall, the relationships affect how consensus-building processes will work, and the more productive the relationship, the less likely a conflict will escalate.[147] For example, an adjudication process that resolves the conflict but does not deal with the relationship may result in future problems and distrust.[148]

A disability-rights interpretation to DSD’s “stakeholders” fine-tunes its meaning using two basic understandings: “nothing about us without us”; and interdependence.

1. Nothing about us without us

The pivotal role of stakeholders in DSD, as opposed to systems designed solely by “decision-makers,” aligns with one of the most famous slogans behind the disability rights movement: “*Nothing about us without us.*” This phrase means that all decisions and policies regarding people with disabilities should be made only through consultation with those affected

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[141] “Leveling the playing field” was suggested by Elizabeth Emens regarding disability rights and the need to accommodate society to promote equality in various fields: Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1310, 1386, 1391 (2009).

[142] Rogers et al., *supra* note 17, at 265.

[143] In addition to the immediate parties in conflict, stakeholders can be individuals or entities that are subsidiary to or constituents of those parties, as well as others directly or indirectly affected by the outcome of the dispute (Blomgren-Amsler et al., *supra* note 11, at 10, 29). For existing systems, it is essential to learn which stakeholders were involved in the system’s initial design and whose interests are represented (Smith & Martinez, *supra* note 69, at 131). All stakeholders do not have equivalent power, and the dictum to engage all stakeholders in a DSD process does not address how competing interests will be resolved in a system (Blomgren-Amsler et al., *supra* note 11, at 104).

[144] Rogers et al. practically describe ways to choose the relevant stakeholders in a way that aspires to achieve enduring resolutions: stakeholders that are knowledgeable about the issue at hand, able to work productively with others, supported by their constituency, interested in participating, and available for periodic meetings (*supra* note 17, at 151).

[145] Blomgren-Amsler et al., *supra* note 11, at 29-30, 67; Rogers et al. *supra* note 17, at 27, 265.

[146] Rogers et al. *supra* note 17, at 243.

[147] *Id.* at 225.

[148] *Id.* at 226-227.

by those decisions and policies. It pushes back against parents, social workers, and medical professionals who have exclusively dominated the disability discourse and policy-making.[149] It reflects the belief that people with disabilities are committed to securing their collective interests, can speak on their behalf,[150] and that their self-identity is essential in policy-making.[151] Thus, it bears repeating: in the process of DSD, the relevant stakeholders will *always* include people with (the relevant) disabilities themselves rather than through their caretakers, educators, health professionals, or loving family members.

Nevertheless, those "others": caretakers, educators, health professionals,[152] bureaucrats,[153] and family members, should also be considered stakeholders since they comprise an inherent part of the design or its opposition. Regarding their participation vis-à-vis the authentic voice of people with disabilities, designers are advised to produce equal status among the parties, "leveling the differences in the playing field".[154] This is not always easy or even possible when we discuss the encounters of people with disabilities with legal aspects since the other participant is often the state, which holds great power and enjoys the status of a "repeat player".[155] A suggestion that might influence this hierarchy and is very relevant to disability is to increase the stakeholders' positive interactions within the larger community as a long-term approach to building constructive relationships.[156]

The lawyer-client relationship between people with disabilities and their lawyers is another critical aspect of the notion of "nothing about us without us" since, in many instances, their voice is delivered through their lawyers. Therefore, when designing disability-related legal

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[149] For a thorough explanation of the slogan's origin, *see* JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT (1998).

[150] Adi Goldiner, *Membership rights: The Individual Rights of Group Members*, 32(2) CAN. J.L. & JURIS. 343, 348 (2019) [hereinafter Goldiner*, Membership Rights*]. A similar claim was recently made by Cohen-Rimer regarding poverty legislation, which unveils the gap between the reality of persons living in poverty and welfare legislation that was not created by them and is based on wrong and excluding presumptions regarding poverty and its sources (Yael Cohen-Rimer, *Participation in Welfare Legislation: A Poverty-Aware Paradigm*, 17(1) REGUL. & GOVERNANCE 83 (2023)).

[151] Dorfman, *supra* note 55, at 204. This notion also lies at the heart of the CRPD, *supra* note 34, at pmbl., ¶ 13: "Considering that people with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programs, including those directly concerning them".

[152] Holler & Ohayon, *supra* note 10 at 11. Historically, pivotal stakeholders in the disability field are medical professionals, who held and still hold high discretionary power over individual decisions and public policy shaping.

[153] Holler & Ohayon, *supra* note 10, at 10. In particular, studies have shown the strength of bureaucrats in social policy formation in professional domains and mainly in disability issues.

[154] Rogers et al., *supra* note 17, at 237. As mentioned in Emens, *supra* note 141, at 1386, 1391, "Leveling the playing field" regards disability rights and the need to accommodate society to promote equality in various fields.

[155] Galanter, *Explaining Litigation*, *supra* note 4, at 360-366.

[156] Rogers et al., *supra* note 17, at 239-240.

fields, it is imperative to understand the lawyers' views and interests and ensure they speak in a disability rights language when representing their clients. Moreover, it is highly advised that lawyers who deal with disability issues adopt a "relationship-centered lawyering" approach.[157] This approach, which focuses on fairness and justice, aims to enhance the client's trust and respect for the law and its actors and the values underlying the decision-making process. It promotes actions that increase clients' feeling that they are treated fairly. It suggests that this feeling depends mainly on processes in which clients are fully informed in accessible language about the procedures and criteria for legal decisions and are treated with respect by legal professionals.[158]

2. Interdependence in the Context of Disability

Relationships compose an imperative part of most people's lives and bring to light the concept of *interdependence*. Accordingly, no individual is truly independent, and everyone's perceived independence results from dependence on others.[159] Interdependence is significant in the lives of people with disabilities, who often depend upon support and services provided by others.[160] Interdependence is compatible with the theory of "relational autonomy", challenging the individualistic convention according to which, ideally, people are independent, self-interested, and act rationally to maximize their gains. Instead, relational models argue that people's autonomy – their identities, needs, and interests – is always dependent and shaped according to their relations with others.[161] Similarly, it has been clarified by disability scholars and activists alike that independence should be referred to as "having choice and control over services to enable societal participation, but not doing everything by oneself or living in isolation from others".[162]

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[157] RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE (Susan L. Brooks & Robert G. Madden, eds., 2010) [hereinafter Brooks & Madden *Transforming Legal Practice*].

[158] David M. Boulding & Susan L. Brooks, *Trying differently: A Relationship-Centered Approach to Representing Clients With Cognitive Challenges*, 33 INT'L J.L. & PSYCHIATRY 448, 450, 451 (2010) [hereinafter Boulding & Brooks *Trying Differently*].

[159] Eva Feder Kittay, *The Ethics of Care, Dependency and Disability*,24(1) RATIO JURIS 49, 50 (2011); Martha Fineman, *Cracking the Foundational Myths. Independence, Autonomy and Self-Sufficiency*, 8(1) Am. U. J. GENDER SOC. POL'Y & L. 13, 14 (2000).

[160] Feder Kittai, *supra* note 159, at 50.

[161] Edward S. Dove et al., *Beyond individualism: Is there A Place for Relational Autonomy in Clinical Practice and Research?*, 12(3) CLINICAL ETHICS 150 (2017).

[162] Ciara Brennan et al., *Negotiating Independence, Choice and Autonomy: Experiences of Parents Who Coordinate Personal Assistance on Behalf of Their Adult Son or Daughter*, 31 DISABILITY AND SOCIETY 604, 616 (2016).

In the context of disability, caretakers hold a central role in the interdependence relationship. Often the person's family is a critical provider of support. Parents of people with disabilities, for example, play an interesting part. On the one hand, their involvement as stakeholders contradicts some of the key goals and principles of disability rights and the independent living movement. Their involvement with service provision for their children could be considered an antithesis of choice and independence.[163] Yet, other voices have highlighted parents' pivotal role in the struggle for disability rights and independent living. Many identify as members of the independent living movement and providers of personal assistance for their children. People with disabilities might require this "third party" to act on their behalf as they negotiate for independence, choice, and autonomy[164]. Therefore, despite criticism of parents as unfit stakeholders in the disability rights movement,[165] their role seems far too complex to cast aside.

Consequently, it is essential to recognize and appreciate the interdependent relationships between stakeholders in the design process. Their nature should be carefully examined, and when appropriate, efforts should be made to preserve and foster interdependent relationships. This maintenance might be a difficult challenge in certain situations, especially ones that involve the enhancement of autonomy as a goal, and therefore, might raise a conflict of interest. Nevertheless, given the importance of interdependence in the lives of people with disabilities, it is a challenge worth confronting.

C. Context and Culture

Context is the circumstance or situation in which a system is diagnosed and designed. *Culture* refers to patterns of being, perceiving, believing, behaving, and sense-making shared by a group.[166] Since culture affects how people perceive fairness regarding disputes,[167] it is imperative to align processes to prevent, manage, and resolve disputes with the system's

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[163] Christine Kelly, *Making 'Care' Accessible: Personal Assistance for Disabled People and the Politics of Language,* 31(4) CRITICAL SOCIAL POLICY 562 (2011).

[164] Brennan et al., *supra* note 162. Given the family's role in the lives of people with disabilities, the CRPD also stresses the importance of the family as a fundamental unit of society. It, therefore, requires state members to protect and assist the family and "enable families to contribute towards the full and equal enjoyment of the rights of people with disabilities" (CRPD, *supra* note 34, at pmbl., ¶24).

[165] Kathryn Knight, *The Changing Face of the 'Good Mother': Trends in Research into Families with a Child with Intellectual Disabilities and Some Concerns*, 28(5) DISABILITY AND SOCIETY 660 (2013).

[166] Blomgren-Amsler et al., *supra* note 11, at 30.

[167] *Id.* at 32.

culture[168] and to foster cultural consciousness within designers to improve the means to deal with culture or intercultural situations.[169]

Culture is commonly viewed as arising within national, regional, or religious contexts but can also develop across professions, a community, a corporation, or other organizations.[170] The term "community" can apply to people with shared characteristics or interests, a common history, or social, economic, political, regional, or policy preferences.[171] This broad definition of "community" can also refer to the general community of people with disabilities and to disability rights as "membership rights", unique and common rights that people with disabilities hold as a group and as individuals belonging to a group, which are grounded in the special interests and circumstances of every member of the group.[172] Therefore, when designing in disability-related areas, the designer should consider disability context and culture.

1. Disability Context

As explained in Section I.A., disability is a *contextual* phenomenon. Many of its negative implications result from the interaction between the person and her surroundings; therefore, their elimination depends on society's duty to eradicate those disabling characteristics.[173]

Consequently, much like the design's goals, the design's context should be deeply rooted within the established knowledge regarding the discrimination and exclusion experienced by people with disabilities in all life spheres, which are manifested in two main (and circular) ways: the first is the *social marginalization* and segregation of people with disabilities, as a consequence of the depiction of disability as a tragedy and personal limitation, through designated institutions such as sheltered factories, special education, secluded living institutions, health professionals' excessive control of disabled people's lives, and legal guardianship. The second type of discrimination is the *inaccessibility* of the rest,

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[168] *Id.* at 31. In this respect, DSD deals with ADR's critics of being detached from the culture in which the dispute occurs.

[169] Singh, *supra* note 42, at 2423, claiming that ADR may only provoke low-quality justice for the impoverished without an established structure and precedent in place.

[170] Blomgren-Amsler et al., *supra* note 11, at 30.

[171] *Id.* at 153.

[172] Goldiner, *Membership Rights*, *supra* note 150, at 345, 353, 356. Membership rights can be derived from general human rights, comprising the entitlement as human beings to human rights and the unique circumstances that require additional protection. Goldiner develops Kymlicka's account of "group-differentiated rights", rising from the idea that the ability to exercise individual freedoms depends on the existence of a culture (WILL KYMLICKA, MULTICULTURAL CITIZENSHIP (1996)) explaining that while people outside the group might also hold similar interests, their extent does not justify having others (or society) under specific duties.

[173] *See, e.g.*, Michael Ashley Stein et al., *Accommodating Every Body*, 81(2) U. CHI. L. REV. 689 (2014).

"undesignated" places and services which prevent people with disabilities from taking part in "regular", "abled", private, and public activities.

Accordingly, the design's context should reflect the depiction of disability as a socio-political category resulting from unequal power relations, a product of social construction and interaction,[174] and the understanding that the current social structure marginalizes people with disabilities and reinforces prejudice.[175]

2. Disability Culture

However, disability rights scholarship and legislation encompass more than just the *exterior context* that has led to the rejection of people with disabilities and their depiction as inferior. Instead, it turns to look *inside* and illuminate the diversified *disability culture* that has evolved from their lives, points of view, and experiences.

Swaine and French, who developed the *affirmative model* of disability, stressed the importance of considering the personal implications of the organic impairment and the physical and psychological experiences accompanying it, including the experience of living in a body that doesn't adhere to social norms.[176] This line of thought led to the depiction of disability not only as inferiority shaped by social context, on one hand, or inner characteristics, on the other[177] but as human diversity. Moreover, it emphasizes the possible *benefits* disability might entail, such as openness to new perspectives, liberation from social expectations and norms, and a sense of identity, leading to positive individual and collective identity.[178] It, therefore, calls for legitimizing and mainstreaming the life experiences of people with disabilities, experiences that often challenge "normalcy" and social expectations.[179] It also raises awareness of the importance of social recognition of the disability experience.[180]

This respect for disability as diversity lies at the heart of the CRPD, which recognizes the variety[181] of people with disabilities and their contributions to their communities' well-

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[174] Tregaskis, *supra* note 21.

[175] *See supra* Section I.A.

[176] John Swaine & Sally French, *Towards an Affirmation Model of Disability*, 15(4) DISABILITY & SOCIETY 569, 573 (2000).

[177] Shakespeare *Disability Rights Revisited*, *supra* note 22, explaining the interactional model of disability, as elaborated in *supra* Section I.A.

[178] Swaine & French, *supra* note 176, at 575-580.

[179] Shakespeare *Disability Rights Revisited*, *supra* note 22.

[180] Robina Goodlad & Sheila Riddell, *Social Justice and Disabled People: Principles and Challenges*, 4(1) SOCIAL POLICY AND SOCIETY 45 (2005).

[181] CRPD, *supra* note 34, at pmbl., ¶ 9.

being.[182] It also acknowledges the importance of culture by asserting its dedication to securing broad access to cultural rights[183] and, more importantly, the states' duties to recognize and support disabled people's specific cultural and linguistic identity, including sign languages and deaf culture.[184]

Since lawyers are often the agents of disability rights, it is imperative to provide knowledge regarding disability culture within the legal profession,[185] especially for lawyers representing clients with cognitive disabilities.[186] These include substantive social science perspectives regarding human development; process-oriented perspectives focusing on justice and effectiveness; and affective and interpersonal perspectives, including cultural competence and emotional intelligence. This relationship-centered lawyering adopts a normative framework (drawn mainly from mental health fields) focusing on the client "in context" beyond the legal controversy and including the systems and persons she interacts with.[187]

Hence, the design should reflect respect for disability culture and validate cultural aspects even if they don't adhere to "normative" conventions. Especially in legal realms, the design should also address the education and training of lawyers representing people with disabilities to provide culturally sensitive representation.

D. Process and Structure

When we examine the system's process and structure, we identify the processes used to prevent, manage and resolve disputes in a system and try to understand how they define and relate to each other. The processes range from formal processes such as a trial, mediation, or arbitration to various other methods and techniques according to the types of disputes. The process options may be linked in an integrated system or exist without a centralized or strategic plan.[188]

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[182] *Id.* at pmbl., ¶ 13. Further, the Convention's general principles include "respect for difference and acceptance of people with disabilities as part of human diversity and humanity" (Article 3(4)).

[183] CRPD, *supra* note 34, at pmbl., ¶ d, v, y; and Articles 2, 4(2), ,30(1), 30(3).

[184] *Id. Supra* note 34, Article 30(4).

[185] Roni Rothler, *Clinical Legal Education and Therapeutic Jurisprudence in the Disability Rights Clinic*, *in* THINKING ABOUT CLINICAL LEGAL EDUCATION: PHILOSOPHICAL AND THEORETICAL PERSPECTIVES 1, 8-9 (Omar Madhloom & Hugh MacFaul, eds., 2022). In this essay, I have addressed lawyers' necessity of disability cultural knowledge

[186] Susan L. Brooks & Robert G. Madden, *Relationship-Centered Lawyering: The Emerging 'Science' of Professionalism*, in Brooks & Madden *Transforming Legal Practice*, *supra* note 157, at 4. Clients with cognitive disabilities are also addressed in Boulding & Brooks *Trying Differently*, *supra* note 158.

[187] Boulding & Brooks *Trying Differently*, *supra* note 158, at 449.

[188] Smith & Martinez, supra note 69, at 130-131.

Many processes can be used to prevent, manage, and resolve conflicts. Some organizations offer one formal process, while others develop a range of (linked or independent) processes for one or more types of disputes. Courts, legislatures, or administrative bodies may constrain an organization's freedom to design its internal processes. Therefore, it is essential to consider how the system has evolved, how external systems (including the formal legal system) reinforce or constrain it,[189] and which factors have produced incentives and disincentives for its use.[190]

Usually, it is advisable to design a system with multiple options, comprising interest and rights-based alternative strategies and an ability to shift between them.[191] In this respect, Blomgren-Amsler et al. suggest that the design should be "responsive", sensitive to human needs and interests, focus on interests, start with lower-cost options, and aim to address conflict broadly.[192] User control over process choice - allowing disputants to select the processes they perceive to be in their best interest - also increases the likelihood of a fair and unbiased system.[193] In addition, fairness in structure should strive to avoid creating disparately-entitled groups, who might lose trust in members of dominant groups, and to provide them with practical ways to voice their opinions.[194]

Given these understandings, when designing in a disability-related context, we should, first and foremost, be aware of the discriminating and excluding historical background that led to the system's existing process and structural barriers such as physically inaccessible buildings, social practices of institutionalization, sheltered work-places, special education, and guardianship. Apart from this awareness of these processes and structures, four other disability-rights-related aspects should be considered. These are accessibility and accommodations; universal design; a particular emphasis on procedural justice; and the structure of conflict-resolving institutions and their relevance to disability.

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[189] It is essential to note that there are strategies that may be beyond the control of most designers. Changes in governmental and social structures affect inequality and rights protection (Rogers et al., *supra* note 17, at 243). Therefore, the designer must consider the interaction of the designed system with the formal legal system and the court's willingness to adhere to the suggested change (Blomgren-Amsler et al., *supra* note 11, at 126).

[190] Blomgren-Amsler et al., *supra* note 11, at 33.

[191] Smith & Martinez, *supra* note 69, at 128.

[192] Blomgren-Amsler et al., *supra* note 11, at 34.

[193] *Id.* at 35.

[194] MARC HOWARD ROSS, THE CULTURE OF CONFLICT: INTERPRETATIONS AND INTERESTS IN COMPARATIVE PERSPECTIVE ix (1993).

1. Accessibility and Accommodations

The struggle for access lies at the heart of the disability rights movement. It is based on the acknowledgment that the exclusion of people with disabilities from the public sphere results from stigma and an exclusionary environment of physical and structural barriers that prohibit people with disabilities from participating and benefiting from services; it demands the removal of these barriers.[195]

Accessibility duties reflect the understanding that disability rights constitute a unique mix of civil-political and social rights.[196] Due to the physical and structural barriers that prohibit equal participation, the "negative" prohibition against discrimination is insufficient to enhance equality.[197] Therefore, disability rights must include negative liberties *and* affirmative duties of the state and private actors to redesign the built environment and make the public space accessible by *actively* removing structural and institutional barriers according to the newly established standards.[198]

As discussed in Section I.B., the aspiration for accessibility doesn't pertain only to places and services but also to the justice system, focusing on access to courts, law, and justice by removing the barriers that people with disabilities face in their interaction with the legal system and related systems of benefits and support.[199] Recently, the notion of disability-rights access to justice was also discussed in the framework of *online* dispute resolution, warning that the general digital shift leaves people with disabilities behind.[200] Therefore, a disability-sensitive design should adopt an accessible structure on all these levels.

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[195] Mor, *supra* note 6, at 613; *See supra* Section I.A.

[196] Neta Ziv, *The Social Rights of People with Disabilities: Reconciling Care and Justice*, in EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 369 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

[197] Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C-R C-L. L. REV. 413, 453 (1991).

[198] Stein et al., *supra* note 173. Accessibility and the duty to accommodate are rooted in most international obligations articulated by the CRPD, *supra* note 34, at the Preamble and Articles 2, 3, 4, 9, 12, 13, 19, 20, 21, 23, 24, 25, 27, 28, 29, 30, 31, 32, 36, 49. Specifically, Article 9 is dedicated to accessibility and acknowledges it as the precondition for independent living and full participation in all aspects of life on an equal basis with others. According to the article, accessibility, including identifying and eliminating obstacles and barriers, should be interpreted broadly: accessibility to the physical environment, transportation, information, technology, facilities, and services, using technology-based and live assistance. The CRPD asserts that discrimination against people with disabilities includes denying reasonable accommodation (Articles 2, 5, 13, 14, 24, 27; Shivuan Quinlivan, *Reasonable Accommodation: an Integral Part of the Right to Education for People with disabilities*, *in* THE RIGHT TO INCLUSIVE EDUCATION IN INTERNATIONAL HUMAN RIGHTS LAW 169 (Gauthier de Beco, Shivaun Quinlivan & Janet E. Lord, eds., 2019).

[199] Mor, supra note 6, at 613, 614, 621.

[200] David Allen Larson, *Digital Accessibility and Disability Accommodations in Online Dispute Resolution: ODR for Everyone,* 34(3) OHIO ST. J. ON DISP. RESOL. 431 (2019).

Alongside the justice system, the structure of disability social policy and the welfare state should also be addressed within the design. Disability studies' critical approach reconceptualizes the rules of the political game and detects what and who is included in the regulations and what is traditionally ignored. This reconceptualization enables the detection of "institutional ableism", which includes formal and informal structures, the extent to which the political process allows people with disabilities to participate in policy-making, the rules that foster their political representation, and the accessibility of the political environment. [201]

Accessibility in this policy-oriented aspect is also referred to by DSD scholars who prefer policy design that reflects "collaborative" or "participatory" governance. This governance seeks citizen deliberation, dialogue, and shared decision-making in large-scale interactive processes and public policy at local, state, national, and international levels.[202] In this process, the participants exchange viewpoints in a neutral space and within an atmosphere of mutual respect, aiming to reach better mutual understanding and even consensus.[203] As opposed to the "stakeholders" component of DSD described in section III.B., this structural component concerns a large-scale public engagement, in addition to or sometimes instead of stakeholders.[204]

2. Universal Design

Universal design is the ultimate, somewhat utopian, consequence of accessibility. It is defined as "the design of products and environments to be usable by all people, to the greatest extent possible, without adaptation". It entails a general shift from reforming the person to meet social norms to redesigning society to meet the variety of ages, bodily shapes, and mental and cognitive capacities. According to universal design theories, a system that is accessible for people with disabilities is accessible to many others.[205]

Universal design is the practical outcome of the "universal model to disability,"[206] which rejects the "special needs" approach, meaning special accommodations for various disabilities

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[201] Holler & Ohayon, *supra* note 10, at 8-9, and the literature mentioned there.

[202] Blomgren-Amsler et al., *supra* note 11, at 56.

[203] *Id.* at 44.

[204] *Id.* at 56-57.

[205] MOLLY FOLLETTE STORY, JAMES L. MUELLER & RONALD L. MACE, THE UNIVERSAL DESIGN FILE: DESIGNING FOR PEOPLE OF ALL AGES AND ABILITIES (1998). *See also* Mor, *supra* note 6, at 620, 624. Mor notes that the principle of universal design was not fully integrated into the CRPD's vision of access and is mainly mentioned in the general obligations sections and not in the particular articles (such as article 9, which deals with accessibility). Nevertheless, she believes that such a vision of universal design can and should guide our understanding of access to justice.

[206] Irving K. Zola, *Toward the Necessary Universalizing of Disability Policy*, 67 THE MILBANK QUARTERLY, 401 (1989).

to fit the "normal" surroundings. According to the universal model, such an approach is too narrow. It should be replaced or supplemented by universal policies of a total redesign, acknowledging that no human being has complete abilities and all are prone to chronic illness and disability at some point.[207]

This universal model is based on social model principles stating that disability is not essentially medical but rather the result of the interaction of the organic impairment with societal norms and institutions. It is also based on the argument that disability issues are not confined to a fixed and precise number of people. Practically, universal design calls for restructuring policies to address human needs. It is used nowadays to enhance disability rights and promote the rights of other underprivileged societies and individuals for adequate accommodations aiming at full participation.[208] Therefore, when applied to DSD terms, universal design seems fit to *prevent* various disputes. Planning universally ex-ante will also save mending resources ex-post.

3. Procedural Justice and Disability

The focus on *process* and *structure* in the design mechanism is crucial due to the long-established understanding that satisfaction is not only based on the outcome but is also a function of the process that led to the specific result.[209] In legal terms, this is "procedural justice".[210] Procedural justice is based on impartiality, the opportunity to be heard, legal grounds for decisions, the neutrality of the process and the decision-makers, the treatment of the participant with dignity and respect, and the trustworthiness of the decision-making authority.[211]

Research has shown that people involved in legal processes were greatly concerned with procedural justice when evaluating the process as a whole. Being heard, treated with respect, and working with a trusted, unbiased third party was highly valued.[212] Therefore, DSD principles encourage participants to shape resolutions for the common good based on their lived reality[213] and promote procedural justice. Since, as mentioned in section I above, the

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[207] Jerome E. Bickenbach, Somnath Chatterji, Elizabeth M. Badley, & T. Bedirhan Üstün, *Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps,* 48(9) SOCIAL SCIENCE AND MEDICINE 1173 (1999).

[208] Zola, *supra* note 206; Einat Albin, *Universalising the Right to Work for Persons with Disabilities: An Equality and Dignity Approach*, in THE RIGHT TO WORK (Virginia Mantouvalou ed., 2014).

[209] Blomgren-Amsler et al., *supra* note 11, at 16, 35.

[210] *Id.* at 35.

[211] *Id.* at 16-17.

[212] Rogers et al., *supra* note 17, at 23.

[213] Blomgren-Amsler et al., *supra* note 11, at 15.

authentic voice of people with disabilities was traditionally silenced, this emphasis on procedural justice within the design is crucial.

Another important consideration regarding procedural justice and disability is self-identity. As Dorfman has shown in his research regarding social security benefits, people whose identity was influenced by the social model perceived the legal procedures based on the medical and individual models to be less fair. They felt they had no control over the process, could not voice their opinions, were mistreated by their representatives, had to present an ingenuine image, and were discouraged from participating in the labor market.[214] Hence, designing a disability-oriented policy based on disability rights should emphasize procedural justice for the participants.

4. The Structure of Conflict-Resolving Institutions and Its Relevance to Disability

When discussing process, structure, and disability rights, striving for meaningful, disability-related access to justice, it is essential to address the design of the legal and non-legal institutes which are supposed to facilitate this justice.[215]

Dealing with disability issues, it seems almost too easy to slide into a discourse of personal needs and interests, which characterizes DSD. However, such discourse usually overlooks years of legal and social achievements based on the understanding that disability is not only a personal trait or problem but a broader issue of social construct.[216] Therefore, since disability *rights* are at stake, rights that were established after long struggles and whose legal and social status is still fragile,[217] it seems fit to give preference to judicial procedures. However, as mentioned in Section I, access to the courts, the law, and justice is not always reached through the traditional judicial system.

DSD encourages the designer to explore other means of dispute management by offering alternative process options to the litigants rather than the traditional trial, aiming to address their interests better.[218] Such alternative processes can be achieved through the "multidoor

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[214] Dorfman, *supra* note 55, at 212-224.

[215] Flynn, *supra* note 35, Mor, *supra* note 6, and Ortoleva, *supra* note 35.

[216] See *supra* Section I.A.

[217] Waterstone, *supra* note 67.

[218] In their book, Blomgren-Amsler et al. provide a relevant example: in the US, students with disabilities have federal legal rights to a free, appropriate public education. To resolve conflicts among students, their parents, and school administrators, there is a legislated dispute resolution process with mediation, complaints to the state agency, and a due process hearing. For the school community, national legislation mandates providing an interest-based mediation process for families and school administrators. Congress (a third party) dictated the mediation design by law. However, that law gave state agencies control over implementing the mediation design (Blomgren-Amsler et al., supra note 11, at 167).

courthouse" in a design phase that is sometimes termed "fitting the forum to the fuss".[219] In a multidoor courthouse, cases that reach the court are diverted, based on their characteristics, according to the most appropriate method of dispute resolution.[220] Some of these courts might collaborate with other institutional actors to address societal problems through means other than a traditional trial.[221]

These problem-solving, specialized, or specialty courts are considered a prominent alternative to the traditional courthouse.[222] Interestingly, some specifically address disabled litigants in criminal or child welfare settings.[223] In these courts, the judges receive access to broader social and medical expertise and services to address underlying and chronic causes of conflict. Their role changes from arbiters of legal status to the leaders of an interdisciplinary problem-solving team integrating court and social services.[224] Instead of exercising authority and coercion, they should encourage the client's choice and participation in the rehabilitative plan and facilitate motivation for change.[225]

Though problem-solving courts have reported many positive outcomes, concerns have been raised regarding a potential abandonment of accountability on the one hand and disproportionately intrusive interventions on the other.[226] Their collaboratory aspect, though

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[219] A term coined by Maurice Rosenberg and explained in Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATING J. 49 (1994).

[220] Blomgren-Amsler et al., *supra* note 11 at 112.

[221] *Id*. at 113, explaining that this kind of collaboration is most common in the criminal justice system.

[222] Problem-solving courts developed during the nineties across the US and internationally, following the opening of the first drug court in Miami, Florida, in 1989. Nowadays, they include community courts, drug treatment courts, mental health courts, domestic violence courts, unified family courts, youth courts, veteran courts, dependency (child welfare), and DUI (drunk driving) courts (Blomgren-Amsler et al., *supra* note 11, at 113, and the literature mentioned there). Perhaps the most important forces contributing to the development of problem-solving courts are rising caseloads and increasing frustration among the public and system players with the standard approach to case processing and case outcomes in state courts (Michal Alberstein, *Therapeutic Keys of Law: Reflections on Paradigmatic Shifts and the Limits and Potential of Reform Movements (Book Review: Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts (eds. Bruck J. Winick & David B. Wexler, Carolina Academic Press, Durham, NC 2003),* 39(1) ISRAEL L. REV. 1, 13 (2006).

[223] Such as community courts and mental health courts.

[224] Blomgren-Amsler et al., *supra* note 11, at 113, 118-119.

[225] Michal Alberstein, *supra* note 222, at 11. Problem-solving courts are considered part of the "comprehensive law movement", including therapeutic jurisprudence, procedural justice, transformative mediation, collaborative law, creative problem-solving, and holistic law, sharing an appreciation for the psychological dynamics involved in legal matters, and focusing on resolving the interpersonal issues underlying the legal problems, preventing future harmful activity, and improving community life rather than punishing or assigning fault (Susan Daicoff, *The Comprehensive Law Movement*, 19 TOURO L. REV. 825 (2004)). They share a desire to see the legal system work to promote and maximize creative and empowering human interactions (Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31(4) U.C.L.A. L. REV. 754, 763-764 (1984)). In DSD terms, these courts' design uses traditional rights-based adjudication as the fallback process, opening up opportunities for community collaboration and individual effort at change (Rogers et al., *supra* note 17, at 126).

[226] Blomgren-Amsler et al., *supra* note 11, at 127.

highly advantageous, has also been questioned, fearing that lawyers might overlook their adversarial duties towards their clients for the sake of cooperation with the rest of the court's team or for advancing broader community issues.[227] Given the tendency to slide into therapeutic interests in disability-related conflicts, the designer should carefully create checks and balances to avoid such a tendency, focusing on rights promotion when designing the appropriate problem-solving tribunal.

E. Resources

A system can only achieve its goals if it is adequately supported. Therefore, when designing or redesigning systems, the designer needs to "have the budget in mind"[228] and be aware of the available or potential resources for the system's implementation and evaluation, bringing the design "down to earth" from idealistic goals to reality.[229] This may require making hard decisions that can affect perceptions of fairness, justice, and the likelihood of success.[230] As I will suggest, before succumbing to the limitations imposed by the existing resources or lack thereof, four disability rights issues should be addressed. These are considerations of the legitimate cost of rights, the notion of "support" and "assistance" in disability theory, benefits and therapeutic resources, including therapeutic jurisprudence, and disability-sensitive legal education. Considering these elements in the design process will provide the designer with a better infrastructure to help achieve, or at least a better approach, the design goals.

1. Legitimizing the Cost of Disability Rights

Resource allocation comprises an inherent part of the usage of law to advance social change in the disability realm. It refers to the existence or inexistence of adequate funds and social services that respond to disabled people's needs and construct societal changes that promote equality. It requires the willingness to enact and amend legislation and to allocate resources to improve the status of people with disabilities and the willingness of courts to rule on questions that involve budgetary issues to enhance accessibility and accommodations.[231]

Accordingly, the CRPD acknowledges the need to back-up rights and ideals with resources. Article 4(2) addresses the complexity of realizing the economic, social, and cultural aspects of

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[227] Anna Arstein-Kerslake & Jennifer Black, *Right to Legal Capacity in Therapeutic Jurisprudence: Insights from Critical Disability Theory and the Convention on the Rights of Persons with Disabilities,* 68 INT'L J.L. & PSYCHIATRY 1, 4 (2020).

[228] Blomgren-Amsler et al., *supra* note 11, at 98.

[229] *Id.* at 35.

[230] *Id.* at 36.

[231] Mor, *supra* note 6, at 628, 645.

disability rights. It asks the state parties to undertake measures to the maximum of their available resources and, where needed, with international cooperation, to achieve the full realization of disability rights progressively.

In this resource allocation process, public consent is crucial. This consent can be achieved by raising public awareness of discrimination and the need to rectify it through resource allocation. As DSD scholars note, *seeking public understanding* is a pivotal design component. Many people are not aware of the social aspects of disability and the need for fundamental change in power structures and resources. Therefore, a designer may need to create an innovative mechanism to foster public understanding of past injustice.[232]

Apart from this explicit recognition of the funds allocated to advance disabled people's rights, three other resource-related issues should be addressed: support and assistance, access to social and therapeutic resources, and disability-sensitive legal education.

2. Support and Assistance in Disability Context

One of the most meaningful aspects of disabled people's participation and presence in public and private arenas, supplementing accessibility in all forms, is the right to assistance and support services. Duties of support and assistance exist regarding multiple aspects, recognizing their pivotal role in realizing disability rights. The CRPD manifests the understanding that accessibility alone is not enough to achieve inclusion and participation and that some disability consequences require personal support and assistance to realize disability rights entirely, and, inter-alia, exercise legal capacity,[233] fight against exploitation,[234] live independently,[235] take care of one's family,[236] acquire education,[237] work,[238] and participate in cultural[239] political and public life.[240]

Therefore, resource-wise, it is crucial to design systems that provide adequate support and assistance. In doing so, it is essential to note that the support and assistance should be "user-led" instead of "professional-led", enabling people with disabilities to act independently and

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[232] Rogers et al., *supra* note 17, at 209.
[233] CRPD, *supra* note 34, Article 12(3).
[234] *Id.* at Article 16(2).
[235] *Id.* at Article 19(b).
[236] *Id.* at Article 23(2) and (3).
[237] *Id.* at Article 24(2)(d) and (f), 3(a) and 4.
[238] *Id.* at Article 27(1)(e).
[239] *Id.* at Artciel 30(4).
[240] *Id.* at Article 29(a)(iii).

make their own decisions according to their will and preference. Among these decisions are the acquisition and supervision of assistance and support.[241]

3. Social and Therapeutic Resources and Therapeutic Jurisprudence

As mentioned in Section I, therapeutic content often contradicts disability rights. This is because the domination of medical and therapeutic professionals has historically overshadowed the oppression of people with disabilities. Nevertheless, it is essential to acknowledge that for some people with disabilities, therapeutic aspects are inseparable from daily life. The lack of therapy resources and options, or barriers to acquiring therapy, are likely to affect them more than others negatively. Therefore, when designing resources for a disability-oriented system, the designer should usually consider the existing or required therapeutic resources and make sure they are provided according to disability rights principles. At least some of those therapeutic resources can be acquired through existing public health institutions and, therefore, would not burden the design's budget.

In addition to therapeutic resources, people with disabilities might be eligible for other social resources, usually termed "benefits". This eligibility is based either directly on the disability (such as transportation benefits due to inaccessible public transportation) or on social and poverty merits, given the link between poverty and disability[242] (such as reduced water or electricity costs). Many times, people with disabilities and their representatives are not fully aware of all the benefits and resources or are reluctant to engage in the process of receiving them. This lack usually negatively affects their lives, leaving them with fewer financial and psychological strengths. Therefore, when designing in disability-related areas, it is vital to dedicate part of the design to investigating relevant benefits and ensuring that eligible people receive them.

Another relevant therapeutic aspect can be found within *therapeutic jurisprudence* (TJ). TJ examines the therapeutic and anti-therapeutic characterizations of the law, policy processes, and the structure of legal institutions, detecting which legal arrangements lead to successful

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[241] Brennan et al., *supra* note 162, at 606. Another possible support suggested by the literature is *health and social care advocacy*. This position is supposed to support vulnerable or disadvantaged people and secure their healthcare and social rights. In line with disability rights principles, a health and social care advocate should ensure that the person's will and preference are central to care planning and facilitate the integration of health, social care, and social work services (Moira Jenkins, E*qual Recognition Before the Law: A Call for a Statutory Social Care Advocate for Vulnerable Adults in Integrating Health and Social Care, in* INTEGRATED CARE FOR IRELAND IN AN INTERNATIONAL CONTEXT: CHALLENGES FOR POLICY, INSTITUTIONS AND SPECIFIC SERVICE USER NEEDS (Tom O'Connor ed., 2013)).

[242] Daniel C. Lustig & David R. Strauser, *Causal Relationship Between Poverty and Disability*, 50(4) REHABILITATION COUNSELING BULLETIN 194 (2007).

therapeutic outcomes and why. Consequently, it aims to advance human dignity through legal events, using those events as benchmarks to enhance the psychological well-being of the participants. TJ's roots are planted in mental health and mental disability law (as well as criminal law and problem-solving courts).[243] Since most TJ systems were initially established to meet the needs of individuals who encounter the justice system due to mental disability, many people with disabilities participate in TJ-related justice systems.[244]

However, TJ's critics have raised concerns that should be considered in its implementation in a disability context. They have claimed that TJ tends to be paternalistic, conservative, and intrusive regarding civil liberties and freedoms.[245] Such concerns are significant when dealing with disability rights since, as mentioned in part I.A., the traditional tendency was to observe disability from a medical-therapeutic lens, which the disability rights movement wished to abolish. Thus, TJ seems to stand opposed to critical disability theory.[246] Even though research has found TJ to be relevant and helpful for people with disabilities who encounter the justice system,[247] the risk is that it would follow in the footsteps of other therapeutic frameworks and contribute to the marginalization of people with disabilities by undermining their choices and imposing therapeutic measures. Therefore, if TJ is applied, it is essential to ensure that it is aligned with the advancement of disability rights, providing a therapeutic resource alongside the development of law and policy and not as a replacement for fundamental civil liberties and human rights.[248]

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[243] TJ was founded by David Wexler and Bruce Winick in the late eighties and is considered part of the "comprehensive law movement" (Daicoff, *supra* note 225). It views the law and legal institutions as therapeutic agents. TJ strives to integrate treatment services with judicial case processing, provide ongoing judicial intervention, close monitoring of and immediate response to behavior, and create multidisciplinary involvement and collaboration with community-based and government organizations (BRUCE J. WINICK & DAVID B. WEXLER, JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (2003)). Different aspects of TJ are practiced in various "problem-solving courts", and the desired outcomes include psychological well-being, health, dignity, and compassion, alongside the traditional legal considerations of due process, civil liberties and rights, and economic efficiency (David C Yamada, *Teaching Therapeutic Jurisprudence*, 50(3) U. BALT. L. REV. 425, 431, 433 (2021)).

[244] William Spaulding et al., *Applications of Therapeutic Jurisprudence in Rehabilitation for People with Severe and Disabling Mental Illness* 17 T.M. COOLEY L. REV. 135 (2000).

[245] Ian Richard Freckelton, T*herapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575 (2008).

[246] Arstein-Kerslake & Black, *supra* note 227 at 2.

[247] Voula Marinos & Lisa Whittingham, *The Role of Therapeutic Jurisprudence to Support Persons with Intellectual and Developmental Disabilities in the Courtroom: Reflections from Ontario, Canada*, 63 INT'L J.L. & PSYCHIATRY 18, 20 (2019).

[248] Arstein-Kerslake & Black, *supra* note 227 at 3.

4. Disability Oriented Legal Education and Professional Training

Attaining legal representation is often the precondition for recognizing and achieving lawful rights. Therefore, establishing legal aid services and clinics for people who cannot afford legal representation is considered one of the most outstanding achievements of the access to justice movement.[249] Still, disability-related cases and clients with disabilities require much more than that. They need the removal of barriers, whether physical, communicational, stigma-based, or others, and most of all, they require lawyers who hold disability rights knowledge.[250]

Therefore, one of the resources that should be developed to advance disability rights and disability-oriented design is disability-sensitive legal education. In her book,[251] Flynn criticizes the current omission of disability rights from the law school curriculum and the lack of academic teaching of disability rights for students and professional training for lawyers and judges.[252] Such disability-oriented knowledge for lawyers and law students[253] includes a theoretical understanding of disability studies, the shift from the medical-individualistic approach to the social approach, and knowledge regarding the interaction between people with disabilities and the systems surrounding them. Advanced courses can be taught on specific topics, such as legal capacity and the labor market.

Disability legal education also includes practical knowledge and cultural aspects that legal clinics can provide. For example, a disability-culture-oriented lawyer would not expect her autistic client to make eye contact. She wouldn't turn to her client's escort to answer her questions. It also includes collaborative work with the client based on "nothing about us without us", accessible office and representation, including access to the physical office, and varied types of accessible communication.[254]

F. Successfulness, Accountability, and Learning

DSD is practice-oriented and therefore includes evaluation as its final element. Evaluation is comprised of *successfulness*, *accountability*, and *learning*.[255] The process of evaluating and

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[249] Cappelletti & Garth *The Newest Wave*, supra note 1 at 248, 278.

[250] Mor, *supra* note 6, at 637

[251] Flynn, *supra* note 35, 5th chapter.

[252] Stephanie Ortoleva also mentions the importance of training professionals, community education, and awareness (Ortoleva, *supra* note 35).

[253] Rothler, supra note 185, at 8-12; Boulding & Brooks *Trying Differently supra* note 158; Morinos & Whittingham, *supra* note 247; Henry Dlugacz & Christopher Winner, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4(2) ST. LOUIS U. J. HEALTH L. & POL'Y 331 (2011).

[254] Rothler, *supra* note 185, at 11.

[255] Smith& Matinez, *supra* note 69, at 132-133; Rogers et al., *supra* note 17, at 320.

revising should be carried out through systematic data collection techniques that measure the effects of the system and its ability to reach its goals[256] and provide guidance in adjusting the system to meet unanticipated or problematic circumstances.[257] Therefore, it is essential to identify the specific outcome criteria for evaluation that include, among other things, justice and fairness,[258] and it is highly recommended to establish them in collaboration with the various stakeholders.[259]

The evaluation's first purpose is to assess the design's *success.* A successful system manages to achieve the system's goals. Naturally, the answer will depend on the specific system's objectives, evaluating their effect on the conflict's prevention, management, and resolution.[260] However, successfulness should also be defined by the system's ability to achieve broader societal goals, including justice and fairness,[261] as well as management goals and ones that affect the organizational environment.[262] These include efficiency, stability,[263] lower transaction costs, outcome satisfaction, building disputant relationship, and recurrence of the dispute.[264] As they assess successfulness, and since the design is usually aimed at achieving *change*, researchers expect to identify and measure change regarding baseline conditions and understand the design's operation and its effects[265] on stakeholders and the organization.[266]

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[256] Rogers et al., *supra* note 17, at 319-356.

[257] *Id.* at 322.

[258] *Id.* at 328.

[259] *Id.* at 332, 334-335, suggesting questions for evaluation, such as: what is the system design delivering on the ground (as opposed to theory)? How do parties experience the process or system? How does the system Does design affect organizations, institutions, and communities? How is it different than before? Since designing the evaluation is a component of designing the system itself, the evaluation process resembles all of DSD's stages: the designer should identify the question the evaluation must answer, identify and recruit stakeholders to participate in the design of the evaluation process, allocate the relevant resources for this task, identify the information and criteria that will answer that question, structure a process to collect, analyze and compile the data, and finally, in consultation with the stakeholders, use the results to improve both the design and the evaluation (Blomgren-Amsler et al., *supra* note 11, at 80-81).

[260] Blomgren-Amsler et al., *supra* note 11, at 88, 130, noting that measuring conflict prevention is challenging.

[261] Blomgren-Amsler et al., *supra* note 11, at 37, 77, elaborating on ways to evaluate justice within a system.

[262] Constantino & Merchant, *supra* note 70.

[263] LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES (1987).

[264] Ury et. al., *supra* note 69 at. 11-13.

[265] Rogers et al., *supra* note 17, at 256-319, 322.

[266] *Id.*, at 322. Typical questions for evaluation are the actual outcomes of the system, the parties' (or stakeholders') experience of the system, the system's effect on organizations, institutions, and communities, and the difference between the revised system and the old one (Rogers et al., *supra* note 17, at 334-335). The assessment should be based on systematic data collection techniques, starting from the beginning of the implementation (Rogers et al., *supra* note 17, at 349), using both qualitative and quantitative research tools (Blomgren-Amsler et al., *supra* note 11, at 83). These tools will enable designers to discover and correct problems and develop confidence that the design accomplished its goals (Rogers et al., *supra* note 17, at 323).

The evaluation's second purpose is to assess *accountability*, which is the obligation and willingness to accept responsibility and account for actions. As adapted to DSD, accountability is a means and an end in and of itself. It refers to the relationship between the designer and the system's oversight body and between the system's managers and stakeholders.[267] Accountability has three primary aspects: it assists in identifying opportunities for improvement, helps users understand how the system operates and how well it does, and allows system operators to assess whether or not the system is working.[268] Evaluating the design's accountability should provide stakeholders with transparency and information on how the system functions to improve it, increase credibility, engender trust, enhance cooperation and participation, encourage feedback,[269] and justify the continuing investment of resources.[270]

The accountability of a system is also strongly linked to the concept of *justice*, which DSD wishes to promote.[271] The accountability promise of justice has both intrinsic and instrumental value. This is because justice provides norms of fairness and equity that may be identified as the design's goals while delivering fundamental standards for evaluating the system's success.[272]

A primary goal of the evaluation is to monitor program implementation and provide guidance in adjusting it to meet altered, unanticipated, or challenging circumstances.[273] Therefore, the *learning* component of assessment refers to the system's improvement based on feedback and stakeholders' training and education[274] on using the new process options.[275] Naturally, the system's success is more readily judged if independent evaluators make its outcomes available for study.[276]

In a disability-rights-based DSD, successfulness, accountability, and learning should be supplemented with the system's ability to realize disability rights as a meta-goal. The outcome criteria[277] for evaluation should be set accordingly. Therefore, the evaluation should examine

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[267] Public administration scholars describe accountability as comprising six promises of means and ends. Three promises are of instrumental value (means): control (inputs), ethical behavior or choices (processes), and performance (outcomes). Three promises are of intrinsic value (ends): integrity (inputs), legitimacy (processes), and justice (outcomes). (Blomgren-Amsler et al., *supra* note 11, at 75).

[268] Blomgren-Amsler et al., *supra* note 11, at 37

[269] Smith & Matinez, *supra* note 69, at 132-133.

[270] Blomgren-Amsler et al., *supra* note 11, at 74.

[271] *See supra* Section II.B.

[272] Blomgren-Amsler et al., *supra* note 11, at 76.

[273] Rogers et al., *supra* note 17, at 322.

[274] Blomgren-Amsler et al., *supra* note 11, at 37, 87.

[275] Smith & Martinez, *supra* note 69, at 128.

[276] Blomgren-Amsler et al., *supra* note 11, at 37.

[277] Rogers et al., *supra* note 17, at 328.

whether the design defies the historically oppressive and exclusive nature of the socially constructed disability[278] and whether the system is accessible. It should ensure that along with the resolution of the particular dispute, the system helps to develop positive and constructive means for the future benefit of people with disabilities as a group. Evaluation should also ensure settled disputes constitute teachable lessons to advance disability rights. Another aspect of a successful design is the inclusion of disability rights and disability consciousness in the judicial discourse. According to the participation rules mentioned in part III.B.1., the evaluation process must include people with disabilities as evaluators.

G. Summary and Possible Shortcomings of the Disability-Rights-Based DSD

The disability rights interpretation of DSD, underlying the disability-rights-based DSD, supplements DSD general guidelines as follows:

	DSD Elements	***Disability Rights Interpretation***
1	*Goals*	*Advancing disability rights*
2	*Stakeholders*	*Nothing about us without us*
		Interdependence
3	*Context and Culture*	*Disability context*
		Disability culture
4	*Process and Structure*	*Accessibility and accommodations*
		Universal design
		Procedural justice and disability
		The structure of conflict-resolving institutions and their relevance to disability
5	*Resources*	*Legitimizing the cost of disability*
		Support and assistance
		Social and therapeutic resources
		Disability-oriented legal education and professional training
6	*Successfulness, Accountability and Learning*	*Achieving disability rights goals*

The disability-rights-based DSD aims to better implement disability rights within the justice system, in legislation processes, public policy, and adjudication, addressing disabled people's access to justice at all levels: access to courts and tribunals, access to the making of

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[278] Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 VA. L. REV. 1151, 1177 (2004)

law and legislation, and access to the institutional change reflecting the paradigmatic shift from the existing disabling norms.

The disability-rights-based DSD facilitates access to justice at all these levels because its infrastructure is comprised of disability rights principles, the social aspects of disability, knowledge regarding the context of disability and disabling history, understandings of social marginalization, the importance of participation, the pivotal role of relationship and interdependence, and the advantages of disability and disability culture. A deep understanding of the crucial role of accessibility, support, and accommodations in the struggle for disability rights and the endeavor for universal design supplements these. The analytical framework of DSD transforms this vast knowledge and theoretical understanding into a comprehensive, practical, implementation-oriented mechanism.

As suggested in this Article, the disability-rights-based DSD is not confined to disability-related legal fields. All its traits, based on profound disability theory, can be employed to design other systems, especially ones that involve hierarchies, and enhance their inclination to achieve justice. That is because disability rights principles thoroughly address inequality, historical disadvantages, social marginalization, relations of power, respect for different cultures, redistribution of resources, social construction, and meaningful participation.

Undoubtedly, the disability-rights-based DSD might also encounter difficulties and might possess shortcomings. Some of these are typical DSD difficulties. A proper DSD process is time-consuming and requires considerable resource allocation, both financial and personal.[279] The disability-rights-based DSD adds to these complexities a requirement of a profound understanding of disability rights, which is not all that common. It requires knowledge of the theoretical foundations and translating them into practical processes and actions. It requires knowledge of the theoretical foundations and the ability to translate them into functional strategies and actions. It is yet unclear whether the results of such a design would be significant compared to the efforts entailed in designing the system.

Implementing the theoretical framework will compound difficulties and dilemmas since rights often contradict organizational and therapeutic goals. The designer of the system, as well as the system's users, will have to continuously examine its application and set priorities within the framework of each case. For example, disability goals of legal capacity and protection from harm might contradict and require balancing; the role of family members as supporters of

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[279] Rogers et al., *supra* note 17, at 348

interdependence might overshadow autonomy aspects; the therapeutic and holistic inclination of "problem-solving" courts might undermine fundamental rights, and allocating substantial resources to support disability rights might draw opposition.

However, experience has shown the many advantages of DSD when dealing with complex conflicts and systems, especially in dealing with long-lasting disputes, making the efforts worthwhile.[280] DSD, as a generative and reflexive system of constant assessment and learning, will have to employ its "successfulness, accountability and learning" component to continuously assess the system's success in reaching its goal, learn and reshape the rules, making it applicable to various disability-rights as well as universal fields. Over time, adding systematic disability rights consciousness to DSD in the early stages of the design will not burden the design and will become an inherent part of it.

CONCLUSION

Disability rights that promote equality and participation in labor, housing, health, legal capacity, and so on have received national and international legal recognition. Still, disability rights are far from comprehensively affecting social policy and being deeply implemented, resulting in diminished access to justice for people with disabilities.

In this article, I have suggested a new way to address this gap between legislation and its implementation through a "disability-rights-based dispute system design". This design provides a disability rights interpretation to DSD's six components: goals, stakeholders, context and culture, process and structure, resources, and successfulness, accountability and learning. It is based on DSD's practical implementation advantages and inherent inclination to seek and attain justice.

The "disability-rights-based DSD" allows designers to practically design systems that fulfill disability rights and address historical inferiority, equality, participation, autonomy, accessibility, support, relationship and interdependence, disability-related resources, and disability culture. Including all these elements in the design's infrastructure will allow systems, primarily legal systems, to achieve access to justice for people with disabilities in its broadest aspects – to courts, to law, and justice, while simultaneously enhancing autonomy and fostering long-lasting positive relationships.

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[280] *Id.* at 13-15.

Moreover, the disability-rights-based DSD strengthens DSD's proclaimed goal to seek, achieve and enhance justice. This is because a disability rights interpretation to DSD addresses human rights broadly, including aspects of scale, distribution, hierarchies, and power imbalances. Consequently, a disability-rights-based DSD can be beneficial not only in the context of disability but also in other systems characterized by hierarchies, such as corporations, welfare systems, or therapeutic systems, such as those involving patients and healthcare professionals.

ARTICLE 2

ACCESS TO LEGAL CAPACITY

A DISABILITY-RIGHTS-BASED DESIGN

Roni Rothler

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ACCESS TO LEGAL CAPACITY

A DISABILITY-RIGHTS-BASED DESIGN

Roni Rothler*

ABSTRACT

The human right to legal capacity encompasses both legal personhood and legal agency, allowing individuals to participate in undertakings, transactions, and decisions about their lives, along with the right to receive necessary support in making those decisions. Despite this, legal capacity may be restricted based on perceived decision-making incapacity, leading to the implementation of substitute decision-making mechanisms to protect the individual. Typically, legal capacity proceedings focus on older adults and people with cognitive or intellectual disabilities. Termed as "civil death" by disability rights scholars, the restriction of legal capacity raises significant concerns regarding its impact on access to justice.

These concerns have prompted international and national policy and legislative reforms emphasizing the right to legal capacity, mainly through supported decision-making (SDM). However, controversies surround the application of these reforms. A current debate revolves around the appropriate design of legal capacity policy, legislation, and tribunals in alignment with the autonomy-focused paradigm and the tools required to balance respecting individuals' will and preferences against the imperative to protect them. This debate underscores the inherent challenges in adapting traditional legal systems to embrace social changes.

This article proposes a unique approach to address legal capacity principles and SDM critiques in response to this debate. It connects theoretical concepts and practical considerations through alternative dispute resolution and dispute system design (DSD). The article suggests applying a "disability-rights-based dispute system design" to aid in developing legal capacity frameworks. This design recommends revising the foundations and conventions *of legal capacity frameworks, replacing them with a structure rooted in disability rights and disability justice, and narrowing the gap between the ideals of legal capacity and their practical realization. Emphasis is placed on creating pre-dispute mechanisms that respect and enhance legal capacity, thereby preventing potential harm. Consequently, the disability-rights-based DSD promises to manage legal capacity issues effectively and strengthen access to justice for people with disabilities and older adults.*

TABLE OF CONTENTS

INTRODUCTION

Anne[1] is a forty-eight-year-old woman with an intellectual disability. She is employed in a state-owned sheltered workshop, handling simple technical tasks. Since she was eighteen, she has lived in a congregate housing with fifteen other people, sharing her room with another woman. Her older brother is her legal guardian, deciding on matters such as her financial expenses, her place of work, and where she lives.

Tired of her lack of privacy, Anne wishes to move to her own apartment, which she inherited from her parents, and live there by herself. Her brother objects. He fears that she will not be safe living on her own. He also needs the rent money for Anne's daily living expenses and future savings. Anne is furious. She refuses to meet him or be in touch with other family members. She experiences a loss of appetite and doesn't want to participate in social activities. Her social worker fears she might be starting to develop depression and wants her to see the house psychiatrist, but Anne refuses. Concerned, the social worker and the psychiatrist contemplate hospitalization.

Anne is not alone. Worldwide, many people with disabilities and older people experience similar situations of being denied their legal capacity to make decisions regarding the way they live their lives. Many of them are subject to substitute decision-making practices such as guardianship. This legal capacity restriction is usually based on the tension between two conflicting values: *autonomy* and *protection*. It manifests in the fear that allowing for autonomous decisions of people with (intellectual or cognitive) disabilities will result in harm to the person or others. Hence, this harm should be prevented. On the other hand, people with disabilities and disability rights advocates have argued that the denial of autonomy entails different types of damage and can lead to a violation of human rights. Underlying this

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[1] The name is fictitious. The situation, though fictitious as well, is based on the life experiences of adults with disabilities.

autonomy/protection tension are conflicting values and perspectives on disability, relationships, power, health, financial issues, and justice.

Addressing these conflicts requires the adoption of policies by the state. It also requires action by the judicial system, as well as professionals. Deciding on the meaning and content of these policies and actions involves a comprehensive analysis of the goals of a society that values disability rights. What do these goals include? Who are the relevant people to consider and consult with? What are the available resources? What is the best way to achieve "successful" solutions that align with rights to legal capacity, inclusion, and health, as well as fair, long-lasting, and positive relationship-preserving solutions? And lastly, what are the necessary means and mechanisms to deal with or prevent such conflicts of respecting a person's autonomy versus protecting them?

This article attempts to answer these questions by focusing on the mechanism to design legal capacity policy, legislation, and tribunals to enhance access to justice for people with disabilities in their encounter with legal capacity issues. This mechanism integrates disability rights principles (and specifically legal capacity principles) into the analytical framework of dispute system design (DSD), creating a "disability-rights-based DSD" that considers, particularly, legal-capacity values, goals, and dilemmas.

Dispute System Design is an analytic framework that seeks to develop and design systems for learning from, preventing, and responding to recurring disputes rather than solving particular conflicts.[2] It is an analytical tool that involves designing processes and procedures to help states, institutions, organizations, and individuals prevent, better manage, or resolve a particular or continuous series of conflicts.[3] Based on the understanding that DSD is an analytical, practical, and justice-oriented tool, a disability-rights-based DSD promises to better manage disputes in the disability realm.[4]

This article suggests using the disability-rights-based DSD to design legal capacity policy, legislation, and tribunals and promote the right to legal capacity. It aims to develop practical solutions to varied cases and situations and ways to manage and prevent the

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[2] NANCY H. ROGERS, ROBERT C. BORDONE, FRANK E.A. SANDERS, CRAIG A. MCEWEN, DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES, 4 (2013).

[3] Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 126 (2009).

[4] Roni Rothler, *Designing Access to Justice: A Disability-Rights-Based Dispute System,* 29(1) HARV. NEGOT. L. REV. [forthcoming] [Hereinafter: *Rothler, Designing Access to Justice*].

autonomy/protection tension based on altering the fundaments of the existing legal capacity frameworks.

Using the disability-rights-based DSD to design legal capacity frameworks addresses the issue of *access to justice* on two levels. The *first* lies within the understanding that people with disabilities whose legal capacity is limited or denied suffer from justice inaccessibility, not only to the courts but also to the very formulation and design of the law and to what constitutes justice.[5] Therefore, a system designed to enhance the legal capacity of people with disabilities will also enhance their access to justice.

The *second* is that DSD, being both practically oriented and justice-oriented, provides, in and of itself, *access* to legal capacity. This argument aligns with the "access to justice" movement's claim that unequal access to the legal system, resulting, among other things, from belonging to a disadvantaged social group, violates the equal protection of the law and infringes on the ability of individuals and groups to exercise their fundamental rights.[6] Based on this understanding, the design of legal capacity frameworks according to a disability-rights-based DSD strives to identify and remove the obstacles that deny people with disabilities full legal capacity.

The article proceeds as follows. Part I addresses the meaning and importance of legal capacity and its interpretation as an integral part of a disability rights framework. It outlines how Article 12 of the Convention on the Rights of People with Disabilities (the CRPD)[7] manifests this right and its effect on domestic law. Part II lays out the various concerns and opposition to recognizing the full legal capacity of people with disabilities and older adults, especially in the circumstances described as "hard cases". Part III introduces the "disability-rights-oriented DSD" to design legal capacity legislation, policy, and tribunals. This design considers legal capacity and disability rights ideals and goals (as described in Part I) alongside

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[5] Sagit Mor, *With Access and Justice for All*, 39 CARDOZO L. REV. 611, 635 (2017).

[6] Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 186 (1978); Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115, 124 (2010).

[7] United Nations Convention on the Rights of People with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 (CRPD). The CRPD is a critical human rights treaty that has affected worldwide legislation. For a discussion of the drafting process of the CRPD and the U.S. participation in this process, *see* Arlene Kanter, THE DEVELOPMENT OF DISABILTIY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS (2015) [Hereinafter: Kanter, *The Development of Disability Rights*] and Arlene Kanter, *The Promise and Challenge of the United Nations Convention on the Right of Persons with Disabilities*, 34(2) SYRACUSE J. INT'L L. & COM. 287, 305 (2007); For a discussion regarding the CRPD's monitoring process *see* Michael A. Stein and Janet E. Lord, *Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential*, 32(3) HUMAN RIGHTS QUARTERLY 689 (2010).

social, professional, and bureaucratic obstacles and concerns (as defined in Part II). Part IV demonstrates the design's implementation and details its application in specific (yet typical) legal capacity cases and situations, such as the case of Anne, and offers some insights and recommendations for future implementation. The conclusion provides a summary of the discussion presented in the article.

I. LEGAL CAPACITY AND ACCESS TO JUSTICE

A. Restricting Legal Capacity and its Collateral Effect on Daily Life and Access to Justice

The human right of legal capacity derives from several human rights instruments.[8] It incorporates legal standing and legal agency to engage in undertakings, actions, and transactions with legal implications.[9] Conventionally, people are considered to have full legal capacity during their late teens when officially recognized by law as adults. Following that, legal capacity can be restricted only by a state's authority and usually through judicial proceedings.[10] Such proceedings are mostly held regarding persons with intellectual or cognitive disabilities and older adults who are perceived to experience a deterioration in their cognitive abilities. Until recently, the denial of legal capacity for these populations was considered trivial, and the justice system has validated it almost automatically in the name of their protection.[11]

Legal capacity proceedings question people's ability to make decisions and meet their basic needs. Consequently, safeguards can be appointed to protect them from exterior or self-harm

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[8] Legal capacity is most extensively referred to in Article 12 of the CRPD, *supra* note 7. However, it was established as a human right in earlier international documents: in Article 6 of the Universal Declaration of Human Rights (Dec. 10, 1948) (UDHR); Article 16 of the International Convention of Civil and Political Rights *opened for signature* Dec. 16, 1966, S. TREATY DOC. No. 95-20, 999 U.N.T.S. 171, 177 (entered into force Mar. 23, 1976) (ICCPR); and Article 15 of the Convention to End All Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13, 19 (entered into force Sept. 3, 1981) (CEDAW).

[9] Legal capacity to be recognized as a "legal person" before the law combines a "passive" capacity of legal standing, which incorporates the holding of rights and duties, and an "active" capacity of legal agency, to exercise those rights and duties. See György Könczei Hoffman, *Legal Regulations Relating To the Passive and Active Legal Capacity of Persons With Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons With Disabilities and the Impending Reform of the Hungarian Civil Code*, 33 LOY. L.A. INT'L & COMP. L. REV. 143, 149-150 (2012).

[10] Legal capacity and guardianship conventions in the U.S. are described *in* Kristin Booth Glen, *Supported Decision Making and the Human Right of Legal Capacity*, 3(1) INCLUSION 2 (2015) [Hereinafter: Glen, *Supported Decision Making*]; *in* Kristin Booth Glen, *Introducing a "New" Human Right: Learning From Others, Bringing Legal Capacity Home*, 49 COLUM. HUM. RTS. L. REV. 1, 5 (2018) [Hereinafter: Glen, *Introducing a New Human Right*]; and *in* Carrie E. Rood, Arlene Kanter, & Julie Causton, *Presumption of Incompetence: The Systematic Assignment of Guardianship Within the Transition process*, 39 RESEARCH AND PRACTICE FOR PERSONS WITH SEVERE DISABILITIES 319, 320 (2015).

[11] For a comparative review of legal capacity proceedings regarding older adults, see Israel Doron, *Elder Guardianship Kaleidoscope - A Comparative Perspective*, 16 INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY 368 (2002).

due to their perceived inability to make decisions and care for different aspects of their life.[12] A typical result of such proceedings is appointing a *guardian* or a *conservator*, a legally recognized substitute decision-maker.[13] Guardians' legal duties vary according to the country's or state's legislation and usually include acting according to the person's individual needs, sometimes considering their *will and preferences*, while in other cases, guided by the aspiration to act according to the person's *best interest*.[14] Scholars have labeled guardianship "civil death"[15] since it revokes one's ability to make decisions regarding life matters, including financial issues, medical treatments, social association, marriage, family-related choices,[16] and even engagement in sexual intimacy.[17]

For people with disabilities, the effect of the appointment of a guardian tends to be much wider than merely limiting formal rights to act legally, thus creating "collateral damage". This vast effect is because the guardian appointment, usually at an early age, pushes them away from demonstrating self-determination later in their lives.[18] Given the early loss of legal capacity, restoring decision-making capabilities that have become degraded through lack of use will usually be complicated.[19] Moreover, the appointment of a guardian is often mistakenly widely interpreted - by third parties, the guardian, and the person himself - not just as a limitation to act legally but as a total inability to make decisions regarding every matter, to engage in any activity, or to associate with anyone without the guardian's consent, forming

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[12] *See generally*, Anna Arstein-Kerslake and Eilionóir Flynn, *The Right to Legal Agency: Domination, Disability and the Protections of Article 12 of the Convention on the Rights of Persons with Disabilities*, INT'L J.L. CONTEXT 25 (2017) [hereinafter: Arstein-Kerslake & Flynn, *The Right to Legal Agency*].

[13] A guardian can be a person or an institution. In some U.S. states, guardianship is called conservatorship (*see* Glen, *Introducing a New Human Right, supra* note 10, at 2-3).

[14] "Best interest" is a broad and subjective term. Recent interpretation of "best interest" requires considering the person's wishes and feelings and respecting their subjectivity, moving away from paternalistic decision-making towards a more autonomous one. Nevertheless, according to the autonomy/protection paradigm, acting upon one's "best interest" is considered opposed to acting according to their "will and preferences" (*See*: Mary Donnelly, *Best Interests in the Mental Capacity Act: Time to Say Goodbye?*, 24 MED. L. REV. 318, 319 (2016)).

[15] Gerard Quinn & Anna Arstein-Kerslake, *Restoring the 'Human' in 'Human Rights: Personhood and Doctrinal Innovation in the UN Disability Convention*, *in* THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW 36, 42 (Conor Gearty & Costas Douzinas, eds., 2012).

[16] Leslie Salzman, *Rethinking Guardianship (Again): Substitute Decision-Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act,* 81 U. COLO. L. REV. 157, 164 (2010). *See* also Michael L. Perlin, *Striking for the Guardians and Protectors of the Mind: The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN ST. L. REV. 1159, 1165 (2013).

[17] Anna Arstein-Kerslake, *Understanding Sex: The Right to Legal Capacity to Consent to Sex*, 30 DISABILITY AND SOCIETY 1459 (2015).

[18] Rood et al., *supra* note 10, at 324-325, claiming that guardianship for young adults with disabilities is contrary to the language and purpose of the Individuals with Disabilities in Education Improvement Act (IDEIA).

[19] Quinn & Arstein-Kerslake, *supra* note 15, at 42.

relationships characterized by domination, creating and reproducing dependency, and further diminishing the person's decision-making.[20]

Moreover, people under guardianship usually experience informal regulation of different aspects of their lives by family members and service providers. Such interventions damage their legal capacity and decision-making abilities regarding daily activities, housing, employment, social relationships, and leisure, thus harming their personhood and shaping their personality. Such barriers to decision-making arise in many different settings, especially institutional ones.[21]

The disability rights discourse sheds light on the historical structuring of the legal subject, which has led to the inferiority of people with disabilities (and especially people with cognitive disabilities) who were, and sometimes still are, perceived as too incompetent to pass the threshold requirements of the rights discourse, such as rationality, autonomy, and independence, and as a consequence, as ineligible to fully participate in civil and social life, and make decisions regarding their personal lives. In this respect, it emphasizes the inherent human quality of people with disabilities, even if they do not adhere to the "normal" standards of participation and productivity.[22]

Consequently, disability rights scholars consider the limitation of legal capacity as one of the primary barriers faced by people with disabilities, mainly intellectual and cognitive disabilities.[23] Though intended to protect, the limitations on legal capacity negatively affect people's daily lives and ability to enter the realm of law, use the law for their benefit, and exercise their rights. Moreover, guardians' extensive, sometimes absolute, power entails more negative implications. It can create a conflict of interest between the guardian and the person under guardianship, violate the person's rights, and lead to exploitation and abuse. Ironically, sometimes, it even results in a lack of legal representation of the person under guardianship in

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[20] Arstein-Kerslake & Flynn *The Right to Legal Agency*, *supra* note 12, at 22.

[21] *Id.*, at 27.

[22] Martha Nussbaum, *The Capabilities of People with Cognitive Disabilities*, 40(3-4) METAPHILOPHY 331, 335 (2009).

[23] Mor, *supra* note 5, at 635; *see also* Arlene S. Kanter & Yotam Tolub, *The Fight for Personhood, Legal Capacity, and Equal Recognition Under Law for People with Disabilities in Israel and Beyond*, 39 CARDOZO L. REV. 557, 578-592 (2017).

the legal capacity judicial proceedings. This absence from participating in the proceedings[24] may result in abuse, fraud,[25] and insufficient supervision of the guardianship relationship.[26]

B. Promoting Legal Capacity Through National and International Legislation

These understandings that the denial of legal capacity is a form of violation of human rights and that people with disabilities suffer from a distinct infringement of this right led to social and legal demands for legislation and policy reform.[27] Consequently, while drafting the United Nations Convention on the Rights of People with Disabilities (the CRPD),[28] legal capacity was declared one of the main issues preventing equality and full social participation of people with disabilities[29] as well as older adults who are perceived to experience a cognitive decline.[30]

Given this centrality of legal capacity in people's lives, Article 12 of the CRPD, "Equal recognition before the law", comprises a pivotal component of the CRPD. It specifically addresses the right to enjoy equal legal capacity in all aspects of life.[31] The Article was among the most contested articles during the Convention's deliberation process.[32] It is considered revolutionary since it affirms that people with disabilities have the right to full recognition as "persons before the law" and portrays a paradigm shift towards the presumption of legal capacity.[33] It separates *mental capacity*, which may vary, from *legal capacity,* which remains

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[24] Paula Case, *When the Judge Met P: The Rules of Engagement in the Court of Protection and the Parallel Universe of Children Meeting Judges in the Family Court*, 39 LEGAL STUD. 302 (2019).

[25] Otávio Daros, *Deconstructing Britney Spears: Stardom, Meltdown and Conservatorship*, 25 JOURNAL FOR CULTURAL RESEARCH 377 (2021); Also *see* Ronnie Greene & Holly Barker, *Gardians' Dark Side: Lax Rules Open the Vulnerable to Abuse*, BLOOMBERG LAW (March 6, 2023, 5:00 A.M.) https://news.bloomberglaw.com/interactive/guardians-dark-side-lax-rules-open-the-vulnerable-to-abuse (last visited Feb. 1, 2024).

[26] Mor, *supra* note 5, at 635.

[27] For an overview of the reform measures in the U.S., beginning in the 1980's, see Glen *Supported Decision Making, supra* note 10, at 3. *See* also Kanter & Tolub, *supra* note 23, at 578-592.

[28] CRPD, *supra* note 7. The Convention was signed by the U.S. administration but wasn't ratified. However, the Convention has and still is influencing U.S. policy, legislation, and case law. The implementation of the CRPD is monitored by the Committee on the Rights of Persons with Disabilities, which provides all state parties with suggestions and recommendations that are not legally binding.

[29] For a summary of the literature on Article 12, *see*: Clíona De Bhailís & Eilionóir Flynn, *Recognising Legal Capacity: Commentary and Analysis of Article 12 CRPD,* 13(1) INT'L J.L. CONTEXT 6 (2017); for a review of the notion of equal recognition before the law in various U.N. tools see: Nandini Devi et al., *Moving Towards Substituted or Supported Decision-Making? Article 12 of the Convention on the Rights of Persons with Disabilities*, 5 ALTER 249 (2011).

[30] Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People Under International Law*, 25 G. ST. U. L. REV. 527, 528 (2009).

[31] CRPD, *see supra* note 7, at Articles 12(1) and 12(2).

[32] Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stronghold of the Past or Lodestar for the Future*, 34 SYRACUSE J. INT'L L. & COM. 429 (2007).

[33] Kanter, *The Development of Disability Rights*, *supra* note 7, at 237-238.

constant, and calls for states to support various mental capacity conditions to enjoy legal capacity fully.[34]

While calling for the revision of traditional regimes of guardianship laws and the adoption of proportional protection measures instead, Article 12 seeks to ensure that all individuals are recognized as legal decision-makers on an equal basis with others and that their decisions are respected and realized. It emphasizes the person's will and preferences,[35] wishes and feelings, and replaces the "best interests"[36] and "substituted judgment"[37] terminology with the rights discourse.[38] In doing so, it refers to the notion of access to justice in the most profound sense of the entitlement to personhood and civil status as legal subjects and the human rights such personhood entails.[39] Therefore, one of the primary outcomes of tying disability rights to access to justice should be the recognition of legal capacity.[40]

In addition to this novel acknowledgment of legal capacity for all, and considering the difficulties and barriers faced by people with disabilities in exercising their legal capacity as mentioned above (in Section I.A.), Article 12 emphasizes two supplemental mechanisms: The *first* is providing access to the *support* needed to exercise legal capacity.[41] As Robert Dinerstein notes, the salience of *support,* not only in Article 12 but also throughout the CRPD, is a concrete expression of the social model of disability, viewing disability as a product of interaction between an individual and their environment.[42] The most prominent mechanism for this autonomy-focused idea, aimed at enabling people to exercise their legal capacity and replacing

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[34] Quinn & Arstein-Kerslake, *supra* note 15, at 47.

[35] "Will" and "preferences" are not separately referred to in Article 12, although scholars have highlighted their different meanings. As Szmukler articulates, "will" has a stronger sense of force to act in a particular way, while "preferences" simply refers to a liking of one alternative over another (George Szmukler, *"Capacity", "Best Interests", "Will and Preferences" and the UN Convention on the Rights of Persons with Disabilities*, 18 WORLD PSYCHIATRY 34–41 (2019)).

[36] *See* Donnelly, *supra* note 14, at 319.

[37] "Substituted judgment" means making the decision that the person would make if they could make and communicate the decision (For a detailed review of the flaws of substituted judgment, *see* Anthoney Wrigley, *The Problem of Counterfactuals in Substituted Judgement Decision-Making*, 28(2) J. APPLIED PHIL. 169 (2011).

[38] Eilionóir Flynn & Anna Arstein-Kerslake, *Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity*, 10(1) INT'L J.L. CONTEXT 81 (2014) [hereinafter: Flynn & Arstein Kerslake, *Legislating Personhood*].

[39] Anna Arstein-Kerslake & Eilionóir Flynn, *The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law*, 20(4) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 471, 480 (2016) [hereinafter: Arstein-Kerslake & Flynn, *The General Comment*].

[40] EILIONÓIR FLYNN, DISABLED JUSTICE? ACCESS TO JUSTICE AND THE UN CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITIES (2015) at 46.

[41] CRPD, *supra* note 7, at Article 12(3).

[42] Robert Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8, 9 (2012).

the traditional *substitute* decision-making models,[43] is *supported decision-making* models.[44] Supported decision-making refers to various mechanisms and pertains to informal and organizational support, civil society voluntary mechanisms, and legally mandated ones.[45] It places great importance on *how* the support is provided by helping the person understand the nature of the decision, the relevant options, the risks and benefits of each option, and articulating their own will and preferences.[46]

As Bigby et al. articulated in their recent report,[47] *supported* decision-making is often referred to as opposed to and sharply distinguished from *substitute* decision-making.[48] This distinction forms a "binary approach", under which a person is either supported to actively make decisions or subject to decisions made by others according to their "best interest". According to Bigby et al., the binary approach excludes people with more significant cognitive disability from supported decision-making. Therefore, they suggest a "principled approach", adopting a continuum of decision support, including people who are supported to make their own decisions alongside people who cannot actively participate or communicate their will and preferences, whose supporters "best interpret" their will and choice. Additionally, in limited circumstances of risk of serious, imminent physical or financial harm with lasting

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[43] Those impermissible substitute decision-making systems are defined in the Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law, UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session (April 2014). They include the following situations: (i) capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective 'best interests' of the person concerned, as opposed to being based on the person's own will and preferences (paras. 7 and 27).

[44] As opposed to *substitute* decision-making models. For a detailed review of this concept as well as qualitative empirical findings regarding the nature of supported decision-making in Canada, one of the first countries to develop supported decision-making legal mechanisms, *see* Michelle Browning et al., *A Process of Decision-Making Support: Exploring Supported Decision-Making Practice in Canada*, JOURNAL OF INTELLECTUAL AND DEVELOPMENTAL DISABILITY 1 (2020). Also *see*: Jacinta Douglas & Christine Bigby, *Development of an Evidence-Based Practice Framework to Guide Decision Making Support for People With Cognitive Impairment Due to Acquired Brain Injury or Intellectual Disability*, 42 DISABILITY AND REHABILITATION 434 (2020). A contemporary debate regarding the exercise of legal capacity involves the practice of *advanced directives*, that allows a person to state in advance directives regarding different aspects of life, to be activated at a time when they lose decision-making capacity. The debate centers on whether advanced directives are a form of support required by Article 12(3) (Daniel Bianchi, *Advance Directives: Addressing the Obligations of Support as Part of the Right of a Person with Disabilities to Equal Recognition Before the Law?*, 70 INT'L J.L. & PSYCHIATRY (2020)).

[45] Terry Carney, *Clarifying, Operationalising, and Evaluating Supported Decision-Making Models*, RESEARCH AND PRACTICE IN INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, 1, 46-50 (2014).

[46] Christine Bigby et al. *Diversity, Dignity, Equity and Best Practice: a Framework for Supported Decision-Making* (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 2023) 79-88 [Hereinafter: Bigby et al. *Diversity, Dignity, Equity and Best Practice*].

[47] *Id.*, at 19-42.

[48] For similar claims regarding the practice in the U.S., according to which supported decision-making and guardianship can sometimes overlap, depending on the legislation and practice in each state, *see* Nina A. Kohn, *Legislating Supported Decision-Making*, 58 HARV. J. ON LEGIS. 313, 326-327 (2021).

consequences, the decisions will be guided by the person's personal and social well-being, ensuring the protection of a minimal safety standard alongside their will and preferences.[49]

The *second* mechanism emphasized by Article 12 is providing the support system with appropriate and effective *safeguards*. Safeguards are mechanisms for third parties aimed to prevent abuse and neglect, addressing the complexity of securing the right to legal capacity while protecting other disability rights, such as the right to health and freedom from abuse and ill-treatment.[50] For these purposes, safeguards should allow third parties to verify the identity of a support person, make sure that they act based on the will and preferences of the person concerned, and that the person using support is free to reject offers of support and to end the support relationship.[51]

Referring to Article 16 of the CRPD, asserting the obligation to protect persons with disabilities from violence, exploitation, and abuse, The Convention's "General Comment no. 1" clarifies that safeguards should protect the person from abuse on an equal basis with others.[52] The protection should address undue influence while respecting the person's rights, will and preferences, including the right to take risks and make mistakes.[53] Nevertheless, states are obliged not to deny an individual's legal capacity in the name of protecting them against abuse: in light of the non-discrimination principle articulated in the Convention, measures taken to protect against violence, exploitation, and abuse must apply to both persons with and without disabilities equally.[54]

Therefore, safeguards should also be free of conflict of interests or undue influence, proportional and tailored to each person's circumstances, applied for the shortest time possible, and subject to regular review by a competent, independent, impartial authority or judicial

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[49] Bigby et al. *Diversity, Dignity, Equity and Best Practice, supra* note 46, at 19-42. This argument is especially relevant for people who are considered to have profound intellectual disability, practically meaning that there is a variety of decisions that they will not be able to fully understand and decide upon, even with the best support. In such cases, it is argued that guardianship should still prevail but alter to follow a supported decision-making approach in practice. See Michelle King, *Dedifferentiation and Difference: People with Profound Intellectual and Multiple Disabilities and the National Disability Insurance Scheme (NDIS)* 45(4) JOURNAL OF INTELLECTUAL AND DEVELOPMENTAL DISABILITY 320, 322 (2020). A similar argument is made by Schuthof in an article that focuses on people with dementia, whose needs and abilities might challenge supported decision-making mechanisms and therefore call for a novel approach that considers the generative nature of their condition and the risks involved (Fiore Schuthof, *Forget Me Not: The Human Right to Legal Capacity of Persons with Dementia* [forthcoming]).

[50] CRPD, *supra* note 7, at Art. 12(4).

[51] Arstein-Kerslake & Flynn, *The General Comment*, *supra* note 39, at 479.

[52] General Comment No. 1, *supra* note 43, at para. 20.

[53] *Id.*, at para. 22.s

[54] Arstein-Kerslake & Flynn, *The General Comment*, *supra* note 39, at 479.

body.[55] The Convention's "General Comment no. 1"[56] clarifies that such protection should be provided through empowerment, recognition of decision-making ability, and social support, and not in the form of denial of legal agency.[57] Only if, after significant efforts, it is still not practical to determine one's will and preferences, the General Comment suggests that the "best interpretation of will and preferences" will replace the "best interests" determination.[58] However, as mentioned before, other opinions have suggested a less radical interpretation of Article 12, leaving more room for protection from grave and imminent harm.[59]

Since the CRPD's adoption by the UN General Assembly in 2006, Article 12 inspired global academic research and legislation reforms portraying a paradigm shift from a "protection-focused" legal framework based on the notion of "best interest" to an "autonomy-focused" legal framework based on "will and preferences". As part of this shift, new legal tools and mechanisms were developed to help people realize their legal capacity while keeping their safety based on a spectrum of values ranging from autonomy to protection,[60] and the concept of supported decision-making was introduced.[61] Countries are also dealing - or struggling - with the practical implications of adopting supported decision-making models as an alternative to substitute decision-making mechanisms, such as guardianship, and as a means to move away from a person's "best interests" paradigm towards adopting a "will and preferences" paradigm. While some countries have developed extensive legislation and designated tribunals, others have hesitated to adopt the necessary changes.[62]

In the U.S., scholars have argued that Article 12's incorporation into the legal discourse and practice should include legal capacity legislation and procedures and innovative ways to domestically harmonize this right through interpreting the Americans with Disabilities Act

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[55] CRPD, *supra* note 7, at Article 12(4).

[56] General Comment No. 1, *supra* note 43.

[57] Arstein-Kerslake & Flynn, *The General Comment*, *supra* note 39, at 472.

[58] General Comment No. 1, *supra* note 43, at para. 21.

[59] See, for example, the nuanced "principled approach" at Bigby et al., *Diversity, Dignity, Equity and Best Practice, supra* note 46, at 86-87.

[60] Flynn & Arstein-Kerslake, *Legislating Personhood*, *supra* note 38, at 81. For a global analysis of the national implementation of Article 12, *see* Faraaz Mahomed et al., *A "Paradigm Shift" in Mental Health Care*, MENTAL HEALTH, LEGAL CAPACITY, AND HUMAN RIGHTS 1 (2021); For a detailed analysis of the national legal reform process in Israel *see* Kanter & Tolub, *supra* note 23. Also *see Article 12: Illustrative Indicators on Equal Recognition Before the Law*, THE HUMAN RIGHTS INDICATORS ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD), UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), 2020.

[61] Kohn, *supra* note 48, at 314.

[62] Shin-Ning Then et al., *Supporting Decision-Making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies – Recommendations, Rationales and Influence*, 61 INT'L J.L. & PSYCHIATRY 64, 70 (2018). Also *See* Mahomed et al., *supra* note 60, at 4.

(ADA).[63] Kristin Booth Glen acknowledges the Article's radical potential, arguing that "an understanding of this right [legal capacity] can serve as a valuable tool for changing beliefs and practices that limit people with intellectual disabilities from leading inclusive and admirable lives."[64] She also notes that the explicit recognition of the human right of legal capacity should be emphasized in the U.S., rather than "leaping" to (the more prominent) practices of supported decision making without a solid human rights backdrop.[65] Similarly, Nina Kohn demonstrates how the "statutory embrace of supported decision making" in the U.S. has proven counterproductive, and antithetical to disability rights.[66]

However, the ADA's effect on revising disability policies (legal capacity related and others) is limited,[67] and up to this date, it does not entail an explicit recognition of legal capacity within a human rights context.[68] Nevertheless, as Leslie Salzman argues, even though domestic law is underdeveloped, an argument can be made that guardianship (which is the primary substitute decision-making mechanism in the U.S.) so isolates the person under guardianship that it violates the ADA's integration mandate, which requires states to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified

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[63] Americans with Disabilities Act, 1990, 42 U.S.C. § 12102 (ADA). One of the main obstacles detected by the American Bar Association (A.B.A.) through its "Commission on Law and Aging and Court Improvement Project|" was the fact that legal capacity and guardianship-related matters are regulated by the state, not federal law (*Modern Laws and Out-of-Court Solutions Can Advance Guardianship*, BLOOMBERG TAX (March 9, 2023, 7 P.M.) https://news.bloombergtax.com/daily-tax-report/modern-laws-and-out-of-court-solutions-can-advance-guardianship (last visited Feb. 1, 2024). The "Uniform Law Commission" issued a model legislation guide, providing states with tools to make legislation reform in legal capacity, replacing the Uniform Guardianship and Protective Proceedings Act (UGPPA). The model follows a "person-centered philosophy" prohibiting courts from granting unnecessary guardian powers and facilitating less restrictive interventions (*See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROTECTIVE ARRANGEMENTS ACT, § 102(31) (UNIF. L. COMM'N 2017) [hereinafter UGCOPAA].

[64] Glen, *Introducing a New Human Right, supra* note 10, at 13.

[65] *Id.*, at 27-31, describing supported decision-making development in the U.S., arguing that most projects support people with intellectual disabilities with their choices rather than insist on their comprehensive right to legal capacity, sometimes relying on medical models of mental capacity as a threshold to enter supported decision-making programs. Glen describes how supported decision-making was promoted in legislation such as the UGCOPAA, revised to require considering supported decision-making as a less restrictive alternative to guardianship. In addition, the American Bar Association (A.B.A.) adopted a resolution requiring consideration of supported decision-making as a less restrictive alternative to guardianship (Glen, *Introducing a New Human Right,* supra note 10, at 31-32; House of Delegates Resolution 113, A.B.A. (2017)).

[66] Kohn, *supra* note 48, at 328-338, arguing that the existing statutes have none or minimal regard for individuals with disabilities, restrict their rights in various ways, and create problematic new legal rights for supporters and third parties, undermining the stated goals of supported decision-making and disempowering people with disabilities.

[67] Thomas F. Burke & Jeb Barnes, *Layering, Kludgeocracy and Disability Rights: The Limited Influence of the Social Model in American Disability Policy*, 17 SOCIAL POLICY AND SOCIETY 101, 108 (2018). For an overview of the enactment of the ADA and its limitations regarding disability policy implementation, see Michael Waterstone, *Backlash, Courts, and Disability Rights*, 95 B.U. L. REV. 833 (2014); also *see* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58(6) VAND. L. REV. 1807 (2005).

[68] Leslie Salzman, *Using Domestic Law to Mover Toward a Recognition of Universal Legal Capacity for Persons with Disabilities*, 39 CARDOZO L. REV. 521 (2017) [Hereinafter: Salzman*, Using Domestic Law*].

individuals with disabilities.”.[69] Moreover, Title II of the ADA and substantive due process should be interpreted to reflect recognition of universal legal capacity, regardless of disability, thus changing domestic guardianship regimes throughout the U.S.[70]

Regrettably, as Michael Waterstone notes, the courts are usually reluctant to use constitutional tools to protect disability rights.[71] Thus, even when judges decided to strike down constitutional provisions that deprived people with disabilities[72] of their legal capacity (namely, their constitutional right to vote), the verdicts were not based on disability rights discourse.[73]

Summing up, legal capacity principles face opposition and obstacles, hindering their adoption.[74] In the next Section (II), I will delve into some of the concerns and barriers that prevent the full realization of legal capacity as a matter of law and policy. Further, in Section III, I will suggest a way to design a system that implements legal capacity objectives given those concerns and obstacles.

II. Obstacles in Realizing Legal Capacity for People with Disabilities: Concerns and Opposition

Indeed, alongside the aspiration to adopt Article 12’s principles, the right to legal capacity has drawn concern, controversy, and opposition, mainly regarding the gaps between the goals and ideas it entails and their practical implementation in the lives of people with disabilities and older adults.[75]

The opposition focuses mainly on Article 12’s perceived radicalism and the contradiction with formerly established, widespread therapeutical conventions of intellectual and cognitive disabilities, wondering whether the person’s ability to make decisions can be ignored.[76] Researchers have especially noted the lack of guidance on resolving rights conflict in particular

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[69] 28 C.F.R. § 35.130(d) (2016). This mandate was interpreted by the U.S. Department of Justice as requiring to provide a setting that enables people with disabilities to interact with “nondisabled persons” to the fullest extent possible (28 C.F.R. pt. 35, App. B (2011)).

[70] Salzman, *Using Domestic Law, supra* note 63, at 538.

[71] Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527 (2014) [hereinafter: Waterstone, *Disability Constitutional Law*].

[72] The States’ provisions that were examined under the verdicts defined the people as “under guardianship by reason of mental illness,” “insane,” or “not mentally competent.”

[73] Waterstone, *Disability Constitutional Law, supra* note 71, at 553.

[74] See, for example, an analysis of the legal reforms that took place in Peru, Argentina, and Ireland at Antonio Martinez-Pujalte, *Legal Capacity and Supported Decision-Making: Lessons from Some Recent Legal Reforms*, 8(4) LAWS 1, 18-20 (2019).

[75] Dinerstein, *supra* note 42, at 11.

[76] Szmukler, *supra* note 35, at 36.

instances where autonomy and protection of other interests contradict each other.[77] The criticism also questions supported decision-making, its practical outcome, and the General Comment's sweeping rejection of substitute decision-making mechanisms, which underlie the laws and regulations constituted in the name of protection.[78]

Within the U.S., Glen identified three "political" potential bases for opposition to adopting the right to legal capacity: the ideology of "protection", an economic stake in the existing system of substitute decision-making, and professional identity.[79] Adding to those oppositions, I will present another obstacle: an insufficient practice-oriented implementation approach in planning and designing new legal capacity policies.

A. The Ideology of Protection

As Salzman notes, "… the notion that the State should protect its vulnerable citizens by designating or appointing someone else to make decisions for them – that it has an *obligation* to do so – is one that is deeply rooted in our historic tradition. It will likely take both constitutional and statutory arguments to reverse this long-standing *parens patriae* tradition and move us toward the recognition of universal legal capacity, with a right to support if needed".[80]

Indeed, the central claim against recognizing full legal capacity for people with intellectual and cognitive disabilities is that favoring a person's will and preferences over their best interest in *all* situations negates duties to protect vulnerable people from self-harm or neglect[81] and from causing harm to others,[82] especially in cases of imminent and grave damage.[83] According to this claim, such recognition of total legal capacity contradicts other disability rights, such as

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[77] John Dawson, *A Realistic Approach to Assessing Mental Health Laws' Compliance with the UNCRPD*, 40 INT'L J.L. & PSYCHIATRY 70, 71 (2015).

[78] Glen, *Introducing a New Human Right, supra* note 10, at 15, analyzing the problem of lack of legislative implementation through Michael Bach's identification of three types of intersecting conflicts: conceptual/philosophical, legal, and political (Michael Bach, *Inclusive Citizenship: Refusing the Construction of "Cognitive Foreigners" in Neo-Liberal Times*, 4 RES. & PRAC. INTELL. & DEVELOPMENTAL DISABILITIES 4, 12 (2017)). Also *see* Kohn, *supra* note 48, at 328-338, pointing to the negative implications of current supported-decision-making statutes in the U.S.

[79] Glen, *Introducing a New Human Right, supra* note 10, at 22.

[80] Salzman, *Using Domestic Law*, *supra* note 63, at 526.

[81] Katrine Del Villar, *Should Supported Decision-Making Replace Substituted Decision-Making? The Convention on the Rights of Persons with Disabilities and Coercive Treatment under Queensland's Mental Health Act 2000*, 4 LAWS 173 (2015); Kirsty Keywood, *The Vulnerable Adult Experiment: Situating Vulnerability in Adult Safeguarding Law and Policy*, 53 INT'L J.L. & PSYCHIATRY 88, 90 (2017).

[82] Matthé Scholten & Jakov Gather, *Adverse Consequences of Article 12 of the UN Convention on the Rights of Persons with Disabilities for Persons with Mental Disabilities and an Alternative Way Forward*, 44 JOURNAL OF MEDICAL ETHICS, 1 (2018).

[83] De Bhailís & Flynn, *supra* note 29; Szmukler, *supra* note 35, at 36.

the highest attainable standard of health[84] and life.[85] This is because, in some situations, a person's will and preferences can harm their mental or physical health status and even pose a risk to their lives. Consequently, it can also increase mental-health-related stigma.[86] Those claims are raised by professionals, family members, and parents' organizations who present substantial, continuous, and sometimes even highly emotional opposition to legal capacity,[87] arguing that substitute decision-making should overtake in some circumstances, mainly those involving potential danger.[88]

"Protection advocates" argue that protection and autonomy do not necessarily contradict, not even in such circumstances. When a person's decision-making ability is substantially impaired, they are not in a good position to assess treatment options consistent with their *own* conception of the good. Stressing the importance of longitude and continuity, they offer a broad definition of "autonomy" as an ability to live according to one's own conception of the good and "wellbeing" as one's overall experience of happiness or the satisfaction of desires over an extended period. According to these definitions, in certain situations, such as psychotic episodes, the autonomy principle calls for *disrespect* of the person's current treatment choice if it contradicts their autonomy and well-being in a broad meaning and exposes them to risks they would never otherwise accept, compromising their ability to live according to their general conception of the good.[89]

Other protection concerns focus on supported decision-making mechanisms and address responsibility allocation and accountability for actions and decisions, arguing that this mechanism might leave people with disabilities in an inferior legal position.[90] For example, in health decisions, the responsibility remains with the person, regardless of their level of current decision-making capacity and the amount of support they received, failing to provide proper checks and balances and increasing the chance of making risky health decisions. This lack of

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[84] CRPD, *supra* note 7, at Article 25.

[85] *Id.*, at Article 10.

[86] Bach, *supra* note 78, at 13; Melvyn Colin Freeman et al., *Reversing Hard Won Victories in the Name of Human Rights: a Critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities*, 2(9) LANCET PSYCHIATRY 844 (2015).

[87] Glen, *Introducing a New Human Right, supra* note 10, at 24.

[88] Jill Stavert, *Supported Decision-Making and Paradigm Shifts: Word Play or Real Change?*, 11 FRONTIERS IN PSYCHIATRY 1, 5 (2021).

[89] *See* Scholten & Gather, *supra* note 82, at 229. A similar claim is made by Arthur Caplan in *Denying Autonomy in Order to Create It: The Paradox of Forcing Treatment Upon Addicts*, 103 ADDICTION 1919, 1919-1920 (2008). Such a distinction between one's conception of the overall experience of happiness and satisfaction versus current treatment choice can also be synonymous with the distinction between (the deeper and more fundamental) "will" versus (the momentary) "preferences." See Szmukler, *supra* note 35, at 38.

[90] *See,* for example, Kohn, *supra* note 48, at 329.

accountability of supporters can also lead to undue influence over the person and hinder proper supervision.[91]

Based on the ideology of protection, "nuanced" models for decision-making status were suggested,[92] portraying a so-called "more realistic" interpretation of Article 12, grounded in the view that not everyone can exercise legal capacity, even with the most extensive support.[93] Those interpretations are based on perfecting substitute decision-making models but not abolishing them entirely,[94] proposing to view substitute and supported decision-making not as exclusive paradigms that mandate preferring one over the other[95] but instead as a continuum.[96]

B. Professional Identity

Anna Arstein-Kerslake identified professional identity, mainly in the care-related and therapeutic professions, as a leading opposition source and an obstacle to the recognition of legal capacity. This is because the necessary policy change directly challenges the established therapeutic mode of operation, which relies on social and medical assessment, denial of legal capacity, and wide use of substituted decision-making mechanisms.[97]

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[91] The fear that supporters themselves may exploit their position and cause harm was expressed by Bach and Kerzner, stressing the importance of including a high-level review and oversight of the supported decision-making relationship (Michael Bach & Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Rights to Legal Capacity: Advancing Substitute Equality for Persons with Disabilities Through Law, Policy, and Practice*, LAW COMMISSION OF ONTARIO, 2010, at 37). Also, *see* Scholten & Gather, *supra* note 82, at 229-230, and the references mentioned there.

[92] *See,* for example, Bach & Kerzner's gradual model of decision-making status: legally independent status, supported decision-making status, and facilitated decision-making status (the latter including the "hard cases") (Bach & Kerzner, *supra* note 91).

[93] Marie Fallon-Kund & Jerome E. Bickenbach, *New Legal Capacity Laws and the United Nations Convention on the Rights of Persons with Disabilities: An Overview of Five Countries in Europe*, 24(3) EUR. J. HEALTH L. 285, 309 (2017).

[94] Joseph Dute, *Should Substituted Decision-Making be Abolished?*, 22 EUR. J. HEALTH L. 315, 318, 320 (2015).

[95] The suggestion is based on using the existing mental capacity tools to achieve both respect to will and preferences, and best interest standards, in a combined model of decision-support and competence assessment as an alternative model for supported decision-making with three aims: to enhance the person's decision-making capacity, improve advance care planning, and improve substitute decision-making (Scholten & Gather, *supra* note 82, at 230-231; Donnelly, *supra* note 14, at 332). Those altered substitute decision-making models are predominantly based on respecting the person's will and preferences to the most significant extent. Legal safeguards will prevent misuse of power while providing a balance between autonomy and protection. Contrary to General Comment No. 1, it is suggested to interpret Article 12 as authorizing the use of *capacity* as an indicator for the institution of protective measures. It is argued that countries would be more likely to make the necessary legal reform with this less radical interpretation of Article 12, allowing specific exceptions to exercise legal capacity and appropriate safeguards (Fallon-Kund & Bickenbach, *supra* note 85, at 309, 310).

[96] The most recent example is the Australian "principled approach" developed by Bigby et al., *Diversity, Dignity, Equity and Best Practice, supra* note 46. According to this approach, most people and situations might still be included in supported decision-making if it is interpreted not as full control over the decision but rather as supporters following their interpretation of the person's will and preferences.

[97] ANNA ARSTEIN-KERSLAKE, RESTORING VOICE TO PEOPLE WITH COGNITIVE DISABILITIES: REALIZING THE RIGHT TO EQUAL RECOGNITION BEFORE THE LAW 221 (2017).

One of these professional-identity-oriented claims raises the difficulty of interpreting one's will and preferences in different situations,[98] especially in "hard cases," such as people with profound intellectual disability.[99] This argument is usually raised when there is a controversy between the person and others in a position of power: family members, service providers, or medical professionals,[100] claiming those cases should be solved according to professional decisions, prioritizing other rights over autonomy and legal capacity.

C. Economic Stake in the Existing System of Substitute Decision-Making, "Gate-Keppers," and Financial Third-Parties Conventions

Like in any other system, legal capacity and guardianship regimes involve stakeholders and groups directly benefiting from the current system. Therefore, they have a solid personal and economic interest in resisting its alteration. Those are, for example, the paid 'professional guardians' in many states and sectors of the bar that deal with guardianship petitions.[101]

Another significant obstacle to the new legal capacity ideas, linked to economic stakes, lies within the conduct of "third parties" operating as "gate-keepers" such as financial institutions' workers or health care professionals. Those hold the position and power to question legal capacity in daily situations, withholding emancipatory outcomes and undercutting efforts to accept decision-making by people with disabilities.

An example of the problematic financial aspect lies within the practical interpretation of Article 12, asserting that people with disabilities have equal rights to own and inherit property, control financial affairs, and access bank loans, mortgages, and financial credit.[102] Nevertheless, given the lack of knowledge and practical tools to exercise these economic

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[98] Quinn & Arstein-Kerslake, *supra* note 15.

[99] Such is Bach's "conceptual/philosophical" conflict, *in* Bach, *supra* note 78. Philosophically, Bach suggests that in some "hard" situations (such as profound intellectual disability) people shouldn't be viewed as moral agents. Practically, Bach mentions situations where a person's "will and preferences" cannot be ascertained, calling for someone else to have the power to make decisions.

[100] Anna Arstein-Kerslake & Jennifer Black, *Right to Legal Capacity in Therapeutic Jurisprudence: Insights from Critical Disability Theory and the Convention on the Rights of Persons with Disabilities,* 68 INT'L J.L. & PSYCHIATRY 1, 4 (2020) [Hereinafter: Arstein-Kerlake & Black, *Right to Legal Capacity*]; *See* also a review of legal capacity conception gaps between parents and their children *in* Shirli Werner & Rachel Chabany, *Guardianship Law Versus Supported Decision-Making Policies: Perceptions of Persons with Intellectual or Psychiatric Disabilities and Parents*, 86 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 486, 490 (2016); A recent famous example is the guardianship case of Britney Spears, who experienced substantial obstacles in access to the courts (and therefore, to justice) trying to regain full legal capacity. Throughout most of the proceedings, the court has expressed traditional views, supporting the claims of family members and medical professionals (Otávio Daros, *supra* note 25).

[101] Glen, *Introducing a New Human Right, supra* note 10, at 23-24.

[102] CRPD, *supra* note 7, at Article 12(5).

aspects of the right to legal capacity (and lack of financial incentives to develop this knowledge and tools), banks and other financial institutions continue questioning the ability of people with disabilities to understand and exercise choice and fear situations where they might be blamed or be liable for the consequences of such decisions.[103] Consequently, those third parties sometimes still insist on supplementary guardianship tools before providing services to people with disabilities.[104]

D. Lack of Adequate Design and Resource Allocation for the Implementation of the Legal Capacity System

As discussed above, the three main ideological objections to implementing Article 12 are protection interests, professional identity, and economic stake in the existing systems. Adding to these three types of "ideological" objections to fully recognizing the right to legal capacity, other *practical-structural* obstacles hinder Article 12's implementation in national policy and legislation. Those are the lack of adequate design and funding for a new system of legal capacity, focusing on supported decision-making.

Indeed, lack of adequate design and funding is often a direct consequence of substantial opposition to change, such as the three main objections aforementioned. However, I claim that even in the presence of a genuine will to establish a legal capacity framework aiming to overcome the objections mentioned above, the problem of the implementation's design consists of a fundamental obstacle to fully recognizing the right to legal capacity.

This is because when aspiring for change, especially a systematic one, the system's practical design plays a central role. A successful design considers ideological goals and objections, such as the ones mentioned in Sections I and II above. But not less important, it entails practical aspects such as the identity of the design's participants, its opponents, strategies to overcome opposition, the existing processes, and the available or necessary resources. Such practical considerations hold the potential to realize ideals and social change.[105]

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[103] This doctrine of mental incapacity in contract law is described in Sean M. Scott, *Contractual Incapacity and the Americans with Disabilities Act*, 124(2) Dick. L. Rev. 253, 257 (2020).

[104] Roni Holler et al., *Choice Within the Israeli Welfare State: Lessons Learned from Legal Capacity and Housing Services*, in CHOICE, PREFERENCE, AND DISABILITY, POSITIVE PSYCHOLOGY AND DISABILITIES SERIES, 95 (Roger J. Stancliffe et al. eds, 2020).

[105] LISA BLOMGREN-AMSLER, JANET J. MARTINEZ, & STEPHANIE E. SMITH, DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT (2020) at 24-25.

Indeed, a substantial obstacle to implementing Article 12 within legal capacity frameworks is budgetary[106] since the provision of support, when appropriately delivered, is costly and time-consuming.[107] Nevertheless, legislation that acknowledges supported decision-making might remain silent regarding proper training and funding for supporters. This omission leaves people with disabilities with limited means and possibilities to benefit from supported decision-making mechanisms, choosing between funding them independently or returning to guardianship.[108] The budgetary issue is also relevant for people who receive informal support from family members, carers, and others who comprise their support network, who are usually not provided with supported decision-making training.[109]

Another obstacle is the lack of clear definitions and boundaries of the supporter's responsibilities and authority, causing tension between the supporters and other people involved in the person's life, calling for drawing more explicit boundaries between decision-making support and different supporting roles such as case management and advocacy.[110]

Another issue concerns the design of psychologists' and social workers' roles in the legal capacity determination process. Research has found that even within advanced regimes of legal capacity, those who are supposed to assess people's abilities are still basing their decisions on bio-medical factors such as diagnosis, functional level, and presence of supportive family, much more than on considerations of the person's preferences.[111]

Consequently, guardianship is still favored in many cases, providing various justifications (all related to the objections above), such as safeguarding practices, promotion of well-being, and its essentiality vis à vis third parties.[112] This preference is due, at least partly, to the fact that psychologists and social workers are not trained according to rights-based approaches,

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[106] Insufficient funding, problems of understaffing, and lack of resources in courts were mentioned by Ellie Lanier on the Bloomberg-Tax report, *supra* note 63.

[107] Scholten & Gather, *supra* note 82, at 230; *See* also an Australian study of several decision-support programs: Christine Bigby et al., *Delivering Decision Making Support to People with Cognitive Disability — What Has Been Learned from Pilot Programs in Australia from 2010 to 2015*, 52(3) AUSTRALIAN JOURNAL OF SOCIAL ISSUES 222, 234, 237 (2017) [Hereinafter: Bigby et al. *Delivering Decision Making Support*].

[108] Holler et al., *supra* note 104, at 95-96.

[109] Bigby et al., *Diversity, Dignity, Equity and Best Practice, supra* note 46, at 81.

[110] Bigby et al., *Delivering Decision Making Support, supra* note 107, at 235.

[111] Roni Holler & Shirli Werner, *Between the Convention and Conventional Practice: Israeli Social Workers' Recommendations Regarding the Legal Capacity of People with Disabilities*, 35 JOURNAL OF APPLIED RESEARCH IN INTELLECTUAL DISABILITIES 826, 828-830 (2022); Shirli Werner & Roni Holler, *Israeli Social Workers' Recommendations on Guardianship and Supported Decision-Making: Examination of Client and Social Worker Factors*, 92 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 109 (2022).

[112] Shirli Werner & Roni Holler, *Necessity is Neither Condemned nor Praised: Social Workers' Meaning of Guardianship for Disabled People*, THE BRITISH JOURNAL OF SOCIAL WORK 1, 6-11 (2020).

including the pivotal role of the right to support and the importance of integrating the individual's will and preferences into their assessments of decision-making capacity.[113]

Additional problems are related to the fact that some national legal reforms do not mandate that the individual involved will be present in the legal-capacity proceedings[114] or provide means for their legal representation in those proceedings, undermining the realization of legal capacity in practice.[115]

To sum up, though widely accepted and valued, the legal capacity revolution acknowledging the right to decision-making, including the necessary support to make decisions and act upon them, still faces substantial criticism and opposition. The criticism lies mainly within the interpretation of Article 12 as abolishing all kinds of substituted decision-making.[116] It is based on therapeutic and professional conventions and focuses on concerns of neglect or harm. Particularly in those situations, it was argued that not all decisions should be supported, substitute decision-making should not be abolished altogether, and that sometimes, the person's best interest should be superior to their will and preferences.[117] In addition to these critiques, Article 12's implementation in national legislation encountered practical obstacles, such as budgetary problems, insufficient professional support, and lack of cooperation from third parties and the public.[118] All these have posed barriers to transforming Article 12's theoretical ideas into practical policies. In Section III, I will suggest a new way to form legal capacity frameworks considering those obstacles and oppositions. I will do so by introducing the "disability-rights-based dispute system design" and implementing it in the legal capacity framework.

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[113] Holler et al., *supra* note 104, at 95.

[114] See, for example, Nina Kohn and Ellie Lanier on the Bloomberg-Tax report (*supra* note 63), mentioning that guardianship proceedings can take place without seeing or hearing the person whose rights are at stake, developing a culture that doesn't allow a meaningful voice. On the importance of being directly heard by the judge, *see* Case, *supra* note 24, and Kanter & Tolub, *supra* note 23.

[115] Holler et al., *supra* note 104, at 95.

[116] *See* the impermissible substitute decision-making mechanisms mentioned in General Comment No. 1., *supra* note 43.

[117] As elaborated in *supra* Sections II.A., II.B., and II.C.

[118] As elaborated in *supra* Section II.D.

III. A DISABILITY-RIGHTS-BASED DISPUTE SYSTEM DESIGN IN LEGAL CAPACITY

A. Inaccessibility to Justice and the Implementation Problem of Disability Rights

The right to legal capacity is part of the broader concept of *disability rights*. Disability rights are the legal manifestation of the social movement focusing on the discrimination and exclusion of people with disabilities (physical, psychiatric, sensory, intellectual, developmental, or cognitive). This discrimination and exclusion are manifested in the inaccessibility of places and services, which prevents participation in private and public activities. It is also manifested in social marginalization, such as placement in secluded institutions, denial of legal capacity, and, generally, pushing people with disabilities to the fringes of society.[119]

Disability rights are based on acknowledging that as a result of this inaccessibility and marginalization, people with disabilities face particular obstacles and suffer from distinct *inaccessibility* to justice.[120] In recent years, researchers have further emphasized the marginality of groups with the intersectionality of disability and gender, people of color, immigrants, and LGBTQ, stressing the importance of bearing all of one's identities together and being included as a part of society as such.[121]

Legislators have used disability rights principles to rectify injustices, advance equality, and enhance accessibility to places and services. Nevertheless, in many respects, including the field of legal capacity,[122] disability rights are still far from being fully adopted and implemented, resulting in physical obstacles, discriminatory policies, and stigma.[123]

Scholars have acknowledged that this lack of disability-rights implementation affects people with disabilities' inaccessibility to justice on multiple levels – formal, physical, and

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[119] Roni Holler & Yael Ohayon, *Understanding Disability Policy Development : Integrating Social Policy Research with the Disability Studies Perspective*, SOCIAL POLICY & SOCIETY 1, 3 (2022). For a detailed description of a disability-rights legislation shift backed up by social struggle, including both advocacy and protestation, see: Hila Rimon-Greenspan, *Disability Politics in Israel: Civil Society, Advocacy, and Contentious Politics*, 27(4) DISABILITY STUDIES QUARTERLY 18 (2007).

[120] *See generally* Mor, *supra* note 5.

[121] *See*, for example, Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683 (2021) and Patricia Berne et al. *Ten Principles of Disability Justice,* 46 WOMEN'S STUD. Q. 227 (2018).

[122] *See generally* Glen, *Introducing a New Human Right, supra* note 10, and Kohn, *supra* note 48.

[123] Mor, *supra* note 5. Also *See generally* MICHAEL OLIVER, THE POLITICS OF DISABLEMENT (1990). Regarding this ignoration of disability rights *see* the introduction of Kanter, *The Development of Disability Rights*, *supra* note 7. For an overview of mundane approaches to disability, which are based on medical parameters and deviation from what is considered the "norm", versus advanced approaches, which relate to disability as a social phenomenon and a sociological explanation for the difficulties entailed in adopting those social approaches, see Holler & Ohayon, *supra* note 119.

procedural obstacles to reaching the courts and the legal system; process barriers in access to legal proceedings (such as structural, cultural and psychological obstacles); and lack of power to effect the design, content, and application of rules and norms.[124] Altering this multi-level inaccessibility to justice calls for a deeper understanding and implementation of disability rights. It requires a paradigmatic change in the way policymakers and legislators conceptualize disability, transforming its views as a personal tragedy and medical pathology, which further reinforces prejudice[125] into the realization of society's share in forming the disabling environments and hence the importance of making the legal system accessible and accommodated.[126]

B. A Disability-Rights-Based Dispute System Design in Legal Capacity

Addressing this implementation problem of disability rights, the "Disability-Rights-Based Dispute System Design" (DR-DSD) model aims to provide a practical tool for applying disability rights and enhancing access to justice for people with disabilities. It does so by providing the disability rights field with dispute management tools while simultaneously giving disability rights interpretation to DSD's general guidelines, as illustrated in **Table 1**. Beyond the technicalities of implementation, the model suggests rethinking the fundamentals of current legal frameworks.[127]

Table 1: Disability Rights Interpretation to Dispute System Design's Elements

	DSD Elements	***Disability Rights Interpretation***
1	*Goals*	*Advancing disability rights*
2	*Stakeholders*	*Nothing about us without us*
		Interdependence
3	*Context and culture*	*Disability context*
		Disability culture
4	*Process and structure*	*Accessibility and accommodations*
		Universal design
		Procedural justice and disability
		The structure of conflict-resolution institutions and their relevance to disability
5	*Resources*	*Legitimizing the cost of disability and its accommodations*
		Support and assistance
		Social, therapeutic, and care resources

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[124] Mor, *supra* note 5, at 613-614, 621, 631-633.

[125] MICHAEL J. OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE (1996).

[126] Mor, *supra* note 5, at 640. Universal access follows the "universal design" idea. *See infra* Section III.B.4.b.

[127] Rothler, *Designing Access to Justice, supra* note 4.

		Disability-oriented legal education and professional training
6	*Successfulness, accountability, and learning*	*Achieving disability rights goals*

DSD emerged from the alternative dispute resolution movement (ADR), which strives to create an institutional change in the court system, inter-alia, by developing non-legal ways to resolve disputes.[128] Based on these goals, DSD seeks to build and design systems to learn from, prevent, and respond to recurring disputes rather than solve particular conflicts. It is an analytical tool that involves designing processes to help organizations, institutions, states, or individuals better manage, prevent, or resolve a particular or continuous series of conflicts. Importantly, DSD does not only strive to *resolve* disputes but also to *manage* and *prevent* conflicts. It includes advocating a problem-solving approach to the organization's, or system's, culture and providing multiple access points and options for all problems, including rights-based and interests-based options.[129]

DSD's practical and analytical nature can be utilized in implementing disability rights, just as it can be used in implementing other principles and agendas. However, the "Disability-Rights-Based DSD" takes a step further. In this model of design, DSD's six elements (goals, stakeholders, context and culture, process and structure, resources, and successfulness, accountability and learning) were given a disability rights interpretation, holding two aspirations: the first, to promote access to justice for people with disabilities and narrow the divide between the ideals of disability rights and their realization in practice. This is because the DR-DSD's underlying structure is based on the rights people with disabilities aspire to attain while overcoming obstacles, and it is designed with their active engagement.[130]

Second, providing a "disability-rights" interpretation for DSD's six elements can enhance DSD's potential to achieve justice (which is one of its central goals)[131] not only in disability-related systems but in other systems and designs, especially those that involve hierarchies or past injustice. This is because a "disability-rights-based DSD" includes core disability rights

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[128] Smith & Martinez, *supra* note 3, at 126; The term "dispute system design" was first articulated by Ury, Brett, and Goldberg in the late 1980s (WILLIAM L. URY, GEANNE M. BRETT, & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988)).

[129] *See generally* Blomgren-Amsler et al., *supra* note 105, and Rogers et al., *supra* note 2, at 201.

[130] Rothler, *Designing Access to Justice, supra* note 4.

[131] Blomgren-Amsler et al., *supra* note 105, at 8, 14; Rogers et al., *supra* note 2, at 205; Mariana Hernandez Crespo Gonstead, *Introduction to the Symposium: Leveraging on Disruption: The Potential of Dispute System Design for Justice, Accountability, and Impact in Our Global Economy*, 13 U. ST. THOMAS L.J. 159 (2017).

values such as socially constructed barriers, hierarchies, marginalization, universal design, accessibility, accommodations, interdependence, and disability culture.[132]

When applied to legal capacity, the disability-rights-based DSD addresses access to justice on two levels: The *first* lies within the understanding that people with disabilities whose legal capacity is restricted suffer from severe inaccessibility to justice not only to the courts but also to the very design of the law and what constitutes justice.[133] Therefore, a system designed to enhance their legal capacity will also enhance their access to justice. The *second* is that DSD, being both practice-oriented and justice-oriented, provides, in and of itself, *access* to legal capacity as part of disability justice. This argument lies within the "access to justice" movement's claim that unequal access to the legal system, resulting from belonging to a disadvantaged social group, violates the equal protection of the law and infringes on the ability of individuals and groups to exercise their fundamental rights.[134] Based on this understanding, the disability-rights-based DSD strives to create a legal capacity framework. It is inclined to do so since its infrastructure is based on disability rights and legal capacity principles, considering existing barriers to their implementation.

Given the obstacles in implementing legal capacity principles, as mentioned in Sections I and II, the disability-rights-based DSD, which is both value-driven and practice-oriented, could provide a comprehensive and analytical solution to the design of legal capacity policy, legislation, and tribunals globally[135] and overcome the obstacles underlying the existing legal frameworks. Notably, it could address problems of the current insufficient and sporadic programs,[136] the lack of legal capacity legislation, and the inadequate use of general disability legislation, like the ADA, to promote legal capacity.[137] In this section, I will explain the design and offer a theoretical framework and practical tools for its implementation, adding to the existing research on legal capacity[138] and enhancing the application of legal capacity principles

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[132] Rothler, *Designing Access to Justice, supra* note 4.

[133] Mor, *supra* note 5, at 631-633.

[134] Cappelletti & Garth, *supra* note 6, at 186.

[135] For a global overview of the work of law reform agencies to promote Article 12, see Then et al., *supra* note 62.

[136] *See,* for example, Glen's description of the nationally supported decision-making sporadic programs, failing to address legal capacity directly (Glen, *Introducing a New Human Right, supra* note 10, at 27-33).

[137] Salzman, *Using Domestic Law, supra* note 63.

[138] See, e.g., Carmel Davies et al., *What Are the Mechanisms that Support Healthcare Professionals to Adopt Assisted Decision-Making Practice? A Rapid Realist Review*, 19 BMC HEALTH SERVICES RESEARCH 1 (2019); Marion Byrne et al., *A New Tool to Assess Compliance of Mental Health Laws with the Convention on the Rights of Persons with Disabilities*, 58 INT'L J. L. & PSYCHIATRY 122 (2018), which suggests a mechanism that would check the compliance of article 12's implementation in national mental health regulation; Another suggestion is the "court of protection" described in Alex Ruck Keene et al., *Taking Capacity Seriously? Ten Years of Mental Capacity Disputes Before England's Court of Protection*, 62 INT'L J. L. & PSYCHIATRY 56, 57 (2019).

in practice. Specifically, I will try to show how this framework can address the opposition and obstacles facing legal capacity ideals, as presented in Section II.

1. Goals

The first component of DSD is the system's *goals*, including the system's values, outcomes, and priorities (See Table 1). In a disability-rights-oriented DSD, among these general goals is a "meta-goal" of advancing disability rights and disability justice, resulting from the understanding that the negative depiction of disability is primarily a result of social construction and is usually rooted deeply within social systems. The solution, therefore, is adopting an alternative view of disability as social-dependent.[139] It also calls for viewing disability not as inferiority but as enriching the "human" concept, as manifested in the definition of disability provided by the CRPD, which includes aspects of identity, discrimination, human interaction, inclusion in the community, and involvement in public policy processes.[140]

Disability rights, set as a "meta-goal," will provide for the critical inspection of the existing norms and regulations within the system. It is imperative to do so in areas with therapeutic or welfare aspects (such as legal capacity) because those are especially prone to be viewed through the traditional paradigm of the bio-medical approach without due consideration for the will and preferences of people with disabilities.[141] Focusing on disability rights will also remind the designer that solving the conflict is not the only issue at stake. Every solution should serve as another step in the struggle to realize disability rights.[142] This is especially important given the existing hierarchies and differences in power between persons with disabilities and the people and institutions they typically depend on.[143]

When considering the legal capacity system design goals, it is essential to note that this legal area has traditionally dealt exclusively with cases of people with disabilities and older adults.[144] This exclusiveness has dictated specific conduct, which relies on traditional approaches to disability based on medical criteria and an emphasis on health professionals' opinions.[145] Thus, it can be argued that the legal capacity system was formed similarly to other segregated institutions designated for people with disabilities, such as sheltered workplaces,

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[139] As elaborated in *supra* Section III.A.
[140] Quinn & Arstein-Kerslake, *supra* note 15, at 38-39.
[141] Arstein-Kerlake & Black, *Right to Legal Capacity*, *supra* note 100, at 3.
[142] Rothler, *Designing Access to Justice, supra* note 4.
[143] TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS REVISITED (2014).
[144] Including older adults who experience deterioration in their cognitive and physical functions.
[145] Arstein-Kerlake & Black, *Right to Legal Capacity*, *supra* note 100, at 3.

special education, and housing institutions. Therefore, the goal of the DR-DSD design should focus on mainstreaming the legal system's operation and transforming it according to disability rights principles.

These principles are manifested in Article 12, stating *everyone's* entitlement to legal capacity and acknowledging the practices and institutions that have labeled people with disabilities incompetent to make decisions regarding their own lives. According to the disability-rights-based DSD, disability rights goals and the right to legal capacity should provide the infrastructure for redesigning any legal capacity system. Although it seems trivial, such a focus on disability rights and legal capacity as main goals could solve the problem addressed by Glen of establishing supported decision-making mechanisms that are not backed up by legal capacity principles.[146] It is also compatible with Kohn's suggestion for legal-capacity legislation according to "person-centered approaches" focusing on empowering people with disabilities.[147]

Other disability rights, such as rights to health[148] and life,[149] should also be set as legitimate goals, acknowledging that those rights might sometimes seem contradictory to the realization of full legal capacity, as mentioned in supra section II.A.

Therefore, the design's goals should persist on people's right to decision-making regarding their lives, including legal and non-legal aspects. According to the CRPD in general,[150] and Article 12 particularly, this "negative" right not to be oppressed should be supplemented by an "affirmative" or "positive" right to support.[151] Given the centrality of other disability rights, the system should also protect people from harm according to each state's general standards and equality with others.[152] The relevant rights and circumstances should be evaluated and balanced in each case to create a solid yet nuanced legal capacity legacy.

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[146] Glen, *Introducing a New Human Right, supra* note 10, at 27-33.

[147] Kohn, *supra* note 48, at 345.

[148] CRPD, *supra* note 7, at Article 25.

[149] *Id.* at Article 10.

[150] *See* Dinerstein, *supra* note 42, at 9, for the salience of "support" as a disability rights mechanism throughout the CRPD.

[151] For a discussion on the negative and positive nature of the right to legal capacity and supported decision-making, see Terry Carney*, Participation and Service Access Rights for People with Intellectual Disability: A Role for Law?* 38(1) JOURNAL ON INTELLECTUAL AND DEVELOPMENTAL DISABILITY 59, 64 (2013).

[152] Arstein-Kerslake & Flynn, *The General Comment*, *supra* note 39, at 482.

2. Stakeholders

The second component of DSD is, or are, the *stakeholders*. Understanding that people will support what they helped to create,[153] individuals, groups, and organizations that host, use, or are affected by a system are critical in creating every DSD.[154]

a. Nothing About Us Without Us

Disability theory adds two main aspects to this basic understanding.[155] The first is "nothing about us without us," which lies at the heart of the CRPD.[156] It means that all decisions and policies regarding persons with disabilities should be made only through consultation with those affected by the decisions and policies. It pushes back against the inclination of parents, social workers, and medical professionals who have dominated the disability discourse and policy-making.[157]

While designing the legal-capacity regime, it is, therefore, crucial to involve people with disabilities themselves in the design and operation.[158] Given the nature of legal capacity barriers, it is imperative to include people with intellectual and cognitive disabilities.[159] This is critical given their historical inferiority and communication differences. Those differences might as well explain why the right to legal capacity was overlooked at the beginning of the

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[153] Rogers et al., *supra* note 2, at 265.

[154] *Id.*, at 225-247. For an overview of "participatory approaches" of stakeholders in decision-making processes and their critiques, see Pradip Ninan Thomas & Elske van de Fliert, *Participation in Theory and Practice*, in INTERROGATING THE THEORY AND PRACTICE OF COMMUNICATION FOR SOCIAL CHANGE 39 (2014).

[155] Rothler, *Designing Access to Justice, supra* note 4.

[156] CRPD, *supra* note 7, at the Preamble, subsection 13: "Considering that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them"; Article 4(4) adds that "In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, State Parties shall closely consult with and actively involve persons with disabilities".

[157] For a thorough explanation of the slogan's origin in the 1990s, *see* JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT, 1998.

[158] The inclusion of consultation and meaningful participation of people with disabilities and their organizations in the law reform process was also mandated by General Comment no. 1, *supra* note 43, at para. 26. A similar suggestion to involve people with mental disabilities who have experienced commitment in a psychiatric hospitalization board was made by Margaret J. Lederer in *Not so Civil Commitment: A Proposal for Statutory Reform Grounded in Procedural Justice* 72 Duke L. J. 903, 938 (2023).

[159] *See,* e.g., Fauzia Knight et al., *Supported Decision-Making: The Expectations Held by People With Experience of Mental Illness*, 28 QUALITATIVE HEALTH RESEARCH 1002 (2018), where people with mental disabilities were interviewed regarding their supported decision-making experiences. Findings have shown that to facilitate supported decision-making, mental health professionals need to act in various roles: facilitators of self-management, self-care, and processes of recovery, companions who know their patients well, and collaborators, providing options and information. Findings also pointed to the value of family, peer support, and social networking.

disability rights social struggle, simply because the people most affected by the denial of this right lacked a voice, even within the disability rights movement.[160]

b. Interdependence

The second disability aspect one should consider within DSD's component of "stakeholders" is *interdependence*. The concept of interdependence means that people's perceived independence results from dependence on others.[161] Interdependence is significant in the lives of people with disabilities, whose ability to act autonomously often depends upon support, services, and care provided by others, stressing the role of those allies.[162] Therefore, family members and relevant professionals should also be involved in the design and application[163] while ensuring their voices and opinions are heard but do not dominate the discussion.

In legal capacity, interdependence is primarily linked to understanding "choice." Liberal theories define choice as the individual's ability to evaluate situations independently, favoring self-reliance as a prerequisite for autonomy. Disability studies scholars, on the other hand, argue that prioritizing independence as a primary requisite for personhood ignores core values such as trust, caring, and interdependence. Stressing ideas of relatedness and interconnectedness reveals that we only acquire the necessary skills for choice-making through relationships and a supportive environment.[164] Hence, a proper interdependent interpretation of legal capacity includes the support the person needs to realize it[165] and the acknowledgment of *relational autonomy*, which highlights the social context of individual existence[166] and the central role of others in decision-making.[167]

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[160] Amita Dhanda, *Universal Legal Capacity as a Universal Human Right*, in MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 177, 178 (Michael Dudley, Derrick Silove, & Fran Gale, eds., 2012).

[161] *See* e.g. Eva Feder Kittay, *The Ethics of Care, Dependency and Disability*, 24(1) RATIO JURIS 49, 50 (2011); Martha Fineman, *Cracking the Foundational Myths. Independence, Autonomy and Self-Sufficiency*, 8(1) Am. U. J. GENDER SOC. POL'Y & L. 13, 14 (2000).

[162] For an overview of the wide range of individuals and institutions that are involved in legal capacity, substitute decision-making, and supported decision-making, see Bigby et al., *Diversity, Dignity, Equity and Best Practice, supra* note 46.

[163] Family members' vital role in the exercise of legal capacity is also articulated in Bigby et al., *Diversity, Dignity, Equity and Best Practice, supra* note 46.

[164] Holler et al., supra note 113, at 89.

[165] *Id*., at 95.

[166] RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF (Catriona Mackenzie & Natalie Stoljar, eds., 2000).

[167] Jennifer K. Walter & Lainie Friedman Ross, *Relational Autonomy: Moving Beyond the Limits of Isolated Individualism*, 133 (Supp. 1) PEDIATRICS, 16, 18-19 (2014).

The importance of interdependence within the DSD component of "stakeholders" also relates to the importance placed by DSD on relationships. DSD mandates the incorporation of all stakeholders into the planning or at least considering their interests in the design. Those include the people who are the objective of the design and the people (usually professionals) who operate the current system and, therefore, will be affected and might oppose new plans (as mentioned in Section II).[168] Such incorporation of pivotal stakeholders is also aligned with social policy reform theories.[169]

Regarding legal capacity, given the controversy around the interpretation and implementation of Article 12 and General Comment No. 1 (as elaborated in Section II), Dhanda suggested that to launch the new paradigm, there is a need for dialogue between the proponents of both the old, primarily therapeutical, paradigm for legal capacity, which is based on protection and mental capacity models and proponents of the new paradigm.[170] Those potential opposing stakeholders are the bureaucrats, social workers, family members, and health professionals, whose involvement in legal capacity processes is substantial.[171]

Particular attention to the professional stakeholders should be paid in the implementation stage: as Holler and Ohayon mention, policy implementation is often integral to the policy-making process, especially in cases where the implementation stage is open to broad interpretation, leaving professionals with relatively high discretionary power.[172] This is especially true in legal capacity since, historically, medical professionals played a hegemonic role in shaping its boundaries, as elaborated in Section II.

Aside from health professionals, and especially mental health professionals who have raised opposition to Article 12's interpretation, which they deem radical (as mentioned in Sections II.A. and II.B.), other pivotal stakeholders are the "third parties" mentioned in Sections I and II, such as banks and financial institutions, as well as other service providers, who should be exposed to the new design and express their concerns and needs regarding it.

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[168] Blomgren-Amsler et al., *supra* note 105, at 10. In addition to the immediate parties in conflict, stakeholders can be individuals or entities that are subsidiary to or constituents of those parties, as well as others directly or indirectly affected by the outcome of the dispute (Blomgren-Amsler et al., *supra* note 105, at 29). For existing systems, it is important to learn which stakeholders were involved in the system's initial design and whose interests are represented (Smith & Martinez, supra note 3, at 131). Also important is to note that stakeholders do not have equivalent power and that the dictum to engage all stakeholders in a DSD process does not address how to resolve competing interests (Blomgren-Amsler et al., *supra* note 105, at 104).

[169] Holler & Ohayon, *supra* note 109, at 10.

[170] Amita Dhanda, *Conversations Between the Proponents of the New Paradigm of Legal Capacity*, 13 INT'L J. L. CONTEXT 87, 87 (2017) [Hereinafter: Dahnda, *Conversations Between the Proponents*].

[171] As detailed in Section II.

[172] Holler & Ohayon, *supra* note 119, at 11.

For example, the legislation should address third parties' liability[173] in a manner that favors and supports people's legal capacity to engage in financial or property transactions.[174]

Moreover, *positive* relationships with these stakeholders should be enhanced in the DSD process to contribute to the design's success[175] through different means, such as constructive contracts[176] and creating a pleasant environment by mentioning common values[177] and fostering common goals.[178] For instance, since beginning the discussion with the "easier" issues is advised,[179] starting with less controversial issues, such as developing supported decision-making mechanisms for everyday circumstances, might be best rather than with contentious matters described in Section II, such as abolishing substitute decision-making practices in situations of potential harm. Finally, throughout the design, the designer should focus on empowering "weaker" sides,[180] usually those subject to extended substitute decision-making regimes. These steps will help keep stakeholders on equal footing, make the interactions pleasant, and increase their depth.[181]

3. Context and Culture

The third component of DSD is *context and culture*. *Context* is the circumstance or situation in which a system is diagnosed and designed. *Culture* refers to patterns of perceiving, believing, behaving, and sense-making a group shares.[182] Since culture affects how people perceive fairness regarding disputes,[183] it is imperative to align processes to prevent, manage, and resolve conflicts within the organization's culture[184] and to assimilate culture consciousness

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[173] Glen, *Introducing a New Human Right,* supra note 10, at 21.

[174] CRPD, supra note 7, at Article 12(5).

[175] Rogers et al., *supra* note 2, at 225, 243.

[176] Differences between members of groups that distrust and dislike one another can lead individuals to attribute ulterior motives for innocent actions, insult each other, and be dishonest, resulting in unstable agreements. Social scientists identified characteristics that tend to promote constructive contracts: positive shared activities, participants who are personable and have common values, extensive interactions, working together toward a common goal, and equal status. Negotiators with higher levels of trust for each other are more likely to use cooperative negotiation techniques, disclose information, and understand the other's perspective. Trust between the parties to a single dispute increases the chances of reaching a long-lasting agreement. Without these situational characteristics, bringing together people who distrust and misunderstand one another runs the risk of reinforcing divisions, hatred, and prejudice. Therefore, in creating a system, designers might consider building in activities that promote constructive contracts (Rogers et al., *supra* note 2, at 229-230.).

[177] Rogers et al., *supra* note 2, at 234.

[178] *Id.*, at 126. Constructive contracts could potentially be part of the system's design or drafted within a specific case.

[179] *Id.*, at 233.

[180] *Id.*, at 235.

[181] *Id.*, at 244.

[182] Blomgren-Amsler et al., *supra* note105, at 30.

[183] *Id.*, at 32.

[184] *Id.*, at 31. In this respect, DSD deals with ADR's critics of being detached from the culture in which the dispute occurs.

within designers to improve the means to deal with culture or intercultural situations.[185] Following this, in a disability-rights-based DSD, the system's contextual and cultural aspects should be interpreted through a disability lens.[186]

a. Disability Context

First and foremost, disability should be viewed as a *contextual* phenomenon, acknowledging that many negative implications result from the interaction between the person and their surroundings.[187] Therefore, the new design's context should reflect the depiction of disability as a socio-political category resulting from unequal power relations[188] and the understanding that the current social structure marginalizes persons with disabilities and reinforces prejudice.[189]

Consequently, the designer should acknowledge that the system's context is rooted within the discrimination and exclusion experienced by persons with disabilities in all areas of life. This includes the inaccessibility of places and services and the social marginalization and segregation faced by persons with disabilities. It also depicts disability as a tragedy and personal limitation. As a result, it normalizes the use of designated institutions such as sheltered workshops, special education, secluded living institutions, health professionals' excessive control, and legal guardianship.[190]

Therefore, *context-wise,* the legal capacity design should consider the negative historical interaction between disability and society, resulting in exclusion and marginalization.[191] Especially in the context of legal capacity, it is imperative to acknowledge that people with intellectual and cognitive disabilities were not expected or even raised to make their own decisions, as elaborated in Section I.A. Given this understanding, a designer who wishes to promote legal capacity should be aware of two main issues: The first is the potential opposition of various institutions and individuals, including banks, health professionals, and family

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[185] Jayne S. Docherty, *Culture and Negotiation: Symmetrical Anthropology for Negotiators*, 87 Marquette L. Rev. 710 (2004); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 Ohio St. J. on Disp. Resol. 211 (1995); Sukhsimranjit Singh, *Access to Justice and Dispute Resolution Across Cultures* 88(6) FORDHAM L. REV. 2407, 2423 (2020) claiming that without an established structure and precedent in place, ADR may only provoke low-quality justice for the impoverished.

[186] Rothler, *Designing Access to Justice, supra* note 4.

[187] *See, e.g.*, Michael Ashley Stein et al., *Accommodating Every Body*, 81(2) U. CHI. L. REV. 689 (2014); Theresia Degener, *Disability in a Human Rights Context*, 35(5) LAWS 1, 16 (2016).

[188] Claire Tregaskis, *Social Model Theory: The Story So Far…*, 17(4) DISABILITY AND SOCIETY, 457, 462 (2002).

[189] For elaboration regarding the principles and historical roots of disability studies and the social approach, *see* Oliver, *supra* note 125 at 30-33; Mor, *supra* note 5, at 645, and the literature mentioned there.

[190] Holler & Ohayon, supra note 119, at 2-3.

[191] *See* Oliver, *supra* note 125.

members, who are used to substitute decision-making regimes[192] as elaborated in Section II. The second is hesitation, fear, and opposition from people with disabilities, who might not feel ready to start making decisions.[193] Therefore, the system should be designed to overcome such objections by providing institutions and individuals with information and practical tools.

A second consideration is the context in which legal capacity is practiced. In this sense, the design should allow for different paths for different circumstances, for example, according to their potential risk and types of decisions: daily habits, financial and housing decisions, and medical decisions. Those decisions should be placed on a spectrum, requiring no support at all, up to extended support for the decision-making process, as elaborated further in Section III.B.4.d.

b. Disability Culture

As for *culture*, the designer should be aware of the diverse *disability culture* that has evolved from the life experiences and viewpoints of people with disabilities.[194] This line of thought led to the depiction of disability not as an inferiority caused by social context, on one hand, or personal characteristics, on the other,[195] but as human diversity.[196] Moreover, it emphasizes the possible *benefits* of disability, such as openness to new perspectives, liberation from social expectations and norms, and a sense of identity, leading to positive individual and collective identity.[197] It, therefore, calls for legitimizing and mainstreaming the life experiences of persons with disabilities, which often challenge traditional concepts of what is "normalcy" and of social expectations.[198] Thus, the designer should be aware of the importance of social recognition of the disability experience.[199] Moreover, when designing legal systems, of particular importance is implementing disability context and culture among lawyers representing persons with disabilities.[200]

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[192] Holler et al., *supra* note 113.

[193] Rood et al, *supra* note 18.

[194] John Swaine & Sally French, Towards an Affirmation Model of Disability, 15(4) DISABILITY & SOCIETY 569, 573 (2000).

[195] *See, generally*, Shakespear, *supra* note 143.

[196] Swaine & French, *supra* note 194, at 579. For a *disability justice* approach that emphasizes another angle of disability culture, shedding light on the intersection of disability and historically excluded groups such as women, people of color, immigrants, and LGBTQ, stressing the importance of bearing all of one's identities together, see Chin, *supra* note 121.

[197] Swaine & French, *supra* note 194.

[198] Shakespeare, *supra* note 143.

[199] Robina Goodlad & Sheila Riddell, *Social Justice and Disabled People: Principles and Challenges*, 4(1) SOCIAL POLICY AND SOCIETY 45 (2005).

[200] The central role of "cause lawyers" in advancing disability rights was described in Michael E. Waterstone, Michael Ashley Stein & David B. Wilkins, *Disability Cause Lawyers*, 53(4) WM. & MARY L. REV. (2011-2012); Issues of disability-related relationship and communication among lawyers was detailed in Susan

Following this understanding, the design of the legal capacity system should be responsive to three types of culture. The first is the disability culture described above. The inclination to embrace disability culture will enable the legal capacity system to be open and responsive to the authentic opinions and decisions of people with disabilities, even when they do not adhere to the so-called “conventional” habits.

The second cultural aspect that should be considered is the diversity of cultures within each country and the formation of a solid multicultural policy framework. Decision-making refers to how people conduct their daily lives and their most profound life decisions; supported decision-making should be implemented according to their culture, including respect for Indigenous people and people from diverse ethnic cultures, such as immigrants, second-generation communities, etc.[201]

The third relevant culture is each country’s legal culture. When considering the reaction to the person’s will and preferences, Anna Arstein-Kerslake and Eilionóir Flynn recommend that instead of a special regime for people with disabilities, one should rely on the state’s legal system’s standards that apply to everyone who wishes to engage in harmful endeavors and make sure that those standards apply in a non-discriminatory way.[202] As long as these standards are used non-discriminately, there should be no conflict with Article 12. According to this line of thought, supporters of decision-making will not be obliged to support the will to exercise legal capacity in a way that would pose a civil or criminal liability. For example, while setting fire to a place is usually lawfully forbidden and would not be supported, smoking, though harmful, is not.

4. Process and Structure

The fourth component of DSD is process and structure, which refers to how systems prevent, manage, and resolve disputes. Generally, processes range from formal procedures such as a trial, mediation, or arbitration to various other methods and techniques according to the

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L. Brooks & Robert G. Madden, *Relationship-Centered Lawyering: The Emerging ‘Science’ of Professionalism*. in RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE (Susan L. Brooks & Robert G. Madden, eds., 2010) [hereinafter: Brooks & Madden, *Relationship Centered Lawyering*]. Lawyers’ necessity of disability culture knowledge was addressed in Roni Rothler’s *Clinical Legal Education and Therapeutic Jurisprudence in the Disability Rights Clinic in* THINKING ABOUT CLINICAL LEGAL EDUCATION: PHILOSOPHICAL AND THEORETICAL PERSPECTIVES 1, 8-9 (Omar Madhloom & Hugh MacFaul, eds., 2022) [Hereinafter: Rothler, *Clinical Legal Education*].

[201] For a broad discussion on the importance of diversity sensitivity in legal capacity and decision-making, see Bigby et al., *Diversity, Dignity, Equity and Best Practice, supra* note 46, at 35-57.

[202] Arstein-Kerslake & Flynn, *The General Comment*, *supra* note 39, at 482. For general Implications of the recognition of the right to legal capacity in criminal law, *see* Glen, *Introducing a New Human Right, supra* note 10, at 49-59.

types of conflicts and organizations. The process options may be linked as an integrated system or exist separately.[203] Usually, it is advisable to design a system with multiple options, containing interest- and rights-based alternative strategies and an ability to shift between them.[204] Nevertheless, the designer must consider the interaction of the designed system with the formal legal system and the court's willingness to accept the suggested change.[205]

Given these understandings, when designing in a legal capacity framework, designers should be aware of the discriminatory and exclusionary historical background and barriers that led to the system's existing process,[206] resulting in solutions that rely primarily on substitute decision-making mechanisms. In addition, designers should use disability-rights tools and mechanisms to overcome these barriers, first and foremost, *accessibility and accommodations*.[207]

a. Accessibility and Accommodations

Accessibility duties reflect the understanding that disability rights constitute a unique mix of ("negative") civil-political and ("positive") social rights.[208] This is because the physical and structural barriers that prohibit equal participation by people with disabilities render the "negative" prohibition against discrimination insufficient to enhance equality.[209] Therefore, disability rights include negative liberties *and* affirmative duties on the public and private actors to redesign places and services and make the public space accessible by *actively* removing structural and institutional barriers.[210] As mentioned in Section III.A., the aspiration for accessibility also pertains to the justice system. It focuses on access to the courts, law, and

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[203] Smith & Martinez, *supra* note 3, at 130-131.

[204] *Id*., at 128.

[205] Blomgren-Amsler et al., *supra* note 105, at 126.

[206] Mor, *supra* note 5, at 613; Holler & Ohayon, *supra* note 119, at 2-3.

[207] Rothler, *Designing Access to Justice, supra* note 4.

[208] Neta Ziv, *The Social Rights of People with Disabilities: Reconciling Care and Justice*, in EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 369 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

[209] Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C-R C-L. L. REV. 413, 453 (1991).

[210] Stein et al., *supra* note 187; Ziv, *supra* note 208; Accessibility and the duty to accommodate are rooted in most international obligations articulated by the CRPD, *supra* note 7. Specifically, Article 9 is dedicated to accessibility and acknowledges it as the precondition for full participation in all aspects of life on an equal basis with others. According to the Article, accessibility, including identifying and eliminating obstacles and barriers, should be interpreted broadly: accessibility to the physical environment, transportation, information, technology, facilities, and services, using technology-based and live assistance. Moreover, discrimination against people with disabilities includes denying reasonable accommodation (Articles 2, 5, 13, 14, 24, 27; Shivuan Quinlivan, *Reasonable Accommodation: an Integral Part of the Right to Education for People with Disabilities*, *in* THE RIGHT TO INCLUSIVE EDUCATION IN INTERNATIONAL HUMAN RIGHTS LAW 169 (Gauthier de Beco, Shivaun Quinlivan & Janet E. Lord, eds., 2019)).

justice by removing the barriers that people with disabilities face in their interaction with the legal system and related social benefits and support systems.[211]

On the policy level, accessibility should enable a "collaborative" or "participatory" governance and a large-scale interactive legislation process.[212] In legal capacity, this legislation should address the accessibility of the process and the structure of relevant institutions, such as educational, health, and financial institutions. Those should be designed in an accessible way, promoting autonomous decision-making and thus avoiding future conflicts. It should focus on the accessibility of the existing or designated courts and tribunals that rule on legal capacity issues. The legislation should ensure that those courts and tribunals are accessible and enable the full participation of the people whose legal capacity is being examined to file motions and be heard in court. A particular emphasis should be placed on the accessibility of all information regarding the implications of legal procedures and treatments requiring informed consent, respecting the person's preferred form of communication.[213] Moreover, full accessibility and access to justice in legal capacity should also pertain to the participation of people with disabilities as *rulers* or *judges* in legal capacity cases and not only as litigants. Addressing accessibility and accommodations at all these levels is compatible with Mor's depiction of broad access to justice, as mentioned in Section III.A., encompassing access to courts, law, and justice.[214]

b. Universal Design

The second disability rights aspect that should be considered as part of DSD's "process and structure" is *universal design,*[215] which is "the design of products and environments to be usable by all people, to the greatest extent possible, without adaptation."[216] Universal design aspires to create an environment that meets the needs of people of various ages, bodily shapes, and mental and intellectual capacities. Based on the diversity of disability, it asserts that a

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[211] Mor, *supra* note 5, at 613, 614, 621. For a discussion on positive duties regarding supported decision-making see Carney, *supra* note 151, at 64.

[212] Blomgren-Amsler et al., *supra* note 105, at 56.

[213] Liz Brosnan & Eilionoir Flynn, *Freedom to Negotiate: A Proposal Extricating 'Capacity' from 'Consent'*, 13(1) INT'L J.L. CONTEXT, 58, 59 (2017).

[214] Mor, *supra* note 5, at 631-633.

[215] Mor notes that the principle of universal design was not fully integrated into the CRPD's vision of access and is mainly mentioned in the general obligations sections and not in particular articles (such as article 9, which deals with accessibility). Nevertheless, she believes that such a vision of universal design should guide our understanding of access to justice (Mor, *supra* note 5, at 620).

[216] MOLLY FOLLETTE STORY, JAMES L. MUELLER & RONALD L. MACE, THE UNIVERSAL DESIGN FILE: DESIGNING FOR PEOPLE OF ALL AGES AND ABILITIES (1998). *See also* Mor, *supra* note 5, at 624.

system accessible to people with disabilities is accessible to many others.[217] In legal capacity, a universal design seems especially fit to *prevent* conflict situations. Accordingly, providing universally designed places and services to be used by a variety of people with a wide range of abilities will help to increase the number of people (with or without disabilities) who can understand and use those places and services without the need for substitute decision-making.

Glen addresses the issue of universal design when she discusses the protection ideology mentioned in Section II.A. According to her, "It is critical to show that affording legal capacity to persons with intellectual, developmental, and cognitive disabilities is not less safe – it is almost certainly more so than taking away their rights in the name of 'protection.' We should not deny or trivialize the fears and concerns of parents and other concerned persons about the possibility of abuse or exploitation, but rather should insist on appropriate and effective measures of protection for *all* people – for universal design – rather than singling out people with and because of their disabilities".[218]

As for the universal design of tribunals, given that legal capacity cases are relevant not only for people with disabilities but also for older adults, it is even easier to understand why the system's design should follow universal design guidelines, making it accessible for a wide variety of ages and a range of abilities and cultures, using both physical and service-oriented accommodations.[219]

c. Procedural Justice

The third disability rights aspect that relates to process and structure is *procedural justice*, which is based on impartiality, the opportunity to be heard, the legal grounds for decisions, the neutrality of the procedure and the decision-makers, the treatment of the participant with dignity and respect, and the trustworthiness of the decision-making authority.[220] Adding to the importance of procedural justice for every individual who takes part in legal proceedings is

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[217] Mor, *supra* note 5, at 620, 624.

[218] Glen, *Introducing a New Human Right, supra* note 10, at 96.

[219] Albeit the need for universal tools and solutions, scholars have pointed out important differences between people with disabilities and older people regarding interest in supported decision-making, such as the reasons that lead to guardianship, the identity of the guardians, the benefits of supported decision-making for younger persons, and different interests in notions of autonomy, inclusion, and self-determination, *see* Rebekah Diller, *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 FORDHAM URBAN L.J. 495, 521 (2016).

[220] Blomgren-Amsler et al., *supra* note 105, at 16-17.

Dorfman's finding that disability self-identity affects how people with disabilities experience procedural justice.[221]

Procedural justice holds tremendous importance in advancing access to justice in legal capacity proceedings.[222] For example, given the temporary nature of legal-capacity circumstances and the changing needs and interests of the individuals involved (as discussed in Sections I and II), proper access to justice requires enhanced court involvement in implementing the ordered legal capacity plan.[223] Among other things, decisions made by the court or tribunal should not be permanent. They should be revisited periodically to make sure that limitations on legal capacity are minimized.

Another procedural justice aspect in legal capacity proceedings is attaining proper legal representation. Given the hierarchies between people with disabilities, families, and professionals and the weight of the legal capacity rights at stake, legal representation is crucial, including free-of-charge representation for people who cannot afford it. As mentioned in Sections III.B.2.b. and III.B.3.b, lawyers who represent people with disabilities in legal capacity procedures should be "disability-educated", focus on fairness and justice, enhance clients' trust and respect for the law and its actors, and increase clients' feeling that they were treated fairly. They should fully inform their clients about the procedures and criteria for legal decisions in accessible language according to their clients' needs and ensure they are treated with respect by other legal professionals.[224] Notably, the lawyers should support their client's decision-making process within the representation, withholding from making decisions for the client's best interests and respecting their wishes regarding the legal procedure.[225]

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[221] Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42(1) LAW & SOC. INQUIRY 195, 212-224 (2017). This research has shown that people whose identity was influenced by the social model perceived the legal procedures based on the medical and individual models to be less fair. They felt they had no control over the process, could not voice their opinions, were mistreated by their representatives, had to present an ingenuine image, and were discouraged from participating in the labor market. Hence, designing a disability-oriented policy based on disability rights should emphasize procedural justice for the participants.

[222] See, for example, Deborah Enix-Ross and Nina Kohn on the Bloomberg-Tax report (*supra* note 63) explaining that guardianship restricts and transfers basic legal rights of adults, sometimes with little or no fundamental due process protections, minimal evidence of the adult's needs and abilities, without seeing or hearing the person whose rights are at stake, and with limited appeals rights.

[223] Kristen M. Blankley, *Online Resources and Family Cases: Access to Justice in Implementation of a Plan*, 88 FORDHAM L. REV. 2121, 2122 (2020).

[224] David M. Boulding & Susan L. Brooks, *Trying differently: A Relationship-Centered Approach to Representing Clients With Cognitive Challenges*, 33 INT'L J.L. & PSYCHIATRY 448, 450 (2010) [hereinafter Boulding & Brooks *Trying Differently*].

[225] For a detailed explanation of such legal representation of clients with mental disabilities regarding psychiatric hospitalization, see Michael L. Perlin & Naomi Weinstein, *"Said I, 'But You Have No Choice'": Why a Lawyer Must Ethically Honor a Client's Decision About Mental Health Treatment Even if It Is Not What S/He Would Have Chosen*, 15 CARDOZO PUB. LAW, POLICY & ETHICS J. 73, 78 (2016).

d. The Process and Structure of the Justice System

Last but not least, in a disability-rights-based DSD, it is essential to pay attention to the process and structure of the *justice system* itself.[226] Since the enactment of Article 12, different countries have approached the legal-capacity tribunal's design in various ways. In some, family courts handle legal capacity cases; designated legal capacity tribunals were established in others.[227] The spectrum of autonomy and protection, which characterizes legal capacity cases, can find a compatible "home" in a tribunal based on DSD, in the sense that those can create a space for nuanced and complex models of conflict resolution that foster non-binary notions of justice and may improve the legal processing of disputes.[228] More specifically, tribunals dealing with legal-capacity cases (among other types of cases or designated legal capacity tribunals)[229] could benefit from following alternative "multidoor courthouse" processes.[230] In this system, cases that reach the court are diverted based on their characteristics, according to the most appropriate method of dispute resolution.[231] In the relevant cases, the tribunal can collaborate with other institutional actors to address societal problems through means other than a traditional trial.[232] Given the rights at stake, a robust rights-based adjudication process should exist in the design's backdrop, among other interests-based options.[233]

Such a design will enable the system to be flexible and address different cases and disputes better. The tribunal can comprise a multidisciplinary team of professionals: legal, health, social services, financial, and education; people with disabilities who are first-hand experienced with legal capacity issues; human rights organizations, and maybe even family members. Those participants could function as either court advisors or, according to the case's characteristics, as part of the judicial team. For instance, when the dispute's main issue involves close and amicable relationships, it could be dealt with in a mediational setting, aiming to solve the conflict while preserving the relationship in the long term. Procedural and low-conflict issues

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[226] The connection between disability and access to justice and its implications on the justice system is broadly discussed in Mor, *supra* note 5.

[227] See, for example, the Court of Protection in England and an overview of tribunals in other countries *in* Alex Ruck Keene et al., *supra* note 135, at 59.

[228] Michal Alberstein, *Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Practice,* 16 CARDOZO J. CONFLICT RESOL. 879, 889-890 (2015). In legal capacity, collaboratively crafting a flexible outcome tailored to the person's needs and wishes was suggested by Ellie Lanier on the Bloomberg-Tax report, *supra* note 63.

[229] Designated legal capacity tribunals might benefit from focusing on one subject matter but risk losing a universal perspective compatible with disability rights principles.

[230] Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

[231] Blomgren-Amsler et al., *supra* note 105, at 112.

[232] Alberstein, *supra* note 228, at 889-890.

[233] Jennifer F. Lynch, *Beyond ADR: A System Approach to Conflict Management*, 17 NEGOT. J. 207 (2001).

will be heard before one juror, a professional appointed according to the conflict's central subject or problem. Higher-conflict matters will be held before a judicial team of several experts consisting of at least one judge or legal professional. Following the principle of stakeholders' participation in the process, as mentioned in Section III.B.2., the tribunal could comprise a person with an intellectual or cognitive disability, a legal expert, and other relevant stakeholders like social work, education, financial or health specialists. In each case, the appropriate professionals will participate. For example, a financial expert will participate in the judicial team in cases involving mainly economic issues, and a health professional will preside in matters involving decisions regarding health issues. Their participation, however, should not dominate the discussion, leaving room for the person's will and preferences.

Nevertheless, the collaborative nature of such a tribunal should not override its primary goal, to *manage* (rather than merely *resolve*) disputes, bearing in mind that legal capacity as a disability right should evolve through the conflicts brought before the tribunal. Considering that the tribunal should first and foremost advance disability rights, a rights-promoting adversarial adjudication should be the tribunal's dominant approach, especially in high-conflict issues. Lawyers, especially, should not overlook their ethical duties towards their clients for the sake of cooperation with the rest of the court's team or for advancing broader community issues.[234] Given the tendency to drift into therapeutic interests in legal capacity cases (as mentioned in Section II above), the designer should carefully create checks and balances to avoid such a tendency, focusing on rights promotion.

5. Resources

The fifth component of DSD is the system's *resources*. When designing or redesigning systems, the designer should be aware of the available or potential resources for the system's implementation and evaluation.[235] In addition, according to the disability-rights-based DSD in legal capacity, it is incredibly beneficial to address four disability rights issues.[236] Those should help ensure that the ideological goal of enhancing legal capacity will become a practical reality and help alleviate at least some of the obstacles mentioned in section II.D. resulting from insufficient resource allocation to the new design of the legal capacity regime.

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[234] Arstein-Kerslake & Black, *supra* note 100, at 4. Also see *infra* section III.B.5.d.

[235] Blomgren-Amsler et al., *supra* note 105, at 35.

[236] Rothler, *Designing Access to Justice, supra* note 4.

a. Legitimizing the Cost of Disability and its Accommodations

Since the employment of the law to advance legal capacity includes resource re-distribution,[237] the designer should first consider how to legitimize these costs. The design of a new or revised legal capacity framework following Article 12's principles will naturally bear expenses. It requires the willingness to enact and change legislation, allocate sources to improve the status of persons with disabilities, and incline courts to rule on questions that involve budgetary issues to enhance accessibility and accommodations and promote supported decision-making. Therefore, it is crucial to lay the ideological infrastructure of the importance of legal capacity as a core disability rights goal and render the relevant costs legitimate.[238]

In this resource allocation process, public consent is crucial. This consent can be achieved by raising public awareness of the existing discrimination and the need to rectify it. Regarding legal capacity, in particular, many people are not aware of the social aspects of disability and the discriminatory nature of substitute decision-making regimes. Therefore, designers must produce a public understanding of substitute decision-making mechanisms' negative aspects and past injustices[239] and link them to the need for a structural change in power and resources. For example, public awareness can be raised from the recent publication of Britney Spears's autobiography, detailing the negative and disabling aspects of guardianship/conservatorship regimes,[240] or the case of former N.F.L. player Michael Oher, claiming he was wrongfully placed under conservatorship and financially exploited by his conservators.[241]

Apart from this explicit recognition of the resources that need to be allocated to advance legal capacity, three other specific resource issues should be considered in the design.

b. Support and Assistance

The primary resource in a legal capacity framework relates to the *support and assistance* needed to allow the participation of people with disabilities in public and private arenas, make decisions, and secure their health and social care rights.[242] Through a vast and varied demand

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[237] Mor, *supra* note 5, at 628, 645. For a discussion on distributive justice and disability, see Ziv, *supra* note 208.

[238] An attempt to raise public awareness of best practices of supported decision-making was recently made in Australia: See Bigby et al. *Diversity, Dignity, Equity and Best Practice, supra* note 46.

[239] Rogers et al., *supra* note 2, at 209.

[240] BRITNEY SPEARS, THE WOMAN IN ME (2023).

[241] Santul Nerkar, *Legal Arrangments in 'Blind Side' Case is Terminated*, THE NEW YORK TIMES (Sep. 29, 2023) https://www.nytimes.com/2023/09/29/business/michael-oher-conservatorship.html (last visited Feb. 1, 2024).

[242] Health and social care advocacy was suggested to support vulnerable or disadvantaged people and secure their healthcare and social rights. In line with disability rights principles, health and social care advocates

for assistance and support, the CRPD acknowledges that accessibility alone (as described in Section III.B.4.a.) is not enough to achieve inclusion and participation and that some disability consequences require personal support and assistance to realize disability rights fully.[243]

Support and assistance are especially vital in exercising one's legal capacity since, as mentioned in Section I, support is a central component of Article 12. Given the knowledge regarding the barriers faced by people with disabilities in this field of legal capacity, the Article calls for the state parties to take appropriate measures to provide access to the *support* that may be required to exercise legal capacity,[244] enabling decision-making.[245] Therefore, the design should allow for different kinds of support people may need to exercise their legal capacity[246] and provide grounds for supported decision-making.

Article 12 and General Comment No. 1 do not provide a rigid definition of "support" to allow the new field to grow naturally and reflect future innovations. Those documents stress that the term is broad and encompasses arrangements of varying types and intensities, all aiming to enable the exercise of legal capacity while respecting the person's rights, will, and preferences. Nevertheless, according to these documents, the support should always consider the person's autonomy and choice and cannot be forced or imposed.[247]

This broad definition of support includes formal state-operated support and informal support by family members or friends. Accordingly, a person should be able to choose one or more support persons to assist them with certain decisions, peer support or advocacy, including self-advocacy support, for other kinds of decisions, and assistance in communication in some other cases. A very relevant example of such peer support is the non-coercive and non-intrusive practices for suicide prevention and additional non-judgmental support for persons in situations of self-harm, as an outcome of the understanding that those situations are best prevented by communitarian support, built on genuine human connection.[248]

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should ensure that the person's will and preferences are central to care planning and facilitate the integration of health, social care, and social work services (Moira Jenkins, *Equal Recognition Before the Law: A Call for a Statutory Social Care Advocate for Vulnerable Adults in Integrating Health and Social Care, in* INTEGRATED CARE FOR IRELAND IN AN INTERNATIONAL CONTEXT: CHALLENGES FOR POLICY, INSTITUTIONS AND SPECIFIC SERVICE USER NEEDS (Tom O'Connor ed., 2013)).

[243] CRPD, *supra* note 7, at the Articles concerning legal capacity (12(3)); fight against exploitation (16(2)); independent living (19(b)); family life (23(2) and (3)); education (24(2)(d) and (f), 3(a) and 4); work (27(1)(e)); participation in cultural life (30(4)); and participation in political and public life (29(a)(iii)).

[244] CRPD, *supra* note 7, at Article 2(3).

[245] General Comment No. 1, *supra* note 43, at para. 16.

[246] Arstein-Kerslake & Flynn, *The General Comment*, *supra* note 39, at 476-477, defining means of support to exercise legal capacity.

[247] *Id.*, at 478.

[248] Tina Minkowitz, *CRPD and Transforming Equality*, 13 Int'l J.L. Context 77, 82 (2017).

Different kinds of support may overlap with measures of accessibility or universal design, as mentioned in Section III.B.4. Those are the requirements from private and public sectors and service providers, such as financial, health, or education institutions, to provide information in an accessible way, such as simplified language, sign language, or non-verbal communication.[249]

Other support measures include "advanced directives", which are legal documents tailored to meet the individual's support needs in the future as well as medical instructions that are given in advance; a durable power of attorney, identifying an agent who is legally entitled to act on behalf of the person on specific matters; special bank accounts, that require a cosigner for certain transactions; special needs trusts, that can be used to protect assets or supplement funds to a person without jeopardizing access to other funds and leaving the person with power to make her own decisions; and case management services, usually community or government based, that weave together the person's different services or provide support with long and short term planning.[250]

Another important aspect of 'support' is that support should also be provided for the *supporters* through initial information, training, and ongoing support.[251]

Given the pros and cons of each type of support, Arstein-Kerslake and Flynn suggest that best legal capacity systems should include a variety of supports, both formal and informal and that according to the General Comment's principles, the support will be tailored to each person's needs, or at least meet a range of different needs.[252] Close attention should be given to implementing supported decision-making mechanisms, ensuring they provide genuine choice and control rather than serve a bureaucratic purpose.[253]

Support systems must include *safeguards* to protect from abuse equally with others.[254] As elaborated in Section I.B., determining adequate safeguards is a delicate task since the protection must respect the person's rights, will, and preferences (or at least, their best interpretation),[255] including the right to take risks and make mistakes.[256] However, it is unclear

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[249] General Comment No. 1, *supra* note 43, at para. 17.

[250] Rood et al., *supra* note 10, at 325. *See also* Kanter & Tolub, *supra* note 23.

[251] Christine Bigby et al., *Providing Support for Decision Making, supra* note 163, at 405.

[252] General Comment No. 1, *supra* note 43, at para. 18; Arstein-Kerslake & Flynn, *The General Comment*, *supra* note 39.

[253] Anna Arstein-Kerslake, J. Watson, M. Browning, J. Martinis, & P. Blanck, *Future Directions in Supported Decision-Making*, 37(1) DISABILITY STUDIES QUARTERLY (2017).

[254] General Comment No. 1, *supra* note 43, at para. 20.

[255] *Id.*, at para. 21.

[256] *Id.*, at para. 22.

whether will and preferences should be respected in 'hard situations' where respecting them might seriously harm the person or others. According to Arstein-Kerslake and Flynn, such situations should be handled according to the state's common standards (as mentioned in Section III.B.3.b).[257] Undoubtedly, this will be one of the most controversial issues within the legal capacity framework.

c. Social, therapeutic, and care resources

Another vital resource aspect for implementing disability rights within the design is *therapeutic, care, and social* resources. Notwithstanding the potential contradiction between therapeutic content and disability rights,[258] it is essential to acknowledge that therapeutic aspects are part of people's lives, including those requiring assistance to realize their legal capacity fully. Therefore, a lack of therapy resources and options (physical or psychological) or barriers to acquiring therapy are likely to affect them negatively. Accordingly, when designing resources for a legal capacity system, the designer should consider the existing or required therapeutic resources and social benefits and make sure they are provided according to disability rights principles.[259] At least some of those therapeutic and social resources can be acquired through existing public health and social institutions and, therefore, would not burden the design's budget.

This exhaustion of benefits and rights holds the potential for an immediate effect on exercising legal capacity. For instance, a person entitled to housing benefits will have more options for decision-making regarding independent living. A person entitled to weekly counseling sessions will have a broader "safety net" that might reduce the need for more intrusive safeguards, resulting in more decision-making space. Naturally, all social benefits and therapeutic services should be provided in a manner that respects the right to legal capacity.[260]

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[257] Arstein-Kerslake & Flynn, *The General Comment*, *supra* note 39, at 482.

[258] As mentioned in *supra* Section III.A.

[259] The lack of disability rights implementation in mental health systems was addressed by the World Health Organization (WHO), encouraging governments and policy-makers to transform mental health systems and base them on recovery, rights, and inclusion. The report focuses on policy reform, law, services, and building the capacity of stakeholders and groups to address stigma and discrimination and to implement rights-based approaches in mental health services and the community (*Mental Health, Human Rights and Legislation: Guidance and Practice,* WORLD HEALTH ORGANIZATION & OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, 2023).

[260] For an innovative implementation of the right to legal capacity within mental health professionals, *see* Davies et al., *supra* note 138; For elaboration on a "legal capacity sensitive" social services and the innovative idea of "social care advocate," see Jenkins, *supra* note 242.

Another relevant therapeutic resource is *therapeutic jurisprudence* (TJ). TJ views the law and legal institutions as having the potential to be therapeutic agents. It examines the therapeutic and anti-therapeutic characterizations of the law, policy processes, and the structure of legal institutions, detecting which legal arrangements lead to successful therapeutic outcomes and why. Consequently, it aims to advance human dignity through legal events, using those events as benchmarks to enhance the participants' psychological well-being.[261] According to TJ, the formal discussion of one's legal capacity and the support necessary to exercise it can provide a therapeutic opportunity to assess relationships, detect strengths, provide assurance for will and preference, and enhance the person's overall well-being.[262]

Despite this almost-obvious connection between legal capacity and TJ, TJ should be implemented cautiously. Anna Arstein-Kerslake and Jenniffer Black have broadly addressed the use of TJ in disability rights cases, particularly in legal capacity. According to their findings, although TJ initially highlighted the importance of autonomy as enhancing well-being, over the years, legal capacity rights were often overlooked in the TJ process mainly due to the contradiction between therapy and disability rights.[263]

Accordingly, they suggest ground rules for TJ to protect the right to legal capacity more robustly while meeting its goal of safeguarding individual well-being.[264] This will be achieved if TJ closely follows critical disability theory, prioritizing the preferences of people with disabilities in the name of therapeutic advantages and recognizing the dignity and autonomy interests that therapeutic approaches might threaten. The emphasis would be placed on autonomy and respect for legal capacity, including the individual's right to make therapeutic decisions[265] based on their desires, will, and preferences, and with their full consent rather than imposing them.[266] For instance, information-sharing in tribunals where interdisciplinary teams practice TJ should not override the person's right to confidentiality. Therefore, lawyers in TJ

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[261] TJ was founded by David Wexler and Bruce Winick in the late 1980s and is considered part of the "comprehensive law movement" (Susan Daicoff, *The Comprehensive Law Movement*, 19 TOURO L. REV. 825 (2004)). It views the law and legal institutions as therapeutic agents. TJ strives to integrate treatment services with judicial case processing, provide ongoing judicial intervention, close monitoring of and immediate response to behavior, and create multidisciplinary involvement and collaboration with community-based and government organizations (BRUCE J. WINICK & DAVID B. WEXLER, JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (2003)). Different aspects of TJ are practiced in various "problem-solving courts", and the desired outcomes include psychological well-being, health, dignity, and compassion, alongside the traditional legal considerations of due process, civil liberties and rights, and economic efficiency (David C Yamada, *Teaching Therapeutic Jurisprudence*, 50(3) U. BALT. L. REV. 425, 431, 433 (2021)).

[262] *See* Perlin, *supra* note 16.

[263] Arstein-Kerslake & Black, *supra* note 100, at 1, 3.

[264] *Id.*, at 4.

[265] *Id.*, at 2.

[266] *Id*,. at 3.

legal capacity settings should play a delicate role, balancing their confidentiality duties to their clients while contributing to the team effort to produce therapeutic results.[267]

d. Disability-oriented legal education and professional training

This kind of legal knowledge is connected to the last DR-DSD resource: *legal education and professional training*. Attaining legal representation is often the precondition for recognizing and achieving lawful rights, including in legal capacity cases. Significantly, it is not enough to merely be represented by counsel but to attain representation that is disability conscious and willing to remove barriers, whether physical, communicational, stigma-based, or others.[268]

Representation in disability-related legal systems,[269] such as legal capacity cases, should also aim to foster positive and relationship-centered lawyer-client relationships[270] based on accessibility, with particular attention and respect to the client's wishes regarding the legal procedure.[271]

Therefore, one of the resources that should be developed to advance legal capacity is disability-sensitive legal education[272] and disability rights training for lawyers and judges.[273] Such education should include a theoretical understanding of disability studies and legal capacity, the shift from the medical-individualistic to socially-based approaches, the implications of disability rights principles and legislation, and knowledge regarding the interaction between people with disabilities and the systems surrounding them, especially the justice systems.[274]

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[267] *Id.*, at 8.

[268] Mor, supra note 5, at 637.

[269] Boulding & Brooks *Trying Differently*, supra note 224, at 451. Also, *see generally* Brooks & Madden, *Relationship Centered Lawyering*, *supra* note 200.

[270] Boulding & Brooks *Trying Differently*, *supra* note 224, at 450.

[271] *See* Perlin and Weinstein, *supra* note 225, at 78.

[272] Flynn, *supra* note 40, at the 5th chapter.

[273] Stephanie Ortoleva mentions the importance of training professionals, community education, and awareness in *Inaccessible Justice: Human Rights, People with Disabilities and the Legal System*, 17(2) ISLA J. Int'l & Comp. L. 281 (2011).

[274] For elaboration regarding disability-oriented lawyers and law students, see Rothler, *Clinical Legal Education*, supra note 200, at 8-12; See also Boulding & Brooks *Trying Differently*, *supra* note 224; Voula Marinos & Lisa Whittingham, *The role of Therapeutic Jurisprudence to Support Persons with Intellectual and Developmental Disabilities in the Courtroom: Reflections from Ontario, Canada*, 63 INT'L J. L. & PSYCHIATRY 18 (2019); Henry Dlugacz & Christopher Winner, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 4 (2011).

6. Successfulness, Accountability, & Learning

Being practice-oriented, DSD dedicates its last element to evaluation: the sixth and final component of DSD is *successfulness, accountability, and learning*. For stakeholders to trust and use a dispute system, they need information about its efficacy.[275] The evaluation should consider all the other five elements: goals, stakeholders, context and culture, process and structure, and resources,[276] and move the design forward beyond translating ideas into practice toward a commitment to achieve its various aims.[277]

In a nutshell, a successful system manages to achieve the system's goals. Therefore, the evaluation will depend on the system's objectives and goals, assessing their effect on addressing individual conflicts of legal capacity, including their prevention, management, and resolution.[278] However, following the disability-rights-based DSD guidelines,[279] successfulness should also be defined by the system's ability to achieve general legal capacity goals, such as developing support measures, enhancing relationships, raising public awareness of legal capacity and its disability-rights roots, and changing stigma-based paradigms.

It should address the universality of the design and whether the system is accessible for people with a variety of disabilities, especially those with cognitive and intellectual disabilities. It should ensure that along with the resolution of the particular disputes, the system helps to develop positive and constructive means for the future benefit of people with disabilities as a group, and whether every dispute is settled and learned from, aiming at advancing legal capacity. Another aspect of a successful design is the inclusion of disability rights, disability consciousness, and a profound understanding of legal capacity in the judicial discourse.

All legal capacity policies, legislation, and tribunals should be evaluated according to disability rights principles. The assessment team should include people with disabilities who have experienced difficulty attaining or exercising legal capacity and other relevant stakeholders. The evaluation should systematically examine the system's success in meeting disability rights and legal capacity goals while adhering to general DSD considerations such as

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[275] Blomgren-Amsler et al., *supra* note 105, at 86.

[276] Smith & Matinez, *supra* note 3, at 132-133.

[277] Rogers et al., *supra* note 2, at 320

[278] Blomgren-Amsler et al., *supra* note 105, at 88 and 130, noting that measuring conflict prevention is challenging.

[279] Rothler, *Designing Access to Justice, supra* note 4.

lower transaction costs, outcome satisfaction of the various participants, building disputant relationships, and addressing the recurrence of the dispute.[280]

The system should continuously assess its success through supervising measures to help judges re-evaluate their decisions and correct them if necessary. This should be done, among other means, through the development of *supervision* of supported decision-making, which is still underdeveloped.

Addressing the *accountability* aspect of the assessment component of DSD, one should look into the willingness to accept responsibility and account for actions, referring to the relationship between the designer and the system's oversight body and between the system's managers and stakeholders.[281]

First, the legal capacity system's various operators (professionals, policymakers, and people with disabilities) must determine whether the system works and whether legal capacity cases are handled according to disability rights principles. Following this, the system's designers must identify opportunities for continuous improvement based on feedback and the knowledge accumulated from case to case. Third, the designers should help users understand how the system operates, spreading this knowledge to people with disabilities and professionals in an accessible manner[282] and ensuring that information processes regarding the system are transparent.[283] All these steps aim to increase the system's credibility, engender trust in its processes, enhance the cooperation and participation of people with disabilities and professionals, and encourage continuous feedback.[284] If done correctly, these steps would justify the continuing investment of resources for the system's development and a greater realization of legal capacity and support measures.[285]

The *learning* component concludes this final DSD stage. According to learning principles, the system should not only process disputes but should include a mechanism of education and training for all stakeholders.[286] It also should generate a learning process from the accumulated knowledge, aiming to advance the right to legal capacity.

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[280] Blomgren-Amsler et al., *supra* note 105.

[281] Blomgren-Amsler et al., *supra* note 105, at 75.

[282] *Id.*, at 37.

[283] Smith & Matinez, *supra* note 3, at 132-133.

[284] *Id.*

[285] Blomgren-Amsler et al., *supra* note 105, at 74.

[286] *See*, for example, Holler et al., *supra* note 113, discussing the importance of providing meaningful training for supporters and systematic empirical evidence on what "really works".

IV. PRACTICAL IMPLEMENTATION OF THE DISABILITY-RIGHTS-BASED DSD IN LEGAL CAPACITY

The article suggests the disability-rights-based DSD in legal capacity as an analytical and practical tool for the design of legal capacity policy, legislation, and tribunals. This design aims to bridge the gap between legal capacity theory and ideals (as elaborated in Section I) and their practical implementation, addressing the opposition and obstacles mentioned in Section II. These barriers include the ideology of protection, the preservation of therapeutic professional identity, economic stakes in the existing legal capacity regime, financial third parties' conventions, and a lack of adequate design and resource allocation for the new legal capacity regime. These barriers also reflect the difficulty of adopting legal capacity principles into traditional legal systems. The DR-DSD addresses this difficulty by suggesting a reframing of the fundamentals of the existing system.

In reviewing the disability-rights-based DSD table in Section III.B., the legal capacity context can be added to the table as follows (**Table 2**):

	DSD Elements	***Disability Rights Interpretation***	***Legal Capacity Context***
1	*Goals*	*Advancing disability rights*	*Advancing legal capacity for persons with intellectual, developmental, cognitive, and psychiatric disabilities and older adults, safeguarding other disability rights to health and life.*
2	*Stakeholders*	*Nothing about us without us*	*Persons with intellectual, developmental, cognitive, and psychiatric disabilities will take a central part in the system's design.*
		Interdependence	*The design will consider the opinions and interests of health and social professionals, third parties, and family members.*
3	*Context and culture*	*Disability context*	*Consideration for past deprivation of legal capacity; Opposition to the new system from stakeholders, including people with disabilities.*
		Disability culture	*Responsiveness to authentic decisions that do not adhere to "normalcy"; sensitivity to the country's legal culture.*
4	*Process and structure*	*Accessibility and accommodations*	*Access to the legislation/design process; accessible and accommodated legal capacity*

			proceedings, allowing various modes of communication of will and preferences; access to ruling positions.
		Universal design	*An accessible design for various ages, abilities, and cultures, using physical and service-oriented accommodations.*
		Procedural justice and disability	*Temporary court decisions; enhanced court involvement in implementing the ordered legal capacity plan; disability-oriented legal representation.*
		The structure of conflict-resolving institutions and their relevance to disability	*A "multidoor" design with a robust legal orientation; a multidisciplinary team of professionals: legal, health, social services, financial, education, and people with disabilities who are first-hand experienced with legal capacity issues, functioning as court advisors or as part of the judicial team.*
5	*Resources*	*Legitimizing the cost of disability and its accommodations*	*Promoting public understanding of substitute decision-making mechanisms' negative aspects, past injustices, and the importance of realizing legal capacity.*
		Support and assistance	*Broad definition including formal and informal support to exercise legal capacity, tailored to each person's needs; support should highly value the person's autonomy and choice and cannot be forced or imposed; support should be provided for supporters; provision of safeguards, mechanisms for third parties to examine the nature of the support.*
		Social, therapeutic, and care resources	*Consideration of the existing or required therapeutic resources and social benefits, ensuring they are provided according to disability rights principles; therapeutic jurisprudence: legal capacity proceedings as an*

			opportunity to enhance well-being.
		Disability-oriented legal education and professional training	*Legal capacity as part of legal education of law students and professionals.*
6	*Successfulness, accountability, and learning*	*Achieving disability rights goals*	*Assessment that is sensitive to legal capacity goals and involves people with disabilities in the evaluation team; A system that continuously strives for a broad purpose of enhancing legal capacity from case to case*

Back to Anne's case at the beginning of this article, the disability-rights-based DSD could be implemented on multiple levels. As detailed, Anne is a forty-eight-year-old woman with intellectual disability, employed in a state-owned sheltered workshop, living in congregate housing, and sharing her room with another woman. Being under guardianship since she was eighteen, it seems that Anne, despite her age, has gained minimal experience in decision-making, justifying her brothers' and social workers' concerns.

If enacted, a disability-rights legal capacity framework could have prepared her, gradually, for decision-making and independent living, alleviating some of these concerns. A housing program that enables her to lead a more private life while providing specific help in household and recreational activities might have satisfied her need for autonomy and freedom while providing for her safety. Financial education could have helped her manage her salary and daily expenses, supplemented by other tailor-made safeguards such as joint decision-making regarding her major asset - the apartment. Such self-control over her life might contribute to her self-esteem vis-à-vis her family members, deepening their interdependent connections and avoiding guardianship, making room for more nuanced, supported decision-making. A peer-support program could have helped her deal better with negative feelings and depression. All these measures could be achieved through a legal capacity framework that follows disability-right-based DSD, aiming to enhance legal capacity early and avoid such conflicts of autonomy and protection. Under the new circumstance, significant others, like her brother and social worker, wouldn't feel forced to choose between her safety and autonomy.

Yet, a disability-rights-based legal capacity framework is not only intended for prevention but also for conflict management. Such management could occur in a tribunal that follows disability-rights-based DSD in legal capacity. Assume a woman with schizophrenia who wishes not to receive health care opposing her physician's advice and raising potential risk to herself. This case, where the right to legal capacity and the right to health might conflict, calls for different tools that a well-established disability-rights-based DSD can provide. For example, it could be dealt with through adjudication with substantial rights orientation by a tribunal that consists of a judge, a medical professional, and a person who has experienced a psychiatric disability and legal capacity challenges. Advisors, such as social workers, will supplement the tribunal.

This tribunal might have a better chance to help the woman reach decisions that align with her wishes while keeping her safe. In this kind of case, there will also be an automatic appointment of a lawyer. In any situation of contradiction between the woman's will and the tribunal's decision, the tribunal should advise on the least harmful measures to the woman's autonomy. The tribunal will also try to locate and foster meaningful relationships with a positive, interdependent nature. All decisions, primarily health-related, will be automatically re-examined every few months.

In other types of cases, the tribunal might utilize different ADR mechanisms. Let's imagine a 25-year-old person with autism who likes gaming, while his parents' main concern regards the way he spends his money and their need to have some control. The young man doesn't want anyone to limit him regarding his hobby. Given that their relationship is close and overall positive, mediation might be the best method to solve the case. The mediation should be aided by financial advisors who will help assess his current and future assets and needs and advise on respecting his will and preferences while securing his financial future.

All current and future social and therapeutic tools and benefits will be assessed, favoring different kinds of supported decision-making. The mediators will be aware of the historical characterization of people with disabilities as inferior, their lack of experience in decision-making processes, and their interdependency on their families. They will also provide solutions to enhance his autonomy while preserving the family relationship. In addition, it will be advisable to explore the option of forming a constructive contract between the person and his parents to plan a strategy for future disputes and foster a positive relationship. Finally, the mediating tribunal will decide on supervising measures for the supported decision-making relationship.

In all cases, an emphasis will be placed on the necessary accessibility and support as critical elements of the mediation or adjudication process, according to the circumstances. The first and third cases call for the accessibility of financial information and support in implementing financial decisions, along with help to acquire all relevant economic benefits and accessibility to financial third parties such as banks. The second case, however, requires different kinds of support, such as psychological and social support and peer support, to provide the woman with the necessary tools to implement her will and preferences in line with her health, safety, and family relationships.

In a legal capacity system that follows a disability-rights-based DSD, these cases and many others have a better chance to be addressed and resolved according to disability rights principles, taking into account other elements such as enhancement of autonomy, interdependence, relationship preserving, and a meaningful realization of accessibility and support. All this will result in more meaningful access to justice. This system also has a better chance to practically and realistically fulfill global legal capacity goals set in CRPD's Article 12 because its infrastructure consists of the Convention's principles. According to DSD rules, the system will be continuously evaluated and improved, promoting best practices, infiltrating concrete meaning into fundamental concepts such as "support" and "safeguards," and balancing contradicting rights and values.

As shown above, the analytical framework is not aimed to provide concrete solutions but rather design principles for a general platform to deal with different situations and circumstances. Therefore, using the system in various cases would generate different solutions according to DSD's elements of the relevant stakeholders, context, culture, process, structure, and resources. Nevertheless, all cases, including the ones ending up in legal capacity tribunals, would benefit from this platform's general principles, such as the design of preventive mechanisms to enhance legal capacity before the occurrence of a conflict.

CONCLUSION

Legal capacity to engage in legal actions and make decisions regarding one's life is a fundamental human right. However, people with disabilities, especially those with intellectual and cognitive disabilities, as well as older adults with dementia, often are denied legal capacity and, consequently, a limitation on their decision-making capabilities and diminished access to justice.

International and national legislative and quasi-legislative initiatives have been enacted to abolish substitute decision-making practices such as guardianship and asserting that people with disabilities should not be denied their legal capacity. Instead, they are entitled to supported decision-making and help realize their decisions, favoring their will and preferences over their best interests. However, these legislative initiatives have also received opposition and faced obstacles of various sorts. Main oppositions were based on the need to protect people from harming themselves and others, preserving health providers' professional identity, concerning economic stakes in the existing regimes, financial third-party conventions, and lack of adequate design of practical tools and resource allocation for the new legal capacity framework.

This article suggests a possible way to overcome the opposition to legal capacity and turn its ideals into a practical reality, or at least narrow the divide. The solution is based on the "disability-rights-based dispute system design (DR-DSD)." This design uses DSD's managerial and practical advantages and basic justice orientation. It provides disability rights interpretation to DSD's six components: goals, stakeholders, context and culture, process and structure, resources, and successfulness, accountability and learning.

The "disability-rights-based DSD," as applied to legal capacity, envisions a fundamentally new legal capacity framework. Consequently, it enables the practical design of legal capacity systems (including policy, legislation, and tribunals) that can fulfill disability rights and maintain legal capacity while attending to all relevant aspects: historical inferiority, equality, participation, autonomy, accessibility, support, relationship and interdependence, resources, and disability culture.

Including all those elements in the design's infrastructure promises to aid in implementing and integrating global legal capacity principles into local legislation and tribunals, addressing the criticism and doubts regarding their practical implementation. Further, it widens the system's options to realize the goal of legal capacity and achieve access to justice for people with disabilities and older adults while enhancing autonomy and fostering long-lasting positive relationships.

ARTICLE 3

DESIGNING CHILD WELFARE DISPUTE SYSTEMS:
A FRAMEWORK FOR ADVANCING PARENTHOOD DISABILITY RIGHTS

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DESIGNING CHILD WELFARE DISPUTE SYSTEMS:

A FRAMEWORK FOR ADVANCING PARENTHOOD DISABILITY RIGHTS

Roni Rothler*

ABSTRACT

This article addresses a critical problem in the child welfare system: parents with disabilities, particularly those with intellectual, cognitive, and mental disabilities, disproportionately lose custody of their children due to systemic discrimination and lack of proper support. Although laws exist to protect the rights of people with disabilities, these rights are rarely implemented effectively in child welfare cases. The system frequently views children's interests as conflicting with their parents' disabilities, leading to unnecessary family separations.

While previous scholarship has identified these problems and called for reform, this article makes a novel contribution by directly tackling the implementation gap between disability rights principles and child welfare practice. It does so by applying the Disability-Rights-Based Dispute System Design framework, an analytical tool developed for implementing disability rights in various legal contexts, to the specific child welfare domain.

This innovative approach moves beyond theoretical critiques to offer specific guidance for reshaping how the child welfare system operates, focusing on preventing unnecessary child welfare interventions and improving court proceedings. Based on DSD guidelines, the framework addresses six key areas: establishing clear goals that respect disability rights, involving all affected parties in decision-making, considering cultural and disability-related contexts, restructuring processes to be more accessible and supportive, providing necessary resources and support services, and ensuring success and accountability through continuous evaluation.

The article proposes several transformative recommendations, including legitimizing broader forms of parental support without jeopardizing parental status; reconceptualizing the parent-child relationship as interdependent rather than solely dependent; incorporating therapeutic jurisprudence while maintaining strong rights-based protections; ensuring proper disability-oriented legal education for professionals; and developing comprehensive early intervention and support systems. The design emphasizes prevention and proactive support while improving judicial processes. This approach promises to enhance access to justice not only for parents with disabilities but for all families in the child welfare system, particularly those from underprivileged communities.

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INTRODUCTION

Sarah and Ben married five years ago. Sarah has schizophrenia, and Ben experiences temporary depression episodes. They work part-time. They have a four-year-old daughter, Ella, and a one-year-old son, Ethan. Sarah's mother lives close to them and used to help them raise the children and keep up with the house chores. When her mother is diagnosed with Alzheimer's disease, Sarah experiences a crisis and is hospitalized. Ben tries to keep up with his job, the children, and the house chores but soon starts to experience a depressive episode.

Consequently, he wakes up late, does not always bring the children to daycare, and struggles with bathing and preparing meals. The municipal child protective services try to provide Ben with some help at home, but when he does not seem to cooperate, they turn to the district family court and ask to place the children in a temporary foster home. Ben is appointed a lawyer through the legal aid program, and the judge orders social services to provide him with more help at home. However, Ben is reluctant to let a stranger in the house, especially concerning the care of Ella and Ethan, and stops returning his lawyer’s calls. Meanwhile, the children are not attending daycare and are not visiting their mother in the hospital. Two months after the first hearing, the judge warns Ben that if the situation does not change immediately, she will place Ella and Ethan in foster care.

This scenario illustrates how the current child welfare system often fails to recognize and accommodate parental disabilities, leading to potentially unnecessary family separations. As Sarah and Ben's case demonstrates, the system typically responds with standardized interventions rather than disability-informed approaches that could address the root causes of family struggles. A system designed to account for disability rights could have provided this family with targeted support services, disability-appropriate communication methods, and accommodations - potentially preventing court involvement altogether.

Parents participating in child welfare proceedings usually belong to underprivileged and marginalized groups.[1] This article focuses on one of those groups: parents with disabilities. Parents with disabilities, predominantly those with mental disabilities (including intellectual, developmental, psychosocial, and psychiatric disabilities), face disproportionate scrutiny in

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[1] Tricia N. Stephens, Colleen Cary Katz, Caterina Pisciotta, & Vicky Lens, *The View from the Other Side: How Parents and their Representatives View Family Court*, 59(3) FAM. CT. REV. 491 (2021).

child welfare proceedings.[2] Despite their frequent involvement in these proceedings, the system rarely acknowledges or accommodates their disability-related rights and needs[3] - as illustrated in Sarah and Ben's case.

Underlying this systemic failure is the persistent stigma that views people with disabilities as inherently incapable. This perception transforms disabled parenting from a fundamental right requiring support into a perceived societal burden requiring intervention. Consequently, even though parenting disability rights are legally recognized through various statutes and the Americans with Disabilities Act, parents and professionals struggle to implement these rights in practice.[4] The result is a legal response to disabled parenthood dominated by skepticism and presumptions of harm to children, leading to excessive reliance on adversarial proceedings, child removal, and termination of parental rights - outcomes that could often be prevented through proper disability accommodations and support.[5]

Drawing from recent literature documenting this implementation gap between disability rights law and child welfare practice,[6] this article proposes a novel solution: applying "dispute system design" (DSD) principles to create disability-responsive child welfare systems. Rather than focusing on individual cases, DSD develops comprehensive frameworks for preventing and managing recurring disputes.[7] Its six key elements - goals, stakeholders, context and culture, process and structure, resources, and successfulness, accountability and learning -

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[2] The National Council on Disability Report, ROCKING THE CRADLE: ENSURING RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN (2012) [Hereinafter: NCD *Rocking the Cradle*]; Robyn M. Powell, *Family Law, Parents with Disabilities, and the Americans with Disabilities Act*, 57(1) FAM. CT. REV. 37 (2019) [hereinafter Powell, *Family Law*]; Elizabeth Lightfoot, Katherine Hill & Traci LaLiberte, *The Inclusion of Disability as a Condition for Termination of Parental Rights*, 34 CHILD ABUSE AND NEGLECT, 927 (2010) [Hereinafter: Lightfoot et al. *The Inclusion of Disability*]; Hanna Bjorg Sigurjónsdóttir & James G. Rice, *'Evidence' of Neglect as a Form of Structural Violence: Parents with Intellectual Disabilities and Custody Deprivation*, 6(2) SOCIAL INCLUSION, 66 (2018); Chris Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labelled Developmentally Disabled or Mentally Retarded*, 83(6) CALIF. L. REV. 1415 (1995).

[3] Leslie Francis, *Maintaining the Legal Status of People with Intellectual Disabilities*: The ADA and the CRPD, 57(1) FAM. CT. REV. 21, 30 (2019).

[4] *See* Jasmin E. Harris, *Legal Capacity at a Crossroad: Mental Disability and Family Law*, 57(1) FAM. CT. REV. 15 (2019)

[5] Francis, *supra* note 3, at 33. As Francis articulates, though most countries, including the U.S., have moved away from sterilizing people with disabilities, the legal response to disabled parenthood is still dominated by negativity, doubt, and consideration of the disability as harmful to children, resulting in a high percentage of termination of parental rights. "It is time," she writes, "to consider seriously how efforts can be made to better realize the promise of the ADA and the CRPD for people with intellectual disabilities as parents."

[6] Robyn M. Powell, Susan L. Parish, Monika Mitra, Michael Waterstone & Stephen Fournierû, *The Americans with Disabilities Act and Termination of Parental Rights Cases: An Examination of Appellate Decisions Involving Disabled Mothers*, 39 YALE L. & POL'Y REV. 157, 199-201 (2020) [Hereinafter: Powell et al., *Examination of Appellate Decisions*].

[7] LISA BLOMGREN AMSLER, JANET J. MARTINEZ, & STEPHANIE E. SMITH, DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT (2020); NANCY H. ROGERS, ROBERT C. BORDONE, FRANK E.A. SANDER, CRAIG A. MCEWEN, DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES, 4 (2013).

provide a practical roadmap for systemic reform. This practical orientation makes DSD particularly valuable for implementing new policies and legal reforms in complex systems like child welfare.[8]

Specifically, this article uses a "*Disability-Rights-Based* DSD," which focuses on managing disputes in disability-related fields,[9] such as psychiatric hospitalization, torts, legal capacity,[10] and child welfare. The Disability-Rights-Based DSD aims to develop practical solutions to varied cases and situations and ways to prevent or manage the autonomy-protection tension that underlies child welfare conflicts, aiming to design a comprehensive child welfare policy.

An essential contribution of this work is demonstrating how DSD principles can transform the preventive and judicial aspects of the child welfare system.[11] By redesigning early intervention services through a disability rights lens, we can often prevent the escalation to court involvement - as might have happened in Sarah and Ben's case with proper disability accommodations. When judicial processes become necessary, DSD principles can help courts better balance disability rights with child welfare concerns. This comprehensive approach moves beyond the current reactive, court-centered model to create proactive solutions that respect disability rights while ensuring family well-being.

The ultimate goal of Disability-Rights-Based DSD in child welfare is to address the issue of *access to justice*. This argument aligns with the "access to justice" movement's claim that unequal access to the legal system, resulting, among other things, from belonging to a disadvantaged social group, violates the equal protection of the law and infringes on the ability of individuals and groups to exercise their fundamental rights.[12]

The article proposes *Disability-Rights-Based DSD in child welfare policy as access to justice*: through the lens of DSD, such as a systematic analysis of the dispute according to the participant's goals, the system's structure and resources, the stakeholders, and the system's successfulness and accountability, the article suggests the redesign of child welfare policy,

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[8] Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 126 (2009).

[9] Roni Rothler, *Designing Access to Justice: A Disability-Rights-Based Dispute System,* 29(1) HARV. NEGOT. L. REV. [forthcoming] [Hereinafter: Rothler*, Designing Access to Justice*].

[10] Roni Rothler, *Access to Legal Capacity: A Disability-Rights-Based Design*, 40 OHIO ST. J. ON DISP. RESOL. 77 (2025) [Hereinafter: Rothler, *Access to Legal Capacity*].

[11] This approach reflects a "public health perspective," which is essentially preventive to the socio-legal system. For elaboration, *see* Michal Albersetin & Nadad Davidovich, *Intersecting Professions: A Public Health Perspective on Law to Address Health Care Conflicts*, 5 INT'L J. CONFLICT ENGAGEMENT RESOL. 83, 85 (2017).

[12] Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 186 (1978); Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115, 124 (2010).

which is practice-oriented and specifically sensitive to nuances of the children and the parents that are the system's main stakeholders. Moreover, based on DSD's focus on context and culture, this framework has the potential to endorse cultural diversities and enhance families' resilience.

Although it focuses on disability, according to the universal approach,[13] such a design promises to provide better access to justice for everyone, especially for parents and children from underprivileged societies and groups.

The article proceeds as follows: Section I presents the phenomenon of parents with disabilities in child welfare proceedings, detailing the obstacles that prevent the full implementation of disability rights in this realm. Section II introduces the "Disability-Rights-Based DSD," providing a comprehensive guideline for designing a disability-rights-sensitive child welfare system according to DSD's six elements: goals, stakeholders, context and culture, process and structure, resources, and successfulness, accountability and learning. The conclusion provides a summary of the discussion presented in the article.

I. PARENTS WITH DISABILITIES AND CHILD WELFARE PROCEEDINGS

A. Parents with Disabilities and Underprivileged Groups in Child Welfare Proceedings

Child welfare proceedings[14] are legal interventions concerning child safety and well-being in family life. These proceedings, also known as child protection or child dependency cases, enable state intervention in parental care.[15] The process encompasses both child protective services and subsequent judicial proceedings.

Child welfare judicial proceedings and decisions vary greatly. While some decisions merely instruct parents regarding care and education, the judicial power extends to decisions of parent-child separation through foster care or termination of the relationship through

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[13] Irving K. Zola, *Toward the Necessary Universalizing of Disability Policy*, 67 THE MILBANK QUARTERLY, 401 (1989).

[14] The proceedings are also called "child protection" or "child dependency." In this article, I will refer to the "child welfare proceedings," which encompass the process within the child protective services and the judicial proceedings that usually follow it. This term reflects various aspects of safeguarding children from abuse, neglect, and exploitation. Still, it also has a broader scope that includes the overall well-being of children, covering aspects such as health, education, and family support.

[15] Harris, *supra* note 4, at 15; For the constitutional grounds establishing the right to parent (care and control of one's children) without state interference as fundamental liberty protected by the 14th Amendment of the U.S. Constitution and its balance against the state's rights to safeguard children from harm *see* Powell, *Family Law, supra* note 2, at 40; Francis, *supra* note 3, at 26; and Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System*, 12 TEMP. POL. & CIV. RTS. L. REV. 273, 294 (2003).

adoption. The judicial proceedings, initialized by the child protective services, take place in the general family or specialized courts, such as family drug courts, family treatment courts, family domestic violence courts, and youth courts. Usually, they occur after a failure to follow a non-judicial intervention plan.[16] Occasionally, parallel non-adjudicative proceedings such as "family group conferencing" occur, depending on the country's or state's applied laws and policies.[17] However, usually, the "parental autonomy / child-protection" paradigm prevails in child welfare proceedings, leading to long-lasting or even irreversible "all or nothing" decisions.[18]

There is a high correlation between parents who participate in child welfare proceedings and underprivileged conditions,[19] predominantly low socio-economic levels,[20] and parents who are characterized by "otherness."[21] Over the years, research has revealed racial disproportionalities and disparities in the child welfare system[22] and distinct inaccessibility to justice.[23] Moreover, parents reported experiencing the proceedings as punitive and unsupportive spaces, even traumatic, where justice is not being served.[24] These feelings are directly linked to the high intimate exposure required within the proceedings.[25]

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[16] For a detailed overview of the different means and procedures regarding child welfare, see Glennon, *supra* note 15, at 280-282. In this article, "child welfare proceedings" encompass the process within the child welfare protective services and the judicial proceedings that follow it.

[17] Susan L. Brooks & Ya'ir Ronen, *The Notion of Interdependence and its Implications for Child and Family Policy,* 17 (3/4) JOURNAL OF FEMINIST FAMILY THERAPY 23, 39-40 (2005).

[18] Francis, *supra* note 3, at 32.

[19] *See* generally: Stephens et al., *supra* note 1; For a focus on the negative impact of adoption regulation on families of color, *see* Shanta Trivedy, *The Adoption and Safe Families Act is Not Worth Saving: The Case for Repeal*, 61 FAM. CT. REV. 315, 317 (2023); A recent British research revealed similar findings since parents were racialized as black and black mixed race (Gillian Hunter, Monica Thomas, & Nicola Campbel, *Experiences of Public Law Care Proceedings: A Briefing on Interviews with Parents and Special Guardians*. Birkbeck, University of London, Institute for Crime & Justice Policy Research, 2024).

[20] Stephens et al., *supra* note 1; Guy Enosh & Tali Bayer-Topilsky, *Reasoning and Bias: Heuristics in Safety Assessment and Placement Decisions for Children at Risk,* 45(6) BR. J. SOC. WORK 1771 (2015).

[21] Brooks & Ronen, *supra* note 17, at 24; Mayis Eissa & Anat Zeira, *The Backyard: Cumulative Trauma of Children from East Jerusalem who were Removed from Their Homes*, 153 CHILD ABUSE & NEGLECT 1 (2024).

[22] *See* Vicki Lens, *Judging the Other: The Intersection of Race, Gender, and Class in Family Court*, 57(1) FAM. CT. REV. 72 (2019) for both a general overview of racial and gender disproportionalities and a focus on the discrimination of poor mothers of color in child welfare proceedings.

[23] *See generally* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES — AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022), which stresses the oppressive intentions and effects of the family system towards marginalized communities, reinforcing gender and racial hierarchies. Also, *see* Ann K. McKeig & Mary Madden, *Family Court Enhancement Project: Improving Access to Justice*, 57(1) FAM. CT. REV, 107 (2019).

[24] Stephens et al., *supra* note 1 and the literature mentioned there regarding parents' displeasment with the proceedings and the need to enhance aspects of justice and therapeutic jurisprudence (further discussed in Section II.B.4.d.); *Also see* Hunter et al., *supra* note 19.

[25] Stephens et al., *supra* note 1 at 496. They articulate, "Unlike many other types of court proceedings, Family Court involves intimate and sustained relationships. Cases evolve over months and even years, with the normally private details of family life exposed and judged at virtually every court appearance".

Overall, parents, and sometimes even their representatives, experience the courts as unfavorable and anti-therapeutic, raising three main themes: the absence of voice and feeling as not included in the proceedings and not considering their input, lack of understanding of the judicial process, and concerns regarding the proceedings' fairness, including bias of the judicial decisions.[26] Specifically, research has found that parents often perceived themselves as outsiders or by-standers at court proceedings, even physically: sitting at the back of the courtroom or muted in virtual hearings, with very few opportunities to speak. Similarly, they reported a lack of understanding of the discussion between the judge and the legal professionals.[27]

Parents with disabilities,[28] predominantly mental disabilities, which include intellectual, developmental, psychosocial, and psychiatric disabilities,[29] may find themselves, more often than other parents, as litigants in child welfare proceedings.[30] Research has found that these parents face substantial and persistent discrimination and bias within the family law system, threatening their custody over their children.[31] This bias, based on historically rooted beliefs

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[26] *Id.*, including the literature mentioned there regarding the parents' voice.

[27] Hunter et al., *supra* note 19; Also *see* Ravit Alfandari, *Partnership with Parents in Child Protection: A Systems Approach to Evaluate Reformative Developments in Israel,* 47 BRITISH JOURNAL OF SOCIAL WORK 1061, 1067-1073 (2017), exhibiting the limited partnership and collaboration between parents and the authorities.

[28] The term "disabilities" encompasses intellectual and developmental disabilities, psychiatric disabilities, physical disabilities, and sensory disabilities. Parents with all these kinds of disabilities are overrepresented in child protection proceedings. For some statistics and data regarding parents with disabilities in the U.S., *see* Powell, *Family Law*, *supra* note 2, at 39. As she notes, although estimates vary, it is clear that parents with disabilities exist within the system in significant numbers.

[29] The definition of disabilities with mental and intellectual characteristics varies across countries. Recent British research uses "learning disabilities" as a broader term (Mary Baginsky, *The Role of Adult Social Care for Parents with Learning Disabilities When Their Children Are no Longer in their Care*, London: NIHR SCHOOL FOR SOCIAL CARE RESEARCH (2025), retrieved from: https://www.sscr.nihr.ac.uk/projects/p203/ (last visited 4.2.25); Nadine Tilbury & Beth Tarleton, *Substituted parenting: What does this mean for parents with learning disabilities in the family court context?* UNIVERSITY OF BRISTOL, 2023). Harris uses the term "mental disabilities" to include intellectual, developmental, psychosocial, and psychiatric disabilities. At the same time, she acknowledges that, in many instances, there is a need for disaggregation and individualization in regulatory approaches. Nevertheless, as she notes, current laws and regulations tend to approach mental disabilities in a unified nature (Harris, *supra* note 4, at 18). For further reading regarding parents with psychiatric disabilities, *see* Robyn M. Powell, Susan L. Parish, Monika Mitra, & Joanne Nicholson, *Responding to the Legal Needs of Parents with Psychiatric Disabilities: Insights from Parent Interviews*, 38(1) MINN. J.L. & INEQ. 69, 75-78 (2020) [hereinafter: Powell et al., *Parents with Psychiatric Disabilities*].

[30] NCD *Rocking the Cradle*, *supra* note 2; Lightfoot et al. *The Inclusion of Disability*, *supra* note 2; Bjorg Sigurjónsdóttir & Rice, *supra* note 2; Watkins, *supra* note 2; Harris, supra note 4, at 16; Powell, *Family Law*, *supra* note 2, at 38; Elizabeth Lightfoot & Sharyn DeZelar, *The Experiences and Outcomes of Children in Foster Care Who Were Removed Because of a Parental Disability*, 62 CHILD. & YOUTH SERVS. REV. 22 (2016) [Hereinafter: Lightfoot & Dezelar *The Experiences and Outcomes*]; Sharyn DeZelar & Elizabeth Lightfoot, *Use of Parental Disability as a Removal Reason for Children in Foster Care in the US*, 86 CHILD. & YOUTH SERVS. REV. 128 (2018); Tracy L. LaLiberte & Elizabeth Lightfoot, *Breaking Down the Silos: Examining the Intersection Between Child Welfare and Disability*, 7(5) JOURNAL OF PUBLIC CHILD WELFARE 471 (2013).

[31] Robyn M. Powell, *Legal Ableism: A Systematic Review of State Termination of Parental Rights Law,* 101 WASH. U. L. REV. 432, 459-464 (2023) [hereinafter: Powell, *Legal Ableism*]. Also *see* Powell, *Family Law*, *supra* note 2, at 38; Robyn M. Powell, Susan L. Parish, Monika Mitra, Michael Waterstone, Stephen Fournier,

regarding parental inabilities,[32] is still manifested today through discriminatory child welfare, adoption, and reproductive health care policies[33] and practices that presume parental unfitness,[34] which are rooted in negative perceptions regarding their right or capability to parent.[35]

Moreover, under some regulations, having a disability, and specifically a mental disability, may, in and of itself, provide grounds for parental termination.[36] Consequently, research has found that children's protective services tend to consider their children to be at risk of significant harm,[37] and they are more likely than other parents to have children removed from their care.[38]

Terminating the Parental Rights of Mothers with Disabilities: An Empirical Legal Analysis, 85(4) MO. L. REV. 1069, 1093 (2020) [Hereinafter: Powell et al., *Terminating the Parental Rights*].

[32] Robyn M. Powell & Michael A. Stein, *Persons with Disabilities and Their Sexual, Reproductive, and Parenting Rights: An International and Comparative Analysis*, 11 FRONTIERS L. CHINA 53 (2016) analyzes the evolution of the curtailment of sexual, reproductive, and parenting rights for people with disabilities over time and across jurisdictions. For the influence of the eugenic movement on the US restricting legislative history regarding family formation, see Powell, *Family Law*, supra note 2, at 38-40.

[33] See generally Roni Rothler, *Disability Rights, Reproductive Technology, and Parenthood: Unrealized Opportunities*, 25(5) REPROD. HEALTH MATTERS, 104 (2017) [Hereinafter: Rothler, *Reproductive Technology*].

[34] Powell, *Family Law*, supra note 2, at 38.

[35] Ayelet Gur & Michael Ashley Stein, *Social Worker Attitudes Toward Parents with Intellectual Disabilities in Israel*, 42(13) DISABILITY & REHAB. 1803 (2020); Elizabeth Lightfoot & Sharyn DeZelar, *Social Work with Parents with Disabilities: Historical Interactions and Contemporary Innovations*, 2 REVISTA DE ASISTENTA SOCIALA 19 (2019) describing the lack of supports or services available for parents with disabilities, and dearth of models for social work practice, presenting several contemporary innovations in social work practice for working with parents with disabilities.

[36] *See* Glennon, *supra* note 15, at 281, explaining that courts may rely on a parent's mental illness that prevents them from being capable of providing proper care and control as a basis for removal and for determining that they are not able to meet their children's special needs; also *see* Francis, *supra* note 3, at 24. As she notes, the laws of many states include intellectual disability in the list of factors to be considered in determining whether parents are unable to discharge their responsibilities, thus allowing their rights to be terminated. Further, in some states, statutes permit services needed for reasonable efforts at reunification to be bypassed in the case of parents with intellectual disabilities. Sometimes, parents with intellectual disabilities are viewed by the authorities as children themselves and, therefore, conceptually, not fit for parenthood (*Id*., at 28). According to Powell, these bypass provisions may generate assumptions that parents with an intellectual disability cannot benefit from services (Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127 (2016) [Hereinafter: Powell, *Safeguarding the Rights*]).

[37] Sharyn DeZelar & Elizabeth Lightfoot, *Who Refers Parents with Intellectual Disabilities to the Child Welfare System? An Analysis of Referral Sources and Substantiation*, 119 CHILD. & YOUTH SERVS. REV. (2020). In this study, they suggest that the high prevalence of parents with intellectual disabilities within child welfare proceedings is also due to higher rates of referral from their social workers. Also *see* Marjorie Aunos & Laura Pacheco, *Able or Unable: How do Professionals Determine the Parenting Capacity of Mothers with Intellectual Disabilities*, 15(3) J. PUB. CHILD WELFARE 357 (2020).

[38] Nicole Buonocore Porter, *Mothers with Disabilities*, 33 BERKELEY J. GENDER L. & JUST. 75 (2018); DeZelar & Lightfoot, *supra* note 30; Powell, *Family Law*, supra note 2, at 38 and the studies cited there, documenting data from the U.S., England, Canada, and Australia.

This prevalence is usually linked to the difficulties some parents with disabilities experience, which affect their physical, intellectual, and mental parental capacities.[39] However, as noted by researchers in this field,[40] underlying these difficulties are social factors, specifically, a history of community segregation, eugenic policies and practices,[41] a disproportionate level of social disadvantage resulting from negative experiences of domestic abuse, childhood trauma, poverty, inadequate economic opportunities,[42] homelessness, absence of medical and social support, discrimination, and low self-esteem.[43] Those factors are the ones that often affect their ability to care for their children.

Indeed, a central issue of "disability-related parenting" is intersectionality. Intersectionality is a theoretical framework for understanding how aspects of a person's identities (gender, sex, race, class, sexuality, religion, or disability) combine to create unique modes of discrimination and privilege.[44] Therefore, parents with disabilities from racial and ethnic minority backgrounds may experience even more significant child welfare system inequities than parents from either individual group owing to the intersection of racism and ableism.[45] Additionally, as parents with disabilities often experience high rates of poverty, low education, and unemployment, and depend on government benefits, they face an increased risk of child welfare system involvement.[46]

As people with disabilities, in general, suffer from specific racism coined "ableism," so do parents in the child welfare system. Albert and Powell[47] categorize this ableism into four

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[39] *See*, for example, Leone Huntsman, *Parents with Mental Health Issues: Consequences for Children and Effectiveness of Interventions Designed to Assist Children and Their Families*, 3 LITERATURE REV. 5 (2008).

[40] Harris, *supra* note 4, at 16; Powell, *Family Law, supra* note 2; Francis, *supra* note 3.

[41] Angela Frederick, *Between Stigma and Mother-Blame: Blind Mothers' Experiences in the USA Hospital Postnatal Care*, 37(8) SOC. OF HEALTH & ILLNESS 1127, 1130 (2015)

[42] Silvia Krumm et al., *Mental Health Services for Parents Affected by Mental Illness*, 26(4) CURRENT OPINION IN PSYCHIATRY 362 (2013); Andrea Reupert & Darryl Maybery, *What Do We Know About Families Where Parents Have a Mental Illness? A Systematic Review*, 37(1) CHILD & YOUTH SERVICES 98 (2016); Alison Luciano et al., *The Economic Status of Parents with Serious Mental Illness in the United States*, 37(3) PSYCHIATRIC REHAB. J. 242 (2014).

[43] *See* an extensive British report on these issues: GOOD PRACTICE GUIDANCE ON WORKING WITH PARENTS WITH A LEARNING DISABILITY (UNIVERSITY OF BRISTOL, 2021): https://www.bristol.ac.uk/media-library/sites/sps/documents/wtpn/FINAL%202021%20WTPN%20UPDATE%20OF%20THE%20GPG.pdf (last visited 4.2.25).

[44] Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 THE UNIVERSITY OF CHICAGO LEGAL FORUM 139 (1989).

[45] Elizabeth Lightfoot & Elspeth Slater, *Disentangling Over-Representation of Parents with Disabilities in the Child Welfare System: Exploring Child Maltreatment Risk Factors of Parents with Disabilities*, 47 CHILD. & YOUTH SERVS. REV. 283 (2014); Lightfoot & Dezelar, *The Experiences and Outcomes*, *supra* note 30.

[46] Lightfoot & Slater, *supra* note 45.

[47] Sasha M. Albert & Robyn M. Powell, *Ableism in the Child Welfare System: Findings from a Qualitative Study*, 46(2) SOC. WORK RSCH. 141 (2022).

categories: the first category is personal beliefs about people with disabilities among parents with disabilities and the attorneys who represent them ("internalized ableism"); the second is interpersonal judgment and bias towards parents with disabilities by professionals who work with them in the child welfare system (interpersonal ableism);[48] the third is discrimination against people with disabilities in the policies and practices of the child welfare system (institutional ableism); and the fourth is cumulative ableism across the child welfare system and other institutions, and its effects on parents with disabilities (structural ableism).

B. The Lack of Implementation of Parenting Disability Rights in Child Welfare Policy and Proceedings

The legal response to ableism should be found within the corpus of "disability rights," which is the legal manifestation of the social movement focusing on the discrimination and exclusion of people with disabilities. This discrimination and exclusion are manifested in the inaccessibility of places and services, which prevents participation in private and public activities. It is also manifested in social marginalization, such as placement in secluded institutions, denial of legal capacity, and, generally, pushing people with disabilities to the fringes of society.[49]

The disability rights discourse sheds light on the historical structuring of the legal subject, which has led to the inferiority of people with disabilities (and especially people with intellectual disabilities) who were, and sometimes still are, perceived as too incompetent to pass the threshold requirements of the rights discourse, such as rationality, autonomy, and independence, and as a consequence, as ineligible to fully participate in civil and social life, make decisions regarding their personal lives, let alone care for children. In this respect, disability rights emphasize the inherent human quality of people with disabilities, even if they do not adhere to the "normal" standards of participation and productivity.[50]

Disability rights are based on acknowledging that people with disabilities face particular obstacles and suffer from distinct inaccessibility to justice as a result of the inaccessibility and

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[48] *See*, for example, Ron Shor & Maya Moreh-Kremer, *Identity Development of Mothers with Mental Illness: Contribution and Challenge of Motherhood*, 14(3) SOC. WORK IN MENTAL HEALTH 215 (2016); Clare Dolman et al., *Pre-conception to Parenting: A Systematic Review and Meta-synthesis of the Qualitative Literature on Motherhood for Women with Severe Mental Illness*, 16 ARCH. WOMENS' MENT. HEALTH 173, 187 (2013).

[49] Roni Holler & Yael Ohayon, *Understanding Disability Policy Development : Integrating Social Policy Research with the Disability Studies Perspective*, SOC. PO'Y & SOC'Y 1, 3 (2022).

[50] Martha Nussbaum, *The Capabilities of People with Cognitive Disabilities*, 40(3-4) METAPHILOPHY 331, 335 (2009).

marginalization mentioned above.[51] In recent years, researchers have further emphasized the need for a broader concept of "*disability justice*" that addresses the marginality of groups with the intersectionality of disability and gender, people of color, immigrants, and LGBTQ. They stress the importance of bearing all one's identities and being included in society.[52]

Given the inaccessibility and marginalization experienced by people with disabilities, the provision of disability rights is based on a shift from an individualized bio-medical approach to a social approach that focuses not on the disability but on the current social construction and, therefore, calls for access to places, services, and personal support.[53] Regarding parenting, access and support should be provided for both child-bringing and child-raising since parents with disabilities are more likely to encounter obstacles in all parenting levels, including cases of assisted conception,[54] marital disputes regarding child custody,[55] and child welfare.[56] This duty to accommodate parenthood is legally manifested in national[57] and international legislation.[58] It is based on the understanding that the family realm is integral to adult life and that people with disabilities experience distinct obstacles in various parenting aspects.

According to this understanding, Article 23 of the United Nations Convention on the Rights of People with Disabilities (the CRPD)[59] "Respect for Home and the Family" requires state parties to ensure equality for people with disabilities in family and parenthood. It includes the duty to ensure that their rights to marry and found a family based on free and full consent is recognized;[60] it renounces their right to decide "freely and responsibly" on the number and spacing of their children and to have access to information, reproductive and family planning

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[51] Sagit Mor, *With Access and Justice for All*, 39 CARDOZO L. REV. 611, 612-613, 623 (2017).

[52] *See*, for example, Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683 (2021) and Patricia Berne et al. *Ten Principles of Disability Justice,* 46 WOMEN'S STUD. Q. 227 (2018). *See* Powell's analysis of the differences between "disability rights" and "disability justice" in Robyn M. Powell, *Care Reimagined: Transforming Law by Embracing Interdependence*, 122 MICHIGAN. L. REV. 1185, 1190-1194 (2024) [Hereinafter: Powell, *Care Reimagined*]. In this article, Powell addresses their different focuses in relation to the notion of care. While "disability rights" focus on enhancing independence through the usage of care, "disability justice" pertains to more complex care relations that are interdependent. In Section II.B.2.b., these aspects of interdependence and their relation to parenthood will be discussed in depth.

[53] *See* generally, MICHAEL OLIVER, THE POLITICS OF DISABLEMENT (1990).

[54] Rothler, *Reproductive Technology, supra* note 33.

[55] NDC *Rocking the Cradle*, supra note 2. Those kind of cases will not be examined thoroughly in this article. For examples of child custody cases where the abilities of parents with disabilities were questioned by their ex-spouses, see Powell*, Family Law, supra* note 2, at 37-38.

[56] As elaborated in *supra* Section I.A.

[57] NDC *Rocking the Cradle*, supra note 2; Powell*, Family Law, supra* note 2.

[58] United Nations Convention on the Rights of People with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [Hereinafter: CRPD], Article 23.

[59] CRPD, *supra* note 58.

[60] CRPD, *supra* note 58, at Article 23(1)(a).

education; it requires the provision of the means necessary to enable them to exercise these rights;[61] and addresses their rights to retain their fertility equally with others.[62]

Concerning child welfare proceedings, Article 23(2) of the CRPD poses a duty to ensure the rights and responsibilities of persons with disabilities relating to children's guardianship and to assist them in performing their child-rearing responsibilities. It also stresses that the child's best interests shall be paramount in all cases. Article 23(4) further asserts that the state should ensure that children are not separated from their parents against their will unless such separation is necessary for the child's best interest. It also states that in no case shall a child be separated from their parents based on a disability, either the child's or the parent's.

The U.S. administration signed the Convention, but it was not ratified. However, the Convention echoes the federal and state constitutional law defining the rights to conceive and to raise one's children as essential, fundamental civil rights, deriving the state's duty to make reasonable efforts to preserve and unify families, including the prevention or elimination of the need to remove children from home or safely return to their homes.[63]

Additionally, disability rights scholars and attorneys focusing on family have stressed the need to interpret and use domestic disabilities law, namely, the Americans with Disabilities Act (ADA)[64] and Section 504 of the Rehabilitation Act of 1973,[65] to argue a failure to accommodate or disparate treatment in family proceedings, including in-court accommodations, home assessments of parental capacity, or family reunification efforts,[66] and to promote family and parenting disability rights by eliminating discrimination and incorporating reasonable modifications into parents' and children's services.[67] In addition, they

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[61] CRPD, *supra* note 58, at Article 23(1)(b).

[62] CRPD, *supra* note 58, at Article 23(1)(c).

[63] For elaboration regarding U.S. family law on this matter, *see* Harris, *supra* note 4, at 16.

[64] Americans with Disabilities Act, 1990, 42 U.S.C. § 12102 [hereinafter: ADA].

[65] Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2018).

[66] Harris, supra note 4; Powell, *Family Law, supra* note 2; Francis, *supra* note 3; Glennon, *supra* note 15, at 285-288, provides an overview of the ADA's potential to advance disability rights in child welfare and the termination of parental rights. Consequently, child welfare services failing to "reasonably modify" services to accommodate parents' disabilities would violate the ADA. As she shows, case studies assert that agencies have not made reasonable efforts to help parents regain custody of their children because the services provided to them prior to the termination were not tailored to their mental illnesses. However, as she explains, attempts to use the ADA as a defense to the termination of parental rights for the benefit of parents with mental illnesses in child welfare cases were mainly unsuccessful (*Id*., at 276).

[67] Under Title II of the ADA people with disabilities must have an equal opportunity to participate in and benefit from state and local governments' programs, services, and activities; Title III of the ADA focuses on the accessibility of private businesses (also known as public accommodations). Together, those titles should cover access to parenting-related services, both state and local government services, and places of public accommodations (Rachel N. Shute, *Disabling the Presumption of Unfitness: Utilizing the Americans with Disabilities Act to Equally Protect Massachusetts Parents Facing Termination of Their Parental Rights*, 50 SUFFOLK U. L. REV. 493, 507-508 (2017)).

stress that federal and state constitutional law should be applied in courts to challenge disparate treatment in parental termination proceedings on due process grounds.[68]

Consequently, several states, the Department of Justice and the American Bar Association (ABA), have adopted legislation and resolutions against disability discrimination in parental rights matters, including child welfare proceedings.[69] Also, over the past few years, there has been some improvement in enforcing ADA principles in child welfare cases, such as in providing accommodations for parents.[70]

However, as scholars note, very few decisions involving parents with disabilities raise ADA provisions.[71] The courts still view parenting as a "solo operation," thus failing to apply ADA provisions to parenthood fully and ignoring their duties according to this law.[72] Another major problem detected regarding the application of the ADA is the courts' decisions regarding the timing of disability rights claims. According to these decisions, such claims should be raised when the services were not provided, not during the (later) welfare proceedings.[73] Therefore, in practice, parenting disability rights are rarely discussed during child welfare proceedings.[74]

Powell and Albert[75] have found three themes indicating barriers and facilitators that affect ADA compliance in this field: those are knowledge, training, and information about the ADA by parents with disabilities, child welfare workers, and legal professionals; institutional support

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[68] Harris, supra note 4; also *see*, Michael E. Waterston, *Disability Constitutional Law*, 63 EMORY L. J. 527 (2014); Sasha M. Albert, Robyn M. Powell, & Jack Rubinstein, *Barriers and Solutions to Passing State Legislation to Protect the Rights of Parents With Disabilities: Lessons From Interviews With Advocates, Attorneys, and Legislators*, 33(1) JOURNAL OF DISABILITY POLICY STUDIES 15, 17-21 (2022).

[69] Francis, *supra* note 3, at 22. As Francis notes, some inspiring exceptions of statutory approaches specifically link the ADA nondiscrimination requirements to child protection proceedings. Under the "South Carolina Persons with Disabilities Right to Parent Act," courts and social service agencies must comply with the ADA and Section 504 of the Rehabilitation Act before taking any action in termination or removal proceedings impacting the parental rights of persons with disabilities. The Department of Social Services must make reasonable, individualized efforts, based on the parent's specific disability, to avoid the removal of a child from the home and provide reasonable accommodations regarding accessing services available to all parents. Family court orders must make specific findings of reasonable efforts to address the parenting limits caused by a disability (*Id*., at 31).

[70] *See*, for example, Department of Justice (DOJ) and Washington Department of Children, Youth and Family Services Settle Claims of ADA Violations: The state agency failed to provide legally required sign language interpreters to those who are deaf or hard of hearing (April 19th, 2021): https://www.justice.gov/usao-edwa/pr/department-justice-doj-and-washington-department-children-youth-and-family-services (last visited 4.2.25).

[71] Powell et al., *Examination of Appellate Decisions*, *supra* note 6, at 199-201.

[72] Francis, *supra* note 3, at 30.

[73] *Id*.

[74] Powell, *Family Law*, *supra* note 2.

[75] Robyn Michelle Powell & Sasha Albert, *Barriers and Facilitators to Compliance with the Americans with Disabilities Act By the Child Welfare System: Insights from Interviews with Disabled Parents, Child Welfare Workers, and Attorneys*, 32 STAN. L. & POL'Y REV. 119 (2021).

and resource availability; and factors related to the legal and social context, such as tensions between children's rights and parents' rights.

C. Calls for Fundamental Disability-Rights Redesign of the Child Welfare System

While both national and international frameworks acknowledge the parenting rights of people with disabilities, translating these legal protections into meaningful safeguards within child welfare proceedings remains an unfulfilled promise. Those are still dominated by bias, stigma, and lack of accommodation and support, resulting in intervention and, many times, separation of children from their parents. Often, these interventions are based on "children's best interests" grounds, which are perceived as contradictory to the parent's disability.[76] As such, child welfare proceedings suffer from multi-level ableism,[77] reaching from the personal opinions and feelings of the stakeholders (professionals and parents) to the very core and infrastructure of this socio-legal system, thus infringing on disabled parents' access to justice.[78]

This disconnect between ideals of disability rights and parenting was addressed by Harris, who identified a general gap between disability rights and family-law-related issues, such as parenting, adoption, reproductive rights, and marriage, arguing that a disability rights lens should be applied to family law. As Harris articulates, many times, disability is antithetical not only to child rearing but also to child-preliminary issues of intimacy, sexuality, and marriage.[79]

As scholars claim, a genuine "disability rights" interpretation of parenting would apply the social approach to family-related proceedings and shift the focus from the parent's impairment

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[76] *Id.*

[77] As described by Albert & Powell, *supra* note 47.

[78] Mauro Cappelletti & Bryant Garth *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 186 (1978). Following the depiction of justice as an inherently changing concept, achieved by pushing back against injustice (Galanter, *supra* note 12, at 124) and arguing for a dynamic conception of access to justice (Lydia Nussbaum, *ADR, Dynamic (In)Justice, and Achieving Access: A Foreclosure Crisis Case Study*, 88 FORDHAM L. REV. 2337, 2338 (2020)), the meaning of "access to justice" has transformed from a formal state duty to enable people to defend their claims into an approach focusing on the state's obligation to provide an affordable, effective justice system accessible to all. Cappelletti & Garth explain that "access to justice" focuses on procedural justice, reveals barriers in the legal procedure, and promotes lowering the costs of litigation and legal representation (via state-funded attorneys, NGOs, or legal clinics), shortening the length of the proceedings, and making legal information available and accessible for all (Cappelletti & Garth, *id.,* at 183-186). Galanter adds a focus on the advantage "repeating players" have in litigation processes: Marc Galanter, *Afterword: Explaining Litigation*, 9(2) LAW SOC. REV. 347, 360-366 (1975). This approach shows that formal access cannot bring just outcomes in a hierarchic system (Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 FORDHAM URB. L.J. 3, 4 (2010)).

[79] *See* Harris, *supra* note 4, at 15, describing "soft" means to regulate family in the disability realm through, e.g., the absence of sex education and inaccessibility of gynecological equipment and services. As she explains, the risk of sexual harm usually underlies and justifies restricting regulations and policy. *See* also Elizabeth Pendo, *Reducing Disparities Through Health Care Reform: Disability and Accessible Medical Equipment*, 4 UTAH L. REV. 1057 (2010); Elizabeth Pendo, *Disability, Equipment Barriers and Women's Health: Using the ADA to Provide Meaningful Access*, 2 ST. LOUIS UNIV. J. HEALTH L. & POL'Y 15 (2008).

to their disabling surroundings, such as the inaccessibility of places and services that should support parenting.[80] As Francis notes, "Parenting is as much a function of schools, community supports, families and neighbors, and even social services, as it is of the characteristics of individual parents. Seeing the disabled parent in isolation forgets that other parents may not be viewed in this way".[81]

As Harris suggests, a meaningful law reform implementing disability rights in family law (including child welfare cases) demands a critical redesign of deeply embedded legal constructions and standards that fail to consider people with disabilities in the normative baseline from which courts measure deviance and incapacity. Therefore, she suggests moving beyond individual accommodation in family law toward more inclusive legal standards and broader structural reforms, aiming at "a universal design of family law standards,"[82] echoing the suggestions made by Roberts,[83] Trivedy,[84] and Powell[85] regarding the need not to amend, but to abolish, dismantle and redesign adoption and child welfare regulation. The following Section will suggest a detailed outline of such systematic redesign.

II. REDESIGNING CHILD WELFARE PROCEEDINGS: A DISABILITY-RIGHTS-BASED DISPUTE SYSTEM

A. Disability-Rights-Based Dispute System Design

As described in Section I, a major challenge lies within the *comprehensive implementation* of the existing knowledge and data regarding parenting disability rights in the design of the child welfare system. In this Section, I will tackle this implementation problem by outlining

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[80] Elizabeth B. Lightfoot & Tracy L. LaLiberte, *Approaches to Child Protection Case Management for Cases Involving People with Disabilities*, 30(4) CHILD ABUSE & NEGLECT 381 (2006). In this study, Lightfoot and Laliberte found a lack of standardization in providing services regarding disability within child protection.

[81] Francis, *supra* note 3, at 25.

[82] Harris, *supra* note 4, at 17. For an extensive study of Parents with Mental Illness that suggests structural reforms in policy and services and "speaking the language" of DSD, *see* Joanne Nicholson, Kathleen Biebel, Betsy Hinden, Alexis Henry, & Lawrence Stier, *Critical Issues for Parents with Mental Illness and their Families* (Center for Mental Health Services Research, Department of Psychiatry, University of Massachusetts Medical School, 2001).

[83] Dorothy Roberts, *Why Abolition*, 61(2) FAM. CT. REV. 229, 231 (2023) [Hereinafter: Roberts, *Why Abolition*].

[84] Trivedy, *supra* note 19, at 338.

[85] Robyn M. Powell, *Under the Watchful Eye of All: Disabled Parents and the Family Policing System's Web of Surveillance*, 112 CALIF. L. REV. 2005, 2061 (2024) [hereinafter: Powell, *Under the Watchful Eye*]; Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33(2) YALE J.L. & FEMINISM 35, 81 (2022) [hereinafter: Powell, *Abolitionist Approach*]. Powell et al. further suggested the "Inequalities Conceptual Framework for Disabled Parents Involved with the Child Welfare System" as a means that can help in the system's redesign (Robyn M. Powell, Susan L. Parish, Monika Mitra, Michael Waterstone & Stephen Fournier, *Child Welfare System Inequities Experienced by Disabled Parents: Towards a Conceptual Framework*, 39(2) DISABILITY & SOCIETY 291, 295-304 (2022)).

the principles for designing child welfare systems and proceedings rooted in disability rights principles. This design is based on an infrastructure that enhances access to justice in all disability rights fields: the "Disability-Rights-Based Dispute System Design."[86]

The Disability-Rights-Based Dispute System Design merges disability rights and dispute resolution principles using the analytical lens of "Dispute System Design" (DSD). DSD emerged as an outgrowth of the alternative dispute resolution (ADR) movement, seeking institutional court reform through non-legal dispute resolution methods.[87] Building on these foundations and extending to broader contexts, DSD encompasses process design that allows organizations, institutions, states, or individuals to more effectively manage, prevent, or resolve both individual and recurring conflicts. The framework rests on six fundamental elements: *goals*, *stakeholders*, *context and culture*, *process and structure*, *resources*, and *successfulness, accountability and learning*. Crucially, DSD's scope encompasses not only dispute resolution but also conflict management and prevention, fostering a problem-solving culture within organizations while providing multiple access points that combine rights-based and interests-based approaches.[88]

DSD's practical and analytical framework facilitates disability rights implementation alongside other principles. The 'Disability-Rights-Based DSD' advances this further by interpreting DSD's six core elements through a disability rights lens, as shown in **Table 1**. This approach structures the design around disability rights objectives while addressing implementation barriers. The model moves beyond procedural changes to challenge fundamental assumptions in existing legal frameworks.[89]

Table 1: Disability Rights Interpretation to Dispute System Design's Elements

	DSD Elements	***Disability Rights Interpretation***
1	*Goals*	*Advancing disability rights*
2	*Stakeholders*	*Nothing about us without us*
		Interdependence
3	*Context and culture*	*Disability context*
		Disability culture
4	*Process and structure*	*Accessibility and accommodations*
		Universal design
		Procedural justice and disability

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[86] Rothler, *Designing Access to Justice, supra* note 9.

[87] Smith & Martinez, *supra* note 8, at 126; The term "dispute system design" was first articulated by Ury, Brett, and Goldberg in the late 1980s (WILLIAM L. URY, JEANNE M. BRETT, & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988)).

[88] *See generally* Amsler et al., *supra* note 7, and Rogers et al., *supra* note 7, at 201.

[89] Rothler, *Designing Access to Justice, supra* note 9. For a thorough implementation of the Disability-Rights-Based DSD in legal capacity, see Rothler, *Access to Legal Capacity, supra* note 10.

		The structure of conflict-resolution institutions and their relevance to disability
5	*Resources*	*Legitimizing the cost of disability and its accommodations*
		Support and assistance
		Social, therapeutic, and care resources
		Disability-oriented legal education and professional training
6	*Successfulness, accountability, and learning*	*Achieving disability rights goals*

The Disability-Rights-Based DSD combines practical and justice-oriented approaches through two key features: *first*, it inherently provides *access* to disability justice by directly confronting disability rights implementation challenges, offering practical application tools and enhanced justice access. This is accomplished by introducing dispute management tools to disability rights while reinterpreting DSD guidelines through a disability rights perspective, as detailed in the table.

Second, applying disability rights perspectives to DSD's six elements strengthens DSD's capacity to achieve justice - a core DSD objective[90] - beyond disability-specific contexts, particularly in systems marked by power imbalances or historical inequities. This interpretation incorporates universal disability rights principles such as socially constructed barriers, hierarchies, marginalization, universal design, accessibility, accommodations, and interdependence.[91]

As elaborated in Section I, parents with disabilities are highly involved in the child welfare system, a system which fails to fully address their parenthood disability rights. In this section, I will utilize the Disability Rights-Based DSD to address this challenge by suggesting redesigning the system and its proceedings. As shown in detail, such a design will enhance parenthood disability rights since its infrastructure is based on disability rights core principles, considering and overcoming existing barriers to their implementation. Moreover, this design is compatible with handling child welfare issues since it enables a nuanced design for different

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[90] Amsler et al., *supra* note 7, at 8, 14; Rogers et al., *supra* note 7, at 205; Mariana Hernandez Crespo Gonstead, *Introduction to the Symposium: Leveraging on Disruption: The Potential of Dispute System Design for Justice, Accountability, and Impact in Our Global Economy*, 13 U. ST. THOMAS L.J. 159 (2017).

[91] Rothler, *Designing Access to Justice, supra* note 9.

cases,[92] providing courts diverse dispute management tools[93] and emphasizing preventive measures.[94]

B. Disability-Rights-Based Dispute System Design in Child Welfare Systems and Proceedings

1. Goals

The first DSD component addresses the system's *goals*, encompassing values, outcomes, and priorities[95] (See Table 1). In disability-rights-based DSD, these include a fundamental 'meta-goal' of advancing disability rights and disability justice, recognizing that negative disability perceptions stem from social constructs embedded within systems. This approach advocates viewing disability as socially-dependent rather than inherently limiting,[96] and embraces disability as enriching human diversity. This aligns with the CRPD's disability definition, which incorporates identity, anti-discrimination, community inclusion, and policy participation elements.[97]

Promoting disability rights as one of the systems' goals entails transformative qualities. As mentioned in Sections I and as elaborated by Francis, the current legislation on child welfare and parenthood does not only ignore disability rights but is contradictory to those. As she explains, current parental rights termination statutes assess disability through an individualized lens, focusing solely on parents' isolated capabilities rather than adopting a social model of disability. This approach ignores how disability intersects with environmental and social factors - including community support, educational systems, and social services. While other parents are evaluated within their support networks, disabled parents are often assessed in isolation, without considering how reasonable accommodations and support systems could enable effective parenting. State laws notably lack the requirement to evaluate parenting ability in conjunction with available family, community, or social support resources.[98]

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[92] Nofit Amir & Michal Alberstein, *Designing Responsive Legal Systems: A Comparative Study*, 22(2) Pepp. Disp. Res. L.J. 263 (2022).

[93] Hadas Cohen & Michal Alberstein, *Multilevel Access To Justice In A World Of Vanishing Trials: A Conflict Resolution Perspective*, 47(1) FORDHAM URB. L.J. 1 (2019).

[94] Alberstein & Davidovich, *supra* note 11.

[95] Amsler et al., *supra* note 7.

[96] As elaborated in *supra* Section I.B.

[97] Gerard Quinn & Anna Arstein-Kerslake, *Restoring the 'Human' in 'Human Rights: Personhood and Doctrinal Innovation in the UN Disability Convention*, *in* THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW 36, 38-39 (Conor Gearty & Costas Douzinas, eds., 2012).

[98] Francis, *supra* note 3, at 25.

Moreover, since the child welfare system encompasses significant therapeutic and welfare components, it tends to be viewed through the traditional bio-medical disability paradigm,[99] resulting in a deficit-focused approach, as detailed in Section I. However, establishing disability rights as an explicit system goal would necessitate critically examining the system's norms and regulations for disability rights compliance. Additionally, a disability rights focus would emphasize that conflict resolution must serve the broader goal of disability rights realization.[100] This consideration is particularly crucial given the power disparities between persons with disabilities and the institutions they typically depend on.[101]

The following Disability-Rights-Based Dispute System Design components - stakeholders, context and culture, process and structure, and resources - will help clarify *how* disability rights as a goal could be achieved in the child welfare system.

2. Stakeholders

The second DSD component addresses *stakeholders*. Based on the principle that people support what they help create,[102] individuals, groups, and organizations who host, use, or are affected by a system play a vital role in DSD development.[103]

a. Nothing About Us Without Us

Disability theory enriches this stakeholder approach in two ways.[104] First, the principle of 'nothing about us without us,' central to the CRPD,[105] requires consulting persons with disabilities on policies affecting them. This counters the traditional dominance of disability discourse by family members, social workers, and medical professionals.[106]

As mentioned in Section I.A., this rule is fundamental in child welfare proceedings, where parents have often reported feeling like outsiders in their hearings and not having their input

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[99] As mentioned in section I.B.

[100] Rothler, *Designing Access to Justice, supra* note 9.

[101] TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS REVISITED (2014).

[102] Rogers et al., *supra* note 7, at 265.

[103] *Id.*, at 225-247. For an overview of stakeholders' "participatory approaches" in decision-making processes and their critiques, see Pradip Ninan Thomas & Elske van de Fliert, *Participation in Theory and Practice*, in INTERROGATING THE THEORY AND PRACTICE OF COMMUNICATION FOR SOCIAL CHANGE 39 (2014).

[104] Rothler, *Designing Access to Justice, supra* note 9.

[105] CRPD, *supra* note 58, at the Preamble, subsection 13: "Considering that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programs, including those directly concerning them"; Article 4(4) adds that "In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, State Parties shall closely consult with and actively involve persons with disabilities".

[106] For a thorough explanation of the slogan's origin in the 1990s, *see* JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT, 1998.

considered,[107] and where findings showed a minimal realization of partnership with parents in terms of allowing them power to influence child welfare decisions.[108] Apart from making more room for the parents' opinions in the proceedings and policy-making, this rule can be achieved by advancing "parents advocates," who are parents with experience in child welfare or family court involvement who escort other parents in the proceedings.[109]

Additionally, the participation rule is relevant not only for the parents but also for their children. As Gal explains,[110] Even in unstable family settings, parents, adults who are alternative caretakers, and professionals can enhance children's ability to participate. To encourage this, training for mainstreaming child participation should be allocated through social organizations and a regulatory regime that requires, promotes, funds, or at least enables child-inclusive processes.[111]

While designing the child welfare regime, it is, therefore, crucial to involve both children and parents with disabilities themselves in the design and operation.[112] Given the nature of child welfare barriers, it is imperative to include parents with intellectual and cognitive disabilities. This is critical given their historical inferiority and communication differences.[113]

b. Interdependence

The second disability aspect relevant to DSD's stakeholder component is *interdependence*, which is crucial to child welfare. Interdependence recognizes that perceived independence stems from reliance on others.[114] This applies universally, including to people with disabilities whose autonomy often depends on support services. The concept aligns with a broader

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[107] Stephens et al., *supra* note 1.

[108] Alfandari, *supra* note 27, at 1067-1073.

[109] Stephens et al., *supra* note 1, at 495; Powell further mentions the importance of disabled parents as leaders: Powell, *Abolitionist Approach*, *supra* note 85, at 91.

[110] Tali Gal, *An Ecological Model of Child and Youth Participation*, 79 CHILD. & YOUTH SER. REV. 57, 62-63 (2017) [Hereinafter: Gal, *Child and Youth Participation*].

[111] *Id.*, at 62. Gal explains that a budgetary basis for participatory practices should support such encouragement. The UN Committee on Children's Rights (2009: 29-30) published its General Comment on child participation, specifying nine basic requirements for meaningful child participation. According to this, all processes that involve children must be transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe and sensitive to risk, and accountable (Gal, *Child and Youth Participation, supra* note 110, at 63).

[112] For the importance of collaboration and partnership with parents in child welfare proceedings, *see* Alfandari, *supra* note 27, at 1063.

[113] Amita Dhanda, *Universal Legal Capacity as a Universal Human Right*, in MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 177, 178 (Michael Dudley, Derrick Silove, & Fran Gale, eds., 2012), explaining the historical inferiority of people with intellectual disabilities and the way they were overlooked at the beginning of the disability rights social struggle, lacking voice to influence.

[114] *See* e.g. Eva Feder Kittay, *The Ethics of Care, Dependency and Disability*, 24(1) RATIO JURIS 49, 50 (2011); Martha Fineman, *Cracking the Foundational Myths. Independence, Autonomy and Self-Sufficiency*, 8(1) Am. U. J. GENDER SOC. POL'Y & L. 13, 14 (2000).

understanding of 'care' as reciprocal relationships[115] rather than unidirectional support, acknowledging personal and relational elements beyond technical assistance.[116]

Interdependence extends beyond physical support to the concept of 'choice.' While liberal theories define choice through independent evaluation and prioritize self-reliance as prerequisite for autonomy, feminist and disability scholars argue this emphasis on independence as essential for personhood overlooks fundamental values of trust, caring, and interdependence. Understanding relatedness and interconnectedness reveals that choice-making abilities develop only through relationships and supportive environments.[117] Therefore, an interdependent interpretation of parental choices must include necessary support systems for making and acting on those choices.[118] This framework embraces *relational autonomy*, emphasizing the social context of individual existence[119] and others' central role in decision-making.[120]

Interdependence's relevance to DSD's stakeholder component reflects DSD's relationship-centered approach. DSD requires incorporating or considering the interests of all stakeholders in the design process, including those targeted by the design and the professionals operating the current system who may resist changes.[121] It's crucial to understand which stakeholders

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[115] Janice McLaughlin, *Understanding Disabled Families: Replacing Tales of Burden with Ties of Interdependency, in* Routledge Handbook of Disability Studies 402, 409 (Nick Watson, Alan Roulstone, & Carol Thomas, eds., 2012).

[116] For a review of the concept of "care" in relation to disability, see Eva Feder Kittay, *Care and Disability: Friends or Foes, in* THE OXFORD HANDBOOK OF PHILOSOPHY AND DISABILITY 416 (Adam Cureton & David Wasserman, eds., 2020). For elaboration on care and disability, specifically regarding disability and interdependence, see Powell, *Care Reimagined*, *supra* note 52. Also see Jonathan Herring, *Disability and Care*, 12 J. INDIAN L. SOC'Y 35 (2021).

[117] In the early 1980s, Carol Gilligan revealed how the atomistic discourse is lacking, ignoring the basic insight that we mature to interdependence and not to independence (Carol Gilligan, IN A DIFFERENT VOICE. HARVARD UNIVERSITY PRESS, 1982). Holler et al. address a similar disability angle of interdependence: Roni Holler, Shirli Werner, Yotam Tolub, & Miriam Pomerantz, *Choice Within the Israeli Welfare State: Lessons Learned from Legal Capacity and Housing Services*, in CHOICE, PREFERENCE, AND DISABILITY, POSITIVE PSYCHOLOGY AND DISABILITIES SERIES, 95 (Roger J. Stancliffe et al. eds, 2020).

[118] *Id*., at 95.

[119] RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF (Catriona Mackenzie & Natalie Stoljar, eds., 2000).

[120] Jennifer K. Walter & Lainie Friedman Ross, *Relational Autonomy: Moving Beyond the Limits of Isolated Individualism*, 133 (Supp. 1) PEDIATRICS, 16, 18-19 (2014).

[121] Amsler et al., *supra* note 7, at 10. In addition to the immediate parties in conflict, stakeholders can be individuals or entities that are subsidiary to or constituents of those parties, as well as others directly or indirectly affected by the outcome of the dispute (Amsler et al., *supra* note 7, at 29). For existing systems, it is essential to learn which stakeholders were involved in the system's initial design and whose interests are represented (Smith & Martinez, supra note 8, at 131). Also important is to note that stakeholders do not have equivalent power and that the dictum to engage all stakeholders in a DSD process does not address how to resolve competing interests (Amsler et al., *supra* note 7, at 104).

participated in the initial system design and whose interests are represented for existing systems. This comprehensive stakeholder approach aligns with social policy reform theories.[122]

Consequently, when designing child welfare systems, "interdependence" has three primary meanings: the *first* is a vision of parent's and children's rights as inseparable and interdependent; the *second* is the interdependent relationship parents have with others; The *third* is the interdependent relationship parents have with their children.

Susan Brooks and Ya'ir Ronen described *the first aspect of interdependence* within the child welfare context. They view the child-parent relationship as a system of interdependence that draws its content from therapeutic law, preventive law, culturally sensitive law, and family system theory. According to this approach, and drawing from Martha Minow's work, they argue that children's and parent's rights should be unified, defying the tendency to assess them automictically.[123] They describe this approach as presenting a more realistic and protective perspective toward the child and their family, benefitting underprivileged populations characterized by "otherness," whose parenting is often questioned legally.[124]

The second aspect of interdependence within the child welfare context is connected to Bronfenbrenner's ecological approach to children's development, according to which children are dependent not only on their parents but on other family members[125] (the microsystem); the mesosystem, such as education, health, and welfare services; the exosystem, such as the parent's workplace, parental social networks, and government and non-government agencies; and the broad regulatory regime of the macrosystem. All these have interdependent relationships with the parents, directly or indirectly affecting their parenthood. Therefore, they should be considered in the system's design and implementation.[126]

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[122] Holler & Ohayon, *supra* note 49, at 10.

[123] Martha Minow, *Comments on "Suffering, Justice, and the Politics of Becoming" by William E. Connolly*, in CULTURE, MEDICINE & PSYCHIATRY, 1996.

[124] Brooks & Ronen, *supra* note 17, at 30, focus on the family (parents and other family members) when assessing rights. As an example, they describe that from the child's perspective, it makes no sense to prosecute a mother victimized by domestic violence or to punish her for failure to protect her child in any other way since such an approach often leads to separating the child from her or making it more difficult for her to fulfill her parental role. This separation deprives the child of his right to a self-constructed identity.

[125] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 43 [hereinafter: CRC]. The U.S. Administration has signed the Convention but has not ratified it. Article 5 states the importance of the extended family and the community. As Brooks & Ronen, *supra* note 17, at 38, articulate, this article shows the CRC's clear foundation on interdependence. As they claim, the article clarifies that the state's primary responsibility towards the child is to respect the role of the nuclear and extended family and the community in the child's life rather than to intervene to protect the child from them.

[126] Uri Bronfenbrenner, *Toward an Experimental Ecology of Human Development*, AM. PSYCH. 32(7) 513 (1997); Urie Bronfenbrenner, *Ecology of the Family as a Context for Human Development: Research Perspectives*. 22(6) DEVELOPMENTAL PSYCHOLOGY, 723 (1986).

During the implementation stage, particular attention should be paid to the professional stakeholders. Policy implementation is often integral to the policy-making process, especially in cases where the implementation stage is open to broad interpretation, leaving professionals with relatively high discretionary power.[127] This is especially true in child welfare since social work and therapeutic professionals play a hegemonic role in shaping its boundaries, as elaborated in Section I.

Moreover, positive relationships with these stakeholders should be enhanced in the DSD process to contribute to the design's success[128] through different means, such as constructive contracts[129] and creating a pleasant environment by mentioning common values[130] and fostering common goals.[131] "Family Group Conferences," where the family actively designs the care plan together with community members and professional services, can exemplify such a collaborative process.[132] Throughout the design, the designer should focus on empowering "weaker" sides,[133] including parents and children. These steps will help keep stakeholders on equal footing, make the interactions pleasant, and increase their depth.[134]

The third aspect of interdependence is understanding the parent-child relationship as interdependent, where *both* parties provide care and value for the relationship. According to this understanding, parents with disabilities do not have to choose between being "care receivers" (and therefore unfit parents) or "care providers" (and thus deny their disability) and can openly and legitimately be aided in their parental roles without jeopardizing their parental status. This legitimization opens the path for broader accommodations and support for parents (as will be elaborated further in Sections II.B.4.a. and II.B.5.b.), aiming not only at the children's functional needs but also at broader parental aspects such as relationships and self-

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[127] Holler & Ohayon, *supra* note 49, at 11.

[128] Rogers et al., *supra* note 7, at 225, 243.

[129] Differences between members of groups that distrust and dislike one another can lead individuals to attribute ulterior motives for innocent actions, insult each other, and be dishonest, resulting in unstable agreements. Social scientists identified characteristics that tend to promote constructive contracts: positive shared activities, participants who are personable and have common values, extensive interactions, working together toward a common goal, and equal status. Negotiators with higher levels of trust for each other are more likely to use cooperative negotiation techniques, disclose information, and understand the other's perspective. Trust between the parties to a single dispute increases the chances of reaching a long-lasting agreement. Without these situational characteristics, bringing together people who distrust and misunderstand one another runs the risk of reinforcing divisions, hatred, and prejudice. Therefore, in creating a system, designers might consider building activities promoting constructive contracts (Rogers et al., *supra* note 7, at 229-230.).

[130] Rogers et al., *supra* note 7, at 234.

[131] *Id*., at 126. Constructive contracts could be part of the system's design or drafted within a specific case.

[132] See Brooks & Ronen, *supra* note 17, at 39-40. As they claim, family group conferences serve the family's procedural justice.

[133] Rogers et al., *supra* note 7, at 235.

[134] *Id*., at 244.

growth. Such support, therefore, will not be limited to helping parents fulfill functional tasks since it can encompass broader support means, including, in some cases, support that was characterized (and therefore denied) as substitutional, which will be provided while keeping and valuing the parent-child relationship.

This approach is connected to the understanding of interdependency, disability, and care, according to the writing by Fink[135] and Powell,[136] who reveal that "[c]are work is the hidden twin of disability."[137] They claim that reimagining "care" according to disability justice values is necessary, including allocating resources to acquire proper care and acknowledging the needs and rights of formal and non-formal caregivers. Most of all, as they claim, society should abolish its abelistic approach to care and realize that disability and care provision should not be considered a burden but part of family life. As Powell concludes, support for care transforms disability from a source of fear into a celebration of interdependence and shared humanity, embracing diversity as enriching family life and fostering dignity and opportunity for all.[138]

As mentioned above, this reimagination of the care that is provided for people with disabilities can also benefit disabled parents caring for their children. It reminds us that taking care of children (whether with or without a disability) is not only a task of technical care but one that enriches life. It focuses on parents' (in)proper and unsupported place as caregivers. It shows how interdependence provides room for broader parent-child relationships since it is not based on one-sided functional dependence but depicts a reciprocal relationship where both sides are co-dependent in their path to realizing their autonomy. Such a relationship legitimizes the child's dual role as the dependent side of the relationship and as a provider of valuable assets such as meaning, company, community, parents' growth, a sense of belonging and security, and love.

3. Context and Culture

The third DSD component is *context and culture*. *Context* represents the circumstances surrounding system diagnosis and design, while *culture* encompasses shared patterns of perception, belief, behavior, and meaning attribution within a group.[139] Cultural influences on fairness perceptions in disputes[140] necessitate aligning conflict processes with organizational

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[135] JENNIFER NATALYA FINK, ALL OUR FAMILIES: DISABILITY LINEAGE AND THE FUTURE OF KINSHIP (2022).

[136] Powell, *Care Reimagined, supra* note 52.

[137] Fink, *supra* note 135, at xv.

[138] Powell, *Care Reimagined*, *supra* note 52.

[139] Amsler et al., *supra* note 7, at 30.

[140] *Id.*, at 32.

culture[141] and developing cultural awareness among designers to address intercultural dynamics.[142] In disability-rights-based DSD, these contextual and cultural elements must be viewed through a disability rights perspective.[143]

a. Disability Context

First and foremost, disability must be recognized as a *contextual* phenomenon where perceived limitations emerge from environmental interactions.[144] Accordingly, the design context should frame disability as a socio-political construct arising from systemic power inequities,[145] acknowledging how societal structures sustain discrimination against persons with disabilities.[146]

Consequently, the designer must recognize how the system's context is embedded in systemic discrimination against persons with disabilities across life domains - from sheltered workshops and segregated education to institutional living, medical paternalism, and restrictive guardianship practices.[147] Concerning parenthood, these discrimination and exclusion include the stigmatization regarding disabled parenting and the inaccessibility of places and services that relate to parenting or are supposed to provide parental support, as detailed further in Sections II.B.4.a. and II.B.5.b. These opinions and practices lead to and normalize the legally-based denial of parenting as described in Section I.

Therefore, *context-wise,* the child welfare system design should consider the negative historical interaction between disability and society, resulting in exclusion and marginalization.[148] In the context of child welfare and parenting, it is imperative to acknowledge that people with disabilities, especially intellectual disabilities, experience discouragement from parenting from an early age and, therefore, might not even expect to be

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[141] *Id.*, at 31. In this respect, DSD deals with ADR's critics of being detached from the culture in which the dispute occurs.

[142] Jayne S. Docherty, *Culture and Negotiation: Symmetrical Anthropology for Negotiators*, 87 MARQUETTE L. REV. 710 (2004); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995); Sukhsimranjit Singh, *Access to Justice and Dispute Resolution Across Cultures* 88(6) FORDHAM L. REV. 2407, 2423 (2020) claiming that without an established structure and precedent in place, ADR may only provoke low-quality justice for the impoverished.

[143] Rothler, *Designing Access to Justice, supra* note 9.

[144] *See, e.g.*, Michael Ashley Stein, Anita Silvers, Bradley A. Areheart, & Leslie Pickering Francis, *Accommodating Every Body*, 81(2) U. CHI. L. REV. 689 (2014); Theresia Degener, *Disability in a Human Rights Context*, 35(5) LAWS 1, 16 (2016).

[145] Claire Tregaskis, *Social Model Theory: The Story So Far…*, 17(4) DISABILITY AND SOCIETY, 457, 462 (2002).

[146] For elaboration regarding the principles and historical roots of disability studies and the social approach, *see* Oliver, *supra* note 53 at 30-33; Mor, *supra* note 51, at 645, and the literature mentioned there.

[147] Holler & Ohayon, *supra* note 49, at 2-3.

[148] *See* Oliver, *supra* note 53.

parents.[149] Given this understanding, a designer who wishes to promote a disability consciousness in child welfare systems and cases should be aware of two main issues: The first is the potential opposition of various institutions and individuals, including health professionals and family members,[150] as elaborated in Section I. The second is the empowerment of people with disabilities, who hold opposing opinions regarding themselves as parents. Therefore, the system should be designed to overcome both kinds of objection by providing institutions, professionals, and individuals with information and practical tools, as will be elaborated further in Sections II.B.4 and II.B.5.

b. Disability Culture

Regarding *culture*, designers must recognize the distinctive *disability culture* that has emerged from the lived experiences and perspectives of people with disabilities. This approach reconceptualizes disability, moving beyond views of socially constructed or individually based inferiority[151] to embrace it as an expression of human diversity.[152] This cultural framework emphasizes disability's positive contributions, including expanded perspectives, liberation from societal constraints, and the development of empowering personal and collective identities.[153] In parenting, such benefits regarding children's sense of autonomy, openness to differences, and resilience were mainly discussed.[154]

A disability-culture consciousness calls for legitimizing and mainstreaming the life experiences of parents with disabilities, which often challenge traditional concepts of what is "normalcy" and of social expectations.[155] Thus, the designer should be aware of the importance of social recognition of the disability experience.[156] Moreover, when designing legal systems,

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[149] Sheila Gould & Karen Dodd, *Normal People Can Have a Child But Disability Can't': the Experiences of Mothers With Mild Learning Disabilities Who Have Had Their Children Removed,* 42(1) BRITISH JOURNAL OF LEARNING DISABILITY 25 (2014).

[150] Holler et al., *supra* note 117.

[151] *See, generally*, Shakespear, *supra* note 101.

[152] John Swaine & Sally French, Towards an Affirmation Model of Disability, 15(4) DISABILITY & SOCIETY 569, 579 (2000). For a *disability justice* approach that emphasizes another angle of disability culture, shedding light on the intersection of disability and historically excluded groups such as women, people of color, immigrants, and LGBTQ, stressing the importance of bearing all of one's identities together, see Chin, *supra* note 52.

[153] Swaine & French, *supra* note 152.

[154] Adam Cureton, *Some Advantages to Having a Parent with a Disability*, 42 J. MED. ETHICS 31, 32 (2016). In her best-seller book, Jeanette Walls describes her childhood life with parents who are described as having mental disabilities. Alongside the difficulties, she describes a loving atmosphere and a unique perspective of life, which embedded her writing career (JEANETTE WALLS, THE GLASS CASTLE (2005)).

[155] Shakespeare, *supra* note 101. For a cultural approach in family and child welfare cases, see Brooks & Ronen, *supra* note 17, at 36-39.

[156] Robina Goodlad & Sheila Riddell, *Social Justice and Disabled People: Principles and Challenges*, 4(1) SOC. POL'Y & SOC'Y 45 (2005).

it is imperative to implement the disability context and culture among lawyers representing parents with disabilities.[157]

The inclination to embrace disability culture will enable the child welfare system to be open and responsive to the authentic conduct, opinions, and decisions of parents with disabilities, even when they do not adhere to the "conventional" habits. A disability culture sensitivity might also indirectly benefit other parents, not necessarily those with disabilities, characterized by "otherness," as described by Brooks & Ronen,[158] since it will increase the system's adherence to different cultural aspects of parenting, forming a substantial multicultural policy framework.

4. Process and Structure

The fourth DSD component - process and structure - addresses dispute prevention, management, and resolution systems. Processes span formal mechanisms like trials, mediation, and arbitration to varied methods tailored to specific conflicts and organizations. These can function as integrated systems or separate pathways.[159] Best practice typically involves designing multiple options incorporating interest- and rights-based strategies with the flexibility to move between them.[160] Designers must also consider how proposed systems interact with existing legal frameworks and courts' receptiveness to changes.[161]

When designing a child welfare framework, designers must consider how discriminatory historical practices and systemic barriers shaped current processes,[162] leading to adverse outcomes for parents with disabilities.[163] The design should incorporate disability rights principles and mechanisms to address and overcome these obstacles.

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[157] Glennon, *supra* note 15; Powell, *Family Law*, *supra* note 2. The aspect of disability-conscious legal education will be discussed in depth in Section II.B.5.d. The central role of "cause lawyers" in advancing disability rights was described in Michael E. Waterstone, Michael Ashley Stein & David B. Wilkins, *Disability Cause Lawyers*, 53(4) WM. & MARY L. REV. (2011-2012); Issues of disability-related relationship and communication among lawyers was detailed in Susan L. Brooks & Robert G. Madden, *Relationship-Centered Lawyering: The Emerging 'Science' of Professionalism.* in RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE (Susan L. Brooks & Robert G. Madden, eds., 2010) [hereinafter: Brooks & Madden, *Relationship Centered Lawyering*]. Lawyers' necessity of disability culture knowledge was addressed in Roni Rothler's *Clinical Legal Education and Therapeutic Jurisprudence in the Disability Rights Clinic in* THINKING ABOUT CLINICAL LEGAL EDUCATION: PHILOSOPHICAL AND THEORETICAL PERSPECTIVES 1, 8-9 (Omar Madhloom & Hugh MacFaul, eds., 2022) [Hereinafter: Rothler, *Clinical Legal Education*].

[158] Brooks & Ronen, *supra* note 17, at 25.

[159] Smith & Martinez, *supra* note 8, at 130-131.

[160] *Id*., at 128.

[161] Amsler et al., *supra* note 7, at 126.

[162] Mor, *supra* note 51, at 613; Holler & Ohayon, *supra* note 49, at 2-3.

[163] As described in Section I.

In her article, *Family Law, Parents with Disabilities, and the Americans with Disabilities Act*,[164] Robyn Powell directly addresses the structural reforms necessary for the strategic deployment of the ADA in child welfare proceedings. She identifies four major issues: individualized treatment, courtroom accessibility, accessible and appropriate parenting evaluations, and enhanced professional responsibility requirements for family law practitioners. Drawing from Powell's insight on the need for structural reforms, this Section will outline the disability-rights-related mechanisms to design the system's process and structure, focusing not only on court proceedings but on all levels of the child welfare system. According to the Disability-Rights-Based DSD, "Process & Structure" should include four critical elements: accessibility and accommodations; universal design; procedural justice; and attention to the structure of the socio-legal system.

a. Accessibility and Accommodations

Accessibility obligations reflect disability rights' unique combination of 'negative' civil-political and 'positive' social rights.[165] Physical and structural barriers make purely 'negative' anti-discrimination measures insufficient - disability rights must include both negative liberties and affirmative duties.[166] These require public and private actors to actively redesign spaces and services by eliminating structural and institutional barriers.[167] In the justice system context, accessibility focuses on removing obstacles to courts, law, and justice that people with disabilities encounter when engaging with legal and social support systems.[168]

As Powell elaborates[169] in the U.S., these accessibility duties of public entities (including courts) are manifested in Title II of the ADA. Those include the duty to provide an equal

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[164] Powell, *Family Law, supra* note 2.

[165] Neta Ziv, *The Social Rights of People with Disabilities: Reconciling Care and Justice*, in EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 369 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

[166] Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C-R C-L. L. REV. 413, 453 (1991).

[167] Stein et al., *supra* note 144; Ziv, *supra* note 165; Accessibility and the duty to accommodate are rooted in most international obligations articulated by the CRPD, *supra* note 58. Specifically, Article 9 is dedicated to accessibility and acknowledges it as the precondition for full participation in all aspects of life on an equal basis with others. According to the Article, accessibility, including identifying and eliminating obstacles and barriers, should be interpreted broadly: accessibility to the physical environment, transportation, information, technology, facilities, and services, using technology-based and live assistance. Moreover, discrimination against people with disabilities includes denying reasonable accommodation (Articles 2, 5, 13, 14, 24, 27; Shivuan Quinlivan, *Reasonable Accommodation: an Integral Part of the Right to Education for People with Disabilities*, *in* THE RIGHT TO INCLUSIVE EDUCATION IN INTERNATIONAL HUMAN RIGHTS LAW 169 (Gauthier de Beco, Shivaun Quinlivan & Janet E. Lord, eds., 2019)).

[168] Mor, *supra* note 51, at 613, 614, 621. For a discussion on positive duties regarding supported decision-making, see Terry Carney, *Clarifying, Operationalising, and Evaluating Supported Decision-Making Models*, RESEARCH AND PRACTICE IN INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, 1, 64 (2014).

[169] Powell, *Family Law, supra* note 2, at 42.

opportunity to participate in services, programs, and activities; to administer services, programs, and activities in the most integrated setting and appropriate to the needs of people with disabilities; not to impose criteria that might screen out people with disabilities; to provide auxiliary aids and services; not to place surcharges on people with disabilities to cover costs of nondiscriminatory treatment; and not to deny services due to inaccessible facilities.

Accordingly, public entities must provide reasonable modifications in policies, practices, and procedures to avoid disability-based discrimination. Title III of the ADA prohibits discrimination against people with disabilities by places of public accommodations, including professional offices such as attorneys and health care professionals. Those places must not apply eligibility criteria that screen out persons with disabilities, make reasonable modifications in policies and procedures to ensure access to services and facilities and provide auxiliary aids and services, including meeting physical accessibility guidelines.[170]

As Powell explains, in addition to accessibility duties, the ADA mandates an affirmative accommodation obligation. The courts must modify their services to accommodate particular disabilities, ensuring meaningful access. These ADA provisions can and should be applied in child welfare cases, specifically in individualized treatment, courtroom accessibility, accessible and appropriate parenting assessments, and attorneys' legal obligations.[171]

Powell shows how the individualized treatment of parents[172] is a matter of accessibility and reasonable modifications. She claims that by treating each case individually and consistent with facts and objectives, courts will be less inclined to act upon stereotypes and (negative) generalizations about people with disabilities and better assess the "reasonability" of the modifications needed by everyone. She adds on the importance of courtroom accessibility allowing for meaningful participation, which is imperative for parents, and which denial can result in unfavorable decisions.[173]

Next, Powell tackles the imperative issue of *professional reports* assessing accommodations and evaluating parental capacity.[174] As she shows, many of the mental health

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[170] *Id*. As Powell elaborates, those duties are subject to defenses in circumstances that render the accommodations "unreasonable" because they are too costly, too risky, or alter the nature of the existing services (See Title II of the ADA, *supra* note 64).

[171] Powell, *Family Law, supra* note 2, at 44.

[172] *Id*., at 43-44

[173] *Id*., at 44.

[174] *Id*., at 45. The issue of experts' opinions regarding child custody evaluations and the way irrelevant information and biased opinions might harm parental rights was also addressed by Jon Amundson & Glenda Lux, *Tippins and Wittmann Revisited: Law, Social Science, and the Role of the Child Custody Expert 14 Years Later*, 57(1) FAM. CT. REV. 88, 95-102 (2019).

professionals who are involved in child welfare cases lack experience or training related to parents with disabilities. Therefore, they do not know how to assess accommodations or perform parental capacity evaluations accommodating various disabilities.[175] She concludes that parenting evaluations must be fully accessible, include reasonable modifications, and comply with the ADA's individualized treatment requirements.[176]

Child welfare system design must ensure accessibility across multiple dimensions: proceedings, institutions, courts, and support services. This requires creating structures that enable accommodated, non-stigmatic, and individualized participation, with particular focus on making legal procedure information accessible. This comprehensive approach to accessibility aligns with Mor's broad access to justice framework.[177] At the policy level, accessibility should facilitate collaborative governance, enabling people with disabilities to actively shape the laws and procedures affecting their lives.[178]

b. Universal Design

The second disability rights element within DSD's 'process and structure' is *universal design*[179] - creating products and environments usable by all people without adaptation.[180] This approach aims to accommodate diverse ages, body types, and intellectual capacities, recognizing that systems accessible to people with disabilities often benefit broader populations.[181]

Providing universally designed places and services will help increase the number of parents (with or without disabilities) who can understand and use those places and services without

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[175] Powell, *Family Law, supra* note 2. As Powell shows, this lack of accommodation violates Articles II and III of the ADA, *supra* note 64.

[176] Powell, *Family Law, supra* note 2, at 45. As she notes, these individualized treatment requirements were also mandated in guidance issued in 2015 by the U.S. Departments of Justice and Health and Human Services to child welfare agencies and courts. Lack of the necessary training for professionals (namely, social workers) that work with parents with intellectual disabilities was also detected by Gur and Stein, who reported the needed training for empowering social workers to act on behalf of their client's parenting rights (Gur & Stein, *supra* note 35).

[177] Mor, *supra* note 51, at 631-633.

[178] Amsler et al., *supra* note 7, at 56.

[179] Mor, *supra* note 51, at 620. Mor notes that the principle of universal design was not fully integrated into the CRPD's vision of access and is mainly mentioned in the general obligations sections and not in particular articles (such as article 9, which deals with accessibility). Nevertheless, she believes that such a vision of universal design should guide our understanding of access to justice.

[180] MOLLY FOLLETTE STORY, JAMES L. MUELLER & RONALD L. MACE, THE UNIVERSAL DESIGN FILE: DESIGNING FOR PEOPLE OF ALL AGES AND ABILITIES (1998). *See also* Mor, *supra* note 51, at 624. Also see AIMI HAMRAIE, BUILDING ACCESS: UNIVERSAL DESIGN AND THE POLITICS OF DISABILITY, 2017.

[181] Mor, *supra* note 51, at 620, 624.

special accommodations. Such universal design can *prevent* conflicts and thus render the involvement of the legal system unnecessary.[182]

The second aspect of universal design concerns the design of parenthood's *meaning*. Harris[183] specifically addresses this issue of a universal redesign of family law. As she explains, the remedy of accommodations (as mentioned in infra Section II.B.4.a.) might not be sufficient for parents who "even with accommodations cannot meet those normative expectations." Therefore, a meaningful intervention would be to consider reshaping the norm of parenthood by "reimagining the core duties of parents and goals of parenting." As she suggests, parental fitness does not necessarily entail functional care, such as assisting children with homework or bathing them independently.

Universal design in child welfare would challenge conventional definitions of parenting, fitness, and neglect. As Harris notes, viewing parental capacity through a communal lens - where parents can delegate tasks while maintaining decision-making authority, similar to non-disabled parents employing caregivers - reduces justification for terminating parental rights of people with disabilities who may execute parental roles differently. As she further explains, the ideal of "super-competence" attributed to parenthood, and especially to motherhood, is unreachable for nondisabled and disabled mothers alike, making disabled mothers seem unfit for parenthood.[184] It is the wrong assumption that able-bodied parents execute custodial duties independently, leading to a lack of public (and legal) support for parents who require assistance performing some tasks. Therefore, universalizing parenting will potentially benefit not only parents with disabilities but all parents who have different abilities and needs - whether temporary or permanent - and parenting styles, cultures, and traditions without being categorized as pathologies.[185]

If disability will not be depicted as a deficit but as diversity (as suggested in *supra* Section II.B.3.b), and if we understand that parents, with or without disability, need and are entitled to

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[182] Similarly, Brooks & Ronen, *supra* note 17, at 32-33, suggest the adoption of the lens of "preventive law" in family cases, calling for professionals (mainly lawyers) to identify their clients' "soft spots" in advance, to prevent risk situations.

[183] Harris, *supra* note 4, at 17-18.

[184] Also see Christina Minaki, *Scrutinizing and Resisting Oppressive Assumptions about Disabled Parents*, DISABLED MOTHERS: STORIES AND SCHOLARSHIP BY AND ABOUT MOTHERS WITH DISABILITIES 31 (Gloria Filax & Dena Taylor eds., 2014). This "super competence" is also derived from Western standards of "intensive parenting," which the Justice system echoes and portrays (Galia Bernstein & Zvi Triger, *Over Parenting*, 44(4) U.C. DAVIS L. REV. 1221 (2010).

[185] For a similar suggestion in the field of labor, see Einat Albin, *Universalising the Right to Work of Persons with Disabilities: An Equality and Dignity Based Approach,* THE RIGHT TO WORK 9 (Virginia Mantouvalou, ed., 2014).

assistance, we will achieve a better and more wholesome depiction of parenthood, thus eliminating or diminishing certain negative feelings and situations such as anxiety, stress, or postpartum depression.[186] As a result, disabled parents' needs will be legitimized and will not necessarily provide the grounds for children's removal.[187] It will also legitimize and even provide official status for relationships between children and significant adults other than the biological parents who take part in raising them without jeopardizing parental status.[188]

c. Procedural Justice

The emphasis on *process and structure* in design reflects understanding that satisfaction stems from both outcomes and procedural elements.[189] This connects to the third disability rights aspect - *procedural justice*. Procedural justice encompasses multiple elements: impartiality, the right to be heard, legal grounds for decisions, neutral procedures and decision-makers, dignified treatment of participants, and trustworthy decision-making authorities.[190]

Research demonstrates that participants in legal processes heavily weigh procedural justice in their overall evaluation, particularly valuing opportunities to be heard, respectful treatment, and interaction with unbiased, trustworthy third parties.[191] DSD principles therefore emphasize participant involvement in shaping solutions based on lived experience and promoting procedural fairness.[192] This focus on procedural justice is especially crucial given the historical silencing of people with disabilities' authentic voices.

As discussed in Section I.A., procedural justice is significantly lacking in child welfare proceedings. Parents (with and without disabilities) reported an absence of voice and felt as if they were not included in the proceedings and not considered their input. They also reported a lack of understanding of the judicial process and concerns regarding the proceedings' fairness, including bias in the judicial decisions.[193] Additionally, they reported feeling that the process was moving too quickly toward court proceedings and being rushed into making life-changing

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[186] Gloria Filax & Dena Taylor, *Introduction*, DISABLED MOTHERS: STORIES AND SCHOLARSHIP BY AND ABOUT MOTHERS WITH DISABILITIES (Gloria Filax & Dena Taylor eds., 2014).

[187] Harold Braswell, *My Two Moms: Disability, Queer Kinship, and the Maternal Subject,* 30 HYPATIA 234 (2015).

[188] ANDREW BAINHAM & STEPHEN GILMORE, CHILDREN: THE MODREN LAW 181-185, 205-210 (2013).

[189] Amsler et al., *supra* note 7, at 16, 35.

[190] *Id*., at 16-17. For a discussion regarding the importance of procedural justice in family and child welfare cases, see Brooks & Ronen, *supra* note 17, at 39-40.

[191] Rogers et al., *supra* note 7, at 23.

[192] Amsler et al., *supra* note 7, at 15.

[193] Stephens et al., *supra* note 1; Sara P. Schechter, *Family Court Case Conferencing and Post-Dispositional Tracking: Tools for Achieving Justice for Parents in the Child Welfare System,* 70 FORDHAM L. REV. 427 (2001); Hunter et al., *supra* note 19.

decisions about the care arrangements of their children.[194] Research has shown that judges' conduct significantly shaped parents' court experience and fueled their hope, reporting to especially note and remember aspects of judicial kindness and informal and formal positive and negative comments.[195]

Procedural justice, manifested in neutrality and the authorities' respectful behavior, is also vital for children.[196] Notably, children's *participation* in the process was found to be an important aspect of child welfare proceedings. Tali Gal elaborated on this issue,[197] stressing findings that show how children's ability to participate is changeable[198] and encourages states to foster child participation. As she describes, research has found that children's effective participation depends on support and encouragement provided by relationships based on trust and respect, communication, and precise information.[199] Specifically, children personally invited to meet with the authority - whether a judge or a social worker - during family court proceedings relating to parental disputes were more keen to have a say in the process.[200] Gal also explains that children are sensitive to tokenistic participation, which leads to frustration and anger, as opposed to genuine interest in their perspectives.[201]

Another key consideration in procedural justice and disability is self-identity. Dorfman's research on social security benefits demonstrates that individuals who embrace the social model of disability view medical and individual model-based procedures as procedurally unjust - reporting lack of control, silenced voices, poor representation, pressure for inauthentic self-

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[194] Hunter et al., *supra* note 19.

[195] *Id.*

[196] Gal, *Child and Youth Participation, supra* note 110, at 61; Jeanette Lawrence, *Safeguarding Fairness for Children in Interactions With Adults in Authority: Computer-based Investigations of the Judgments of Secondary School Students*. REPORT TO THE AUSTRALIAN CRIMINOLOGY RESEARCH COUNCIL, 2003.

[197] Gal, *Child and Youth Participation, supra* note 110, at 59.

[198] *Id.*, at 59. As Gal explains, research has suggested a gradual process of developing children's participation ability (coined "scaffolding").

[199] Michael Gallagher, Mark Smith, Mark Hardy, & Heather Wilkinson, *Children and Families' Involvement in Social Work Decision Making*, 26(1) CHILD. & SOC'Y 74 (2012).

[200] Tamar Morag, Dori Rivkin, & Yoa Sorek, *Child Participation in the Family Courts — Lessons from the Israeli Pilot Project*, 26(1) INT'L J.L. POL'Y & FAM. 1 (2012).

[201] Jadi Hall, Joan Pennell, & R. V. Rikard, *Child and Family Team Meetings and Restorative Justice for Foster Youth*, in INTERNATIONAL PERSPECTIVES AND EMPIRICAL FINDINGS ON CHILD PARTICIPATION: FROM SOCIAL EXCLUSION TO CHILD-INCLUSIVE POLICIES 207 (T. Gal, & B. Faedi Duramy (Eds.) 2015); Chelsea Marshall, Bronagh Byrne, & Laura Lundy, *Participation in Policy-Making: Reflections from Children, Young People and Duty-Bearers* in INTERNATIONAL PERSPECTIVES AND EMPIRICAL FINDINGS ON CHILD PARTICIPATION: FROM SOCIAL EXCLUSION TO CHILD-INCLUSIVE POLICIES 357 (T. Gal, & B. Faedi Duramy (Eds.) 2015). Guidelines on children's participation in child welfare proceedings from a Therapeutic Jurisprudence (TJ) perspective were also addressed by Tali Gal & Dahlia Schilli-Jerichower, *Mainstreaming Therapeutic Jurisprudence in Family Law: The Israeli Child Protection Law as a Case Study*, 55(2) FAM. CT. REV. 177, 185-186 (2017). As they explain, children's participation should be tailored to their abilities through a mechanism for empowering them and allowing them to participate according to their abilities, wishes, and best interests.

presentation, and labor market discouragement.[202] Since child welfare proceedings similarly rely on medicalized and individual models rather than parenting disability rights frameworks, parents who identify with the social model are likely to perceive these proceedings as lacking procedural fairness.

Consequently, parents and children should actively participate in the proceedings and the system's design, aiming to design a system that answers procedural justice challenges. One of those challenges addresses the complex and sometimes temporary nature of family circumstances and parents' and children's changing needs and interests (as discussed in Section I). Hence, procedural justice requires enhanced court involvement in implementing the ordered custody plan.[203] This can be achieved by establishing ground rules regarding the temporary nature of these decisions. They should be revisited periodically to ensure that limitations on parenthood are minimized.

Finally, a fundamental procedural justice aspect involving time is the immediacy and availability of support, which is often crucial in child welfare matters. Welfare services and courts alike are reluctant to implement parenting disability rights when presented with cases of apparent neglect, which can result from insufficient accommodations, accessibility, and support. These cases portray children's rights as opposed to their parents', usually resulting in separation. When provided early, various parenting resources, accommodations, and support are far more valuable and can help prevent such risky situations.[204] Therefore, adopting a "Disability-Rights-Based DSD" in child welfare should emphasize early attention to disability rights.

Another procedural justice aspect in child welfare proceedings is attaining proper legal representation. Given the hierarchies between people with disabilities, families, and professionals and the weight of the parenthood rights at stake, legal representation is crucial, including free-of-charge representation for people who cannot afford it.[205] However, the formal representation is not enough: parents reported feeling that their lawyer did not adequately represent their views on life or challenge aspects of evidence that they considered wrong or

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[202] Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42(1) LAW & SOC. INQUIRY 195, 212-224 (2017).

[203] Kristen M. Blankley, *Online Resources and Family Cases: Access to Justice in Implementation of a Plan*, 88 FORDHAM L. REV. 2121, 2122 (2020).

[204] For the importance of early intervention and advocacy for disabled parents, see Glennon, supra note 15, at 299.

[205] As mentioned in supra Section I, Powell identifies proper legal representation as one of the accessibility requirements for advancing parenting rights for people with disabilities (Powell, *Family Law, supra* note 2).

unfair.[206] Therefore, as will be elaborated in infra Section II.B.5.d., lawyers representing parents with disabilities should be "disability-educated," focus on fairness and justice, enhance clients' trust and respect for the law and its actors, and increase clients' feeling that they were treated fairly. They should fully inform their clients about the procedures and criteria for legal decisions in accessible language according to their client's needs and ensure they are treated with respect by other legal professionals.[207] Notably, lawyers should support their clients' decision-making process within the representation, refrain from making decisions for the client's best interests, and respect their wishes regarding the legal procedure.[208]

The timing of legal representation presents another critical concern. While formal representation is typically assigned only upon court filing, significant parent-agency interactions and decisions often occur during pre-filing stages without legal counsel. For parents with disabilities, this creates heightened vulnerability to power imbalances and potential rights violations. Moreover, early legal representation could facilitate better conflict resolution with child welfare authorities, potentially preventing unnecessary court proceedings.[209]

d. The Process and Structure of the Justice System: Socio-Legal Aspects and Therapeutic Jurisprudence in the Child Welfare System's Design[210]

Finally, a disability-rights-based DSD must address the justice system's process and structure.[211] With their complexity, multiple stakeholders, and lasting impact, child welfare cases are particularly suited for a DSD-based tribunal approach. This framework can create

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[206] Hunter et al., *supra* note 19.

[207] David M. Boulding & Susan L. Brooks, *Trying differently: A Relationship-Centered Approach to Representing Clients With Cognitive Challenges*, 33 INT'L J.L. & PSYCHIATRY 448, 450 (2010) [hereinafter Boulding & Brooks *Trying Differently*].

[208] For a detailed explanation of such legal representation of clients with mental disabilities regarding psychiatric hospitalization, see Michael L. Perlin & Naomi Weinstein, *"Said I, 'But You Have No Choice'": Why a Lawyer Must Ethically Honor a Client's Decision About Mental Health Treatment Even if It Is Not What S/He Would Have Chosen*, 15 CARDOZO PUB. LAW, POLICY & ETHICS J. 73, 78 (2016).

[209] Powell, *Under the Watchful Eye, supra* note 85, at 2059.

[210] In the original "Disability-Rights-Based DSD" (Rothler, *Designing Access to Justice, supra* note 9), therapeutic jurisprudence was part of the aspect of "resources." However, in the context of child welfare, it seems fitter to discuss it within the aspect of "process & structure."

[211] The connection between disability and access to justice and its implications on the justice system is broadly discussed in Mor, *supra* note 51. For a comprehensive analysis of how legal systems can adjust to be more responsive and human-centered, *see* Amir & Alberstein, *supra* note 92.

space for nuanced conflict resolution models that embrace non-binary justice concepts and enhance legal dispute processing.[212]

For example, tribunals could adopt community court principles focusing on rehabilitation and 'multidoor courthouse' approaches.[213] This system routes cases based on their characteristics to the most suitable resolution method.[214] The tribunal can work with other institutional actors to address issues through alternatives to traditional trials,[215] such as family mediation and 'Family Group Conferencing.'[216] This flexible design better accommodates diverse cases and disputes.

Additionally, the tribunal design can incorporate a multidisciplinary team including legal, health, social services, financial, and education professionals,[217] alongside people with disabilities who have direct child welfare experience, human rights organizations, and family members. These participants could serve either as court advisors or judicial team members, depending on case needs

Particular attention should be given to the system's dual socio-legal characteristics, such as emphasis on the court's ecological and therapeutic capacities.[218] Indeed, every legal field has social implications;[219] however, in child welfare proceedings, social and legal aspects are often inseparable. This is because the legal case revolves around the state's intervention in social aspects of family, relationships, and care.[220]

Importantly, child welfare cases (as well as other family-related cases such as divorce or legal capacity issues) are mainly *future-focused* as opposed to other legal cases (such as criminal law, torts, and contracts), which contain futural aspects but are primarily focused on

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[212] Michal Alberstein, *Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Practice,*16 CARDOZO J. CONFLICT RESOL. 879, 889-890 (2015). For a similar argument regarding the complex blend of rights and interests in child welfare cases, *see* Shelley M. Kierstead, *Therapeutic Jurisprudence and Child Protection*, 34 COMP. RES. IN L. & POL. ECON. 33 (2012).

[213] Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

[214] Amsler et al., *supra* note 7, at 112.

[215] Alberstein, *supra* note 212, at 889-890.

[216] *See* Kierstead, *supra* note 212, at 34. For the advantages of involving children and parents in the decision making process through such means *see* Gal & Schilli-Jerichower, *supra* note 201, at 185, 186.

[217] Such as the "parents advocates" described in Stephens et al., *supra* note 1, at 495.

[218] For a thorough analysis of family court's that promote family justice *see* BARBARA A. BABB & JUDITH M. MORAN, CARING FOR FAMILIES IN COURT: AN ESSENTIAL APPROACH TO FAMILY JUSTICE (2019), and particularly Chapter 2 emphasizing the interdisciplinary paradigm through the court's ecological and therapeutic capacities (pp. 32-48).

[219] BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY (2001).

[220] Kathleen Coulborn Faller & Frank E. Vandervort, *Interdisciplinary Clinical Teaching of Child Welfare Practice to Law and Social Work Students: When World Views Collide*, 41 U. MICH. J. L. REFORM 121 (2007).

the investigation of the past. The case's "futuristic" character highlights the cruciality of social and therapeutic individual evolvement and family-oriented change.

This tight socio-legal connection is also portrayed - and enhanced - by the professionals who play essential roles in the proceedings, mainly social, therapeutic, and legal experts. Federal legal statutes also mention this socio-legal connection, which demands that child welfare social workers and legal professionals adjudicating child welfare cases collaborate more frequently.[221] Therefore, a socio-legal structure for the proceedings should be investigated. A brief discussion of the obstacles and suggested boundaries for such a structure follows.

The insufficiency of social and therapeutical content in family courts has been at the center of the family court's criticism. Critics have noted the failure to ensure essential services and treatment for parents and children:[222] they characterized courts as a harsh environment populated with multiple actors that makes it difficult for parents and their representatives to navigate.[223]

Others have found that although family and youth courts are officially supposed to portray a therapeutic setting, they usually run in an adversarial manner, enhancing conflict, inefficiency, and failure to seize opportunities.[224] It was argued that contextual factors, such as trauma[225] and bias, multiply the anti-therapeutic effects of family courts[226] and that attention to such social and therapeutic content might not only help the families but alleviate some stress attributed to professionals such as lawyers, social workers, and judges.[227]

Research has suggested that this lack of attention to combining legal and social content results from differences in professional education programs between lawyers and social workers. This leads to obstacles in collaborating in their future professional lives and prevents

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[221] Such as the 1980 Adoption Assistance and Child Welfare Act (AACWA) and the 1997 Adoption and Safe Families Act (ASFA); Sarah Taylor, *Educating Future Practitioners of Social Work and Law: Exploring the Origins of Inter-Professional Misunderstanding*, 28 CHILDREN & YOUTH SERVICES REVIEW, 638 (2006)

[222] Lens, *supra* note 22; Barbara A. Babb, *Family Courts Are Here to Stay, So Let's Improve Them*. 52 FAM. CT. REV. 642 (2014).

[223] Stephens et al., *supra* note 1.

[224] Gal & Schilli-Jerichower, *supra* note 201.

[225] For a discussion on the trauma that characterizes many parents and children whose cases are heard in family courts, *see* Stephens et al., *supra* note 1, at 505. As argued there, this trauma is not properly (or at all) addressed by the court due to a lack of attention to therapeutic content.

[226] *Id*.

[227] *Id*., Suggesting the judges have a key role in mediating contextual factors such as trauma and bias in family court, providing a supportive and therapeutic environment for adjudicating cases. For further reading on legal professionals' stress, *see* Carly Schrever, Carol Hulbert, & Tania Sourdin, *The Privilege and the Pressure: Judges' and Magistrates' Reflections on the Sources and Impacts of Stress in Judicial Work,* PSYCHIATRY PSYCH. & L. 1 (2024).

the system from adequately meeting the needs of children and families.[228] Kierstead elaborates on these inherent and substantial differences in the professional conduct of lawyers and social workers, focusing on their different approaches to defining and solving family-related problems.[229] Coulborn Faller and Vandervort further explain other aspects of difficulty in collaborating, given their different roles in child welfare cases, ethical guidelines, approaches and methods of intervention, and social statuses.[230]

Those obstacles result in both "under-collaboration" and "over-collaboration." As for "under-collaboration," as mentioned above, child welfare cases require a very tight, often future-oriented, client-lawyer-social professional collaboration. Unlike a tort claim, where the lawyer interacts with the client mainly to receive the relevant documents and information, a lawyer handling a child welfare case usually must prove that the client's parental conduct will improve. Consequently, as the case evolves, the lawyer is involved in many care details, aiming to present the client's life to the authorities to yield favorable legal results (which often might ignore some unfavorable aspects of the client's life.[231]) This requires much more client interaction and collaboration with their families and professionals such as therapists and social workers.

Therapeutic content and collaboration become essential for legal representation since the lawyer aspires to help the client act a certain way. However, lawyers are not trained in social or therapeutic professional conduct and do not know how to provide therapeutic counsel, which leaves room for the client's autonomic evolution. Without proper collaboration with social professionals, this complex mixture of legal and therapeutic content in the case can lead to unfavorable results. For example, lawyers representing parents might get too involved in their lives, trying to take over their tasks and ending up failing and frustrated.[232]

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[228] Taylor, *supra* note 221, at 639, 640.

[229] *See* Kierstead, *supra* note 212, at 43.

[230] Coulborn Faller & Vandervort, *supra* note 220.

[231] As explained by Kierstead, *supra* note 212, at 42-43, the lawyer will usually strive to develop a case theory based on the client's desired outcome, which may lead her to look for specific evidence and ignore others. Social workers and therapeutic professionals usually adopt a more comprehensive approach, integrating all the circumstances.

[232] Rothler, *Clinical Legal Education*, *supra* note 157. This kind of conduct of lawyers/professionals as "rescuers" who might later become aggressive is compatible with Karpman's "drama triangle." The drama triangle is a social model of human interaction often used in psychotherapy. It comprises three characters: the victim, the persecutor, and the rescuer, as roles that people often adopt in interpersonal conflicts (Stephen Karpman, *Fairy Tales and Script Drama Analysis*, 7(26) TRANSACTIONAL ANALYSIS BULLETIN 39 (1968)). Lawyers might begin as rescuers, but when parents fail to follow their instructions, they feel like victims, which leads them to act aggressively toward their clients.

However, a lack of social and therapeutic training, combined with the importance attributed to children's best interests by the lawyers who represent their parents, can also lead to over-collaboration with social services: lawyers would be more inclined to collaborate with the welfare authorities, who play a dual role as providers of support for parents and as opponents.[233]

Overcoming these issues of under-collaboration and over-collaboration, focusing on the legal case's relevant social and therapeutic aspects instead of ignoring them or treating them as subtexts, will better serve parents, children, and professionals. The holistic approach mainly enhances collaboration between children's and parents' attorneys. While narrow models encourage viewing these roles in isolation, a collaborative framework identifies shared goals while presenting distinct perspectives to decision-makers. For instance, a child's attorney might advocate for school accommodation based on the child's academic and social development. In contrast, the parent's attorney emphasizes how the lack of such support impacts family stability and parental functioning.

Therapeutic jurisprudence (TJ) suggests such a balanced socio-legal approach. Accordingly, it was proposed as a favorable approach and structure for family courts that might help alleviate some of the flaws when dealing with cases of child neglect.[234] TJ views the law and legal institutions as having the potential to be therapeutic agents. It examines the therapeutic and anti-therapeutic characterizations of the law, policy processes, and the structure of legal institutions, detecting which legal arrangements lead to successful therapeutic outcomes and why. Consequently, it aims to advance human dignity through legal events, using those events as benchmarks to enhance the participants' psychological wellbeing.[235] According to TJ, in family disputes, the formal legal discussion of parenthood and child welfare can

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[233] As Glennon, *supra* note 15, at 282-283, explains, this dual role might lead lawyers and parents to agree to support plans that do not fit their wishes or needs for fear of vexing the social worker whom they depend upon for a positive evaluation.

[234] Stephens et al., supra note 1; Gal & Schilli-Jerichower, *supra* note 201.

[235] TJ was founded by David Wexler and Bruce Winick in the late 1980s and is considered part of the "comprehensive law movement" (Susan Daicoff, *The Comprehensive Law Movement*, 19 TOURO L. REV. 825 (2004)). It views the law and legal institutions as therapeutic agents. TJ strives to integrate treatment services with judicial case processing, provide ongoing judicial intervention, close monitoring of and immediate response to behavior, and create multidisciplinary involvement and collaboration with community-based and government organizations (BRUCE J. WINICK & DAVID B. WEXLER, JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (2003)). Different aspects of TJ are practiced in various "problem-solving courts", and the desired outcomes include psychological well-being, health, dignity, and compassion, alongside the traditional legal considerations of due process, civil liberties and rights, and economic efficiency (David C Yamada, *Teaching Therapeutic Jurisprudence*, 50(3) U. BALT. L. REV. 425, 431, 433 (2021)). For a general discussion regarding the connection of disability rights tribunals, problem-solving courts, and TJ, *see*: Michael L. Perlin & Mehgan Gallagher, *Why a Disability Rights Tribunal Must Be Premised on Therapeutic Jurisprudence Principles*, 10 PSYCHO. INJ. & LAW, 244-253 (2017).

provide a therapeutic opportunity to assess relationships, detect strengths, provide the necessary support, and enhance the well-being of parents and children.[236]

As Stephens et al. suggest, a TJ approach in family court could more adequately fulfill the courts' primary mission of helping families and the expressed need of parents who participate in the proceedings and their representatives. Such TJ approach includes being adequately treated by judges, reduced caseload that would help professionals form closer relationships with the parents, attention to parents' trauma, a collaborative environment that includes the parents and considers their opinions, assisting parents in preparing for court hearings, avoiding punishing attitude, and celebrating accomplishments.[237]

Stephens et al. and Gal & Schilli-Jerichower point to the crucial role of judges and the importance of adopting TJ style judging, including acknowledging the parents' emotional reactions and their individuality, building relationships over time, compassion, and support.[238] Gal and Schilli-Jerichower add that a TJ-oriented definition of child neglect examines the full range of the child's changing needs and how these needs are satisfied rather than focusing on the parents' behavior or omissions.[239] Another TJ-related child welfare solution articulated by Brooks and Ronen is the practice of open adoption, as opposed to the more common closed adoption practice that does not answer the therapeutic needs of many children.[240]

Acknowledging the socio-legal nature of child welfare cases might also affect the prolongment of the proceedings for rehabilitation purposes, which is also one of TJ's characteristics portrayed in the conduct of community courts.[241] A socio-legal therapeutic jurisprudence approach would also challenge the practice of closing cases once parental care reaches a minimal threshold. Instead, it would require proceedings conclude only after establishing and monitoring long-term support systems. This ensures parents with disabilities

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[236] Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach*, 5 PSYCHOL. PUB. POL'Y & L. 951, 951-954 (1999); Kierstead, *supra* note 212; Stephens et al., *supra* note 1, at 493-494; Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72(3) IND. L. J. 775 (1997).

[237] Stephens et al., *supra* note 1, at 493-494.

[238] Id., at 294-495. For elaboration on TJ in family courts and child welfare issues, *see* Kierstead, supra note 297; Gal & Schilli-Jerichower, supra note 287, at 187, elaborating on the principles of therapeutic judging that have been developed in the context of problem-solving courts involving (1) the expression of empathy toward family members, including those accused of abuse or neglect; (2) using dialectic communication rather than lecturing; (3) involving relatives; (4) expressing satisfaction and happiness or disappointment and sadness according to the degree to which the parents achieved their therapeutic goals; and (5) addressing the family holistically.

[239] Gal & Schilli-Jerichower, *supra* note 287, at 184.

[240] Brooks & Ronen, *supra* note 17, at 31.

[241] Tali Gal & Hadar Dancig-Rosenberg, *Evaluating the Israeli Community Courts: Key Issues, Challenges, and Lessons,* INTERNATIONAL ANNALS OF CRIMINOLOGY, 1, 4 (2024).

have sustained success, prevents cyclical system re-entry, and transforms institutions from reactive to proactive entities.

Despite TJ's apparent relevance to child welfare, its implementation requires caution given disability rights advocates' concern that therapeutic discourse can undermine rights advancement.[242] Arstein-Kerslake and Black propose guidelines for TJ implementation that protect both disability rights and individual wellbeing.[243] Their approach aligns TJ with critical disability theory, prioritizing autonomy and preferences of people with disabilities while recognizing potential threats to dignity. In child welfare tribunals, this means balancing interdisciplinary collaboration with privacy rights - requiring attorneys to contribute to therapeutic outcomes while maintaining client confidentiality.[244]

While the tribunal's collaborative structure is valuable, its primary function remains dispute *management* rather than mere *resolution*, with parenting disability rights evolving through case adjudication. Given the fundamental rights involved, rights-promoting adversarial procedures should be the dominant approach, particularly for high-conflict cases, while maintaining other interest-based options.[245]

Attorneys, especially, must maintain ethical obligations to clients, even when collaborating with court teams or addressing broader community issues.[246] Given child welfare cases' tendency toward therapeutic interests and professional paternalism (as described in this Section above), the design requires careful checks and balances to prioritize rights promotion and establish specific ethical guidelines for legal representation that balance both legal and therapeutic objectives.

5. Resources

The fifth DSD component addresses *resources*. System design requires understanding available and potential resources for implementation and evaluation.[247] Within disability-

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[242] Anna Arstein-Kerslake & Jennifer Black, *Right to Legal Capacity in Therapeutic Jurisprudence: Insights from Critical Disability Theory and the Convention on the Rights of Persons with Disabilities,* 68 INT'L J.L. & PSYCHIATRY 1, 3 (2020). In this article, Arstein-Kerslake and Black have broadly addressed the use of TJ in disability rights cases, particularly in legal capacity. According to their findings, although TJ initially highlighted the importance of autonomy as enhancing wellbeing, over the years, legal capacity rights were often overlooked in the TJ process mainly due to the contradiction between therapy and disability rights. These precautions are also relevant for child welfare cases.

[243] *Id.*, at 4.

[244] *Id.*, at 8.

[245] Jennifer F. Lynch, *Beyond ADR: A System Approach to Conflict Management*, 17 NEGOT. J. 207 (2001).

[246] Arstein-Kerslake & Black, *supra* note 242, at 4.

[247] Amsler et al., *supra* note 7, at 35.

rights-based DSD, resource considerations encompass four key disability rights issues, beginning with accommodation cost justification.[248]

a. Legitimizing the Cost of Disability and the Necessary Accommodations

Since disability rights advancement necessitates resource redistribution,[249] designers must establish legitimacy for associated costs. Implementing a new or revised child welfare framework encompasses legislative changes, funding allocation for parent support services, and court rulings on budgetary matters affecting accessibility and accommodations. This underscores the importance of building an ideological foundation that validates parenting disability rights and justifies the requisite financial investments.

The legitimization and need for resource allocation to disability parenthood rights echoes Powell's writing on resource allocation for care.[250] As she writes, as a result of current policy, many people with disabilities (and their family members) lack access to paid care, pushing them to "choose" institutional solutions and further distancing them from society.[251] In child welfare cases, this lack of access to care work within the framework of the family results in the removal of children from their homes.

Public consent is crucial for resource allocation. As Braswell explains, this entails altering the able-bodied conception of parenthood[252] that requires an imaginary "super-competence" – a requirement that damages all parents, primarily parents with disabilities, who are perceived as inherently unfit for parenthood.[253] As explained in Section II.B.2.b., the false assumption regarding parental independence leads to a lack of public recognition for parental support, rendering parents who need or request such support incompetent and unfit. This approach

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[248] Rothler, *Designing Access to Justice, supra* note 9.

[249] Mor, *supra* note 51, at 628, 645. For a discussion on distributive justice and disability, see Ziv, *supra* note 165.

[250] Powell, *Care Reimagined, supra* note 52, at 1206. As Powell elaborated, supporting Fink's writing (Fink, *supra* note 135), this need to allocate resources addressing the needs of disabled people, their children, and care persons while advancing inclusivity and dignity is crucial for the next step in advancing disability rights in general. Powell addresses explicitly the practice of institutionalizing people with disabilities and argues that allocating significantly more funding for "home and community-based services", making it accessible for more people with disabilities, is not only legally mandated, but tends to be more cost-effective for states, better meat people's healthcare needs, increase employment for family members and reduce racial disparities. However, as she explains, acquiring these services is hindered by legal and bureaucratic impediments, placing significant burdens on people with disabilities, their families, and caregivers.

[251] *Id*., at 10.

[252] Braswell, *supra* note 187, addresses *motherhood*, arguing that the ableistic vision of parenthood mainly damages women.

[253] Id., at 240; Harris, *supra* note 4, at 17; ROSEMARIE GARLAND THOMSON, EXTRAORDINARY BODIES: FIGURING DISABILITY IN AMERICAN CULTURE AND LITERATURE 26 (1996).

primarily damages parents with disabilities.[254] Additionally, as elaborated by Francis, parenthood was never at the forefront of the struggle to advance disability rights, which focused on issues that were considered more pressing, such as employment, health care, housing, and legal capacity. It, therefore, failed to challenge parents' discrimination within the child welfare system.[255]

One way to achieve public consent is by adopting a different approach and definition of parenthood.[256] This first phase of acknowledging the importance of parenthood disability rights by adopting an alternative view of parenting is crucial to justifying resource allocation. The allocation of these resources will entail two main benefits: first, their preventive nature might render the need for child welfare legal intervention unnecessary. Second, their existence will support parenthood disability rights legislation, creating practical accommodation, assistance, and universalizing parenting rights. Without them, legal statutes will remain a dead letter. Empirical findings regarding the importance of preserving relationships with birth parents, even in situations and phases when they are unable to care for their children,[257] should also serve for the legitimization of parenthood disability rights.

Beyond explicitly recognizing resources needed for parenting disability rights, the design must address three additional components: support and assistance mechanisms, social and therapeutic resources, and disability-rights-oriented legal education.[258] These elements transform the ideological commitment to disability parenting rights into practical implementation.

b. Support and Assistance: Lessons from Legal Capacity

Support and assistance represent essential mechanisms for meaningful disability rights implementation, as recognized by the CRPD.[259] While accessibility provides foundational access (as described in Section II.B.4.a.), comprehensive personal support systems are crucial

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[254] Harris, *supra* note 4, at 17.

[255] Francis, *supra* note 3, at 31.

[256] *Id.*, at 31. As Francis notes, some organizations, such as the "Lurie Institute for Disability Policy," have started to devote their attention to reproductive and parenting issues.

[257] Vivec S. Sankaran & Christopher E. Church, *The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61(2) FAM. CT. REV. 246, 257-259 (2023).

[258] Rothler, *Designing Access to Justice, supra* note 9.

[259] CRPD, *supra* note 58, including in Article 23, "Respect for Home and Family".

for full participation and inclusion.[260] This dual framework establishes both 'negative' protections against oppression and 'affirmative' rights to support.[261]

The fact that parents with disabilities (like all other parents) require support and assistance in child-rearing is obvious. It was also acknowledged that for many parents, adequate support was the answer for acquiring parenting skills and caring for children[262] and that many times, support means are inadequate.[263] As explained in Section I.B., the question regards the *kind* of support and its *extent*: while some narrow, parental support was considered legitimate, extended types of support were rendered illegitimate, resulting in a denial of support and consequently, the removal of children from their homes. Additionally, as Glennon explains, the very structure of support plans might prove unfit for parents with mental disabilities, and they might also be reluctant to seek support for fear of being stigmatized.[264]

Therefore, when redesigning child welfare systems according to disability rights principles, it is essential to acknowledge parents' need for support and broaden our vision regarding the nature of this support.[265] As Francis suggests, given the similarities in the importance of their

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[260] CRPD, *supra* note 58, at the Articles concerning legal capacity (12(3)); fight against exploitation (16(2)); independent living (19(b)); family life (23(2) and (3)); education (24(2)(d) and (f), 3(a) and 4); work (27(1)(e)); participation in cultural life (30(4)); and participation in political and public life (29(a)(iii)).

[261] *See* Robert Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8, 9 (2012), for the salience of "support" as a disability rights mechanism throughout the CRPD. Abolishing the policing of families and replacing it with family support is a central claim made by Dorothy Roberts, *Why Abolition*, *supra* note 83, at 231.

[262] Glennon, *supra* note 15, at 291; Nicholson et al., *supra* note 82; Elizabeth Lightfoot & Tracy LaLiberte, *Parental Supports for Parents With Intellectual and Developmental Disabilities*, 49(5) INTELLECTUAL & DEVELOPMENTAL DISABILITIES 388 (2011); Elizabeth Lightfoot, Traci LaLiberte, & Minhae Cho, *Parental Supports for Parents with Disabilities*, 96(4) CHILD WELFARE 89 (2018). The researchers have reported that parents greatly preferred informal support, which is more emotional and flexible, over formal support, which they found overwhelming and confusing.

[263] Sharyn DeZelar & Elizabeth Lightfoot, *Parents with Disabilities: A Case Study Exploration of Support Needs and the Potential of a Supportive Intervention*, 100(3) FAMILIES IN SOCIETY 293 (2019), pointing to the fact that that the overall support networks of parents with disabilities were fragile. Also *see* Sharyn DeZelar & Elizabeth Lightfoot, *Enhancing Supports for Parents with Disabilities: a Qualitative Inquiry Into Parent Centered Planning*, 24(4) J. FAM. SOC. WORK 263 (2021) elaborating on the benefits of parents-centered planning intervention. Also see: Mary Baginsky, *How Parents With Learning Disabilities Lack Support Before, During and After Care Proceedings*, COMMUNITY CARE: https://www.communitycare.co.uk/2024/06/11/how-parents-with-learning-disabilities-lack-support-before-during-and-after-care-proceedings/ (last visited 4.2.25).

[264] Glennon, *supra* note 15, at 282, 296. In her article, Glennon provides examples for modifying support means to accommodate parents with mental disabilities (*Id*., at 296-300); Elizabeth Lightfoot & Sharyn DeZelar, *Parent Centered Planning: A New Model for Working with Parents with Intellectual and Developmental Disabilities*, 114 CHILD. & YOUTH SERVS. REV. (2020) introduced "parent-centered planning," which includes an individual's parenting desires and goals, along with the needs of the parent's child.

[265] For elaboration on the necessary support for parents with disabilities within the child welfare system, *see*: Powell, *Under the Watchful Eye*, *supra* note 85, at 2061-2064; Powell, *Abolitionist Approach*, *supra* note 85, at 97; Powell et al., *Examination of Appellate Decisions*, *supra* note 6, at 210; Melissa M. Ptaceka, Lauren D. Smitha, Robyn M. Powell a,b, & Monika Mitra, *Experiences With and Perceptions of the Child Welfare System During the Perinatal Period of Mothers With Intellectual and Developmental Disabilities*, JOURNAL OF PUBLIC CHILD WELFARE 1, 15-22 (2024); Sasha M. Albert &Robyn M. Powell, *Supporting Disabled Parents and Their*

depiction as constitutional liberties, the change that the field of *legal capacity* has undergone can and should inspire recognition of parental capacity and the provision of support for parental actions and decisions, as follows.[266]

The human right to legal capacity encompasses both legal personhood and legal agency, allowing individuals to participate in undertakings, transactions, and decisions about their lives. Following recent national and international policy and legislation reforms, the right to receive the necessary *support* in making those decisions has become inherent to the right to legal capacity.[267] "Support" is a broad term encompassing arrangements of varying types and intensities, aiming to enable legal capacity while respecting people's rights, will, and preferences.[268] Additionally, support systems must include safeguards to protect against abuse equally from others.[269]

As Francis articulates, while legal capacity is the person's right to make decisions regarding her life, parenting essentially entails a person's right to make decisions regarding *her child's* life.[270] Adopting the new paradigm for legal capacity for all, will, therefore, broaden the legitimization of disabled parenthood. Accordingly, Francis suggests that parenthood capacities should be viewed on a spectrum. As contemporary courts should favor limited guardianship, supported decision-making mechanisms, and tailored safeguards over plenary

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Families: Perspectives and Recommendations from Parents, Attorneys, and Child Welfare Professionals, 15(5) JOURNAL OF PUBLIC CHILD WELFARE 530, 534 (2021).

[266] Francis, *supra* note 3, at 32.

[267] CRPD, *supra* note 58, at Article 12(3); Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law, UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session (April 2014), at para. 16; Anna Arstein-Kerslake & Eilionóir Flynn, *The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law*, 20(4) INT'L J. HUM. RTS. 471, 476-477 (2016), defining means of support to exercise legal capacity.

[268] Arstein-Kerslake & Flynn, *supra* note 267, at 478. This broad definition of support includes formal state-operated support and informal support by family members or friends. Accordingly, a person should be able to choose one or more support persons to assist them with certain decisions, peer support or advocacy, including self-advocacy support, for other kinds of decisions, and assistance in communication in other instances. Given the pros and cons of each type of support, Arstein-Kerslake and Flynn suggest that best legal capacity systems should include a variety of supports, both formal and informal and that according to the General Comment's principles, the support will be tailored to each person's needs, or at least meet a range of different needs (General Comment No. 1, supra note 267, at para. 18). Close attention should be given to implementing supported decision-making mechanisms, ensuring they provide genuine choice and control rather than serve a bureaucratic purpose (Anna Arstein-Kerslake, Joanne Watson, Michelle Browning, Jonathan Martinis, & Peter Blanck, *Future Directions in Supported Decision-Making*, 37(1) DISABILITY STUD. Q. (2017).).

[269] General Comment No. 1, *supra* note 267, at para. 20; Determining adequate safeguards is a delicate task since the protection must respect the person's rights, will, and preferences (or at least, their best interpretation) (*Id*., at para 21), including the right to take risks and make mistakes (*Id*., at para 20).

[270] Francis, *supra* note 3, at 31.

guardianship,[271] so should the child welfare system allow for a limited exercise of parental duties rather than terminate parental relations.[272]

Currently, child welfare proceedings offer limited 'permanency' options for removed children: return to parent, adoption, placement with kin, or continued Social Services care. This binary approach - either full parental care or removal to foster care - fails to address the nuanced needs of parents with disabilities and their children. The system requires more creative, individually-tailored solutions that could include supported parenting arrangements or maintaining meaningful parental roles even when children reside elsewhere.

As mentioned above, a critical aspect of the new legal capacity paradigm is the right to receive support in exercising one's legal capacity. This aspect is vital to parenting since, as Francis notes, courts tend to consider parenting as a "solo operation" and, therefore, evaluate the skills of parents with intellectual disabilities without regard to the support that is available to them. Based on these assessments, they might terminate parental relations, stating that it is unreasonable to provide long-lasting support.[273]

Similarly, A recent British research has brought to light the court's and professionals' tendency to define situations of "substituted parenting" as one that justifies the separation of children from their parents. It happens when the authorities seem to think the support they have identified as necessary is too extensive. They consider the high level of support required to equate to "substituted parenting," which, they say, is detrimental as it confuses children as to who the parent is.[274]

Answering this difficulty is the path legal capacity legislation has paved in recent years. It prioritizes people's right to exercise their legal capacity according to their will and preferences while acknowledging their right to support in all aspects of their lives. It focuses on people with intellectual and mental disabilities, broadening the scope of instrumental and non-instrumental support. Since support – broadly defined - was determined as inherent to legal capacity, new support means can be legitimized for parenting, extending their scope from limited instrumental support usually provided for parents with physical disabilities to broad

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[271] Arstein-Kerslake & Flynn, *supra* note 267.

[272] Francis, *supra* note 3, at 32.

[273] Francis, *supra* note 3, at 26, 28. As she notes, the press of time, common in these kind of cases, may be particularly difficult for parents with intellectual disabilities, who may need more services, take longer to access these services and take longer to benefit from them (*Id*., at 26-27).

[274] Nadine Tilbury & Beth Tarleton, *Substituted parenting: What does this mean for parents with learning disabilities in the family court context?* UNIVERSITY OF BRISTOL, 2023.

care that includes emotional aspects and formal recognition of other significant adults such as family and caretakers, without jeopardizing the original parental connections.[275]

As Francis notes, supportive arrangements for parents might include extensive instrumental support of care, such as daily home services and communal living arrangements, opening new possibilities for meaningful parental involvement.[276] They can also include broad care support, such as acknowledging other adults' participation in child-rearing. Therefore, it holds the promise to influence the legitimization of disabled parenthood, broadening the definition of support to realize it and opening opportunities for delegating the exercise of parental decisions.[277]

c. Social, Therapeutic, and Care Resources

Therapeutic, care, and social resources are crucial in implementing disability rights within child welfare design. While acknowledging tensions between therapeutic approaches and disability rights,[278] therapeutic support often plays a significant role for parents with disabilities and their children. Therefore, system design must ensure accessible therapeutic and social resources aligned with disability rights principles.[279] Some of these resources can be accessed through existing public health and social institutions, minimizing additional budgetary impact.

This exhaustion of benefits and rights has the potential to have an immediate effect on parenting. For instance, housing benefits will help parents better care for their children. A father entitled to weekly counseling sessions will acquire more skills that reduce the need for intrusive actions. Similarly, disability benefits or other means of support for *children* help to alleviate the burden and stress from their parents.

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[275] Francis, *supra* note 3, at 33.

[276] *Id*.

[277] As Harris, *supra* note 4, at 17, explains, this delegation should not be viewed as different from the "conventional" delegation of the exercise of parental decisions to other people who care for the house and children, such as nannies or housecleaners. Consequently, parents with disabilities would not be stripped of their parental status if they cannot execute the tasks associated with that role.

[278] As mentioned in *supra* Section II.B.4.d.

[279] The lack of disability rights implementation in mental health systems was addressed by the World Health Organization (WHO), encouraging governments and policy-makers to transform mental health systems and base them on recovery, rights, and inclusion. The report focuses on policy reform, law, services, and building the capacity of stakeholders and groups to address stigma and discrimination and to implement rights-based approaches in mental health services and the community (*Mental Health, Human Rights and Legislation: Guidance and Practice,* WORLD HEALTH ORGANIZATION & OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, 2023). Glennon, *supra* note 15, at 283, also notes that parents with mental disabilities might encounter labor problems, which might lead to difficulties in attaining welfare assistance.

Social and therapeutic supports form vital infrastructure for child and family wellbeing. These include parental leave policies, healthcare access, social services, and benefits that ensure children's rights to proper nutrition, healthcare, parental care, and living conditions.[280] As Gal explains, support networks and institutions can provide parents with information, education, and assistance accessing rights and benefits.[281] Importantly, these services should be delivered respectfully, recognizing parents' capacity for growth and changing resource needs over time.[282]

However, while the exhaustion of therapeutic services for children within the child welfare system is trivial, suggesting those services for parents is more complicated. For example, as mentioned in Section I.B., parents might be reluctant to admit to having a disability, (rightfully) fearing that this might damage their chances of keeping their children. This practice of hiding the disability does not provide grounds for seeking and accepting assistance. Second, therapy for parents within the framework of a child welfare case might seem coercive, raising dilemmas regarding combining legal and therapeutic aspects, as discussed in Section II.B.4.d.[283]

Finally, social and therapeutic resources should also consider parents whose children were already removed from their care. Research has shown that those parents felt abandoned by the system, feeling angry, shocked, confused, and grieved, even suicidal and self-harming, over the removal of their children. Proper attendance to their needs would help to alleviate at least some of these negative consequences.[284]

d. Disability-Oriented Legal Education and Professional Training

The final resource component in Disability-Rights-Based DSD is *legal education and professional training*. While legal representation is crucial for accessing rights within child

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[280] Tali Gal, A *Socioecological Model of Children's Rights*, THE OXFORD HANDBOOK OF CHILDREN'S RIGHTS LAW 9 (2020).

[281] *Id*., at 12.

[282] As Francis notes, a significant theme in the case law is viewing intellectual disabilities as unchangeable despite evidence that supports their abilities to learn and develop capabilities with appropriate services (Francis, *supra* note 3, at 27).

[283] Stephens et al., *supra* note 1, at 493-494; Babb, *supra* note 90, suggesting that therapeutic attention should also be given to the parents and not only the children within the framework of TJ.

[284] Hunter et al., supra note 19.

welfare systems,[285] effective advocacy requires disability-conscious representatives committed to removing physical, communicational, and stigma-based barriers.[286]

Therefore, disability-sensitive legal education and rights training[287] for legal professionals (lawyers and judges)[288] represent a crucial resource for advancing parental disability rights. This education, deliverable through law schools and legal clinics,[289] should encompass disability studies theory, the evolution from medical to social approaches, disability rights principles, legislation, and an understanding of how people with disabilities interact with justice systems.[290]

Disability-oriented legal representation rests on fundamental knowledge of disability rights ('hard' knowledge) and expertise in managing client-lawyer relationships when disability is present ('soft' knowledge).

Powell broadly addressed the first, claiming that although the ADA has, so far, done little to protect disabled people's parenting rights (as elaborated in Section I.B.), when used correctly, it can serve as an essential tool for family law attorneys. Hence, she contends that family law practitioners must comprehensively understand the ADA's strengths and limitations.[291] This includes ensuring full and broad access to the courtroom, including physical

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[285] Ravit Alfandari, L*egal Advocacy for Parents in Child Protection: Not a Question of If, But a Question of How*, 49 BRIT. J. SOC. WORK 1601 (2019). While highlighting the legal advantages of being represented by a council, the research has also found the key role lawyers had in providing parents with emotional support and the positive evaluation of the representation by the welfare authority professionals.

[286] Mor, *supra* note 51, at 637. According to the American Bar Association (ABA) Model Rules of Professional Conduct, when an attorney represents a client "with diminished capacity," they "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client" (MODEL RULES OF PRO. CONDUCT R. 1.14 (AM. BAR ASS'N 2002). For recent comments regarding applying this provision and suggesting a revision in drafting legal ethics rules about the representation of clients with disabilities and mental health issues, *see* David R. Kanter, *"Normal"*, 33(3) S. CAL. REV. L. & SOC. JUST. 427 (2024). Kanter points to the need to involve therapeutic professionals in the drafting process, distinguish between different "diminished capacity" situations, and provide more meaningful education on this matter for law students as future lawyers, moving towards a "client-centered-representation".

[287] EILIONÓIR FLYNN, DISABLED JUSTICE? ACCESS TO JUSTICE AND THE UN CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITIES (2015), in the 5th chapter.

[288] Stephanie Ortoleva mentions the importance of training professionals, community education, and awareness in *Inaccessible Justice: Human Rights, People with Disabilities and the Legal System*, 17(2) ISLA J. Int'l & Comp. L. 281 (2011); for further claims regarding professional training, see Powell et al., *Examination of Appellate Decisions*, *supra* note 6, at 203.

[289] See generally, Damian J. Ortiz, *The Need to Make Clinical Teaching Mandatory as Part of the Experiential Methodology to Prepare Students for the Practice of Law in the Twenty-First Century*, 57(4) UIC LAW REVIEW 697 (2024).

[290] For elaboration regarding disability-oriented lawyers and law students, see Rothler, *Clinical Legal Education*, supra note 157, at 8-12; See also Boulding & Brooks *Trying Differently*, *supra* note 207; Voula Marinos & Lisa Whittingham, *The role of Therapeutic Jurisprudence to Support Persons with Intellectual and Developmental Disabilities in the Courtroom: Reflections from Ontario, Canada*, 63 INT'L J. L. & PSYCHIATRY 18 (2019); Henry Dlugacz & Christopher Winner, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 4 (2011).

[291] Powell, *Family Law, supra* note 2, at 38.

access,[292] communication access, and nondiscriminatory conduct.[293] Additionally, lawyers must provide accommodations for clients in their offices to ensure the client's full participation in the representation.[294] Powell concludes that attorneys should use three main strategies to ensure that the rights of parents with disabilities are protected: raise the ADA early and often, educate the courts by providing social science evidence regarding misconceptions about parents with disabilities, and make sure that judges base their decision on the individual's circumstances as required by the ADA and not on prejudice and bias;[295] and partner with disability rights organizations.[296] As Powell elaborates, attorneys should advocate for more training on parents with disabilities and the ADA for judges and court personnel.[297] The importance of educating child welfare professionals and developing coordinated and comprehensive treatment services was also addressed by Glennon[298] as a means to diminish discrimination and prejudice against parents and the misapplication of the ADA in the child welfare arena.

This professional education is particularly crucial given children's frequent interactions with foster parents, welfare officials, attorneys, and judges. When these actors maintain ableist perspectives toward parents with disabilities, their attitudes may influence children's views, creating additional barriers to reunification and undermining disability rights-based solutions. This concern extends to cases involving young children whose attorneys may present positions on their behalf, making it essential that these legal representatives embrace disability rights frameworks to prevent perpetuating systemic discrimination.

The second foundation of a disability-oriented representation is "soft" knowledge regarding the client-lawyer relationship in the presence of a disability. Boulding and Brooks addressed this issue broadly and asserted that representation in disability-related legal systems[299] should aim to foster positive and relationship-centered lawyer-client relationships[300] based on accessibility, with particular attention and respect to the client's wishes regarding the legal

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[292] *Id*., at 44.

[293] *Id*., at 45.

[294] *Id*., at 46. Powell mentions the National Council on Disability (NCD *Rocking the Cradle*, *supra* note 2) finding that even though Title III of the ADA mandates private attorneys to provide clients with disabilities reasonable accommodations since attorneys are generally required to absorb the costs of accommodations, they may decline these kind of cases, justifying the declining on other grounds.

[295] *Id*., at 44, 47.

[296] *Id*., at 46

[297] *Id*., at 47, mentioning NCD *Rocking the Cradle*, *supra* note 2.

[298] Glennon, supra note 15, at 292.

[299] Boulding & Brooks *Trying Differently*, *supra* note 207, at 451. Also, *see generally* Brooks & Madden, *Relationship Centered Lawyering*, *supra* note 157.

[300] Boulding & Brooks *Trying Differently*, *supra* note 207, at 450.

procedure.[301] Powell et al. further elaborate on attorneys' need for a profound understanding of mental health, including assisting clients beyond litigation and their role in access to additional legal services that the parents may require.[302]

Rovner[303] shed light on the way litigation, which is aimed at defining and shaping the disability in a way that is compatible with the ADA (or other relevant legislation) and the theory of the case, may be antithetical to the way the client sees herself, and therefore harm the genuine identity of disabled people.[304] Applying her scholarship on child welfare cases draws two main conclusions: one, that parents should be given complete information and be consulted regarding the way their disability is portrayed in the litigation; the second, that child welfare cases (as opposed to cases where compensatory damage is at the focus) may provide grounds for litigation that acknowledges the disability and the difficulties that might arise from it, on the one hand, while still stressing positive aspects regarding the person, not just for the sake of being politically correct but as the case's strategy, which requires putting the parents' strengths at the front.

Given the intersectionality of disability and poverty,[305] lessons of representation can be learned from the practice of "poverty-informed social work" and poverty-informed lawyering. This paradigm calls for professionals to stand alongside their clients and empower their fight. It calls for culturally sensitive representation, acknowledging the power differences between the lawyers and their clients. This kind of sensitivity sheds a different light on clients' behaviors, such as reluctance to cooperate, delay, or hiding information. It views the professional-client relationship as an arena that can enhance these power differences or social justice and asks lawyers to choose the latter.[306]

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[301] *See* Perlin and Weinstein, *supra* note 208, at 78. Litigating and judging in child welfare cases can also be very stressful and expose professionals to vicarious trauma. For a recent special issue on judicial and lawyer well-being and stress, see volume 31(3) PSYCHIATRY, PSYCHOLOGY, AND THE LAW, 2024.

[302] Powell et al., *Parents with Psychiatric Disabilities*, *supra* note 29, at 95-105. As they note, such assistance includes taking more time to explain the legal process, assisting with administrative tasks, and coordinating with other supports and services, including access to legal assistance in other areas.

[303] Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, UTAH L. REV. 247 (2001).

[304] Drawing from Martha Minow's writing on the way identity is shaped through relationships (MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW 30-58 (1997); Martha Minow, *Identities*, 3 YALE J. L. & HUMAN. 97 (1991)).

[305] *See*, for example, Glennon, *supra* note 15, at 292, explaining that poverty (and race) are risk factors for parents with mental illnesses who are involved in the child welfare system. This is because they must turn to the public system for assistance, thus risking separation from their children. Also *see* DOROTHY ROBERTS, SHUTTERED BONDS: THE COLOR OF CHILD WELFARE 16-19 (2002); and Powell, *Abolitionist Approach*, supra note 85, at 92.

[306] MICHAL KRUMER-NEVO, RADICAL HOPE: POVERTY-AWARE PRACTICE FOR SOCIAL WORK (2020).

As elaborated in Section II.B.4.d., apart from these aspects of representation, it is vital to address the unique position of parents' attorneys in child welfare cases, which sometimes call for enhanced collaboration with the welfare authorities for the overall well-being of the family – parents and children alike. It is, therefore, essential to develop special ethical rules that will allow lawyers to collaborate with the welfare authorities, therapeutic professionals, and guardians regarding the children, keep parents' authentic voices at the forefront of the case, and follow rules of zealous advocacy.

6. Successfulness, Accountability, & Learning

Aligned with its practice-oriented approach, DSD concludes with an evaluation component: its sixth element centers on *successfulness*, *accountability*, and *learning*. For stakeholders to develop confidence in and utilize the dispute system, they require comprehensive information about its effectiveness.[307] The evaluation must encompass and critically examine all five preceding elements: goals, stakeholders, context and culture, process and structure, and resources[308] while progressing beyond mere conceptual translation to a dedicated commitment to achieving its multifaceted objectives.[309]

Essentially, an effective system accomplishes its intended goals. Consequently, the evaluation will be intricately linked to the system's specific objectives, assessing their impact on addressing individual child welfare conflicts, including prevention, management, and resolution.[310] However, by disability-rights-based DSD guidelines,[311] successfulness extends beyond immediate conflict resolution. It should also be defined by the system's capacity to achieve broader parenting goals, such as developing supportive mechanisms for parents, strengthening parental relationships, elevating public understanding of disabled parenting's advantages and significance, and dismantling the pervasive stigma and bias prevalent in this domain.

The assessment must thoroughly investigate the design's universal applicability and accessibility, particularly for parents with diverse disabilities, with special attention to those with mental and intellectual disabilities. It should ensure that beyond resolving specific disputes, the system contributes to developing constructive and positive approaches for the future collective benefit of individuals with disabilities. The evaluation should examine

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[307] Amsler et al., *supra* note 7, at 86.
[308] Smith & Matinez, *supra* note 8, at 132-133.
[309] Rogers et al., *supra* note 7, at 320
[310] Amsler et al., *supra* note 7, at 88 and 130, noting that measuring conflict prevention is challenging.
[311] Rothler, *Designing Access to Justice, supra* note 9.

whether each dispute is comprehensively settled and serves as a learning opportunity, ultimately aiming to advance parenthood rights. An additional critical aspect of a successful design is incorporating disability rights and disability consciousness within judicial discourse.

All parenthood policies, legislation, and tribunals should undergo rigorous evaluation through the lens of disability rights principles. The assessment team must include parents with disabilities who have personally navigated child welfare legal proceedings alongside other pertinent stakeholders. The evaluation should systematically and comprehensively scrutinize the system's success in achieving disability rights and parenthood goals while adhering to broader DSD considerations. These include minimizing transaction costs, ensuring outcome satisfaction across participants, fostering disputant relationships, and addressing dispute recurrence.[312] The system should implement continuous assessment mechanisms that enable judges to re-evaluate periodically and, if necessary, correct their decisions.

Addressing the *accountability* dimension of the DSD assessment requires a deep examination of the willingness to accept responsibility and be answerable for actions. This involves exploring the intricate relationships between the system's designer and its oversight body and between system managers and stakeholders.[313]

Effective system accountability demands a balanced and equitable approach to responsibility across all participants in child welfare proceedings. It requires that the mechanisms for ensuring compliance and adherence apply uniformly without privileging any group of actors. When accountability is used inconsistently, it undermines the fundamental integrity of the dispute-resolution process, creating power dynamics that can obstruct meaningful engagement and comprehensive problem-solving. The ideal system should establish a framework where all participants - parents, institutional actors, professionals, and support services - are equally subject to the same accountability standards, fostering a more just and transparent approach to addressing child welfare challenges.

On a functional level, equitable accountability will dramatically diminish existing power imbalances and help alleviate feelings of marginalization and unequal treatment among parents, avoiding their systematic disengagement, feeling unheard, disempowered, and increasingly alienated from the system designed to support them.

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[312] Amsler et al., *supra* note 7.
[313] *Id*., at 75.

Initially, the child welfare system's diverse operators - including professionals, policymakers, and parents with disabilities - must verify that child welfare cases are handled in strict accordance with disability rights principles. This verification must now explicitly include mechanisms to ensure institutional accountability, creating reciprocal responsibility among all system participants. Subsequently, system designers must identify opportunities for continuous improvement, drawing insights from accumulated case-by-case knowledge. Furthermore, designers should facilitate user understanding by disseminating information on system operations to people with disabilities and professionals in an accessible manner,[314] ensuring transparency in information processes.[315]

These strategic steps aim to enhance the system's credibility, foster trust in its processes, amplify the cooperation and participation of people with disabilities and professionals, and encourage ongoing feedback.[316] When executed effectively, these measures would justify the continued resource investment in system development and promote a more comprehensive realization of parenthood disability rights and support measures.[317]

The learning component serves as the concluding element of this final DSD stage. Guided by learning principles, the system should transcend mere dispute processing. It must incorporate an educational and training mechanism for all stakeholders, generating a dynamic learning process from accumulated knowledge to advance parenthood disability rights.

CONCLUSION

This article addresses the persistent challenge of implementing disability rights within child welfare proceedings, offering a novel, practical framework for systemic reform by applying the Disability-Rights-Based Dispute System Design. The analysis reveals how current child welfare systems often fail to meaningfully incorporate disability rights principles despite existing legal protections, leading to discriminatory outcomes for parents with disabilities.

The article's primary contribution is bridging the gap between theoretical disability rights and practical implementation in child welfare settings. Applying the Disability-Rights-Based DSD framework provides a structured reform approach that addresses preventive

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[314] *Id.*, at 37.
[315] Smith & Matinez, *supra* note 8, at 132-133.
[316] *Id*.
[317] Amsler et al., *supra* note 7, at 74.

measures and judicial proceedings. This comprehensive framework encompasses several key innovations.

A fundamental aspect of this framework is its reconceptualization of parenting and disability. It moves beyond the traditional focus on functional care to embrace broader concepts of interdependence and relational parenting. This shift challenges the prevailing tendency to view parents with disabilities in isolation and instead recognizes the legitimate role of support networks in all parenting contexts.

The framework provides practical guidance for implementing disability rights at multiple levels of the child welfare system. It emphasizes developing early intervention and support mechanisms to prevent unnecessary court involvement while restructuring court processes to ensure meaningful accessibility and accommodation. It calls for creating comprehensive support systems that legitimize various forms of assistance without stigmatizing parents, establishing disability-conscious professional training and education, and implementing robust accountability measures to ensure ongoing system improvement.

Notably, the framework addresses the complex balance between therapeutic and rights-based approaches in child welfare. It demonstrates how therapeutic jurisprudence principles can be incorporated while maintaining strong protections for parental rights and avoiding the pitfalls of medical model approaches to disability.

The implications of this redesign extend beyond parents with disabilities. By adopting universal design principles and emphasizing accessible, supportive approaches to family preservation, the framework has the potential to benefit all families involved in the child welfare system, particularly those from marginalized communities. It promotes a more nuanced understanding of family support needs and challenges the binary thinking that often characterizes child welfare decision-making.

This framework provides a roadmap for concrete policy reform and system redesign. Its emphasis on prevention, support, and rights-based intervention offers a promising path toward a more equitable and effective child welfare system. The ultimate goal of this redesign is to create a child welfare system that truly serves its intended purpose: supporting families and maintaining children's well-being while respecting the fundamental rights and dignity of parents with disabilities. This article contributes to the broader project of creating more just and inclusive social institutions by providing practical tools for achieving this balance.

DISCUSSION AND CONCLUSIONS

This research introduces the innovative Disability-Rights-Based Dispute System Design (DR-DSD) framework, offering a novel approach to enhancing access to justice for people with disabilities, particularly in legal capacity and child welfare proceedings. The DR-DSD framework contributes significantly to both disability rights and dispute management by systematically integrating disability rights principles into dispute system design, addressing long-standing barriers to fully implementing disability rights in critical areas.

Key Contributions and Impacts

1. **Bridging Theory and Practice**: This work bridges the crucial gap between disability rights theory and real-world practice. Providing practical frameworks for redesigning legal and social systems offers tangible approaches for translating disability rights principles into actionable measures. This pragmatic orientation addresses a persistent challenge in the field, moving from abstract concepts to concrete improvements in the lives of people with disabilities and in their access to justice.
2. **Systemic Reforms**: The proposed reforms offer concrete strategies for shifting from substituted to supported decision-making models in legal capacity cases and creating more inclusive, family-centered approaches in child welfare proceedings. These changes represent a significant step towards more equitable and rights-respecting systems.
3. **Universal Design Principles**: The framework's emphasis on universal design principles suggests that these reforms could benefit all justice system users, not just those with disabilities, by creating more flexible, responsive, and user-centered processes.
4. **Interdisciplinary Integration**: An essential contribution lies in the seamless integration of dispute management theory with disability rights goals. This synthesis expands the traditional conception of access to justice, encompassing the design of social systems and institutions that profoundly impact the rights and experiences of people with disabilities, and prevent injustices.

5. **Broader Applicability**: While rooted in disability rights, the DR-DSD approach serves as a model for integrating other human rights principles into the design of dispute management and social service systems. Its potential reaches beyond the specific domains explored, promising broader applications across various social policy and governance fields.

Implications and Future Directions

The impact of this work extends beyond theoretical contributions, offering practical tools for policymakers, system designers, and advocates. It represents a significant step forward in creating more inclusive, accessible, and rights-respecting systems for people with disabilities. It provides a template for rights-based approaches in other areas of social policy.

This research contributes to broader efforts to enhance access to justice and promote more equitable and inclusive legal systems for all by influencing policy development and legal reform efforts across multiple jurisdictions. It encourages a deeper examination of how justice systems operate and interact with diverse populations, moving beyond surface-level accommodations to consider more fundamental reforms.

While the full impact of this approach remains to be seen and tested in practice, the methodologies and insights presented aim to contribute to ongoing efforts to operationalize human rights principles through system design. They offer a possible model for addressing the complex challenges of realizing disability rights in concrete settings.

As societies grapple with implementing disability rights, the DR-DSD framework provides valuable perspectives and tools. By proposing a method to reimagine legal and social systems through a disability rights lens, this work contributes to the broader dialogue on creating more just, inclusive, and equitable societies. It provides a foundation for future research and practical applications in enhancing access to justice for people with disabilities and for all.

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נגישות לצדק עבור אנשים עם מוגבלות: גישת עיצוב מערכת הסכסוך

תקציר

אנשים עם מוגבלויות, בישראל וברחבי העולם, מתמודדים עם אפליה, הדרה, וסטיגמה. לאורך העשורים האחרונים פותחו כלים משפטיים שמטרתם לקדם שוויון זכויות של אנשים עם מוגבלויות, אולם השפעתם בפועל של כלים אלה על שוויון זכויותיהם של אנשים עם מוגבלויות והשאת רווחתם, מצומצמת. זאת, בין השאר, בשל חוסר נגישות למערכת המשפט ולצדק. המחקר מתמקד בבעיה זו של חוסר נגישות לצדק ומציע דרך חדשנית להתמודד עמה, באמצעות פיתוח מסגרת אנליטית בעלת אופק יישומי רחב.

המהלך המחקרי פותח בבניית המסגרת האנליטית. זאת באמצעות הצגת שיטת ״עיצוב מערכת הסכסוך״ (DSD – Dispute System Design) כמסגרת בעלת פוטנציאל לניהול סכסוכים באופן צודק ואפקטיבי. על מנת להגביר את האפקטיביות והרלוונטיות של מסגרת זו לסכסוכים הקשורים למוגבלות, המחקר יוצק תוכן של זכויות אנשים עם מוגבלויות לתוך ששת האלמנטים של DSD (מטרות, בעלי עניין, הקשר ותרבות, תהליך ומבנה, משאבים, והצלחה, אחריותיות ולמידה). התוצאה של מהלך זה היא פיתוח ״עיצוב מבוסס מוגבלות של מערכת סכסוך״, עיצוב המכוון להתמודד עם המכשולים לנגישות של אנשים עם מוגבלויות לצדק. המחקר מפרט את יתרונותיו האוניברסלים של עיצוב זה, אשר הופכים אותו לרלוונטי גם לארגונים ומנגנונים שאינם בהכרח קשורים למוגבלות.

על בסיס עקרונותיו של עיצוב זה, מפרט המחקר את יישומו בשני תחומים מרכזיים הקשורים לזכויות אנשים עם מוגבלות, אשר קיימת בהם הדרה, אפליה וסטיגמה: כשרות משפטית והורות. המחקר מתאר את המצב הקיים בתחומים אלה, את הכוחות השונים הפועלים במסגרתם, את הקונפליקטים והאפליה, ועל בסיס כל אלה מציע עיצוב מחודש של המערכות הקשורות לכשרות משפטית והורות, באופן שיקדם באופן אפקטיבי זכויות אנשים עם מוגבלות.

המאמר הראשון “Designing Access to Justice: A Disability-Rights-Based Dispute System”[1] מציג את חוסר הנגישות של אנשים עם מוגבלויות לצדק ומתווה את הפתרון המוצע – ״עיצוב מערכת סכסוך מבוססת מוגבלות״.

״נגישות לצדק״ הוא מושג המדגיש את הפער בין עקרון השוויון בפני החוק לבין יכולתן האפקטיבית של קבוצות שונות להנות מזכויות חוקיות. הטענה המרכזית העומדת בבסיסו של רעיון הנגישות לצדק היא כי גישה בלתי שוויונית למערכת המשפט סותרת את עקרון ההגנה השוויונית בפני החוק ופוגעת ביכולתם של פרטים וקבוצות לממש את זכויות היסוד שלהם. לפיכך, יש לזהות ולהסיר את החסמים העומדים בפני קבוצות אלה בבואן לקבל סעד ממערכת המשפט.

אנשים עם מוגבלות, כקבוצה, מתמודדים עם מכשולים ואתגרים מובהקים בבואם לממש נגישות למערכת המשפט ולצדק: אפליה, הדרה, סטיגמה, וחוסר נגישות למקומות ושירותים דוחקים אותם למוסדות ייעודיים ולשולי החברה, הרחק משולחנות קבלת ההחלטות ועיצוב המדיניות

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[1] Roni Rothler, *Designing Access to Justice: A Disability-Rights-Based Dispute System*, 29(1) HARV. NEGOT. L. REV. [forthcoming].

החברתית והמשפטית. ״זכויות אנשים עם מוגבלויות״ הוא הכלי המשפטי אשר אמור לשנות, ולמצער, לשפר, את המציאות הזו.

אולם, על אף התפתחויות חברתיות ומשפטיות בתחום, בפועל אנשים עם מוגבלויות ממשיכים להיתקל במכשולים משמעותיים בדרכם למימוש מלא של זכויותיהם. גם בניהול הליכים משפטיים אשר קשורים הדוקות למוגבלות, כגון בתחומי קצבאות הביטוח הלאומי, נזיקין, בריאות הנפש, הורות וכשרות משפטית, עדיין קיים חסר ביישום עקרונות הקשורים לזכויותיהם של אנשים עם מוגבלויות. מציאות זו משקפת את הקושי הבסיסי שבנסיון לשנות שיטות משפט קיימות ולהתאימן לשיח זכויות האדם.

המאמר מציע גישה חדשה לטיפול בבעיית יישומן של זכויות אנשים עם מוגבלויות ולהגברת נגישותם של אנשים עם מוגבלות לצדק. לשם כך, המאמר מציע להשתמש במנגנוני ניהול סכסוכים ולאמץ באופן ספציפי את ״עיצוב מערכת הסכסוך״ (Dispute System Design - DSD), מסגרת אנליטית לפיתוח ועיצוב מקיף של מערכות לניהול, מניעה ויישוב סכסוכים. בהתאם לעקרונות המסגרת, ניתן לעצב כל מערכת (כגון מקומות עבודה, ארגונים, ואף מדינות) בהתאם לשישה מרכיבים: 1) מטרות, 2) בעלי עניין, 3) הקשר ותרבות, 4) תהליך ומבנה, 5) משאבים ו-6) הצלחה, אחריותיות ולמידה.

בהתבסס על היסודות של גישת ״עיצוב מערכת הסכסוך״, אשר אחד מעקרונותיה המוצהרים הוא השאיפה להשיא צדק, המאמר מציע לשלב בתוך ה-DSD עקרונות של זכויות אנשים עם מוגבלות, כגון תשומת לב לחסמים מבניים, נחיתות היסטורית, שוויון, עיצוב אוניברסלי, נגישות, תמיכה, טיפול, ותרבות של מוגבלות. שילוב זה מומשג במסגרת המאמר כ״עיצוב מבוסס מוגבלות של מערכת הסכסוך״ (״Disability-Rights-Based Dispute System Design״). העיצוב מעודד חשיבה מחודשת על תחומים משפטיים אשר משפיעים באופן מהותי על חייהם של אנשים עם מוגבלות, ויש בו גם יתרונות אוניברסלים לעיצוב מחדש של מערכות כלליות, בעיקר כאלה המבוססות על הירככיות והיסטוריה של אפליה.

המאמר השני ״Access to Legal Capacity - A Disability-Rights-Based Design״,[2] מבוסס על ״עיצוב מבוסס מוגבלות של מערכת הסכסוך״ תוך התמקדות בתחום הכשרות המשפטית, אחת הסוגיות הבוערות בתחום זכויותיהם של אנשים עם מוגבלויות כיום. בבסיסה, כשרות משפטית מגלמת את יכולתו של האדם לקבל החלטות הנוגעות לכל היבט בחייו. ככזו, היא מספקת את התשתית לכל זכויות האדם האחרות. בהתאם לחקיקה מתקדמת (בינלאומית ומקומית), הזכות לכשרות משפטית כוללת גם את הזכות לקבל את התמיכה הדרושה לאדם לצורך קבלת החלטות.

המשפט מאפשר להגביל ואף לשלול כשרות משפטית על בסיס תפיסה של חוסר יכולתו של אדם לקבל החלטות, וכתוצאה מהצורך להגן על הפרט או על סביבתו באמצעות מנגנוני קבלת החלטות חלופיים (ובראשם אפוטרופסות). הליכים שמטרתם הגבלת כשרות משפטית מתקיימים בדרך כלל לגבי אנשים זקנים החווים הידרדרות קוגניטיבית, וכן אנשים עם מוגבלות, בעיקר מוגבלות שכלית, נפשית ואוטיזם. לאורך השנים, הקבילו חוקרים את שלילת הכשרות המשפטית ל״מוות אזרחי״, והעלו חששות כבדים בנוגע להשלכותיה של הגבלה זו על נגישותם של אנשים עם מוגבלות לצדק.

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[2] Roni Rothler, *Access to Legal Capacity: A Disability-Rights-Based Design*, 40(1) OHIO ST. J. DISP. RES. (2024).

השקפות אלה הניעו רפורמות מדיניות וחקיקה, בינלאומיות ומקומיות, תוך הדגשת הזכות האוניברסלית לכשרות משפטית וקבלת החלטות, הכוללת גם את הזכות לסיוע ותמיכה במימושה. הרפורמה מציגה שינוי פרדיגמה ואיזון מחודש בין עקרונות של אוטונומיה והגנה, תוך הדגשת חשיבותם של הרצון וההעדפות האישיות של כל אדם. ביטויה הבולט ביותר של הרפורמה הוא סעיף 12 של האמנה הבינלאומית בדבר זכויותיהם של אנשים עם מוגבלויות. עם זאת, ולצד עיגון חקיקתי רחב של הרפורמה, יישומה בפועל עורר מחלוקות מהותיות. הדיון הנוכחי – הן ברחבי העולם והן בישראל - מתמקד בעיצוב הנכון של מדיניות, חקיקה והערכאות העוסקות בכשרות משפטית בהתאם לפרדיגמה החדשה הממוקדת באוטונומיה, ובכלים המתאימים לאיזון בין כיבוד רצונו והעדפותיו של הפרט לבין הגנה עליו בשם טובתו.

המאמר מזהה מספר חסמים מרכזיים המעכבים את יישום עקרונות הכשרות המשפטית לאנשים עם מוגבלויות, ובהם: מערכות מושרשות של קבלת החלטות חלופית, תפיסות מוטעות לגבי מהות קבלת ההחלטות הנתמכת, אתגרים מעשיים ביישום מערכות תמיכה מגוונות, התנגדות לשינוי מצד בעלי עניין שונים, והיעדר תשתיות, מומחיות ומשאבים מספקים ליישום יעיל של מערכות מורכבות אלו.

בהמשך לזיהוי החסמים הללו, המחקר עוסק בעיצוב מפורט של מדיניות, חקיקה וערכאות משפטיות בתחום הכשרות המשפטית תוך התייחסות לששת האלמנטים של "עיצוב מבוסס מוגבלות של מערכת הסכסוך". הוא מציע הן קווי מתאר כלליים והן רפורמות מבניות ספציפיות המבוססים על עקרונות של כשרות משפטית, ההתנגדות שעלתה לגבי יישומם, והפתרון המעשי-אידיאולוגי המצוי במסגרת "עיצוב מערכת סכסוך מבוסס מוגבלות" ויישומו הספציפי בתחום הכשרות המשפטית.

המאמר השלישי, "Designing Child Welfare Dispute Systems: A Framework For Enhancing Parenthood Disability Rights",[3] עוסק בסוגיה בוערת נוספת בחייהם של אנשים עם מוגבלות – ההורות. הליכים משפטיים העוסקים בהורות מתקיימים כאשר רשויות המדינה מתערבות ביחסי הורה-ילד, בדרך כלל על בסיס הזנחה או התעללות בילדים. בדומה מאוד לכשרות משפטית, גם בהליכים אלה מתקיים מתח בין עקרונות של הגנה לעקרונות של אוטונומיה. מחקרים עדכניים מצביעים על שכיחות רבה של הורים עם מוגבלויות (ובעיקר מוגבלות שכלית ונפשית) המעורבים בהליכים אלה. שכיחות זו קשורה לקשיים שחווים חלק מההורים עם מוגבלות המשפיעים על יכולותיהם ההוריות הפיזיות, השכליות והנפשיות. לצד זאת, מחקרים מצביעים על כך שגורמים אחרים (כגון מצב סוציו-אקונומי, סטיגמה, פחד לבקש עזרה והיעדר תמיכה חברתית ומוסדית) - ולא המוגבלות – הם המנבאים הישירים של הזנחת ילדים.

סעיף 23 לאמנה הבינלאומית בדבר זכויותיהם של אנשים עם מוגבלות מתייחס לסוגיה זו, ומחייב את המדינות אשר חתמו על האמנה להבטיח שוויון לאנשים עם מוגבלויות גם בתחומי המשפחה וההורות. עם זאת, בפועל, זכויותיהם של אנשים עם מוגבלויות אינן נדונות לעומק בהליכים המשפטיים העוסקים בהורות, הן בישראל והן ברחבי העולם. זאת ועוד, בניגוד לתחום הכשרות המשפטית, אשר עבר רפורמה חקיקתית נרחבת (כמתואר לעיל) הקשר בין זכויות אנשים עם מוגבלויות לבין הליכים משפטיים בתחום ההורות לא זכה לתשומת לב והכרה מספקת.

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[3] Roni Rothler, *Designing Child Welfare Dispute Systems: A Framework for Advancing Parenthood Disability Rights*, 24(2) CONN. PUB. INT. L.J. [forthcoming].

המאמר השלישי מתייחס לסוגיה זו ומציג שני חסמים עיקריים ליישום זכויותיהם של אנשים עם מוגבלות בתחום ההורות: הראשון הוא ההתייחסות הרווחת להורות כמשימה תפקודית אישית, תוך התעלמות ממרכיבים של צמיחה, חשיבותן של מערכות יחסים, והמערכות החיצוניות המשפיעות על יחסי ילד-הורה (כגון מערכות מוסדיות, מקומות עבודה, מערכות רווחה, ורגולציה מדינתית). החסם השני הוא הגישה האדוורסרית הרווחת בהליכים המעמידה את ההורים כנגד ילדיהם, ואשר בבסיסה הנחה לפיה המוגבלות בדרך כלל עומדת בניגוד לטובת הילד. חסמים אלה עומדים בלב היעדר היישום של זכויות אנשים עם מוגבלויות בתחום ההורות.

בהתבסס על הבנות אלה, המאמר מציע להשתמש ב"עיצוב מבוסס מוגבלות של מערכת הסכסוך" לצורך עיצוב מערכות והליכים סוציו-משפטיים בתחום ההורות. עיצוב זה ממוקד בבעיית היישום של זכויות הורים עם מוגבלות, תוך מתן דגש על עקרונות של נגישות לשירותים ולבית המשפט, תלות הדדית של ההורים והילדים, פתיחות לגיוון תרבותי בהורות, וחשיבותן של מערכות תמיכה חיצוניות. ניתוח ההליכים מנקודת מבט זו מספק פלטפורמה לעיצובם מחדש באופן שמרחיב את אפשרויות התמיכה ומאפשר הורות של אנשים עם יכולות מגוונות. אחד מהעקרונות המרכזיים בעיצוב הוא עקרון המניעה, המשתקף בשאיפה לזהות ולטפל בבעיות פוטנציאליות בשלב מוקדם, במטרה למנוע הסלמה של סכסוכים ולצמצם את הצורך בהתערבות משפטית, תוך יצירת סביבה תומכת יותר עבור משפחות.

שלושת המאמרים מציגים מסגרת חדשנית ומקיפה להתמודדות עם האתגרים העומדים בפני אנשים עם מוגבלויות במסגרתן של מערכות חברתיות-משפטיות, וכתוצאה מכך, לקדם את נגישותם לצדק ואת השתתפותם המלאה בחברה. ביחד, הם מהווים מכלול מחקרי המתפתח באופן הדרגתי. המאמר הראשון מניח את התשתית התיאורטית והמעשית של "עיצוב מבוסס מוגבלות של מערכת הסכסוך". המאמרים השני והשלישי מיישמים ומרחיבים את המסגרת הזו בשני תחומים ספציפיים - כשרות משפטית והורות - תוך הדגמת הפוטנציאל והאתגרים ביישום הגישה. כל מאמר מתבסס על התובנות של קודמו ומעמיק את ההבנה של האופן שבו ניתן ליישם את העקרונות הללו במערכות משפטיות וחברתיות מורכבות.

המחקר מציע תרומה משמעותית לתחום זכויות אנשים עם מוגבלויות ולתחום ניהול הסכסוכים. הוא מספק כלים מעשיים לעיצוב מחודש של מערכות, לא רק בתחום המשפט אלא גם בתחומי מדיניות, חקיקה, חינוך משפטי, ואף יצירת טריבונלים חדשים.

חשיבותו של מחקר זה טמונה ביכולתו לגשר על הפער בין אידיאלים של זכויות אנשים עם מוגבלויות לבין יישומם בפועל. הגישה המוצעת מספקת כלים מעשיים לעיצוב מחדש של מערכות משפטיות וחברתיות, תוך התמודדות עם חסמים מבניים ותפיסתיים.

בניגוד לגישות רווחות למשפט המתבססות על **תגובה** לבעיות קיימות, המחקר מציע גישה **תכנונית** המבקשת לעצב מראש מערכות כך שיהיו נגישות ומותאמות לאנשים עם מוגבלויות, תוך התבססות משמעותית על עקרונות של זכויות, משפט וצדק. גישה זו גם מהווה אלטרנטיבה למתודות של ניהול סכסוכים המתמקדות בעיקר במערכות יחסים ובהשגת מטרות ניהול הסכסוך, שכן היא מציעה פרספקטיבה רחבה יותר על תפקיד המשפט בקידום זכויות, ובפרט זכויות אנשים עם מוגבלויות.

המחקר פותח פתח למספר כיווני מחקר עתידיים. הראשון הוא בחינת יישום המודל בתחומים נוספים הקשורים לזכויות אנשים עם מוגבלויות, כגון תעסוקה, דיור, או חינוך, כמו גם בתחומי

חברתיים-משפטיים נוספים. כיוון מחקרי מרכזי נוסף של המחקר נובע מהצבת התשתית למחקרים אמפיריים שיבחנו את האפקטיביות של המודל המוצע בשטח.

תוכן עניינים

עבודה זו נעשתה בהדרכתם של פרופ׳ גדעון ספיר ופרופ׳ מיכל אלברשטין מהפקולטה למשפטים של אוניברסיטת בר אילן.

נגישות לצדק לאנשים עם מוגבלות:
גישת עיצוב מערכת הסכסוך

חיבור לשם קבלת תואר ״דוקטור לפילוסופיה״

מאת:

רוני רוטלר

הפקולטה למשפטים

הוגש לסנט של אוניברסיטת בר אילן

רמת-גן תשרי, תשפ״ה