

**The Right to Recognition as a Person before the
Law and the Capacity to Act under
International Human Rights Law**

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August 2012

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I.Introduction

I. Introduction

Article 16 of the International Covenant on Civil and Political Rights (ICCPR) asserts the non-derogable right of everyone to “recognition everywhere as a person before the law”.¹ This recognition of legal personality does not include legal capacity (the ability to perform legally significant acts).² Part of the reason for the omitting a right to legal capacity was the understanding that certain individuals, in particular minors and ‘persons of unsound mind’, are incapable of exercising legal capacity.³

The Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD) had to confront the question of how such incompetent individuals might possess and exercise human rights. If incompetent individuals were granted legal capacity, their ability to exercise that capacity would need to be addressed. If they were not granted legal capacity, the treaties would need to ensure that this did not inhibit their exercise of human rights.

In each case, this task was complicated by the wide range of competence among the individuals covered by the treaty. The CRC covers children from birth to eighteen; from the complete dependence of newborn babies until the day the child becomes legally an adult.⁴ The CRPD includes both individuals with physical disabilities who have the same mental competence as non-disabled individuals and those with mental or intellectual disabilities (which may affect competence in various ways).⁵

Persons with disabilities may have difficulty demonstrating competence and

- 1 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 16. Art 4(2) lists non-derogable provisions.
- 2 Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edn, N.P. Engel 2005), 370-1.
- 3 Nowak (n 2), 370.
- 4 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), art 1 defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.
- 5 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD), art 1 “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

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be affected by guardianship even if they are not covered by the restriction of legal capacity of ‘those of unsound mind’.

The CRC does not include a right to legal capacity, implicitly recognising the legitimacy of restricting the legal capacity of children.⁶ Children are, however, considered capable of possessing and exercising human rights. Their lower but developing competence is recognised and allowed for by requiring parents and guardians to provide guidance and direction in the exercise of rights “in a manner consistent with the evolving capacities of the child ...”.⁷ Article 12 requires States Parties to assure:

“the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”.⁸

The CRPD directly challenges the position that legal capacity may be restricted on grounds of mental incompetence by asserting that “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others ...”.⁹ Lack of competence is to be addressed through the provision of assistance, enabling individuals to use their legal capacity effectively.¹⁰

This essay explores and compares these different approaches to legal capacity for individuals who have been considered to lack competence and how this relates to their possession and exercise of human rights. Through this comparison it considers whether the distinction between legal personality and legal capacity adopted in the ICCPR remains meaningful or has been superseded by other constructions of legal personality and legal capacity.

The first chapter defines how recognition as a person before the law,

6 Article 5 refers to the ‘evolving capacities of the child’ rather than a right to legal capacity and the same phrase appears in article 14 (freedom of religion). Article 40(3) (a) requires “The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”.

7 CRC, art 5.

8 CRC, art 12(1).

9 CRPD, art 12(2).

10 CRPD, art 12(3).

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legal personality, legal capacity, competence and related terms are used in this essay. The original meaning and purpose of article 16 of the ICCPR as evidenced by its drafting history are considered before turning to the interpretation of the relevant provisions of the CRC and CRPD. The second chapter addresses the question of why legal capacity is important in a human rights context. The connection between autonomy and the possession of human rights advanced by some authors is noted and the extent to which this conflicts with the objective of protecting vulnerable individuals considered. This tension is perhaps most obvious in the varying interpretations of the principle of the best interests of the child. Guardianship and supported decision making, as two solutions to the problem of the exercise of human rights and legal capacity by individuals with limited competence, are examined in this context. The third chapter explores the ways in which competence and incompetence are perceived and assessed. It starts by considering the logic behind the presumption that children and 'persons of unsound mind' are incompetent before turning to questions of how competence is assessed and the problems with assessing competence. The final chapter considers how the strategies for addressing limited competence and the construction of legal personality and legal capacity in the CRC and CRPD function in the reality of the lives of individuals. To do this it asks what role and influence the individual has in decisions about his or her life.

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Recognition as a person before the law, legal personality, juridical personality, the capacity to have rights, legal capacity, the capacity to act, competence, and autonomy are related terms used in various overlapping ways. The first part of this chapter defines how these terms are used in this essay and describes the connections that exist between them. The drafting history of article 16 of the ICCPR and article 6 of the Universal Declaration of Human Rights (UDHR) illustrate these connections and the purpose of these rights. The CRC and CRPD approach these issues in very different ways from each other and the ICCPR, but some of the same concerns and connections emerge from their provisions.

A. Definitions

The term ‘recognition as a person before the law’ is used only when it appears in the text of treaties. Legal personality and juridical personality are treated as synonyms. A legal person “enjoys, and is subject to, rights and duties at law”.¹¹ It recognises the existence of the individual as a human being with distinct needs, interests, and opinions and is “a necessary prerequisite to all other rights of the individual”.¹² This is the essence of the right to recognition as a person before the law in the ICCPR.¹³

Legal capacity and capacity to act are treated as synonyms, meaning the ability of an individual to carry out legally significant acts (such as entering into a contract). Legal capacity may be absolute (comprising all the rights that able-bodied and able-minded adults are assumed to have) or

11 ‘legal personality’ *Osborn’s Concise Law Dictionary* (11th edn, Sweet and Maxwell 2009).

12 Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff 1995), 40; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edn, N.P. Engel 2005), 369.

13 Nowak (n 12), 369.

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limited. Capacity to exercise rights is similar, but applies only to the rights laid out in the relevant human rights treaty. It covers only those legally significant acts that are included in the relevant treaty, but also includes acts that are not legally significant.

Competence can be defined as “sufficiency of qualification; capacity to deal adequately with a subject.”¹⁴ Competence is used in this sense to refer to the ability and skills of an individual. While capacity is externally recognised or denied, competence is internal to the individual and dictates the use (for their benefit or to their disadvantage) that an individual is able to make of their capacity. Capacity may be, but is not always, made conditional on competence. The ‘evolving capacities of the child’ as used in article 5 of the CRC is taken to mean the developing competence of children, although it may also acknowledge any areas in which children are granted legal capacity before maturity.

Autonomy is defined as “liberty to follow one's will; control over one's own affairs; freedom from external influence, personal independence”.

¹⁵ Full autonomy requires both competence and capacity. Without competence the individual is not able to make independent decisions and without capacity he or she is unable to carry out his or her decisions.

B. The Origin and Purpose of the Right to Recognition as a Person before the Law in International Human Rights Law

The interpretation of the final text of article 16 of the ICCPR is limited by the explicit intention of the General Assembly to restrict it to legal personality.¹⁶ This statement of intent was necessary because the scope

14 ‘competence, n.’ *OED Online* (June 2012) <<http://www.oed.com/view/Entry/37567?redirectedFrom=competence>> accessed 2 August 2012.

15 ‘autonomy, n.’ *OED Online* (June 2012) <<http://www.oed.com/view/Entry/13500?redirectedFrom=autonomy>> accessed 2 August 2012.

16 Nowak (n 12), 370-371; Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn, OUP 2004), 299 observe that the widespread existence and acceptance of limitations support Nowak’s interpretation.

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of the provision was ambiguous and had at times explicitly or implicitly included legal capacity as well as legal personality.¹⁷

The text discussed by the Commission on Human Rights (UNCHR) in 1947 read:

- “1. No person shall be deprived of his juridical personality.
2. No person shall be restricted in the exercise of his civil rights save in the case of:
 - a) minors;
 - b) persons of unsound mind; and
 - c) persons convicted of crime for which such restriction is provided by law.”¹⁸

The second paragraph was deleted on the grounds that it was “impractical and incomplete. ... [S]everal categories in addition to those enumerated ought to have been included.”¹⁹ Two years later, it was changed to “Everyone has the right to recognition everywhere as a person before the law” on the basis that this was clearer and more accurately reflected the French text.²⁰

At the same session of the UNCHR in 1947 the parallel article of the UDHR was adopted in the form:

- “Everyone has the right everywhere in the world to recognition as a person before the law and to the enjoyment of fundamental civil rights.”²¹

17 Nowak (n 12), 370 mentioning particularly the Secretary-General’s statement that article 16 included the capacity to exercise rights and to enter into contractual obligations.

18 UNCHR, ‘Report of the Working Party on an International Convention on Human Rights’ (11 December 1947) UN Doc E/CN.4/56, art 14; Marc J Bossuyt, *Guide to the ‘Travaux Préparatoires’ of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987), 335.

19 UNCHR, ‘Summary Record of Thirty-Seventh Meeting’ (13 December 1947) UN Doc E/CN.4/SR.37, 10-11.

20 UNCHR, ‘Summary Record of the One Hundred and Thirteenth Meeting’ (3 June 1949) UN Doc E/CN.4/SR.113, 16; Bossuyt (n 18), 336.

21 UNCHR ‘Report of the Working Group on the Declaration on Human Rights’ (10 December 1947) UN Doc E/CN.4/57, art 15; E/CN.4/SR.37 (n 19), 10.

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The reference to the exercise of civil rights in the UDHR text suggests that it really was the wording of the exceptions rather than opposition to the principle that led to its deletion from the ICCPR. It was eventually deleted from the UDHR in part due to the difficulty in defining fundamental civil rights, since there was no English equivalent to the French *droits civils fondamentaux*.²² Attempts to define the French term during drafting referred to the rights to marry, make wills, own property, access the courts, and enter into contracts.²³ The deletion of the reference to the enjoyment of fundamental civil rights was facilitated by the fact that most of these rights were explicitly guaranteed in other provisions.²⁴ The French delegation, which had strongly supported this provision, also considered that the ability to enter into contracts was integral to the recognition of legal personality.²⁵

Underlying most of the reasons advanced for including this provision is the idea that certain civil rights are so fundamental to a dignified life that no-one should be forced to live without them.²⁶ These *droits civils fondamentaux* relate primarily to the personal life of the individual and are necessary to function in human society. One specific purpose of this provision was to prohibit discrimination between citizens and non-citizens in the exercise of these rights.²⁷ This is a valuable addition to the general non-discrimination provisions, which do not prohibit distinctions on grounds of citizenship. It is particularly important since the ICCPR permits distinction on grounds of citizenship with regard to the rights to take part in

22 Albert Verdoodt, *Naissance et Signification de la Déclaration Universelle des Droits de l'Homme* (Société d'Études Morales, Sociales et Juridiques 1964), 110.

23 UNCHR Drafting Committee 'Summary Record of the Thirty-Seventh Meeting' (18 May 1948) UN Doc E/CN.4/AC.1/SR.37, 3-4; Verdoodt (n 22), 108, 110; Fernando Volio, 'Legal Personality, Privacy, and the Family' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981), 187.

24 Verdoodt (n 22), 110-111.

25 Verdoodt (n 22), 111.

26 UNCHR, 'Summary Record of the Fifty-Eighth Meeting' (3 June 1948) UN Doc E/CN.4/SR.58, 3; Verdoodt (n 22), 108; Volio (n 23), 187.

27 UNCHR Drafting Committee, 'Summary Record of the Eighth Meeting' (17 June 1947) UN Doc E/CN.4/AC.1/SR.8, 7-8; E/CN.4/AC.1/SR.37 (n 23), 3; E/CN.4/SR.58 (n 26), 3; Verdoodt (n 22), 110.

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the conduct of public affairs, vote and stand for election, and access public services.²⁸

The recognition of legal personality and legal capacity was also linked to the prohibition of slavery and so to the principle of equality and the recognition of the innate dignity of all people. The denial of capacity to exercise such basic rights as marriage and ownership of property and the failure to recognise slaves as legal persons separate from their masters were facets of the control of slaves that would be countered by the recognition of legal personality and the capacity to exercise *droits civils fondamentaux*.²⁹

Another objective was to ensure that “One may not say to any human being ‘you are nothing’ as a matter of law”.³⁰ This is the point at which legal personality is most distinct from legal capacity. It is linked to recognition of the independent existence, innate dignity, and human rights of each individual.³¹ It aims to prevent individuals being deprived of their rights by defining humanity in a way that excludes them. Recognition of legal personality is linked in this respect to the prohibition of discrimination. It is necessary for the possession of human rights and is a precursor to legal capacity.³²

These objectives suggest that legal personality, legal capacity, and the capacity to exercise basic civil rights were originally seen as closely interlinked and interdependent. They contained elements of non-discrimination and respect for the innate dignity of human beings as well as emphasising the importance of recognising all humans as persons capable of possessing rights. It was the need for clarity and consensus during the drafting of the UDHR and ICCPR that caused the ideas to be separated. This led to the distinction between recognition of legal personality and recognition of legal capacity in article 16 of the ICCPR.

28 ICCPR, art 2(1) prohibits discrimination on grounds “such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. Art 25 asserts the rights of *citizens* to take part in public affairs.

29 E/CN.4/AC.1/SR.8 (n 27), 7; E/CN.4/AC.1/SR.37 (n 23), 3.

30 Verdoodt (n 22), 108; Volio (n 23), 188.

31 Volio (n 23), 186.

32 Van Bueren (n 12), 40.

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C. The Right to Recognition as a Person before the Law in the Convention on the Rights of the Child

The CRC does not contain a provision explicitly stating that every child has the right to recognition as a person before the law. Article 7 provides that “The child shall be registered immediately after birth and shall have the right from birth to a name...”.³³ These rights are necessary for and “designed to promote recognition of the child's legal personality”.³⁴

The recognition that the child is a person with rights, views, and interests distinct from those of his or her parents and family is integral to the CRC and implicit in many of its provisions.³⁵ In particular article 3(1) states that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”³⁶

Considering the child's best interests requires recognition of the separate existence of the child and of the possibility that the child's interests are distinct from (and may be in conflict with) those of his or her family and, indeed, those of the State.³⁷ This probably requires recognition of the legal personality of the child, since it would be difficult to consider the

33 CRC, art 7(1).

34 UN Human Rights Committee ‘General Comment 17: Rights of the Child’ in ‘Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ UN Doc HRI/GEN/1/Rev.9, para 7, discussing article 24 (2) of the ICCPR, which reads “Every child shall be registered immediately after birth and shall have a name.”; Nowak (n 12), 372; Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF 2007), 97-98.

35 Hodgkin and Newell (n 34), 149.

36 CRC, art 3(1).

37 John Eekelaar, ‘The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism’ in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press 1994), 46 observes that “The first value of the ‘principle’ is, then, that it injects a set of issues into the decision-making process which is independent of other concerns”.

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separate interests of a child who was considered to share the legal personality of an adult.

The recognition that the child has a separate viewpoint which should be taken into consideration when decisions are made about his or her life is made explicit in article 12:

“1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”³⁸

This again recognises the independent personality of the child.³⁹ The second paragraph suggests that the child might be recognised as a separate party to any official proceedings affecting him or her and, in that sense, recognises the child’s legal personality. The age and maturity of the child only influence the weight attached to the child’s views; the right to be heard is extended to any child capable of forming views. The recognition of the child’s independent viewpoint and the right to be heard therefore apply even to very young children.⁴⁰ This aspect of article 12 contributes to the CRC’s implicit recognition of the legal personality of the child. Of course, the recognition of legal personality in article 16 of the ICCPR also applies to children, which reinforces the assumption that all children are recognised as having legal personality even without an explicit statement to this effect in the CRC.⁴¹

38 CRC, art 12.

39 Hodgkin and Newell (n 34), 149.

40 UN Committee on the Rights of the Child ‘General Comment 7: Implementing Child Rights in Early Childhood’ (20 September 2006) UN Doc CRC/C/GC/7/Rev.1, para 14; Hodgkin and Newell (n 34), 153.

41 UN Human Rights Committee ‘General Comment 17: Rights of the Child’ (n 34), para

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The weighing of the child's views in accordance with his or her age and maturity is logically connected with the idea of the 'evolving capacities of the child'. Article 5 provides that:

"States Parties shall respect the responsibilities, rights and duties of parents or ... other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention".⁴²

This recognises that children may be generally less competent than adults and so need assistance in exercising their rights. Articles 5 and 12 establish the child's right to participate in decisions affecting his or her life rather than asserting their legal capacity.⁴³ Article 5 emphatically asserts the position of the child as the rights holder, and sees the role of adults as assisting in the exercise by the child of his or her rights rather than exercising the rights on behalf of the child.⁴⁴ This does not, however, amount to a recognition of legal capacity since the exercise of most rights does not require legal capacity. As Van Bueren puts it:

"Together articles 5, 12 and 13 [freedom of expression] of the Convention shifts the onus from what decisions children are not competent to take to how children can participate and which parts of decisions they are able to take".⁴⁵

Both articles 5 and 12 reflect an awareness that children's competence is developing and so that the child will need progressively less

2 points out that "as individuals, children benefit from all of the civil rights enunciated in the Covenant" and not only from the child specific rights in article 24; Volio (n 23), 186; Nowak (n 12), 372-373.

42 CRC, art 5.

43 Målfrid Grude Flekkøy and Natalie Hevener Kaufman, *The Participation Rights of the Child: Rights and Responsibilities in Family and Society* (Jessica Kingsley Publishers 1997), 60; Thomas Hammarberg and Barbro Holmberg, 'Best Interests of the Child: The Principle and the Process' in Alfhild Petré and James Himes, *Children's Rights: Turning Principles into Practice* (UNICEF 2000), 36; Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF 2005), 4; Hodgkin and Newell (n 34), 150.

44 Hodgkin and Newell (n 34), 77-78.

45 Van Bueren (n 12), 137.

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assistance in exercising his or her rights.⁴⁶ Although competence is generally expected to increase with age, the reference in article 12 to maturity acknowledges that children mature at different rates. The CRC therefore avoids a purely aged based approach in favour of a more flexible system of assessing the competence of the individual child.⁴⁷ This also indicates that the intention is to give the child as large a role in decision making as he or she is competent to take.⁴⁸ It is implicit in article 5 that part of the role of parents and guardians is to encourage the development of competence, although they must also protect the child from decisions that he or she is not competent to make.⁴⁹

The CRC assumes that the child has legal personality and provides for the consideration of the separate rights, views, and interests of the child in decisions affecting him or her. It accepts that children may not have legal capacity, or may only have legal capacity in limited areas, but considers that they are nonetheless capable of possessing and exercising rights. The developing competence of children is recognised and opportunities for exercising this competence are provided within the protective framework created by the lack of legal capacity and the need to consider the best interests of the child as well as his or her opinions.

D. Right to Recognition as a Person before the Law in the Convention on the Rights of Persons with Disabilities

Article 12 of the CRPD reads:

“1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

46 Committee on the Rights of the Child, ‘General Comment No.12: The Right of the Child to be Heard’ (20 July 2009) UN Doc CRC/C/GC/12, 84; Hammarberg and Holmberg (n 43), 36; Rachel Hodgkin and Barbro Holmberg, ‘The Evolving Capacities of the Child’ in Petrén and Himes (n 43), 95; Hodgkin and Newell (n 34), 150

47 Committee on the Rights of the Child, ‘General Comment No.12: The Right of the Child to be Heard’ (n 46), 29-30; Hodgkin and Newell (n 34), 77-78.

48 Flekkøy and Kaufman (n 43), 88; Hodgkin and Holmberg (n 46), 95.

49 Hodgkin and Newell (n 34), 77-78, 80.

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2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.”⁵⁰

By including both recognition as a person before the law and legal capacity article 12 restates the connection between the two. It has been hailed as one of the most significant provisions of the CRPD because it creates a presumption of legal capacity for persons with disabilities.⁵¹ However, it does not take a firm position on the question of whether it is legitimate to limit capacity on grounds of mental incompetence. This was a deliberate compromise “so that each person could see what they desired ...”⁵²

The phrase ‘on an equal basis with others’ could mean that restriction

50 CRPD, art 12(1),(2),(3) and (4).

51 Frédéric Mégret, ‘The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?’ (2008) 30 *Human Rights Quarterly* 494, 511; Gerard Quinn ‘Disability and Human Rights: A New Field in the United Nations’ in Catarina Krause and Martin Scheinin *International Protection of Human Rights: A Textbook* (Abo Akademi University Institute for Human Rights 2009), 262.

52 Amita Dhanda, ‘Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future’ (2006) 34 *Syracuse Journal of International Law and Commerce* 429, 450.

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of legal capacity is permitted provided that it is based on objective criteria that apply to the population as a whole and not only to persons with disabilities. This interpretation would allow the restriction of legal capacity on grounds of incompetence, provided that the manner of establishing the individual's incompetence did not discriminate against persons with disabilities.⁵³ An alternative interpretation is that the legal capacity of persons with disabilities may only be restricted in circumstances in which the legal capacity of a person without that disability would also be restricted.⁵⁴ In this interpretation article 12 would permit the restriction of legal capacity of children with disabilities to the same extent as other children and on the same grounds (status as minors). It would not permit the limitation of capacity for reasons connected to a disability, such as incompetence. In support of this position Dhanda rightly points out that article 12 must be read in a manner consistent with the general principles and purpose of the CRPD.⁵⁵ Article 1 describes its purpose as:

“to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”.⁵⁶

The general principles include “Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons” and “Full and effective participation and inclusion in society”.⁵⁷ There is no mention of protecting persons with disabilities in the general principles. Although these principles support the interpretation of article 12 as prohibiting deprivation of legal capacity, it is doubtful that

53 Dhanda (n 52), 455-456. This seems to be the position taken by Australia, Canada and Estonia <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en>, accessed 2 August 2012.

54 Dhanda (n 52), 461; International Disability Alliance, ‘Principles for Implementation of CRPD Article 12’ <http://www2.ohchr.org/SPdocs/CRPD/DGD21102009/Article_12_Principles_Fina_IDA.doc> accessed 2 August 2012, paras.3, 5, 18-19; Mental Disability Advocacy Centre, *Supported Decision-Making: An Alternative to Guardianship* <http://mdac.info/sites/mdac.info/files/English_Supported_Decision-making_An_Alternative_to_Guardianship.pdf>, accessed 2 August 2012, 6.

55 Dhanda (n 52), 461.

56 CRPD, art 1.

57 CRPD, art 3(a) and (c).

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this should overrule the clear intention of the States which adopted the text not to prohibit guardianship. This intention is evident from the statements made on adoption and the declarations made upon ratification by Australia, Canada, and Estonia.⁵⁸ Although the form of these declarations differs each asserts explicitly or implicitly that guardianship is permitted. The fact that no other State Party objected to these interpretations strengthens the view that this should be considered the correct reading of article 12.⁵⁹ Dhanda's narrative of the drafting process makes it clear that it was only possible to achieve consensus on the text *because* it did not prohibit guardianship.⁶⁰

By requiring the provision of assistance to enable individuals to exercise their legal capacity article 12(3) does, however, suggest that limited competence is not usually a legitimate reason for denying legal capacity. Instead of seeing persons with disabilities as *incapable* of exercising capacity, the CRPD suggests that they have *difficulty* exercising capacity, a problem which can be rectified by the provision of assistance. Restriction of capacity is certainly discouraged by this approach, although it is not prohibited. Supported decision making is closely linked to non-discrimination and particularly to the idea of reasonable accommodation. The principle of reasonable accommodation is to enable persons with disabilities to function or exercise their rights on the same basis as others.⁶¹ It is an essential part of prohibiting discrimination against persons with disabilities since the discrimination faced usually arises from general features of society rather than directly discriminatory conduct. The classic example of reasonable accommodation is the provision of a ramp to enable wheelchair users to access a building; without a ramp wheelchair users are

58 Dhanda (n 52), 455-456; Interpretive declarations by Australia, Canada, and Estonia <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en>, accessed 2 August 2012. Declarations by Egypt and Syria deal with the inclusion of the capacity to act in the recognition of legal capacity, but arguably also indicate a position that guardianship is permitted.

59 Objections are listed on <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en>, accessed 2 August 2012.

60 Dhanda (n 52), 444-456.

61 Frédéric Mégret 'The Disabilities Convention: Towards a Holistic Conception of Rights' 2008 12(2) The International Journal of Human Rights 261, 270.

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excluded and so discriminated against, despite the fact that there is no active policy of excluding them. The provision of assistance can be seen as a form of reasonable accommodation for individuals with low competence in that it is a compensatory measure that enables them to exercise their legal capacity on an equal basis with others.⁶²

Several features of this provision resemble article 15 of the Convention on the Elimination of Discrimination Against Women (CEDAW). Like the CRPD, CEDAW asserts the rights to both legal personality and legal capacity. It also recognises that formal legal capacity is useless if individuals do not have the opportunity to exercise it and therefore asserts the equal right of women to exercise capacity.⁶³ CEDAW contains only one safeguard (in contrast to the list in article 12(4) of the CRPD), but it is one that does not appear in the CRPD:

“all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void”.⁶⁴

In effect, women are not permitted to waive their right to legal capacity. The inclusion of a similar provision in the CRPD does not seem to have been considered, despite the awareness of the vulnerability of persons with disabilities to limitation of their capacity.⁶⁵ Presumably it was not considered desirable to exclude the possibility of persons with disabilities voluntarily entering into agreements to limit their capacity. This does, however, leave a gap in the protection of the legal capacity of persons with disabilities, although women could invoke the protection of CEDAW.

62 Leslie Salzman ‘Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act’ (2010) 81(1) *University of Colorado Law Review* 157, 165-166.

63 Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), art 15(1) and (2).

64 CEDAW, art 15(3).

65 Dhanda (n 52) does not mention any proposal to this effect in her review of the drafting.

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One of the most significant features of both the CRC and the CRPD is that they recognise children and persons with disabilities respectively as subjects who possess and can exercise rights. Insofar as the exercise of rights promotes the autonomy of individuals it can conflict with the desire to protect vulnerable individuals. Within the CRC this tension is epitomised by varying interpretations of the principle of the ‘best interests of the child’. A similar debate about the relative importance of ensuring protection and promoting autonomy informs the discussion of the merits and demerits of guardianship and supported decision making as means of dealing with individuals with low competence.

A. Theories of Rights, Competence, and Capacity

The CRC and the CRPD assume and assert that children and persons with disabilities have human rights and are capable of exercising such rights.⁶⁶ In doing so they reject any theory of rights that sees the independent exercise of and ability to enforce rights as preconditions for possessing rights. The assertion of legal capacity in the CRPD could accommodate these theories, but the provision of assistance runs counter to the emphasis on the independent ability of the individual to enforce his or her rights. Any theory of this kind would see the lack of legal capacity and of a right to remedy for violations of their rights as fatal flaws in the CRC, since this leaves children without a guarantee that they can legally enforce their rights. The Committee on the Rights of the Child has emphasised that children must have access to complaints mechanisms as part of the recognition of their rights.⁶⁷ Although this goes some way towards filling the gap, the

66 The CRC does contain rights that must be exercised by adults on behalf of the child, but these do not detract from the general principle that the child exercises his or her rights with assistance.

67 Committee on the Rights of the Child, ‘General Comment No.12: The Right of the Child to be Heard’ (20 July 2009) UN Doc CRC/C/GC/12, paras 46-47; Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF 2007), 11, 158

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vindication of rights is still dependent on the cooperation of adults and so cannot reconcile the CRC with these theories. An approach of this kind sees the 'rights' as belonging to the adults who have the legal capacity to exercise and enforce them. It is therefore argued that it would be more useful to focus on their obligations to provide care and protection to children than on the child's 'rights'.⁶⁸ Once human rights is accepted as a relevant framework, the underlying principles of this position lead to a debate about the purpose of human rights for vulnerable individuals: is it more important to promote autonomy or to ensure protection?

Mégret argues that:

“autonomy is probably one of the things that renders the individual *capable* of enjoying these rights (as opposed to merely being their more - or less - passive recipient) and, therefore, of fully participating in the realm of rights”.⁶⁹

He considers the assertion of the autonomy of persons with disabilities one of the central purposes and greatest achievements of the CRPD. The recognition of legal capacity is the culmination of this process; a natural consequence of the acknowledgement of the fundamental autonomy of persons with disabilities. Freeman, similarly, sees the recognition of children's autonomy as essential to the respect of their rights.⁷⁰ Both he and Mégret suggest that one of the functions of human rights is to create and safeguard a space within which the individual is autonomous.⁷¹

Freeman explains the importance of rights by reference to agency:

“Rights are important because those that have them can exercise agency. Agents are decision-makers. They are persons who can negotiate with others, who can alter relationships and decisions,

68 Onora O'Neill, 'Children's Rights and Children's Lives' in Philip Alston, Stephen Parker, and John Seymour, *Children, Rights and the Law* (Clarendon Press 1992).

69 Frédéric Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30 *Human Rights Quarterly* 494, 513.

70 Michael D A Freeman 'Taking Children's Rights More Seriously' in Alston, Parker, and Seymour (n 68), 65-66.

71 Freeman 'Taking Children's Rights More Seriously' (n 70), 64-65; Frédéric Mégret, 'The Disabilities Convention: Towards a Holistic Concept of Rights' (2008) 12(2) *The International Journal of Human Rights* 261, 262; Mégret, 'Human Rights of Persons with Disabilities or Disability Rights?' (n 69), 513.

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who can shift social assumptions and constraints”.⁷²

Mégret recognises that persons with disabilities (and indeed persons without disabilities) are not and cannot be completely autonomous. He suggests that this may be why, despite the importance of autonomy in the disability context, the CRPD contains no right to autonomy.⁷³ Instead of asserting an absolute right to autonomy, paragraphs 3 and 4 of article 12, by facilitating and safeguarding legal capacity, aim to maximise the autonomy of individuals.

Although Freeman agrees that maximising autonomy is one of the objectives of human rights, he recognises that children, because of their dependent status and lower competence, need care and protection and that such protection will sometimes necessitate limiting children’s autonomy.⁷⁴ He reconciles these facts by suggesting that child rights are concerned with maximising the child’s future autonomy. This can justify the limitation of the child’s autonomy and the overruling of the child’s choices when those choices might impair the future autonomy of the child. The criteria for intervention should be that the future adult would be grateful for the intervention. It should only be permitted:

“to the extent necessary to obviate the immediate harm, or to develop the capacities of rational choice by which the individual may have a reasonable chance of avoiding such harms”.⁷⁵

This approach can be criticised as valuing the future-adult more than the child.⁷⁶ The idea of the future-adult’s consent to the intervention is particularly problematic since it is the hypothetical consent of an individual shaped by the choices made in regard to his or her upbringing.⁷⁷ Nor is the

72 Michael Freeman ‘The Value and Values of Children’s Rights’ in Antonella Invernizzi and Jane Williams *The Human Rights of Children: From Visions to Implementation* (Ashgate 2011), 22.

73 Mégret, ‘Human Rights of Persons with Disabilities or Disability Rights?’ (n 69), 512-513.

74 Freeman ‘Taking Children’s Rights More Seriously’ (n 70), 65-69.

75 Freeman ‘Taking Children’s Rights More Seriously’ (n 70), 67.

76 Tom Campbell, ‘The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult’ in Alston, Parker and Seymour (n 68), 20-21.

77 Campbell (n 76), 21; Catherine Lowy, ‘Autonomy and the Appropriate Projects of

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subordination of protection to the ideal of autonomy an entirely satisfactory approach to child rights or, indeed, to human rights.⁷⁸ The CRC includes rights to care and protection as rights of the child on an equal basis with rights promoting autonomy.⁷⁹ Such rights, however, tend to treat the child a passive recipient rather than an active rights holder.

Both the CRC and the CRPD recognise that individuals with lower competence or who lack legal capacity are vulnerable. However, they strike different balances between the desire to protect these individuals (for their own good and to ensure their well-being) and the promotion of autonomy. The CRPD prioritises autonomy, and so asserts legal capacity. It mandates assistance and provides safeguards to ensure that assistance does not become abusive. This suggests that the development of competence and the promotion of the autonomy of persons with disabilities are seen as the best means of protecting their rights. The CRC, on the other hand, recognises that children need care and protection and that this will sometimes conflict with the exercise of autonomy. It balances these concerns by guaranteeing the child's right to participate in decisions about his or her life and to exercise rights, but permitting the restriction of the child's autonomy by adults, particularly when this is seen as being in the child's best interests.

B. The Best Interests Principle

One of the general principles of the CRC is that

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.⁸⁰

Children: A Comment on Freeman' in Alston, Parker and Seymour (n 68), 73-74.

78 Campbell (n 76), 3 eloquently puts it “the exclusive stress on self-sufficiency and autonomy ... is a woefully partial expression of why people count and why we matter to each other”.

79 Freeman considers physical integrity and dignity important aspects of respect for the rights of the child, but his theories appear to consider autonomy the more important value.

80 CRC, art 3(1).

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Article 18 having recognised that parents or legal guardians “have the primary responsibility for the upbringing and development of the child” asserts that “The best interests of the child will be their basic concern”.⁸¹ As a guiding principle of the CRC the best interests of the child, along with the right to be heard, the principle of non-discrimination, and the right to life should inform the interpretation of all other provisions.⁸² It is, as Cantwell points out, important to note that the best interests of the child is only a primary consideration.⁸³ Although the best interests of the child must always be considered (reinforcing the recognition of the independent legal personality of the child) they will not be determinative of the outcome of every decision. Nor can the best interests principle be given more weight than the other general principles.

The CRC does not define the best interests of the child. In the absence of guidance, an assessment of the child’s best interests is likely to be influenced by the opinions of the person making the assessment and shaped by the society’s assumptions about children.⁸⁴ A further problem is the difficulty inherent in assessing best interests. Apart from the general difficulty of trying to predict the future, several options may seem equally good or bad. For instance, in most custody disputes either parent would be a reasonable choice. In the absence of clear, strong, and objective reasons for preferring one parent the decision is likely to reflect the value judgement of the decision maker about what is most important for the child or cultural assumptions about custody.⁸⁵

81 CRC, art 18(1).

82 Committee on the Rights of the Child, ‘General Comment No.12: The Right of the Child to be Heard’ (n 67), para 2.

83 Nigel Cantwell ‘Are Children’s Rights Still Human?’ in Invernizzi and Williams (n 72), 49, contrasting article 21, which establishes that the best interests of the child should be *the paramount* concern in adoption proceedings.

84 Jaqueline Rubellin, ‘The Best Interest Principle in French Law and Practice’ in Philip Alston (ed) *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press 1994), 264; Thomas Hammarberg and Barbro Holmberg, ‘Best Interests of the Child: The Principle and the Process’ in Alfhild Petré and James Himes (eds) *Children’s Rights: Turning Principles into Practice* (UNICEF 2000), 34; Martin Guggenheim, *What’s Wrong with Children’s Rights* (Harvard University Press 2005), 36-41.

85 Savitri Goonesekere ‘The Best Interests of the Child: A South Asian Perspective’ in Alston (n 84); Guggenheim (n 84), doubts that consideration of the child’s best interests ever actually benefit the child.

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Seymour sees a fundamental conflict between protecting children by taking decisions based on their best interests and granting legal capacity in some areas to children who display sufficient competence.⁸⁶ Similarly Van Bueren warns that the best interests principle might “become a fulcrum for regression”,⁸⁷ being invoked not only to justify harmful ways of treating children, but also to override other rights and children’s own views. Milne sees a similar tendency even in the idea of the evolving capacities of the child, suggesting that this permits the restriction of rights “for almost any reason adults consider justifiable”.⁸⁸ Hammarberg and Holmberg, on the other hand, see no real conflict between the best interests of the child and other rights. They argue that the substantive rights of the CRC should be part of the definition of the best interests of the child.⁸⁹ It could even more forcibly be argued that an action which violates the rights of the child can never be in his or her best interests.⁹⁰ This point deserves emphasis since ‘best interests’ have been used to justify many actions that do not obviously correspond to the rights of the individual.⁹¹

Hammarberg and Holmberg emphasise that the child’s views should be considered in assessing his or her best interests.⁹² Article 12 is not in conflict with considerations of the best interests of the child, since it “ensure[s] consultation and growing participation” rather than yielding decision-making power to the child.⁹³ Taking the child’s views into account

86 John Seymour, ‘An ‘uncontrollable’ child: A case study in children and parents’ rights’, in Alston, Parker and Seymour (n 68), 101.

87 Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff 1995), 47.

88 Brian Milne, ‘From Chattels to Citizens? Fifty Years of Eglantyne Jebb’s Legacy to Children and Beyond’ in Antonella Invernizzi and Jane Williams (eds), *Children and Citizenship* (Sage 2008), 51-52.

89 Hammarberg and Holmberg (n 84), 35-37; John Eekelaar, ‘The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism’ in Alston (n 84), 57 suggests that the best interests principle might be “an interpretive device in the application of the ‘rights’ and ... a residual standard in areas unaffected by express rights”.

90 Freeman ‘The Value and Values of Children’s Rights’ (n 72), 33 makes a similar point when he argues that “true protection of children does also protect their rights”.

91 Hammarberg and Holmberg (n 84), 34.

92 Hammarberg and Holmberg (n 84), 36; Van Bueren (n 87), 47; Eekelaar (n 89) also stresses the active role of the child in shaping the determination of best interests, but places less emphasis on explicit statements of opinion instead stressing the opportunities for the child’s actions over time to shape the outcome.

93 Hammarberg and Holmberg (n 84), 36; Cantwell (n 83), 55-56.

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in determining his or her best interests must, however, be distinguished from the child's right to be heard in decisions affecting him or her.⁹⁴ Failure to distinguish the two risks subsuming the child's views into what is thought to be in his or her best interests, preventing due consideration of the child's view, particularly if it does not correspond to his or her best interests. On the other hand, an approach which places too much emphasis on the child's view and ignores his or her best interests risks forcing the child to be the decision maker whether or not he or she is competent to make that decision.⁹⁵ In the first instance the child's role is minimised, contrary to article 12 of the CRC, and in the second he or she is at risk of having his or her capacities overestimated, contrary to article 5.

When the child's competence to make decisions is being assessed, considerations of the child's best interests can have a particularly complicated role. The purpose of considering the child's best interests is to protect the child from his or her own incompetent decision making. In this respect the best interests principle is premised on the belief that the child may not be the best person to make decisions about his or her own life.⁹⁶ However, respect for the rights of the child, recognition of the child's evolving competence, and the obligation to give due weight to the child's views in light of his or her age and maturity require that children should be allowed to make those decisions that they are competent to make.⁹⁷ The problem is how to balance the child's competence to make decisions and the obligation to protect the child when the decision that the child would make is not in his or her best interests.⁹⁸ There is no simple answer to when the child's competent decision should be allowed to overrule the determination

94 Hodgkin and Newell (n 67), 129, 157.

95 Eekelaar (n 89), 53-57, discusses problems with setting children up as decision makers.

96 Lowy (n 77), 72 quoting Neil MacCormick 'Children's Rights: A Test-Case for Theories of Right' (1976) LXII *Archiv für Recht- und Sozialphilosophie*, 305.

97 Van Bueren (n 87), 137; Målfrid Grude Flekkøy and Natalie Hevener Kaufman, *The Participation Rights of the Child: Rights and Responsibilities in Family and Society* (Jessica Kingsley Publishers 1997), 88; Hammarberg and Holmberg (n 84), 36; Rachel Hodgkin and Barbro Holmberg, 'The Evolving Capacities of the Child' in Petrán and Himes (n 84), 95.

98 When the child's choice corresponds to what are thought to be his or her best interests it will be much easier to accept the child as competent. Seymour (n 86), 101; Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF 2005), 28.

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of his or her best interests. Age limits can create a presumption of competence, but even this can often be overruled by considerations of a minor's best interests in exceptional circumstances. Lansdown makes the reasonable point that the answer should depend on the risks associated with the decision. Where these are low the child's decision should be respected, even if it is not in his or her best interests, so that the child has an opportunity to learn from his or her mistakes.⁹⁹ Eekelaar, like Freeman, accepts that a competent child's decision might be overruled if it is contrary to his or her physical or mental well-being and integrity.¹⁰⁰ Critics of this view see it as placing too high a barrier to intervention.¹⁰¹

C. Solutions for Individuals with Limited Competence - Guardianship and Supported Decision Making

The tension between rights based and welfare based approaches to children and persons with disabilities arises in part from the knowledge that individuals with limited competence will have difficulty exercising their rights and legal capacity. Both guardianship and supported decision making aim to resolve this problem.

A guardian is "a person who has, or is by law entitled to, the custody of the person or property (or both) of an infant or other person legally incapable of managing his or her own affairs".¹⁰² This definition highlights two central features of guardianship, the control the guardian has over the ward and that this control is based on the incompetence of the ward. Guardianships may be limited to particular areas (financial transactions or medical treatment, for example) or the guardian may have control over all aspects of the ward's life.

O'Neill identifies four significant features of the dependence of

99 Lansdown (n 98), 56.

100 Eekelaar (n 89), 53, 57; Freeman 'Taking Children's Rights More Seriously' (n 70), 66-69.

101 Lowy (n 77), 72-73.

102 'guardian, n.' *OED Online* (June 2012) <<http://www.oed.com/view/Entry/82151>> accessed 2 August 2012.

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children on adults which sets them apart from oppressed groups: the dependence is not artificially produced; it cannot be ended by social or political changes; the controlling adults are not reciprocally dependent on children; and the controlling adults want and work towards the ending of the child's dependence.¹⁰³ The first two assertions are debatable, since childhood is, at least partially, socially constructed.¹⁰⁴ Similar ideas, based on innate incompetence, traditionally justified the appointment of guardians for persons with disabilities.¹⁰⁵ This is, however, something that has been strongly rejected by the disability movement and is reflected in the shift to the social model of disability. This model sees disability as the result of societies which fail to allow for human variation or to accommodate impairments.¹⁰⁶ It replaces the medical model, which regards disability as the inevitable consequence of the impairment that the individual suffers; disability is therefore something to be prevented, treated, cured, or ameliorated, but above all classified.¹⁰⁷ According to this model incompetence is a consequence of the individual's impairment and there is nothing inappropriate in appointing a guardian to act on behalf of the individual. The social model of disability, on the other hand, sees altering the disabling environment or society to enable persons with disabilities to function as a better solution.¹⁰⁸

O'Neill's third point corresponds to Frolik's observation that:

103 O'Neill (n 68), 37-39; Freeman 'Taking Children's Rights More Seriously' (n 70), 57, who usefully summarises O'Neill's argument. Guggenheim (n 84), 9 takes a similar position, arguing that it is the way adult control of children is exercised rather than the control itself that is a problem.

104 Philip E Veerman, *The Rights of the Child and the Changing Image of Childhood* (Martinus Nijhoff 1992), 3-10; Freeman, 'Taking Children's Rights More Seriously' (n 70), 56. It should be noted that O'Neill is mostly concerned with young children, where the argument that the dependence of children on adults is inescapable becomes more potent. She does also acknowledge that dependence may be artificially extended even if it is not artificially produced.

105 James Charlton, *Nothing About Us Without Us: Disability, Oppression and Empowerment* (University of California Press 1998), 53.

106 Anna Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?' (2006) 34 *Syracuse Journal of International Law and Commerce*, 563, 572-573.

107 Lawson (n 106), 571; Aaron A Dhir, 'Human Rights Treaty Drafting through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities' (2005) 41 *Stanford Journal of International Law* 181, 191-196.

108 Lawson (n 106), 572-573.

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“Guardianship may have conflicting interests, but it has one primary goal: the protection and advancement of the life and property of the incapacitated person”.¹⁰⁹

In practise, of course, the appointment of a guardian may be due to administrative convenience or lack of options, but the guardian should not profit from the guardianship.¹¹⁰ O’Neill’s final point is that the situation of children is distinct because those in control over them want and expect their dependence to end. This is a simple, but not unreasonable, view of the parent-child relationship. Ideally, it would also be true that while under guardianship persons with disabilities were able to develop their competence with the aim of eventually (re)claiming their legal capacity.

A serious objection to guardianship is that it has a negative effect on the competence of the ward. The lack of opportunities to make decisions means that the ward has neither the chance to develop competence through practice nor occasions on which to demonstrate competence.¹¹¹ Once under guardianship it therefore becomes very difficult to prove that guardianship is no longer necessary. Loss of control over his or her life and labelling as incompetent are likely to affect the ward’s self-esteem and sense of self. This will, in turn, have a negative effect on his or her competence.¹¹²

Guardianship as “a massive intrusion upon the autonomy and independence of those adjudicated incompetent” poses a problem for those

109 Lawrence A Frolik, ‘Promoting Judicial Acceptance and the Use of Limited Guardianship’ (2001-2) 31 *Stetson Law Review* 735, 745.

110 Stanley S Herr, ‘Self-Determination, Autonomy, and Alternatives for Guardianship’ in Stanley S Herr, Lawrence O Gostin and Harold Honju Koh (eds), *The Human Rights of Persons with Intellectual Disabilities: Different But Equal* (OUP 2003), 430.

111 Amita Dhanda, ‘Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future’ (2006) 34 *Syracuse Journal of International Law and Commerce* 429, 436 citing Bruce J Winick, ‘The Side Effects on Incompetency Labeling and the Implications for Mental Health’ (1995) 1 *Psychology, Public Policy and Law* 6; Leslie Salzman ‘Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act’ (2010) 81(1) *University of Colorado Law Review* 157, 169-170.

112 Dhanda (n 111), 436-437 citing Bruce J Winick, ‘The Side Effects on Incompetency Labeling and the Implications for Mental Health’ (1995) 1 *Psychology, Public Policy and Law* 6, 42; Salzman (n 111), 169-70; Lansdown (n 98), 17 makes the inverse point that participation in decision making increases children’s confidence in their abilities, which in turn increases their competence and interest in participating.

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who see autonomy as a central attribute of the human as rights holder.¹¹³

Guardianship in this view inevitably infringes the ward's human rights and denies the ward 'full personhood'.¹¹⁴ If, however, protection of the individual is accepted as an objective of human rights, guardianship can be justified in some circumstances.

The view of guardianship as essentially demeaning is linked to its long history of abuse. It also tends to assume that the ward does not participate in decision making.¹¹⁵ The abuse and neglect of wards, the use of guardianship for administrative convenience, arbitrary procedures for deciding on the incompetence of the individual, and the use of incompetence findings for social control have been extensively documented.¹¹⁶ This history leads some to consider that the innate power imbalance makes guardianship either inherently abusive or at least highly susceptible to abuse.¹¹⁷

A practical problem that arises from the combination of the possibility of abuse and the lack of competence of the ward is the difficulty the ward faces in asserting his or her rights vis-à-vis the guardian.¹¹⁸ If the ward is not recognised as having any legal capacity or capacity to exercise rights it will be difficult, if not impossible, for him or her to bring a complaint about the conduct of the guardian or obtain redress for abuse. Even if a complaints mechanism exists and is accessible to the ward, the fact that the ward is known to have limited competence may cause his or her recollection and interpretation of events or competence to complain to be

113 Frolik (n 109), 739

114 Dhanda (n 111), 435; Salzman (n 111), 167-168; Theresia Degener and Gerard Quinn, 'A Survey of International, Comparative and Regional Disability Law Reform' in Mary Lou Breslin and Silvia Yee (eds), *Disability Rights Law and Policy: International and National Perspectives* (Transnational Publishers 2002), 87 more cautiously talk about the need to restore the indicia of legal personality.

115 Dhanda (n 111), 446.

116 Lawson (n 106), 569-570; Michael L Perlin, *International Human Rights and Mental Disability Law: When the Silenced are Heard* (OUP 2012), 59-102 include references to many reports on the abuses of guardianship and the situation of individuals in civil commitment.

117 Herr (n 110), 429; Dhanda (n 111), 445-446.

118 Mental Disability Advocacy Centre, *Supported Decision-Making: An Alternative to Guardianship* <http://mdac.info/sites/mdac.info/files/English_Supported_Decision-making_An_Alternative_to_Guardianship.pdf> accessed 2 August 2012, 8-9.

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questioned.¹¹⁹

Limited guardianships are able to avoid some of these problems. Because the ward retains control of some areas of his or her life, he or she will have opportunities to develop and demonstrate competence. The relationship between the ward and the guardian would be different and it should be easier for the ward to challenge the authority, decisions, or abusive practices of the guardian.¹²⁰ The fact that the individual is not regarded as completely incompetent should help to ensure that his or her opinions and complaints are not dismissed as incompetent or the product of the problems that caused him or her to be placed under guardianship.

This suggests that in most circumstances limited guardianship will be better for the ward than plenary guardianship. Frolik, however, notes that limited guardianships would require a more complex appointment and monitoring process.¹²¹ Rigorous oversight will be needed to ensure that the guardian is not overstepping his or her authority. The task of appointing a guardian also becomes harder since it requires a careful delineation of the bounds of his or her authority. A related concern is the possibility that third parties will feel the need to continuously check who has capacity in a particular respect or continue to treat the ward as completely incapacitated.¹²² This would reduce the benefits that limited guardianship presents by exposing the ward to continuous questions about his or her capacity so increasing his or her awareness of being labelled incompetent.

There may also be situations in which limited guardianships are not the best solution for the ward. In particular, individuals with degenerative conditions, whose competence is decreasing may find that limited guardianships simply mean regular extensions of the guardian's power. This would, if anything, be a depressing reminder of their declining competence

119 Frolik (n 109), 754; Robin Banks 'More than Law: Advocacy for Disability Rights' in Melinda Jones and Lee Ann Basser Marks *Disability, Divers-ability and Legal Change* (Martinus Nijhoff 1999) 354-355 makes this point with regard to legal systems where credibility is crucial to success and persons with disabilities find themselves ignored or disbelieved because of their disability.

120 Frolik (n 109), 152-153.

121 Frolik (n 109), 749-750

122 Salzman (n 111), 176.

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and leave them vulnerable if the guardian's powers did not keep pace with their loss of competence.¹²³

Supported decision making aims to compensate for lack of competence by providing assistance rather than seeing this as grounds for loss of capacity. This approach recognises both the legal personality and the legal capacity of each individual and aims to maximise the autonomy of individuals with limited competence.¹²⁴ It promotes the development of competence by giving individuals the opportunity to exercise their existing skills and an incentive to develop and improve them.¹²⁵ Potential problems with supported decision making relate to two issues: who receives support, and the role of the assistants.

The first questions that have to be asked are who requires support and who is eligible for support. The CRPD requires States Parties to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity".¹²⁶ This suggests that all persons with disabilities should be eligible for support, a position that would be more helpful if it were easier to define persons with disabilities. According to the CRPD:

"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

¹²⁷

This definition suggests that anyone with sufficiently low competence that they are unable to effectively exercise their legal capacity should be defined as a person with a disability and therefore be eligible for support. This does not actually provide any guidance on identifying such

123 Frolik (n 109), 747-748.

124 Mégret 'Human Rights of Persons With Disabilities or Disability Rights' (n 69), 512.

125 Salzman (n 111), 180.

126 CRPD, art 12(3).

127 CRPD, art 1.

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individuals, except by categorising them as disabled (or having specific disabilities), which runs counter to the social model of disability adopted by the CRPD. There would seem to be two options: either assistance is available to anyone who requests it or it is provided to those with competence below a certain level. In the first case there may be problems with ensuring that the system is not overburdened, that those in need of assistance are aware of its availability, and that there is no stigma attached to requesting assistance. The second option requires a decision about the level of competence that is needed for ordinary functioning and an assessment of the competence of individuals in order to establish who is eligible for assistance.

A second question that supported decision making must address is how to deal with individuals who are eligible for and would benefit from assistance, but who refuse assistance.¹²⁸ There could be various reasons for refusing assistance, from over-optimistic assessments of their own competence to paranoia and distrust of the offer to fear of stigma. In some cases it might be possible to overcome these objections, and the clearer it is that a system does not presume the incompetence of its subject the easier it should be to ensure cooperation. This will also make assumptions about incompetence based on lack of cooperation more valid. However, the basic problem that supported decision making requires the cooperation of the individual remains.¹²⁹ A supported decision making system will either have to accept that some incompetent individuals do not receive assistance or include the possibility of imposing assistance. It is hard to see how assistance could be imposed without resorting to guardianship.¹³⁰

128 Salzman (n 111), 241.

129 Mental Disability Advocacy Centre (n 118), 8 sees this as a positive feature of supported decision making.

130 Herr (n 110), 435-436 notes that in the Swedish system an administrator (whose role is similar to a guardian and who acts as a substitute decision maker) can be appointed when an individual objects to the decisions made by or the appointment of a mentor. Unlike the appointment of a mentor, the appointment of an administrator is not consensual. International Disability Alliance, 'Principles for Implementation of CRPD Article 12'

<[http://www2.ohchr.org/SPdocs/CRPD/DGD21102009/Article_12_Principles_Fina_ID A.doc](http://www2.ohchr.org/SPdocs/CRPD/DGD21102009/Article_12_Principles_Fina_ID_A.doc)> accessed 2 August 2012, para. 11 recognises the problem, but asserts that no-one should be forced to accept support.

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There may also be some individuals with such low competence that even with assistance they are unable to exercise their legal capacity effectively.¹³¹ Degener and Quinn note in the context of the more general objective of ensuring equality of opportunities for persons with disabilities:

“If there is a neglected issue ... it is the assumption of an *ability* to function in civil society and the assumption of arbitrary exclusion *despite* that ability. There are some however who lack this ability totally or to a large extent ...”¹³²

The problem with supported decision making for these individuals is the extent to which the assistant will influence the decision. Salzman recognises this risk, but contends that it is unlikely to be worse than decisions taken by guardians. He points out that at least the participation of the individual is guaranteed.¹³³ He does not, however, consider the significance of the difference between a decision that is presented as being made by the individual and one that is presented as being made on his or her behalf. In a supported decision making system the final decision should be respected as an exercise of the individual’s autonomy; it is not subject to review. On the other hand, a decision taken by a guardian should be open to review or to a challenge that it does not reflect the best interests or take into consideration the desires of the ward. The safeguards required by the two systems are different. There is a risk that by applying supported decision making to all situations, individuals with very low competence suffer all the disadvantages of guardianship without any of the safeguards.

There are several roles that the assistant may fulfil, including providing information, highlighting the consequences of actions, assisting with implementing a decision, or being available to answer questions. Each of these may be appropriate in different situations and will require different skills and training from the assistant.¹³⁴ Some individuals may already have

131 Salzman (n 111), 241.

132 Gerard Quinn and Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (OHCHR 2002), 12.

133 Salzman (n 111), 233 fn 237.

134 Mental Disability Advocacy Centre (n 118), 12-16; Herr (n 110), 434; Salzman (n 111), 241.

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informal support networks, which have the advantage that the individual has freely chosen the assistants. Such assistants can also be presumed to have the individual's best interests at heart.¹³⁵ However, the use of such informal networks does not eliminate the need for training or for a mechanism to ensure respect for agreements about the role and powers of the assistants.¹³⁶ The extent to which the assistant influences the decision and the appropriate degree and form of oversight will vary depending on the role. If the assistant ends up guiding the decision and reducing the role of the individual to, at best, giving informed consent to the assistant's choice the advantages of supported decision making over guardianship become less clear. It might be surprisingly easy for supported decision making to cease to promote the individual's autonomy, instead becoming a subtle way of controlling him or her and ensuring that he or she makes the 'correct' choice.

¹³⁵ Mental Disability Advocacy Centre (n 118), 13-14 discusses one initiative that makes use of such existing support networks.

¹³⁶ Salzman (n 111), 240.

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The fundamental reason for denying children and persons with disabilities legal capacity is that they are assumed to be incompetent and so unable to exercise legal capacity effectively or in a manner which adequately protects their rights and interests. The CRC and CRPD, however, assert that children and persons with disabilities are capable of possessing and exercising human rights and, in the case of the CRPD, that persons with disabilities have legal capacity. Both treaties regard competence as a quality that exists on a spectrum, rather than something that individuals either do or do not possess. This requires a decision on what level of competence is necessary for legal capacity if incompetence is to be used as a reason for restricting capacity. It also means that the competence of each individual must be assessed in order to ascertain whether he or she is above or below the threshold set for capacity. It is no longer possible to simply label children and ‘persons of unsound mind’ as incompetent and therefore restrict their capacity.

A. The Assumption that Children and Persons with Disabilities are Incompetent

Alderson and Goodwin point out that it is difficult to define competence positively rather than by placing it in opposition to obvious examples of incompetence.¹³⁷ This reinforces the illusion that there is a rigid divide between competence and incompetence. This division is then applied to the problem of defining children; since adults are assumed to be competent this is taken as a characteristic of adulthood and children as non-adults are presumed to be incompetent. The dichotomy of competence and incompetence fits into and reinforces the tendency to define children negatively as ‘not-adults’.¹³⁸ Even the CRC takes this approach, defining a

137 Priscilla Alderson and Mary Goodwin, ‘Contradictions Within Concepts of Children’s Competence’ (1993) 1 *International Journal of Child Rights*, 303, 306.

138 Alderson and Goodwin (n 137), 307-308; Rachel Hodgkin and Barbro Holmberg, ‘The

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child as “every human being below the age of eighteen years *unless under the law applicable to the child, majority is attained earlier*”, i.e. a child is anyone who is not recognised as an adult under national law.¹³⁹ In this way the idea of incompetence becomes a defining feature of childhood, making it problematic to recognise children as competent. The child’s dependent status reinforces the presumption of incompetence since it follows logically that the dependent must be less competent than the individual(s) he or she relies on for protection.¹⁴⁰

A further complicating factor that arises from the dichotomy between child and adult is the construction of a single category for all children. Despite the obvious fact that a seventeen-year-old is much more similar to a twenty-year-old than to a three-year-old the need for a division into children and adults elides the difference between the seventeen-year-old and the three-year-old.¹⁴¹ The magic barrier of maturity becomes the key distinction between the competent adult and the incompetent child. This sharp division is broken by the practice of setting minimum ages that grant children capacity in some areas before maturity. The idea of the ‘evolving capacities of the child’ also reflects an appreciation of the continuum in the development of competence rather than a transition from one state of another.¹⁴² However, the fundamental difference represented by a shift from a presumption of incompetence to a presumption of competence still underlies idea about the difference between children and adults.

The belief that children are incompetent arises partly from the perception that they are arational and likely to prioritise short term wants over long term desires and needs.¹⁴³ Children cannot be trusted to make the

Evolving Capacities of the Child’ in Alfhild Petré and James Himes *Children’s Rights: Turning Principles into Practice* (UNICEF 2000), 95-6 make a similar point about the standard of comparison for the evolving capacities of the child. They also point out that the equation of capacity with autonomous freedom is peculiar to childhood.

139 CRC, art 1 (emphasis added).

140 Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (3rd ed. UNICEF 2007), 80 note the traditional view of children as passive dependants.

141 Alderson and Goodwin (n 137), 311.

142 Hodgkin and Holmberg (n 138), 95, 101; Hodgkin and Newell (n 140), 77-78.

143 Eugeen Verhellen ‘Changes in the Images of the Child’ in Michael Freeman and Philip Veerman (eds), *The Ideologies of Children’s Rights* (Martinus Nijhoff 1992), 81; Alderson and Goodwin (n 137), 305; Gerison Lansdown, *The Evolving Capacities of*

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‘correct’ decision because their understanding of the consequences is incomplete or their analysis flawed. Although it is true that children function differently from adults, it is easy to overstate these differences.¹⁴⁴ Studies on consent to medical treatment (which is precisely the sort of balancing of short term discomfort against long term benefit that children are expected to be bad at) demonstrate that there is surprisingly little difference between the decisions made by even young children and adults.¹⁴⁵

One area in which children are at a distinct disadvantage in decision-making is in experience and knowledge on which to base the decision. This applies to both information directly relating to the decision and general knowledge which might influence an adults choice. The former is relatively easy to remedy, the latter less so.¹⁴⁶ Of course, this will also vary depending on the individual child and the decision to be made.¹⁴⁷

The conception of persons with disabilities as incompetent also derives largely from the implicit contrast with a ‘normal’ competent adult.¹⁴⁸ The medical model of disability defines disability as a deviation from the normal healthy status. This may be the case whether the individual’s disability has a direct effect on his or her competence or inhibits his or her ability to function ‘normally’ or demonstrate competence. Dependence has traditionally been associated with disability.¹⁴⁹ To be dependent on someone

the Child (UNICEF 2005), 55.

144 Hodgkin and Holmberg (n 138), 99.

145 Målfrid Grude Flekkøy and Natalie Hevener Kaufman, *The Participation Rights of the Child: Rights and Responsibilities in Family and Society* (Jessica Kingsley Publishers 1997), 66; Alderson and Goodwin (n 137); Lansdown (n 143), 24, 55.

146 Laura Martha Purdy, *In their Best Interest? The Case Against Equal Rights for Children* (Cornell University Press 1992), 33-34.

147 Alderson and Goodwin (n 137), 307.

148 Lynne Davis, ‘Rights Replacing Needs: A New Resolution of the Distributive Dilemma for People with Disabilities in Australia’, 16; WP Hanley, ‘Voluntary Sector Associations as Part of the Problem or Part of the Solution: Empowering People with Disabilities’ in Marge Hauritz, Charles Stamford and Sophie Blencowe (eds), *Justice for People with Disabilities: Legal and Institutional Issues* (The Federation Press 1998), 144-146; James Charlton, *Nothing About Us Without Us: Disability, Oppression and Empowerment* (University of California Press 1998), 7.

149 Theresia Degener and Gerard Quinn, ‘A Survey of International Comparative and Regional Disability Law Reform’ in Mary Lou Breslin and Silvia Yee (eds), *Disability Rights Law and Policy: International and National Perspectives* (Transnational Publishers 2002), 5; Davis (n 148), 17; Charlton (n 148), 53, 66-68 noting the terms used to refer to persons with disabilities often reflect assumptions about dependence.

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puts the individual in a subordinate position and highlights the fact that he or she does not and cannot function in the same way as a 'normal' adult. Because dependence is associated primarily with childhood, it helps fit a dependent adult into the role of an (incompetent) child as the logical opposite of an independent adult.¹⁵⁰ This is a perception that the CRPD rejects, instead asserting the independence and autonomy of persons with disabilities.

B. Models for the Assessment of Competence

The CRC and CRPD both recognise competence as a variable quality rather than something that an individual either does or does not possess. If either legal capacity or the provision of assistance are to be dependent on the individual's level of competence it therefore becomes necessary to assess competence. The basis on which such assessments are carried out may have a significant impact on the outcome. The two most fundamental questions to be asked are 'what triggers an assessment of competence' and 'is the initial presumption that individuals are competent or that they are incompetent'. The latter influences whether the individual is trying to prove their competence or someone else is attempting to prove their incompetence. It is also significant in that the presumption will govern the situation of all individuals who do not challenge the *status quo* and most of those who do.¹⁵¹

The disability rights movement has identified three main models for assessing competence: the status, outcome and functional models.¹⁵² The

150 Alderson and Goodwin (n 137), 311; Charlton (n 148), 53; Michael D A Freeman 'Taking Children's Rights More Seriously' in Philip Alston, Stephen Parker and John Seymour (eds), *Children, Rights and the Law* (Clarendon Press 1992), 56 notes that those who are denied rights are assimilated to children.

151 Bruce C Hafen, 'Puberty, Privacy and Protection: The Risks of Children's "Rights"' (1977) 63 American Bar Association Journal 1383, 1386; Lansdown (n 143), 35.

152 Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' (2006) 34 Syracuse Journal of International Law and Commerce 429, 431-432; Gerard Quinn 'Disability and Human Rights: A New Field in the United Nations' in Catarina Krause and Martin Scheinin *International Protection of Human Rights: A Textbook* (Abo Akademi University Institute for Human Rights 2009), 262-263.

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status model identifies categories of people who are considered incompetent (either totally or in particular areas). The process of assessment focuses on establishing whether or not the individual belongs to the relevant category.¹⁵³ For instance, if persons with mental disabilities are an ‘incompetent’ category, anyone who is diagnosed with a mental disability is automatically considered incompetent, irrespective of their actual level of competence. Instead of considering each individual separately, a status based system creates an unrebuttable presumption that individuals who share certain characteristics are incompetent. How objectionable this presumption is will depend on how ‘incompetent’ groups are defined. The chief advantage of the status model is that it provides a clear and fixed framework for decisions on competence based on objective criteria. Like cases are treated alike and there is little risk of discrimination arising from the assumptions and attitude of the decision maker.¹⁵⁴

In the child rights context a system based entirely on age limits is status based. Allowing exceptions to age limits for a child who is found competent resolves some of the problems by making the presumption of incompetence rebuttable.¹⁵⁵ It recognises that age is generally a good guide to the child’s competence, but that there are significant variations between children.¹⁵⁶ However, in doing so it reintroduces the need for subjective rather than objective assessments of competence and might be applied in an inconsistent manner. In order to provide effective protection to children, age limits must be high enough that almost all children will have the necessary competence at that age.¹⁵⁷ There will always be a substantial minority of children who develop that competence before they reach the age limit. Although allowing children to demonstrate competence before they reach the age limit recognises their potential competence and promotes autonomy it undermines the protection of children under the age limit.

¹⁵³ Dhanda (n 152), 431; Quinn (n 152), 262.

¹⁵⁴ Lansdown (n 143), 49-50 makes these points in regard to fixed age limits for exercising certain rights.

¹⁵⁵ Hodgkin and Holmberg (n 138), 103 describe age based systems that do not allow such exceptions as “illogical, unfair and unsatisfactory”.

¹⁵⁶ Lansdown (n 143), 51.

¹⁵⁷ Flekkøy and Kaufman (n 145), 14.

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In the outcome model an incompetent decision triggers consideration of the individual's competence with the possibility of restricting legal capacity.¹⁵⁸ This has the advantage that everyone is assumed to be competent until they are shown to be incompetent by a 'bad' decision. Because incompetence has to be proved by a 'bad' decision this approach should lead to the separate consideration of an individual's competence in different areas; incompetence in one thing will not create a presumption of incompetence in all other areas. The most significant problem with this model is establishing what decisions trigger consideration of the individual's competence. It is, in particular, necessary to distinguish between incompetent decisions and decisions that are eccentric, but competent. In practice there is a risk that what is in fact assessed is whether or not the decision is in the individual's best interests.¹⁵⁹ To put it another way, the result of the decision may be treated as more important than the process by which it was reached. For instance, a decision to refuse medical treatment is more likely to be considered irrational and therefore incompetent than one to accept treatment, even if the acceptance of treatment is due to delusions and the refusal to a careful weighing of the consequences.¹⁶⁰ The extent to which the conclusion about an individual's competence is based on subjective assessments of their decision making creates significant scope for paternalistic impulses which treat best interests as more important than the recognition and exercise of competence.¹⁶¹

The functional approach limits capacity in areas in which the individual is unable to function.¹⁶² It requires careful consideration of the limits of an individual's competence and allows the exercise of capacity to be limited only where it is strictly necessary to do so and for as little time as possible.¹⁶³ It treats each individual as an individual and recognises that

158 Dhanda (n 152), 431; Quinn (n 152), 262.

159 John Seymour 'An 'uncontrollable' child: A Case Study in Children and Parents' Rights' in Alston, Parker and Seymour (n 150), 101.

160 Donald N Bersoff, 'Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self-Determination and Social Science' (1992) 37 Villanova Law Review 1569, 1583.

161 Quinn (n 152), 262.

162 Dhanda (n 152), 431.

163 Quinn (n 152), 263.

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incompetence in one area does not necessarily mean that an individual is incompetent in any or all other areas. However, it requires a much more detailed investigation into the situation and competence of each individual and so will take longer and involve a more complex procedure than either of the other approaches. This is not simply a bureaucratic objection. A more complicated procedure will be harder for individuals to navigate. It might also penalise individuals who resist the limitation of their capacity, since the detailed assessment of competence will require cooperation.¹⁶⁴ This has the advantage of giving the individual a clear role as a participant in the proceedings rather than the object of them. It might, however, lead to individuals being pressured into accepting assistance or guardianships that they do not feel they need because failure to cooperate will be seen as evidence of lower competence and understanding.¹⁶⁵ Precisely because the functional approach is so flexible and assesses the individual and his or her particular circumstances, it has to be largely based on a subjective assessment. It therefore runs the risk of becoming discriminatory.

In some ways the functional approach is similar to the idea of considering the age and maturity of the child in weighing his or her competence. Both approaches focus on the individual and aim to assess his or her competence rather than making assumptions based on generalisations. The major difference between the two is that the functional approach should start from a presumption of competence, but the weighing of a child's views or decisions about his or her competence can start from a presumption of incompetence on the grounds of age.¹⁶⁶ Decisions on children's competence also demonstrate the extent to which the assessor's view of the rational choice and the child's best interests influences his or her conclusion.¹⁶⁷

164 Dan Shnit 'When Legislation Should take Intellectual Disabilities into Account' Stanley S Herr, Lawrence O Gostin and Harold Hongju Koh *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (OUP 2003), 249 mentions special measures for individuals who do not cooperate.

165 For instance in the much praised Swedish system a substitute decision maker can be appointed without the consent of the individual if he or she objects to the appointment or decisions of a mentor (who is appointed by consent) and and property or personal interests would be seriously jeopardised. Stanley S Herr 'Self-determination, Autonomy and Alternatives for Guardianship' in Herr, Gostin and Hongju Koh (n 164), 435.

166 Flekkøy and Kaufman (n 145), 48.

167 John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of

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Although the three systems have been described as though they were completely separate, to some extent a status-based assessment is likely to underlie both the outcome and the functional approaches.¹⁶⁸ In theory the outcome approach avoids this by having an objective system for identifying those who are incompetent. In practice, it is likely to be individuals whose status suggests they may be incompetent whose decisions are reviewed for evidence of incompetence. For example, a decision that is not in the individual's best interests (such as refusing a particular medical treatment) is far more likely to be considered evidence of incompetence if the individual has been diagnosed with a mental disability than if he or she is a 'normal' adult. In the latter case the presumption of competence is strong enough to override the 'bad' decision. It is the status of the person with a mental disability that permits his or her competence to be questioned. The point is not that this is necessarily a bad reason for assessing an individual's competence, but that it is the underlying status combined with a 'bad' decision that triggers the consideration rather than the 'bad' decision in itself. The outcome approach modifies rather than replacing the status approach. Similarly, the functional approach leaves open the question of what triggers consideration of an individual's competence in the first place. Dhanda refers to the requirements of this test as being both disability and inability "to perform a specified function".¹⁶⁹ The real purpose and advantage of this approach is to restrict the scope of the deprivation of capacity and make denial of capacity a more complex and so less appealing option.

C. Problems with Trying to Assess Competence

Any attempt to assess competence faces certain challenges. The first and most fundamental is the lack of a single agreed definition of

Dynamic Self-Determinism', 55-56; Savitri Goonesekere 'The Best Interests of the Child: A South Asian Approach' in Philip Alston *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press 1994), 129.

¹⁶⁸ Dhanda (n 152), 432-433.

¹⁶⁹ Dhanda (n 152), 431.

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competence (or, indeed, of what constitutes a rational decision or decision-making process).¹⁷⁰ Part of the problem is that different tasks require different skills and so competence in one area will not necessarily translate to competence in another.¹⁷¹ Equally each person has a different combination of skills which will affect his or her competence at given tasks. The question should therefore always be not 'is this individual competent', but 'is this individual competent *at this*'. It is in recognising this variation between individuals and the need to tailor solutions to the needs of the individual that the functional approach is most attractive.

Competence is not a fixed quality, but varies over time and depending on the surrounding circumstances.¹⁷² The idea of the evolving capacities of the child recognises that competence develops as the child grows older, but treats this as a one way process. Competence can, however, alter in either direction, including over relatively short periods.¹⁷³ In general individuals are more likely to be competent in familiar situations, since they will be more relaxed and more confident.¹⁷⁴ Confidence improves competence in itself and also relates to the development of competence through practice.¹⁷⁵

Competence can be trained and developed through use and, conversely, will not develop and may decrease if an individual does not have opportunities to exercise it.¹⁷⁶ An individual who is treated as incompetent will lack both the practice needed to develop competence and opportunities to demonstrate that he or she is competent. This increases the risk that competence assessments become a one way process. Labelling an

170 Bersoff (n 160), 1581-1582; Alderson and Goodwin (n 137), 306-308; Lansdown (n 143), 55.

171 Lansdown (n 143), 55-56.

172 Hodgkin and Holmberg (n 138), 101.

173 Peter Bartlett, Oliver Lewis and Oliver Thorold, *Mental disability and the European Convention on Human Rights* (Martinus Nijhoff 2007); Lawrence A Frolik, 'Promoting Judicial Acceptance and the Use of Limited Guardianship' (2001-2) 31 *Stetson Law Review* 735, 745-748 discusses the situation of individuals losing competence.

174 Lansdown (n 143), 24-25.

175 Lansdown (n 143), 17; Dhanda (n 152), 436 discusses the inverse point that labelling as incompetent reduces competence.

176 Dhanda (n 152), 436,-7 citing Bruce J Winick, 'The Side Effects on Incompetency Labeling and the Implications for Mental Health' (1995) 1 *Psychology, Public Policy and Law* 6.

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individual as incompetent may become a self-fulfilling prophecy, ensuring that the individual will become and remain incompetent.¹⁷⁷

Accessible information is essential for competent decision making. Without the relevant information about the available options and likely consequences of a choice it is impossible to choose rationally.¹⁷⁸ It is also important to distinguish between the inability to make decisions, the inability to express decisions, and the inability to carry out decisions.¹⁷⁹ Only the former is a symptom of lack of competence. In the latter two cases the individual needs assistance in implementing his or her decisions, not in making them.

An essential question in any assessment of competence is who is making the decision. Given the complexities of the problem and the extent to which most systems rely on a subjective judgement, the assumptions, ability, and integrity of the decision maker are important. In order to work efficiently the assessment is also likely to require the cooperation of all parties. The individual whose competence is being assessed must in any case be treated as a full participant in the decision making process, not only as its object.¹⁸⁰ If, however, the decision could be left completely in the hands of the individual concerned there would be no need for official regulation of supported decision making or guardianship; all matters relating to capacity could be left to the discretion of the individual.

The need to avoid conflicts of interest means that the decision maker must not stand to benefit from deciding one way or the other.¹⁸¹ For this reason neither family members nor the putative guardian or assistant should take the final decision. Their knowledge of and concern for the individual should however ensure that these individuals have a role in the process.

177 Dhanda (n 152), 436 citing Bruce J Winick, 'The Side Effects on Incompetency Labeling and the Implications for Mental Health' (1995) 1 *Psychology, Public Policy and Law* 6.

178 Purdy (n 146), 33-34; Lansdown (n 143), 4; Nigel Cantwell 'Are Children's Rights Still Human?' in Antonella Invernizzi and Jane Williams *The Human Rights of Children: From Visions to Implementation* (Ashgate 2011), 55.

179 Hodgkin and Newell (n 140), 153 quoting Marta Santos Pais 'The Convention on the Rights of the Child' in *Manual on Human Rights Reporting* (OHCHR 1997), 426.

180 Herr (n 165), 442 praises the German system which permits the individual to take part in all proceedings irrespective of his or her competence.

181 CRPD, art 12(4).

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Most systems make a court or a judge the final decision maker in order to provide a formal process involving all interested parties and avoid conflicts of interest.¹⁸² A formal process has the disadvantage that it is an unfamiliar and, potentially, intimidating setting, which may make the individual appear less competent. This might be minimised by the organisation of the process and by having some assessment of the individual take place in a more familiar setting.¹⁸³ Perlin argues that the involvement of a lawyer is crucial in order to ensure a rigorous process and to help guarantee the full involvement of the individual being assessed.¹⁸⁴ This may be true, but will depend on the role that the lawyer plays, as Perlin himself notes. In particular it may depend on whether the lawyer is representing the individual or the individual's best interests (as assessed by the lawyer). Naffine (writing about the juvenile justice system in Australia) warns against assuming that the presence of a lawyer guarantees due process and documents the ritual process of children's courts dominated by experts in which the presence of a lawyer in fact serves to exclude the child.¹⁸⁵

Finally, it is necessary to consider what role 'experts' should play in decisions about an individual's competence. The term expert may cover a range of professions: social workers and the employees of care facilities as well as psychologists, psychiatrists, doctors and child development specialists. The role of experts should be to provide specialist knowledge about factors that may affect the individual's competence.¹⁸⁶ There are two overarching concerns with the involvement of experts: the extent to which their opinions are privileged because of they are accorded the status of

182 Herr (n 165), comments on the contrast in the Swedish system between the consensual appointment of an assistant and the more formal proceedings needed to appoint a guardian. He also notes the Court's role in appointing and overseeing guardians and assistants in the German system.

183 Lansdown (n 143), 24-25 discusses the greater competence of children in familiar situations.

184 Michael L Perlin, *International Human Rights and Mental Disability Law: When the Silenced are Heard* (OUP 2012). He is mostly concerned specifically with civil commitment cases, but the point can be generalised.

185 Ngaire Naffine, 'Children in the Children's Court: Can there be rights without a remedy?' in Alston, Parker and Seymour (n 150), 86-92.

186 Michael L Perlin, 'Pretexts and Mental Disability Law: The Case of Competency' (1992-1993) 47 *University of Miami Law Review* 625, 640; Perlin, *International Human Rights and Mental Disability Law* (n 184), 113.

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expert, and the risk of returning to generalisations rather than an focusing on the individual. One of the problems with relying on ‘expert’ opinions is the near impossibility of accurate predictions in mental health cases.¹⁸⁷ Almost all expert opinions will therefore be based on generalisations, particularly if the expert has had limited contact with the individual being assessed. These difficulties may lead experts to overestimate the danger that an individual poses to himself or herself or to society, since the risk of getting it wrong is seen as greater than that of institutionalising an individual who does not need it.¹⁸⁸ Experts may also consciously or unconsciously adapt their evidence in order to achieve what they believe is the desirable outcome.¹⁸⁹ In some cases the challenge to the individual’s competence may arise from the individual’s refusal to follow expert advice. This is typical of challenges to an individual’s competence resulting from a refusal of treatment or reluctance to be institutionalised.¹⁹⁰ In such cases privileging the ‘expert’ view may be undermine the impartiality of the proceedings. As Stefan highlights, the real problem is not the evidence that experts present, but the assumptions of decision makers which lead them to privilege the views of experts without adequately considering what factors influence these views.

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187 Perlin ‘Pretexts’ (n 186), 670; Dhanda (n 152), 433

188 Susan Stefan ‘Leaving Civil Rights to the “Experts”’: From Deference to Abdication under the Professional Judgment Standard’ *Yale Law Journal* 102(3) (1992), 639, 667; Dhanda (n 152), 433; Perlin, ‘Pretexts’ (n 186), 646.

189 Stefan (n 188), 656-667 discusses the influence of experts values; Perlin, ‘Pretexts’ (n 186), 640-646; Perlin, *International Human Rights and Mental Disability Law* (n 184), 114 lists this and a number of other ways in which experts testimony may be deliberately or inadvertently unhelpful.

190 Stefan (n 188), 655-657.

191 Stefan (n 188).

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The CRC and CRPD both attempt to balance respect for human rights, dignity and autonomy with the need to protect vulnerable individuals through provisions dealing with capacity, competence and protection. The outcome of this process may be considered in terms of the involvement and influence that the individual has in the decisions made about his or her life.

A. Degrees of Involvement in Decision Making

The idea of involvement in decision making makes it easier to see the ways in which international human rights law provides for participation as a continuum, rather than treating the divide between possessing and lacking legal capacity as the only relevant variable. Five general levels of involvement in decision making can be identified: full decision making capacity; supported decision making; free and informed consent; right to have views taken into account; right to be heard.

Full decision making capacity is assumed to be the default position and applies to ‘normal’ adults. The individual has the capacity and is assumed to have the competence to take and carry out any decision about his or her life.¹⁹² This is Mégret’s ‘implicit human’, “an autonomous, self-determining individual” created and consecrated by human rights.¹⁹³ The individual is free to get advice from others, but is not required to do so, and the presence or absence of advice does not alter the respect accorded to the decision.

Supported decision making is distinguished from full decision

192 Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF 2005), xiii.

193 Frédéric Mégret, ‘The Disabilities Convention: Towards a Holistic Concept of Rights’ (2008) 12(2) *The International Journal of Human Rights* 261, 262.

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making capacity by the obligatory involvement of a second person. The individual has decision making capacity but is believed to lack the necessary competence, so another person is involved to ensure that the decision is competent. Although the individual retains control of the final decision there is some oversight of the process by which this decision is reached. The individual is not completely independent and uninfluenced the way that one with full decision making capacity is.

Informed consent is the third level. Here, the individual is not making the decision himself or herself, but is asked to ratify the decision of a second person. The individual is effectively given a veto on the decision, and so has a substantial degree of influence on the outcome. The requirement that the consent be informed also means that the individual must know the basis on which the decision was reached, the reasons for it, and the likely outcomes.

The last two are situations in which the individual does not have the final say in the decision. The right to have his or her views taken into account is a very flexible standard. This could mean a presumption that the individual's choice determines the decision unless there is an overwhelming reason to make a different choice or it might give the individual almost no influence. It does, as a minimum, guarantee the individual a role in the decision making process and ensures that his or her views may not be completely ignored.

The lowest level, the right to be heard, is usually combined with the right to have views taken into account. As a separate possibility it provides a minimal guarantee that the individual must know that a decision is being made and be given an opportunity to express an opinion. The former could be important in terms of enabling the individual to challenge a decision which he or she opposes. Minimal as the individual's participation is, the right to be heard at least recognises that the individual is intimately concerned with the decisions made about his or her life and that he or she may have opinions on the matter.

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Solutions to the problem of limited competence fall at different points in this hierarchy and each level has advantages and disadvantages. Guardianship may include any of the last three, or completely exclude the ward from participation in decision making. Much of the criticism of guardianship in the context of persons with disabilities presumes that the ward has no part in decision making.¹⁹⁴ Systems that are described as supported decision making may in some cases amount to full decision making capacity.¹⁹⁵ The essential question is whether the involvement of a second person is compulsory or depends on the wishes of the individual. In the first case this is supported decision making, in the second the individual has full control over the decision.

There is an important difference between even the lowest level of engagement and the taking of decisions on behalf of someone who is in no way engaged in the decision making process. In the latter case although the individual's best interests may be considered his or her independent personality is not. Such an approach arguably denies the individual legal personality as well as legal capacity.¹⁹⁶

B. The Convention on the Rights of the Child

The CRC recognises that each level of participation may be appropriate at different times, depending on the age and maturity of the child and the decision to be made.¹⁹⁷ The provisions of the CRC on the best interests of the child, the evolving capacities of the child, the right to be

194 Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' (2006) 34 *Syracuse Journal of International Law and Commerce* 429, 436-437.

195 Mental Disability Advocacy Centre, *Supported Decision-Making: An Alternative to Guardianship* <http://mdac.info/sites/mdac.info/files/English_Supported_Ddecision-making_An_Alternative_to_Guardianship.pdf> accessed 2 August 2012, 7 makes the point that most people use informal supported decision making systems in their day-to-day life.

196 Dhanda (n 194), 435.

197 Målfrid Grude Flekkøy and Natalie Hevener Kaufman, *The Participation Rights of the Child: Rights and Responsibilities in Family and Society* (Jessica Kingsley Publishers 1997), 60.

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heard and the weighing of the child's views, as well as the substantive rights interact to provide an almost infinitely flexible system. The general approach, however, aims to promote the development of competence by ensuring the child's participation in decision making to the greatest extent possible, but places this participation within a protective framework of the denial or limited exercise of legal capacity.

The 'evolving capacities of the child' recognises the variable nature of competence and the pattern that a child's competence is expected to develop as he or she gets older. The same pattern is reflected in the weighing of the child's views on the basis of age and maturity.¹⁹⁸ Article 5 of the CRC requires parents or guardians to provide guidance and direction in accordance with the evolving capacities of the child. This suggests that the child should be encouraged to exercise his or her competence and that its development should be promoted.¹⁹⁹ The ideas of the evolving capacities of the child and the weighing of the child's views in light of his or her age and maturity indicate a desire to involve children in decision making and respect their competence.²⁰⁰ These factors should not detract from the right of any child capable of forming views to express his or her opinion.²⁰¹

However, there is no requirement to recognise the legal capacity of the child. Although the child's participation in decision making is promoted, the parents or guardians (or the State) do and should retain the possibility of overriding a child's decision, the primary justification for such intervention being the protection of the child's best interests.²⁰²

198 CRC, art 12(1).

199 Flekkøy and Kaufman (n 197), 50; Lansdown (n 192), 4; Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF 2007), 77-8.

200 Geraldine van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff 1995), 137.

201 CRC, art 12(1); Hodgkin and Newell (n 199), 153, 155.

202 John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press 1994), 43, 53, 57; Thomas Hammarberg and Barbro Holmberg, 'Best Interests of the Child: The Principle and the Process' in Alfhild Petré and James Himes (eds), *Children's Rights: Turning Principles into Practice* (UNICEF 2000), 36; Hodgkin and Newell (n 199), 130.

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Setting age limits before maturity for the granting of capacity in some areas articulates the idea of recognising the evolving capacities of the child. By granting children capacity in some areas, age limits can serve as stepping stones on the way to full adult capacity, recognising the developing competence of children and providing ever increasing areas in which they are deemed competent.²⁰³ This use of age limits allows a more fluid conception of full capacity as composed of the recognition of capacity in many different areas, rather than a single thing that changes at the age of maturity.²⁰⁴ The rigid definition of incompetent child and competent adult is broken down by the official recognition that children are in transition between the two states. However, the age of maturity retains significance as the point at which the presumption of incompetence (except in those areas in which capacity has been granted) switches to the adult presumption of competence and capacity unless and until that capacity is explicitly removed.²⁰⁵

The CRC recognises that any child capable of forming an opinion has the right to participate in decisions about his or her life. This, combined with the position of children as rights holders and individuals capable of exercising rights (albeit with assistance), shows that all children are considered to have some degree of competence. By separating the exercise of competence and of capacity it allows the protective framework of denial of capacity to be maintained without this necessarily resulting in a presumption of incompetence. This also enables the protection of children from the consequences of failures of competence. The child is recognised as an independent actor with views and interests of his or her own. However,

203 Lansdown (n 192), 50.

204 Rachel Hodgkin and Barbro Holmberg, 'The Evolving Capacities of the Child' in Petrán and Himes (n 202), 101; Hodgkin and Newell (n 199), 80 refer to the path to maturity through increasing autonomy as the goal of article 5 of the CRC; Tom Campbell 'The Rights of the Minor: As Person, as Child, as Juvenile, as Future Adult' Philip Alston, Stephen Parker and John Seymour (eds), *Children, Rights and the Law* (Clarendon Press 1992), 18 similarly refers to redrawing the boundary between childhood and adulthood as a better description of child rights than extending adult rights to children.

205 Flekkøy and Kaufman (n 197), 48.

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the generally lower competence of children is recognised as a relevant difference from adults, justifying restrictive measures to protect children. This permits a presumption of incompetence, which is considered reasonable grounds for the denial of capacity.²⁰⁶ It also makes the exercise of competence dependent on another's recognition of that competence.²⁰⁷ This leads to the problem that competence is more likely to be recognised if the child's opinion coincides with the assessor's view of his or her best interests or at least appears to be a reasonable choice.²⁰⁸ Because it is so flexible the system runs the risk of becoming discriminatory. Rather than competence and capacity being tied to age they come to depend on an assessment by a third party.²⁰⁹ The system of limited capacity due to setting of different age limits may result in an irrational patchwork of capacities at different ages rather than a graduated development towards full capacity. There is no guarantee that the child's actual competence will govern his or her legal capacity, rather than presumptions about the ages at which children develop certain capacities.²¹⁰

C. The Convention on the Rights of Persons with Disabilities

The CRPD takes a much simpler approach. It starts from the position that persons with disabilities should have legal capacity on an equal basis with others.²¹¹ It then distinguishes this legal capacity from competence and provides for supported decision making to facilitate the exercise of capacity by those lacking competence.²¹²

206 Flekkøy and Kaufman (n 197), 48-50; Lansdown (n 192), xiii.

207 Hodgkin and Newell (n 199), 5.

208 John Seymour 'An 'uncontrollable' child: A Case Study in Children's and Parents' Rights' in Alston, Parker and Seymour (n 204), 101; Lansdown (n 192), 28 notes that where the child's view does not agree with the professionals it is sometimes assumed to be the result of other adults manipulating the child.

209 Hodgkin and Newell (n 199), 5.

210 Lansdown (n 192), 35, 49; Michael D A Freeman, 'The Limits of Children's Rights' in Michael Freeman and Philip Veerman (eds), *The Ideologies of Children's Rights* (Martinus Nijhoff 1992), 35 similarly argues that age limits are arbitrary.

211 CRPD, art 12(2).

212 CRPD, art 12(3).

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The phrasing of article 12(2) that “persons with disabilities enjoy legal capacity on an equal basis with others” makes it unclear whether the limitation of capacity because of an individual’s incompetence is legitimate or not. In light of the general principles and objectives of the CRPD, which include promoting the autonomy, independence and self-determination of persons with disabilities as well as their equality with other persons, article 12 should certainly be read as discouraging, even if it does not prohibit, the limitation of capacity on grounds of incompetence.

Supported decision making has the advantage of protecting the control over their lives of persons with disabilities. It fits with the provision of reasonable accommodation in order to provide equality of opportunities with non-disabled individuals which is a driving force of the CRPD.²¹³ However, the CRPD does not resolve questions relating to who may be eligible for assistance and how the situation of individuals who resist the provision of assistance should be handled. Nor does it define the role of the assistant.

Article 12(4) provides for safeguards in relation to the exercise of legal capacity:

“to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.”²¹⁴

The concern with ensuring the control of his or her life by the individual is once again clear in these safeguards addressing some of the

213 CRPD, arts 1, 3, 5.

214 CRPD, art 12(4).

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concerns about the need to regulate and oversee the role of the assistant in supported decision making. However, these safeguards appear less satisfactory in relation to the possibility of guardianship. In particular, there is no absolute assertion of the right of a ward to participate in decisions made about his or her life. The obligation to respect the rights, will and preference of the individual could, and ought, to be read to include such a right. This is, however, significantly weaker than the right of the child to be heard in the CRC and does not provide any indication of the factors that might be considered in attaching weight to the individual's views. Although there is a requirement of oversight, and the reference to proportionality would ensure greater oversight of guardianships, there is no mention of the possibility of challenging a decision taken on behalf of the individual. If the individual does not have capacity to access judicial mechanisms, then provision for a complaints procedure that he or she has both the capacity and the opportunity to access would seem essential.

By not addressing guardianship at all the CRPD fails to regulate the use and objectives of guardianship. There is a risk that individuals under guardianship will remain a neglected underclass because the CRPD is seen as inappropriate to address their needs and situation. This must be considered a major failing in a treaty that aims to assert the rights of all persons with disabilities. As Degener and Quinn emphasise, one of the values of human rights for persons with disabilities is that human rights recognises the innate value of the human irrespective of their competence, capacity, or autonomy.²¹⁵

Whichever interpretation of article 12 is adopted, it is clear that the CRPD starts from a presumption of legal capacity and in doing so asserts the equality of persons with and without disabilities in this regard. The CRPD does not, however, assume competence. Article 12(3) requires that low competence should be compensated for by the provision of assistance

²¹⁵ Gerard Quinn and Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (OHCHR 2002), 11.

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through supported decision making. The assertion of capacity means that the individual retains control of the final decision, while the supported decision making model ensures that they are not abandoned to suffer the consequences of incompetent decision making. The CRPD seems to aim to advance persons with disabilities to a situation as close to that of a fully independent decision maker as possible. In this it recognises as Mégret suggests that autonomy exists on a spectrum and aims to maximise the autonomy of persons with disabilities, but without asserting a right to autonomy.²¹⁶

²¹⁶ Frédéric Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30 *Human Rights Quarterly* 494, 512.

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The CRPD and the CRC take very different approaches to the question of the possession and exercise of human rights by persons regarded as having low competence and particularly the role that these individuals should have in decisions about their lives. The CRC prioritises protection, enabling children's decisions to be overruled in almost all circumstances by reference to their best interests. Children's capacity is and can be limited for no other reason than that they are children and as such are assumed to have limited competence.

The CRPD, on the other hand, takes the position that the final power to make decisions about their lives should rest with the individual. Individuals possessing legal capacity cannot be prevented from making 'bad' decisions, but the guarantee of assistance aims to ensure that these decisions are the result of the will of the individual, not a consequence of incompetence. Because it safeguards the exercise of autonomy by the individual and assumes that the individual is the primary player in decisions about his or her life, the CRPD does not explicitly assert his or her role in decision making. The CRC on the other hand provides for the child's right to be heard and for his or her views to be taken into account. It provides a stronger guarantee of participation precisely because children are disempowered by their lack of capacity and so their right to participate cannot be assumed. If it were not stated as a right, children's participation in decisions about their lives would be wholly at the discretion of the adults who control their lives. The CRPD provides no such absolute safeguards for persons with disabilities under guardianship.

A fundamental difference in purpose and approach may underlie these differences. The CRPD is primarily a non-discrimination treaty. It asserts the equality of persons with disabilities and aims to provide the necessary framework, understanding of equality, and accommodation for them to exercise the same rights as other people. In this respect its approach to legal capacity is concerned first and foremost with the legal equality of

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persons with disabilities. It then addresses the problem of ensuring that persons with disabilities are able to exercise that capacity; that is, it addresses the particular problem that lack of competence creates for the exercise of capacity.

In contrast the CRC accepts that there is a legitimate distinction between children and adults and that children need greater protection than adults. This protection includes protecting them from the consequences of their own incompetence and lack of experience. This protection is provided despite an awareness that the difference between children and adults is largely a social and legal construction. The legal designation that children are minors and so presumed to be incompetent and lacking capacity is sufficient reason to provide them with additional protection. The CRC recognises and addresses the social reality of children's powerlessness whereas the CRPD aims to break down the social reality of the powerlessness of persons with disabilities. The CRC aims to strike a balance between protection and recognition of the individual personality and competence of the child. The CRPD asserts the equality of persons with disabilities and their right to the assistance needed to reach the competence necessary to exercise rights. Both approaches have values and both have weaknesses. Some children will have their capacity unnecessarily limited by the protective aspects of the CRC, but others will receive much needed protection. Some persons with disabilities may find that they are left behind and inadequately protected in their dependent status by the CRPD's focus on promoting autonomy. Others will be liberated by the CRPD's rejection of the idea that persons with disabilities are dependent and its construction of access to assistance in order to exercise legal capacity as a form of reasonable accommodation.

Another reason for the difference in approach might be the fact that the CRPD has to address the situation of persons with disabilities throughout their lives. The CRC is able to take a more protective approach because it safeguards children for a limited space of time. The present restriction of their autonomy is balanced by the knowledge that these

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restrictions will end when they reach maturity, at which point they will be recognised as having full adult rights and legal capacity. Because persons with disabilities are not expected to stop being disabled the CRPD cannot apply the same compromise of greater protection for a time in order to promote future autonomy.

These factors may also help to explain why the two treaties have different attitudes towards the validity of designating individuals as lacking legal capacity. The CRC, because it sees children as developing towards adulthood, does not see legal capacity as a single thing that individuals either possess or do not possess. Instead it is comprised of the recognition of an individual's capacity (and presumed competence) in a number of different areas. Capacity in each area can be recognised separately and often is through the setting of age limits below the age of maturity for recognition of capacity in some respects. Children are expected to gradually acquire full legal capacity through the cumulative effect of recognition of capacity in specific areas rather than being completely lacking in capacity until they reach maturity. The distinction is that after maturity capacity is assumed to exist, whereas before maturity incapacity is assumed and has to be refuted by the specific recognition of capacity in a particular area. The CRPD on the other hand regards legal capacity as a human right. Depending on the reading of article 12 it may prohibit or permit the limitation of capacity, but it certainly regards it as an infringement of the individual's rights that requires justification. This is much closer to the view of legal capacity as something that an individual either does or does not possess.

Within the CRPD legal personality and legal capacity are linked by being grouped in a single article, as they are in the Convention on the Elimination of Discrimination Against Women. The failure to provide for any exceptions to either right, the obligation to provide assistance to individuals in exercising their legal capacity, and the object of promoting the autonomy of persons with disabilities all combine to imply that the restriction of legal capacity would be problematic for the possession and exercise of human rights. Without legal capacity the individual's autonomy

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is reduced and the extent to which he or she can control his or her life is diminished. In this the CRPD seems to regard the restriction of article 16 of the ICCPR as too limited, implying that legal personality cannot provide an adequate basis for the possession, exercise and vindication of human rights. The CRC, on the other hand, does not regard the lack of legal capacity as preventing the possession and exercise of human rights. Human rights are instead used to reassert the separate legal personality of the child and to ensure that despite lack of capacity he or she has a role in the decisions made about his or her life. In this the CRC agrees with the ICCPR that the recognition of legal personality is both an objective of human rights and a necessary criterion for the possession of these rights. Both treaties accept fundamentally the distinction drawn between legal personality and legal capacity in the ICCPR. The difference is in the conclusions that they reach about the necessity of legal capacity for the possession and exercise of human rights.

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