

**Legal Capacity and the Convention on the Rights of Persons with Disabilities:
An Alternative Framework to Promote Law Reform in Hong Kong and Beyond**

[Forthcoming in (2021) (16) *Journal of Comparative Law*]

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INTRODUCTION

Although widely ratified, the Convention on the Rights of Persons with Disabilities (CRPD)¹ has proven challenging for governments to implement. The purpose of the treaty is 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.’² The treaty is often described as a ‘paradigm shift’ because it rejects the medical and social welfare models, which view persons living with impairments as objects of medical treatment and charity.³ Instead, the treaty embraces the human rights model of disability, an extension of the social model that arose out of the deinstitutionalisation movement.⁴ Viewing disability as a form of social oppression, the treaty explains that

* The authors thank Urania Chiu, Jane Richards, and Jaime Wong for their assistance, the University of Hong Kong (Seed Fund for Basic Research Grant No. 201611159202) and the William S. Richardson School of Law for their support for the research that led to this article.

¹ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 of 24 January 2007, UN Doc. A/RES/61/106 (CRPD). As of May 2021, there were 182 states parties.

² *Ibid* at article 1.

³ See Kanter, AS (2007) ‘The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities’ (34) *Syracuse Journal of International Law and Commerce* 287; and Kayess, R and French, P (2008) ‘Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (8) *Human Rights Law Review* 1.

⁴ For background on the social model of disability, see Oliver, M (1996) *Understanding Disability: From Theory to Practice* St. Martin’s Press; and Oliver, M (2013) ‘The Social Model of Disability: Thirty Years On’ (28,7) *Disability and Society* 1024. For a discussion of how the human rights model of disability differs from the social model, see Degener, T (2017) ‘A Human Rights Model of Disability’, in Fina, VD; Cera, R and Palmisano, G (eds) *The United Nations Convention on the Rights of Persons with Disabilities* Springer. Degener argues that the human rights model can address the critique that the social model neglects some of the lived experience of persons with

‘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.’⁵ Yet the treaty also acknowledges that the removal of physical, legal, and social barriers is not always sufficient. Some persons living with impairments require significant services and support in order to be treated equally and live with dignity.⁶

This article focusses on the right to legal capacity, which is protected in Article 12 of the CRPD and essential to the enjoyment of many other rights in the treaty. Article 12 is controversial and governments have taken widely different approaches to its interpretation. In 2014, the CRPD’s treaty-monitoring body, the UN Committee on the Rights of Persons with Disabilities (CRPD Committee) issued its first General Comment, interpreting Article 12 as requiring governments to abolish all forms of substitute decision-making and provide, instead, mechanisms of supported decision-making for those who need assistance in implementing decisions that reflect their own will and preferences.⁷ While intended to promote law reform, this particular General Comment has arguably had the opposite effect. This is because reforms that do not fully comply with it will be criticised by the CPRD Committee.⁸ Rather than invite that criticism, it appears that many governments are choosing not to engage in the difficult process of reforming laws governing adult guardianship, compulsory treatment, and detention on the ground of disability.

Hong Kong provides an excellent example of the unintended consequences of General Comment 1 and a lens through which to consider an alternative approach to interpreting Article 12 and promoting law reform. Although bound by the CRPD since

disabilities (see, for example, Shakespeare, T (2006) *Disability Rights and Wrongs* Routledge).

⁵ CRPD, article 1 (emphasis added).

⁶ See, for example, Degener, T (2016) ‘Disability in a Human Rights Context’ (5, 3) *Laws* 35, at <http://www.mdpi.com/2075-471X/5/3/35/htm>; and Stein, MA ‘Disability Human Rights’ (95) *California Law Review* 75.

⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the law, CRPD/C/GC/1 (11 April 2014).

⁸ For example, although Canada and Australia are recognised leaders in the field of supported decision-making, the Committee has criticised both nations for failing to fully comply with General Comment No. 1. See Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Canada, CRPD/C/CAN/CO1 (8 May 2017), para. 8; and Committee on the Rights of Persons with Disabilities, Concluding Observations on the Combined Second and Third Periodic Reports of Australia, CRPD/C/AUS/CO/2-3 (15 October 2019), paras 23-24.

2008,⁹ Hong Kong has not implemented Article 12 and largely ignored the issue in its 2018 report to the CRPD Committee.¹⁰ The report acknowledges the existence of ‘mentally incapacitated persons’ but does not disclose the number of adults living under guardianship or the legal standard used to determine whether an adult will be placed under guardianship. The Hong Kong government also avoided these issues in its 2019 report to the UN Human Rights Committee, which monitors Hong Kong’s compliance with the International Covenant on Civil and Political Rights (ICCPR).¹¹ These omissions are concerning, especially in light of cogent critiques that Hong Kong’s legal standard for adult guardianship is incoherent, overly broad, and in dire need of reform.¹²

Hong Kong’s 2018 CRPD report also incorrectly claims that the Mental Health Ordinance¹³ (MHO) protects persons with disabilities from medical treatment without their freely given and informed consent.¹⁴ In fact, the opposite is true: Hong Kong’s MHO is regularly used to authorise compulsory treatment in the community¹⁵ and compulsory admission to mental health hospitals.¹⁶ Hong Kong’s threshold for compulsory admission to a mental health hospital is low when compared to other common law jurisdictions and

⁹ Petersen, CJ (2008) ‘China’s Ratification of the Convention on the Rights of Persons with Disabilities: The Implications for Hong Kong’ (38) *Hong Kong Law Journal* 611 at 618-43.

¹⁰ See Combined Second and Third Periodic Reports Submitted by Hong Kong China, CRPD/C/CHN-HKG/2-3 (31 August 2018), available at: <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCHN-HKG%2f2-3&Lang=en> (accessed 1 May 2020) (hereinafter ‘Hong Kong’s 2018 CRPD Report’).

¹¹ Fourth periodic report submitted by the Hong Kong Special Administrative Region of the People’s Republic of China under article 40 of the International Covenant on Civil and Political Rights, CCPR/C/CHN-HKG/4 (19 December 2019). The report addresses only the limitations on voting rights of ‘mentally incapacitated persons’ (at paras 203-207).

¹² See, for example, Cheung, D (2018) ‘Mental Health Law in Hong Kong: the Civil Context’ (48) *Hong Kong Law Journal* 461, at section 6; and Lee, R (2019) ‘The Adult Guardianship Dilemma in Hong Kong’ (25) *Trusts & Trustees* 1073.

¹³ Mental Health Ordinance, Cap. 136 (hereinafter ‘MHO’).

¹⁴ Hong Kong’s 2018 CRPD Report supra note 10 at para. 17.1.

¹⁵ Chiu, U (2019) ‘Compulsory Treatment in the Community in Hong Kong: Implications of the Current Law and Practice on the Rights of Persons with Mental Illnesses’ (20) *Asia-Pacific Journal on Human Rights and the Law* 60.

¹⁶ For statistics on the number of compulsory admissions, see Siu, BWM; Fistein, EC; Leung, HW; Chan, L; Yan, CK; Lai, A; Yuen, KK; Ng, KK (2018) ‘Compulsory Admission in Hong Kong: Balance between Paternalism and Patient Liberty’ (28) *East Asian Archives of Psychiatry* 122 at 123.

the MHO does not provide for meaningful judicial oversight.¹⁷ Resolving these problems in Hong Kong's mental health laws and policies has become particularly critical due to a prolonged period of political and social unrest, which, together with COVID 19, has contributed to a mental health crisis in the territory.¹⁸ Fortunately, the CRPD Committee has requested more detailed information on the right to legal capacity for its upcoming review of Hong Kong.¹⁹ It is, therefore, an ideal time to consider what Hong Kong and jurisdictions in similar situations can do to better meet their obligations under the CRPD.

This article recognises that the right to legal capacity is a particularly contentious area of law and policy and that it is unrealistic to expect governments to immediately abolish all forms of substitute decision-making. Indeed, public demand for this type of legislation has actually increased in the Asia-Pacific region in the past 25 years, due to the rapid aging of its population.²⁰ We therefore propose an alternative theoretical framework for interpreting Article 12, one that fully reflects the treaty's holistic approach to rights. Although our approach differs from that taken by the CRPD Committee in its General

¹⁷ See, for example, Cheung, D; Dunn, M; Fistein, E; Bartlett, P; McMillan, J; and Petersen, CJ (2020) 'Articulating Future Directions of Law Reform for Compulsory Mental Health Admission and Treatment in Hong Kong' (69) *International Journal of Law and Psychiatry* 101513; and Cheung, D (2017) 'The Compulsory Psychiatric Regime in Hong Kong: Constitutional and Ethical Perspectives' (50) *International Journal of Law and Psychiatry* 24-30.

¹⁸ Hou, WK; Lee, TMC; Liang L; Tze WL; Liu H; Ettman CK; Galea, S (2021) 'Civil Unrest, COVID 19 Stressors, Anxiety and Depression in the Acute Phase of the Pandemic: a Population-Based Study in Hong Kong' *Social Psychiatry and Psychiatric Epidemiology*, <https://doi.org/10.1007/s00127-021-02037-5>; and Lew, L and Cheung, E (9 October 2019) 'Mental health in Hong Kong at its worst level in eight years, affected by ongoing social unrest: survey' *South China Morning Post* (reporting on a survey conducted by the Chinese University of Hong Kong).

¹⁹ Committee on the Rights of Persons with Disabilities, List of issues in relation to the combined second and third periodic reports of Hong Kong, China CRPD/C/CHN-HKG/Q/2-3 (21 April 2020).

²⁰ Petersen, CJ (2016) 'Promoting the Rights of Older Persons: Addressing Adult Guardianship and Substituted Decision-Making in Health Care' (10,1) *Asia Pacific Journal of Health Law, Policy & Ethics* 41-70; and Tsoh, J; Chiu, H; and Peisah, C (2014) 'Guardianship Laws & Surrogate Decision-making Practices: Focusing on Hong Kong and selected Asia-Pacific Rim Nations,' paper presented at the 1st Annual International Capacity Conference, available at: <https://www.researchgate.net/publication/271385047_Guardianship_Laws_Surrogate_Decision-making_Practices_Focusing_on_Hong_Kong_and_selected_Asia-Pacific_Rim_Nations> (accessed 30 April 2021).

Comment 1, we believe that it is fully consistent with the rules of treaty interpretation²¹ and the doctrines of interpretation that have developed in relation to human rights treaties in particular.²²

Part II of this article briefly introduces the holistic approach to rights in the CRPD, which does not prioritise civil liberties over other rights. We argue that this approach requires careful analysis of the principles of state obligation and progressive realisation of rights, concepts that are defined differently in the CRPD than in previous treaties. Part III focusses on Article 12, which was controversial during the drafting process and ultimately silent regarding the concept of substitute decision-making, neither explicitly endorsing nor prohibiting it.²³ Part IV then critiques the CRPD Committee's interpretation of Article 12, arguing that it stretches the concept of indirect discrimination too far and could undermine the treaty's holistic approach to rights. While General Comments issued by treaty-monitoring bodies should be given careful consideration, they are not binding.²⁴ We thus suggest, in Part V, an alternative interpretation of Article 12, one that embraces the holistic approach to rights and applies the concept of 'progressive realisation' to the obligation to create more mechanisms of supported decision-making. This section also presents Ireland's new law as a possible model for jurisdictions like Hong Kong, where reforms are long overdue but the political reality requires gradual change. We conclude by arguing that Hong Kong's current laws are ripe for a constitutional challenge.

II. The Holistic Approach to Human Rights and the Principle of State Obligation

²¹ Article 31 (1) of the Vienna Convention on the Law of Treaties provides that a 'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

²² On approaches to the interpretation of human rights treaties, see, for example, Dothan, S (2019) 'The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights' (42) *Fordham International Law Journal* 765 and Tobin, J (2010) 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (23) *Harvard Human Rights Journal* 201, at 203-4 (arguing that 'legal interpretation is not simply the process of attributing a meaning to the text of a treaty but is ultimately an act of persuasion: an attempt to persuade the relevant interpretive community that a particular interpretation is the most appropriate meaning to adopt').

²³ See generally, Dhanda, A (2007) 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' (34) *Syracuse Journal of International Law and Commerce* 429.

²⁴ Keller, H and Grover, L (2012) 'General Comments of the Human Rights Committee and their Legitimacy' in Keller, H and Ulfstein, G (eds) (2012) *UN Human Rights Treaty Bodies: Law and Legitimacy* Cambridge University Press 116 at 129.

The human rights model of disability emphasises the interconnectedness of rights and rejects the traditional dichotomy between civil liberties and economic, social, and cultural rights.²⁵ This approach is evident in the text of the CRPD. The treaty often combines traditional civil liberties with the right to accessible facilities and services, creating a set of rights that are truly interconnected and therefore cannot be easily categorised as ‘civil and political rights’ or as ‘economic and social’ rights. For example, the CRPD affirms that persons with disabilities enjoy freedom of expression but also obligates states to provide information in accessible formats and to promote the use of Braille and sign language.²⁶ Similarly, it defines the right to live independently to include ‘access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community and to prevent isolation or segregation from the community.’²⁷

This holistic approach is consistent with the international community’s resolution in the 1993 Vienna Declaration and Programme of Action that all human rights are indivisible, interrelated, and interdependent.²⁸ This is a welcome development, but it complicates the principle of state obligation. Article 4 of the CRPD, which sets out states’ general obligations under the treaty, is far longer and more detailed than comparable clauses in previous human rights treaties. In summary, it obligates governments to review virtually all policies and programs that affect persons with disabilities;²⁹ to modify or repeal all discriminatory laws, regulations, customs or practices;³⁰ and to increase accessibility in the public and private spheres.³¹ States parties must also provide effective enforcement mechanisms, and ensure that persons with disabilities enjoy effective access to justice on an equal basis with others.³²

The treaty recognises, however, that many of these obligations require substantial resources and thus cannot be fulfilled immediately by all states. It thus provides that:

With regard to economic, social, and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively

²⁵ Frédéric Mégret (2008) ‘The Disabilities Convention: Toward a Holistic Concept of Rights’ (12, 2) *International Journal of Human Rights* 261.

²⁶ Article 21.

²⁷ Article 19.

²⁸ Vienna Declaration and Programme of Action (25 June 1993) at para 5, available at: <<https://www.refworld.org/docid/3ae6b39ec.html>> (accessed 30 April 2021).

²⁹ CRPD, article 4(1)(a) and (c).

³⁰ Article 4(1)(b) and (d).

³¹ Article 4(1)(f)-(h).

³² Article 13(b).

the full realization of rights, *without prejudice* to those obligations contained in the present Convention that are immediately applicable according to international law.³³

Some of this language was clearly borrowed from Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and there is a large body of literature on the implications of that clause.³⁴ However, the ‘without prejudice’ language in Article 4(2) of the CRPD has no equivalent in the ICESCR. Moreover, the CRPD does not define what rights should be considered ‘immediately applicable’ under international law. Under the traditional dichotomy (which viewed civil liberties as ‘negative’ rights that could be fulfilled without economic support from the state), one might assume that a state party is immediately obligated to respect all of the civil and political rights stated in the treaty but can progressively implement other rights. As noted above, however, the CRPD does not definitively separate civil and political rights from economic, social and cultural rights; rather, it defines many important civil liberties in a manner that requires the state to provide substantial support and services. While this is also made explicit in a limited number of rights in the ICCPR (e.g. the right to a fair trial in Article 14, which requires the state to provide legal representation for defendants who cannot afford to retain their own attorneys), the interconnectedness of civil liberties and economic, social and cultural rights is far more pronounced in the CRPD.

This raises the question of when (if ever) a state can ‘progressively implement’ rights stated in the CRPD. In recent years, the Human Rights Committee has recognised that most, if not all, civil and political rights require positive duties that may necessitate the spending of resources but do not allow for progressive realisation.³⁵ Similarly, the Committee on Economic, Social and Cultural Rights has confirmed that states must

³³ Article 4(2) (emphasis added).

³⁴ See, for example, Griffey, B (2011) ‘The Reasonableness Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (11) *Human Rights Law Review* 275.

³⁵ See, for example, Human Rights Committee (3 September 2019) General Comment No. 36 on the Right to Life, CCPR/C/GC/36. The Committee explains that ‘[p]ersons with disabilities, including psychosocial or intellectual disabilities, are also entitled to specific measures of protection so as to ensure their effective enjoyment of the right to life on an equal basis with others. Such measures of protection must include the provision of reasonable accommodation when necessary to ensure the right to life, such as ensuring access of persons with disabilities to essential facilities and services, and specific measures designed to prevent unwarranted use of force by law enforcement agents against persons with disabilities’ (para. 24). The Committee does not refer to the concept of progressive realisation and apparently views these duties as immediate.

implement certain core obligations with immediate effect.³⁶ In other words, the treaty bodies' recent interpretive work has already broken down the rigid dichotomy between civil and political rights (entailing negative, immediate obligations) and economic, social and cultural rights (requiring positive measures subject to progressive realisation).

The CRPD Committee has taken conflicting approaches to this issue, depending on the right at issue. In some contexts, the Committee has advised governments that they can divide, into two components, what was described in the treaty as an interconnected right. For example, in General Comment 5 (on the right to live independently) the CRPD Committee interprets the right to 'choose one's residence and where, how and with whom to live' as a civil right that is 'immediately applicable' but describes the right to access support services in one's residence as an economic, social, and cultural right that is subject to 'progressive realisation.'³⁷ In essence, the Committee is acknowledging the practical challenges that some states face in providing community services and instructing them to separate the liberty interest from the right to services in order to achieve, more quickly, the liberty interest. While this approach may work well for many individuals living with impairments, it could have disastrous consequences for individuals with high support needs and limited resources.

Differentiating between the nature of the obligations associated with liberty interests and economic rights in this way, and therefore prioritising the former over the latter, also implicitly endorses a particular view of the human condition – one that assumes that exercising individual agency is the essential component of a life of dignity. While some have argued that this emphasis on individual autonomy is a natural result of the shift to the 'rights model' of disability advocacy,³⁸ the CRPD embraces a much broader concept of rights and human dignity.³⁹ The very premise of the CRPD is that all human beings have equal moral worth, including those who live in relationships of dependency and care. For individuals who live with profound impairments, the right to receive compassionate care and economic support may be just as – if not more - important to their dignity and overall

³⁶ See Committee on Economic, Social and Cultural Rights (20 January 2003) General Comment No. 15: The Right to Water (contained in E/C.12/2002/11) available at: <https://www.refworld.org/pdfid/4538838d11.pdf> (accessed 1 May 2020). 'In the Committee's view, at least a number of core obligations in relation to the right to water can be identified, which are of immediate effect' (para. 37).

³⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 5: Living independently and being included in the community, CRPD/C/GC/5 (27 Apr. 2017), at para. 39.

³⁸ Ziv, N (2007) 'The Social Rights of People with Disabilities: Reconciling Care and Justice', in Barak-Erez, D and Gross A (eds) (2007) *Exploring Social Rights: Between Theory and Practice* Hart Publishing 369 at 372-377.

³⁹ See Stein *supra* note 6 and Mégret *supra* note 25.

quality of life as the enjoyment of all civil and political rights.⁴⁰ There are also situations in which unfettered individual liberty could lead to great suffering, either for the individual or for society.⁴¹

A truly holistic approach to rights thus requires a more nuanced understanding of the concept of state obligation. The Committee should recognise that governments have a duty to respect and promote the full range of rights in the CRPD and that prioritising individual autonomy may not be the response that is most compliant with the human rights model of disability in all situations. Some of the interconnected rights stated in the CRPD require substantial resources and the building of a political consensus. Governments need to undertake research, conduct public consultations, and test pilot programs. In these situations, the Committee should not rule out applying the concept of ‘progressive realisation’ to a right that integrates a liberty interest with supportive services. Rather, the Committee should consider what the state is doing to promote the interconnected right and whether it is making a good faith effort to fully comply with the overall goals of the treaty.

In the context of the right to legal capacity, it is also important to acknowledge that compromises were reached during the drafting of the CRPD, generating certain ambiguities in the text and a legitimate debate on the meaning of Article 12. This issue is explored in the next section.

III. Ambiguities in Article 12 and Competing Interpretations by States Parties

Evolution of the Right to Legal Capacity in International Law

In order to understand the debate on the meaning of Article 12, it is important to appreciate the historical context. In theory, the civil and political rights of persons with disabilities should have been protected even before the CRPD came into force, at least in those countries that had already ratified the ICCPR. The ICCPR provides that everyone ‘shall have the right to recognition everywhere as a person before the law’ and permits no derogation from this right.⁴² The ICCPR also protects the rights to equality and non-discrimination, liberty and security of the person, the right to bodily integrity, the right to be treated with dignity if deprived of liberty, and the right not to be subjected to torture or

⁴⁰ Bilchitz, D (2016) ‘Dignity, Fundamental Rights and Legal Capacity: Moving Beyond the Paradigm Set by the General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities’ (32) *South African Journal of Human Rights* 410.

⁴¹ The harmful effects of ‘deinstitutionalising’ individuals without adequate support are well documented. See, for example, Primeau, A; Bowers, TG; Harrison, MA; and Xu, X (2013) ‘Deinstitutionalization of the Mentally Ill: Evidence for Transinstitutionalization From Psychiatric Hospitals to Penal Institutions’ (2,2) *Comprehensive Psychology*.

⁴² Articles 16 and 4(2).

medical experimentation.⁴³ Unfortunately, the concept of legal *capacity* was never expressly stated in the ICCPR⁴⁴ and the institution of adult guardianship was used to create huge exceptions to the rights protected in the ICCPR. When a person is placed under ‘plenary guardianship’ (sometimes referred to as ‘full guardianship’) the guardian is authorised to exercise all, or nearly all, of the legal rights and duties of the individual.⁴⁵ This means that the individual could lose control over even the most basic decisions regarding her life, including where to reside, how to spend her money, and whether to consent to medical treatment.⁴⁶

Despite the lack of a specific reference to legal capacity in the ICCPR, the UN Human Rights Committee (the treaty-monitoring body for the ICCPR) has gradually recognised the connection between legal capacity and civil rights. The Committee now takes the position that a state party to the ICCPR must establish, on an individual basis, the necessity and proportionality of any decision to deprive a person of legal capacity and provide effective procedural safeguards, including judicial review of any decision that could lead to the loss of legal capacity or institutionalisation.⁴⁷ Activists have also lobbied for law reform at the domestic level. As a result, many countries have now developed procedural protections and less restrictive forms of substitute decision-making, such as orders of conservatorship and limited forms of guardianship.⁴⁸ The concept of ‘supported decision-making’ is the most recent and potentially transformative reform. While some

⁴³ Articles 26, 7, 9, and 10.

⁴⁴ Although the ICCPR obligates states not to discriminate on the ground of ‘other status’ many governments did not consider disability to be a prohibited ground of discrimination in international law until the CRPD came into force. The Human Rights Committee does, however, now consider disability to be a prohibited ground of discrimination. See, for example, Human Rights Committee, *Q v Denmark*, Communication No. 2001/2010, 19 May 2015.

⁴⁵ Frolik, LA (2002) ‘Promoting Judicial Acceptance and Use of Limited Guardianship’ 31 *Stetson Law Review* 735, 746-7.

⁴⁶ While Hong Kong’s MHO does not use the term ‘plenary,’ it empowers the Guardianship Board to confer extensive powers upon a guardian. See MHO, section 59R.

⁴⁷ See, for example, Concluding Observations of the Human Rights Committee: Russian Federation, CCPR/C/RUS/CO/6 (24 Nov. 2009), para. 19 and Human Rights Committee, General Comment No. 35: Article 9 (Liberty and Security of Person), CCPR/C/GC/35 (16 December 2014).

⁴⁸ Australia pioneered a least restrictive and presumptively limited form of guardianship in the 1980s. See Carney, T (2015) ‘Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?’ (4,1) *Laws* 37-59, available at: <<https://doi.org/10.3390/laws4010037>> (accessed 1 May 2021). For examples of reforms in the United States (which has signed but not ratified the CRPD), see Diller, R (2016) ‘Legal Capacity for All: Including Older Persons in the Shift from Substituted to Supported Decision-Making’ (43) *Fordham Urban Law Journal* 495, 504-510.

individuals may seek only informal support (e.g. assistance with communication), supported decision-making can also include more structured mechanisms, such as advance directives, enduring powers of attorney, health care proxies, or personal ombudsman. Certain jurisdictions have made significant progress in this area,⁴⁹ enabling individuals to avoid or terminate guardianship orders.⁵⁰ But most commentators would agree that this is still a developing field, one that requires governments to invest resources, conduct research, and test pilot programs.⁵¹ Law reform also normally involves public consultation and political compromises.

Ambiguity in the Meaning of the Right to Legal Capacity in the CRPD

Cognizant of how guardianship laws have been used to abuse individual liberties, disability rights activists made the issue of legal capacity a priority in the drafting of the CRPD. Unlike the ICCPR, the CRPD expressly protects the right to legal capacity and directly links it to the right to legal recognition.⁵² The issue was, however, contentious, with some states arguing that there should be a distinction between the capacity to enjoy rights and the capacity to exercise those rights.⁵³ Other states supported an express

⁴⁹ See, for example, Dinerstein, R (2012) 'Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making' (19, 2) *Human Rights Brief*; and Hoffman, SJ; Sritharan, L; and Tejpar, A (2016) 'Is the UN Convention on the Rights of Persons with Disabilities Impacting Mental Health Law in High-Income Countries? A Case Study of Implementation in Canada' (16) *BMC International Health and Human Rights* 28.

⁵⁰ See Devi, N; Bickenbach, J; and Stucki, G (2011) 'Moving Towards Substituted or Supported Decision-Making? Article 12 of the Convention on the Rights of Persons with Disabilities' (5) *ALTER European Journal of Disability Research* 249-64; and Odendahl, M (18 June 2018) 'Indiana Court Pilot Project Helps Woman Gain Independence,' *The Indiana Lawyer*, available at: <<https://www.theindianalawyer.com/articles/47328-indiana-court-pilot-project-helps-woman-gain-independence>> (accessed 1 May 2021).

⁵¹ See, for example, Carney, T and Beaupert, F (2013) 'Public and Private Bricolage - Challenges Balancing Law, Services and Civil Society in Advancing CRPD Supported Decision-Making' (36) *University of New South Wales Law Journal* 175, 176-79; and Douglas, J and Bigby, C (2020) 'Development of an evidence-based practice framework to guide decision making support for people with cognitive impairment due to acquired brain injury or intellectual disability' (42) *Disability and Rehabilitation* 434-441, DOI: 10.1080/09638288.2018.1498546, available at: <<https://doi.org/10.1080/09638288.2018.1498546>> (accessed 1 May 2021).

⁵² CRPD, article 12.

⁵³ Kanter, A (2014) *The Development of Disability Rights Under International Law: From Charity to Human Rights* Routledge at Chapter 7; and Dhanda supra note 23.

statement confirming the right to exercise legal capacity but maintained that restrictions should be allowed in certain circumstances.

As a result of these competing views, the language addressing legal capacity went through many different versions and multiple drafts were considered.⁵⁴ A number of states supported text that would have allowed for the appointment of a personal representative as a matter of last resort when accompanied by procedural safeguards.⁵⁵ Opponents argued that the new treaty should be forward looking and fully embrace the paradigm shift by affirming the legal capacity of all persons, including those with high support needs. Eventually, a compromise was reached: the treaty would clearly state that all persons enjoy legal capacity and the obligation to provide support for decision-making but would remain silent on the issue of substitute decision-making.⁵⁶ Thus, the final text of Article 12 provides:

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

⁵⁴ The CRPD was drafted by an Ad Hoc Committee over a period of four years (from 2002-2006). For the reports of the Ad Hoc Committee and drafts of the treaty, see <https://www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html> (accessed 1 May 2021).

⁵⁵ Devi, N; Bickenbach, J; and Stucki, G (2011) 'Moving Towards Substituted or Supported Decision-Making? Article 12 of the Convention on the Rights of Persons with Disabilities' 5 *ALTER - European Journal of Disability Research* 249-264.

⁵⁶ For analysis of the negotiations leading to this compromise, see Martin, W; Michalowski, S; Stavert, J; Ward A; Keene, AR; Caughey, C; Hempsey, A; McGregor, R (6 June 2016) *The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Article 12 in Capacity/Incapacity Legislation across the UK*, at 58-62, available at: <<https://autonomy.essex.ac.uk/wp-content/uploads/2017/01/EAP-3J-Final-Report-2016.pdf>> (accessed 1 May 2021).

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.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Although this compromise enabled the treaty to be finalised, it also introduced ambiguity and ensured that the debate on Article 12 would continue long after the treaty was adopted by the General Assembly and opened for ratification. When states began to ratify the CRPD, numerous governments entered reservations and interpretative declarations to preserve their own understandings of Article 12. Some of these statements are extremely broad and could effectively eliminate any 'right' to legal capacity. For example, Estonia (which has been widely criticised for human rights abuses in its mental health care system⁵⁷) filed a declaration stating that it interprets Article 12 to permit restrictions on 'a person's active legal capacity when such need arises from the person's ability to understand and direct his or her actions.'⁵⁸ Similarly, when Egypt ratified the treaty in 2008 it declared that persons with disabilities enjoy the capacity to acquire rights and assume legal responsibility (ahliyyat al-wujub) but not the capacity to perform ('ahliyyat al-'ada'), under Egyptian law.⁵⁹ This reflected the position advanced by twenty nations in the Arab Group during the drafting of the treaty. Although it was designated as an 'interpretative declaration,' it would be more accurate to describe this as a broad reservation to Article 12,⁶⁰ one that effectively destroys the right to legal capacity and is therefore inconsistent with the object and purpose of the CRPD.

Other nations have, however, taken a more nuanced approach, recognising a general right to exercise legal capacity but filing declarations to preserve the possibility of

⁵⁷ Germanavicius, A; Rimsaite, E; Pilt, E; Puras, D; Juodkaite, D; Leimane, I (2012) *Human Rights in Mental Health Care in Baltic Countries*, available at: <http://cilvektiesibas.org.lv/site/attachments/30/01/2012/HRinMHbaltics_ENG.pdf> (accessed 1 May 2021).

⁵⁸ U.N. Treaty Collection, Chapter IV(15), CRPD, Declarations and Reservations: Estonia.

⁵⁹ Ibid, at Declarations and Reservations: Egypt.

⁶⁰ See also the declarations filed by the Syrian Arab Republic in 2009 and by Kuwait in 2013, which take a similar position.

substitute decision-making in limited situations. These governments believe that subparagraph 4 of Article 12 can be interpreted to allow for ‘fully supported’ decision-making, a term that is often used to refer, albeit obliquely, to what is essentially a form of substitute decision-making. For example, when Australia ratified the CRPD it declared its understanding that the treaty permits ‘fully supported or substitute decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.’⁶¹ Similarly, Canada declared its understanding that Article 12 permits both supported and substitute decision-making arrangements and reserved its right to use the latter ‘in appropriate circumstances and subject to appropriate and effective safeguards’⁶² Norway, the Netherlands, Ireland, Georgia, Singapore, and France made similar statements upon ratification. In our view, if applied in good faith, these statements do not conflict with the overall object and purpose of the CRPD.⁶³

Governments have also expressed reluctance to completely eliminate compulsory treatment orders from their domestic legal frameworks.⁶⁴ The right to refuse medical treatment is an important element of one’s legal capacity. In addition to Article 12 of the CRPD, this issue is also affected by Article 14 (which states that the existence of a disability shall in no case justify a deprivation of liberty), Article 17 (which protects the right to bodily integrity), Article 25 (which emphasises the principle of free and informed consent as part of the right to health), and Article 5 (which recognises equality before the law and prohibits discrimination on the basis of disability). In some contexts, medical intervention without free and informed consent may even constitute a form of torture, which is prohibited as a *jus cogens* norm of customary international law, as well as by the Convention Against Torture, the ICCPR, and Article 15 of the CRPD.⁶⁵ There is, however, widespread disagreement on the question of whether compulsory medical treatment always violates international norms and numerous states have preserved their right to impose treatment in certain circumstances. For example, when Ireland ratified the CRPD it declared ‘its understanding that the Convention allows for compulsory care or treatment of persons, including measures to treat mental disorders, when circumstances render

⁶¹ U.N. Treaty Collection, Chapter IV(15), CRPD, Declarations and Reservations: Australia.

⁶² Ibid, at Declarations and Reservations: Canada.

⁶³ The CRPD Committee has recommended that states withdraw these declarations.

⁶⁴ See, for example, Szmukler, G; Daw, R; and Callard, F (2014) ‘Mental Health Law and the UN Convention on the Rights of Persons with Disabilities’ (37) *International Journal of Law & Psychiatry* 245-252.

⁶⁵ See Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, U.N. Doc. A/HRC/22/53 (1 February 2013), at 14-16 and 20-21, available at: <<https://www.refworld.org/docid/51136ae62.html>> (accessed 1 May 2021).

treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards.’⁶⁶ Australia⁶⁷ and the Netherlands have filed similar declarations.⁶⁸

To the best of our knowledge, no state has filed an objection to these interpretative declarations and reservations.⁶⁹ This indicates that the other states parties to the CRPD do not view these statements as inconsistent with the object and purpose of the treaty.⁷⁰ However, the UN High Commissioner for Human Rights was highly critical of governments that viewed Article 12 as allowing for the continuation of substitute decision-making.⁷¹ Certain disability rights organisations have also criticised reservations and interpretative declarations relating to legal capacity.⁷² For example, the International Disability Rights Alliance (IDA) published a legal opinion, signed by more than 30 experts in the field, arguing that reservations to Article 12 would defeat the object and purpose of the treaty and are therefore invalid.⁷³ The opinion endorsed the concept of universal legal capacity and the importance of providing mechanisms of supported decision-making, noting that ‘the support should be based on trust, be provided with respect and not against the will’ of an individual. The opinion did not, however, make any assessment of the specific interpretative declarations that have been filed by states regarding Article 12.

⁶⁶ U.N. Treaty Collection, Chapter IV(15), CRPD, Declarations and Reservations: Ireland.

⁶⁷ *Ibid*, at Declarations and Reservations: Australia (stating that it interprets the CRPD to permit ‘compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards’).

⁶⁸ *Ibid*, at Declarations and Reservations: The Netherlands.

⁶⁹ *Ibid* at Objections. Some objections have been filed to very broad reservations (such as the reservation entered by El Salvador) but no states have objected to the specific reservations and interpretative declarations relating to Article 12.

⁷⁰ See, for example, Vienna Convention on the Law of Treaties, article 20 (providing that a reservation is considered to be accepted by a state if it raises no objection within 12 months).

⁷¹ UN High Commissioner for Human Rights (January 2009) Annual Report: Thematic Study on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities, A/HRC/10/48, at para. 42.

⁷² See, for example, Minkowitz, T (2012) ‘CRPD Advocacy by the World Network of Users and Survivors of Psychiatry: The Emergence of a User/Survivor Perspective in Human Rights’, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326668> (accessed 1 May 2021).

⁷³ International Disability Alliance (2010) ‘Legal Opinion on Article 12 of CRPD’ available at: <<http://www.internationaldisabilityalliance.org/resources/legal-opinion-article-12-crpd>> (accessed 1 May 2021).

Of course, many states (including China) have ratified the CRPD without any reservations or interpretative declarations relating to legal capacity.⁷⁴ That does not necessarily mean, however, that these governments are ready to abolish all forms of substitute decision-making. In some cases, a decision to ratify a treaty without reservations merely indicates that a government does not understand the extent to which their domestic laws may conflict with treaty obligations.⁷⁵ For example, Spain's Initial Report to the CRPD Committee described provisions in its Civil Code (which empower courts to limit legal capacity when an illness 'prevents the person from managing his/her affairs unaided') as examples of its *compliance* with Article 12(3). Although these provisions clearly describe a system of substitute decision-making, the Spanish government described them as 'measures to provide persons with disabilities the support they need to exercise their legal capacity.'⁷⁶ The Committee took issue with this position and urged Spain to repeal its laws allowing for guardianship and trusteeship.⁷⁷ As the Committee reviewed other states' reports, it became clear that many governments were interpreting the term 'support' in Article 12(3) to include mechanisms of substitute decision-making, including plenary guardianship. This is likely one of the reasons that the Committee selected legal capacity as the subject of its first General Comment. As discussed below, however, the CRPD Committee may have taken an approach that could undermine the persuasive value of its recommendations to states parties.

IV. General Comment 1 and the Absolutist Approach to Legal Capacity

The CRPD Committee began the process of drafting its first General Comment by hosting interactive discussions and a 'Day of General Discussion' on the right to legal capacity.⁷⁸ The subject proved controversial, just as it did when the treaty was being

⁷⁴ China did not enter any reservations for Mainland China and the only reservation that it entered on behalf of Hong Kong relates to immigration controls.

⁷⁵ This may explain why China filed no reservations for Mainland China although it has many laws and policies that violate the CRPD. See Petersen, CJ (2013) 'The Convention on the Rights of Persons with Disabilities: Using International Law to Promote Social and Economic Development in the Asia Pacific' (35) *University of Hawai'i Law Review* 821, 841-855; and Hallett, S (2019) 'Objects of pity or subjects of rights? Disability and human rights in the People's Republic of China' in Biddulph, S and Rosenzweig, J (eds) *Handbook on Human Rights in China* Edward Elgar Publishing Limited at Chapter 11.

⁷⁶ Implementation of the Convention on the Rights of Persons with Disabilities, Initial Reports Submitted by States Parties in Accordance with Article 35 of the Convention: Spain, U.N. Doc. CRPD/C/ESP/1 (3 May 2010), paras 53-54.

⁷⁷ Committee on the Rights of Persons with Disabilities, Concluding Observations of the Committee on the Rights of Persons with Disabilities Spain, CRPD/C/ESP/CO/1(19-23 September 2011), paras 33-34.

⁷⁸ See CRPD Committee Day of General Discussion on 'Article 12 of the CRPD – the Right to Equal Recognition Before the Law' (21 October 2009), available at:

drafted. The Committee created a small Working Group, which was initially chaired by Gabor Gombos (a survivor of forced psychiatric treatment in Hungary). However, the General Comment took five years to finalise and most of the drafting occurred under the leadership of co-chairs Theresia Degener (of Germany) and Edah Maina (of Kenya).

In 2013, the Committee distributed a draft of its General Comment, interpreting the CRPD as requiring states parties to abolish all forms of substitute decision-making, including guardianship, conservatorship, and mental health laws that permitted compulsory treatment.⁷⁹ Numerous governments submitted comments disagreeing with the Committee's draft General Comment, arguing that substitute decision-making and orders of compulsory treatment would not violate the treaty if they were applied in a non-discriminatory manner, in limited circumstances, and with sufficient safeguards. Germany's submission pointed out that the Committee's proposed interpretation of Article 12 was 'not shared by the states parties in general, not even by a substantial minority.'⁸⁰

The CRPD Committee did not revise its core views on Article 12 in the final version of General Comment 1. Moreover, the Committee took the position that the obligations imposed by Article 12 are immediately applicable and that states cannot rely upon the doctrine of progressive realisation and gradually transition to systems of supported decision-making.⁸¹ In our view, this part of the General Comment is particularly challenging because states need to invest significant resources in order to develop the necessary support services, safeguards, and dispute resolution mechanisms.⁸² Governments may also need time to build a political consensus on the necessary reforms because of the controversial nature of policies related to legal capacity.

When one dissects the final version of General Comment 1, two things become apparent. First, the Committee has interpreted Article 12(4) as imposing an absolute duty to implement an individual's will and preferences. This interpretation seems to deviate from the text of Article 12(4), which requires states only to 'respect the rights, will and

<<https://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD2009.aspx>> (accessed 1 May 2021).

⁷⁹ Committee on the Rights of Persons with Disabilities (2013) Draft General Comment on Article 12: Equal Recognition before the Law, CRPD/C/11/4 at para. 7.

⁸⁰ Federal Republic of Germany (20 February 2014) 'German Statement on the Draft General Comment on Article 12 CRPD' available at: <<https://www.ohchr.org/Documents/HRBodies/CRPD/GC/FederalRepublicOfGermanyArt12.pdf>> (accessed 1 May 2021).

⁸¹ General Comment No. 1, supra note 7 at para. 30.

⁸² Carney, T (2017) 'Prioritising Supported Decision-Making: Running on Empty or a Basis for Glacial-to-Steady Progress?' (6, 4) *Laws* 18, available at: <<https://www.mdpi.com/2075-471X/6/4/18>> (accessed 1 May 2021).

preferences’ of individuals. While the term ‘respect’ is somewhat ambiguous, we argue that it does not require the state to abide by an individual’s stated preferences in all circumstances. Rather, the state is obligated to carefully consider and to show due regard for an individual’s will and preference, a standard that requires more than simply ‘taking into account’ a person’s expressed preferences but does not require absolute adherence to them.⁸³

General Comment 1 also implicitly prioritises liberty interests over other human rights. Yet, in line with the CRPD’s holistic approach to rights, the state must consider not only the right to legal capacity but the entire range of human rights, including the right to life, the right to health, the right to equality, and the right to live with dignity. In certain situations – for example, if a person is living in a state of extreme self-neglect and refusing all assistance and efforts to communicate – the state may have to balance its overall duty to promote human rights with its specific duty to respect an individual’s will and preferences. There also may be situations in which a person expresses an immediate desire that is not consistent with that person’s long-term preference. For example, a person under the influence of a hallucinogenic drug may express a short-term desire to engage in self-destructive behavior while having a long-term desire to live.⁸⁴ It is not unreasonable for the state to have legal mechanisms in place to override a person’s expressed desires in such circumstances. This approach reflects more progressive interpretations of the ‘obligation to respect’ human rights by recognising not only the duty to do no harm but also the responsibility not to dehumanise individuals by leaving them in situations of extreme vulnerability.⁸⁵

The other striking feature of General Comment 1 is that the CRPD Committee does not confine its analysis to restrictions on legal capacity based upon disability. Rather, the Committee has interpreted Article 12 as requiring governments to eliminate all restrictions on legal capacity, regardless of whether disability is the legal basis. This can be seen from the ‘three approaches’ discussed by the Committee in its General Comment 1. The Committee starts by describing restrictions based on a diagnosis of impairment, which is often described as the ‘status approach.’⁸⁶ We agree that the status approach (which

⁸³ See Martin, W; Michalowski, S; Jutten, T; and Burch, M (2014) *Achieving CRPD Compliance: Is the Mental Capacity Act of England and Wales Compatible with the Convention on the Rights of Persons with Disabilities? If not, what next?* Essex Autonomy Project Position Paper, available at: <<https://autonomy.essex.ac.uk/wp-content/uploads/2017/01/EAP-Position-Paper-FINAL.pdf>> (accessed 1 May 2021) at 38-44.

⁸⁴ Ibid at 49.

⁸⁵ Karp, DJ (2020) ‘What is the Responsibility to Respect Human Rights? Reconsidering the ‘Respect, Protect, and Fulfil’ Framework’ (12) *International Theory* 83-108.

⁸⁶ CRPD General Comment No. 1 supra note 7 at para.13.

permeates Hong Kong's MHO) violates the CRPD, as it is a clear case of direct discrimination on the ground of an impairment. However, the Committee also categorises, as violations of Article 12, restrictions on legal capacity that are based upon the negative consequences of a person's prior decisions (which the Committee refers to as the 'outcome approach') and restrictions based upon a determination that a person's decision-making skills are deficient in a particular context (which the Committee refers to as the 'functional approach'). In the opinion of the Committee, these restrictions also violate Article 12 because they have tended to have a disproportionate impact on persons with disabilities.

The Committee's position appears to depart from how the concept of indirect discrimination has generally been interpreted in international human rights law. Establishing indirect discrimination has been a two-step process. The first step involves determining whether the requirement or condition has a disproportionate impact on a specific group, such as women, ethnic minorities, or persons with disabilities. If it does, then the second step assesses whether there is an objective, non-discriminatory, and proportionate justification for the requirement or condition.⁸⁷ For example, examinations for driving licenses typically ask applicants to select the most appropriate action in a set of circumstances. Success on the test thus requires both knowledge of the rules of driving and certain decision-making skills. If it turns out that individuals with intellectual impairments are less likely to pass the test then it will have a disproportionate impact on them. But this would not settle the question of whether the test constitutes indirect disability discrimination. It would lead to the second question: can the functional test for a driving license be justified as an appropriate and necessary means of promoting a legitimate aim (safe driving) and is it being applied in a non-discriminatory manner?

Similarly, in the context of legal capacity, it is possible for states to create tests that assess a person's ability to make decisions in various contexts and to apply those 'functional tests' in a non-discriminatory manner.⁸⁸ For example, Ireland's reformed test for the capacity to make decisions (which we discuss in greater detail in Part V below) is not limited to persons with disabilities but rather can be applied to any person whose

⁸⁷ The two-part test is widely recognised by human rights treaty-monitoring bodies. See, for example, Committee on Economic, Social and Cultural Rights, General Comment No. 20 – non-discrimination in economic, social and cultural rights, E/C.12/GC/20 (2 July 2009), para. 10; and Human Rights Committee, General Comment No. 18, Non-Discrimination (10 November 1989), para. 13. However, the CRPD Committee has tended to focus only on the first part of the test (disproportionate impact), generating an overly broad definition of indirect discrimination. See Committee on the Rights of Persons with Disabilities, General Comment No. 6 – right to equality and non-discrimination, CRPD/C/GC/6 (26 April 2018), para. 18(b).

⁸⁸ For further analysis of why functional tests do not necessarily constitute indirect discrimination, see Martin *Achieving CRPD Compliance* supra note 83 at 16-19.

decision-making capacity is in question. Thus, while we agree with those commentators who criticise the discriminatory application of functional tests, we do not agree that such tests are inherently discriminatory.⁸⁹

It is noteworthy that the CRPD Committee has not confined its demand for universal legal capacity to a person's right to make decisions for herself. Rather, it applies its interpretation of the right to legal capacity to decisions that could have profound effects on other individuals. For example, the Committee maintains that a state party cannot use decision-making ability as a reason to exclude a person from jury service.⁹⁰ This is a compelling example of why governments must be able to apply at least the functional test of legal capacity in certain circumstances. The functional test asks whether a person can understand the nature and consequences of a decision and whether he or she can use or weigh the relevant information. The Committee rejects this approach, partly because the functional test has been applied in a discriminatory manner in the past but also because it 'presumes to be able to accurately assess the inner-workings' of the mind.⁹¹ It is true that statutes on juror eligibility have been notoriously discriminatory but there is no reason why governments cannot employ the functional approach in a non-discriminatory manner. For example, a statute could specify that an individual is eligible for jury duty if s/he can understand the charges and the jury instructions, follow the evidence, and reach an unbiased decision based upon the evidence. Judges can question prospective jurors to determine whether they can perform these duties. There will be some situations in which a person with a disability cannot fulfil the role, even with accommodations. For example, a person with age-related dementia may not be able to remember the evidence long enough to deliberate. But there will also be situations in which a person with no impairment cannot concentrate on the evidence, perhaps because of a pending personal crisis or because the case would trigger a traumatic memory. Regardless of the underlying cause, if a judge determines that a prospective juror cannot process and deliberate on the evidence, even with reasonable accommodations, then that individual must be excluded from serving on the jury in order to protect the defendant's right to fair trial.

Other commentators have pointed out additional examples of the potential for harm if governments were to attempt to fully implement the interpretative position taken by the CRPD Committee.⁹² We will not elaborate further on that issue because we do not expect

⁸⁹ For arguments that even a facially neutral functional test would violate Article 12, see Flynn E and Arstein-Kerslake, A (2014) 'The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?' 32 *Berkeley Journal of International Law* 124, 127-9.

⁹⁰ CRPD General Comment No. 1, supra note 7 at para. 48.

⁹¹ Ibid at para. 15.

⁹² See, for example, Scholten, M and Gather, J (2018) 'Adverse Consequences of Article 12 of the UN CRPD for Persons with Mental Disabilities and an Alternative Way Forward' (44) *Journal of Medical Ethics* 226-233; and Freeman, MC; Kolappa, K; de Almeida, JMC;

governments to follow General Comment 1. Our concern is that governments will use their disagreement with the CRPD Committee as an excuse to delay reforms to the laws governing guardianship and compulsory treatment. This could also undermine the credibility and effectiveness of international human rights law more generally, especially as the human rights movement increasingly comes under attack.⁹³ The next section of the article therefore proposes an alternative framework for interpreting Article 12 and applies the framework to Hong Kong's MHO.

V. An Alternative Framework and Recommendations for Hong Kong

We agree with the CRPD Committee that governments bound by the CRPD have an obligation to 'holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others.'⁹⁴ In our view, however, a government can comply with Article 12 of the CRPD if it adopts reforms that are consistent with the following general principles and applies them equally to all: (1) laws that use a diagnostic (medically-based) threshold as the basis for limiting the right to exercise legal capacity, the right to liberty, or the right to consent to medical treatment must be repealed; (2) the law should clearly state that all adults are presumed to have full legal capacity, irrespective of any impairment, and that they have the right to access support services that are reasonably necessary for the individual to exercise legal capacity; (3) the presumption of legal capacity should be rebuttable only if it is shown that a person is unable (even with reasonable support) to understand the information relevant to the decision, or to retain the information long enough to make an informed decision, or to weigh that information in the process of making a decision, or to communicate the decision if communication is necessary in order to effect the decision; (4) any process that could lead to a restriction on legal capacity must be accompanied by robust procedural safeguards, including the provision of legal aid for those who cannot afford to retain private legal representation; (5) guardianship and other forms of substitute decision-making should be legally defined as a measure of last resort, to be applied only when shown to be a necessary and proportionate response to protect the individual's full range of human rights; (6) the scope of substitute decision-making should be defined as narrowly as possible and the law should expressly recognise that a person retains legal capacity in other contexts; (7) any person authorised to serve as a substitute decision-maker should have a legal duty to give

Kleinman, A; Makhshvili, N; Phakathi, S; Saraceno, B; and Thornicroft, G (2015) 'Reversing Hard Won Victories in the Name of Human Rights: A Critique of the General Comment on Article 12 on the UN Convention on the Rights of Persons with Disabilities' (2) *The Lancet Psychiatry* 844-50.

⁹³ See, for example, Posner, E (2014) *The Twilight of Human Rights Law* Oxford University Press; and Hopgood, S (2013) *The Endtimes of Human Rights* Cornell University Press.

⁹⁴ CRPD General Comment No. 1 supra note 7 at para. 7.

effect to the individual's reasonably ascertainable will and preferences unless another course of action is necessary to effectively protect the individual's full range of human rights; (8) any restrictions on legal capacity must be subject to regular review by a competent, independent and impartial authority with the goal of removing or narrowing the scope of restrictions if they are no-longer justifiable; and (9) the legal framework must also include safeguards and regular review by a competent, independent and impartial authority to protect against abuse, conflict of interest, and undue influence by support persons and substitute decision makers.

At present, Hong Kong's MHO certainly violates these basic principles. Cheung has criticised the multiple definitions of 'capacity' in the MHO and we agree that Hong Kong needs a more coherent test for legal capacity.⁹⁵ Moreover, all of the relevant provisions in the MHO employ a diagnostic threshold and therefore expressly discriminate on the ground of disability. For example, the MHO states, in the definitions clause, that 'mental incapacity' means '(a) mental disorder; or (b) mental handicap' and that 'mentally incapacitated' shall be construed accordingly.⁹⁶ The two components of this definition are also defined very broadly: an individual is considered to have a 'mental handicap' if she has 'sub-average general intellectual functioning with deficiencies in adaptive behavior,' and a 'mental disorder' if she has a mental illness, psychopathic disorder, or 'any other disorder or disability of mind which does not amount to mental handicap.'⁹⁷ This diagnostic threshold clearly violates the CRPD. Moreover, the various functional tests that the MHO applies once the diagnostic threshold is satisfied are overly broad and inherently subjective. For example, when Hong Kong's Guardianship Board decides whether a 'mentally incapacitated person' should be received into guardianship it considers whether the mental disorder or handicap 'limits' the person in making 'reasonable decisions' and whether a guardianship order is 'necessary in the interests of the welfare of the mentally incapacitated person or for the protection of other persons.'⁹⁸

Cheung suggests that the Mental Capacity Act of England and Wales (MCA) might provide a model for Hong Kong.⁹⁹ While the MCA is superior to Hong Kong's MHO, it still contains a diagnostic threshold and therefore directly discriminates on the ground of disability.¹⁰⁰ The MCA states: "For the purposes of this Act, a person lacks capacity in

⁹⁵ Cheung supra note 12 at section 6.

⁹⁶ MHO at section 2.

⁹⁷ Ibid.

⁹⁸ MHO at section 59O(3).

⁹⁹ Cheung supra note 12.

¹⁰⁰ Even if the diagnostic threshold were analysed as a form of indirect (rather than direct) discrimination, it would violate the CRPD because it does not constitute a reasonable means of achieving a legitimate aim. See Martin *Achieving CRPD Compliance* supra note 83 at 31-36.

relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter *because of an impairment of, or a disturbance in the functioning of the mind or brain*.¹⁰¹ The latter phrase is usually interpreted to refer to a mental disorder. Thus, although the MCA also contains a functional test, only persons who fail the test as result of certain impairments will be deemed to lack capacity. This is comparable to a law that requires only persons with certain impairments to pass a functional test for a driving license. While a functional test is not inherently discriminatory, it can become discriminatory if it is only applied to persons living with impairments. For this reason, we do not suggest that Hong Kong adopt the MCA as a model for law reform.

Hong Kong could instead seek guidance from Ireland's Assisted Decision-Making (Capacity) Act 2015 (hereinafter 'ADMCA'), which will replace Ireland's 'Ward of Court' system when it comes fully into force.¹⁰² The test for capacity in the ADMCA has no diagnostic component. Rather, the ADMCA presumes that an individual has capacity unless it is shown that the person is unable, even with support, to understand the information relevant to the decision, or to retain the information long enough to make a voluntary choice, or to use or weigh that information as part of the process of making the decision, or to communicate the decision (if implementation requires communication).¹⁰³ The ADMCA also expressly rejects the outcome approach. Thus, a person shall not be considered as unable to make a decision '*merely* by reason of making, having made, or being likely to make, an unwise decision.'¹⁰⁴

The ADMCA provides three options for those who need assistance in making decisions in particular contexts: an informal 'decision-making assistant' appointed by the individual; a co-decision maker appointed by the individual; or, in rare circumstances, a representative appointed by the Circuit Court.¹⁰⁵ Thus, while Ireland will retain the possibility of substitute decision-making, there will now be a strong legal presumption against it and a person shall not be declared unable to make a decision unless all practicable steps have been taken, without success, to enable the person to do so.¹⁰⁶ By bringing the law into force over a period of years, Ireland has given stakeholders time to adjust to the

¹⁰¹ Mental Capacity Act (2005), section 2(1).

¹⁰² Assisted Decision-Making (Capacity) Act 2015 (Ireland), available at: <<http://www.irishstatutebook.ie/eli/2015/act/64/enacted/en/html>> (accessed 1 May 2021).

¹⁰³ Ibid at section 3.

¹⁰⁴ Ibid at section 8(2) (emphasis added).

¹⁰⁵ The Circuit Court has the power to issue (1) a declaration that a person lacks capacity to make one or more decisions without the assistance of a suitable person as a co-decision-maker; or (2) a declaration that a person lacks capacity to make one or more decisions even with the assistance of a co-decision-maker, in which case the Circuit Court can appoint a Decision-Making Representative. Ibid at sections 37-38.

¹⁰⁶ Ibid at section 8(3).

new framework and the mechanisms for supported decision-making. While the ADMCA has been criticised by some for not going far enough, in our view, a capacity law that follows this model would be vastly superior to Hong Kong's existing patchwork of confusing definitions of capacity and 'incapacitated persons' and could eventually replace the existing guardianship system.¹⁰⁷ In any event, according to the eighth principle we propose above, any law that provides for restrictions on legal capacity must be subject to regular review by a competent, independent and impartial authority with the goal of removing or narrowing the scope of restrictions if they are no-longer justifiable.

Ireland's law could also provide a model for reforming Hong Kong's law governing detention on the ground of disability and compulsory treatment. Currently, under section 36 of the MHO, if two doctors agree that an individual is suffering from a mental disorder of a nature or degree which makes it appropriate for him or her to receive medical treatment in hospital' and that it is 'necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained' then they can simply complete a certificate to this effect and forward it to a District Court for countersigning. This is a very loose legal standard. Moreover, the District Judge's role is primarily to confirm that the proper procedures were followed. The court does not question the diagnosis, the reasoning of the two doctors, or even the reliability of the evidence that the doctors relied upon in reaching their conclusion that the individual should be detained.¹⁰⁸ This lack of procedural safeguards before detaining a person who is not even accused of committing a crime clearly violates Article 13 of the CRPD (access to justice), Article 14, which provides that the existence of a disability shall in no case justify the deprivation of liberty, and Article 17, which protects the integrity of the person.

In our view, these provisions in Hong Kong's MHO also violate Article 9 of the ICCPR, which protects the right to liberty. This is significant because the ICCPR has been largely incorporated into Hong Kong's domestic law, through the Bill of Rights

¹⁰⁷ The ADMCA abolishes the pre-existing 'ward system' and provides for a review of all wards to either discharge them or transition them to the new system. Ibid at sections 53-57. For a discussion of the potential impact, and weaknesses, of the ADMCA see, for example, Hendrick C and McNamara, D (2020) 'Silenced, Alone, Powerless: My Life as a Ward of the Court in Ireland' in Flynn, E; Arstein-Kerslake, A; de Bhailís, C and Serra ML (eds) *Global Perspectives on Legal Capacity Reform: Our Voices, Our Stories* Routledge.

¹⁰⁸ This was confirmed in *Hospital Authority v. A District Judge* [2002] Hong Kong Cases 98. See also Cheung supra note 17.

Ordinance¹⁰⁹ and Article 39 of the Hong Kong Basic Law.¹¹⁰ The local judiciary has frequently struck down legislation on the ground that it violates the ICCPR and the courts often look to the UN Human Rights Committee for guidance on how to interpret the treaty.¹¹¹ Although the Human Rights Committee has not gone as far as the CRPD Committee,¹¹² it has stated that disability ‘shall not *in itself* justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others.’¹¹³ The Human Rights Committee also requires that such detention be applied as a measure of last resort, for the shortest appropriate period of time, and accompanied by procedural and substantive safeguards. Rather than await a constitutional challenge – which might lead to a sudden change in the law – it would be far better if the Hong Kong government takes a proactive approach to reforming the MHO, using Ireland’s ADMCA as a model.

VI. Conclusion

While we have examined the right to legal capacity through the lens of Hong Kong, there are many other jurisdictions with equally flawed laws governing adult guardianship, detention on the ground of disability, and compulsory treatment. The widespread failure to reform these laws is, no doubt, what inspired the CRPD Committee to issue General Comment 1. By insisting, however, that states immediately implement universal legal capacity the Committee has missed an opportunity to promote more gradual reforms and undermined the persuasive value of its recommendations. It has also failed to fully embrace the treaty’s holistic approach to rights, which we believe demands a more robust and careful analysis of the principles of state obligation and progressive implementation of rights.

¹⁰⁹ Hong Kong Bill of Rights Ordinance (Cap. 383) (1991).

¹¹⁰ Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, article 39. The Hong Kong Court of Appeal has consistently held that the ICCPR is incorporated into the Hong Kong Basic Law. See, for example, *HKSAR v. Fong Kwok Shan Christine* (2017) 20 Hong Kong Court of Final Appeal Reports 425 paras 12-15.

¹¹¹ Petersen, CJ (2007) ‘Embracing Universal Standards? The Role of International Human Rights Treaties in Hong Kong’s Constitutional Jurisprudence’ in Fu, H; Harris, L; and Young, SNM (eds) *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence*, Palgrave Macmillan at 33-53.

¹¹² For a summary of disagreements between the Human Rights Committee and the CRPD Committee, see Neuman, GL (2016) ‘Arbitrary Detention and the Human Rights Committee’s General Comment 35’, available at:

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2840254> (accessed 1 May 2021).

¹¹³ Human Rights Committee, General Comment No. 35 supra note 47.

Some scholars have suggested that those who reject General Comment 1 are implicitly endorsing disability-based discrimination.¹¹⁴ We disagree. This article suggests an alternative interpretation of Article 12 of the CRPD, one that is more consistent with the treaty's holistic approach to human rights. We have suggested nine principles that states should follow when assessing laws and policies that could affect a person's right to legal capacity. Our framework would permit states to apply the functional test for decision-making ability in certain circumstances, such as eligibility for jury duty. It also recognises that the state may need to override a person's expressed will and preferences in extreme situations, in order to protect the person's right to live in dignity. Finally, while acknowledging there may be room for improvement, we endorse the approach taken by Ireland in the ADMCA. By bringing this legislation into force over a period of years, Ireland is progressively implementing Article 12 while also protecting the full range of rights in the CRPD.

¹¹⁴ Arstein-Kerslake, A and Flynn, E (2016) 'The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a Roadmap for Equality before the Law' (20) *The International Journal of Human Rights* 471 at 473.