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To cite this article: Willene Holness (2014) Equal Recognition and Legal Capacity for Persons with Disabilities: Incorporating the Principle of Proportionality, South African Journal on Human Rights, 30:2, 313-344, DOI: [10.1080/19962126.2014.11865111](https://doi.org/10.1080/19962126.2014.11865111)

To link to this article: <https://doi.org/10.1080/19962126.2014.11865111>



Published online: 07 Apr 2017.



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EQUAL RECOGNITION AND LEGAL CAPACITY FOR PERSONS WITH DISABILITIES: INCORPORATING THE PRINCIPLE OF PROPORTIONALITY

WILLENE HOLNESS*

ABSTRACT

The new approach to legal capacity legislation promoted by the Convention on the Rights of Persons with Disabilities is that all persons with disabilities have full legal capacity on an equal basis with others, but *may* require support in making certain decisions. Any restrictions on legal capacity must accordingly incorporate safeguards in line with art 12(4) of the Convention, including that the restriction must be tailored to the individual's circumstances and must be proportional to his or her needs. The South African Law Reform Commission has embarked on law reform in this regard and has recommended the Assisted Decision-making Bill to provide for support measures as an alternative and parallel measure to the current curatorship system. Proportionality is not only a standard of judicial review to ascertain whether a legislative measure justifiably limits the right to equality and legal capacity. It is also a principle that must guide any person that provides support to a person with a disability who cannot make decisions independently to ensure that whatever support is provided to him or her to come to a decision regarding his or her welfare or finances, remains proportional to his or her circumstances and needs. The support must not be overbroad, must not negate the autonomy of the person, and even in hard cases, the will and preferences of the person must be sought. The Assisted Decision-making Bill does not sufficiently incorporate the principle of proportionality and other safeguards and will require revision.

Key word: Disability

I INTRODUCTION

The 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master ... I wish to be the instrument of my own, not of other men's acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own ... I wish to be ... a doer – deciding not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realising them.¹

* Lecturer, University of KwaZulu-Natal, Durban. I wish to acknowledge Mahendra Chetty of the Legal Resources Centre (LRC) and Sarah Rule of CREATE for their support during my work at the LRC in 2012 where the seed was planted for the paper on which this article is based. All errors are my own. After writing this article, the Committee on the Convention on the Rights of Persons with Disabilities issued General Comment 1 'Article 12: Equal Recognition before the Law' (2014) CRPD/C/GC/1. The article therefore does not address the General Comment, which is aimed at exploring the general state obligations deriving from the different components of art 12. This welcome comment is likely to clear up current misunderstanding of the scope of states' obligations to respect the legal capacity of persons with disabilities.

1 I Berlin 'Two Concepts of Liberty' in I Berlin *Four Essays on Liberty* (1969) 16.

For countries which still only provide for the ‘classic’ *curatel*, [the introduction of the principle of proportionality] would mean that the curator is under the obligation to involve the person concerned in the realisation of his tasks and duties; and foremost: to allow the adult to act for him- or herself wherever possible. Participation and self-realisation are the keywords now.²

Equality entails, amongst other entitlements, ‘the power to take independent decisions’,³ a power which continues to be denied to persons with disabilities, usually in the form of restrictive legal capacity legislation, including plenary or partial guardianship. In this way, courts declare persons with psychosocial disabilities, intellectual disabilities, persons with communicative barriers and, sometimes, persons with physical disabilities as legally incapacitated.⁴ The status quo, in many countries around the world where persons with disabilities are denied the right to make their own decisions, is changing⁵ as a result of the paradigm shift towards a rights-based approach required by the Convention on the Rights of Persons of Disabilities (CRPD).⁶ The CRPD introduced an understanding of legal capacity as a social and legal status accorded to persons with disabilities independent of a person’s particular abilities. Most importantly, art 12 of the CRPD requires equal recognition before the law and signals a move away from substituted decision-making towards supported decision-making laws and measures.⁷ Capacity is not a binary concept, where one either has capacity or lacks capacity; instead the CRPD recognises that one can have variable levels of capacity to make different kinds of decisions.⁸ This recognition requires individually tailored systems of support and measures that exemplify the principle of proportionality.⁹

- 2 S Jansen ‘Recommendation No R(99)4 of the Committee of Ministers to Member States on Principles Concerning the Legal Protection of Incapable Adults, an Introduction in Particular to Part V Interventions in the Health Field’ (2000) 7 *European J of Health Law* 333–47.
- 3 M Kjaerum ‘Foreword’ in European Union (EU) Agency for Fundamental Rights *Legal Capacity of Persons with Intellectual Disabilities and Persons with Mental Health Problems* (2013) 3 (EAFR).
- 4 Persons with disabilities are defined in art 1 of the Convention on the Rights of Persons with Disabilities (adopted 13 December 1966, entered into force 3 May 2008) UNGA/61/106 2515 UNTS 3 (CRPD) as 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 This change is apparent in Sweden, some provinces in Canada and Germany. See SS Herr ‘Self-determination, Autonomy and Alternatives to Guardianship’ in SS Herr, LO Gostin & HH Koh (eds) *The Human Rights of Persons with Intellectual Disabilities Different but Equal* (2003); M Bach & L Kerzner *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* prepared for Law Commission of Ontario (2010). For a detailed summary of guardianship laws and law reform in line with art 12 of the CRPD, see EAFR (note 3 above) 27–39.
- 6 CRPD and Optional Protocol to CRPD.
- 7 KB Glen ‘Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond’ (2012) 44 *Columbia Human Rights LR* 93, 98.
- 8 G Quinn ‘Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD’ presented at Harvard Law School (20 February 2010) reprinted in NIU Galway Center for Disability Law & Policy *Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality* 6, 14 <http://www.nuigalway.ie/cdlp/documents/cdlp-submission-on-legalcapacitythe-oireachtasscommitteeonjustice-defenceandequality_.pdf>.
- 9 M Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities – A Handbook on the Human Rights of Persons with Disabilities* (2010) 86.

Such support can take many forms, including support by a trusted person or a network of people, and the support may be necessary to be provided occasionally or more regularly, amounting to a continuum of measures depending on the circumstances and needs of the individual.¹⁰ The person providing the support may help the individual to understand the choices at hand or communicate the individual's intentions to others. In essence, the CRPD was negotiated amid a process of reform, both at domestic and supranational levels, inspired by the social model and as the antithesis of the 'tyranny of paternalism'¹¹ that characterises the medical and charity¹² model of disability.¹³

Although the CRPD does not explicitly prohibit restrictions on legal capacity, art 12 requires that states recognise that persons with disabilities have legal capacity on an equal basis with others in all aspects of life. Disability alone does not justify the deprivation of legal capacity and may not be the reason for appointing a guardian or curator or implementing a measure of support.¹⁴ The approach promoted by the CRPD is that a disabled individual has legal capacity but *may* require support in making certain decisions and that any restrictions on legal capacity must incorporate safeguards. These safeguards include that the restriction must be tailored to the individual's circumstances and must be proportional to his or her needs. These safeguards are listed in art 12(4).¹⁵ This new approach to legal capacity then:

reflects an individual's right to make decisions and have those decisions respected, and signals a social model approach to defining and understanding disability ... [It focuses on] the social, economic and legal barriers a person faces in formulating and executing individual decisions, and the supports and accommodations they may require given their particular decision-making abilities.¹⁶

- 10 UN Enable 'From Provisions to Practice: Implementing the Convention' *Handbook for Parliamentarians* <www.un.org/disabilities/default.asp?id=242>.
- 11 JF Childress 'Ensuring Care, Respect, and Fairness for the Elderly' (1984) 14 *Hastings Center Report* 27, 31 ('Paternalism motivated by individual or communal benevolence, but unlimited and unconstrained by respect for autonomy, becomes tyrannical').
- 12 D Fleischer & F Zames *The Disability Rights Movement From Charity to Confrontation* (2001) 7–10 (describing the charity approach).
- 13 V Perju 'Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States' (2011) 44 *Cornell Int LJ* 279, 280.
- 14 Thematic Study by the Office of the UN High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities (2009) UN doc A/HRC/10/48 para 45.
- 15 CRPD art 12(4) provides: '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.'
- 16 International Disability Alliance *Legal Opinion on Article 12 of the CRPD* (2008) 2. See also A Kanter 'The Globalisation of Disability Rights Law' (2003) 30 *Syracuse J Int Law and Commerce* 241, 244–6.

This social model understanding of disability¹⁷ is aimed at securing structural change through putting ‘the onus on society, its institutions and private individuals to dismantle the barriers that have been constructed on the norm of *ableism* in order to accommodate persons with disabilities’.¹⁸ The achievement of meaningful equality and respect for human dignity requires such dismantling.¹⁹

This approach to supported decision-making is opposed to South Africa’s current, essentially paternalistic, costly and inflexible curatorship system, which is essentially a substituted decision-making approach and is based on the medical model of disability.²⁰ The appointment of an administrator for a person who has a ‘severe or profound intellectual disability’ in terms of the Mental Health Care Act 17 of 2002²¹ contains some safeguards, but does not include proportionality as a principle. The medical model, which both curatorship and administration subscribe to,²² centralises the impairment of the person and sees the person as an object of pity, philanthropy and paternalistic rehabilitation – an impairment that can and should be cured.²³ Concomitantly, with regard to incapacity, the medical profession plays a large role in clinical diagnosis to legitimise declarations of incapacity or curator appointments, and the diagnosis remains, to a large extent, the determinant of the person’s *lack of capacity*.²⁴

The South African Law Reform Commission’s (SALRC) has recently embarked on revising the Assisted Decision-making Bill of 2004, with a view to bringing our legislation and provision for decision-making in line with art 12 of the CRPD.²⁵ This has been necessary since the Bill preceded South Africa’s ratification of the CRPD. The SALRC initiated an Issue Paper in

17 L Vanhala ‘Twenty-five Years of Disability Equality? Interpreting Disability Rights in the Supreme Court of Canada’ (2010) 39 *Common Law World Review* 27.

18 C Ngweni ‘Deconstructing the Definition of “Disability” under the Employment Equity Act: Social Deconstruction’ (2006) 22 *SAJHR* 613, 638. See also C Ngweni ‘Deconstructing the Definition of “Disability” under the Employment Equity Act: Legal Deconstruction’ (2007) 23 *SAJHR* 116.

19 M Jones & LA Basser Marks ‘Law and Social Construction of Disability’ in M Jones & LA Basser Marks (eds) *Disability, Diversity and Legal Change* (1999) 5.

20 J Heaton ‘The Concepts of Status and Capacity: A Jurisprudential Excursus’ in A Cockrell, B van Heerden & R Keightley (eds) *Boberg’s The Law of Persons and the Family* 2 ed (1999) 106–7.

21 Section 59, with the procedure in ss 60–1.

22 Sometimes the medical model is referred to as the bio-medical model. JE Bickenbach et al ‘Models of Disablement, Universalism, and the International Classification of Impairments, Disabilities and Handicaps’ (1999) 48 *Social Science and Medicine* 1173.

23 TP Seto & S Buhai ‘Tax and Disability: Ability to Pay and the Taxation Difference’ (2006) 154 *Univ of Pennsylvania LR* 1053, 1058.

24 Most domestic legislation that deals with the rights of persons with disabilities constructs disability along the lines of the medical model that focuses on the individual’s physical or mental impairment that creates a functional limitation and often requires medical diagnosis and corroboration. See F Bhabha ‘Disability Equality Rights in South Africa: Concepts, Interpretation and the Transformation Imperative’ (2009) 25 *SAJHR* 218, 229; Ngweni (2006) (note 18 above). South Africa’s Integrated National Disability Strategy (Office of the Deputy President *Integrated National Disability Strategy* (1997)) distances itself from the medical model and prefers the social model construction.

25 South Africa ratified the CRPD and its Optional Protocol on 3 April and 3 May 2008, respectively.

2001²⁶ aimed at providing an alternative decision-making procedure for older persons, essentially persons suffering from dementia and Alzheimer's.²⁷ Notably, the need for enduring powers of attorney was crucial and a primary aim of the law reform at that stage.²⁸ In 2004, the SALRC published a discussion paper titled 'Assisted Decision-making of Adults with Impaired Decision-making Capacity', together with a Bill aimed more broadly at persons with disabilities.²⁹

In this regard, the SALRC commenced a process of public consultation in 2012, and redrafted the Bill in the light of some of the submissions received from the participants of a workshop, changing the name of the Bill to the Supported Decision-making Bill.³⁰ These recent redrafts of the Bill have not yet been published for wider public comment. Since the SALRC is still in the drafting and public consultation process, it would be premature to discuss the changes that are likely to follow from this process until such time as the new version of the Bill is finalised and published in the *Government Gazette (GG)*. This process of revision is currently ongoing.

What is evident is that the redrafts are likely to be a step closer to providing appropriate measures and appropriate and effective safeguards for persons with disabilities to enjoy legal capacity on an equal basis with others in all aspects of life, if the safeguards in art 12(4) are incorporated in the revised Bill. However, I argue that the Assisted Decision-making Bill of 2004 did not go far enough to incorporate the principle of proportionality by analysing its specific draft provisions with regard to the proposed support measures and safeguards.³¹ I further argue that the safeguards in the Bill should be revisited to ensure that the principle of proportionality is promoted in the revised Bill. This, I argue, must be done commensurate with an understanding of the principle as upholding the values of equality, dignity and freedom and the

26 The Issue Paper conceived of diminished capacity as 'the result of mental illness, inability to communicate because of a physical or other disability, head injury, stroke, learning disability, a specific disease (including diseases such as Alzheimer's and Parkinson's diseases) or may be related to ageing in general. In some cases incapacity is relatively short-term, in others mental capacity is lost and may never be recovered, while some people have never had the capacity to make decisions about their own affairs because of congenital conditions or conditions which developed early in their lives'. The medical model construction is followed here, with no reference to social, physical or environmental barriers that disable the person.

27 South African Law Commission (SALC) Issue Paper 18 *Incapable Adults Project* (December 2001).

28 See B Bertrand 'The Need for Enduring Powers of Attorney for Older Persons with Impaired Decision-making Capacity' (2011) *De Rebus* 38.

29 SALC Discussion Paper 105 *Assisted Decision-making of Adults with Impaired Decision-making Capacity* (March 2004).

30 The author, in the capacity of attorney at the LRC, Durban, attended the workshop as legal representative of CREATE, a disability organisation, on 16 February 2012. The LRC and CREATE provided submissions to the SALRC on the draft Bill.

31 Noteworthy is that Estonia, France, Luxembourg, Portugal and Spain use the term curatorship to refer to partial restriction of legal capacity and systems where the legal representative can make legally binding decisions only with the agreement to consent of the person concerned. However, the Netherlands uses the term 'curator' or 'curatele' where the person under the system requires the curator's permission for all legal acts and decisions. See EAFR (note 3 above) 29.

recognition of the equal worth of all people.³² Ultimately, the new system must avoid the pitfalls of curatorship and not allow a support person to simply substitute decision-making on behalf of the person with a disability, disrespecting that person's will and preferences. An argument for the replacement of the curatorship system is made.³³

First, the article outlines the recognition of legal capacity that considers persons with disabilities as holders of rights on an equal basis with others, moving away from substituted towards supported decision-making. Second, the article interrogates the rationale for the principle of proportionality and its incorporation in the CRPD and the centrality of principle to devising appropriate and effective measures and safeguards that supports the decision-making for persons with disabilities. Third, the article briefly considers the substituted decision-making measures currently in our law, and then considers the provisions of the Assisted Decision-making Bill that provide for support measures, and ascertains whether these measures meet the requirement of proportionality.³⁴

II LEGAL CAPACITY: FROM SUBSTITUTED TO SUPPORTED DECISION-MAKING

Legal incapacity, so conceived, is important precisely because a [legal] fiction is determined by prevailing values, knowledge, and even the economic and political spirit of the time ... [T]he criteria or elements needed to establish legal incapacity are the products of society's prevailing beliefs concerning individual autonomy and social order, tempered by the restraint of legal precedent. Just as societal values and needs have evolved over time, so will the legal criteria for capacity and incapacity.³⁵

The CRPD heralded a new approach to capacity due to the sea change in attitudes and beliefs concerning disability, legal capacity and decision-making, culminating in a richer view of autonomy.³⁶ Legal capacity comprises two aspects in civil law systems – it refers to a person's capacity to have rights on an equal basis with others, and also to the capacity to act and have one's action's recognised by the law.³⁷ The capacity to have rights (for rights) is

32 D Bilchitz 'Does Balancing Adequately Capture the Nature of Rights?' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 266.

33 G Quinn & E Flynn 'Transatlantic Borrowings: The Past and Future of EU Non-discrimination Law and Policy on the Ground of Disability' (2012) 60 *American J of Comparative Law* 23, 47.

34 This article does not address the implications of art 12(4) for involuntary psychiatric detention in South Africa, informed consent requirements for health decisions, political rights such as the right to vote, or curatorship appointments in terms of the Administration of Estates Act 66 of 1965. Rather, I focus on legal capacity in relation to personal welfare (day-to-day living decisions) and property decisions (with financial implications).

35 CP Sabatino & E Wood 'The Conceptualization of Capacity of Older Persons in Western Law' in I Doron & A Snoden *Beyond Elder Law: New Directions in Law and Aging* (2012) 35, 36.

36 S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 14.

37 Glen (note 7 above) 96. See also A Dhanda 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' (2006) 34 *Syracuse J of Int Law and Commerce* 429, 429.

known as passive capacity, and the capacity to act is known as active capacity.³⁸ In common law systems the two aspects are conflated into ‘competency’. In South Africa, it is referred to as ‘legal capacity’, which incorporates the ability to stand before a court of law, including both passive and active aspects of legal capacity.³⁹ Decision-making autonomy⁴⁰ indicates the presence of active legal capacity.⁴¹

The recognition of full legal capacity is set out in art 12. Articles 12(2) to (5) indicate that a supporter may interfere with the active legal capacity of an individual only under exceptional circumstances to minimise the possibility of abuse. The possibility of abuse arises where the individual is supported in reaching decisions, or where facilitated decision-making⁴² takes place where decisions are, to an extent, facilitated for the individual.⁴³ In both situations, the supporter must still respect the individual’s will and preferences, as well as uphold the other principles in the safeguards provided for in the CRPD, including, most importantly, the principle of proportionality. In place of wide-ranging restrictions through incapacity declarations and guardianship, the CRPD proposes supported decision-making wherever possible.⁴⁴

Article 12 resonates with other provisions of the CRPD⁴⁵ that recognise the individual autonomy and independence of the person.⁴⁶ Specifically, the

38 I Hoffman & G Konczi ‘Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code’ (2011) 33 *Loyola of Los Angeles Int and Comparative LR* 143.

39 J Parry & EY Drogin *Mental Disability Law, Evidence and Testimony A Comprehensive Reference Manual for Lawyers, Judges and Mental Disability Professionals* (2007) 7.

40 See the general principles of the CRPD in art 3, which include: ‘(a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons... (c) Full and effective participation and inclusion in society ...’

41 Hoffman & Konczi (note 38 above) 164.

42 Facilitated decision-making is not a concept used in the CRPD, but has been utilised by Bach & Kerzner (note 5 above) 24 in a position paper for the Law Commission of Ontario, Canada, to refer to a situation where an individual is unable to be supported sufficiently by others to exercise his or her legal capacity. Temporary ‘facilitated’ decision-making will be needed where a facilitator would build personal relationships that would enable the person’s will and intention to become known by others as the basis for decision-making. It is close to current substituted decision-making laws and measures but contains safeguards to avoid actual substitution.

43 Quinn (note 8 above) 14 (discussion on the difference between substituted decision-making, where the third party makes the decision for the individual, and facilitated decision-making in hard or extreme cases, for instance where a person is in a permanent vegetative state).

44 Ibid. See also Preamble to the CRPD para o.

45 It is important to consider the indivisibility of human rights in this regard. S Hissa al Thani, UN Special Rapporteur on Disability ‘Convention on the Rights of Persons with Disabilities: A Progressive Human Rights Instrument’ *Statement to the United Nations Human Rights Council* (2006) <<http://www.un.org/esa/socdev/enable/rapporteur.htm>>. See also the Vienna Declaration’s refrain that human rights are ‘indivisible, interdependent and interrelated’ World Conference on Human Rights *Vienna Declaration and Program of Action* (14–15 June 1993) para 63 <[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)A.CONF.157.23.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)A.CONF.157.23.En)>.

46 RD Dinerstein ‘Implementing Legal Capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-making’ (2011) 19 *Human Rights Brief* 8, 9 (discussing the interrelationship between the Preamble, and arts 3, 5, 19, 23 & 26 with art 12 of the CRPD’s recognition of legal capacity and choice making).

Preamble of the CRPD recognises ‘the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices’.⁴⁷ The Preamble also recognises ‘the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support’,⁴⁸ which means that even people with the most significant disabilities have legal capacity and are covered by the CRPD.⁴⁹ Measures to support a person in decision-making, it has been argued, can only be justified due to a ‘factual inability to decide autonomously’⁵⁰ no matter from what the inability to decide may result.⁵¹ A legal definition of disability and its interpretation, to be responsive and adhere to the social model, should not focus on the extent of the functional limitation arising from the disability (the existence of the physical, intellectual or psycho-social impairment is trite), but rather on the presence of aversive attitudes that are causally linked to disability.⁵² This, by necessity, challenges social, medical and judicial attitudes towards capacity.

Equality for people with disabilities involves not only the eradication of discrimination,⁵³ but also removing barriers to opportunities, and the provision of positive measures to accommodate⁵⁴ and include persons with disabilities.⁵⁵ It is important to situate legal capacity squarely within the right to equality⁵⁶ and specifically within the conception thereof in art 5(1) of the CRPD. Article 5(1) of the CRPD requires that states: ‘recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law’. This understanding of equality, according to Anna Lawson, raises three issues: first, the possession of legal capacity; second, the exercise of legal capacity; and third, the equal protection of, and benefit from, the law.⁵⁷

47 CRPD Preamble para n.

48 Dinerstein (note 46 above) 9.

49 Ibid.

50 V Lipp & JO Winn ‘Guardianship and Autonomy: Foes or Friends’ (2011) 5 *J of Int Aging Law and Policy* 41, 49.

51 EA Cárdenas ‘Legal Capacity of Persons with Disabilities: The CRPD’s New Vision for Mexico and Other Civil Law Countries’ (2009) 58 *Int Rehabilitation Review* 11.

52 Ngweni (2006) (note 18 above) 124.

53 Quinn & Flynn (note 33 above) 30; Bhabha (note 24 above) 220.

54 See M Rioux ‘Towards a Concept of Equality of Well-being: Overcoming the Social and Legal Construction of Inequality’ (1994) 7 *Canadian J of Law and Jurisprudence* 127.

55 C Albertyn & B Goldblatt ‘Equality’ in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2007) 15-70.

56 G Quinn & T Degener ‘Human Rights and Disability: The Current Use and Future Potential of UN Human Rights Instruments in the Context of Disability’ (2002) 2 <<http://www.nhri.net/pdf/disability.pdf>>.

57 A Lawson ‘The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?’ (2007) 34 *Syracuse J of Law and Commerce* 563, 597.

(a) Possession of legal capacity

First, art 12(1) requires that states recognise that ‘persons with disabilities have the right to recognition everywhere as persons before the law’.⁵⁸ Related is art 12(2), which requires that states ‘recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’. These two articles, therefore, relate to the possession of legal capacity.⁵⁹ This means that a person with a disability is a bearer of rights and responsibilities, and is a subject and not an object. The individual must be placed at the centre of all decisions that affect that person’s life.⁶⁰ This inherent legal capacity requires that entitlements to rights such as property and family life must be protected even if he or she is unable to manage his or her affairs independently.⁶¹ It also embraces the cross-cutting nature of legal capacity and art 12⁶² as an instrumental value in the achievement of other rights.⁶³

Article 12(2) is aimed at preventing states from issuing declarations of legal incapacity that will render a person powerless to make legally effective decisions.⁶⁴ Article 12(2) can be read as an outright rejection of the default substitution model of decision-making, and reframes legal capacity as a ‘universal right’.⁶⁵ Article 12(2)’s requirement that persons with disabilities enjoy legal capacity on an equal basis with others ‘in all aspects of life’, includes not only decisions about financial and legal matters, and health care, but also personal decisions such as choices about where and with whom to live.

(b) Exercising legal capacity

Second, art 12(3) embodies the understanding of equality that allows a person to exercise her legal capacity.⁶⁶ It requires that states ‘take appropriate measures to provide access by persons with disabilities with the support they may require in exercising their legal capacity’. Such support must contain safeguards that protect against harm and abuse.

Oliver Lewis is of the opinion that art 12(3) and its wording that people with disabilities ‘may’ need support in exercising legal capacity, is ‘no more than a universal sociological observation: everyone – irrespective of disability

58 See A Sen *Inequality Re-examined* (1992).

59 Lawson (note 57 above) 597.

60 Quinn & Degener (note 56 above) 1, 14.

61 Lawson (note 57 above) 598.

62 Note two UN CRPD Interpretive Declarations entered against art 12 of the CRPD by Estonia and Poland, respectively, that these two countries can restrict a person’s legal capacity according to their domestic laws. Canada and Australia made similar declarations.

63 UN Thematic Study (note 14 above) para 43. See also EAFR (note 3 above) 15, which lists other rights, inter alia the right to liberty and security (art 14), decisions about where and with whom to live (art 19), deciding about family and relationships (art 23).

64 Ibid.

65 O Lewis ‘Advancing Legal Capacity Jurisprudence’ (2011) 6 *European Human Rights LR* 700, 704.

66 Ibid.

– may require some support in exercising their legal capacity’.⁶⁷ Putting the individual at the centre of decision-making is also a recognition that all persons govern themselves through ‘a mix of the rational with the irrational, of preference comingled with choice’ and as such that we rely, at least implicitly on others to assist us in making decisions within a social context.⁶⁸ Persons with intellectual and psychosocial disabilities, therefore, may require support in exercising their legal capacity, under art 12(3), similar to the way in which all persons need support in decision-making. This stands in contradistinction to a foundationalism premise of rationality that does not hold true for the able-bodied or for persons with disabilities.⁶⁹ In fact, the CRPD envisions interdependence, grounded in liberal individualism and recognising that everyone pursues life in conjunction with others.⁷⁰ Seen in this light, art 12(3) sets up a system of societal support in line with the natural way in which all humans make decisions.⁷¹

Article 12(4) allows support in the exercise of legal capacity that embeds the values of dignity and autonomy.⁷² The greater the extent to which a measure will affect a person’s rights and interests, the stricter the safeguards must be.⁷³ Such an understanding of equality refocuses the right to equality by recognising the capacity of all persons, including persons with disabilities, to form purposes and make choices and to become aware of options available so as to obtain both control and knowledge of one’s desires and motives.⁷⁴ We accord individuals respect when we foster self-development and strive for excellence. These characteristics, when denied, diminish respect and negate the promotion of autonomy and self-determination within an understanding of substantive equality.⁷⁵ The safeguards in art 12(4) are not merely procedural but touch the heart of what it means, substantively, to be equal.

Substantive equality, and the recognition of positive duties to meet substantive equality for persons with disabilities, requires an approach to disability that values the enhancement of capabilities, the realisation of self-worth and individual potential, the preservation of human dignity and the

67 Ibid.

68 J Raz *The Morality of Freedom* (1986) 124; Fredman (note 18 above) (When conceiving freedom as agency regards the social context itself as enhancing autonomy as opposed to seeing society as a limitation on individual freedom. As such, the individual is unable to achieve his or her full potential without social input and his or her individual identity is based on interpersonal recognition and relationships). See further GWF Hegel *Phenomenology of Spirit* (1977) 104–99; and A Patten ‘Hegel’ in D Boucher & P Kelly (eds) *Political Thinkers* (2003) (Hegel views individual identity as deriving from the inter-subjective recognition within the context of social relations).

69 Quinn (note 8 above) 14.

70 Lewis (note 65 above) 704.

71 Ibid.

72 Lawson (note 57 above) 599.

73 EAFR (note 3 above) 17.

74 S Lukes ‘Socialism and Equality’ in L Kolakowski & S Hampshire (eds) *The Socialist Idea* (1974).

75 MH Rioux & CA Riddle ‘Values in Disability Policy and Law: Equality’ in MH Rioux, LA Bassar & M Jones (eds) *Critical Perspectives on Human Rights and Disability Laws* (2011) 38.

promotion of individual and collective self-determination.⁷⁶ Cathi Albertyn and Beth Goldblatt posit that substantive equality, therefore, challenges the social, political and economic factors that systemically privilege some groups and undermine others, and the way in which these hierarchies continue to be perpetuated at all levels, including social, economic and political institutional levels, as well as through the attitudes and behaviour of the general public. Stereotypical attitudes about group characteristics that underlie law or government action must, according to substantive equality, be challenged to ensure experiential differences are taken into account.⁷⁷ Such stereotypical attitudes include assumptions about a person's capacity to make decisions for him or herself.

(c) Equal protection and benefit of the law

In essence, equal protection and benefit of the law relates to access to justice and requires that persons with disabilities are provided with access to justice the same way as able-bodied persons in terms of art 13 of the CRPD. This requires appropriate (and reasonable) accommodations and disability-specific training for persons in the administration of justice.⁷⁸

Taken together then, the possession and exercise of legal capacity finds its genesis in art 5 of the CRPD, as well as art 12, which locates legal capacity within the right to equality. The way in which persons with disabilities can access the justice system in ensuring the possession and exercise of legal capacity is respected and is located within the requirement of reasonable accommodation⁷⁹ to access justice, as well as a justice system that is sensitive to disability rights, as underscored by art 13. The CRPD's emphasis on self-determination is grounded in an understanding of participatory justice.⁸⁰ Such participatory justice can counter exclusion of persons with disabilities, especially by attitudinal barriers.⁸¹ This again conceives of legal capacity situated within substantive equality.⁸²

76 Bhabha (note 24 above) 220.

77 C Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *SAJHR* 253, 253–4.

78 Lawson (note 57 above) 599.

79 The importance of reasonable accommodation, in art 5(3) of the CRPD, cannot be overstated. Article 2 of the CRPD defines reasonable accommodation as: 'Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.' The draft Bill does not contain the requirement of reasonable accommodation.

80 J tenBroek 'The Right to Live in the World: The Disabled in the Law of Torts' (1966) 54 *California LR* 841, 859.

81 MA Stein & PJ Stein 'Beyond Disability Civil Rights' (2007) 58 *Hastings LJ* 1203, 1206–7.

82 General principle of full and effective participation and inclusion in society in art 3(c) of the CRPD.

Unfortunately, some of the laws on guardianship and even recent law reforms⁸³ still accept 'the predominance of a legal regime that locates decision making in the surrogate or guardian and not in the individual assisted'.⁸⁴ In these substituted decision-making laws, self-determination, participation and autonomy are watered down, negating substantive equality. I argue that the Assisted Decision-making Bill falls into the same trap because the Bill does not recognise the full legal capacity of all persons and remains overbroad in its conception of 'support', and the term 'assisted decision-making' is used merely as a rhetorical change from substituted decision-making because the decision-maker role is given to a third party, very similar to the situation currently under curatorship.⁸⁵

Robert Dinerstein argues that what art 12 requires instead, is supported decision-making where the individual is the primary decision-maker, but may need some assistance or 'support' in making and communicating a decision.⁸⁶ As such, the individual's autonomy is expressed in multiple ways and the autonomy itself 'need not be inconsistent with having individuals in one's life to provide support, guidance and assistance to a greater or lesser degree, so long as it is at the individual's choosing'.⁸⁷ This is because the right to self-determination in exercising all the rights that accrue to all persons demands not only that individuals can 'fend off any interference by the state or by other persons' in their decision-making, but also demands that support in making decisions where there is interference must be carefully circumscribed through safeguards.⁸⁸

When is such interference warranted?⁸⁹ Kristin Glen considers that the greatest conceptual obstacle to full implementation of art 12 and supported

83 See, for example, Bulgaria's art 164(2) of the Family Code of 1 October 2009 (the guardian is authorised to make all personal decisions); Slovenia's art 41 of the Code of Obligations and arts 190–1 of the Marriage and Family Relations Act (decisions taken on behalf of the individual under full guardianship need not consider his or her wishes).

84 Dinerstein (note 46 above) 10.

85 M Swanepoel 'Human Rights that Influence the Mentally Ill Patient in South African Medical Law: A Discussion of Sections 9; 27; 30 and 31 of the Constitution' (2011) 14(7) *PER* 127, 137; R Cook & C Ngweni (eds) *International Library of Medicine, Ethics and Law* (2007) xiii.

86 CRPD art 2 defines communication as follows: 'Includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology.' 'Language' is defined as including 'spoken and signed languages and other forms of non-spoken languages.' CRPD art 21(b) emphasises the need to provide for various means of communication by noting that appropriate measures must be taken to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and 'through all forms of communication of their choice'. See recommendations by Inclusion Europe, including that legislation should promote examples of good practice in overcoming communication barriers. Inclusion Europe *People with Severe Disabilities and/or Complex Needs and the UN Convention* (2009) 4–5 <http://inclusion-europe.org/images/stories/documents/PositionPapers/Position_paper_Complex_Needs_EN.pdf>.

87 Dinerstein (note 46 above) 10.

88 Lipp & Winn (note 50 above) 50.

89 Poland's Constitutional Court has acknowledged the need for law reform to move to more tailored approaches and less restrictive interference in the Poland Constitutional Tribunal Judgment K 28/05 (7 March 2007). See also *Kędzior v Poland* No 45026/07 (16 October 2010) paras 38 & 80.

decision-making regimes, is the ‘deeply ingrained belief that there are some persons who are, simply, just beyond reach’ and will require substituted decision-making.⁹⁰ This perception, she argues, undermines the entire premise of legal capacity on an equal basis with others and equality before the law.⁹¹ Only in hard cases⁹² will some kind of interference with full capacity be defensible,⁹³ but these measures will require strikingly different measures from current guardianship laws and substituted decision-making.⁹⁴ In truly ‘hard cases’ there should be ‘an added obligation to divine the will if at all possible and create social embeddedness that allows some flash of the will to emerge’.⁹⁵ This flash of the will can emerge when the will and preferences principle is upheld, rather than the perceived best interests of the person, often interpreted as the best medical interests.

The ‘best interests’ standard is inappropriate when respecting the right to equality because it implies that decisions are taken by a third person and as such is irreconcilable with supported decision-making.⁹⁶ This standard finds its source in law and policy focused on children and is inappropriate in relation to adults as it carries the significant risk of paternalism.⁹⁷ Instead, the CRPD has chosen the ‘will and preferences’ of the person as a determining factor in decisions about that person’s life, requiring a move away from the ‘best interests’ approach.

Gerard Quinn explains that.⁹⁸

As a last resort, when all other less restrictive support mechanisms have failed to resolve an individual situation, [prospective legislation] should outline the circumstances in which substituted decision-making can be used ... Understanding the ‘will and preferences’ of the

90 Glen (note 7 above) 165.

91 Ibid.

92 See also art 6 of the Montreal Declaration on Intellectual Disabilities adopted on 6 October 2004 by the Pan American Health Organisation and World Health Organisation <<http://www.mdri.org/mdri-web-2007/pdf/montrealdeclaration.pdf>>.

93 Some EU member states have provided national authorities to monitor the implementation and follow-up of protective measures. For example, in Lithuania dedicated municipal or regional institutions are responsible for the supervision of designated guardians in terms of arts 3.241 & 3.278 of the Civil Code. In England and Wales the Public Guardian is responsible to police those who act on behalf of persons deprived of legal capacity in terms of s 9 of the Mental Capacity Act 2005, as does Scotland’s ss 6 & 7 of the Adults with Incapacity Act 2000. EAFR (note 3 above) 34 notes that Denmark, Estonia, Hungary and Sweden have comparable institutions. Under the current curatorship system under rule 57 of the Uniform Rules, South Africa has no such independent institutional monitoring of curators, but the Master does generally supervise the duties of the curator once he or she is appointed.

94 Quinn (note 8 above) 14.

95 Ibid.

96 Centre for Disability Law and Policy: NUI Galway ‘Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence and Equality’ 21.

97 Ibid.

98 Quinn (note 8 above) 13. See also M Bach ‘Supported Decision-making under Article 12 of the UN Convention on the Rights of Persons with Disabilities: Questions and Challenges’ *Notes for Presentation to Conference on Legal Capacity and Supported Decision-making Parents’ Committee of Inclusion Ireland* (3 November 2007) 1–2 <<http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner>> (substitute decision-making should be a last resort).

person can be a lengthy process, especially where individuals do not use easily recognised systems of communication.⁹⁹

This means that business as usual for legal capacity cannot continue, but should be replaced with supported decision-making measures, including in truly hard cases where a measure of facilitated decision-making¹⁰⁰ is followed, and must, as far as possible, comply with the safeguards in art 12, particularly necessity and proportionality.¹⁰¹ This is because the need for safeguards is not merely a ‘question of safeguarding against bad decision-making’, it also requires ‘super-adding supports to divine the will or to spark the will even in extreme cases’.¹⁰²

In summary, arts 5 and 12 of the CRPD promote the possession and exercise of legal capacity for all persons on an equal basis, necessitating adherence to the principle of proportionality, cognisant of the will and preference of the person concerned, regardless of the severity of that person’s disability and perceived incapacity.

III THE PRINCIPLE OF PROPORTIONALITY AND ITS INCORPORATION IN ART 12(4) OF THE CRPD

Proportionality, derived from German law, is one of the general principles of law.¹⁰³ In terms of this principle, a public authority may not impose obligations on a citizen unless the obligations are strictly necessary in the public interest to attain the purpose of the measure and exhibit a reasonable relationship between ends and means.¹⁰⁴ It is considered to be partly codified in art 5(3)

99 Quinn’s reference to substituted decision-making here is more aptly co-decision-making or facilitated decision-making.

100 National Health Act 61 of 2003 ss 6, 7 & 8 are instructive in that they provide, in the context of user consent for health-care services, for the participation of the person requiring support in providing informed consent. The person giving consent on behalf of the person with the disability must, if possible, consult the user before giving the required consent and, importantly, where a user is capable of understanding he or she must be informed of the necessary information even if he or she lacks the legal capacity to give their informed consent. The following elements are, therefore, part of the decision-making process of providing informed consent in the context of health services: providing the person (the user) with the necessary information about the service; ensuring that the person is given information in the right language and considering her level of literacy (and here augmentative and other communication is important); and, lastly, ensuring that the person participates.

101 See the Canadian proposals in Bach & Kerzner (note 5 above) 91, including a facilitator appointed by an administrative tribunal or through a planning document such as a power of attorney for persons who did not establish prior planning documents or whose supporting ‘others’ are unable to discern the person’s current will and/or intentions sufficient to guide decision-making, including people who have experienced traumatic injury, illness or dementia which left them in a coma or with dramatically impaired cognitive and communication function.

102 Ibid 20.

103 In Germany it is called *Verhältnismäßigkeit* and is regarded as underlying certain provisions of the German constitution. It is also understood as an aspect of the *rechtsstaat* principle (DP Currie *The Constitution of the Republic of Germany* (1994) 309). A Barak *Proportionality Constitutional Rights and their Limitations* (2012) 175–208 (the historical origins of the principle of proportionality).

104 EH van Collier ‘Proportionality Review – the Battle between Community Standards and English Domestic Law’ (2006) 39 *Comparative and Int LJ of SA* 469, 470.

of the European Convention, stating that ‘any action by the Community shall not go beyond what is necessary to achieve the objects of the Treaty’.¹⁰⁵ In other words, the principle requires that the adverse consequences of a certain measure may not be disproportionate in relation to the purpose and objects served by that measure.¹⁰⁶

The European Court of Justice has formulated a three-question doctrine to determine whether the principle of proportionality has been violated in a certain measure: first, whether the measure is suitable in order to achieve the objective of the measure; second, whether the measure is necessary in order to achieve the measure; and third, whether the result obtained is proportionate in sensu stricto.¹⁰⁷ This involves examining whether a measure which is suitable and necessary, violates the interests of a specific group of individuals in a disproportionate manner.¹⁰⁸ This principle and its intensity of review will be greater, with a concomitantly lower margin of discretion to the decision-maker, where a violation of fundamental human rights is alleged.¹⁰⁹ Examples of such fundamental rights include the right to equality and the right to legal capacity.

The domestic guardianship laws of many EU member states include the principle of proportionality.¹¹⁰ This principle is enshrined in principle 6 of the Recommendation R(99)4¹¹¹ of the Council of Europe Committee of Ministers¹¹² and acts as a safeguard that must be in place *before* a decision

105 See also EU Amsterdam Treaty art 3 and protocol 30 on the application of the principles of subsidiarity and proportionality annexed to the Treaty on the EU. See art 3(4) of the Lisbon Treaty amending the Treaty on EU and the Treaty Establishing the European Community (2007) which reads ‘under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’. See R Pati ‘Rights and their Limits: The Constitution for Europe in International and Comparative Legal Perspective’ (2005) 23 *Berkeley J Int Law* 223.

106 Van Coller (note 104 above) 470.

107 The European Court of Justice first recognised proportionality in *Internationale Handelgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

108 Van Coller (note 104 above) 471.

109 *R (on the application of Farrakhan) v Secretary of State of Home Department* 2002 EWCA Civ 606 2002 QB 1391 64.

110 EAFR (note 3 above) 36.

111 Recommendation R(99)4 of the Council of Europe Committee of Ministers was adopted on 23 February 1999, predating the CRPD. It provides guidance to the European Court of Human Rights.

112 Principle 6 of the Council of Europe Committee of Ministers Recommendation R(99)4 provides as follows:

- ‘1. Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.
2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention.’

is made to lawfully deprive a person of his or her legal capacity through protective measures.¹¹³

The interpretation of the principle of proportionality in the judgment of the European Court of Human Rights (ECtHR) in *Shtukaturv v Russia*¹¹⁴ is instructive. First, the court held that intellectual or psychosocial disability does not, on its own, constitute a reason for legal incapacitation.¹¹⁵ The court considered what threshold must be met for the full removal of legal capacity to be compliant with art 8 of the European Convention on Human Rights (ECHR) right to respect for private and family life.¹¹⁶ The court stated that ‘in order to justify full incapacitation the mental disorder must be “of a kind or degree” warranting such a measure’.¹¹⁷ The court looked at the distinction between degrees of legal capacity restrictions and indicated the need for any measures restricting legal capacity to be ‘proportionate’ to the ‘legitimate aims’ described in art 8(2).¹¹⁸

The Russian Code, in its binary distinction between full capacity and full incapacity did not provide for borderline situations, other than drug or alcohol addiction. The court stressed the need for proportionality and the maximum reservation of capacity and concluded that the binary distinction¹¹⁹ between full and no legal capacity did not ‘provide for a “tailor-made response” as is envisaged by the principles in the recommendation’.¹²⁰ The court concluded that in the circumstances, the applicant’s right to private and family life was limited ‘more than strictly necessary’ and such interference was ‘disproportionate to the legitimate aim pursued’. The Russian Code and its restrictive guardianship provisions requiring plenary guardianship on a finding of *any* incapacity was struck down by the Russian constitutional court,

113 ‘Protective measures’ is the nomenclature used by the EU Agency for Fundamental Rights as a generic term to refer to any measure that can be taken (whether plenary or partial guardianship, curatorship, etc) to limit or deprive a person’s legal capacity.

114 *Shtukaturv v Russia* No 11009/05 ECtHR (27 March 2008).

115 Ibid para 90.

116 Note that art 8 of the ECHR does not explicitly refer to legal capacity, but the ECtHR has recognised that restriction of legal capacity can represent an ‘interference’ with the art 8 right to respect for private and family life. Article 8 is interpreted to secure a sphere within which the individual can ‘freely pursue the development and fulfilment of [her] personality’. See European Commission of Human Rights (1981); *Brüggeman & Scheuten v Germany* No 6959/75 (12 July 1977) para 55; *Shtukaturv* (note 114 above) para 83; *Sýkora v the Czech Republic* No 2341/07 (22 November 2012) para 101.

117 *Shtukaturv* (note 114 above) para 94.

118 ECHR art 8(2) provides: ‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

119 See Quinn (note 8 above) 13 (Status-based assumptions under guardianship laws rests on a binary view of capacity and stereotypes about disability which is unable to assess each individual’s circumstances. Capacity is not a binary concept – one can have variable levels of capacity to make different kinds of decisions).

120 *Shtukaturv* (note 114 above) para 95.

ordering the Russian parliament to enact a new law which better respects people's decision-making capacity, citing the CRPD.¹²¹

In the South African context, proportionality¹²² refers to a standard of review when the challenge to general norms is based on an alleged infringement of a right in the Bill of Rights, according to s 36(1) of the Constitution of the Republic of South Africa, 1996. This test requires the court to assess if limitations to the right are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The court must take into account the nature of the right, the importance of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and the existence of less restrictive means to achieve the legitimate purpose.¹²³ Michael Bishop explains that proportionality is a structured test of reasonableness, which means that where a law is disproportionately tailored to its end, it suffers from unreasonableness.¹²⁴

The Constitutional Court has held that proportionality 'calls for the balancing of different interests'.¹²⁵ This is because the limitations clause requires the 'weighing up of competing values, and ultimately an assessment based on proportionality'.¹²⁶ David Bilchitz explains two sub-principles of proportionality as follows.¹²⁷ First, suitability requires that 'a particular measure that purports to restrict the realisation of a right must be closely connected to the realisation of another normative principle'. Section 36(1) of the Constitution incorporates the idea by requiring that there be a close connection between the limitation of a right and the purpose it seeks to achieve. Second, the requirement of necessity 'entails that if there are a number of measures that would equally give effect to a particular principle then the measure that

121 See also Mental Disability Advocacy Center (MDAC) 'Russian Constitutional Court Criticizes "Abusive" Guardianship Law' (28 June 2012) <<http://mdac.info/en/28/06/2012/RussianConstitutionalCourt-criticises-abusive-guardianship-law>>. See also MDAC 'Analysis of the Russian Legal Capacity System for Persons with Mental Disabilities: Towards Implementation of Article 12 of the CRPD' <[http://mdac.info/sites/mdac.info/files/English-Analysis-of-the-Russian-legal-capacity-system-for-persons-with-mental-disabilitiesTowards implementation of Article_12_oftheUNCPRD.pdf](http://mdac.info/sites/mdac.info/files/English-Analysis-of-the-Russian-legal-capacity-system-for-persons-with-mental-disabilitiesTowards%20implementation%20of%20Article%2012_oftheUNCPRD.pdf)>.

122 C Courtis 'Rationality, Reasonableness, Proportionality: Testing the Use of Standards of Scrutiny in the Constitutional Review of Legislation' (2011) 4 *Constitutional Court Review* 31, 35.

123 S Woolman & H Botha 'Limitations' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2006) chapter 34.

124 M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' in Woolman & Bilchitz (note 32 above) 53 fn 71; *Law Society of South Africa v Minister for Transport* (2011) 1 SA 400 (CC).

125 *S v Makwanyane* (1995) 3 SA 391 (CC) 104 (Chaskalson J). See S Woolman & H Botha 'Limitations: Shared Constitutional Interpretation, an Appropriate Normative Framework and Hard Choices' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 156.

126 I Currie 'Balancing and the Limitation of Rights in the South African Constitution' in Woolman & Bilchitz (note 32 above) 251.

127 D Bilchitz 'Does Balancing Adequately Capture the Nature of Rights?' in Woolman & Bilchitz (note 32 above) 268. Both Bilchitz and Iain Currie draw from Robert Alexy's work on proportionality R Alexy *A Theory of Constitutional Rights* (2002). See also R Alexy 'Individual Rights and Collective Goods' in C Nino (ed) *Rights* (1992) 163; R Alexy 'On the Structure of Legal Principles' (2000) 13 *Ratio Juris* 294; R Alexy 'Constitutional Rights Balancing and Rationality' (2003) 16 *Ratio Juris* 131.

would be least intrusive of competing normative principles must be chosen'.¹²⁸ This is similar to the European Court of Justice's three questions doctrine.

It must be borne in mind that the principle of proportionality plays two distinct roles in legal capacity legislation and support measures. First, it is a safeguard to protect against abuse of the authority of the person who supports the individual with the disability in reaching a decision. In this vein, all persons who provide support to others must be cognisant of the principle and give effect to it when providing support. Second, it is a standard of judicial review that ensures that courts can review any legislative measures which effectively restrict the legal capacity and limit the right to equality of the person with the disability, in order to uphold that person's autonomy. A statutory measure that limits a person's legal capacity affects that person's rights to equality, dignity and psychological integrity. It would have to withstand scrutiny in the proportionality enquiry.

Central to an understanding of all fundamental human rights in the South African Constitution, including the right to equality, is that these rights seek to protect some of our most fundamental interests as human beings, and especially the recognition of the 'equal importance of individual lives'. These rights, according to Bilchitz:¹²⁹

relate to the very most basic elements of our lives – the necessary conditions of our freedom, the resources we need to live lives of value, and to function adequately. Rights have a form of urgency that flows from the impact that they have on our ability as individuals to lead lives of value to us.

Rights are thus best understood as 'weighty principles that protect the most fundamental interests of the individual'. At their foundation is a concern for the value and quality of individual lives. In a just political community, each individual life will be understood as having equal value. Thus, rights can be understood to flow from what may be termed the 'equal importance of individual lives'. This understanding of rights is fundamentally congruent with the text of the South African Constitution. The fundamental values underlying the Constitution are 'human dignity, equality and freedom'. Human dignity involves a fundamental assumption of the worth of each individual life and thus captures the notion of the importance of individual lives. Equality represents the notion that each life is to be treated as *equally* valuable. Freedom is part of what constitutes the value in individual lives: to be able to flourish and live according to one's own conception of the good.

These foundational values of equality, dignity¹³⁰ and freedom embedded in s 1 of the Constitution, play a role in the determination of whether a limitation of a right is justifiable or not, and particularly in the proportionality enquiry discussed above. This means that justification for a limitation of a right must take account of the equal importance of individuals.¹³¹ It is this constitutional understanding of equality and the inherent worth of individuals that is

128 Bilchitz (note 127 above) 270; Alexy *Theory of Constitutional Rights* (note 127) 47.

129 Bilchitz *ibid* 287.

130 For a discussion on over-reliance on dignity as a value within an equality analysis see Bhabha (note 24 above); and also DS Greschner 'Does *Law* Advance the Cause of Equality' (2001) 27 *Queen's LJ* 299, 313; S Martin 'Balancing Individual Rights to Equality and Social Goals' (2001) 80 *Canadian Bar Review* 299; and Albertyn (note 77 above) 258.

131 Bilchitz (note 127 above) 288.

encapsulated by the CRPD's conception of equality and legal capacity, and will be necessary to apply in a proportionality enquiry.

The forms that support measures and safeguards may take are varied and best practice models abound.¹³² However, countries formulate support measures in their law reform efforts¹³³ for the decision-making to meet the requirements of the CRPD, and what is crucial is that individualised and proportional support is necessary.¹³⁴ This is necessary if we accept that 'unlike [the] individual pathology approach to disability' that is premised on the medical approach, the human rights approach requires that 'idiosyncratic needs are taken into account in the provision of support'.¹³⁵ A one-size-fits-all measure or measures will not be sufficient. Instead, our law reform must reflect support measures that are suitable, necessary and not disproportionate to the needs and rights of the person who needs support in decision-making.

IV SOUTH AFRICA'S LEGISLATIVE SCHEME ON LEGAL CAPACITY

The following discussion briefly outlines the curatorship and administrator systems in the current substituted decision-making laws, and then outlines the SALRC's draft support measures under the Assisted Decision-making Bill.

(a) Curatorship

Curatorship is vested in the approach of substituted decision-making where the curator has court-authorised power to take decisions on behalf of the individual without necessarily having to demonstrate that the decisions are according to that person's wishes.¹³⁶ Curatorship applications come in many forms¹³⁷ and include an application under common law, rule 57 of the Uniform

132 MDAC *Supported Decision-making: An Alternative to Guardianship* 3, designed to assist countries in their law reform processes to ensure supported decision-making is effective and appropriate. See also Montreal Declaration (note 92 above).

133 For examples of support measures to exercise legal capacity see the German custodianship (betreuer); Sweden's contact person and personal agent and the United Kingdom's Independent Mental Health Advocate and Independent Mental Capacity Advocates, as well as Person-centred Planning and Circles of Support.

134 M Bach & L Kerzner 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity' (15 October 2010) 73 <<http://www.lco-cdo.org/disabilities/bach-kerzner.pdf>>. Bach & Kerzner postulate that three kinds of support services are needed: first, support to assist in formulating one's purposes and to explore the range of choices and to make a decision; second, support to engage in the decision-making process with other parties to make agreements that give effect to one's decision, where one's decisions require this; and third, support to act on the decisions that one has made, and to meet one's obligations under any agreements made for that purpose.

135 Rioux & Riddle (note 75 above) 53.

136 EAFR (note 3 above) 9.

137 A curator ad litem is appointed to assist the person to bring or defend legal proceedings and the test is whether the person can understand legal proceedings; a curator bonis is appointed to administer the person's property and the requisite test is whether or not the person can look after her own patrimonial affairs; and a curator personae is appointed to take care of the individual's person (personal welfare).

Rules of Court de lunatic inquirendo procedure.¹³⁸ In terms of the de lunatico inquirendo procedure, a High Court application is brought, premised on a finding that the person concerned is ‘of unsound mind and incapable of managing his or her own affairs’.¹³⁹ This determination of ‘unsound mind’ is reliant upon affidavits by medical practitioners.¹⁴⁰

Under our common law then,¹⁴¹ legal capacity has been linked to the questioning as to whether or not the person has a ‘consenting mind’. This has been understood to mean that legal capacity cannot be acquired by a person if, due to that person’s mental condition, he or she does not understand or appreciate the nature and consequences of the juristic act. Legal transactions entered into by persons with impaired capacity are void ab initio (and therefore cannot be ratified whether the other party was aware of the mental incapacity or not).¹⁴² Full capacity is ascribed to all persons, that is, all persons above 18 years of age may exercise their legal capacity to its fullest extent, and ‘may by him or herself and without the assistance or consent of any other person, exercise all the rights and become subject to all the duties of a “person”’.¹⁴³ However, ‘insane or mentally disordered persons have limited legal capacity’.¹⁴⁴ The intervention of a curator under the common law or an administrator under the Mental Health Care Act is then presupposed as necessary to validate a legal decision. This is because a declaration of unsound mind creates a rebuttable presumption of incapacity. How the curator fulfils the task of decision-making, however, is not limited by safeguards other than the ‘care of a prudent and careful person’¹⁴⁵ in managing the affairs of the person concerned, and the avoidance of conflict of interest between the curator and those of the person under curatorship.¹⁴⁶

138 The SALRC in its Issue Paper (note 27 above) stated the legal understanding of legal capacity (or mental incapacity) in South African law as follows: ‘Any mental incapacity that affects a person’s intellect and judgment will in terms of South African private law affect his or her capacity to act in the legal sense (e.g. to enter into a contract) and to litigate (i.e. to appear in court as a party to a suit). These capacities depend on whether the person in question is “insane” or not at the relevant time. A person is insane if he or she is incapable of managing his or her affairs. An insane person’s capacity to act is determined by common-law principles as extended by the courts and is currently not all regulated by legislation.’ The undesirability of labels such as ‘insane’ or ‘insanity’ must be addressed. In fact it is unconscionable that such terms are still used in our law.

139 *Lange v Lange* 1945 AD 332.

140 Rule 57(3) requires the filing with the application of affidavits by at least two medical practitioners wherein they must state all such facts as were observed by them at such examinations in regard to such condition, the opinions found by them in regard to the nature, extent and probable duration of any mental disorder or defect observed and their reasons for the same and whether the patient is in their opinion incapable of managing her affairs.

141 But see Beadle J’s decision in *Nyathi v Nyathi* 1976 (4) SA 43 (R) indicating that curatorship applications are ‘alien’ to African customary law. The court directed the curator to, in as far as possible, when administering the estate, pay attention to the requirements of customary law.

142 *Molyneux v Natal Land & Colonization Co Ltd* [1905] AC 555 (PC) 561.

143 ML Lupton ‘The Law and Older Persons: Legal Capacity’ in B Clark (ed) *Family Law Service* (2011) Service Issue 56 para Q30.

144 *Ibid.*

145 Heaton (note 20 above) 139 fn 139.

146 DSP Cronjé & J Heaton *South African Family Law* (1999) 246.

The common law curatorship system, then, sees legal capacity as a determination based on a person's own ability to understand information and assess the consequences of making a decision. Being legally capable is, therefore, attached to the attributes and limitations of the person. This approach is founded on the medical model of understanding disability, which perceives persons with disabilities as 'objects' of legal intervention, whereas the supported decision-making model is founded on the social or human rights model, which sees persons with disabilities as holders of rights, acting with agency.¹⁴⁷ A declaration of incompetence, even when the curator functions appropriately as intended, evokes a kind of 'civil death' for the person 'who is no longer permitted to participate in society without mediation through the actions of another if at all'.¹⁴⁸ The SALRC has admitted, in relation to the current curatorship system that:

Placement under curatorship ... does not in itself terminate active legal capacity. The person can therefore enter into a valid legal transaction with its normal consequences if, at a given moment, he or she is mentally and physically capable of doing so. The capacity to do so remains a question of fact. Some however regard this as of academic interest only and point out that *in practice it would be very difficult, if not impossible, to persuade a third party to enter into legal transactions with a person who has been declared mentally ill or incapable of managing his or her affairs, or in respect of whose person and/or property a curator has been appointed*.¹⁴⁹

No prior notification to the person to be affected by the appointment of a curator over that person's affairs is necessary.¹⁵⁰ A declaration is issued that the person is of unsound mind¹⁵¹ and as such unable to manage his or her affairs and the curator is then appointed (usually a curator bonis or personae depending on the needs of the individual) with unrestricted powers¹⁵² to make decisions on behalf of the individual.¹⁵³ The Master authorises the curator to

147 T van Reenen & H Combrinck 'The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 years' (2011) 14 *Sur Int J on Human Rights* 133, 144.

148 CRPD Preamble para j.

149 SALRC Discussion Paper (note 29 above) para 4 14, 55. Emphasis added and footnotes omitted. In its Issue Paper, the SALRC (note 27 above) 12–14 recognised the inappropriateness of a legal representative as curator personae as it 'constitutes a serious inroad into rights and liberties and drastically diminishes his or her legal status'. A similar shortcoming of the curator bonis is recognised by the SALRC as follows: 'In spite of many safeguards and controls of the curator's functions through the Master's office, there remains the potential for abuse, neglect or maladministration. The process of preparing the required annual account is time-consuming and often does not warrant the curator's statutory fee. The curator bonis, in spite of being limited to administering the property of the incapable person, cannot avoid becoming involved in the day-to-day needs of the patient which are financially related.'

150 However, rule 57(9) of the Uniform Court Rules provides that the court 'may require the attendance of the applicant, the patient, and such other persons as it may think fit, to give such evidence viva voce or furnish such information as the court may require' at the hearing.

151 The appointment of a curator bonis does not necessarily require such declaration, rule 57(13) of the Uniform Court Rules.

152 It is desirable that any order of court appointing a curator should specify the powers conferred upon the curator, but not necessary. *Ex parte Hulett* 1968 (4) SA 172 (D) 174D.

153 DE van Loggerenburg *Jones and Buckle Civil Practice of the Magistrate's Courts* (2013).

act and generally supervises his or her duties and receives annual reports from the curator. There is no periodic review provided for in the rule.¹⁵⁴

Notably, two of the criticisms against the curatorship system received through public comments in response to the Issue Paper were related to its high cost and unnecessary sophistication; and insufficient protection against abuse and exploitation of the individual by unscrupulous professionals and relatives.¹⁵⁵ According to the SALRC, curatorship is considered as 'constitutionally justified' when premised on a finding that the individual is 'of unsound mind and incapable of managing his or her own affairs'.¹⁵⁶ Yet, curatorship applications do not include safeguards to ensure that the curator respects the rights, will and preferences of the person; that it is free of conflict of interest¹⁵⁷ and undue influence; that it is proportional and tailored to the persons' circumstances; that it applies for the shortest time possible and is regularly reviewed. According to art 12(4) of the CRPD, the more the measures (a declaration of incapacity or curatorship) affect the individual's rights and interests, the stricter the safeguards must be.¹⁵⁸ This is not evident in the curatorship system. As discussed earlier, art 12(2) of the CRPD is opposed to state laws that presuppose the issuing of declarations of legal incapacity that will render a person powerless to make legally effective decisions, as happens when a curator is appointed. Instead, even where support is provided by other persons, no declaration of unsound mind is necessary, and full legal capacity should be recognised. Just because a person is utilising the support of someone else in coming to a decision, does not render that person by necessity as having 'diminished capacity' and the person providing the support should not substitute the decision of the person with the disability. The curatorship system does not comply with arts 5 and 12 of the CRPD.

(b) Administration of property under the Mental Health Care Act

The Mental Health Care Act 17 of 2002 (MHCA) provides for an administrator to be appointed by the Master of the High Court to 'care for and administer' the property of a mentally ill person or a person with 'severe or profound intellectual disability' upon application.¹⁵⁹ The application must be

154 Instead of periodic review, the onus is on the person to whom the declaration pertains to apply to the Court, in terms of rule 57(14) for a declaration that he or she is 'no longer of unsound mind and incapable of managing [his or her] affairs or for release from such curatorship' and must give 15 days' notice of such application to such curator and to the Master.

155 SALRC Discussion Paper (note 29 above) para 3.33.

156 Ibid para 3.18.

157 The only requirement to avoid conflict of interest is that the curator is not related to the individual and has no interest in the outcome.

158 CRPD art 12(4) provides that: 'The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.'

159 MHCA s 59(1).

accompanied by medical certificates or reports.¹⁶⁰ The Master can request an investigation to be conducted in certain instances, requiring the investigator to report to the Master.¹⁶¹ The procedure followed is different for bigger estates where the individual's assets are above R200,000 and income above R24,000.¹⁶² The Master will make a finding and appoint the administrator with limited powers.¹⁶³ The MCHA does not explicitly require supervision of the administrator's duties or that reports be provided to the Master.

Importantly, prior notice to the individual to be affected by the administration order must be given and the order and reasons therefore must also be furnished to the individual.¹⁶⁴ He or she may also appeal the decision of the Master to appoint an administrator upon application. Termination of the administrator's appointment can be applied for by the individual affected by the appointment. The costs for an investigation that may be called by the Master into the merits of the application must be borne by the estate of the individual concerned.¹⁶⁵

Some safeguards exist in this procedure.¹⁶⁶ There is, however, no periodic review. The requirement of proportionality and the need to respect and incorporate the will and preferences of the person is also absent from the MCHA.

(c) Assisted Decision-making Bill (2004)

The Issue Paper contemplated a revamped statutory system of substitute decision-making catering to the various and specific needs identified by the Commission. Some of the possible reform measures mooted included alternative decision-making, although still based on substitution of a decision, and these measures included: the introduction of alternative decision-makers

160 Ibid s 60(2)(b) & (c) provides that the application includes 'all available mental health related medical certificates or reports relevant to the mental health status of that person' and to her incapability to manage her property and to set out the grounds on which the applicant believes that such person is incapable of managing her property.

161 Ibid s 60(5) requires an investigation into the merits of the application to be conducted if: (a) certain allegations in the application require confirmation; (b) further information is required to support the application; or (c) the estimated property value and annual income of the person is above the prescribed amount.

162 Ibid s 60(4), where the estimated property value and annual income of the person is below the threshold, the Master can appoint an administrator without conducting an investigation, but where the value and income is above the threshold, s 60(5) requires that an investigation is first conducted before the appointment can be made. Regulation 45 of the General Regulations to the Mental Health Care Act, GN R1467 in GG 27117 of 15 December 2004, as corrected by GN R98 in GG 27236 of 11 February 2005 stipulates these values.

163 Ibid s 63(3) provides for the powers and functions to 'take care of and administer the property of the person for whom he is appointed and to carry on any business or undertaking of that person subject to any other law'.

164 Ibid ss 60(3) & (9) respectively.

165 Ibid ss 60(1), (10) & (14).

166 Safeguards include a requirement that the Master 'inform' the object of the legislation, the person with the disability, as to its decision regarding the appointment of the administrator (s 59(9)); provides for the right to appeal within 30 days (s 59(10)).

designated in legislation;¹⁶⁷ multi-disciplinary committees or tribunals; advocates (family or volunteer) to 'plead' the individual's case and ensure access to services; and the possibility of reforming the curatorship system.

The Assisted Decision-making Bill and Discussion Paper included draft clauses for substituted decision-making by family and spouses regarding the personal welfare of the person (including signing powers for banking purposes);¹⁶⁸ intervention orders for once-off decisions;¹⁶⁹ the appointment of a manager to manage the property and financial affairs of a person on a long-term basis;¹⁷⁰ the appointment of a mentor to make personal welfare decisions on a long-term basis;¹⁷¹ and the introduction of enduring power of attorney.¹⁷² These measures would be supervised by the Master's Office of the High Court.¹⁷³

Notably, one of the objectives of the Discussion Paper was to develop the common law concept of 'capacity'¹⁷⁴ 'for purposes of new statutory substitute decision-making measures to deal with the grey areas of temporary and fluctuating incapacity and to clearly reflect the internationally accepted notion that decision-making is function-based'.¹⁷⁵ The Discussion Paper and attendant Bill were premised on an intervention being in the 'best interests' of the person with the 'incapacity' as the central principle reflecting respect for human dignity.¹⁷⁶ It is evident that the law reform was still in the manner of substituted decision-making, based on the medical model approach to disability and on the outmoded standard of 'best interests'.¹⁷⁷

The SALRC acknowledged the importance of the principle of proportionality: 'that where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned i.e. it should be tailored to the individual circumstances of the case'.¹⁷⁸ But the SALRC's understanding of the principle is skewed: it considers that support measures 'should therefore restrict the legal capacity, rights and freedoms of the adult

167 These alternative decision-makers would 'automatically make decisions for someone unable to make them, could be identified in legislation. The choice of decision-maker could vary according to the type of decision and might be a single individual or a combination of people. Alternative decision-makers could, depending on the circumstances, include a representative already formally appointed (e.g. a curator); a responsible professional; the primary caregiver of the incapable adult; a family member; a combination of professional, primary carer and family; a court, tribunal or other authority.' SALRC Issue Paper (note 27 above) 22.

168 Assisted Decision-making Bill clauses 6–10.

169 Ibid clauses 11–21.

170 Ibid clauses 22–48.

171 Ibid clauses 49–69.

172 Ibid clauses 70–87.

173 Ibid clauses 88–95.

174 Ibid clause 4.

175 SALRC Discussion Paper (note 29 above) vii.

176 Assisted Decision-making Bill clause 5.

177 The SALRC in its Discussion Paper (note 29 above) 10 para 2.5 views law as being concerned with capacity and therefore the 'common inability' amongst the various disabilities 'to make all necessary decisions'. The emphasis on inability and thus reliance on the medical or functional approach is inescapable.

178 Ibid 15–16.

concerned by the minimum which is consistent with achieving the purpose of the intervention'. The restriction of capacity, rights and freedoms is at odds with the CRPD's requirement that measures need to recognise the full legal capacity of the person with the 'incapacity' on an equal basis with others.

Two related issues in this regard require mention. The Bill imputed the requirement that any decision could be made by a 'mentor' for the personal welfare of the individual if 'it is reasonable for it to be done by the person who does it in relation to the matter in question; and if it is reasonably believed by the person who does it to be in the best interests of the adult with incapacity'.¹⁷⁹ Furthermore, the safeguards listed in the Assisted Decision-making Bill are also premised on the 'best interests' standard.¹⁸⁰ Notably clause 5(2)(b) of the Bill provides for the principle of 'necessity' but it is awkwardly phrased and does not incorporate the proportionality principle.¹⁸¹ This clearly does not meet the art 12(4) safeguards, but is understandable in the context of law reform efforts pre-CRPD. In the next two sections, I consider how the principle of proportionality should be included as a safeguard in the revised versions of the Bill going forward.

(d) The SALRC redrafting post CRPD

The 2012 and ongoing redrafts of the 2004 Bill are likely to provide for similar measures of support as in the Assisted Decision-making Bill. Since this redrafting process is ongoing, it is likely that the SALRC will endeavour for the revised Bill to be in line with the safeguards required by art 12(4) of the CRPD.

There are two points to note regarding the ongoing redrafting process. First, the SALRC indicated in the Discussion Paper a need for the provision of

179 Assisted Decision-making Bill clause 8.

180 Ibid clause 5 provides that in deciding what is in an adult's best interests:

- '(a) it must be established that the intervention is the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention;
- (b) it must be taken into account that –
 - (i) no intervention should take place unless it is necessary with regard to the individual circumstances and needs of the adult; and
 - (ii) intervention is unnecessary if any less formal arrangements can be made or any assistance can be provided by relatives or by others;
- (c) it must be recognised that the adult must be encouraged to participate, or to improve his or her ability to participate, as fully as possible in anything done for and any decision affecting him or her;
- (d) the cultural environment, values and beliefs of the adult must be taken into account in so far as it is reasonable and practicable to do so;
- (e) the adult's past and present wishes and feelings in relation to the intervention must, in so far as they are ascertainable, be taken into account ...'

181 Assisted Decision-making Bill clause 22(2) provides that 'when deciding whether it is in the adult's best interests to appoint a manager a Master must, in addition to the matters contemplated in section 5, take into account that where the adult concerned needs assistance with regard to a single matter or a limited range of matters with regard to his or her property a specific intervention order is to be preferred to the appointment of a manager; and the powers conferred on a manager should be as limited in scope and duration as possible.' The limitation of scope and time is one step closer to proportionality, but does not quite meet the standard required of the CRPD.

a 'default arrangement' where an individual has no support network (family or carers) to 'act on behalf of' the person, or where existing 'formal measures' (presumably curatorship or administration) are not utilised. However, the SALRC did not, in fact, make recommendations in that regard, except for the Master to have a wide discretion to appoint a manager or mentor to attend to the personal welfare or property interests of an 'adult with incapacity' where the Master deems it necessary in the 'best interests' of the person to do so.¹⁸² The new Bill will have to provide for a support measure for this scenario. Here a personal ombudsman may be helpful, and would have to be funded by the state. Over-reliance on the court for dispute resolution in relation to legal capacity is not only resource intensive, but may also continue to medicalise the court's approach to legal capacity when medical professionals inevitably enter the fray.¹⁸³ This is because courts have historically deferred to the medical model approach on capacity.¹⁸⁴ Similarly, the need for dispute resolution mechanisms and an avenue for complaints regarding decision-making have not been addressed by the SALRC.¹⁸⁵

Second, the new draft of the Bill is likely to contain safeguards for support measures as required by the CRPD, including that the support, must: (a) be necessary with regard to the person's needs and circumstances; (b) be proportional to the assistance required; (c) respect the persons' rights, preferences and will; and (d) in so far as they are ascertainable, take account of the person's past and present wishes and feelings in relation to the support. These four safeguards, central to which is the principle of proportionality, require further exposition to ensure that they meet the CRPD standard.

V THE PROPORTIONALITY PRINCIPLE AND OTHER SAFEGUARDS IN THE ASSISTED DECISION-MAKING BILL

The Assisted Decision-making Bill did not include the principle of proportionality. A clear understanding of this principle is important. Article 12(3) of the CRPD states that the measures must be 'proportional and tailored to the person's circumstances', not to be proportional to the assistance, but rather the person's circumstances. The emphasis is not on the kind of decision to be made along with a presumption that the person does or does not have capacity to make a decision in the particular instance. Any measure of support, to be consonant with the proportionality principle requires emphasis firstly, on the individual concerned. The support must be tailored to his or her circumstances and this means that even informal support should only be rendered where circumstances call for it.

182 SALRC Discussion Paper (note 29 above) vii, 11 & 238. See clause 91 of the Assisted Decision-making Bill for this so-called 'default arrangement' referred to in the Discussion Paper.

183 Centre for Disability Law and Policy (note 96 above) 22.

184 Ibid.

185 The SALRC Discussion Paper (note 29 above) instead referred the request to provide dispute resolution mechanisms to the researcher on the SALRC's investigation into Arbitration: Alternative Dispute Resolution, Project 94.

Should any form of informal support be envisioned in the revised Bill, it must also comply with the safeguards in art 12(4) of the CRPD. Article 12(4) requires instead that a safeguard, which requires measures that respect the rights, preference and will of the person, is paramount in ensuring autonomy and independence in decision-making.¹⁸⁶ A lower standard than that of formal support without safeguards should not be legislated. Related to the safeguard of proportionality is the principle of full and effective participation in art 3(c) of the CRPD. Similarly, the need to respect individual autonomy, including the freedom to make one's own choices, should be present as a safeguard whether the support rendered is by a family member, friend or a personal ombud. The less regulated and open-ended this kind of support, the more safeguards there must be to guide the person rendering the support to ensure the 'support' does not become merely 'substituted' decision-making.¹⁸⁷

A further implication is that the safeguard requires measures that are free of conflict of interest and undue influence, which have the potential to be violated on this reading of informal support. More than 'consultation' is required from the person receiving the support, to avoid that the person rendering informal support could impose his or her own decision. The length or duration of informal support rendered must be as short as possible. This safeguard required by the CRPD ensures that the person rendering informal support would facilitate the independence of the person receiving support and particularly that support in decision-making is only provided when necessary and not on an on-going basis.

The Bill should be clear about its application to the 'categories' of persons who essentially have divergent needs for accommodation and support.¹⁸⁸ This would include persons with intellectual disabilities, persons with psychosocial

186 Even in facilitated decision-making, see Bach & Kerzner (note 5 above) 24, as well as Quinn (note 8 above) 17.

187 Note also that instances of informal support create the most potential for imposition of substitute decision-making for persons with communication barriers, for instance persons with cerebral palsy, persons who are deaf or require augmentative communication. CRPD arts 2 & 21(b) (as discussed earlier) must therefore provide the standard for persons rendering informal support to persons with this kind of disability or barrier.

188 The CRPD's definition of persons with disabilities is very broad (note 4 above). Psychosocial disabilities refer generally to 'mental' or psychiatric disabilities. The term psychosocial disability differs from the term psychiatric disability in that it places an emphasis on the social consequences of disability whereas psychiatric disability focuses on the medically defined illness or impairment. Using the social model of disability, the term assists in identifying a person's functioning, what limits this functioning and the supports that are required for his or her full and effective participation in the community. See World Network of Users and Survivors of Psychiatry *Implementation Manual for the UN Convention on the Rights of Persons with Disabilities* (2008).

disabilities and persons with communication or augmentative barriers.¹⁸⁹ Yet, the Assisted Decision-making Bill is mostly premised on measures for older persons (who have different requirements for accommodation and support). The diversity of needs and abilities must be accommodated in the model for support in the Bill, and its subsequent implementation must be flexible and individually tailored.

Importantly, proportionality and individual tailoring re-emphasises a move away from the preference for ‘the least restrictive alternative’ and instead requires support measures that meet the needs of those who want support, including support that does not restrict the legal capacity of the person concerned. The association, Inclusion Europe, stresses that the least restrictive alternative’s corollary, the principle of maximum preservation of capacity, means that ‘no measure should result in the automatic or complete removal of the legal capacity of the person concerned’.¹⁹⁰ A preference for the ‘least restrictive option’ is given in the Bill.¹⁹¹ It could be argued that the least restrictive option is consistent with the maximisation of capacity if one understands maximisation of capacity to entail that the legislative measures should only countenance support that is the least restrictive of the person’s decision-making capacity. If, however, the principle is interpreted to mean that excessive intrusion on a person’s capacity is alright as long as it is the least restrictive option to achieve the goals, it would be distinct from capacity maximisation. The Constitution’s s 36 limitations analysis requires merely a ‘less restrictive means to meet the legitimate purpose’. The CRPD does not explicitly mention less or least restrictive means as a principle, but, I would argue, that respecting a persons’ full capacity would favour the maximum preservation principle over less or least restrictive means. The principle of maximum preservation of capacity should be included in the revised Bill as a stronger safeguard.

In order to comply with the principle of proportionality, support measures must be both suitable and necessary, and not disproportionate to the person’s needs and rights. Proportionality is, therefore, not merely a standard of judicial review that a court will utilise to ascertain whether a legislative measure (such as the appointment of a curator or mentor or personal welfare assistant) justifiably limits the right to equality and legal capacity of the individual concerned in an open and democratic society based on human dignity, equality and freedom. It is also a principle that must guide any person that provides support to a person with a disability who cannot make

189 The Bill must acknowledge that persons who experience difficulties in understanding information or reaching a decision should receive the necessary assistance to do so, without simultaneously running the risk that the assistance or support provided will take over the entire decision-making process. Persons who have difficulties in communicating their will to third parties should have access to support, without having to defend their decision to the support person. Hence the emphasis on the person *retaining* full capacity would mean the functional approach can still play a minor role as a model for appropriate support so that the individual can be put on an equal footing.

190 Ibid.

191 Assisted Decision-making Bill clause 5(2)(a).

decisions independently to ensure that whatever support is provided to that person to come to a decision regarding his or her welfare or finances, remains proportional to the needs of the person concerned. The support must not be overbroad, the support must not negate the autonomy of the person, and even in hard cases, the will and preferences of the person must be sought.

VI THE WAY FORWARD FOR SOUTH AFRICAN LAW REFORM

Persons with disabilities and specifically persons with psychosocial and intellectual disabilities are often not able to access independent and effective accountability mechanisms when their human rights are violated.¹⁹² The severity of their disability and the absence of effective and appropriate safeguards for support measures, as well as lack of access to legal aid, and a general lack of awareness of rights, entitlements¹⁹³ and remedies, all conspire to leave violators unaccountable.¹⁹⁴

South Africa is one amongst many countries adopting law reform measures to comply with the requirements of the CRPD, and specifically with art 12 of the CRPD.¹⁹⁵ The alternative support measures in the Assisted Decision-making Bill discussed in this article, however, are a broad reframing of the curatorship system, and curator bonis and personae, respectively, with mere rhetorical changes.¹⁹⁶ What is clear from other countries' efforts is that consultation in drafting new legislation or measures to recognise the legal capacity of persons with disabilities must be broad and inclusive to negate mere rhetoric and encourage a real paradigm shift. This consultation ranges from resources such as intergovernmental organisations' reports;¹⁹⁷ conferences and workshops featuring experts on disability rights; non-governmental organisations (NGOs), including those that produce alternative reports for states reporting to the CRPD's Committee; and persons with disabilities themselves.¹⁹⁸ It is, therefore, hoped that the SALRC will utilise the full extent

192 Swanepoel (note 85 above) 143.

193 Ibid.

194 The South African Human Rights Commission (SAHRC) can take complaints and instigate investigations into human rights abuses, including on disability (s 181(1) of the Constitution and the Human Rights Commission Act 54 of 1994). The Equality Courts are also available to take complaints based on discrimination challenges and have done so to ensure physical access and reasonable accommodation in some cases. N Bohler-Muller 'The Promise of Equality Courts' (2006) 22 *SAJHR* 380, 386.

195 Bulgaria formed a task team on legal capacity law reform after a decision in *Stanev v Bulgaria* ECHR, Grand Chamber; Czech Republic introduced a new civil code that introduces supported decision-making and views restriction on legal capacity as a last resort; and Ireland.

196 See Dinerstein (note 46 above) 8 ('Rhetorical identification of the shift from substituted to supported decision-making, however, is one thing; understanding what these terms mean, and fully implementing a regime truly oriented towards supporting rather than supplanting the decision making rights or people with disabilities, is quite another matter').

197 UN Thematic Study (note 14 above) 14–15; European Commissioner for Human Rights 'Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual Disabilities and Psychosocial Disabilities' CommDH/Issue Paper (2012) 2.

198 EAFR (note 3 above) 55. Law reform measures must also include participation of persons with disabilities and their representative organisations, in keeping with the ethos 'nothing about us without us'.

of public consultation processes available to it to ensure that its efforts to revise the Assisted Decision-making Bill are commensurate with the CRPD's requirements for safeguards. Persons with disabilities will need to be made aware of their right to the recognition of their full capacity under the CRPD, and the need for the new legislation to meet these requirements. Awareness and education measures will thus have to be undertaken by the Department of Women, Children and Persons with Disabilities, as well as the Department of Justice and Constitutional Development to ensure the public, including persons with disabilities and their families as well as support networks, are aware of the repercussions of the new legislation on the outdated understanding of curatorship and decision-making.

The CRPD Committee has expressed the critical need for states to provide training for policy-makers and stakeholders (including persons with disabilities, government officials and all other persons coming into contact with persons with disabilities) on the meaning of supported decision-making.¹⁹⁹ Dinerstein notes that the reports of states to date, which allege that their provision of supported decision-making is accomplished by guardianship, suggest that much training is needed.²⁰⁰ This training must be grounded in a 'solid philosophical and legal framework of autonomy, equality and non-discrimination'.²⁰¹ South Africa can benefit greatly from utilising the resources available, and from the practical training of policy and law makers, and indeed of all persons who are likely to be impacted by the new decision-making Bill, to ensure that the paradigm shift in the CRPD, specifically in art 12, is achieved through appropriate and effective legislation.²⁰²

Michael Bach warns that:

substitute decision-making should always be a last resort. The problem is, that for far too many people with intellectual disabilities, it has become the first route followed. Families are being forced by health care, financial and community service systems into placing their adult family members under wardship or guardianship simply because alternative supported decision-making provisions and community services are not yet in place.²⁰³

In South Africa, community services to support persons in decision-making are lacking, and the absence of an ombudsman is striking. The sustainability of law reform measures for supported decision-making will require coordination between service providers, local officials and existing support schemes. It also requires dispute resolution mechanisms and independent accountability mechanisms such as an ombudsman. The difficulty in accessing formal complaints mechanisms through the Master's Court will invariably mean that

199 Concluding observations of the Committee on the Rights of Persons with Disabilities: Tunisia CRPD/C/TUN/CO/1, 4 (2011) para 22-3. See also Concluding observations of the Committee on the Rights of Persons with Disabilities: Spain CRPD/C/ESP/CO/1, 5 (2011) para 33-4.

200 Dinerstein (note 46 above) 12.

201 Ibid.

202 P Bartlett 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75 *Modern LR* 752. Bartlett explains that in ratifying the CRPD, countries 'signed up to a paradigm shift, and implementing that shift does not occur without a challenge to fundamental assumptions about how we acted in the past'.

203 Bach (note 98 above) 2.

where safeguards are not adhered to, persons who provide support will remain unaccountable.

Periodic reviews on their own may merely amount to the rubber stamping of an appointment of a support person in terms of the Assisted Decision-making Bill, especially if the Master and other stakeholders do not subscribe to the new paradigm shift required by the CRPD. The duty to uphold the principle of proportionality and to ensure that the measures of support are tailored to a person's individual circumstances rests on all persons who support persons with psychosocial, intellectual disabilities or those with communication barriers with their decision-making:

The primacy of individual autonomy can only be asserted on the basis that autonomy should be equally available to all ... failure to promote the autonomy of others in society is just as much a manifestation of harm as intruding on their legitimate area of autonomy. This insight allows us to derive the duty to contribute positively to society directly from the duty not to harm others. Since the state can legitimately restrain individual freedom to the extent that it is causing harm to others, it can justifiably impose duties to contribute in order to ensure that those who are in a position to promote the autonomy of others in fact do so.²⁰⁴

The promotion of autonomy will require proportionality as the overarching guideline to ensure that the safeguards for support measures are 'proportional to the degree to which such measures affect the person's rights and interests'. The more the measure affects the person's legal capacity, right to equality, and other interests, the higher the degree of scrutiny must be and the stronger the safeguards must be. Only then can the equal worth of all persons be maintained, cognisant of the values of equality, dignity and freedom in an open and democratic society. The support must not be overbroad, must not negate the autonomy of the person, and even in hard cases, the will and preferences of the person must be sought.

The individual who provides support to the person with the disability in making a decision, should always be cognisant of the suitability and necessity of the support for every decision that is made, with the aim to preserve the capacity of the person to the maximum extent and always proportionate to that person's needs and interests. Should the proportionality principle not be upheld and capacity be restricted during the decision-making itself, the proportionality enquiry could assist in judicial review of a supported decision after the fact. Currently, however, there is no such complaint or review process possible in the Assisted Decision-making Bill and the status quo of unaccountable substitute decision-makers will remain. The Assisted Decision-making Bill requires revision to ensure that the CRPD's safeguards for support measures are appropriate and effective and that proportionality will inform all decision-making.

The Assisted Decision-making Bill is anticipated as an alternative to current measures, which means that the new measures of 'support' envisaged by the Bill will be available 'parallel' to the existing curator and administrator

laws.²⁰⁵ The Inter-American Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities in its General Observations has been explicit that substituted decision-making measures must be replaced entirely.²⁰⁶ It has been argued that traditional guardianship measures and laws should be ‘progressively’ replaced by a supported decision-making system, but that:

This system will take time to develop and would run the risk of becoming dysfunctional if all existing measures of traditional guardianship were declared illegal at the same time, without the conditions in place that made supported decision-making effective for a particular individual. The system of guardianship and the system of supportive decision-making should therefore exist in parallel *during the period of time until the transition is completed*.²⁰⁷

Glen anticipates that this incremental approach may have been suggested to counter some of the opposition in the United States.²⁰⁸ South Africa’s situation is very different. There has been no evident resistance to the CRPD’s ratification nor to the state’s obligations in that regard. Yet, the Bill does not foresee that the outmoded substituted decision-making measures will be replaced in time by the new support measures. This parallel situation, therefore, will continue to exist and will cause legal uncertainty in an area of law that requires utmost clarity, not just for the legal profession which inevitably is involved in capacity issues, whether traditionally as curators or as legal representatives, but also for persons with disabilities who are likely to be affected by the new legislation. We must heed the call for a total replacement of the substituted decision-making measures with supported decision-making measures.

205 SALRC Discussion Paper (note 29 above) vii, 259.

206 Organisation of American States, Inter-American Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities *General Observation of the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities* OEA/Ser.L/XXV.3.1 CEDDIS/doc.12 (I-E/11) rev 1 (4–5 May 2011) on the need to interpret art 1.2(b) in line with the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities in the context of art 12 of the United Nations Convention on the Rights of Persons with Disabilities. See also N Pillay quoted in EAFR (note 3 above) 27.

207 Inclusion Europe *People with Severe Disabilities and/or Complex Needs and the UN Convention* (2009) 4–5 <http://inclusion europe.org/images/stories/documents/PositionPapersPosition-paper_Complex_NeedsEN.pdf> (emphasis added).

208 Glen (note 7 above) 164.