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THE 10 COMMANDMENTS OF CAPACITY

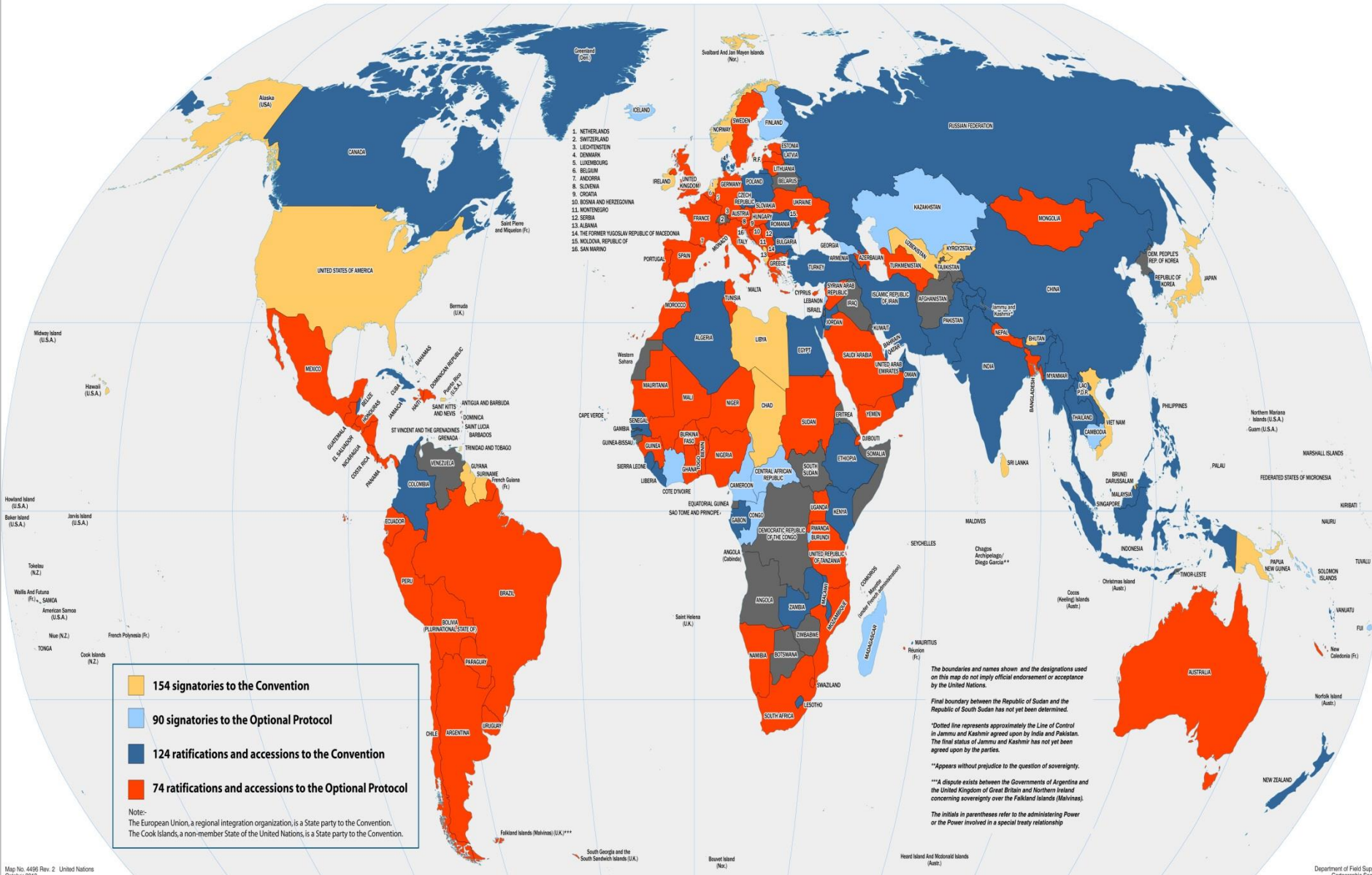
The 10 Commandments of
capacity.....

**Commandment 1:
capacity is a
human rights issue**

CRPD and Optional Protocol Signatures and Ratifications

Not Signed
 Signed Convention
 Signed Convention & Protocol
 Ratified Convention
 Ratified Convention & Protocol

As of 9 October 2012



UN Convention on the Rights of Persons with Disabilities (the "CORPD")

❖ United Nations

- ❖ Entered into force May 2008; entered into force for China, including the HKSAR, in 2008
- ❖ 50 articles, including :-
 - Article 14: Liberty and security of the person
 - Article 16: Freedom from exploitation, violence and abuse
 - Article 19: Living independently and being included in the community
 - Article 22: Respect for privacy
 - Article 23: effective appropriate measures to eliminate discrimination against PWD in all matters relating to marriage, family, parenthood & relships, on an equal basis with others
 - Article 25: Health

Article 1

- defines persons with disabilities to include those who have “long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others
- promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”.

Article 12

Equal recognition before the law

- 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
- 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
- 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Article 12 (Cont'd)

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law.

Such safeguards shall ensure that measures relating to the exercise of legal capacity

- respect the rights, will and preferences of the person,
- are free of conflict of interest and undue influence,
are proportional and tailored to the person's
circumstances, apply for the shortest time possible;
&
- 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.

Article 16 - Freedom from exploitation, violence and abuse

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, *inter alia*, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

Article 25

Health

- States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.

Medical Ethics

- **beneficence**
- **autonomy/independence**
- **justice**
- **non-maleficence**

Practical application

- **The presumption of capacity**
- **The intrusive nature of assessment**
- **Loss of autonomy associated with guardianship (not to mention practical aspects)**
- **Limited & restricted orders always preferable over plenary/permanent**
- **Who's agenda is it to apply for substitute DM?**
- **Can we get by with informal means?**
- **IS THERE A NEED?**
- **Mediation/family/systems work- what is driving the application?**

Impt issues: proxy decision making is last resort

- Just because a person has a certain diagnosis doesn't mean they lack capacity
- Just because someone lacks capacity doesn't mean they need a guardian/proxy decision-maker
- Just because there's family conflict doesn't mean they need a guardian

Capacity assessment & human rights

- **The balance promoting autonomy and protecting against abuse vs capacity being (ab)used as a barrier to full enjoyment human rights**
- **Health care professionals as filters:**
 - **Education & understanding**
 - **Abuse detection: risk factors, understanding undue influence**
- **Lawyers as filters**
- **Financial service professionals as filters**
- **The legal tests as filters**

Red flags undue influence (Peisah et al, 2009)

- **Relationship risk factors**
 - anyone in position of trust or upon whom p is dependent for emotional or physical needs
- **Social or environmental risk factors**
 - Isolation and sequestration of the person,
 - Change in family relationships/dynamics
 - Recent bereavement.
 - Family conflict
- **Psychological and physical risk factors**
 - Physical disability
 - Non-specific psychological factors e.g. deathbed wills, sexual bargaining, serious medical illness with dependency/regression
 - Personality disorders
 - Substance abuse
 - Mental disorders including dementia, delirium, mood and paranoid disorders
- **Legal risk factors**
 - Beneficiary instigates or procures the will
 - Contents of the will has unnatural provisions
 - Contents favour the beneficiary
 - Contents not in keeping with previous wishes
 - Other documents have changed at the same time

Commandment 2. Capacity is the ability to make decisions

- **overlap with term competence**
- **Some say competence is legal determination, capacity is health professional determination**

Commandment 3: Capacity is task-specific

- Power of Attorney,
- consent for treatment,
- decisions regarding accommodation,
- getting married,
- making a will,
- financial management,
- professional capacity

INTRA AND INTERTASK
VARIATION

Task –specific capacity and the law

- “the mental capacity required by law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of the transaction when it is explained.”
- One cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject-matter of the particular case.”
Gibbons v Wright (1954) 91 CLR 423, 438.

- Each task has its own criteria or legal tests
- Mostly....

Commandment 4 : even within task, capacity can vary according to complexity

ie It is meaningless to say she has capacity to write A will (not THE will)

A simple mathematical formula

$$\text{Capacity} = \text{marbles/decision}$$

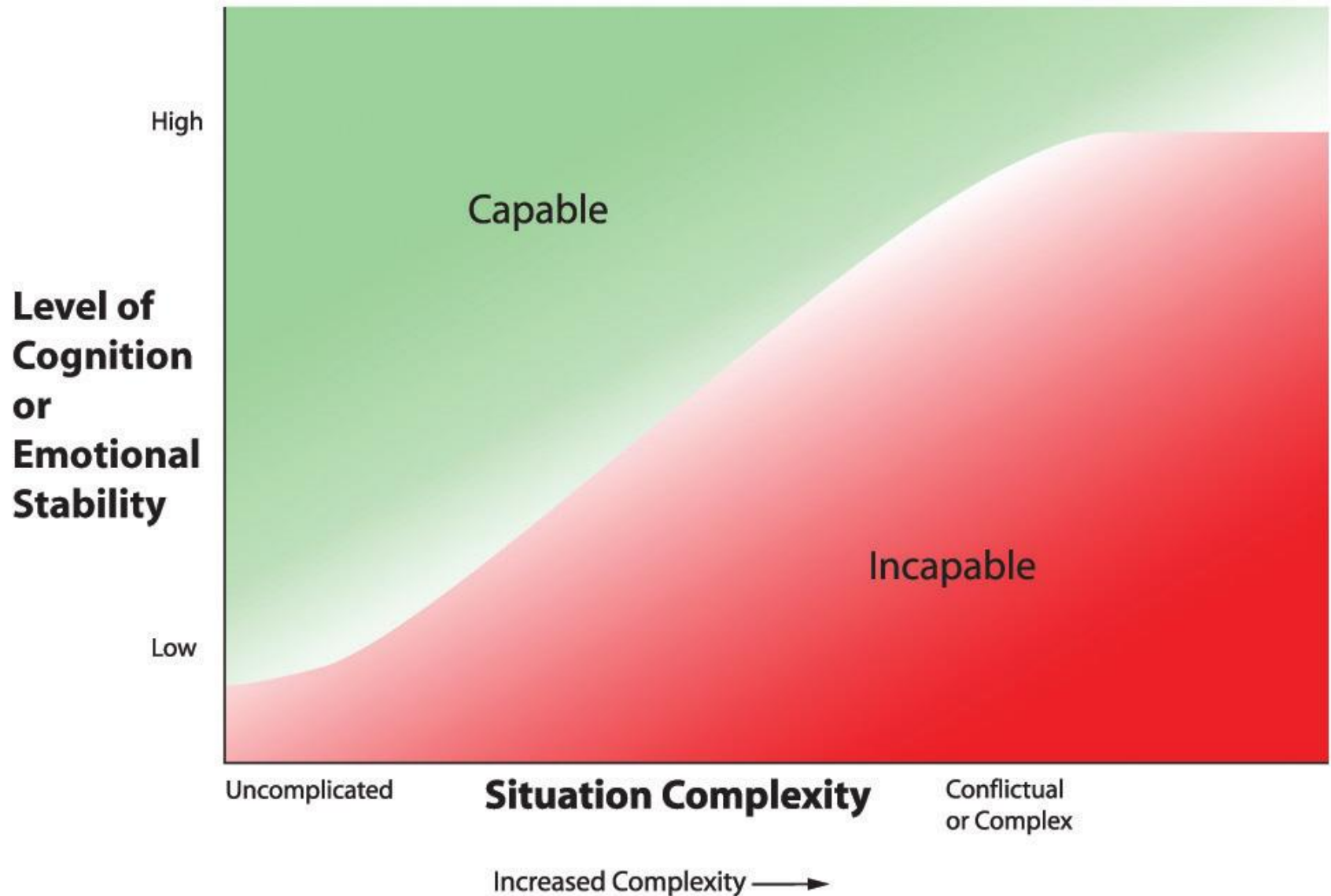
Commandment 5: Capacity can't be extrapolated from one task to another

e.g. Just because someone is under guardianship doesn't mean they can't write a will & vice a versa

Commandment 6: Capacity is situation- specific

- The personal situation or context is paramount to any decision involving the appointment of another person
- The WHO of capacity

Cognition, Emotions and Situation-Specific Capacity



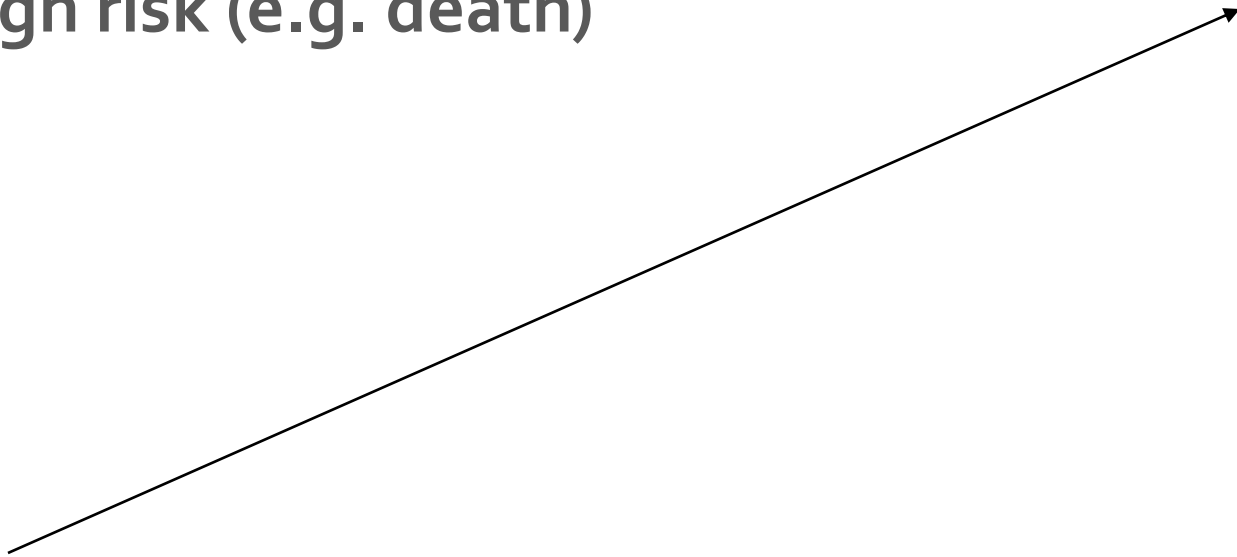
Commandment 7: Capacity is determined according to a risk hierarchy

Threshold approach for

High risk (e.g. death)

Low risk/low threshold

high threshold



COMMANDMENT NO 8

**Capacity is not diagnosis
bound.**

What can affect capacity

- **Dementias**
- **Mood disorders**
- **Psychotic disorders**
- **Delirium**
- **Tumours**
- **Substance disorders**

Commandment NO 9 : Capacity can't be extrapolated from cognitive performance alone except in extreme stages

- Why?
- What can cognitive exam tell us?
- What are the limitations of neuropsych?
- What can neuropsych tell us?
- You don't need a neuropsych test for a capacity assessment

Commandment 10: Capacity is not all or nothing, supported decision making is key to CORPD. The "ASKME" Model

Stepwise approach to assessment & support:

- (i) **A**ssessing strengths and deficits;
- (ii) **S**implifying the task;
- (iii) **K**nowing the person;
- (iv) **M**aximizing understanding; and
- (v) **E**nabling participation in DM (use threshold or hierarchy approach).

Peisah C., Sorinmadeayo D. Mitchell L., Hertogh C., (2013) Decisional capacity: towards an inclusionary approach The International Psychogeriatric Association Task Force on Capacity International Psychogeriatrics 25 (10): 1571-9

Summing up all

- **WHY** – what is trigger for making decision? eg who contacted the solicitor?
- **WHAT** – does the person understand the tests
- **WHO** – in cases of appointment of others, can they choose (e.g. who to trust)?
- **FREEDOM**- did they make decision freely without influence