This article seeks to contribute to a theoretical framework for understanding the status of children as legal persons in Western legal systems. Analytic legal philosophers have done much work in analysing concepts relevant for understanding the legal status of children. However, they have usually not approached childhood as a topic that warrants investigation in its own right, distinct from both infancy and adulthood. The article presents two main arguments. It will, first, argue against the occasional claim – made especially by some scholars working in the civil-law tradition – that even infants have the legal capacity to bear duties under private law. The article challenges this conception: such duties are borne by the infants’ representatives, and infants should therefore be seen as purely passive legal persons. The article then turns to legal competences held by children. Insufficient attention has been paid to the idiosyncratic features of children’s competences. A new framework is offered, which distinguishes three categories of competences: independent competences, negative competences, and dependent competences. Independent competences enable their holder to effect a legal change that, ordinarily, cannot be prevented by others. The latter two types of competences are particularly relevant in the case of children.

1. Introduction

Over the recent decades, the legal status of children has changed considerably. The Convention on the Rights of the Child\textsuperscript{1} – which was adopted in 1989 and entered into force in 1990 – spearheaded an approach that understands children as active participants and agents, rather than merely as objects of protection. The Convention, which has been described as a ‘paradigm shift’,\textsuperscript{2} reflects a broader changing understanding of childhood. This new understanding can be seen, for instance, within the field of childhood studies. Some of the central commitments of the field include, according to Martyn Hammersley, ‘the idea that children are worthy of study “in their own right”, that childhood is a “social construction”, [and] that children are and must be treated as active agents’.\textsuperscript{3}
However, this way of approaching childhood has not yet garnered the interest of analytic legal philosophers to a significant extent. Though legal philosophers have not been oblivious to the aforementioned changes, few have approached childhood and the legal status of children as a topic that merits philosophical study in its own right. I will here try to contribute to bridging that gap between child law and legal philosophy. The focus will be on how the new understanding of children as active agents should be reflected in our theoretical understanding of children as legal persons.

I will not be focusing on any particular legal system but will rather hope to contribute to a more general framework for understanding the status of children as legal persons in Western legal systems. Though the analysis may apply to non-Western legal systems as well – and the Convention has indeed been adopted by many such countries – I make no claims that it does, given my scant knowledge of non-Western law.

I have two main arguments. First, I will scrutinise the occasional claim – made especially by some scholars working in the civil-law tradition – that even infants can bear duties under private law. If this claim were true, even infants could be seen as agents in the law. However, I will argue that such duties are truly borne by the infants’ representatives. Second, I will focus on the legal personhood of children who are older than infants but not yet adults, arguing that their legal personhood is a special form of dependent legal personhood. They can make decisions that have legal effect, but these decisions may be subject to the oversight of, say, their guardians in various ways.

Much of the article will focus on certain legal differences between infants and other children. Thus, for reasons of clarity, when I refer to ‘children’, I mean primarily children (under 18 years of age) who are not infants, except when the opposite is clear from context.

The essay is structured as follows. I will first discuss how analytic legal philosophers have approached children’s rights, noting that they have mostly neglected the idiosyncratic features of children’s legal status. I will then move on to discuss legal personhood. I will in Section 3 introduce the terminology and conceptual apparatus that I will be using to analyse children’s legal personhood. In Section 4, I will discuss infants’ legal duties, arguing against the notion that they could bear duties, and in Section 5 address children’s increasing role as active participants. I will first briefly discuss children’s right to be heard and to express their views, and then present an analysis of children’s legal competences, i.e. their capacity to make legally binding decisions. The essay will then conclude.

2. Analytic legal philosophy and children: the case of rights

Analytic legal philosophers have done much work in analysing concepts relevant for understanding the legal status of children. However, they have usually not approached childhood as a topic that warrants investigation in its own right, distinct from both infancy and adulthood. This observation applies both to legal personhood and to a closely related legal concept: rights. Since analytic legal philosophers have until recently been more interested in rights than in legal personhood, the lack of focus on childhood as a distinct topic is more apparent in the case of rights. I will therefore briefly consider rights before moving on to legal personhood.
Rights theorists have offered various explanations of what a right is and what it means to hold a right. Most of the accounts offered in this ‘debate over rights’ can be categorised under two theories: the will theory and the interest theory. Under the will theory, the holding of a right consists of the capacity to make legally binding decisions over others’ duties. Given that at least some children, such as infants, are unable to make such decisions, these children are not right-holders at all under certain ‘hard’ versions of the will theory. Under the interest theory, on the other hand, one can hold rights if one can benefit from others’ duties, even if one cannot control said duties. Interest theorists have made much of the counterintuitive conclusion that children cannot hold rights under the hard will theory, identifying this result as a chief weakness of the will theory. This criticism has led some will theorists to adopt a ‘soft’ will theory, under which minors can hold rights if their control is exercised by their legal representative. Such a version of the will theory can therefore account for children’s ‘passive’ rights.

I have elsewhere presented some arguments in favour of the interest theory, but it is not my intention here to take sides in this debate. I simply wish to draw attention to the fact that with some exceptions, the focus of the debate over rights has mainly been on determining whether children can hold rights, rather than on analysing the nuances of children’s rights.

Many of the most important contributions in rights theory often adopt one of two approaches to children’s rights. First, some – though relatively few – scholars treat childhood and adulthood as two completely different categories, where one is either fully a child or fully an adult. The second approach has been to present a more nuanced view of childhood, but mainly for the purposes of demarcating the domain of right-holders. The first approach is apparent in this classical passage by HLA Hart, where he presented a soft version of the will theory:

Where infants or other persons not sui juris have rights, such powers and the correlative obligations are exercised on their behalf by appointed representatives and their exercise may be subject to approval by a court. But since (a) what such representatives can and cannot do by way of exercise of such power is determined by what those whom they represent could have done if sui juris and (b) when the latter become sui juris they can exercise these powers without any transfer or fresh assignment; the powers are regarded as belonging throughout to them and not to their representatives, though they are only exercisable by the latter during the period of disability.

Hart relies here on a strict division between those who are sui juris, and those who are not. There is no intermediate position; no grey areas, where one could for instance exercise some of one’s rights oneself, but not all. This approach resembles what David Archard calls the claim that ‘rights are all-or-nothing’, which he rejects.

An example of the second approach is the work of Carl Wellman, another classical will-theory account. Wellman distinguishes between infants, young children,
adolescents, and adults, arguing that infants cannot hold rights.\(^{11}\) This approach is also apparent in the recent arguments of certain theorists who have started to question certain dogmas concerning children and the will theory. James Dwyer has noted that will theorists often fail to specify why young children could not hold rights under the will theory:

> [I]f there is a plausible argument that some more sophisticated thought process is required, we should ask why that of a normal three-year-old is not enough. Surely a lawyer could ask a three year old questions like ‘Do you want your father to stop burning you with a cigarette when he’s angry?’ and get an answer that seems [...] worthy of respect […]. If not at three then at least by five the average child could comprehend in a rough way the ideas of a legal duty and a powerful, governing entity called a ‘court’ or ‘judge’ who can order people to do or not do certain things.\(^{12}\)

A somewhat similar argument been offered by Maija Aalto-Heinilä, who argues that even hard will theories can in fact account for young children’s rights, if autonomy is understood in relational terms.\(^{13}\) Both question the conventional wisdom regarding children’s rights, but they are still mainly focused on the question of whether children hold rights. Few legal theorists have considered the status of children as right-holders and legal persons as something that warrants consideration in its own right, rather than merely as a ‘test-case for theories of right’, as Neil MacCormick famously put it.\(^{14}\)

Accounts of legal personhood – including my own – have also mostly neglected the evolving understanding of children as agents, and more generally, the distinct legal status of children. I will here attempt to do that, and given the attempt here to bridge two disciplines, I should first explain the most relevant aspects of the terminology and conceptual apparatus that I will be using.

3. Legal personhood: terminology and central concepts

Legal personhood has traditionally been understood as the holding of legal rights and/or duties. I have elsewhere labelled this view the Orthodox View of legal personhood and argued against it.\(^{15}\) Instead, I have explained legal personhood as a cluster property. Most of the details of my theory are not relevant here, but let me summarise some of the most pertinent ideas and notions. First, very roughly put, what I take to be distinctive of legal persons is that they hold a large number of rights and, potentially, duties. I call such rights and duties *incidents of legal personhood*. This explanation of legal personhood thus resembles the rather popular understanding of ownership as a ‘bundle of rights’. Different legal persons may also be endowed with a somewhat different bundle. The most pertinent distinction in this regard is what I term *active* and *passive* legal personhood. Both passive and active legal persons hold a large number of rights. For instance, infants are passive legal persons, with a large set of rights: after they are born, they can for instance own property, be parties to contracts and so on. However, they cannot be held responsible for their actions, nor can they administer their rights themselves.

\(^{11}\)Wellman (1995), p 113. Interest theorists have often been content with pointing out that infants lack the relevant kind of agency but are right-holders regardless.

\(^{12}\)Dwyer (2020), p 17.

\(^{13}\)Aalto-Heinilä (2021).

\(^{14}\)MacCormick (1976).

\(^{15}\)Kurki (2019).
Active legal personhood, on the other hand, consists of two elements: legal responsibility and the capacity to administer one’s passive incidents through the exercise of legal competences. The notion of legal responsibility should not need much elaboration: adults can normally be held legally responsible under tort and criminal law, whereas if an infant causes damage – say by knocking down a precious vase from a pedestal – it is relatively obvious that the infant is not responsible. However, I use ‘competence’ in a sense that might be unfamiliar to some readers, and which will therefore require explanation.

In analytic legal philosophy, a legal competence is typically not understood as an inherent property of an individual, but rather as a legal position conferred by the legal system – a ‘legal power’, to use a phrase favoured by some theorists. I will below offer a more fleshed-out account of competence, but roughly put, a competence is the capacity to change one’s legal situation through intentional action. Adults normally have the legal competence to enter into contracts: their signing a contract will have legal effect. On the other hand, children typically do not possess many competences. If we give to a six-year-old a piece of paper entitled ‘Contract’, laying out a complicated financial arrangement, and see to it that she signs the paper, it is obvious that the ‘contract’ is not valid – or rather, that there is no contract at all. The child thus lacks the competence to enter a contract. However, this depends on the legal system: a child in some paternalistically-minded legal system could possess very few competences, whereas the same child living in a jurisdiction that emphasises the autonomy of children might be endowed with a much larger set of competences. This difference would depend on legal norms, not on the child’s inherent capacities.

We can now distinguish different legal personhood arrangements on the passive/active ‘scale’. First, I take it for granted that infants have no competences, and I will below argue that they have no responsibilities either. Their legal status can hence be labelled as purely passive legal personhood. On the other hand, adults who are deemed to be of sound mind are, in Western legal systems, fully active legal persons. Thus, they may normally dispose of their rights and duties, enter into contracts freely and so on. Furthermore, they are held fully responsible under tort law and criminal law, as well as under other types of responsibility. I call this type of fully active legal personhood independent legal personhood.

However, there is a middle ground between these two extremities: that of most children past their very earliest years. Children leave full passivity at a relatively young age, as they gradually begin to be treated as legal actors. Such children have some control over their rights and duties and can be held responsible to some extent. They are thus not fully passive, yet not independent either. This position can be labelled ‘dependent active legal personhood’, or dependent legal personhood for short. I will argue below that dependent legal personhood is accompanied by legal competences with idiosyncratic features to which legal theorists have not paid sufficient attention.

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16On the distinction between legal powers and legal competences, see Kurki (2017).
17Dyschkant (2015).
18Of course, a certain level of inherent capacities is a necessary precondition for competences: presumably, the legislator simply cannot give infants the competence to enter contracts, because they lack the required capacity to understand what a contract is.
19I am following here the terminology introduced by Samir Chopra and Laurence White (2011).
Before moving on, let me offer one final terminological clarification. By calling these two aspects of legal personhood ‘passive’ and ‘active’, I have sought to avert certain terminological confusions.\textsuperscript{20} Especially in the civil-law tradition, there is a long tradition of denoting passive legal personhood in private law as ‘legal capacity’: infants have legal capacity – the capacity to incur private-law rights and obligations – but no legal competence, i.e. the authority to administer and make decisions about one’s rights and obligations.\textsuperscript{21} However, this passive meaning of ‘legal capacity’ is squarely opposite to how the phrase is understood in international disability law, where the same phrase usually denotes what is here meant by ‘legal competence’, i.e. an incident of active legal personhood – though sometimes the phrase denotes both active and passive legal personhood.\textsuperscript{22} The active/passive terminology is not beset by these deep ambiguities.

I will now address two issues pertaining to the legal personhood of minors, both pertaining to the active/passive distinction. First, I will first scrutinise the question whether infants can bear duties, as some scholars claim, and whether they therefore are dependent legal persons. I will argue that infants cannot bear legal duties, and – assuming that they are not endowed with legal competences either – they are purely passive legal persons. I will then turn to analyse children’s competences, which I take to have certain special features, having to do with children’s special status as dependent legal persons.

4. Do neonates bear duties?

The fact that some children bear some legal duties is relatively uncontroversial. Textbooks lay out the conditions under which children can be held responsible under tort and criminal law. The legal regulation of these issues varies widely. For instance, children under 15 years can never be held criminally responsible in Finland, whereas there is no statutory minimum age for tort-law responsibility. Regardless, infants have never been held responsible under Finnish tort law.

However, some scholars think that all children, including infants, bear some legal duties. For instance, the German legal scholar Friederike Wapler starts a handbook chapter by simply asserting that ‘[c]hildren can have rights and duties, such as being party to a sales contract, or purchasing or inheriting property’ (emphasis added).\textsuperscript{23} Wapler then goes on to discuss the notion of children’s rights critically but does not address the question of obligations further.

I take the idea that infants bear duties to be motivated by the following reasoning. First, ownership and contracts do typically entail duties. Owning a piece of property may, for instance, incur an annual property tax. The question is, then, whether infants can own property and be parties to contracts. Western jurisdictions employ two primary strategies here. First, a solution favoured by many common-law countries is to use the notion of a trust: a piece of property owned by a child is, formally, understood as being part of a trust, with the child as the beneficiary. Civil-law countries, on the

\textsuperscript{20}This passive/active terminology is inspired by Neil MacCormick. See MacCormick (2007).
\textsuperscript{21}See for instance Section 1 of the German Civil Code (Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719)).
\textsuperscript{22}See, e.g. See Dhanda (2007), pp 442–443; Nilsson (2012), pp 9–10; Arstein-Kerslake (2021), pp 1–28.
\textsuperscript{23}‘Kinder können Rechte und Pflichten haben, etwa Partei eines Kaufvertrages sein, Eigentum erwerben oder erben.’ Wapler (2019), 121.
other hand, generally lack the notion of a trust. In many civil-law countries, children are instead understood to own the property directly. However, they only have the right to ‘enjoy’ the property, rather than the right to ‘exercise’ or ‘administer’ it. This arrangement relates to the abovementioned civil-law concept of legal capacity, which is often defined in terms of the capacity to hold private-law rights and duties. Even infants are endowed with legal capacity, but not with ‘legal competence’, i.e. the authority to administer and make decisions about one’s rights and obligations. Wapler is clearly referring to this doctrinal construction.

Infants can own property and be parties to contracts, and these legal institutions do typically entail duties. Can infants therefore bear duties? Many civilian property lawyers would likely say that the duty is the infant’s, even if the infant is not in practice expected to fulfil the obligation. The main problem with this explanation is obvious: the infant is not really the party who is expected to do anything. Rather, this task falls upon the infant’s representative. Hence, the explanation relies on a problematic notion of a duty.

A feature of duty-bearing that I take to be relatively uncontroversial is that some action or omission is expected from the duty-bearer. This expectation involves, in most cases, a personal requirement for the duty-bearer to do or omit something, or the duty to supervise someone else. Neither case is applicable to infants: legal systems do not expect any kind of actions or omissions from infants, nor are infants expected to supervise anyone. Consider six-month-old Lauri. If property tax pertaining to Lauri’s property is not paid on time, it is not his actions that are evaluated when considering the potential legal sanctions. Now, of course, the older the child is, the more likely they are to be personally evaluated by the law.

One way of contending that the duties are indeed borne by the child would be to argue along similar lines as soft will theorists have done with regard to children’s rights. As noted above, Hart argued that children can be understood as right-holders because

what [their] representatives can and cannot do by way of exercise of such power is determined by what those whom they represent could have done if sui juris and (b) when the latter become sui juris they can exercise these powers without any transfer or fresh assignment.

One could apply this line of argumentation mutatis mutandis to children’s duties: since (a) what children’s representatives ought and ought not to do is determined by what those whom they represent should have done if sui juris and (b) when the latter become sui juris they assume these duties without any transfer or fresh assignment, the duties are regarded as belonging throughout to them and not to their representatives.

However, I find this argument unsatisfactory. Infants’ rights are not analogous to their (putative) duties. Consider for instance a feature of the right–duty relationship: if duty-bearer D contravenes his duty toward right-holder R, he wrongs R. It is intuitive to think that infants can be wronged, but counterintuitive to think that infants could wrong others. Let us say that Lauri’s representatives have entered a contract with Astrid in Lauri’s name. Under the contract, €200 must be paid each month to Astrid, in exchange for some services. Now consider a situation where the payment is not made on time. Is it

24 See, for instance, Sections 1 and 104 of the German Civil Code.
25 I have personally debated this issue with some legal scholars from civil-law jurisdictions.
26 Hart (1982), p 184f.
feasible to say that Lauri has wronged Astrid? I would find this conclusion strange. If someone wrongs Astrid, it is Lauri’s representatives, not Lauri himself.

I have argued elsewhere that this kind of a situation is best understood as a triangular situation, depicted in Figure 1. Let us assume that Lauri is represented by Maria, who acts as his guardian. We should now distinguish three elements: Lauri, Maria, and Lauri’s legal platform, i.e. the legal rights and duties of Lauri. Given that Lauri is an infant and therefore a purely passive legal person, he cannot administer his legal platform: he cannot exercise his rights or fulfill his duties. Instead, Maria administers the legal platform, and such administration is done in Lauri’s name. Lauri is, however, the beneficiary of the platform: if there are, say, property rights in the platform, it is Lauri who should benefit from them, and Maria has the fiduciary duty to administer the legal platform.27

Employing this model, we can find a midway solution. Lauri does not bear legal duties. However, there are duties in Lauri’s legal platform, which are currently borne by Maria. The bearer of these duties can change if Maria ceases to be Lauri’s legal guardian. To reappropriate a metaphor of John Austin, Lauri can thus be understood as the ‘compass’ of the duty, who stays constant even if his representatives might change.28 Lauri may also have several representatives who represent him in different capacities. For instance, Finnish law distinguishes between a child’s custodians and guardians.29

A more comprised way of expressing the same idea could be to label these duties as ‘proxy duties’. The label hopefully signifies the idea that talk of the ‘duties’ of Lauri is really a shorthand for the duties Lauri’s proxy, whoever that proxy might be.

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27This analysis raises the question who or what can be represented, i.e. who or what can be a passive legal person. I address this in a working paper Kurki (2021).
28Austin (1885), p 874.
29See Guardianship Services Act (Holhoustoimilaki, 442/1999).
To sum up, neonates do not bear legal duties and should therefore not be understood as active legal persons. However, even relatively young children do gradually start being treated as active legal persons. I will now move on to discuss the competences of children – the second incident of active legal personhood – as well as the right to be heard, which can be seen as a kind of proto-competence. The focus will not be on infants but rather on somewhat older children, who can already function in the law to a limited extent.

5. Child as an active participant: right to be heard and legal competences

The notion of a legal competence is integral for the will-theory understanding of rights. Hence, the scant attention that rights theorists have paid to the idiosyncrasies of children’s rights is relevant for children’s competences as well. For instance, Hart’s theory of rights relied on an assumption that one is either *sui iuris* – an independent legal person, with a wide array of competences – or *alieni iuris*, a minor with no say in how one’s rights should be exercised and administered.

As noted above, Hart’s approach was likely influenced by his focus on the question of whether children can hold rights, rather than on what kind of rights and competences children have. His analysis might also have reflected the legal outlook of the time, as he was writing before the adoption of the UN Convention on the Rights of Child, which introduced a new approach to children’s rights, emphasising their autonomy and right to be heard – part of a broader trend toward children’s participation. Children did, of course, have some competences before the adoption and ratification of the Convention. Even relatively young children could for instance make minor purchases, such as buying school lunch or candy. However, the trend since has been to extend incidents of active legal personhood to children, especially some of its beneficial elements. This is likely expressed most clearly in Articles 5 and 12 of the Convention. Article 5 is perhaps most relevant for children’s competences:

**Article 5**

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.31

The italicised part at the end of the article highlights the principle that it is the children themselves who exercise their rights.32 In the words of Gerison Lansdown, the article ‘implies a transfer of responsibility for decision making from responsible adults to children’, while emphasising that ‘the level of adult support needed to enable the child to do so must take account of the capacities of the individual child’.33 The notion of the

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30For an overview of children’s participation more broadly, see Thomas (2007).
31United Nations Convention on the Rights of the Child 1989, UN Doc A/44/25, emphasis added.
32What it means to ‘exercise a right’ is ambiguous. For instance, if one takes so-called liberties (permissions) to be rights, then one could argue that one could exercise one’s right to walk in the forest by walking in the forest. I will here take ‘exercise a right’ to be synonymous with ‘exercise a legal competence’, i.e. making decisions with a legal effect (in a specific sense which I will specify below).
33Lansdown (2009), p 13.
‘evolving capacities of the child’ appearing in Article 5, as well as in Article 14(2)\(^{34}\) – has also been central in the General Comments of the UN Committee on the Rights of the Child. In her comprehensive overview and analysis, Sheila Varadan has argued that the notion of evolving capacities can be seen as an *enabling principle*, as an *interpretative principle* and as a *policy principle*. As an enabling principle, Varadan takes the notion to serve four functions:

1. it affirms the child as a rights-holder under international law, recognising that as children grow, develop and mature, they acquire capacities to exercise increasing levels of agency over their rights;
2. it supports and recognises children’s agency in decision-making;
3. it recognises that all children, even very young children, should be engaged as agents in the promotion and protection of their own rights; and
4. it crystalises the role of parents and legal guardians as duty-bearers to their children, providing guidance and direction to support their child’s exercise and enjoyment of rights under the [Convention].\(^{35}\)

Hence, taken as a whole, Article 5 clearly requires treating children as competence-holders who can make their own, legally valid decisions and exercise their rights.

Article 12, on the other hand, stresses children’s right to express their views and to be heard. I will now consider this right – which I take to be a kind of ‘proto-competence’ – before focusing on children’s competences.

**Children’s right to be heard and to express their views**

Article 12 of the Convention is formulated as follows:

*Article 12*

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

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

There is a lot to unpack here. First, the article distinguishes between the right to express one’s views and the right to be heard in judicial and administrative proceedings. However, there is no stark difference between the two. Aisling Parkes notes that the right to express one’s views can be seen as a broader category that, in fact, implies the narrower right to be heard in proceedings.\(^{36}\) In what follows, I will mostly focus on this narrower right to be heard.

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\(^{34}\) ‘States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.’

\(^{35}\) Varadan (2019), p 317.

\(^{36}\) Parkes (2013), p 37. For another conceptualisation of the article, see Laura (2007). In Finnish law, the difference between the right to express one’s views and the right to be heard is clearer. See, e.g. Pajulammi (2014), pp 144–146.
Second, the article applies primarily to children who are ‘capable of forming [their] own views’. However, the UN Committee on Rights of the Child has repeatedly emphasised that this passage should be interpreted broadly. The Committee has for instance noted that the phrase should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible.37 States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. Furthermore, the Committee has held that the article applies even to young children38 and encouraged States parties to take all appropriate measures to ensure that the concept of the child as rights holder with freedom to express views and the right to be consulted in matters that affect him or her is implemented from the earliest stage in ways appropriate to the child’s capacities, best interests, and rights to protection from harmful experiences.39 Thus, the right to be heard is held already by young children, though what the right exactly entails depends on the child’s age and maturity.

Children’s participation can be understood to serve various functions and goals.40 Given the focus of this article, I will here focus on two distinct functions. First, under the epistemic function, the hearing of a child gives information about the child’s best interests.41 For instance, consider a divorce case where an authority is to decide which parent gets the primary custody of the children. Here, the child’s opportunity to be heard may be helpful in determining which arrangement best serves her interests. If the child prefers to live with one parent, that may serve as a reason for concluding that that parent takes better care of the child. This epistemic function does not necessarily entail that the child’s expressed preferences would have a weight in themselves. Perhaps parent A has manipulated the child into being afraid of parent B for no reason. In this case, assuming the judge is aware of the manipulation, the child’s preference to be with A might be completely disregarded by the judge, because the preference would not truly reflect her best interests.

However, Article 12 does require that the child’s preferences be given ‘due weight’. Thus, in most cases, the epistemic function of the right to be heard would not suffice: the child’s expressed opinion does not merely provide information about the child’s best interests but rather has weight in itself. The opportunity to be heard would therefore also serve a weight function. In the case with the manipulative parent, the child’s preference could have at least some weight, regardless of its being based on

37UN Committee on the Rights of the Child, General Comment No 12 (2009) The Right of the Child to Be Heard, UN Doc CRC/C/GC/12, para 20.
38Young children are acutely sensitive to their surroundings and very rapidly acquire understanding of the people, places and routines in their lives, along with awareness of their own unique identity. They make choices and communicate their feelings, ideas and wishes in numerous ways, long before they are able to communicate through the conventions of spoken or written language. UN Committee on the Rights of the Child, General Comment No 7 (2005) Implementing Child Rights in Early Childhood, UN Doc CRC/C/GC/7, para 14(a).
39UN Committee on the Rights of the Child, General Comment No 7 (2005) Implementing Child Rights in Early Childhood, UN Doc CRC/C/GC/7, para 14(a). See also Parkes (2013). pp 32–33.
40For instance, the UN General Assembly has declared that children’s right to express their views freely enables them to ‘build self-esteem, acquire knowledge and skills, such as those for conflict resolution, decision-making and communication, to meet the challenges of life’ A World Fit for Children, Adopted by the UN General Assembly at the twenty-seventh special session, 10 May 2002.
41According to Article 3(1) of the Convention, ‘[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’. 
problematic reasons. However, the child’s views need not be taken as ‘determinative or conclusive’.42 Rather, they should be taken into account and given due weight – even if the exact meaning of this notion is unclear.43 The epistemic function and the weight function are also clearly intertwined and difficult to completely detach from each other.

A legal competence, on the other hand, is the capacity to effect an intentional legal change. Legal competences are thus determinative and conclusive. The child gains access to an incident of active legal personhood par excellence when she is endowed with her first competences.

**Legal competences of children**

I take a child to have legal competences when her will – expressed in the appropriate form and forum – no longer merely has ‘due weight’, but rather may alone bring about some legal consequences, intended by the child. More formally, I have suggested that legal competence should be defined as follows:

**Legal competence:**

(1) $x$ holds the competence $C$ to effect the legal consequence $r$ if and only if $x$ can perform an act-in-the-law to bring about $r$.

**Act-in-the-law:**

Act $a$, performed by $x$, constitutes an act-in-the-law if and only if

(1) $x$ performs $a$ with the intention to bring about the legal consequence $r$, and
(2) the fact that $x$ has performed $a$ in order to bring about $r$ is an element of a set of actually occurrent conditions minimally sufficient for $r$.44

One holds a legal competence to effect a legal consequence if and only if one can perform an act-in-the-law to bring it about. An act-in-the-law is an act that is performed with the intention to bring about a legal consequence, and the intention is part of the reason why the legal consequence is brought about as a result of the act.

Children’s legal competences have certain idiosyncratic features, to which legal theorists have not paid much attention. Archard adverts to this fact when criticising the all-or-nothing approach to rights:

[A] right unconditionally held by an adult may be possessed by a child subject to certain conditions, and these conditions might be made the more stringent the lower the age. Sixteen-year-olds may marry subject to the consent of their parents or a magistrate.45

But Archard’s point, too, is mainly to argue against the all-or-nothing approach, rather than to analyse the specific features of children’s competences. I do this in what follows.

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42Parkes (2013), p 35.
43Parkes (2013), pp 34–36. In most cases, the adults deciding on the case can likely reach the decision they would have reached anyway, regardless of the child’s opinion, as Milka Sormunen noted to me in private correspondence.
44Kurki (2017).
45Archard (2015), p 116.
Three categories of competences

For our purposes here, we can distinguish three main categories of competences. First, a negative competence is the power to prevent a legal change, initiated by another. Second, dependent competences are subject to a consent, veto or cancellation by some other party. Finally, a competence is independent if its holder may freely decide to exercise it, and the legal effect is not subject to e.g. the consent of some other party (Table 1).

I will use the Finnish Act on the Freedom of Religion as an example because it contains an interesting provision that exemplifies these different categories. As regards membership in a religious community, Section 3(1–3) sets out the following rules:

Section 3

Membership of a religious community

Everyone has the right to decide on his or her religious affiliation by joining a religious community that accepts him or her as a member or by resigning from one.

The decision on the religious affiliation of a child is made jointly by the persons who have custody of the child. [...] A child who has attained the age of 15 years may, however, personally join a religious community or resign from one with the written consent of the persons who have custody of the child. A person who has attained the age of 12 years may be joined to a religious community or be notified as having resigned from one only with his or her written consent.

The provision thus contains four different categories:

(1) Children under 12 years old, whose religious affiliation is decided by those who have custody of them.
(2) Children between 12–17 years, who must consent to a change in their religious affiliation (negative competence, approval).
(3) Children between 15–17 years, who may initiate a change in their religious affiliation, though requiring the consent of their guardians (dependent competence).
(4) Adults, who may freely decide over their religious affiliation (independent competence).

Children’s increasing autonomy and independence are, thus, reflected in the types of competences that they have regarding their religious affiliation.

The competences of a child and those of her guardian are interrelated in an interesting manner. For instance, the dependent competence of a child is ‘correlated’ by the negative competence of the child’s guardian, whose permission may be required for the desired change.

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46Even dependent competences do of course have the immediate legal effect of enabling, say, the guardian to prevent the change.

47Uskonnolvapauslaki (453/2003).
legal effect to take place, or who may veto or cancel the legal effect. These relationships are sketched in Table 2.

**Negative and dependent competences**

Let us now consider more carefully the interrelations of negative and dependent competences. We can detect three primary scenarios: approval, veto and cancellation.

In the case of approval, the exercise of a competence will only have legal effect if the holder of the correlative negative competence approves. Such is the case under Finnish law if the guardian of a child attempts to change the religious affiliation of the child: the change will only take place if the child consents. On the other hand, if 15-year-old wishes to change his religious affiliation, the guardian has the corresponding negative competence.

In the case of veto, the desired legal effect will obtain unless vetoed within a specified timeframe. Though such vetoes are common in certain areas of law, they do not seem that prevalent in areas relating to the active legal personhood of children.

Finally, an exercise of competence may be subject to cancellation. In this case, the child’s exercise of a competence does indeed effect the desired legal change, but the guardian may cancel or rescind this effect. For instance, according to Section 3(2) of the Finnish Young Workers’ Act, ‘[t]he person having care and control of a young worker shall have a right to rescind his contract of employment if this is necessary for the sake of the young worker’s education, development or health’. The rescindment here is not retroactive, but it is immediate.

Let me make a final point. The trifurcation between negative, dependent and independent competences is useful for analysing children’s competences, but it is not meant to logically exhaust all the possible options. I have here assumed that negative competences are ‘independent’, in the sense that they are the final say in the matter. However, there could also be ‘dependent’ negative competences. In this case, a child’s negative competence could be overridden. For instance, suppose that a 12-year-old refuses to give consent to a change in their religious affiliation. We could imagine that under some specific conditions, an official could override the child’s refusal at the request of the parents. In this case, the child’s negative competence would also be a dependent one.

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48 I have put the word ‘correlation’ in scare quotes to indicate that I do not mean correlation in the sense as it is understood in the Hohfeldian analysis.

49 *Laki nuorista työntekijöistä* (998/1993), official translation.
Competences and autonomy

The path of a child from a purely passive legal person to an independent legal person is thus a gradual development. In this somewhat schematic presentation, I have charted the path toward independence and autonomy in terms of five stages. Infants are not entitled to being heard—except, perhaps, if ‘hearing’ is understood very broadly—nor are they endowed with legal competences. As the child grows older, she must be heard in an increasing number of contexts, and she will gradually also receive an increasing number of competences.

Figure 2 depicts how law’s relationship toward the child gradually shifts from paternalism to recognising the child’s autonomy and independence.

A caveat should be entered about the ‘neatness’ of this depiction. A child might be deemed relatively independent with regard to some matters, and highly dependent with regard to others. A child may even possess independent competences with regard to certain issues, while being completely devoid of competences in certain other areas. Again, a Finnish example should suffice. Under Finnish legislation, a minor may freely dispose of any property he or she has earned by working. The sole exception is if the minor uses the property ‘obviously contrary to his/her best interests or if there is an imminent danger of the same’. In this case, the guardian may apply for permission from the guardianship authorities to take the property into his or her administration. Thus, barring this exception, the child has a ‘sphere of independence’ with regard to the property. However, the child is a still a minor in most regards. Thus, the kind of competences a child might have is highly context-specific.

Furthermore, law’s determinations of the capacity of children to act autonomously and independently—which are then reflected in their competences—are not always based on clear, age-based limits. For instance, under Finnish law, minors’ status as healthcare patients depends on whether they, based on their age and level of development, are capable of deciding on their treatment. If they are deemed capable, they can for instance prohibit providing their guardians with information on their state of health. I take this to be an independent competence, even if its realisation depends on the judgment done by the official assessing the child’s capability.

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Figure 2. The competences that have been conferred to a child can be seen as an expression of the extent to which the legal system recognises the child’s autonomy and independence, as opposed to taking a paternalistic stance to the child.

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50Guardianship Services Act (Holhoustoimilaki, 442/1999), section 25, unofficial translation.
51Act on the Status and Rights of Patients (Laki potilaan asemasta ja oikeuksista, 785/1992), sections 7 and 9.
52Many scholars in the field are critical of age limits. For instance, Gerison Lansdown notes that ‘[b]y requiring that attention is given to both age and maturity, Article 12 makes clear that age on its own should not be used to limit the significance accorded to children’s views. Children’s level of understanding is far from uniformly linked to age’. Lansdown (2009), p 12. On the other hand, e.g. Pajulammi has emphasised that strict age-based thresholds can also be cohesive for children’s participation, for instance in situations where children that have reached the required age must always be heard. Pajulammi (2014), p 218.
6. Conclusion

This article has addressed children’s legal personhood, focusing on two issues. First, I have argued against the notion that infants can bear legal duties. Infants are best understood as purely passive legal persons, with no legal duties or competences. Though there are duties pertaining to their legal platform, these duties are not borne by the infants themselves. On the other hand, children do start acquiring competences at a relatively young age. What most scholars writing on the topic have missed is that children’s competences are not merely different in quantity, but also in quality: children’s competences have their own idiosyncratic features. Though I have not focused on the legal status of persons with disabilities here, I believe much of the analysis offered here applies to persons with disabilities as well.

As mentioned at the outset, the aim of the article has been to analyse children’s legal personhood in modern Western law. I have not presented the analysis as an eternal and universal truth, nor as a normative ideal. The understanding of childhood expressed in Western law and in the Convention on the Rights of the Child is a reflection of a cultural understanding of childhood. In fact, childhood and its aspects – including when it begins and ends, and what it entails – can be seen as social constructions, or in sociological terms, as ‘structural forms’ of the society.53 Our understanding of childhood has changed relatively quickly, as the most recent paradigm shift – the adoption of the Convention on the Rights of the Child – happened only some decades ago. Thus, very different approaches to the legal personhood of children could be conceivable as well.

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