

Bringing the Adult Guardianship Regime in Line with the UNCRPD: The Chinese Experience

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ABSTRACT

This article examines the Chinese experience with adult guardianship, focusing in particular on the regimes in Hong Kong and China. As jurisdictions in which the UN Convention on the Rights of Persons with Disabilities ('UNCRPD') applies, a key question is whether the adult guardianship regimes in these jurisdictions can be considered compliant with the principles of the UNCRPD, specifically those in Article 12. The adult guardianship regimes in both jurisdictions are in essence substitute decision-making regimes and are therefore not consistent with the interpretation of Article 12 by the Committee on the Rights of Persons with Disabilities, or what is described as the 'strong interpretation' in this article. The question remains, however, as to whether they might be nonetheless considered compliant with what is described in this article as the 'weak interpretation'. This article explores supported decision-making, the concept of capacity and the existence and sufficiency of safeguards in each of the two regimes, concluding that neither regime can be considered compliant even using the weak interpretation of Article 12. Reflections on the way forward are discussed.

I. INTRODUCTION

Population ageing has been described as one of the four global demographic 'mega-trends', with almost every country in the world witnessing growth in the size and proportion of the elderly in their population.¹ The growth in this demographic has many implications, including the inevitable increase in the amount of individuals who may be subjected to adult guardianship regimes in their jurisdictions, many of which permit substitute decision-making on behalf of the individual on the basis that she lacks mental capacity. This increase is a matter of concern in light of the new paradigm brought about by the UN Convention on the Rights of Persons with Disabilities ('UNCRPD'), the principles and obligations of which appear to be in conflict with such regimes.

It is thus of great importance for signatories to the UNCRPD who retain such adult guardianship regimes to examine carefully the extent to which their regimes

1 United Nations, Department of Economic and Social Affairs, Population Division (2019). *World Population Ageing 2019: Highlights* (ST/ESA/SER.A/430).

comply with the UNCRPD, if at all, and if not, to consider how they might be reformed to be brought closer to UNCRPD standards. This article conducts an examination of the Chinese experience with adult guardianship, focusing in particular on the regimes in Hong Kong and China, which both have a significant ageing population.² The comparison of how these two jurisdictions have responded to their obligations under the UNCRPD is an intriguing one, given the similarities and differences between them. On the one hand, the two jurisdictions are one country, with a comparable socio-cultural context. There is a large amount of movement between the two places, with social ties that are often maintained across borders. On the other hand, Hong Kong and China have two entirely different legal systems and traditions. Hong Kong, having inherited its legal system from the British, follows the common law tradition, while China follows a civil law tradition. How do the adult guardianship regimes in Hong Kong and China differ, and in particular, how well do each of these regimes comply with the UNCRPD?

These questions are explored in this article, which proceeds as follows. Parts II and III introduce the adult guardianship regimes in Hong Kong and China, respectively. Part IV considers what it means for adult guardianship regimes to be compliant with the UNCRPD, and examines whether the regimes in Hong Kong and China can be viewed as compliant. Part V concludes with remarks about the Chinese experience and how further reform might be contemplated.

II. HONG KONG'S ADULT GUARDIANSHIP REGIME

Hong Kong's adult guardianship regime is contained in the Mental Health Ordinance (Cap. 136) ('MHO'). The term 'guardianship' was first introduced in sections 33–35 of the Mental Health (Amendment) Ordinance 1988, modelled after the Mental Health Act 1959 of the UK.³ The current form of the regime was not introduced until the 1997 amendments to the MHO, which included an entirely new Part IVB (Guardianship) that replaced the prior regime. This new regime, modelled after the successful 'tribunal' approach in Australia,⁴ was not designed with the purpose of using compulsory powers to enable individuals to receive care in the community in mind,⁵ as the previous one had been, but instead as a mechanism for the

- 2 The proportion of elderly persons aged 65 and over in Hong Kong is projected to increase from 17 per cent in 2016 to 31 per cent in 2036 (see further Census and Statistics Department, HKSAR Government. *Hong Kong Population Projections for 2017 to 2066* (Printing Division 2017)). In China, the proportion of elderly persons aged 65 and above is projected to reach 24.9 per cent in 2045 (see further C.W. Zhang, *Renkou yu laodong lüpishu : zhongguo renkou yu laodong wenti baogao No. 19* (人口与劳动绿皮书: 中国人口与劳动问题报告No.19) [*Green Book of Population and Labor: Reports on China's Population and Labor (No. 19)*] (Social Sciences Academic Press (China), 2018)).
- 3 M.C. Lo, 'Civil Liberties and Treatment in Mental Health Law: The Mental Health (Amendment) Ordinance 1988' (1991) 21 *Hong Kong Law Journal* 204–217, 212.
- 4 T. Carney, 'Globalisation and Guardianship – Harmonisation or (Postmodern) Diversity?' (2001) 24 *International Journal of Law and Psychiatry* 95, 105.
- 5 See further D. Lush, 'Guardianship in England and Wales' in A.K. Dayton (ed.), *Comparative Perspectives on Adult Guardianship* (Carolina Academic Press, 2014), for a discussion of the difference between the two types of 'guardianship' regimes.

management of affairs of individuals lacking mental capacity.⁶ Some of the new elements this regime introduced are explored below.⁷

1. Introduction of New Criteria for Guardianship

The new regime came with new criteria for individuals to be placed under guardianship, as follows:

- a. The individual has a mental disorder or mental handicap of a nature or degree which warrants her reception into guardianship;
- b. The mental disorder or mental handicap limits the individual in making reasonable decisions in respect of all or a substantial proportion of the matters which relate to her personal circumstances;
- c. The particular needs of the individual may only be met or attended to by her being received into guardianship and that no other less restrictive or intrusive means are available in the circumstances; and
- d. It is in the interests of the welfare of the individual or for the protection of other persons that the individual is received into guardianship.⁸

Unlike the prior regime, which did not contain any test of mental capacity, the 1997 amendments introduced a functional test of capacity in item (b) above. It should be noted that this test is specific to Part IVB, and that other tests of capacity contained in other Parts of the MHO are worded differently.⁹ I return to this test in Part IV.

2. Establishment of the Guardianship Board

The 1997 amendments also established the Guardianship Board, a quasi-judicial tribunal tasked with many responsibilities, including the appointment of guardians (the selection criteria of which are listed below) and the making and reviewing of guardianship orders.¹⁰

In addition to monitoring requirements already in place under the prior regime, such as the requirement that an officer of the Social Welfare Department visit the individual under guardianship at intervals of not more than 6 months,¹¹ the Guardianship Board is also responsible for the monitoring and supervision of guardians. For example, guardians are required to submit monthly financial accounts, which are reviewed by the case social worker prior to the submission of progress social enquiry reports for reviews of guardianship orders conducted by the Guardianship

6 The word 'property' is purposely left out here as the management of property of persons lacking mental capacity is regulated by Part II of the MHO.

7 See also H.K. Cheung, 'The New Mental Health Ordinance 1996 to 1997 — A Reference Guide for Physicians and Mental Health Workers' (2000) 10 *Hong Kong Journal of Psychiatry* 3–13 for an in-depth discussion of the changes made to the guardianship regime.

8 MHO, section 59O(3).

9 See further D. Cheung, 'Mental Health Law in Hong Kong: The Civil Context' (2018) 48 *Hong Kong Law Journal* 461–484.

10 MHO, section 59K.

11 Mental Health (Guardianship) Regulations (Cap. 136D), section 5.

Board.¹² The review of guardianship orders generally takes place upon renewal of the order, but can also be initiated by the Guardianship Board or upon request by interested parties.¹³

3. Change in Duration

Prior to the 1997 amendments, guardianship orders were initially for 2 years and were renewable for 2 years at a time. Initial guardianship orders have now been shortened to 1 year, but are renewable for a lengthened period of 3 years at time.¹⁴

4. Additional Powers of the Guardian

The 1997 amendments saw an increase to the powers of the guardian, which are currently as follows (* denotes a new power)¹⁵:

- a. Require the individual under guardianship to reside at a place specified by the guardian;
- b. Convey the individual under guardianship to this place, using such reasonable force as may be necessary;*
- c. Require the individual under guardianship to attend at specific times and places to receive treatment or occupation, education or training;
- d. Consent to treatment (other than special treatment as defined in the MHO) on behalf of the individual under guardianship, to the extent that she is incapable of understanding the general nature and effect of the treatment;*
- e. Require access to the individual under guardianship to be granted (at her place of residence) to any registered medical practitioner, registered social worker, or other person specified; and
- f. Hold, receive, or pay a specified monthly sum on behalf of the individual under guardianship for the maintenance or other benefit of her.*

Hong Kong's adult guardianship regime follows the essential powers approach which was adopted by the British government in the Mental Health Act 1983 ('MHA 1983'), in response to the view that the power given to a guardian under the Mental Health Act 1959 was too broad.¹⁶ Under this approach, specific powers that restrict the liberty of an individual are granted to a guardian only to the extent that is necessary to ensure that the individual receives medical treatment, social support, and training.¹⁷

12 'Checklist for Preparing Progress Social Enquiry Report' (Guardianship Board, 2016) <<http://www.adultguardianship.org.hk/admin/Data/uploadfile/174/16%20Leaflet%20Eng.pdf>>.

13 MHO, sections 59U(1), (2).

14 MHO, section 59R.

15 MHO, section 59R(3).

16 *LWY v Guardianship Board & Another* [2009] 3 HKC 170, paras 13–15.

17 Department of Health and Social Security, *Reform of mental health legislation* (White Paper, Cm 8405, 1981) para 43.

5. Introduction of Selection Criteria for Guardians

The 1997 amendments introduced a clear set of selection criteria for guardians. The requirements state that the guardian must¹⁸:

- a. Be at least 18 years of age;
- b. Be willing and able to act as a guardian;
- c. Be capable of taking care of the individual under guardianship;
- d. Have a personality generally compatible with the individual under guardianship;
- e. Not have undue conflict of interest (especially financially) with the individual under guardianship;
- f. Promote the interests of the individual under guardianship, which will include overriding her views and wishes where the guardian considers the action in her interests;
- g. Despite (f) above, respect the views and wishes of the individual under guardianship, in so far as they can be ascertained; and
- h. Consent in writing to the appointment.

While item (g) above highlights the importance of the views and wishes of the individual under guardianship, item (f) makes it clear that any such views and wishes can be overridden as long as the guardian considers an action in that person's interests. I return to this in Part IV.

Although Hong Kong's adult guardianship regime was considered a major step forward in the protection of vulnerable adults, it has not been amended since Part IVB of the MHO was introduced in 1997. In the 23 years since, the regime has not been able to catch up with significant developments in such areas as human rights jurisprudence and mental capacity law. This has implications not only for the content of the guardianship regime, but the way this regime fits into the larger context of the law relating to individuals without mental capacity. Currently, Hong Kong has two separate regimes to handle the affairs of persons lacking mental capacity, namely the Committee regime under Part II of the MHO to handle financial matters and adult guardianship to handle matters relating to general welfare. The effectiveness of this approach was recently questioned by the Hong Kong courts in the cases of *SPLP v Guardianship Board* and *Re CML*.¹⁹ The reason for this separation appears to be historical; the Committee regime and the prior guardianship regime had been transplanted from the MHA 1983, with the guardianship regime then undergoing reform in 1997. The UK has since consolidated its law relating to persons lacking mental capacity in the Mental Capacity Act 2005 ('MCA'), but no similar changes have been adopted in Hong Kong.

18 MHO, section 59S.

19 *SPLP v Guardianship Board* [2019] HKCFI 1680, paras 39–42, and *Re CML* [2020] HKCFI 1232, paras 41–42.

III. CHINA'S ADULT GUARDIANSHIP REGIME

Unlike the Hong Kong regime, which has not been recently amended, the legislative provisions regulating the Chinese adult guardianship regime were relatively recently overhauled by the General Rules of the Civil Law ('GRCL').²⁰ Previously, legislative provisions concerning adult guardianship were located in the General Principles of Civil Law ('GPCL'),²¹ the Law on the Protection of Rights and Interests of the Elderly,²² and the Mental Health Law.²³ While the recently promulgated Civil Code²⁴ replaces the GRCL, the content regarding adult guardianship remains largely unchanged,²⁵ and thus the provisions of the GRCL will continue to be used throughout this article.

The overhaul of the adult guardianship regime saw several major changes, which are briefly discussed below.²⁶

1. Expansion of Scope

One of the most significant changes under the GRCL is that the scope of persons eligible for guardianship has been expanded to include not only those with mental illness, but any individual who has limited or no capacity for civil conduct.²⁷ This had been an issue of concern, as individuals without mental illness (such as those with acquired brain injury or intellectual disability) previously could not benefit from the regime.²⁸

20 Zhonghua Renmin Gongheguo Minfa Zongze (中华人民共和国民法总则) [General Rules of the Civil Law of the People's Republic of China] (promulgated by the National People's Congress, 15 March 2017, effective 1 October 2017).

21 Zhonghua Renmin Gongheguo Minfa Tongze (2009 Nian Xiuding) (中华人民共和国民法通则 (2009年修订)) [General Principles of the Civil Law of the People's Republic of China (Revised in 2009)] (promulgated by the Standing Committee, National People's Congress, 27 August 2009, effective 27 August 2009).

22 Zhonghua Renmin Gongheguo Laonianren Quanyi Baozhang Fa (2018 Nian Xiuding) (中华人民共和国老年人权益保障法 (2018年修订)) [Law of the People's Republic of China on the Protection of the Rights and Interests of the Elderly (Revised in 2018)] (promulgated by the Standing Committee, National People's Congress, 29 December 2018, effective 29 December 2018).

23 Zhonghua Renmin Gongheguo Jingshen Weisheng Fa (2018 Nian Xiuding) (中华人民共和国精神卫生法 (2018年修订)) [Mental Health Law of the People's Republic of China (Revised in 2018)] (promulgated by the Standing Committee, National People's Congress, 27 April 2018, effective 27 April 2018).

24 Zhonghua Renmin Gongheguo Minfadian (中华人民共和国民法典) [Civil Code of the People's Republic of China] (promulgated by National People's Congress, 28 May 2020, effective 1 January 2021).

25 One notable change was the addition of a provision to deal with emergency situations in Article 34.

26 See C. Chan and R. Lee, 'Adult Guardianship Law in China: Traditional Values and Modern International Developments' in A.K. Dayton (ed.), *Comparative Perspectives on Adult Guardianship* (Carolina Academic Press, 2014); L. Willmott et al., 'Guardianship and Health Decisions in China and Australia: A Comparative Analysis' (2017) 12 *Asian Journal of Comparative Law* 371–400 for detailed discussions of the previous regime.

27 See GRCL, Articles 21 and 22.

28 Chan and Lee (n 26) 132. It appears, however, that the courts had already been exercising their discretion to extend the definition of mental illness to people with acquired brain injury, intellectual injury and those in a permanent vegetative state in some cases (see further Willmott et al. (n 26) 385).

The determination of whether an individual has limited or no capacity for civil conduct is to be made by a people's court,²⁹ the procedure of which is regulated by Articles 187-189 of the Civil Procedure Law.³⁰ In terms of what it means to have limited or no capacity for civil conduct, these terms have varying definitions across legislative and guidance documents. The GRCL, for example, provides one definition for these terms which focuses on the ability to recognise one's own conduct.³¹ There are then various guidance documents issued at various levels, including the 1989 Temporary Provisions on the Judicial Determination of Mental Disorders (which remain in effect and are applicable nationally; '1989 Temporary Provisions'),³² the 2010 Guiding Standards for the Determination of Legal Capacity in Forensic Psychiatry (applicable in Beijing),³³ the 2018 Guideline to the Assessment of Legal Competences in Forensic Psychiatry (applicable in Shanghai; '2018 Guidelines'),³⁴ and the 2019 Guidelines for Assessment of the Capacity for Civil Conduct in the Mentally Disordered (applicable nationally; '2019 Guidelines'),³⁵ which are all in effect and generally contain differing formulations for what these two terms mean.³⁶ All the guidance documents additionally provide definitions for what it means to have capacity, with the 2019 Guidelines further making a distinction between 'capacity for civil conduct' and 'full capacity for civil conduct'. I return to this in Part IV.

2. Enhancement of Autonomy

The new regime also brought about autonomy-enhancing changes, one of the most important of which is the introduction of the principle of 'respect for the true will of the ward'. This principle appears in several of the new provisions. Notably, the views and wishes of the individual are to be considered where an appointment of a guardian needs to be made in cases of dispute (Art 31) and where the guardian is fulfilling her guardianship responsibilities (Art 35). Article 35 also contains wording that further promotes the autonomy of the individual under guardianship, namely that the guardian's role is to assist the individual in the performance of civil legal acts that are

29 GRCL, Article 24.

30 *Zhonghua Renmin Gongheguo Minshi Susong Fa (2017 Nian Xiuding)* (中华人民共和国民事诉讼法 (2017年修订)) [Civil Procedure Law of the People's Republic of China (Revised in 2017)] (promulgated by the Standing Committee, National People's Congress, 27 June 2017, effective 1 July 2017).

31 GRCL, Articles 21 and 22.

32 *Jingshen Jibing Sifa Jianding Zanxing Guiding (精神疾病司法鉴定暂行规定)* [Temporary Provisions on the Judicial Determination of Mental Disorders] (promulgated by Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of Justice, Ministry of Health, 11 July 1989, effective 1 August 1989).

33 *Sifa Jingshen Bingxue Falü Nengli Jianding Zhidao Biaozhun (司法精神病学法律能力鉴定指导标准)* [Guiding Standards for the Determination of Legal Capacity in Forensic Psychiatry] (promulgated by Beijing Municipal Bureau of Justice, 7 June 2010, effective 1 July 2010).

34 *Fayi Jingshen Bingxue Xingwei Nengli Pingding Guifan (法医精神病学行为能力评定规范)* [Guideline to the Assessment of Legal Competences in Forensic Psychiatry] (promulgated by Shanghai Association of Forensic Science, 8 October 2018, effective 1 November 2018).

35 *Jingshen Zhangaizhe Minshi Xingwei Nengli Pingding Zhinan (精神障碍者民事行为能力评定指南)* [Guidelines for Assessment of the Capacity for Civil Conduct in the Mentally Disordered] (promulgated by Bureau of Public Legal Services Administration, Ministry of Justice of the People's Republic of China, 8 November 2018, effective 1 January 2019).

36 It should be noted, however, that the 2018 Guidelines and 2019 guidelines are very similar in wording.

compatible with the ward's intelligence and mental health, and that the guardian is not to interfere with affairs that the individual is able to deal with independently. This carve-out protects the individual from being subjected to blanket substitute decision-making by the guardian even where she has the capacity to make those decisions herself, and better takes into account the fact that mental capacity is task-specific in nature. In addition, while the legal mechanism of voluntary guardianship was previously only an option for the elderly,³⁷ Article 33 of the GRCL now makes it available for all adults with full capacity. This mechanism allows individuals to choose their own guardian after consultation with the individual or organisation that may be willing to act as her guardian.

While the introduction of autonomy-enhancing changes is to be applauded, the way that these changes have been implemented needs to be examined closely to see the extent to which they do in fact enhance the autonomy of the individual under guardianship. The cases that have applied these Articles appear to be inconsistent in terms of whether the views and wishes of the individual under guardianship are ascertained.³⁸ In most cases where these views and wishes are made known to the court, the court gives effect to them, but on the basis that the decision will also be in the individual's best interests (which I discuss below). For example, in the case of *Zhang v Ge*,³⁹ the court considered that following the wishes of the individual in appointing her son as her guardian would be better for maintaining the peaceful condition of her current life, and would better protect her rights. It remains unclear what would happen if the individual's wishes departed from what was considered to be in her best interests, and no indication of what should be done in such circumstances is provided in the legislation.

3. Best Interests

A companion principle that was also introduced in the new regime was the principle of 'benefiting the ward to the largest extent', which can be considered an equivalent of the concept of best interests. While the GPCL did contain wording regarding the interests of the individual under guardianship,⁴⁰ this principle elevates the importance of the individual's interests to a position of top priority. Like the respect for the true will of the individual, this best interests principle appears in Articles 31 and 35 about appointing guardians in cases of dispute and guardian responsibilities respectively, meaning that in such cases, the principle of 'benefiting the ward to the largest extent' must be adhered to.

While the emphasis on the individual's interests is again commendable, there is very little clarity on what exactly the concept of 'best interests' covers, or in other words, how the court should assess whether a particular decision does indeed benefit the ward to the largest extent. As mentioned above, it is also unclear which will

37 Law on the Protection of Rights and Interests of the Elderly, Article 26.

38 See, eg *Xin v Yang* for application for change of guardian, the People's Court of Haidian District, Beijing Municipality (2019) Jing 0108 Special Procedure No. 1087 and Civil Judgment of *Zhang v Ge*, the People's Court of Fangshan District, Beijing Municipality (2019) Jing 0111 Special Procedure No. 453.

39 *Zhang v Ge* (n 38).

40 See GPCL, Article 18, which states that a guardian shall not handle the property of his ward unless it is in the ward's interests.

prevail if a decision that the court considers to be in the individual's best interests conflicts with the views and wishes of that individual.

4. Guardianship Competence

The new regime also places much more of a focus on the competence and qualifications of guardians. An example of this can be found in the selection of guardians. For those who have not chosen guardians themselves, the selection of guardians generally follows the order of priority provided in Article 28 of the GRCL. This means that the individuals or organisations in this list will generally be designated as the individual's guardian in this order.⁴¹ While Article 17 of the GPCL provided a similar list,⁴² the addition of the phrase 'who have the competence to be guardians' in Article 28 of the GRCL suggests that there should be some evaluation of competence before one of the persons in the list becomes the guardian of the individual, although there is no specification in the legislation as to how this is to be done. Article 11 of the Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the GPCL ('Opinions')⁴³ does contain limited guidance on how guardianship competence might be assessed, namely, 'according to such factors as the physical health and economic conditions of the guardian, and the connection between the guardian and his ward in life', though this is vague, with no indication as to how such factors should be assessed.⁴⁴ There continues to be no mention of any guidance or training for guardians, or any effective monitoring of guardians and their guardianship competence under the GRCL, similar to the situation under the GPCL.⁴⁵

5. Disqualification and Termination

Additionally, the new regime provides much more detail regarding the process for disqualifying appointed guardians. Previously, it had merely been stated that the courts could disqualify a guardian on the application of a concerned party or unit,⁴⁶ whereas the new regime lays out in detail the circumstances under which a disqualification might be ordered by the court, as well as the individuals and organisations that can apply for

41 Chan and Lee (n 26) 126. Article 28 is subject, however, to Article 31, which regulates situations of dispute, and Article 30, which provides a mechanism by which persons qualified to act as guardian according to the list in Article 28 are permitted to enter into an agreement among themselves to decide who shall act as guardian.

42 No provision was made at the time for persons qualified to act as guardian to agree upon a guardian amongst themselves, however.

43 Zuigao Renmin Fayuan Guanyu Guanche Zhixing 《Zhonghua Renmin Gongheguo Minfa Tongze》 Ruogan Wenti De Yijian (Shixing) (最高人民法院关于贯彻执行《中华人民共和国民事诉讼法》若干问题的意见 (试行)) [Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (Trial Implementation)] (promulgated by Supreme People's Court, 4 February 1988, effective 4 February 1988).

44 It should be noted that the Opinions are merely an interpretative document and not legislation. The Opinions are also in relation to the GPCL, which has now been superseded by the GRCL, but since there is similar legislative wording in the GRCL, the opinions expressed by the Supreme People's Court on guardianship competence should retain their persuasive value.

45 Chan and Lee (n 26) 130.

46 GPCL, Article 18.

disqualification (Article 36). It is notable that the individual under guardianship is not one of the individuals listed as being able to make such an application.⁴⁷ The new regime further adds a new provision regarding termination of the guardianship relationship,⁴⁸ although there remains no legislation regarding post-termination affairs, such as how the property of the individual under guardianship is to be handled.⁴⁹

IV. COMPLIANCE WITH THE UNCRPD

In the above sections, I have briefly laid out the key features of the adult guardianship regimes in China and Hong Kong. As jurisdictions in which the UNCRPD applies,⁵⁰ it is a vital concern whether and to what extent these regimes are compliant with the requirements of the UNCRPD. This is not a simple question—what exactly it is that the UNCRPD requires of states is itself a great source of contention. The most fundamental question, perhaps, is whether adult guardianship regimes can in fact be compliant with the UNCRPD at all.

The article of the UNCRPD that is most relevant to adult guardianship regimes and substitute decision-making is Article 12. Article 12 protects the right to equal recognition before the law and in particular, the right of persons with disabilities to enjoy legal capacity on an equal basis with others in all aspects of life (Article 12.2). States are obligated to take appropriate measures to support persons with disabilities in exercising their legal capacity (Article 12.3) and in designing a regime that supports individuals in their exercise of legal capacity, Article 12.4 requires the presence of appropriate and effective safeguards to prevent abuse. In describing what such safeguards entail, several important requirements are laid out: (i) the rights, will, and preferences of the individual must be respected; (ii) there must be no conflict of interest or undue influence; and (iii) the measures taken must be proportional, tailored to the individual's own circumstances, apply for the shortest time possible and be subject to regular review.

The question of whether adult guardianship regimes can ever be considered compliant with Article 12 is a controversial one, with various interpretations existing in the literature. While different jurisdictions employ varying models of adult guardianship, the discussion here focuses on those that permit substitute decision-making on behalf of an individual who is deemed as lacking mental capacity. As my co-authors and I have argued elsewhere,⁵¹ these interpretations can be largely categorised into two: the strong and weak interpretations.

47 GRCL, Article 36. The Hong Kong regime, by contrast, does allow an individual under guardianship to request for a review of the guardianship order (MHO, section 59U(4)(a)).

48 GRCL, Article 39.

49 Chan and Lee (n 26) 129.

50 The People's Republic of China ratified the UNCRPD in 2008 and applied it to Hong Kong pursuant to Article 153 of the Basic Law. See further C.J. Petersen, 'China's Ratification of the Convention on the Rights of Persons with Disabilities: The Implications for Hong Kong' (2008) 38 *Hong Kong Law Journal* 611–643.

51 D. Cheung et al., 'Articulating future directions of law reform for compulsory mental health admission and treatment in Hong Kong' 68 *International Journal of Law and Psychiatry* 101513.

1. Strong Interpretation

The ‘strong interpretation’ is the position that any kind of legal regime that permits substitute decision-making on grounds which include the presence of a mental disorder or disability can never be consistent with the UNCRPD.⁵² This includes permitting substitute decision-making on the basis of mental incapacity. The Committee on the Rights of Persons with Disabilities (‘Committee’), which monitors the implementation of the UNCRPD, takes this position. They emphasise that legal capacity, which includes both the ability to hold rights and duties and the ability to *exercise* them,⁵³ is different from mental capacity, and that the two are not to be conflated.⁵⁴ What this means is that where an individual has or is perceived to have deficits in her mental capacity, this should not be a reason to deny her legal capacity.⁵⁵

Instead of focusing on the removal of legal capacity on the basis of mental capacity deficits, this position emphasises the need to eliminate discrimination on the basis of mental disability and to maximise the agency of those with disability by providing suitable support and accommodation. The Committee takes the view that compliance with the UNCRPD requires the outright abolition of substitute decision-making regimes; it is not enough that supported decision-making regimes be developed in tandem.⁵⁶ Thus, according to the strong interpretation, adult guardianship regimes that permit substitute decision-making on the basis of mental incapacity would not be compliant with the UNCRPD, which means that neither the adult guardianship regime of China or Hong Kong is compliant with the strong interpretation of the UNCRPD.

2. Weak Interpretation

The second, or the ‘weak’ interpretation, is the position that legal regimes that permit substitute decision-making in some cases may nonetheless be compliant with the UNCRPD, as long as certain criteria are met.⁵⁷ This position recognises that mental disability can have an effect on mental capacity, and while this does not mean legal capacity should be denied to all individuals with mental disability, it may mean substitute decision-making is needed to protect the best interests of the person with disability where (i) supported decision-making is not possible or (ii) respecting the individual’s preferences will conflict with the individual’s underlying will or with some other legitimate aim supported by the UNCRPD.⁵⁸ Szmukler et al., for example, argue that a narrowly-drawn form of capacity-based law, or what they call ‘fusion law’, would be compliant with the UNCRPD as long as it is disability-neutral

52 Ibid, 3.

53 UN Committee on the Rights of Persons with Disabilities (2014). *General Comment No. 1, Article 12 (CRPD)* (CRPD/C/GC/1) para 12.

54 General Comment No. 1 (n 53) paras 12–13.

55 General Comment No. 1 (n 53) para 13.

56 See further General Comment No. 1 (n 53) paras 3, 21, and 28.

57 See, eg W. Martin et al., ‘Three Jurisdictions Report. Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK’ (Essex Autonomy Project, 2016) <https://autonomy.essex.ac.uk/resources/eap-three-jurisdictions-report/>; J. Dawson, ‘A realistic approach to assessing mental health laws’ compliance with the UNCRPD’ (2015) 40 *International Journal of Law and Psychiatry* 70–79.

58 Cheung et al. (n 51) 3.

and non-discriminatory—in other words, one that applies to all (regardless of diagnosis, if any) and is based on a functional inability to make a specific decision at a specific time, rather than a status of mental impairment.⁵⁹ Dawson argues for the retention of the concept of mental capacity in the law on the basis that it is often necessary as a way to resolve conflicts between rights protected by the UNCRPD.⁶⁰ Specifically, the functional test of decision-making capacity is often a key concept in many legal systems, used to settle the balance between competing imperatives and determine whether the respect for autonomy or the protection of a vulnerable person's interests should prevail in a particular case.⁶¹ Others have pointed out that the UNCRPD does not explicitly call for the abolition of substitute decision-making,⁶² and that Article 12(4) appears to permit the denial of legal capacity as long as appropriate safeguards are in place.⁶³

In determining whether the regimes in China and Hong Kong can be considered compliant with the weak interpretation, it is important to explore several key issues, such as (i) whether support for decision-making is provided, (ii) whether in cases of substitute decision-making, it can be said to be carried out in a way that is nonetheless compliant with the UNCRPD, and (iii) whether appropriate safeguards have been put in place. I consider each of these below.

A. Supported Decision-Making

The analysis under this heading for the Hong Kong regime is brief. The Hong Kong adult guardianship regime currently employs a substitute decision-making model, with no infrastructure in place for supported decision-making. Although the individual's views and wishes are taken into account, the individual does not formally participate in the decision-making process in relation to matters over which the guardian has decision-making power, and is certainly not given support of any kind (statutory advocacy or similar forms of support, for example) in making decisions of her own.

The Chinese regime, on the other hand, does appear to provide for some form of support. Article 35 of the GRCL requires the guardian to *assist* the ward in the performance of civil legal acts that are compatible with the ward's intelligence and mental health, suggesting that there may be an element of supported decision-making within this generally substituted decision-making regime, or what

59 G. Szmukler, R. Daw and F. Callard, 'Mental Health Law and the UN Convention on the Rights of Persons with Disabilities' (2014) 37 *International Journal of Law and Psychiatry* 245–252. See also J. Dawson and G. Szmukler, 'Fusion of mental health and incapacity legislation' (2006) 188 *British Journal of Psychiatry* 504–509; G. Szmukler, R. Daw, and J. Dawson, 'A Model Law Fusing Incapacity and Mental Health Legislation' (2010) 20 (Special Issue Edition) *Journal of Mental Health Law* 11–22.

60 Dawson (n 57) 71.

61 G. Szmukler, "Capacity", "best interests", "will and preferences" and the UN Convention on the Rights of Persons with Disabilities' (2019) 18 *World Psychiatry* 34–41, 36.

62 See, eg P. Fennell and U. Khaliq, 'Conflicting or Complementary Obligations? The UN Disability Rights Convention, the European Convention on Human Rights and English Law' (2011) 6 *European Human Rights Law Review* 662–674, G. Richardson, 'Mental Disabilities and the Law: From Substitute to Supported Decision-Making?' (2012) 65 *Current Legal Problems* 333–354, D. Lush, 'Article 12 of the United Nations Convention on the Rights of Persons with Disabilities' (2011) 1 *Elder Law Journal* 61–68.

63 See, eg Richardson (n 62) 346; Dawson (n 57) 72.

can be described as a hybrid model of sorts. While this model does create much more flexibility for those who have fluctuating capacity and changing needs than that of the Hong Kong regime, however, this element of supported decision-making is limited in several ways.

First, the guardian only needs to provide support in the performance of acts for which the individual has sufficient mental capacity—all other decisions will be made by the guardian in the form of substituted decision-making. This position presumably aims to be protective of individuals lacking capacity, who are viewed as unable to make objectively ‘right’ decisions in their own best interests.⁶⁴ However, while there are no fixed definitions of the term,⁶⁵ supported decision-making regimes should generally be a set of components that are put in place for the promotion of legal capacity and autonomous decision-making,⁶⁶ for all persons on different points of the spectrum of capacity. Providing support only for capacitous decision-making goes against the spirit of the UNCRPD.

Apart from the restricted nature of this support, the judgment as to whether the individual has sufficient ‘intelligence and mental health’ for an act appears to be one made by the guardian. This is a conflict of interest, as the person who is exercising the power, in this case, to make decisions on behalf of the individual under guardianship, is also the one tasked with putting limits on this power. Of course, this conflict may be inevitable, in particular where decisions need to be made on a routine basis by close family members. In such cases, the question then becomes whether sufficient safeguards are in place to prevent abuse. I return to the issue of safeguards below.

Finally, the only form of support available is from the guardian. Apart from the conflict of interest concern, the guardian is not often someone chosen or necessarily preferred by the individual.⁶⁷ While supported decision-making can come in different forms, it is important for an individual to have a supporter that she can trust, so that the assistance provided to the individual can be truly meaningful.

B. Substitute Decision-Making—The Concept of Capacity

Because the substitute decision-making carried out in both regimes is on the basis of a determination that the individual lacks or has limited mental capacity, I will focus on the concepts of capacity as defined in the two regimes. As briefly discussed above, some have argued that the concept of capacity should be retained in the law and that this should be considered consistent with the obligations under the UNCRPD. The key, however, is that the application of this concept should be disability-neutral

64 S. Pathare and L. Shields, ‘Supported Decision-Making for Persons with Mental Illness: A Review’ (2012) 34 *Public Health Reviews* 1–40, 5.

65 S. Then et al., ‘Supporting Decision-Making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies – Recommendations, Rationales and Influence’ (2018) 61 *International Journal of Law and Psychiatry* 64–75.

66 Pathare and Shields (n 64) 27.

67 Unless the guardian has been chosen pursuant to a voluntary guardianship agreement under Article 33 of the GRCL.

and non-discriminatory,⁶⁸ with a focus on the individual's functional ability to make decisions rather than her diagnosis.

The Hong Kong regime fails the 'disability-neutral' test immediately, as mental incapacity is defined in relation to mental disability. The test for incapacity, as laid out in Part II of this article, specifically states that it is the 'mental disorder or mental handicap' that is limiting the individual's decision-making ability. The Chinese regime does not appear to pass this test either. Although the GRCL does not mention mental disability in its definitions of limited or no capacity for civil conduct, which is defined in terms of the ability to recognise one's own conduct, Articles 4 and 5 of the Opinions,⁶⁹ which elaborate on what it means to be unable to recognise one's own conduct and how this should be assessed, both do so specifically in the context of individuals with mental illness. The guidance documents also define mental incapacity in relation to mental disability. In the 2019 Guidelines, for example, the second General Principle states that the assessment of capacity has two key components, medical and legal, with the medical component being the existence of some kind of mental disability.⁷⁰ In the assessment criteria themselves, both the criteria for limited and no civil capacity for conduct include as the first criterion a clear diagnosis for mental disability.⁷¹ The fact that mental incapacity is defined in relation to a diagnosis of mental disability is discriminatory, and cannot be considered consistent with the principles of the UNCRPD.

Looking beyond this problematic link between mental incapacity and mental disability, the tests of capacity in both regimes remain deeply unsatisfactory, despite being functional assessments of an individual's mental capacity. I begin with the test contained in Hong Kong's regime, which, as mentioned above, asks whether the individual has been 'limited by mental disorder or mental handicap in making reasonable decisions in respect of all or a substantial proportion of the matters which relate to his personal circumstances'.⁷² As I have argued previously,⁷³ there are several apparent problems with this test. The first is that this test relies on the inaccurate premise that capacity is a holistic, all-or-nothing concept. Instead of a decision or task-specific test of the individual's decision-making abilities, this test assesses the individual's general decision-making abilities surrounding her personal affairs at one point in time. If the individual fails the test, she will be subjected to the extensive powers of the guardian to make significant decisions about her life for an entire year, and then for 3 years at a time after that. There is no consideration of whether the individual is capable of making any of the decisions the guardian is given the power to make on her behalf during this period of time. Although the Chinese regime is similar in that individuals are subjected to guardianship on the basis of a capacity test conducted at

68 The word 'non-discriminatory' as used here and as used by the Committee focuses on the applicability of the concept to all regardless of diagnosis or state of mental impairment (see above n 59). It is recognised that a wider literature in relation to what the term 'discrimination' means or should mean in the context of the UNCRPD exists (see, eg Dawson (n 57) 71), although this is beyond the scope of the article.

69 See n 44 regarding the validity of the Opinions.

70 2019 Guidelines, para 4.2.

71 2019 Guidelines, paras 5.1.2 and 5.1.3.

72 MHO, section 59O(3)(b).

73 Cheung (n 9) 482.

one point in time, the prohibition in Article 35 of the GRCL that prevents guardians from interfering in matters that the ward is able to deal with independently technically protects the individual from decisions being made on her behalf in relation to issues for which she has the capacity to decide.⁷⁴

The second problem with Hong Kong's test relates to the idea that the individual must be able to make 'reasonable' decisions in order for her to be considered as having capacity. This requirement is incompatible with the common law understanding of capacity,⁷⁵ and elicits the worry that decisions based on values or beliefs not shared by the majority will not be respected.⁷⁶ A third problem with the test lies in its breadth. As currently drafted, the test only requires the individual be *limited* in the making of such decisions. There is also no qualifier before the word 'limited', suggesting that a trivial limitation could nonetheless be caught by this test. When coupled with the reasonableness requirement, this renders this test for capacity unacceptably broad.

The Chinese regime has its own difficulties. As discussed in Part III, there are a number of varying definitions of capacity across different documents.⁷⁷ The concern with this is the lack of consistency and transparency in the judicial determination process. It is unclear which test of capacity should and will be employed by the courts in each individual determination, which means that the standards of assessment are likely to vary across cases. A second issue relates to the content of these definitions. Many of the concepts used in these definitions are vague. For example, what exactly does it mean to have the ability to protect one's legal rights and interests? What are the specific abilities that one needs to have in order to be considered able to do so?

Apart from the vagueness of these concepts, the substance of some of these definitions is problematic as well. I consider two examples here. First, the definition of 'capacity for civil conduct' in the 2019 Guidelines contains the requirement that the individual has the ability to 'rationally and carefully handle her affairs'. The problem with a requirement that a decision be rational or reasonable to satisfy a capacity test has been discussed above, and the requirement that the individual be careful in order to be considered capacitous, without more specific elaboration as to what 'careful' means, is no more than a subjective value judgment that should have no role in the determination of capacity. Second, the definition of 'limited capacity for civil conduct' in the 2019 Guidelines includes the requirement that the individual have the ability to completely and correctly communicate her wishes. The key concern here is with the term 'correctly' – what is this correctness in relation to, and how is it to be assessed? If it is a matter of accuracy, how is this to be determined? If it is in relation to some sort of external standard of decision-making, it again appears to be a

74 As discussed, however, there is a conflict of interest here, and the extent to which this prohibition is complied with is unclear.

75 See, eg the case of *Re T (An adult: Consent to Medical Treatment)* [1992] 4 All ER 649, in particular para 37.

76 Taking this to the extreme, the concern is that individuals may only be considered capacitous where their decisions align with that of their caregivers or treatment providers. See further M. Gunn, 'The Meaning of Incapacity' (1994) 2 *Medical Law Review* 8–29, 15–16.

77 It should be noted that Hong Kong also has various capacity tests contained in the MHO, but only one applicable for the guardianship context.

requirement that should have no place in a capacity assessment. As one of the principles of the MCA states, ‘a person is not to be treated as unable to make a decision merely because he makes an unwise decision.’⁷⁸

C. Safeguards

As discussed above, Article 12.4 of the UNCRPD lays down several important requirements for appropriate and effective safeguards to prevent abuse. I consider each of these below:

2. Respect for rights, will, and preferences of the individual.

Article 12.4 requires that the individual’s rights, will, and preferences be respected in measures that support an individual’s exercise of legal capacity. What does this mean? There are two questions that need to be answered here. The first, which is beyond the scope of this article, is what exactly the terms rights, will, and preferences mean. This is a complex and nuanced question that is not easily answered, although such authors as Carney et al. have taken great strides in exploring the theoretical debates, practice dilemmas, and conceptual tensions inherent in understanding what these terms mean.⁷⁹ For the purposes of this discussion, however, I will limit this term to refer to the expressed views and wishes of the individual.

The second question relates to what the term ‘respect’ means in this context. Various interpretations of this can be found in the literature. The Committee’s position has been documented above, which is that regimes allowing substitute decision-making must be abolished entirely,⁸⁰ as such regimes allow for substitute decision-makers to make decisions based not on the individual’s will and preferences, but what the decision-maker believes to be in the ‘best interests’ of the individual.⁸¹

Not all interpretations go this far. The Essex Autonomy Project has suggested, for example, that while the mere *consideration* of the will and preferences of the individual would not be sufficient to be considered ‘respect’, it is also not possible to defer to the individual’s will and preferences in an unqualified manner.⁸² Instead, the decision-maker should begin with a presumption giving effect to the reasonably ascertainable will and preferences of the person.⁸³ This presumption is, however, rebuttable—in exceptional cases, the decision-maker may act contrary to the individual’s will and preferences if such a course of action is a ‘proportional and effective strategy for protecting the full range of the person’s fundamental rights, freedoms and interest.’⁸⁴ Donnelly also advocates a middle-ground approach. Although she

78 MCA, section 1(4).

79 T. Carney et al., ‘Realising ‘Will, Preferences and Rights’: Reconciling Differences on Best Practice Support for Decision-Making?’ (2019) 28 *Griffith Law Review* 357–379 <<https://doi.org/10.1080/10383441.2019.1690741>>. See also G. Szmukler, ‘The UN Convention on the Rights of Persons with Disabilities: ‘Rights, Will and Preferences’ in Relation to Mental Health Disabilities’ (2017) 54 *International Journal of Law and Psychiatry* 90–97 for an in-depth consideration of these terms.

80 General Comment No. 1 (n 53) para 28.

81 *Ibid*, para 27.

82 For example, because of the conflicts that may arise between the will and preferences or between the preferences themselves. See further Martin et al. (n 57) 40.

83 *Ibid*.

84 *Ibid*.

argues that the MCA should be amended to include a ‘stronger statement of the primary importance of the individual’s wishes and feelings’, she contends that a substitute decision-making regime needs to operate in parallel and that in certain restricted situations, the regime should allow factors beyond the individual’s will and preferences to be taken into account as well.⁸⁵ On the other end of the spectrum from the Committee’s position is Szmukler, who argues that the best interests approach, which may entail going against an expressed, present preference, should be seen as giving effect to the individual’s will and is to be preferred.⁸⁶ It appears, however, that the consensus lies in the individual’s will and preferences being given a position of priority, even if it must be overridden in some cases.

The Hong Kong regime does not appear to meet this standard. Although it does provide for the ascertainable views and wishes of the individual to be respected, it is also clearly stated that a guardian is to override such views and wishes where the guardian considers the action to be in the individual’s interest.⁸⁷ This approach, akin to what the Essex Autonomy Project describes as mere *consideration* of the individual’s will and preferences, does not place the individual’s will and preferences in a sufficiently primary position to be considered respect. The individual’s will and preferences need to be given much more priority—even if the position is adopted that they may be overridden in certain situations, there should be elaboration on when this is permitted; not simply when it is in what the decision-maker considers to be the individual’s interests.

The Chinese regime seems to fare slightly better, and it can be argued that there is a higher level of respect for will and preferences in that the guardian is explicitly required by Article 35 of the GRCL to avoid interfering with matters that the individual under guardianship can deal with herself, and where decisions have to be made on behalf of the individual, to respect the true will of the ward when doing so. Having said this, however, Article 35 also requires the guardian to fulfil her guardianship responsibility according to the ‘principle of benefiting the ward to the largest extent’, which as discussed above, can be understood as a best interests standard. There is, problematically, no clarity as to which principle should be preferred where there is conflict between the two, and no indication that the individual’s will and preferences will be given priority of any kind.

A. *No conflict of interest or undue influence*

This is also a requirement that has a large measure of ambiguity. As the Essex Autonomy Project has pointed out, both the concepts ‘conflict of interest’ and ‘undue influence’ contain many uncertainties in operationalisation.⁸⁸ In terms of ‘conflict of interest’, neither the UNCRPD nor the General Comment provides any elaboration on what the term means. While it would be impracticable to list all the different types of conflicts of interest, a ‘non-enumerative’ definition that describes

85 M. Donnelly, ‘Best Interests in the Mental Capacity Act: Time To Say Goodbye?’ (2016) 24 *Medical Law Review* 318–332. See also A.R. Keene and C. Auckland, ‘More Presumptions Please? Wishes, Feelings and Best Interests Decision-Making’ (2015) *Elder Law Journal* 293–301.

86 Szmukler (n 79) 95.

87 See Part II above.

88 Martin et al. (n 57) 44–51.

the effect of conflicts of interest and is not bound to any specific type of relationship may prove useful.⁸⁹ There is also the question of whether it is necessarily wise to simply remove someone who has a conflict of interest—often it may be such persons who are in the best position to support the individual with disability.⁹⁰ Undue influence is similarly difficult to operationalise. Although the General Comment does provide a definition for the term,⁹¹ it has been criticised as being overly broad.⁹² It is also unclear what kinds of safeguards need to be in place, and to what extent the undue influence as defined in the General Comment must exist for intervention to be justified.⁹³

Hong Kong's regime appears to provide a bit more clarity on this, although neither regime is satisfactory. One of the selection criteria for guardians in the Hong Kong regime is that the guardian must not have an undue conflict of interest, especially of a financial nature, with the individual with mental impairment. Apart from clarifying that financial conflicts of interest are included, there is no elaboration on what a conflict of interest might entail, which makes it difficult for this criterion to be meaningfully implemented. It should be noted, however, that the qualifier 'undue' reflects the abovementioned concern that removing someone with any conflict of interest may not be what is best for the individual with disability. Regarding 'undue influence', Hong Kong's guardianship legislation contains no mention of the term, which means that a consideration of whether undue influence exists between a guardian and the individual under guardianship is not necessary. Given that family members are often appointed as guardians in Hong Kong, this is an important omission that needs to be rectified.

There is no mention of either term at all in China's guardianship legislation. The legislation does not specify what it means for guardians to be competent, and whether such competence includes an absence of conflict of interest or undue influence. Even where a conflict of interest has been identified in a case before a court, the matter may not necessarily be dealt with directly. For example, in the case of *Chen v Li*,⁹⁴ the elder sister of the individual under guardianship applied for a change of guardian from the wife of the individual to herself. It was uncovered in evidence that there were remaining issues from a previous probate matter between the sister and the individual that would likely cause a conflict of interest if the sister were appointed as guardian. Although the court eventually ruled in favour of the wife, they did so on the basis that there was no evidence showing that the wife was an unfit guardian. No mention was made of the potential conflict of interest in the court's conclusion.⁹⁵

Thus, it appears that there does not need to be a consideration of whether a conflict of interest or undue influence might exist between a guardian and the individual

89 Ibid, 49.

90 Ibid, 50.

91 General Comment No. 1 (n 53) para 22.

92 Martin et al. (n 57) 46.

93 Ibid, 45.

94 Civil Judgment of *Chen and Li* for application for change of guardian, the People's Court of Xicheng District, Beijing Municipality (2018) Jing 0102 Special Procedure No. 2090.

95 Ibid, p 3.

under guardianship at any point during the guardianship arrangement. While the absence of any and all conflict of interest may not necessarily be beneficial for the individual under guardianship, it is important that any such conflict of interest be scrutinised to see whether it may impede the ability of a guardian to support the individual under guardianship. Undue influence is also a matter of concern, given that family members will often become guardians by default according to the list in Article 28 of the GRCL.

B. Measures are proportional, individually tailored, as short as possible, and subject to regular review

The meaning of this requirement is relatively straightforward. Guardianship orders in Hong Kong are indeed subject to regular review, as discussed in Part II. When deciding on the merits of the guardianship order, the Guardianship Board considers, among other criteria, whether there are any less restrictive or intrusive means available in the circumstances,⁹⁶ suggesting that consideration will be given to keeping the order as short as possible. With a renewal period of 3 years, however, there may be a question as to how timely the consideration of the case can be, particularly if there are no requests made by interested parties.

The Chinese regime, on the other hand, is almost entirely void of protection in this regard, and procedural safeguards remain dismal. First, there remains no special judicial or other panel like Hong Kong's Guardianship Board that is tasked with guardianship-related matters,⁹⁷ such as the (i) appointment of guardians or (ii) conducting of regular reviews. In relation to (i), because the determination of guardians is generally carried out according to the list contained in Article 28 of the GRCL, or via agreements under Articles 30 and 33 of the GRCL, the majority of guardian appointments will not be overseen by the courts, unless a dispute is involved. This also means that there will generally be no formal assessment of the suitability of the guardian in most cases.

In relation to (ii), guardianship arrangements are not subjected to regular review. Despite the relatively recent overhaul, there continues to be an almost complete lack of state supervision over guardians.⁹⁸ There was and continues to be no supervisory institution, no reporting or accounting requirements, nor any periodic evaluation of the necessity and appropriateness of guardianship.⁹⁹ There can be said to be some supervision of the performance of duties by guardians, however. While there is no special panel or tribunal to which complaints can be brought, a number of individuals and organisations can apply to court to have a guardian disqualified on a number of grounds.¹⁰⁰ Even though these parties can be said to have been given a 'partial authority to exercise supervisory duties', however, they continue to lack powers similar to other state-appointed supervisors of guardians elsewhere, such as the power to investigate accounts, and there are no other avenues of recourse for the individual if

96 MHO, section 59O(c).

97 Chan and Lee (n 26) 131.

98 Ibid.

99 Ibid.

100 GRCL, Article 36.

such an application is not filed.¹⁰¹ Also, as noted above, the individual under guardianship is not included as one of the individuals able to make such an application.

3. Compliance with the UNCRPD?

Given that the Hong Kong and Chinese regimes cannot be considered compliant according to the strong interpretation of what Article 12 of the UNCRPD requires, the question then becomes whether they might still be compliant according to the weak interpretation. In the above, I have examined supported decision-making, capacity tests, and safeguards in each regime, and while the regimes achieve varying levels of success in each domain, neither of them can be said to have reached the requisite standard in compliance. Perhaps most importantly, neither of the regimes are disability-neutral in nature, which means that they are discriminatory against those with mental disability, a key departure from the principles of the UNCRPD. Hong Kong's regime has failed to implement any form of supported decision-making and insufficiently prioritises the views and wishes of individuals under guardianship, whereas the Chinese regime contains appallingly few procedural safeguards for individuals under guardianship. These characteristics, among the others described in detail above, make it clear that neither regime can be said to be compliant even with a weak interpretation of the UNCRPD.

Despite these conclusions, neither jurisdiction has confronted these difficulties in their reports to the Committee. In Hong Kong's initial report to the Committee in 2010,¹⁰² a brief description of the guardianship regime was included under the discussion of Article 12, although no mention was made of the right to legal capacity or substitute decision-making under the regime, apart from the straightforward acknowledgment that such decision-making on behalf of persons under guardianship exists. No mention was made of the guardianship regime in Hong Kong's combined second and third reports to the Committee in 2019.¹⁰³ In China's initial report to the Committee in 2010, the section on Article 12 included a discussion of the guardianship regime, which was largely focused on the ability of individuals (problematically described as 'mental patients') to undertake civil actions by appointing a guardian as their proxy, who would in turn protect their rights and interests.¹⁰⁴ Where a guardian failed her responsibilities, she could lose her eligibility as a guardian and bear liability as a result. No mention, however, was made of substitute decision-making under the regime. Despite the fact that the Committee's Concluding Observations on the initial report of China stated that the system of legal guardianship and the complete

101 Chan and Lee (n 26) 131.

102 Labour and Welfare Bureau, HKSAR Government. *Initial Report of the Hong Kong Special Administrative Region of the People's Republic of China under the United Nations Convention on the Rights of Persons with Disabilities* (Printing Division, 2010).

103 Labour and Welfare Bureau, HKSAR Government. *Second and Third Report of the Hong Kong Special Administrative Region of the People's Republic of China under the United Nations Convention on the Rights of Persons with Disabilities* (Printing Division, 2018).

104 UN Committee on the Rights of Persons with Disabilities (2010). *Initial Reports Submitted by States Parties under Article 35 of the Convention: China* (CRPD) (CRPD/C/CHN/1), para 52.

absence of supported decision-making measures were not compliant with Article 12,¹⁰⁵ no changes were implemented in response to this during the overhaul of the guardianship regime in 2017, and no mention was made of the guardianship regime under Article 12 in China's combined second and third periodic reports to the Committee in 2018.¹⁰⁶

V. CONCLUDING REMARKS AND THE WAY FORWARD

This article has closely examined and compared the Hong Kong and Chinese adult guardianship regimes and the extent to which they can be said to fulfil the obligations imposed by the UNCRPD. Despite having submitted two reports each to the Committee, neither jurisdiction has taken the steps needed to bring their adult guardianship regimes in line with Article 12 of the UNCRPD. This is particularly disappointing for the Chinese regime, which had only recently undergone an overhaul: one that brought about encouraging improvements, but was a missed opportunity to bring the regime up to international disability rights standards. The Hong Kong regime has remained largely untouched since it was revamped in 1997, which is an astounding and unacceptably lengthy period of time, during which important advances have been made in both mental capacity and disability rights law.

What is the way forward? As discussed above, both regimes cannot be said to be disability-neutral and non-discriminatory, and in order to achieve this, significant structural and conceptual changes will need to be made. A full discussion of the best way to proceed is beyond the scope of this article, but important decisions need to be made about the pathway to reform. This includes, for example, whether piecemeal amendments to existing provisions should be advocated in hopes of gaining the widespread political approval needed to push them through, or whether comprehensive, ideological changes to these regimes should be pursued, perhaps at the cost of not achieving these until a significant amount of time later, or not at all.¹⁰⁷ These are some of the difficult questions that will need to be grappled with when considering the way forward. In order to fulfil their obligations under the UNCRPD, however, Hong Kong and China will both need to squarely confront the inadequacies of their respective adult guardianship regimes.

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- 105 UN Committee on the Rights of Persons with Disabilities (2012). *Concluding observations on the initial report of China, Adopted by the Committee at Its Eighth Session* (CRPD) (CRPD/C/CHN/CO/1) paras 21–22.
- 106 UN Committee on the Rights of Persons with Disabilities (2018). *Combined Second and Third Periodic Reports Submitted by China under Article 35 of the Convention, due in 2018* (CRPD) (CRPD/C/CHN/2-3).
- 107 See Cheung et al. (n 51), eg for a discussion of these issues in the Hong Kong context; P. Bartlett, 'Implementing a Paradigm Shift: Implementing the CRPD in the Context of Mental Disability Law. Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 thematic report' (Centre for Human Rights and Humanitarian Law, American University Washington College of Law 2014) on these issues more generally.

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