The Challenge of China's New Adult Guardianship in the Implementation

Xia Li

East China University of Political Science and Law, Shanghai, China
Email: lisa_1@163.com
Changing regimes of supported decision-making and guardianship for adults

Content

1. Guardianship in the General Rules of Civil Law
2. The Distance between the GRCL and the CRPD
3. The Gap between China and Other Parties of the CRPD
1.1 Incompetent Adult and Incapacitated Adult

The GRCL divides adults without full capacity into incompetent adult and incapacitated adult, while the former can perform parts of civil conduct and the later can’t perform any civil conduct at all.
1.2 Full Guardianship for Adult

In the modern times, many countries have shifted paradigm from guardianship to supported decision making. However, the GRCL still conserves comprehensive guardianship model. such as the Article 23 provides that the guardian of a person without capacity for civil conduct or with limited capacity for civil conduct shall be the statutory agent of the person.
1.3 Lacks Rights of Procedural Participation

The GRCL pays little attention to procedural rights of principal, procedure of guardian can be launched by many subjects and principal has little weapon to resist that.
1.4 Obscure Principles of Adult Guardianship

Modern guardianship demands principle of least restrictive alternative, best interest and presumption of capacity. However, the GRCL applies the principle of best interest to adult guardianship and causes conflicts of principle.
Part 2. The Distance between the GRCL and the CRPD
2.1 Retain the Plenary Adult Guardianship

It’s a great chance for China to abandon surrogate decision making, which is adopted by the GRCL at last. Regrettably, the GRCL take steps backward.
2.2 Conflicts of Basic Principles

- Best interest
- Respect will
- Minor Guardianship
- Adult Guardianship
2.3 Alternatives Are too Unitary to Support Decision-making

Each principal preserve different ability and needs for protection are variously. Therefore the CRPD advocates that we should provide various support and alternatives should be provided for people with disabilities, according to his individual condition.
2.4 Ignore Procedural Participation

Due process must be provided before a guardianship can be imposed. However, the GRCL fails to notice principal’s procedural right.
Part 3. The Gap between China and Other Parties of the CRPD
3.1 Abandon Incapacity

Many countries have abandon incapacity and in the move from substitutions to supported decision making, so there no incompetent adults anymore. Accordingly, conducts of incapacitated adults is valid and in some circumstance can be cancelled.
3.2 Respect Individual Autonomy

One of the consensuses is that supporting decision-making paradigm should respect those adults with impaired decision-making abilities and protecting autonomy and the right to legal capacity.
3.3 Put Proceedings of Adult Guardianship under the Examination of Court

Guardianship is a double-edged sword. Sometimes it would protect principal, but other times it would harm rights and ability of principal. Thus, start-up and termination of guardianship should receive judicial examination. No matter what expert opinions allege, nobody should be treat as incapacitated adults without verdict.
Conclusion

Generally speaking, China's New adult guardianship in the General Rules of Civil Law fail to fulfill demands of the CRPD. Thus, we must acknowledge legal capacity of principal, put the beginning and termination of adult guardianship under the examination of court.
Changing regimes of supported decision-making and guardianship for adults

Thanks!

Xia Li
East China University of Political Science and Law, Shanghai, China
Email: lisa_1@163.com