

STUDIES IN COMPARATIVE LEGAL HISTORY

Current Legal Issues in American and Taiwanese Law

Comparative Perspectives

Edited by

Laurent Mayali and Kuan-Ling Shen

- Emergent Regulatory Systems and Their Challenges: The Case of
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problems remain. As for the evolution of the adult guardianship system in Taiwan before 2014, please see the author's past article.¹

II. Evolution and the Current Adult Guardianship System in Taiwan

Taiwan's adult guardianship system was comprehensively revised in 2008, abolishing the past declaration of interdiction, and turned to the two-tier categorization system divided into guardianship and assistance. Among such institutions, a declaration of guardianship applies to "any person who is not able to make declaration of intention, receive declaration of intention, or who lacks the ability to discern the outcome of the declaration of intention due to mental disability,"² and a declaration of assistance applies to "any person who has insufficient capacity to make declaration of intention, receive declaration of intention, or who lacks the ability to discern the outcome of the declaration of intention due to mental disability."³ This system aims at protecting persons who have difficulties in decision-making. After the court's declaration, a person

1. Sieh-Chuen Huang, *Adult Guardianship in Taiwan: A Focus on Guardian Financial Decision-making and the Family's Role*, 9 J. INT'L AGING L. & POL'Y 127-150 (2016).

2. For the contents of the Taiwan Civil Code see the Ministry of Justice, Laws & Regulations Database (<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000001>, last visited: Nov. 15, 2021). Paragraph 1, Article 14 provides, with respect to any person who is not able to make declaration of intention, receive declaration of intention, or who lacks the ability to discern the outcome of the declaration of intention due to mental disability, the court may order the commencement of guardianship at the request of the person in question, his/her spouse, any relative within the fourth degree of kinship, a prosecutor, a competent authority, an organization of social welfare, an assistant, an agent of adult guardianship by agreement or any other interested person.

3. Paragraph 1, Article 15-1 provides, With respect to any person who has insufficient capacity to make declaration of intention, receive declaration of intention, or who lacks the ability to discern the outcome of the declaration of intention due to mental disability, the court may order the commencement of assistance at the request of the person in question, his/her spouse, any relative within the fourth degree of kinship, a prosecutor, a competent authority or an organization of social welfare.

under guardianship has no right to act,⁴ and a guardian will be appointed by the court as a legal representative to perform legal acts for the principal (Paragraph 1 of Article 1098).⁵ For persons under assistance, their legal capacity is not affected. Only some specific financial affairs, such as purchasing or selling real estate, require their assistant's consent.⁶

The above circumstances regulated by the Civil Code about lack or insufficiency of capacity often meet the definitions of "people with disabilities" stated in Article 5 of the People with Disabilities Rights Protection Act.⁷ In fact, according to statistics offered by the Ministry

4. Article 15 of the Taiwan Civil Code provides, a person who has become subject to the order of the commencement of guardianship has no capacity to perform any juristic act.

5. Paragraph 1, Article 1098 provides that a guardian within the scope of their delegated power is the statutory agent of his ward. This is a rule regarding guardianship of minors. And Article 1113 provides, unless otherwise provided by the provisions of this Section, the provisions concerning the guardianship over minors shall apply mutatis mutandis to the guardianship over adults. Therefore, an adult guardian has full authority to make transactions for an adult ward.

6. Paragraph 1, Article 15-2 provides, a person under assistance must obtain the consent of his/her assistant if he/she intends to perform any of the following acts; provided, however, that, this shall not apply to any act relating to pure legal benefit or the necessity based on the person's age, status, and daily life

(1) being a responsible person of a sole proprietorship, of a partnership company, or of a juristic person;

(2) making loans for consumption, consumption deposit, a guaranty, a gift, or a trust;

(3) taking any procedural action;

(4) agreeing to compromise, conciliation, adjustment, or signing arbitration contract;

(5) performing any act with the purpose of obtaining or relinquishing any right regarding real estate, vessels, aircrafts, vehicles, or other valuable property;

(6) performing partition of the inheritance, legacy, waiving the right to inheritance, or any other related right;

(7) performing any other act, at the request of the person or his/her assistant, appointed by the court under previous provision.

7. The contents of the People with Disabilities Rights Protection Act see Ministry of Justice, Laws & Regulations Database (<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=D0050046>, last visited: Nov. 15, 2021). Article 5 provides, people with disabilities in this Act refer to those who with the following deviation or loss resulting from physical or mental impairments, are limited or restricted to be engaged in the ordinary

of the Interior, in 2018 the number of wards subject to guardianship was 22,858 (this is the number of wards alive at that time, not wards newly added to in 2018, neither does it include persons under assistance). Data from the Ministry of Health and Welfare indicates that in 2018 there were 1,173,9778 people holding disability identifications, which accounts for 4.98% of the total population in Taiwan. This fact demonstrates that most possessors of disability identification are not under guardianship or assistance, and often, the case will enter the procedure of application to the court only when possessors of disability identification have difficulties in decision-making and are in need of others' help. Still, it is an indisputable fact that cases of declarations of guardianship and assistance have increased year after year: the number of new cases of guardianship and assistance had been 3,227 (=2,739+488) in 2010 which was increased to 5,679 (=4,698+981) in 2020 (see Table 1 below).

Year	Entertainments of Case	Conclusions of Case	Applications for Declaration of Guardianship and Assistance	Granted Declarations of Guardianship	Granted Declarations of Assistance
2020	13,160	11,131	7,478	4,698	981
2019	12,405	10,525	7,108	4,427	900
2018	11,966	10,205	6,812	4,321	939
2017	11,050	9,381	6,349	4,057	778
2016	10,206	8,629	5,796	3,677	644
2015	9,677	8,208	5,428	3,387	653
2014	9,220	7,911	5,214	3,170	668
2013	8,887	7,573	5,031	3,052	576
2012	7,194	5,952	4,666	2,809	538
2011	5,216	4,485	4,444	2,728	524
2010	5,257	4,530	4,496	2,739	488

Table 1: The annual number of court's rulings on the declaration of guardianship and assistance. Statistics data was gathered by the author through Professor Deng, Xue-Ren.

living activities and participation in the society. This definition is used to decide whether a person can acquire a disability identification and connects to social welfare benefits.

Although persons under guardianship or assistance account for a small portion of the possessors of disability identification (persons with disabilities identified by the government), considering their capacity of decision-making and the powers of their guardians and assistants, it can be generally assumed that these persons are vulnerable to financial exploitation. And an increase of persons under guardianship or assistance over the years further adds to the necessity of critically reviewing whether the adult guardianship system could truly protect the principals' property security, support their decision-making, and meet the basic requirements from the viewpoint of human rights.

On June 19, 2019, contractual guardianship was newly introduced to the Taiwan Civil Code and allows people to choose reliable persons as future guardians beforehand. As a result, two modes of adult guardianship are included in Taiwan's system—one assigned by the court and the other by contract, while the latter is more aligned with self-determination, problems still exist. The next part will further elaborate this issue.

III. Challenges from CRPD to Adult Guardianship

Though the word "guardianship" is not explicitly seen in Article 12 of the CRPD itself, the CRPD General Comment No. 1⁸ states:

States parties must holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others. Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.

8. CRPD General Comment N0.1 (2014), CRPD/C/GC/1, para. 7. See United Nations Human Rights Office of the High Commissioner (<https://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>, last visited: Nov. 15, 2021).

This statement clearly observed the conflicts between CRPD and a guardianship system involving deprivation of legal capacity and substitute decision-making regimes and that such practices should be abolished. Conflicting points between the existing adult guardianship system in Taiwan and the CRPD are listed below.

A. Problems of Restrictions on the Right to Act

Paragraph 2 of Article 12 of the CRPD pinpoints that persons with disabilities should enjoy legal capacity on an equal basis with others. Nowadays, it is clear that legal capacity not only includes the right to own but also covers the right to act.⁹ However, the Chinese translations of the CRPD released by the Taiwanese Government in 2008 identified legal capacity as only “the right to own.”¹⁰ This is an obvious misunderstanding of Article 12 of CRPD. If legal capacity in the CRPD is interpreted simply as the right to own, requirements of equal recognition will be meaningless as the right to own has been admitted to every person by Article 6 of the Taiwan Civil Code already.¹¹ Fortunately, the Taiwanese Government

9. *Supra* note 8, para. 12 states, “Legal capacity includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes that the person as an agent with the power to engage in transactions and create, modify or end legal relationships.”

10. The translation of the “legal capacity” of the CRPD was “法律權利能力.” See Social and Family Affairs Administration, Ministry of Health and Welfare, about CRPD (https://crpd.sfaa.gov.tw/BulletinCtrl?func=getBulletin&p=b_2&c=C&bulletinId=56, last visited: Nov. 15, 2021). This mistake might inherit from the official (simplified) Chinese version of the CRPD. See United Nations Human Rights Office of the High Commissioner (<https://www.ohchr.org/CH/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#12>, last visited: Nov. 15, 2021). However, “權利能力” (Rechtsfähigkeit) means the right to own or the capacity to have rights and obligations. It is different from the right to act, which is addressed as “行為能力” (Geschäftsfähigkeit). See Qi-Yang Shi, Minfa Zongze [General Principles of the Civil Code] 89, 110 (2010).

11. Sieh-Chuen Huang, *Cong Shenxin Zhangaizhe Quanli Gongyue zhi Guandian Pingxi Taiwan zhi Chengnian Jianbu Zhidu* [Adult Guardianship in Taiwan in Light of CRPD], 233 TAIWAN LAW REVIEW 136, 139 (2014).

recently corrected the translation of the legal capacity and the amendments have been delivered to the Legislative Yuan.¹²

Provisions about the right to act in the Taiwan Civil Code are stipulated mainly in “Section I: Natural Persons” of “Chapter II: Persons.” Among these, regulations about the right to act of a person under guardianship and assistance are stipulated in Article 15 (a person under declaration of guardianship) and Article 15–2 (a person under declaration of assistance). These two provisions are considered to balance the protection of principals and transaction security.¹³ More specifically, on the one hand, denial of the principal’s right to act provided by Article 15 could protect persons from unwanted transactions. On the other hand, anyone who wishes to enter a transaction is required to investigate whether the counterparty is under guardianship or assistance. If the answer is positive, one will turn down the trade and could avoid harm (such as voided transactions). The Judicial Yuan in Taiwan also constructed an inquiry system for people to verify whether a person is under guardianship or assistance by entering a person’s name or ID/passport number.¹⁴ Therefore, the adult guardianship system with deprivation of or restrictions on legal capacity is thought to ensure transaction security.¹⁵ That is, through standard restrictions consisting of a guardianship system and the right to act, transaction security could then be protected.

As mentioned above, the right to act is the “legal capacity” protected by Paragraph 2, Article 12 of the CRPD. Thus, as a few Taiwanese academics have stated, Article 15 of the Taiwan Civil Code which views wards subject to a declaration of guardianship as one lack of right to act contravenes the CRPD and therefore does not comply with the principle of equal legal

12. Social and Family Affairs Administration, Ministry of Health and Welfare, about CRPD (https://crpd.sfaa.gov.tw/BulletinCtrl?func=getBulletin&p=b_2&c=C&bulletinId=1424, last visited: Nov. 15, 2021).

13. Ze-Jian Wang, Minfa Zongze [General Principles of the Civil Code] 129 (2008).

14. Judicial Yuan, Family Issues Announcement System (<https://domestic.judicial.gov.tw/abbs/wkw/WH09HN01.jsp>, last visited: Nov. 15, 2021).

15. Chin-Ming Guo, *Lun Taiwan yu Riben Chengnian Jianbu Zhidu zhi Bijiao yu Yanjiu* [The Comparison and Studies of the Adult Guardianship System in Taiwan and Japan], 55 HWA KANG LAW REVIEW 67, 67 (2013).

capacity.¹⁶ In regard to the declaration of assistance, provided by Paragraph 1, Article 15–2 of the Civil Code, an assistant's consent is required while a person subject to a declaration of assistance performs specific acts. This provision does not deprive the principal of right to act and perhaps is not a direct contravention of the CRPD. Yet the court has no authority to reduce the types of ward's acts requiring consent, it can only expand the types of ward's acts requiring consent based on individual needs. That is, restrictions on capacity can only be expanded, not be reduced, and such practices could therefore be inconsistent with Paragraph 4, Article 12 of the CRPD which states that measures relating to the exercise of legal capacity should be tailored to the person's circumstances.¹⁷

Nevertheless, the provisions regarding right to act (行為能力, Geschäftsfähigkeit) only apply to financial affairs. Marriage, divorce, recognition and so on, require only the person's own comprehension (意思能力, mental capacity) about the meaning and effect of the act. Thus, the person under guardianship declared to have a lack of "right to act" (行為能力, Geschäftsfähigkeit) may still have the capacity and right to marry or divorce. In other words, a guardian has no power to decide marriage on behalf of the principal, nor does an assistant has the power to consent.¹⁸ This is a long-standing basic principle in the Taiwan Civil Code which emphasizes the will of the person and does not allow substitute decision-making.

Furthermore, the right to act (行為能力, Geschäftsfähigkeit) does not relate to medical decisions, either. For example, a person under

16. Chun-Han Chen & Sieh-Chuen Huang, *Dibazhang: Falu Nengli Pingdeng Renke* [Chapter 8: Equal Recognition Before the Law], in Shenzin Zhangaizhe Quanli Gongyue [the Convention on the Rights of Persons with Disabilities] (Nai-Yi Sun & Fort Fu-Te Liao eds.) 193, 204 (2017).

17. Huang, *supra* note 11, at 143.

18. Yan-Hui Tai, *Zhongguo Qinshufa* [China Family Law], 2nd ed., 5 (1959); Zhen-Gong Guo, *Hunyun Xingshi Yaojian zhi Yanjiu* [A Study on Formality of Marriage] 5 (1986); Zhen-Gong Guo, *Shenfen Xingwei zhi Nengli* [Capacity for Status Behavior], 7 *TAIWAN LAW JOURNAL* 122, 124 (2000); Yu-Zu Tai, *Shenfen Xingwei de Teshuxing* [Features of Status Behavior], 93 *TAIWAN JURIST* 52, 53 (2010); Shu-Lin Hsu, *Qinshufa Xinlun* [New Family Law], 2nd ed., 7 (2010); Yan-Hui Tai, Tong-Schung Tai, *Qinshufa* [Family Law] 45 (2011); Hsiu-Hsiung Lin, *Qinshufa Jiangyi* [Lecture on Family Law] 2nd ed., 13, 63 (2012).

guardianship may have the right to consent or refuse a specific medical treatment as long as they have the mental capacity.¹⁹ This principle is also confirmed by many legal practices in Taiwan, such as Supreme Court 105 Tai-Shang No. 89 and Supreme Court 106 Tai-Shang No. 2418. However, some special medical laws do not stick to this significant principle. For example, regarding abortion and sterilization, a person under guardianship or assistance needs to acquire consent from the guardian or assistant, though the person has full capacity to make a decision.²⁰ Another example is that the Hospice Palliative Care Act requires a person to have full rights to act (行為能力) to make a living will towards hospice palliative care or life-sustaining treatment, or choose a healthcare agent.²¹ The same rule can be seen in the provision regarding the Patient Right to Autonomy Act.²² Since the person under guardianship has no rights to act, according to these special laws, they are also deprived of the right to make an end-of-life healthcare decision. Last but not least, a person under guardianship will also automatically lose the right to vote.²³ As the right to

19. Min-Chen Wang, Sieh-Chuen Huang, Chu-Chiao Chen, Ping-Jen Chen, *Guanyu Yisi Nengli Shousun Bingren zhi Yiliao Juece: Ruhe zai Zizhu Daili Zuijialiyi ji Yiliao Pingzhi jian Qude Zuijia Pingheng* [Regarding Medical Decision-Making of Patients with Impaired Capacity: Balancing Autonomy, Agency, Best Interests and Healthcare Quality], 83 (2) *CLINICAL MEDICINE* 112, 113 (2019).

20. The Paragraph 2 of the Article 9 of the Genetic Health Act provides that, "(i)nduced abortion to an unmarried minor or a woman under guardianship or assistance according to the preceding provisions shall be subject to her statutory agent's or assistant's consent. And the Paragraph 2 of the Article 10 provides that, "An unmarried man and woman meeting any one under provision above may receive sterilization straight on his/her accord; an unmarried minor or a person under guardianship or assistance shall be subject to consent from his/her statutory agent or assistant before receiving."

21. The Article 5 of the Hospice Palliative Care Act provides,

"An adult who demonstrates legal capacity (行為能力) may prewrite such a letter of intent referred to in Article 4.

The letter of intent in the preceding paragraph, the decision maker may designate a medical surrogate agent in advance, give details of the designation in writing. The agent may sign on his/her behalf expression of his/her will become impossible."

22. The Paragraph 1 of the Article 8 of the Patient Right to Autonomy Act provides, "(p)ersons with full disposing capacity (行為能力) may make advance decisions, and may revoke or alter them in writing at any time."

23. The Article 14 of the Civil Servants Election and Recall Act stipulates that

vote is a fundamental right, this denial make it difficult for people under guardianship to enjoy equal political and public participation.²⁴

B. Problems of Supervision

Paragraph 4 of Article 12 in the CRPD states measures relating to the exercise of legal capacity shall be free of conflict of interest and undue influence and subject to regular review by a competent, independent and impartial authority or judicial body. Then, is there an impartial and regular mechanism of supervision or review in Taiwan's adult guardianship system?

Firstly, there is almost no *ex ante* mechanism to check whether a guardian's decision-making conforms to the wishes or interest of the principal, except for that legal acts regarding the real property as its disposition or other circumstances that need the court's permission (Article 1101 of the Civil Code). In addition, with respect to *ex post* mechanism, Paragraph 2 of Article 1103 of the Civil Code states that the court may ask the guardian to provide reports regarding guardianship and inventory of properties, if necessary. This is not a regular report system. The "necessary" circumstances only occur when families or other related persons of the principal tell the court about the misbehavior of the guardian. It is rarely seen that the court begins investigations on its own authority.

IV. Corresponding Measures Adopted by the Taiwanese

²⁴“(a)ny citizen of the ROC reaching 20 years of age shall have the right of suffrage, unless the declaration of guardianship has yet been revoked.”

²⁴ The problem of restricting the right to vote, see Isao Takenaka, *Right to Vote of Adult Ward under Guardianship and the Theory of Constitutional Right to the Pursuit of Creating One's Own Life in the Twenty-First Century*, 5 J. INT'L AGING L. & POL'Y 1 (2011).

Government

Taiwan is not a member of the United Nations and thus unable to submit a national report to the Committee on the Rights of Persons with Disabilities through the Secretary-General of the United Nations as stipulated in the Article 35 of the CRPD. In order to review the report, Taiwan's government invited international experts to form a committee. The initial state report was examined by the International Review Committee (hereinafter "IRC"), which was made up of 5 specialists. Between October 30 and November 3, 2017, and afterward, the IRC provided concluding observations, in which the problems of the adult guardianship system in Taiwan and its relations with the Article 12 of the CRPD have been clearly pointed out.

A. The Initial State Report

In the initial state report²⁵ published in 2016, measures taken to give effect to obligations under Article 12 of the CRPD are described in paragraphs 75 to 79. Among them, paragraphs 76 to 79 are related to financial affairs, and only paragraph 75 mentions adult guardianship, of which the content (official English version) is set out below:

People with disabilities are under the protection of the Civil Code and they have legal capacity (權利能力) as a natural person. The Civil Code uses the commencement order of guardianship and assistance to protect the rights over property of the people who do not have behavioral capacity (行為能力) or mental capacity (意思能力) to do so. The Civil Code further stipulates that these people are entitled to pure legal benefits, such that a person who has become the subject to the order of commencement of guardianship or assistance may also exercise the right to consent in consideration of his/her age, status, and necessities of life. In

²⁵ Social and Family Affairs Administration, Ministry of Health and Welfare, the Convention on the Rights of Persons with Disabilities, the Initial Report of Republic of China (Taiwan), https://crpd.sfaa.gov.tw/BulletinCtrl?func=getBulletin&p=b_2&c=D&bulletinId=72 (last visited: Jan. 2, 2022).

addition, the Trust Law only governs trust acts involving the legal capacity (行為能力) or commencement order of guardianship and assistance to ensure the rationality of the trust system, its normal operation, and protection of transactions. These stipulations are not limited to people with disabilities.

It can be seen from the first sentence of the paragraph 75 that in 2016, Taiwan's government viewed the "legal capacity" stated in Article 12 of the CRPD as the "right to own" (權利能力), which is clearly against the definition provided by General Comment No. 1. Secondly, paragraph 75 contains less than 300 Chinese words, among which the word "保護" (protection or protect) appears up to 3 times. It reveals that Taiwan's Government considers adult guardianship to be a system for protection rather than support. In addition, there is a more serious mistake about "pure legal benefits and necessities of life." Paragraph 75 claims that a principal may have the right to consent to acts relating to pure legal benefits. However, according to Paragraph 1, Article 15-2 of the Taiwan Civil Code, the person under assistance can independently make a decision relating to pure legal benefits (see footnote 6). That is to say, the person under assistance has full legal capacity for these acts. On the other hand, as mentioned previously, the person under guardianship is deprived of the right to act in the financial domain with no exception. There is no way that this person exercises their rights to consent to "pure legal benefits." It is very surprising that Taiwan's Government (the Ministry of Health and Welfare) has such a misunderstanding about the Civil Code.

B. Concluding Observations

The concluding observations²⁶ written by the IRC responds to the initial state report clearly on the issue of Article 12. Specifically speaking,

26. Social and Family Affairs Administration, Ministry of Health and Welfare, the Convention on the Rights of Persons with Disabilities, Concluding Observations of The ROC's Initial CRPD Report, https://crpd.sfaa.gov.tw/BulletinCtrl?func=getBulletin&p=b_2&c=D&bulletinId=261 (last visited: Jan. 2, 2022).

paragraphs 38 and 39 relate to Article 12 and adult guardianship as follows:

38. The IRC is concerned that the State has yet to harmonize domestic laws with Article 12 of the CRPD as it has been interpreted by the UN CRPD Committee in its General Comment No. 1. Among these domestic laws are the Civil Code, the Trust Code, and all associated laws. The IRC specifically highlights the prevalent situation in which individuals with disabilities placed under guardianship are denied their legal capacity to express their will, preferences or autonomy. Such situations include, but are not limited to, marriage, electoral rights, public service, disposition of property, access to financial services, employment, and informed consent to medical procedures, including sterilization. The IRC is further concerned that the State has conflated the concepts of legal capacity and mental capacity.

39. The IRC recommends that the State amend all relevant laws, policies, and procedures and that a system of supported decision-making be put into place that is compliant with the UN CRPD Committee's General Comment No. 1, including the provision of adequate resourcing for such a new system. Legal capacity and mental capacity are distinct concepts. The IRC recommends the training of all civil servants, including judges, on the following concept: Legal capacity is the capacity to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may depend on many factors including environmental and social factors.

The IRC pointed out that the initial state report views the "legal capacity" as the right to own but the IRC does not share this opinion. Adult guardianship in Taiwan's Civil Code restricts and denies the right to act and is exactly the denial of "legal capacity." Furthermore, Taiwan's Government insists that the purpose of restricting the right to act is to protect the property of persons without mental capacity. But the IRC states that this interpretation links one's mental capacity directly to the legal capacity, which exactly contradicts with spirit of the CRPD. The IRC

recommends that Taiwan's Government examine and amend related laws and policies to establish adequately supported decision-making regimes.

C. Taiwan Government's Response to the Concluding Observations

After receiving the above concluding observations, Taiwan's Government has published a "Response Form"²⁷ summarizing its opinions and strategies. Regarding adult guardianship, the Response Form basically states the current system does not conflict with the CRPD as follows:

Background and Problem Analysis: A. Guardianship System (MOJ) (C) Persons subject to guardianship in Taiwan are generally persons who are nearly unable to make a declaration of intention or understand a declaration of intention. Therefore, Article 15 of the Civil Code specifies that if a person subject to a declaration of guardianship has no capacity to perform any juristic act, such a person requires a guardian to make and receive a declaration of intention on his/her behalf. This regulation aims to protect persons lacking mental capacity instead of limiting and obstructing such persons from exercising their rights. Additionally, most persons subject to a declaration of guardianship are unable to make a declaration of intention on their own. Therefore, having the capacity to make a declaration of intention through supported or assistive decision-making is unlikely. Such a circumstance corresponds to the aforementioned "should assistive decision-making be insufficient [then] substitute decision-making [can] be adopted" and is inconsistent with Paragraph 3, Article 12 of the CRPD. . . . Moreover, the existing guardianship system in Taiwan applies to persons in a persistent vegetative state, patients with severe mental disorders, and persons lacking verbal ability and with noticeable cognitive decline. Thus, the existing guardianship

27. Social and Family Affairs Administration, Ministry of Health and Welfare, the Convention on the Rights of Persons with Disabilities, Concluding Observations Response Form, https://crpd.sfaa.gov.tw/BulletinCtrl?func=getBulletin&p=b_2&c=D&bulletinId=761 (last visited: Jan. 2, 2022).

system in Taiwan shall not be abolished.

As seen above, one of the reasons that the Ministry of Justice insists adult guardianship should be maintained is that most people under guardianship are those in a persistent vegetative state, with severe mental disorders, noticeable cognitive decline, or who lack verbal ability. These people are indeed unable to make a declaration of intention or understand an intention and thus requiring a guardian to act on their behalf. Yet this rationale is not completely reasonable. First of all, some individuals with aphasia still have the ability to write and express intentions via writing, body language, communication toolkits, or other means. It is not a situation where "a person is unable to make a declaration of intention or understand a declaration of intention." Paragraph 16 of General Comment No. 1 states that parties must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect. And Paragraph 17 points out that support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences. It is thereby inappropriate for the Taiwanese Government to consider people without verbal competence as unable to express their own expression and include them in the scope of guardianship. Secondly, an empirical study of Taiwanese courts' judgments on the declaration of guardianship has found that 33% of the persons under guardianship lack verbal competence, 24% are in a vegetative state or comatose, 27% suffer from stroke, while 5% have schizophrenia and mood disorders, and 11% have developmental disabilities.²⁸ That is to say, in reality, people under guardianship in Taiwan are definitely not as confined to persons "unable to make a declaration of intention or understand" as the Ministry of Justice claims in the Response Form. And such a fact could also be proved by Table 1 which indicates the number of persons under guardianship is far greater than those under assistance. Taiwan is in fact imposing the declaration of guardianship to those who do not necessarily need it, which may be seen as abuse.

28. Pei-Chi Hu, Sieh-Chuen Huang, *Yi Shizheng Fangfa Fenxi Fayuan Xuanding Jianhuren yu Fuzhuren zhi Shitai* [An Empirical Study on Court's Appointment of Guardians and Assistants], 218 FT LAW REVIEW 2, 7 (2018).

Secondly, the Ministry of Justice intends to introduce the contractual guardianship to improve the whole guardianship system, namely:

Action Plans and Scheduled Deadlines for Completion: Short term objectives (to be completed before Jan. 1, 2021) 2. The MOJ proposes draft amendments to the adult guardianship system detailed in the family law section of the Civil Code that enables each person with disabilities to reach an agreement (when the person still has sound mental capacity) to designate a guardian upon the issuance of a guardianship declaration instead of allowing the court to assign a guardian in accordance with its functions and powers. Thus, said person is permitted to appoint a guardian at his/her discretion according to the decision made beforehand should he/she lose mental capacity, thereby safeguarding the person's human dignity and right to self-determination.

With the joint efforts of social organizations, legislators, and scholars, contractual guardianship was introduced to the Civil Code on June 19, 2019.²⁹ But the problem is whether this amendment enables adult guardianship in Taiwan to be more coherent to the CRPD.

D. The New Contractual Guardianship and Its Issues

The definition of contractual guardianship is stipulated as "an agreement whereby parties agree that one of them appoint the other party as his/her guardian when he/she has become subject to the order of commencement of guardianship, and the latter agrees to do so." (Paragraph 1 of Article 1113-2). The reason that this article addresses this system as "contractual guardianship" instead of durable/enduring/lasting/continuing power of attorney is the huge difference between these two regimes. The features of contractual guardianship are as follows.

29. Parents' Association for Persons with Intellectual Disability, Taiwan, Adult's Contractual Guardianship Passed and Guardians Can Be Decided by Oneself, May 24, 2019 (<https://www.papmh.org.tw/services/597>, last visited: 2022/01/07).

1. Strict Requirements

To enter into a contractual guardianship, the principal and the agent should express their consensus in front of a notary, and the notary must complete a document to approve the contract (Paragraph 1 and 2 of Article 1113-3 of the Civil Code). After the conclusion of the contract, the notary public shall give written notice to the court (Paragraph 1 of Article 1113-3). The most important feature is that contractual guardianship becomes effective from the date of the commencement of guardianship (Paragraph 3 of Article 1113-3). Also, Paragraph 1 of Article 1113-4 provides that if a person had a guardianship contract, upon making a ruling of commencement of guardianship, the court should designate the agent in the contract to be the guardian. This means that the start of contractual guardianship is upon the court's declaration of guardianship. The parties have no power to decide when the contractual guardian begins to work. The design is similar to that in Japan and Korea.³⁰ In other words, contractual guardianship is not a purely private relationship but a highly controlled and monitored agreement by the court.

2. Narrow Scope of the Protected Persons

Compared to the systems in Japan and Korea, contractual guardianship in Taiwan is more inflexible regarding protected persons. In Japan and Korea, contractual guardianship begins when the court appoints a guardianship supervisor, which is mandatory.³¹ The reason to have a supervisor is that contractual guardianship respects self-determination and hence can only

30. Regarding Japanese law, see Makoto Arai and Akira Homma, *Guardianship for Adults in Japan: Legal Reforms and Advances in Practice*, 24 (1) AUSTRALASIAN JOURNAL ON AGEING 19, 22 (2005). Korean law, see Cheol Ung Je, *Korean Guardianship as a Policy for the Protection of Adults with Impaired Decision-Making Abilities*, 9 J. INT'L AGING L. & POL'Y 101, 118 (2016).

31. Arai and Homma, *supra* note 30, at 22; Fukiko Nakayama, *Issues Surrounding the Continuing Power of Attorney System in Japan*, in *Adult Guardianship Law for the 21st Century: Proceedings of the First World Congress on Adult Guardianship Law 2010* (Makoto Arai, Ulrich Becker, Volker Lipp eds.) 145 (2013); Je, *supra* note 30, at 118.

be indirectly monitored by the court.³² But there is no such mechanism (guardianship supervisor) in Taiwan. Instead, to start contractual guardianship in Taiwan, the declaration of guardianship by the court is necessary. Therefore, the conditions of legal guardianship are basically applied to contractual guardianship. That is to say, a person must be confirmed to be “unable to make a declaration of intention or understand due to mental disability” according to Paragraph 1 of Article 14. In other words, those with remaining capacity are not entitled to be subject to guardianship declared by the court, and contractual guardianship will not initiate. These persons will be protected by the system and can only utilize the declaration of (legal) assistance.

Whether contractual guardianship should exclude the person needing assistance was once discussed in the Legislative Yuan.³³ Some consider the narrow scope of subjects inevitable due to our legal “guardianship” system. That is, since Taiwan’s (legal) adult guardianship is divided into “guardianship” and “assistance,” naturally only those legally defined as “guardianship” can utilize contractual “guardianship” and those legally defined as “assistance” will then be excluded. Nevertheless, this theory is paradoxical. Similar to Taiwan, Japan and Korea do have 3 types of support in their (legal) adult guardianship, yet there are no such categories in contractual guardianship. In Japan, when a person is “incapable of making sound judgments due to impairment of mental faculties,” the court can select a guardianship supervisor and contractual guardianship will be enacted (Paragraph 1 of Article 4 of Voluntary Guardianship Contracts Act, Japan). In this way, persons needing the support in decision-making can obtain assistance from an agent (contractual guardian) as far as possible. In contrast, the attitude of the Ministry of Justice in Taiwan is very conservative so the 2019 law reform is minimal and confines the contractual system to persons subject to guardianship only.

32. Makoto Arai, *Continuing Power of Attorney and Trusts*, 8 J. INT’L AGING L. & POL’Y 149, 151 (2015).

33. Tong-Schung Tai, *Chengnianren zhi Yidingjianhu yu Faingjianhu: Cong Lifayuan yu Fawubu Zengding Yidingjianhu Qiyue zhi Caoan Tanqi (Xia)* [Contractual Guardianship and Legal Guardianship of Adults: Focusing on Drafts of Contractual Guardianship Submitted by Legislative Yuan and Ministry of Justice (2)], 68 (10) LAW MONTHLY 7, 10, 15 (2017).

3. The Deprivation of the Right to Act

As mentioned above, a court’s declaration of guardianship is required for the contractual guardianship to take effect. Therefore, a person under contractual guardianship will be deprived of the right to act as a person under legal guardianship. That is to say, contractual guardianship in Taiwan has no effect on incapacity planning, and is not a system tailored to the person’s circumstances.

4. Inflexible Scope of Authority Conferred

According to Paragraph 2 of Article 1113–2, “the parties, as specified in the preceding paragraph, may agree one or several agents; if there is more than one guardian, unless otherwise agreed upon by the parties, the guardianship shall be jointly managed by all the guardians.” It is thus clear that the principal can appoint multiple agents (contractual guardians). However, the scope of authority conferred to the agent is stipulated by the Civil Code, which cannot be adjusted by the principal. That is to say, the scope of authority is “all affairs” pertaining to livelihood, medical treatment and care, and asset management. The principal cannot confer, for example, only the power to manage the real property on behalf of the principal. Such legislation is not seen in other jurisdictions and is unique to Taiwan. The reason is that the legislator is concerned that if the principal needs support on affairs not conferred to the contractual guardian, it is questionable whether the court should declare the commencement of legal guardianship. The coexistence of contractual guardian and legal guardian should be avoided so that the legislator can decide to make the authority of these two guardians the same.

It is pointed out that there are three dimensions to observe whether a system respects one’s autonomy or will. The first is whether the supporter could be decided by the principal, the second is whether the scope of authority could be determined by the principal, and the third is whether shortcomings derived from restrictions on legal capacity could be avoided.³⁴ In order to keep the law reform as mild as possible, contractual

34. Yasushi Kamiyama, *Ninyikoken Keiyaku no Yuetsuteki Chii no Genkai ni Tsuite*

guardianship in Taiwan does not adopt the supervisor system as in Japan and Korea. And it can only achieve the first goal regarding appointing the guardian/agent while the second and the third goals are completely unreachable. From the view of comparative law, Taiwan has created a system with the highest state intervention (notarial documents and court's declaration), the most rigidity (the unchangeable scope of authority), the most limited range of protected persons (those in accordance with paragraph 1 of Article 14 of the Civil Code), and the most infringements of fundamental human rights (principal's loss of legal capacity).

V. Recommendations

To sum up, Taiwan's current guardianship system obviously contravenes the CRPD, and the conservative and rigid contractual guardianship established in 2019 does not ease the tension. Taiwan is going to submit the second state report in 2022. This article anticipates that adult guardianship in the Taiwan Civil Code will still be taken issue with by the IRC. In East Asia, Japan promulgated contractual guardianship in 1999 (enforced in 2000), Korea promulgated it in 2011 (enforced in 2013), while Taiwan became the latest to promulgate and enforce it in 2019. However, disappointingly, a more ideal or progressive contractual guardianship (or supported decision-making) has not been constructed. Regarding the direction of improvement, the author was once conducting research for the Ministry of Justice and has raised several recommendations which are outlined below.³⁵

From the standpoint of the CRPD, adult guardianship should be changed to a system compliant with supported decision-making. From the perspective of measure of support, this article suggests that though the

[*The Superior Status of Contractual Guardianship and Its Limits*], 11 TSUKUBA LAW JOURNAL 97, 120–21 (2012).

35. Sieh-Chuen Huang, Chien-Chang Wu, Yi-Hsuan Huang, Yi-Chin Chou and Chi-Lun Peng, A Study on the Necessity of Legal Reform on Adult Guardianship, Commissioned Research by the Ministry of Justice 136–139 (2020) (<https://www.moj.gov.tw/2204/2645/2687/83306/post>, last visited: Jan. 7, 2022).

“power of agent (or legal representative)” enables others to make legal acts as a delegate, it does not necessarily contradict the CRPD. The point is how the supporters act (whether they respect the principal's wishes or not). Regarding “power to consent,” it should be repositioned as an approach to co-decision making. That is, the aim is to facilitate communication between the assistant and the principal, to enable the former to provide the necessary information and coordinate the decision-making with the latter.

Secondly, regarding the restrictions on the legal capacity, this article does not encourage a radical abolishment of restrictions on the right to act.³⁶ But it is necessary to construct person-centered support and refuse to link support to legal (in)capacity. Instead, two means could be considered: Delete clauses that connect declaration of guardianship and assistance automatically to the restriction on legal capacity in General Provisions of the Civil Code (including Article 14, 15, 15–1, 15–2). The other is to make restrictions on the legal capacity and the measure of support (i.e., supporter's authority) tailored to the person. That is to say, restrictions and support should be on an individual basis.

The author recommends a milder amendment to achieve these goals. Thus, for the structure of supportive measures, instead of a one-tier system in Germany or a three-tier system in Japan and Korea, Taiwan can maintain the current two-tier framework of “guardianship/assistance.” This study agrees that under some circumstances, persons unable to act and express intention must rely on supporters doing a legal act on their behalf of them and these supporters must be granted full authority.³⁷ Nevertheless, unlike the current law, this article considers that these persons are unlikely to proactively perform legal acts, so it is not necessary to deprive their rights to act (legal capacity) for transaction security. Therefore, Article 15 of

36. Legal incapacitation may not necessarily conflict with the CRPD as long as the very strict conditions of the Paragraph 4 of Article 12 are respected. That is to say, the restriction of the legal capacity of the ward has to be assessed on the facts of the case according to the principles of necessity and proportionality and must be adjusted to his individual situation. See Volker Lipp & Julian O. Winn, *Guardianship and Autonomy: Foes or Friends*, 5 J. INT'L AGING L. & POL'Y 41, 54 (2011).

37. Lipp & Winn, *supra* note 36, at 51–52 (pointing out that the guardian's power to decide on behalf of the ward is not per se in violation of the CRPD because there are cases where it is necessary that someone decides instead of the principal).

the current Civil Code should be thereby eradicated. In other words, a declaration of guardianship will not be a reason for the deprivation of legal capacity. Instead, guardianship should purely assist one unable to express intention by allowing a guardian to act on behalf of the principal. In this way, persons under guardianship enjoy legal capacity on an equal basis with others, which is in accordance with Paragraph 2 of Article 12 of the CRPD.

As for the declaration of assistance, it should be revised to be more flexible and more tailored to a person's circumstances. That is, the court should have the power to expand or reduce the scope of act requiring consent according to the person's needs. Furthermore, some under declaration of assistance may demand others' help on certain act; thus types of support methods should include the power of agent. Meanwhile, persons under assistance are still able to decide but they need support in the decision-making process. The power of an agent could more easily neglect a person's will and preference compared to a co-decision-making mode (power to consent). Accordingly, the grant of power of an agent should depend on the person's consent.

VI. Conclusion

Taiwan's second state report was published in 2021³⁸ and will be under review in 2022. With respect to Article 12, the report mentions provisions in the Taiwan Civil Code that "respect the ward's wishes" and "take the ward's opinion" (in the paragraph 98). In addition, it claims that the promulgation of contractual guardianship and the Patient Right to Autonomy Act ensures that the wishes of wards and patients will be more respected (in the paragraph 99 and 101). It also suggests the local governments subsidize medical assessment of adult guardianship and

38. Social and Family Affairs Administration, Ministry of Health and Welfare, Implementation of the CRPD Second Report Submitted under Article 35 of the Convention (https://crpd.sfaa.gov.tw/BulletinCtrl?func=getBulletin&p=b_2&c=D&bulletinId=1510, last visited: Jan. 7, 2022).

organize guardian workshops to form a more accessible system. Compared to the initial report, this version provides more details and shows a deeper understanding of the spirit of the CRPD.

The law reform advocated by the author which unties adult guardianship with the standardized restrictions on legal capacity was hardly imaginable in the past³⁹ (and still is hard to imagine in present Taiwan). The reason is the concern of transaction security. However, this article believes that a proper means of publication such as "registration certificate" can solve this problem. It will not cause too many difficulties in indicating that a person under assistance has customized restrictions on legal capacity and an assistant has individualized authority in the certificate.

Finally, to decide whether adult guardianship (or other support systems) is compliant with the CRPD, it is not sufficient to observe the Civil Code only. The civil procedure laws, medical related laws, and social laws must also be taken into account to answer the question. Still, since the Civil Code is the most fundamental law in civil law countries, its reform will undoubtedly set a style of Taiwan's determination to fulfill the CRPD and respect the rights of persons with disabilities. This will then promote further law or policy amendments. Although the reform of legal incapacitation is significant and means a paradigm shift of the Civil Code, the author believes, with a registration system built by modern technology, the registration could be sophisticated and individualized and enables a balance between transaction security and autonomy of persons with disabilities instead of a zero-sum outcome. Therefore, the author maintains that revising Taiwan's adult guardianship and legal incapacitation of the Civil Code is necessary and practical to make our legal frame closer to the spirit of the CRPD.

39. Lipp & Winn, *supra* note 36, at 54 (pointing out that in most countries, incapacitation is either a precondition for or a consequence of the appointment of a guardian).